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Recent Cases

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CONSTITUTIONAL LAW—EVIDENCE—ADMISSIBILITY IN STATE COURTS OF EVIDENCE OBTAINED THROUGH VIOLATION OF FOURTEENTH AMENDMENT—Local police officers, suspicious of violations of the California Anti-Gambling laws, stole into the defendant's home without a search warrant, and there *planted* a microphone. Officers were stationed in a nearby garage where they monitored defendant's household conversations for a period of over one month. After defendant's arrest, these officers were permitted to testify concerning the *overheard* remarks. Conviction followed and the defendant appealed alleging a violation of the Fourteenth Amendment. The United States Supreme Court in a 5-4 decision held that the methods of the police were a flagrant violation of due process but, nevertheless, the evidence so obtained was admissible in state courts. *Irvine v. California,* 347 U.S. 128 (1954).

This decision has settled the rule on admissibility of unconstitutionally obtained evidence by distinguishing between instances of subtle intrusion and those involving coercion or physical assault. It was stated that such clear lines might better serve the state courts faced with admission questions.

The Court at the outset distinguished this situation from the conventional wire-tapping wherein a communication is *intercepted.* Here the communication was *overheard.* It was conceded, however, that the method used was a trespass and probably a burglary if done by other than an official.

Although the benefits of the exclusion rule were criticized, the Court approved *Wolf v. Colorado,* 338 U.S. 25 (1949), which stated that the federal exclusion doctrine of *Weeks v. United States,* 232 U.S. 383 (1914) was "stoutly" adhered to in the federal courts where applicable.

The court considered this abuse of the Fourth Amendment's "right to privacy" as a violation of the Fourteenth Amendment which has been interpreted to include all that is "implicit in the concept of ordered liberty." In the alternative, the Court could have viewed the question as one of due process considered in the abstract, void of any direct search and seizure implications; thus following *Rochin v. California,* 342 U.S. 165 (1949) and leading to the exclusion of this evidence in the event it proved shocking to the Court. The Court distinguished the *Rochin* case and chose to follow the *Wolf* decision.

The *Wolf* case decided for the first time that, ". . . the security of one's privacy against arbitrary intrusions by the police" is encompassed within the Fourteenth Amendment. However, that Court expressly stated that the Fourteenth Amendment does not forbid the admission of evidence obtained by every unreasonable search and seizure. This Court would not impose the firm federal exclusion rule upon the state courts, since it is settled law that the first Eight Amendments are not incorporated *in toto* within the Fourteenth Amendment. *Palko v. Connecticut,* 302 U.S. 319 (1937). The different holdings, it has been suggested, result from the local nature of state offenses and consequent recourse to public opinion and the ballot box to preserve the constitutional right to privacy in the states, if not done indirectly through rules of court. For, in fact, about two-thirds of the states admit illegally obtained evidence. *See* appendix to *Wolf v. Colorado, supra,* at 33.

Professor Wigmore searchingly challenges the wisdom of the *Weeks* doctrine, *supra.* He states:

> The truth is that the doctrine in question is illogical, and that the citizen has no rights to claim a return of the articles taken unless their criminal

> or innocent nature be first determined; but as that is part of the very issue in the main charge, it cannot be determined in advance; so that the doctrine leads to impracticable results. *CF.* 8 WIGMORE § 2184.

Basically Wigmore believes the law should not do justice incidentally or enforce penalties by indirect methods. 8 WIGMORE § 2183. This fundamental position is obviously not shared by the Supreme Court.

The Court in the principal case was moved by a desire to provide a definite rule to guide the state courts. The rule, as here drawn, would exclude only evidence obtained through coercion or physical assault. Other illegal invasions, it is stated, would find their remedy in tort (What damages? See Mr. Justice Murphy's dissent in *Woolf v. Colorado, supra* at 41), or through the criminal sanctions of the Civil Rights Act. 62 STAT. 696, 18 U.S.C. § 242 (Supp. III, 1952). This statute provides a penalty for anyone who would wilfully deprive another of his constitutional rights.

Two of the Justices felt that the record of this case should be forwarded to the United States Attorney General for appropriate action. The office of the United States Attorney General later reported that an investigation was made wherein procedure used in the *Irvine* case was shown to have been permitted under California law. No grand jury action was taken since it was felt that the United States Government could not satisfy the rigid—"specific intent" to take away a right "made specific"—requirement of *Screws v. United States,* 325 U.S. 91 (1945). See, *State Police, Unconstitutionally Obtained Evidence and Section 242 of the Civil Rights Statute,* 7 Stan. L. Rev. 94 (1954).

Mr. Justice Frankfurter in his dissenting opinion preferred to proceed on a case to case basis in defining the limits of due process, rather than to settle upon a rule made clear and certain by separating the subtle infringements upon one's dignity and privacy from those involving coercive or physical violence. He felt that the police action in this instance was clearly contrary to the "concept of ordered liberty"; but more than that, to be also of such a character as to offend the "elementary standards of justice" requiring exclusion of the evidence.

The sanction for arbitrary police action is certainly a unique circumstance in terms of its enforcement. Yet, compounding wrongs by excluding otherwise relevant evidence seems but of sporadic worth at best. Further, such a rule works an injustice on society where no other evidence is available to assure a fair and just trial to all concerned including the public. While it may be said that no practical remedy is now available to deter such invasions, it does not seem settled that none may be provided. The individual rights involved herein are among our most noble and necessary, sternly to be preserved and protected. May not the legislature proceed on a case to case basis directing sanctions particularly toward police policies. Until then, the present decision seems admirably adjusted to the judicial function.

WILLIAM T. DUCKWORTH

EVIDENCE—MILITARY LAW—INSANITY AS A DEFENSE—DURHAM RULE NOT ACCEPTABLE IN MILITARY LAW—Defendant was accused of the premeditated murder of her Army husband while they resided in Japan under Army jurisdiction. She was taken into military custody several hours after the assault and was hospitalized in a military facility until the date of her trial. A general

court-martial convened at Tokyo, Japan, and found the accused guilty as charged in violation of the Uniform Code of Military Justice Article 118, 50 U.S.C. § 712, C.M. 360857, 10 C.M.R. 350. The convening authority approved the findings, and the sentence of imprisonment for life—a board of review affirmed. The United States Court of Military Appeals granted her petition to review the case. *United States v. Smith,* 5 U.S.C.M.A. 314, 17 C.M.R. 314, (1954).

The only important issue at the trial was the mental condition of the accused when she stabbed her husband Colonel Smith. Her defense was lack of mental responsibility. The same issue was presented to the U.S.C.M.A. and an assault was made on the principles of law dealing with mental responsibility on the basis of a decision by the United States Court of Appeals for the District of Columbia in the case of *United States v. Durham,* 214 F.2d 862 (1954). For a comprehensive survey of this controversial decision, see: Cavanagh, *"A Psychiatrist Looks at the Durham Decision,"* 5 Catholic U. L. Rev. *25* (1955); Nolan, *"Freedom of Will and Irresistible Impulse,"* 5 Catholic U. L. Rev. *55* (1955); Yeager and Consalvo, *"A Proposal for a Fountainhead of Rationality in the Jurisprudence of Insanity,"* 5 Catholic U. L. Rev. *63* (1955).

The U.S.C.M.A. in a lengthy discussion on the issue of insanity as a defense to criminal punishability rejected the contention of the appellant, reaffirmed their acceptance of the established rules regarding mental responsibility and affirmed the decision of the lower courts.

In *United States v. Kunak,* 5 U.S.C.M.A. 346, 17 C.M.R. 346 (1954) the accused, a member of the 82nd Airborne division, shot and killed a lieutenant presumably because he was disgruntled and wanted to be discharged from the Army. He was court-martialed, convicted of premeditated murder and sentenced to death. Intermediate appellate agencies had approved the finding and sentence. *Cr.* 10 C.M.R. 198 (1953). The case came before the U.S.C.M.A. on review and the sole issue both at the trial and on review was the new test for the determination of legal insanity as laid down by the United States Court of Appeals for the District of Columbia in the *Durham* case, *supra.* The court declined to follow this change and used the *right* and *wrong* and *irresistible impulse* tests accepted in many other jurisdictions. Improper admission of a Training Technical Manual caused the case to be remanded and a new trial ordered.

The rule followed by the highest appellate body in the military system regarding mental responsibility is a derivation from the *McNaughten* case, 10 Clark and Finnelly, 200 (1843) and is phrased in terms of whether the accused was, at the time of the alleged offense, so far free from mental defect, disease, or derangement as to be able, concerning the particular acts charged, to distinguish right from wrong and to adhere to the right. This is known as the *right and wrong* test. As a correlate, many courts have added to the test, an inability to adhere to right as a result of some mental defect, disease, or derangement, which constitutes a lack of mental responsibility, but which does not exist unless the act was committed under an *irresistible impulse* which completely deprives the person of the power of choice or volition.

The innovation in the *Durham* case, *supra,* requires that unless the jury believe beyond a reasonable doubt either that the accused was not suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality, it must find the accused not guilty by reason of insanity. About the new ruling, the court in the *Smith* case, *supra,* states:

> In the first place we are—it must be confessed—somewhat troubled by the uncertainty of the criterion set down in Durham to the effect that, to be

> exculpable, a criminal act must be the *"product"* of mental abnormality Indeed there may be some controversy concerning the scientific validity of the premise that a criminal act may be committed which is *not,* in some sense a product of whatever mental abnormality may coexist.

This is a wedge which psychiatrists and allied experts who believe that every crime reflects the existence of mental abnormality have been avidly seeking. For, it is contended that since they possess the necessary qualifications to dccide as to whether the act is or is not the product of mental abnormality, (or indeed, if the very act denotes an abnormality) not only can they testify as to the abnormality, but once a conviction is procured, it is their task to reorient the individual to what they believe he should be reoriented to without outdated considerations of right and wrong.

The jury as a trier of the facts becomes for all practical purposes a puppet of the expert witness (since it has no guide posts) and the expert witness finds himself in the desired position of authoritatively asserting anything his particular school of thought follows as the last word on the matter. In our democratic, constitutional society an arrogation of this much power by a small group of men must be suspect. The law must be imposed on the psychiatrist in the same manner it reaches the rest of us. The conviction, cure and rehabilitation of a person is not a task for the psychiatrist alone but in order to be truly successful it must be a harmonious effort of the legal, medical, and religious spheres of our society. The writer submits that the decisions handed down by the U.S.C.M.A. are the best possible in view of the checks and balances necessary to preserve a legal order which dispenses objective justice.

ADRIAN COZZI

REAL PROPERTY—MURDER OF SPOUSE—TENANCY BY ENTIRETIES BECOMES TENANCY IN COMMON—Defendant-husband murdered his wife and was convicted of second degree murder. Heirs of deceased brought suit to determine husband's rights in realty held by him and deceased as tenants by entirety. HELD: Murder destroyed the marital relationship and created a tenancy in common. Therefore the husband and the decedent's heirs are both entitled to an undivided one-half interest in the realty. *Budwitt v. Herr,* 339 Mich. 422, 63 N.W.2d 841 (1954).

Considerable conflict has confronted the courts in determining the disposition of realty held by entirety where one tenant has murdered the other. Four positions have been taken: (1) no title passes to the surviving spouse; (2) title passes to the surviving spouse; (3) title passes to the surviving spouse but equity will hold him a constructive trustee for the decedent's heirs; and (4) title passes in a tenancy in common with the surviving spouse and decedent's heirs sharing equitably.

In the first position, courts which deprive a murderer of his benefits, hold that to allow one any benefit would be contrary to the common law doctrine that no one shall be allowed to profit by his wrong. "Where the death of one spouse has been feloniously effected by the other, it seems to be generally held that there is no right of survivorship." 2 Tiffany, THE LAW OF REAL PROPERTY (§ 430) 219. The court said in the leading case of *Riggs v. Palmer,* 115 N.Y. 506, 22 N.E. 188 (1889):

> No one shall be permitted to profit by his own fraud, or to take advantage of

> his own wrong, or to found any claim upon his own inquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.

The second position is supported by the rule found in 32 ALR2d 1102:

> Where land is conveyed to husband and wife to hold by entirety, the survivor, upon the death of the other, takes and becomes vested in the entire estate, has been held to be unchanged by the fact that one spouse wilfully murdered the other, since the murdering spouse's estate vested by operation of law and not by will or inheritance.

Beddingfield v. Estill & Newman, 118 Tenn. 39, 63 N.W.2d 845 (1907) held:

> That a husband who had murdered his wife became the sole owner of property that they had held as tenants by the entireties, the theory being that he had by her death acquired no new interest of any kind or character but that the estate continued by virtue of the fact that he was the survivor.

The court followed other decisions of that state which defended the rationale of the tenancy by the entirety doctrine that the spouses were one legal person without separable interests. Criticizing the Tennessee opinion the court in the principal case said:

> Apparently the court did not consider the bearing of the fact that the marital relation, an essential incident of the estate, was destroyed by the felonious act of the husband in murdering his wife, nor the situation resulting from such destruction of the marital unity.

This view had its origin in the first case in which the problem arose: *Owens v. Owens,* 100 N.C. 240, 6 S.E. 794 (1888), and since then has been the majority ruling. See: 49 Harv. 717 (1936). Such jurisdictions are in obvious need of a statute to guide the courts in more judicial disposition.

The third view has been substantially supported in Delaware, Missouri, New Jersey and North Carolina. The court in *Bryant v. Bryant,* 193 N.C. 372, 137 S.E. 188 (1927) stated:

> A court of equity will not deprive the murderer of his interest in the estate, but by his crime he took away his wife's interest; as to this he must be held a constructive trustee for the benefit of her heirs.

The judge, in effect, found that the decedent would have survived her spouse. This decision was subject to the defendant's rights to rents and profits during his life. Thus, the construction of a trust would not constitute a forfeiture in violation of the common law. See: 17 Univ. of Detroit Law Journal 165 (Mar. 1954), 7 Miami Law Quarterly 524 (June 1952-1953). Equity courts, in the absence of a statute to guide them, certainly have recognized the need to prohibit a murderer from profiting by his crime and have granted relief to the decedent's heirs.

In the fourth and last view, the surviving spouse acquires less than the entire estate and shares with the decedent's heirs as tenants in common. This seems to be the present trend, if not the majority rule. In *Grose v. Holland,* 357 Mo. 874, 211 S.W.2d 464 (1948), the court held that one-half of the property should go to the heirs of the wife and the other half belonged to the husband. It was also pointed out that before the murder he was obliged to share the profits with the decedent and that it was possible to lose his interest altogether.

The felonious destruction of one spouse by the other certainly should not allow the murderer to benefit fully when they are tenants by the entirety. A murderer thus destroys his spouse's even chance in natural survivorship. He also reaps a wrongful reward by his unnatural survivorship. This cannot be sanctioned; it should be forbidden—if necessary, by statute. For, where one tenant by the entirety feloniously destroys the other, he also destroys his right of total survivorship. It would seem to the writer that the fourth position is the most reasonable and just rule.

ALEXANDER DEMATATIS

STATE CONSTITUTIONAL LAW—FAIR TRADE ACTS—NON-SIGNER PROVISIONS —The Union Carbide and Carbon Corporation executed a fair trade contract with a retailer in the State of Arkansas who agreed to sell Prestone at a price not less than three dollars and seventy-five cents per gallon. Prestone bears a trade mark and is in free and open competition with commodities of the same general class. Subsequent to and with full knowledge of said contract, White River Distributors, a *non-signer,* sold Prestone at a reduced price, still realizing a profit. Appellant-corporation brought a bill in equity to enjoin Appellee-distributor from selling below the established fair trade price. Appellant alleged as its bases: (1) the Arkansas State Fair Trade Act through its *non-signer* provision forbids such price-cutting; and (2) other retailers threaten to discontinue Appellant's product unless Appellee is compelled to maintain the minimum price.

Appellee contends it has a valuable property right to sell at a reduced price all the goods to which it has title, and this right remains until it is contracted away. The Arkansas State Fair Trade Act allows vertical price maintenance by the manufacturer or distributor of a commodity. The *non-singer* clause in issue states that when *one* retailer in the State signs a fair trade contract, all retailers with notice are bound thereby. ARK. STAT. § 70-201 to 70-208 (1947).

The Supreme Court of Arkansas *held* the Arkansas Fair Trade Act void as to *non-signers* because: (1) the clause deprives the *non-signer* of due process of law in relation to its property and (2) the clause is an abuse of the State's Police Power. The Court refused to rule on the constitutionality of the fair trade statute as a whole. Appellee was allowed to sell at a reduced price. *Union Carbide & Carbon Corp. v. White River Distributors,* 275 S.W.2d 455 (Ark. 1955).

To this date forty-five states, Hawaii and Puerto Rico have enacted fair trade acts. The exceptions are Texas, Missouri, Vermont and the District of Columbia. Among the forty-five the constitutionality of the respective fair trade statutes has never been judicially determined in seventeen states or Puerto Rico. Hawaii has held its fair trade act constitutional in general, but has not ruled upon its *non-signer* provision. The acts and *non-signer* provisions have been held constitutional in twenty states. In addition to Arkansas, five states have held their respective fair trade *non-signer* provisions unconstitutional. These states are: Michigan, *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.,* 54 N.W.2d 268 (Mich. 1952); Florida, *Miles Laboratory, Inc. v. Eckerd,* 73 So.2d 680 (Fla. 1954); Georgia, *Cox v. General Electric Co.,* 85 S.E.2d 514 (Ga. 1955); Colorado, *Olin Mathieson Chemical Corp. v. Francis,* 1955 Trade Cases 67,984 (Colo. Dist. Ct. 1955); Virginia, *Benrus Watch Co. v. Smith-Williams Jewelers,* 1955 Trade Cases 67,985 (Richmond Ct. 1955).

Utah and Nebraska are the only states which have held their respective State Fair Trade Acts unconstitutional *in toto*. The bases for these holdings were: (1) arbitrary immunities were granted to producers and wholesalers by the acts themselves; and (2) *non-signers* were deprived of property without due process of law. *General Electric Co. v. Thrifty Sales,* 1954 Trade Cases 67,861 (Utah Dist. Ct. 1954); *McGraw Electric Corp. v. Lewis & Smith Drug Co., Inc.,* 68 N.W.2d 608 (Neb. 1955).

In 1890, the Sherman Anti-Trust Act was enacted with its pertinent provision on the restraint of trade. 15 U.S.C. 1. Price fixing *per se* has been declared to be a restraint of trade, and therefore illegal. Since 1931, fair trade acts have been passed by state legislatures and have met with general judicial approval. The Miller-Tydings Act, 15 U.S.C. 1, and the McGuire Act, 15 U.S.C. 45, allowed fair trade acts with *non-signer* provisions to operate in interstate commerce in those states which have fair trade.

Recent cases indicate a trend of the state courts, independent of one another, to find by constitutional review, a wanting of due process in fair trade laws. Fair trade was allegedly based upon the theory that a commodity, bearing a trade mark, involves the goodwill of the manufacturer. In order to protect this goodwill, the manufacturer or distributor has been allowed to establish a minimum resale price for its commodity. Moreover he has been allowed to maintain his price to the detriment of *non-signers.* The decisions which follow the reasoning of the present case hold that when one buys a commodity, it becomes his property, and he may dictate his own resale price. It is necessary that resale price maintenance be restricted by all the state courts in line with the fundamental constitutional principle of due process.

WILLIAM C. MITCHELL, JR.

TAXATION—CRIMINAL TAX EVASION—USE OF NET WORTH METHOD—SUFFICIENCY OF EVIDENCE—Defendant, convicted of income tax evasion under § 145 (b) of the Internal Revenue Code (now INT. REV. CODE §§ 7201, 7202) sought reversal on the grounds, inter alia, that: (1) adequate books were kept, therefore § 41 of the Internal Revenue Code (now INT. REV. CODE § 446b) foreclosed use of the net worth method; and (2) assuming the propriety of the use of the net worth method, there was insufficient evidence to convict. In reference to the second ground, the defendant contended that: (a) the beginning net worth was inaccurate because assets were omitted and the Government failed to check all leads; (b) the increases were not shown to be attributable to net income and (c) the Government had not proved willfulness. The United States Supreme Court *held*—(1) § 41 is not a limitation on the use of the net worth method. (2)(a) Defendant's precarious financial position prior to the prosecution period and the Government's thorough investigation negated the probability of unincluded assets. (b) The Government is not required to negate every possible source of income in proving that the net worth increase is attributable to unreported income if they prove a likely source. (c) The willfulness can be inferred from a consistent pattern of not reporting substantial amounts of income. Conviction affirmed. *Holland v. United States,* 348 U.S. 121 (1954).

Due to the increasing number of tax evasion convictions based on the net worth method in recent years, the Supreme Court granted certiorari to this case and to three others. See *Friedberg v. United States,* 348 U.S. 142 (1954), *Smith v. United States,* 348 U.S. 147 (1954), *United States v. Calderon,* 348 U.S. 160 (1954). Although the Court had denied certiorari in similar cases previously, it had passed on the application of the expenditure method, in *United States v. Johnson,* 319 U.S. 503 (1943), where the taxpayer had no records.

The fact that records are kept does not preclude use of the net worth method since § 41 grants authority to use it where the records do not clearly reflect income. The contention of the defendant is untenable since it would foreclose conviction for income tax evasion where the records are ostensibly adequate. *But cf. United States v. Clark,* 123 F. Supp. 608 (S.D. Cal. 1954).

The net worth method is an indirect method of proof based on circumstantial evidence. When the increase in net worth after adjustments is greater than the reported net income, the increase is presumed to be net income if two conditions obtain, *viz.,* (1) where there is evidence of a possible source of income and (2) where there is a starting point to exclude the hypothesis that the net worth increase can be explained in terms of prior accumulated funds. See Rothwacks, *Indirect Proof of Income,* American Bar Ass'n. Section on Taxation, Symposium on Procedure in Tax Fraud Cases 47 (1951).

In reference to the first condition, no direct proof of income from the source is needed—only proof of the source. *United States v. Chapman,* 168 F.2d 997, 1001 (7th Cir. 1948). As to other possible sources of income, the Court said that as long as the Government makes a reasonable investigation it is not required to negate every possible source of income because it is a matter peculiarly within the knowledge of the defendant.

The second condition is wrought with difficulty since the usual defense in net worth cases is that prior accumulated funds were not included in the starting net worth figure. See Webster, *Section 145 (b) and Prior Accumulated Funds,* 28 Taxes 1065 (1950). There has been an apparent diversity of opinion among the circuits as to the requirement of satisfactory exclusory evidence. *Compare Bryan v. United States,* 175 F.2d 223 (5th Cir. 1949) and *Fenwick v. United States,* 177 F.2d 488 (7th Cir. 1949) *with Schuermann v. United States,* 174 F.2d 397 (8th Cir. 1949) and *Bell v. United States,* 185 F.2d 302 (4th Cir. 1950). In the principal case the Court laid down the requirement of "reasonable certainty." The test is stricter than those required by some of the lower courts previously, but its necessity is evident since the net worth method requires a comparison of the beginning and ending figures to ascertain the increase or the income of the taxpayer. See Note, 38 Geo. L. J. 285 (1950). Whether this test is also to be applied in cases involving the bank deposits method, see *Gleckman v. United States,* 80 F.2d 394 (8th Cir. 1935); *Malone v. United States,* 94 F.2d 281 (7th Cir. 1938) and the expenditures method, see *United States v. Johnson, supra,* is doubtful since the mere showing of deposits or expenditures creates the inference of income if there is a likely source.

The evidence in the instant case clearly justified the conviction but the

opinion should not be interpreted to be a *carte blanche* to the Government to use the net worth method in its battle for revenue. To insure the maintenance of the traditional safeguards of criminal administration, the *caveats* expressed throughout the opinion should not be taken lightly.

GEORGE J. NOUMAIR

TORTS—BAILMENTS—NEGLIGENCE—LIABILITY OF AIRPLANE OWNERS TO THIRD PARTIES—Plaintiff brought action to recover damages for mental suffering, fright, and injury to her real property when an airplane crashed into her home. Plaintiff joined the owner of the airplane, the lessee, and the flyer of the plane as party defendants. The flyer defaulted, and the court granted a non-suit to the owner of the airplane because the plaintiff could not prove an agency relationship existing between the bailor and bailee. The plaintiff appealed the non-suit; affirmed, on the grounds that the doctrine of absolute liability could not apply. *Boyd v. White,* 276 P.2d 92 (Cal. 1954).

Is the bailor of a plane who leases it to a competent flying instructor strictly or absolutely liable to third persons for ground damage, if the bailor had notice that it was to be flown by a reckless student pilot to whom he refused instruction?

An airplane like an automobile is not a dangerous instrumentality *per se,* but it may become so when placed in the hands of a reckless individual. *State v. Hollis,* 273 P.2d 459 (Okla. 1954). Therefore, a bailor is held liable for the negligent acts of the bailee when he entrusts a vehicle to a person known by him to be reckless or incompetent. *Rocca v. Steinmetz,* 61 Cal. App. 102, 214 Pac. 257 (1923); *Lane v. Bing,* 202 Cal. 590, 262 Pac. 318 (1927). The bailor of an instrumentality which threatens serious danger to others is bound by law to use reasonable care in ascertaining that the instrumentality is in good working condition. *Aircraft and Sales Service v. Gantt,* 225 Ala. 508, 52 So.2d 388 (1951); *Opple v. Ray,* 208 Ind. 450, 195 N.E. 81 (1935).

> One who leases a chattel as safe for immediate use is subject to liability to those whom he should expect to use the chattel, or to be in the vicinity of its probable use, for bodily harm caused by its use in a manner for which, and by a person for whose use, it is leased, if the lessor fails to exercise reasonable care to make it safe for such use or to disclose its actual condition to those who may be expected to use it. RESTATEMENT, TORTS § 408 (1934). *McNeal v. Greenburg,* 225 P.2d 810 (Cal. 1953).

In 1922 the Commission on Uniform State Laws proposed the Uniform Aeronautics Act. Soon California and twenty-two other states passed this act either completely or in part. Section 5 of this act reads in part:

> The owner of every aircraft which is operated over the lands or waters of this state is absolutely liable for injuries to persons or property in the land or water beneath, caused by the ascent, descent, or flight of the aircraft *** whether such owner was negligent or not. Uniform Aeronautics Act, § 5 (1922).

With the advance of the airplane, the legislatures of the various states (California included) found that this act was too much of a burden to place on the aircraft industry. By 1945 the act was declared obsolete. The rule today is that a bailor not in control of the subject of the bailment, will be liable to third parties

injured, *only* if he has been negligent in some duty owed. *Hammerbeck v. Hubbard,* 42 Wash. 2d 204, 254 P.2d 479 (1953).

The common law rule, which has been codified in most jurisdictions today, is that a bailor is not liable to third persons for damages resulting from the bailee's negligent use of the bailed property. *Baugh v. Rogers,* 24 Cal. 2d 200, 148 P.2d 633 (1944).

In New York it has been held that an owner of a plane who leases it in good flying condition is not liable to third parties when the plane crashed in the possession of the bailee. *D'Aquilla v. Pryor,* 122 F. Supp. 346 (S.D.N.Y. 1954).

Therefore, the issues now to be resolved are:

1. Was the plane rented by the defendant in good flying condition?
2. Was the defendant negligent in renting it, knowing it to be flown by a student refused instruction at the defendant's school?

It is reasonable to presume that since the plane was able to get off the ground and fly for some forty odd minutes and since it was proven that the crash resulted from the pilot's inability to cope with the situation, that it was in good flying condition.

Absolving the defendant from any negligence is impossible, however, since the student was present when the plane was taken by the bailee. This should have put the bailor (defendant) on notice. His inquiry would have produced the needed evidence for a refusal. Since he didn't act when he should have, it is reasonable to conclude that there was a breach of duty on the part of the bailor.

It is the writer's opinion that the court erred in affirming the non-suit on the grounds that under the doctrine set out in *Hammerbeck v. Hubbard, supra,* liability is imposed on a bailor if he has knowledge of the incompetency of the person renting the plane from the bailee. Also, the general welfare of the community is affected when a person of limited skill is handling an instrumentality which has become dangerous *per se.*

WILLIAM J. RILEY, JR.

WILLS—REVOCATION IMPLIED IN LAW—DIVORCE AND PROPERTY SETTLEMENT—An appeal was taken by the testator's former wife from a judgment that the will of her ex-husband was impliedly revoked by their separation, divorce and a property settlement, and her remarriage.

The Court of Appeals of Tennessee ruled that since the common law doctrine of implied revocation of wills was established in Tennessee, these events (*i.e.* divorce and property settlement) worked such a change in the domestic life of the testator that the law conclusively presumes he intended the will to be revoked, and a revocation by operation of law results. *Rankin v. McDearmon,* 270 S.W. 2d 660 (Tenn. 1953).

At common law, a will of a woman was revoked by her subsequent marriage. A will of a man was not revoked solely by marriage or solely by birth of issue but required both of these events for a revocation implied in law. This matter was subsequently altered by the Wills Act, 1837, which expressly provided for revocation by subsequent marriage and abolished all other aspects of revocation by change of circumstances. ATKINSON, ON WILLS, § 85, (2d ed. 1953).

The English law today does not authorize revocation of a will by change of circumstances of the testator. This is also the case in two jurisdictions of the United States. R. I. GEN. LAWS, ch. 566 § 18 (1938); N. C. CODE ch. 1098 § 9

(1953). In the absence of a statute, it is generally agreed in this country that a divorce, unaccompanied by a property settlement is not sufficient to revoke a prior will. *Card v. Alexander,* 48 Conn. 492, 40 Am. Rep. 187 (1881); *Jones' Estate,* 211 Pa. 364, 60 Atl. 915 (1905); *Lansing v. Haynes,* 95 Mich. 16, 54 N.W. 699 (1893); *Donaldson v. Hall,* 106 Minn. 502, 119 N.W. 219 (1909). At the present time, however, several jurisdictions allow a divorce, in itself, to be sufficient to revoke a will. (Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Minnesota, North Carolina, Pennsylvania, and Washington.)

It must be realized that the decisions on this matter of implied revocation of a will are first based on the statutory provisions of the respective jurisdictions. If a state recognizes implied revocations, the question then arises as to the limit of such a power. Whether a strict common law interpretation is given or an extension of this doctrine is allowed is of utmost importance.

Many states have recognized the doctrine of implied revocation which is manifested in their statutes by the words:

> . . . excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator. Mich. Public and Local Acts, ch. II, 27.3178(79) §9 (1939).

The above portion of the Michigan statute exemplifies the recognition by other states of the same doctrine. The effect of such a provision is to allow the common law interpretation of revocation implied by law.

Some jurisdictions have extended this doctrine. Thus, the courts, under authority of this provision, will generally hold that where there is an agreement regarding property rights accompanied by divorce there is a revocation of the provisions of a will in favor of the divorced spouse. In addition, the courts hold that this presumption of a change of heart on the part of the testator is conclusive. (Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, Ohio, Vermont, and Wisconsin). The Massachusetts decision in *Hertrais v. Moore,* 88 N.E.2d 909 (Mass. 1949) is unique insofar as the interpretation of an *implied revocation* statute limits the change of circumstances to those as they existed at common law.

If the statutes enumerate the instances of revocation by the operation of law and particularly if it is declared that these instances shall be exclusive, divorce and property settlement do not cause a revocation. (Connecticut, Florida, Georgia, Illinois, Louisiana, Maryland, Mississippi, Missouri, Montana, New Jersey, New Mexico, New York, Oklahoma, Oregon, and Texas).

What is the effect upon adjudication where there is an omission of any reference to implied revocation in the statutes? Such an omission is evident in the legislation of the principal state and several others. (Arizona, California, Colorado, Idaho, Iowa, Kentucky, South Carolina, Tennessee, and Utah).

In the absence thereof, the court must choose one of the following, namely: the application of the common law doctrine of a very limited implied revocation doctrine, or extend that doctrine to include divorce and property settlement, or deny the application *in toto.*

In the principal case, the court chose to extend the common law doctrine so as to include divorce and property settlements within its purview. The result is that the judiciary has usurped the powers of the legislature. It has applied a sister court's interpretation to a statutory mandate when the statutes are not even related.

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