RECENT CASES

Army and Navy—Civil Court’s Refusal to Review Double Jeopardy Question in Court Martial—Petitioner, a naval officer, was convicted of murder by a general court-martial and acquitted of assault with intent to commit murder on the same victim. The Judge Advocate General reversed the murder conviction for lack of jurisdiction. A second court-martial then convicted petitioner of voluntary manslaughter, overruling his plea of former jeopardy based on the earlier acquittal of assault with intent to commit murder. The Judge Advocate General confirmed the judgment. In habeas corpus proceedings, the district court refused to consider the ruling on the plea, holding that errors of law by a court-martial are not reviewable by civil courts unless amounting to a denial of the basic doctrine of fairness under the due process clause. In re Wrublewski, 71 F. Supp. 143 (N. D. Cal. 1947).

Since civil courts will not review the proceedings of courts-martial unless the military court lacked jurisdiction, determination of the jurisdictional question must precede the civil court’s collateral attack upon other phases. Thus a court-martial, having jurisdiction initially, may forfeit it on the broad ground that the accused was deprived of the basic fairness underlying the due process clause of the Constitution as where the accused was denied counsel, or there was a gross accumulation of prejudicial errors. Those properly under military jurisdiction are specifically excepted by the Fifth Amendment from the right to grand jury indictment. The clause providing this exception is relied upon in the instant case further to except military personnel from the protection against double jeopardy. The court’s authority for this extension is broad language in cases where the applicability of the double jeopardy clause was not in issue. Observing that all of the Fifth Amendment “relating to criminal

1. Naval courts-martial have jurisdiction of the crime of murder only when committed outside the territorial jurisdiction of the United States. 12 Stat. 602 (1862), 34 U. S. C. § 1200, art. 6 (1940).

2. E. g., Collins v. McDonald, 258 U. S. 416 (1922); Mullan v. United States, 212 U. S. 516, 520 (1909); Johnson v. Sayre, 158 U. S. 109 (1895); Ex parte Mason, 105 U. S. 696 (1881).


4. Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947). This was not a habeas corpus proceeding; nevertheless, the court assumed that it had the power to review, provided that the court-martial’s findings were void. The findings of a court-martial which for any reason lacks jurisdiction are void, not voidable. See, e. g., Keyes v. United States, 109 U. S. 436, 440 (1883). But if counsel is provided, the mere subsequent contention of accused that counsel was incompetent is not of itself sufficient to make out a denial of due process. Ex parte Benton, 63 F. Supp. 808, 810 (N. D. Cal. 1943).


6. U. S. Const. Amend. V. Ex parte Quirin, 317 U. S. 1, 40 (1942), construing the Fifth and Sixth Amendments together; see Ex parte Milligan, 4 Wall. 2 (U. S. 1866).

7. The court cites Ex parte Quirin, 317 U. S. 1 (1942) (right to jury trial); Ex parte Milligan, 4 Wall. 2 (U. S. 1866) (right to jury trial); United States ex rel. Innes v. Crystal, 131 F. 2d 576 (C. C. A. 2d 1943) (military counsel transferred for duty in course of trial); Ex parte Benton, 63 F. Supp. 808 (N. D. Cal. 1943) (incompetent counsel).

(117)
prosecutions” is inapplicable to courts-martial,\(^8\) the court curiously then bases its refusal to review the findings on the due process clause of the same amendment, on the grounds that under the fairness doctrine the latter clause has not been violated.\(^9\)

The decision as to the double jeopardy clause is contrary to the plain language of the Fifth Amendment,\(^10\) and is unnecessary to the result toward which the court was impelled by the record presented by the petition.\(^12\) Observing that there are different kinds of double jeopardy, the Supreme Court has held that a mere fact situation suggesting the label “double jeopardy” may be insufficient to demand judicial deference to the plea.\(^13\) It has been suggested that in certain fact situations a different label, “one continuing jeopardy,” should be applied.\(^14\) The extension, in the instant case, of the clause excepting military personnel from grand jury protection, can lead, in a clear-cut double-jeopardy situation bestirring judicial sympathy, only to further distortions of logic or, improvidently, to a flat prohibition against the federal courts' review of the question of double jeopardy in all courts-martial.\(^15\) Since the Supreme Court has not prescribed the extent to which each provision of the Bill of Rights applies to courts-martial, the proper determination of the applicability of the double jeopardy clause must await an express ruling. A just result, however, will only be available upon the recognition that the holding in the instant case is based on inappropriate dicta.

8. Instant case at 144.

9. For those in military service military law is due process. Reaves v. Ainsworth, 219 U. S. 296, 304 (1911); United States v. Weeks, 259 U. S. 336, 344 (1922). “But the due process clause guarantees to them that this military procedure will be applied to them in a fundamentally fair way.” United States v. Hiatt, 141 F. 2d 664, 665 (C. C. A. 3rd 1944).

10. See Sanford v. Robbins, 115 F. 2d 435, 438 (C. C. A. 5th 1940). “We have no doubt that the provision of the Fifth Amendment, 'nor shall any person . . . be twice put in jeopardy . . .' is applicable to courts-martial. The immediately preceding exception of 'cases arising in the land or naval forces' from the requirement of an indictment abundantly shows that such cases were excepted from the other provisions.” Cf. Grafton v. United States, 206 U. S. 333 (1907). The Attorney General has ruled that the provision applies, 9 Ops. Att’y Gen. 223, 230 (1858), as has the Judge Advocate General, Naval Court-Martial Order 141—1918, p. 17.

11. The validity of the plea was not examined. Conceptually it is at least doubtful that acquittal of the crime of assault with intent to commit murder will necessarily preclude prosecution for voluntary manslaughter. “The test is, whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second cannot be maintained . . . .” 1 BISHOP, CRIMINAL LAW § 1052, subd. 2 (9th ed. 1923).

12. The petitioner's guilt apparently was not in doubt. Instant case at 144-145.

13. Palko v. Connecticut, 302 U. S. 319, 328 (1937). “The tyranny of labels . . . must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other.” Id. at 323. Cf. Trono v. United States, 199 U. S. 521 (1905).


15. This is unlikely in view of the current tenor of opinion, reflected by recent investigations into the military’s administration of justice and by the proposed legislation for revision of the military judicial system, H. R. 2575, 80th Cong., 1st Sess. (1947). Moreover, “An individual does not cease to be a person within the protection of the Fifth Amendment of the Constitution because he has joined the nation’s armed forces. . . .” United States v. Hiatt, 141 F. 2d 664, 666 (C. C. A. 3rd 1944).
Constitutional Law—Selection of River Pilot Apprentices on Family Basis as a Violation of the Equal Protection Clause—A Louisiana statute,\(^4\) regulating pilotage on the Mississippi below New Orleans, empowered a board of commissioners, should a necessity for more pilots exist, to examine those applicants who had served an apprenticeship and to certify them to the governor for commissioning. Plaintiffs in this case, a number of pilots previously engaged on unregulated shipping, were virtually put out of work by an extension of the regulated area to include the port of New Orleans.\(^2\) Contending that the state pilots, organized as an association, had consistently chosen members of their own families as apprentices, plaintiffs asserted a denial of equal protection of the laws and sued for (1) declaratory judgment of the statute’s unconstitutionality and injunction of its enforcement, or (2) in the event of constitutionality, mandamus to the board to examine and certify them. The Supreme Court affirmed the state courts’ dismissal of the complaint: \(^3\) equal protection does not preclude a legislature from setting up apprenticeship requirements working on a family basis to effect exclusion from a properly regulated state activity \(^4\) if such classification is directly related to its objective. *Kotch v. Board of River Port Pilot Comm’rs. for Port of New Orleans, 67 Sup. Ct. 910 (1947).*

A state’s creation of lines of classification under its police power \(^5\) is subject to the availability of the broad constitutional guarantee of equal protection to strike out whatever exercise of state authority has become arbitrary.\(^6\) But the federal courts, loath to assume the responsibility of resolving matters of purely local policy,\(^7\) have developed the rule of thumb that any classification bearing a rational relation to a valid state objective will not be extirpated by a judgment of unconstitutionality.\(^8\) Such a rationale, buttressing constitutionality, finds ready application when request is made for a comprehensive declaration that the legislative judgment on the face of a statute effects a prohibited discrimination.\(^9\)

But attack upon state action has met with more success when narrowly aimed at discriminatory enforcement of statutes valid on their face.

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4. Throughout the argument it was conceded that pilotage regulation was a valid exercise of the state’s police power, Congress having at an early date set this activity apart as a fit subject of state regulation until such times as Congress should act. Act of Aug. 7, 1789, ch. 9, § 4, REV. STAT. § 4235 (1875), 46 U. S. C. § 211 (1940). See Cooley v. Board of Wardens of Port of Philadelphia, 12 How. 299, 315 et seq. (U. S. 1851).
7. The cautionary attitude was expressed by Mr. Justice Holmes: "Obviously the question ... is one of local experience on which this court ought to be very slow to declare that the state legislation was wrong on its facts ... it is enough that this court has no such knowledge of local conditions as to be able to say that it was manifestly wrong." Patson v. Pennsylvania, 232 U. S. 138, 144 (1918).
Though the necessity of distinguishing state from private action has given complexity to the problem, relief has been afforded by injunction of such enforcement, by reversal of criminal conviction, by granting of habeas corpus, and by mandamus. In view of the breadth of the relief demanded in the instant case and in the light of the fact that plaintiffs' quarrel was primarily with the behavior of the private association of pilots, it seems clear that plaintiffs were properly denied their prayer. But the Court might well have placed this decision on the narrow basis that the statute itself, as to apprenticeship provisions, was fair on its face; that plaintiffs had not shown the statutorily required necessity for more pilots. The Court's reading of the statute as embodying the legislature's adoption of the familial system, and the breadth of its approval of that system as a valid exercise of state discretion seem, therefore, not to have been altogether necessary.

A classification based upon the accident of birth appears hardly to fit into a democratic tradition, whether it be birth into a particular race or into a particular family. The former having been consistently condemned without much desire on the part of the Court to find justification in some supposed local policy, the latter should receive condonation, if at all, only upon a most compelling showing of a not otherwise attainable, socially desirable objective.

10. See Mr. Justice Frankfurter, concurring in Snowden v. Hughes, 321 U. S. 1, 13 (1944) and cases cited therein dealing with determination of whether action of a state official constitutes state action sufficient to confer jurisdiction under the Fourteenth Amendment upon the federal courts.

11. The Louisiana court was impressed by the distinction between the public character of the board and the private nature of the pilots association, and the fact that the attacked discrimination was exercised by the latter. Kotch v. Board of River Port Pilot Comm'rs. for Port of New Orleans, 209 La. 737, 756, 25 So. 2d 527, 533 (1946). Finding the statute itself constitutional, the court refused mandamus of the scope requested since it would have required certification in complete disregard of the statutory apprenticeship provision. Id. at 762, 25 So. 2d at 535.


15. Missouri ex rel. Gaines v. Canada, 305 U. S. 337 (1938). Mandamus in such cases is not so directed, as in the instant case, as to attack the statute itself.

16. Under any reading of the prayer for relief, plaintiffs were requesting a declaration of the statute's inherent unconstitutionality: clearly, by request for declaratory judgment and injunction; also, by request for mandamus which would require the board to ignore the apprenticeship provision. See note 10 supra.

17. Such provisions are not peculiar to Louisiana, as a device employed by the legislature to develop a trained pilotage corps. See PA. STAT. ANN., tit. 55, § 44 (Purdon, 1930).

18. Plaintiffs, thereafter, would still have had a possible remedy in the state court through a more finely-drawn prayer for relief designed to affect the particular discriminatory practices of the pilots association. A prayer for mandamus to compel the board to adopt objective standards in accepting apprentices from the association, possibly by clearing prospective apprentices through the board, would at least be within the bounds laid out by judicial approval of the statute's apprenticeship requirements as such. See Note, Remedies for Discrimination by State and Local Administrative Bodies, 60 Harv. L. Rev. 271 (1946).


20. See Mr. Justice Rutledge, dissenting in instant case at 916. Since the principal case reached the Supreme Court upon dismissal of the complaint, the Court relied heavily for its appraisal of the demands of an efficient pilotage system upon extensive judicial notice of pilotage problems.
Corporations—Effect of Breach of Stock Pooling Agreement on Validity of Stockholders’ Election—All the shares in a well-known circus corporation were family owned, petitioner and defendant Haley each holding 315, and another defendant, North, holding the remaining 370. Petitioner and Haley in 1941 executed a ten-year written agreement to vote their shares together in all matters, any disagreement to be referred for “arbitration” to Loos, an attorney, whose decision would be binding. Until 1946 there were no disagreements and petitioner and Haley effectively controlled the corporation. In 1946, however, Haley opposed a director proposed by petitioner and the continuance as president of petitioner’s son. North sided with Haley. When the arbiter decided in favor of petitioner, Haley refused to vote accordingly. Haley and North then joined forces, elected five out of seven directors, were thus able to install a new slate of their own officers, and took over the running of the circus. Upon petition to set the election aside, the Court of Chancery found the agreement valid and specifically enforceable, declared the 1946 election invalid, ordered the defendants’ candidates ousted, and directed a new stockholders’ election be held before a master. The Supreme Court affirmed the validity of the agreement but modified the decree in that the contested election itself was held valid, but Haley’s votes were not to be counted. Although this left a deadlocked six man directorate, three each having been legally elected by petitioner and North, the Court indicated the forthcoming annual election for 1947 might solve this dilemma.  

While for most purposes courts will uphold pooling agreements in the absence of fraud or illegal purpose, the alleged dogma is that such agreements will not be specifically enforced. Authority for such a rule, however, is of doubtful origin, being derived from dictum, and cases in which the agreement either was itself totally invalid or was a form of voting agreement which expressly attempted to limit the directors in the independent exercise of their corporate powers. See note 7 infra.  


2. The statement of facts includes additional material from the Transcript of Record which, while not reported directly in the Supreme Court opinion, is thought relevant.  

3. Brightman v. Bates, 175 Mass. 105, 55 N. E. 809 (1900) (plaintiff who performed contractual services in organizing the pool allowed to recover compensation); Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 47 Pac. 582 (1897) (directors’ election based upon votes cast in accordance with pooling agreement held valid in quo warranto); 5 Fletcher, Cyclopedia of Private Corporations § 2064 (perm. ed. 1931); Wormser, The Legality of Corporate Voting Trusts and Pooling Agreements, 18 Col. L. Rev. 123-4 (1918). A pooling agreement, in which the stockholders merely agree their stock will be voted together for certain broad purposes, should be distinguished from other types of voting agreements that seek to predetermine the specific ways in which stock will be voted on particular matters. See note 7 infra.  

4. Cases cited notes 5 and 6 infra; 5 Fletcher, op. cit. supra note 3, § 2067. But see Thompson v. J. D. Thompson Carnation Co., 279 Ill. 54, 55, 116 N. E. 648, 651 (1917). Since, however, the avowed object of a pooling agreement is to gain control, it would appear that where there has been a breach damages would be of so speculative a nature that the agreement could have no practical significance except in terms of specific enforceability. Contrast situation for a voting agreement, note 7 infra.  


ent exercise of their judgment.\(^7\) The courts tend to regard specific performance as impracticable.\(^8\) and have traditionally been reluctant to sanction any separation of voting rights from ownership of stock which may result in minority control.\(^9\) In the instant case the lower court faced this problem and boldly ordered specific performance.\(^10\) Such a holding was pregnant with the potential problems of practical enforcement\(^11\) and the legal consequences of *de facto* directorship.\(^12\) At first glance, however, the Supreme Court would appear to have retreated from this position. By holding that the votes of the stockholder violating the pooling agreement were invalid, the Court has accorded the agreement some legal effect; but by failing affirmatively to direct these votes be cast in accordance with the agreement the Court has taken the teeth out of the decree of specific performance. Nevertheless, it should be remembered that this was an equitable proceeding, and the Court was evidently more concerned with settling this particular dispute than in either reinforcing or rejecting a legal dogma. It therefore rendered a decision advantageous to neither side, which, by its deadlocking effect, obviously would be an incentive for the parties to reach a compromise agreement.\(^13\)

7. McQuade v. Stoneham, 142 Misc. 842, 256 N. Y. Supp. 431 (Sup. Ct. 1932) (agreement to have plaintiff elected director and treasurer at specific salary for indefinite period), aff'd, 238 App. Div. 827, 262 N. Y. Supp. 966 (1st Dep't 1933), rev'd *on other grounds*, 263 N. Y. 323, 189 N. E. 234 (1934); Haldeman v. Haldeman, 176 Ky. 635, 197 S. W. 376 (1917) (agreement to have plaintiff elected president); see Dulin v. Pacific Wood & Coal Co., 103 Cal. 357, 364-5, 35 Pac. 1045, 1047 (1894). But distinguish Trefethen v. Amazeen, 93 N. H. 110, 36 A. 2d 266 (1944) (injunction granted to prevent breach of voting agreement); Clark v. Dodge, 269 N. Y. 410, 199 N. E. 641 (1936) (suit for specific performance of voting agreement allowed where parties were sole stockholders). The specific provisions of voting agreements render them more susceptible to an assessment of damages for breach (loss of salary, etc.) than pooling agreements, and it is a general rule that equity will not step in when damages are available. See 4 *Pomeroy, Equity Jurisprudence* §1401 (Symons ed. 1941).

Also, most voting agreements are more objectionable to the courts than pooling agreements, and it is a general rule that equity will not step in when damages are available. See *McQuade v. Stoneham*, 142 Misc. 842, 256 N. Y. Supp. 431, 439-41 (Sup. Ct. 1932) (trial court); Rosenkantz v. Chattahoochee Brick Co., 147 Ga. 730, 732, 95 S. E. 225, 226 (1918); Haldeman v. Haldeman, 176 Ky. 635, 651-2, 197 S. W. 376, 383-4 (1917). But distinguish *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 47 Pac. 582 (1897).


9. See, e. g., *Haldeman v. Haldeman*, 176 Ky. 635, 649, 197 S. W. 376, 382 (1917); *Gleason v. Earles*, 78 Wash. 491, 504, 139 Pac. 213, 218 (1914); *Gage v. Fisher*, 5 N. D. 297, 303-8, 65 N. W. 809, 811-12 (1895). This was always the favorite argument against the legality of any voting control device. See *Wormser, supra* note 3, at 123-4.

10. The Court of Chancery relied upon *Clark v. Dodge*, 269 N. Y. 410, 199 N. E. 641 (1936), which granted specific performance of a voting agreement wherein two stockholders who owned all the stock agreed that the minority holder would manage the business. This case, however, did not involve a pooling agreement, and can also be distinguished from the instant case because the court reinstated the minority holder as manager of the corporation on the theory that, since all the stockholders were parties to the agreement, there was no "damage threatened" to any other interests. See 11 *St. John's L. Rev.* 117 (1936).

11. See note 8 *supra*.


13. Note the Court's comments, instant case, next to last paragraph. The Court's opinion was handed down May 3, 1947. Subsequent events would seem to indicate
Corporations—Inclusion of Unrealized Appreciation of Fixed Assets in Surplus Available for Distribution to Shareholders—Defendants, former directors of plaintiff corporation, had authorized and paid to themselves, as the only shareholders, $13,000 in dividends. The surplus, on the basis of which the dividends were declared, depended on the inclusion in the assets of $26,000 of unrealized appreciation of certain fixed assets. The corporation, in a suit instituted by the present directors, sought to recover under a statute which makes assenting directors jointly and severally liable to the corporation for repayment of unlawful dividends. Because an asset denominated "franchise and promotion expense" was written off the books at the time of the reappraisal by the directors, the trial judge found for the defendants on the ground that the unrealized appreciation produced no increase in the aggregate of corporate assets over the aggregate of liabilities. On appeal, the Supreme Court, in a unanimous opinion, reversed, holding that the rule prohibiting the inclusion of unrealized appreciation of assets in a fund available for dividends has been embodied as a categorical imperative in Pennsylvania law. *Berks Broadcasting Co. v. Craumer, et al.,* 356 Pa. 620, 52 A. 2d 571 (1947).

This decision, the first interpreting the unrealized appreciation phase of Pennsylvania’s Business Corporation Law of 1933, was not unexpected. Although it was thought that the approval by the New York court of the current valuation of assets in *Randall v. Bailey* would produce sweeping changes in existing dividend law, there has been little inclination to follow that decision. This may be due to the fact that such markups are considered poor accounting technique, or that the highly solvent condition of most corporations in the last seven years has obviated the practice. The principal objection to the use of present worth of assets in determining that the Court’s expectation has been fulfilled. At the annual stockholders’ meeting and election of directors for 1947, held June 20, the contestants apparently reached a settlement whereby they agreed upon a compromise candidate for the disputed directorship and also decided that petitioner’s son was to continue in a modified executive capacity as first vice-president. Accordingly, petitioner and Haley finally cast their votes together.

1. PA. STAT. ANN., tit. 15, §2852-701 (Purdon, 1938), provides that no corporation shall pay dividends: “In cash or property, except from the surplus of the aggregate of its assets over the aggregate of its liabilities, including in the latter the amount of its stated capital, after deducting from such aggregate of its assets the amount by which such aggregate was increased by unrealized appreciation in value or revaluation of fixed assets, unless the amount thereof shall have been transferred to, or included in, its stated capital.” §2852-707 provides for the liability of directors.

2. [Record, p. 84a.]

3. 54 HARV. L. REV. 505 (1941).

4. 23 N. Y. S. 2d 173 (1940), aff’d, 288 N. Y. 280, 43 N. E. 2d 43 (1942), cited by the trial court in its opinion dismissing exceptions. [Record, p. 102a.]


6. It has been cited for the unrealized appreciation proposition only in Hayman v. Morris, 36 N. Y. S. 2d 756, 768 (Sup. Ct. 1942) (inclusion by corporation of good will valued at $1,000,000 in fund for purchase of its own stock held proper). See 70 JOURNAL OF ACCOUNTANCY 564 (1940); as to the writing up of fixed assets in quasi-reorganization, see Katz, Corporate Accounting Problems, 89 U. OF PA. L. REV. 764, 770 (1941).
the fund available for dividends is that with the usual presumptions in favor of directors’ discretion, current valuation becomes little more than directors’ valuation. The expense of an impartial appraisal prior to each dividend declaration, however, would be clearly prohibitive. As a partial solution to the dilemma, one state allows the corporation to include in the fund available for dividends the market value of all securities held by the corporation, except its own. On the other hand, the effort to protect the rights of creditors by the strict application of the statute, as in the instant case, could conceivably lead to hardship on the shareholders. In spite of this, a statute similar to Pennsylvania’s exists in eight other states. The court in the instant case suggests that the conflicting interests of creditors and shareholders can best be resolved by the declaration of a share dividend. The shareholders thus realize the increment to corporate holdings, while the creditors are protected by the addition of the amount of the share dividend to stated capital. Except in California, such a solution is available under all the statutes which require the reduction of assets by the amount of unrealized appreciation. In the absence of an inexpensive, impartial appraisal board, the better result would seem to be reached in decisions like the instant one, and in the case law enunciated before Randall v. Bailey.

Inheritance Tax—Relinquishment of Support as Consideration for Contract to Be Executed at Death—Prior to divorce, husband and wife had entered into a separation agreement whereby the husband promised to give his wife one-quarter of his estate upon his death in addition to a small monthly payment during his life, and the wife agreed not to sue for more support. The husband died without making provision in his will for his ex-wife, and she enforced the contract. The state sought to impose a transfer inheritance tax on her acquisition of a share of the estate, but the Supreme Court of Pennsylvania held that the transfer was not taxable be-

10. In Randall v. Bailey, e. g., the intrinsic value of the land in question had increased some 800%. To force a sale in order to “realize” the appreciation before the shareholders profit by the increment would be, at best, unwieldy.
12. Instant case at 626, 52 A. 2d at 575.
13. See Graham and Katz, Accounting in Law Practice 155 (2d ed. 1938), where the authors suggest that while the book value of the new holdings remains constant, the market value is enhanced.
cause it was made in return for an “adequate and full consideration in money or money’s worth.” In re Neller’s Estate, 356 Pa. 628, 53 A. 2d 122 (1947).

The transfer falls within the language of § 1 of the Transfer Inheritance Tax Act, which imposes a tax on transfers “intended to take effect in possession or enjoyment at or after death.” § 2, however, provides that in the determination of the taxable value of an estate, deductions are to be made of “debts of the decedent . . . to the extent that they were contracted bona fide and for an adequate and full consideration in money or money’s worth.” While the latter section might logically have been interpreted as referring only to those “debts” which were not within the scope of § 1, the weight of authority supports the view that it is not the purpose of such statutes to tax those transfers designed to take effect at death which are supported by full consideration, but only those which are gratuitous.

The dissent, however, emphasizes that relinquishment of a marital right (such as the right to support) should not be construed as a “consideration in money or money’s worth.” While treatment of the surrender of some marital rights as a sufficient consideration might well serve as an invitation to tax avoidance, it is not therefore necessary to impose the tax wherever the consideration for a transfer could be fitted into so broad a classification as “relinquishment of marital rights.” The surrender of support to which she is entitled is a calculable financial detriment to a wife during her husband’s lifetime, and a corresponding benefit to his estate. If the instant case is viewed as precedent only where husband and wife are actually separated, so that there will be no likelihood that the wife received

1. PA. STAT. ANN., tit. 72, § 2301 (Purdon, 1946). “A tax . . . is . . . imposed upon the transfer of any property . . . (c) When the transfer is by deed, grant, bargain, sale, or gift . . . intended to take effect in possession or enjoyment at or after . . . death . . .”

2. PA. STAT. ANN., tit. 72, § 2302 (Purdon, 1946).

3. It could be contended that § 2 purports only to define the taxable value of property which is taxable under § 1, and not to change the scope of § 1. Furthermore, the use of the words “… bargain, sale . . .” in § 1 (see note 1) might be regarded as a deliberate inclusion of transfers for consideration. Cf. Estate of Oppenheimer, 75 Mont. 186, 243 Pac. 589 (1926).

4. See In re Hubbs, 41 Ariz. 466, 473, 19 P. 2d 672, 674 (1933). Where property passes by will, however, the fact that the bequest is in fulfillment of a contract may not be enough to exempt the transfer from tax. In re Howell, 255 N. Y. 211, 174 N. E. 457 (1931). Some courts reach this result only when the will transfers specific property rather than money or a general share in the estate, on the theory that only then does the will add anything to the contract. In re Johnson’s Estate, 389 Ill. 425, 59 N. E. 2d 825 (1945). The “specific enforcement” of a contract to devise property may also be subjected to the tax. Matter of Kidd, 188 N. Y. 274, 80 N. E. 924 (1907). But cf. In re Vanderbilt’s Estate, 162 Misc. 497, 169 N. Y. Supp. 201 (Surrt. Ct. 1918), aff’d, 226 N. Y. 638, 123 N. E. 893 (1919).

5. The Federal Estate Tax Act provides that “relinquishment of dower . . . of any other marital rights in decedent’s property . . . shall not be considered to any extent a consideration ‘in money or money’s worth.’” In re Judge, 111 F. 2d 576 (C. C. A. 2d 1940).

6. For instance, the relinquishment of taxable dower rights should not make a transfer at death a non-taxable payment of a “debt” of the estate. That such a result would defeat the purpose of the statute was pointed out in People v. Estate of Field, 248 Ill. 147, 153, 93 N. E. 721, 723 (1910).
support after giving up the right to it, an effective method for avoiding inheritance taxation will not have been made available.

Patents—Legality of Price-Fixing Clause in License Agreements Under Sherman Anti-Trust Act—Defendant patentee was indicted under §§ 1-8 of the Sherman Anti-Trust Act for issuing a license under his patent including a condition that the licensee would maintain prices established by the defendant. The complaint was dismissed. Although price-fixing agreements concerning competitive products in interstate commerce are illegal per se, on the authority of United States v. General Electric Co. a patentee is not subject to the provisions of the Anti-Trust Act when his limitation of price is reasonably adopted to secure his reward as patentee. United States v. Line Material Co., 64 F. Supp. 970 (E. D. Wis. 1946), now before the Supreme Court.

Beginning in 1917, the Supreme Court has steadily diminished the rights conferred by the patent grant. In its decisions accommodating the patent laws to the basically opposed Anti-Trust Laws, the court has shown an awareness of the changing economic pattern concentrating organized research and patent ownership in corporations. Congress, apparently, has been satisfied with the balance maintained by the Court, for although reforms have been pressed periodically, no major revision has been made in the patent laws since 1870. The General Electric case had determined


2. 272 U. S. 476 (1926).

3. The U. S. Supreme Court noted jurisdiction at 67 Sup. Ct. 113 (1947); argument was heard April 29, 1947, 15 U. S. L. Week 3418 (1947); assigned for re-argument at 67 Sup. Ct. 1528 (1947).


that a patentee who fixes reasonable prices at which the patented article is sold by his licensee is excepted from indictment under the Anti-Trust Laws. The Government now seeks to overrule that decision, contending that it was based upon a misconception of the function of the patent law, and that it is not in accord with the modern doctrine of the Court which has re-emphasized the public nature of the patent grant. Plainly, the Court is asked to replace the now emasculated "private property" concept of the patent grant with the "public franchise" view; a reform which had been rejected by Congress.

Historically, a basis for this view exists in American law. Significantly, it would admit no exception to the Anti-Trust Laws in favor of a patentee. The Court's recent rejection of compulsory licensing, however, an equally necessary branch of the franchise concept, may indicate an unwillingness to impose the policy recently rejected by the legislative branch. This is no bar, however, since compulsory licensing bears strong similarity to property confiscation, a potent defense not applicable in the instant problem. Aside from the fundamental controversy concerning the public nature of the patent grant, the ruling requested by the Government is impractical under existing patent statutes, since the rule will, admittedly, result in reduced licensing by patentees. The law affords no means of preventing such suppression. Thus a situation now considered un-

8. The Government rationale: (1) The primary function of patent law is the public interest in advancement of arts and sciences. Reward to the inventor is secondary and private. (2) The Anti-Trust Acts enunciate a general public policy under which price-fixing is illegal per se. (3) The secondary consideration of reward to the inventor should be subordinate to the general policy of the Anti-Trust Acts, and, therefore, should preclude any price-fixing by the inventor. 15 U. S. L. WEEK 3418 (1947).


10. The earlier patent decisions, see note 13 infra, treated the patent grant as conditioned on continued use in the public interest. This concept, styled the "franchise view," was supplanted by the "property" concept in Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405 (1908), which held that the patentee's "property" interest privileged him to suppress the patent.

11. For a complete development of the consequences of these different concepts see Meyers and Lewis, The Patent "Franchise," 30 Geo. L. J. 117 (1941). See note 10 supra.

12. The most recent critical examination of the Patent Laws was made by the Temporary National Economics Committee. The Justice Department's major recommendations for reform were: (1) compulsory licensing, (2) unrestricted licenses (patentee not permitted to restrict license as to price, production, manner of use, or geographical area), (3) forfeiture of patent for violation of (1) or (2) above. T. N. E. C. Final Report, pp. 36-37 (1941). None of these recommendations were enacted. See note 6 supra.


14. Hartford-Empire v. United States, 323 U. S. 386 (1945). Compulsory licensing laws, commonly comprised in European patent laws, require a patentee to manufacture the patented article and/or grant licenses to all applicants at a reasonable royalty.


favorable would be aggravated. Nor would the inability of the patentee to offer price security encourage licensees to challenge the validity of patents, thus freeing the economy from invalid grants. The language of the General Electric case, on the other hand, can be construed to restrict price-fixing by the patentee whenever a court finds that there is an abuse of the privilege. Evidence of a program of wide-spread industrial control or unreasonable prices could be rebuked by a narrow application of the rule asserting that the patentee had exceeded the normal and reasonable means of securing his reward. Such modification of the General Electric rule appears to be the only practical adjustment of the conflict unless the Court is willing to undertake a part-by-part revision of the patent law by judicial legislation with its resultant ambiguity and uncertainty.

Search and Seizure—Effect of the Fourth Amendment Upon Admissibility of Evidence Seized During Lawful Arrest for Unrelated Crime—Immediately following his arrest on two warrants duly issued charging violation of the Mail Fraud Statute and the National Stolen Property Act, FBI agents searched petitioner's apartment, expressing as their objective two stolen checks and any means used to commit the thefts. After five hours of thorough searching they discovered, in a sealed envelope marked "personal papers," classification cards and registration certificates possessed in violation of the Selective Training and Service Act of 1940. Petitioner, indicted on charges arising out of this unlawful possession, moved to suppress the evidence on the ground that it was obtained contrary to the "reasonable search and seizure" provisions of the Fourth Amendment and consequently inadmissible under the Fifth. This motion was denied and he was convicted. The circuit court affirmed the conviction and the Supreme Court, in a five to four decision containing three separate dissenting opinions, upheld the circuit court, holding that the search and seizure were not unreasonable, but properly incident to a lawful arrest. *Harris v. United States*, 67 Sup. Ct. 1098 (1947).

The federal rule on the inadmissibility of evidence obtained contrary to the "reasonable search and seizure" provisions of the Fourth Amendment was created by the Court and can only be removed by the Court. Harris v. United States, 67 Sup. Ct. 1098 (1947). On the other hand, valuable patents licensed for large sums are invariably subjected to research, very often covering examination of major scientific libraries in every country in the world. In the instant case note the extent of effort to invalidate made by Westinghouse. Instant case at 974 and 977.

18. The Government had contended that it would. But challenging the validity of a patent involves expensive research. Under present practice licenses are often taken under narrow and possibly invalid patents when to do so would be more economical than challenging the validity. Affording more opportunity to challenge would not reduce the cost. On the other hand, valuable patents licensed for large sums are inevitably subjected to research, very often covering examination of major scientific libraries in every country in the world. In the instant case note the extent of effort to invalidate made by Westinghouse. Instant case at 974 and 977.

19. One member, at least, is willing. Justice Douglas, dissenting, in *Special Equipment Co. v. Coe*, 65 Sup. Ct. 741 (1945), states: "We should not pass on to Congress the duty to remove the private perquisites which we have engrafted on the patent laws. This Court was responsible for the creation. This Court should take the responsibility for the removal."
strikes a balance between maximum law enforcement efficiency on the one hand and a maximum of libertarian guarantees on the other. In effect, it modifies the usual dogma that courts will not stop to inquire into the source of evidence. The libertarian ideal has developed in the Court's outlining of the concept of reasonableness. In this light, the right to search that is a recognized incident of lawful arrest was originally limited to the place or premises in the immediate possession and control of the person arrested. Later decisions proscribed general exploratory searches for evidence of crime and strongly suggested that the authority to search on arrest be no greater than that conferred by a particularizing search warrant. In the instant case the Court followed the established distinction between exploratory searches and searches having as objectives "the fruits or instrumentalities of the crime for which the arrest is made," concluding that anything found in the latter type of search may lawfully be seized. Thus since the thoroughness of the search alone is apparently not to be regarded as the basic criterion of its legality, the distinction may prove to be a precarious one, especially since the only solution that the Court could offer for this problem was to put its reliance on the "good faith" of the arresting officers. In the Davis and Zap cases, the Court had already indicated a

shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. The Fifth Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself, . . ." The interaction of the Fourth with the Fifth Amendment was first postulated in Boyd v. United States, 116 U. S. 616 (1886), and established in Weeks v. United States, 232 U. S. 383 (1914). See also Silverthorne Lumber Co. v. United States, 251 U. S. 385 (1920); Gouled v. United States, 255 U. S. 298 (1921).

6. 8 Wigmore, Evidence § 2183 (3d ed. 1940). Commonwealth v. Dana, 2 Metc. 329 (Mass. 1841). Though the Court as yet evaded a direct contest of the applicability of the Fourth Amendment to the States, it has clearly intimated that it does not apply. See National Safe Deposit Co. v. Stead, 232 U. S. 58, 71 (1914); Byars v. United States, 273 U. S. 28, 32 (1927); Wheatley v. United States, 159 F. 2d 599, 601 (C. C. A. 4th 1946).

7. For an interesting study of the Amendment in its historical setting see Lasson, The History and Development of the Fourth Amendment to the United States Constitution in 55 Johns Hopkins University Studies in Historical and Political Science (1937). See the useful tabular analysis of the Court's decisions in the appendix to the instant case at p. 1121 et seq.


9. Weeks v. United States, 232 U. S. 383 (1914); Agnello v. United States, 269 U. S. 20 (1925). In Marron v. United States, 275 U. S. 192 (1927), the search of the premises apparently extended beyond the "immediate possession and control" limitation, besides being close to exploratory in nature, but the Court limited the holding in that case to its particular facts and clarified its scope in Go-Bart Importing Co. v. United States, 282 U. S. 344, 358 (1931). See also United States v. Kirschenblatt, 16 F. 2d 202 (C. C. A. 2d 1926).


13. The Court also relied on several dicta to the effect that a search for stolen goods is privileged on arrest. See, e. g., Boyd v. United States, 116 U. S. 616, 623
tendency to narrow its prior liberal interpretations of the Fourth Amendment.\textsuperscript{14} In the instant case, the potential dangers of continuing such a trend, with its possible effect of endowing the arresting officer with ministerial discretion, were eloquently set forth in the dissenting opinions.\textsuperscript{15}

That the class of persons who might need to invoke the Amendment's protection may suddenly be expanded is illustrated by the numerous appeals to it in prosecutions under the National Prohibition Act.\textsuperscript{16} With the possibility being not too remote that the law will reach out and embrace a new category of political offenses,\textsuperscript{17} the Court should be less willing than it seems to narrow its prior interpretations of the Amendment in such fashion.

\textbf{Torts—Effect of Plaintiff’s Wanton Misconduct in a Last Clear Chance Situation—Plaintiff, standing in the center of an intersection, between the tracks of an east-west trolley line, raised his hands to warn a street car, 400 feet away, of the approach of a fire engine coming south towards the intersection. When the trolley was at least seventy-five feet away, plaintiff, seen by the motorman, turned around in order to wave the fire engine on. Defendant’s trolley struck and injured the plaintiff who had been unaware of his peril. In an action based on defendant’s wanton misconduct the jury returned a verdict for plaintiff. Judgment n. o. v. for defendant was sustained on appeal to the Pennsylvania Supreme Court which held that (1) plaintiff was guilty of wanton misconduct, and (2) plaintiff's wantonness bars recovery in an action based on defendant’s wanton misconduct. \textit{Elliott v. Philadelphia Transportation Co.}, 53 A. 2d 81 (Pa. 1947).}

\textsuperscript{(1886). It also used the makeweight argument that a crime had been committed in the very presence of the agents conducting the search, which, though useful in distinguishing the \textit{Marron} case, as applied to the facts of the instant case was expressly rejected by the prosecution. [Brief for United States, pp. 38, 39.] See also dissenting opinion of Mr. Justice Frankfurter, instant case at p. 1110.}

\textsuperscript{14. \textit{Davis} v. United States, 328 U. S. 582 (1946) (distinction between public and private papers); \textit{Zap} v. United States, 328 U. S. 624 (1946) (waiver of the Amendment's protection). For a critique of these decisions see Hendrix, \textit{Recent United States Supreme Court Interpretations of the Law of Searches and Seizures}, 37 J. Crim. L. & Criminology 413 (1947). See also Note, 35 Geo. L. J. 92 (1946) and Comment, 45 Mich. L. Rev. 605 (1947). In general see Fraenkel, \textit{Concerning Searches and Seizures}, 34 Harv. L. Rev. 361 (1921).}

\textsuperscript{15. Dissenting opinion of Mr. Justice Murphy, instant case at p. 1117, and of Mr. Justice Jackson, at p. 1119.}


\textsuperscript{17. "... Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition." Judge Learned Hand in \textit{United States v. Kirschenblatt}, 16 F. 2d 202, 203 (C. C. A. 2d 1926).}

\textsuperscript{1. Mr. Justice Allen Stearne dissented, holding, as did the Superior Court, 160 Pa. Super. 291, 50 A. 2d 537 (1947), that the question of plaintiff's "wantonness" is properly for the jury.}
When in the 1943 case of Kasanovich v. George recovery was allowed against a defendant who, having observed the negligent plaintiff's position of peril, did not exercise the ordinary care which would have avoided the accident, the road was opened for that phase of "last clear chance" known as the doctrine of "discovered peril" to make its way into the tort law of Pennsylvania. There the court was prevented by precedent and legislative inertia from expressly applying the principles of that doctrine. Instead the concept of "wanton misconduct" was employed to describe the defendant's conduct and the principle was announced that contributory negligence was no bar to recovery against a "wanton" defendant. But in the instant case by finding the plaintiff "wanton" when he is in just that situation encompassed by the doctrine of last clear chance and by subscribing to the dogma that a wanton plaintiff is barred from recovering against a wanton defendant, the court emphatically reiterates Pennsylvania's traditional rejection of that doctrine, long the law in most jurisdictions, which is designed to alleviate some of the harshness resulting from undiscriminating application of in pari delicto principles.

The Restatement of Torts, upon which the court relied for its proposition, did not intend an emasculation of its sections on last clear chance (under which the instant plaintiff would have recovered) by the application of a "wanton misconduct" principle found in another, unrelated section. Moreover, most courts, even though verbally in accord with the proposition announced in this case, make no inquiry into the degree or kind of fault attributable to the plaintiff where his peril has been discovered.


3. HARPER, LAW OF TORTS 304 (1938).


5. House Bill No. 604, proposed in the 1943 session of the Pennsylvania legislature, would have provided a rule of comparative negligence; it was never enacted. See Note, 17 TEMP. L. Q. 276 (1943).


8. Instant case at 83.

9. See Eldredge, MODERN TORT PROBLEMS 237 (1941); PROSSER, LAW OF TORTS 408 (1941).

10. 2 RESTATEMENT, TORTS §§ 479, 480 (1934).

11. See 2 RESTATEMENT, TORTS § 480 (1934). The instant case meets the requirements of section 480 in that defendant, at the time plaintiff's peril was observed, could have stopped the trolley in time to avoid injuring the plaintiff who was unaware of his peril. See also PROSSER, op. cit. supra note 9 at 413; HARPER, op. cit. supra note 3 at 307.

12. 2 RESTATEMENT, TORTS § 482(2) (1934). "Wanton misconduct" was defined in conformity with the language of the section by the Pennsylvania Supreme Court in Kasanovich v. George, 348 Pa. 199, 204, 34 A. 2d 523, 526 (1943).

13. California, for example, applied the dogma of the instant case in an automobile guest-host situation, Price v. Schroeder, 35 Cal. App. 2d 700, 96 P. 2d 949 (1939), but in holding for the plaintiff in a last clear chance situation the court said: "A defend-
They, like the Restatement, recognize such situations as *sui generis* and so treat them. Pennsylvania does not recognize the problem of the instant case as one requiring a unique solution, but rather describes the conduct of the parties as "wanton," a "weasel word" used in many situations which are capable of factual distinction and varying treatment. By finding the plaintiff "wanton" as a matter of law in the instant case, whereas in the past in all but the clearest-cut case the question of mere ordinary contributory negligence has been left to the jury, and by holding "wantonness" a bar to recovery against one in the position of the instant defendant (capable of avoiding the accident after discovering the plaintiff's peril) the hope raised by the *Kasanovich* case of achieving by judicial decision at least one phase of "last clear chance" is gone. If there is to be a ant is never relieved of liability if he has it in his power to prevent the injury. . . . If he has the opportunity of avoiding the injury, he must at his peril exercise it. . . . the . . . doctrine . . . is humane in its nature." *Girdner v. Union Oil Co.*, 216 Cal. 197, 203, 13 P. 2d 915, 918 (1932). In *Waynick v. Walrond*, 155 Va. 400, 154 S. E. 522 (1930), a case involving a *non* last clear chance situation, the court indicated (p. 411) it might adopt the dogma of the instant case, whereas in a last clear chance case, *Roaring Fork R. R. v. Ledford's Adm'r.*, 126 Va. 97, 101 S. E. 141 (1919), the same court stated (p. 144): "... a plaintiff, however great may have been the negligence of the defendant owed to him, under the humane doctrine of the last clear chance, the duty . . . to exercise ordinary care to avoid injuring him. . . ."

14. Note the plea made for recognition of last clear chance situations as unique and for treatment in accord with the principles of the "discovered peril" doctrine in *Note, 24 Minn. L. Rev. 81, 101* (1939). It is there noted that a doctrine based on concepts of "wanton and willful" fails to give effect to the public policy underlying the last clear chance doctrine. Alabama apparently is the only state which uses the concept "wanton" to grant recovery to a negligent plaintiff in a last clear chance situation and in addition expressly states that a plaintiff's "wantonness" will not bar recovery, *Central of Georgia R. R. v. Partridge*, 136 Ala. 587, 34 So. 927 (1902). See 41 A. L. R. 1379, 1382-1383.


16. South Carolina and Minnesota, as well as Pennsylvania, reject "last clear chance" and subscribe to the proposition of the instant case, holding plaintiff's wanton misconduct a bar to recovery in last clear chance situations as in others. See *Spillers v. Griffin*, 109 S. C. 78, 95 S. E. 133 (1917); *Hinkle v. Minneapolis, A. & C. Ry.*, Co., 162 Minn. 112, 202 N. W. 340 (1925). The history of "last clear chance" in Minnesota and that state's failure to recognize the problem as *sui generis* closely parallels the situation in Pennsylvania. Compare *Sloniker v. Great Northern Ry. Co.*, 76 Minn. 305, 79 N. W. 168 (1899) with *Kasanovich v. George*, 348 Pa. 199, 34 A. 2d 523 (1943); compare *Note, 8 Minn. L. Rev. 329* (1924) with *Note, 92 U. of Pa. L. Rev. 431, 444* (1944); compare *Hinkle v. Minneapolis, A. & C. Ry.*, 162 Minn. 112, 202 N. W. 340 (1925) (usually regarded as a last clear chance situation, though the reported facts are not clear) with instant case.

17. *Van Note v. Philadelphia Transportation Co.*, 353 Pa. 277, 45 A. 2d 71 (1945); *McPherson v. Philadelphia Rapid Transit Co.*, 85 Pa. Super. 275 (1925); see *Cox v. Scarazzo*, 333 Pa. 15, 17, 44 A. 2d 294, 295 (1945). But see Southern Ry. Co. v. *Carroll*, 138 Fed. 638 (C. C. A. 4th 1905). In *Schubring v. Weggen*, 234 Wis. 517, 219 N. W. 788 (1940), plaintiff-guest was held, as a matter of law, to have assumed the risk of defendant-host's negligent driving. The court in the instant case cited the *Schubring* case as authority for holding plaintiff wanton as a matter of law despite the Wisconsin court's *caveat* that its doctrine of assumption of risk "... does not apply except in cases of guest against host." To the effect that there is a discernible public policy against permitting auto guests to recover from their hosts, see *Shulman and James, Cases on Torts* 709 (1942).

relaxation of the doctrine of contributory fault in Pennsylvania and substitution for it of a doctrine of comparative fault, legislative action will be necessary.\textsuperscript{10}

\textsuperscript{19} See Eldredge, \textit{op. cit. supra} note 9 at 237; 92 U. of Pa. L. Rev. 431, 445 (1944). For an interesting discussion of the Wisconsin comparative negligence statute, Wis. Stat. 9, §331.045 (1943), in operation, see 27 Marq. L. Rev. 219 (1943), especially as to the respective functions of judge and jury.