Adjacent Airspace in the Law of Landlord and Tenant

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Whether a tenant's right to space extends beyond the exterior of the walls bounding the premises demised must appear at first glance, even to the serious student of the law of landlord and tenant, a purely academic query. Even to raise the question may strike some as foolhardy since the field is already heavily laden with technical, indeed, hypertchnical concepts. But the question no longer may be regarded as one wholly within the realm of scholarly speculation. Like many recent vexations of the law it is a child of the material inventiveness and creativity of the twentieth century. In eras blessed with fewer gadgets, the tenant's right might safely be assumed to stop at the exterior of the walls, though there were some who doubted this at a time comparatively recent in the development of this phase of the law.

With the cornucopia of science issuing forth a steady stream of new contrivances and devices, it has become commonplace to find a new legal problem created by nearly every invention. The television antenna, a fixture of the American landscape, has been a fruitful source of litigation. How far an air-conditioner may protrude into the airspace outside the tenant's window has been before the courts. The right to hang signs, or restrict them, has always been a problem, but one resolved on the basis of possession of the wall, and without a consideration of conflicting claims to adjacent or contiguous airspace.

Rather than wait for science to spring new surprises, and hence problems, it may be well to consider the question of the tenant's rights to adjacent airspace in advance. This in itself may seem revolutionary in a system of law slavishly addicted to solution by precedent. But the lack of cases in point must not deter the search for the answer to a problem destined to provide litigation in ensuing years. In assessing the problem, perhaps it would do well to bear in mind Holmes' observation:

Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious

* Shep. Touch. 89.

result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.²

THE SIGN OR WALL EXTERIOR CASES

Notwithstanding the dearth of cases in point as to the right to adjacent airspace, the landlord and tenant relationship has given rise to one problem that literally ends where the immediate problem begins. The problem, distilled to its essentials, is whether the tenant, without agreement one way or the other, has the possession and right to use the exterior of the walls bounding the premises leased. An unbroken current of authority, both in the United States and England, holds that he does. A brief examination of the cases so holding is in order in that it is here that important clues exist indicating which way the courts will hold when ultimately they decide who has the right of enjoyment and possession of adjacent airspace outside the walls of the tenant's premises.

In the leading case of Riddle v. Littlefield, it was squarely held that the tenant, "by the terms of the lease of 'a certain store,' acquired the right to the use and occupation of the outside of the walls belonging to that portion of the tenement which included the store."³ The court went on to point out that the tenant took the outside walls as a "parcel of the demised premises proper, and not as a thing technically appurtenant thereto. The outside wall of a building leased or conveyed passes by the lease or deed as much as the inside of the same wall."⁴ Quoting with approval from a recognized authority,⁵ the court held that "whatever easements and privileges legally appertain to property pass by a conveyance of the property itself, without any additional words. The grant of a thing passes the incident as well as the principal, though the latter only is mentioned; and this effect cannot be voided without an express reservation."⁶ The court added:

A grant of a thing will include whatever the grantor had power to convey, which is reasonably necessary to the enjoyment of the thing granted. . . . If a house or a store be conveyed, everything which belongs to it or is in use with it, and whatever is essential to the enjoyment passes as an incident, unless specially reserved. Whenever anything is granted, all the means to attain it, and all the fruits and effects of it are also granted, and will pass inclusive. . . .⁷

Fourteen years later, an English court indicated its agreement with the Riddle case, citing it by name and approving its rationale.⁸ The contro-

⁴ Ibid.
⁵ Smith and Soden, Landlord and Tenant, 86-88.
⁷ Ibid.
versy in the English case arose, as has so often been the case, over the
right to hang signs. Defendant tenants leased the premises relying upon
representations that they would have the right to use the outer walls for
the purpose of advertising their business. Plaintiff, also a tenant, erected a
sign that covered by some two and a half feet, the lower portion of the
outer wall of the defendants' story. Defendant tenants of the upper floor,
evidently inclined to seek summary relief, tore down the sign below,
whereupon a suit was brought for an injunction to restrain the defendants
from removing the sign or erecting one of their own. In defense, the
*Riddle* case was urged upon the court as authority for the proposition
that a tenant has the right to use both the outside and inside of the walls
bounding the space he rents. The High Court of Justice, Chancery divi-
sion, concurred with defendants' position, holding through Byrne, J.:

The premises let . . . constitute a little dwelling by itself. . . . It is said on be-
half of the plaintiff, that the letting did not include the outer walls of the house.
I think that it did include them, so far as they were solely appropriate to the
rooms let. . . . If, then, the defendants had a right to use the outer walls at all,
they had a right to use them in the way they have done. I think they had that
right, and that the signboard put up by the plaintiff was in derogation of that
right.9

Similarly, the Massachusetts courts have repeatedly held that the tenant
is not restricted to the inside of the walls bounding the space rented.
In *Lowell v. Strahan*, the court said there is no reason the landlord should
be regarded as having one set of rights on the outside of the wall and
quite a different set on the inside.10 The court defined the rights of the
landlord, stating that where he retains control of an upper tenement, he
has the right in the whole wall for support, but that otherwise the tenant
retains control and has the right to give a license to affix a sign to the
wall to another without breaching a covenant against "underletting."11

In a Massachusetts case of more recent vintage, where a landlord
sought to enjoin the maintenance of a sign by the lessee, the court refused
to grant relief even though the lease provided for the necessity of the
lessor's permission before any sign could be erected.12 It was held that
the landlord was estopped to deny the lessee's right to hang the sign since
it had hung on the wall for some two and one half years, pursuant to the
landlord's oral permission. The court restated what has been a recurrent
theme in the cases:

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9 Ibid., at 516.
10 145 Mass. 1, 12 N.E. 401 (1887).
11 Ibid., at 405.
A lease, unless otherwise providing, includes the control of the outside walls adjacent to the demised premises with the incidental right to such walls for such purposes as they are usually and ordinarily employed...\

A similar statement was made where it was held, in denying relief in a tort action against the landlord, that an awning overhanging the store of a lessee was not shown to be in control of the landlord who occupied the floor above the demised premises, merely because the awning was attached to the outside of the wall. Another Massachusetts tort decision, held that where plaintiff was injured on a sidewalk as the result of ice formed thereon from water dripping from a sign hung by lessees, the burden of proof was on the plaintiff to show that the sign was under the lessor's control. The court noted:

The fact that it was entirely, or almost entirely, located above the store premises is not enough to fasten liability upon the defendant [lessor]. There is nothing in the record to indicate that the portion of the exterior wall to which the sign was attached was in the control of the owner rather than in that of the tenants upon the second floor. Ordinarily, the control of such portion of this wall would be in the tenants of the second floor, who were occupying the premises adjacent to the wall, in the absence of anything to the contrary.

And, in a relatively recent decision, the Supreme Judicial Court of Massachusetts affirmed an injunction preventing a first floor tenant from erecting a sign that extended on the wall of the building a mere fifteen inches above the floor level of the second floor.

The Riddle case has received recognition in other jurisdictions. Forbes v. Gorman, a frequently cited Michigan decision, held that the lease of a building, or of one floor or story thereof, conveys to the lessee "absolute dominion over the premises leased, including the outer as well as the inner walls." It was said that the tenant acquired the right to use the walls for all purposes not inconsistent with the lease. Hilburn v. Huntsman, a Kentucky decision, affirmed denial of relief to a ground floor tenant stating that although a lintel upon which a sign was attached hung slightly below the tenant's ceiling line, there was no showing that the sign itself extended below the ceiling. The court noted however:

The principles of law governing a case of this kind are well settled. In the absence of a contrary provision in the lease, the lessee has the exclusive right to the

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16 Ibid., at 691.
20 187 Ky. 701, 220 S.W. 528 (1920).
use of the outside walls of the portion of the building covered by his lease, for advertising purposes, to the exclusion of a lessee of another part of the same building.\textsuperscript{21}

In \textit{Smith v. Jensen}, the Supreme Court of Georgia ruled that in the absence of an express provision to the contrary, the lease of a building, "or a portion thereof," for business purposes, gives the lessee "the exclusive right to the use of the outside walls of that portion of the building embraced in his lease for advertising purposes."\textsuperscript{22} The court held that where there are different tenants of several floors of a building, a tenant on one floor has no right to prevent a tenant on another floor from placing signs upon the walls outside the other tenant's story. In a 1951 decision, the Rhode Island Supreme court restated the rule,\textsuperscript{28} and the court of last resort in North Dakota has taken a similar position.\textsuperscript{24}

Illinois apparently has adopted the doctrine of the \textit{Riddle} case. In \textit{400 North Rush, Inc. v. D. J. Bielzoff Products Co.}, plaintiff lessor brought an action against lessee under the state forcible entry and detainer act to oust the defendant from possession of a wall upon which the defendant had painted a sign.\textsuperscript{25} Holding that the action could not be maintained, the court said that authorities in other states hold that "the exterior walls of leased premises are part and parcel of the demise to the lessee; and if that be the rule (as we think it is), there could have been no trespass. ..."\textsuperscript{26} In a subsequent case, the same Illinois Appellate court was called on to decide whether plaintiff lessee of two floors of a building could maintain an action of forcible entry and detainer to recover possession of the exterior surface of the walls of the floors which it had rented.\textsuperscript{27} Defendants contended that the sign which they had painted on the walls was there by virtue of a license from the landlord, and that as mere licensees, the action of forcible entry and detainer, being in nature possessory, could not be maintained against them. Holding that the action could be maintained, the court said:

Defendants' claimed rights as licensee were with plaintiff's lessor, who it was determined ... had no right to enter into the agreement. Defendants by painting a sign advertising a product of one of plaintiff's competitors on the outside wall of the building disseized plaintiff from its paramount right of possession to its portion of such wall. As long as defendants' sign remained, plaintiff was disseized and deprived of the possession to which it was lawfully entitled.\textsuperscript{28}

\textsuperscript{21} Ibid. \textsuperscript{22} 156 Ga. 814, 120 S.E. 417, 419 (1923).
\textsuperscript{23} Moretti v. C. S. Realty Co., 78 R.I. 341, 82 A. 2d 608 (1951).
\textsuperscript{24} Platou v. Swanton, 59 N.D. 466, 230 N.W. 725 (1930). See also Kratovil, Real Estate Law § 654 (2d ed., 1952).
\textsuperscript{26} Ibid., at 210.
\textsuperscript{28} Ibid., at 137.
A Massachusetts decision defines in some detail the limits of the tenant's spatial rights. The case involved an action in contract to recover the expenses of replacing a plate glass window broken by a third person, the window forming a part of the outer wall of the plaintiff's office. The lessee plaintiff was specifically forbidden to affix or paint any sign on the outside of the building. In holding that the lessor was under no obligation to replace the window, the court opined:

It is manifest that the tenant of a room possesses the incidental right to use and decorate the interior walls, floor and ceiling in accordance with his own taste and needs so long as he does no harm to them. *His lease covers not merely the cubical space bounded by the inner planes of walls, floor and ceiling. Such a tenancy implies the right to attach carpets or rugs to the floor.... Painting and papering are within the natural uses by the tenant of a room. These factors lead to the conclusion that, prima facie and in the absence of agreement, the lease in the case at bar included the whole of the plate glass window.*

Most of the foregoing cases were concerned with relatively small buildings in which the competitive interests of several tenants were not in conflict. But there have been at least two cases considering the effect of a number of tenants in a single building on the general doctrine. In *Emmons v. D. A. Schulte, Inc.*, the court held that putting advertising signs on an office building did not constitute waste, the Chancellor saying:

If it be legally sound to accord to the tenant of a floor or story of a building the exclusive use of the outside walls for advertising purposes, and the authorities clearly hold that it is, then there is no logical escape from the conclusion that a room or rooms should be accorded a similar right.

But in *Fuller v. Rose*, where tenants were denied the right by the court to use the walls for advertising purposes although they could use the windows, it was held that tenants could not, in the absence of a showing of injury to their business, restrain the landlord from painting advertisements on the walls. Conceding on the one hand that the lessee of an entire building acquires the right to use both sides of the wall, the court maintained that the presence of a number of tenants in a single building restricts the extent of the devise to each, and the rights and privileges incident thereto. The court observed:

The right of all must be so curtailed that they will not interfere with each other. In this building all of the tenants possessed the right to support and in-

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30 Ibid., at 272. (italics added) The court cited as authority for its holding two English decisions: Hope Brothers, Ltd. v. Cowan, 2 Ch. 312 (1913); Goldfoot v. Welch, 1 Ch. 213 (1914).
81 13 Del. Ch. 336, 120 Atl. 221 (1923).
32 Ibid., at 226.
83 110 Mo. App. 344, 85 S.W. 931 (1905).
closure of the south wall including the part thereof claimed by the plaintiffs. It would lead to absurd conclusions to say that any tenant was vested with title to any portion of the outer walls. The title to them remained in the owner of the building, whose duty it was to maintain them for the benefit of all the occupants. It has been said by some authorities that tenants in buildings of this character, whose rooms are inclosed by an outer wall, have the right to use such portion of the exterior thereof for the placing thereon of their signs; but such right is a privilege acquired from custom—a mere incident to, not a parcel of, the demised premises, and consequently not derived from title. The landlord may deprive his tenants of such privilege by stipulations in the lease, in which case, the ownership of the walls remaining in him, he may use their outside surfaces for purposes of revenue.

The court cautioned that the landlord is required not to inflict damages upon the tenant upon his covenant to give the tenant uninterrupted and peaceable possession of the respective premises and therefore the landlord could not erect signs which would injure the business of any of the tenants. It was said that the court would not take cognizance of “aesthetics” and that “[o]ffended taste will not support a cause of action.”

The foregoing decision, qualifying the right of the tenant to the exterior of the wall almost to destroying it, is curious for a number of reasons. Most of the courts that have considered the problem seem to be influenced by what was no doubt an ingenious argument of counsel in the Riddle case, to the effect that if the landlord retained control of the wall space outside the premises demised to the tenant, the landlord could rent the space to a competitor which could put the tenant out of business. The Missouri court collided head on with the same proposition but chose to approach the problem from a different direction, holding that the landlord retained ownership of the wall, but could run no advertisements harmful to the business of the tenants. This solution enabled the court to back out of what would otherwise have been equitably a dead-end street, but the rationale of the case lacks the semblance of symmetry intrinsic in the doctrine of Riddle v. Littlefield.

An undercurrent of controversy in the wall or sign cases has revolved around acts of the tenant in using the exterior of the wall, involving possibility of waste or damage to the landlord's reversionary interest. Because of the varying factual situations, it is difficult in the extreme to fashion any sort of general definition as to what constitutes waste in this

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34 The building in the instant case was seven stories, had 100 rooms and 50 tenants.
35 110 Mo. App. 344, 85 S.W. 931, 932 (1905).
36 Ibid.
38 The possibility that a tenant might be eliminated from the market was of course not the only string in the bow of the New Hampshire court.
regard. An examination of a few decisions will suffice for purposes of
the question at hand.

In *Bee Building Co. v. Peters Trust Co.*, the issue was whether the les-
see of a building had the right to abandon or change the name of the
building, and in doing so, to partially dismantle a parapet wall for that
purpose.\(^{39}\) Quoting with approval from a leading text writer, the court
said that a lease of part of a building prima facie passes the outer walls
adjacent to the rooms or apartment named as a part of the premises
leased, and consequently the lessee has the exclusive right to use such wall
for advertising purposes.\(^{40}\)

In holding that the lessee had the right to partially dismantle and re-
buid the parapet wall which held the old name of the building, the court
reasoned that no damage was done to the freehold since it was shown that
the rental value of the building remained unaffected by the changes in
the wall, and that the lessee had the right to change the name so as to in-
dicate its possession of the building.

As noted, the question of waste ultimately hinges on the facts of each
particular case. Thus where the tenant in possession of a boardinghouse
allowed the defendant to paint on a blank wall of the premises a large
sign advertising chewing gum, a decision for plaintiff-owner for damage
to his reversionary interest was affirmed.\(^{41}\) The defendants cited *Riddle v.
Littlefield*\(^ {42}\) as authority for the right of the tenant in possession to allow
the sign to be painted. The court answered the defendants' contention in
the following manner:

> [I]t is therefore plain that the tenant in possession is entitled to the use of the
outside of the walls, just as he is entitled to the use of the inside of the walls, and
can delegate that use to a third person.

> But the . . . authorities . . . clearly establish the rule that the tenant in posses-
sion of the property cannot so use the outer wall as to injure the freehold, nor can
he use them for a purpose inconsistent with the lawful and reasonable enjoyment
of the property.\(^ {43}\)

It was held that since the tenant could give the defendant no authority
to damage the freehold, the jury having found that the painting of the
sign did constitute such damage, the defendant third party was liable to
the plaintiff-owner.

In the light of the cases, it may be taken as established that the tenant
has the right to possession as a part of the demised premises the exterior

\(^{39}\) 106 Neb. 294, 183 N.W. 302 (1921).

\(^{40}\) Ibid., at 303. 1 Tiffany, Landlord and Tenant 271.

\(^{41}\) Kretzer Realty Co. v. Thomas Cusack Co., 196 Mo. App. 596, 190 S.W. 1011 (1916).

\(^{42}\) 51 N.H. 503, 16 Am. Rep. 688 (1873).

\(^{43}\) 196 Mo. App. 596, 190 S.W. 1011, 1013 (1916).
of the wall, and that in the absence of agreements against subletting, he may allow another to use the wall. The only qualification on this right is that which exists in relation to every part of the leasehold premises, namely, that the tenant must not injure the landlord's reversionary interest nor commit waste.

TELEVISION ANTENNA CASES

Having discovered that the cases hold that the tenant has the right to at least the exterior of the walls, it becomes important to consider a group of cases that have at least indirectly touched upon the question of tenant's rights to adjacent airspace.

Because New York reports more fully than any other jurisdiction, the opinions of its inferior courts, and because of the countless apartments in New York City, most of the cases available for consideration are from that state. However, there appear to be no cases from the court of last resort in that state bearing on the issue. Since many of the antenna cases have gone off on questions of pleading or other collateral issues, only those which come reasonably close to a discussion of the problem of the right to adjacent airspace will be considered.

One of the first television antenna cases held that the installation of an antenna on the roof or exterior walls of a building, without first getting the landlord's consent in writing, was a violation of a lease provision calling for written consent, but did not constitute a violation so substantial as to warrant eviction.\(^4\) The case appeared to augur well for the rights of tenants, but the decision must be viewed in the light of the housing emergency existing in New York at the time. Yet, the language of the court was certainly favorable to the tenant's position. Witness the following bit of *obiter dictum*:

The advent of television is an incident in the progress of the times. It is unnecessary to dwell at length upon the comforts, the convenience and the educational vistas which are opened up by this comparatively new device. Suffice it to say that its presence in many homes is becoming increasingly common with a rapidity that resembles the acceptance of the radio when sets for home use were first made and marketed. . . . Undoubtedly, when telegraph poles were first erected with the wires stretching across their heights, many people felt that the sight was an ungainly one and their presence objectionable.\(^5\)

*Goldstein v. Alweiss*, cited several times later in cases favorable to landlords, held in a cryptic and terse opinion that where, without the landlord's permission, the tenant attached a television antenna to the outside frame of a window in his apartment, "the erection and maintenance of


\(^{5}\) Ibid., at 848.
this structure constitute[d] an unauthorized intrusion or squatting on the landlord's property within the purview of §1411 of the Civil Practice Act.\textsuperscript{46}

In \textit{Ruthann Corp. v. Adler}, petitioner sought to recover possession of the outside portion of one of respondent's living room windows, upon which an antenna had been installed.\textsuperscript{47} It was contended that to the extent to which the arrangement of the bars touched the outside portion of the tenant's window, there was a squatting or intrusion within the meaning of the statute. Bringing the case under the squatter sections of the act was a fatal misstep for the petitioner. The court seized upon it to hold for the tenant, in what was to prove to be the last of the decisions favorable to lessees. Landlords' lawyers in subsequent cases took the hint and brought their cases under different theories. The court in the \textit{Ruthann} opinion noted:

The window in question is the usual rectangular opening in the wall of a building . . . the window extends from the outer surface or facade of the building, to the inner surface of the walls of the tenant's apartment . . . Its ordinary, most obvious purpose is to give the tenant immediate access to the easement in light and air enjoyed by lands in private ownership abutting the public way. To give full effect to this palpable purpose the tenant must be deemed to have a possessory right in every part of the window, throughout its length, breadth and depth; \textit{from its inner perimeter to its outer perimeter and all that lies between}.\textsuperscript{48}

It was concluded that having come into possession of the entire window frame, for any purpose the tenant could not be regarded as a squat-ter or intruder in the sense in which the words were used in the statute. "A squatter is one who settles on the lands of another without any legal authority," the court noted.\textsuperscript{49}

Another window frame case, \textit{West Holding Corp. v. Cordero}, held for the landlord when he sought an injunction under the theory that the tenant was guilty of trespass.\textsuperscript{50} Defendant in that case occupied a sixth floor apartment in plaintiff's building. Without the plaintiff's permission, the tenant installed a television antenna consisting of two pipes that extended out of one of the apartment windows. The antenna was attached to the window frame. The landlord testified on trial that he offered to grant the tenant permission to install a television aerial on the roof if the tenant would execute a lease increasing the present rental by fifteen per cent. The court observed:

\textsuperscript{46} 196 Misc. 513, 93 N.Y.S. 2d 854 (S.Ct., 1949). The antenna in the case was affixed to the window frame by bolts and extended outwardly away from the building for a distance of about a foot and a half. The window was located one flight up and directly above the entrance to the building.


\textsuperscript{48} Ibid., at 21 (italics added).

\textsuperscript{49} Ibid.

\textsuperscript{50} 114 N.Y.S. 2d 668 (S.Ct., 1952).
The tenant has no legal right, without the landlord's permission, to erect or attach a television aerial to the frame of a window in his apartment. . . . Equity is properly invoked to enjoin a continued trespass. The defendant has refused to remove the television aerial and threatens to continue its installation and use. Under such circumstances the plaintiff is entitled to equitable relief enjoining the defendant from the continued maintenance and use of such aerial television.\footnote{51}

Of course, where a lease provided that "no plants, rugs, bedding or anything of any nature whatsoever shall be placed in the window or out of the same," the court properly enjoined the tenant from maintaining, by means of a metal bar braced against the window frame, a television antenna projecting out of the window.\footnote{52}

As to the right to erect an antenna on a roof, the uniform holding of the cases is against the tenant. Kanon v. Hefgold Realty Corp. held that where a television aerial erected by the tenant had been removed by the landlord because of the absence of written consent as required by the lease, the tenant could not have a temporary injunction restraining alleged interference with his peaceful enjoyment of the apartment because to grant the motion would destroy the status quo and grant plaintiff all the relief he could obtain by a final judgment.\footnote{53} In another roof antenna case, the court required removal of a roof antenna erected by the tenant of an apartment in a thirty-nine unit building.\footnote{54} The lease provided that the tenant should not "drill into, drive nails, . . . or place in any manner any sign, advertisement, illumination, or projection in or out of the windows or exterior, or from the said building or upon it in anyplace," except as approved by the landlord.\footnote{55} The court felt that there was damage to the reversion by the affixing of eye screws holding the leading line from the aerial.\footnote{56}

\footnote{51}Ibid., at 669.
\footnote{52}5701 15th Ave. Realty Corp. v. Rosenberg, 94 N.Y.S. 2d 560 (S.Ct., 1949).
\footnote{53}194 Misc. 54, 85 N.Y.S. 2d 581 (S.Ct., 1949).
\footnote{54}Scroll Realty Corp. v. Mandell, 195 Misc. 972, 92 N.Y.S. 2d 813 (S.Ct., 1949).
\footnote{55}Ibid., at 814.
\footnote{56}The problem became so aggravated in New York, that, like so many other sources of conflict in a large metropolitan area, it became a political football. Several bills relating to antennas were introduced in the 1949 session of the state legislature. Some of the bills were designed to guarantee every tenant the right to install and maintain an antenna or equipment necessary for the operation of television sets and forbade additional charges for tenants who had television sets. A. Int. 755; S. Int. 100; S. Int. 1089. Another group would have declared the installation, operation, and maintenance of antennas or other apparatus an ordinary incident of the tenancy and sought to make it a misdemeanor to make an additional rent charge. A. Int. 57; A. Int. 1260; S. Int. 1172. None of the bills were reported out of committee and one observer called them "dемagogic."

In 1950, a bill was introduced in the State Assembly providing that: "Every agreement in or in connection with or collateral to any lease of real property denying the lessee the right to erect or maintain a radio or television aerial or antenna shall be deemed void as against public policy and wholly unenforceable, provided that the lessee
In so far as the courts hold that the tenant has no right to erect aerials on the roof, they appear to be on solid ground. Although the lease of an entire building includes the roof,\textsuperscript{57} and a lease of a portion of a building entirely independent of other sections includes the roof,\textsuperscript{58} where there is a common roof over premises occupied by several different tenants, the portion of the roof covering the premises leased to one tenant is not included in the lease.\textsuperscript{59} It has been said that tenants sharing a common roof have no easements or rights in the roof except for purposes of shelter.\textsuperscript{60}

As for considerations of policy, hear New Jersey Vice Chancellor Jayne in holding that a tenant had the right to install a television set, but not the right to erect a twenty-five foot antenna in the rear-yard to which the lessee had the right to use in common with other tenants:\textsuperscript{61}

There are casual and incidental rights and interests which sometimes pass to lessees by implication arising from reasonable needs, conventional uses, or from other circumstances manifesting the probable intentions of the parties.

No one, I conjecture, has as yet prepared a written lease or contract so copious and diffuse as to speak its entire piece.

And so, where the nature of the intended basic and principal use of the premises is made perceptible, the rights and privileges which habitually and customarily appertain to and accompany such a use are implied, unless clearly negated.

To the trite expression that death and taxes are certain may also be added as of equal certainty the changes of the customs of life. Must a lessee now find in his lease the express permission to install a telephone?

Science has bequeathed to humanity the radio, the juke box, air-conditioning, and the neon sign, all of which may more commonly and generally than elsewhere be found at modern cafes, restaurants and places for recreation and entertainment. Was it not evident in February last that television sets would be similarly popular and prevalent in such resorts?

That the law should always be harmonious with the contemporaneous standards of knowledge and intelligence is a conviction I do not care to defy. Sound law is the dictate of reason. \textit{Lex est dictamen rationis}.\textsuperscript{62}

\begin{itemize}
  \item pays or offers to pay to the lessor any increase in insurance premiums resulting from the installation of such aerial or antenna." A. Int. 16.
  \item All of the proposed bills were assailed as ignoring property rights, increased insurance costs, damage liability to passersby, fire hazards and matters of size regulation. But they also indicated that the law, as well as nature, abhors a vacuum.
  \item Robinson v. Armstrong, 154 Kan., 336, 118 P. 2d 503 (1941).
  \item Rayhertz Amusement Corp. v. Fulton Improvement Co., 124 N.J. Eq. 121, 200 Atl. 557 (1938).
  \item Bellomo v. Bisanzio, 142 N.J. Eq. 363, 60 A. 2d 64 (1948).
  \item Ibid., at 65.
\end{itemize}
In addition to the problems of television antennas, the courts have recently been called upon to decide just how far air-conditioners may project into contiguous airspace. Two lower New York courts have openly split on the question, not yet settled by the highest court in the state. In the first case, the court dismissed an action to compel removal of an air-conditioning unit projecting six inches beyond the window sill, no part of which touched the outside of the building. The court said that the principle underlying a squatter proceeding is that the alleged squatter is unlawfully trespassing upon and remaining in possession of realty. "The air-conditioning unit in the instant proceeding," the court noted, "has its physical origin and attachment on the demised premises and is incidental to the tenant's enjoyment of those premises, and is, therefore, distinguishable from the television antenna cases." Three years later, another court in the same state, in reversing a final order for the tenant, said simply:

The installation and maintenance by the tenant of an air-conditioning unit projecting beyond the building wall is an intrusion or squatting upon the landlord's property within the purview of... the Civil Practice Act. In so far as Taft Constr. Corp. v. Bachnoff is to the contrary, we must decline to follow it.

The television antenna and air-conditioning unit cases presented the courts with an excellent opportunity to define the rights of the tenant to the area outside the tangible, physical boundaries of the premises. But, as should be evident from the foregoing discussion, the problem has received scant attention. This is in part due to the fact that counsel in most of the cases have been content to argue the cases on other grounds, or upon broader theories of landlord and tenant which appeared to meet the exigencies of the varying situations. The courts likewise have been unwilling to examine this problem, the solution of which might have rendered more satisfactory results in some of the cases decided. Dudic Holding Co. v. Reinstein, a masterpiece of terseness and brevity, is typical of the treatment accorded the problem.

Even within the limits of the issues attempted to be settled, the television cases are inconclusive. They hardly define the rights of tenants as to erection of aerials. With the wall cases as a ready springboard, the courts might have gone on to settle the problem. As they have not, it is apparent that only by recurring to the bedrock of landlord and tenant law can feasible solutions to the question be posited.

64 Ibid., at 899.
65 Ibid.
67 Ibid.
Textwriters, theorists and courts have been generous in their statement of the tenant’s rights. Most of the pronouncements have been so broad that the rights, unless “limited by the neighborhood of principles of policy,” which are other than those upon which the particular rights are founded, “tend to declare themselves absolute to their logical extreme.”68 Yet these general statements have value in that they indicate certain policies in the law which have become maximatic in statement, if not in application from case to case.

Taylor declares that a tenant is entitled to the use of “all those privileges, easements, and appurtenances in any way belonging to the premises under lease, as incident to his grant,” unless the landlord restricts the rights by stipulation.69 In another passage in his treatise, he states:

In general, the grant of a thing passes the incident as well as the principal, though the latter only is mentioned, unless there appears an express reservation. Thus, the lease of a building passes everything belonging to it which is essential to its enjoyment.70

It could hardly be contended, it would seem, that a tenant could lease an entire building and not have the right to extend into the column of airspace surrounding the building, various mechanical or structural projections necessary for the reasonable enjoyment and use of the building. The conclusion, however, is not so readily drawn where the tenant leases a relatively small space in a building, along with several other tenants. Questions of practicality press the rule at every point, competing interests forcing and compelling compromise at every turn.71

However, Taylor’s statement of the principle seems to be in accordance with the common-law rule, stated by the Supreme Court of Alabama in Senteney v. United Embroidery Co.72 There, authority was cited in the jurisdiction to the effect that lessees have by implication, the right to “possess and enjoy” the premises and “to put it to such use and enjoyment as they please,” not materially different from that in which it is usually employed, “to which it is adapted, and for which it was constructed.”73

69 Taylor, Landlord and Tenant (9th ed.), 275.
70 Ibid., at 192.
71 In Adler v. Sklaroff, 154 Pa. Super. 444, 36 A. 2d 231, 233 (1944), the court states: “[W]here a landlord leases different parts of a building to different tenants he remains in control of those portions not specifically leased, and as to such portions he retains the responsibilities of a general owner.”
72 230 Ala. 53, 159 So. 252 (1935).
73 Ibid., at 255.
In Weiland v. American Stores Co.,\(^7\) the Supreme Court of Pennsylvania, holding that a tenant was not liable for injuries due to a defective sidewalk, quoted with approval from a learned textwriter to the following effect:

The lease of a part of a building carries with it for the benefit of the tenant everything which is necessarily used with or which is reasonably necessary to the enjoyment of the particular portion which he occupies. . . . Under the general rule that those rights essential to the enjoyment of the demised premises, and necessary for the enjoyment thereof, pass as appurtenant thereto, the rights of ingress and egress pass to the tenant even though they are not specifically mentioned.\(^7\)

The California courts likewise have been liberal in their definitions of tenant rights. In Bellon v. Silver Gate Theaters, a state appellate court, holding that whether a basement was part of the demised premises where a store above was leased to the tenant was a question of fact for the jury, said that a lease of a part of a building passes with it everything "necessarily used with or reasonably necessary to the enjoyment of the part demised."\(^7\)

In Jackson v. Birgfeld, a Maryland court said that in determining what constitutes the premises, the court, after considering the language of the instrument itself, considers the nature of the building and surrounding property and the general purposes of the parties.\(^7\) The court regarded as settled that a deed, absent qualifications, passes to the grantee everything reasonably necessary to the full beneficial use and enjoyment of the property. "This principle," the court declared, "is equally applicable to a lease."\(^7\)

Similar considerations as to reasonable use and enjoyment have been involved in construing the word "appurtenance." In an Illinois decision, the court held that a lease of rooms on the third floor of a building could by no reasonable interpretation include as an appurtenance a storage

\(^7\) 346 Pa. 253, 29 A. 2d 484 (1943).
\(^7\) Ibid., at 485. Trickett, Landlord and Tenant (2d ed.), 47, 48. In Martel v. Malone, 138 Conn. 385, 85 A. 2d 246, 249 (1951), citing language in Arpilie v. Colonial Trust Co., 118 Conn. 573, 579, 173 Atl. 237, 239 (1934), the court states: "In the absence of an agreement, expressed or implied, the tenant of an apartment acquires an exclusive right of occupancy and control of that apartment, and as incidental thereto of those parts of the structure which form an integral part of the tenement. 1 Underhill, Landlord and Tenant § 3." The court held that the landlord was responsible only for structural defects as the tenant has no exclusive control of them. Thus it was held that the landlord would be liable for structural defects in beams supporting a floor but not for defects in the floorboards.

\(^7\) 189 Md. 552, 56 A. 2d 793 (1948).
\(^7\) Ibid., at 795.
space in the basement of the building, entirely apart from space designated in the lease itself.\textsuperscript{79} The court stated that nothing passes by the word *appurtenance* except "incorporeal easements, or rights, or privileges, strictly necessary and essential to the proper enjoyment of the estate granted."\textsuperscript{80} Mere convenience, said the court, will not create an easement.\textsuperscript{81}

How courts balance some of the conflicting claims of right is amply illustrated by *Owley v. Hanmer.*\textsuperscript{82} The central point of controversy there was whether a lease signed prior to the completion of a building constructed around a central patio, restricted the lessor from closing up one of the street openings into the patio, converting it from a thoroughfare between two streets into a narrow *cul de sac.* The net effect of the conversion was to interfere with the light, air, visibility and access of passersby to the tenant's display windows.

After paying the customary homage to the rule that a "lease of part of a building passes with it, as an incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part demised,"\textsuperscript{83} the court reversed and ordered a new trial upon appeal by both parties, holding that in view of the importance of the patio, the fact that there was nothing in the lease as to the right of the landlord to close it off made it mandatory that oral evidence offered to show the intention of the parties be admitted. It was said that whether considered as an easement, or consideration of a contract, or an incorporeal right, the lessee is entitled to "all of that for which he contracted" at the time the lease was entered into. Thus the intent of the parties with regard to the patio became all important.\textsuperscript{84}

It may be regarded as settled that a tenant may acquire a right to light

\textsuperscript{79} Harmony Cafeteria Co. v. International Supply Co., 249 Ill. App. 532 (1928).
\textsuperscript{80} Ibid.
\textsuperscript{81} The word "*appurtenance*" has undergone a process of deterioration as a concept of importance. In *Riddle v. Littlefield,* 53 N.H. 503, 508, 16 Am. Rep. 688 (1873), it is said: "These distinctions are refined, and in the common practice of modern conveyancing are not much regarded,—the term *appurtenances,* in a vast majority of cases in deeds and leases, having, in fact, I presume, no meaning whatever in the minds of the contracting parties, who append the unnecessary formula by force of the custom and example which has for so long a time applied it to grants and leases of a principal thing, to which no inferior easement or servitude whatever, in fact, belongs."
\textsuperscript{82} 83 Cal. App. 2d 454, 189 P. 2d 50 (1948).
\textsuperscript{83} Ibid., at 52.
\textsuperscript{84} The trial court in the instant case found that it was the manifest intention and agreement of the lessor and lessee that the lessee should have occupancy of the interior areas described in the lease (the patio) and the right to have it kept open for free access by the lessee's customers. Curiously enough, however, the trial court concluded that there was nothing in the lease which required the landlord to keep the building as it was originally constructed.
and air from an open space owned by the lessor which is necessary to the beneficial enjoyment of the premises demised, even though there be no express agreement to that effect between lessor and lessee.

Some of the cases, even at an early time, have said that a lease, expressing nothing as to the way in which premises are to be used, clothes the lessee with full power and right to use the land in the same manner that the owner might have used it, subject to the usual qualification as to damage to the reversion. The cases are legion as to this point. Courts have continually held that the lessee stands in the position of an owner in fee with regards to rights of use, except that the lessee may not commit waste, and thus where the lessor draws the lease, ambiguities will be drawn against him most stringently. The Draconian possibilities of such a doctrine are plain, yet the courts have not, as a statement of principle, seen fit to narrow it. Treating the lessee as the owner of a possessory estate, the courts have continually said that the lessor may be sued in trespass for unlawful entry, or in ejectment where the tenant has been evicted, or possession has not been delivered to the lessee.

In short, the holding of the courts has been that while the lease is in force, the tenant is the absolute owner of the premises and the landlord has only a reversionary interest. Textwriters have assented in this proposition, Taylor stating:

"Upon taking possession the tenant is invested with all the rights incident to possession and to the use of all the privileges and easements appurtenant to the tenement. He may maintain an action against any person who disturbs his possession or trespasses upon the premises though it be the landlord himself. . . ."

Under the existing principles of landlord and tenant, it would be cautious in the extreme to declare that a tenant's rights do not extend beyond the exterior of the wall bounding the premises, where an extension would be necessary for the beneficial enjoyment of the premises. Of course, there are competing claims of right where there are several tenants, as in an office or apartment building, but this would seem to call for a balancing of the rights as between the tenants, instead of a restriction of the tenants rights vis-d-vis the landlord. In view of the fact that the language of the

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85 U.S. v. Bostwick, 94 U.S. 53 (1877); Asling v. McAllister-Fitzgerald Lumber Co., 120 Kan. 455, 244 Pac. 16 (1926).
88 Stanton v. Tapp., 113 Md. 324, 77 Ad. 672 (1910); Winchester v. O'Brien, 266 Mass. 33, 164 N.E. 807 (1929).
89 Walker v. Clifford, 128 Ala. 67, 29 So. 588 (1900).
90 Taylor, Landlord and Tenant (9th ed.), 228.
courts has been anything but restrictive of tenant's rights, it becomes dif-
cult to reconcile the holdings in the New York television antenna cases
with the principles enunciated in other decisions.

Because of the intangible nature of rights to airspace, the theorist treads
on thin ground in attempting to define spatial limitations that may, in some
instances, defy limitation, or be inherently incapable of precise deline-
ation. However, there is some degree of comfort in Whitehead's re-
mark that success in practice depends on "theorists who, led by other
motives of exploration, have been there before, and by some good chance
have hit upon the relevant ideas."

CONTIGUOUS LAND, CONTIGUOUS AIRSPACE

While an examination of so-called settled concepts provides an indica-
tion as to the path the courts may follow, there is one rule that, if ap-
plied by analogy, lends great weight to the tenant's right to reasonable use
of the airspace outside the walls of the premises demised.

That rule is that a lease of an entire building, or the grant in fee of a
building, carries with it "so much of the lot on which the building stands
as is necessary to the complete enjoyment of the building for the purpose
for which it was leased." If this principle applies to the lease of an entire
building, why not to the lease of an entire floor, and if to the lease of an
entire floor, why not to a lease of an apartment or room? As the lot sur-
rounding the building may be necessary to its complete enjoyment, simi-
larly, the column of airspace surrounding it may be indispensable to rea-
sonable and full use of the demised premises.

In *McDaniel v. Willer*, a recent case, there was a lease of a "General
Merchandise store Building and Fixtures therein—The Store building is
located in Village of Coffman, County of Ste. Genevieve, State of Mo. . . ." The controversy was over admissibility of evidence tending to
show that the parties by their actual agreement, had not intended to limit
the property demised to the store building itself as appeared on the face of
the lease, but on the contrary had intended and agreed that the leasehold

91 Note, for instance, the difficulty courts have had in reconciling the maxim, *Cujus
est solum ejus est usque ad coelum*, Shep. Touch. 90, with the right of free navigation
of the skies. U.S. v. Causby, 328 U.S. 256 (1946), is a relatively recent and controversial
decision in this regard.


93 Jackson v. Birgfeld, 189 Md. 552, 56 A. 2d 793, 795 (1948). Whether land in the
rear of a building is necessary to its complete enjoyment is a question for the jury de-
pending upon the facts of the case, the court ruled. Note Sheets v. Selden, 2 Wall. 177,
17 L.Ed. 822, 826 (1865), where it is said that a deed, in the absence of any language indi-
cating a contrary intention of the grantor, passes to the grantee everything that is prop-
erty appurtenant to the land conveyed, i.e., everything essential or reasonably necessary
to the full beneficial use and enjoyment of the property.

94 216 S.W. 2d 144 (Mo. App., 1948).
estate should embrace land immediately to the rear of the store upon which was situated an old barn, previously used for storage by the last proprietor of the store. Holding that the lease was ambiguous and that parol evidence was admissible to clear up the ambiguities, the court said:

The authorities are agreed that where, as in this instance, a lease purports on its face to be no more than the lease of an entire building, and contains no reference to the land, it will be none the less construed as carrying with it the lease, not only the land upon which the building actually stands, but also such adjacent land belonging to the lessor as may be used with the building or may be necessary to its proper occupation for the purpose for which it was intended.95

The court labeled as "arbitrary" an attempt by the landlord to restrict the leasehold estate to the lot on which the building was situated where the language of the lease "would comprehend whatever of his land might be shown to be incident to the complete enjoyment of the building."96

In view of the law's generosity with the landlord's land, why should it be less liberal with his airspace? An Illinois decision held that "[u]nder the recognized rules of construction, where property is leased by street number, the lease will include . . . the lot upon which the building itself is situated."97 In the Massachusetts case of Ansin v. Taylor, it was held that ordinarily a grant of a house carries with it title to all the land under the house, including that under projecting eaves.98 In Patterson v. Graham, it was held that where a lease does not in terms convey any right to a passageway to buildings in the rear of that leased, or any right to such buildings in the rear, the lease conveys so much of the lot on which the buildings stand as may be necessary to the complete enjoyment of the leased building for the purpose for which it is rented.99

The Illinois Supreme court has said in an early case that the grant of a steam elevator carries with it, as part of the grant, land upon which the elevator is located and all that is necessarily used in connection therewith.100 The court cited Tinker v. City of Rockford101 as authority for the proposition that when property is granted, whatever is necessary to the enjoyment of the grant is impliedly conveyed as an incident thereto. Thus, even though the mortgage conveying the elevator was upon a chattel mortgage form, it was held that the land on which the elevator was sit-

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95 Ibid., at 144. 86 Ibid.
98 262 Mass. 159, 159 N.E. 513 (1928).
99 140 Ill. 531, 30 N.E. 460 (1892).
100 Cross v. Weare Comission Co., 153 Ill. 499, 38 N.E. 1038 (1894).
101 137 Ill. 123, 28 N.E. 573 (1894).
uated passed with the grant of the elevator. Likewise, the Alabama court of last resort has held that a mortgage on a grist and saw mill and gin, "together with all the privileges and appurtenances belonging thereto," included two acres of land upon which the mill and gin were located, and which had always been used in connection therewith and were thus "necessary to the enjoyment thereof."102

Finally, to adduce one extreme example, perhaps looking the other way as far as tenant's rights are concerned, there is the Leiferman v. Ostein case.103 There, the landlord actually moved the building in which the tenant had rented a floor, to an adjoining lot. The court ruled that the tenant could have treated the removal as an eviction only by leaving, but that since he remained, there was no eviction. The court said that by renting part of a building, the tenant acquired only support rights and enjoyment of easements, but no estate in the land itself. Therefore, the tenant was only disturbed in the enjoyment of an easement, the court reasoned. This could constitute eviction only if treated as such by going out. Judgment for the landlord in the action of forcible entry and detainer was sustained. It is enough to say that the case is restrictive of the tenant's rights and is productive of a result more in keeping with the refinements of eviction law than with the underlying principles of landlord and tenant.

Nevertheless, it is settled that a lease of a building passes the land upon which the building stands for the duration of the lease, and in some cases may pass land contiguous or incident thereto necessary to the ordinary use and enjoyment of such building. It would, then, be obviously inconsistent to deny the lessee of an entire building necessary adjacent airspace, and yet grant him necessary adjacent land. And there are no cases so holding. Whether or not a lessee of a floor of a building, or of a room, has the right to make use of adjacent airspace necessary for the full enjoyment of the floor or room is not so obvious. However, consistency would require that such right be recognized.

CONCLUSION

Mr. Justice Holmes has pointed out that in law, only occasionally can an "absolutely final and quantitative determination" be reached, because as he says, "the worth of the competing social ends which respectively elicit a judgment for the plaintiff or the defendant cannot be reduced to number and accurately fixed."104

There are few places in the law where his observation has greater validity than in assessing the rights of tenants in relation to other tenants and

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103 64 Ill. App. 578, 47 N.E. 203 (1896).
104 Law in Science and Science in Law, Collected Legal Papers, 231 (1921).
in relation to the rights of the landlord. No doubt many of the decisions in the future in this regard will be "the unconscious result of instinctive preferences and inarticulate convictions . . . traceable to views of public policy in the last analysis."105

Yet is is possible to draw certain tentative conclusions. The courts have early and consistently held that the circle of the tenant's rights is great in circumference. They have not hesitated in giving him something like unbridled dominion over the exterior of the walls. Where an entire building has been leased, they have held that the lessee also takes by the lease necessary contiguous land. It is then but a short step to hold that the lessee of a floor, or of a room, has not only possession of the exterior of the walls, but also possession and the right to use adjacent airspace essential to the enjoyment of the lease.

But admittedly, the law here, as elsewhere, is unsettled, indeed undecided. Additional decisions will be needed to more fully clarify the rights of both landlords and tenants as technological advances continue to create new difficulties for lawyers and laymen alike. There is, then, reassurance in the words of Cardozo:

There are topics where the law is still uninformed and void. Some hint or premonition of coming shapes and moulds, it betrays amid the flux, yet it is so amorphous, so indeterminate, that formulation, if attempted would be the prophecy of what is to be rather than the statement of what is. . . . [W]ith all our centuries of common law development, with all our multitudinous decisions, there are so many questions, elementary in the sense of being primary and basic, that remain unsettled even now. . . . What is certain is that the gaps in the system will be filled, and filled with ever-growing consciousness of the process by a balancing of social interests, an estimate of social values, a reading of the social mind.106

105 Ibid.
106 Paradoxes of Legal Science, 76 (1928).

COMMENTING UPON FAILURE OF ACCUSED TO TESTIFY

At common law, the defendant was incompetent to testify in a criminal proceeding.1 As a result of such incompetency, comment by the prosecution concerning the failure of the accused to testify was of no importance. Historically, therefore, the problem of whether the prosecution can effectively comment upon the failure of the accused to take the witness stand was created by the enactment of the statutes which relieved the accused of his incapacity to testify.2

Some of these statutes contained express clauses that no presumption

2 State v. Ferguson, 222 Iowa 1148, 283 N.W. 917 (1939). For a list of the statutory enactments, see Reeder, Comment Upon Failure of Accused to Testify, 31 Mich. L. Rev. 40, 41, 42 (1932).
shall arise from the failure of the accused to testify, whereas others pro-
vided that his silence shall not be subject to comment. If all the statutes
contained words of similar import, comment by prosecution would have
been conclusively prohibited. But some states, whether by design or in-
advertence, failed to provide against any comment by the prosecution
and, as a result of such omissions, seven states now allow comment.

There is a strong possibility that more jurisdictions will adopt laws al-
lowing the prosecution to comment upon the failure of the accused to
testify. In view of this possibility, an examination of the doctrine as well
as its impact on the furtherance of justice is in order.

I. WHAT IS COMMENT?

The test laid down by the federal courts on what is or is not comment
is "whether the language used is manifestly intended to be, or is of such
character that the jury would naturally and necessarily take it to be com-
ment on accused's failure to testify." In applying the rule the courts have
said that a general comment such as, "certain evidence was uncontra-
dicted" is not objectionable, but that a strong, emphatic, and specific re-
mark directed toward the defendant's failure to testify is objectionable
and reversible error. Generally, the state courts seem to be in harmony
with the federal courts as to what constitutes comment. Pennsylvania has
said, "the statute does not prohibit a mere reference to the fact that a de-
fendant has not taken the witness stand; the prohibition is against adverse
comments on the part of the court or prosecutor." The majority of the
courts which do not allow comment appear to use the following criterion:
Under statutes expressly prohibiting comment on the failure of the ac-
cused to testify, and under those providing that his failure to become a
witness in his own behalf shall create no presumption against him, and
under other statutes of similar import, it is generally held that it is im-
proper and prejudicial for the prosecuting attorney, in the course of the

3 Evidence—Comment on a Defendant's Failure to Testify in a Criminal Proceeding,
28 N.Y.U.L.R. 1049 (1933).

4 Iowa and New Jersey, by judicial approbation, absent a constitutional privilege
State, 61 N.J.L. 308, 39 Atl. 651 (1898). California and Ohio by constitutional amend-
Art. 1, § 10, amended Sept. 3, 1912; Ohio Gen. Code Ann. § 13444(3). Vermont and
New Mexico by statute in spite of a constitutional privilege against self-incrimination:
§ 41-12-19. Connecticut, by judicial decision in the face of a constitutional privilege:
(1929).

5 Morrison v. United States, 6 F. 2d 809, 810 (1925).

trial, to comment on or to make any reference to the fact that the ac-
cused did not testify as a witness in his own behalf. Oklahoma, which
follows the above rule, has said:

It is immaterial what words are used in such circumstances, if they are clearly
calculated to direct the attention of the jury to the fact that a defendant has not
testified in his own behalf, that he might have done so, and that by such failure
some inference might be indulged against him.

A Mississippi court simply said, “the attention of the jury is not to be
called to the fact that defendant did not testify.”

II. WHEN THE INference MAY BE DRAWn

Having generally determined the definitive meaning of “comment” in
the jurisdictions which do not recognize such a mode of procedure, it
follows that it should be ascertained when such comment is allowed in the
jurisdictions that do recognize such procedure. Even though comment is
allowed in the latter jurisdictions, there are certain specific restrictions as
to its propriety.

In determining at what stage in the proceedings the inference of de-
fendant's failure to testify may be properly drawn, a Connecticut court
declared:

The question immediately arises as to how much evidence the state must pro-
duce before the trier is permitted to apply the inference. Obviously the state
must first produce some evidence of guilt. The state must produce a case where
the evidence, apart from the inference, would be sufficient to go to a jury.

If the state has supported its burden of proof, then the jury, may throw its infer-
ence arising from the failure of the accused to testify in his own defense into the
scale to determine the ultimate question of guilt or innocence.

A 1953 New Jersey decision held that if the evidence is only prejudicial
to the defendant and perhaps not inculpatve in some degree of guilt, then
silence on his part does not justify a comment by the state. Consequently,
it must necessarily be concluded that in order for the inference to be
drawn: 1) the state must prove a prima facie case and 2) there must be
facts in evidence concerning the acts of the defendant which facts can be
denied by defendant and if not denied will be inculpatve in some degree
of guilt.

California, another state which allows comment, takes a somewhat

\(^7\) 84 A.L.R. 784.
\(^8\) Perkins v. Territory, 17 Okla. 82, 87 Pac. 297 (1906). Accord: Presnell v. State, 71
Okla. 158, 109 P. 2d 836 (1941).
Miss. 790, 25 So. 2d 477 (1946).
\(^10\) State v. McDonough, 129 Conn. 483, 484, 29 A. 2d 582, 583 (1942).
broader viewpoint on when such inference is permissible. In *People v. Greenberg* the California Court of Appeals said that it is the failure of the defendant to explain or deny evidence of facts against him, when it appears that he could do so, if innocent, not his mere failure to take the witness stand, which may be commented upon and taken into consideration.

### III. LEGAL EFFECT

In jurisdictions that recognize the defendant’s failure to testify as being adverse to his case, the weight given to that evidence seems to vary depending upon the state. Connecticut, for example, has repeatedly held that from the fact that the accused has either neglected or refused to testify, the jury may draw any inference as to his guilt which is reasonable under the circumstances. The state of California appears to go further in emphasizing the failure of the accused to testify. In the famous case of *People v. Adamson* the California court noted, “if it appears that the defendant could reasonably be expected to explain or deny evidence presented against him, the jury may consider his failure to do so as tending to indicate the truth of such evidence, and, as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable.” Ohio looks upon such failure to testify as tilting the scale of evidence against the accused. As was mentioned in *State v. Cott*, “the failure of the defendant to testify was therefore effective in supplying any deficiency in degree of the evidence and with the evidence tended to prove the guilt of the defendant beyond a reasonable doubt.” The legal effect of failing to testify is apparently given the strongest emphasis in New Jersey. In *State v. Marinella*, the New Jersey court observed:

His [defendant’s] failure to be a witness in his own behalf is no presumption of guilt, and does not erase the presumption of innocence, but if facts are testified to which concern the acts of that particular defendant which he could by his own oath deny, his failure to testify in his own behalf raises a strong presumption that he could not truthfully deny those facts.

Thus, whereas California, under the same circumstances, would hold that defendant’s failure to testify would tend to indicate the truth of certain evidence, New Jersey holds that a *strong presumption* of the validity of such evidence (evidence which he could deny) is raised. It may be con-

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14 27 Cal. 2d 478, 165 P. 2d 3, 10 (1946).
cluded, therefore, that the probative legal effect of the defendant's failure to testify varies in degree depending upon the jurisdiction.

In jurisdictions where comment is not allowed, the misconduct of a prosecuting attorney in commenting on the defendant's failure to testify does not result in a miscarriage of justice warranting a reversal, when the evidence of the defendant's guilt is otherwise clearly established. However, where the defendant is not clearly guilty, there is a split of authority on whether such comment constitutes reversible error. The majority of these jurisdictions hold that comments of the prosecuting attorney on the failure of the defendant to testify in a criminal case, though highly improper, may under some circumstances work no injury, where the trial judge promptly intervenes, excluding the comments and admonishing the jury to disregard them. In other words, comments of that kind stand on very much the same footing as other improper arguments, and whether they call for a reversal or not depends on whether, after a full consideration of all the circumstances, including the action of the trial judge at the time they were made, the appellate court is of the opinion that no prejudice resulted. However, a minority of the courts hold that remarks by prosecuting officers, as to the failure of the accused to testify, made in violation of statute, are so prejudicial that they cannot be cured by instruction to the jury, however forcibly given.

IV. ARGUMENTS IN SUPPORT OF COMMENT

1. *An inference from the refusal to testify is inevitable; therefore why try futilely to avoid it?*

This line of argument was best expressed in *State v. Cleaves*, wherein the court observed:

But the defendant having the opportunity to contradict or explain the inculpative facts proved against him may decline to avail himself of the opportunity thus afforded by the law. His declining to avail himself of the privilege of testifying is an existent and obvious fact. It is a fact patent in the case. The jury cannot avoid perceiving it. Why should they not regard it as a fact of more or less weight in determining the guilt or innocence of the accused? All the analogies of the law are in favor of their regarding this as an evidentiary fact. . . .

When the prisoner is on trial, and the evidence offered by the government tends to establish his guilt, and he declines to contradict or explain the inculpatory facts which have been proved against him, is not that a fact ominous of criminality? . . . The silence of the accused,—the omission to explain or contradict, when the evidence tends to establish guilt is a fact,—the probative effect of which may vary according to the varying conditions of the different trials in

17 E.g., *People v. Curran*, 207 Ill. App. 264 (1917) aff'd 286 Ill. 302, 121 N.E. 637 (1918).


which it may occur,—which the jury must perceive, and which perceiving they
can no more disregard than one can the light of the sun when shining with full
blaze on the open eye.\(^\text{20}\)

2. *An innocent defendant cannot have any reason for refusing to testify.*

The Attorney General of Ohio in a speech subsequent to the passing of
Ohio's constitutional amendment\(^\text{21}\) which allowed comment had this to
say to the argument that an innocent defendant would not wish to be sub-
jected to cross-examination:

Of course it is a well known fact that certain matters that probably could not
be brought out in the trial, in any other way, are possible of disclosure by reason
of the defendant taking the stand.

But why should not that not be true? Why should courts exist, and why should
there be criminal prosecution? Is it for the purpose of protecting criminals? Is it
for the purpose of handicapping the state in its efforts to bring about a full dis-
closure of all the facts attendant upon a crime committed, or alleged to have been
committed by the accused. . . . There are many provisions throughout the coun-
try that make it very difficult for prosecuting attorneys to conduct cases for the
best interests of the state.\(^\text{22}\)

As an illustration of the contrast between an innocent and a guilty de-
fendant's desire to take the witness stand, it has been said that:

The defendant, in criminal cases, is either innocent or guilty. If innocent, he
has every inducement to state the facts, which would exonerate him. The truth
would be his protection. There can be no reason why he should withhold it, and
every reason for its utterance.

Being guilty, if a witness, a statement of the truth would lead to his convic-
tion, and justice would ensue. Being guilty, and denying his guilt as a witness, an
additional crime would be committed, and the peril of a conviction for a new
offense incurred.\(^\text{23}\)

3. *There is no actual compulsion to testify; for the accused has an op-
tion, and the exercise of this option, by choosing silence, is therefore a
voluntary act of his own.*

The statement that there is no actual compulsion to testify is the target
which receives the majority of the attacks by the opponents of comment.
Nevertheless, the advocates of comment steadfastly deny that the consti-
tutional privilege against self-incrimination is vitiated. In *State v. Ford*,
where the defendant objected to comment by the prosecuting attorney
on the grounds that his privilege against self-incrimination had been vi-
olated, Justice Banks proclaimed:

The constitutional privilege goes no further historically or logically than to
prevent the employment of legal process to compel an accused to incriminate


\(^{23}\) State v. Cleaves, 59 Me. 298, 301, 8 Am. Rep. 425 (1871).
himself by what he may say upon the witness stand. He cannot be compelled to testify against his will. The privilege of refraining from testifying, if he so elect, does not protect him from any unfavorable inference which may be drawn by his triers from his exercise of the privilege. . . . There is no actual compulsion upon the accused to testify, and, when he elects not to do so, he is obviously not being compelled to give evidence against himself. 24

In further support of the concept that comment does not abridge the privilege against self-incrimination Andrew A. Bruce wrote:

Never, at any time, could the defendant be compelled to testify against himself, and we believe that it was only against direct compulsion that the constitutional provision was aimed. He is not asked to testify against himself, but in favor of himself. All that was in the minds of the framers of the constitutional provisions was the desire to prevent injustice and direct compulsion. 25

4. In the jurisdictions where comment is permitted, it has achieved most satisfactory results.

The American Bar Association Committee in 1938 made a study of the jurisdictions where comment was permitted and the results of that study were that 93.65 per cent of the judges regarded comment as an important and proper aid in the administration of justice, while only 2.65 per cent considered it definitely unfair to the accused (the others listing it as relatively unimportant). Over 85 per cent said that it seldom if ever causes the prosecuting attorney to be less diligent in his search for evidence of guilt. 26

V. ARGUMENTS AGAINST COMMENT

1. Comment is unjust when it results in the situation where the defendant must choose between being subjected to a cross-examination of past offenses and remaining tacit.

The advocates of comment claim that an innocent defendant cannot have any reason for refusing to testify, in spite of the fact that in many states if the accused takes the stand he may be subjected to a cross-examination which is not limited to the offense for which he is then on trial. 27 It is not without logic that a defendant, whether because of previous misconduct or his own personality, may deem it advantageous to refrain from testifying. 28 Yet, if the prosecution can comment on his reti-

26 8 Wigmore, Evidence § 2272a (3d ed., 1940).
27 For a list of those states, see Reeder, Comment upon Failure of Accused To Testify, 31 Mich. L. Rev. 40, 56 at note 78 (1932).
28 Authority cited note 22 supra. At p. 293 it was said, "Now, on the question of the defendant taking the stand, one of the strongest arguments that is urged against the right of the prosecutor to comment rises out of this fact: that many people, innocent or guilty,
cence, the defendant is placed in not only an awkward but, moreover, a somewhat unfair position. Assuming such a defendant is actually innocent but remains tacit on these grounds, the effect of the prosecutor's comment is, nevertheless, accepted as evidence adverse to the defendant's cause. The counter argument that prior acts are not evidence against the present indictment and that personality quirks can actually work to the defendant's advantage if he were to testify does not seem to outweigh the greater justice that would ensue if defendant were to exercise his constitutional privilege of not testifying. Consequently, on the one hand, there is the ideal of searching for the truth by indirectly coercing the accused to take the witness stand out of fear of damaging comment by prosecution, and on the other hand, there is the ideal of protecting the accused from any possible cross-examination of prior offenses. There are reasons to seek out the truth. There are also reasons to protect the accused in the obtainment of the truth. The ultimate question that must be resolved is, does allowing comment so benefit the State as to overcome any injury to the defendant caused by comment so that substantial justice is achieved?

2. Right of comment would cause prosecutors to become less diligent.

A general practice of allowing comment might tend to bring about the very evils which the privilege (against self-incrimination) is intended to prevent, namely, the reliance by the prosecution, for the means of proof, upon the confessions in court of the accused himself or upon the inferences of guilt which could be drawn from his silence. As a result, there is a consequent slack and imperfect investigation of other sources of proof.

Speaking on the possible evils involved if the prosecution would be allowed to comment, Hugo Pam of the Superior Court of Cook County said:

The point I wanted to make is this: the reason I think such an amendment to the constitution is dangerous is because of the over-zealous prosecutor. If all the prosecutors were intellectually honest and weighed questions judicially, I don't think there would be any danger from them. But we know that prosecutors are not all thus, and we know that many prosecutors would take advantage of such a law, and with very little evidence of guilt would spend an hour commenting on the fact that the defendant didn't testify, make a great speech about it and build up a beautiful argument, which would very likely mislead the jury. In other words, it seems to me, it is wholly immaterial. The jury knows he didn't testify; the jury makes the argument itself; somebody on the jury is going to do the arguing when they get into the jury room; and the state can point out that the evidence has not been disputed. . . . Possibly it hasn't caused any great harm, but the opportunities to cause harm are great; it seems when called to the witness stand are timid, and do not present the best side of their character."

29 Comment on Defendant's Failure To Take the Stand, 57 Yale L.J. 145 (1947).
30 Authority cited note 26 supra.
COMMENTS

3. The effect of comment is in violation of the privilege against self-incrimination.

The United States Supreme Court has declared that comment does not violate due process, but has not passed on the specific question whether comment violates the self-incrimination provision, although in Adamson v. California the Supreme Court has indicated that the self-incrimination provision would not be affected.

Since 1936, there have been three important decisions pertaining to the constitutionality of comment in the face of a provision against self-incrimination.

In 1936, the South Dakota Supreme Court declared unconstitutional a statute allowing comment because of a constitutional privilege against self-incrimination. Two years later a similar decision was handed down in Massachusetts, where the court said:

The protection of the Constitution is that no subject shall be ... compelled to furnish evidence against himself. That shield is positive and unequivocal. It is subject to no condition. ... The proposed bill is not positive and unequivocal. ... That which was before certain, clear, and indubitable has become contingent, clouded, and ambiguous. Positive rights secured to individuals by the Constitution cannot be thus circumscribed and rendered doubtful.

The third important decision was handed down in 1951 by a Louisiana court wherein it was held:

After a careful and exhaustive study of all the arguments pro and con by eminent legal scholars and logicians, we are convinced that the better rule pre-

81 Authority cited note 22 supra at page 297.
82 Adamson v. California, 312 U.S. 46 (1946), which reaffirmed the Twining v. New Jersey case, 211 U.S. 78 (1908), and the Palko v. Connecticut case, 302 U.S. 319 (1937). In answering the question whether comment violates due process, the court said at page 50, "Assuming comment violates the provisions against self-incrimination, there is still no violation of the due process clause, because the fifth amendment is not made effective against state action by the fourteenth amendment."

The court noted that however sound may be the legislative conclusion that an accused should not be compelled in any criminal case to be a witness against himself, and it saw no reason why comment should not be made upon his silence. On the same point, Justice Murphy in his dissent, at page 124, remarked: "It is my belief that this guarantee against self-incrimination has been violated in this case. ... Much can be said pro and con as to the desirability of allowing comment on the failure of the accused to testify. But policy arguments are to no avail in the face of a clear constitutional command. This guarantee of freedom from self-incrimination is grounded on a deep respect for those who might prefer to remain silent before their accusers. ... We are obliged to give effect to the principle of freedom from self-incrimination. That principle is as applicable where the compelled testimony is in the form of silence as where it is composed of oral statements."

84 In re Opinion of the Justices, 300 Mass. 620, 15 N.E. 2d 662 (1938).
vails in this state, which is in accord with the majority view; that it is not only sound, but that if such comment were to be permitted, it would, in effect, amount to an infringement of the constitutional right of the accused to abstain from taking the witness stand or to give testimony in the trial of his own cause. . . .

We are fortified in this view by the fact that in those states where comment obtains, experience has shown the defendant is, in fact, pressed to testify. . . .

Allowing comment would indeed make the constitutional privilege against self-incrimination an idle gesture, for everyone accused of crime would be faced with the dilemma of being forced to either take the stand in his own defense or have an inference of guilt attach merely because he does not do so.35

CONCLUSION

It would appear that all the arguments favoring the right of comment may be distilled into one major proposition, viz., a greater amount of truth will be obtained in criminal proceedings. This will occur because the possible effect of comment will cause more defendants to testify, and therefore direct evidence will be obtained for the court.

While it is true that the obtaining of direct evidence would aid in producing a just result, the fact remains that such a desirable end tends to reduce the effectiveness of the constitutional privilege against self-incrimination since the accused will usually testify out of fear of the prosecution's right to comment on his failure to testify.

Therefore, although the choice is technically a voluntary one on behalf of the accused, in a real sense he is being forced to testify, which is the exact right which the self-incrimination amendments are designed to protect. The all-important question, then, is whether the increased obtaining of direct evidence is a great enough benefit to pay for the cost of reducing a constitutional right.

35 State v. Bentley, 219 La. 893, 54 So. 2d 137, 141, 142 (1951).

DEFENDANT'S RIGHT TO POLL THE JURY IN CRIMINAL CASES

Polling the jury—the practice whereby the jurors are asked individually the findings they have reached, thus creating individual responsibility and eliminating any uncertainty as to the verdict announced by the foreman—is designed to afford the members of the jury an opportunity for free expression before the court, unhampered by the fears or the errors which may have attended their private deliberations.2 A survey of the extent to which this right exists, if at all, comprises the subject matter of this comment.

Little did Sir Matthew Hale realize, in writing his History of the Pleas of the Crown, the extent of the divergence subsequent judicial interpreta-
tion was to accord his choice of but one word. In writing, "now touching the giving up of their verdict, if the jury say they are agreed, the court may examine them by poll, and if in truth they are not agreed, they are finable," he provided the foundation for three separate and distinct theories with regard to polling the jury upon the defendant's request, namely, (1) no such right exists; (2) whether or not a poll will be granted is solely within the discretion of the court; and (3) the defendant has an absolute legal right to do so.

THEORIES

The rule adopted in three New England states declares that the defendant has no right to poll the jury. In Commonwealth v Costley the court said: "In Massachusetts, it has never been the right of a party, in any case, civil or criminal, to have the jury polled." In State v Hoyt, in affirming a refusal to grant the defendant's request for a poll of the jury, the Connecticut court declared: "Such a right, under the law and practice of this state, has never been recognized, and there are no considerations of justice, expediency, or security to the prisoner, that require its adoption instead of our present practice." Justification for this position is found in the practice prevalent in these jurisdictions whereby the entire panel is asked whether or not they assent to the verdict, which purportedly is substantially equivalent to a poll of the jury.

Other jurisdictions, adopting a more literal interpretation of Hale's choice of words, permit the trial court, in the exercise of its sound discretion, to grant the defendant's request for a poll of the jury. Typically, this result is reached without the aid of any statute, as illustrated by Ryan v People, wherein the court remarked:

We have no statute on this subject. The right, if any, which exists respecting the poll of the jury is from the common law. That the right is absolute may be well doubted. What little authority we have upon the subject rather points to the fact that at common law the matter was in the discretion of the court and for it to exercise if, for any reason, upon return of a verdict there appeared a doubt as to its entire unanimity.


4 State v Hoyt, 47 Conn. 518, 36 Am. Rep. 89 (1880); Commonwealth v Costley, 118 Mass. 1 (1875); Fellow's Case, 5 Me. 333 (1828).

5 118 Mass. 1 (1875).

6 47 Conn. 518, 36 Am. Rep. 89 (1880).

7 Authorities cited note 4 supra.

8 State v Grierson, 96 N.H. 36, 69 A. 2d 851 (1949); State v Simon, 126 S.C. 437, 120 S.E. 230 (1923); State v Sousa, 43 R.I. 176, 110 Atl. 603 (1920); Ryan v People, 50 Colo. 99, 114 Pac. 306 (1911).

9 50 Colo. 99, 114 Pac. 306 (1911).
Circumstances properly motivating the court to exercise its discretion so as to grant the defendant's request for a poll of the jury have included those where there exists some doubt as to the unanimity of the agreement upon the verdict or upon a showing of some other reason or justification for the polling. The third view—which represents the great weight of authority among the courts that have litigated the question—permits the defendant, irrespective of an statute, to demand as a matter of legal right a poll of the jury after a guilty verdict. This right is considered absolute in felony cases, and has frequently been applied, and expressly declared applicable, in misdemeanor cases as well; moreover, the defendant has this right whether it be an oral or a sealed verdict. It should be noted, in addition, that in those jurisdictions according the defendant an absolute right to poll the jury, there is authority for granting a similar right to the prosecution.

10 Ryan v. People, 50 Colo. 99, 114 Pac. 306 (1911).
14 Stewart v. State, 147 Ala. 137, 41 So. 631 (1906).
15 State v. Young, 77 N.C. 498 (1877), where the court said: "We think a defendant on trial in a criminal case, . . . has the right to have the jury polled, whether it be oral or a sealed verdict. He has no right to say in what manner it shall be done, nor to pro- pounded any question, but simply to know that the verdict given by the foreman is the verdict of each juror, and we think it is error in the court to deny it when demanded." Many jurisdictions, however, permit sealed verdicts in misdemeanor cases only; see, e.g., Ill. Rev. Stat. (1929) c. 38, sec. 745, which declares: "[P]rovided, in cases of misdemeanor only, if the prosecutor for the people and the person on trial, by himself or counsel, shall agree, which agreement shall be entered upon the minutes of the court, to dispense with attendance of an officer upon the jury, or that the jury when they have agreed upon their verdict, may write and seal the same, and after delivering the same to the clerk, may separate, it shall be lawful for the court to carry into effect any such agreement and receive any such verdict so delivered to the clerk, as the lawful verdict of such jury."
Illinois, assuming continued adherence to a remarkably uncontroversial 1825 decision in *Nomaque v. People*, must be included among those jurisdictions that regard the defendant's right to poll the jury an inviolate one. In holding that a prisoner has the right to have the jury present in court when they deliver their verdict in order that they may be polled, the court relied on prior civil cases, justifying its holding on the theory that it certainly was of no less importance to grant a similar right to a defendant in a criminal case. This theoretical justification is difficult to undermine; in addition, this position presents no cumbersome procedural problems regarding a poll of the jury so as to require revision—consequently, an abrupt change in attitude seems highly unlikely.

To dispel any confusion which may exist in their courts, and to promulgate an affirmative policy, many jurisdictions have enacted legislation regarding the defendant's right to poll the jury; typically, they permit the jury to be polled at the instance of either party, which right is regarded as a substantial one and an integral part of trial by jury.

**Restrictions**

Even in the jurisdictions regarding a poll of the jury a matter of right—whether by interpretation of the common law or by statute—and clearly in the jurisdictions regarding such a right as merely discretionary, the court is not bound to poll the jury unless the defendant requests, at the proper time, that it do so. Requests which have been held timely include those made (1) after the verdict is announced and prior to its filing;

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17 1 Ill. 145 (1825), rev'd on other grounds in *People ex rel. Merrill v. Hazard*, 361 Ill. 60, 196 N.E. 827 (1935).


19 Contra: Ind. Stat. Ann. (Burns, 1933) § 9-1811, which apparently limits the right to poll to the defendant only.

20 Mackett v. United States, 90 F. 2d 462 (1937); Johnson v. Commonwealth, 308 Ky. 709, 215 S.W. 2d 838 (1948); State v. Callahan, 55 Ia. 364, 7 N.W. 603 (1880).


(2) prior to the separation or discharge of the jury;\textsuperscript{28} and (3) prior to the pronouncement of sentence.\textsuperscript{24} A request that the jury be polled when they first report that they cannot agree on a verdict has been held to be premature.\textsuperscript{28}

Failure to make a timely request for a poll of the jury, where a reasonable opportunity to do so has been afforded the defendant, is generally held to constitute a waiver of the right.\textsuperscript{26} The defendant's consent to the separation of the jury prior to the rendition of the verdict,\textsuperscript{27} and the voluntary absence of the defendant or his counsel from the courtroom at the time the verdict is delivered,\textsuperscript{28} similarly may give rise to a waiver under some circumstances. This is true in spite of statements to the effect that a waiver of the right to poll should never be implied.\textsuperscript{29}

CONCLUSION

In conclusion, having observed the three different interpretations accorded Hale's statement regarding the defendant's right to poll the jury, it seems inescapable that the position adopted by the vast majority of American courts—that the defendant's right to poll the jury, if properly made, is absolute—is in greater harmony with our traditional notions of fair play and substantial justice; much more so, in any event, than the rules considering this right as merely discretionary or denying it entirely. It is submitted for the reader's consideration, however, that perhaps our traditional notions, as propounded by judges and legislators, are steeped in precedent rather than reason so as to afford the criminally accused an unwarranted and unreasonable measure of protection; for in application, a poll of the jury is requested by the defendant only as a final effort, as a last resort in the hope of a mistrial resulting from a possible defection among the jury because of the public declaration required.

\textsuperscript{28} Budges v. State, 154 Miss. 489, 122 So. 533 (1929); Hammond v. State, 166 Ga. 213, 142 S.E. 895 (1928); Joy v. State, 14 Ind. 139 (1860).

\textsuperscript{24} Webb v. State, 166 Ga. 218, 142 S.E. 898 (1928).

\textsuperscript{26} Cable v. State, 38 So. 98 (Miss., 1905).


\textsuperscript{29} Vaughan v. State, 9 Ga. App. 613, 71 S.E. 945 (1911).

\textsuperscript{28} Clemens v. State, 176 Wis. 289, 185 N.W. 209 (1922); State v. Waymire, 52 Ore. 281, 97 Pac. 46 (1908); Hommer v. State, 85 Md. 562, 37 Atl. 26 (1897).

\textsuperscript{29} Carver v. Commonwealth, 256 S.W. 2d 375 (Ky., 1953); Wooten v. State, 19 Ga. App. 739, 92 S.E. 233 (1917), where the court said: "The right to poll the jury should never be denied where the right is exercised in time. This right is always exercised in time when demanded after the verdict is published and before the jury is dispersed and before sentence. A waiver of the right should never be implied."
DUTY OF LANDOWNER OR OCCUPIER TO FIREMEN DISCHARGING THEIR DUTIES

The law places those who come upon the premises of another in three classes: invitees, licensees and trespassers. Upon such classification depends the degree of care that must be exercised toward each by the landowner or occupier.¹

In the majority of jurisdictions, the rule is that in the absence of a statute or municipal ordinance, a member of a public fire department who, in an emergency, enters a building in the exercise of his duties is a mere licensee under a permission to enter given by law.² However, there is authority to the effect that a fireman, under certain circumstances, may be considered an invitee.³

As a general rule, a person is a "licensee," as that term is used in the law of negligence, where his entry or use of the premises is permitted, expressly or impliedly, by the owner or person in control thereof.⁴ The licensee takes the premises as he finds them and the possessor is under no obligation to make the premises safe for his reception. However, the possessor must warn him of any latent defects or of any dangerous change in the condition of the premises of which he actually knows.⁵

The "invitee" may be defined as a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant or for their mutual advantage.⁶ The invitee is placed upon a higher footing than is the licensee in that the owner or occupant owes the invitee the duty of exercising reasonable care to keep the property in a safe condition.⁷

A. RECOVERY DENIED

Firemen have been denied recovery on various bases, perhaps the most prevalent of which is that they qualify only as licensees and that the facts

⁴ E.g., Christensen v. Weyerhaeuser Timber Co., 16 Wash. 2d 424, 133 P. 2d 797 (1943).
⁵ Prosser, Torts § 77 (2d ed., 1955).
⁶ E.g., Wilson v. Goodrich, 218 Iowa 462, 252 N.W. 142 (1934).
⁷ E.g., Olderman v. Bridgeport-City Trust Co., 125 Conn. 177, 4 A. 2d 646 (1939).
of the case fail to support the contention that the defendant has been
guilty of the breach of any common-law duty owed a licensee.8

In Anderson v. Cinnamon,9 for example, plaintiff was injured when the
porch of an apartment building owned by the defendants collapsed while
he and other firemen fighting a fire in the building were on the porch.
One of the defendants was on the premises during the fire but did not
know the firemen were going on the porch before they did so. In denying
recovery to the plaintiff, the Supreme Court of Missouri said:

... The duty of a possessor of land to firemen is the same as to licensees, who
enter with his permission. Firemen enter under a license given by law, primarily
for the benefit of the public generally, although the possessor may also be bene-
fitted by their work. ... [T]he licensee takes the premises as he finds them, ex-
cept for wantonness or some form of intentional wrong as active negligence of
the possessor.10

The Nebraska Supreme Court referred to a fireman or individual fight-
ing a fire on the premises of an owner or occupant as a "bare licensee" to
whom the owner or occupant owes no greater duty then to refrain from
injuring him by wilful or wanton negligence or a designed injury or by
a hidden danger or peril known to the owner or occupant but unknown
to or unobservable by the fireman in the exercise of ordinary care.11 The
decedent in this case was a professional, paid fireman who volunteered to
serve with a group of volunteer firemen.

In an earlier Nebraska case, on identical facts and arising out of the same
fire,12 the plaintiff was a member of the volunteer group that the decedent
in the later case had volunteered to help. In other words, the later decision
involved a fireman who volunteered, while the earlier involved a volun-
teer fireman. In any event, the defendant was making a trailer tank de-
ivery of gasoline and fuel oil to bulk receiving tanks of an oil association
at the latter's plant when a fire broke out on the truck. The unit was
driven down the road where it continued to burn. The volunteer fire de-

8 Anderson v. Cinnamon, 282 S.W. 2d 445 (Mo., 1955); Wax v. Co-operative Refinery
Ass'n, 154 Neb. 805, 49 N.W. 2d 707 (1951); Mulcrone v. Wagner, 212 Minn. 478,
4 N.W. 2d 97 (1942); Aldworth v. F. W. Woolworth Co., 295 Mass. 344, 3 N.E. 2d
1008 (1936); Steinwedel v. Hilbert, 149 Md. 121, 131 Atl. 44 (1925); Clark v. Boston &
158 Cal. 579, 112 Pac. 459 (1910); Lunt v. Post Printing & Publishing Co., 48 Colo. 316,
110 Pac. 203 (1910); New Omaha Thomson-Houston Electric Light Co. v. Anderson,
73 Neb. 84, 102 N.W. 89 (1905); Woodruff v. Bowen, 136 Ind. 431, 34 N.E. 1113 (1893);
609, 162 S.E. 394 (1932); Volluz v. East St. Louis Light & Power Co., 210 Ill. App. 565
(1918).

9 282 S.W. 2d 445 (Mo., 1955).
10 Ibid., at 447.
partment of which the plaintiff was a member was summoned to fight the fire. The plaintiff, an experienced fire fighter with knowledge of oil fires and explosions, was injured when the trailer tank exploded. Although the court made no attempt to assign to the plaintiff a formal status as licensee or other, it denied recovery on the ground that "... in the absence of any statute or ordinance prescribing a duty on the part of the owner of premises to members of a public fire department, the owner is not liable for injuries to such fireman except those proximately resulting from willful or wanton negligence or a designed injury," citing with approval the case of *New Omaha Thomson-Houston Electric Light Co. v. Anderson*.

In the Minnesota decision of *Mulcrone v. Wagner*, a member of the St. Paul bureau of fire prevention was injured when he stumbled on a faulty stair tread and fell down a stairway in the defendant's building while making a fire inspection of the premises. Firemen were held to be licensees. Following the rule laid down forty-two years earlier in *Hamilton v. Minneapolis Desk Mfg. Co.*, the court said that the owner or occupant of a building owes no duty to keep it in a reasonably safe condition for members of a public fire department who might, in the exercise of their duties, have occasion to enter the building. It is interesting to note that both the *Hamilton* and *Mulcrone* courts considered the rule harsh but that they agreed it was up to the legislature and not the judiciary to change it.

A Worcester fireman, who was injured when he fell from a defective fire escape on the defendant's building, which fire escape he was using as a vantage point from which to fight a fire in a nearby building, was denied recovery on the ground that the entry of a fireman upon a premises is by virtue of a permission implied by law and constitutes him a licensee. Consequently, the plaintiff could not recover on the ground of ordinary negligence but was required to show wilful, wanton or reckless conduct in the absence of a violation of a statute.

In *Clark v. Boston & M.R.R.*, a fireman injured while fighting a fire set by the defendant's locomotive was denied recovery. The court construed the plaintiff's connection with the fire to have arisen solely from his own act in coming into contact with it after it was set, and termed him an "intervenor" to whom one who created the situation owed no "anticipatory duty." The court likened the situation to that of a "land owner and licensee."

13 Ibid., at 227.
14 73 Neb. 84, 102 N.W. 89 (1905).
15 212 Minn. 478, 4 N.W. 2d 97 (1942).
16 78 Minn. 3, 80 N.W. 693 (1899).
18 78 N.H. 428, 101 Atl. 795 (1917).
Another case where a fireman was termed a licensee and recovery denied was that of Pennbaker v. San Joaquin Light & Power Co. The intestate was killed while fighting a fire, by contact with wires of the defendant lighting company in the back yard of the burning premises. It did not appear that the defendants had any exact knowledge of the location of the fire, and the current which killed the decedent was one which would not ordinarily endanger life. The defendant was held not negligent so as to make it liable for the decedent’s death because it had no actual knowledge that the fire had felled dangerous wires. The court, in defining the defendant’s duty, said that “[i]n the absence of ordinance or statute changing the common-law rule in this regard, a fireman entering a building under imperative public necessity is but a licensee, who assumes the risks as he finds them, and to whom the owner of the premises owes no special duty to maintain these premises in a safe condition.”

Even the fact that the defendant himself turned in the alarm has been held not to constitute the fireman who responds an invitee. In a well-reasoned decision, the Colorado Supreme Court held that the right of a fireman to enter the premises is created by law and exists before the alarm is sounded, and that, “[w]hen the right to enter is dependent upon an invitation, express or implied, that creates the right to enter, and without the invitation the right does not exist. Hence as an alarm does not create the right to enter, and the right exists independent of the alarm, it cannot be an invitation.” The court concluded that firemen are only licensees and that there is ordinarily no duty to a licensee except to refrain from wilful or wanton injury to him and to use reasonable care to prevent injury to him after discovering his danger.

The owner of a building on which twelve firemen were standing while engaged in extinguishing a fire therein when the roof gave way and carried all of them to their deaths in the basement below was also absolved of liability on the licensee theory, the court saying that “[t]he owner

\[19\] 158 Cal. 579, 112 Pac. 459 (1910).

\[20\] They knew within a wide area where it was located but the court felt that to require the defendant to turn off the lights and power in such a wide area during a night fire such as this might cause damage from panic greater than the fire damage it was sought to prevent.

\[21\] Ibid., at 206.
of a building in a populous city does not owe it as a duty, at common law, independent of any statute or ordinance, to keep such building safe for firemen, or other officers who in a contingency may enter the same under a license conferred by law."\(^{24}\)

Members of fire insurance patrols and fire insurance salvage corps units have been held to share the licensee status of firemen. In Illinois, for instance, a member of the Chicago fire insurance patrol was injured through the faulty operation of an elevator on the defendant's premises while he was in the building to spread tarpaulins on the defendant's goods and thereby prevent water damage to them. The plaintiff was deemed a "mere licensee" and denied recovery.\(^{25}\) A member of the Fire Insurance Salvage Corps of Baltimore who, while on the premises where a fire had originated to save property endangered by fire, fell into an open and unguarded elevator shaft and was injured, was accorded the same treatment.\(^{26}\)

Other courts, though often reluctant to clearly define the status of firemen have denied recovery on various other grounds.\(^{27}\)

In the recent case of \textit{Gannon v. Royal Properties},\(^{28}\) for example, a gasoline explosion in a burning garage was held not to be an "unusual hazard" the knowledge of the existence of which would impose upon the owner the duty to give warning of the peril to firemen entering the building to extinguish the fire. Gasoline, said the court, is known by everybody to be stored about a garage.

"Considerations of public policy" prevented the predication of any liability of a property owner to a fireman upon negligence causing a fire in \textit{Suttie v. Sun Oil Co.}\(^{29}\) The property owner whose own negligence caused the fire, it was reasoned, may otherwise be tempted to defer calling the fire department and help himself until perhaps greater danger to the public would be threatened. Public policy, said the court, requires firemen to look to their employer for proper compensation for injuries.

\(^{24}\) Woodruff v. Bowen, 136 Ind. 431, 34 N.E. 1113, 1117 (1893).

\(^{25}\) Gibson v. Leonard, 143 Ill. 182, 32 N.E. 182 (1892).

\(^{26}\) Steinwedel v. Hilbert, 149 Md. 121, 131 Atl. 44 (1925).


\(^{29}\) 15 Pa. D. & C. 3 (1931). Actually, the doctrine of assumption of risk as well as considerations of public policy defeated the plaintiff's claim here.
A city fireman under no duty to look after fires outside city limits, has been termed an invitee as to a property owner outside the city limits who requests his aid in fighting a fire. The property owner was held bound to use reasonable care to invitees and warn of latent dangers of which he had knowledge. However, since the defect involved here was deemed patent and because of the presence of conjecture as to the exact cause of the accident, liability was not imposed on the defendant.

The presence of contributory negligence will, of course, preclude recovery, nor will the defendant be held liable when the plaintiff is injured where there could be no reasonable expectation of his presence, or where it does not appear that he entered by any way which was reasonable to anticipate he would take.

Where the plaintiff is deemed not one of the class of persons for whose benefit a statute was passed, he cannot predicate liability for his injury on violation of that statute; nor can one not vested with a remedy by virtue of a statute bring an action thereon in his own name.

**B. RECOVERY ALLOWED**

One of the leading cases in the minority group that allows recovery for firemen is the New York case of *Meiers v. Fred Koch Brewery*, an action for personal injuries by the chief of the Dunkirk, New York, fire department. Over its property from the street in front, beside its building, giving access to a stable in the rear, the defendant had built a paved driveway. Back, 150 feet, across half of this pavement, ran an unguarded coal hole. The driveway was used by the defendant and by those who had business with it. One evening the barn caught fire. The plaintiff walked up the unlighted driveway to get to the barn, fell into the hole, and was injured. The court did not clearly define the status of firemen in that it specifically denied that the plaintiff was a trespasser or a licensee yet seemed reluctant to define him as a special class of invitees. The plaintiff, while groping his way in dense smoke, on the roof of a burning building, stepped over a low parapet or coping and fell into an opening on the premises of the adjoining owner, the defendant. Prosser, Business Visitors & Invitees, 26 Minn. L. Rev. 573, 610 (1942).


Eckes v. Stetler, 98 App. Div. 76, 90 N.Y. Supp. 473 (1904). The remedy was held to be vested in the board of fire commissioners or in the fire commissioner, but not in an individual fireman.

229 N.Y. 10, 127 N.E. 491 (1920).
to place its holding on the factor of implied invitation. However, it was held that the duty of "reasonable care under all the circumstances" existed and was owing to the plaintiff. The decision was expressly limited to "... the case of one not a licensee, entering business property as of right over a way prepared as a means of access for those entitled to enter, who is injured by the negligence of the owner in failing to keep that way in a reasonably safe condition for those using it as it was intended to be used."37

Other cases that have allowed recovery to firemen have proceeded upon the theory that firemen are invitees and that the defendant has breached the common-law duty owed an invitee.38

In Zuercher v. Northern Jobbing Co.39 the plaintiff, a volunteer fireman, was invited upon the defendant's premises to deliver and put into operation a sump pump which the defendant had purchased from the fire department with the understanding that the department would deliver and install the pump in working order. Carbon monoxide gas inhaled by the plaintiff while he was helping to install the pump caused a heart ailment known as a myocardial infarction. The court held that the plaintiff was on the premises as an invitee, but more specifically as a "business visitor."40

In Clinkscales v. Mundkowski41 the deceased, though not a member of the city fire department, was serving with it when killed while fighting a fire on the defendant's farm outside the city. The court held that the deceased was an invitee of the defendant and allowed recovery because the defendant had violated his duty of ordinary care.

Taylor v. Palmetto Theater Co.42 involved a situation wherein the plaintiff, while in the performance of his duties as a fireman and fighting a fire in buildings adjacent to the defendant's, fell into a pit maintained by the defendant in a passageway. In his complaint, the plaintiff alleged an invitation extended to the general public to use the passageway and that he entered thereon as a member of the general public, although in the discharge of his duties as a fireman, and was, therefore, an invitee or licensee. The court sustained the complaint and said that simply because the plaintiff was a fireman and in the discharge of his duties as such should not

37 Ibid., at 493.
39 243 Minn. 166, 66 N.W. 2d 892 (1954).
40 The term is defined in 65 C.J.S. § 43 (1) as "a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly connected with business dealings between them."
41 183 Okla. 12, 79 P. 2d 562 (1938).
42 204 S.C. 1, 28 S.E. 2d 538 (1943).
limit his cause of action to the right or permission to enter the premises extended by law. The inference was that if, on trial, the plaintiff could prove that the general public used the passageway with the defendant's knowledge and consent, he can recover as an invitee or licensee.43

At least one court felt that firemen should enjoy a status all their own. The Minnesota Supreme Court in Sbypulski v. Waldorf Paper Products Co.44 said that firemen, entering upon the premises of another in response to a call of duty are not trespassers, licensees or invitees. They have a status sui generis since they enter under license of law to perform a duty owed to the public and the landowner's consent to entry is immaterial.45

Some courts, even though they went along with the majority holding that firemen are licensees, have allowed them recovery because the defendant was guilty of a breach of the common-law duty owed licensees.46

In referring to firemen as "gratuitous licensees," the court in James v. Cities Service Oil Co.47 held that if a fireman is exposed to a "hidden danger" of which the owner knows, it is the owner's duty to notify the fireman unless the fireman has knowledge of the danger or has had reasonable opportunity to discover the same. This case involved the explosion of a gasoline storage tank that occurred after the defendant's employees had fled, without warning the firemen who arrived on the scene of certain dangerous conditions that they knew existed therein.

In a separate decision, the city whose firemen responded to that fire was allowed reimbursement for wages, and medical and hospital expenses paid the injured firemen on the ground that the same duty was owed by the defendant to the city as licensees as was owed to the firemen as licensees and that the doctrine of "hidden dangers" applied equally to both.48

The possession of quantities of flammable liquids in excess of those allowed by city ordinance has been held to constitute wilful and wanton conduct that amounts to a violation of the duty owed a fireman, though only a licensee by operation of law, killed by a flashback of the burning liquid.49

Similarly, where a railroad company delivering a freight car containing fireworks, and with knowledge of its contents and its liability to explode

43 The factual situation and treatment of this case bear a strong resemblance to those involved in the Meiers case, supra note 36.
44 232 Minn. 394, 45 N.W. 2d 549 (1951).
45 Ibid.
47 66 Ohio App. 87, 31 N.E. 2d 872 (1939).
from concussion, placed the car at a place in its yards where it would be subjected to impact from other cars and a fire broke out in the car, the railroad was held liable for the death of a fireman who responded and was killed in an ensuing explosion of the car. Though the fireman was termed a licensee, "... where a person is rightfully upon the premises of another, even as licensee, he has the right to require of the proprietor that he so conduct himself as not to injure him through his active negligence." Another case in the same jurisdiction thirty years later was said to involve similar facts and to be controlled by the same rule of law, except that the plaintiff was held not to be a licensee as to the defendant. However, here too, recovery was allowed.

A New Jersey decision that classified the decedent fireman a licensee nonetheless refused to absolve the defendant of liability because the latter was not a landowner. The court felt that the exemption of the landowner from liability as to trespassers and licensees is necessary to secure him the beneficial use of his land, but that no reason exists for extending the exemption to the case where the rights of the defendant have not been interfered with. The plaintiff was electrocuted when he went up into the tower of the city hall to extinguish a fire that had broken out there and came into contact with a metal pipe which, unknown to him, was charged with a deadly current of electricity that had escaped from wires installed and maintained by the defendant electric company for the purpose of furnishing light from its street lighting system to lamps in the tower. The decedent was not upon property either owned or controlled by the defendant at the time of the occurrence.

Another fireman electrocuted by coming into contact with wires of the defendant utility company, here in a public alley, was held entitled to a "high degree of care" by those operating electric light and power lines.

Liability for death or injury of firemen has, on occasion, been successfully predicated upon violation of a statutory duty.

In Maloney v. Hearst Hotels Corp., the defendant, in violation of a

51 Ibid., at 602.
52 Texas Cities Gas Co. v. Dickens, 156 S.W. 2d 1010 (Tex. Civ. App., 1949). The defendant gas company failed to cut off the gas supply to a burning building in time to avert an injury to the plaintiff, a fireman directing a hose stream therein from the curb line.
54 Gannon v. Laclede Gaslight Co., 145 Mo. 520, 47 S.W. 907 (1898).
56 274 N.Y. 106, 8 N.E. 2d 296 (1937).
New York city ordinance, maintained a paint shop in the subcellar of its hotel wherein were stored large quantities of paints and other explosive liquids. A fire broke out in the subcellar and the city fire department was called. Plaintiff's intestate, a fireman, was killed by an explosion in the paint room. The court, in allowing recovery for his wrongful death based on violation of the ordinance, held that the ordinance had been enacted for the benefit of firemen as well as for hotel guests.

A Pennsylvania statute requiring that elevator shafts be kept closed and guarded was involved in the case of Drake v. Fenton where the plaintiff, a Philadelphia fireman, was injured when he fell through an open and unguarded elevator shaft in a warehouse owned and occupied by the defendant. In holding that there was no liability on the defendant at common law because the plaintiff was a licensee, the court defined the statute violated by the defendant as one intended to afford protection to city officers such as firemen, who at any time may be required to come on the premises.

Where a dangerous condition exists in a building to the knowledge of the owner or his agent, presenting an "unusual peril" to persons entering thereon, it is the duty of the owner, if he had the opportunity, to give warning of the peril to firemen about to enter the building in response to an alarm of fire therein.

Similarly, the doctrine of assumption of risk has been held inapplicable to "hidden, unknown and ultrahazardous dangers" encountered by firemen on the premises in response to an alarm, although it is contemplated that firemen encounter those risks ordinarily incidental to extinguishing fires.

The storage of a large quantity of explosive powder within city limits has been held to represent a "public nuisance" and render the possessor liable for the death of a city fireman killed by an explosion of the powder while fighting a fire on the premises.

CONCLUSION

An analysis of the foregoing decisions leads one to conclude that the courts, in cases of this type, are striving for a legal and equitable balance between the rights of the landowner or occupier of land and the rights of one lawfully upon his premises.

57 237 Pa. 8, 85 Atl. 14 (1912).
Although the owner is sovereign over his land, he has the duty to consider the safety of all those who, having the right or privilege to enter his premises, may be expected to enter it. The "commonly accepted formula in America" that divides those to whom this obligation is owed into "licensees" and "invitees" depends upon whether their right to enter is by virtue of permission or of invitation. If such is the case, it seems illogical to hold, as most courts have, that a fireman cannot be an invitee because there has been no invitation, but that he can be a licensee even though there has been no permission.

If we accept benefit to the landowner as the determining factor of the invitee, it is equally difficult to see on what basis it can be held that a fireman is a mere licensee. It is absurd to say that a fireman who comes to extinguish a blaze in the defendant's building confers no benefit on the defendant.

Perhaps the real reason why firemen seem to be set apart as a class to whom no duty is owed to inspect and prepare the premises is that they enter at unforseeable moments, upon unusual parts of the premises, and under circumstances of emergency, where care in preparation cannot reasonably be looked for. As Professor Bohlen has stated:

It would be an obviously unreasonable burden to impose on landowners to require them to keep the whole of their premises in such condition as to make every part of it safe for those whose unusual and exceptional right of entry may never accrue. The balance of social benefits can require such a serious restriction on the owner's use of his land, or justify the imposition of such a burden on his exchequer, to prevent so vague a risk of so improbable an injury.


Ibid., at 1160.

Prosser, Torts § 78 at 461 (2d ed., 1955); Prosser, Business Visitors & Invitees, 26 Minn. L. Rev. 573, 608-611 (1942).

Bohlen, op. cit. supra note 61, at 350-51.

EXCLUSIVE SALES RIGHTS GIVEN TO REAL ESTATE BROKERS

When a real estate broker is employed to sell property, one of two types of agreement is entered into; the first being a general listing whereby the broker is given the bare right to sell the owner's property with the broker receiving a commission for producing a purchaser. The second is a so-called "exclusive" agreement of one kind or another whereby the broker is given the exclusive agency to sell, or exclusive right to sell, for a stipulated period of time— the broker's commission being due when or if a purchaser is found.
Upon occasion, an owner who has entered into such an "exclusive" agreement gets the opportunity to sell the property during the exclusive period to a buyer not in any way procured by the broker. If the owner does sell to this person, though the broker has not yet found a purchaser willing to buy according to the terms of the listing, a suit for a commission often results. Where only an exclusive agency to sell has been given, and it appears that the owner sold his own property without the aid of another broker, the broker's suit will fail in most jurisdictions. Where, however, a second broker appears to have sold the property during the exclusive agency, some courts have allowed recovery. The concern of the courts for the broker's welfare in that situation and where an exclusive right to sell has been given, has resulted in decisions which blur the distinction between unilateral and bilateral contracts, leaving the law in a rather confused state. It is this situation primarily which will be examined here.

THE AGREEMENT—A UNILATERAL CONTRACT

In return for the broker's act of procuring a purchaser, the owner has promised a commission. The broker's promise to find a purchaser is not sought, nor is it given in the usual exclusive listing. It seems clear, therefore, that the owner has made an offer for a unilateral contract, and such an offer may be revoked, whether it is said to be irrevocable or not, at any time before performance of the act requested.

In Bartlett v. Keith, decided by the Supreme Judicial Court of Massachusetts, a broker had an exclusive right to sell certain property. The owner, during the period, sold the property to a buyer of her own finding. In disallowing recovery the court stated:

Here the condition was at least the procuring of a customer who was able, willing, and ready to buy on the owner's terms. The plaintiff's contention that


3 "A unilateral contract is one in which no promisor receives a promise as consideration for his promise." Rest., Contracts § 12 (1932).

4 1 Williston, Contracts § 60 (Rev. ed., 1936).

by listing the property she fully performed the service required is fallacious. The writing says nothing of the kind, and the usual rule is to the contrary. The defendant's objective, like that of any seller, did not stop with the placing of her property on the plaintiff's list. Nor is the plaintiff's case aided by asserting that the defendant bound herself for ninety days when she did not bind herself at all. The acceptance of an offer to a unilateral contract must be by all the acts contemplated by the offer. There was no fraudulent revocation, and once the question of consideration is analyzed, this case falls within the usual principles of brokerage cases.\(^6\)

This statement represents proper legal reasoning in requiring consideration be given to make a promise to keep an offer open binding.\(^7\)

An Illinois court presented with a similar factual situation refused to grant a commission to the broker and said: "[T]he agreement in this proceeding is not one coupled with an interest and it was revocable at the will of the principals."\(^8\)

An Ohio court, where the broker sued for a commission when the owner sold his own property during the "exclusive sales right" period, stated:

>[P]laintiff did not purchase the exclusive right to sell the defendant's property. There was no consideration flowing to defendants. The plaintiff was not bound to do anything. He could abstain from any activities in the interest of selling the property without incurring the slightest legal liability to the defendants. The offer to contract was unilateral in its effect.\(^9\)

Where even nominal consideration has been given in fact by the broker for the owner's promise to keep the offer for a unilateral contract open for a given period, the offer must be kept open.\(^10\) In a state where a seal is conclusive evidence of consideration, such an offer under seal would also have to be kept open.\(^11\) These methods for rendering the owner's offer irrevocable do not often appear in the reported cases as the basis for decision.

A few courts have applied proper theory.\(^12\) Numerically, courts apply-

\(^6\) Ibid., at 309, 310 (omitting court's citations).
\(^7\) Rest., Contracts § 19 (1932).
\(^9\) Davis v. Hora, 63 N.E. 2d 843, 844 (Ohio App., 1944).
ing proper theory are in the minority. The unsound methods by which the other courts reach their conclusions follow.

POWER TO REVOKE VERSUS RIGHT TO REVOKE

Several courts have spoken in terms of power to revoke versus right to revoke, admitting the power of the owner to revoke the agreement, but claiming that he had no right to do so, in that the employment contract was broken.\(^{13}\) Professor Mechem is quoted as follows:

\[\text{[T]he principal always has the power to revoke: but not ... the right to do so ... in those cases wherein he has agreed not to exercise his power during a certain period ... the authority may be withdrawn at any moment, but the contract of employment cannot be terminated in violation of its terms, without making the principal liable in damages.}\(^{14}\)

This statement then presupposes a contract, a binding agreement. Later statements by Professor Mechem concerning the necessity of contract in the broker-owner relationship make this even more clear:

\[\text{[T]he principal may agree—for a sufficient consideration—that, during a stated period, he will not sell except through the broker, or that the broker shall have his commission whoever makes the sale. ...}\(^{15}\)

Therefore, it is submitted that the courts that apply the power versus right to revoke rules have begged the question of whether a contract exists at all or not. Unless the owner for a consideration has contracted away his right to revoke, he may do so at any time.\(^{16}\) A contract, then, has still to be found.

PROMISE TO PROCURE AND PROMISE TO TRY TO PROCURE

It is true that the possible harshness of the rule allowing revocation of offers for unilateral contracts at any time is the basis for a rule of law which would construe such offers and assents as bilateral, and therefore, as contracts, if at all feasible.\(^{17}\) Few brokers would agree that they have promised to find a purchaser in return for the owner’s promise to pay a commission, not wishing to risk a suit for damages for not finding a buyer.\(^{18}\) Most brokers, however, would agree that they have promised to try to find a purchaser. Some courts have considered such promise to be

\(^{13}\) E.g., Geyler v. Dailey, 70 Ariz. 135, 217 P. 2d 583 (1950) where the broker found a purchaser on the day after revocation; Ferguson v. Bovee, 239 Iowa 775, 32 N.W. 2d 924 (1948); Isern v. Gordon, 127 Kan. 296, 273 Pac. 435 (1929) where nominal consideration was given, but not relied on.

\(^{14}\) 1 Mechem on Agency § 568 (2d ed., 1914) (italics added).

\(^{15}\) 2 Mechem on Agency § 2445 (2d ed., 1914) (italics added).

\(^{16}\) 1 Mechem on Agency § 563, 565, 566 (2d ed., 1914).

\(^{17}\) Rest., Contracts § 31 (1932).

\(^{18}\) 2 Mechem on Agency § 2429 (2d ed., 1914). No case has been found where the broker promised specifically to find a purchaser.
part of the consideration requiring that the broker keep the offer open or be guilty of breach of contract.\textsuperscript{19} The courts do not rely, however, on the promise to try exclusively. In \textit{Jones v. Hollander} it is stated that: "the consideration is the agreement of the broker to try to obtain a purchaser and his actual efforts in that regard..."\textsuperscript{20}

The promise to try is subject to the objection that it is too vague, and therefore, void.\textsuperscript{21} However, in \textit{Wood v. Lucy, Lady Duff-Gordon}, a promise to use reasonable efforts was implied and upheld, as being proper.\textsuperscript{22} A federal court in New York was faced with a situation wherein the defendant had given plaintiff the exclusive right to sell its wholly owned subsidiary.\textsuperscript{23} Defendant then sold the business himself prior to revoking plaintiff's authority, and plaintiff sued for a commission. In finding the agreement to be bilateral, the court cited the \textit{Lucy} case and stated that: "... Braxton's promise to work intensively, since a speedy sale was desired, and to handle the matter with the utmost discretion may be fairly implied."\textsuperscript{24}

But, is it to be supposed that the owner's promise to keep the offer open was "bargained for and given in exchange" for the broker's promise to use "efforts" to sell? If the broker were to list the property at all, his efforts would be a foregone conclusion if he hoped to earn a commission. No real element of bargaining appears—the owner simply holds out a prize for the broker to take or not, as he is able or chooses. There has been no case reported where the owner has recovered damages for the broker's \textit{inactivity}. The broker's degree of activity is of relatively little importance to the owner. The only thing that matters to the owner is the production of a buyer who is ready, willing and able to meet the owner's terms of sale. If the broker could do this without getting out of his chair or lifting a telephone, the owner would be satisfied.

However, if the broker did refuse to attempt to sell the property except on the condition that he be given an exclusive right to sell, and the owner, because he wanted this \textit{particular} broker to sell the property, gave the broker this right, the owner might properly be said to have bargained for the broker's efforts, and hence be bound by his agreement to keep the offer open.\textsuperscript{25} This probably is not the usual case. Most businessmen do not so easily turn away a possible client.

\textsuperscript{19} Piper v. Wells, 175 Md. 326, 2 A. 2d 28 (1938); Melzner v. Toman, 57 N.D. 639, 223 N.W. 691 (1929); Jones v. Hollander, 3 N.J.M. 973, 130 Atl. 451 (1925).
\textsuperscript{20} 3 N.J.M. 973, 130 Atl. 451, 452 (1925).
\textsuperscript{21} Rest., Contracts § 32 (1932).
\textsuperscript{22} 222 N.Y. 88, 118 N.E. 214 (1917).
\textsuperscript{24} Ibid., at 708.
\textsuperscript{25} 2 Mechem on Agency § 2453 (2d ed., 1914). This rationale has not been found in any reported case.
THE PART PERFORMANCE THEORY

The most popular method, however, of protecting the broker's commission under an "exclusive" agreement involves section 45 of the Restatement of Contracts.26 Here it is admitted that the agreement was unilateral to begin with, but by "part performance" the broker is said to accept the owner's offer for a unilateral contract, rendering the agreement bilateral and hence irrevocable.27

_Baumgartner v. Meek_, a California decision which followed this theory, quoted section 45 and disposed of the contention that there was no consideration to support the contract by stating that is was to be found in the services to be performed by the broker.28 An Ohio statute referring to unilateral contracts was as follows:

The contract does not come into existence until one party to it has done _all that is necessary_ on his part; it is performance by one party which makes obligatory the promise of the other.29

The court's interpretation follows:

Conceding that at the time the contract was signed and accepted it was a mere _nudum pactum_, when the plaintiff exerted her efforts to find a purchaser for the property, consideration was supplied.30

Apparently the statute was taken as meaning "part performance," not "performance" as it stated. Advertising, phone calls, and showing the property to prospective purchasers, then, are said to constitute part performance. Theoretically as least, this is not part performance of the act of producing a purchaser, because purchasers do not come in parts—one is either found, whole and entire, or he is not. Efforts to find one are mere preparations to the performance of the act of producing the purchaser.

What is tendered must be part of the actual performance requested in order to preclude revocation under this Section [45]. Beginning preparations though they may be _essential_ to carrying out the contract or to accepting the offer is not enough.31

26 Rest., Contracts § 45 (1932). If "part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract." For an excellent criticism of this doctrine see Anderson, Mutual Assent in Unilateral Contracts, 1 DeP. L.R. 167 (1952).


29 9 Ohio Juris. 239, § 5.

30 Bell v. Dimmerling, 149 Ohio St. 165, 78 N.E. 2d 49 (1948).

31 Rest., Contracts § 45, Comment a (1932) (italics added).
Most conclusive is the fact that the owner did not promise to reward efforts, but only performance, though the efforts might have been in some way foreseeable.

PROMISSORY ESTOPPEL

The theory of promissory estoppel, which does away with the necessity of consideration, is stated as follows:

A promise which the promisor should reasonably expect to induce action of a definite and substantial character upon the part of the promisee and which does induce such action, is binding, if injustice can be avoided only by enforcement of the promise.\(^\text{32}\)

In *Richter v. First Nat. Bank of Cincinnati* it was said that "whether consideration existed upon the making of the promise would be important if an action for breach of one or the other had been instituted before the parties had acted upon the promise. . . ."\(^\text{33}\) The broker had an exclusive right to sell several lots, had sold all but the last, which the owner sold, without notice to the broker, on his own. In allowing recovery of the commission, the court mentioned promissory estoppel and went on to state:

To now limit his commission to such sales only as he initiated and carried to fulfillment would operate as an injustice to him.\(^\text{34}\)

Justice to the owner was not discussed.

A Missouri court, in a situation where an owner had granted an exclusive right to sell and then had sold the property during that period, to a buyer of his own finding, stated:

While the Agreement did not expressly bind plaintiffs [broker] to do anything at all and plaintiffs had no interest in the subject matter of the agency, plaintiffs, it may be inferred, listed the property and . . . acted [court's italics] in the endeavor to procure a purchaser, spending considerable time and money . . . upon the performance of these stipulated acts in reliance upon the defendants' promise the Agreement became a bilateral one and binding upon the defendants.\(^\text{35}\)

This court then does not specifically adopt the doctrine, but the rationale is present, and in some degree controlling.

This analysis, like others, is subject to the criticism that the owner promised only to reward success, not efforts, and that the nature of a uni-

\(^{32}\) Rest., Contracts § 90 (1932).

\(^{33}\) 82 Ohio App. 421, 80 N.E. 2d 243, 245, 246 (1947).

\(^{34}\) Ibid., at 246.

lateral contract is such that certain things must be done preparatory to acceptance. All this is within the contemplation of the parties at the time of the offer and efforts to accept are entered into with the realization that they might fail, in the ordinary course of business. The section 90, *Restatement of Contracts* (quoted above), version of the doctrine has had only slight usage as the actual basis for decision among the courts of last resort of the commercial states.\(^8\)

**SPECIFIC JURISDICTIONS**

In *Hutchinson v. Dobson-Bainbridge Realty Co.*,\(^9\) a Tennessee appellate court adopted the “part performance” rationale in a decision which was mentioned by many other courts.\(^8\) A few year later, in *Hood v. Gillespie*, the court allowed a seller, under an exclusive agency agreement, to withdraw his property from sale without liability.\(^9\) Apparently the fact that the owner had not agreed not to take the land off the market was controlling. The broker’s “part performance” availed him nothing. Then, in *Jenkins v. Vaughan*, the Tennessee Supreme Court refused a commission to a broker where the owner had sold the property himself during the exclusive period.\(^4\) The basis for this decision was that the broker’s efforts had been insufficient to warrant a commission. The court acknowledged the rule of the *Hutchinson* case, but stated:

> The reason for the rule is avoidance of hardship to a broker, who has spent time and money in an effort to sell and may have created a market or stimulated a demand for the property.\(^4\)

Tennessee, then, would weigh the efforts of the broker, determining whether they constitute “part performance” or not. This is not a very certain rule at best, and seems more equitable than legal.

New York, according to decision and dictum in the lower courts, is committed to the rule that when an exclusive right to sell has been given, the owner may not revoke without becoming liable for a commission.\(^4\) Two very early cases are relied on as having established this rule. The first was *Moses v. Bierling* which stated the rule as follows:

> 39 190 Tenn. 548, 230 S.W. 2d 997 (1950).
> 40 197 Tenn. 578, 276 S.W. 2d 732 (1955).
> 41 Ibid., at 733.
When one of the contracting parties prevents or waives the literal performance of a condition precedent, which the other is ready and offers to fulfill, he cannot avail himself of such non-performance to relieve him from his own obligation.

A broker, employed to make a sale, under an agreement for the exclusion of all other agencies, is entitled to his commissions when he produces a party ready to make the purchase at a satisfactory price. In that case the owner had sold four thousand muskets through another agent, and had, therefore, refused to sell to the buyer found by the plaintiff. The other case, Levy v. Rothe, involved a situation where consideration had been paid for a sole agency, the owner sold his own property, and the broker recovered a commission.

In the Moses case it appears that the broker probably found a buyer prior to the revocation of his authority, in which case, he was obviously entitled to his commission. Were the buyer found after revocation, the result perhaps would have differed. The offer, in the Levy case, was given for consideration and therefore binding. These two cases then are not entitled to their position as establishing a rule allowing the broker to recover when the owner sells the property himself under the usual “exclusive right to sell” agreement.

Ohio courts have arrived at decisions applying proper theory, promissory estoppel, and the part performance theory. Pennsylvania courts have allowed the broker a commission where the owner sold the property himself during the exclusive agency, or right to sell period. Various other courts have allowed the broker to recover a commission with no discussion of the lack of consideration being given for the owner’s promise to keep the offer open.

Some jurisdictions have allowed revocation, but have allowed the broker to recover on a quantum meruit basis. This view is criticized in
Where it was stated that whatever the owner promised, he did not promise to pay the broker the fair value of his services, nor did he get anything of value for those services. Either the owner was liable for a commission or he was not liable at all. Allowing recovery on a *quantum meruit* basis is prompted by sympathy for the broker, and not legal theory.

In 1952, an Illinois court, in *Nicholson v. Alderson*, followed proper legal theory and refused to grant a broker a commission, where the owner sold his property after written notice of revocation during the exclusive period, no consideration being given for the exclusive by the broker. Earlier decisions were less astute. In *Schwartz v. Akerland* (1926) a broker was allowed to recover a commission where the owner had sold the property through another broker during the exclusive agency period. The broker's advertisement was held to be consideration for the promise to keep the offer open. *Wozniak v. Siegle*, four years earlier, did not allow a commission in a similar situation. In 1911, in *Pretzel v. Anderson*, a broker was refused a commission under an exclusive agency agreement where he found a purchaser within the period, but after revocation by the owner. The court stated:

The contract is not under seal, and was not paid for when given. It is unilateral, it is maintained, and without consideration—a *nudum pactum*, liable to be revoked at will... [as to contentions that advertising, etc. constituted consideration, it was said] we do not think, however, this a consideration which makes the agency irrevocable either generally or for any time specified therein.

### Conclusion

About forty years ago, a New Jersey court, in allowing a broker to recover in a situation similar to that discussed here, claimed that the governing rule was a “doctrine of public policy intended to effectuate justice between the parties.” This statement explains all the twisting and turning done to allow the broker a commission, but does not explain the necessity for overthrowing the common-law rule requiring consideration for a promise in order to make it binding. That rule, too, has for its basis the intention to “effectuate justice between the parties.” Consider the mortgagor, in 1954, pressed to meet payments, who decided to sell his property, giving a broker an exclusive right to sell for no consideration.

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53 240 Ill. App. 480 (1926).
54 226 Ill. App. 619 (1922).
55 162 Ill. App. 538 (1911). 56 Ibid., at 541.
57 Stevenson Co. v. Oppenheimer, 91 N.J.L. 479, 104 Atl. 88 (1918).
months later when the broker had not yet sold the property, this mort-
gagor, under threat of foreclosure, reconveyed to the mortgagee. This
was held to constitute a sale within contemplation of the parties, and the
mortgagor-seller had to pay a commission though he had received no con-
sideration for his irrevocable offer. Suffice to say, the equities are not al-
ways with the broker. A resurgence of the doctrine of consideration to
render a promise binding might better "effectuate justice between the
parties."

The basic fallacy in this area is the supposition that the owner bargained
for the broker's efforts, or that these efforts constitute an acceptance of
the owner's offer. It is submitted that this is contrary to the agreement,
and to the owner's promise, which would reward only success, regardless
of verbiage about "services." "The acceptance of a unilateral contract
must be by all the acts contemplated by the offer." 59


MATTER OF TOTTEN—AN ANOMALY IN
THE LAW OF TRUSTS

The term Totten Trust1 is a familiar one.2 A comprehension of the
meaning of the term exists in the minds of the majority of lawyers to
varying degrees. Yet, the very danger of the Totten Trust lies in this
vague familiarity which leads to various misconceptions.

Many lawyers feel that the Totten Trust is the law throughout the
land, and that it is certainly the law in their particular jurisdiction, though
the question may never have been litigated. There are those who accept
it as a valid trust without question, completely overlooking its transgres-
sion of many of the settled concepts of trust law. Oftentimes, bank ac-
counts for more than a single person are indiscriminately labeled as
Totten Trusts.3

The purpose of this discussion is to dispel the misunderstandings and
doubts concerning the Totten Trust. The analysis of this anomaly4 in the

1 Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904).
2 The Totten Trust is often referred to as a "tentative trust" also.
3 See footnote 30 for a treatment of the problem.
4 In 1905 the case Matter of Totten was thought to be judicial legislation. For example,
one author said:
"This decision has been widely commented upon by legal journals and, so far as the
writer is aware, has been unanimously disapproved. It is inconsistent with earlier au-
thorities in the State of New York. It introduces a serious anomaly into the law of
trusts; indeed, a trust that is revocable at the will of the creator can hardly be said to be
a trust at all. It impugns the policy of the statute of wills, by permitting a disposition of
property to take effect only after death, without following the testamentary require-
ments. On the other hand, as a piece of constructive legislation the decision could hard-
ly be too highly praised. It effectuates a custom which has grown up among the hum-
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history and law of trusts will involve a complete coverage of the area, including an analysis of states adhering to the doctrine, states which rejected it, and states which have never considered it.

BACKGROUND TO THE LAW OF TRUSTS

I. HISTORY

Uses and Trusts were introduced into England shortly after the Norman conquest. Maitland suggests that the first general employment of trusts would be as uses in the thirteenth century when lands were conveyed to be held to the use of the Franciscan Friars, who by the laws of their order were not allowed individually or as a community to own property. By the fifteenth century, the custom of conveying land to uses had become so common that during the reign of Henry V (1413–1422), it has been said, that the greater part of land in England was held in use. By this method, tenants could avoid the exactions of their lord, forfeitures and dower could be avoided, creditors could not reach the cestui que, and religious corporations could hold land in spite of the mortmain acts. At first, these trusts or uses were purely honorary and not enforceable in any court of law because of the rigidity of early English law.

...bler classes of people who, in placing their money on deposit in trust for other persons, often intend to retain the right to use it, principal as well as interest, during life, but that whatever remains at the time of death shall go the cestui que trust. Under the law as it stood the estates of depositors, who as trustees had drawn money from accounts, would be liable to refund the same to the cestuis que trust. The validation of the business custom in question seems so unobjectionable, indeed so desirable, that the writer has on various occasions advocated the enactment of a statute on just the lines laid down in the Matter of Totten. He did not believe that a court would venture upon such a radical innovation and it is difficult to justify it as an exercise of judicial power.” 14 Yale Law Journal 312, 315 (1905).

There has been some conflict among the authorities as to the derivation of the trust. Some scholars believed that the trust evolved from the Roman fidei-commissum. Story Eq. Juris. §§ 966, 967 (1918). Pomeroy, Eq. Juris § 976–978 (1918). More recently however the authorities have agreed that the trust evolved from the German treuhand or Salmon. Holmes, Early English Equity, 1 L. Quart. Rev. 162 (1885); Ames, Origin of Uses & Trusts, 2 Select Essays in Anglo-American Legal History, 739, 740 (1893); Maitland, The Origin of Uses, 8 Harv. L. Rev. 127, 136 (1894). It also has been suggested that the Waif or Waqf which is the equivalent under Moslem law of a charitable trust, gave rise to the English use or trust. Khadduri & Liebesny, 1 Law in the Middle East, 212–218 (1955). Consult Newman on Trusts, 4–9 (2nd Ed. 1935) for the trust concept in other legal systems.

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Digby, History of Law of Real Property, 320 (1950). The words “use” and “trust” are often employed as synonyms. However there was a distinction at common law. A trust which was active or special, that is, one where the trustee had duties to perform was properly called a “trust.” When the trust was passive and the trustee had no duties to perform, it was called a “use.” Also see Ecclesiastical Origin of the Use, 10 Notre Dame L. Rev. 353 (1935).

See 1 Bogert, Trusts & Trustees, 13 (1951).
There could be no remedy at law unless a writ could be found to fit your case and no such writ existed for the beneficiary of a trust or use. Thus, the trustee of the property could do with it as he wished and the beneficiary was helpless to stop him. However, with the development of the Court of Chancery, the uses and trusts became enforceable, since in Chancery, equity and fairness ruled and not technicality.

In 1535, the Statute of Uses was passed, the object of which was to convert the equitable interest of the *cestui que use* into a legal interest. This was passed to prevent the loss of feudal rights by the landlords; obviate fraud on creditors, alienees, doweresses and tenants by the curtesy; and injure the religious orders which were the beneficiaries of uses. The statute expressly did not apply to personal property and was held, upon interpretation, to apply only to passive trusts or uses, thus leaving Chancery free to enforce active trusts. All these interests which were unaffected by the Statue of Uses, and which were recognized and enforced by Chancery, became more commonly known as "trusts" and form the basis of our modern system of that subject.

II. DEFINITION

The difficulty with defining a trust has led many authors to list its characteristics rather than to attempt a definition. The following characteristics are to be noticed: (1) a trust is a relationship; (2) it is a relationship of a fiduciary character; (3) it is a relationship with respect to property, not one involving merely personal duties; (4) it involves the existence

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11 27 Henry VIII (1535), C. 10.
13 In Tyrrel's Case, Dyer 155 (1557), the statute was held not to apply to a use on a use. For a discussion of the effect of the Statute of Uses, see 1 Bogert, Trusts and Trustees § 5 (1951).
14 See 17 Mich. L. Rev. 87 (1918) for a discussion of the reasons for the survival of the trust.
15 The Restatement of Trusts adopts the definition that it is "a fiduciary relationship with respect to property subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it." Rest., Trusts § 2 (1937). Bogert defines a trust as a "fiduciary relationship in which one person holds a property interest for the benefit of another, Bogert, 1 Trusts and Trustees § 1 (1951). Walter G. Hart, after considering and criticizing all the important definitions since 1734, defines a trust as "an obligation imposed, either expressly or by implication of law, whereby the obligor is bound to deal with the property over which he has control for the benefit of certain persons, of whom he may himself be one, and any one of whom may enforce the obligation." What Is a Trust? 15 L. Quart. Rev. 301 (1899).
of equitable duties imposed upon the holder of the title to the property to 
deal with it for the benefit of another; and (5) it arises as a result of a 
manifestation of intention to create the relationship. The combination of 
these things characterizes the notion of the trust as that notion has been 
developed in the Anglo-American law.

III. CLASSIFICATION

Trusts, in respect to the ways in which they arise, are divided into (1) 
express trusts, (2) resulting trusts, and (3) constructive 

express trusts come into being because the parties concerned have formed the 
actual intent that they shall arise and have expressed that intent in written 
or spoken words or otherwise and have made the requisite property trans-
fers. Resulting trusts occur where the courts presume or infer from cer-
tain acts that the parties intended a trust to exist, although the parties ex-
pressed no such trust intent directly and may not actually have it. Con-
structive trusts are imposed by chancery on the holders of legal or equita-
ble titles as means of accomplishing justice and preventing unjust enrich-
ment. The scope of this discussion shall be hereafter limited to the express 
trust.

IV. CREATION

The principal methods of creating an express trust are generally treated 
according to the following enumeration: (1) a declaration by the owner 
of property that he holds it as trustee for another person; (2) a transfer 
inter vivos by the owner of property to another person as trustee for the 
transferor or for a third person; (3) a transfer by will by the owner of 
property to another person as trustee for a third person; (4) an appoint-
ment by one person having a power of appointment to another person as 
trustee for the donee of the power or for a third person; (5) a promise 
by one person to another person whose rights thereunder are to be held 
in trust for a third person. These methods of creation shall become im-
portant in a subsequent discussion of the validity of the legal results of 
the Matter of Totten.

16 This classification is adopted in the Restatement of Trusts in Section 2 (1935). 
1 Scott on Trusts § 2.1 (2nd ed., 1956), also adopts the classification. Cf. Bogert 
1 Trusts and Trustees 7 (1951). Bogert classifies trusts into two main groups, express trusts and 
implied trusts with two subdivisions under each main heading. Private and charitable 
trusts are under the heading of express trusts while resulting and constructive trusts 
are subheads under implied trusts. Some authors have classified trusts into four groups, 
namely, express, implied, resulting and constructive. They feel that an implied trust 
exists because the parties used certain language which does not clearly create a trust, 
but is construed by the courts to have that intent. Lewin, Trusts, 16, 82 (14th ed., 1888); 
Perry on Trusts § 112 (7th ed., 1889).

17 See Rest., Trusts § 17, (1935); 1 Scott on Trusts § 17-17.5 (2nd ed., 1956); 1 Bogert, 
Trusts and Trustees, § 41-80 (1951).
V. ELEMENTS

The authorities agree that there must be four distinct elements in every private express trust. They have been enumerated as follows: (1) there must be an intent to create a trust; (2) there must be a trustee; (3) there must be a res; (4) there must be a cestui que trust. These are determined by asking four questions: (1) Is a trust intended? (2) Who is trustee? (3) Of what is he trustee? (4) For whom is he trustee?18

VI. REVOCATION OF A TRUST

It is important to note in the discussion of the Totten Trust that the ordinary trust is irrevocable by the settlor, unless he demonstrates his desire for a power of revocation. This reservation of a right of revocation does not invalidate a trust19 since the exercise of the right to revoke operates as a condition subsequent.20 Further, it has been said that “unless it can be gathered from the language used by the settlor or from the circumstances that he intended to reserve a power to revoke the trust, the trust is irrevocable.”21

VII. TESTAMENTARY DISPOSITION

A trust may often involve the post-mortem distribution of property and, as such, is commonly known as an inter vivos trust.22 In effect, it is a disposition of property generally accomplished by a will.23 By definition, a will is “the expression, in the manner required by law, and operative for no purpose until death.”24 It would seem that an inter vivos trust falls under this definition and, therefore, to avoid fraud, should comply with the formalities required by the Statute of Wills.25 The law here makes a

18 The settlor of a trust is the person who intentionally causes the trust to come into existence. The trustee is the person who holds the title for the benefit of another. The trust property is the property interest which the trust holds, subject to the rights of another. The beneficiary is the person for whose benefit the trust property is held or used by the trustee. See 1 Bogert, Trusts and Trustees § 1 (1951).
20 The recognition of the validity of rights of revocation in trusts presents no difficulty when one considers that rights of re-entry for condition broken and rights for revocation in obsolete deeds are now recognized in England and the United States. Tiffany, Real Property, § 681 (3rd ed., 1939).
21 3 Scott on Trusts 2393 (2nd ed., 1956).
22 See 1 Scott on Trusts § 56 (2nd ed., 1956).
23 The trust does have two of the three important qualities of a will: It can be revocable and it has the “hereditative” quality, i.e., it appoints someone to represent the settlor after his death to carry out his intentions. The trust lacks the ambulatory quality of a will. II Pollock & Maitland, History of English Law 315 (2nd ed., 1903).
25 “The legislatures have presumably balanced the hardship to the intended beneficiaries which occurs where there is an intention to create a trust, against the hardship
distinction. If the transferor succeeded in divesting himself in praesenti of the interest he wished to transfer, the Statute of Wills is in no way involved. But, if he retained an interest which upon his death was to go to another, his effort was testamentary and the statute must be complied with. Therefore, there must be found a valid transfer inter vivos in order to uphold the trust. It is here that the problem arises, since, in each case, the court must decide whether or not the combined effect of all the powers, rights, control and dominion reserved by the settlor is such as to leave him virtually the owner of the property and the trustee his mere agent. It must decide what extent of control is sufficient in the settlor to nullify the purported technical vesting of legal title in the trustee. It must also draw the line between a valid inter vivos trust and an attempted testamentary disposition. A later discussion of the Totten Trust indicates that this line is not clearly drawn.

THE MATTER OF TOTTEN

I. FACTUAL SITUATION

The factual situation which has created the problems of the Totten Trust now confronting the courts arises when a person makes a deposit in a savings bank or in the savings department of a bank or trust company in his own name “in trust” for another. The depositor simply designates himself on the deposit card as trustee for the named beneficiary. Some what analogous situations arise when the deposit is made in some other form, but with the intention of giving an interest in the deposit to another. These situations arise when the deposit is made in the name of the depositor and he subsequently makes an assignment of it to another, when the

which would result from making false claims; and in order to prevent the making of false claims they have required that the disposition should be evidenced in a certain formal manner,” 1 Scott on Trusts § 55.9, 420 (2nd ed., 1956).

20 The instruments, in the words of Mr. Justice Holmes in Bromley v. Mitchell, 155 Mass. 509, 30 N.E. 83 (1892), have a “testamentary look” and the line must be drawn somewhere.

27 Because the Totten or tentative trust circumvents the Statute of Wills, dispensing with the necessity for probate or administration, it has often been referred to as the “poor man’s will.” Newman on Trusts 77 (2nd ed., 1955).

28 This is a question of the gift of a choses in action which will be incomplete unless the donor delivers the savings bank book to the donee or delivers a deed of gift. If the gift is imperfect the courts generally do not declare a trust, Eschen v. Steers, 10 F. 2d 739 (C.C.A. 8th, 1926); Knickerberg v. Hoff, 201 Ark. 63, 143 S.W. 2d 560 (1940); Noble v. Learned, 153 Cal. 245, 94 Pac. 1047 (1908); Trubey v. Pease, 240 Ill. 512, 88 N.E. 1005 (1909); First and Tri-State National Bank & Trust Co. v. Caywood, 95 Ind. App. 591, 176 N.E. 871 (1933); Sinift v. Sinift, 229 Iowa 56, 284 N.W. 91, 293 N.W. 841 (1929, 1940); Frazier v. Hudson, 279 Ky. 334, 130 S.W. 2d 809 (1939); Rock v. Rock, 309 Mass. 44, 33 N.E. 2d 1973 (1941); Detroit Bank v. Bradfield, 324 Mich. 124, 36 N.W. 873 (1949); State ex rel. Union National Bank of Springfield v. Blair, 350 Mo. 622, 166
deposit is made in the name of another, and when the deposit is made in the name of the depositor and another jointly.

II. THE PROBLEM

The problem then arises whether the depositor has created a trust, and, if so, the kind of trust. The answer to this problem will be solved by a scrutinization of the settlor's intention in setting up the trust. This question has been previously referred to in this discussion as the first element to be considered in the examination of a trust in the determination of its validity. The possible intentions of the depositor when he makes the deposit "in trust" for another may be (1) to create an irrevocable trust; (2) not to create a trust; (3) to create a revocable trust. The courts must determine this intention by examining the evidence of it or by conjecturing in the absence of it. The remainder of the discussion shall be devoted to an analysis of these possible intentions as presented by the facts of each case.

III. THE HISTORY IN NEW YORK

The history of the New York decisions must first be studied if one is to acquire an intelligent grasp of the situation since it is here that the court decided The Matter of Totten. The early cases doubted that a deposit in a savings bank "in trust" for another created a trust if there was no evidence of an intention to create a trust other than the mere form of the deposit. There was even conjecture whether a trust resulted without a delivery of the bank book to the 


29 This is neither a trust nor an assignment of a chose in action. It is consideration paid to the bank for its promise to pay the amount of the deposit to another party. 1 Scott, § 58.6 (2nd ed., 1956).

30 This is generally not the creation of a trust but the payment of consideration to the bank for its promise made to the depositor and the other party. Although no question of the law of trusts is involved, the courts sometimes speak in the terminology of trusts. But it should be noted that there may be the intent to create a trust for a third person. Jarkieh v. Badagliacco, 75 Cal. App. 2d 505, 170 P. 2d 994 (1946).

31 The other elements for the creation of a trust are obviously present. The depositor's claim against the bank is specific trust property. He has communicated his declaration to a third party. The beneficiary is definite and identified.

32 See Rest. Trusts, § 58, comment a (1935) which adopts the language of the Totten case.

33 75 N.Y. 134, 31 Am. Rep. 446 (1878).
a trustee to retain it. The court further stated that communication to the beneficiary is unnecessary to the creation of a trust. It should be observed that the court concerned itself with the questions of the creation of a trust and whether it was irrevocable. The case is only authority for the conclusion that a trust of a savings bank deposit can be created without delivery of the bank book to the beneficiary and without communication to him of the intention to create a trust if there was evidence of the depositor’s intention to create a trust other than the mere form of the deposit.

The Court of Appeals of New York eleven years later in Beaver v. Beaver\(^{34}\) held that, when the deposit was in fact made in the name of another and not in the name of the depositor as trustee for another, that even if the deposit had been made in the name of the depositor in trust for the other that the mere form of the deposit alone was insufficient to raise an inference that the depositor intended to create a trust. The court still assumed that it was either a question of no trust or an irrevocable trust. Then, fifteen years later, the New York Court of Appeals decided the case of Matter of Totten.\(^{35}\) The court there held that, in the absence of evidence that an irrevocable trust was intended or that no trust at all was intended, there arose an inference from the mere form of the deposit that the depositor intended to create a revocable trust. Thus, the court recognized that there are not merely two possible alternatives, but that there is a third—a revocable trust.

### IV. AN ANALYSIS OF THE ACCEPTANCE OF THE TOTTEN TRUST AT THE STATE LEVEL

The situation of a deposit in the bank by the depositor in trust for another in the absence of other evidence as to the intention of the depositor has resulted in a division of courts as to the formation of a trust.\(^{36}\) A num-

\(^{34}\) 117 N.Y. 421, 22 N.E. 940 (1889); 137 N.Y. 59, 32 N.E. 998 (1893).

\(^{35}\) “After much reflection upon the subject, guided by the principles established by our former decisions, we announce the following as our conclusion: A deposit by one person of his own money in his own name as trustee for another standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act on declaration, such as delivery of the passbook or notice to the beneficiary. In case the depositor dies before the beneficiary in that revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor.” 179 N.Y. 112, 125, 71 N.E. 748, 752.

\(^{36}\) There is even a division of authorities on the conclusion to be drawn from the cases. “In most states . . . the inference is that the depositor intended to create a trust but to reserve power to revoke it at any time,” Scott, § 58.1, 478 (2nd ed., 1955). “The tendency is to hold that the depositor impliedly intends to reserve a power of revocation by act inter vivos or by will,” Bogert, 1 Trusts and Trustees, § 47, 327 (1951). “When funds are deposited in the name of the depositor in trust for another person,
ber of courts, following the decision of the Totten case, have held that there is an inference that the depositor intended to create a revocable trust. There is also some authority for the proposition that there is an inference of the creation of an irrevocable trust. Furthermore, some few cases hold that there is an inference that the depositor did not intend to create any kind of a trust.

A problem again results when there is evidence to be considered by the court. The evidence will be important when it conflicts with the prevailing tendency of the state. The states which follow the theory of the Totten case and presume a revocable trust from the mere bank account in trust for another will be confronted by a conflict when the evidence shows that the depositor either intended no trust or an irrevocable trust. In contrast, those states which hold that there is an irrevocable trust, will be presented with a conflict when there is evidence of either no trust or a revocable trust. Lastly, those states that hold there is no trust must find evi-

there arises, according to the law of a few states, a trust which, being revocable, is merely tentative.” Newman on Trusts, 76 (1955).

“The weight of authority, however, appears to be in support of the doctrine that the mere fact of such a deposit, standing alone, does not establish an irrevocable trust during the lifetime of the depositor, but a tentative trust merely, which is revocable at the will of the depositor until he dies or completes the gift in his lifetime by some unequivocal act or declaration showing that the creation of a trust was intended.” 7 Am. Jur. 438.

37 In the absence of evidence of a different intention of the depositor, the new fact that a deposit is made in a savings bank is the name of the depositor “as trustee for another person is sufficient to show an intention to create a revocable trust” Rest., Trusts, § 58, Comment a (1935). “... we hold that neither the retention of the passbook, the absence of notice to the beneficiary, nor the withdrawals from and additions to the deposit had the effect of disproving an intention on the part of the depositor to create a trust; and we further hold, in harmony with the overwhelming weight of authority, that the deposit here involved is presumptively a tentative trust, and in the absence of evidence to rebut this presumption the beneficiary is entitled to the fund.” Wilder v. Howard, 188 Ga. 426, 4 S.E. 2d 199, 202-203 (1939). See also Walso v. Lattner, 140 Minn. 455, 168 N.W. 353 (1918), 143 Minn. 364, 173 N.W. 711 (1919); Nicklas v. Parker, 69 N.J. Eq. 743, 61 Atl. 267 (1905) aff’d 71 N.J. Eq. 777, 71 Atl. 1135 (1907); Fioecchi v. Smith, 97 Atl. 283 (N.J.Ch., 1916). Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904). “This conclusion is in accord with the doctrine of tentative trusts which has been developed in New York, where litigation of trust bank accounts has been much greater than with us.” Scanlon’s Estate, 313 Pa. 424, 169 Atl. 106, 108 (1933), noted in 82 U. Pa. L. Rev. 413; Banca D’Italia and Trust Co. v. Giordano, 154 Pa. Super. 452, 36 A. 2d 242 (1944); Krewson Estate, 154 Pa. Super. 509, 36 A. 2d 250 (1944).

38 “The rule of the Totten Case does not appeal to us with favor.” Cazallis v. Ingraham, 119 Me. 240, 110 Atl. 359, 363 (1920); Rose v. Osborne, 133 Me. 497, 180 Atl. 315 (1935).

idence of an irrevocable trust. This distinction is important and must be remembered in the analysis of evidence which is to follow.

Evidence which indicates no trust was intended shows that the deposit was made in his own name as trustee for another merely for a private and different purpose of the depositor. A depositor's statements at the time of the deposit that he intended no trust is receivable as part of the res gestae and carries great weight. The supposed beneficiary's statements that no trust was intended, made with knowledge of the deposit, or that the deposit was made for the purpose of receiving higher interest rates and not as a trust is receivable as strong evidence that the depositor intended no trust. The depositor's act of obliterating the words of trust from the bank book indicates that he had no intention of creating a trust. A deposit subsequent to the death of the named beneficiary indicates no trust but a mere form of convenience of the depositor. The fact that the depositor has used the interest accruing upon the deposit for his personal benefit has some tendency to show that the depositor intended no trust, and considered along with other facts has led to a decision that there was no trust. The use by the depositor of the account as his only active account for the transaction of his business is strong evidence against a trust. Failure to indicate the trust intent by notice, delivery of the book, or in some other manner, is strong evidence that no trust was intended if this occurs before the death of the named beneficiary. Further,


44 Ibid.


the depositor's allowance of the account to stand as a trust account after the death of the supposed beneficiary or an addition to the account after his death does not show a complete trust. It may also appear from the evidence that the deposit was made in order to evade a statute or by law of the bank limiting the amount of the deposits permitted to individual depositors, or to conceal the true ownership of the deposit.

The evidence may also show that the depositor intended to create an irrevocable trust. A statement by the depositor to a third person of his intention to make the trust irrevocable constitutes strong evidence of irrevocability. A notification by depositor to the beneficiary that the deposit has been made in trust form shows a strong indication of an irrevocable trust but this may be rebutted by other facts in the case.


livery of the bank book by the depositor to the beneficiary also indicates an intention of an irrevocable trust but it may be shown that the delivery was to the beneficiary for safekeeping purposes only.

V. CONFLICT WITH THE STATUTE OF WILLS

The previous discussion of the effect of the Statute of Wills as an attempted trust which passed no present interest indicated that this attempted trust failed because it did not comply with the wills act. This law becomes important when a deposit is made in trust for another and the court has declared that there exists a power of revocation in the depositor. There is no problem if the court has held that there is no trust created by the deposit since the disposition fails on trust principles and not on those of wills. On the other hand, if there is an inference or evidence of the creation of an irrevocable trust, there is again no question as to the effect of the Statute of Wills since the disposition is not testamentary.


tary since the depositor has passed a present interest to the beneficiary. But the problem does arise in the situation of the revocable trust since the depositor has not only power to revoke and modify the trust so long as he lives but also the power to act as he likes with respect to the trust property.

As might be expected, the decisions of the courts which recognize a bank account in trust for another as a revocable trust are split on the issue. New York has decided the question in favor of the trust in a multitude of decisions, and has awarded the deposit to the beneficiary at the death of the settlor. Following the lead of New York, the decisions of ten other jurisdictions have upheld the saving bank deposits as valid trusts not in violation of the Statute of Wills.

However, a few states have held that the fact that the depositor intends to retain control over the deposit during his lifetime makes the disposition testamentary, therefore violative of the Statute of Wills, with the result that the beneficiary is not entitled to the deposit, even though the settlor has not attempted to revoke the trust.

The problem among the states is further complicated by statutes, which have been passed by the majority of states, providing that whenever a deposit is made in a savings bank by one person in trust for another, with

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the bank receiving no further notice from the depositor, that the bank may pay the deposit to the beneficiary on the death of the trustee.\textsuperscript{59} The interpretation placed upon these statutes by the courts have indicated that the purpose of the statute is merely to protect the bank if it makes payment to the beneficiary.\textsuperscript{60}

\section*{VI. THE POSITION OF ILLINOIS}

There is no question but that the formula of the "Totten Trust" is present in Illinois.\textsuperscript{61} A depositor in a bank or saving and loan association designates himself on the deposit card as trustee for a named beneficiary. The depositor still retains complete control over the account so long as he lives and may withdraw, deposit, or close out the account at will.\textsuperscript{62} Upon the death of the depositor-trustee, the named beneficiary receives the funds so deposited. In effect, this is a Totten Trust and yet, strangely enough, that case has not been litigated at the appellate level in Illinois courts.\textsuperscript{63}

Therefore, if the issue is placed squarely before the courts in Illinois,\textsuperscript{64} they will find themselves confronted with three problems: (1) What is


\textsuperscript{60} The Illinois decisions on the subject will be analyzed in detail in a later section of this comment.

\textsuperscript{61} The following are some of the banks which issue deposit cards in the Totten Trust form: (1) Continental Illinois National Bank and Trust Co. of Chicago. Form 4-C-63; City National Bank and Trust Co. of Chicago. Form NN-6; Harris Trust & Savings Bank. Form B-373.

\textsuperscript{62} The typical form provides: "All deposits in this account are made for the benefit of . . . (name of beneficiary) . . . (residence) . . . (relationship) . . . (date of birth) . . . (birth place) to whom or to whose legal representative said deposits or any part thereof, together with the interest thereof, may be paid in the event of death of the undersigned trustee . . . (S) Trustee." See the various forms as listed in footnote 61, supra. It is interesting to note that there is no express reservation of revocation by the depositor-trustee in these forms.

\textsuperscript{63} In Helfrich’s Estate v. Commissioner of Internal Revenue, 143 F. 2d 43 (1944), there was a savings accounts trust which the commissioner contended was "Totten" or "tentative" and hence invalid or at best, revocable. The court, in a decision which we shall consider, rejected the contention and found a valid irrevocable trust. The Illinois Annotations of Rest. Trusts, § 58 (1941), reveals no cases directly on point in Illinois. A check with some officers of Chicago banks revealed that there has been some litigation involving the issue of the Totten Trust. This litigation, however, was minor and inconsequential and hence is unreported. Also see 23 Univ. Chi. L. Rev. 301 (1956).

\textsuperscript{64} This could most easily occur if a suit arises between the trust beneficiary and a third person claiming an interest in the estate of the deceased depositor-trustee. There are many other conceivable situations, i.e., Helfrich’s Estate v. Commissioner of Internal Revenue, 143 F. 2d 43 (1944).
the intention of the depositor in making the deposit?\textsuperscript{65} (2) Is the trust invalid as a testamentary disposition that does not comply with the Statute of Wills?\textsuperscript{66} (3) What is the interpretation of the Illinois statutes which provide that a bank will be protected if it pays the deposit to the beneficiary on the death of the trustee.\textsuperscript{67} These problems shall receive separate treatment in the succeeding paragraphs.

As stated before,\textsuperscript{68} the intention of the depositor when he makes a deposit in his own name in trust for another may be: (1) to create an irrevocable trust;\textsuperscript{69} (2) not to create a trust;\textsuperscript{70} (3) to create a revocable trust.\textsuperscript{71} In Illinois, as far back as 1892,\textsuperscript{72} it was said that "where the deposit is in the name of a third person, and there is no delivery of the bank book, the title to the fund does not pass to such person in the absence of any declaration of trust\textsuperscript{73} or circumstances showing an intention to vest title."\textsuperscript{74} In a later case,\textsuperscript{75} the court said, "It has been said in many cases, particularly where the ownership of bank accounts has been in controversy that the mere form of the account\textsuperscript{76} will not be regarded as sufficiently establishing the intent of the person making it to create a trust in behalf of another."\textsuperscript{77} These two statements raise the following questions: What is a "declaration of trust"? What is the "mere form of the account"? The court, in using the term "declaration of trust," could have intended that a deposit "in trust" for another would meet this requirement and form a trust. However, an analysis of the case shows that the court intended that "declaration of trust" is to have the same meaning as was indicated in a leading New York case on savings accounts trusts.\textsuperscript{78} In Beaver v. Beaver,\textsuperscript{79}

\textsuperscript{65} This problem is discussed nationally under Matter of Totten, Section IV of the text supra.
\textsuperscript{66} This problem is discussed nationally under Matter of Totten, Section V of the text supra.
\textsuperscript{67} See footnote 59 for states with similar statutes.
\textsuperscript{68} See Matter of Totten, Section II of the text supra.
\textsuperscript{69} Cazzallis v. Ingraham, 119 Me. 240, 110 Atl. 359 (1920).
\textsuperscript{71} Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904).
\textsuperscript{72} Telford v. Patton, 144 Ill. 611 (1892).
\textsuperscript{73} Italics added.
\textsuperscript{74} Telford v. Patton, 144 Ill. 611, 625 (1892).
\textsuperscript{75} Bolton v. Bolton, 306 Ill. 473, 138 N.E. 158 (1923).\textsuperscript{76} Italics added.
\textsuperscript{77} Beaver v. Beaver, 117 N.Y. 421, 22 N.E. 940 (1889). Telford v. Patton relies upon and quotes directly from this case. Beaver v. Beaver, besides holding that no trust was created by the mere form of the deposit, also held that either an irrevocable trust was created or no trust was created. The case was subsequently overruled by Matter of Totten which held a trust was created by the mere form of the deposit and that it was revocable.
\textsuperscript{78} Ibid.
the New York court indicated that, even if a deposit had been in the name of the depositor in trust for another, the mere form of the deposit was insufficient to raise an inference that the depositor intended to create a trust. Thus, the language in the later Illinois decision is completely in conformity with the earlier case and Beaver v. Beaver. This interpretation of the "mere form of the account" and "declaration of trust" leads to the theoretical conclusion that Illinois would find no trust created from the Totten Trust formula alone.

However, if the court did find a trust created from the mere form of the account, it would then be faced with the problem of whether, in the absence of express language, it is a revocable or an irrevocable trust. It would have to choose between the thought of Beaver v. Beaver, which held that there is either an irrevocable trust created or no trust, and Matter of Totten, which held there is a third choice, namely, the revocable trust. Illinois has consistently held that when a trust has been perfectly cre-

80 Bolton v. Bolton, 306 Ill. 473, 138 N.E. 158 (1923). This case relies on two earlier New York cases which state the rule followed in Beaver v. Beaver, namely, Kelly v. Beers, 194 N.Y. 49, 86 N.E. 980 (1909), and In re Bolin, 136 N.Y. 177, 32 N.E. 626 (1892).

81 117 N.Y. 421, 22 N.E. 940 (1889).

82 The term "theoretical conclusion" is used because the question is open to conjecture on the following grounds: (1) The Illinois decisions which hold that no trust is created from the mere form of the account relied on New York decisions which have since been overruled by "Matter of Totten." Thus, it might be argued that since the cases upon which the Illinois law stands have been overruled, the Illinois cases themselves are overruled; (2) In Helfrich's Estate et al. v. Commissioner of Internal Revenue, 143 F. 2d 43 (1944), a valid, irrevocable trust was created by a savings accounts instrument. The court quotes from Gurnett v. Mutual Life Ins. Co. of New York, 356 Ill. 612, 191 N.E. 250 (1934), as stating the requirements of a valid Illinois trust, "To constitute a valid trust of personal property, there must be a declaration by a person competent to create it, a trustee, designated beneficiaries, a certain ascertained object, a definite fund or subject-matter, and its delivery or assignment to the trustee." The case merely indicates the form of the deposit alone as the "declaration of trust" and there is no further evidence of intent shown. If there was no evidence other than the "mere form of the account" no trust should be created under Illinois law. Yet, the question was completely ignored in this case and a valid, irrevocable trust was created. The court does, however, cite a Massachusetts case, Wasserman v. Commissioner, 139 F. 2d 778 (1944) where there was other evidence besides the "mere form of the account" and a trust was created. Albert v. Albert, 334 Ill. App. 440, 80 N.E. 2069 (1948) follows the reasoning and quotes from Helfrich's Estate as to the creation of a valid irrevocable trust. There is no question raised as to "the mere form of the account" but the case indicates more evidence of intention to support the declaration of trust on the deposit instrument. Whether the issue was missed, ignored, or taken care of by other evidence of intention in these two cases, is open to conjecture. Thus, there is the possibility in Illinois that the "mere form of the account" may create a trust; (3) The courts may interpret the Illinois statutes protecting a bank which pays the beneficiary on the death of a depositor, as creating a Totten Trust. Ill. Rev. Stats. (1955) c. 16, § 23 c. 32, § 770 (b); (4) The courts may just adopt the Restatement of Trusts § 58 (1933) viewpoint which is a codification of the Totten Trust.

83 This would only be one step in the recognition of the "Totten Trust."

84 117 N.Y. 421, 22 N.E. 940 (1889).
ated, it is not revocable at the will of the party who created it, unless he has expressly reserved the power of revocation.\textsuperscript{85} Whether Illinois would make an exception in the cases of savings accounts trusts is hardly probable. In connection with this problem, it would be well to consider two decisions\textsuperscript{86} which cast some light upon the situation. \textit{Helfrich's Estate v. Commissioner of Internal Revenue}\textsuperscript{87} has the distinction of being the only case which mentions the Totten Trust in connection with Illinois law. In this case there were two trustees and several instruments, one of which provided: “During the lifetime of the trustees and the survivor of them, all moneys now and hereafter deposited in said accounts may be paid to or upon the order of the trustees, or either of them, and upon the death of the survivor of the trustees all moneys deposited in said account shall be payable to or upon the order of the beneficiary.”\textsuperscript{88} The commissioner contended that the trust was “Totten” or “tentative” and therefore invalid or at best revocable.\textsuperscript{89} The court found a valid irrevocable trust and not a “Totten” or “tentative” trust. It said: “The present case is distinguishable from the \textit{Totten} cases on several grounds. Separate trust instruments were executed here and another trustee besides the settlor was included. Neither practice is common to Totten trusts. . . . Furthermore, the language of the instrument itself clearly negatives any right of withdrawal or revocation in the settlor when it provides that “all moneys now and hereafter deposited in said account may be paid to or upon the order of the trustees. . . . No provision is made for the settlor to withdraw in his own name.”\textsuperscript{90} In \textit{Albert v. Albert},\textsuperscript{91} there was an instrument purporting to be a declaration of trust,\textsuperscript{92} which provided: “During the lifetime of the trustee all money now and hereafter deposited in said account shall be paid to or upon the order of the trustee and, upon the death of the trustee, all moneys deposited in said account shall be payable to or upon the order of the beneficiary, or to his legal representative. . . . The trustee

\textsuperscript{85} Trubey v. Pease, 240 Ill. 513, 88 N.E. 1005 (1909); Light v. Scott, 88 Ill. 239 (1878); Fry v. Pence, 261 Ill. App. 218 (1931); Harris Trust and Savings Bank v. Morse, 238 Ill. App. 232 (1925). This is in accord with the general rule of Trusts. See Historical Background, section VI of the text, supra. The cases following Matter of Totten make an exception in the cases of savings accounts. They “imply” a power of revocation.

\textsuperscript{86} Helfrich's Estate et al. v. Commissioner of Internal Revenue, 143 F. 2d 43 (1944); Albert v. Albert, 334 Ill. App. 440, 80 N.E. 2d 69 (1948).

\textsuperscript{87} 143 F. 2d 43 (1944).

\textsuperscript{88} Ibid., p. 43.

\textsuperscript{89} The commissioner seems to have felt that the Totten Trust would be invalid under Illinois law but that there was a possibility of its being recognized. Thus, the wording of his contention.

\textsuperscript{90} 143 F. 2d 43 (1944).

\textsuperscript{91} 334 Ill. App. 440, 80 N.E. 2d 69 (1948).

\textsuperscript{92} The problem as to whether this “declaration” alone was enough to create a trust is discussed in footnote 82, supra.
represents that there is existing no agreement in respect to said account, except as herein set forth." There was, in fact, a separate instrument reserving the power of revocation. The court found a valid irrevocable trust. Though the Helfrich case pays lip service to the Totten Trust and indicates that it might possibly exist under Illinois law, it rather evasively avoids that question and finds an irrevocable trust. The language of both decisions in finding that irrevocable trusts were created by the savings accounts instruments is a very strong indication that Illinois will not recognize a revocable trust without an express reservation of revocation by the depositor. Thus, it would seem that a "tentative" or Totten Trust could not exist in Illinois under the theory of an "implied" reservation of a power of revocation by the depositor-trustee.

But if Illinois were to recognize the doctrine of Totten trust, there would arise the problem of "testamentary disposition." As a general rule, the creation of a trust is testamentary if no interest passes to the beneficiary before the death of the settlor. As seen before, the whole problem centers around the powers, rights, control and dominion reserved by the settlor. Are they such as to leave him virtually the owner of the property and the trustee his mere agent? If these principles are applicable to savings banks trusts, it is quite arguable that they are testamentary dispositions and that, since there is no compliance with the formalities required by the Statute of Wills, the beneficiary would not be entitled to the deposit on the death of the depositor.

Thus, it will be important to determine where Illinois draws the line between a valid inter vivos trust and an attempted testamentary disposition in regard to the "control" of the settlor. The history of Illinois courts in this respect indicates a definite liberal tendency in upholding trusts

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84 As explained before, no question of testamentary disposition will arise if the intention of the depositor is shown to be to create an irrevocable trust or no trust at all. See Matter of Totten, Section V of text supra.

85 See 1 Scott on Trusts, § 53 (2d Ed., 1956).

86 See Matter of Totten, Section V of text supra.

87 Some authorities feel that the problem of testamentary disposition is largely ignored by the courts when considering savings accounts trusts. See 39 Dickinson L. Rev. 36 (1934); 1 Scott on Trusts, § 58.3 (2d Ed., 1956).

88 The customary savings accounts trust allows the depositor to retain complete control over the account as long as he lives. He may deposit, withdraw or close out the account at will and he may change the beneficiary by making out a new deposit card. See footnote 62 supra.

89 Farkas v. Williams, 5 Ill. 2d 417, 25 N.E. 2d 600 (1955). The court, while admitting that inter vivos trusts have a "testamentary look" and that the "line must be drawn somewhere," did not feel the point had been reached in that case.
where the settlor retains a large measure of control. The latest and leading case on this point is Farkas v. Williams. There, Farkas as settlor and trustee, reserved to himself as settlor the cash dividends of the stock for his own personal account and use. He reserved the right as trustee to vote, sell, redeem, exchange or otherwise deal with the stock. He also reserved the right to revoke the trust or change the beneficiary. However, Farkas did register the stock in the name of Farkas as trustee for the beneficiary. This indicated that Farkas intended to assume those obligations set out in the instrument as well as those fiduciary obligations implied by law. Also, on the death of Farkas, the beneficiary would become the absolute owner unless Farkas changed the beneficiary or revoked the trust, which was not to be effective as to the company until written notice was delivered to it. These are not the rights of an absolute owner for he can do with his property as he will without securing the approval of or notifying anyone and without being held to the duties of a fiduciary while doing so. The court, in balancing these factors and recognizing the liberal trend of Illinois said: "It is obvious that a settlor with the power to revoke and to amend the trust at any time is, for all practical purpose, in a position to exert considerable control over the trustee regarding the administration of the trust. For anything believed to be inimicable to his best interests can be thwarted or prevented by simply revoking the trust or amending it in such a way as to conform to his wishes." The court then lists some of the powers a settlor might reserve which could render a trust testamentary and states: "Actually any of the above powers could readily be assumed by a settlor with the reserved power of revocation through the simple expedient of revoking the trust, and then, as absolute owner of the subject matter, doing with the property as he chooses." Finally, the court looked to the purpose of meeting the formalities required by the Statute of Wills, namely, to prevent fraud. Here, there was clearly no fraud since the stock was issued in compliance with the written declaration of trust, in the name of Farkas as trustee for Williams. For these reasons, the court found a valid inter vivos trust, and leave for consideration the effect of this decision on the testamentary disposition problem of the Totten Trust.


101 Farkas v. Williams, 5 Ill. 2d 417, 125 N.E. 2d 600 (1955).

102 Ibid. 5 Ill. 2d 417, 125 N.E. 2d 600 (1955).

103 Ibid.

104 Though some New York cases speak of the Totten Trust as arising upon the death of the depositor, this comment shall proceed under the theory that the trust arises at the time of the deposit. That is, that the trust is subject to a condition subsequent of revocation rather than a condition precedent of the depositor's death.
many ways. The settlor in both instances, besides retaining a life interest, can destroy the trust by revoking or consuming the corpus. Realistically, the beneficiary's interest in either case amounts to a mere expectancy. The formal documents executed in the Farkas trust are more elaborate and extensive than those customarily used in a savings accounts trust but theoretically they are the same. Therefore, by analogy, it would seem that Illinois would follow the theory of the Totten case so far as the problem of testamentary disposition is concerned. From the language in the Farkas case, it would seem that Illinois courts would desire to effectuate the settlor's intent. They do not want to frustrate that intent with technicalities. Thus, as long as the courts can find any limitation on the settlor, they will most probably reject the argument of testamentary disposition and find a valid inter vivos trust. Thus, it would seem that if a Totten Trust can be created in Illinois, it will not be held invalid as a testamentary disposition.

The final problem to be considered by the Illinois courts in regard to a Totten Trust is the interpretation of two statutes which could conceivably lead to recognition of the tentative trust. As far back as 1921, an act in relation to the payment of deposits in trust was approved by the Illinois legislature:

If a deposit is made with any corporation doing a banking or trust business by one person in trust for another, the name and residence of the person for whom it is made shall be disclosed, and it shall be credited to the depositor as trustee for such person; and if no other notice of the existence and terms of a trust has been given in writing to such corporation, the deposit, or any part thereof, together with the interest thereon, may, in the event of the death of the trustee, be paid to the person for whom said deposit was made, or to his legal representative.

While the wording of this statute could be reasonably interpreted as recognizing the tentative trust, there has not yet been any litigation in Illinois concerning this theory. In 1955, another statute, passed as part of the Illinois Savings and Loan Act, goes a little further and provides:

If one or more persons opening or holding a withdrawal capital account shall execute a written agreement with the association providing that the account

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105 This limitation would probably come in the form of the deposit. By referring to himself as "trustee," the depositor has bound himself in that fiduciary capacity. One must also remember that small sums are involved which are easy to identify and there is no great danger of fraud. Also the public policy behind the "poor man's will" has to be considered, viz., the elimination of probate.


107 Italics added.

108 There has been no litigation at all on this statute since 1936. Ill. Rev. Stat. (1921) c. 164, § 23.

COMMENTS

shall be held in the name of such person or persons as trustees for one or more persons designated as beneficiaries, the account and any balance thereof which exists from time to time, shall be held as a trust account and unless otherwise agreed between the trustees and the association: (1) Any such trustee during his life time may change any of the designated beneficiaries by a written direction accepted by the association; and (2) Any such trustee may withdraw or receive payment in cash or check payable to his personal order and any payment or withdrawal shall constitute a revocation of the agreement as to the amount withdrawn; and (3) Upon the death of the last surviving trustee the person or persons designated as beneficiaries who are living at the death of the last surviving trustee shall be the holders of the account (as joint owners with right of survivorship if more than one) and any payment to the holder or any such holders shall be a complete discharge of the association's obligation as to the amount so paid.110.

Some states have interpreted similar statutes as merely protecting a bank if it makes payment to the beneficiary.111 In states where a revocable trust of the deposit is invalid as a testamentary disposition, it has been held that the statute does not validate the disposition.112 In states where the Totten Trust is recognized it has been said that “the principle of law laid down in Matter of Totten, was later made a part of the banking law.”113 From an analysis of these cases, it would seem that the interpretation of such statutes protecting banks follows the policy of the particular state in regard to a tentative trust. Thus, if a state recognizes the Totten Trust, the banking statute adopts the Totten Trust principle. If a state does not recognize the Totten Trust, they interpret the statute as being there solely for the protection of the bank and that the rights of the depositor and of the beneficiary are not affected. No state has seen fit to interpret this type of statute of itself as giving rise to a Totten Trust. Proceeding under this theory, it would seem that Illinois would not recognize these statutes as an enactment of the Totten Trust unless such trust was first judicially recognized in this state.

There is some indication that the legislature may have intended the latter statute114 to be an enactment of the Totten Trust. The 1921 act115 states the bank “may” pay the beneficiary. The 1955 act118 states the account “shall” be held as a trust account and that the beneficiaries “shall” be the holders of the account as joint “owners” and payment to the “holder” shall be a discharge. The use of the words “shall,” “owners,” and

110 Italics added.
113 In Hendersons Estate, 198 N.Y. Supp. 799, 800 (1923). See also Walso v. Lattemer, 140 Minn. 455, 168 N.W. 353 (1918).
“holder” indicate that the intention of the legislature may have been to enact the Totten Trust. Further evidence of this intention may be gathered from the fact that this act repealed the Savings and Loan Act of 1919 but did not repeal a portion enacted in 1939 which specifically was directed to limiting the liability of the association in paying the proceeds of trust accounts to fiduciaries and beneficiaries. A second section whose sole object was to protect the associations from liability would be redundant.

From the foregoing analysis it can be seen that the Illinois courts can either follow the standard interpretation of such statutes by other states and thus find that the Totten Trust is not enacted by this statute or they can engage in statutory construction to find that the Totten Trust is enacted by the statute.

CONCLUSION

The theory behind trusts as evidenced throughout history is in apparent conflict with the theory behind the Totten Trust. The trustee has always held the legal title for the cestui que trust who has always enjoyed the benefits of the trust. The Totten Trust places the legal title and the benefits in the trustee. Therefore, the Totten Trust is in conflict with the definition of a trust. Technically, it cannot be classified as an express trust, resulting trust or constructive trust. Nor can it be said that it arises by any of the principal methods of trust creation. Further, the

119 This latter interpretation hardly seems probable when one considers legislative intent. The legislature would have come out in more positive terms employing the language of § 58 of the Restatement of Trusts or of the Totten case had such been their intent. It seems more probable that the real reason for the enactment of this statute lies in the legislature’s knowledge that the “tentative trust” does not exist in Illinois and that the courts will so hold. In view of the thousands of savings accounts trusts in Illinois in the form of tentative trusts, they wanted to provide definite and adequate protection for the banks.

120 See Historical Background, Section I of text supra.
121 It could be argued that the beneficiaries’ enjoyment is merely postponed. This is not true, however, because the beneficiaries’ interest in a Totten Trust is little than a mere expectancy.

122 See Historical Background, Section II of text supra. There is no fiduciary relationship. There are no equitable duties on the trustee to deal with it for the benefit of another. It is hard to see how it arises as a manifestation of intention to create the relationship.

123 See Historical Background, Section III of text supra. The only conceivable category in which to place the Totten Trust is the express trust. Technically the Totten Trust lacks the requisites of property transfer and express declaration of intention to create a trust.

124 See Historical Background, Section IV of text supra.
The technical elements of a trust are not present. The Totten Trust also violates the ordinary presumption against revocability in the law of trusts. Finally, it violates the Statute of Wills. For these reasons, the Totten Trust has been called a “serious anomaly” and a piece of “judicial legislation.”

Thus, we are left to consider the total effect of this “fiction,” this “poor man’s will,” this “tentative” or “Totten” trust. The first important observation to be made is that the doctrine is law in only a few states. Many states have specifically rejected the doctrine. Many states have not as yet passed upon the doctrine. The total effect of the doctrine when considering all states may be summarized in the word “confusion.” For example, confusion exists in the states which recognize the doctrine because it is fiction. This is illustrated if a creditor of the beneficiary attempts to attach the account, if the depositor disposes of the deposit by

125 See Historical Background, Section V of text supra. Though it may be argued that the depositor is the trustee, that the account is the trust res and that the beneficiary is clearly named, it is hard to satisfy the requirement of intention.

126 See Historical Background, Section VI of text supra. Some authorities feel that this “implied” power of revocation is not an extreme step. They feel that if the depositor intended a trust at all, it seems rather clear that he intended a revocable trust. See C. W. Leaphart, 78 U. of P. L. Rev. 626 (1930).

127 See Historical Background, Section VII of text supra. Some authorities feel that the courts tend to ignore this problem in savings accounts trusts. See 39 Dickinson L. Rev. 36 (1934). One must also consider this issue in the light of the recent liberal trend evidenced by such cases as Farkas v. Williams, 5 Ill. 2d, 417, 125 N.E. 2d 600 (1955).

128 Wilbur Larremore in 14 Yale L. J. 312 (1905). Most authorities choose to treat the Totten Trust as a fiction. The application of the trust idea to bank deposits is useful in arriving at a final solution of the problem. In other words everybody knows that the trust deposit is not a trust, but they will treat it as if it were a trust. By this method they may effectuate the intent of the depositor and realize the object of the deposit. As has been said, the mind is baffled by conflicting forces and grasps at an admittedly erroneous conception for the purpose of clarifying its reasoning and effecting a desired objective. 39 Dickinson L. R. 37, 38 (1934).

129 These are some of the various terms employed by the authorities in describing the savings accounts trust.

130 The doctrine is law only in California, Delaware, Georgia, Kentucky, Minnesota, Pennsylvania, New York and Texas.

131 See footnotes 38, 39, supra.

132 These states are probably in the majority.

133 In Kelly General Finance Co., 16 D. & C 435 (Pa.) the court refused to permit a creditor of the beneficiary of a trust account to attach the fund: “The case before the court may be disposed of on the ground that, though the deposit is in form a trust deposit, it is in fact not so, because the depositor has made withdrawals from time to time from her funds, treating it as her own; or, if not withstanding her withdrawals her deposit in the form made could be construed to be a declaration of trust in favor of the beneficiary, she revokes it by her claim to it filed in this case.” This case indicates that the equitable and legal title are in the depositor and also shows the confused thinking of the courts in trying to solve a problem of reality. It should also be noted
a will,\textsuperscript{134} or if the beneficiary dies before the depositor.\textsuperscript{135} This same confusion arises among those courts which hold that the trust arises upon the making of the deposit,\textsuperscript{136} while others hold that it does not arise until the death of the depositor.\textsuperscript{137} The tentative trust theory has led to interminable litigation, as shown by the New York cases.\textsuperscript{138} Further speculation exists in states like Illinois\textsuperscript{139} which have not as yet passed upon the issue. The existence of a savings account trust in this unpredictable situation forces the legislature to pass statutes protecting banks,\textsuperscript{140} places the depositor in a precarious position in regard to his account,\textsuperscript{141} and generally jeopardizes the law of trusts.\textsuperscript{142}

Against this confusion one must weigh the advantages of the Totten Trust:

1. An avoidance of inheritance taxes.
2. There are no formalities connected with its creation in contrast to a will.
3. The incompetency of the creator of a trust is not subject to as great an attack as the incompetency of the testator of a will.
4. The trust does not incur the great expense and delay that is connected with the administration of estates.

The advantages are ostensibly beneficial to a great number of depositors and banks. But so long as social policy is held to be inferior to the settled

\textsuperscript{134} See Scanlon's Estate, 313 Pa. 424, 169 Atl. 106 (1933). In Re Mannix Estate 147 Misc. 479, 264 N.Y. Supp. 24 (1933). In these cases the court held that a contrary will revoked the tentative trust. It would seem that the "fiction" always yields to reality.

\textsuperscript{135} Rambo v. Pyle, 220 Pa. 235, 69 Atl. 106 (1908). The executor of the cestui que trust and the administrator of the trustee both claimed the fund. It was awarded to the latter.

\textsuperscript{136} Coughlin v. Farmers and Mechanics Savings Bank, 199 Minn. 102, 272 N.W. 166 (1937); Pozzuto's Estate, 124 Pa. Super. 93, 188 Atl. 209 (1936). Under this theory the trust is initiated at the time of the deposit subject to a condition subsequent of revocation.

\textsuperscript{137} Matter of Slobiansky, 152 Misc. 232, 273 N.Y. Supp. 869 (Surr. Ct., 1934); Matter of Kelly, 151 Misc. 277, 271 N.Y. Supp. 457 (Surr. Ct., 1934). Under this theory the beneficiaries' rights remain inchoate until the depositor's death. It has been suggested that the Restatement of Trusts adopts this theory. See 87 U. of Pa. L. Rev. 852 (1939). Under this theory it must be clearly seen that the deposit is testamentary since the depositor's death is a condition precedent to the creation of the trust.

\textsuperscript{138} See cases cited 1 Scott on Trusts, 477–510 (1956).

\textsuperscript{139} See Matter of Totten, Section VI of text supra.

\textsuperscript{140} See footnote 59 supra.

\textsuperscript{141} For example the depositor may deposit his money thinking he has established a revocable trust and have the courts decide it is irrevocable. The beneficiaries' creditors may be able to reach the account. Various difficulties may be envisioned.

\textsuperscript{142} Unnecessary use of anomalous fictions such as the Totten Trust may prove in the long run to be detrimental in that it opens the door for further erosions of some of the settled doctrines upon which the stability trust law depends.
principles of trust law the courts will continue to remain divided as to acceptance of the Totten Trust theory.

TAXABILITY OF ILLEGALLY ACQUIRED FUNDS

Does illegally obtained money or property constitute taxable income to the person so obtaining it? This area of the income tax law has been a source of great discomfort to the federal courts and has been the subject of considerable judicial divergence.

The initial consideration is, simply stated, whether or not illegally received funds meet the requirements of “gross income,” according to the Internal Revenue Acts—as that term is interpreted by the federal courts. The decisions further raise a question at times at to the motivation of the government; that is, does the federal government seek to tax a given type of receipt as a matter of policy, to punish those who participate in illegal activities? This discussion, however, will center mainly on the question first presented, that is, are illegal gains taxable?

EARLY DECISIONS (1919–27)

In a 1919 case, Rau v. United States, the defendant insurance agent embezzled moneys which were delivered to him to be paid as insurance premiums, and the court held that defendant had committed a larceny, and therefore, the money so received was not subject to taxation under the Revenue Act.

In 1926, there were two cases in which the decision in the Rau case was attacked. Steinberg v. United States held that profits from the sale of liquor in violation of the law were taxable income. The court, in discussing the applicable provision of the Internal Revenue Act, said that since the phrase, “gains and profits from any source whatever,” was used in the statute, as contradistinguished from the term “income,” there was no doubt that Congress meant to include all species of gain, no matter how immoral or vicious the method of acquiring the same might be.

The case of United States v. Sullivan, in opposing the Rau case, presents a concise and persuasive argument, by showing the trend in the history of national income tax legislation. The court quoted from the first income tax law to be passed under the Sixteenth Amendment of the federal Constitution, where it was provided that the net income of a taxable person

2 Revenue Act referred to here was the Act of 1916.
3 14 F. 2d 564 (C.A. 2d, 1926).
4 Internal Revenue Act, 1921, at § 6, 42 Stat. 238 (1921).
5 274 U.S. 259 (1927).
6 Internal Revenue Act, 1913, at § 4, 38 Stat. 167 (1913).
should include income from "the transaction of any lawful business. . . ."

The court went on to explain that the word "lawful" has been omitted from the corresponding sections of all subsequent revenue acts,\(^7\) thus clearly showing the legislative intent to make illegally obtained funds taxable income.

The argument is often advanced that Congress is being totally inconsistent by prohibiting an activity, then proceeding to collect taxes on the gains made from the same activity. The court in the Steinberg case, in answering this objection, quoted Justice Holmes' opinion in United States v. Stafoff,\(^8\) where he said, "Of course Congress can tax what it also forbids," and went on to say that such was the regular procedure, and properly so, in regard to prohibited liquor. The Steinberg court then concluded that if the Legislature could tax the liquor which it forbids, then it can also tax the gains made by dealing in that which is prohibited.\(^9\)

**INTERMEDIATE DECISIONS (1932-42)**

The decisions from this period lean quite heavily toward the proposition that money illegally obtained constitutes taxable income. However, some diversity of authority was still in evidence.

A 1932 case, North-American Oil v. Burnet,\(^10\) took the position that without some bona-fide legal or equitable claim, even though it be contingent or contested in nature, the taxpayer cannot be said to have received any gain or profit within the reach of the income tax law.\(^11\) This contention received support in the case of McKnight v. Commissioner of Internal Revenue,\(^12\) where the defendant had embezzled the funds in question. The court in this case conceded that profits made from the use of embezzled funds are income, and taxable as such. However, the court went on to declare that no taxable gain arose from the embezzlement itself under Section 22(a) of the 1936 Revenue Act.

The North-American Oil and McKnight cases must be considered the minority in deference to the great number of cases taking a contrary view during this period. In a prosecution for the failure to pay income tax or to file a return, it was held, in 1933, that bribes accepted by the defendant from unions seeking admission to the association of which defendant was vice-president, constituted taxable income.\(^18\) In a 1935 prosecution against

\(^7\) E.g., Internal Revenue Act, 1928, at § 22, 45 Stat. 797 (1928).
\(^8\) 260 U.S. 477 (1923).
\(^9\) Steinberg v. United States, 14 F. 2d 564 (C.A. 2d, 1926).
\(^10\) 286 U.S. 417 (1932).
\(^11\) Internal Revenue Act, 1928, at § 22, 45 Stat. 797 (1928).
\(^12\) 127 F. 2d 572 (C.A. 5th, 1942).
\(^18\) United States v. Commerford, 64 F. 2d 28 (C.A. 2d, 1933).
a county commissioner for attempting to evade income tax, it was stated that, "because the part of the net income omitted from the income tax report was income derived from unlawful transactions was no defense to the charge of attempting to evade income tax."\textsuperscript{14} A 1942 case held that the receipt of $50,000.00 as a ransom payment for a kidnapping constituted taxable income.\textsuperscript{15}

In specific refutation of the argument, as advanced in the \textit{North-American Oil} and the \textit{McKnight} cases that illegally received money is not taxable because the taxpayer does not have good title to it, it must be stated that there are several cases, besides those already cited, in which persons have been taxed upon property which could have been recovered from them. For example, if a lender takes usurious interest (on an accrual basis), he must include his apparent profit on his return.\textsuperscript{16} When a railroad collects too-large fares, the excess is income, although the passengers have a theoretical right of restitution.\textsuperscript{17} An unlawful bonus acquired by a director at his company's expense was held to be income.\textsuperscript{18}

Justice Learned Hand, in \textit{National City Bank of New York v. Helvering}, said of the \textit{Rau} case:

\textbf{RECENT DECISIONS (1946-55)}

In a 1946 case, \textit{Commissioner v. Wilcox}, wherein the defendant embezzled money and dissipated it in gambling houses, the Supreme Court of the United States held that the proceeds of the embezzlement did not constitute taxable income. In the language of the court, "Not every benefit received by a taxpayer from his labor or investment necessarily renders him taxable. Nor is mere dominion over money or property decisive in all cases.\textsuperscript{20} The court went on to say that the reason that embezzled money

\textsuperscript{14} Chadick v. United States, 77 F. 2d 961 (C.A. 5th, 1935).
\textsuperscript{15} Humphreys v. Commissioner, 125 F. 2d 340 (C.A. 7th, 1942).
\textsuperscript{16} Magruder v. Barker, 95 F. 2d 122 (C.A. D.C., 1938).
\textsuperscript{17} Chicago R.I. & P.R. Co. v. Commissioner, 47 F. 2d 990 (C.A. 7th, 1931).
\textsuperscript{18} Board v. Commissioner, 51 F. 2d 73 (C.A. 6th, 1931).
\textsuperscript{19} 98 F. 2d 93 (C.A. 2d, 1938).
\textsuperscript{20} Commissioner v. Wilcox, 327 U.S. 404, 407 (1946).
does not come under the definition of taxable income in the Internal Revenue Code is obvious upon the face of the statute, which says, "A taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain, and (2) the absence of a definite unconditional obligation to repay or return that which would otherwise constitute a gain."\(^{21}\)

*North-American Oil v. Burnet*\(^{22}\) was cited in support of this contention that money cannot constitute income to an individual unless he holds it under some bona fide legal or equitable claim. The court in the *Wilcox* case felt that the situation was analogous to that of a lender-borrower relationship, when they said: "... nor can taxable income accrue from the mere receipt of money or property which one is obliged to return or repay to the rightful owner. ..."\(^{23}\) In commenting on the commissioner's contention that the defendant's dissipation of the money in gambling houses rendered the money taxable, the court held that such dissipation could no more create taxable income to the embezzler-dissipater than the insolvency or bankruptcy of an ordinary borrower causes the loans to be treated as taxable income to the borrower.

In *Rutkin v. United States*,\(^{24}\) the United States Supreme Court was faced with the decision of whether or not $250,000.00, extorted by Rutkin, should be deemed taxable. A five to four decision ruled that the extorted funds were subject to the income tax.

The majority of the court first pointed out, as has already been discussed herein, that the first Revenue Act\(^{25}\) contained the phrase "... from the transaction of any lawful business"; while the revised Act of 1916 excluded the word *lawful*.\(^{26}\) This, they said, demonstrated the congressional intent to tax illegally gained funds. Secondly, the majority opinion declared that the administrative and judicial recognition of the taxability of unlawful gains of many kinds is widespread and settled, citing many of the cases already discussed herein.\(^{27}\) Concluding, the five concurring justices said:

We think the power of Congress to tax those receipts as income under the Sixteenth Amendment is unquestionable. The broad language of section 61(a) supports the declarations of this court that Congress in enacting that section exercised its full power to tax income.\(^{28}\) We therefore conclude that section 61(a) reaches these receipts.\(^{29}\)

\(^{21}\) Ibid., at 408.
\(^{22}\) 286 U.S. 417 (1932).
\(^{23}\) 287 U.S. 417 (1932).
\(^{24}\) 343 U.S. 130 (1952).
\(^{25}\) Internal Revenue Act, 1913, at § b, 38 Stat. 167 (1913).
\(^{27}\) E.g., Humphreys v. Commissioner, 125 F. 2d 340 (C.A. 7th, 1942).
\(^{28}\) Internal Revenue Act, 1954, at 61(a), 26 U.S.C. Supp. III 678, says: "Except as otherwise provided in this subtitle, gross income means all income, from whatever source derived. . . ."
The dissent of the Rutkin case was based on two lines of reasoning. The first is substantially the same rationale underlying most of the previous decisions of this nature, that is, one who extorts money not owed him has neither legal nor equitable claim to the extorted money and is under a continuing obligation to return it to its rightful owner. The Wilcox case is cited for support. The other basis for dissent is different from any judicial approach yet taken, and one which is extremely interesting. It can best be conveyed by quoting from the dissenting opinion, written by Justice Black:

To all intents and purposes, gamblers and bootleggers are engaged in going businesses and make regular business profits which should be taxed in the same manner as profits made through more legitimate endeavor. However in my judgment, it stretches previous tax interpretations too far to classify the sporadic loot of an embezzler, an extortioner, or a robber as taxable earnings derived from a business, trade or profession. I just do not think Congress intended to treat the plunder of such criminals as theirs.\(^{30}\)

Now that the line has been drawn between the Wilcox case (along with the dissent in the Rutkin case) on one side, and the majority opinion of the Rutkin case on the other, a few 1955 decisions will be examined to see which line of reasoning they chose to follow. Where the business manager of a labor welfare organization arranged with a painting contractor to overstate his bills to the organization, then approved and paid the bills, and finally received the amount of the overpayment from the contractor, such receipts constituted taxable income.\(^{31}\) Where defendants, in the course of their employment as traffic managers and solicitors of bids for subsidiaries of steel company, used their position to extract personal gains in the form of kickbacks from companies interested in doing business with their employers, the kickbacks constituted income to the defendants—despite the fact that the kickbacks constituted the proceeds from embezzlement required to be restored to the employer.\(^{32}\) In a case where a corporation president embezzled money from corporate bank accounts, it was declared that Commissioner of Internal Revenue v. Wilcox governs and that Rutkin v. United States does not apply. The court here was of the opinion that Rutkin did not completely obliterate Wilcox.\(^{33}\) The court then cited Marienfield v. United States, where it was said:

Since the court in the Wilcox case flatly held that embezzled funds were not taxable income to the embezzler and in the Rutkin case has unequivocally held that extorted funds were taxable income to the extortionist, the line of demar-

\(^{30}\) Ibid., at 140.


cation lies between those rather closely related factual situations and must be determined by the facts in the individual case.  

The conclusion was then drawn that the facts in the instant case were closer to those of Wilcox, so that case was followed.

A casual inspection of the above-mentioned recent decisions will reveal the considerable amount of judicial "fencing" which has been carried on in this area. For example, Justice Black, in the Rutkin case, drew a conclusion which meant, in effect, that the determining factor of taxability is the incidence of occurrence of the activity from which the illegal funds are derived. Thus, a distinction is made between the steadier, more efficient crimes, such as bookmaking and bootlegging, and the sporadic-type crimes, such as embezzlement and extortion—for the purpose of determining which criminals should have their receipts taxed. The court in the Marienfield case then proceeded to "split the hair" a bit finer by making a distinction between embezzlement and extortion, so far as taxability is concerned; and it ruled that while money derived from the latter is taxable, one deriving funds by the former method has no income tax liability.

There remains one aspect for consideration. That is, is the federal government using its taxing power to punish those who participate in illegal activities? In other words, there are those who feel that some courts are first deciding that criminals should have their monetary intake taxed, and then, in seeking legal justification for such decision, proclaiming that such intake represents income under the Revenue Act. To lend support to the fact that this problem exists, we quote from Justice Black's dissent in the Rutkin case, wherein he was joined by three of the other justices:

Since it seems pretty clear that the government can never collect substantial amounts of money from extortioners, there must be another reason for applying the tax law to money they extract from others . . . the only other reason that occurs to me is to give Washington more and more power to punish purely local crimes such as embezzlement and extortion.

Numerous legal as well as ethical considerations arise in connection with this theory of federal "encroachment" on state jurisdiction. It is not to be argued whether or not this theory is correct, nor to deal with these collateral considerations. Suffice to say, that in considering the state of the law in this area, one should be cognizant of the possibility that some of the decisions declaring illegal gains to be taxable may have been motivated by these "extraneous" factors. In other words, the court may be trying to prevent a wrongdoer from accomplishing something which an honest man, in most instances, cannot, that is: acquiring money and not surrendering a portion of it to the government.

35 E.g., Internal Revenue Act, 1936, at § 22, 49 Stat. 1657 (1936).
In summary, it can be seen that the split of authority which developed shortly after the passage of the 1916 Revenue Act is in existence, even at the present time; but it can be safely concluded that the weight of authority is made up of the cases holding illegally obtained money to be taxable income. The rationale usually relied upon is that since Congress saw fit to revise the 1913 Revenue Act to omit the word "lawful" from the definition of gross income, it manifested an obvious intent to tax the profits of crime. The primary legal contention of the minority is that since the taxpayer does not have good legal or equitable title to the unlawfully-acquired funds (in other words, he is under a continuing obligation to return them to their rightful owner), they should not be considered taxable to him.\footnote{Commissioner v. Wilcox, 327 U.S. 404 (1946).}

Aside from the legal issues involved, there are strong policy aspects to consider. The arguments for both sides are presented in \textit{United States v. Sullivan}, where it was explained, in essence, as follows.\footnote{274 U.S. 259 (1927).} The minority felt that Congress could not have intended to include the gains from crime within the meaning of the income tax code, because the effect would be to place legitimate and illegitimate transactions on the same footing. It is argued that strong reasons of public policy require that the gains of commercial dealings, which are also criminal, be regarded as beneath the contempt of the law for purposes of taxation. The inconsistency of the government in prohibiting an act, and at the same time subjecting it to taxation for purposes of revenue is obvious. On the other hand, argues the majority, it certainly does not satisfy the standard concept of justice to tax those who are engaged in legal enterprise, and allow those who thrive by violation of the law to escape. It seems doubtful that Congress should intend that an individual set up his own wrong to avoid taxation, and thereby increase the burden on those who are lawfully employed.

It becomes apparent that either a future revision of the Internal Revenue Code, or a broad, yet well-defined judicial interpretation of the present code is necessary to clarify this area of the tax law where confusion and inconsistency have reigned for four decades. Whether or not one of these reform measures is forthcoming is a matter for conjecture; but it would certainly be most welcome.