RECENT CASES

CONSTITUTIONAL LAW—FREEDOM OF SPEECH—RIGHT OR PRIVILEGE.—The defendants sought to unionize complainant's business and to induce complainant to sign a closed shop contract. He was willing to sign such a contract if a majority of his employees desired it, but no employee evidenced such a desire. Following complainant's refusal to sign, defendants visited complainant's customers and threatened to picket and boycott them if they bought from complainant. Some customers cancelled orders, others refused. The defendants picketed the latter group and distributed circulars among passersby calling upon them not to buy from this group of customers of complainant. Defendants threatened to picket complainant's place of business. The complainant then filed a bill for an injunction to restrain the defendants' activity. *Held,* injunction granted. Acts complained of constituted a private nuisance. No constitutional guarantees of defendants would be violated by the injunction. *Mitnick v. Furniture Workers Union, Local No. 66, C.I.O. of Newark*, 124 N.J.Eq. 147, 200 Atl. 553 (Chan. 1938).

If this case only involved the element of picketing it would not warrant further discussion. As the court points out, the law of this state is settled that picketing where no strike or labor controversy exists is unlawful.[1] The New Jersey statute prohibiting injunctions in certain types of labor disputes has no application to the factual situation in this case, particularly insofar as the case involves secondary boycotting.[2]

The interesting phase of this case revolves around the question of the right of the defendants to distribute circulars, involving as it does the constitutional guarantees of freedom of speech and of the press. The court has propounded a theory of constitutional law which is unique and at the same time ominous to those who cling to the State and Federal Constitutions as the bulwarks of their individual liberty in a world that seems to stress the authority of the state. The point of

1. Evening Times P. & Pub. Co. v. American Newspaper Guild, 124 N.J.Eq 71, 199 Atl. 598 (E. & A. 1938); International Ticket Co. v. Wendrich, 123 N.J.Eq. 172, 196 Atl. 474 (E. & A. 1938); Feller v. Local 144, International Ladies Garment Workers Union, 121 N.J.Eq. 452, 191 Atl. 111 (E. & A. 1937).

2. R.S. 1937, 2:29-77; P.L. 1926, Chap. 207.

view of the court is that there are two classes of constitutional rights: absolute rights, which are essentially property rights and qualified rights in the nature of privileges. In the second category goes the "so-called" right of free speech. Whenever a member of the second category clashes with a member of the first, the privilege must give way to the right; the "privilege" of freedom of speech must give way to the "right" to the possession of property.

It is not without significance that the court cites no authority for its views, as those views are counter to the fundamental principles of constitutional law. At the heart of our American democracy stands the individual whose unalienable rights expressed in the Declaration of Independence it is the duty of the American government to protect. The state is the social institution set up to guarantee and protect the rights of the individual. Among those rights are to be found the right to freedom of speech and the right to the ownership of property as well as the right to religious freedom and others. Not one of these rights is absolute in the sense that under no circumstances can it be overruled. All of these rights have their limitations. In the name of religious worship one cannot practice polygamy or offer up human sacrifices. In the name of freedom of speech one cannot advocate forceful overthrow of the government nor speak libel about his neighbor. In the name of the right to private property one cannot endanger the health of his community nor resist the state's power of eminent domain. These rights with their limitations are coordinate rights, however, and one of them is not, *ipso facto,* on a higher plane than the other.

There is no basis in the law of New Jersey for the view that freedom of speech is a privilege and not a right. The State Constitution by its very language denies it. "Every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."[3] The cases interpreting this section of the Constitution, while not numerous, are unanimous in treating freedom of speech as a right, although pointing out its limitations. No case involves the direct comparison of the right to the possession of

3. Constitution of N. J., Article I, Section 5

private property with that of freedom of speech.

The courts have had to determine the constitutionality of criminal statutes forbidding speeches advocating the unlawful destruction of property.[4]

During the period of the World War the state government enacted a sedition act similar to the act passed by Congress.[5] Born in the heat of war passion the act was extreme in language and was interpreted even more extremely by the executive branch of the government. Our Court of Errors and Appeals was called upon to determine the constitutionality of the statute on the appeal of several defendants convicted under it.[6] The court divided on the question, the majority upholding the act although there was a vigorous dissenting opinion.[7] Both

4. State v. Scott, 86 N.J.L. 133, 90 Atl. 235 (Sup. Ct. 1914); State v. Boyd, 86 N.J.L. 75, 91 Atl. 586 (Sup. Ct. 1914). The court in upholding such a statute said in State v. Boyd: "The fundamental answer to the point raised is that free speech does not mean unbridled license of speech, and that language tending to the volation of the rights of personal security and private property, and towards breaches of the public peace, is an abuse of the right of free speech, for which, by the very constitutional language invoked, the utterer is responsible. . . . That the right of free speech is not unlimited is well settled."

5. P.L. 1918, Ch. 44. Now, as amended, in R.S. 1937, 2:173-12 to 2:173-14.

6. State v. Tachin, 93 N.J.L. 485, 108 Atl. 318 (E. & A. 1919), *aff'd*, 92 N.J.L. 269, 106 Atl. 145 (Sup. Ct. 1919).

7. The dissenting opinion of Mr. Justice Minturn stands out as a forthright defense of individual liberty at a time when the individual's rights were easily disregarded. "If legislation of this character is to pass unchallenged by courts of justice, whose officers are sworn to uphold the Constitution as the very bedrock of our legal system, the time is not inopportune for a revision of the fundamental law, comporting with the excision of the guaranties contained in the Bill of Rights, and Magna Charta, which have been the cherished legacy of British and American law since the epochal day at Runnymede. . ."

"The presence of such legislation upon the statute book is not only subversive of personal liberty to speak, write and publish one's sentiments upon government policies, and in criticism of acts of state and national agencies, rights which were upheld in the seventeenth century, in the King's Bench in England, by Lord Erskine, in the famous trials of Hardy and Lord George Gordon, but its legal recognition is equally subversive of constitutional and party government, and must inevitably supersede it, by the substitution of a Napoleonic bureaucracy, in which the inevitable *coup d'etat* awaits only the advent of the man on horseback."

majority and minority recognized freedom of speech as a right but they divided over the extent to which that right could be limited.

In the most recent pronouncement of New Jersey's court of last resort on the subject, a case is found which has more similarity to the instant case.[8] The defendants engaged in blaring, raucous name-calling and misrepresentations about complainant shouted from a sound truck. The majority of the court rightly held that to restrain such activities was not a violation of a constitutional guarantee. An admirable statemen of the proper approach to a conflict of constitutional rights is given in the opinion. "The problem is to save to each such a degree of freedom as is commensurate with the protection of the rights of others."

It may here be pointed out that the same Vice Chancellor who delivered the opinion in the instant case, in an earlier case, treated property and personal rights as on an equal basis. "Under our basic law property rights are entitled to the same protection as personal rights."[9]

The Supreme Court of the United States has not been called upon to deal with freedom of speech as frequently as might be expected considering the importance of the subject. When called upon to do so, however, it has never treated freedom of speech as a privilege but always as a right, which, of course, has its limitations. Most of the decisions are the result of constitutional tests of the Sedition Act enacted during the last war.[10] The right of free speech has been further held to be guaranteed by the Fourteenth Amendment to the Federal Constitution.[11]

For another vigorous dissenting opinion by Justice Minturn, see Colgan v. Sullivan, 94 N.J.L. 201, 109 Atl. 568 (E. & A. 1920).

8. Evening Times P. & Pub. Co. v. American Newspaper Guild, 124 N.J.Eq. 71, 199 Atl. 598 (E. & A. 1938).

9. International Ticket Co. v. Wendrich, 122 N.J.Eq. 222, 193 Atl. 808 (Chan. 1937).

10. Schenck v. United States, 249 U.S. 47 (1919); Abrams v. United States, 250 U.S. 616 (1919); Schaefer v. United States, 251 U.S. 466 (1920). See particularly dissenting opinion of Justice Holmes in Abrams v. United States.

11. Stromberg v. California, 283 U.S. 359 (1931).

CONFLICT OF LAWS—WHAT LAW GOVERNS THE VALIDITY OF A TRUST OF CHOSE IN ACTION.—Depositor, whose domicile was in New Jersey, caused his bank account in New York to be changed to a trust for a named beneficiary, whose domicile was also in New Jersey. *Held*: Title to the account on depositor's death is to be determined by the law of New York rather than by the law of New Jersey. *Cutts v. Najdrowski,* 123 N.J.Eq. 481, 198 Atl. 885 (E. & A. 1938).

The transfer was invalid in New Jersey since it violated the New Jersey statute of wills[1] but created a valid trust in New York.[2] The court thus accepts the broad general principle that the validity of a trust of a chose in action is determined by the law of the place of the transaction.[3] The case further indicates a universal judicial tendency to uphold *inter-vivos* trusts.[4] Unfortunately, there is no attempt at a positive rationalization of the rule by the court.

The decision impliedly discards the several alternative solutions to the problem; *viz.,* domicile, on the analogy to testamentary trusts[5] and the place of administration,[6] but is supported by a weight of precedent.[7]

1. *In re* Farrell's Estate, 110 N.J.Eq. 260, 159 Atl. 617 (Prerog. 1932); *In re* Coyle's Estate, 9 N.J.Misc. 158, 154 Atl. 774 (Prerog. 1931); Thatcher v. Trenton Trust Co., 119 N.J.Eq. 408, 182 Atl. 912 (Ch. 1935). See also note in (1937) II UNIV. OF NEWARK LAW REVIEW 176.

2. In the Matter of Totten, 179 N.Y.Supp. 112, 70 L.R.A. 711 (1904).

3. Hutchinson v. Ross, 262 N.Y. 381, 187 N.E. 65 (1933); CONFLICT OF LAWS RESTATEMENT, sec. 294 (2). *Cf.* Direction Der Discounts—Gesellschaft v. United States Steel Corp., 267 U.S. 22. See Beale, *Living Trusts of Movables in the Conflict of Laws* (1932), 45 HARVARD LAW REVIEW 969, 970.

4. See note to Hutchinson v. Ross, *supra, note 3,* in (1933) 47 HARVARD LAW REV. 350.

5. Swetland v. Swetland, 105 N.J.Eq. 608, 149 Atl. 50 (1930); *aff'd,* in 107 N.J.Eq. 504, 153 Atl. 907 (E. & A. 1931). See comment in (1932) I MERCER BEASLEY LAW REVIEW No. 2, 96.

6. Equitable Trust Co. v. Pratt, 117 N.Y.Misc. 708, 193 N.Y.Supp. 152 (1922), *aff'd,* 206 App. Div. 112, 203 N.Y.Supp. 83 (1924); Robb v. Washington & Jefferson College, 185 N.Y. 485, 75 N.E. 359 (1906).

7. Hutchinson v. Ross, *supra,* note 3; Bouree v. Trust Francais des Actions de la Franco—Wyoming Oil Co., 14 Del. Ch. 332, 127 Atl. 56 (1924). *Cf.* Wilmington Trust Co. v. Wilmington Trust Co., 186 Atl. 903 (1936), modifying 180 Atl. 903 (1936). But *Cf.* Swetland v. Swetland, *supra,* note 5. *Contra*

Many of the decisions in accord are further supported by the element of intent.[8] Aside from a criticism of intent as a basis of conferring jurisdiction and testing validity, it is doubtful whether there is justification in emphasizing it in a situation such as is presented by the instant case, as the jurisdiction selected must have a normal relation to the transaction,[9] there must be a confluence of other possible points of contact if the *lex sitae* of the transaction is to take precedence over the law of the domicile of the settlor.[10] Thus, it is questionable if the doctrine will be extended to cases involving conflicting rules against accumulations and perpetuities[11] wherein public policy is given strong emphasis.

The decision by holding the place of the transaction to be determinative of the validity of the trust dispenses with the necessity of ascertaining the *situs* of a bank account.[12] This problem is undoubtedly the reason for the distinction between an *inter vivos* trust of chattels and an *inter vivos* trust of a chose in action.[13]

The rationale of the decisions is far from satisfactory. One writer has pointed out that such a simplification is apt to distort the decisions, as it is not difficult to imagine cases where, because of the differences in the pattern of laws and "contacts," its application will work results wholly out of harmony with the spirit which informs the opinion.[14]

It is also to be hoped that future decisions make the necessary distinction between contract rights and property rights that may arise

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Hasbrouck v. Martin, 120 N.J.Eq. 96, 183 Atl. 735 (Prerog. 1936).

8. Hutchinson v. Ross, *supra*, note 3. See 47 HARVARD LAW REVIEW 182, note 16. *Cf.* Swetland v. Swetland, *supra*, note 5.

9. See Seeman v. Phila. Warehouse Co., 274 U.S. 403, 408, 47 Sup. Ct. 626, 628 (1927).

10. See 33 COLUMBIA LAW REVIEW 1251.

11. See Chamberlain v. Chamberlain, 43 N.Y. 424 (1871); Hope v. Brewer, 136 N.Y. 126, 32 N.E. 558 (1892); Robb v. Washington & Jefferson College, *supra*, note 6; Appeal of Fowler, 125 Pa. St. 388, 17 Atl. 431 (1889).

12. For a discussion of this problem see Redzina v. Provident Institute, 96 N.J.Eq. 346, 125 Atl. 133 (E. & A. 1924).

13. See Sec. 294 CONFLICT OF LAWS RESTATEMENT.

14. Cavers (1933), *A Critique of the Choice of Law Problem*, 47 HARVARD LAW REVIEW 173, 182.

simultaneously with the making of the contract,[15] thus rationalizing the rule of the instant case with the rule that the effect of an assignment of a contract right as between the assignor and the assignee is determined by the law of the place of assignment.[16] Whenever an assignment is made under circumstances that legal title passes to the assignee, but he undertakes to deliver to a third person, the relation of trustee and *cestui que trust* arises.[17] The validity of the contract is to be tested by the law of the place of the making, but the equitable interest is determined by the place of the *situs* by settled principles of international law. This distinction, it is submitted, is a necessary one in testing the soundness of the rule of the instant case.

The importance of the decision is that it provides prospective settlors with precise information, even though the rationale is hardly more satisfactory than a judicial application of that law which will most effectively sustain the trust.[18] If there is "distortion" in the application of the rule, it will be the premium placed on certainty in the field.

CONTRACTS—VALIDITY OF SUNDAY BAIL BOND.—Respondent was duly taken into custody under and by virtue of a Writ *ne Exeat,* and was confined to the County Jail, gaining his release after the posting of an appropriate bond with surety, the bond being posted with the Sheriff of the County on a Sunday. The suit in which the Writ of *ne Exeat* was issued, proceeded against respondent, and upon his non-compliance with the provisions of the bond, the present action was instigated. The surety, who was made a respondent, was looked to

15. See generally WILLISTON ON CONTRACTS (Rev. Ed. 1936), sec. 348, and CONTRACTS RESTATEMENT, sec. 133.

16. CONFLICT OF LAWS RESTATEMENT, sec. 350.

17. WILLISTON, *supra,* note 15.

18. See (1933) 47 HARVARD LAW REVIEW 350. We are reminded of the late Mr. Justice Holmes' familiar analogy to the traffic problem: That it makes very little difference whether we drive on the right or left hand side of the street, what is important is that it be *settled* that we are to drive either on the right or on the left.

for payment of the penalty incurred by the forfeiture. Respondent surety, in seeking freedom from his obligation, claimed the bond ineffective because its Sunday execution was nullified by the VICE AND IMMORALITY ACT.[1] *Held*: a bond posted on Sunday to accomplish the release of one in custody is correctly placed within the charity exception to the VICE AND IMMORALITY ACT, thereby escaping the prohibitive effect of the Act. *Ballantine v. Ballantine,* 123 N.J.Eq. 577 (E. & A. 1938).

The construction of the Sunday Statutes which are in force in most of the American states has resulted in some conflict of authority.[2] The common law of England made no distinction between Sunday and secular days as to labor or the transaction of business. But in 1677 a Statute[3] was enacted forbidding any person to exercise "worldly labor or business or work of their ordinary calling"[4] on the Lord's Day, works of necessity and charity excepted. Therefore, the prohibition of

1. REVISED STATUTES, 2:207-1.

2. The common prohibitions within the Statutes are the acts of work, labor and business. Under such restrictions the contract formed for such purpose is void. However, is the contract entered into on a Sunday to be performed on a secular day also illegal? This is dependent upon the interpretation of the courts. Some courts, Reynold v. Stevenson, 4 Ind. 619 (1853); Cranson v. Goss, 107 Mass. 439 (1871), place the mere act of forming a contract, *sans* performance to be work, labor or business. Some courts do not. Merritt v. Earle, 29 N.Y. 115 (1864); Richmond v. Moore, 107 Ill. 429 (1883), holding that mere formation of a contract on Sunday is not sufficient to bring it within the effect of the Statute. In Berry v. O'Niel, 92 N.J.L. 63, 104 Atl. 25 (Sup. Ct. 1918) it was held that final consummation of the contract had to be accomplished on Sunday before it was within the scope of the Statute. Under such a principle an offer made on Sunday but accepted on a secular day creates a valid contract. Dickenson v. Richmond, 97 Mass. 45 (1867); McDonald v. Fernald, 68 N.H. 171, 38 Atl. 729 (1894); Stackpole v. Simonds, 23 N.H. 229 (1851). So a formal instrument such as a bond or deed though signed on Sunday is valid if delivered on a secular day since until delivery the transaction is incomplete. Hall v. Parker, 37 Mich. 590 (1877); Schwab v. Rigby, 101 Minn. 395, 38 N.W. 101 (1888), *Contra*: Int. Book Co. v. Ohl, 150 Mich. 131, 111 N.W. 768 (1907).

3. 29 Charles 11 C. 7.

4. Any sale or contract without one's ordinary calling was valid. Bloxsom v. Williams, 3 B. & C. 232 (1824); Smith v. Sparrow, 4 Bing. 84 (1827); Scarfe v. Morgan, 4 M. & W. 270 (1838).

certain employments or undertakings is purely statutory. Excepting these statutes all contracts otherwise legal are valid, though made on Sunday.[5]

The New Jersey Statute has maintained the exceptions originated in the English Statute and it is one of these, works of charity, which is relied upon in the present case. While it is a fact that ample authority exists to the effect that it is an act of charity to post bail bond on Sunday in criminal proceedings,[6] and such authority being further strengthened by a Statute in New Jersey[7] expressly permitting such bail bond to be accepted; our Legislature has not enacted a similar statute in regard to civil bail bond. The effect then is to require a dependance upon the common law in a determination of the validity of a bail bond posted in a civil proceeding on Sunday. If, as the court states, the Criminal Statute be declaratory of the common law and that such common law is applicable to these civil proceedings, we cannot agree that the common law in its inception and subsequent broadening has been correct in interpreting a Sunday posting of bail bond to be in the nature of an act of charity.

A definition of charity has caused some difficulty in some courts.[8] However, it would seem there is little justification for this difficulty and the one upon which the present court relied, "that it is a *gift* to be applied consistently with existing laws for the benefit of an *indefinite number of persons* either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint; by assisting them to establish themselves in life; or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of Government. It is immaterial whether the purpose is called charitable in the gift itself if it be so

5. Richmond v. Moore, 107 Ill. 429 (1883); Prout v. Hoy Oil Co., 263 Ill. 54, 105 N.E. 26 (1914); Rodman v. Robinson, 134 N.C. 503, 47 S.E. 19 (1904).

6. Hammons v. State, 59 Ala. 164 (1877); Salter v. Smith, 55 Ga. 244 (1875); Weldon v. Colquit, 62 Ga. 449 (1879); Adams v. Candler, 114 Ga. 151 39 S.E. 893 (1901); Johnston v. People, 31 Ill. 869 (1863).

7. REVISED STATUTES, 2:187-8.

8. Staines v. Burton, 17 Utah 331, 53 Pac. 1015 (1898).

prisoners brought into custody by virtue of a Writ *ne Exeat,* or even further, prisoners brought into custody by virtue of a Writ *ne Exeat* on Sunday. He was a particular individual treated as such. The term charity does not, it would seem, extend particular gifts to particular persons.[16]

Generally, definitions and interpretations of charity embrace the word gift.[17] A gift is a gratuity.[18] Is it, therefore, proper to call an act charitable if it be instigated by the desire for personal gain? It is common knowledge that the business of suretyship has now grown to a formidable one, and as a consideration for supplying bond or bail a certain charge is levied against the prisoner.[19] Since the term charity implies a gift in some form, it further implies the bestowal of goods or money, rendition of service or awarding of privileges free to the recipient, without gainful return and it is not of the character of a charity in a legal sense to bestow benefits when the recipient is required to return an adequate consideration.[20] A gift may therefore fall within the meaning, when used in connection with charity, if the purpose to be obtained is not personal, private or selfish.[21] The test of whether or not an act is charitable is in examination of the purpose.[22] If the purpose be for a gain and the result takes on the aspects of a charitable act, it still does not come within the scope of the true meaning as the purpose or motive of the act should be kept in view rather than the

16. In Yates v. Yates, (N.Y.) 9 BARBOUR'S SUPREME COURT RECORDS 324 (1850) in 5 R.C.L. 91, this statement appears: "The non-legal mind would undoubtedly consider it an act of charity for one to aid another in the hour of sickness, distress or need. In law such an act would amount to benevolence, not charity."

17. *Supra,* note 9. *Supra,* note 11.

18. Albright v. Albright, 153 Iowa 397, 133 N.W. 737 (1911).

19. In some instances a gratuitous bondsman is involved. In such a case the above does not apply. Although it does not appear in the record it has been determined that the surety in this instance was compensated.

20. Susman v. Young Men's Christian Assn. of Seattle, 101 Wash. 487, 172 Pac. 554 (1918); Arnheiter v. State, 115 Ga. 572, 41 S.E. 989 (1902). "There is no suggestion of any charitable intention on part of the accused for the testimony was that he sold for cash."

21. *In re* Burnham's Estate, 183 N.Y.S. 539, 112 Misc. Rep. 560 (1920).

22. Haggerty v. St. Louis K. & N. W. R. Co., 100 Mo. App. 424, 74 S.W. 456 (1903).

results or accomplishments of it.[23] The question, therefore, must be answered in the affirmative to the effect that in a situation where a Surety is recompensed for his services[24] the resulting act is not one of charity because it is stripped of its gratuitous nature.

As to the contractual aspect of the present case the surety's act of giving bond amounted to an executory promise under seal to produce the prisoner within the jurisdiction on a certain date of requirement. Performance by the Surety was executory in nature. It has been held by authority that the invalidity of Sunday contracts applied to executory contracts[25] and further holds that where contracts are executed, *i.e.,* formed and performed on a Sunday, the parties are in *pari delictu* and neither will be relieved by the court from the position in which he finds himself.[26] It has been held that where a vendor and vendee have passed money and land on Sunday executing a contract in full there could be no recovery of the consideration to either party on the ground that the transaction took place on Sunday.[27] Generally speaking, therefore, executory contracts made on Sunday will not be enforced, while executed contracts will not be disturbed.[28]

In conclusion it is submitted that this situation being identified as a valid act of charity is not in accordance with the true legal significance of the word and its connotations. A sounder approach to the

23. Fort Madison First M. & E. Church v. Donnell, 110 Iowa 5, 81 N.W. 171 (1899).

24. *Supra,* note 19.

25. Williams v. Rapid Transit Co., 257 Pa. 354, 101 Atl. 748 (1917); Rickards v. Rickards, 98 Md. 136, 56 Atl. 397 (1903)

26. Harriman v. Bunker, 79 N.H. 127, 106 Atl. 499 (1919); Finn v. Donahue, 35 Conn. 216 (1868); Perkins v. Jones, 26 Ind. 499 (1866)

The hardship of this rule as to executory and executed contract will readily be seen where one party has performed. Not only is the promisee unable to enforce the contract but he must forfeit the consideration. In order to avoid a harsh result some courts hold that the retention of the consideration results in an implied assumpsit, Broadly v. Rea, 96 Mass. 20 (1867). Some courts have applied the subsequent ratification theory whereby an executory contract is not enforced nor an executed contract rescinded but enforces a subsequent promise made on a secular day. Cook v. Forker, 193 Pa. 461, 44 Atl. 560 (1899).

27. Wilson v. Calhoun, 170 Iowa 111, 151 N.W. 1087 (1915).

28. Horton v. Buffinton, 105 Mass. 399 (1870); Nibert v. Baghurst, 47 N.J.Eq. 201, 20 Atl. 252 (Ch. 1890).

problem would be to embrace the surety's act within the exception of necessity rather than charity. Necessity has been held to be that which if not done would create great discomfort or inconvenience to the individual.[29] Placing an individual in prison and subjecting him further to the subsequent conditions which are normal in such a placement may safely be described as creating a discomfort or inconvenience which is sharp although not dire in its effect. However, a dire necessity need not be shown to excuse the act, but rather an act which is reasonably necessary under the particular circumstances.[30] The necessity exception creates a basic problem of determination rather than definition. It has been held that if two reasonable minds could not disagree as to the necessity of the situation, the situation was entitled to be declared one of necessity, and further, if the act was of such a nature that no two reasonable minds could see within it an element of necessity; then as a matter of law it could be declared no necessity existed. Where, however, there is a discrepancy in the minds of persons as to the necessity of the act the jury will then be employed in considering the facts presented.[31]

If, therefore, the present case rested upon the exception of necessity there would be greater legal justification for accomplishing the desirable purpose of forbidding Respondent surety from rescinding his obligation merely because of his having made a bad bargain.

CORPORATIONS—LIABILITY OF H.O.L.C. IN TORT.—Plaintiff was injured in an accident arising from the disrepair of a house owned by the Home Owners Loan Corporation. Defendant pleaded immunity from suit by virtue of its being an arm of the United States Government. Judgment was entered for the plaintiff in the lower court. On appeal, *Held*: Affirmed. *Herman v. H.O.L.C.*, 120 N.J.L. 437, 200 Atl. 742 (Sup. Ct. 1938).

29. McAfee v. Commonwealth, 173 Ky. 83, 190 S.W. 671 (1917).

30. 25 R.C.L. 1421.

31. State v. Schatt, 128 Mo. App. 622, 107 S.W. 10 (1908). State v. Coffee, 225 Mo. App. 373, 35 S.W. (2nd) 969 (1931).

The decision rests on the grounds that liability to suit is a matter of Congressional intent[1] and that where the purpose of the agency partakes of the nature of private enterprise, a *fortiori* when the element of private profit is present, it is intended that the agency shall be liable as a private corporation.

It is submitted that the holding is sound and is in accord with decisions of the Federal Courts based on similar facts.[2] The New Jersey Courts have consistently held municipal corporations liable in torts arising out of the performance of a function in private enterprise.[3] In such a situation, the law casts upon the municipality the duties and obligations of private citizens.[4] The same doctrine has found favor in the Federal courts when "a government becomes a partner in any trading company, it divests itself . . . of its sovereign character and takes that of a private citizen."[5]

It is in this one respect, i.e., *sueability,* that agencies of the sovereign resemble private corporations, and it is advisable that the characterstic be retained. There is a need to protect the citizen in dealing with the ever-increasing governmental agencies, many of which are engaged in enterprises essentially of a private nature. Beyond this, the prediction as to what status a governmental agency might take is perilious.[6]

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1. Citing Federal Land Bank v. Priddy, 295 U.S. 229, 79 L. Ed. 1408 (19__).

2. Peanell v. H.O.L.C., 21 Fed. Supp. 497 (Dist. Ct., S.D., Maine, 1937).

3. See Olesiewicz v. Camden, 100 N.J.L. 336, 126 Atl. 317 (E. & A. 1924); Zboyan v. Newark, 104 N.J.L. 258, 140 Atl. 225 (Sup. Ct. 1928); Martin v. Asbury Park, 111 N.J.L. 364, 168 Atl. 612 (E. & A. 1933).

4. Olesiewicz v. Camden, *supra,* note 3.

5. Marshall, C. J. in Bank of U. S. v. Planters Bank, 9 Wheat. 904, 6 L. Ed. 244 (U. S. Sup. Ct. 1824); see also Salas v. United States, 234 Fed. 842 (C.C.A., 2nd Circ. 1916); Sloan Shipyards v. Emergency Fleet Corp., 42 Sup. Ct. 386, 258 U.S. 549, 66 L. Ed. 762.

6. See Emergency Fleet Corp. v. Wood, 42 Sup. Ct. 386 (not entitled to priority in bankruptcy); Emergency Fleet Corp. v. Western Union, 48 Sup. Ct. 198, 275 U.S. 415, 72 L. Ed. 345 (1927) (is entitled to a preferential rate extended to governmental communications); Federal Deposit Insurance Corp. v. Mangiaracina, 16 N.J.Misc. 203, 198 Atl. 777 (Circ. Ct. 1938) (does not come within rule of depositing security for costs as non-resident plaintiff, in suit in State courts).

FUTURE INTERESTS—TESTAMENTARY GIFT OVER AFTER A FEE.—By will[1] testatrix left property to her husband for his sole use and benefit during his life with a power of disposition and enjoyment as if the devise was absolute; at his death, so much of the property as was left was devised over to three nephews. *Held* that the gift was void as inconsistent with the rights of the first legatee. *Trafton v. Bainbridge,* 124 N.J.Eq. 179 (Ch. 1938).

The decision is based on the theory that a fee cannot be limited over after a fee,[2] a rule of construction that extends back to the common law of the feudal system. A future estate at the common law could be created only by way of reversion or remainder.[3] The "mounting of a fee upon a fee" was considered an invalid attempt to create a remainder.[4] The soundness of the rule in its application today can be questioned,[5] but it is too deeply embedded in New Jersey juris-

1. The third and fourth clauses of the will reads as follows: "*Third*: All the rest residue and remainder of my estate . . . I give, devise and bequeath to my husband . . . for his sole use and benefit *during his life* (italics ours) with full right and power to sell, transfer, and convey the same and use the whole or any part of the estate . . . for his own use and benefit in any manner he may deem proper, the intention hereof being that he shall at all times use and enjoy the whole or any part of my said property or estate the same as if this devise and bequest was absolute. "*Fourth*: At the decease of my said husband, I give, devise and bequeath so much of said estate property as shall remain, one-third thereof to my nephew Howard Trafton, one-third to my nephew Clifford Trafton, and one-third to the children of my nephew Clifford Trafton. . ."

2. Tooker v. Tooker, 71 N.J.Eq. 513, 64 Atl. 806 (Ch. 1906). Briggs v. Faulkner, 120 N.J.Eq. 1, 187 Atl. 540 (Ch. 1936) and cases therein cited; Klotz v. Klotz, 122 N.J.Eq. 31, 191 Atl. 854 (Ch. 1937); Brown v. Turpan, 122 N.J.Eq. 305 (Ch. 1937).

3. Co. LITTLETON, 217a; 2 BL. COM. 165; 4 KENT COM. 259; DIGBY, HIST. LAW OF REAL PROP. (5th ed.) 263; WILLIAM, REAL PROP. (17th ed.) 417; WALSH, LAW OF PROP. (2nd ed.) 463; Buckler v. Hardy, Croke. (Eliz.), 585 (tenant for life leased for four years and granted over the reversion "*habendum* from midsummer next," *held* the grant over void.)

4. WALSH, LAW OF PROP. (2nd ed.) 465; Blanchard v. Brooks, 12 Pick. (Mass.) 70; Hennessy v. Patterson, 85 N.Y. 91; see also Proprietors of Church, etc. v. Grant, 3 Bray (Mass.) 142.

5. It is doubtful if there ever was a valid reason for the rule. Seisen was not in abeyance, since the seisen of the first tenant would continue until the taking effect of the second fee. The reason historically given is that when the

prudence to hope for a change.[6] After the enactment of the Statute of Wills,[7] permitting the disposition of property by testamentary gift, interests void when created by the common law were good as executory devises.[8] But the gift over in the principal case could not take effect by way of executory devise,[9] for by its very nature an executory devise is indestructible.[10] The first taker having a power of complete disposition, necessarily has a corrolary power of destruction.[11]

But was the court correct in assuming that the first taker had a fee simple absolute? Where A is given property clearly *for life* with a power to dispose of the fee or an absolute interest and a gift over to B of any part of the property that remains undisposed of, A does not take a fee but a life estate with a power; and the gift over to B is valid.[12] In the peak case of *Downey v. Borden*[13] it was held that

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entire fee was given to the first taker there was nothing left of the fee to give anyone else. The rule seems to be an arbitrary application of the principle that future estates could be created only by way of remainder. The rule is sound from a feudal standpoint where seisen would be put in abeyance by its violation, but there is no sound reason for its application to a fee on a fee. See Walsh, *supra,* for a criticism of the rule.

6. See cases cited, *supra,* note 2.

7. 32 Henry VIII C. 1 (1540).

8. When created by a conveyance *inter vivos* the interests were good as springing or shifting uses after the enactment of the *Statute of Uses* (1535).

9. The question was not considered by the court in its opinion.

10. Mannings Case, 8 Coke 94b (1609); Lampets Case, 10 Coke 46b (1612); Pells v. Brown, Cro. Jac. 590 (1620) (Devise to A and his heirs forever, and if A should die without issue, living B, then to B and his heirs. A enters; and, after suffering a common recovery to the use of himself and his heirs, devises the land to C. A dies without issue in the lifetime of B. *Held:* Since the devise to A is in fee, the limitation over must be a executory devise. Taking under an executory devise, B is not barred by the recovery and may enter on the death of A without issue.) The indestructibility of executory limitations became firmly established and created an imperative need of some restriction on their creation; this was a leading factor in the evolution of the modern Rule against Perpetuities. See on this point LEWIS, PERP. 128-134; GRAY, PERP. sec. 159; CHALLIS, REAL PROP. 206; SPITZ, COND. AND FUTURE ESTATES, 194.

11. "A valid executory devise cannot subsist where there is an absolute power of disposition in the first taker . . ." Hoxsey v. Hoxsey, 37 N.J.Eq. at p. 21 (Ch. 1883).

12. CLAPP, WILLS AND ADM. IN NEW JERSEY (1937) and cases therein

where lands are devised in the first instance in language indeterminate as to the quantity of the estate (from which an estate for life would arise by implication), and words adapted to the creation of a power of disposal without restriction as to the mode of execution are added, the construction will be that an estate in fee is given; but where the quantity of the estate is expressly defined to be for life, the superadded words will be construed to be a mere power. The distinction, then, is between a devise made expressly for life, with a power of disposition annexed, and a devise in general terms with such a power annexed; in the former case an estate for life only passes, in the latter a fee.

The rule is founded in logic. The first taker may elect to take a fee, or an absolute interest.[14] But until he acts he has only a life estate.

In the principal case the will expressly stated that the first taker was to use the property "during his life." It is submitted that these words clearly created a life estate with a power of disposition within the rule of the *Downey* case. This being so, the gift over would be valid by way of remainder.[15] Such a construction would be consistent with the principle that if a gift over can be construed as a remainder it will not take effect as or be defeated by the rules applicable to an executory devise.[16]

WATERS AND WATER COURSES, NEGLIGENCE—DUTY OF A PUBLIC WATER COMPANY SUPPLYING WATER. — Plaintiff, the owner and operator of a hotel brought action against the Passaic Valley Water Commissioin, a publiic *quasi* corporation furnishing Plaintiff water, to recover damages to the plumbing system of his hotel resulting from

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cited.

13. 36 N.J.L. 460 (E. & A. 1872).

14. Courter v. Howell, 33 N.J.Eq. 80 (Ch. 1880); Lienau v. Summerfield, 41 N.J.Eq. 381, 4 Atl. 660 (Ch. 1886).

15. Naundorf v. Schumann, 41 N.J.Eq. 14, 2 Atl. 609 (Ch. 1886).

16. *In re* Lechmere v. Lloyd, 18 Ch. D. 524 (1881); Dean v. Dean, 3 Ch. 150 (1891); Blanchard v. Blanchard, 1 Allen (Mass.) 223 (1861).

the alleged negligence of the defendants. The water supplied to the subscribers contained an excessive amount of sand and the constant depositing of this sediment clogged the plumbing system, necessitating cleansing and repairing. *Held*: The defendant negligent because of its failure to exercise reasonable and due care in the performance of its duty as a water company, the negligence consisting of the construction of a type of pressure filter which discharges sand in water where a gravity filter preventing the discharge of water should have been constructed. This act, coupled with the failure of defendant to immediately install an indispensable sand trap for removing any discharge of sand, was found to constitute the proximate legal cause of the damage to the plumbing work. *Seiden v. Passaic Valley Water Commission*, 16 Misc. 301, 199 Atl. 420 (District Court of Passaic County, 1938).

The first and foremost duty of a water company is to deliver to the consumers potable water fit for domestic use and a dereliction of that duty by negligently furnishing water deleterious to the health renders the company liable for the harmful results of infected and polluted water.[1] Pure and wholesome water must be delivered, this has been construed to require the water to be reasonably free from any bacteria, suitable for domestic purposes, and devoid of any contamination detrimental to the individual.[2]

In order that Plaintiff have a good cause of action the Defendant must be proven negligent. In the absence of negligence there is no liability.[3] A water company supplying water is not a guarantor or insurer of the potability of water.[4] The water company is under the

1. Jones v. Mt. Holly Water Co., 87 N.J.L. 106, 93 Atl. 860 (Sup. Ct. 1915). Hamilton v. Madison Water Co., 116 Me. 157, 100 Atl. 659 (1917). Kohlmeyer v. Ohio Valley Water Co., 58 Pa. Super. Ct. 63 (1914).

2. Peffer v. Penn. Water Co., 221 Pa. 578, 70 Atl. 870 (1908). See also: (When it is stated the water must be fit for domestic use, and in no manner detrimental to the individual, a water company is not generally held liable for unfitness to the needs of a simple industry. There is no liability if the water furnished is wholesome for private consumption or for ordinary industrial purposes.) Oakes Mfg. Co. v. New York, 206 N.Y. 221, 99 N.E. 540, 42 L.R.A. (N.S.) 286 (1912).

3. Buckingham v. Plymouth Water Co., 142 Pa. 221, 21 Atl. 824 (1891).

4. Hayes v. Torrington Water Co., 88 Conn. 609, 92 Atl. 406 (1914); Aronson v. City of Everett, 136 Wash. 312, 239 Pac. 1011 (1925); City of Salem

duty of determining whether or not there is a probability that the water supplied is infected from either a cause which exists or causes which could have been foreseen by the exercise of reasonable care. If in the exercise of due care a prudent person would have foreseen the probability of an infection, the Water Company is bound to take the proper and necessary steps to investigate the supply and do everything feasible by adopting the proper remedial measures in order to protect the community from injury.[5] Notice or knowledge by the defendant of the unwholesome or salacious effect of the water is not essential in the establishment of liability because it is not an element of proof.[6] In the case at hand, however, we need not concern ourselves with this factor because defendant had actual knowledge or notice of the presence of sediment in the water.

A customer cannot be guilty of contributory negligence by reason of not personally investigating and determining whether the water is in any way polluted or contains any extraneous substance. There is no duty to take positive action by notifying the company of the existence of a foreign substance.[7]

In the principle case the injury resulted from a function of the company incident to the duty of supplying and delivering water. No injury has been sustained from the use of the water for the ultimate purpose for which water is ordinarily required. Damage has been done by excessive sand to a plumbing system which is a means of supplying water for a subsequent use by the consumer All previous cases have established liability for injury which is sustained by the use of water.[8]

v. Harding, 121 Ohio St. 412, 169 N.E. 457 (1929); Green v. Ashland Water Co., 191 Wis. 258, 77 N.W. 722, 43 L.R.A. 117, 5 Am. Neg. Rep. 265 (1898).

5. Hayes v. Torrington Water Co., *supra*, note 4. (As to duty of care, one furnishing or supplying water is held to the same duty as one dealing in foods. Water is a necessity of life and is a commodity necessary for human existence, as food. Both are held to reasonable care.) See also: Jones v. Mt. Holly Water Co., *supra*, note 1; Canavan v. City of Mechanicville, 229 N.Y. 473, 128 N.E. 882 (1920).

6. Jones v. Mt. Holly Water Co., *supra*, note 1, p. 861.

7. Hamilton v. Madison Water Co., *supra*, note 1. Jones v. Mt. Holly Water Co., *supra*, note 1.

8. *i.e.*: In the Mt. Holly case, action was brought against a water company because of the illness to children from typhoid carried from the drinking of

It is in this respect that the cases differ factually. Excessive sand in water may or may not cause injury to the use of water, but will as it appears in this case, invariably cause damage to the plumbing system required in the furnishing of water. The question arises as to the extent of duty of a water company supplying water. Does the duty of the water company extend to the supply of water so as to establish liability where damage has been done to a plumbing system caused by the inclusion of excessive sand? This case removes the point at issue from the realm of conjecture, and extends the liability of water companies to the delivery of water to the consumer, as well as to the use of water by the consumer; the Court stating that the delivery of water today is as invaluable as the ultimate use of water. The advent and advancement of civilization has paved the way for the introduction of many contrivances necessary for the proper enjoyment and general convenience of a pleasurable living.

In this advanced stage of life we no longer cling to the simple and archaic methods of obtaining water from individual sources, but have water companies assume the complicated functions of serving a community at large. Therefore, it is the duty of the water company to provide for the proper delivery of water, and liability extends to damage caused in delivering water as well as for injuries to a person by reason of the pollution of the water rendering it injurious to the health.[9]

In New Jersey there is a group of cases establishing the duty of a water company while supplying water but they deal with responsibility occasioned by the insufficiency of water. A water company unless it unconditionally contracts to supply a consumer water with pressure sufficient for fire purposes in the absence of negligence is not held liable for loss by fire caused by the failure of the company to supply sufficient water pressure.[10] If the water company contracts that it

polluted water.

9. However distinguish: Philadelphia Ritz Carlton Co. v. City of Philadelphia, 282 Pa. 301, 127 Atl. 843 (1925). (Where a hotel brought action for damages caused by a broken water pipe laid by the city. *Held*: Defendant entitled to a non-suit on the ground that the break was a result of a latent defect not discoverable by reasonable inspection.

10. Hall v. Passaic Water Co., 83 N.J.L. 771, 85 Atl. 349 (1912); Knapp-

shall not be liable for failure to supply water, it is not liable for failure to furnish sufficient water for fire protection even though the Defendant company is negligent because of an insufficient supply.[11] These cases do not hold the contracting water company bound as an insurer of the quantity of water, though they do not unhesitatingly state whether there is liability for the failure to exercise reasonable care. Recovery is for the delinquency of a specific function that the company assumed by reason of a definite purpose to supply water in the event of a contingency. Suit is upon contract and the gravamen of the action is upon a breach of contract and not in tort for damages sustained from negligence.[12]

If recovery is sought upon negligence, it is because of negligence arising from a contractual relationship as counterdistinguished in the instant case where the action was based upon the negligent performance of a duty owed to the consumers. The fact that a defendant company would not be liable for damage under a situation where it contracted to supply water at a definite pressure, in spite of negligence, is an undeniable demonstration that recovery is sought for insufficiency of supply of water and not for damage caused by negligent conduct.[13]

A municipal public water company engaged in the distribution of water to its inhabitants for compensation acts in a proprietary capacity, enters the field of private business, is subject to the same rights and liabilities as a privatae corporation, is governed by the same rules, and is bound to exercise the care required of an ordinary private water company. Therefor, the fact that defendant was a public *quasi* corporation raises no difficulty as to liability because of the immunity of a city from suit, and renders applicable in support of this case all cases

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man Whiting Co. v. Middlesex Water Co., 64 N.J.L. 240, 45 Atl. 692 (1900); Baum v. Somerville Water Co., 84 N.J.L. 611, 87 Atl. 140 (1913).

11. Buchanan & Smock Lumber Co. v. East Jersey Coast Water Co., 71 N.J.L. 350, 59 Atl. 31 (1904).

12. In Canavan v. City of Mechanicville, 229 N.Y. 473, 128 N.E. 882 (1920). (Liability was sought to be asserted on contract. Decision was for Defendant. The Court holding that there was no implied warranty for fitness of water.)

13. Buchanan & Smith Lumber Co. v. East Jersey Coast Water Co., *supra*, note 11.

heretofore decided in which the defendant may have been a water company owned, operated or controlled by a city.[14]

14. Canavan v. City of Mechanicville, *supra*, note 12. Woodward v. Livermore Falls Water District, 116 Me. 86, 100 Atl. 317 (1917).