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Recent Decisions

RECENT DECISIONS

DOMESTIC RELATIONS—HUSBAND AND WIFE—LIABILITY OF WIFE FOR FUNERAL EXPENSES OF HUSBAND.—Plaintiff undertaker sued a widow to recover the funeral expenses of her deceased husband. The court charged the jury to find for the plaintiff if the evidence disclosed that the wife went to the undertaker's place of business and selected a certain casket and other services, and if the undertaker rendered the services. The jury found for the plaintiff. Defendant's motion for a new trial was overruled. Upon appeal, *held*, the charge was erroneous and judgment was reversed upon the ground that a wife is not liable for her husband's funeral expenses in the absence of a contract binding her personally. *Collins v. Sam R. Greenberger & Co.*, —Ga. A.—, 36 S. E. (2d) 484 (1945).

At common law, a husband was personally liable for the funeral expenses of his wife.[1] Nor was this liability altered by the fact that they were living apart at the time of her death,[2] even though the separation was due to her misconduct.[3] This liability was imposed by law irrespective of whether he had requested the services or had knowledge of her death or notice of the funeral.[4] But while the courts agree substantially on the general rule, there is no accord as to the grounds upon which the duty rests. Most jurisdictions hold that the duty of the husband to defray his wife's funeral expenses evolved out of his corresponding duty to provide her with necessaries.[5] On the other hand, there have been statements in the decisions to the effect that the obligation is predicated on the broader grounds of common decency and a duty arising from the marital relation.[6] It is submitted

1. Kenyon v. Brightwell, 120 Ga. 606, 48 S. E. 124 (1904); Scott v. Carothers, 17 Ind. App. 673, 47 N. E. 389 (1897); Sears v. Gidday, 41 Mich. 590, 2 N. W. 917 (1879); Jenkins v. Tucker, 1 H. Bl. 90, 126 Eng. Rep. 55 (C. P. 1788).

2. Cunningham v. Reardon, 98 Mass. 538 (1868); Gleason v. Warner, 78 Minn. 405, 81 N. W. 206 (1899); Watkins v. Brown, 89 App. Div. 193, 85 N. Y. Supp. 820 (2d Dep't 1903); Bradshaw v. Beard, 12 C. B. (n.s.) 344, 142 Eng. Rep. 1175 (C. P. 1862).

3. Weinstein v. Lotsoff, 232 Ill. App. 566 (1924), cited with approval in Colovos' Adm'r v. Gouvas, 269 Ky. 752, 108 S. W. (2d) 820 (1937). Thus, in a recent New Jersey case, the court said, with particular reference to the aforementioned cases, ". . . the established misconduct of the wife does not relieve an undivorced husband from his duty to bury her." Mondock v. Gennrich, 19 N. J. Misc. 499, 21 A. (2d) 611, 613 (1941). *See* also MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) § 61. *But see* Magrath v. Sheehan, 296 Mass. 263, 5 N. E. (2d) 547 (1936) in which by implication it appears that the court assumes that such duty would no longer exist if the separation was due to her misconduct.

4. RESTATEMENT, RESTITUTION (1937) § 115 comment (b); Cunningham v. Reardon, 98 Mass. 538 (1868) (Stranger held entitled to reimbursement from the husband for funeral expenses of wife although husband had no notice of funeral); Stone v. Tyack, 164 Mich. 550, 129 N. W. 694 (1911) (stepfather of wife allowed to recover for her funeral expenses from husband who did not learn of wife's death until a week after it occurred).

5. Smyley v. Reese, 53 Ala. 89, (1875); Beverly v. Nance, 145 Ark. 589, 224 S. W. 956 (1920); *In re* Wehringer's Estate, 100 Cal. 345, 34 Pac. 825 (1893); Kenyon v. Brightwell, 120 Ga. 606, 48 S. E. 124 (1904); Rocap v. Blackwell, 79 Ind. App. 232, 153 N. E. 515 (1923).

6. For example, in Weinstein v. Lotsoff, 232 Ill. App. 566, 576 (1924), the court said

that the rule on necessaries is not sufficiently broad or inclusive enough to support the husband's liability and that recourse to the latter ground is finally necessary to discover the rationale underlying the decided cases. For example, how else can we reconcile the duty of the husband to pay for the funeral expenses of a wife living apart from him without justification[7] with his corresponding non-liability for necessaries purchased by her?[8]

Whether there existed at common law a correlative legal duty of the wife to defray the funeral expenses of the husband, in the absence of an express contract or one implied in fact, is a moot question.[9] Suffice it to say that although the authorities generally accede to the view that the wife was not bound to use her separate property for the payment of her husband's funeral expenses,[10] there have been cases which have upheld such a common law liability.[11] Concededly, if the

". . . the obligation of the husband to bury his deceased wife is placed on the grounds of common decency, the interest of society, the protection of the public against expense, the near relation which the husband bears to his wife *(persona conjuncta)*, the health and comfort of the public, the laws of nature and society. It is said that the obligation of the husband to bury his deceased wife is 'placed on a broader ground' than that of the duty to furnish necessaries to his wife; 'namely on the ground of common decency'." *See also* E. R. Butterworth & Sons v. Teale, 54 Wash. 14, 102 Pac. 768 (1909); Chapple v. Cooper 13 M. & W. 252, 153 Eng. Rep. 105 (Ex. 1844). Similarly, RESTATEMENT, RESTITUTION (1937) § 115 states that "a person who has performed the duty of another by supplying things or services, although acting without the other's knowledge or consent is entitled to restitution from the other if . . . (b) the things or services supplied were immediately necessary to satisfy the requirements of public decency, health, or safety." This general rule is applied in comment (b) to situations involving the burial of the dead.

7. See note 3 *supra*.

8. Denver Dry Goods Co. v. Jester, 60 Colo. 290, 152 Pac. 903 (1915); Oinson v. Heritage, 45 Ind. 73, (1873); M'Cutcheon v. M'Gahay, 11 Johns 281 (N. Y. 1814); Gimbel Bros. v. Adams, 178 Wis. 590, 190 N. W. 357 (1922).

9. The paucity of decided cases on this precise question is well illustrated by the fact that although it is stated as a general rule in 21 Cyc. 1449 that the wife is not bound to use her separate property for the payment of the husband's funeral expenses, only one case is cited to support the text. The case so cited, Robinson v. Foust, 31 Ind. App. 384, 68 N. E. 182 (1903), if in point, would appear to be so incidentally, since it merely involved the enforcement of a promise by the grandfather of the deceased to provide for the wife out of his estate, if she paid the expenses of her husband's last illness.

10. SCHOULER, LAW OF DOMESTIC RELATIONS (5th ed. 1895) § 211; Compton v. Lancaster, 130 Ky. 751, 114 S. W. 260 (1908); McNally v. Weld, 30 Minn. 209, 14 N. W. 895 (1883); O'Hagan v. Fraternal Aid Union, 144 S. C. 84, 141 S. E. 893 (1928).

11. In E. R. Butterworth & Sons v. Teale, 54 Wash. 14, 102 Pac. 768 (1909), with practically the same facts that existed in the instant case, a widow was held personally liable for the funeral expenses of her husband. The majority opinion did not state the grounds upon which the liability was predicated. However, a concurring opinion was rendered in which, after an extensive study of the precise question herein considered, the conclusion was reached that there was such a common law liability arising from the marital relation. In the case of Chapple v. Cooper, 13 M. & W. 252, 153 Eng. Rep. 105 (Ex. 1844), there is considerable *dicta* to the effect that the obligation of husband and wife were alike in regard to the funeral expenses of either spouse.

funeral expenses are to be regarded merely as necessaries, then clearly the wife would not be responsible since at common law her personal estate was not liable for her husband's and family's necessaries.[12] If, however, the obligation is held to rest on the ground of duty arising from the marital relation, it would seem proper even at common law to impose a liability on the wife equivalent to that of the husband.[13] Especially does this latter view commend itself when consideration is given to the present economic independence of women resulting from the enactment of the various Women's Enabling Acts,[14] together with the statutory directives rendering the wife or her property liable with the husband for necessaries furnished the family.[15]

An interesting facet to the question of the husband's liability for his wife's funeral expenses has arisen as a result of the statutory enactments making funeral expenses a preferred charge against the estate of the decedent.[16] It might well be arguable that as a result of these statutes, the deceased wife's estate has been made principally liable. Although this view has been advanced,[17] the prevalent opinion still holds that the duty of paying the funeral expenses devolves on the husband and the wife's estate is not liable for reimbursement to the husband if he has paid.[18] Conversely, however, although a deceased husband's estate may be insufficient to pay the funeral expenses and although the wife be the recipient of the proceeds of his in-

12. As a logical result of the common law principle that the "legal existence of a woman was suspended" during coverture, the contracts of a married woman, with a few minor exceptions, were absolutely void. 1 BL. COMM. (Chitty's ed. 1851) 442, 2 BL. COMM. (Chitty's ed. 1851) 433.

13. This would appear to be a natural correlative to the rights which either surviving spouse has to the body of the deceased. Such rights, include among others, the right to sue for damages if the body is violated before burial. O'Donnell v. Slack, 123 Cal. 285, 55 Pac. 906 (1899); Foley v. Phelps, 1 App. Div. 551, 37 N. Y. Supp. 471 (1st Dep't 1896). The concern of the public that the dead have a decent burial (*e.g.* N. Y. PEN. Law § 2211, N. Y. Soc. WEL. LAW § 141) would seem to accentuate further the sociological desirability of buttressing the right to the body of a deceased with the obligation of defraying the funeral expenses, especially if the husband dies insolvent.

14. *E.g.*, N. Y. DOM. REL. LAW §§ 50-61.

15. For a comprehensive collection of the so-called Family Expenses Statutes, see 3 VERNIER, AMERICAN FAMILY LAWS (1935) § 160. These statutes, rendering the wife or her property liable with the husband for necessaries furnished the family, are certainly consistent with the independent property status now universally accorded to married women.

16. For an example of such statutes, see N. Y. SURR. CT. ACT § 216, and N. Y. DEC. EST. LAW § 176.

17. While this question is not covered specifically by the various statutes, some courts have implied a legislative intent to shift the liability for funeral expenses from the husband to the separate estate of the deceased wife. *In re* Skillman, 146 Iowa 601, 125 N. W. 343 (1910); Morrissey v. Mulhern, 168 Mass. 412, 47 N. E. 407 (1897); *In re* Stadtmuller, 110 App. Div. 76, 96 N. Y. Supp. 1101 (2d Dep't 1905); Smith v. Eichner, 124 Wash. 575, 215 Pac. 27 (1923).

18. Alcorn v. Alcorn, 183 Ark. 342, 35 S. W. (2d) 1027 (1931); Medros v. Kohn, 68 Cal. App. 367, 229 Pac. 873 (1924); Palmer v. Turner, 241 Ky. 320, 43 S. W. (2d) 1017 (1931); Reynolds v. Rice, 224 Mo. App. 972, 27 S. W. (2d) 1059 (1930).

surance, it has been held that she is under no liability to pay his funeral expenses.[19] It would appear that neither the economic independence of women nor the statutes making funeral expenses a preferred charge against the estate of the decedent has to any appreciable extent enlarged the common law obligation of the wife in regard to her husband's funeral expenses.[20] However, some decisions of the lower courts of New York have, when the husband's estate was insolvent, imposed liability on the wife.[21] These decisions would seem contrary to the weight of authority. A recent New York decision recognized this but nevertheless imposed liability when the estate of the deceased husband was insolvent on "the public policy of saving the taxpayers from burying this decedent . . . ."[22]

The difficulty involved in applying rules of the common law, based upon the theory of unity of person and property in the husband at marriage, to problems arising in this day and age when the husband and wife, equal before the law, are regarded as partners in a joint enterprise, can readily be observed.[23] It is submitted that a more realistic approach, in view of the statutes making the funeral expenses a preferred charge on the decedent's estate, would be to hold the decedent's estate primarily and principally liable for reasonable funeral expenses with merely a secondary and subordinate liability imposed on the surviving spouse, be it husband or wife, in the event of the insolvency of the decedent's estate.

DOMESTIC RELATIONS—MEANING OF WORD "CHILD" IN STATUTE—RIGHT OF ILLEGITIMATE CHILD TO RECOVER PENSION BENEFITS.—Plaintiff brought an action as *guardian ad litem* against the New York City Employees' Retirement System to recover benefits for her illegitimate child. The controversy was submitted on an agreed statement of facts pursuant to Sections 546-548 of the New York Civil Prac-

19. O'Hagan v. Fraternal Aid Union, 144 S. C. 84, 86, 141 S. E. 893, 895 (1928). The court, in deciding that the widow, who was the beneficiary of several insurance policies, could not be compelled to apply their proceeds in payment of her husband's funeral expenses, sadly commented "It regretfully appears that the undertakers, who performed the last earthly service for Mr. O'Hagan, will have to look to a Greater Court than this for their reward, unless appellant, in search of her reward in that Court, changes her position."

20. It is interesting to note that the same court which upheld the common law liability of a wife for her husband's funeral expenses (E. R. Butterworth & Sons v. Teale, 54 Wash. 14, 102 Pac. 768 (1909), cited *supra* note 11) construed the statutes making funeral expenses a preferred charge against the decedent's estate as changing the wife's liability to a secondary one, only to be resorted to in the event the husband's estate is insufficient, Butterworth v. Bredemeyer, 74 Wash. 524, 133 Pac. 1061 (1913).

21. *In re* Cava's Estate, 174 Misc. 750, 21 N. Y. S. (2d) 999 (Surr. Ct. 1940); *In Re* Vosburg's Estate, 167 Misc. 611, 5 N. Y. S. (2d) 804 (Surr. Ct. 1938). *Cf.* Apostle v. Pappas, 154 Misc. 497, 277 N. Y. Supp. 400 (Sup. Ct. 1935).

22. *In re* Wolpert's Estate, 174 Misc. 85, 87, 19 N. Y. S. (2d) 781, 783 (Surr. 1940). However, with direct reference to *dicta* from other opinions as to the "reciprocity expected from the new woman", the court pointed out that "the rights and duties arising out of the relation of marriage are so extensively under the control of the state legislature that any such changes in the established rule" should be sought at the hands of the legislature rather than the judiciary.

23. *See* note (1944) 13 FORDHAM L. REV. 117.

tice Act. Conceding her ineligibility as a beneficiary because of the invalidity of her marriage to the deceased member of the pension system, the plaintiff claims, however, that their acknowledged and dependent illegitimate child is entitled to a pension award. Plaintiff's claim is based upon Section 1718 of the Greater New York Charter which provides that, where an employee dies from injuries sustained in the performance of duty, a pension is to be paid to his "widow" or "child." *Held*, two justices dissenting, the illegitimate child, as a dependent of deceased employee, is entitled to the designated benefits. *Ciarlo et al. v. New York City Employees' Retirement System*, 270 App. Div. 594, 61 N. Y. S. (2d) 751 (1st Dep't. 1946).

In giving the broad and natural meaning to the term "child",[1] the majority of the court had to cope with the historically strict construction of that word[2] as imposed by the common law disdain for the illegitimate child.[3] At common law the illegitimate child was termed *filius nullius*.[4] He had neither the right to inherit from anyone,[5] nor the right to support by his putative father.[6] The illegitimate child was isolated by the law, and as a result, was thrown very often upon the charity of the community for his maintenance.[7]

The rule that an illegitimate child was *filius nullius*, Kent has stated, ". . . applies only to the case of inheritances. . . ."[8] It has been contended, moreover, that the other disabilities of the illegitimate child at common law were merely incidental to this inability to inherit.[9] That the problems ensuing upon the birth of children out-of-wedlock in regard to the rights of inheritance, descent and

1. WEBSTER, NEW INTERNATIONAL DICTIONARY (2nd ed. 1944) 465, defines the word "child": "A son or a daughter; a male or female descendant in the first degree; the immediate progeny of human parents".

2. The word "child" has been defined by the decisions of the courts of England and the United States as to include only a legitimate child. 1 BOUVIER, LAW DICTIONARY (8th ed. 1914) 479.

3. 1 SCHOULER, DOMESTIC RELATIONS (6th ed. 1921) 736; McKellar v. Harkins, 183 Iowa 1030, 166 N. W. 1061 (1918).

4. ". . . the son of no one,—of no father and no mother. That is to say, it [the common law] closed its eyes to the fact of that relation and in legal aspect ignored its existence". Doughty v. Engler, 112 Kan. 583, 211 Pac. 619 (1923).

5. 1 BL. COMM. § 459; 2 KENT, COMMENTARIES ON AMERICAN LAW (13th ed. 1884) 275; Brewer v. Blougher, 14 Pet. 178, 198 (U. S. 1840). *See* Ayer, *Legitimacy and Marriage* (1902) 16 HARV. LAW REV. 22, 23, where the author writes that the traditional explanation of this rule is that it is founded on the necessity ". . . that the heir should be one whose right could be ascertained, therefore marriage, an act capable of proof, could be relied upon as determining the heir."

6. People v. Snell, 216 N. Y. 527, 111 N. E. 50 (1916); Todd v. Weber, 95 N. Y. 181 (1884); Moncrief v. Ely, 19 Wend. 405 (N. Y. 1838).

7. Robbins and Deak, *The Familial Property Rights of Illegitimate Children: A Comparative Study* (1930) 30 COL. L. REV. 309, 317. The authors indicate that it was through the parish's displeasure with this situation ". . . that the bastard received his first right to support in England."

8. KENT, *op. cit. supra* note 5, at 277.

9. "Other disabilities which have been recognized by law are less fundamental and have not been due to any profound legal principle, but rather to the disrepute of bastardy." Ayer, *Legitimacy and Marriage*, (1902) 16 HARV. L. REV. 22.

property should have caused this narrow doctrine, can be readily understood.[10] The asperities of the *filius nullius* doctrine, however, have had their effect upon legislation not within the contemplation of the era that produced such a fiction. For in the history of judicial interpretation, the courts of England[11] and the United States[12] have not limited the rigid definition of the class "child" to the statutes and instruments of inheritance. Although the status of the illegitimate child has been improved gradually,[13] the disabilities which the common law placed upon him have left a strong impression upon the decisions of our courts. Strict construction has been applied in defining the word "child" when used in statutes,[14] wills[15] or deeds.[16] Generally, when used alone without further description or qualification, the term "child" is held to exclude an illegitimate child.[17] Following the introduction of remedial legislation in the form of wrongful death statutes,[18] Workmen's Compensation Laws,[19] and other legislative acts similar in scope and purpose,[20] the

10. See note 5 *supra.*

11. The early English case of Dickinson v. Northeastern Ry. Co., 9 L. T. R. (N. S.) 299 (Ex. 1863) represents the reluctance of the court to interpret a wrongful death statute so as to extend the right of action to an illegitimate child.

12. A view similar to that taken by the English courts has been accepted by American courts. In the case of Lynch v. Knoop, 118 La. 611, 43 So. 252 (1907), the court refused to include the mother of an illegitimate child under a statute granting right of action to a parent for death of his child.

13. 4 VERNIER, AMERICAN FAMILY LAWS (1936) 154; Robbins and Deak, *supra,* note 7; Note (1922) 36 HARV. L. REV. 96.

14. Burris v. Burgett, 16 Del. Ch. 10, 139 Atl. 454 (1927); Wilson v. Bass, 70 Ind. App. 116, 118 N. E. 379 (1918).

15. 1 SCHOULER, LAW OF WILLS (5th ed. 1915) § 534; Smith v. Garber, 286 Ill. 67, 121 N. E. 173 (1918); Gelston v. Shields, 16 Hun. 143 (N. Y. 1878). However, recently there has been a tendency to escape this strict rule in the construction of wills. Cases holding the liberal view have been noted in (1932) 45 HARV. L. REV. 890.

16. Johnstone v. Taliaferro, 107 Ga. 6, 32 S. E. 931 (1899); Orthwein v. Thomas, 127 Ill. 554, 21 N. E. 430 (1889).

17. Matter of Cady, 257 App. Div. 129, 12 N. Y. S. (2d) 750 (3rd Dep't. 1939), *aff'd mem.* 281 N. Y. 688, 23 N. E. (2d) 18 (1939). The cited case involved an inheritance problem, but the majority did state it to be a general rule of construction that the word "child" in a statute refers only to a legitimate child. *See also* "Castellani" v. "Castellani" (Fictitious names), 176 Misc. 763, 28 N. Y. S. (2d) 879 (Dom. Rel. Ct. 1941) *aff'd mem.* 263 App. Div. 984, 34 N. Y. S. (2d) 400 (1st Dep't 1942).

18. *See* Good v. Towns, 56 Vt. 410 (1884), where the court in construing the Civil Damage Act held that an illegitimate child, even though dependent, could not recover for loss of its parent; *accord,* Smith v. Hagerstown & Frederick Ry., 139 Md. 78, 114 Atl. 729 (1921) where the court, in interpreting Code Pub. Gen. Laws, act 67 § 2, held a mother could not recover for the death of an illegitimate child. Note also that the old common law view still prevails in certain jurisdictions. Adams v. Powell, 67 Ga. App. 460, 21 S. E. (2d) 111, 112 (1942) where in interpretation of a statute (Code, §§ 105-1306 as amended by Laws 1939, pp. 233, 234) which provided for recovery for tortious death of a wife, held that the word "child" in that statute meant only "legitimate" child. *See also* notes 11 and 12 *supra.*

19. Bell v. Terry & Tench Co., 177 App. Div. 123, 163 N. Y. Supp. 733 (3rd Dep't 1917) became the leading authority for maintaining the narrow definition of word

majority of jurisdictions still refused to extend the definition of the word "child" to include an illegitimate child as a beneficiary of such remedial legislation.[21] Among the states that would not mitigate the strenuousness of the rule, New York was conspicuous by its decision in the case of *Bell v. Terry & Tench Co.*[22] In that case, the court, in interpretating the Workmen's Compensation Law, held that an illegitimate child did not come under the meaning of the word "child" as used in that statute.[23] It should be noted, however, that in the aforementioned statute the legislature gave particular definition of the word "child" and did not see fit to include the special class of illegitimate children.[24] In the absence of legislative intent to include them the court refused to extend the class of beneficiaries to children born out-of-wedlock, who, nevertheless, were dependent on the deceased employee.[25] The *Bell* case reiterated the attitude of disfavor that the law held for the illegitimate child and stressed the strict rule of construction derived from that attitude. On examination of the authorities upon which the court relied in the *Bell* case, it should be observed that such decisions were construing wills[26] and matters of descent and inheritance.[27] Significant, too, is the obvious distinction between the statute involved in the principal case and that in the *Bell* case. In the former statute the word "child" is described merely by the word "dependent"; in the latter statute, the fact that the legislature gave further and specific description to the class of children covered[28] and omitted the illegitimate child, was a controlling factor.

The *Bell* case was approved by the Court of Appeals in the case of *Hiser v. Davis*,[29] wherein Chief Judge Hiscock, in the course of his opinion, wrote: "It is

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"child" in the Workmen's Compensation Acts throughout the United States; *accord*, Murrell v. Industrial Comm., 291 Ill. 334, 126 N. E. 189 (1920); Scott v. Independent Ice Co., 135 Md. 343, 109 Atl. 117 (1919); Staker v. Industrial Comm. of Ohio, 127 Ohio St. 13, 186 N. E. 616 (1933). *Contra*: Marshall v. Industrial Comm., 342 Ill. 400, 174 N. E. 534 (1930) which represents the more liberal view. *See* Lockhart's Guardian v. Bailey Pond Creek Coal Co., 235 Ky. 278, 30 S. W. (2d) 955 (1930). Several of these cases have been noted in (1931) 16 CORN. L. Q. 587.

20. The same unfavorable policy may be found in interpretation of Federal Employers' Liability Act, 35 STAT. 65 (1908) now amended, 53 STAT. 1404 (1939), 45 U. S. C. A. § 51 (1940). *See* Seaboard Air Line v. Kenney, 240 U. S. 489 (1915). *But see*, Middleton v. Luckenback S. S. Co., Inc. 70 F. (2d) 326 (C. C. A. 2nd, 1934).

21. See notes 18, 19, 20 *supra*.

22. 177 App. Div. 123, 163 N. Y. Supp. 733 (3rd Dep't (1917).

23. *Id.* at 125, 163 N. Y. Supp. at 735.

24. The court followed the well recognized rule of statutory construction. *inclusio unius est exclusio alterius*. At that time, N. Y. WORK COMP. LAW § 2 (11) defined the term "child" as including ". . . a posthumous child and a child legally adopted prior to the injury of the employee."

25. 177 App. Div. 123, 163 N. Y. Supp. 733 (3rd Dep't 1917). However, by N. Y. Laws, 1922, C. 615, the section was amended to include ". . . step-child or acknowledged illegitimate child dependent upon the deceased".

26. Van Voorhis v. Brintnall, 23 Hun. 260 (N. Y. 1880); Gelston v. Shields, 16 Hun. 143 (N. Y. 1878); Miller v. Miller, 79 Hun. 197 (N. Y. 1894).

27. Matter of Miller, 110 N. Y. 216, 18 N. E. 139 (1888).

28. See note 24 *supra*.

29. 234 N. Y. 300, 137 N. E. 596 (1922).

not claimed by respondent that under the law in this state the word 'child' in a statute or will, without any other description, would include an illegitimate child. It would be useless for her to make any such contention because the law is the other way."[30] The court in the *Hiser* case was construing the Federal Employer's Liability Act,[31] which authorizes rights of action to representatives of deceased employees. Such benefits are derived from the laws of inheritance and on that basis we may distinguish the *Hiser* case from the principal case. Further, the *Hiser* case apples the ancient rule of construction where no further description is given the term "child". The *Bell* and *Hiser* cases, however, follow the apparent policy of the New York courts in adhering to a strict construction of the word "child" even in the interpretation of statutes not immediately within the field of inheritance.[32]

It is in opposition to the rigid common law view exemplified in the *Bell* and *Hiser* cases that the majority in the principal case gave the full and natural meaning to the word "child". In interpreting the statute in question,[33] the majority held that the language "Upon application by or on behalf of the dependents of such deceased member, . . ." impliedly indicated the purpose of the statute; i.e. to care for ". . . dependents of a member after his death."[34] They contended that the fact of illegitimacy does not make the child any less dependent ". . . legally as well as morally. . . ." Viewing the statute from its wording and purpose, the majority of the court in the principal case announced that it was justified in ". . . departing from inheritance law concepts. . . ."[35] For support in this innovation, they quoted the language of *Middleton v. Luckenbach S. S. Co., Inc.*,[36]

30. *Id.* at 305, 137 N. E. at 598.

31. 35 STAT. 65 (1908), now amended, 53 STAT. 1404 (1939), 45 U. S. C. A. § 51 (1940).

32. Upon the policy of these cases rests the dissenting opinion of the principal case. Ciarlo v. N. Y. C. Employees' Retirement System, 270 App. Div. 594, 598, 61 N. Y. S. (2d) 751, 753 (1st Dep't 1946).

33. Greater N. Y. Charter § 1718, added to Charter by N. Y. Laws, 1920, c. 427, amended by N. Y. Laws 1923, c. 142, and now, § B3-33.0 of ADMINISTRATIVE CODE OF THE CITY OF N. Y.

34. The broad purpose and coverage of the statute may be observed from the language of the commission that prepared the draft, REPORT ON THE PENSION FUNDS OF THE CITY OF N. Y. (Commission on Pensions of City of N. Y.) 1918, Part III, at p. 13. "Death of an employee in the actual performance of duty may be assumed to result ordinarily from an accident occurring in the employee's prime of life, when he has a *family whom he has not protected* against such a contingency. The commission believes that there is *both an obligation and a desire* on the part of the taxpayers to provide generously for this contingency as for disability from similar causes not resulting in death. In case of the employees' death the rate of pension payable to the widow or *other dependents* is proposed as one-half of the average salary of the last ten years." (Italics supplied.)

35. Some of the common law cases expressly state that the rule of *filius nullius* applies only in matters of inheritance. Garland v. Harrison, 8 Leigh 368 (Va. 1837); Rex. v. Hodnett 1 T. R. 96, 99 Eng. Rep. 993 (K. B. 1786); Hains v. Jeffell, 1 Ld. Raym. 68, 91 Eng. Rep. 942 (K. B. 1695).

36. 70 F. (2d) 326, 330 (C. C. A. 2nd, 1934). This decision has become the modern authority for disavowing the common law disregard of the illegitimate child. Note the liberal viewpoint of the court: "Humane considerations and the realization that children are such no matter what their origin alone might compel us to the construction that

where the court, in construing the Federal Death Act,[37] declared: "There is no right of inheritance involved here. It is a statute that confers recovery upon dependents, not for the benefit of an estate, but for those who by our standards are legally or morally entitled to support." The court in the *Middleton* case, after repudiating the use of the narrow common law rule in interpreting the statute in question, continued, holding: "The purpose and object of the statute is to continue the support of dependents after a casualty. To hold that these children or the parents do not come within the terms of the statute would be to defeat the purposes of the act."[38]

The more liberal view taken in the *Middleton* case is reflected in the current legislation on illegitimate children.[39] Cognizant of the many injustices which stemmed from the prejudicial position of children born out-of-wedlock, the legislatures of most states have indicated their willingness to break down the historic isolation of the illegitimate child.[40] Such legislation is not based solely on revamped social concepts, but is grounded upon the policy of safeguarding the interests of the community.[41] The policy of the common law threw the illegitimate child upon the charity of the parish. As a practical matter, society could not long sustain a policy so fraught with evils against all concerned.[42] Indicative of this development are the New York statutes placing upon the putative father (jointly and severally with the mother) the obligation to support and educate the illegitimate child[43] and providing for legitimation by a subsequent marriage of the parents.[44] Even the inviolable stronghold of inheritance was disturbed when provisions for

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under present day conditions, our social attitude warrants a construction different from that of the early English view." The court went further and announced that the rule of *filius nullius* in regard to illegitimate children " . . . applies only in cases of inheritance." The *Middleton* case was approved by the court in the recent case of Turner v. Metropolitan Life Ins. Co., 56 Cal. App. (2d) 862, 133 P. (2d) 859 (1943) where the court, in defining the term "child" in an insurance policy, held that it included any child of insured whom he was legally bound to support. Compare last case cited with Lavigne v. Ligue des Patriotes, 178 Mass. 25, 59 N. E. 674 (1901).

37. 41 STAT. 537 (1920), 46 U. S. C. A. § 761 (1940).

38. 70 F. (2d) 326, 330 (C. C. A. 2nd, 1934).

39. See UNIFORM ILLEGITIMACY ACT § 1, 9 U. L. A. 390 which provides that both parents are under obligation to support illegitimate child. *See also* Epps. v. Redfield, 68 Conn. 39, 35 Atl. 809 (1896); Kordoski v. Belanger, 52 R. I. 268, 160 Atl. 205 (1932).

40. VERNIER, *op. cit. supra* note 13, at 154. The author reports all fifty-one American jurisdictions have provided means for mitigating the harsh rules of common law. Arizona and North Dakota have gone to the extent of declaring the illegitimate child ". . . legitimate issue of their natural parents." In all jurisdictions, the child may become legitimate by acts of one or both parents; in forty-eight jurisdictions, he becomes legitimate if parents subsequently intermarry. For further details, *see Id.* Table CXVII, at 158.

41. Burr v. Phares, 81 W. Va. 160, 94 S. E. 30 (1917); SCHOULER, *op. cit. supra* note 3, at 744; REED, THE ILLEGITIMATE FAMILY IN NEW YORK CITY (1934). Welfare Series No. 11, App. 2, p. 11.

42. See note 7 *supra.*

43. N. Y. DOM. REL. LAW § 120; N. Y. SOC. WEL. LAW, § 398 (5). For a complete digest of laws regarding rights of illegitimate children in New York, see REED, THE ILLEGITIMATE FAMILY IN NEW YORK CITY (1934), Welfare Series No. 11, App. 2, p. 224.

44. N. Y. DOM. REL. LAW § 24. See note 40 *supra.*

reciprocal rights of inheritance between a mother and her illegitimate child were enacted.[45] This tendency of liberalizing the status of the illegitimate child was further demonstrated by the legislatures of the various states, including New York, when they expressly designated the illegitimate child as a beneficiary under the Workmen's Compensation Law.[46] Such legislation was enacted to remedy the harshness of the rule laid down in the *Bell* case. It is of value to observe too, that the many protective measures enacted in behalf of members of the armed forces and their dependents during the past war years have invariably included benefits for acknowledged illegitimate children.[47]

It would seem that the majority holding in the subject case is justified in breaking with established precedents, especially since such precedents emanated from a doctrine which did not recognize the changes in which the legislatures of our era have acquiesced and which they have now formulated as law. Where the fiction of *filius nullius* serves as a convenience in the law, there can be no objection to it,[48] but where it develops into an obstacle to clear, judicial interpretation, it should be abandoned.[49] The historical and well settled legal conception of the illegitimate child and its concomitant exacting rules of construction, it is conceded, may be justified on the basis of the uncertainties that might prevail if the stability of the family status were not kept intact in the laws of property and inheritance. In that regard, the common law precept may be tenable.[50] Where, however, it prevents the performance of obligations inherent in a natural relationship, it should yield to the justice of such obligations.[51] The reasoning of the majority, therefore, appears logical in the light of both the purpose of the statute in question and the more recent liberal policy toward the illegitimate child. If the statute was

45. N. Y. DEC. EST. LAW § 83 (7) (13). It should be noted that the status of the father-illegitimate child relationship in the inheritance laws has not been generally disturbed. The common law rule still prevails as to that relationship.

46. N. Y. WORK COMP. LAW § 2 (11). See note 25 *supra*; Larsen v. Harris Structural Steel Co., 230 App. Div. 280, 243 N. Y. Supp. 654 (3rd Dep't 1930); Battalico v. Knickerbocker Fireproofing Co., 250 App. Div. 258, 294 N. Y. Supp. 481 (3rd Dep't 1937). The foregoing cases represent the liberal interpretation of § 2 (11). *But see* McLean v. Thatcher Process Co., 214 App. Div. 842, 211 N. Y. Supp. 925 (3rd Dep't 1925).

47. National Service Life Insurance Act of 1940, Oct. 8, 1940, c. 757, 54 STAT. 1009, as amended, 56 STAT. 657-659 (1942), 38 U. S. C. A. § 802 (g) (Supp. 1945); Serviceman's Dependents Allowance Act of 1942, June 23, 1942, c. 443, 56 STAT. 385, as amended, 57 STAT. 581, 582 (1943), 37 U. S. C. A. § 220 (c) (Supp. 1945); World War Veterans' Relief Act, 1924, June 7, 1924, c. 320, 43 STAT. 607, as amended, 48 STAT. 1281 (1934), 38 U. S. C. A. § 505 (c) (1940).

48. "All fictions of law have been introduced for the purpose of convenience and to subserve the ends of justice." State v. Standard Oil Co., 49 Ohio St. 137, 177, 30 N. E. 279, 287 (1892).

49. Lord Mansfield has written that "Fictions of law hold only in respect of the ends and purpose for which they were invented." Morris v. Pugh, 3 Burr. 1241, 97 Eng. Rep. 811 (K. B. 1761).

50. Some American jurisdictions have attacked even this basis for the rule. Note the language of McKellar v. Harkins, 183 Iowa 1030, 1043, 166 N. W. 1061, 1066 (1918): "This rule [of disability of inheritance] has been one of the reproaches of the common law, which has shocked the legislative and judicial conscience of the civilized world."

51. Pound, *Common Law and Legislation* (1908) 21 HARV. L. REV. 383, 392.

enacted to protect those whom the deceased was legally and morally bound to support, and if the policy of the legislature has been to give the illegitimate child the support due a legal dependent, then it appears that such child is entitled to a recovery of the pension benefits, provided by statute.

MONOPOLIES—EXEMPTION OF LABOR UNIONS FROM STATUTORY PROHIBITIONS AGAINST MONOPOLIES—WHO ARE "WORKINGMEN"?—The defendants were charged by indictment with violating the Donnelly Anti-Monopoly Act in that they conspired to restrict competition in the supply of laundry service in New York County and elsewhere. The defendants moved to dismiss the indictment, contending that the acts charged against them as crimes were acts committed by them as officials and members of a "*bona-fide* labor union", and as such not subject to action by the grand jury. The membership of the alleged union consisted of drivers and storekeepers who owned their own laundry trucks or stores, acted as so-called "agents", and received as earnings the difference between the amounts they charged customers and the amounts charged by the laundry companies who did the actual laundering. The court below, holding that the defendants were members of a *bona-fide* labor union composed of workingmen, and, therefore, exempt from the restraints imposed by the Donnelly Act, dismissed the indictment. Upon appeal, *held*, three judges dissenting, order affirmed. *People v. Gassman*, 295 N. Y. 254, 66 N. E. (2d) 705 (1946).

The Donnelly Act, originally enacted in 1899,[1] declares illegal and penalizes contracts or combinations in restraint of trade. It is little more than a codification of the common law upon the subject.[2] There is some doubt as to whether a combination of workmen to regulate the terms of their employment was, *per se*, an unlawful combination at common law, or whether such combination was illegal only when the means used were unlawful.[3] An early New York case adopted the view that such combinations were illegal *per se*.[4] Later New York decisions, however, recognized the right of workmen to combine, even without statutory authorization, in order to better their conditions.[5] The test of the illegality of such combinations became the means that they employed to accomplish their ends.[6] When, in 1933, the legislature amended[7] the Donnelly Act to exclude *bona fide* labor unions from its prohibitions, it did more than merely recognize the right of workers to organize. It exempted from the prohibitions of the Act those contracts of labor unions which were themselves in restraint of trade.[8]

1. New York Laws 1899, c. 690 § 1.

2. Matter of Davies, 168 N. Y. 89, 61 N. E. 118 (1901).

3. OAKES, THE LAW OF ORGANIZED LABOR AND INDUSTRIAL CONFLICTS (1927) § 2; MARTIN, A TREATISE ON THE LAW OF LABOR UNIONS (1910) §§ 3, 4.

4. People v. Fisher, 14 Wend. 9 (N. Y. 1835).

5. Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5 (1905); National Protective Ass'n. v. Cummings, 170 N. Y. 315, 63 N. E. 369 (1902); Curran v. Galen, 152 N. Y. 33, 46 N. E. 297 (1897).

6. American Fur Mfrs'. Ass'n. v. Associated Fur Coat & Trimming Mfrs., 161 Misc. 246, 250, 291 N. Y. Supp. 610, 615 (Sup. Ct. 1936).

7. New York Laws 1933, c. 804 § 1.

8. American Fur Mfrs'. Ass'n. v. Associated Fur Coat & Trimming Mfrs., 161 Misc.

In the instant case the grand jury had found that the members of said alleged union were persons independently engaged in the laundry business on their own account, having no employers, and engaged in the business of soliciting laundry trade for profit and consequently not a *bona-fide* labor union. The court agrees with the grand jury insofar as it held that the members of the alleged union are not employees. The majority of the court even concedes that they have "some of the marks or qualities of independent contractors, such as a measure of independence and some small investment of capital."[9] However, it finds that their physical activities and economic functions are the same as those of "workingmen" as that word is commonly understood. As such, they are held to enjoy immunity from the restrictions against monopolies contained in the Donnelly Act, which by its express terms does not apply to bona-fide labor unions or associations of workingmen.[10]

The minority dissented on the narrow ground that the indictment should not have been dismissed observing that it was a usurpation of the function of the grand jury for the court to rule as a *matter of law* that the evidence before the Grand Jury established that the membership of the union comprised workingmen rather than entrepreneurs.

Aside from this technical objection, however, there are more serious implications to the decision which deserve comment. The few New York decisions concerned with the question of whether an organization could claim exemption from the restraints imposed by the Donnelly Act based their holdings, for the most part, on a determination as to whether or not the members of the organizations involved were "employees".[11] Similarly, the Federal courts in deciding that an organization is not exempt from the federal anti-monopoly statutes,[12] have considered sufficient

246, 291 N. Y. Supp. 610 (Sup. Ct. 1936), *aff'd.*, 251 App. Div. 708, 296 N. Y. Supp. 1000 (1st Dept. 1937).

9. 295 N. Y. 254, 260, 66 N. E. (2d) 704, 707 (1946).

10. NEW YORK GENERAL BUSINESS LAW § 340 (3).

11. Bernstein v. Madison Baking Co., 186 Misc. 474, 38 N. Y. S. (2d) 811 (Sup. Ct. 1942), *aff'd without opinion*, 266 App. Div. 839, 43 N. Y. S. (2d) 517 (1st Dept. 1943), *leave to appeal denied*, 291 N. Y. 827, 51 N. E. (2d) 698 (1943) (Distributors of bakery products could unite in a *bona fide* labor union, since the distributors were not true jobbers engaged in the buying and selling of bakery products, but were actually employees whose wages were paid on a commission basis); People v. Masiello, 177 Misc. 608, 31 N. Y. S. (2d) 512 (Sup. Ct. 1941) (A combination of newsdealers who purchased and resold newspapers at a profit, and received no stipulated wages and fixed their own hours of labor, and also purchased and resold magazines and other literature, and dealt in other products, such as cigarettes and candy, was a trade association of retail merchants and not a *bona fide* labor union of employees); People v. Distributors Division, Smoked Fish Workers Union, Local No. 20377, 169 Misc. 255, 7 N. Y. S. (2d) 185 (Sup. Ct. 1938) (An organization of fish jobbers was not a *bona fide* labor union of employees).

12. The Sherman Act, 26 STAT. 209 (1890), 15 U. S. C. A. § 1 (1941) forbids in interstate commerce what the Donnelly Act forbids in intrastate commerce. The Clayton Act. 38 STAT. 731 (1914), 15 U. S. C. A. § 17 (1941), freeing unions from the restraints of the Sherman Act, is similar to the sections of the Donnelly Act which exempt *bona fide* labor unions from its provisions. These provisions of the Clayton Act have been clarified by the Norris-LaGuardia Act, 47 STAT. 70 (1932), 29 U. S. C. A. §§ 101-115 (1942). It should be noted, however, that while the Clayton Act was the model

a finding that the members were not employees.[13] The decision in the principal case is based upon the exemption from the prohibitions of the Donnelly Act which extends to "workingmen". In holding as a matter of law that the drivers and storekeepers were workingmen the Court relied upon the Restatement of Torts,[14] to the effect that the word "worker" has a wider range than the word "employee", and that "worker" is the genus of which "employee" is a species. The Restatement, however, goes no further than to recognize that a worker is either an employee or one seeking employment.[15] It in no way appears to support the contention of the court that a "workingman" may be one who neither is, nor is seeking to be, an "employee". The assertion of the Restatement that the word "worker" is of a broader significance than the word "employee" is itself not free from doubt. The decisions of many courts have acknowledged that the term "employee" is either synonymous with or more inclusive than such words as "laborer", "workman" or "workingman".[16]

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upon which the Donnelly Act was formed, the express reference to the right of "workingmen" which is found in the state statute is not present in the federal statute. Compare N. Y. GENERAL BUSINESS LAW § 3 with 38 STAT. 731 (1914), 15 U. S. C. A. § 17 (1941). This omission in the Clayton Act, may explain in part the failure of the federal courts even to consider the problem raised in the instant case.

13. American Medical Ass'n. v. United States, 317 U. S. 519 (1943) (An organization of doctors); Columbia River Packers Ass'n. v. Hinton, 315 U. S. 143 (1942) (An organization of fishermen, formed primarily to regulate the price at which fish were sold); Ring v. Spina, 148 F. (2d) 647 (C. C. A. 2d, 1945) (A combination of authors).

14. Although the Restatement does define "worker" more broadly than "employee" and holds that the former is the genus of which the latter is a species, it goes on to add that the greater comprehensiveness of the word "worker" is merely that it includes ". . . wage earners who are unemployed and employed wage earners in their relation to their own employer or in their relation to other employers". It includes also persons who are seeking employment for the first time, such as young men just out of school. RESTATEMENT, TORTS (1939) § 776.

15. "The word 'worker', as used in this Chapter [Labor Disputes], means a person who offers his services for compensation in the employ of another, whether or not he is so employed at a given time and whether or not he is employed by the employer against whom concerted action is directed." RESTATEMENT, TORTS (1939) § 776 (1).

16. *In re* Fabbri, 8 F. Supp. 35 (S. D. N. Y. 1934) (Words "employee" and "workman" are synonymous); Van Vlaanderen v. Peyet Silk Dyeing Corp., 278 Fed. 993 (S. D. N. Y. 1921) (Employees include mechanics, workingmen and laborers); Gay v. Hudson River Electric Power Co., 178 Fed. 499 (N. D. N. Y. 1910) (Scope of the word "employee" may be limited by the use of the word "workingman" with it.); Atlanta v. Hatcher, 31 Ga. App. 633, 121 S. E. 864 (1924) ("employee" and "workman" are synonymous); Shriver v. Carlin and Fulton Co., 155 Md. 51, 141 Atl. 434 (1928) (Word "employee" more comprehensive than "laborer" or "workingman".) Europe v. Addison Amusements, 231 N. Y. 105, 110, 131 N. E. 750, 751 (1921) ("Although in a general sense all workmen and operatives are employees, yet all employees are not workmen or operatives. . . ."); *In re* Stryker, 158 N. Y. 526, 53 N. E. 525 (1899) (The word "employee" is limited by the use of the more specific words "operatives" and "laborers" in a statute.); Palmer v. Van Santvoord, 153 N. Y. 612, 47 N. E. 915 (1897) (same) West Virginia Coal & Coke Corp. v. State Compensation Comm., 116 W. Va. 701, 182 S. E. 826 (1935) ("employee" broader than workman").

The court cites *Bernstein v. Madison Baking Co.*[17] as being in point and essentially undistinguishable from the instant case. However, the basis of the holding in the *Bernstein* case that the union involved was *bona fide* was that its members were employees in fact, if not in name. The opinion is free from any attempt such as that made in the instant case to distinguish between "employees" and "workingmen". There is also an important factual difference between the *Bernstein* case and the instant one. The union involved in the instant case has many members who maintain places of business (laundry shops) operated with their own capital, furnished with their own equipment, and staffed by employees whom they hire and whose wages they pay. The members of the union involved in the *Bernstein* case maintained no stock or office or place of business. It is this feature, as the Court in that case pointed out, which distinguishes the members of the union involved from true jobbers or entrepreneurs.[18] Many members (the drivers of the laundry trucks) of the organization involved in the instant case[19] also maintain no stock or office or place of business. These then, occupy the same position in the laundry industry as the members (the drivers of bakery trucks) of the union involved in the *Bernstein* case occupy in the baking industry. According to the standards of the *Bernstein* case, the membership of the union in the instant case contains those who are able to combine and enjoy exemption from the restrictions of the Donnelly Act and those who are prohibited from so doing. While a concession may be made to the court's contention in the instant case that the laundry drivers are workingmen and therefore entitled to the benefits of § 3 of the Donnelly Act the court's inclusion within that category of laundry shop owners who operate with their own capital and employ workers presents a far more difficult concept to approve. To call the laundry shop owners "workingmen" is to fly in the face of reality. They are in fact employers or entrepreneurs. That being the case, such a combination (entrepreneur and workingmen) should disqualify

17. 186 Misc. 474, 38 N. Y. S. (2d) 811 (Sup. Ct. 1942), *aff'd without opinion*, 266 App. Div. 839, 43 N. Y. S. (2d) 517 (1st Dept. 1943), *leave to appeal denied*, 291 N. Y. 827, 51 N. E. (2d) 698 (1943).

18. The persons involved in the *Bernstein* case distributed bakery products in trucks which they owned to various retail shops. As compensation they kept a certain percentage of the sales price of the products. Their work in no way differed from that of employee drivers.

19. As previously noted, the organization in the instant case contained two main groups. One group consisted of the drivers of laundry trucks. Originally these drivers were employees. Then the laundry companies decided to change their status. Under the new plan each driver had to own his truck and ceased to be an employee. His work remained the same. The compensation under this plan was the difference between the amounts charged by the laundry and the amounts paid by the householders. If the organization in the instant case consisted only of such drivers it might be held that it was a *bona fide* labor union of employees. It was on this basis that the indictment was dismissed in the Court of General Sessions (182 Misc. 878, 45 N. Y. S. (2d) 709 (1943). The organization, however, also contained storekeepers who with their own capital operated laundry shops furnished with their equipment on premises leased by them, and they had employees whom they hired and whose wages they paid. Even under the Bernstein decision the latter must be considered to be true entrepreneurs. Thus, even if we consider the drivers as workingmen, the combining with a non-workingmen group would destroy the *bona fide* quality of the union. See note 20 *infra*.

the union from asserting the protection given by the Donnelly Act to labor unions and associations of workingmen.[20] The danger inherent in such an arrangement is readily cognizable. To allow employers to obtain exemption from the anti-monopoly statutes by combining with workingmen would tend to emasculate the statutes.

The determination of the court in the instant case that there can be a *bona fide* labor union whose members neither are, nor desire to be, employees leads us to another difficulty. It makes necessary the interpretation of the various statutes of New York relating to the rights of labor with conflicting yardsticks. As a result, a labor union signifies one thing under one statute and something different under another. While only a few New York cases have indicated that the various New York statutes concerning labor should all be interpreted by the same standards,[21] the Federal decisions have viewed the Acts of Congress relating to labor as forming the parts of one comprehensive scheme.[22] Although Congress failed to provide specifically that the protection granted labor unions by the Norris-LaGuardia Act[23] should apply to criminal as well as equity actions, the Supreme Court, expressing the desirability of uniformity, decided that the same rules would govern in the criminal and equity divisions of the Federal courts.[24] It is submitted that the court in the instant case should have shown the same concern for uniform interpretation of the New York laws concerning labor. Instead, it has apparently isolated the provisions of the Donnelly Act relating to labor unions from other labor legislation.[25]

20. The Federal courts have so decided in several cases. The United States Supreme Court succinctly stated the applicable rule: "A business monopoly is no less such because a union participates, and such participation is a violation of the Act". Allen Bradley Co. v. Union, 325 U. S. 797, 811 (1945). *See also* Albrecht v. Kinsella, 119 F. (2d) 1003 (C. C. A. 7th, 1941) (Labor union joined with employers' association to prevent plaintiff from price cutting; union enjoined although low prices depressed wages.); Loew's Inc. v. Basson, 46 Fed. Supp. 66 (S. D. N. Y. 1942); United States v. New York Electrical Contractor's Ass'n., 42 F. Supp. 789 (S. D. N. Y. 1941); United States v. Local Union No. 3, 42 F. Supp. 783 (S. D. N. Y. 1941).

21. Manhattan Storage and Warehouse Co. v. Movers and Warehousemen's Ass'n., 262 App. Div. 332, 335, 28 N. Y. S. (2d) 594, 597 (1st Dep't. 1941), *rev'd on other grounds*, 289 N. Y. 82, 43 N. E. (2d) 820 (1942); People v. Masiello, 177 Misc. 608, 31 N. Y. S. (2d) 512 (Sup. Ct. 1945); People v. Distributors Division, etc., 169 Misc. 255, 7 N. Y. S. (2d) 185 (Sup. Ct. 1938).

22. See account of the history of Federal labor legislation in Allen-Bradley Co. v. Union, 325 U. S. 797 (1945).

23. 47 STAT. 70 (1932), 29 U. S. C. A. §§ 101-115 (1942).

24. United States v. Hutcheson, 312 U. S. 219, 234, 235 (1941) (Defendants were indicted on a charge of violating the Sherman Act. They defended on the ground that their actions were exempt as acts in support of a legitimate labor objective. By Federal statute such acts were protected from being enjoined by injunction, but not from criminal prosecution. The Court decided that it would be improper to allow the punishment criminally as violations of the Sherman Acts, which could not be enjoined in equity as violations of that Act).

25. According to its decision, a labor union, under the Donnelly Act, may be an organization of non-employees. However, as it recognizes, under Section 876-a of the New York Civil Practice Act, (sometimes referred to as the "little Norris-LaGuardia Act") regulating the issuance of injunctions in labor disputes, a labor union is an organization

Were the principal case not a criminal action but a suit in equity by the laundries seeking an injunction to restrain the defendants from violating the Donnelly Act, the first question to be decided by the court would be whether the limitations on its power to issue injunctions prescribed by Section 876-a of the Civil Practice Act were to be invoked because a labor dispute was before it. It would appear that the Court in such a case would be compelled to hold the "little Norris-LaGuardia Act" to be inapplicable since the relationship between the laundries on the one hand, and the drivers and storekeepers on the other, is not that of employer and employee. The incongruity of such a result would appear to make evident the need for applying uniform standards in interpreting the New York statutes concerning Labor. It is only through such uniform interpretation that a cohesive and compact system of labor jurisprudence will be developed.

PATENTS—INVENTOR'S SECRET USE COMMERCIALLY OF PROCESS FOR MORE THAN ONE YEAR INVALIDATING SUBSEQUENT PATENT.—Plaintiff's assignor was granted a United States patent on a process for the building up of worn metal parts by means of sprayed molten metal. For more than a year before the patent was applied for, the patentee had commercially used this process in repairing worn metal parts for various customers. The customers could not ascertain from the repaired parts the process used in effecting the repairs. Plaintiff brought action in the United States District Court charging infringement of the patent. The District Court held the patent valid, since the plaintiff's assignor's use of the process prior to a filing of the patent application, even though commercial, with the experimental purpose subordinate, was not public but secret. Defendant appealed. *Held*, judgment reversed. The patentee's commercial use of the invention for more than one year prior to the filing of his application thereon rendered the patent invalid. It is immaterial that the inventor's use was secret and that the public could obtain no information as to the process. *Metallizing Engineering Co., Inc. v. Kenyon Bearing & Auto Parts Co. Inc.*, 153 F. (2d) 516 (C. C. A. 2d, 1946); *cert. denied* 326 U. S. — (1946).

The basic constitutional provision under which the Federal Government grants a patent posits such a grant of power on the promotion of science and the useful arts.[1] Pursuant to this constitutional provision, Congress has enacted the patent statutes. The present statute[2] makes it a condition to the grant of a patent that

of employees only. This is also true under Article 20 of the NEW YORK LABOR LAW, which is the New York Labor Relations Act based upon the Wagner Act, 49 STAT. 449 (1935), 29 U. S. C. A. § 151 (1942).

1. The U. S. CONST., Art. 1, § 8, "The Congress shall have power . . . (8) To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

2. REV. STAT. § 4886 (1875) 35 U. S. C. § 31 (1934). Section 1 of the first Act (1 STAT. 109 (1790) provided that a petition for a patent must state that the subject matter had not been "before known or used." The Patent Act of 1793 (1 STAT. 318), altered these words to read "not known or used before the application." Section 6 of the Patent Act of 1836 (5 STAT. 117) changed the previous statute by requiring that the invention must not at the time of the application for a patent have been "in public use or on sale" with the inventor's consent or allowance. Section 7 of the Patent Act

the invention was ". . . not in public use or on sale in this country for more than one year prior to his [inventor's] application . . ." and also had not been "abandoned." Abandonment in a general sense has been divided into that which is actual and that which is constructive.[3] For actual abandonment not only must there be proved an act of abandonment but, where there is no express declaration of intention,[4] the act must be done under conditions from which an intention to abandon may be inferred.[5] Such an abandonment may also be shown by an unexplained or negligent delay in making application for a patent.[6] However, more correct terminology would call such negligent delay laches rather than abandonment.[7]

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of 1839 (5 STAT. 353) provided that "no patent shall be held to be invalid, by reason of such purchase, sale or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public; or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent." Section 4886 of the Revised Statutes made no substantial change and the present statute (35 U. S. C. § 31 (1934)) is precisely the same except that the prior use, which will prevent patentability, is limited to the United States and to one year (instead of two years) before the application. Statutes at large as quoted in Appendix to WALKER, PATENTS (Deller's ed. 1937) 455 *et seq.*

3. "Its abandonment is actual when it is the result of intention. . . . It is constructive when it is the result of some statute which operates regardless of the intention of the inventor." WALKER, PATENTS (Deller's ed. 1937) 329, 330.

4. The expressed declaration may consist of a statement by the inventor that he abandons his invention. In Westinghouse Electric & Mfg. Co. v. Saranac Lake Electric Co., 108 Fed. 221, (C. C. N. D. N. Y. 1901) the inventor of an electric lighting system in a letter to a scientific magazine stated that his invention was open to anybody who saw fit to use it and by this statement he expressly abandoned his right to the invention. Such express abandonment may also be shown by a formal disclaimer. Leggett v. Avery, 101 U. S. 256, 259 (1880).

5. In Allinson Manufacturing Co. v. Ideal Filter Co., 21 F. (2d) 22 (C. C. A. 8th, 1927) where the patent was for a machine for filtering gasoline which had been used secretly for six years before application for a patent was made, the court said that the long delay in applying for a patent indicated that the inventor had abandoned the invention. In Macbeth-Evans v. General Electric Co., 246 Fed. 695 (C. C. A. 6th, 1917) *cert. denied*, 246 U. S. 659 (1918) the patentee had invented a process for making glass light shades and competitively exploited it for a period of ten years in secret, applying for a patent only when the process had been discovered by others. One of the grounds on which the court held the patent invalid was that such long delay in applying for a patent indicated an intention to abandon the invention.

6. In Woodbridge v. United States, 263 U. S. 50 (1923) the inventor of an artillery shell had in 1852 made application for a patent which was allowed. Before the patent was issued the inventor requested that the application be filed in the secret archives of the Patent Office and that issuance of the patent be postponed for one year so that he could secure patents abroad. Thereafter for a period of nearly ten years he deliberately abstained from requesting issuance of the patent until the needs of the government should make the invention of monetary value to him. The court held that the inventor had forfeited his right to a patent by his conduct.

7. The court in Utah Radio Products Co. v. Boudette, 78 F. (2d) 793, 799 (C. C. A. 1st, 1925) said: "This is a case of laches, not of abandonment. To prove abandonment it is necessary to show an intention on the part of the inventor to abandon or give

The so-called constructive abandonment occurs where the inventor fails to comply with the other condition specified in the statute by using or permitting his invention to go into public use for more than a year prior to the date of his application for a patent. Such public use for more than the prescribed period deprives the public of the consideration for which the patent is granted, namely, the benefit to be derived from the knowledge and use of the invention.[8]

The question presented in the principal case involves the interpretation of the statutory phrase "public use" which, if indulged in for more than one year before the inventor makes his application for a patent, will prevent patentability. It must first be determined what constitutes "public use." Public use does not mean an experimental use which is permissible under the law.[9] The use is experimental so long as it is necessary to test the merits of the invention. An experimental use conducted in a public place is not a public use if use in public were the only way the invention could be tested.[10] In *City of Elizabeth v. American Nicholson Pavement Co.*,[11] the inventor, to test the qualities of a wooden pavement which he invented, paved a small street in Boston owned by a corporation of which he was an officer and the court upheld the use as experimental. Likewise in *Eclipse Machine Co. v. Harley-Davidson Motor Co.*,[12] the court held that the testing of a motorcycle on a public highway to perfect it was experimental. However, a commercial use, that is, a use for profit or gain, cannot be disguised under the pretext of experiment. The primary purpose of the use counts.[13] The use is public if the main reason for the use is to gain profits and the experimental part is merely incidental thereto. For example, in *International Tooth & Crown Co. v. Gaylord*,[14] the inventor, for more than the statutory period, instructed a large number of dentists throughout the country as to his unpatented invention for fitting artificial teeth with no suggestion that the use was experimental and received payment for such instruction. The court there held the use was public as the main object of the use was the gaining of profits and the experimental character of the use was merely incidental thereto. However, incidental profits resulting from the experi-

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the subject matter to the public; but where laches—unreasonable delay—is the issue, the intent is unimportant, and especially so where public rights have attached pending the delay."

8. In Pennock v. Dialogue, 2 Pet. 1, 19 (U. S. 1829) the patent was for a process for making hose 13,000 feet of which had been sold in a period of seven years before the patent application was made. The Supreme Court invalidated the patent saying: "If an inventor should be permitted to hold back from the knowledge of the public the secrets of his invention; if he should . . . make and sell his invention publicly, and thus gather the whole profits . . . it would materially retard the progress of science and the useful arts . . . to allow him fourteen years of legal monopoly when the danger of competition should force him to secure the exclusive right."

9. Smith & Griggs Mfg. Co. v. Sprague, 123 U. S. 249, 256 (1887).

10. Egbert v. Lippman, 104 U. S. 333, 336 (1881).

11. 97 U. S. 126 (1877).

12. 252 Fed. 805 (C. C. A. 3d, 1918).

13. ". . . but where the use is mainly for the purposes of trades and profit and the experiment is merely incidental to that, the principal and not the incident must give character to the use.' Smith & Griggs Mfg. Co., v. Sprague, 123 U. S. 249, 256 (1887).

14. 140 U. S. 55 (1890).

mental use do not destroy its experimental character.[15] Once the invention has been perfected, any use thereafter is not experimental but public.[16]

In the present case the trial court found that the use was primarily commercial and only secondarily experimental and that the secret of the process had not been disclosed by the use of the process. The trial court, relying upon *Peerless Roll Leaf Co. v. Griffin & Sons*,[17] held that such use was not public and that the patent was not thereby invalidated. In the *Peerless* case the patent was for a machine[18] which was kept secret but the output of which was freely sold. The same court which decided the instant case held that this was not a public use of the machine because no knowledge of the invention could possibly be obtained from the sale of the product thereof. Previous cases had left undecided whether a patent for a process[19] would be invalid where the process was kept secret but the product was sold on the market for more than the statutory period.[20] The court in the *Peerless* case distinguished between a machine and a process holding that, where the invention was not disclosed, in the case of a sale of the product of the former, there was no public use, but indicating that in the sale of the product resulting from the process, there was public use. However, it cannot be said that there is always more secrecy attached to a machine than to a process. The court in the instant case recognized that it erred in the *Peerless* case in holding that the product of a machine which had been kept secret could be freely sold without preventing patentability and discarded the distinction which it had previously made between the product of a machine and that of a process. It placed its decision upon the broad ground that an inventor's commercial use more than one year, before the patent application is made, is a "public use" within the meaning of the statute regardless of any secrecy which may cling to the invention. To uphold such a patent the court reasoned would be a fraud on the public, because the consideration for the grant of the patent is public benefit. The patentee should not, by secret monopoly, be permitted purposely to deprive the public of disclosure of his invention retarding science and then, when he is ready, seek to obtain a legal monopoly. Once the court recognized the constitutional basis for the grant of a patent and the intent of Congress to exact, as a consideration for its grant, the bestowal of a benefit upon the public, the statutory requirement received its correct interpretation. According to the court's holding the "public use" of an invention for more than a

15. *Id.* at 62.

16. In Eastman v. Mayor etc. of City of New York, 134 Fed. 844 (C. C. A. 2d, 1904), the patent was for a pumping device on a steam fire engine which had been used commercially for four years before a patent was applied for and the court held that, once the invention had been completed, the use thereafter was public and rendered the patent invalid.

17. 29 F. (2d) 646 (C. C. A. 2d, 1929). The patent in this case was for a machine printing titles on book covers.

18. The term machine as used in patent law, is defined as "an assemblage of parts which function together according to an inherent law of operation." AMDUR, PATENT LAW AND PRACTICE (1935) § 4.

19. The generic term "process" as applied in patent law refers to an operation performed by a rule to produce a result. WALKER, PATENTS (Deller's ed. 1937) 39.

20. *See* Macbeth-Evans Glass Co. v. General Electric Co., 246 Fed. 695 (C. C. A. 6th, 1917), *cert. denied* 246 U. S. 659 (1918) *Cf.*, Stresau v. Ipsen, 77 F. (2d) 937 (C. C. P. A. 1935).

year after its perfection, which will prevent patentability, was not intended as the antithesis of a secret use.[21] A secret use merely benefits the inventor and in fact deprives the public of the consideration (disclosure within a reasonable time) which is the consideration for the grant of the monopoly.

L. Hand, J., in the principal case, stated that the statutory forfeiture resulting from more than a year's public use "has nothing to do with abandonment which presupposes a deliberate, though not necessarily an express, surrender of any right to a patent." However, it would seem that somewhat the same basic ground may underlie the denial of a patent in either case: the inventor fails to furnish to the public the consideration for the issuance of the patent, namely the public benefit resulting from the disclosure of the invention.[22]

SURETYSHIP—BUILDING CONTRACTS—APPLICATION BY MATERIALMAN OF PAYMENTS UPON UNSECURED CLAIMS.—Defendant, a general contractor, contracted with the United States to construct a housing project at Nashville, Tennessee. Pursuant to the Miller Act, he furnished a bond guaranteeing payment of labor and materials and sub-let a portion of the job to a painting contractor. The sub-contractor purchased paints and sundries for the job from a materialman, from whom the sub-contractor also borrowed money to meet his payrolls on the job. Estimate checks issued to the sub-contractor by the defendant general contractor for work done were endorsed by the sub-contractor to the materialman. not for the materials purchased, but for the loans made by the materialman to the sub-contractor. Such application of these payments was made pursuant to an agreement between the sub-contractor and materialman, of which defendants general contractor and his surety had no knowledge. The materialman brought suit against the general contractor and his surety in the name of the United States to recover the balance claimed to be due for materials and supplies purchased by the sub-contractor as well as for an additional balance for money loaned to meet the payrolls. Upon an appeal from a judgment for defendants, *held,* judgment affirmed. The application of the checks by the materialman to his loan account instead of the materials account was prejudicial to the prime contractor and his surety, and they were both entitled to have such payments reapplied upon the materials account, thereby extinguishing it. *United States v. Beck*, 151 F. (2d) 964 (C. C. A. 6th, 1945).

As a general rule, a debtor is entitled to direct the application of any payment

21. This holding may be contrary to what had been accepted as the law heretofore. For instance Robinson states, "A use in public is not necessarily a use by the public. It is distinguished not from an individual, but from a secret use. It is a use which places the invention in such a relation to the public that if they choose to be acquainted with it, they can do so." 1 ROBINSON, LAW OF PATENTS (1890) 434.

22. In Wirebounds Patents Co. v. Saranac Automatic Machine Corp., 65 F. (2d) 904, 906 (C. C. A. 6th, 1933) the court said: "The rationale of these three cases [Webster Electric Co. v. Splitdorf Electric Co., 264 U. S. 463 (1924), Chapman v. Wintroath, 252 U. S. 126 (1920) and Woodbridge v. United States, 263 U. S. 50 (1923)] is that if the inventor, intentionally or by reason of culpable neglect, be guilty of action which unduly postpones the time when the public would be entitled to the free use of the invention, and thus defeats the policy of the patent law, the right to a patent will be lost."

he makes to whatever account he chooses.[1] In the absence of a direction by him, the creditor holding two or more accounts from the same debtor is free to apply such payment as he pleases,[2] since it is presumed that the debtor by his omission assents to whatever appropriation the creditor should make.[3] And generally, if the manner of application is not provided for, it has been held that the court will make it for them.[4] Just how far the courts will go in exercising such right of application, especially where the interests of third persons are concerned, is but one of the considerations which tend to leave the decisions in this phase of the law "lamentably conflicting."[5]

One line of reasoning has been developed by the Minnesota Courts, culminating in the leading case of *Standard Oil Co. v. Day*.[6] The facts in that case were substantially similar to those in the subject case. The sub-contractor was already indebted to the materialman at the time he purchased materials to complete his sub-contract with defendant prime contractor, who had furnished a statutory bond for payment of such materials. With full knowledge of the source of the funds, the materialman accepted payments from the sub-contractor which the latter had received from the general contractor and, pursuant to an agreement between sub-contractor and materialman, applied such payments to the pre-existing indebtedness. Upon the materialman's suit to recover the balance due for materials purchased, the court found in his favor, denying any equity in the general contractor or his surety to have the payments applied to the materials account. The court reasoned that upon payment to the sub-contractor, the money became his absolutely, and in the absence of express provision, in the bond or statute, he was entitled to apply it in any way he chose without regard to the surety's interest. The knowledge of the creditor as to the source of the money was held to be immaterial. In accounting for its solicitude towards the creditor in such a case, the court commented on the inherent perils of a compensated surety's business and observed that "the surety, in modern business, should be, and usually is, quite

1. 6 WILLISTON, CONTRACTS (rev. ed. 1938) § 1795; 2 RESTATEMENT, CONTRACTS (1932) § 387; RESTATEMENT, SECURITY (1941) § 142; United States v. January & Patterson, 7 Cranch. 572 (U. S. 1813); Seyman v. Marvin & Allen, 11 Barb. 80, 90 (N. Y. 1851); Wright v. Wright, 7 Daly, 55, 57 (N. Y. 1877); Bank of California v. Webb, 94 N. Y. 467 (1884).

2. 2 RESTATEMENT, CONTRACTS 1932 § 387; RESTATEMENT, SECURITY (1941) § 142; Field v. Holland, 6 Cranch. 8 (U. S. 1810); Davison v. Klaess, 280 N. Y. 252, 20 N. E. (2d) 744 (1939); Feldman v. Beier, 78 N. Y. 293 (1879); Harding v. Tifft, 75 N. Y. 461 (1878).

3. 6 WILLISTON, CONTRACTS (rev. ed. 1938) § 1796; Field v. Holland, 6 Cranch. 8 (U. S. 1810). This rule has often been confined to cases of voluntary payments by the debtor, as distinguished from payments made pursuant to judicial decree, such as upon a mortgage foreclosure. Orleans County Nat'l Bank v. Moore, 112 N. Y. 543, 20 N. E. 357 (1889); Cowperthwaite v. Sheffield, 3 N. Y. 243 (1850). It has also been held that the creditor's right to apply money in his hands does not extend to a future indebtedness, leaving a prior demand unpaid. Baker v. Stackpoole, 9 Cow. 420 (N. Y. 1827).

4. United States v. January & Patterson, 7 Cranch. 572 (U. S. 1813); Field v. Holland, 6 Cranch. 8 (U. S. 1810).

5. Orleans County Nat'l Bank v. Moore, 112 N. Y. 543, 20 N. E. 357 (1889).

6. 161 Minn. 281, 201 N. W. 410 (1924).

able to care for itself."[7] The Minnesota doctrine has found some support in several quarters.[8]

Another line of reasoning, which is limited in its acceptance, adopts a partiality for the surety in such cases, even to the point of endangering the stability of everyday commercial transactions involving the exchange of money and the payment of debts. In *Columbia Digger Co. v. Sparks*,[9] it was held that the equitable interest of the surety in payments made by a sub-contractor to a materialman holding two or more claims against such sub-contractor prevails, even though the materialman had no knowledge of the source of the money or of the interest of the surety. The effect of such a doctrine, if adopted generally, would appear to unsettle every transaction involving payments made by a building contractor until the statute of limitations had run against any claim of a third party, who might be entirely unknown to the creditor. The creditor would be in constant danger of being required to re-open an account which he believed extinguished and apply the money received therefor to some other account. The *Columbia Digger Co.* case, which evidently entered the federal courts upon a diversity of citizenship, does not represent the current trend of federal decisions in actions arising upon statutory bonds[10] such as those required by the Miller Act.[11] The majority opinion in the *Columbia Digger Co.* case relied heavily on the Washington decision of *Crane Co. v. Pacific Heat & Power Co.*[12] as representing the rule of that state. The choice of authority appears to have been an unfortunate one, since the creditor in the *Crane* case appeared to have full knowledge of the source of the payment, although such fact was not stressed by the state court. The vigorous dissent in *Columbia Digger Co. v. Sparks*[13] expressed the opinion that, "The decision of the majority exhibits a tender regard for the rights of sureties, but a wilful disregard for the obligation of private contracts."[14] The reasoning of the *Columbia Digger Co.* case has not been generally adopted, and it is best summed up in a recent decision of another circuit court as going "too far" in asserting that notice to the creditor of the source of payment was immaterial to the surety's right to prevail.[15]

7. *Id.* at 285; 201 N. W. 412 (1924).

8. *See* Bankers' Surety Co. v. Maxwell, 222 Fed. 797 (C. C. A. 4th, 1915); People v. Powers, 108 Mich. 339, 66 N. W. 215 (1896); Grover v. Board of Education, 102 N. J. Eq. 415, 141 Atl. 81 (1928); Crane Co. v. U. S. F. & G. Co., 74 Wash. 91, 132 Pac. 872 (1913). The court which decided the *Banker's Surety Co.* case has since observed that that case "may no longer be regarded as authoritative." United States v. Johnson, Smathers & Rollins, 67 F. (2d) 121 (C. C. A. 4th, 1933).

9. 227 Fed. 780 (C. C. A. 9th, 1915).

10. The court in the subject case considered whether or not it was bound under Erie R. R. v. Tompkins, 304 U. S. 64 (1938) to observe the law of Tennessee, where the cause of action arose. It was decided that since the action arose upon a bond required by a federal statute, the Erie R. R. Co. decision was not applicable to such a case, citing R. P. Farnsworth & Co. v. Electrical Supply Co., 112 F. (2d) 150 (C. C. A. 5th, 1940).

11. 49 STAT. 793, 40 U. S. C. A. § 270-a (1935). *See* MacEvoy Co. v. United States, 322 U. S. 102 (1944).

12. 36 Wash. 95, 78 Pac. 460 (1904).

13. 227 Fed. 780 (C. C. A. 9th, 1915).

14. *Id.* at 786.

15. R. P. Farnsworth & Co. v. Electrical Supply Co., 112 F. (2d) 150 (C. C. A. 5th, 1940).

The more middle-of-the path view, which appears to be favored in New York as well as in the federal decisions, including the subject case, generally permits the creditor to apply the payment to whichever account he chooses providing he did not have knowledge of the source of the money.[16] To this qualification might reasonably be added the further requirement that he have notice, directly or by implication, of the rights of the third parties (here both general contractor and surety) whose interests are at stake. Whether the basis for protecting the third parties' interest in such cases, lies in abstract consideration of equity and justice or upon an implied in law contract running to the surety and principal, as suggested by the opinion in the subject case,[17] it appears consistent with fair practice that the creditor should not be permitted wilfully to impair their interest. The degree to which the courts should go in giving aid to the surety in building cases has not been determined satisfactorily, and evidences of the reluctance of the courts to depart from the general rules concerning the absolute right of control over application by the debtor, and, where the debtor has given no instruction, by the creditor, are apparent. The United States Supreme Court, in the very early case of *Field v. Holland*,[18] speaking through Chief Justice Marshall, deemed it equitable for the court to apply indefinite payments first to those debts "for which the security is most precarious."[19]

The question also arose in the recent case of *F. H. McGraw & Co. v. Sherman Plastering Co.*[20] While the facts are similar to those in the subject case, the action evidently entered the federal courts upon diversity of citizenship rather than in a suit under a Miller Act bond. Consequently, having determined that the contract was made in New York and that New York law must govern its decision,[21] the court sought to determine the New York rule. It was held that the materialman was entitled to apply the payments as his interests dictated, in the absence of directions by the debtor. The decision did not appear to regard the issue of knowledge or lack of knowledge by the materialman of the source of the payments as important, but rather chose to give particular weight to the fact that the materialman had made such application within a reasonable time of payment. Since the New York case of *Bank of California v. Webb*[22] had held such an application to be effective even though not made until more than a-year after action was brought, the court in the *McGraw* case was compelled to define such reasonable period as one in which application may be made without injury to the position of the debtor. The New York law on this subject does not appear

16. United States v. Johnson, Smathers & Rollins, 67 F. (2d) 121 (C. C. A. 4th, 1933); Farnsworth & Co. v. Electrical Supply Co., 112 F. (2d) 150 (C. C. A. 5th, 1940); Town of River Junction v. Maryland Casualty Co., 110 F. (2d) 278 (C. C. A. 5th, 1940), *cert. denied*, 310 U. S. 634 (1940); First Camden Nat'l Bank & Trust Co. v. Aetna Casualty & Surety Co., 43 F. Supp. 596 (D. C. N. J., 1942); Shipsey v. Bowery Nat'l Bank, 59 N. Y. 485 (1875); Harding v. Tifft, 75 N. Y. 461 (1878). The RESTATEMENT appears to have adopted this rule as well. 2 RESTATEMENT, CONTRACTS (1932) § 388; RESTATEMENT, SECURITY (1941) § 142.

17. United States v. Beck, 151 F. (2d) 964, 966 (C. C. A. 6th, 1945).

18. 6 Cranch. 8 (U. S. 1810).

19. *Id.* at 28.

20. 60 F. Supp. 504 (D. C. Conn. 1943).

21. *See* Erie R. R. v. Tompkins, 304 U. S. 64 (1938).

22. 94 N. Y. 467 (1884).

to be entirely stabilized. *Harding v. Tifft*[23] perhaps best expresses the compromise which the moderate line of reasoning seeks to effect between the Minnesota doctrine and that of *Columbia Digger Co. v. Sparks*.[24] Plaintiff sued upon a promissory note endorsed by defendant for the accommodation of the makers. The money paid by the makers to the plaintiff, without direction as to application, had been raised by the makers upon another note endorsed by defendant for the purpose of having the proceeds applied upon the note in suit. This fact was not communicated to the plaintiff creditor, and he applied it upon another note made by the same debtors and held by him. It was held that in the absence of knowledge of the defendant's interest in the payment, the plaintiff was free to apply it to the unendorsed note and then bring action, upon the note in suit.[25]

This reasoning appears to be consistent with the decision in the subject case, which is generally in line with the federal decisions arising upon the payment of statutory bonds securing those who furnish materials and supplies. The creditor's knowledge of the source of the money is deemed requisite.[26] The materialman here sought to distinguish the case by the fact that the loan and the materials purchased were both in connection with the same project and were, it was argued, merged into one matured obligation. The court rejected this reasoning, holding that they were two separate and distinct transactions with the loans logically preceding the furnishing of materials. The fact that the loans were to enable the sub-contractor to meet his payrolls on the project did not alter the general principles involved.[27] The lender remained a mere volunteer, regardless of the purpose of the loans; one who loans money to a contractor in such case is not

23. 75 N. Y. 461 (1878).

24. 227 Fed. 780 (C. C. A. 9th, 1915).

25. In this connection the court stated: "The mere fact that there is a surety for one of the debts, does not preclude the creditor from applying a payment thus received, to the debt for which he has not security. If the money had been raised by the debtor by the aid of the indorsement of the surety, given for the express purpose of enabling the debtor to raise funds to pay the secured debt, and these facts had been communicated to the creditor, he would not be permitted even with the consent of the debtor to misapply it. But it can hardly be disputed that if the debtor brought money thus raised, to the creditor, and paid it to him expressly upon the unsecured debt, without disclosing the means by which the money had been raised or any agreement as to its use, the payment would be valid." Harding v. Tifft, 75 N. Y. 461, 464-465 (1878). But *cf.* Mack v. Colleran, 136 N. Y. 617, 32 N. E. 604 (1892).

26. However, as a matter of fact, it does not appear that the materialman's *knowledge* of the actual source of the payments in the subject case was conclusively proved. The court merely observed that "it is said, the facts clearly establish that Carroll knew that the money paid by Henry came from Beck but do not show that any part of it came from the United States. If it came from independent funds of the general contractor and not from payments arising out of the contract, the surety had no interest in it to be protected. It is fair inference, however, that the money used by Beck to pay Henry came from the United States. . . ." United States v. Beck, 151 F. (2d) 964, 967 (C. C. A. 6th, 1945).

27. Despite the court's consideration of this issue, it appears reasonably certain that the liability of a surety for a personal loan of money to a sub-contractor does not exist under a Miller Act bond, which is given for the protection of persons supplying "labor and materials" only. 49 STAT. 794, 40 U. S. C. A. § 270-a (1935).

subrogated to the rights of the laborers whose wages were thereby paid, and he acquires no lien.[28]

TESTAMENTARY TRUSTS—PREMATURE TERMINATION ON EQUITABLE GROUNDS—BENEFICIARY'S PERSONAL NECESSITY.—The plaintiff sought premature termination of a testamentary trust created by her mother's will on the grounds of personal necessity and the happenings of events unforeseen by the testator. She pleaded that her father had died leaving property to her under a trust that makes it unnecessary for her to depend entirely upon the income from her mother's trust for future security, and that the present income from the trust is insufficient to purchase and maintain a home on the scale to which she has been accustomed. The trust created by her mother's will directed the trustees to hold and accumulate the entire net income of the trust estate and to reinvest it for the beneficiaries. The will further provided that the trustees might at their absolute discretion pay, apply, and expend any part of the net income for the support, care, and education of the plaintiff. The trust estate and all accumulations thereof were to be delivered to the plaintiff when she became thirty-five years of age unless she should die before that time, in which event, the trust estate and accumulations were to go to her issue, or if there were no issue, to any beneficiary designated by the daughter. She designated her husband as her beneficiary, and he joined her in this action seeking termination of the trust. The corporate trustee and the guardian *ad litem* for contingent remaindermen demurred on the ground, among others, of failure to state facts sufficient to constitute a cause of action. The demurrers were sustained by the court below. *Held,* affirmed, three justices dissenting, on the ground of failure to state facts sufficient to constitute a cause of action. *Moxley v. Title Insurance & Trust Co.*, —Cal.—, 165 P. (2d) 15 (1946).

As pointed out by the court, a demurrer must be sustained by a reviewing court if any one of the grounds relied upon are valid.[1] The other grounds of the demurrer need not be and were not considered.[2] If a contingent remainder in unborn issue had not been involved in the instant trust, the same decision would have been reached by the majority of the court.

Premature termination of a testamentary trust on the ground of the beneficiary's personal necessity or the happening of events not foreseen by the testator does not raise a difficult problem under the law of England,[3] nor in a state such as New York where the interest of a beneficiary under the usual trust is in-

28. Prairie State Nat'l Bank v. United States, 164 U. S. 227 (1896); Town of River Junction v. Maryland Casualty Co., 110 F. (2d) 278 (C. C. A. 5th, 1940), *cert. denied*, 310 U. S. 634 (1940).

1. Haddad v. McDowell, 213 Cal. 690, 691, 3 P. (2d) 550, 551 (1931).

2. Hays v. Temple, 23 Cal. App. 690, 696, 73 P. (2d) 1248 (1937). The other grounds pleaded in the instant case were: (1) lack of jurisdiction in the court, and (2) defect of parties defendant in that, unborn issue were not, and could not, be represented in the action.

3. Saunders v. Vautier, 4 Beav. 115, 49 Eng. Rep. 282 (Rolls Ct. 1841); Purtis v. Lukin, 5 Beav. 147, 49 Eng. Rep. 533 (Rolls Ct. 1842); Wharton v. Masterman, A. C. 186 (A. H. L. Cas. 1895).

alienable.[4] Premature termination of spendthrift trusts has been universally denied in this country.[5] In England, if all the beneficiaries are *sui juris* they can compel the termination of a testamentary trust regardless of the intention of the testator.[6] The English courts' view is that the property vests as soon as the beneficiary reaches twenty-one years of age and the testator cannot fetter his enjoyment of it.[7] As a result, in England, a trust has been considered comparable to a common law gift and the trustee's position as that of a mere intermediary.[8] If the testator wishes to keep the principal of a trust from the beneficiary until he reaches a certain age over twenty-one, the court in *Gosling v. Gosling*[9] indicates that the testator must place the enjoyment of the property in another person until the beneficiary reaches the desired age. However, payment of the *corpus* of the trust will be withheld where there is a gift over in case of the legatee's failure to attain the specified age.[10] The elements of necessity or emergency are not considered.[11]

As a general rule, the courts in this country have refused to terminate a testamentary trust before the time of termination set by the testator.[12] The courts have usually followed the reasoning of the court in *Claflin v. Claflin*[13] and hold that the intention of the testator must prevail, if it is lawful.[14] They hold that a decree of premature termination in effect substitutes the will of the beneficiary for the will of the testator.[15] Nevertheless, even under this majority view, a court of equity may in its discretion grant a decree prematurely terminating a trust,[16] and under proper conditions, the courts, in fact, have decreed premature termination or modification.[17] The conditions under which a court of equity will

4. N. Y. PERS. PROP. LAW, (1916) § 15; N. Y. REAL PROP. LAW, (1917) § 103.

5. Nichols v. Eaton, 91 U. S. 716 (1875); Bowlin v. Citizens' Bank & Trust Co., 131 Ark. 97, 198 S. W. 288 (1917); Wagner v. Wagner, 244 Ill. 101, 91 N. E. 66 (1910); Rose v. Southern Michigan Nat'l. Bank, 255 Mich. 275, 238 N. W. 284 (1931); *In re* Hanna's Estate, 155 Misc. 833, 280 N. Y. Supp. 662 (Surr. Ct. 1935); *in re* Leonard's Will, 151 Misc. 558, 271 N. Y. Supp. 897 (Surr. Ct. 1934); Vines v. Vines, 143 Tenn. 517, 226 S. W. 1039 (1921).

6. See note 3 *supra*.

7. Gosling v. Gosling, Johns 265, 70 Eng. Rep. 423 (Ch. 1859).

8. UNDERHILL, TRUSTS AND TRUSTEES, (8th ed., 1926) 370.

9. Johns 265, 70 Eng. Rep. 423 (Ch. 1859).

10. *See*, Grant v. Grant, 3 Y. & C. 171, 160 Eng. Rep. 661 (Eq. ex. 1838).

11. *In re* Wells, 1 Ch. 848 (1903); *In re* New, 2 Ch. 534 (1901).

12. Shelton v. King, 229 U. S. 90 (1913); Hurt v. Gilmer, 40 F. (2d) 794 (App. D. C., 1930); *In re* Yates, 170 Cal. 254, 149 Pac. 555 (1915); DeLadson v. Crawford, 93 Conn. 402, 106 Atl. 326 (1919); Wallace v. Foxwell, 250 Ill. 616, 95 N. E. 985 (1911); Lunt v. Lunt, 108 Ill. 307 (1884); Claflin v. Claflin, 149 Mass. 19, 20 N. E. 454 (1889); *In re* Hamburger's Will, 185 Wis. 270, 201 N. W. 267 (1924).

13. 149 Mass. 19, 20 N. E. 454 (1889).

14. Ackerman v. Union & New Haven Trust Co., 90 Conn. 63, 96 Atl. 149 (1915); *In re* Hamburger's Will, 185 Wis. 270, 201 N. W. 267 (1924).

15. Pennington v. Metropolitan Museum of Art, 65 N. J. Eq. 11, 22, 55 Atl. 468, 472 (1903).

16. Tilton v. Davidson, 98 Me. 55, 56 Atl. 215 (1903); Armistead v. Hartt, 97 Va. 316, 33 S. E. 616 (1899).

17. Moor v. Vawter, 84 Cal. App. 678, 258 Pac. 622 (1927); Whittingham v. Cal.

decree premature termination of a testamentary trust have been said to be: 1) that all interested parties unite in seeking the termination; 2) that every reasonable purpose of the trust has been fulfilled; 3) and that no fair and lawful restriction imposed by the testator be disturbed or nullified by the termination.[18]

Compliance or non-compliance with the first condition is readily ascertainable. All the beneficiaries must seek the termination and it is generally held that they must be *sui juris* and under no disability.[19] It is a necessary corollary that in the absence of statute,[20] if all possible beneficiaries are not in being or cannot be ascertained, a trust generally will not be prematurely terminated even though all the existing beneficiaries consent to its termination.[21]

The courts have the opportunity for, and have exercised, a great deal of discretion as to fulfillment of the second and third conditions.[22] Where the trust created is substantially similar to the one in the instant case, the courts generally have applied the doctrine of the *Claflin* case and have refused to anticipate payment of the principal to the beneficiaries on the ground that the purpose of the testator, to keep the principal from the beneficiary for his own protection until he reaches a certain age, is clear and should be respected.[23]

Trust Co., 214 Cal. 128, 4 P. (2d) 142 (1931); *In re* Pease, 11 Conn. Supp. 61 (1942); Central Trust Co. v. McCarthy, 73 Ohio App. 431, 57 N. E. (2d) 126 (1943); Sears v. Choate, 146 Mass. 395, 15 N. E. 786 (1888); Hill v. Hill, 90 Neb. 43, 132 N. W. 738 (1911).

18. Ackerman v. Union & New Haven Trust Co., 90 Conn. 63, 71, 96 Atl. 149, 151 (1915).

19. Bronson v. Thompson, 77 Conn. 214, 58 Atl. 692 (1904); Hoffman v. New England Trust Co., 187 Mass. 205, 72 N. E. 952 (1905); Shaller v. Miss. Valley Trust Co., 319 Mo. 128, 3 S. W. (2d) 726 (1928).

"However, some courts seem to be willing to deviate from the terms of a trust when the beneficiaries are infants and in need. In one case, to aid infants, the court ordered the sale of both the estate *pour autre vie* and their absolute remainder, Richards v. East Tenn. Ry. Co., 106 Ga. 614, 33 S. E. 193, 197 (1899). In speaking of the power of the court to anticipate payment of a trust to aid infants, the court in Rhoads v. Rhoads, 43 Ill. 239 255 (1857) said, "This does not subvert the will, or tend to defeat the intention of the testator, for his children were the darling objects of his solicitude and were he living, he would undoubtedly make ample provision for them."

20. For a discussion of statutes providing for the compromise and settlement of contested cases, regardless of contingent interests, *see* Cleary, INDESTRUCTIBLE TESTAMENTARY TRUSTS, (1934) 43 YALE L. J. 393, 414 *et seq.*

21. Fletcher v. Los Angeles Trust & Sav. Bank, 182 Cal. 177, 187 Pac. 425 (1920); Byers v. Beddow, 106 Fla. 166, 142 So. 894 (1932); Hill v. Hill, 159 Tenn. 27, 16 S. W. (2d) 27 (1929).

22. Note the terms "reasonable purpose" and "fair restriction" in the second and third conditions.

23. The trusts considered in the following cases do not, as in the principal case, involve contingent remainders. However, since the presence of the contingent remainder was not a ground of the majority's decision in the principal case, the following cases may be considered substantially in point. Shelton v. King, 229 U. S. 90 (1913); Stier v. Nashville Trust Co. 158 Fed. 601 (C.C.A. 6th, 1908); *In re* Yates, 170 Cal. 254, 149 Pac. 555 (1915); DeLadson v. Crawford, 93 Conn. 402, 106 Atl. 326 (1919); Perabo v. Gallagher, 241 Mass. 207, 135 N. E. 113 (1922); Claflin v. Claflin, 149 Mass. 19, 20

One of the most frequent reasons given by the courts for permitting premature termination of a testamentary trust has been the occurrence of circumstances which were regarded by the court as unforeseen by the testator.[24] The circumstances regarded as unforeseen are varied. They range from the fact that the property constituting the trust *res* could only be carried at a loss,[25] to the death of the remainderman prior to the beneficiaries of the life term.[26] The courts have very readily authorized modification and deviation from the terms of the trust instrument where unforeseen circumstances endanger the trust *res* or income.[27] For example, trustees have been ordered to convert real property into personalty contrary to the express provisions of the trust.[28] But, as a rule, modification or termination will not be granted when the circumstances are such that the modification or termination would be merely advantageous to the beneficiaries.[29] The reasoning of courts favoring modification and termination on the ground of unforeseen conditions is well summed up by the Illinois Supreme Court in *Curtis v. Brown*,[30] in which it said that the court did not believe so great a defect existed in our jurisprudence as to consider the terms of trust instruments "like iron bands". The court went on to say that, "Exigencies often arise not contemplated by the party creating the trust. . . .where the aid of the court of chancery must be invoked to grant relief imperatively required, and in such cases the court must, as far as may be, occupy the place of the party creating the trust, and do with the fund what he would have dictated had he anticipated the emergency."[31]

The view of the majority of the courts in this country which consider a trust indestructible, except when the above mentioned conditions are present, has been criticized because of the restraint trusts place upon the alienation of property,[32] because it is felt to be against public policy to tie the hands of the only persons interested in the trust *res*,[33] and, finally, because the majority view is im-

N. E. 454 (1889); Young v. Snow, 167 Mass. 287, 45 N. E. 686 (1897); Lent v. Title & Trust Co., 137 Ore. 511, 3 P. (2d) 755 (1931).

24. Black v. Bailey, 142 Ark. 201, 218 S. W. 210 (1920); Booe v. Vinson, 104 Ark. 439, 149 S. W. 524 (1912); Wilce v. VanAnden, 248 Ill. 358, 94 N. E. 42 (1911); *In re* Cornil's Estate, 167 Iowa 196, 149 N. W. 65 (1914); Bowditch v. Allen, 8 Allen 339 (Mass., 1864).

25. Black v. Bailey, 142 Ark. 201, 218 S. W. 210 (1920).

26. Bowditch v. Allen, 8 Allen 339 (Mass., 1864). The court considered the trust to be created solely to provide for maintenance of the remaindermen, and terminated the trust granting three-eighths to the life tenant and five-eighths to the remaindermen's estate.

27. Vickers v. Vickers, 189 Ky. 323, 225 S. W. 44 (1920); Young v. Young, 255 Mich. 173, 237 N. W. 535 (1931); Scott, DEVIATION FROM THE TERMS OF A TRUST, (1931) 44 HARV. L. REV. 1025.

28. Stout v. Stout, 192 Ky. 504, 233 S. W. 1057 (1921); *In re* Pulitzer's Estate, 139 Misc. 575, 249 N. Y. Supp. 87 (Surr. Ct. 1931).

29. Atkinson v. Lyle, 191 Ark. 61, 85 S. W. (2d) 715 (1935); Russell v. Russell, 109 Conn. 187, 145 Atl. 648 (1929); *In re* Caswell's Will, 197 Wis. 327, 222 N.W. 235 (1928).

30. 29 Ill. 201 (1862).

31. *Id.* at 230.

32. Note (1911) 24 HARV. L. REV. 224.

33. Scott, CONTROL OF PROPERTY BY THE DEAD, (1917) 65 U. OF PA. L. REV., 632, 647; Note, (1937) 46 YALE L. J. 1005, 1011

practical.[34] The last criticism may be made most strongly in a case like the instant one where personal necessity of the beneficiary might require a sale of the beneficial interest.[35] In such a case it would seem to frustrate the intent of the testator to force the beneficiary (the primary object of the testator's benevolence) in time of need to sell her beneficial interest at an inevitable loss due to the fact that the transferee will be refused termination of the trust.[36] Especially is this true when we consider that the testator had no intention of or purpose in preserving the trust property for a stranger. This fact was recognized by the early English courts.[37]

In addition, as pointed out in the minority opinion in the instant case, the majority view places an unreasonable burden upon conscientious beneficiaries who seek the court's sanction for a judicial termination. Such a termination can be achieved without the court's aid if the trustee is willing to join with the beneficiary in a transfer to a third person of the entire legal and beneficial title of the trust *res*,[38] or a willing trustee may, in return for a release, turn the property over to the beneficiary.[39] These extra-judicial methods of termination may be criticized as affording the trustee an objectionable amount of authority in consenting or objecting to the termination. The trustee does not have this authority in a judicial proceeding, for the consent of the trustee is not essential to a decree authorizing the termination of a trust,[40] and is bound by the decree of termination rendered in a proceeding to which he is a party.[41]

When dealing with cases involving the beneficiary's personal necessity and the intervention of conditions unforeseen by the testator which bring about such necessity, the courts are presented with an opportunity to alleviate the often harsh results of the majority American rule. It is unsafe to conclude that those American decisions which refuse premature termination of a testamentary trust[42] con-

34. 4 BOGERT, TRUSTS (1st ed., 1935) 2940. "In the opinion of the writer the majority American position to the effect that non-spendthrift trusts are indestructible as long as they are active and have a purpose to be performed has the appearance of strength, in that it stresses respect for the intent of the settlor, harmony with the spendthrift trust docrine, and refusal by the courts to remake wills and deeds; *but it seems in fact an impractical rule which brings about an adherence to theory but no practical individual or social benefits.*" (italics added.)

35. Provided the trust is not a spendthrift trust, the beneficiary can transfer her beneficial title to the trust property at any time. Young v. Gnichtel, 28 F. (2d) 789 (D. C., N. J., 1928).

36. Stier v. Nashville Trust Co., 158 Fed. 601 (C.C.A. 6th, 1908).

37. In *Curtis* v. *Lukin*, 5 BEAV. 147, 155, 49 Eng. Rep. 533, 536 (Rolls Ct. 1842), the court gave as one of the bases for the English rule, the fact that the beneficiary has upon attaining the age of twenty-one the legal power to dispose of his beneficial interest or to sell, charge, or assign it and that the courts have thought fit to say that since the legatee has such power over the property and can deal with it as he pleases, it will not subject him to the disadvantage of raising money by selling or charging his interest.

38. Langley v. Conlan, 212 Mass. 135, 98 N. E. 1064 (1912); Lemen v. McComas, 63 Md. 153 (1884).

39. Partridge v. Clary, 228 Mass. 290, 117 N. E. 332 (1917).

40. Armistead v. Hartt, 97 Va. 316, 33 S. E. 616 (1899).

41. Payne v. Bowdrie, 110 Ga. 549, 36 S. E. 89 (1900).

42. See note 23 *supra*.

stitute authority for the proposition that in a case where the beneficiary is in real need a court of equity will never direct premature termination. In none of these cases did the courts directly pass on such need as a distinct ground for judicial relief.[43] The same is true of the decree in the instant case, since the court, despite a long opinion seemingly tending to show that it would not grant termination on this ground, states that the plaintiff, in any event, did not show sufficient necessity or change in events to warrant the court's intervention.[44] The decision in the case cannot be considered a holding that in a proper case relief may not be granted. That premature termination may be granted in a proper case is indicated by the language of the United States Supreme Court in a leading case, *King v. Shelton*,[45] where in denying such termination the court said, "It is not claimed they are in want or that anything has happened since the will which was not anticipated by the testatrix, and no special reasons are claimed for terminating the trust because of new conditions which she did not take into account."[46]

43. For example in Claflin v. Claflin, 149 Mass. 19, 20 N. E. 454 (1889), the beneficiary contended that the provisions of the will, postponing the distribution of the trust *res* beyond the time when he was twenty-one years old, were void; Perabo v. Gallagher, 241 Mass. 207, 135 N. E. 113 (1922), was a suit by a creditor to reach the principal of a trust; in Stier v. Nashville Trust Co., 158 Fed. 601 (C.C.A. 6th, 1908) the assignee of the beneficiary attempted to have the restriction upon the delivery of the corpus declared null and void; and in DeLadson v. Crawford, 93 Conn. 402, 106 Atl. 326 (1919) the beneficiary contended the trust was an illegal and invalid restriction upon the power of alienation of his property.

44. It would seem that the decision of the majority of the court would be less open to question if it were placed upon the ground that there was the contingent interest of unborn issue involved. (Since the writing of this case note, the holding in the instant case has been affirmed —Cal.—, 154 P. (2d) 417 (1946) upon this very ground.) The minority opinion would disregard such ground, as well, by extending the doctrine of those statutes which permit a compromise of the contingent interests of unborn issue. See note 20 *supra*. In dealing with this problem 2 RESTATEMENT, TRUSTS (1935), 336 would seem pertinent. This section provides: "If owing to circumstances not known to the settlor and not anticipated by him the continuance of the trust would defeat or substantially impair the accomplishment of the purposes of the trust, the court will direct or permit the termination of the trust." Genuine personal necessity would seem to be an unforeseen event and one not desired by the testator in the usual case. Section 336 continues in Comment C. (headed: *Beneficiary under incapacity or non-consenting*:) "The rule started in this Section is applicable whether or not one or more of the beneficiaries are under an incapacity or do not consent to the termination of the trust."

45. 229 U. S. 90 (1913). Trusts for three beneficiaries were to terminate when the youngest of the beneficiaries reached twenty-five years of age. The beneficiaries sought to have the trust corpus transferred as they reached twenty-one years on the ground that the trust was illegal.

46. *Id.* at 94. *See* Fletcher v. Los Angeles Trust and Savings Bank, 182 Cal. 177, 187 Pac. 425, 426 (1920).