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Notes and Comments

NOTES AND COMMENTS

Constitutional Law: Partial unconstitutionality: Unconstitutional application of statutes.— *Borchert v. City of Ranger,* 42 F. Supp. 577 (N. D. Tex. 1941), though not a leading case, raises an interesting problem. Jehovah's Witnesses sued to enjoin future prosecutions for violation of ordinances which forbade all peddling without a license from certain officials. The court granted the injunction on the ground that the ordinances violated the Fourteenth Amendment, but it is not the purpose here to discuss the substantive law of this case or of any case mentioned. Judge Wilson raised the problem to be dealt with here when he said,[1] "I am not holding that these ordinances of the various defendant cities are invalid. They may be perfectly valid and enforceable against certain activities that may be carried on in their midst. . . . I am holding as to these plaintiffs, there was an unconstitutional application of these ordinances to them."

The question of whether a statute which will be unconstitutional when applied to a certain set of facts but constitutional when applied to others, should be declared totally void or whether it should be upheld as far as possible, has received a rather confusing treatment at the hands of the Supreme Court of the United States, perhaps because this question in most cases has been incidental to the decision of the major issue in the specific case under consideration. An orderly analysis of the decisions on this issue is difficult, but one can distinguish with reasonable certainty between federal statutes and state statutes.

The most clearly defined series of cases involving federal statutes began with *United States v. Reese*[2] which was a prosecution under a statute forbidding discrimination by an election official and influencing an election. Without discussing the facts of the case before it, the Supreme Court held that the statute embraced subjects beyond the control of the federal government and so was unconstitutional. The court refused to limit the statute by construction to subjects over which the federal government properly could exercise its authority. Four years later, the court refused to limit a law punishing the counterfeiting of trade marks to counterfeiting in interstate commerce,[3] but they discussed the intention of Congress, as well as making the broad statement that they would not limit by construction the application of a general statute. However, the broad rule was approved in later cases,[4] until in *Yu Cong Eng v. Trinidad,*[5] the court said, referring to the *Reese* and subsequent cases, "The effect of the authorities we have quoted is clear to the point that we may not in a criminal statute reduce its generally inclusive terms so as to limit its application to only that class of cases which it was

[1] 42 F. Supp. 577 at 582.

[2] 92 U. S. 214, 23 L. ed. 478 (1875).

[3] Trade Mark Cases, 100 U. S. 82, 25 L. ed. 550 (1879).

[4] James v. Bowman, 190 U. S. 127, 23 Sup. Ct. 678 (1903); Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. 656 (1887); United States v. Harris, 106 U. S. 629, 1 Sup. Ct. 601 (1882).

[5] 271 U. S. 500, 46 Sup. Ct. 619 (1926). This was a Philippine statute, but the Supreme Court felt that they were not bound by the construction placed upon it by the Philippine court.

within the power of the legislature to enact, and thus save the statute from invalidity."[6]

While all the above cases have involved criminal statutes, and while general statements of this doctrine generally limit it to criminal laws, other cases have held that a general statute can not be limited by construction so as to save its constitutionality. In *United States v. Ju Toy*,[7] an alien exclusion case which the court insisted was not criminal, Mr. Justice Holmes said, by way of dictum,[8] that the section making findings of fact by administrative officers final, must be valid in every application, or it would be void in its entirety. And in the *Employers Liability Cases*,[9] the court refused to limit a statute, making common carriers engaged in interstate commerce liable to any of its employees, to employees engaged in interstate commerce. However, Mr. Justice Moody, dissenting, pointed out that a law must be construed so as to be constitutional, if this is possible, and distinguished the *Reese* and other cases on the ground that they concerned clear statutes where there was no room for construction. Mr. Justice Moody seems to have more support in later decisions than does the majority.

The rule that the court, where it is possible, should construe a statute so as to avoid unconstitutionality and even to avoid grave constitutional doubts, is well established.[10] In the *Abby Dodge*,[11] the United States was seeking to enforce a fine for violating a statute which forbade bringing into the United States sponges taken in the Gulf of Mexico or the Straits of Florida. The statute would have been unconstitutional if applied to sponges taken within the territorial waters of a state, so the law was construed as not applying to this class of sponges. The Court stated that a statute must be construed so as to be constitutional, if possible, and permitted the United States to amend the libel so as to conform to the statute as construed. In *Texas v. Eastern Texas R.R. Co.*,[12] a statute allowing a railroad to abandon its lines after getting a certificate from the Interstate Commerce Commission, was construed as not permitting abandonment of its intrastate business, and in *N.L.R.B. v. Jones & Laughlin Steel Corp.*,[13] the National Labor Relations Act was construed as applying only to transactions directly affecting interstate commerce. In *United States v. Walters*,[14] a criminal statute was limited by construction. A statute which made it a crime to conspire to present for,

[6] *Id.* at 522. The doctrine of the *Reese* case also has been applied to administrative orders. Where part of the order goes beyond the powers of the administrative body, the whole order had been declared void in Illinois Central R.R. v. McKendree, 203 U. S. 514, 27 Sup. Ct. 153 (1906) and United States v. Seven Oaks Dairy, 10 F. Supp. 995 (D. Mass. 1935).

[7] 198 U. S. 253, 25 Sup. Ct. 644 (1905).

[8] *Id.* at 262, 25 Sup. Ct. at 646.

[9] 207 U. S. 463, 28 Sup. Ct. 141 (1908).

[10] N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 Sup. Ct. 615 (1937); Crowell v. Benson, 285 U. S. 22, 62, 52 Sup. Ct. 285, 296 (1932); Texas v. Eastern Texas R. R. Co., 258 U. S. 204, 42 Sup. Ct. 281 (1922); The Abby Dodge, 223 U. S. 166, 32 Sup. Ct. 310 (1912); United States v. Delaware & Hudson Co., 213 U. S. 366, 29 Sup. Ct. 527 (1909).

[11] 223 U. S. 166, 32 Sup. Ct. 310 (1912).

[12] 258 U. S. 204, 42 Sup. Ct. 281 (1922).

[13] 301 U. S. 1, 57 Sup. Ct. 615 (1937).

[14] 263 U. S. 15, 44 Sup. Ct. 10 (1923)

or to obtain, payment of a fraudulent claim against any corporation in which the United States was a stockholder, was construed as meaning corporations which were instrumentalities of the government, Mr. Justice Holmes saying,[15] "But against the cases that decline to limit the generality of words in order to save the constitutionality of an act are many others that imply a limit, and, when the circumstances permit, the latter course will be adopted."[16]

In cases where no constitutional problem was raised, the Supreme Court has not hesitated to limit a statute by construction. In *United States v. Palmer*,[17] a statute declaring murder or robbery by any person on the high seas to be piracy, was not applied to a foreign subject on a foreign vessel, and in *Holy Trinity Church v. United States*,[18] a statute making it unlawful for any person or corporation to transport aliens to this country under contract to perform labor or services of any kind, was construed not to include a contract to become pastor of a church. Both these were criminal statutes. The decisions were based mainly on the intention of the legislature, but the cases applying the *Reese* doctrine have asserted that there was no power in the court to limit a general statute by construction, with very little discussion of legislative intention.

The decisions are thus conflicting on the question whether a federal statute which is too general can be saved and applied in cases which fall within Congressional power.[19] While the cases supporting the *Reese* doctrine can be dismissed on the theory that the statutes were so clear as to leave no room for construction,[20] the statutes have differed but little. It is the approach of the court that has changed.[21] Or the theory of the *Reese* case may continue to be applied to criminal statutes which are to be strictly construed,[22] and disregarded in remedial statutes which receive a liberal construction. It is doubtful whether the present court would say that it had no power to limit a general remedial statute to its proper scope by construction.[23]

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[15]*Id.* at 18, 44 Sup. Ct. at 11.

[16]In United States v. Gramlich, 19 F. Supp. 422 (S. D. Ill. 1937), the Anti- Racketeering Act, which covered acts in any way affecting commerce, was construed to mean only acts which materially interfered with commerce, in order to save its constitutionality.

[17]3 Wheat. 610 (U. S. 1818).

[18]143 U. S. 457, 12 Sup. Ct. 528 (1892).

[19]In El Paso & Northeastern Ry. Co. v. Gutierrez, 215 U. S. 87, 30 Sup. Ct. 21 (1909), the Federal Employers Liability Act was applied to an injury in a territory, after it had been declared unconstitutional in regard to interstate commerce. Territories and interstate commerce, however, were separately mentioned. *But cf.* Butts v. Merchants & Miners Transportation Co., 230 U. S. 126, 33 Sup. Ct. 964 (1913) where there was a single general clause. In both cases the intention of Congress was discussed.

[20]*See* Employers Liability Cases, 207 U. S. 463, 504, 28 Sup. Ct. 141, 148 (1908) (dissenting opinion).

[21]See cases cited *supra* note 10.

[22]Another point in support of the refusal to limit criminal statutes by construction is the requirement that criminal statutes be definite. See note (1935) 21 CORNELL L. Q. 100, 104. Was the statute sufficiently definite in United States v. Walter, 163 U. S. 15, 44 Sup. Ct. (1923), when construed to apply to an attempt to defraud a corporation which was an instrumentality of the United States.

[23]The approach to the National Labor Relations Act has been that the statute covers only matters within the power of Congress, and each case is tested by its facts to see whether it is within the statute. Associated Press v. N.L.R.B., 301 U. S. 103, 57 Sup. Ct. 650 (1937); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 Sup. Ct. 615. (1937).

In dealing with state statutes, the Supreme Court has been much more hesitant to declare the entire statute void because of actual or possible unconstitutional applications. In *Ratterman v. Western Union Telegraph Co.*,[24] a state tax on receipts of the company was enjoined as to receipts from interstate commerce, but was allowed to stand as to receipts from intrastate business,[25] and in *Kansas City Southern Ry. Co. v. Anderson*,[26] a statute allowing the owner of livestock a double recovery against a railroad which failed to pay after notice of injury to the stock, was upheld when the action and judgment equaled the demand, although it had been declared unconstitutional as applied to a case where action and judgment were for less than the demand.[27] The problem in these cases seems only to be whether separate applications of the statute are possible. This is well illustrated by *Bowman v. Continental Oil Co.*,[28] where the constitutionality of a state excise tax on each gallon of gasoline sold, and of a state license tax on distributors of gasoline, was attacked. The court enjoined collection of the excise tax on interstate sales, while allowing collection on other sales, but the entire license tax was declared unconstitutional, since the dealers made sales in both interstate and intrastate commerce, and the court could see no way in which to divide the sum. Thus, although the facts before the court show a possible unconstitutional application of the law, the Supreme Court will generally allow a statute to be enforced, if this is possible, in its other proper applications.[29]

Where the law as applied to the parties before the court is valid, the Supreme Court will not declare it unconstitutional because of possible improper applications. The Court will consider only the facts before it, and presumes that the state court, whose power it is to construe state statutes, will construe the statute so that it will be constitutional. In *Hatch v. Reardon*,[30] Mr. Justice Holmes declared that,[31] "Unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all. If the law is valid when confined to the class of the party before the court, it may be more or less of a speculation to inquire what exceptions the state court may read into general words, or how far it may sustain an act that partially fails. With regard to taxes, especially, perhaps it might be assumed that the legislature meant them to be valid to whatever extent they could be sustained. . . ."

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[24]127 U. S. 411, 8 Sup. Ct. 1240 (1887).

[25]*Accord*, Lehigh Valley R. R. v. Pennsylvania, 145 U. S. 192, 12 Sup. Ct. 806 (1891); Western Union Telegraph Co. v. Alabama, 132 U. S. 472, 10 Sup. Ct. 161 (1889).

[26]233 U. S. 325, 34 Sup. Ct. 599 (1914).

[27]St. Louis, Iron Mountain, & Southern Ry. Co. v. Wynne, 224 U. S. 354, 32 Sup. Ct. 493 (1911).

[28]256 U. S. 642, 41 Sup. Ct. 606 (1920).

[29]Dahnke-Walker Co. v. Bondurant, 257 U. S. 282, 42 Sup. Ct. 106 (1921); Petition of Medley, 134 U. S. 160, 10 Sup. Ct. 384 (1889); Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903 (1884).

[30]204 U. S. 152, 27 Sup. Ct. 188 (1907).

[31]*Id.* at 160, 27 Sup. Ct. at 190.

Although the doctrine that the Court will consider only the facts before it, is well established in civil cases,[32] Mr. Justice Murphy raised some doubt about criminal cases in *Thornhill v. Alabama*,[33] when he held a state anti-picketing statute void on its face, saying,[34] "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas." However, in *Watson v. Buck*,[35] the Court, in dealing with the Florida anti-trust law, reaffirmed the doctrine that it would limit itself to the facts of the particular case before it, unless the law was obviously bad.

Whenever the Supreme Court goes beyond the facts of the case before it, however, it seems that it is taking a dangerous step. The construction of state statutes is the province of the state courts, and it has been presumed that the state legislature and courts will act in a constitutional manner.[36] When the case arises in a federal court and thus there is no chance for state construction, the presumption that the state legislature intended to act in a constitutional manner still applies.[37] For the Supreme Court to go beyond the facts of the case before it, and construe a general statute, and then declare it unconstitutional, seems an invasion of the functions of the state courts, and one not necessary to protect private rights.

The Supreme Court in dealing with state statutes, will ordinarily save the constitutionality of a general statute, although it has been improperly applied in the case before it. It will not speculate on possible invalid applications where there is not illegality in the case before it. The principal fault to be found in their approach to this problem, and certainly in their approach to federal statutes, is that legislative intent is apparently of little weight. It would seem that no definite rules should be laid down on the subject. Rather, the question whether a general statute should be held partially valid when it can not be constitutionally applied to certain facts but can be applied to others, should be governed almost entirely by legislative intent.

Kenneth A. Tifft

Federal Natural Gas Act: Effect on interrelation of state and federal regulation.—Until Congress enacted the Natural Gas Act[1] in 1938, the regulation of the natural gas industry was left to the states.[2] The Interstate Com-

[32]Heald v. District of Columbia, 259 U. S. 114, 42 Sup. Ct. 434 (1922); Yazoo & Mississippi Valley R. R. Co. v. Jackson, 226 U. S. 217, 33 Sup. Ct. 40 (1912); Hatch v. Reardon, 204 U. S. 152, 27 Sup. Ct. 188 (1907).

[33]310 U. S. 88, 60 Sup. Ct. 736 (1940).

[34]*Id.* at 97, 60 Sup. Ct. at 741.

[35]313 U. S. 387, 61 Sup. Ct. 962 (1941).

[36]St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S. 350, 35 Sup. Ct. 99 (1914); Singer Sewing Machine Co. v. Brickell, 233 U. S. 304, 34 Sup. Ct. 493 (1914); Walters-Pierce Oil Co. v. Texas, 177 U. S. 28, 20 Sup. Ct. 518 (1900).

[37]Prouty v. Coyne, 55 F. (2d) 289 (D. So. Dak. 1932), *rev'd on other grounds*, 289 U. S. 704, 53 Sup. Ct. 658 (1932).

[1]52 STAT. § 821, 15 U. S. C. § 717 (1938).

[2]For an excellent discussion of the regulation of the natural gas industry before the

merce Act had specifically excepted from its provisions the transportation of of natural gas by pipe line.[3] The federal action in 1938 was prompted primarily by the inability of the states to adequately regulate the natural gas industry because of the fact that strictly interstate features were beyond the reach of state regulation.[4] These interstate features of the natural gas industry had become increasingly accentuated by the comparatively recent improvements in the transmission of natural gas over considerable distances.

Congress delegated to the Federal Power Commission the task of administering the Natural Gas Act. The Commission was given jurisdiction and regulatory control over the transportation of natural gas in interstate commerce, over the sale in interstate commerce of natural gas for ultimate public consumption, and over the natural gas companies engaged in such transportation or sale.[5] The Commission's control over these subjects has been held to be exclusive and state action forbidden.[6] The Act expressly provides that it does not apply to any other transportation or sale of gas, or to the local distribution of natural gas, or to the facilities used for the production or gathering of natural gas.[7]

The Natural Gas Act came before the United States Supreme Court for the first time in the recent case of *Illinois Natural Gas Company v. Central Illinois Public Service Company*.[8] The point at issue in this case was the validity of an order of the Illinois Commerce Commission compelling the Illinois Natural Gas Company to extend its facilities to connect with those of the complainant, an intrastate company distributing natural gas. The defendant was a subsidiary of a large pipe line company, which owned and operated a pipe line system extending through several states. The appellant's pipe lines were connected with those of its parent corporation but were wholly within Illinois. It received and transported natural gas within Illinois and sold the gas to local distributing plants. The Illinois Commerce Commission, on these facts, found that the appellant was engaged in intrastate commerce and based its order on this finding. This was affirmed in the Illinois Supreme Court on the ground that in the transportation the local interest was para-

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enactment of the Federal Natural Gas Act, see Howard, *Gas and Electricity in Interstate Commerce* (1934) 18 MINN. L. REV. 611. For a discussion of the State Taxation of natural gas transported in interstate commerce, see Hedrick, *State Taxation of Natural Gas Transported in Interstate Commerce* (1938) 4 JOHN MARSHALL L. Q. 24.

[3]24 STAT. § 379 (Hepburn Amendment 1906), 49 U. S. C. § 1 (b) (1926).

[4]Howard, *Gas and Electricity in Interstate Commerce* (1934) 18 MINN. L. REV. 611, 660. *Cf.* Federal Power Act, 49 STAT. 836, 16 U. S. C. 791 (1935).

[5]52 STAT. § 821, 15 U. S. C. § 717 (1938). The constitutionality of the Act was sustained in Natural Gas Pipeline Co. of America v. Federal Power Commission, 120 F. (2d) 627 (C. C. A. 7th 1941).

[6]It has been held that where the established course of business was predominantly interstate a state commission has no power of regulation simply because some of the gas is sold in the state of origin. Kentucky Natural Gas. Corp. v. Public Service Commission of Kentucky, 28 F. Supp. 509 (E. D. Ky. 1939), *aff'd*, 119 F. (2d) 417 (C. C. A. 6th 1941). *Cf.* Peoples Gas Co. v. Public Service Commission of Pennsylvania, 270 U. S. 550, 46 Sup. Ct. 371 (1925), for the situation before the Natural Gas Act.

[7]*Supra* note 5.

[8]314 U. S. 498, 62 Sup. Ct. 384, 86 L. ed, 322 (1941).

mount and the national interest was indirect and of minor importance.[9] The appellant contended that it was engaged in interstate commerce and was subject to the provisions of the Federal Natural Gas Act and that under this act only the Federal Power Commission could issue such an extension order.[10] The United States Supreme Court reversed the decision of the Illinois Supreme Court, on the ground that the federal act applied to the wholesale distribution of natural gas in interstate commerce to the exclusion of state regulation.[11] The Court pointed out that under all former tests the appellant was engaged in interstate commerce as it made the first sale to the distributor after the gas was brought into the state;[12] that the proposed extension was closely related to interstate commerce in that it would affect the volume of gas moving into the state and its distribution among the states;[13] and that Section 7c of the Natural Gas Act[14] applied, since the communities to which the facilities were to be extended were supplied by two companies and constituted a market already served within the meaning of that section.

In determining that the appellant was engaged in interstate commerce, the Court applied tests derived from cases decided prior to the enactment of the Natural Gas Act, but it failed to point out that there is some conflict among these older cases. This is important because the extent of the Commission's powers turns largely on what is interstate commerce within this field. The

[9]375 Ill. 634, 32 N. E. (2d) 157 (1941).

[10]52 STAT. 824, 15 U. S. C. § 717f (1938). The following factors are considered by the Federal Power Commission in determining whether an extension should be permitted: (1) whether the applicant has a supply of natural gas adequate to meet the demands which it is reasonable to assume would be made upon it; (2) whether there existed in the territory proposed to be served, customers who could reasonably be expected to use such gas service; (3) whether the facilities proposed to be constructed would be adequate to meet the estimated demands for gas in the area; (4) whether the applicant possessed adequate financial resources with which to construct the facilities proposed; (5) whether the cost of construction of the facilities proposed was adequate and reasonable; (6) whether rates proposed to be charged were reasonable, comparing in that connection the proposed rates with those of natural gas companies alrcady serving the territory. *In re* Kansas Pipe Line & Gas Co., 30 P. U. R. (N. S.) 321 (1939). It has been held that under this section the Commission may properly impose, in the interest of the public to be served, reasonable conditions upon the granting of a certificate of public convenience and necessity for the construction of a gas pipe line. Arkansas Louisiana Gas Co. v. Federal Power Commission, 113 F. (2d) 281 (C. C. A. 5th 1940).

[11]*Re* East Ohio Gas Co., 28 P. U. R. (N. S.) 129 (1939); *Re* Behlings Gas Co., 35 P. U. R. (N. S.) 321 (1940). In these two cases the Federal Power Commission held that under the Natural Gas Act it has jurisdiction over gas companies which, like the appellant, operate wholly within a state, and sell natural gas moving in interstate commerce at wholesale to local distributors.

[12]Public Utilities Commission v. Landon, 249 U. S. 236, 39 Sup. Ct. 268 (1918); *cf.* Missouri *ex rel.* Barrett v. Kansas Natural Gas Co., 265 U. S. 298, 44 Sup. Ct. 544 (1923).

[13]On this ground the commerce could be regulated by the federal authority as a matter affecting interstate commerce. Southern R. Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2 (1911); Houston, E. & W. T. R. Co. v. United States, 234 U. S. 342, 34 Sup. Ct. 833 (1913); United States v. Darby, 312 U. S. 100, 65 Sup. Ct. 451 (1940).

[14]52 STAT. § 821, 15 U. S. C. § 717f (1938). This section prohibits the extension of facilities by one natural gas company into a market in which natural gas is already being supplied without first obtaining a certificate of public convenience and necessity from the Federal Power Commission.

cases prior to the Natural Gas Act arose before Congress had acted and the issues, therefore, concerned the extent of the states' power to regulate under the Commerce Clause. In deciding these cases the Court developed two broad tests. The first was a mechanical test which was concerned with the point in time and space where the interstate commerce ends and the intrastate commerce begins.[15] The other test considered the nature and purpose of the state regulation and its effect on interstate commerce.[16] Under these tests[17] it had been held that where the one putting the gas into interstate commerce transported and sold it directly to the local consumer the whole transaction was in interstate commerce, but that the ultimate distribution was local in nature and, therefore, the state could regulate the rate in the silence of Congress.[18] In the *East Ohio Gas Company*[19] case the Court disapproved this position in part and held that where natural gas was supplied directly to the consumer, the stepdown in pressure when the gas was passed into the local distribution mains was similar to the breaking of an original package, and hence the sale to the local consumer was said to be exclusively intrastate commerce.

The principal case raises the question of the present significance of the doctrine of the *East Ohio Gas* case[20] under the Natural Gas Act. That case arbitrarily set the point at which the interstate commerce in gas ends and the intrastate commerce begins. If it can be said that "intrastate commerce" is synonymous with "local distribution," as that phrase is used in the Natural Gas Act, then the extent of the authority of the Federal Power Commission under the Natural Gas Act will be limited by the application of the *East Ohio Gas Company* case. However, the Court in the *Illinois Natural Gas Company* case inferred that intrastate commerec and local distribution might not be

[15]Public Utilities Commission v. Landon, 249 U. S. 236, 39 Sup. Ct. 268 (1918); Missouri *ex rel.* Barrett v. Kansas Natural Gas. Co., 265 U. S. 298, 44 Sup. Ct. 544 (1923); East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 51 Sup. Ct. 499 (1930).

[16]Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23, 40 Sup. Ct. 279 (1919); Arkansas Louisiana Gas Co. v. Department of Public Utilities, 304 U. S. 61, 58 Sup. Ct. 770 (1937).

[17]In applying these tests, the Supreme Court has held that the transportation of natural gas through pipe lines, from one state to another, is interstate commerce. Public Utilities Commission v. Landon, 249 U. S. 236, 39 Sup. Ct. 268 (1918); Ozark Pipe Line Corp. v. Monier, 266 U. S. 555, 45 Sup. Ct. 184 (1924). The interstate commerce character of natural gas in transit from state to state is not affected by transfer of title and delivery at a state border, where there is no arresting of movement. Pennsylvania v. West Virginia, 262 U. S. 553, 43 Sup. Ct. 658 (1919); Peoples Gas Co. v. Public Service Commission of Pennsylvania, 270 U. S. 550, 46 Sup. Ct. 371 (1925). The sale to local distributing agents is part of interstate commerce and is not subject to regulation by the states. Missouri *ex rel.* Barrett v. Kansas Natural Gas Co., 265 U. S. 298, 44 Sup. Ct. 544 (1923); State Tax Commission v. Interstate Natural Gas Co., 284 U. S. 41, 52 Sup. Ct. 62 (1931). But the sale by the local distributing agent is intrastate commerce and regulation by the state at the burners' tips is proper. Public Utilities Commission v. Landon, 249 U. S. 236, 39 Sup. Ct. 268 (1918); East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 51 Sup. Ct. 499 (1930).

[18]Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23, 40 Sup. Ct. 279 (1919).

[19]283 U. S. 465, 51 Sup. Ct. 499 (1930).

[20]*Ibid.*

one and the same. After holding that the appellant was engaged in interstate commerce, the Court went on to apply the second test and held that even if the appellant was engaged in intrastate commerce its activities were so closely and intimately associated with interstate commerce as to come within the scope of federal regulation as a matter indirectly affecting interstate commerce.[21] This indicates that the regulation of a purely intrastate activity may be permissible under the Natural Gas Act and that the prohibition of regulation over local distribution does not prevent regulation of some intrastate features.

It is interesting to note that the effect of this doctrine is to prohibit the state from control and regulation of an intrastate activity and give to the federal government, to the extent that Congress has assumed it, complete and exclusive control over an intrastate activity. This holding continues a phase of a development which began with the *Minnesota Rate Case*.[22] In that case, after Congress had passed the Hepburn Amendment to the Interstate Commerce Act,[23] the state legislature fixed certain intrastate railway rates, which were objected to by interstate carriers as discriminating against and creating a direct burden on interstate commerce. The Supreme Court upheld the rate as a local regulation permissible because of the silence of Congress, since the Interstate Commerce Act did not purport to deal with the matter directly but through its administrative organ, the Interstate Commerce Commission, which had not yet acted thereon. Then followed the *Shreveport* case,[24] where the Interstate Commerce Commission, after due hearing, ordered certain interstate railroad carriers not to transport at rates lower than the interstate rates, to certain intrastate competing points, *i.e.* to remove the discrimination against interstate commerce This was upheld by the Supreme Court as proper Congressional regulation of a matter indirectly affecting interstate commerce, despite the fact that the state commission had set the intrastate rates.[24a] A third phase in this development was the decision in the *Wisconsin Rate Case*.[25] It was there held that the Interstate Commerce Commission, under the Interstate Commerce Act, as amended by the Transportation Act of 1920,[26] had the power to fix intrastate railway rates to remove a disparity between interstate rates and intrastate rates which had brought about an unreasonable and unjust discrimination against interstate commerce. In the

[21] *Supra* note 13.

[22] Simpson v. Shepherd, 230 U. S. 352, 33 Sup. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18 (1912).

[23] 24 STAT. § 379 (1906), 49 U. S. C. § 1 (1926).

[24] Houston E. & W. T. R. Co. v. United States, 234 U. S. 342, 34 Sup. Ct. 833 (1913).

[24a] In the Federal Motor Carriers Act of 1935, Part II, Interstate Commerce Act, 49 STAT. 543, 49 U. S. C. § 301 (1935) Congress specifically provided that the "Shreveport doctrine" should not apply in the enforcement of that act. See George, *The Federal Motor Carriers Act of 1935* (1936) 21 CORNELL L. Q. 249, 272.

[25] Wisconsin R. R. Comm. v. Chicago, P. & Q. R. R. Co., 257 U. S. 563, 42 Sup. Ct. 232, 22 A.L.R. 1086 (1922); and in New York v. United States *et al.*, 257 U. S. 591, 42 Sup. Ct. 239 (1922), federal regulatory power was upheld even as against rates fixed by the charter of the Railroad Corporation as the contract clause of the Federal Constitution does not operate against the United States.

[26] 41 STAT. 474 (1920), 49 U. S. C. § 1 (1929).

principal case this line of development has been carried one step further, for in the intrastate railway cases the federal action did not prohibit regulation by the state unless such regulation discriminated against interstate commerce.[27] But as this second test seems now to be applied under the Natural Gas Act, regulation by a state over an intrastate activity affecting interstate commerce is excluded when federal action is permitted.

At present it is difficult to foretell the exact effect the principal case will have upon the Natural Gas Act. If the Supreme Court follows the trend indicated in this case there will be a period of adjustment in which the authority of the Federal Power Commission over intrastate activities must be reconciled with the prohibition in the Act against control over the local distribution of natural gas. On the other hand, it is still possible for the Supreme Court to recognize that "intrastate commerce" and "local distribution" are synonymous. Should the Court take the latter view, the Federal Power Commission will find its authority limited by the holding of the *East Ohio Gas Company* case, to the effect that the intrastate commerce begins at the time of the stepdown in pressure when the gas is passed into local distribution mains. Regardless of which way the Court goes, it must be remembered that certain practical considerations limit the extent to which the federal government should control purely intrastate operations. In general, as the Natural Gas Act seems to recognize by its wording, the regulation of local distribution is purely a matter of local concern and can be accomplished more satisfactorily by a local commission.[28]

Though the principal case seems correct in result, it is unfortunate that the Court chose to be so ambiguous. It was not necessary for the decision to apply the doctrine of "matters affecting interstate commerce," but it would have been sufficient to have stood on its holding under the first test, that the appellant was engaged in interstate commerce. By the application of both tests the Court has created doubt and uncertainty as to the extent of the regulatory control that Congress has delegated to the Federal Power Commission in the Natural Gas Act.

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[27]In United States v. Darby, 312 U. S. 100, 61 Sup. Ct. 451 (1941), the Court permitted a regulation of intrastate activities under the Fair Labor Standards Act, which prohibited the introduction into interstate commerce of any product not made under specified conditions set out in the Act. Under this type of regulation the state control is not completely ousted as the state could set up higher standards and enforce them. See Note, (1940) 26 CORNELL L. Q. 464, 469.

[28]In support of local regulation it has been said, ". . . that federal regulatory statutes and the regulatory agencies created thereunder, are to *supplement* rather than to *supersede* local state authority." Preston, *Regulation of the Natural Gas Industry* (1938) 45 W. VA. L. Q. 250, 257. The principal case clearly shows the possibilities of extensive intrastate regulation of the natural gas industry by the Federal Power Commission through an application of the "Shreveport doctrine." This may bring forth a new declaration of legislative policy barring the application of the "matters affecting interstate commerce" test under the Federal Natural Gas Act to correspond with a similar prohibition in the Federal Motor Carriers Act of 1935, 49 STAT. 543, 49 U. S. C. §§ 301, 302 (b) (1935).

Landlord and Tenant: Damages for holding over where because of illness of tenant there is no liability for rent for another term.—A lease expired on September 30, 1939, but the tenant remained in possession until his death on March 7, 1940, the rent having been paid to and including March, 1940. In this proceeding the landlord sought to recover rent from the tenant's estate from April 1, 1940 to September 30, 1940, the claim being based on two alternative theories: (1) a renewal of the lease for another year beginning October 1, 1939 on the basis of holding over, and (2) damages for alleged breach of covenant to surrender the premises at the expiration of the lease, including special damages because of loss of a new tenant to whom a lease had been given beginning September 30, 1939. In re *Weinberg's Estate,* 31 N. Y. S. (2d) 445 (Surr. Ct. 1941).

After the expiration of the lease, and before the tenant's death, the landlord instituted summary proceedings[1] in the Municipal Court in order to recover possession of the premises. The court stayed the issuance of a warrant to dispossess[2] upon its finding that the removal of the tenant, who suffered from a grave heart ailment, might cause his death. After the expiration of the stay, another Justice extended the decedent's time to vacate the premises. Both of these orders stipulated that the decedent must pay for the use and occupation of the premises[3] at the rate fixed in the lease.

In holding that the decedent, because of serious illness, did not hold over within the meaning of the rule which permits the landlord to continue the lease and collect rent for another year,[4] the decision of the Surrogate

[1]N. Y. CIV. PRAC. ACT § 1410. Summary proceedings provide for removal of the tenant where he holds over after the expiration of his term without the consent of the landlord.

[2]N. Y. CIV. PRAC. ACT § 1436a. Where a final order had been granted to recover possession of premises in the city of New York, the court may stay the issuance of a warrant and its execution for not more than six months where there would be extreme hardship to the tenant or his family if not granted. The tenant must deposit with the court, in a single sum or in installments, the rental money for such an extended period. A tenant may not waive the provisions of this section.

[3]At common law the landlord was entitled to compensation for use and occupation of the premises after the expiration of a lease. Van Brunt v. Pope, 6 Abb. (N. S.) 217 (1869); Abeel v. Radcliffe, 13 Johns, ch. 297 (1816); Comm. of Pitkin County v. Brown, 2 Colo. App. 473, 31 Pac. 525 (1892); Sargent v. Smith, 78 Mass. 426 (1859); note (1925) 38 HARV. L. REV. 1117. Recovery for use and occupation is now covered by statute in New York. N. Y. REAL PROP. LAW § 220. N. Y. CIV. PRAC. ACT § 990 provides that "In an action to recover real property, or the possession thereof, the plaintiff may demand in his complaint, and in a proper case recover, damages for withholding the property. Those damages include the rents and profits or the value of the use and occupation of the property where either can be recovered legally by the plaintiff."

[4]Where a tenant holds over after the expiration of his term the landlord has an election to treat him as a trespasser or as a tenant for another term. Kennedy v. City of New York, 196 N. Y. 19, 89 N. E. 360 (1909); Schuyler v. Smith, 51 N. Y. 309 (1873); Lancourse Realty Corp. v. Cohen, 166 Misc. 307, 2 N. Y. S. (2d) 437 (Mun. Ct. 1938); Oussani v. Thompson, 43 N. Y. Supp. 1061 (Sup. Ct. 1897); Conway v. Starkweather, 1 Denio 113 (N. Y. Sup. Ct. 1845); 1 TIFFANY ON REAL PROPERTY (1939) § 175; note (1937) 108 A. L. R. 1464. By statute, some of the states either have abolished the rule entirely or have modified it. CONN. GEN. STAT. (1930) § 5021; VA. CODE (Michie, 1930) § 5517; WYO. REV. STAT. ANN. (Courtright, 1931) § 97-207. Legislation was proposed by the New York Bar Association that a new section, 230a, be added to the

is in accord with the rather limited authority on the subject.[5]

Courts have variously explained the holdover rule as based upon an implied contract,[6] an implied agreement,[7] a penalty imposed by law,[8] a duty imposed by law,[9] an option implied in law,[10] an implied condition in the lease,[11] and a tacit renovation of the contract implied in law.[12] But, disregarding terminology, the essence of the liability for rent for a further term is that it is thrust upon the individual by law, and is quasi-contractual in nature.[13] It is not based on a true contract implied from the facts for it may exist in spite of the tenant's contrary intent,[14] or where notice is given to the landlord that he will not continue as a tenant.[15]

Impossibility of performance, normally, is not an excuse for non-performance of an express contract[16] on the theory that inevitable occurrences might be guarded against by stipulation in the agreement of the parties.[17] An exception[18] exists, however, where the liability is not voluntarily under-

Real Property Law providing that, in the absence of an agreement to the contrary, only a tenancy from month to month would arise where there has been a holdover after a lease of a year or more under the terms of the previous lease, whether written or oral. N. Y. L. J., March 20, 1937, p. 1389, col. 3.

[5]Herter v. Mullen, 159 N. Y. 28, 53 N. E. 700 (1899); Stewart v. Briggs, 147 App. Div. 386, 132 N. Y. Supp. 89 (3d Dep't 1911); Preiser v. Wielandt, 48 App. Div. 569, 62 N. Y. Supp. 890 (2d Dep't 1900); Weber v. Rogers, 41 Misc. 662, 85 N. Y. Supp. 232 (Sup. Ct. 1903); Regan v. Fosdick, 19 Misc. 489, 43 N. Y. Supp. 1002 (Sup. Ct. 1897); *cf.* Mason v. Wierengo's Estate, 113 Mich. 151, 71 N. W. 489 (1897).

[6]Herter v. Mullen, *supra* note 5, at 34.

[7]Haynes v. Aldrich, 133 N. Y. 287, 289, 31 N. E. 94 (1892); Greaton v. Smith, 1 Daly 380 (N. Y. 1860); Schuyler v. Smith, *supra* note 4, at 313.

[8]United Merchant's Realty & Impr. Co. v. Roth, 193 N. Y. 570, 576, 86 N. E. 544, 545 (1908).

[9]Herter v. Mullen, *supra* note 5, concurring opinion per Martin, J., at 43.

[10]Stern v. Equitable Trust Co., 238 N. Y. 267, 269, 144 N. E. 578 (1924).

[11]Herter v. Mullen, *supra* note 5, concurring opinion per Martin, J., at 44.

[12]Johnson v. Bjeregaard, 158 Misc. 436, 437, 285 N. Y. Supp. 581, 582 (Sup. Ct. 1936); Right d. Flower v. Darby and Bristow, 1 T. R. 159, 99 Eng. Rep. 1029, 1031 (K. B. 1786).

[13]2 TIFFANY ON LANDLORD AND TENANT (1912) 1472; note (1933) 19 CORNELL L. Q. 138, 144, note 32. Although the liability is imposed to induce the tenant to leave the premises and avoid loss to the landlord, the liability imposed is partially penal since there is no relation to the damage actually suffered by the landlord, and the rule has been criticized for its severity in this respect. 1 TIFFANY ON REAL PROPERTY (1939) 282.

[14]Conway v. Starkweather, *supra* note 4, at 115; Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151 (1881); Haynes v. Aldrich, *supra* note 7.

[15]Schuyler v. Smith, *supra* note 4, at 314; 805 St. Marks Ave. Corp. v. Finkelstein, 234 App. Div. 15, 253 N. Y. Supp. 785 (2d Dep't 1931); 1 MC ADAM ON LANDLORD AND TENANT (1934) 103; 6 WILLISTON ON CONTRACTS (Rev. ed. Williston and Thompson 1937) § 1856.

[16]Dolan v. Rodgers, 149 N. Y. 489, 44 N. E. 167 (1896); Lorillard v. Clyde, 142 N. Y. 456, 37 N. E. 489 (1894); Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595 (1891); Dexter v. Norton, 47 N. Y. 62 (1871); RESTATEMENT, CONTRACTS (1932) § 455.

[17]Harmony v. Bingham, 12 N. Y. 99, 107 (1854); Herter v. Mullen, *supra* note 5, at 43, 49.

[18]In the case of express contracts, Professor Williston states that impossibility of performance is a valid excuse when there is: (1) impossibility due to domestic law, (2) impossibility due to death or illness in the case of a contract for personal services, and (3) impossibility due to destruction of the subject matter of the contract. 6 WILLISTON ON CONTRACTS (Rev. ed. Williston and Thompson 1937) § 1935, and cases cited.

taken, but is placed upon the individual by operation of law.[19] In such a case, impossibility of performance of the duty for breach of which liability is imposed—in this case the duty to leave the premises—if occasioned by an act of Providence, is a valid excuse.[20] In other words, the courts have been unwilling to impose the holdover liability when the tenant's removal is rendered impossible through no fault of his own.

Although the court correctly refused to impose the quasi-contractual liability in this case, there was, nevertheless, a violation of the tenant's obligation to quit the premises at the end of his term. The question which faced the court was to determine what other liability, if any, to attach to this conceded breach of duty by the tenant.

One of the normal relational obligations of the landlord and tenant is that the tenant shall leave the premises at the end of his term,[21] and where, as here, there is an express provision in the lease obligating the tenant to leave at that time, there is a contractual duty as well.

Even in the absence of statute,[22] the landlord could proceed on either of two theories to obtain reimbursement or damages for the period during which he was kept out of possession.[23] On the one hand, the landlord is entitled to use or rental during the time the tenant retains possession.[24] This, of course, was provided for by the orders of the Municipal Court. The older authorities held such action for damages to be in the nature of one for mesne profits.[25] More recent authority indicates that the reasonable value for use and occupation is *prima facie* equal to the rent reserved by the lease, in the absence of evidence to the contrary.[26] In the alternative, the landlord may recover damages on the basis of trespass.[27] Although an

[19]Herter v. Mullen, *supra* note 5; Matter of Garland, 173 Misc. 832, 19 N. Y. S. (2d) 411 (Surr. Ct. 1940); (1941) 30 ILL. BAR J. 118.

[20]Harmony v. Bingham, *supra* note 16; Tompkins v. Dudley, 25 N. Y. 272 (1862); Wolfe v. Howes, 20 N. Y. 197 (1859); Herter v. Mullen, *supra* note 5; School District v. Dauchy, 25 Conn. 530 (1857). An analogy exists in the doctrine of impossibility in the case of public or common carriers. The common carrier is relieved of absolute liability as insurer of the goods carried in the cases of supervening impossibility of performance caused by: (1) act of God, (2) act of the public enemy, (3) act of the shipper, (4) act of the public authority, and (5) inherent nature of the goods. DOBIE ON BAILMENTS (1914) § 116.

[21]Rector v. Gibbon, 111 U. S. 276, 284, 4 Sup. Ct. 605, 608 (1883); Herter v. Mullen, *supra* note 5, at 43; 2 TIFFANY ON LANDLORD AND TENANT (1912) 1465; 1 MCADAM ON LANDLORD AND TENANT (1934) § 167; 3 N. Y. LAW OF LANDLORD AND TENANT (1937) E. T. Co. § 961; 16 R. C. L. § 275.

[22]See *supra* notes 2 and 3.

[23]"It seems to be immaterial for most purposes whether the landlord brings an action for damages for holding over, or an action for use and occupation. . ." 2 TIFFANY, *op. cit. supra* note 21, 1495.

[24]See *supra* note 3.

[25]Sargent v. Smith, 78 Mass. 426 (1859); Russell v. Killion, 7 Phila. 110 (Pa. 1868); COMYN ON LANDLORD AND TENANT (1834) 510.

[26]2 TIFFANY *op. cit. supra* note 21, 1494, and cases cited; (1924) 36 C. J. 63, and cases cited; (1910) 17 Am. and Eng. Ann. Cas. 284; *cf.* City of Detroit v. Gleason, 116 Mich. 564, 74 N. W. 880 (1898); Williams v. Ladew, 171 Pa. 369, 33 Atl. 329 (1895).

[27]See *supra,* note 4.

action of trespass is possessory in nature and cannot be maintained without proof of actual or constructive possession, the landlord, after re-entry, is regarded as having been in possession from the commencement of the wrong and thus able to recover damages for the withholding of the premises.[28] Strictly speaking, the trespasser is not liable for use and occupation,[29] but New York has taken the view that the trespasser is liable in damages and the amount of recovery is determined by the reasonable rental value of the property, presumptively the amount provided in the lease.[30] The fact that the landlord brought summary proceedings originally would tend to indicate that he had made his election to treat the tenant as a trespasser.[31]

But the landlord in the instant case claimed special damages in excess of the value of the use and occupation of the premises predicated upon the loss of a new tenant who had taken a lease of the premises to commence upon the expiration of the old one. In view of his inability to give possession to the new tenant, the lessor attempted to placate him by installing him in a larger apartment at the same rent. The new tenant, however, was not satisfied and left.[32] The actual amount lost by the landlord is not disclosed in the report.

In *Herter v. Mullen* the court intimated that it might be possible to recover additional damages from the overholding tenant, even though the operation of the holdover rule was suspended by impossibility of removal due to illness.[33]

When the tenant fails to relinquish possession at the end of the term some courts have held that the tenant is liable in damages for resulting injury to the landlord,[34] including: (a) the loss of an opportunity

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[28]BIGELOW ON TORTS (8th. ed. 1907) 375; 1 TIFFANY ON LANDLORD AND TENANT (1912) 145.

[29]WOODWARD ON QUASI-CONTRACTS (1913) 456; KEENER ON QUASI-CONTRACTS (1893) 191; Ames, *Assumpsit for Use and Occupation*, 2 HARV. L. REV. 379, 380 (1889).

[30]New York v. Fink, 130 Misc. 620, 224 N. Y. Supp. 404 (Sup. Ct. 1927); WOODWARD, *op. cit. supra* note 29, 457.

[31]Where the landlord makes his election to treat the tenant holding over as a trespasser, he cannot thereafter make the tenant liable for a further term. Macklin v. McNelton, 63 N. Y. Supp. 438 (Sup. Ct. 1900); Coleman v. Fitzgerald Bros. Brewing Co., 29 Misc. 349, 60 N. Y. Supp. 460 (Sup. Ct. 1899); Goldberg v. Mittler, 23 Misc. 116 (Sup. Ct. 1898); Smith v. Maxfield, 9 Misc. 42 (Com. Pl. 1894).

[32]The report of the case does not indicate the reason why the new tenant gave up possession. Since the rental was the same for both apartments it is fair to assume that he was simply dissatisfied rather than unable to meet his obligations financially.

[33]159 N. Y. at 43: ". . . if the tenant's removal was rendered impossible by inevitable accident or the act of God, he is excused for his omission to surrender the premises, *at least so far as it creates a liability for a year's rent which is implied in law.*" 159 N. Y. at 45: ". . . if by reason of their failure to surrender up the premises additional damages follow, . . . they may be recovered in a proper action so that *all damages caused by the defendant's misfortune would be borne by them* [the tenants] . . ." (italics added).

[34]Stevenson v. Peterson, 131 Kan. 690, 293 Pac. 497 (1930); Moore v. Davis, 49 N. H. 45 (1869); Russell v. Fabyan, 34 N. H. 225 (1856); Bramley v. Chesterton, 2 C. B. (N. S.) 592, 140 Eng. Rep. 548 (1857); 3 SUTHERLAND ON DAMAGES (1916) § 842; 36 C. J. 62; 16 R. C. L. § 275.

to let to another,[35] providing the landlord can prove that he could have leased to another;[36] (b) the cost of removing the tenant's property from the premises;[37] and (c) the expense of litigation in forcing removal of the tenant.[38] One state has made provision by statute for the recovery of special damages by the landlord.[39] It is apparently well-established in New York that although the landlord brings summary proceedings against a tenant, and thereby regards him as a trespasser,[40] this does not cut off a recovery in damages for breach of the covenant to surrender the premises.[41] In other words, "where the lease has terminated and the tenant has been thereafter removed by summary proceedings, the right of action for a breach of the covenant to surrender remains in force."[42] Although the proceedings for removal were stayed by the Municipal Court in the *Weinberg* case, and removal was forestalled by the illness of the tenant, these factors appropriately relate to the inapplicability of the holdover rule in such a case, but should have no relation whatever to the breach of duty on the part of the tenant where actual damage has resulted to the landlord.

Granted that the refusal of the court to apply the holdover rule in this case is correct, and that the lessor might have collected for use and occupation if he had elected to do so, should the lessor be limited to this remedy? It would seem, rather, that it should be possible for the landlord, who is entirely without fault,[43] to recover such special damages as he may be able to prove. Such recovery might be based upon a tort theory, whereby the measure of damages would be the natural and proximate consequence of the wrongful breach of duty.[44] Or, since there was an express covenant here involved, the measure of damages on a contractual basis could be those contemplated by the parties at the time the agreement was made.[45] In either event the landlord would receive something more than an amount equal to use and occupation for the period of actual holding over.

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[35]Stoddard and Hewett v. Walters, 30 Ark. 156 (1875).

[36]Watrigant v. Dufort, 28 La. Ann. 892 (1876).

[37]Livingston v. Robb, 61 Misc. 81, 113 N. Y. Supp. 137 (Sup. Ct. 1908).

[38]Bramley v. Chesterton, *supra* note 34. New York has not, however, allowed recovery by the landlord for the costs of litigation in removing the tenant. See cases cited, *infra* note 41.

[39]VA. CODE (Michie, 1930) § 5517. A tenant for a definite term "shall not, by his mere failure to vacate the premises upon the expiration of the lease, be held as tenant for another term when such failure is not due to his wilfulness, negligence or other avoidable cause, but such tenant shall be liable to the lessor for use and occupation of the premises and also *for any loss or damage sustained because of such failure to surrender possession at the time stipulated.*" (italics added).

[40]Conway v. Starkweather, 1 Denio 113 (N. Y. 1845).

[41]Sullivan v. Ringler & Co., 59 App. Div. 184, 69 N. Y. Supp. 38, *aff'd* 171 N. Y. 693, 64 N. E. 1126 (1901); Phelan v. Kennedy, 185 App. Div. 749, 173 N. Y. Supp. 687 (1st Dep't 1919); Vernon v. Brown, 40 App. Div. 204, 58 N. Y. Supp. 11 (2d Dep't 1899); Livingston v. Robb, *supra* note 37; Marbridge Bldg. Co. Inc. v. White, 115 Misc. 320, 188 N. Y. Supp. 233 (Sup. Ct. 1921); note (1925) 39 A. L. R. 386.

[42]Vernon v. Brown, *supra* note 41, at 205.

[43]Mason v. Wierengo's Estate, 113 Mich. 151, 153, 71 N. W. 489 (1897).

[44]1 SUTHERLAND ON DAMAGES (1916) §§ 13, 16; 2 GREENLEAF ON EVIDENCE (1899) § 256.

[45]1 SUTHERLAND, *op. cit. supra* note 44, at 45.

In jurisdictions in which the lessor is under a duty to put the new tenant into possession on the expiration of a lease to another party,[46] no questions beyond those already discussed would seem to be involved. But in some jurisdictions, as *e.g.* in New York,[47] it may be necessary to distinguish between a case where the lessor claims loss because the holding over of the first tenant prevented him from securing another, and a case, like the one under discussion, where the lessor claims loss because of inability to give possession to a new tenant who has already signed a lease. Since the rule in New York is that the lessor is not under a duty to give possession in such circumstances,[48] the new lessee is the one entitled to maintain ejectment against the old tenant[49] and, where impossibility of removal does not protect the old tenant, he can recover rent for another year from the old lessee, wrongfully holding over, on the theory that he succeeds to the rights of the landlord.[50] It has been held, however, that because of a lack of a landlord and tenant relationship between the old and new tenants, only the lessor can maintain summary proceedings.[51] In the instant case, then, it would seem that the new tenant should have brought ejectment or had the lessor bring summary proceedings on his behalf. The lessor, apparently in ignorance of his rights against the new tenant, accepted a surrender of the lease with the new tenant[52] when he was not compelled to do so.[53] Under these circumstances it may be argued that the landlord is not entitled to special damages. Had the new tenant instituted the action, the old tenant would still have been al-

[46]Such jurisdictions follow the so-called "English" rule, and include at least the following: Alabama, Arkansas, Indiana, Iowa, Kentucky, Missouri, Nebraska, North Carolina, Philippines, Tennessee, Texas, Canada and England. For cases from each of these jurisdictions and a general discussion of the problem, see (1931) 70 A. L. R. 151, 153.

[47]New York originated the "American" rule that the lessor impliedly covenants that the lessee shall have the legal right to the premises and possession will not be withheld by the lessor or one having paramount title; but there is no implied covenant to put the tenant in possession as against a third party wrongdoer. United Merchant's Realty and Improvement Co. v. Roth, 193 N. Y. 570, 86 N. E. 544 (1908); Gardner v. Keteltas, 3 Hill 330, 38 Am. Dec. 637 (N. Y. 1842); Mirsky v. Horowitz, 46 Misc. 257, 92 N. Y. Supp. 48 (Sup. Ct. 1905); Mechanics' & Traders' Fire Ins. Co. v. Scott, 2 Hilt. 550 (Com. Pl. 1859). Other jurisdictions which follow the American rule are: California, Hawaii, Illinois, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey and Virginia. See (1931) 70 A. L. R. 151. For a general analysis of the English and American rules, see Hannan v. Dusch, 154 Va. 356, 153 S. E. 824 (1930).

[48]See *supra* note 47.

[49]Gardner v. Keteltas, 3 Hill 330, 38 Am. Dec. 637 (N. Y. 1842). For a criticism of this doctrine see Imbert v. Hallock, 23 How. 456 (N.Y. 1862) and cases cited therein.

[50]United Merchant's Realty and Improvement Co. v. Roth, 193 N. Y. 570, 86 N. E. 544 (1908).

[51]Eells v. Morse, 208 N. Y. 103, 101 N. E. 803 (1913). In an unpublished manuscript dealing with the New York Real Property Law, Professor Richard R. Powell compares this case with the one cited in note 50, *supra*, and concludes that *Eells v. Morse* ". . . is a product either of formalistic reasoning or of a liking for the doctrine, existent in some states, that a landlord is under a duty *in all cases* to give the tenant not only a right to possession but possession itself." Cited in JACOBS, CASES AND MATERALS ON LANDLORD AND TENANT (1932) 167, note 4 and 169, note 5.

[52]The report of the case does not indicate that the landlord made any objections to the surrender of the premises by the new tenant.

[53]See *infra* note 56.

lowed to remain, but the court would have been faced with the question of what compensation, if any, to award to the new tenant.

Unless the holdover rule can be invoked, the second lessee could not recover rent for another year from the tenant holding over.[54] Apparently, only the landlord has been allowed to recover for use and occupation.[55] On the other hand, since the new tenant is still liable for the rent although he is unable to obtain possession because of the presence of a third person wrongfully in possession,[56] the new tenant would have a strong argument that he was entitled to a recovery for use and occupation rather than the landlord. At least, the new tenant can succeed in an action for damages against the landlord. The measure of damages in such case, where the lessor fails to give possession, is the difference between the rental value of the premises and the rent reserved,[57] together with such necessary expenses incurred by the lessee in preparing for occupation as were within the contemplation of the parties.[58] Special damages may be recovered if they are the natural consequence of the failure of the lessor to give possession.[59] However, from the incomplete facts stated in the report is cannot be determined whether the new lessee would be entitled to damages or not.

Tozier Brown

Trusts: Creation and validity: Reservation of control by settlor, when testamentary?—The owner of property who wishes to create an *inter vivos* trust, retaining for his lifetime the income therefrom, power to revoke, alter and amend, the right to withdraw parts of the corpus and also the right to

[54]United Merchants' Realty and Improvement Co. v. Roth, 193 N. Y. 570, 86 N. E. 544 (1908).

[55]*Supra* note 3.

[56]Smith v. Barber, 96 App. Div. 236, 89 N. Y. Supp. 317 (1st Dep't 1904), *on later appeal*, 112 App. Div. 187, 98 N. Y. Supp. 365 (1st Dep't 1906); Foreshaw v. Hathway, 112 Misc. 114 (Sup. Ct. 1920); Dodd v. Hart, 30 Misc. 459, 62 N. Y. Supp. 484 (Sup. Ct. 1900); Ward v. Edesheimer, 43 N. Y. St. Rep. 138, 17 N. Y. Supp. 173 (Com. Pl. 1892); McKinney v. Holt, 8 Hun 336 (3d Dep't 1876); Mechanics' and Traders' Fire Ins. Co. v. Scott, 2 Hilt. 550 (Com. Pl. 1859).

[57]Eastman v. The Mayor, 152 N. Y. 468, 46 N. E. 841 (1889); Dodds v. Hakes, 114 N. Y. 260, 21 N. E. 398 (1889); Pumpelly v. Phelps, 40 N. Y. 60 (1869); Trull v. Granger, 8 N. Y. 115 (1853); Podalsky v. Ireland, 137 App. Div. 257, 121 N. Y. Supp. 950 (1st Dep't 1910), *later appeal*, 146 App. Div. 940, 131 N. Y. Supp. (1st Dep't 1911), *aff'd.* 210 N. Y. 598, 104 N. E. 1138 (1914); Goldman v. Gainey, 67 App. Div. 330, 73 N. Y. Supp. 738 (3rd. Dep't 1901); Smith v. Barber, *supra* note 56; 2 TIFFANY ON LANDLORD AND TENANT (1912) 547.

[58]Podalsky v. Ireland, *supra* note 57; Williamson v. Stevens, 84 App. Div. 518, 82 N. Y. Supp. 1047 (1st Dep't 1903); Oehlhof v. Soloman, 73 App. Div. 329, 76 N. Y. Supp. 716 (1st Dep't 1902); Driggs v. Dwight, 17 Wend. 71, 31 Am. Dec. 283 (1837); *cf.* Shultz v. Brenner, 24 Misc. 522, 53 N. Y. Supp. 972 (Co. Ct. 1898).

[59]Williamson v. Stevens, 84 App. Div. 518, 82 N. Y. Supp. 1047 (1st Dep't 1903); Segal v. Bingham Engraving Co., 184 N. Y. Supp. 584 (Sup. Ct. 1920). Loss of the use of premises for a particular purpose unknown to the lessor gives no right to damages. Rothman v. Kosower, 107 N. Y. Supp. 2 (Sup. Ct. 1907). But it may be otherwise if such special purpose is known to the lessor. Friedland v. Myers, 139 N. Y. 432, 34 N. E. 1055 (1893); Price v. Eisen, 31 Misc. 457, 64 N. Y. Supp. 405 (Sup. Ct. 1900).

dictate all sales, purchases, investments and reinvestments as well as indicate the ultimate beneficiary after his death, may fail to accomplish his purpose because of the Statute of Wills.[1] The individual who wishes to remain the absolute owner of his property until death and then direct its subsequent devolution may do so only by complying with the statutory formalities for the execution of a will, if it is his intention that no interest whatsoever is to pass until his death.[2] In spite of this basic principle of law, the trust provides a medium whereby an individual may retain many of the incidents of absolute ownership during his lifetime and still effectively direct the ultimate disposition of the property after his death without having executed a will. Often the line between a trust which is valid and one that violates the Statute of Wills is shadowy and difficult to draw.[3] In discussing the distinction we are now concerned solely with the quantum of rights and powers which the settlor may effectively reserve to himself and not with those trusts which run counter to the Statute of Wills because the beneficiary is not to be determined, or the trust property is not identified and conveyed to the trustee until after the death of the settlor.[4] Moreover, cases finding the equivalent of absolute ownership in the settlor for the purpose of income taxation must be carefully distinguished from the cases under discussion since in the field of taxation entirely different principles are controlling.[5]

The pertinent question is: How many rights and powers may the settlor retain for his life, while indicating the ultimate disposition of the trust property after his death, and still create a trust which is unassailable? A deed must pass some interest to the grantee or it is not a conveyance at all; so it is conceivable that the settlor may retain so many of the incidents of complete ownership that the purported deed of trust becomes illusory and is an attempted testamentary disposition. If one retains title to property and gives possession of it to another to hold for him and deal with it as directed and on his death, if not otherwise directed, to deliver it to another person,

[1]Scott, *Trusts and the Statute of Wills* (1929) 43 HARV. L. REV. 521.

[2]Sometimes the deed or instrument expressly states that it is only to take effect at the death of the grantor. Such instruments have been subject to two interpretations: (1) That it is an attempted will and therefore invalid. Boon v. Castle, 61 Misc. 474, 115 N. Y. Supp. 583 (Sup. Ct. 1908); Butler v. Sherwood, 196 App. Div. 603, 188 N. Y. Supp. 242 (3d Dep't 1921), *aff'd*, 233 N. Y. 655, 135 N. E. 957 (1922); Leonard v. Conard, 145 Mich. 563, 108 N. W. 985 (1906); Moore v. Layton, 147 Md. 244, 127 Atl. 756 (1925). (2) That possession and enjoyment by the grantee is merely postponed. Harshbarger v. Carroll, 163 Ill. 636, 45 N. E. 565 (1896); Trumbauer v. Rust, 36 S. D. 301, 154 N. W. 801 (1915); Lauck v. Logan, 45 W. Va. 251, 31 S. E. 986 (1898).

[3]*Compare* McEvoy v. Boston Five Cents Savings Bank, 201 Mass. 50, 87 N. E. 465 (1909) *with* Jones v. Old Colony Trust Co., 251 Mass. 309, 146 N. E. 716 (1925).

[4]If the beneficiary is not to be determined until after the death of the settlor the trust may be invalid as an attempted testamentary disposition of the beneficial interest in the property, with no interest to vest prior to the settlor's death. McGillivray v. First Nat'l Bank, 56 N. D. 152, 217 N. W. 150 (1927); Van Cott v. Prentice, 104 N. Y. 45, 10 N. E. 257 (1887); Syracuse Trust Co. v. Fuller, 140 Misc. 918, 252 N. Y. Supp. 90 (Sup. Ct. 1930). On the other hand, if the beneficiary acquires an interest during the lifetime of the settlor the Statute of Wills is not violated even if possession and enjoyment are postponed until after the settlor's death. Moreover, the interest of the beneficiary may be vested or contingent. Thomas v. Williams, 105 Minn. 88, 117 N. W. 155 (1908).

[5]See, for example § 166 INT. REV. CODE, 53 STAT. 68 (1939), 26 U. S. C. § 166 (1940) and Note (1940) 27 CORNELL L. Q. 133.

the possessor becomes merely an agent of the owner and the attempted disposition is testamentary.[6] But if the settlor delivers title to the trustee and reserves to himself merely the life income from the property, the transfer is not testamentary even though the ultimate beneficiary will not get possession or enjoyment until after the settlor's death.[7] Though an attempted gift, not in trust, is generally held to be invalid if a power of revocation is retained by the donor,[8] it is settled law that a gift in trust is not invalidated by such a reservation.[9] Nor does the reservation of a life estate coupled with a power to revoke the trust render the trust invalid as testamentary for if the ultimate remainderman is in being he at once acquires an interest in the property even though it may later be divested should the settlor exercise his reserved power.[10] It has been held further that the reservation of the power to alter and amend the provisions of the deed of trust, even to the extent of changing the beneficiaries, does not cause the *inter vivos* trust to violate the Statute of Wills.[11] Moreover, a combination of all the rights and powers specifically mentioned heretofore may be reserved by the settlor with the same legal consequence.[12]

The courts have had more difficulty in upholding trusts where the settlor has reserved a life interest, a power to revoke, the right to alter and amend, the right to withdraw securities from the trust corpus, as well as the right to direct the trustee concerning the sale or retention of trust properties, or

[6]1 SCOTT ON TRUSTS § 56.1 (1939) and cases cited at p. 328, n. 6. See also Coon v. Stanley, 230 Mo. App. 524, 94 S. W. (2d) 96 (1936); *In re* Tunnell's Estate, 325 Pa. 554, 190 Atl. 906 (1937).

[7]Pass v. Stephens, 22 Ariz. 461, 198 Pac. 712 (1921); Candee v. Conn. Sav. Bank, 81 Conn. 372, 71 Atl. 551 (1908); Lauterbach v. New York Investment Co., 62 Misc. 561, 117 N. Y. Supp. 152 (Sup. Ct. 1909), *aff'd*, 137 App. Div. 919, 122 N. Y. Supp. 1137 (1st Dep't 1910); Brace v. Van Eps, 13 S. D. 452, 80 N. W. 197 (1899); RESTATEMENT, TRUSTS (1935) § 57 (1).

[8]Barnum, Ex'r v. Reed, 136 Ill. 388, 26 N. E. 572 (1891); Smith v. Dorsey, 38 Ind. 451, 10 Am. Rep. 118 (1872); Calvin v. Free, 66 Kan. 466, 71 Pac. 823 (1903); Bickford v. Mattocks, 95 Me. 547, 50 Atl. 894 (1901); Curry v. Powers, 70 N. Y. 212, 26 Am. Rep. 577 (1877); Walsh's Appeal, 122 Pa. 177, 15 Atl. 470 (1888).

[9]Hall v. Birkhaur, 59 Ala. 349 (1877); Brown v. Findlay Trust Co., 126 Md. 175, 94 Atl. 523 (1915); Stone v. Hacket, 78 Mass. (12 Gray) 227 (1858); Pingrey v. Nat'l Life Ins. Co., 144 Mass. 374, 11 N. E. 562 (1887); Kendrick v. Ray, 173 Mass. 305, 53 N. E. 823 (1899); Hiserodt v. Hamlett, 74 Miss. 37, 20 So. 143 (1896); *In re* Estate of Soulard, 141 Mo. 642, 43 S. W. 617 (1897); Robb v. Wash. & Jeff. College, 185 N. Y. 485, 78 N. E. 359 (1906); Van Cott v. Prentice, 104 N. Y. 49, 10 N. E. 257 (1891); RESTATEMENT, TRUSTS (1935) § 57 (1).

[10]Cramer v. Hartford-Connecticut Trust Co., 110 Conn. 22, 147 Atl. 139 (1929); Lewis v. Curnutt, 130 Iowa 423, 106 N. W. 914 (1906); Brown v. Fidelity Trust Co., 126 Md. 175, 94 Atl. 523 (1915); Kelley v. Snow, 185 Mass. 288, 70 N. E. 89 (1904); Jones v. Old Colony Trust Co., 251 Mass. 309, 146 N. E. 716 (1925); Goodrich v. City National Bank & Trust Co., 270 Mich. 222, 258 N. W. 253 (1935); Von Hesse v. MacKaye, 136 N. Y. 114, 32 N. E. 615 (1892); Lines v. Lines, 142 Pa. 149, 21 Atl. 809 (1891); RESTATEMENT, TRUSTS (1935) § 57 (1).

[11]Stone v. Hackett, 78 Mass. (12 Gray) 227 (1858); Kelley v. Snow, 185 Mass. 228, 70 N. E. 89 (1904); Goodrich v. City National Bank and Trust Co., 270 Mich. 222, 258 N. W. 253 (1935); Robb v. Wash. & Jeff. College, 185 N. Y. 485, 78 N. E. 359 (1906); Pinckney v. City Bank Farmers Trust Co., *et al.*, 249 App. Div. 375, 292 N. Y. Supp. 835 (3d Dep't 1937); Cleveland Trust Co. v. White, 134 Ohio St. 1, 15 N. E. (2d) 627 (1938).

[12]See cases cited *supra* note 11.

the additional power to veto a proposed sale or investment deemed advisable by the trustee. Clearly, in such a trust, we are approaching rather closely to the equivalent of absolute ownership in the settlor, and numerous cases hold that the reservation of so much control renders the attempted ultimate disposition of the property testamentary and is invalid unless executed according to the law governing testamentary dispositions.[13]

The great majority of our courts are very liberal in sustaining the validity of trusts wherein the settlor has reserved all or substantially all of these rights and powers. The decisions are based on the theory that title has passed to the trustee and the beneficiaries have taken an immediate interest in the trust property with the settlor's reserved powers amounting to conditions subsequent which operate merely to divest their interest. Furthermore, there is usually an express finding that the settlor had a *bona fide* intention to create an *inter vivos* trust and intended to insure certain beneficiaries of his bounty by setting up safeguards against future contingencies.[14] In those cases where

[13]Dunham v. Armitage, 97 Colo. 216, 48 P. (2d) 797 (1935); Smith v. Simmons, 99 Colo. 227, 61 P. (2d) 589 (1936); Coston v. Portland Trust Co., 131 Ore. 71, 278 Pac. 586 (1929); Warasco v. Oshkosh Savings & Trust Co., 183 Wis. 156, 196 N. W. 829 (1924) (here the trustee alone had discretion as to investments, but trust was held invalid).

The RESTATEMENT OF TRUSTS (1935) § 57 (2) provides:

"Where the settlor transfers property in trust and reserves not only a beneficial life estate and power to revoke but also such power to control the trustee as to the details of the administration of the trust that the trustee is the agent of the settlor, the disposition so far as it is intended to take effect after his death is testamentary and is invalid unless the requirements of the statutes relating to the validity of wills are complied with."

At best this is an unworkable test since it usually has the effect of requiring the highest court of each state to be burdened with the ultimate decision on the question of control in every case where an *inter vivos* trust is assailed as testamentary in the trial court.

[14]Pres. of Bowdoin College v. Merritt, 75 Fed. 480 (N. D. Cal. 1896) (reserved power to revoke, modify and substitute); Adams v. Hagerott, 34 F. (2d) 899 (C. C. A. 8th 1929) (right to advise investments); Cramer v. Hartford-Connecticut Trust Co., 110 Conn. 22, 147 Atl. 139 (1929) (broad general powers of control); Kelley v. Parker, 181 Ill. 49, 54 N. E. 615 (1899) (reserved power to sell and manage); Bear v. Milliken Trust Co., 336 Ill. 366, 168 N. E. 349, 73 A. L. R. 173 (1929) (general control reserved over investments); Keck v. McKinsty, 206 Ia. 1121, 221 N. W. 851 (1928); Goodrich v. City National Bank & Trust Co., 270 Mich. 222, 258 N. W. 253 (1935) (power to alter and amend, revoke, withdraw part of corpus, control all investments); Sims v. Brown, 252 Mo. 58, 158 S. W. 624 (1913); Pinckney v. City Bank Farmers Trust Co., 249 App. Div. 375, 292 N. Y. Supp. 835 (3d Dep't 1937) (reserved right to revoke and modify, direct retention and sale of securities and add and substitute securities); Talbot v. Talbot, 32 R. I. 72, 78 Atl. 535 (veto power over any sales of trust securities).

In McEvoy v. Boston Five Cents Savings Bank, 201 Mass. 50, 87 N. E. 465 (1909) the settlor placed certain money in trust and reserved the right to withdraw any sums as she might demand during her life and at her death to pay the balance to certain named persons. The trust was held invalid. In Jones v. Old Colony Trust Co., 251 Mass. 309, 146 N. E. 716 (1925) the settlor reserved a life income, power to alter and amend, and right to demand parts of the principal but the trust was held valid. The *McEvoy* case was distinguished on the sole ground that there the trustee had no discretion in the premises and was a mere agent, while in the *Jones* case the trustee had power over investments, etc. Undoubtedly the court in the *McEvoy* case was influenced by the fact that there was evidence to the effect that the settlor had expressed herself as having made the trust agreement instead of a will.

the settlor reserved the right to withdraw parts of the corpus of the trust a few courts have held that this factor makes a gift to remaindermen testamentary,[15] but it seems far more reasonable to hold that the right of withdrawal is not essentially different from a power to revoke the whole trust which is generally accepted as a valid provision.[16] Of course, the court may hold that a trust, otherwise valid under the doctrines already discussed, is invalid as an illusory transfer in the nature of a fraud on the settlor's widow's statutory right of election; in such cases different principles of law are controlling.[17]

The Supreme Court of Ohio, in recent years, has had occasion to deal with the problem under discussion and the state of the Ohio law today is not altogether clear. In *Union Trust Co. v. Hawkins,* the Supreme Court, in an opinion not officially reported, held a trust invalid as testamentary, primarily on the ground that the settlor had reserved the power to revoke the trust. In its later officially reported opinion[18] the court sustained the validity of the trust on the basis of a recent statute[19] which it deemed controlling. The court, however, maintained, as it had in the opinion not officially reported, that as a common law proposition the reservation of a power to revoke invalidated the trust. The view expressed in the *Hawkins* case was clearly contrary to the weight of authority in other jurisdictions at the time[20] and has been subsequently discredited by the same court.[21]

In *Cleveland Trust Co. v. White,*[22] the settlor of the trust in question reserved the life income from the trust, the right to use the real property, certain stock voting rights, and the power to revoke, alter and modify the trust if the directors of the corporate trustee acquiesced. The trustee apparently had full control over investments and reinvestments. Provision was made for ultimate remaindermen after the settlor's death. The Supreme Court held that the trust was not testamentary and set forth certain guiding principles for future cases dealing with the same problem.[23] The court, how-

[15]Brown v. Crafts, 98 Me. 40, 56 Atl. 213 (1903); Darling v. Mattoon State Bank, 189 Wis. 117, 207 N. W. 254 (1926). *Cf.* McEvoy v. Boston Five Cents Savings Bank, *supra* note 14.

[16]Cramer v. Hartford-Connecticut Trust Co., 110 Conn. 22, 147 Atl. 139, 73 A. L. R. 201 (1929); Jones v. Old Colony Trust Co., *supra* note 14; Goodrich v. National Bank & Trust Co., 270 Mich. 222, 258 N. W. 253 (1935); Gilman v. McArdle, 99 N. Y. 451, 2 N. E. 464 (1885); Cleveland Trust Co. v. White, 134 Ohio St. 1. 15 N. E. (2d) 627 (1938).

[17]Newman v. Dore, 275 N. Y. 371, 9 N. E. (2d) 966 (1937), Note (1937) 23 CORNELL L. Q. 457.

[18]121 Ohio St. 159, 167 N. E. 389 (1929).

[19]OHIO GEN. CODE ANN. (Page, 1938) § 8617.

[20]See cases cited *supra* note 9.

[21]Cleveland Trust Co. v. White, 134 Ohio St. 1, 15 N. E. (2d) 627 (1938).

[22]*Supra* note 21.

[23]The principles enumerated by the court are supported by the great weight of authority. See cases cited *supra* note 14. The court said, 134 Ohio St. at 6, 7: "By the weight of authority, a trust, otherwise effective, is not rendered nugatory because the settlor reserves to himself the following rights and powers: (1) The use of the property and the income therefrom for life; (2) the supervision and direction of investments and reinvestments; (3) the amendment or modification of the trust agreement; (4) the revocation of the trust in whole or in part; (5) the consumption of principal." The court further stated, 134 Ohio St. at 9: "It is evident that cases of the type now under consideration

ever, placed great weight on the fact that the settlor could not revoke, alter or modify the trust without the consent of the trustee.

In *Schofield v. Union Trust Co.*,[24] the settlor conveyed a parcel of real estate to the trustee and reserved the right to receive the income therefrom for life. The trustee was required to secure the settlor's consent to all sales and purchases of property connected with the trust. The settlor reserved an absolute power to revoke the trust and he had also designated the ultimate remaindermen. The Supreme Court, by a divided court, sustained the validity of this trust and relied entirely on the principles enunciated in the *White* case in so holding. The court emphasized that the settlor had a *bona fide* intention to create a trust and perhaps this is the crux of the decision. If so, it goes about as far as any court has gone in sustaining such a trust since the court admitted that the trustee had "little or nothing to do with its management." But the importance of the *Schofield* case is that it clearly shows that the *White* case is a more sweeping decision than a superficial reading of the opinion discloses, and it will not be limited to its own peculiar facts.[25]

The most recent case to come before the Ohio Supreme Court, on the topic under discussion, is *Central Trust Co. v. Watt, 139 Ohio St. 50, 38 N. E. (2d) 185 (1941)*. For our purposes, the essential facts were as follows: In 1910 *S* executed a trust instrument and by its terms he transferred certain securities to a trustee to hold, manage, sell, invest and reinvest as the settlor should direct. *S* reserved the right to withdraw any securities he desired from the trust, as well as an absolute power of revocation and a life interest in the income. He also indicated the manner in which the trust should be administered after his death. *S* died in 1911 without having revoked the trust and from that time until this case arose the subsequent beneficiaries had been receiving the income and no one had heretofore contested the validity of the trust. Three judges concurred in sustaining the validity of the trust, one judge concurred in the result but refused to discuss validity on its merits because he felt that the pleadings had not raised the issue, and three judges dissented in an opinion declaring the trust invalid. The opinion sustaining the validity of the trust relied upon the *White* and *Schofield* cases and expressly concluded that the settlor had a *bona fide* intention to create an *inter vivos* trust. This conclusion was clearly justified since the settlor in the *Watt* case had retained no more incidents of control than had been enumerated in the *White* case as permissive.[26] It is clear that the control exercised by the settlor was for the benefit of the trust and its beneficiaries, and not for his own individual interest as owner of the fund. The three dissenting judges maintained that the reservations of rights and powers were such that the trustee became a mere agent of the settlor, citing the *White* case. It is

must be decided on their own particular facts. Where the settlor retains powers which in their cumulative effect amount to ownership of the trust estate with such control over the administrative functions of the trustee as to make him simply the settlor's representative, no trust is established and the courts have so declared."

[24]135 Ohio St. 328, 21 N. E. (2d) 119 (1939).

[25]It is now clear that the fact in the *White* case that the trustee had to consent to the settlor's exercise of the power to revoke, alter, or amend was not felt to be controlling in the outcome of the case.

[26]*Supra* note 23.

difficult to perceive how they could read that part of the *White* case which enumerated five permissible reservations of rights and powers[27] and still maintain that this settlor had stepped beyond them. They did not question the settlor's *bona fide* intention to create a trust, on which the prevailing opinion was in part based. How one judge could concur with the majority in the *Schofield* case and then unqualifiedly dissent in the principal case is not readily understandable.

In order to clarify an important principle of property law for the benefit of Ohio practitioners engaged in drafting trust instruments for the future, it would seem that the whole court should adopt the rules of the *White* and *Schofield* cases in the spirit of liberality with which they were written.[28] The law of Ohio today is based on the principles as stated in the *White* case, and they should be construed broadly whenever the court finds a *bona fide* intention on the part of the settlor to create an express *inter vivos* trust which conveys a present interest, vested or contingent, to the ultimate beneficiaries who are special objects of the settlor's bounty. When such an intention is found it seems clear that the Ohio court will uphold the trust however ministerial the functions of the trustee may prove to be.

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[27]*Supra* note 23.

[28]Moreover, these cases do not establish an unorthodox rule. On the contrary they do not go beyond the rules already established in courts of other jurisdictions. See cases cited *supra* note 14, especially Jones v. Old Colony Trust Co., 251 Mass. 309, 146 N. E. 716 (1925) and Goodrich v. City National Bank and Trust Co., 270 Mich 222, 258 N. W. 253 (1935).