ditions or restrict the duration of privately imposed use restrictions.[55] The weakness of legislation is that its retroactive effect may be limited. Hence, while statutes may constitutionally terminate conditions which have become obsolete becausc of changes in the character of the neighborhood or other similarly altered circumstances, the validity of an attempt to legislate an existing condition unlimited in time into one of definite duration is questionable. Such legislation probably can have only prospective effect.[56] The existing judicial techniques for terminating conditions subsequent are commendable and reasonably effective devices in avoiding harsh forfeitures and preventing past actions from controlling land use indefinitely. However, the traditional judicial reluctance to override precedent, the uncertainties of litigation, and the present inviolability of determinable fees often result in the continuance of unwarranted restrictions long after the required use has become uneconomical and without present value to anyone. While legislation could remedy many of these defects, statutes have been infrequent and may well be constitutionally inapplicable to those restrictions in effect at the time of enactment.

Transferors of land desiring to place reasonable restrictions upon its future use should consider carefully the implications of the device selected. Unless a future windfall in the form of a forfeiture is contemplated, a covenant will ordinarily suffice and will avoid needless penalties on the transferee. Moreover, in jurisdictions where rights of re-entry and possibilities of reverter are non-alienable[57] a covenant will usually more nearly effectuate the transferor's intent and will redound to his greater benefit. Restrictions beneficial to the land expressed in terms of covenant will survive conveyance to a stranger,[58] thus, often increasing the value and marketability of the retained estate.

TESTIMONIAL PRIVILEGE AND COMPETENCY IN INDIANA

The ultimate objective of exclusionary rules of evidence is to admit all reliable facts, thereby facilitating just disposition of a legal controversy, while rejecting all testimony so dubious as to render it repugnant

55. See Clark, *Limiting Land Restrictions,* 27 A.B.A.J. 737 (1941); WALSH, *Conditional Estates and Covenants Running with the Land,* 14 N.Y.U.L.Q. REV. 162, 194 n.80 (1936); Legis., [1940] WIS. L. REV. 121 (1940).

56. See Clark, *Limiting Land Restrictions,* 27 A.B.A.J. 737, 739 (1941); Goldstein, *supra* note 13, at 275 n.103.

57. See notes 2 and 3 *supra.*

58. WALSH, *op. cit. supra* note 55, at 165.

to any systematic procedure for ascertaining truth. Practical, contemporary experience of the courts reveals that evidence emanating from certain sources is not to be trusted.[1] Other exclusions have such remote origins that their justifications have become obscure or entirely unintelligible.[2] The latter repeatedly have been challenged by proponents of the view that the jury should be permitted to hear all evidence relevant to material issues and, with guidance from the court, determine its weight and credibility.[3]

In conflict with this desired liberality in the introduction of evidence are the rules of competency and privilege.[4] Most witnesses are both competent and compellable. An incompetent person, however, is one ineligible to testify under any circumstances as a result of a legally imposed disability. Furthermore, in many situations the law confers a privilege enabling its holder to obstruct introduction of certain evidence. In this event, a witness may testify only when the privilege has been waived. Two classes universally held incompetent, insane and infants, have long been distinguished by the courts as lacking intrinsic elements of testimonial competency—ability to perceive, recollect, and narrate. On the other hand, most privilege situations, of recent legislative origin, are founded upon the extrinsic policy of perpetuating certain socially desirable relationships, even though this necessitates foregoing introduction of additional testimony.

Except for an occasional minor amendment, existing statutory rules governing competency and privilege in Indiana had all been estab-

1. Three elements constitute the practical foundation for exclusionary rules: a human tendency to form impressions without reliable basis; a possibility that much of the testimony in acrimonious litigation will be perverted; and a necessity to limit trials to reasonable length by admitting only the most authoritative evidence. WIGMORE, LAW OF EVIDENCE § 8a (Student ed. 1935).

2. Historically, when Norman judges summoned jurors to participate in a trial, it was not as triers of fact but as witnesses. They were neighbors of the litigants who were presumably responsible men acquainted with the facts. Over a period of years the juror's function was completely reversed, so that he no longer contributed testimony, but made a determination of the true facts from evidence produced by others. Due to the judges' fear that legally-inexperienced individuals would be unduly influenced by false, biased, or otherwise tainted testimony, they constructed a network of exclusionary rules which allowed the jury to hear only the most trustworthy declarations. Thus, witnesses were admitted only under strict limitations to assure their being well-qualified. THAYER, PRELIMINARY TREATISE ON EVIDENCE cc. I-IV (1898).

3. In hearings before the Interstate Commerce Commission, patent litigation, admiralty trials, and some juvenile courts exclusionary rules are largely ignored. 1 WIGMORE, EVIDENCE § 8c (3d ed. 1940).

4. These rules exist in all states and the federal courts, *e.g.*, FED. R. CIV. P. 43 (a); FED. R. CR. P. 26; CAL. CODE CIV. PROC. A. 1946, §§ 1880, 1881; ILL. REV. STAT. c. 51, §§ 2, 5 (1947); IOWA CODE ANN. §§ 622.1, 622.4, 622.9, 622.10 (1950); MASS. ANN. LAWS c. 233, § 20 (Michie, 1933); MICH. COMP. LAWS §§ 617.62-617.68 (1948); N.Y. PENAL CODE § 2445 (1944); OHIO GEN. CODE ANN. §§ 11493, 11494, 11495 (Page, 1938); TENN. ANN. CODE § 9978 (1934); WIS. STAT. §§ 325.16-325.22, 325.30 (1947).

lished by the legislature as early as 1881.[5] In its final form, the statute constituting the nucleus of the Indiana law characterizes as "incompetency" the absolute disability of insane and infants and also other relationships more accurately designated "privilege."[6] Far from counteracting the legislature's confusion, the courts have further obscured this provision with numerous conflicting interpretations. For example, only four years after passage of the 1881 act, the Indiana Supreme Court, referring to the physician-patient relationship, remarked: "Notwithstanding the absolute prohibitory form of our present statute, we think it confers a privilege which the patient, for whose benefit the provision

5. The historical development of the Indiana statute is of interest in attempting to detect some logical reason for the form in which the rules were finally established. The first provision relating to competence was enacted in 1831, and prohibited Negroes, Mulattoes, and Indians from testifying in any case in which a white man was a party. Ind. Rev. Laws 1831, p. 407. This disqualification was removed in 1867, after the Civil War and Emancipation Proclamation. In 1843 provisions were added making persons competent to give evidence of gaming; establishing the competency of any person against whom an offense had been committed; providing that belief in a Supreme Being should only affect credibility; permitting examination of infants or persons of "weak intellect" to ascertain mental or moral capacity; and declaring that anyone convicted of an infamous crime shall be incompetent. Ind. Rev. Stat. 1843, c. 54, §§ 42, 44; c. 40, §§ 257, 259, 261. Several revisions occurred in 1852: general moral character could be shown to affect credibility; rebuttable presumption that children under ten are incompetent; removal of incapacity due to crime or interest, but declaration of disability of a party or his spouse; any fact previously creating a disability would hereafter affect credibility; husband and wife incompetent witnesses for or against each other, and spouses could not disclose any communication from one to the other; provision that no attorney, physician, or clergyman shall be allowed to reveal a confidential communication unless with consent of the communicator; in criminal proceedings competent witnesses are those allowed to testify in civil actions, the party injured, and accomplices when they consent. 2 Ind. Rev. Stat. 1852, §§ 242, 239, 238, 243, 240, 241, 90. In 1852 the General Assembly first accorded explicit recognition to privileged communications between parties in certain enumerated relationships. In 1861 all of these privilege situations were combined in one statutory provision; the legislature also declared that a party could generally be a witness, and added the "Dead Man Statutes," excluding surviving parties in a suit against a deceased's estate. Acts 1861, §§ 2 and 3, p. 51. The alterations made between 1861 and 1881 were the deletion of the disability of spouses to testify for or against each other and the change in form from privilege to incompetency in the last four relationships in the principal statute. Ind. Acts 1881 (Spec. Sess.), c. 38, § 275.

6. "The following persons shall not be competent witnesses:

First. Persons insane at the time they are offered as witnesses, whether they have been so adjudged or not.

Second. Children under ten (10) years of age, unless it appears that they understand the nature and obligation of an oath.

Third. Attorneys, as to confidential communications made to them in the course of their professional business, and as to advice given in such cases.

Fourth. Physicians, as to matter communicated to them, as such, by patients in the course of their professional business, or advice given in such cases.

Fifth. Clergymen, as to confessions or admissions made to them in course of discipline enjoined by their respective churches.

Sixth. Husband and wife, as to communications made to each other."
IND. ANN. STAT. § 2-1714 (Burns, 1933).

is made may claim or waive."[7] Thus the court allowed waiver, which is peculiar to privilege, although the statute explicitly classified the relationship as one of incompetency. On the other hand, the Indiana courts have specifically endorsed the extant statutory language as expressing "the matured judgment of the legislative department of the state, which has met the approval of succeeding legislatures during the forty years that it has been in force. . . ."[8] The General Assembly thus far has acquiesced in the inconsistent judicial constructions of this ill-conceived legislative pattern.[9]

In addition to those inaugurated by statute, there are several judicially created privileges. While the attributes of some of these relationships are well-established, others have not yet been clearly delineated by the Indiana courts. Although seldom invoked, common law privileges should not be disregarded in an examination of the law of privilege and competency in Indiana.[10]

Statutory Privilege and Competency. An early Indiana provision in accord with the widespread trend toward abrogation of absolute exclusionary rules is the 1843 enactment stating that absence of religious belief should reflect only on a witness' credibility.[11] An individual is thereby rendered capable of taking an oath whether he is an atheist, an agnostic, or a child unversed in religious teachings. Another section of the same enactment, providing for admission of proof of general moral character, also affects only credibility. Two early cases held that a witness in a *criminal* case cannot be impeached under this section by proof of general moral character, especially when it consists of an isolated act of bad conduct.[12] In 1909, following passage of a corresponding rule of

7. Penn Mutual Life Ins. Co. v. Wiler, 100 Ind. 92, 100 (1885).

8. Kreager v. Kreager, 192 Ind. 242, 249, 135 N.E. 660, 662 (1922).

9. Not only does the principal section need revision, but the entire body of statutory law in Indiana concerning admissibility of witnesses' testimony should receive careful scrutiny.

10. Due to the widespread attention accorded self-incrimination and illegal search and seizure in recent years, and because these immunities are based on principles differing from those herein considered, they will be excluded from this discussion.

11. This conception attained constitutional status in 1852: "No person shall be rendered incompetent as a witness, in consequence of his opinions on matters of religion." IND. CONST. Art. I, § 7. It was also re-enacted by the 1852 legislature. IND. ANN. STAT. § 2-1724 (Burns, 1933). But see MODEL CODE OF EVIDENCE, Rule 224 (1942), which confers a privilege on a witness to prevent disclosure of his religious belief even to affect his credibility. This principle apparently is in accord with the motive underlying the Indiana constitutional mandate.

For comment on religious beliefs as affecting witnesses, see Swancara, *Iniquity in the Name of Justice,* 18 VA. L. REV. 415 (1932); Swancara, *Non-Religious Witnesses,* 8 WIS. L. REV. 49 (1932); and Hartogensis, *Denial of Equal Rights to Religious Minorities and Non-Believers in the United States,* 39 YALE L.J. 659 (1930).

12. Fletcher v. State, 49 Ind. 124 (1874); Farley v. State, 57 Ind. 331, 334 (1877).

criminal procedure, *Dotterer v. State,* thoroughly discussing both acts and the early precedents, observed that the criminal statute was doubtless enacted with an intent of overruling the two early cases.[13] Thus, *Dotterer* indicated that the credibility of a witness may be impugned in a *civil or criminal* action by demonstrating that he has been previously arrested, prosecuted, and convicted of a similar offense.

Previous conviction also is significant under another section of the Indiana statutes.[14] At common law any person who had been convicted of an infamous crime and sentenced therefor was disqualified as a witness. Treason, felonies and *crimen falsi* were in this category; the true test of infamy was whether the crime displayed such depravity or disposition to impede justice on the part of its perpetrator as to create a strong presumption against his truthfulness under oath.[15] This theory, that veracity can hardly be expected from a person of such low moral qualities, supported the doctrine until the time of Bentham. His vehement attack upon its fallacies led to virtual disappearance of the disqualification. Some jurisdictions still retain it, however, as to certain offenses, such as perjury.[16] Many provide that any previous conviction shall go to the credibility of the witness.[17] The latter view was adopted by the Indiana legislature in a provision included in the revised statutes of 1852, which superseded the act of 1843 defining infamous crimes and rendering those convicted incompetent.[18]

13. 172 Ind. 357, 361-365, 88 N.E. 689, 691-693 (1909).

14. "Any fact which might, heretofore, be shown to render a witness incompetent, may be hereafter shown to affect his credibility." IND. ANN. STAT. § 2-1725 (Burns, 1933).

Prosecution, indictment, or arrest are insufficient to bring a witness within the bounds of the statute; the judgment of the court, not the verdict of the jury, rendered an accused legally infamous. Petro v. State, 204 Ind. 401, 411-416, 184 N.E. 710, 713-715 (1932); Canada v. Curry, 73 Ind. 246, 249 (1881); Dawley v. State, 4 Ind. 128 (1853). The court in the *Petro* case overruled Vancleave v. State, 150 Ind. 273, 49 N.E. 1060 (1897) and Tosser v. State, 200 Ind. 156, 162 N.E. 49 (1928), to the extent that they allowed evidence of arrest or charge to affect credibility of a witness. See Note, 9 IND. L.J. 543 (1934).

This provision has been held not to prevent the court from compelling a witness to answer as to matters that may disgrace or humiliate him. South Bend v. Hardy, 98 Ind. 577 (1884); Bessette v. State, 101 Ind. 85 (1884).

15. 58 AM. JUR., WITNESSES § 138.

16. *E.g.,* FLA. STAT. § 90.06 (1949); KY. REV. STAT. § 421.090 (1946); MD. ANN. CODE Art. 35, § 1 (1939); MISS. CODE ANN. § 2315 (1942).

17. *E.g.,* CAL. CODE CIV. PROC. A. 1946, § 1879; ILL. STAT. ANN. § 37.720 (Jones Cum. Supp. 1950); MICH. COMP. LAWS § 617.63 (1948); N.Y. PENAL CODE § 2444 (1944); VA. CODE § 19-239 (1950).

18. See IND. ANN. STAT. § 2-1725 (Burns, 1933), Niemeyer v. McCarty, 221 Ind. 688, 692, 51 N.E.2d 365, 367 (1943). Several cases upholding the statute construed it as removing all objections to the competency of a witness by reason of conviction of a crime. Glenn v. Clore, 42 Ind. 60, 61 (1873); Jeffersonville, M. & I. R.R. v. Riley, 39 Ind. 568, 588 (1872); Muir v. Gibson, 8 Ind. 187, 190 (1856); Stocking v. State, 7 Ind. 326, 330 (1855).

In Indiana "competency to testify is the rule, and incompetency is the exception. No person will be excluded from testifying, and no testimony be rejected, unless within the inhibition [prohibition?] of the statute."[19] These statements allude to the primary competency statute, which prescribes the testimonial capacity of witnesses in general, and especially of parties and persons interested in a suit.[20] This section is a preamble to the exceptive clauses which have provoked frequent litigation and considerable perplexity in Indiana.

All jurisdictions declare that persons insane or infants at the time they are offered as witnesses are prima facie incompetent. It is well settled in Indiana that an adverse party may assert incompetency due to insanity. Examination of the witness to determine this issue then devolves upon the trial judge.[21] If the witness is found competent, the credibility of his testimony is left to the jury.[22] Under the prevailing rule, the judgment of the trial court on the question of competency will not be disturbed on appeal unless there is a manifest abuse of discretion.[23]

Although Indiana courts have strictly adhered to a narrow construction of the statutory rule, most jurisdictions hold that unsoundness of mind will not render a person incompetent if he has sufficient understanding to apprehend the obligation of an oath and to be capable of presenting a correct account of the matters he has seen or heard relevant to the questions at issue.[24] The latter is more likely to facilitate discovery

19. Metropolitan Life Ins. Co. v. Head, 86 Ind. App. 326, 328, 157 N.E. 448 (1927); Payne v. Larter, 40 Ind. App. 425, 426, 82 N.E. 96 (1907); Haughton v. Aetna Life Ins. Co., 165 Ind. 32, 35, 73 N.E. 592 (1905); Jordan v. State, 142 Ind. 422, 424, 41 N.E. 817, 818 (1895).

20. "All persons, whether parties to or interested in the suit, shall be competent witnesses in a civil action or proceeding except as herein otherwise provided." IND. ANN. STAT. § 2-1713 (Burns, 1933).

21. Courts no longer consider the insane entirely incapable of testifying. Duncan v. Welty, 20 Ind. 44 (1863); Carpenter v. Dame, 10 Ind. 125, 131 (1858); 58 AM. JUR., WITNESSES §§ 208-213. See Maguire and Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility*, 36 YALE L.J. 1101 (1927).

The fact that a witness had been previously adjudged insane is not controlling; the important factor is his capacity at the time of the trial to recollect and clearly relate his observations. Dickson v. Waldron, 135 Ind. 507, 35 N.E. 1 (1893); Breedlove v. Bundy, 96 Ind. 319, 324 (1884). Where a proposed witness is adjudged insane after the trial starts, however, or where he is under guardianship at the time of the trial, he has been held incompetent to testify. Hart v. Miller, 29 Ind. App. 222, 244-248, 64 N.E. 239, 246-248 (1902); Hull v. Louth, 109 Ind. 315, 339, 10 N.E. 270, 281 (1886). Deaf and dumb persons who can communicate with signs are competent. Skaggs v. State, 108 Ind. 53, 56, 8 N.E. 695, 697 (1886); Snyder v. Nations, 5 Blackf. 295 (Ind. 1840).

22. Holmes v. State, 88 Ind. 145, 147 (1882).

23. Wheeler v. United States, 159 U.S. 523 (1895); Lanier v. Bryan, 184 N.C. 235, 114 S.E. 6 (1922); Shannon v. Swanson, 208 Ill. 52, 69 N.W. 869 (1904); People v. Walker, 113 Mich. 367, 71 N.E. 641 (1897).

24. *E.g.*, People v. Enright, 256 Ill. 221, 99 N.E. 936 (1912); Barker v. Washburn, 200 N.Y. 28, 93 N.E. 958 (1911); Mead v. Harris, 101 Mich. 585, 60 N.W. 284 (1894).

of the truth than is vigorous application of the Indiana rule that insane persons cannot testify.

Where a child under ten is offered as a witness, however, an Indiana rule, liberal by comparison with the insanity decisions, asserts his competency if he understands the "nature and obligation of an oath."[25] Passing over a purely mechanical determination of the infant's age, the courts can proceed to a more meaningful inquiry into his mental capacity.[26] A more prevalent view relaxes this rule as to an infant's competency even further, positing his capacity on his intelligence, ability to recall and narrate the facts, and perception of a duty to tell the truth.[27] Since the purpose of admitting testimony is to elicit facts, it is probable that the inflexible Indiana requirement promotes suppression rather than discovery of the truth. Before rejecting the progressive view as an inducement to unreliable evidence, it should be recognized that the jury has the prerogative to determine the weight to be given a witness' testimony. In accord with this suggestion is one offered, surprisingly enough, in an old Indiana opinion which proposed use of scientific methods to accurately determine capacity to testify.[28] If accepted in determining competency of infants, such a suggestion would precipitate the use of psychological tests to disclose their intelligence, memory and ability to communicate recollections, thus obviating reliance on the decision of a judge unskilled in such matters.[29]

Despite statutory characterization of the attorney-client relation as one imposing an absolute disqualification, the attorney is a competent witness. Since the courts have tacitly repudiated the statutory language

---

25. Age at the time of the trial and not the date of the observed transaction determines competency. Foster, Adm'r. v. Honan, 22 Ind. App. 252, 259, 53 N.E. 667, 669 (1898); if, however, at the time of the transaction the child was too young to observe and remember what occurred, he should be disqualified.

26. The court must act on its own judgment upon a public examination; the judge cannot appoint referees to determine competency of a child. Simpson v. State, 31 Ind. 90 (1869). Presumption favors the decision of the trial court, since the judge has the proposed witness before him and is able to estimate capacity from his deportment and the manner in which he replies to questioning. Blackwell v. State, 11 Ind. 196 (1858).

27. Commonwealth v. Allabaugh, 162 Pa. Super. 490, 58 A.2d 184 (1948), noted, 22 TEMP. L.Q. 234 (1948). For an analysis of decisions supporting this modern doctrine see Hutchins and Slesinger, *Some Observations on the Law of Evidence—the Competency of Witnesses,* 37 YALE L.J. 1017 (1928). Michigan permits children to testify on a promise to tell the truth. MICH. COMP. LAWS § 617.68 (1948).

28. Nave's Adm'r. v. Williams, 22 Ind. 368 (1864); this case concerned the determination of competency of witnesses who were allegedly mulattoes.

29. *Cf.* R. v. Reynolds, 1 All England Rep. 335, (1950), noted, 13 MOD. L. REV. 235 (1950). See Note, 26 IND. L.J. 98 (1950), advocating use of psychological tests to establish credibility of prosecutrix in rape cases.

and properly construed the situation as one of privilege, the client may object to admission of his confidential communications to counsel.[30] The oldest testimonial privilege, it originated in England as early as 1577.[31] In deference to the oath and honor of the barrister, the tribunal did not require him to disclose his client's confidences. While the privilege has endured, the emphasis has shifted to indulgence of the client's interest, as evidenced by Judge Shaw's opinion in *Hatton v. Robinson:* "So numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, . . . that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that . . . [as to confidential communications] the mouth of the attorney shall be forever sealed."[32]

Bower's Administrator v. Briggs poses an interesting question.[33] Two defendants to a suit on a promissory note consulted plaintiff's attorney regarding a matter primarily of importance to the former. Confronted with the question whether an attorney's advice may be solicited by adverse parties to the same litigation, the court perceived nothing reprehensible in the course pursued by the lawyer since he merely rendered services concerning defendants' right *inter sese.* As to the subject of defendants' inquiry, their communications were privileged.[34] This decision adopts a sound approach. For the court to scrutinize the circumstances of each case to determine whether the communicator intended his conversation to be confidential and whether the particular relationship is one deserving judicial asylum is to adhere to the policy underlying the privilege.

30. Brown v. Clow, 158 Ind. 403, 62 N.E. 1006 (1901) and cases cited; Fluty v. State, 224 Ind. 652, 71 N.E.2d 565 (1946). The attorney must be consulted in his professional capacity, with a view towards obtaining advice. McDonald v. McDonald, 142 Ind. 55, 41 N.E. 336 (1895). A suit need not be pending, however, nor is it necessary that a fee be paid. Bigler v. Reyher, 43 Ind. 112 (1873); Reed v. Smith, 2 Ind. 160 (1850). The communication must be made in confidence, not within the hearing of third parties. Hanlon v. Doherty, 109 Ind. 37, 9 N.E. 782 (1886). Communication to an attorney acting merely as a scrivener or notary public is not confidential. Borum v. Fouts, 15 Ind. 50 (1860); Lukin v. Halderson, 24 Ind. App. 645, 57 N.E. 254 (1899).

31. Berd v. Lovelace, Cory 88 (1577); Kelway v. Kelway, Cory 127 (1580); Dennis v. Codrington, Cory 143 (1580).

32. 14 Pick. 416 (Mass. 1833). For history and development of the policy underlying this privilege see 16 CALIF. L. REV. 487 (1928).

33. 20 Ind. 139 (1863).

34. This holding is supported by 58 AM. JUR., WITNESSES § 496. Professor Wigmore, however, claims that a communication to an attorney consulted by adverse parties is clearly without the privilege, since no confidence is reposed in the lawyer. 8 WIGMORE, EVIDENCE § 2312. *Cf.* Scranton v. Stewart, 52 Ind. 68 (1875).

Although denied the right to testify as to confidential communications, an attorney in Indiana is a competent witness, even where his client is a party to the proceedings. In *Kintz v. R. J. Menz Lumber Co.*, an action to recover on an account for goods sold and delivered to defendant, plaintiff's counsel was the sole witness.[35] Acknowledging that the practice of admitting an attorney's testimony in his client's behalf has often been denounced and is not to be encouraged, the court nevertheless condoned it as imperative in this situation.[36] The record disclosed that no other witness to the transaction was present at the trial. No absolute prohibition against adducing such evidence has evolved because of judicial confidence that lawyers will scrupulously respond to a judge's admonition that they refrain from testifying unless absolutely necessary.

Where a trial court improperly directs a lawyer to testify as to confidential communications, a reviewing court will grant a new trial.[37] Under the supreme court rules, an attorney's oath contains a provision that he will "preserve inviolate" the confidence of his client.[38] His professional status may be jeopardized by an unwarranted revelation of privileged communications.[39] Hence, the attorney's proper course of action, rather than complying with the unreasonable judicial command, is to submit to a contempt citation.

A final consideration regarding the attorney-client privilege is the extent of the latter's power of waiver. Unquestionably the privilege inheres in the client and can be waived only with his consent. However, such waiver can be implied from the client's own testimony concerning the confidential communication.[40] As to deceased clients, two rules are

35. 47 Ind. App. 475, 94 N.E. 802 (1932).

36. Nowhere is an attorney made absolutely incompetent. 58 AM. JUR., WITNESSES § 152. It is contrary to professional ethics, however, for counsel to testify in a case which he is conducting for one of the parties. 58 *id.* § 153; *Canons of Professional Ethics* adopted by the A.B.A., No. 19. The public is likely to lose much respect for, and confidence in, the profession because of a belief that a testifying attorney will distort the truth in favor of his client. 6 WIGMORE, EVIDENCE § 1911. Exceptions are made where counsel testifies as to purely formal matters, *Canons of Professional Ethics;* or where his testimony is essential, Kintz v. R. J. Menz Lumber Co., *supra* note 35; or where his integrity has been subjected to attack and he takes the stand to defend himself, Doll v. Loesel, 288 Pa. 527, 136 Atl. 796 (1927); Cooper v. United States, 5 F.2d 824 (6th Cir. 1925).

37. George v. Hurst, 31 Ind. App. 660, 68 N.E. 1031 (1903).

38. Rule 3-20, RULES OF THE INDIANA SUPREME COURT. Rule 3-21 provides for disciplinary proceedings, which may result in disbarment or suspension. The prescribed duties of an attorney contain a provision similar to Rule 3-20. IND. ANN. STAT. § 4-3608 (Burns, 1933).

39. Thus, in a recent proceeding, *In re* Lane, 223 Ind. 94, 57 N.E.2d 773 (1944), an attorney was disbarred by the supreme court for, *inter alia,* utter disregard of the ethical standards of Rule 3-20.

40. Oliver v. Pate, 43 Ind. 132, 143 (1873); Bigler v. Reyher, 43 Ind. 112 (1873). If a client reveals a confidential communication to his attorney, the lawyer can testify

noteworthy: the privilege may be waived by the decedent's personal representative;[41] and a presumption is indulged that selection of an attorney as an attesting witness manifests a testator's intention to waive to the extent that the attorney may legitimately authenticate the will.[42]

An exclusion which has provoked considerable litigation and much academic criticism is the physician-patient privilege.[43] An excerpt from the leading Indiana case indicates the customary position of courts recognizing this relationship: "The purpose of the statute is not the suppression of truth needed for reaching correct results in litigation, though this may sometimes incidentally occur . . . but the purpose is the promotion and protection of confidence of a certain kind, the inviolability of which is deemed of more importance than the results sought through compulsory disclosure in a court of justice."[44] Here, too, the courts construe the statute as creating a privilege although it is phrased in terms of competency.[45] Persuasive arguments have been advanced for

to the entire subject matter discussed. Fluty v. State, 224 Ind. 652, 659, 71 N.E.2d 565, 567 (1946); see 20 MASS. L.Q. (No. 3) 16 (1935) and 33 YALE L.J. 782 (1924).

41. Morris v. Morris, 119 Ind. 341, 344, 21 N.E. 918, 919 (1889).

42. Pence v. Waugh, 135 Ind. 143, 155, 34 N.E. 860, 864 (1893).

43. At common law information given a physician stood upon no better legal footing than private confidences generally, which were not privileged. New York, followed by about half of the states, created the privilege by statute to conform to the physician's ethical canon of secrecy: ". . . [W]hatsoever things I see or hear concerning the life of men, in my attendance on the sick or even apart therefrom, which ought not to be noised abroad, I will keep silence thereon, counting such things to be as sacred secrets." *Hippocratic Oath,* ENCYC. BRITANNICA, Vol. 15, p. 198 (1946). The privilege was supposedly based on the theory that the personal privacy of a patient's body and physical condition was entitled to be respected. Its real support, however, seems to be the weight of professional medical opinion pressing upon the legislature; doctors claim that, since the secrets of the legal profession are inviolable, the confidences of the medical profession deserve equal consideration. The purpose of the statutes is allegedly to encourage patients to fully disclose their ailments to attending physicians without apprehension that their statements may be revealed upon the witness. stand to their humiliation and disgrace. COMMISSIONERS ON REVISION OF THE STATUTES OF NEW YORK, Vol. III, p. 737 (1836).

44. Penn Mutual Life Ins. Co. v. Wiler, 100 Ind. 92, 100 (1885); this decision was discussed in a recent Indiana case, Stayner v. Nye, 227 Ind. 231, 85 N.E.2d 496 (1948). The appellate court decision in the *Stayner* case was challenged in Note, 23 IND. L.J. 295 (1948); the supreme court thereafter reversed the lower court's opinion, citing the Journal note in support of its views. For a thorough examination of the physician-patient privilege in Indiana see this note and the *Stayner* case.

45. The general rules governing privileged communications between attorney and client are applieable by analogy to physician and patient. Myers v. State, 192 Ind. 592, 601, 137 N.E. 547, 550 (1922). Communications are not confidential where third persons are present. Springer v. Byram, 137 Ind. 15, 23, 36 N.E. 361, 363 (1893); General Acc., Fire, & Life Assur. Co. v. Tibbs, 102 Ind. App. 262, 268, 2 N.E.2d 229, 232 (1936). The privilege belongs to the patient and can be waived by him or his personal representatives. Stayner v. Nye, *supra* note 44; Scott v. Smith, 171 Ind. 453, 457, 85 N.E. 774, 775 (1908); Heaston v. Krieg, 167 Ind. 101, 115, 77 N.E. 805, 809 (1906); Lane v. Boicourt, 228 Ind. 420, 428, 27 N.E. 1111, 1112 (1891). It cannot be invoked by a physician charged with a crime, or by a patient suing for malpractice. Hauk v. State, 148 Ind. 238, 260, 46 N.E. 127, 134, 47 N.E. 465 (1897); Lane v. Boicourt, *supra.* This

restricting or entirely eliminating this exclusion.[46] Such proposals have had a conspicuous impact on modern industrial accident legislation, where the privilege invariably is abrogated.[47]

In several notable instances the Indiana courts have expanded or restricted the scope of this concession. An early case extended the legislative deference to encompass the partner of an attending physician.[48] The court maintained that the physician's associate came within the spirit, if not the letter, of the statute. More recently, the wife of an unconscious patient imparted to her husband's physician information regarding the cause, origin and history of his ailment.[49] Again the court enlarged the privilege. In *Mathews v. Rex Health and Accident Insurance Co.*, the court broadened the rule that information acquired during an autopsy by a physician who attended the deceased before death was privileged because the autopsy was an integral part of the treatment. This exclusion was held to embrace knowledge obtained in a post mortem by a doctor who had never attended the patient.[50] The court rationalized this extension on the ground that the physician was employed by the hospital in which deceased was a patient at the time of his death. In the midst of these deleterious decisions have emerged a few commendable instances of judicial limitation. For example, the supreme court admitted testimony of the superintendent of a gymnastic and orthopedic institute as to a patient's physical deformity.[51] Holding that the witness was not a physician, the court rationalized that, since the provision was in derogation of the common law, it should not be strained beyond its

rule would also apply to an attorney charged with crime or aiding a client in contemplation of a crime or fraud. Missouri Real Estate & Loan Co. v. Gibson, 282 Mo. 75, 220 S.W. 675 (1920).

46. The communication of a patient to his doctor is seldom intended to be confidential; and, even where it is, no one is likely to be deterred from seeking medical treatment because of the possibility of its disclosure in court. Concerning the analogy to the attorney-client privilege, it can be said that the services of an attorney are sought primarily for aid in litigation, while those of a physician are sought for physical cure. Hence the rendering of legal advice would result more directly and surely in disclosure of the client's admissions if there were no privilege. 8 WIGMORE, EVIDENCE § 2380a.

47. "No fact communicated to . . . any physician . . . who may have attended . . . the employee . . . shall be privileged . . . in the hearings provided for in this act. . . ." IND. ANN. STAT. § 40-1227 (Burns, 1933).

48. Aetna Life Ins. Co. v. Dewing, Adm'r., 123 Ind. 384, 390, 24 N.E. 86, 88, 24 N.E. 375 (1889).

49. North American Union v. Oleska, 64 Ind. App. 435, 116 N.E. 68 (1916).

50. 86 Ind. App. 335, 157 N.E. 467 (1927), noted in 3 NOTRE DAME LAW. 101 (1927).

51. William Laurie Co. v. McCullough, 174 Ind. 477, 488, 90 N.E. 1014, 1018, 92 N.E. 337 (1910). The court discussed cases from several jurisdictions with statutes similar to that in Indiana, in which privilege was not applied to men in professions similar to medicine: Hendershot v. Western Union Tel. Co., 106 Iowa 529, 76 N.W. 828 (1898) (veterinary surgeon); People v. DeFrance, 104 Mich. 563, 62 N.W. 709 (1895) (dentist); Brown v. Hannibal, T. Co., 66 Mo. 588 (1877) (druggist).

literal meaning. And in *Indianapolis & Martinsville Rapid Transit Co. v. Reeder, Adm'r.*, a physician was permitted to testify as to involuntary manifestations of pain by his client, on the theory that such expressions were not intended to be confidential.[52] While Indiana courts fortunately have circumvented the inaccurate designation of the competency statute, they have not accomplished the extensive confinement of the privilege which its limited justification warrants.

Few controversies have involved the priest-penitent privilege. Although there was no equivalent legal relationship at common law, in very few instances was a clergyman required to testify as to confidences communicated to him by a penitent.[53] Today more than half the states, including Indiana, have adopted legislation creating this exclusion.[54] Indiana cases reflect the conventional limitations placed upon the privilege.[55] The authorities have uniformly recognized the priest-penitent doctrine, although its necessity has never been demonstrated and its acceptance is incompatible with the modern theories concerning admissibility.[56] However, little advantage apparently would be gained by requiring admission of a penitent's confession, and the policy underlying protection of religious freedom is a strong one. Seldom will a case arise in which the only evidence against a defendant is his confession to a clergyman. Even Bentham, who vigorously opposed most privileges, accepted this one.[57]

In contrast with priest and penitent, the marital privilege has been productive of numerous perplexing disputes. The legislature and courts have combined to confound these issues in Indiana.[58] The original

52. 37 Ind. App. 262, 76 N.E. 816 (1905).

53. 8 WIGMORE, EVIDENCE § 2395.

54. *Ibid.*

55. Only statements made in obedience to some supposed religious duty are privileged. Knight v. Lee, 80 Ind. 201 (1881). The statute does not prevent a minister from testifying to such matters as the mental condition of the penitent. Buuck v. Kruckeberg, 95 N.E.2d 304 (Ind. App. 1950).

56. MODEL CODE OF EVIDENCE, Rule 219 (1942); WIGMORE'S CODE OF EVIDENCE, Rule 217 (2d ed. 1935).

57. JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, bk. IX, pt. II, c. VI (1827) (Bowring's ed., Vol. VIII, p. 367, 1843).

58. Amidst the complexity a few settled rules stand out. Husband or wife cannot testify as to communications made to each other during marriage, nor can they testify to such after the relationship has ceased. Dwigans v. State, 222 Ind. 434, 436, 54 N.E.2d 100, 101 (1943); Higham v. Vanosdol, 101 Ind. 160, 162 (1884); Dye v. Davis, 65 Ind. 474, 481 (1879). Where it was obviously not intended to be confidential, a communication is not privileged; *e.g.*, where made in presence of a third person. Reynolds v. State, 147 Ind. 3, 8, 46 N.E. 31, 33 (1896); Keyes v. State, 122 Ind. 527, 23 N.E. 1097 (1889); Gebhart v. Burkett, 57 Ind. 378, 384 (1877); Mercer v. Patterson, 41 Ind. 440, 444 (1872). Authority given by a wife to her husband to transact her business is not confidential. Schmied v. Frank, 86 Ind. 250, 257 (1882). Court properly allowed a statement of negotiations between spouses that resulted in conveyance of land,

competency statute, codifying the common law rule, not only excluded their confidential communications but also made spouses incompetent to testify for or against one another.[59] The General Assembly dispensed with the latter disqualifications in 1881. Thereafter, husband and wife were only "incompetent" as to communications made to each other. As has been indicated, the other relationships in the exceptive statute are actually privileged in judicial contemplation. As to the marital relation, however, the courts inexplicably have construed the statute literally, holding that a spouse is actually incompetent to testify as to confidential communications.[60]

Interpretation of "communications" in the Indiana statute poses a delicate problem. While it is not explicitly stipulated, the purpose of the act is acknowledged to be protection of marital confidences.[61] However, the boundaries of "confidential communications" are nebulous, to say the least. Most jurisdictions have generously conceded that this category includes all information or knowledge privately imparted by one spouse to the other by virtue of the marital relation, through acts, signs, and

Beitman v. Hopkins, 109 Ind. 177, 178, 9 N.E. 720 (1887); *cf.* Gifford v. Gifford, 58 Ind. App. 665, 672, 107 N.E. 308, 311 (1914). In divorce suit a wife could testify as to her conduct as a wife, her husband's habits of intoxication, and his abuse of her. Smith v. Smith, 77 Ind. 80, 82 (1881).

59. The multitude of Indiana Supreme Court opinions reviewing the disqualification of husband and wife as witnesses for or against each other had as their main objective the determination of the interest of the witness in the proceedings. If it were decided that the witness was actually testifying in his own behalf, then the incompetency was nonexistent. *E.g.,* Morgan v. Hyatt, 62 Ind. 560 (1878); Kingen v. State, 50 Ind. 557 (1875); Bennifield v. Hypres, 38 Ind. 498 (1872); Bonham v. Keen, 40 Ind. 197 (1872); Gee v. Lewis, 20 Ind. 149 (1863). It was early settled that this disability ended upon death of one spouse or after one had obtained a divorce. Woolley v. Turner, 13 Ind. 253 (1859). Taulman v. State, 37 Ind. 353 (1871), contains dicta to the effect that a wife may be a witness against her husband in cases for surety of the peace, assault and battery, and other similar instances.

60. While the decisions have inconsistently referred to "communication . . . not within the privilege," no case allowing waiver by either spouse has been discovered. The only possible inference is that the courts actually treat confidences between husband and wife as absolutely inadmissible.

The reasons for the language used by the legislature and the interpretation put upon the statute by the courts are readily inferrable. In all probability competency and privilege situations were combined under the term "incompetent" due to inadvertence; and perhaps the need for clarity was subordinated to the General Assembly's desire to compress the statutory mandates. The judicial interpretation may be attributable to the fact that the courts have always construed the statute in light of the 1852 provisions first enumerating privilege situations. Although the 1861 enactment incorporated all the relationships (attorney-client, physician-patient, priest-penitent, and husband-wife) in one section, much as they are today, an 1863 decision reverted to the language of the 1852 provisions: ". . . the term, 'confidential communications' . . . seems limited to matters confided to attorneys, physicians, and clergymen; and, if so the authority to waive objection to their disclosure, does not extend to matters between husband and wife." Bevins v. Cline's Adm'r., 21 Ind. 37, 43 (1863); and see note 4 *supra.*

61. See note 58 *supra.*

spoken or written words.[62] An early Indiana case apparently conforms to the majority view in conferring this excessively broad privilege.[63] In *Smith v. State,* however, the court attained a more sophisticated perspective, asserting that conduct, to gain refuge under the statute, must be characterized by that intimacy peculiar to the married state.[64] The manner in which the communicator's acts were performed indicated that they were not intended to be confidential; such intent must be demonstrated by the party claiming the privilege. In this instance the Indiana court applied a test more commensurate with the policy underlying the privilege than do those tribunals which arbitrarily maintain that *all* acts done in the presence of the spouse are privileged. The Indiana rule adequately safeguards the marital relation without unduly subordinating the objective of confining exclusionary rules.

Prior to 1881, one spouse was absolutely disqualified from testifying for or against the other except in the case of assault and battery, or a similar offense, committed against the witness spouse. A leading decision under the modern statute, which discontinues this "for and against" limitation, reflects the influence of the exception on confidential communications.[65] The husband was charged with forgery. The state introduced his wife's testimony to prove that defendant had coerced her signature on a promissory note. The husband's objection to his wife's competency, on the ground that her testimony subverted the marital relationship, was overruled.[66] The court observed that if the husband was accusing the wife of complicity, she could testify as an injured party

62. *E.g.,* People v. Daghita, 299 N.Y. 194, 86 N.E.2d 172 (1949); Menefee v. Commonwealth, 189 Va. 900, 55 S.E.2d 9 (1949).

63. Perry v. Randall, 83 Ind. 143 (1882). Defendant found money in his home. Plaintiff, claiming he had lost the money while visiting defendant, brought an action to recover it. The trial court admitted testimony by defendant's wife as to his actions upon discovering the money. She avoided the statement of a single word spoken to her by defendant. The supreme court held that the husband's actions were confidential communications to his wife, and therefore she was not competent to testify in regard to them.

64. 198 Ind. 156, 152 N.E. 803 (1926). Defendant was convicted of first degree murder of his grandmother; one of errors on which he appealed was admission of his wife's testimony to the effect that she saw him empty something from a trunk through the floor of an outhouse. Defendant claimed that his acts were confidential communications to his wife, since they resulted in information acquired by virtue of the marriage relation. See Recent Case Notes, 2 IND. L.J. 188 (1926); 26 COL. L. REV. 897 (1926).

65. Beyerline v. State, 147 Ind. 125, 45 N.E. 772 (1897).

66. In allowing the testimony the court said, "Where the criminal, in seeking advice and consolation, lays open his heart to his wife, the law regards the sacredness of their relation and will not permit her to make known what he has thus communicated, even as it will not ask him to disclose it himself. But if what is said or done by either has no relation to their mutual trust and confidence as husband and wife, then the reason for secrecy ceases." *Id.* at 130, 45 N.E. at 774.

under the criminal competency statute.[67] Alternatively, if she was an "abused and maltreated wife," the marital relation had no connection with the husband's misconduct.[68] Thus, the unique Indiana marital communications disqualification is subject to a limitation commonly imposed upon the husband-wife privilege in other jurisdictions.

A different aspect of the marital relationship is that of competency of a mother to testify as to non-access of her husband in a filiation or bastardy proceeding, charging another with the support of her child. Brief recourse to the common law background of this problem will illustrate the historical influences on its modern statutory development.[69] In 1734, Lord Hardwicke arbitrarily declared, in a filiation proceeding, that, due to the wife's interest in relieving her husband of the burden, it was improper to charge a child's maintenance against a defendant on the strength of the mother's uncorroborated testimony. Equally dogmatic, Lord Mansfield 43 years later announced as the law of England, "founded in decency, morality, and policy," that neither spouse was competent to bastardize the wife's issue by testifying to non-access. This doctrine, as against husband and wife, conclusively presumed legitimacy of the child. In the United States the courts initially favored Lord Hardwicke's rule, but it has long since been repudiated in most jurisdictions in favor of the Mansfield view. The latter has been rationalized on the ground that it is indecent to allow a person to testify to an illicit connection and immoral to permit a parent to be instrumental in obliterating his own child's legal status.[70]

The general competency statute of one jurisdiction has been interpreted to reject the common law rules and qualify the mother of an illegitimate child to testify even as to non-access.[71] In *Evans v. State,* the Indiana Supreme Court likewise rejected a contention that neither

67. "The following persons are competent witnesses:
First. All persons who are competent to testify in civil actions.
Second. The party injured by the offense committed.
Third. Accomplices, when they consent to testify.
Fourth. The defendant, to testify in his own behalf. . . ." IND. ANN. STAT. § 9-1603 (Burns, 1933).

68. Doolittle v. State, 93 Ind. 272 (1883).

69. For a complete history and examination of this situation, see Evans v. State *ex rel.* Freeman, 165 Ind. 369, 74 N.E. 244, 75 N.E. 651 (1905); 7 AM. JUR., BASTARDS § 21; 7 WIGMORE, EVIDENCE §§ 2063 and 2064; 37 HARV. L. REV. 916 (1924); 19 ILL. L. REV. 280 (1924).

70. Professor Wigmore cites evidentiary principles that demonstrate the basis for this rule to be "utterly artificial" and of a "false nature." He claims that ". . . these high-sounding 'decencies' and 'moralities' are mere pharisaical afterthoughts, invented to explain a rule otherwise incomprehensible, and lacking support in the established facts and policies of our law. There never was any true precedent for the rule; and there is just as little reason of policy to maintain it." 7 WIGMORE, EVIDENCE § 2064.

71. State v. Soyka, 181 Minn. 533, 233 N.W. 300 (1930).

the Hardwicke nor Mansfield rule should be adopted.[72] Instead the court relied on an early case, *Cuppy v. State,*[73] which had upheld an Indiana statute rendering relatrix a competent witness in a bastardy proceeding.[74] This decision construed an original 1852 enactment to abolish the common law rule precluding a wife's testimony as to non-access. In the *Evans* case, the court discerned in the 1881 reenactment legislative acquiescence in the *Cuppy* decision. As to the prerequisite of corroboration, the *Evans* doctrine dismissed it with the observation that the weight of the mother's testimony, as that of other competent witnesses, is left to the jury.[75] All previous non-access legislation in Indiana was superseded in 1941 by a new statutory scheme, providing for the determination of support of children born out of wedlock.[76] Nevertheless, two opinions construing the recent statutes characterize *Evans v. State,* as the "modern doctrine."[77] Indiana is apparently one of few jurisdictions having initiated an improved rule calculated to elicit rather than suppress the truth on the issue of non-access.

The most recent addition to statutory privilege in Indiana is a 1941 provision, amended in 1949, protecting newspapers, radio, and television stations from disclosing the sources of information disseminated by them.[78] This exclusionary principle, while it has gained legislative recognition in more than a dozen states,[79] is in sharp conflict with the temperament of modern thinking in the field of evidence. Several states have declined to enact similar provisions and the American Bar Association has criticized their passage. Nevertheless, the Indiana General Assembly has preferred the policy of encouraging disclosure of information to media of mass communication over that of adducing all evidence essential to just disposition of legal controversies.[80]

---

72. 165 Ind. 369, 74 N.E. 244, 75 N.E. 651 (1905).

73. 24 Ind. 389 (1865); the court also relied on Dean v. State *ex rel.* Marrical, 29 Ind. 483 (1868).

74. IND. ANN. STAT. §§ 3-602 and 3-604 (Burns', 1933).

75. The court did mellow the rule with a few words of warning: "The prevailing presumption that a child born in wedlock is legitimate is a just and salutary rule that should not be lightly regarded. . . . [T]he court should always carefully scrutinize the testimony of a married woman and . . . proof of the principal fact (as to non-access) . . . should be direct, clear and convincing to justify the court in charging the defendant, and in placing a badge of dishonor upon the unoffending offspring of the mother." 165 Ind. at 376, 75 N.E. at 652.

76. IND. ANN. STAT. §§ 3-630, 3-638 (Burns, Cum. Supp. 1951).

77. Pilgrim v. Pilgrim, 118 Ind. App. 6, 12, 75 N.E.2d 159, 162 (1947); Pursley v. Hisch, 119 Ind. App. 232, 237, 85 N.E.2d 270, 272 (1948).

78. IND. ANN. STAT. § 2-1733 (Burns, Cum. Supp. 1949).

79. 8 WIGMORE, EVIDENCE § 2286.

80. See Note, 17 IND. L.J. 162 (1941), questioning the constitutionality of the statute's classification of newspapers which can avail themselves of the privilege.

Important policy considerations are raised by the Indiana "Dead Man Statutes." [81] In 1852, the legislature discontinued exclusion of witnesses due to interest. In 1861, incompetency of a party also was eliminated. However, provisions then added render incompetent the survivor to a transaction when he is an adverse claimant against the estate of a deceased person. These enactments were prompted by the General Assembly's apprehension that, in the absence of disqualification for interest, the motive of personal gain, coupled with the opportunity to misrepresent offered by the decedent's death, would be sufficient to create a serious threat of fictitious claims against estates.[82] As a result of the "Dead Man Statutes," the facility with which living claimants may establish honest demands is sacrificed to discourage survivors, who might take advantage of their favorable positions with respect to prior transactions, from despoiling the estates of the dead. Although criticism of this legislation has been severe, few jurisdictions have initiated reform measures.[83]

81. IND. ANN. STAT. §§ 2-1715, 2-1716, 2-1717, 2-1718, 2-1719 (Burns, 1933). The first portion of § 2-1715 is illustrative of the language of all five sections: "In suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate. . . ." This section, however, allows testimony where a deposition has been taken from the decedent, or where he had previously testified to the matter.

82. While the policy considerations involved in survivor disqualifications are not unduly obscure, courts often have failed to articulate them clearly, proffering instead such facile rationalizations as, "if death has closed the lips of the one party, the policy of the law is to close the lips of the other." Louis's Adm'r. v. Easton, 50 Ala. 470 (1873); *see* Taylor v. Duesterberg, 109 Ind. 165, 171, 9 N.E. 907, 910 (1887).

83. The Legal Research Committee of the New York Commonwealth Fund has embodied the arguments against statutory survivor disqualifications in its study of several major problems in the field of evidence. MORGAN, THE LAW OF EVIDENCE; SOME PROPOSALS FOR ITS REFORM c. III (1927). (1) Any living witness who can shed light upon a fact in issue should be heard to state what he knows. Few dishonest witnesses can deceive the court and jury. (2) A claimant corrupt enough to commit perjury would not hesitate to suborn perjury. (3) The argument in Owens v. Owens, 14 W. Va. 88 (1878), that a contrary rule "would place in great peril the estates of the dead" is based on superficial reasoning. Every day the present rule jeopardizes the honest claims of the living. (4) Two arguments nullify the claim that it is unfair to permit the survivor to testify when the lips of the decedent are sealed: the contention overlooks the fact that the court and jury will judiciously scrutinize the testimony of the survivor; it assumes that the only fair thing to do is seal the lips of the survivor, without considering the alternative of admitting in evidence self-serving declarations of the decedent. (5) Experience in nine states proves the fallacy of the assertion that public sentiment would not tolerate a rule making the survivor competent. 46 HARV. L. REV. 834 (1933).

The Commonwealth Fund Committee has recommended a relatively brief statutory provision which might advantageously replace all five sections of Indiana's Dead Man Statutes. The proposed statute first eliminates all disqualification due to interest and then allows in evidence statements of the decedent to counteract the survivor's testimony. Adoption of this provision has been recommended by the A.B.A. COMMITTEE ON EVIDENCE, 63 ANNUAL REPORTS OF THE AMERICAN BAR ASSOCIATION 581 (1938).

Both theory and experience justify abolition of the rule excluding testimony of an interested survivor, and establishment of the principle that all relevant statements of the decedent are admissible.[84]

Non-statutory Privilege and Competency. Testimonial competency of judge, juror, and court reporter is affected by their peculiar relation to the tribunal. The latter may be summarily dismissed with the observation that it is contrary to public policy to require the reporter to serve as a witness in a trial in which he is functioning in his official capacity, since this would necessitate disruption of his duties and the record of the trial would be incomplete.[85] Similar factors enter into consideration of judges as witnesses. Two distinct situations arise: the judge may be called to testify in a trial over which he is presiding; or he may be summoned to appear in another tribunal as any other witness. In the former, sound arguments militate persuasively against permitting the judge to testify. Proper exercise of the separate functions of judge and witness are incompatible. For example, the judge would be placed in the paradoxical situation of ruling on objections to his own testimony. The jury would be inclined to accord inordinate weight to his evidence. Any subjection to the vicissitudes of cross examination would impair judicial prestige. Accordingly most jurisdictions have concluded that a judge cannot testify at a trial over which he is presiding.[86] Since the difficulties are substantially alleviated when the testifying judge is not on the bench, Indiana has satisfactorily solved the dilemma by statutory provision for change of venue where "the judge of the court wherein such action is pending is

84. Two provisions in addition to the Dead Man Statutes have survived abolition of the common law disqualification for interest. The first excluded one spouse where the other is not competent in his own behalf. IND. ANN. STAT. § 2-1720 (Burns, 1933); Pfaffenberger v. Pfaffenberger, 189 Ind. 507, 513, 127 N.E. 766, 768 (1920); Terry v. Davenport, 185 Ind. 561, 577, 112 N.E. 998, 1003 (1916); Belledin v. Gooley, 157 Ind. 49, 60 N.E. 706 (1901); Scherer v. Ingerman, Adm'r., 110 Ind. 428, 443, 11 N.E. 8, 12 N.E. 304 (1886); Gilbert v. Estate of Swain, 9 Ind. App. 88, 36 N.E. 374 (1893). The other provides that where an insane person is a party to a suit, neither he nor his adversary shall be competent as to matters which occurred prior to the appointment of a guardian. IND. ANN. STAT. § 2-1721 (Burns, 1933). When the General Assembly abolishes the Dead Man Statutes, the legislators should also reconsider these sections to determine whether or not they are based on sound reason stronger than the arguments against them. See premises in note 83 *supra*.

85. Where the official shorthand reporter has taken notes of evidence, he may read them at a subsequent trial. Bass v. State, 136 Ind. 165, 169, 36 N.E. 124, 125 (1893); Meyer v. Garvin, Rec., 110 Ind. App. 403, 416, 37 N.E.2d 291, 296 (1941); Houk v. Branson, 17 Ind. App. 119, 122, 45 N.E. 78, 79 (1896).

86. CAL. CODE CIV. PROC. A. 1946, § 1883; 58 AM. JUR., WITNESSES § 150; 6 WIGMORE, EVIDENCE § 1909. At a recent military trial a member of the court testified for the prosecution. It did not appear that he withdrew from duty as a participant in the tribunal. A reviewing court held that the court was not legally constituted and the proceedings were vitiated. C.M. 220693 (1942); 1 BULL. OF U.S. J.A.G. (Army) 12 (1942).

a material witness."[87] In *Wood v. Pogue,* the appellate court held that a judge from whom a change of venue was taken was qualified to testify, since he was not included in the statutory enumeration of incompetent witnesses.[88]

Critics of the judge as a witness under any circumstances point out that his attendance at a separate tribunal detracts valuable time from the proceedings in his own court, thus overloading already crowded dockets; as well as that his testimony will be accorded undue weight by the jury and that the judicial dignity may be impaired by interrogating a judge and subjecting his credibility to question. These objections must be weighed against the public interest in obtaining all facts which are material to the issues on trial. The Indiana Supreme Court has held that the judge presiding over a prior stage of the litigation "stood upon exactly the same footing as any other witness."[89] Conflicting policies might more appropriately be reconciled by bestowing on judges the privilege to refuse to appear and testify, unless the court determines that the importance of his testimony eclipses the reasons for conferring the privilege.[90]

Also occupying a special status in the law of privilege and competency because of association with the tribunal is the juror. Several facets of the problem are worthy of investigation. Since not embraced within the exceptive statute, jurors are competent as witnesses.[91] Because of the awkwardness of examining a juror, difficulties similar to those surrounding the presiding judge problem are encountered. Few attorneys would jeopardize rapport with the jury by cross examining or attempting to impeach one of their number. In addition, the witness-juror would enjoy an undue advantage when arguing in the jury room.[92] A practicable solution is to discover on voir dire that a juror has information concerning the controverted issues and to dismiss him from the panel if he is desired as a witness.

Another aspect of the juror's testimonial capacity is his competency to impeach the verdict.[93] The typical rule, holding the juror incompetent, has been justified by the Indiana Supreme Court as follows: "To permit

87. IND. ANN. STAT. § 2-1401 (Burns, 1933).

88. 103 Ind. App. 577, 599, 5 N.E.2d 1011, 1019 (1937).

89. State v. Hindman, 159 Ind. 586, 593, 65 N.E. 911, 913 (1902); *accord,* State v. Duffy, 57 Conn. 525, 18 Atl. 791 (1889).

90. Welcome v. Batchelder, 23 Me. 85 (1843); Hale v. Wyatt, 78 N.H. 214, 98 Atl. 379 (1916).

91. In Curtis v. Burney, 55 Ga. App. 552, 190 S.E. 866 (1937), a juror was considered the same as any other witness.

92. MISSOURI BAR, PROPOSED EVIDENCE CODE § 5.03, (1948).

93. Dunn v. Hall, 8 Blackf. 32 (Ind. 1846); Barlow v. State, 2 Blackf. 114 (Ind. 1827); Indianapolis Power & Light Co. v. Moore, 103 Ind. App. 521, 536, 5 N.E.2d 118, 124 (1937).

members of the jury, after the return of a verdict, to thus impeach it, would present to the unsuccessful party a strong temptation to tamper with jurors, and open a wide door to corruption."[94] However, this rule subsequently has been misapplied in a case in which defendant moved to correct the answer to an interrogatory by changing it from "yes" to "no."[95] He based his contention on affidavits of all the jurors to the effect that their intent to answer in the negative was thwarted by clerical error. Rigorously applying the impeachment rule, the court rejected the affidavits with the observation that interrogatories and answers thereto are analogous to a special verdict. Most jurisdictions receive statements of jurors, before or after separation, for the purpose of correcting mechanical error.[96] The Indiana decision reflects the compound hypothesis that jurors are so likely amenable to unscrupulous overtures of unsuccessful litigants that they might be induced to issue perjured refutations of the original verdict. These doubtful assumptions should not be invoked to preclude correction of clerical error in a jury's verdict.[97]

In general, rules applicable to petit jurors are equally germane to the competency of grand jurors. The grand jurors' oath, however, forbids the disclosure of any "evidence given or proceeding had before them."[98] Several Indiana cases have held that this does not prevent proof by one of the jurors of what transpired in their presence.[99] Although not articulated in the opinions, the doctrine rests on the sound basis that secrecy must yield to disclosure when the latter becomes of tantamount importance to administration of justice.[100]

A privilege universally accorded to law enforcement officers is that of refusing to reveal the identity of their informants.[101] One of the

94. Haun v. Wilson, 28 Ind. 296, 299 (1867).

95. McKinley v. First Nat. Bank, 118 Ind. 375, 21 N.E. 36 (1888).

96. *E.g.*, State v. Hargett, 196 N.C. 692, 146 S.E. 801 (1929); Randall v. Peerless Motor Car Co., 212 Mass. 352, 99 N.E. 221 (1912) and cases cited therein.

97. Relevant to a discussion of petit jurors is the proposal that a privilege be conferred based on the relationship between jurors. See the discussion of this proposition by Mr. Justice Cardozo in Clark v. United States, 289 U.S. 1 (1932); also see 8 WIGMORE, EVIDENCE § 2345.

98. IND. ANN. STAT. § 9-807 (Burns, 1933); and see IND. ANN. STAT. §§ 9-816, 9-817, 9-818 (Burns, 1933).

99. Hinshaw v. State, 147 Ind. 334, 375, 47 N.E. 157, 170 (1896); Burdick v. Hunt, 43 Ind. 381, 389 (1873); Shattuck v. State, 11 Ind. 473, 478 (1858); Burnham v. Hatfield, 5 Blackf. 21 (Ind. 1838).

100. *E.g.*, Attorney General v. Pelletier, 240 Mass. 264, 134 N.E. 406 (1922); State v. Putnam, 53 Or. 266, 100 Pac. 2 (1909); State v. Will, 97 Iowa 58, 65 N.W. 1010 (1896).

101. Akin to this privilege are the ones granted to government officials, to refuse to disclose confidential information, designated state secrets, and official communications. MODEL CODE OF EVIDENCE, Rules 227 and 228 (1942). While authorities have debated the propriety of this immunity, the courts have generally upheld legislation conferring it, leaving to the legislature determination of its wisdom. Several provisions exist in

earliest decisions recognizing this rule in the United States was an Indiana case, *Oliver v. Pate.*[102] Withholding the identity of an informer was explicitly posited on the attorney-client privilege, however.[103] The United States Supreme Court later cited this holding with approval and indicated the correct rationale of the privilege.[104] The identity is not suppressed for the protection of the witness or party in the particular prosecution, but rather on the ground that such disclosures should be encouraged. In order to elicit confidences, police must be authorized to insure exemption from compulsory disclosure of informants' identities. The privilege is limited by the court's discretion to require admission if the evidence is deemed essential to assure a fair determination of defendant's guilt or innocence.[105]

A well-established common law privilege relates to offers to compromise between adverse parties to a civil action. *Louisville, New Albany, and Chicago Ry. v. Wright,* a leading decision on the point, has precisely articulated the significant distinction in the Indiana cases.[106] An "offer or proposition" for a compromise is privileged. But admission of an independent fact, not connected with the offer, although it occurs during a conference calculated to produce a settlement, is competent evidence. Later decisions in Indiana merely examine the facts in the particular case to determine whether the offered testimony was a proposal to compromise or was the statement of an independent, unqualified fact.[107]

Indiana conferring a privilege to withhold official information. *E.g.,* IND. ANN. STAT. § 40-1507 (Burns, 1933) (Workmen's Compensation Act—accident reports); § 47-1920 (Motor Vehicles—accident reports); § 65-105 (Taxation—business records). See the consideration of such a privilege in Totten v. United States, 92 U.S. 105 (1875); Note, 27 IND. L.J. 209 (1952); 8 WIGMORE, EVIDENCE §§ 2367-2379.

102. 43 Ind. 132 (1873).

103. The court practically recognized the true reason for the rule in the following statement: "Public policy requires that a person in making communications to a prosecuting attorney, relative to criminals or persons suspected of being guilty of crime, should be at liberty to make a full statement to him without fear of disclosure." *Id.* at 141. Apparently assuming a need for a more substantial basis for the privilege, the court utilized the existing attorney-client relationship rather than elaborating on this public policy rationale.

104. Vogel v. Gruaz, 110 U.S. 311 (1883). In addition to citing *Oliver v. Pate,* the Court relied on Worthington v. Scribner, 109 Mass. 487 (1872), which contains a thorough examination of English and early American authority.

105. Michael v. Matson, 81 Kan. 360, 105 Pac. 537 (1909) and cases cited; Commonwealth v. Congdon, 265 Mass. 166, 165 N.W. 46 (1928); MODEL CODE OF EVIDENCE, Rule 230 (1942); 38 YALE L.J. 117 (1928).

Another accepted governmental privilege is the right of a voter not to disclose the nature of his vote at a political election unless it was cast illegally. IND. CONST. ART. 2, § 13; Williams v. Stein, 38 Ind. 89 (1871); Pedigo v. Grimes, 113 Ind. 148, 13 N.E. 700 (1887); and see MODEL CODE OF EVIDENCE, Rule 225 (1942).

106. 115 Ind. 378, 390, 16 N.E. 145, 151, 17 N.E. 584 (1888).

107. McCrum v. McCrum, 36 Ind. App. 636, 639, 76 N.E. 415, 416 (1905); Steeg v. Walls, 4 Ind. App. 18, 30 N.E. 312 (1891); Hood v. Tyner, 3 Ind. App. 51, 28 N.E.

The basis of the privilege is that the policy of encouraging settlements will be unduly hampered if evidence of offers to compromise is admitted. Tender of charitable aid to victims of accidental harm might be discouraged if evidence of such generosity could be received as an implication of the benefactor's legal responsibility. The offer to compromise does not ordinarily proceed from a specific conviction that an adversary's claim is well founded.[108] More often it is believed that further prosecution of the claim, whether legitimate or not, would cause such annoyance that settlement is preferable.[109]

Conclusion. Severe exclusionary rulings and the confusing array of precedents precipitated by Indiana competency and privilege statutes indicate the need for legislative reform. Since the entire exceptive provision is drafted in terms of absolute disqualification, certain of its components, properly regarded as privileges, should be accorded separate treatment. In addition, the General Assembly should consider abrogation of the "Dead Man Statutes," coupled with initiation of a section admitting declarations of deceased parties, and codification of essential common law exclusions.

Until the legislature effectuates these recommendations, the courts frequently can circumscribe existing privileges by liberally applying the

---

1033 (1891); *accord,* Hook v. Bunch, 180 Ill. App. 39 (1913); Kalus v. Bass, 122 Md. 467, 89 Atl. 731 (1914); Long v. Pierce County, 22 Wash. 330, 61 Pac. 142 (1900).

108. Schnull v. Cuddy, 36 Ind. App. 262, 267, 74 N.E. 1030, 1032 (1905); 20 AM. JUR., EVIDENCE §§ 565, 566; 4 WIGMORE, EVIDENCE §§ 1061, 1062; MODEL CODE OF EVIDENCE, Rule 309 (1942).

109. Several unique privileges have been proposed by interest groups.

Social Welfare Workers. Courts and legislatures have consistently denied a privilege to refuse disclosure of case histories and records. The contention is made that communications between welfare workers and their clients meet the requirements of other privilege relationships. B. B. Resnik and H. G. Balter, *Withholding Information From Law Enforcement Bodies,* VIII SOCIAL SERVICE REV. 688 (1934). It is unlikely, however, that such a privilege will soon be recognized, since it would require exclusion of evidence now admissible. The A.B.A. Committee on Evidence voted 28 to 4 against the recognition of the privilege. 63 ANNUAL REPORTS OF THE AMERICAN BAR ASSOCIATION 595 (1938).

Trade Secrets. A privilege conferred upon businessmen not to disclose trade secrets has had limited acceptance. The provision recommended by the American Law Institute embodies the contentions of businessmen and also limitations to prevent over application: "The owner of a trade secret has a privilege . . . to refuse to disclose the secret and to prevent other persons from disclosing it, if the judge finds that the allowance of the privilege will not tend to conceal fraud or otherwise work injustice." MODEL CODE OF EVIDENCE, Rule 226 (1942); see MISSOURI BAR, PROPOSED EVIDENCE CODE 90 (1948).

An interesting and somewhat perplexing problem may arise where the question of competency is also the issue on trial. For a comprehensive and penetrating analysis of this question see Maguire and Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence,* 40 HARV. L. REV. 392, 408 (1927); also consult Recent Case Note, 30 HARV. L. REV. 87 (1916).

devices of waiver, inference, and discretion. Implication of waiver from surrounding circumstances constitutes a potentially effective means of limiting claims of privilege which unduly obstruct introduction of testimony.[110] Often illogical technicalities have been invoked to substantiate such claims. For example, although a party calls as witnesses several physicians who treated him, he can exclude another who was also in attendance.[111] Indiana courts employ an uncompromising rule that judge and counsel may not comment, nor may the jury draw an unfavorable inference, against a party who exercises a privilege.[112] Proponents of the contrary view point out that adverse comment by judge and opposing attorney does not extinguish the privilege because the unfavorable inference does not fully compensate for loss of the excluded testimony.[113] Finally, perhaps the most feasible proposal for diminishing the ill-effects of stringent exclusionary principles would invest the trial judge with discretion to compel disclosure where the need for the disputed evidence outweighs the considerations underlying the privilege.[114] Advantages to be attained by isolated instances of legislative and judicial reform are indeed significant. However, achievement of a rational law of privilege and competency depends ultimately upon willing subordination of technical rules to practical considerations facilitating ascertainment of the facts in a judicial controversy.

---

110. Several rules presently exist in Indiana which tend to make waiver effective. Once a privilege has been waived by the divulgence of information, it can never be recalled. Stalker v. Breeze, 186 Ind. 221, 225, 114 N.E. 968, 969 (1916). If the question of competency is not raised on the trial court level it is considered waived. Dime Sav. & Trust Co. v. Jones, 84 Ind. App. 508, 511, 151 N.E. 701, 702 (1925).

111. Acme-Evans Co. v. Schnepf, 214 Ind. 394, 14 N.E.2d 561 (1938); Penn Mutual Life Ins. Co. v. Wiler, 100 Ind. 92 (1885); see 7 CORNELL L.Q. 377 (1922); 31 YALE L.J. 529 (1922); 32 YALE L.J. 93 (1922). Since the communications are no longer confidential, the court appropriately might find a waiver. See 20 CALIF. L. REV. 302 (1932), discussing the California statute, which provides for waiver in such cases.

112. Metropolitan Life Ins. Co. v. Fidelity Trust Co. 214 Ind. 134, 14 N.E.2d 911 (1938); Brackney v. Fogle, 156 Ind. 535, 60 N.E. 303 (1900). This is in accord with the weight of authority; McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEXAS L. REV. 447, 467 (1938).

113. MODEL CODE OF EVIDENCE, Rule 233 (1942).

114. There is tenuous support for such procedure in Indiana in the last portion of IND. ANN. STAT. § 2-1718 (Burns, 1933). One state has already resorted to this device with respect to the physician-patient relationship, and its adoption has been recommended by the American Bar Association. The North Carolina statute provides: " . . . Provided that the presiding judge of a superior court may compel such a disclosure if in his opinion the same is necessary to the proper administration of justice." N.C. GEN. STAT. § 8-53 (Michie, 1943). The Bar Association Committee on Improvements in the Law of Evidence recommended the enactment of the North Carolina statute because of the amount of truth suppressed by the statutory privilege and because of the "wholesome flexibility of the provision." 63 ANNUAL REPORTS OF AMERICAN BAR ASSOCIATION 590 (1938).

ADAPTATION OF PRIVATE CONTRACT PRINCIPLES TO GOVERNMENT CONTRACTS

Participation of the Federal Government in the market for goods and services has substantially increased in recent times as a result of a severe depression, extended periods of military preparedness, and the changing concept of the role of government in our economy. The result has been a huge expansion in the amount of goods and services absorbed by agencies of the government,[1] with a consequent multiplication of problems peculiar to public contracting. A current English view is that the sovereign may not fetter its freedom of action by any agreement the performance of which concerns the public welfare.[2] While the doctrine of sovereign immunity has been influential in defining the contractual prerogatives of the United States,[3] the inherent right of the governing authority to bind itself in contract has always been acknowledged.[4] The

1. In 1940, prior to the United States' entrance into hostilities, Government purchases of goods and services amounted to 30 billion dollars, or 15 per cent of the national product. By 1944, at the height of war activity, the total absorbed by the Government had increased to 149 billion dollars, equalling 45 per cent of the country's total output. Government purchases fell 100 billion from 1944 to 1946, reducing the percentage of federally appropriated goods and services to 17 per cent. No major changes in this ratio occurred between 1944 and 1950. However, a 15½ billion dollar increase, largely attributable to the expanding defense program, appeared between mid-1950 and the first half of 1951. The share of goods and services presently allocated to the United States, approximately 25 per cent, is expected to increase in proportion to the severity of the current emergency. THE MIDYEAR ECONOMIC REPORT OF THE PRESIDENT, TRANSMITTED TO CONGRESS, July, 1951.

2. Mitchell, *Limitations on the Contractual Liability of Public Authorities*, 13 MOD. L. REV. 318, 455 (1950). "The authorities seem to show that the doctrine is based upon a public policy which has ceased to be applicable and which . . . extends beyond the bounds where that policy could be operative. On the other hand, the authorities suggest that the rule is derived from a more general principle. . . . This is the principle that the state or . . . any public authority, cannot be prevented from performing functions essential to its existence and for which it was created." *Id.* at 466. However, his conclusion is that the doctrine is not adequately supported by the authorities and that certainly a right of action should exist against the state for breach of contract.

3. The doctrine of sovereign immunity originally precluded Government contractors from all legal redress. Petition to Congress concerning claims denied by disbursing authorities was the private contractor's sole recourse. Carusi, *Government Contracts Before the Court of Claims*, 41 AM. L. REV. 161 (1909). In Kawanakoa v. Polyblank, 205 U.S. 349, 353 (1907), Justice Holmes explained, "A sovereign is exempt from suit not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. . . . As the ground is thus logical and practical, the doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that, in actual administration, originate and change at their will the law of contract and property. . . ."

4. In United States v. Tingey, 5 Pet. 115, 128 (U.S. 1831), Justice Story declared: ". . . a question has been made . . . whether the United States have, in their political capacity, a right to enter into a contract or to take a bond in cases not previously provided for by law. Upon full consideration of the subject, we are of the opinion that

creation of the Court of Claims in 1855[5] and the Tucker Act in 1887[6] provided a means for aggrieved contractors to litigate their disputes with the Government before a judicial tribunal. However, Congress is under no obligation to create such a remedy, and the right to its withdrawal at any time is recognized.[7] It is commonly thought that these statutes were intended to place the United States on an equal basis with those with whom it deals, although the legislative history fails to reveal this as the motivating purpose.[8] Nevertheless, the courts have continually reiterated the proposition that the United States, upon entering the market place, subjects itself to the same rules which govern private contracting, unless such rules have been specifically abrogated by statute.[9]

It early became apparent that private contract principles were, in some respects, inadequate to the solution of problems arising out of the

---

the United States have such a capacity. It is in our opinion an incident to the general right of sovereignty. . . ." See also United States v. Bradley, 10 Pet. 343 (U.S. 1836); United States v. Linn, 15 Pet. 290 (U.S. 1841); Neilson v. Lagoue, 12 How. 98 (U.S. 1851); Naylor, *Liability of the United States in Contract*, 14 TULANE L. REV. 580, 584 (1940).

5. 28 U.S.C. § 241 (1946).

6. *Ibid.*

7. In Lynch v. United States, 292 U.S. 571 (1934), cancellation of war-risk insurance policies by legislative action was held invalid as a taking of property under the Fifth Amendment. However, the Court recognized the difference between the contractual rights under the policies and the remedy to enforce them. If Congress had manifested an intention to eliminate only the remedy, presumably the court would have upheld the legislation. At page 582 the Court said: "Mere withdrawal of consent to sue on policies for yearly renewable term insurance would not imply repudiation. When the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts."

8. Rather, the objective appears to have been a desire to relieve Congress of the burden occasioned by special legislation to adjust disputed contract claims. ". . . [T]hese claims should be asserted before a judicial and not a legislative tribunal. It is not fit that Congress should be a court to try causes, and the time it occupies in doing so is taken from its legitimate work of legislating for the great interests of the growing people." H.R. REP. No. 1077, 49th Cong., 1st Sess. (1886).

9. United States v. Smoot, 15 Wall. 36, 45 (U.S. 1875) is the classic example. Justice Miller asserted, ". . . for that branch of the Government [Congress] has limited the jurisdiction of the Court of Claims to cases arising out of contracts express or implied—contracts to which the United States is a party in the same sense in which an individual might be, and to which the ordinary principles of contracts must and should apply." Smoot had contracted with the Government to supply a certain number of horses to the cavalry. A subsequent official order required that the animals be inspected upon delivery. Smoot attempted to take advantage of the order by claiming that performance of his contract had become impossible. Applying the principle enunciated above, the court rejected this contention. Other cases which assert this principle include: Priebe & Sons v. United States, 332 U.S. 407 (1947); Lynch v. United States, 292 U.S. 571 (1934); Reading Steel Casting Co. v. United States, 268 U.S. 186 (1925); United States v. Atlantic Dredging Co., 253 U.S. 1 (1920); United States v. Spearin, 248 U.S. 132 (1918); Christier v. United States, 232 U.S. 234 (1915); Peck v. United States, 102 U.S. 64 (1880); United States v. Bostwick, 94 U.S. 700 (1878); The Floyd Acceptances, 7 Wall. 666 (U.S. 1869); Hunter v. United States, 5 Pet. 173 (U.S. 1831).

Government's business transactions. Several factors differentiate the state from private business in its commercial undertakings. Necessarily Government must operate solely through representatives,[10] who, unlike agents in private enterprise, lack supervising authority motivated by profit incentive to insure prudence and honesty. Division of governmental functions results in one instrumentality providing funds, another determining the manner of expenditure, and frequently, a third performing the actual purchasing. Hence, all transactions must be founded upon existing appropriations and statutory authorization,[11] and precautionary measures are required to assure compliance with these limitations. Further, the exigencies of war or other emergency often necessitate placing the Government in a favored position to facilitate mobilization.[12]

In numerous instances these differentiating factors have resulted in the Government being accorded certain contractual advantages normally unavailable to the private contractor. For example, when approval by a higher authority is required by statute, it has been held that the contract may become binding upon the contractor alone before the confirmation is granted.[13] Similarly, when a signed writing is required[14] it may be that only the Government may enforce the agreement from the time negotia-

10. This is a frequently recognized differentiation between the contractual status of the Government and that of a private contractor. To this effect see Coffman, *Wartime Contracts and Control in Equity of Inordinate Profits,* 9 GEO. WASH. L. REV. 693, 697 (1941); Thurlow, *Some Aspects of the Law of Government Contracts,* 21 CHI-KENT L. REV. 300, 301 (1943).

11. REV. STAT. § 3732 (1875), 41 U.S.C. § 11 (1946) provides: "No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law and under an appropriation adequate to its fulfillment."

12. In Lichter v. United States, 334 U.S. 742, 782, 783 (1948), the constitutionality of the Renegotiation Act of 1942, which conferred extensive powers to the War Contracts Price Adjustment Board to revise the terms of Government contracts, was upheld under Congress' war powers.

Support for this view may be found in Mr. Justice Frankfurter's dissenting opinion in Priebe & Sons v. United States, 332 U.S. 407, 419 (1947), he asserts: "Accordingly, if this contract were an ordinary commercial contract subject to the ordinary rules of the law of contract, I should have to find against the Government. . . . But this is not an ordinary peace-time Government contract. The Government may certainly assure the performance of contract upon which the effective conduct of the war depended by tightening the consequences of non-performance of each stage in the ultimate process of delivery of essential goods. . . . "

13. District of Columbia v. Singleton, 81 A.2d 335 (D.C. 1951).

Approval of various types of transactions entered into by the Army's contracting officers is required by the Army Procurement Procedure. A.P.P. § 1-604. Also see D.C. CODE § 1-245 (Supp. VII 1949); note 29 *infra.*

14. REV. STAT. § 3744 (1875), repealed by 45 STAT. 985 (1941). A similar statute in effect until recently was 45 STAT. 985 (1928), 5 U.S.C. § 219 (1946), repealed by PUB. L. No. 247, 82d Cong., 1st Sess. (October 31, 1951). The only requirements for formal writings at the present are those prescribed by regulations. *E.g.,* the Army Procurement Procedure provides, "All purchases made by a contracting officer will be evidenced by written contracts. . . ." A.P.P. § 1-601.

tions are concluded until such writing is effected.[15] Failure to comply with prescribed formalities in advertising for bids[16] also may render the contract enforceable only by the United States.[17] The usual doctrines of ostensible authority are not applicable and the contractor is bound to ascertain, at his peril, the authority of the officer with whom he is contracting.[18] The Statute of Limitations does not run against the United States[19] and interferences by government agents with a contractor's performance of government contracts does not subject the state to contractual liability.[20] Legislation authorizes renegotiation of certain gov-

15. United States v. New York & Porto Rico S.S. Co., 239 U.S. 88 (1915).

16. REV. STAT. § 3709 (1875), as amended, 41 U.S.C. § 5 (1946), providing: "Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies and services for the Government may be made or entered into only after advertising a sufficient time previously for proposals. . . ."

In recent years, the Government has recognized the economic plight of small businessmen who are unable to obtain Government contracts because they lack access to the requisite information. An extensive program has been initiated to acquaint the small business enterprises with current government contract opportunities. For a thorough discussion of this recent trend see Shestack and Long, *The Small Businessman and Government Contracts*, 11 LA. L. REV. 426 (1951).

17. United States v. Speed, 8 Wall. 77 (U.S. 1869); Schneider v. United States, 19 Ct. Cl. 547 (1884); Driscoll v. United States, 13 Ct. Cl. 75 (1877); Thurlow, *supra* note 10, at 303.

18. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947). A regulation promulgated by the F.C.I.C. and published in the Federal Register prohibited contracts of insurance covering certain planted wheat. Unaware of this provision, an agent had entered into a contract insuring an excluded crop. When the agency refused to cover a loss under the policy, Merrill sued for breach of contract. The Supreme Court determined that the regulation constituted a limitation on the authority of the officer, declaring: "Whatever the form in which the Government functions, anyone entering into an agreement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. . . . And this is so even though, as here, the agent may have been unaware of the limitation upon his authority." For a criticism of the case see Note, *Governmental Immunities, A Study in Misplaced Solicitude*, 16 U. OF CHI. L. REV. 128, 137 (1948), in which the writer criticizes the decision for denying private parties redress for losses occasioned by "mistake, delay or illegal actions" of government agents. He suggests that the prudence and honesty of such agents would be enhanced if they were required to answer to Congress for their increased expenditures due to satisfaction of such claims. See also, Note, *Legal Responsibility of Federal Agencies*, 24 IND. L.J. 427 (1949).

19. United States v. Nashville, C. & St. L. R.R., 118 U.S. 120 (1885). The United States failed to cash in coupons of bonds issued by defendant railway until after a Tennessee statute of limitations had expired. To defendant's contention that the statute extinguished its liability, Mr. Justice Gray replied: ". . . the United States asserting rights vested in it as a sovereign government is not bound by any Statute of Limitations unless Congress has clearly manifested its intention that it should be so bound." *Id.* at 124.

20. In Horowitz v. United States, 267 U.S. 458, 461 (1925) the Court defined this doctrine as follows: "the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." See also, Jones v. United States, 1 Ct. Cl. 383 (1865). This limitation applies as well to acts of a legislative character. Deming v. United States, 1 Ct. Cl. 190 (1864). See Naylor, *supra* note 4, at 585.

ernment defense contracts to eliminate excess profits.[21]

Several rationalizations have been advanced in support of the application of special rules to government contracts. It has been contended that a person dealing with the state enters into a fiduciary relationship which requires the utmost good faith and limits his compensation to an amount commensurate with the benefit conferred.[22] A similar conclusion is reached under the theory that the Fifth Amendment, which requires the Government to pay just compensation in the taking of property, conversely requires that no one doing business with the United States shall receive more than just compensation. Contrary to the rule applicable between private parties, under both of these theories the adequacy of the consideration would become a relevant subject of inquiry in every case.[23] Still another rationale involves the use of the Government's visitorial powers over corporations to justify the application of different principles where the contracting party is a corporate enterprise.[24] It has also been suggested that since the Government is essentially a non-profit organization, and its policies are formulated for the benefit of the entire body politic, it should be permitted to exact any conditions which the contract-

21. The most recent renegotiation statute is PUB. L. No. 9, 82d Cong., 1st Sess. (March 23, 1951) as amended by PUB. L. No. 183, 82d Cong., 1st Sess. (Oct. 20, 1951). See note 12, *supra*. The theory underlying renegotiation seems incompatible with the element of mutual risk-taking traditionally regarded as a characteristic of contractual relationships. See Fain and Watt, *War Procurement, A New Pattern in Contracts,* 44 COL. L. REV. 127, 154, 155 (1944).

Until recently, assignment of government contracts was prohibited by REV. STAT. § 3477, 3737 (1875), 31 U.S.C. § 203, 41 U.S.C. § 15 (1946). This legislative policy was reversed by the Assignment of Claims Act of 1940, 54 STAT. 1029 (1940), 31 U.S.C. § 203, 41 U.S.C. § 15 (1946) and contracts with the United States were made assignable as security for loans. Note, *Financing by Assignment of Government Contracts,* 60 YALE L.J. 548 (1951).

22. Coffman, *supra* note 10, at 701. The basis of the relationship would not be a technical trust, but a "confident reliance on the integrity, veracity and justice of another," and the trust would be in the "skill and integrity" of the contractor. See also, Grismore, *Contracts with the United States,* 22 MICH. L. REV. 749, 750 (1924). Discussion of the trust theory was engendered by United States v. Bethlehem Steel Corp., 113 F.2d 301 (3d Cir. 1940), in which the court allowed Bethlehem to recover profits on exorbitant World War I contracts. Subsequently, the case was affirmed by the Supreme Court. United States v. Bethlehem Steel Corp., 315 U.S. 289 (1942). Renegotiation was thereafter adopted to prohibit such excessive profits on existing and future contracts. See Reardon, *Problems Arising Under the Renegotiation Act,* 33 GEO. L.J. 153 (1945).

23. Grismore, *supra* note 22, at 757-58. This theory is criticized because it would entail overhauling of all agreements made by the Government. Moreover, since the statute of limitations is inapplicable to the United States, such a re-examination into the consideration could be done at any time in the future and would impair the security of transactions.

24. Coffman, *supra* note 10, at 699, 700. Equity courts have jurisdiction through the Government's reserved visatorial powers to protect the public from corporate activities injurious to their interests. Such powers logically could be invoked to

ing authority deems expedient.[25] Such a view would disregard the absence of statutory authorization and principles of contract law which would ordinarily nullify the condition or render the contract void. Opposed to all of these views is the position that no variances from ordinary contract doctrines should be countenanced unless Congress has specifically so provided.[26]

It is likely that additional instances may arise in which established contract doctrines initially appear inadequate to satisfactorily accommodate the interests of the sovereign with those of the contractors with whom it deals. Perhaps just such a situation is presaged by the occasional attempts of government agents to bind a party with whom they are negotiating while themselves remaining entirely unfettered until a later time. In the future it often may be expedient, or even essential, for the Government to avail itself of such an arrangement in order to secure the advantage of propitious market conditions or acquire scarce materials and yet retain the right to repudiate at a later time if further operation under the agreement would prove highly detrimental to the public interest.[27] The lengths to which some writers have gone in their attempts to justify deviation from existing contract principles in Government transactions might seem to suggest that a complete departure from the rules of contract is indicated in all instances of Government acquisition and

---

recover inordinate profits made by corporations contracting with the Government, because such unreasonable exactions are detrimental to the public welfare.

25. See Note, *Penalties in Government Contracts,* 43 ILL. L. REV. 238, 242, 243 (1948), in which the writer concludes that "this view recognizes that some of the traditional, judicial safeguards for free contracting must be sacrificed to the efficacy of big government. It is also a reflection of faith in the fairness of administrative action."

26. Priebe & Sons v. United States, 332 U.S. 407, 413, 414 (1947). The dispute concerned the validity of a penalty provision inserted in a Government contract to supply dried eggs for shipment under the Lend-Lease Program. The provision was repugnant to the rules of private contract law which deny enforceability to liquidated damages clauses having no relation to the actual harm incurred. The Government contended that authority to impose such a penalty could be inferred from the broad power to purchase granted by the Lend-Lease Act. The Court replied: "The power to purchase on appropriate terms and conditions is, of course, inferred from every power to purchase. But if that is the source of Congressional authority to impose penalties, then any procurement officer, in war or in peace, could impose them. That is contrary to the premise underlying all our decisions on this question which involve government contracts. . . . The other view is such a radical break with the past and so counter to the whole development of the law as to indicate that the Congressional purpose should be plain before we take the step."

27. Such a need apparently was felt by the Judge Advocate General when he issued the ruling: ". . . bidders may, by appropriate provision in the form of bid, be legally bound to keep their bids open for a reasonable time after the date specified for receipts of bids." 2 BULL. J.A.G. 437 (1943). There is also a tendency among private contractors to provide for contingencies by requiring bidders to make irrevocable or "firm" offers. This practice is discussed in Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry,* 19 U. OF CHI. L. REV. 237 (1952).

sale of goods and services. However, such a step should not be taken lightly in view of the drastic readjustments in commercial practice it would require and the suspicion with which it would likely be viewed by the contractors who deal with the United States. A re-examination of concepts either already established or on the verge of recognition in the law of contracts reveals means of adapting existing law to the changing needs of the nation's largest businessman.

Analysis of a single instance in which there have been indications that private contract theory is inadequate to the needs of a government participating in commercial transactions on an ever-increasing scale may suggest a valuable approach to the accommodation of other discordant governmental and private interests which may emerge in future business transactions to which the United States is a party. In *D. C. v. Singleton,*[28] the Municipal Court of Appeals for the District of Columbia apparently perceived a need for a departure from the accepted requirement of mutuality of consideration. Singleton had submitted a bid to provide supplies for the schools of the District, which was accepted by a contracting officer. Subsequently, Singleton discovered his inability to comply with the terms of his bid because another dealer held an exclusive franchise for the area. A statute provided that all contracts made on behalf of the District of Columbia by its contracting agents, where the amount exceeded $3,000, must be approved by the Commissioners before constituting a contract binding on the District.[29] Singleton sought to take advantage of this approval requirement by asserting that there was no contract, binding upon himself or the District, until approval, and he therefore was free to withdraw his bid.[30] The Government argued that

28. 81 A.2d 335 (D.C. 1951).

29. D.C. Code § 1-245 (Supp. VII 1949), providing: ". . . but no contract of $3,000 or more entered into on behalf of the District of Columbia by any contracting officer appointed pursuant to sections 1-244 to 1-249 shall be binding upon said District of Columbia, or give rise to any claim or demand against said District of Columbia, until approval by the Commissioners or a majority of them sitting as a Board."

30. Singleton contended that the statute was a limited grant of authority to contracting officers and did not authorize them to enter into contracts in excess of $3,000, execution of the latter being reserved to the Commissioners by the approval requirement. The title of the Act, "An Act to Authorize the Commissioners of the District of Columbia to Appoint Officers to Make Contracts in Amounts Not Exceeding $3,000," was invoked in support of this position. His further theory was that the language of the statute, which indicates that no claim or demand shall arise against the District prior to approval, did not by its silence on the point mean that one did arise against the individual contractor. The intent of Congress could not have been to give the District an "escape-hatch" by making contracts binding only upon the private party until action by the Commissioners. Moreover, the acceptance of the contract was incomplete, being conditioned upon some future act on the part of the District, and could create no enforceable agreement. Brief for Appellants, pp. 7-19, Singleton, et. al. v. District of Columbia, in the United States Court of Appeals for the District of Columbia. Appeal of District of Columbia v. Singleton, 81 A.2d 335 (D.C. 1951).

the acceptance created a valid contract, which, however, was binding only upon Singleton until the requisite approval was effected.[31] In an attenuated opinion, the court found for the Government, cryptically observing that the statute was, "clearly enacted for the benefit of the District and not parties contracting with the District."[32] The court thus refused to accede to the contention that the contract was illusory.[33]

The court was confronted with competing lines of authority. Plaintiff relied on *United States v. N. Y. and Porto Rico S. S. Co.*,[34] a case in which the Government sought recovery for breach of contract where the agreement had not been reduced to writing and signed by both parties as required by the statute.[35] While the Supreme Court acknowledged that there could have been no recovery against the Government without compliance with the statutory directive, it perceived no objection to the action initiated by the official agency. Since the writing requirement was enacted to prevent fraud by government agents, it was designed for the benefit of the United States and not for the private contractor, who had no need of protection.[36]

---

31. The District argued that the statute was clear in giving contracting officers the power to enter into contracts in excess of $3,000, while reserving only a power of review. This was said to be inferred from the wording of the statute to the effect that contracting officers, "may exercise any powers with respect to making and entering into contracts. . . ." The provision in the statute that no claim or demand shall arise against the District was alleged to signify that only the contractor's right to enforce, and not the creation of a valid contract, was postponed. It was further asserted that there were no principles of mutuality applicable to a situation of this sort, and the statute could not be invoked by a contracting individual to escape his obligation. Brief for Appellant, pp. 6-27, District of Columbia v. Singleton, 81 A.2d 335 (D.C. 1951).

32. 81, A.2d 335, 337 (D.C. 1951).

33. 1 CORBIN ON CONTRACTS § 146 (1950). "It has been said, thousands of times, that both parties to a contract must be bound or neither is bound. . . . The statement comes nearer the truth in bilateral contracts, promise exchanged for promise. Usually, both promises become binding at the moment of acceptance of the offer. If, at that moment, something prevents one of the promises from being legally enforceable, it is frequently assumed that the return promise is void for lack of sufficient consideration."

34. 239 U.S. 88 (1915).

35. REV. STAT. § 3744 (1875), 41 U.S.C. § 16 (1946), repealed by 45 STAT. 985 (1941), 41 U.S.C. § 16 (1946). "It shall be the duty of the Secretary of War, Navy, and Interior to cause . . . every contract made by them . . . to be reduced to writing and signed by the contracting parties with their names at the end thereof . . . within thirty days. . . ." Also included were certain provisions making it a misdemeanor for contracting officers to fail promptly to comply with the statute.

36. The Court conceived an analogy between this writing requirement and the Statute of Frauds. The two are distinguishable, however, since either party to a contract may avail himself of the latter, depending on which has signed the agreement. By contrast, under the Supreme Court's interpretation of the writing provision, no matter which party has failed to sign the contract it can be enforced only by the Government.

The writing requirement has been productive of much litigation. Although no indication of this appears in *Singleton*, the writing cases actually are in conflict as to when the contract is formed. In Sanger & Moody v. United States, 40 Ct. Cl. 47, 66 (1905), claimant sought reformation for mistake in the writing and contended that the ne-

Completely ignored in the *Singleton* case, however, were decisions involving approval by a higher authority. In *Monroe v. United States*,[37]

---

gotiations constituted the actual contract. Acknowledging that the preliminary negotiations, bid, and acceptance are the essential components of a binding agreement between individuals, the court nevertheless indicated that in a government contract neither party is bound until the writing is signed. In Gillioz v. United States, 102 Ct. Cl. 454, 466 (1944), the Court of Claims again observed that a government contract does not come into being until both parties have affixed their signatures to a writing in conformity with the statute. Other cases to this effect include: Gillespie v. United States, 47 Ct. Cl. 310, 312 (1912); McLaughlin v. United States, 37 Ct. Cl. 150, 185 (1902); Lender v. United States, 7 Ct. Cl. 530, 533 (1872); Henderson v. United States, 4 Ct. Cl. 75, 83 (1868).

On the other hand, in Ackerlind v. United States, 240 U.S. 531, 534 (1916), the Supreme Court approved the *Porto Rico* decision. The court reformed the contract at the instance of the private party. Since the mistake occurred only in the formal contract the plaintiff could refer to the prior unsigned agreement in support of his contention. The initial unsigned contract was not void but merely unenforceable against the Government. American Smelting and Refining Co. v. United States, 259 U.S. 75, 78 (1922), held that the contemplation of a formal agreement did not prevent the negotiations from creating a binding contract where the claimant was attempting to repudiate the oral contract and recover a statutory price for supplies furnished to the Government. And in Waters v. United States, 75 Ct. Cl. 126 (1932), on facts nearly identical to the *Porto Rico* case, the Government recovered by a counterclaim based upon an unwritten agreement which violated the statute.

Some cases involving private parties seeking to hold the Government have avoided declaring a contract void for non-compliance with the statute. Erie Coal & Coke Co. v. United States, 266 U.S. 518, 521 (1925), held the United States was not bound because the necessary formalities had not been performed; and Camp v. United States, 113 U.S. 648, 652 (1885), merely indicated that no contract could bind the Government unless in writing as required by a regulation. In Lindsley v. United States, 4 Ct. Cl. 359, 365 (1868), the court explicitly pointed out that the statute does not prohibit verbal contracts but merely makes them unenforceable against the Government. See also, Clark v. United States, 95 U.S. 539 (1876). Other cases recognizing the existence of a contract before the writing is concluded are those which held that after performance no barrier to recovery on the contract is presented by the initial unenforceability. Clark v. United States, *supra;* St. Louis Hay & Grain Co. v. United States, 191 U.S. 159 (1903); Emery v. United States, 13 F.2d 658 (D. Conn. 1926); Moran Bros. v. United States, 39 Ct. Cl. 486 (1904).

Similarly, the statute requiring advertising for bids on government contracts, *supra* note 16, has evoked competing lines of authority. Where this requirement has not been met, contractors have been barred from recovery against the Government on the ground that the contract is void. United States v. Speed, 8 Wall. 77 (U.S. 1869); Schneider v. United States, 19 Ct. Cl. 547 (1884). However, as with the writing cases, it also has been held that the statute is for the protection of the United States and is unavailable as a defense to a suit by the Government. American Smelting and Refining Co. v. United States, *supra.* In a similar situation where advertising was a prerequisite to the sale of naval vessels, the Attorney General held that failure to comply did not render the contract void, but only voidable at the option of the Government. 38 OPS ATT'Y GEN. 328 (1935); Note, 4 GEO. WASH. L. REV. 520 (1936).

That the writing and advertising cases should not control the *Singleton* result is suggested by one crucial distinction. A private contractor may ascertain, prior to the bidding, whether the advertising requirement has been met, or he may insist upon prompt execution of a formal written agreement. But there is no means by which he can determine whether final approval will be accorded. Thus, under the *Singleton* decision, he cannot avoid binding himself prior to the time when the Government becomes bound.

37. 184 U.S. 524 (1902).

the contract by its terms was subject to approval by the Chief of Engineers. The contractor attempted to hold the United States prior to final approval. The Supreme Court, in dismissing the action, observed that the requirement constituted a condition precedent to the formation of a *valid* contract. The implication was that the Government could not have held the contractor. The rationale of this and other approval cases would seem to foreclose the issue in the *Singleton* case.[38]

The *Singleton* opinion is subject to serious criticism not only because it fails to reveal the basic reason for its result, but also because it prefers, as a governing precedent, a case far less apposite than the approval cases relied on by the defendant. Nevertheless, the result which the court was determined to reach may have been a legitimate one. However, before resorting to judicial fiat as a substitute for rational analysis of the basic considerations presented in a controversy where special contractual concessions are sought by the Government, future courts might profitably explore the existing body of contract doctrine.

Consideration of the law of voidable contract suggests a possible means of reconciling the special concessions accorded Government with the existing framework of contract law. There, the fundamental policy is to protect the infants or defrauded persons from improvident engagements, perhaps attributable to a recognized disability.[39] In dealing with voidable contracts, courts have experienced little difficulty in accounting for the absence of reciprocity necessary to satisfy traditional notions of consideration. The absence of mutuality stems, not from the bargain itself, but from some element outside its terms.[40] The present exchange

38. See Little Falls Knitting Mill Co. v. United States, 44 Ct. Cl. 1 (1908), in which the court stipulated: "A contract containing a clause which makes its final execution dependent upon the approval of the head of a department or some supervising official of the Government is not a binding obligation until such approval is had." *Id.* at 17; Cathell v. United States, 46 Ct. Cl. 368, 371 (1911), where the dispute hinged upon the time when a binding contract was formed. The court decided: ". . . a contract providing for the approval of a superior officer is not a valid subsisting agreement until such approval is made. . . . Neither the contractor nor the defendants [United States] incurred liabilities until it was approved."

39. See Willis, *Rationale of the Law of Contract,* 11 IND. L.J. 227, 249 (1936). "The last class of promises to which social control is applied is those promises which are voidable. . . . In such cases the law will . . . make the promises contracts. In addition, it will apply . . . social control, to allow the infant . . . to avoid the contract . . . [T]he social interests . . . are important enough so that the law protects them by giving the injured party a power of avoidance. . . ."

40. "In the second [voidable contracts] we have all the affirmative elements of a valid contract, but the obligation of one of the parties is affected or taken away owing to the presence of some defense or negative element which does not affect the obligation of the other. These cases of voidable contracts can therefore be satisfactorily explained only by the theory here advanced, *viz.,* that there is ample consideration at present in the reciprocity or mutuality of the respective undertakings, although one of the parties may have an absolute personal defense. A promise by a minor, therefore, furnishes

of promises constitutes sufficient consideration on both sides. It would seem arguable that in some respects the Government is incapacitated in its business dealings by handicaps equally as severe as those prompting judicial recognition of voidability in the case of minors and insane.[41] However, the voidable contracts concept has been narrowly applied and courts and legislatures are more ready to limit than expand it.[42] The merit of enlarging this doctrine would lie in the ability of the courts to allow or reject the Government's claim, depending upon whether a disability were shown to justify the need under the particular circumstances.

Another approach would necessitate implication of a promise on the part of the Government to use good faith and reasonableness in considering the contract. Such an obligation might be deemed sufficient consideration for requiring a contractor to be bound. Courts are frequently willing to imply promises, to uphold the validity of contracts, as where a promise to sell necessarily involves an implied agreement by the other party to buy.[43] In *Sylvan Crest Sand and Gravel Co. v. United States,*[44] the court approved such a theory in upholding an agreement against the objection that it was illusory. The Government had reserved a sweeping right of cancellation which would have rendered the consideration insufficient had the court not found an implied promise by the United States to give reasonable notice before exercising the right.

That such a requirement of good faith and reasonableness would constitute adequate consideration is suggested by the fact that the courts

consideration . . . because there is reciprocity in the terms of the bargain." Ballantine, *Mutuality and Consideration,* 28 HARV. L. REV. 121, 131, 132 (1914); SELECTED READINGS ON THE LAW OF CONTRACTS, 343, 351 (1931).

41. See notes 10-16 *supra,* and accompanying text.

42. See Note, *Avoidanee by Infants of Contracts for Performance of Services,* 21 ROCKY MT. L. REV. 213 (1949), discussing the recent case of Warner Bros. Pictures v. Brodel, 31 Cal. 2d 766, 192 P.2d 949 (1948), which upheld the constitutionality of a California statute limiting the power of infants to avoid their contracts. ". . . [I]t is . . . another step in the modern trend toward limiting the privilege of infants to avoid their contracts. . . ." *Id.* at 213.

43. ". . . [T]he tendency has developed, whenever possible, as a matter of interpretation of intention, to imply a promise where one is lacking in order that there may be mutuality." Whitney, *Implying a Promise to Establish Mutuality,* 11 ST. JOHNS L. REV. 51, 52 (1936). See also, 1 CORBIN ON CONTRACTS § 18 n.43, § 144 n.12 (1950).

44. 150 F.2d 642 (2d Cir. 1945). Plaintiff had contracted to deliver trap rock of a certain amount, "as required." The reservation of the power of cancellation was unrestricted as to time. The Government contended the power was exercised by a mere failure to order delivery. The court's implication of the promise to give notice seems to have defeated an attempt by the Government to create a contract wholly devoid of obligation upon its part. Perhaps this suggests that the courts are unwilling to validate attempts by the Government to dispense with mutuality of obligation.

have uniformly upheld "sales on approval" contracts.[45] There the buyer agrees to retain the purchase only if he is satisfied with it. Some cases permit rejection if the buyer is honestly dissatisfied[46] while others adopt a standard of reasonableness.[47] Conceivably this technique may be adopted to bind the private contractor while allowing the Government approval authority an opportunity to reject if reasonably dissatisfied.

The concept of firm offer, vigorously advocated in recent years as a valuable adjunct to private commercial transactions, suggests another contractual basis for enabling the Government to circumvent the consideration dogma which denies validity to one-sided government contracts. This notion converts the offeror's considerationless proposal, to remain irrevocable for a period of time, into a dependable basis of action while the offeree is in no way obligated. While firm offer has never been recognized as a matter of common law, New York and Pennsylvania have enacted legislation which provides for enforcement of such promises.[48] In addition, the proposed Uniform Commercial Code includes a provision that short-term firm offers be given effect according to their terms.[49] These instances indicate a trend toward enforceability of deliberately made promises despite the absence of consideration.

It has been asserted that firm offers should be enforced without specific statutory authorization when seriously proposed.[50] The deliberative and evidentiary functions of consideration would be performed

45. "That a binding contract exists in the case of a 'sale on approval,' before the buyer has expressed his approval or disapproval, seems seldom to have been doubted in Anglo-American law." Patterson, *'Illusory' Promises and Promisors' Options*, 6 IOWA L. BULL. 129, at 135 (1920), SELECTED READINGS ON THE LAW OF CONTRACTS, 401 at 406 (1931).

46. Hoffman v. Gallaher, 6 Daly 42 (N.Y. 1842).

47. Fechteler v. Whittemore, 205 Mass. 6, 91 N.E. 155 (1910).

48. N.Y. PERS. PROP. LAW § 33(5) (1949). "When hereafter an offer to enter into a contract is made in a writing signed by the offeror or his agent, which states the offer is irrevocable during a time fixed, the offer shall not be revocable during such period or until such time because of the absence of consideration for the assurance of irrevocability." And see Jarka Corp. v. Hellenic Lines, Ltd., 182 F.2d 916, 919 (2d Cir. 1950) in which Judge Clark stated: ". . . its [the contract's] clear intent was to keep the offer open for a stated time. . . . If New York law is applicable to the transaction, the offer is binding even though without consideration."

The Pennsylvania provision provides for the enforceability of a much wider group of promises. "A written release or promise, hereafter made and signed by the person releasing or promising, shall not be unenforceable for lack of consideration if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound." PA. STAT. ANN. tit. 33, § 6 (Purdon, 1949).

49. THE UNIFORM COMMERCIAL CODE, § 2-205 (1950), provides: "An offer by a merchant to buy or sell goods expressed in a signed writing to be 'firm' or otherwise irrevocable needs no consideration to be irrevocable for a reasonable time, or during a stated time. . . ." See Corbin, *The Uniform Commercial Code—Should It Be Enacted*, 59 YALE L.J. 821, 827, 829 (1950).

50. Sharp, *Pacta Sunt Servanda*, 41 COL. L. REV. 783, 788 (1941); Sharp, *Promises, Mistake, and Reciprocity*, 19 U. OF CHI. L. REV. 286, 292 (1952).

by requiring formalities in the making of the promise not to revoke.[51] Less easily dispensed with are the elements of equality and exchange in the concept of consideration. That one party cannot be bound unless the other is also bound—an idea which the law of contract has clung to with tenacity—is abandoned in the firm offer.[52] Moreover, the courts' diminishing solicitude for the requirement of benefit to the promisor, in return for his promise, is completely eliminated.[53] The latter obstacles suggest that the firm offer should not be recognized as a valid principle of the law of contracts under all circumstances but should be limited in its application to those situations in which the need for such a device more than offsets these objections.

The ability of one party to an agreement to bind the other without himself assuming any concurrent duties would constitute a formidable weapon in the hands of the contractor in the superior bargaining position. Hence, such an innovation should be sanctioned, even at the instance of the Government, only when the strongest justification can be demonstrated. Perhaps the propriety of such a departure is a subject of inquiry which exceeds the scope of the judicial prerogative. Surely the courts should not seek to justify the deviation solely on the strength of a statute such as that involved in the *Singleton* case, which is wholly devoid of any explicit manifestation of Congressional intent to dispense with mutuality of consideration.

It has never been conclusively demonstrated that the requirements of Government in its business dealings transcend the importance of retaining a single body of law governing contractual relations.[54] Adherence to such a unified theory, as opposed to recognition of Government's absolute

---

51. *Ibid.*

52. "We are dealing . . . with the argument that it is unfair or somehow contrary to principle, or inconsistent with the nature of things to treat an undertaking against revocation as binding . . . in the absence of acceptance by the offeree."

"Equality is one of the . . . indispensable working notions of the law . . . it requires eareful use. It does not require that people be treated identically, if there is a practieal reason of the sort with which courts are qualified to deal, for distinguishing them. . . . There would be no violation of any simple working idea of equality if the bidder who has made a promise were treated quite differently from the contractor who has made none." Sharp, *Promises, Mistake, and Reciprocity, supra* note 50, at 289.

53. "There appears to be a feeling that undertakings for which no return is made ought not to be enforced. In Roman and continental law the limitations . . . dependent on . . . 'exchange' have been almost entirely superseded. . . . The doctrines of consideration . . . may be developing in the same direction." Sharp, *Promises, Mistake, and Reciprocity, supra* note 50, at 290, 291.

54. In some areas of the law of contracts, the ordinary rules have been manifestly inadequate to allow the courts to solve the peculiar problems confronting them. A notable example is the field of insurance, where the courts have resorted to tort principles to relieve individuals upon whom unconscionable conditions have been imposed by the insurer. See Kessler, *Contracts of Adhesion,* 43 COL. L. REV. 629 (1943).

right to exact any conditions it sees fit, seems preferable. If the United States were exempt from the rules of contract, considerations in support of or opposition to a claimed concession would become irrelevant. Conversely, such considerations are determinative of controversies resolved under existing contract law. Blanket endorsement of such an exemption would invite extreme business practices with ramifications affecting a sizeable percentage of commercial transactions. Such a license, manifestly impinging upon the security of government contractors, should be vindicated only upon a showing of positive necessity. Contractors' familiarity with existing commercial practice and aversion to uncertain change might necessitate a substitute for security in the form of increased cost of goods and services to Government. It should not be prematurely assumed that contract doctrine lacks the flexibility to adapt itself to the changing position of Government in our economy.

The delicate reconciliation of interests required can best be accomplished by adherence to existing contract doctrine whenever possible, by intelligent legislative or judicial adaptation of existing principles to new situations where necessary, and above all, by a method of judicial decision which clearly presents the competing factors in a controversy.

EFFECT OF ILLEGAL ABDUCTION INTO THE JURISDICTION ON A SUBSEQUENT CONVICTION

As prerequisites to a valid criminal conviction the accused must be present at all proceedings of the court[1] and must be tried in the state in which the alleged crime was committed.[2] While these requirements cause little difficulty when the accused is apprehended within the jurisdiction in which the crime occurred, frequently the individual has fled the jurisdiction of the accusing state. In contemplation of this possibility, the Constitution expressly permits rendition of prisoners from one state to another.[3] The procedures established to implement the Constitutional provision[4] are comparatively simple,[5] and rendition ordinarily will be granted,[6] usually as a matter of course. Nevertheless, at times overzealous police officers remove the accused from another jurisdiction with-

1. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 413 *et seq.* (1947).
2. See Note, 15 L.R.A. 722 (1892).
3. U.S. CONST. Art. IV, § 2.
4. 18 U.S.C. § 3182 (Supp. 1951).
5. See Note, 135 A.L.R. 973 (1941).
6. Plumb, *Illegal Enforcement of the Law,* 24 CORNELL L.Q. 337, 349 (1939)