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Case Notes

CASE NOTES

Attorneys—Legal Services Rendered Over Two-Week Period Within New York State by California Attorney Not Violative of Penal Statute as "Practice of Law" and Are Compensable.—Defendant requested plaintiff, a California attorney not admitted to practice in New York, to come to New York to assist in resolving defendant's marital problems. Plaintiff informed defendant that he could not appear in any New York action nor render services beyond advice and consultation with her New York attorneys. In meetings extending over a two-week period, plaintiff conferred with defendant and her attorneys, with plaintiff's knowledge of New York law the basis of his advice. He sued to recover the reasonable value of the legal services rendered in New York. The supreme court awarded recovery on a daily basis for fourteen days. The appellate division affirmed in a three-to-two decision, and held that plaintiff's conduct did not violate Sections 270 and 271 of the New York Penal Law so as to bar compensation.[1] *Spivak v. Sachs*, 21 App. Div. 2d 348, 250 N.Y.S.2d 666 (1st Dep't 1964).

The unlicensed attorney, absent court permission for a special appearance in trial argument,[2] is statutorily prohibited from practicing law in New York.[3]

1. N.Y. Pen. Law § 270 prohibits an unlicensed person from practicing or appearing in a New York court, representing that he is entitled to practice in New York, or unlawfully practicing law in any other manner. Section 271 denies compensation to an unlicensed person for appearing in court, making a business of practicing law, or preparing legal instruments. See Fein v. Ellenbogen, 84 N.Y.S.2d 787 (Sup. Ct. 1948) (per curiam). When the court has given its permission, however, the out-of-state attorney is entitled to his fee. Finnerty v. Siegal, 168 Misc. 476, 5 N.Y.S.2d 309 (Sup. Ct. 1938). Recovery of compensation for strictly legal services is generally denied to one who has not been admitted to practice before the court or in the jurisdiction where the services were rendered. Taft v. Amsel, 23 Conn. Supp. 225, 180 A.2d 756 (Super. Ct. 1962); Appell v. Reiner, 81 N.J. Super. 229, 195 A.2d 310 (Ch. 1963); Harriman v. Strahan, 47 Wyo. 208, 33 P.2d 1067 (1934); 7 C.J.S. Attorney and Client § 165 (1937); 1 Thornton, Attorneys at Law § 23, at 25 (1914).

2. N.Y. Ct. App. R. VII (4) states: "An attorney and counsellor-at-law or the equivalent from another state, territory, District, or foreign country may, in the discretion of any court of record, be admitted Pro hac vice to participate in the trial or argument of any particular cause in which he may for the time being be employed." See Finnerty v. Siegal, supra note 1, at 477, 5 N.Y.S.2d at 310. Other American decisions are in agreement: Chappell v. Real Estate Pooling Co., 89 Md. 258, 260-61, 42 Atl. 936, 937 (1899); Browne v. Phelps, 211 Mass. 376, 380, 97 N.E. 762, 763-64 (1912). In State ex rel. Boynton v. Perkins, 138 Kan. 899, 903, 28 P.2d 765, 767 (1934), the court noted that permission to enter and handle a case is not a general admission to the practice of law in the forum state.

3. N.Y. Pen. Law § 270 provides, in part: "It shall be unlawful for any natural person to practice or appear as an attorney-at-law . . . in a court of record in this state or in any court in the city of New York . . . or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, or to assume to be an attorney or counselor-at-law, or to assume, use, or advertise the title of lawyer . . . or equivalent terms in any language, in such manner as to convey the impression that he is a legal practitioner of

Section 270 of the Penal Law has been enforced rigorously against unlicensed attorneys[4] and laymen[5] who have held themselves out to the public as being entitled to practice law in New York and have performed legal acts restricted to members of the bar. The statute specifically prohibits appearance in court or legal proceedings,[6] and broadly includes services and legal advice rendered out of court.[7] While the carrying on of a continuous legal practice has invariably

law . . . without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state . . . ."

"Section 270 of the Penal Law does not explicitly set out those acts which constitute 'unlawful practices.' The task of definition has been left to the courts. . . . [T]he judicial department has acknowledged the apparent will of the Legislature by leaving to the organized bar the task of deciding what constitutes the unlawful practice of law." 1 N.Y.L.F. 376, 377 (1955). See 1916 N.Y. Att'y Gen. Ann. Rep. 455, 477. In People v. Alfani, 227 N.Y. 334, 337-38, 125 N.E. 671, 673 (1919), the court of appeals resorted to definitions appearing in Eley v. Miller, 7 Ind. App. 529, 535, 34 N.E. 836, 837-38 (1893), and In re Duncan, 83 S.C. 186, 189, 65 S.E. 210, 211 (1909). See generally Committee to Act Upon Recommendations of the Conference of State and Local Bar Associations, Report, 44 N.Y.S.B.A. Rep. 294, app. A at 301-02 (1921); Legislation, 26 Fordham L. Rev. 163 (1957). The difficulty of setting forth an accurate definition persists due to the very nature of the problem. "It would be extremely difficult to formulate an accurate definition of the 'practice of law' which might endure, for the reason that under our system of jurisprudence such practice must necessarily change with the everchanging business and social order." Grand Rapids Bar Ass'n v. Denkema, 290 Mich. 56, 64, 287 N.W. 377, 380 (1939).

4. Roel v. New York County Lawyers Ass'n, 3 N.Y.2d 224, 144 N.E.2d 24, 165 N.Y.S.2d 31 (1957), appeal dismissed per curiam, 355 U.S. 604 (1958); Fein v. Ellenbogen, 84 N.Y.S.2d 787 (Sup. Ct. 1948) (per curiam); People v. Collins, 271 App. Div. 511, 67 N.Y.S.2d 53 (1st Dep't 1946). Foreign attorneys cannot advertise the fact that they are attorneys if this carries the impression that they are entitled to practice in New York. Roel v. New York County Lawyers Ass'n, supra; N.Y. Pen. Law § 270, see note 3 supra; [1913] 2 N.Y. Att'y Gen. Ann. Rep. 45, 47. See People v. Collins, supra; New York County Lawyers Ass'n v. Anonymous, 207 Misc. 698, 139 N.Y.S.2d 714 (Sup. Ct. 1955).

5. Dawkins v. New York County Lawyers Ass'n, 289 N.Y. 553, 43 N.E.2d 530 (1942) (memorandum decision); People v. Alfani, 227 N.Y. 334, 125 N.E. 671 (1919).

6. N.Y. Pen. Law § 270. See note 3 supra.

7. People v. Alfani, 227 N.Y. 334, 125 N.E. 671, reversing 186 App. Div. 468, 174 N.Y. Supp. 527 (2d Dep't 1919). "The words [of § 270] 'as aforesaid' have reference to practice in the courts mentioned, and the following 'or in any other manner' refer to the practice as an attorney-at-law out of court and not in legal proceedings." 227 N.Y. at 337, 125 N.E. at 672. "To practice law in any manner, unless one be duly and regularly licensed and admitted to practice law, is a violation of our penal law, and it has been determined that giving legal advice outside of court is a violation of the stature [sic]." Address by Attorney-General Lefkowitz, American Bar Association National Conference on the Unauthorized Practice of Law, May 25-26, 1962. See generally Committee on Unlawful Practice of the Law, Report, 84 N.Y.S.B.A. Rep. 193, 194-95 (1961); Committee to Act Upon Recommendations of the Conference of State and Local Bar Associations, Report, 44 N.Y.S.B.A. Rep. 294, app. A at 363-66 (1921).

Other states have included the giving of legal advice in a definition of practice. "In determining what is the practice of law it is well settled that it is the character of the acts performed and not the place where they are done that is decisive. The practice of law is not,

been held a statutory violation,[8] some earlier cases found lawful an isolated act such as the drafting of a will or bill of sale provided it was not attended by some representation by the individual that he was acting under indicia of legal standing.[9] New Jersey, under a similar statute,[10] has held that charging a fee is not necessary to commit a violation.[11]

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therefore, necessarily limited to the conduct of cases in court but is engaged in whenever and wherever legal knowledge, training, skill and ability are required." Stack v. P. G. Garage, Inc., 7 N.J. 118, 120-21, 80 A.2d 545, 546 (1951); accord, In re Duncan, 83 S.C. 186, 189, 65 S.E. 210, 211 (1909).

8. In People v. Alfani, supra note 7, at 339, 125 N.E. at 673, the court interpreted § 270: "The legislature is presumed to have used the words as persons generally would understand them, and not being technical or scientific terms 'to practice as an attorney-at-law' means to do the work, as a business, which is commonly and usually done by lawyers here in this country." Both unlicensed attorneys and laymen who made a business of the law have been either enjoined from continuing their activities, or convicted under this section: In Roel v. New York County Lawyers Ass'n, 3 N.Y.2d 224, 144 N.E.2d 24, 165 N.Y.S.2d 31 (1957), appeal dismissed per curiam, 355 U.S. 604 (1958), a Mexican attorney advertised his availability in the New York newspapers, advised the public on Mexican law, acted as consultant to New York attorneys on Mexican legal matters, and testified as an expert on Mexican law in the New York courts; in People v. Hanham, 266 N.Y. 573, 195 N.E. 206 (1935) (memorandum decision), a layman engaged in the initial steps of negligence cases, examined official records, engaged doctors and automobile repair men, and made settlements; in People v. Alfani, supra note 7, a real estate and insurance man drafted wills, bills of sale, mortgages, and deeds over a period of time; in People v. Collins, 271 App. Div. 511, 67 N.Y.S.2d 53 (1st Dep't 1946), a Tennessee attorney engaged in practice in New York regarding immigration and other matters. See New York County Lawyers' Ass'n v. Clark, 256 App. Div. 674, 11 N.Y.S.2d 432 (1st Dep't 1939), where defendants engaged in the business of publishing and distributing a pamphlet on how the public could get wills made "secretly without other legal aid"; New York County Lawyers' Ass'n v. Wenger, 186 Misc. 966, 61 N.Y.S.2d 686 (Sup. Ct. 1946), where a real estate broker regularly performed all the legal requisites in handling dispossess proceedings for landlords.

9. People v. Goldsmith, 249 N.Y. 586, 164 N.E. 593, reversing mem. 224 App. Div. 707, 229 N.Y. Supp. 896 (1st Dep't 1928) (memorandum decision); People v. Weil, 237 App. Div. 118, 260 N.Y. Supp. 658 (1st Dep't 1932). In 1919 the court of appeals felt that there was no intention behind § 270 to prevent a layman from drafting a simple instrument as long as he did not also give legal advice or simulate the character of an attorney. People v. Title Guar. & Trust Co., 227 N.Y. 366, 376, 125 N.E. 666, 669 (1919). However, the courts appear to be imposing greater restrictions on the activities of laymen; there is authority which would restrict even a single act. In New York County Lawyers Ass'n v. Epter, 178 Misc. 907, 36 N.Y.S.2d 952 (Sup. Ct. 1942), a real estate man drafted a will and deed for a client; in New York County Lawyers Ass'n v. Bercu, 273 App. Div. 524, 78 N.Y.S.2d 209 (1st Dep't 1948), aff'd mem. 299 N.Y. 728, 87 N.E.2d 451 (1949), an accountant addressed himself to a question of law alone, not just incident to preparing a tax return; 1933 N.Y. Att'y Gen. Ann. Rep. 290, 291. See Mandelbaum v. Gilbert & Barker Mfg. Co., 160 Misc. 656, 290 N.Y. Supp. 462 (N.Y. City Ct. 1936), where an accountant rendered information as to the interpretation of a tax law under a bargain for fifty per cent of a tax refund. Perhaps the various bar associations, which have maintained a constant vigil against unauthorized practice, are partially responsible for this restrictive tendency. E.g., Standing Committee on Unauthorized Practice of the Law, Report, 88 A.B.A. Rep. 589

In the instant case, the majority's brief opinion does not clarify the criteria to be used in determining the legality of an unlicensed attorney's activities within New York State. The court did not consider whether the question of statutory violation required an inquiry into the nature of plaintiff's services. The specific violations of appearing in court or maintaining an office in the state[12] were not committed. In reaching its decision, the majority emphasized that the plaintiff did not hold himself out as entitled to practice law in New York and, therefore, did not infringe upon the legislative purpose of protecting the public against representation by those who are not subject to the regulatory provisions governing New York practitioners.[13] The court's remaining concern was whether two weeks of advisory and consultative conduct demonstrated a continuous course of conduct or a single act.[14] The majority called this "a solitary incident."[15] Presumably, the court relied upon the fact that only one

(1963); Committee on Unlawful Practice of the Law, Report, 86 N.Y.S.B.A. Rep. 181 (1963), 83 N.Y.S.B.A. Rep. 161 (1960), 62 N.Y.S.B.A. Rep. 140 (1939).

The New Jersey courts feel that it is not necessary that a person pursue a course of conduct over a period of time in order to be engaged in the practice of law. In the Matter of Baker, 8 N.J. 321, 338, 85 A.2d 505, 513 (1951). N.J. Rev. Stat. § 2A:170-80 (1951) specifically includes the drafting of wills and deeds of conveyance in "practice."

10. N.J. Rev. Stat. § 2A:170-78 (1951).

11. "'It might as well be said that a surgeon who performs, without fee or reward, a tonsillectomy or appendectomy is not practicing surgery.'" In the Matter of Baker, 8 N.J. 321, 339, 85 A.2d 505, 514 (1951) (quoting from State ex rel. Wright v. Barlow, 131 Neb. 294, 297, 268 N.W. 95, 96 (1936)). However, in Clark v. Rearden, 231 Mo. App. 666, 669-70, 104 S.W.2d 407, 409 (1937) (per curiam), it was noted that charging a fee may be an important factor in some cases in determining whether specified conduct constitutes the practice of law. See generally Note, 33 U. Det. L.J. 335 (1956).

12. N.Y. Pen. Law § 270. See note 3 supra.

13. "Protection of the members of the lay public of our State, when they seek legal advice . . . is the basis of the requirements of licensing of attorneys by the State . . . ." Roel v. New York County Lawyers Ass'n, 3 N.Y.2d 224, 231, 144 N.E.2d 24, 28, 165 N.Y.S.2d 31, 37 (1957), appeal dismissed per curiam, 355 U.S. 604 (1958). (Emphasis omitted.) The legislative purpose was "not to protect the bar . . . but to protect the public." People v. Alfani, 227 N.Y. 334, 339, 125 N.E. 671, 673 (1919). "The clear and only permissible intent of the Legislature was to protect the general public from exploitation at the hands of unscrupulous or unskilled persons posing as lawyers, or unauthorized persons demanding or receiving compensation for purely legal service. The protection of the legal profession could not have been attempted . . . ." People v. Black, 156 Misc. 516, 518, 282 N.Y. Supp. 197, 200 (Otsego County Ct. 1935). See Committee on Unlawful Practice of the Law, Report, 84 N.Y.S.B.A. Rep. 193, 194-95 (1960); New York County Lawyers Ass'n v. Bercu, 273 App. Div. 524, 538, 78 N.Y.S.2d 209, 221 (1st Dep't 1948), aff'd mem. 299 N.Y. 728, 87 N.E.2d 451 (1949); New York County Lawyers' Ass'n v. Standard Tax & Management Corp., 181 Misc. 632, 634-35, 43 N.Y.S.2d 479, 481 (Sup. Ct. 1943); Committee on Unlawful Practice of the Law, Report, 87 N.Y.S.B.A. Rep. 148, 149-50 (1964).

14. New York decisions indicate that this choice may be a significant basis upon which permissible or forbidden conduct can depend. See cases cited notes 8 & 9 supra and accompanying text.

15. 21 App. Div. 2d at 350, 250 N.Y.S.2d at 668. The work for which plaintiff sued con-

client and one case were involved here. However, a single litigation or course of advice to one client may endure for a protracted length of time; therefore a court might well consider additional factors such as the purpose, nature, and duration of the services. While observing the distinction between an isolated act and continuous conduct,[16] the majority failed to discuss the conditions under which conduct becomes continuous rather than remains solitary. This omission is particularly unfortunate because the duration of plaintiff's activities was considerably longer than that sanctioned in any previous case.[17] Since the issue of duration was not discussed, the court did not indicate whether it considered two weeks of meetings an extension of former findings, or the limit of a solitary occurrence. Rather, the court appeared to feel that proscription of this activity would lead to impracticable restrictions in today's business world. The majority recognized the present day custom and practical necessity for lawyers to accompany clients on interstate travels,[18] but conceded that "it is true that in any such situation where the acts tend to become regular, a question of degree can arise as to whether this constitutes practice."[19]

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sisted of meetings over a two week period, which covered the jurisdictional problems of certain Connecticut litigation, the advisability of dismissing that action and instituting a new one in New York, property settlements, the terms of proposed drafts of separation agreements, the custody of an infant son, and plaintiff's opinion as to the suitability of defendant's New York counsel, with the recommendation that she retain a certain New York attorney.

16. "The literal interpretation which attributes to a single act, not attended by misleading the client, the same consequences as a continuing course of conduct, is virtually self-defeating." Ibid.

17. People v. Goldsmith, 249 N.Y. 586, 164 N.E. 593, reversing mem. 224 App. Div. 707, 229 N.Y. Supp. 896 (1st Dep't 1928) (memorandum decision) (allowed drafting of a will); People v. Weil, 237 App. Div. 118, 260 N.Y. Supp. 658 (1st Dep't 1932) (allowed drafting of a bill of sale and chattel mortgage). See cases cited note 9 supra and accompanying text.

Previous findings of prohibited "continuous" conduct have involved periods longer than two weeks. Roel v. New York County Lawyers Ass'n, 3 N.Y.2d 224, 144 N.E.2d 24, 165 N.Y.S.2d 31 (1957), appeal dismissed per curiam, 355 U.S. 604 (1958) (maintaining New York offices and advising the public "for a considerable period of time"); Dawkins v. New York County Lawyers Ass'n, 289 N.Y. 553, 43 N.E.2d 530 (1942) (memorandum decision) (representing clients before formal boards "for about six years"); People v. Alfani, 227 N.Y. 334, 125 N.E. 671 (1919) (performing legal services from real estate office "for a long period of time"); New York County Lawyers Ass'n v. Wenger, 186 Misc. 966, 61 N.Y.S.2d 686 (Sup. Ct. 1946) (handling dispossess proceedings "for many years"). See New York County Lawyers Ass'n v. Bercu, 273 App. Div. 524, 78 N.Y.S.2d 209 (1st Dep't 1948), aff'd mem. 299 N.Y. 728, 87 N.E.2d 451 (1949) ("often" advising clients on tax law). An analysis of these New York decisions indicates that the middle-ground on the issue of duration of legal activities is not well defined.

18. "[S]carcely a transaction of any magnitude with citizens of other States is closed without the legal advice here of lawyers who accompany them to give the advice. There can scarcely be a question that in so doing they are practising their profession, and if so, they are perhaps . . . violating the penal provisions of the present law." Committee on Law Reform, Report, 43 N.Y.S.B.A. Rep. 215, 242 (1920).

19. 21 App. Div. 2d at 350, 250 N.Y.S.2d at 668. The problem of degree also arises in

The dissenting opinion maintained that the plaintiff's services constituted a clear violation of section 270.[20] Both opinions acknowledged that "legal services" had been rendered.[21] The dissent noted particularly that the plaintiff admittedly came to New York solely to advise the defendant and that the legal services that plaintiff himself described[22] continued for a period of "about two weeks."[23] This opinion also pointed out that plaintiff's conduct did not

connection with occupations so closely related to the legal profession that the area encompassing their overlap has been termed the "twilight zone." Hillside Housing Corp. v. Eisenberger, 173 Misc. 75, 79, 16 N.Y.S.2d 142, 146 (Munic. Ct. N.Y. 1939). See Blumenberg v. Neubecker, 12 N.Y.2d 456, 191 N.E.2d 269, 240 N.Y.S.2d 730 (1963); New York County Lawyers Ass'n v. Bercu, 273 App. Div. 524, 78 N.Y.S.2d 209 (1st Dep't 1948), aff'd mem. 299 N.Y. 728, 87 N.E.2d 451 (1949) (accounting); New York County Lawyers' Ass'n v. Cool, 294 N.Y. 853, 62 N.E.2d 398 (1945) (memorandum decision) (labor relations); Bennett v. Goldsmith, 280 N.Y. 529, 19 N.E.2d 927 (1939) (memorandum decision) (immigration matters). For extensive discussions of the problem of overlapping professions, see Principles Applicable to Legal and Accounting Practice in the Field of Taxation, N.Y. Judiciary Law app. 348 (1964); Committee on Unlawful Practice of the Law, Report, 79 N.Y.S.B.A. Rep. 212 (1956); Griswold, Lawyers, Accountants, and Taxes, 10 Record of N.Y.C.B.A. 52 (1955); Wilner, The Practice of Lawyers and Accountants in the Field of Taxation, 14 Record of N.Y.C.B.A. 456 (1959); Comment, 2 S.D.L. Rev. 104, 112-25 (1957); Note, 9 Syracuse L. Rev. 275 (1958); Comment, 36 U. Det. L.J. 464 (1959).

20. "Whenever a person gives advice as to the law, whether the 'New York law, Federal law, the law of a sister State, or the law of a foreign country, he is giving legal advice.' . . . The giving of the legal advice constitutes the practice of law." 21 App. Div. 2d at 351, 250 N.Y.S.2d at 669 (dissenting opinion) (quoting from Roel v. New York County Lawyers Ass'n, 3 N.Y.2d 224, 229, 144 N.E.2d 24, 26, 165 N.Y.S.2d 31, 35 (1957)).

21. "We have no doubt that the services performed were legal services." 21 App. Div. 2d at 349, 250 N.Y.S.2d at 667. See People ex rel. Holzman v. Purdy, 162 N.Y. Supp. 65 (Sup. Ct. 1916). "The plaintiff, in advising the defendant . . . was drawing upon his training and experience as a lawyer, and the defendant intended to and was securing the benefit of such training and experience. . . . The plaintiff's own testimony as to the basis for his valuation of his services at $750 a day establishes undisputably that they were lawyer's services." 21 App. Div. 2d at 351, 250 N.Y.S.2d at 669 (dissenting opinion). "Where the rendering of services for another involves the use of legal knowledge or skill on his behalf—where legal advice is required and is availed of or rendered in connection with such services—these services necessarily constitute or include the practice of law." Committee on Unlawful Practice of the Law, Report, 84 N.Y.S.B.A. Rep. 193, 196 (1961).

22. The plaintiff's usual per diem fee was $475 to $525; he requested $750 a day based on the following: "'[M]y standing in the community where I practice * * * my experience at the Bar. * * * the complexities of the litigation itself, where here we were concerned with Connecticut and New York. * * * the very strength of the opposition we've had in this case . . . . The very nature and the importance of the subject matter * * * The importance of the parties involved. The skill which it was necessary for me both to have and the skill to employ. There is only one element that is missing * * * that is the result obtained, and had I been permitted to continue I think we would have had a favorable result.'" 21 App. Div. 2d at 351, 250 N.Y.S.2d at 669 (dissenting opinion).

23. Id. at 352, 250 N.Y.S.2d at 670 (dissenting opinion). Since plaintiff was awarded payment on a daily basis for fourteen days, the conferences were spread over at least two weeks.

consist of "furnishing advice which was merely incidental to plaintiff's practice of law in California."[24] If plaintiff had rendered advice to defendant in New York based on California law and pertaining to some matter in California with which defendant had contact, the court might well have held that such service was a mere incident to plaintiff's California practice.[25]

The dissent's view of plaintiff's disability to give advice on New York law can be compared with the recognized procedure for giving advice on the law of a foreign jurisdiction. A foreign attorney is allowed to directly advise only a New York attorney.[26] Therefore, a New York citizen who has regular conferences in New York concerning affairs in another jurisdiction must retain a New York attorney,[27] notwithstanding that the advice of the non-admitted attorney would be based entirely on the laws of a sister state or foreign country.[28] In the pioneer case of *Roel v. New York County Lawyers Ass'n*,[29] Judge Van Voorhis, seeking to modify the injunction of the court, criticized this system for acquiring foreign advice from intermediaries:

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24. Ibid.

25. In Appell v. Reiner, 81 N.J. Super. 229, 238, 195 A.2d 310, 315 (Ch. 1963), where a New York attorney indulged in unauthorized practice in New Jersey, the court felt that in any factual determination of unlawful practice, the following factors should be considered: Whether the services and advice were rendered in the forum state, were based on the laws of that state, related to property or subject matter within the state, and whether that state's courts would be the forum for litigation. However, the court commented: "I do not intend to imply that if a foreign attorney, actively engaged in the practice of law in his state, is employed by a resident of New Jersey for a specific case or for general advice relating to services to be rendered within the jurisdiction of the foreign state, he will be denied a recovery in this State for the value of his services, even though he may, as incidental to his employment, find it necessary to occasionally come to this State for the better performance of his duty." Id. at 240, 195 A.2d at 317 (dictum).

26. New York County Lawyers Ass'n v. Anonymous, 207 Misc. 698, 699, 139 N.Y.S.2d 714, 716 (Sup. Ct. 1955); Reisler, The Roel Case—A Landmark Decision on Unlawful Practice, 29 Bull. N.Y.S.B.A. 369, 372 (1957); 3 N.Y.L.F. 440, 442 (1957); Comment, 31 So. Cal. L. Rev. 416, 421-22 (1958).

27. Roel v. New York County Lawyers Ass'n, 3 N.Y.2d 224, 229, 144 N.E.2d 24, 26, 165 N.Y.S.2d 31, 35 (1957), appeal dismissed per curiam, 355 U.S. 604 (1958). "[A] foreign lawyer cannot give advice on foreign law directly to the public but may do so indirectly through a New York lawyer." 3 N.Y.L.F. 440, 441 (1957). See Letter From Thomas J. Boodell in Reply to Inquiry to the American Bar Association, in 22 Unauthorized Practice News 39, 41 (March 1956) (partial text); Note, 9 Syracuse L. Rev. 275, 278 (1958).

28. See note 20 supra.

29. 3 N.Y.2d 224, 144 N.E.2d 24, 165 N.Y.S.2d 31 (1957), appeal dismissed per curiam, 355 U.S. 604 (1958). See note 8 supra. For a full discussion of this case see Reisler, The Roel Case—A Landmark Decision on Unlawful Practice, 29 Bull. N.Y.S.B.A. 369 (1957); Comment, 31 So. Cal. L. Rev. 416 (1958); Note, 9 Syracuse L. Rev. 275 (1958); 3 N.Y.L.F. 440 (1957); 36 Texas L. Rev. 356 (1958). For discussions of the supreme court decision (New York County Lawyers Ass'n v. Roel, 4 Misc. 2d 728, 156 N.Y.S.2d 651 (Sup. Ct. 1956)), see Committee on Unlawful Practice of the Law, Report, 80 N.Y.S.B.A. Rep. 205, 206-07 (1957); 70 Harv. L. Rev. 1112 (1957).

It is said that such [foreign] practitioners may give advice here regarding foreign law provided that they are employed to do so in conjunction with some lawyer who is admitted to practice in this State, but . . . . it would be quite as much practicing law to advise a New York State lawyer as it would be to advise a layman, at least, unless the New York lawyer assumed responsibility for the correctness of the advice and did not act as a conduit to transmit the foreign lawyer's advice to the client. In the latter event, the New York lawyer would be merely a 'stand in', and, if the theory of petitioner [Roel] be sound, would be unethically splitting fees with persons engaging in illegal practice of the law. All that would be accomplished by that would be to obtain remuneration for a New York lawyer for the rendition of no service which he was qualified to perform, which would tend to justify the charge that the motive of such restrictions is 'feather bedding' rather than the protection or advantage of the public.[30]

Further, this opinion argued that an unlicensed attorney should not be restrained from advising a New York client, who had some contact with the jurisdiction in which the foreign attorney was admitted, when the advice pertained exclusively to that foreign jurisdiction.[31] However, while the court

30. 3 N.Y.2d at 235-36, 144 N.E.2d at 30-31, 165 N.Y.S.2d at 40-41 (dissenting opinion). "It should be noted that nowhere in the petition or in the opinions is there any restriction, proposed or adopted, upon a foreign lawyer acting as a consultant to duly admitted members of the Bar on matters of foreign law concerning the latter's clients. Thus [by the Roel decision], public convenience is in no matter denied while public protection is served." Reisler, supra note 29, at 372.

31. The Roel dissent agreed with the majority that an unlicensed attorney should be restrained from rendering legal services within New York, but only as to their effect upon New York citizens having no contact with Mexico. The dissent felt that the following, having no impact upon the New York public, should not constitute a violation of § 270: A Mexican lawyer advising a Mexican resident visiting in New York concerning business or litigation pending in Mexico; preparing a Mexican will; advising a Mexican national residing in New York how to obtain restitution of Mexican property seized by his government; advising a New York resident as to the preparation and execution of a power of attorney in Spanish to effect the sale of real estate in Mexico; or advising a New York resident how to establish rights of inheritance under Mexican law. 3 N.Y.2d at 233-34, 144 N.E.2d at 29-30, 165 N.Y.S.2d at 39 (dissenting opinion).

It appears that the points raised by Judge Van Voorhis are reasonable providing the unlicensed attorney has been properly admitted to practice in the jurisdiction about which he is giving advice. However, the legislature has not yet conceded these points. 3 N.Y.L.F. 440, 442 (1957). For a discussion of the problem and recommendations for the passage of applicable legislation, see Committee on Law Reform, Report, 43 N.Y.S.B.A. Rep. 215, 239-45 (1920). Proposals were organized and drafted into amendment form in Special Committee on the Practice of Law, Report, 1924-1925 N.Y.C.B.A. Rep. 322, 336-38, 1925 N.Y.C.B.A. Rep. 405, 411-12. No action was taken, but discussion of the need for legislative amendment was revived in Committee on Unlawful Practice of the Law, Report, 1936 N.Y.C.B.A. Rep. 245, 248-50; Committee on Unlawful Practice of the Law, Report, 1942 N.Y.C.B.A. Rep. 279, 280-81; Committee on Unlawful Practice of the Law, Interim Report, 2 Record of N.Y.C.B.A. 135, 136 (1947). In 1955 a bill, drafted in accordance with the maintaining of the standards of excellence now required of admitted attorneys as to conduct and disciplinary regulation, was proposed but not reported out of committee. Sen. Introd.

of appeals in *Roel* convicted a foreign attorney who advised New York clients on Mexican law,[32] the appellate division allowed recovery here to a California attorney who based his advice on *New York law* and who was, in fact, supervising the groundwork for a potential New York litigation. From this point of view the cases are difficult to reconcile. Notwithstanding plaintiff's warning that he was not entitled to practice in New York, a mere statement of disability should not act to insulate improper conduct from judicial restraint.

Although the courts have censured the single drafting of a legal instrument, even in the absence of pronounced misrepresentation,[33] the present court allowed recovery for what seemed a certain violation—fourteen days of legal advice and consultation. Possible reconciliation lies in the distinction between a layman and an unlicensed attorney. Prior New York decisions indicate that the plaintiff would have been denied recovery if he had performed these same acts as a layman.[34] The question then arises whether the New York courts should hold the layman and the unlicensed attorney to different standards of conduct constituting practice.[35] While the present court would not allow a layman or an unlicensed attorney to practice in New York, the *Spivak* decision may portend a tendency toward relaxation of the restraint on legal activities within the state, when performed by an out-of-state attorney.[36]

No. 880, Pr. No. 907, Ass. Introd. No. 840, Pr. No. 843, N.Y. State Leg. 178th Sess. (1955); 1 N.Y.L.F. 376, 377 (1955). See generally Roel v. New York County Lawyers Ass'n, 3 N.Y.2d at 230-31, 144 N.E.2d at 27-28, 165 N.Y.S.2d at 36; Note, 9 Syracuse L. Rev. 275, 279-81 (1958); 3 N.Y.L.F. 440, 442 (1957). After the court of appeals' decision in Roel, a thorough statement of the problem and further recommendation for legislative action appeared in Comment, 31 So. Cal. L. Rev. 416 (1958).

32. But see note 25 supra.

33. New York County Lawyers Ass'n v. Epter, 178 Misc. 907, 36 N.Y.S.2d 952 (Sup. Ct. 1942); 1933 N.Y. Att'y Gen. Ann. Rep. 290, 291; see note 9 supra.

34. See cases cited note 8 supra. Indeed, in such a situation, it appears that the nature of plaintiff's services would have been examined extensively in the manner of People v. Alfani, 227 N.Y. 334, 125 N.E. 671 (1919), and New York County Lawyers Ass'n v. Bercu, 273 App. Div. 524, 78 N.Y.S.2d 209 (1st Dep't 1948), aff'd mem. 299 N.Y. 728, 87 N.E.2d 451 (1949), and in the light of the restrictive influence of the various bar associations (see note 9 supra).

35. The foreign lawyer is analogous to accountants or real estate men who attain proficiency in their occupations and become learned in the laws relating to their specific fields. The specialized areas in which these laymen are competent does not entitle them to give legal advice. In like manner the foreign lawyer "is a specialist in a particular field of the law, but is nevertheless a layman in this State when he is not a member of the Bar here." Roel v. New York County Lawyers Ass'n, 3 N.Y.2d 224, 231, 144 N.E.2d 24, 28, 165 N.Y.S.2d 31, 37 (1957), appeal dismissed per curiam, 355 U.S. 604 (1958). An unlicensed attorney is "deemed to be a layman in this State and not authorized to give legal advice or render legal services to persons in this State." New York County Lawyers Ass'n v. Anonymous, 207 Misc. 698, 699, 139 N.Y.S.2d 714, 716 (Sup. Ct. 1955). See Appell v. Reiner, 81 N.J. Super. 229, 239, 195 A.2d 310, 316 (Ch. 1963); 1 N.Y.L.F. 376, 377 (1955).

36. However, the dissenting opinion said that "recovery here is particularly an induce-

The New York courts have prohibited foreign attorneys from advising New York residents on either foreign or New York law.[37] The legislature itself has considered the problem of allowing direct, competent foreign advice for New York clients.[38] The responsibility has fallen to the judiciary to observe the boundary between permissible and forbidden "practice" by non-admitted attorneys concerning advice and services based on New York law. Continuing litigation is inevitable, since the judiciary, in exercising its interpretive function, must periodically revise the desired boundary of "practice" to comply with the advancing needs and demands of modern business.[39] However, without probing and conclusive analysis of the facts presented, the summary dismissal of a relatively lengthy series of conferences, such as occurred in the instant case, as "a solitary incident" does not lead to a more precise guide to the conduct permitted of out-of-state attorneys. It merely indicates a possible trend toward greater leniency.[40]

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ment for attorneys from neighboring States to come into our State and practice law without seeking admission here and thus being subjected to the regulatory powers our courts possess with respect to attorneys admitted to practice in the State." 21 App. Div. 2d at 352, 250 N.Y.S.2d at 670 (dissenting opinion). Further, it should be noted that the dissent's remarks, pertaining to New York advice by an out-of-state practitioner, are of significant import since the court of appeals in Roel, on distinguishable facts, prohibited foreign advice by a foreign practitioner.

37. Roel v. New York County Lawyers Ass'n, 3 N.Y.2d 224, 144 N.E.2d 24, 165 N.Y.S.2d 31 (1957), appeal dismissed per curiam, 355 U.S. 604 (1958); Fein v. Ellenbogen, 84 N.Y.S.2d 787 (Sup. Ct. 1948) (per curiam); People v. Collins, 271 App. Div. 511, 67 N.Y.S.2d 53 (1st Dep't 1946); New York County Lawyers Ass'n v. Anonymous, 207 Misc. 698, 139 N.Y.S.2d 714 (Sup. Ct. 1955).

38. Sen. Introd. No. 880, Pr. No. 907, Ass. Introd. No. 840, Pr. No. 843, N.Y. State Leg. 178th Sess. (1955). See note 31 supra.

39. See Grand Rapids Bar Ass'n v. Denkema, 290 Mich. 56, 64, 287 N.W. 377, 380 (1939); see note 3 supra.

40. Illustrative of such a trend is Spanos v. Skouras Theatres Corp., 235 F. Supp. 1 (S.D.N.Y. 1964), which allowed a California attorney $150,000 for legal services rendered in New York over a period of years for aid in preparation of antitrust litigation. The defense had asserted that plaintiff violated § 270. The court admitted that the question was a close one and, in citing Spivak v. Sachs, interpreted "continuing course of conduct" as referring to the varied clients and diffuse matters occurring in the ordinary course of an attorney's practice. The court implied that a different result might have prevailed if plaintiff had been a layman, or if he were seeking recovery for services directly given to defendant's affiliates. As in Spivak, no discussion was made of the relevance of the work consisting of legal services, or of the jurisdiction the work was based upon, or of the duration of the services. Thus, the lenient attitude of Spivak was followed, but the criteria marking the boundary of practice by out-of-state attorneys in New York State go yet undefined.

Conflict of Laws—Public Policy—Claim Arising From Foreign Gambling Contract Held Enforceable in New York.—Defendant, a New York resident, incurred gambling debts at plaintiff's government-licensed gambling casino in Puerto Rico. Defendant gave plaintiff a check and thirteen "I.O.U.'s" amounting to 12,000 dollars. In an action to recover this sum, defendant asserted that enforcement of the debt would violate the public policy of New York. The court of appeals, reversing the appellate division[1] and affirming the decision of the trial court (which sat without a jury),[2] held that the contract, valid and enforceable under the law of Puerto Rico, did not so offend the public policy of New York as to be denied enforcement in its courts. *Intercontinental Hotels Corp. v. Golden*, 15 N.Y.2d 9, 203 N.E.2d 210, 254 N.Y.S.2d 527 (1964).

Both the majority and the dissent in the instant case were in agreement that the law to be applied, were it not for the issue of public policy, was that of Puerto Rico.[3] This is in accord with the decision of the court of appeals in *Auten v. Auten*[4] where it was held that the law of the state with the most "significant contacts" should be applied in contract actions.[5] In *Haag v. Barnes*,[6] the court, upholding this rule, noted that an exception would exist in a case representing a grave affront to our public policy.[7] This, in effect, was the sole determination to be made in the instant case: Did the contract in question so offend the public policy of New York that the court should have been compelled to deny it enforcement?[8]

1. Intercontinental Hotels Corp. v. Golden, 18 App. Div. 2d 45, 238 N.Y.S.2d 33 (1st Dep't 1963).

2. 36 Misc. 2d 786, 233 N.Y.S.2d 96 (Sup. Ct. 1962).

3. 15 N.Y.2d at 13, 18, 203 N.E.2d at 212, 215, 254 N.Y.S.2d at 529, 533.

4. 308 N.Y. 155, 124 N.E.2d 99 (1954).

5. The court, in offering an alternative means to arriving at the same decision, stated: "[E]ven if we were not to place our emphasis on the law of the place with the most significant contacts, but were instead simply to apply the rule that matters of performance and breach are governed by the law of the place of performance, the same result would follow. . . . True, the husband's payments were to be made to a New York trustee for forwarding to plaintiff in England, but that is of no consequence in this case." Id. at 163, 124 N.E.2d at 103.

6. 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65 (1961).

7. "[T]he issue is not whether the New York statute reflects a different public policy from that of the Illinois statute, but rather whether the enforcement of the particular agreement before us under Illinois law represents an affront to our public policy." Id. at 560, 175 N.E.2d at 444, 216 N.Y.S.2d at 69. (Emphasis omitted.)

8. By applying the "significant contacts" test, the court, in the instant case, did not need to concern itself with the place of the execution of the instruments in payment of the debt. However, the check in question was executed in Puerto Rico, and would not, therefore, present a conflict of laws problem. Swift & Co. v. Bankers Trust Co., 280 N.Y. 135, 19 N.E.2d 992 (1939), held that the validity of a check is "fixed at the inception of the instrument and by the law of the place where the instrument has inception." Id. at 145, 19 N.E.2d at 997. The "I.O.U.'s" given have not yet, however, been paid. Whether the defendant executes a check in New York or in Puerto Rico in payment of that portion of the debt evidenced by these writings will be of little consequence in view of the "significant contacts"

The public policy of New York is to be found in its constitution, its statutes and its judicial decisions.[9] However, as noted by the instant court, a mere reference to the laws will not exhaust the bases of public policy. "Strong public policy is found in prevailing social and moral attitudes of the community."[10] The Constitution of New York prohibits gambling of the type engaged in by the plaintiff.[11] The New York Penal Law renders contracts such as the one in question void and unenforceable.[12] Nevertheless, New York has, on previous occasions, enforced obligations arising from contracts which would not have been valid had they been products of intrastate transactions.

In *Thatcher v. Morris*,[13] the plaintiff sued to recover money won in a lottery which validly took place in Maryland, although lotteries were illegal in New York. Speaking of the New York statute the court noted: "It is as if an exception had been engrafted upon the statute which prohibits all dealing in regard to lottery tickets, excluding from its operation all contracts made without the state . . . ."[14] In *Harris v. White*,[15] the court held that a suit by a jockey for wages earned without the state would not be barred by any public policy of this state. In the *Matter of Estate of May*,[16] the court held valid a marriage between an uncle and niece, void as incestuous according to the laws of New York, but valid under the laws of Rhode Island, the *locus contractus*. More recently, a lower court resolved a controversy almost identical to that presented in the instant case by stating: "[S]ections 991, 992 and 993 of the New York Penal Law do not invalidate the check even if given in payment of a gambling debt, since the complaint alleges that such a contract is enforceable in Cuba, where the check [drawn on a New York bank] was issued."[17]

As the majority noted, the "sophisticated season" in which we live reflects a change in the mores of the community.[18] Not only have lotteries and bingo games been legalized, but there is also a strong movement afoot to legalize off-

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test and the holding of the instant case itself. See N.Y.U.C.C. § 3-802(1)(b) which provides in part: "If the instrument is dishonored action may be maintained on either the instrument or the obligation . . . ."

9. People v. Hawkins, 157 N.Y. 1, 12, 51 N.E. 257, 260 (1898).

10. 15 N.Y.2d at 14, 203 N.E.2d at 212-13, 254 N.Y.S.2d at 530.

11. N.Y. Const. art. I, § 9 authorizes pari-mutuel betting on horse races, bingo and lotto games only.

12. N.Y. Pen. Law § 993 provides in part: "All things in action . . . and every other security whatsoever, given or executed, by any person, where the whole or any part of the consideration of the same shall be for any money or other valuable thing won by playing at any game whatsoever . . . shall be utterly void . . . ."

13. 11 N.Y. 437 (1854).

14. Id. at 439. See also Ormes v. Dauchy, 82 N.Y. 443 (1880).

15. 81 N.Y. 532, 544 (1880) (alternative holding).

16. 305 N.Y. 486, 114 N.E.2d 4 (1953).

17. Tropicales, S.A. v. Milora, 7 Misc. 2d 281, 282, 156 N.Y.S.2d 942, 943 (Sup. Ct. 1956). See also Tropicales, S.A. v. Drinkhouse, 15 Misc. 2d 425, 183 N.Y.S.2d 679 (Sup. Ct. 1959).

18. 15 N.Y.2d at 14, 203 N.E.2d at 213, 254 N.Y.S.2d at 530.

track betting.[19] Thus, the public policy of New York respecting gambling is not as inflexibly negative as the dissent seems to imply. In addition, the dissent incorrectly noted that while constitutional amendments were adopted by the people of New York legalizing bingo games and pari-mutuel betting, they did so with a clear recognition of the difference between these "forms of gambling and the operation of gambling houses."[20] Quite to the contrary, a report by the New York State Commission of Investigations stated:

> To understand legalized bingo and the problems which arose in its operation and control, this game must be recognized for what it is. . . . [A]s the playing public on the whole regarded it, legalized bingo was not charitable or civic fund raising. It was gambling—big gambling . . . .[21]

In further support of its holding, the majority alluded to the principle that "foreign rights" should be denied enforcement only when such enforcement would sanction transactions which are "inherently vicious, wicked or immoral, and shocking to the prevailing moral sense."[22] This principle was voiced in even stronger language in *Loucks v. Standard Oil Co.*,[23] when the court stated:

> The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.[24]

In dictum, the court stated that "the fundamental public policy is perceived to be that rights lawfully vested shall be everywhere maintained."[25] This principle of enforcing foreign rights has been strongly advocated by many authorities.[26] Of course, in deciding whether to enforce the foreign right, weight should be given to the effect of enforcement upon the forum,[27] and the nature of the contract.[28]

19. See Report, Mayor's Citizens Committee on Off-Track Betting 10 (Final Report 1959): "It was evident to the Committee that the most widely held belief is that gambling, in moderation, is not morally wrong."

20. 15 N.Y.2d at 19, 203 N.E.2d at 215, 254 N.Y.S.2d at 534 (dissenting opinion).

21. Report, N.Y. State Commission of Investigation, An Investigation of Bingo in New York State 12 (1961).

22. 15 N.Y.2d at 13, 203 N.E.2d at 217, 254 N.Y.S.2d 529.

23. 224 N.Y. 99, 120 N.E. 198 (1918).

24. Id. at 111, 120 N.E. at 202.

25. Id. at 113, 120 N.E. at 202 (dictum).

26. E.g., Goodrich, Conflict of Laws 305-08 (3d ed. 1949); Beach, Uniform Interstate Enforcement of Vested Rights, 27 Yale L.J. 656 (1918); Nussbaum, Public Policy and the Political Crisis in the Conflict of Laws, 49 Yale L.J. 1027 (1940).

27. Lorenzen, Territoriality, Public Policy and the Conflict of Laws, 33 Yale L.J. 736, 748 (1924); Nussbaum, supra note 26, at 1030. Beach, supra note 26, at 662, supports the doctrine of enforcing all rights vested in a foreign state, the basis for which doctrine is that, among the several United States, cases cannot arise where a vested right will be so offensive to the public policy of the forum as to justify a denial of enforcement, because the differences among the states "relate to the minor morals of expediency, and to debatable questions of internal policy."

These two public policies, that which regards the transaction as illegal or void or repugnant to the forum and that which advocates the enforcement of foreign rights, must be weighed in situations such as that presented by the instant case. The stronger the particular public policy in question and the more repugnant the contract in question, the more necessary will it be to deny it enforcement.

The public policy of New York with respect to gambling is statutorily strong. However, its extraterritorial efficacy has been, to a large extent, emasculated by the judiciary. The New York gambling cases relied upon by the dissent clearly establish the public policies asserted. Their applicability to the facts of the instant case is, nevertheless, highly questionable since these cases all involved actions and transactions which were entirely intrastate.[29] Other states, when faced with the problem herein presented, have not been consistent in their holdings. Some states have denied enforcement of the contract;[30] some have granted enforcement;[31] while a few states, like New York, have inconsistencies among their own decisions.[32]

The prohibitions in the New York Constitution were adopted to protect "the family man of meager resources from his own imprudence at the gaming tables."[33] The debt in the instant case was not only validly incurred, but incurred in a gambling casino licensed and therefore, to some degree, regulated by the Government of Puerto Rico. In addition, a provision in the statutes of Puerto Rico gave the court the discretion to reduce the amount of any debt "which may exceed the customs of a good" family man.[34] Therefore, two possible

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28. Katzenbach, Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law, 65 Yale L.J. 1087, 1127 (1956).

29. Hofferman v. Simmons, 290 N.Y. 449, 49 N.E.2d 523 (1943) (gambling monies seized in New York City); People v. Bright, 203 N.Y. 73, 96 N.E. 362 (1911) (gambling in Albany); People v. Stedeker, 175 N.Y. 57, 67 N.E. 132 (1903) (keeping a room in New York City for recording bets on horse races). People v. Goldstein, 295 N.Y. 61, 65 N.E.2d 169 (1946); Bamman v. Erickson, 288 N.Y. 133, 41 N.E.2d 920 (1942); Watts v. Malatesta, 262 N.Y. 80, 186 N.E. 210 (1933), all concerning wagers in New York City upon horse races.

30. Ciampittiello v. Campitello, 134 Conn. 51, 54 A.2d 669 (1947); Thomas v. First Nat'l Bank, 213 Ill. 261, 72 N.E. 801 (1904).

31. Sondheim v. Gilbert, 117 Ind. 71, 18 N.E. 687 (1888); Sullivan v. German Nat'l Bank, 18 Colo. App. 99, 70 Pac. 162 (1902); Gordon v. Andrews, 222 Mo. App. 609, 2 S.W.2d 809 (1927).

32. Compare Benton & Brother v. Singleton, 114 Ga. 548, 40 S.E. 811 (1901), with Champion v. Wilson & Co., 64 Ga. 184 (1879). Compare Richter v. Empire Trust Co., 20 F. Supp. 289 (S.D.N.Y. 1937), with Nielsen v. Donnelly, 110 Misc. 266, 181 N.Y. Supp. 509 (Munic. Ct. N.Y. 1920). The court, in Thuna v. Wolf, 130 Misc. 306, 223 N.Y. Supp. 765 (N.Y. City Ct. 1927), specifically rejected the Nielsen holding and enforced the gambling contract.)

33. Intercontinental Hotels Corp. v. Golden, 15 N.Y.2d at 15, 203 N.E.2d at 213, 254 N.Y.S.2d at 531.

34. P.R. Laws Ann. tit. 31, § 4774 (1955): "A person who loses in a game or a bet which is not prohibited is civilly liable.

"Nevertheless, the judicial authority may either not admit the claim when the sum which

bases for the application of New York law—namely, the chance of an *exorbitant recovery* by a *corrupt gambling house*—have been minimized. Indeed, these two factors seem to be the guidelines of the majority opinion.

The position of the dissent is an indulgence in "legi-centrism"[35] which would distort the very public policy it purports to preserve. By refusing to enforce plaintiff's rights,[36] the court would be sanctioning the actions of New York residents who enter a foreign jurisdiction to gamble "legally"—a jurisdiction in which they could maintain an action to recover their winnings[37]—and then return as "welshers," protected by our courts. This would offer New Yorkers a greater incentive to gamble, albeit on credit, thus encouraging an activity which our laws seek to curtail.

The holding of the majority is conditioned on three factors: (1) the claim was enforceable in Puerto Rico; (2) the gambling house was government licensed; and (3) the laws of Puerto Rico give the court the discretionary power to reduce the amount of recovery. The first two factors seem prerequisites for enforcement of a gambling debt by a New York court.[38] Respecting the third factor, the instant court noted that this discretionary power "would be properly considered in any case before a New York court which may be asked to enforce a Puerto Rican gambling debt."[39] It is not clear what position the court would take if the debt arose in a jurisdiction in which an action could be maintained and where the gambling house was licensed but where the court was not given this discretionary power. The more consistent approach would be to first examine the reasonableness of the claim; if the amount does not prove to be exorbitant, the court should enforce it. If the amount does prove to be "unreasonable" the court

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was wagered in the game or bet is excessive, or may reduce the obligation to the amount it may exceed the customs of a good father of a family."

35. This is the belief that the forum law is superior to any conflicting foreign law. Paulsen & Sovern, "Public Policy" in the Conflict of Laws, 56 Colum. L. Rev. 969, 981 (1956) states: "The common invocation of the public policy argument to defeat a foreign claim is a denial that foreign law should govern at all and an assertion of the forum's right to have its law applied to the transaction because of the forum's relationship to it."

36. The dissent states the issue to be as follows: whether New York courts are "open to suits by gambling house proprietors who let their customers run up debts . . . ." 15 N.Y.2d at 17, 203 N.E.2d at 214, 254 N.Y.S.2d at 533. From this it is not clear whether the dissent's objection to the action lies mainly with the "charge account" aspect of the debt in particular, or with the gambling aspect of the contract in general.

37. P.R. Laws Ann. tit. 31, § 4774 (1955). Puerto Rico would not be able to obtain in personam jurisdiction over a nonresident defendant by service by publication unless it first attaches property of the defendant located in Puerto Rico. Rules of Civil Procedures, P.R. Laws Ann. tit. 32, App. R. 4.5 (Supp. 1963) (Process. Service by publication.)

38. The instant court noted that "since a gambling debt is unenforceable when made in Nevada, courts in other States have no public policy issue to pass upon, and refusals elsewhere to enforce these claims are a mere application of Nevada law." 15 N.Y.2d at 16, 203 N.E.2d at 214, 254 N.Y.S.2d at 532. Therefore, it would never reach consideration of the third factor.

39. Id. at 15, 203 N.E.2d at 213, 254 N.Y.S.2d at 531.

must either deny or grant enforcement of the entire claim.[40] The former alternative, denying enforcement, would be the better course.

Constitutional Law—Criminal Law—Pretrial Hearing on Change of Venue Required in Misdemeanor Cases.—Petitioner, a civil rights worker, was charged with aggravated assault upon a peace officer, a misdemeanor in Texas.[1] At trial, his attempt to introduce evidence of community racial prejudice in support of a motion for a change of venue was rebuffed on the ground that Texas, with one inapplicable exception,[2] does not grant changes of venue in misdemeanor cases.[3] After conviction and exhaustion of state remedies,[4] petitioner applied to the federal district court for a writ of habeas corpus. His petition was granted, the court holding that failure to provide for a hearing on a motion for change of venue before jury trial constituted a violation of the due process clause of the fourteenth amendment. *Mason v. Pamplin,* 232 F. Supp. 539 (W.D. Tex. 1964).

"[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors."[5] The due process requirement of im-

40. The petitioner in such an action would probably seek recovery of only so much of the debt as he hopes the court will consider to be a "reasonable amount."

1. Tex. Pen. Code arts. 1147, 1148 (1961); Tex. Pen. Code art. 48 (1952).

2. Tex. Code Crim. Proc. art. 563 (1954) provides for changes of venue in misdemeanor cases where a jury cannot be empaneled in counties of less than 2,500 persons. Defendant was tried in Falls County, Texas, which has a population in excess of 2,500. Mason v. Pamplin, 232 F. Supp. 539, 541 (W.D. Tex. 1964).

3. Tex. Code Crim. Proc. art. 560 (1954) provides: "Whenever in any case of felony the judge presiding shall be satisfied that a trial, alike fair and impartial to the accused and to the State, can not, from any cause, be had in the county in which the case is pending, he may, upon his own motion, order a change of venue to any county in his own, or in an adjoining district, stating in his order the grounds for such change of venue." Under this statute, Texas courts have consistently held that, apart from article 563, no right to a change of venue in misdemeanor cases exists. Root v. State, 169 Tex. Crim. 382, 334 S.W.2d 154 (1960); Cobert v. State, 169 Tex. Crim. 68, 331 S.W.2d 328 (1960); Privitt v. State, 150 Tex. Crim. 524, 202 S.W.2d 681 (1947); Burton v. State, 149 Tex. Crim. 579, 197 S.W.2d 346 (1946); Patton v. State, 124 Tex. Crim. 656, 65 S.W.2d 308 (1933); Duffield v. State, 118 Tex. Crim. 191, 43 S.W.2d 104 (1931); Fox v. State, 53 Tex. Crim. 150, 109 S.W. 370 (1908); Mischer v. State, 41 Tex. Crim. 212, 53 S.W. 627 (1899); Henderson v. State, 37 Tex. Crim. 193, 39 S.W. 116 (1897); Halsell v. State, 29 Tex. Crim. 22, 18 S.W. 418 (1890); Cotton v. State, 32 Tex. 614 (1870); see Adams v. State, 164 Tex. Crim. 549, 301 S.W.2d 101 (1957). None of these cases mentioned a test for reversing a denial of a change of venue. See note 26 infra and accompanying text. On the Texas law relating to changes of venue, see generally Walton, Change of Venue in Criminal Cases, 1 So. Tex. L.J. 131 (1954).

4. Mason v. State, — Tex. Crim. —, 375 S.W.2d 916 (1964). The exhaustion doctrine no longer requires application for certiorari. Fay v. Noia, 372 U.S. 391, 435 (1963).

5. Irvin v. Dowd, 366 U.S. 717, 722 (1961).

partiality extends beyond the mind of the individual judge or juror and includes the entire atmosphere in which a trial is conducted. In *Moore v. Dempsey*,[6] for example, the conviction of five negroes for the murder of a white victim at a trial so dominated by mob sentiment that "there never was a chance for the petitioners to be acquitted" was found to be a denial of due process.[7] This same dominating influence was found in *Irvin v. Dowd*,[8] where a defendant was brought to trial after extensive news coverage of his case. Reports explored his criminal background, opinions were solicited from individuals as to his guilt and punishment and broadcast over local stations, and a confession was asserted. The crime became, in the words of the Court, the "*cause célèbre*" of the local community.[9] Irvin's application for a change of venue to an adjoining county was granted, but it became clear that conditions in that county were no better than in the first. Irvin's application for a further change of venue was nevertheless denied.[10] Over ninety percent of the veniremen admitted holding some opinion as to his guilt, including eight who actually sat on the jury. The United States Supreme Court held on these facts that petitioner had been denied his right to a "fair" trial. The Court reasoned that "the influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man."[11]

Irvin v. Dowd naturally created problems of definition[12] and implementation. Generally, several procedural devices are used to assure a fair trial. Among the more common of these are *voir dire* examination, change of venue, change of

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6. 261 U.S. 86 (1923).

7. Moore v. Dempsey was a habeas corpus proceeding. The Court did not determine the truth of the petition, but merely decided that the district court could take evidence on point. The Court's holding followed dictum in Frank v. Mangum, 237 U.S. 309, 335 (1915) that "if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term."

8. 366 U.S. 717 (1961). The decision in Irvin v. Dowd was somewhat foreshadowed by the concurring opinion of Mr. Justice Frankfurter in Shepherd v. Florida, 341 U.S. 50 (1951) (per curiam). Cf. Marshall v. United States, 360 U.S. 310 (1959).

9. 366 U.S. at 725.

10. The reason for the denial was that the Indiana venue statute then in effect provided that "only one [1] change from the county shall be granted." Ind. Ann. Stat. § 9-1305 (1956).

11. 366 U.S. at 727. Cf. Jackson v. Denno, 378 U.S. 368 (1964), where the Court expressed a somewhat less than trusting attitude toward jurors in holding that they cannot be trusted to distinguish between the issues of guilt or innocence and the voluntariness of a confession.

12. The trend in subsequent decisions has been to confine the holding in Irvin v. Dowd to particularly strong circumstances. Compare Beck v. Washington, 369 U.S. 541 (1962), with Rideau v. Louisiana, 373 U.S. 723 (1963). See generally, Manes, Irvin v. Dowd: Retreat from Reality, 22 Law in Transition 46 (1962); Note, The Changing Approach to "Trial by Newspaper," 38 St. John's L. Rev. 136 (1963).

venire and continuance.[13] The *Irvin* decision left no indication as to which, if any, of these procedures was to be preferred,[14] although it did seem to indicate that a satisfactory *voir dire* would not preclude a reversal based upon the other circumstances of that case.[15] A stronger implication could be read from the language of the Court in *Rideau v. Louisiana*.[16] There, the Court, after finding insuperable prejudice in the televising of a twenty-minute "interview" with the defendant, during which he confessed in detail to the crimes of which he was accused, stated: "[W]e do not hesitate to hold, *without pausing to examine a particularized transcript of the* voir dire *examination of the members of the jury,*

13. See Note, Community Hostility and the Right to an Impartial Jury, 60 Colum. L. Rev. 349 (1960); Comment, Trial by Newspaper, 33 Fordham L. Rev. 61 (1964).

14. Only one district court decision has interpreted Irvin v. Dowd as requiring change of venue as a sole remedy. In United States ex rel. Brown v. Smith, 200 F. Supp. 885 (D. Vt. 1961), a district court ordered a change of venue before relator could be retried. The Second Circuit Court of Appeals reversed on the ground that a sufficient showing of community hostility had not been made. 306 F.2d 596 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963). In United States ex rel. Bloeth v. Denno, 313 F.2d 364 (2d. Cir. 1962), cert. denied, 372 U.S. 978 (1963), the second circuit declined to include a change of venue in a conditional grant of habeas corpus because it believed a sufficient amount of time had elapsed for the relator to obtain a fair trial in the original venue. Change of venue is the usual remedy for community as opposed to individual prejudice. See Community Hostility and the Right to an Impartial Trial, supra note 13, at 365.

The instant court seized upon a statement made by the Court in Irvin v. Dowd that, "as we read Gannon [a state case construing an Indiana venue statute], it stands for the proposition that the necessity for transfer will depend upon the totality of the surrounding facts. Under this construction the statute is not, on its face, subject to attack on due process grounds." 366 U.S. at 721. The district court construed this statement to mean that "a transfer may become a necessity, depending upon 'the totality of the surrounding facts.'" 232 F. Supp. at 542. (Emphasis omitted.) From this it went on to state that such a holding implied an opportunity to hear these "surrounding facts" and that such a hearing could only be meaningful before trial. It should be observed that the instant court perhaps read more into this language than was intended. One of the contentions of the petitioner in Irvin v. Dowd was that the Indiana court had been compelled to abridge his right to an impartial trial. See note 10 supra. Because of the construction of the Indiana courts, however, the court found that the petitioner had misinterpreted the statute. The import of the language quoted by the instant court was to remove the question of that statute's constitutionality on the ground asserted from further consideration. It was not meant to define the requirements of due process, if any, in the changing of venue. In contrast to the rather elaborate analysis of the body of the opinion, the portion in which this discussion appears is utterly bare of citation or argumentation. The court would not, it is hopefully to be presumed, have made such a pronouncement in so cavalier a fashion. The change of venue would, of course, be an appropriate, if not exclusive, means of implementing the Irvin decision.

15. Normally, jurors holding preconceived opinions may be sworn provided they give assurances of their intention to be fair and impartial. Holt v. United States, 218 U.S. 245 (1910); Spies v. Illinois, 123 U.S. 131 (1887); Hopt v. Utah, 120 U.S. 430 (1887); Reynolds v. United States, 98 U.S. 145 (1878). Defendant's attempts to examine individual jurors were refused in the present case. 232 F. Supp. at 540.

16. 373 U.S. 723 (1963).

that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.' "[17] A blanket reading of this statement would further seem to indicate that a continuance of the trial under the circumstances would not be regarded as sufficient.[18]

The defendant in the instant case, on his motion for a new trial, did not offer proof of community prejudice,[19] but instead claimed to have had witnesses at the time of his motion for a change of venue who would have testified to these contentions. The Texas Court of Criminal Appeals, hearing his appeal, observed that the rule in that state was that a denial of a motion for a change of venue will not be reversed unless prejudice against the accused found its way into the jury box at his trial. The court then concluded: "We likewise here find no evidence in this record that prejudice against appellant found its way into the jury box at his trial. It has been the consistent holding of this Court that our statutes, which do not provide for a change of venue in misdemeanor cases, are not unconstitutional."[20] In context, this statement by the Texas court could be interpreted in three ways. It might, first of all, mean that the court was placing its decision on two independent grounds: that the defendant had not shown the kind of prejudice required for a change of venue *in any case*, and also that Texas did not grant a change of venue in misdemeanor cases. If this were the case, then it might be observed, in regard to the first ground, that one of the points of divergence between the majority and dissent in *Rideau v. Louisiana* was whether the defendant ought only to be required to establish such an impression on public opinion as would make subsequent court proceedings "a hollow formal-

17. Id. at 727. (Emphasis added.) The emphasis in this statement is probably on the word "particularized." The Court evidently paused long enough to note that three members of the panel had seen the interview. Moreover, it hardly seems likely the court would enter into a detailed consideration of extraneous material if it could find prejudice in the voir dire transcript itself. Certainly, if hundreds had to be examined to obtain a panel of twelve, the voir dire transcript would be telling evidence of prejudice in itself.

18. Because the Court declared "for anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial—at which he pleaded guilty to murder," 373 U.S. at 726 (Emphasis omitted.), it is probable that no juryman who had seen the interview would ever be acceptable to the Court, no matter what the time interval. However, time might cool passions aroused by the telecast among the community as a whole. In United States ex rel. Bloeth v. Denno, 313 F.2d 364 (2d Cir. 1962), cert. denied, 372 U.S. 978 (1963), the Court of Appeals for the Second Circuit found that a new trial could be had at the original venue where more than two and one-half years had expired from the end of the first trial, provided voir dire showed this to be possible.

19. Tex. Code Crim. Proc. art. 754 (1950) provides for a motion for a new trial in misdemeanor cases. The grounds for such a motion are set out in Tex. Code Crim. Proc. art. 753 (1950), which has been construed to include changes of venue. Hagans v. State, — Tex. Crim. —, 372 S.W.2d 946 (1963). Affidavits and other evidence may be used to show prejudice on the motion for a new trial. Mangum v. State, 139 Tex. Crim. 111, 139 S.W.2d 94 (1939).

20. Mason v. State, — Tex. Crim. —, —, 375 S.W.2d 916, 918 (1964).

ity,"[21] or whether "the adverse publicity [ought to be] . . . shown by the record to have fatally infected the trial . . . ."[22] Unless, therefore, the test for showing that "prejudice against the accused found its way into the jury box at his trial" includes the possibility of showing that the community as a whole held sentiments adverse to the defendant, regardless of the statements of individual jurors,[23] this test might, in itself, be constitutionally suspicious. The second ground would, under this interpretation, be an independent determination.

Secondly, the statement of the Texas court might have been intended to state a standing problem: since the defendant had defaulted in placing evidence of prejudice on the record for review by a court whose jurisdiction is limited to the record, he had not established the right to a change of venue under the Texas rule, and had not, therefore, established standing to test the constitutionality of the statute. Such a position raises the problem of whether the defendant's default constituted an intentional and knowing waiver of his right to test the statute.[24] If it did not, the Texas Court of Criminal Appeals is in the embarrassing position either of determining the constitutional question in the abstract, or of sitting by, helpless under state law,[25] while federal courts strike down a statute it could not consider. Again, too, the problem of the earlier interpretation arises as to what kind and degree of evidence would be sufficient to give him standing.

A third interpretation of the Texas court's statement is suggested by the fact that no previous case by that court has ever discussed the criterion for reversing a denial of a change of venue in connection with a misdemeanor case.[26] The Texas statute, if it were to stand as an absolute bar to obtaining an impartial trial in a proper case, would seem to be unconstitutional.[27] What the court might have been saying, therefore, is that given a proper showing *after trial* that a defendant had been denied an impartial trial, it would consider overruling its consistent position in the past and grant a new trial with appropriate safeguards

21. 373 U.S. at 726.

22. Id. at 729 (dissenting opinion).

23. In Irvin v. Dowd, the Court observed that in cases of mass community sentiment the statements of individual jurors, regardless of the apparent sincerity of the speaker, would have to be discounted. 366 U.S. 717, 728 (1961).

24. Henry v. Mississippi, 85 Sup. Ct. 564 (1965); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

25. Tex. Const. art. 5, § 5 limits the jurisdiction of the Court of Criminal Appeals to matters on the record. Unless a matter appears on the record it cannot be considered on appeal. Gower v. State, 169 Tex. Crim. 81, 332 S.W.2d 328 (1960); Sanchez v. State, 90 Tex. Crim. 518, 236 S.W. 734 (1921). There is no requirement under the United States Constitution, of course, that a state grant appellate review in any case. Dohany v. Rogers, 281 U.S. 362 (1930); Reetz v. Michigan, 188 U.S. 505 (1903); McKane v. Durston, 153 U.S. 684 (1894).

26. See cases cited note 3 supra.

27. The only problem in making a direct statement on this point is that no case appears to have applied the Irvin doctrine to misdemeanor cases. There seems no logical barrier to such an application. Cf. Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965), applying the rule of Gideon v. Wainright, 372 U.S. 335 (1963) to misdemeanor cases.

in spite of the statutory omission; but that the failure of the defendant to make such a showing precluded it from doing so in this case.[28]

Viewed from the position of a state which wants to protect itself from the expense of prosecuting minor crimes at varying distances from their proper venue, and which also wants to protect itself from the necessity of defending frequently baseless motions in the prosecution of petty offenses, the last solution has a certain appeal. The instances in which ordinary misdemeanor cases will involve mass public sentiment are probably rather rare.[29] If the defendant could not, in fact, establish after trial that he had been denied a fair trial, then he would have no complaint regarding the trial he actually received.[30] On the other hand, if he does establish prejudice, then he could be given a proper retrial and his constitutional rights vindicated. Meanwhile, prosecutors could proceed in their work under procedures designed for the usual, not the extraordinary, case. The stress laid by the district court on the necessity for a hearing on the issue of prejudice before instead of after trial indicates that it thought the Texas court might have intended such a pronouncement.

The instant court advanced two reasons for requiring a hearing before trial.[31]

28. There is nothing novel in such a solution. A similar situation was presented in State ex rel. Gannon v. Porter Circuit Court, 239 Ind. 637, 159 N.E.2d 713 (1959), where the Supreme Court of Indiana construed that state's venue statute to provide for a second change of venue in cases where failure to do so would result in a constitutionally void conviction in spite of the fact that the statute specifically prohibited a second change of venue. It was this construction which may have saved the statute's constitutionality in Irvin v. Dowd. See note 14 supra.

29. In addition to cases involving strained racial relations, other possibilities might include violations of obscenity laws, possession of narcotics, impairing the morals of a minor, etc., where drives are being conducted against such vices at the time of the defendant's trial.

30. Cf. Jackson v. Denno, 378 U.S. 368 (1964), where the Supreme Court denied petitioner a new trial until he could show that his confession was, in fact, coerced.

31. As a holding, the determination of the court was perhaps of first impression. It is not, however, the first time the constitutionality of a denial of a right to a change of venue in misdemeanor cases has been discussed. At the state level, the Supreme Court of Oregon, after deciding that a failure to provide for a change of venue in misdemeanor cases violated the Oregon Constitution, went on, in dictum, to express the belief that such a failure also violated the fourteenth amendment. State ex rel. Ricco v. Biggs, 198 Ore. 431, 255 P.2d 1055 (1953). At the federal level is the somewhat perplexing opinion of a district court in Texas in State v. Dorris, 165 F. Supp. 738 (S.D. Tex. 1958). Misdemeanor defendants in the Texas courts sought removal of his case to the federal courts under 28 U.S.C. § 1443 (1958), which permits removal whenever it appears a defendant is being denied equality in the enforcement of his civil rights in a state court. The defendants alleged, inter alia, that the venue statute under attack in the instant case deprived them of their rights under the due process and equal protection clauses. The district court summarily rejected this argument, asserting that change of venue in a misdemeanor case was not a constitutional right. In support of this proposition the court cited a number of cases declaring such a holding under the state constitution, and another which declared states free under the fourteenth amendment to enact their own procedures within the limits of due process. At this point, if the court was making a declaration as to the federal constitution,

First, it was observed that unless a misdemeanor defendant were given the same privileges as the felony defendant in making a total showing of prejudice before trial he would be seriously handicapped, if not altogether precluded, in *ever* making such a showing. This argument is capable of two interpretations. Conceivably, what the court meant was that unless a pre-trial change of venue procedure were established it would be difficult if not impossible to get the kind of data relevant to the issue of community prejudice into the record for review, if necessary, by an appellate court.[32] On the other hand, it is equally conceivable that the court meant that such evidence might go "stale" by the time it could be established on the record. In either guise, the argument is either incorrect or extremely questionable. If it goes to the ability to place relevant evidence in the record, then it should be observed that Texas permits extrinsic evidence to be introduced at a motion for retrial which then becomes a part of the record.[33] If, on the other hand, it goes to the ability to keep evidence "fresh," then the argument must be regarded as unrealistic. In felony cases, the motion for a change of venue is usually brought on the day of the trial, before empaneling a jury.[34] Assuming the same practice would apply to misdemeanor cases, the only delay in ultimately placing this data on the record at a motion for retrial need be the time taken by the trial itself.[35] In the present case the time consumed was one day, and it is difficult to see how a trial of even several days could affect the freshness of such material. To be sure, a quiet, orderly trial might destroy

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it might have concluded its opinion. However, it went on to discuss the "equality" requirement of the statute and concluded that the defendants had not been deprived of equal civil rights because all misdemeanor defendants in Texas were similarly precluded from a change of venue. No hypothetical language preceded this discussion. Compare State v. Kurek, 233 F. Supp. 431 (D. Md. 1964); Hill v. Commonwealth, 183 F. Supp. 126 (W.D. Pa. 1960). If the court was holding as to the federal constitution, why did it enter a discussion of equality in denying a non-existent right? If it was holding as to the state constitution, why did it not distinguish its holding from petitioners' contentions, and why did it cite the fourteeth amendment case? Subsequent cases have tended to treat Dorris as a declaration of state constitutional law. Compare State v. Kurek, supra, and Hill v. Commonwealth, supra, with Rand v. State, 191 F. Supp. 20 (W.D. Ark. 1961). The respondents and the court in the instant case apparently felt the court was discussing the federal constitution. 232 F. Supp. at 542 n.6.

In addition to the Biggs case, some states have held that a denial of a change of venue did not violate state constitutional provisions. State ex rel. Clark v. Cowen, 29 Idaho 783, 162 Pac. 674 (1916); Commonwealth v. Sacarakis, 196 Pa. Super. 455, 175 A.2d 127 (1962); Patton v. State, 124 Tex. Crim. 656, 65 S.W.2d 308 (1933). Similarly, a number of cases have denied changes of venue on the ground that state statutes did not provide for such a change on the facts presented. State v. Pierson, 331 Mo. 636, 56 S.W.2d 120 (1932); Washington v. State, 2 Okl. Crim. 428, 101 Pac. 863 (1909); State ex rel. Carpenter v. Backus, 165 Wisc. 179, 161 N.W. 759 (1917). See generally Annot., 38 A.L.R.2d 738 (1954).

32. See note 25 supra.

33. See note 19 supra.

34. Walton, supra note 3, at 142.

35. A motion for a new trial must be made within ten days of conviction. Tex. Code Crim. Proc. art. 755 (Supp. 1964).

much of the "lustre" of evidence showing prejudice by the time a motion for a new trial is brought on, but to the extent that the Supreme Court has discounted the tenor of the proceedings as a factor in discovering prejudice, this should not be material.[36] To the extent that the Court has not, it may properly indicate that the contentions of the defendant are groundless.

Secondly, the court asserted that if no change of venue were available in misdemeanor cases, all a remand or new trial would accomplish would be a retrial in the same county where it had been shown the defendant could not obtain a fair trial to begin with. This is insupportable. Having found no evidence of prejudice in the case of the immediate defendant, the Texas Court of Criminal Appeals never stated precisely what its position might be were it to have found such prejudice.[37] Indeed, if the court were actually declaring its intent to overrule existing law, it would not be surprising that it would be vague at this point. No subsequent case has clarified its position. The assumption of the district court, in the absence of a clear ruling, that Texas would compel a defendant whose first trial was unconstitutional for reason of community prejudice to stand another trial void for the same reason is illogical and unwarranted.

The evil presented by the Texas procedure is not that it precludes the defendant caught in a wave of prejudicial sentiment from making an adequate showing of that fact, but that it compels him to go through "kangaroo court proceedings"[38] before he can obtain the kind of trial to which he was initially entitled. It places upon such a defendant the financial and other burdens of a double trial in order to obtain a competent adjudication of his guilt or innocence, and, in the case of a defendant who is unable to raise bail during these proceedings, it *systematically* extends the time he may have to remain in custody.[39] But

36. In neither Irvin v. Dowd nor Rideau v. Louisiana was any showing of a disruptive atmosphere in or about the court discussed. Of course, if such a showing can be made, it would be a factor. See Moore v. Dempsey, 261 U.S. 86 (1923).

37. The cases of Samino v. State, 83 Tex. Crim. 481, 204 S.W. 233 (1918), and Woodland v. State, 57 Tex. Crim. 352, 123 S.W. 141 (1909), discussing the possibility of a new trial in aggravated assault cases, would not seem applicable, since both dealt with prejudice on the part of individual jurors, and not the prejudice of an entire community.

38. Rideau v. Louisiana, 373 U.S. 723, 726 (1963).

39. Cf. United States v. Tateo, 377 U.S. 466 (1964) where the Court stated: "While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the Ball principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial." Id. at 466. (Emphasis omitted.) If this represents the current rationale behind granting new trials, then it must be questioned whether there is any merit to the granting of a new trial to misdemeanor defendants who have served substantially all of the time to which they might have been sentenced. As a corollary, the systematic extension of the time necessary to obtain a fair trial might also affect the ability of a state to conduct a new prosecution. In the present case, the defendant, who was sentenced to a maximum two year sentence, would have served over six months of this sentence before the granting of a new trial had he not been on bail.

granting that thus putting the defendant "over the hurdles" to obtain his constitutional rights may be somewhat burdensome on the defendant, it is far from clear that it is a violation of due process. Traditionally, the Supreme Court has jealously guarded the right of states under the federal system to establish criminal procedures under their "own conception of policy,"[40] and it has struck down only such procedures as amount to a denial of fundamental rights.[41] That some other method may seem "to be fairer or wiser or to give a surer promise of protection to the prisoner," is irrelevant.[42] In *Hoag v. New Jersey*[43] the Court sustained the conviction of a defendant based on an indictment returned only after he had been acquitted of three other crimes arising out of the same transaction. It did so after observing that "it may well be preferable practice for a State in circumstances such as these normally to try the several offenses in a single prosecution."[44] In *Brock v. North Carolina*[45] the Court similarly sustained the conviction of a defendant upon a second trial after the State obtained a mistrial on its first prosecution based on the default of its own witnesses. While specific holdings of the Court seem thus tolerant of multiple-trial procedures, nevertheless, its language in condemnation of such practices has been consistently broad. In *Palko v. Connecticut*[46] the Court suggested attempts "to wear the accused out by a multitude of cases with accumulated trials" would not be favorably received.[47] Such statements, considered in connection with the Court's apparently increased willingness to pass on unfair state procedures,[48] make the instant court's decision at least somewhat plausible, if considerably in advance of present holdings.

Even allowing the unconstitutionality of the instant procedure, however, there yet remains the question of whether the present defendant has been sufficiently aggrieved by it to test its constitutionality.[49] Initially, with respect to his default in placing evidence of prejudice on the record, some determination should be made as to whether the defendant intended a waiver of his right to test the statute.

This might have been a substantial portion of a lesser sentence. Such an argument, going solely to the ability of a state to bring malfactors to justice, says nothing, of course, of the hardship borne by a defendant who is ultimately found not guilty of the crime charged.

40. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

41. Fay v. Noia, 372 U.S. 391, 432 n.41 (1963).

42. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

43. 356 U.S. 464 (1958).

44. Id. at 467-68.

45. 344 U.S. 424 (1953).

46. 302 U.S. 319 (1937).

47. Id. at 328.

48. See, e.g., Jackson v. Denno, 378 U.S. 368 (1964) (jury may not pass on both voluntariness of confession and guilt in first instance); Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent's right to appointed counsel at trial); Mapp v. Ohio, 367 U.S. 643 (1960) (exclusionary rule for illegally seized evidence).

49. Cf. Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Barrows v. Jackson, 346 U.S. 249 (1953); Doremus v. Board of Educ., 342 U.S. 429 (1952). But cf. WMCA v. Lomenzo, 377 U.S. 633 (1964), where a non-voting corporation was permitted to test the constitutionality of state legislative apportionment.

If he did not, then under the rule of *Henry v. Mississippi*,[50] decided since the instant case, the matter should be remanded to the state courts to enable him to place such facts on the record, the district court retaining the right to create its own record if the state court fails to act. But even were he to do so, it is difficult to see how he or anyone could acquire proper standing. If, on a motion for a new trial it appeared that the defendant did, in fact, have a fair trial, then he could not well argue that the failure to change venue had denied him what he actually received. On the other hand, if he did not receive a fair trial, the State stands ready to give him a new trial, rendering his constitutional objections moot. In this regard, the determination of the district court that the Texas statute was unconstitutional, without a prior determination that the defendant was, in fact, entitled to a change of venue, would seem irregular.

The instant case, then, while an appropriate corollary of the *Irvin* rationale, is somewhat advanced as a due process decision. The standing question is not insubstantial. Perhaps the impact of the decision will be minimized, both because of the limited number of cases to which the holding would apply, and also because the greater part of the states which grant jury trials in misdemeanor cases already provide for pre-trial changes of venue.[51] It represents, nonetheless, yet another restriction on state governments in their right to administer criminal justice according to their own standards and, if followed, ought to be narrowly interpreted.

Contracts—Implied Warranty; Reformation—No Implied Warranty in Absence of Reliance; Government Held Liable for One-Half of Loss Incurred by "Fixed-Price" Contractor.—Plaintiff, a manufacturer of cartridge cases and shells, entered into two contracts with the Government. Under the terms of the first contract, the plaintiff selected, purchased and installed the necessary machinery for the production of artillery shells by a new process, which the Government and the contractor expected would decrease per-unit costs. As was agreed, the Government, by immediately reimbursing the plaintiff, took title to the property, while the plaintiff retained possession. The second contract obligated the plaintiff to produce 1,100,000 105-millimeter shells with the equipment procured pursuant to the first contract. The plaintiff, in preliminary negotiations, indicated that plunge grinders[1] were necessary for

50. 85 Sup. Ct. 564 (1965).

51. The following statutes would seem to be affected by the instant decision: Idaho Code Ann. §§ 19-1801 to -1815 (1948); La. Rev. Stat. §§ 15:280-:300 (1951); Md. Ann. Code art. 75, § 44 (Supp. 1964); Mass. Gen. Laws ch. 277, §§ 51-53 (1956); Pa. Stat. tit. 19, § 551 (1964); Tex. Code Crim. Proc. §§ 560-67 (1954); Vt. Stat. tit. 13, §§ 4631-38 (1958); Wis. Stat. § 956.03 (3) (1958).

1. A production stage of the conventional method involves turning steps to remove excess steel from the shell casings. The plunge grinders recommended by the contractor in the instant case were to perform this same function. National Presto Indus., Inc. v. United States, — Ct. Cl. —, —, 338 F.2d 99, 101 (1964). The parties ultimately agreed, apparently erroneously, that these devices were unnecessary with the new process.

a fully integrated, efficient production line. When the Government declared plunge grinders unnecessary, the plaintiff deleted the devices from the equipment schedule, and quite probably adjusted[2] the per-unit cost of the shells to be provided under the second contract. After both contracts were fully performed, the plaintiff instituted suit to recover a 743,000 dollar operational deficit, alleged by the plaintiff to be the result of the defendant's refusal to include plunge grinders in the original equipment schedule. Plaintiff contended that the Government's failure to furnish machines capable of economically making 105-millimeter shells constituted a breach of an implied warranty. In the alternative, the court was asked to reform the contract by increasing the plaintiff's compensation by the amount of the loss incurred. The ground asserted for the requested relief was a mutual mistake as to material fact, namely the inefficiency of the machinery and time required to disclose the inefficiency. The United States Court of Claims, after rejecting the breach of warranty argument, held that the loss attributable to the lack of plunge grinders must be borne equally by the parties, and the Government must, therefore, pay one-half of the deficit. *National Presto Indus., Inc. v. United States*, — Ct. Cl. —, 338 F.2d 99 (1964).

The plaintiff's use of the Government's facilities for the production of ammunition created a mutually advantageous bailment.[3] It was claimed that this relationship resulted in the Government's warranting that the equipment supplied was reasonably suited for the purposes intended.[4] If a breach of warranty were found, there is no doubt that the plaintiff would have been entitled to recoup all causally related expenses.[5] As Judge Davis noted, however, in writing for the majority, one of the necessary elements in establishing such a warranty is reliance by the plaintiff on the skill or knowledge of the defendant.[6]

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2. The court's findings of fact do not disclose whether the plaintiff actually adjusted his per-unit cost after the Government declined to authorize plunge grinders. Neither is it clear whether the plaintiff had even calculated a unit price at that stage of the negotiations. In any event, plaintiff had the opportunity to make adjustments prior to entering the contract. Id. at — & n.7, 338 F.2d at 106 & n.7.

3. Ekco Prods. Co. v. United States, — Ct. Cl. —, —, 312 F.2d 768, 771 (1963); see 8 Am. Jur. 2d Bailments § 10 (1963).

4. If the bailor is cognizant of the use intended for the bailed chattel, and there is reasonable reliance by the bailee on the knowledge of the bailor, a warranty will be implied. E.g., Ekco Prods. Co. v. United States, supra note 3; Eastern Motor Express, Inc. v. A. Maschmeijer, Jr., Inc., 247 F.2d 826, 828 (2d Cir. 1957), cert. denied, 355 U.S. 959 (1958).

5. See Helene Curtis Indus., Inc. v. United States, — Ct. Cl. —, —, 312 F.2d 774, 778-79 (1963); 8 Am. Jur. 2d Bailments § 337 (1963).

6. — Ct. Cl. at —, 338 F.2d at 105. Judge Davis cited Helene Curtis Indus., Inc. v. United States, supra note 5, at —, 312 F.2d at 778, for this almost axiomatic formulation of the law. In Helene Curtis, a cosmetics firm contracted with the Army, on the basis of government-supplied specifications, to produce large quantities of disinfectant chlorine powder. It later developed that the specifications were sufficiently incomplete so as to be misleading, thereby causing the plaintiff to sustain a substantial loss. Because the Government, in

The Court of Claims has found such reliance in government contract cases where the specifications originated with the Government and the Government had a knowledgeability edge.[7] In *R. M. Hollingshead Corp. v. United States*,[8] the court went a step further and held that although the parties were mutually ignorant, a warranty ran in favor of the plaintiff where the Government prepared the specifications, and the contractor, in ignorance of any possible difficulty, performed accordingly.[9] It would appear then, in the instant case, that the court's finding of equal knowledge would not, of itself, have precluded the imposition of a warranty. In contrast to *Hollingshead*, however, the contractor here selected the machinery which he considered necessary for the production of the 105-millimeter shells. The Government rejected the plunge grinders prior to the existence of any contractual obligations. Rather than terminating negotiations at this juncture, the contractor elected to proceed. The equipment schedule was redrafted, and although the facts fail to disclose whether a corresponding adjustment in the per-unit production cost of the shells was made, the important consideration was that such an opportunity existed. This fact pattern did not permit a finding of reliance,[10] and therefore, the warranty claim was correctly rejected.

Under general contract principles, an instrument may be reformed where it fails to reflect the actual agreement of the parties because of a unilateral[11] or mutual mistake.[12] The mutual mistake cases fall into two broad classifications: the first consisting of cases where the actual agreement is improperly expressed in the written contract as a result of a scrivener's mistake,[13] and the

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publishing the specifications, withheld important facts which were within its knowledge and otherwise unavailable to the plaintiff, the court held that the defendant had breached the implied warranty that the contract could be effectively performed on the Government's terms. Ibid.

7. Helene Curtis Indus., Inc. v. United States, supra note 5.

8. 124 Ct. Cl. 681, 111 F. Supp. 285 (1953).

9. Id. at 683-84, 111 F. Supp. at 286. Cf. Anthony M. Meyerstein, Inc. v. United States, 133 Ct. Cl. 694, 699-700, 137 F. Supp. 427, 430-31 (1956), where there was no possibility of implying a warranty, even though government specifications were incorrect, since the plaintiff-contractor discovered the error prior to submitting his bid.

10. The only semblance of reliance in the instant case was short-lived. While the court noted that the Government had prior knowledge, it further found that the contractor had discussed the manufacturing process in detail with the source of the Government's knowledge, namely a prior contractor, before submitting its bid. Findings of Fact, nos. 12 & 15, National Presto Indus., Inc. v. United States, No. 370-58, Ct. Cl., Oct. 16, 1964, at 28-30.

11. In unilateral mistake cases, the defendant will be estopped from asserting that the agreement, as reformed, is not in conformity with the actual intention of the parties, where he has fraudulently induced the plaintiff's error. E.g., Simmons Creek Coal Co. v. Doran, 142 U.S. 417, 435 (1892); Hayes v. Travelers Ins. Co., 93 F.2d 568, 570 (10th Cir. 1937). The same result will be reached where defendant has acted with knowledge of the plaintiff's mistaken belief. E.g., International Harvester Co. v. Mississippi Land Co., 43 F.2d 17, 22 (8th Cir. 1930), cert. denied, 282 U.S. 905 (1931).

12. See 45 Am. Jur. Reformation of Instruments § 2 (1943).

13. E.g., Panama Power & Light Co. v. United States, 150 Ct. Cl. 290, 299, 278 F.2d

second involving cases in which both parties, at the time of executing the contract, are laboring under a mistake concerning a material fact.[14] In determining whether reformation is available, the courts have traditionally subdivided the latter type of mutual mistake cases. Reformation is denied in the first group of cases consisting of contracts which, though induced in whole or in part by a mutually mistaken belief, exactly record the agreement of the parties.[15] These cases are to be contrasted with contracts which, because of a mutual mistake, inadequately portray the underlying agreement and are, therefore, proper subjects for reformation.[16] The court attempted to place the instant case within the last category. Judge Davis stated that the "arrangement was infused throughout, on both sides, with mutual ignorance of two essential facts—the need for turning equipment; [and] the time and work required to establish that need . . . ."[17] Indeed, since neither the contract nor course of dealings required the plaintiff to carry the resulting burden of the shared ignorance, the underlying agreement of the parties apparently envisioned a joint enterprise formed to perfect the new manufacturing process.[18] The court, on the basis of these conclusions of fact, granted what was considered to be appropriate relief via reformation.

In reaching its decision, the court adopted the standards enunciated in *Flippin Materials Co. v. United States*.[19] In *Flippin*, the plaintiff contracted with the Government to extract a given quantity of sand and crushed rock from government-owned land on a per-ton basis. A layer of clay was encountered which, in complicating removal operations, caused a reduction in plaintiff's profits. The court said that "a mutual mistake . . . will not support relief if the contract puts the risk of such a mistake on the party asking reformation . . . or normally if the other party, though made aware of the correct facts, would not have agreed at the outset to the change now

939, 944 (1960); Sutcliffe Storage & Warehouse Co. v. United States, 125 Ct. Cl. 297, 304, 112 F. Supp. 590, 593 (1953).

14. E.g., Philippine Sugar Estates Dev. Co. v. Government of the Philippine Islands, 247 U.S. 385, 389 (1918); Weiss v. Turney, 173 F.2d 617, 619 (8th Cir. 1949); Pan Am. Petroleum Corp. v. Kessler, 223 F. Supp. 883 (E.D. La. 1963); American Cas. Co. v. Memorial Hosp. Ass'n, 223 F. Supp. 539 (E.D. Wis. 1963); American Sanitary Rag Co. v. United States, 142 Ct. Cl. 293, 161 F. Supp. 414 (1958); Furman v. United States, 135 Ct. Cl. 202, 206, 140 F. Supp. 781, 784 (dissenting opinion), cert. denied, 352 U.S. 847 (1956); Walsh v. United States, 121 Ct. Cl. 546, 102 F. Supp. 589 (1952).

15. E.g., Moffat Tunnel Improvement Dist. v. Denver & S.L. Ry., 45 F.2d 715, 731-32 (10th Cir. 1930), cert. denied, 283 U.S. 837 (1931); American Cas. Co. v. Memorial Hosp. Ass'n, supra note 14; American Sanitary Rag Co. v. United States, supra note 14; Furman v. United States, supra note 14.

16. E.g., Philippine Sugar Estates Dev. Co. v. Government of the Philippine Islands, 247 U.S. 385, 389 (1918); Pan Am. Petroleum Corp. v. Kessler, 223 F. Supp. 883 (E.D. La. 1963).

17. — Ct. Cl. at —, 338 F.2d at 108.

18. Id. at —, 338 F.2d at 108-09.

19. — Ct. Cl. —, 312 F.2d 408 (1963).

sought . . . ."[20] The second part of the rule is clearly contrary to existing law, for the courts have consistently held that in reformation actions it is not what the parties would have done if they had known better, but what they in fact did do with their then existing fund of knowledge.[21] The court in *Flippin* found that a clause in the contract unequivocally placed the risk of loss on the contractor.[22] The second proposition then was clearly unnecessary to the resolution of the case because it would be illogical to contend that although the plaintiff contracted to assume the specific risk which ultimately materialized, the parties would have contracted otherwise had they known in advance of the existence of clay pockets. The court here employed this unsound part of the *Flippin* rule to circumvent the compelling argument of Judge Whitaker, in dissent, that no *legal* material mistake was present to justify reformation.[23] By reasoning that the defendant would have initially agreed to share the development costs, the court transformed the fixed-price contract, where the risk of loss would rest with the contractor,[24] into a joint enterprise.

Although the court did not rely on *Peter Kiewit Sons' Co. v. United States*[25] or *Poirier & McLane Corp. v. United States*,[26] and in fact declared its holding to be "unprecedented,"[27] these two Court of Claims' cases are peripherally consistent with the present case. In *Peter Kiewit Sons'*, the plaintiff contracted to reconstruct airfield runways. The material for the grading was to be procured from areas designated by the Government. After the operations had commenced, the Government changed the source of the materials, thereby causing the plaintiff's costs to increase. The court, in overruling the defendant's demurrer to the plaintiff's suit for reimbursement, said that if the parties would have contracted otherwise, except for their mutual mistake, reformation was available.[28] In *Poirier*, the plaintiff sought to recover excess labor costs incurred in performing under a government contract. The contract in question specified that the wage rate for unskilled labor would be eighty-five cents per hour, in accordance with what was believed to be the

20. — Ct. Cl. at —, 312 F.2d at 415. (Citations omitted.)

21. Russell v. Shell Petroleum Corp., 66 F.2d 864, 867 (10th Cir. 1933); Moffat Tunnel Improvement Dist. v. Denver & S.L. Ry., 45 F.2d 715, 731 (10th Cir. 1930), cert. denied, 283 U.S. 837 (1931); Metzler v. Bolen, 137 F. Supp. 457 (D.N.D. 1956). 5 Williston, Contracts § 1549 (2d ed. 1937) states in part: "[I]f, because of mistake as to an antecedent or existing situation, the parties make a written instrument which they might not have made, except for the mistake, the court cannot reform the writing into one which it thinks they would have made, but in fact never agreed to make." (Footnote omitted.)

22. — Ct. Cl. at —, 312 F.2d at 415-16.

23. — Ct. Cl. at —, 338 F.2d at 113 (dissenting opinion).

24. See, e.g., Moffat Tunnel Improvement Dist. v. Denver & S.L. Ry., 45 F.2d 715, 731-32 (10th Cir. 1930), cert. denied, 283 U.S. 837 (1931); American Cas. Co. v. Memorial Hosp. Ass'n, 223 F. Supp. 539 (E.D. Wis. 1963).

25. 109 Ct. Cl. 517, 74 F. Supp. 165 (1947).

26. 128 Ct. Cl. 117, 120 F. Supp. 209 (1954).

27. — Ct. Cl. at —, 338 F.2d at 111.

28. 109 Ct. Cl. at 522, 74 F. Supp. at 168.

current figure for that category as promulgated by the Secretary of Labor. After the contract was executed, the Secretary issued a retroactive order raising the wage rate to one dollar per hour. The court held that because a mutual mistake as to the prevailing wage rate had, in part, induced the contract, the agreement failed to express the true intention of the parties; thus reformation was a proper remedy.[29] Common to both these decisions is the holding that a court may virtually create for the parties the contract they probably would have made, but for their ignorance. This proposition is in conflict with the general posture of the law of reformation.[30]

A landmark case in the mainstream of reformation decisions is *Moffat Tunnel Improvement Dist. v. Denver & S.L. Ry.*[31] In that case the defendant agreed to build, and then rent, a tunnel to the plaintiff railway. Both parties believed that the construction costs would not exceed 9,220,000 dollars and the rent was determined accordingly. In fact, the construction costs totalled 15,470,000 dollars. The lessor gave notice that unless a rent adjustment was negotiated the lease would be terminated. The railway thereupon sued to have the lease declared valid as written, while the defendant, *inter alia*, sought reformation on the basis of a mutual mistake. The Court of Appeals for the

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29. 128 Ct. Cl. at 127, 120 F. Supp. at 214. A commentator recently criticized the court for reforming the contract which, he felt, fully recorded the original agreement. Note, 49 Va. L. Rev. 773, 793-94 (1963). It can be argued, however, that the parties intended to include whatever was the current wage rate, and thus the inclusion of eighty-five cents, when the Secretary subsequently disclosed that the figure should have been one dollar, was susceptible to reformation. Such a conclusion would be speculative, however, because the parties might not have drafted the original contract if they were aware of the correct, and higher, wage rates. In any event, whether the contract involved is viewed as an accurate agreement, based on a mutual mistake, or as a contract which possibly inadequately expresses the underlying bargain, reformation should not have been granted.

30. In contrast to Peter Kiewit Sons' and Poirier, the Court of Claims in two other decisions refused to allow recovery in mutual mistake cases. In American Sanitary Rag Co. v. United States, 142 Ct. Cl. 293, 161 F. Supp. 414 (1958), one-third of the "new" sunhelmets purchased from government surplus were used, mildewed and worthless. In Furman v. United States, 135 Ct. Cl. 202, 140 F. Supp. 781 (1956), cert. denied, 352 U.S. 847 (1956), the Government was selling cloth by weight, rather than by the conventional standard of yardage. The plaintiff asked the number of yards in a given weight unit. The figure which the Government gave was incorrect, and the plaintiff thereby lost the value of his bargain. In both cases all merchandise was sold on an "as is" and "where is" basis. The decisions turn on the exculpatory clauses, and the cases appear to be sui generis.

31. 45 F.2d 715 (1930), cert. denied, 283 U.S. 837 (1931). Cf. Carnegie Steel Co. v. United States, 240 U.S. 156 (1916), where the contract provided for per diem liquidated damages for delays in delivery, unless delays were attributable to unavoidable causes, "'such as fires, storms . . . etc.'" Plaintiff, an established armor producer, sustained unexpected difficulties in manufacturing heavy armor by a novel process. Plaintiff's attempt to evade the penalty provision proved abortive. The Court felt that the contractor should have experimented more extensively prior to the submission of his bid, and added that the "very essence of the promise . . . to deliver articles is [the] ability to procure or make them." Id. at 164.

Tenth Circuit, in affirming the district court's refusal to grant the requested relief, stated that a court has "no power to strike down one clause of a contract and insert another, unless the elements necessary for reformation are present. . . . The power of reformation is the power to make an agreement conform to the actual agreement made by the parties. Before a writing may be reformed to express the real agreement of the parties, the parties must have agreed."[32]

The party seeking reformation must convince the court, beyond a reasonable doubt, that the written contract deviated from the intended bargain.[33] To find a joint enterprise agreement in the instant case, the court constructed the agreement the parties probably would have executed had they been clairvoyant, rather than uncovering an underlying agreement. Indeed the court conceded that there was "no mistake in the written formulation of the understanding here; the formal contract embodied the actual agreement as the parties thought it to be."[34] Traditionalists cannot term the remedy granted "reformation," and the court itself noted that the decision is "unprecedented."[35] Nonetheless, the instant case, when viewed in conjunction with *Peter Kiewit Sons'*, *Poirier* and *Flippin*, strongly suggests that the Court of Claims is breaking new ground. The court may apportion the loss resulting from a "fixed-price" contractor's miscalculations provided (1) the agreement does not explicitly place the risk of loss on the contractor; (2) a novel process is involved, the complexities of which are equally unknown to both parties; and (3) some benefit accrues to the Government from the development of the process. The Government probably can circumvent the impact of this decision by attempting to anticipate possible difficulties which might be encountered in performing the contract, and then unequivocally place the burden of any resulting loss on the intended party. Such a provision should preclude the Court of Claims from ignoring the intention of the parties, and further, prevent it from fashioning an agreement in accordance solely with its own questionable sense of fair play.

Criminal Law—Suicide—Hospital Superintendent Not Granted Order To Administer Transfusion to a Competent Patient Where It Was Likely That Death Would Otherwise Ensue.—Respondent, a Jehovah's Witness,[1] was voluntarily admitted to the County Hospital with a diagnosis of gastrointestinal bleeding. It was suggested that he submit to an operation and a blood

32. 45 F.2d at 731.

33. See, e.g., Moffett, Hodgkins & Clarke Co. v. Rochester, 178 U.S. 373, 385 (1900); Maryland Cas. Co. v. United States, 169 F.2d 102, 111-12 (8th Cir. 1948); McCann v. Chicago, G.W. Ry., 191 F. Supp. 730, 731 (D. Minn. 1961).

34. — Ct. Cl. at —, 338 F.2d at 107.

35. Id. at —, 338 F.2d at 111.

1. The fact that the respondent was a Jehovah's Witness was not mentioned in Judge Meyer's opinion. However, it is clear the transfusion was refused because of respondent's religious beliefs. Erickson v. Dilgard, Civil No. 11974, N.Y. Sup. Ct. Nassau County, Oct. 1, 1962.

transfusion. Respondent was willing to submit to the operation but refused the transfusion. Petitioner, superintendent of the hospital, applied for an order authorizing administration of a transfusion on the ground that it was very likely that respondent would otherwise die, whether he had the operation or not. It was contended this would be tantamount to suicide as defined in the New York Penal Law.[2] Supreme court, special term, rejected the suicide argument on the ground that the certainty of any medical decision is always in question and held that, where the individual is competent, his final decision must be respected.[3] *Erickson v. Dilgard*, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (Sup. Ct. 1962).

At common law, suicide was a felony which was punishable "by ignominious burial and forfeiture of goods and chattels to the king."[4] The attempt to commit the act was a misdemeanor.[5] In New York, the successful commission of suicide is a "grave public wrong,"[6] but not a crime. The attempt to commit the act has not been criminal since 1919.[7] According to one commentator,[8] where there is no statute making *attempted* suicide illegal, "the refusal of necessary medical aid . . . must be conceded to be lawful."[9] It is debatable, however, whether New York intended to go this far despite its recognition that the act and attempt are not crimes, since the act is still expressly against public policy.[10]

There is no doubt that the courts have the power to order compulsory treatment of children for any serious injury or sickness (including blood transfusions),[11] and adults may be ordered to submit to prophylaxis for contagious

2. N.Y. Pen. Law § 2300 provides that "suicide is the intentional taking of one's own life."

3. The question arises as to the court's jurisdiction of the action. In People v. Laman, 277 N.Y. 368, 14 N.E.2d 439 (1938), it was held that equity will not refuse to consider the act simply because it falls within a penal statute. Where "public health, morals, safety and welfare of the community . . . required protection from irreparable injury" equity would have proper jurisdiction. Id. at 378, 14 N.E.2d at 443.

4. Perkins, Criminal Law 65 (1957).

5. Ibid.

6. N.Y. Pen. Law § 2301 states that suicide is "a grave public wrong." See Darrow v. Family Fund Soc'y, 116 N.Y. 537, 543, 22 N.E. 1093, 1094 (1889), overruled on other grounds, Shipman v. Protected Home Circle, 174 N.Y. 398, 410, 67 N.E. 83, 87 (1903); Hundert v. Commercial Travelers Mut. Acc. Ass'n, 244 App. Div. 459, 460, 279 N.Y. Supp. 555, 556 (1st Dep't 1935).

7. N.Y. Sess. Laws 1919, ch. 414, § 1. See also Marks & Paperno, Criminal Law in New York § 100 (1961). The Model Penal Code makes no mention of suicide except where an individual purposely causes another to take his own life. Model Penal Code § 201.5(1) (Tent. Draft No. 9, 1959). In comment 1 to the above section, it is stated that "this [suicide] is not an area in which the penal law can be effective and that its intrusion on such tragedies is an abuse."

8. Cawley, Criminal Liability in Faith Healing, 39 Minn. L. Rev. 48 (1954).

9. Id. at 68.

10. See notes 2 & 6 supra and accompanying text.

11. People v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, cert. denied, 344 U.S. 824 (1952)

diseases.[12] The question presented, however, is whether a competent adult may, by a court order, be required to submit to a blood transfusion when death is imminent. Even if we assume, *arguendo*, that New York would go to great lengths to enforce its express public policy, it is questionable whether the act of this particular patient is within the purview of the penal law.

Section 2300 provides that the act of suicide must be intentional.[13] Most authority, and it is sparse, indicates that the instant situation is not within the scope of the definition because the intent to die in such a case is merely passive[14] or ancillary[15] to the dominant intent to follow certain beliefs that conflict with medical attention. It has been suggested, however, that a diabetic who refused insulin would in fact be committing suicide.[16] The latter conclusion seems more reasonable. The "passive intent" argument centers on the premise that the patient in fact does nothing. If this were so, the hospital probably could have proceeded with the transfusion.[17] What brought about the controversy was an *active* refusal to let the hospital pursue this course. Nor is the "ancillary intent" argument wholly effective. The most laudable motive is no defense where conduct constitutes a violation of the penal law.[18]

(blood transfusion); Morrison v. State, 252 S.W.2d 97 (Mo. Ct. App. 1952) (blood transfusion); Santos v. Goldstein, 16 App. Div. 2d 755, 227 N.Y.S.2d 450 (1st Dep't) (memorandum decision) (blood transfusion), appeal dismissed, 12 N.Y.2d 672, 185 N.E.2d 904, 233 N.Y.S.2d 465 (1962); Mitchell v. Davis, 205 S.W.2d 812 (Tex. Ct. Civ. App. 1947) (medical care).

12. Jacobson v. Massachusetts, 197 U.S. 11 (1905) (smallpox vaccination); State v. Hay, 126 N.C. 999, 35 S.E. 459 (1900) (smallpox vaccination).

13. N.Y. Pen. Law § 2300; see note 2 supra.

14. See Ford, Refusal of Blood Transfusions by Jehovah's Witnesses, 10 Catholic Law. 212, 225 (1964): "The person who commits suicide violates a negative precept of the law of God; 'Thou shalt not kill.' The moral situation of one who fails to take affirmative measures to keep himself alive is quite different, especially when the measures concerned are artificial surgical procedures." But see Application of Georgetown College, Inc., 331 F.2d 1000, 1009 (D.C. Cir.) (dictum), cert. denied, 377 U.S. 978 (1964): "Only quibbles about the distinction between misfeasance and nonfeasance, or the specific intent necessary to be guilty of attempted suicide, could be raised against this latter conclusion."

15. "Death, to Mrs. Jones, was not a religiously-commanded goal, but an unwanted side effect of a religious scruple. There is no question here of interfering with one whose religious convictions counsel his death, like the Buddhist monks who set themselves afire." Application of Georgetown College, Inc., supra note 14, at 1009.

16. Perr, Suicide Responsibility of Hospital and Psychiatrist, 9 Clev.-Mar. L. Rev. 427, 433 (1960).

17. For a discussion of the "implied consent" doctrine which it appears would be applicable in such a situation, see Comment, Torts-Battery-Consent and Privilege in Surgical Operations—Tabor v. Scobee, 42 Ky. L.J. 98 (1953). The author points out that, when a patient is conscious, it usually is possible to obtain either express permission or refusal. However, if the patient were to say nothing, the situation would be analogous to the discovery of a serious condition while the patient was under anaesthetic. See also Comment, Surgery Without the Patient's Consent—A New Test for Liability, 4 U.C.L.A.L. Rev. 627 (1957).

18. "'Motive . . . is resorted to as a means of arriving at an ultimate fact, not for

It simply does not matter what other intentions may accompany a person's conduct so long as he has knowledge of the prohibited results of that conduct. Therefore, the intent in the instant case should be sufficient to satisfy the standard in the penal law if the patient in fact had knowledge he would die should no action be taken. The court, however, held no such knowledge could exist due to lack of definiteness in medical diagnosis.[19] Two decisions have been reached this year, which, although distinguishable from the instant case on their facts, are contra to the present decision on the question of medical competency.

In *Application of Georgetown College, Inc.*[20] an adult woman was ordered to submit to a blood transfusion on the grounds that she was *in extremis, non compos mentis*,[21] and therefore, in the same position as a dying child. The court reasoned that if a parent may not prevent the saving of his child's life, *a fortiori*, the husband may not forbid treatment to his wife because of his being a Jehovah's Witness.[22] It is interesting to note there was no, and never has been, a statute covering attempted suicide in the District of Columbia. Consequently, the common law, which considered attempted suicide a misdemeanor, applied.[23] The court's discussion of attempted suicide,[24] however, was dictum since due to the patient's lack of mental capacity, technical suicide was impossible. The court was, nevertheless, willing to accept the doctor's diagnosis of forthcoming death.[25] On this point, the instant case and *Georgetown College* are simply at odds.

Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson,[26] decided in New Jersey, held that where a pregnant woman might need transfusions to protect

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the purpose of explaining the reason of a criminal act which has been clearly proved . . . .'" People v. Lewis, 275 N.Y. 33, 40, 9 N.E.2d 765, 768 (1937) (quoting from People v. Fitzgerald, 156 N.Y. 253, 258, 50 N.E. 846, 847 (1898)). See State v. Merrifield, 180 Kan. 267, 269, 303 P.2d 155, 157 (1956): "The doing of an inhibited act constitutes the crime, and the moral turpitude or purity of motive by which it is prompted, and knowledge or ignorance of its criminal character, are immaterial circumstances on the question of guilt." See also Morss v. Forbes, 24 N.J. 341, 359, 132 A.2d 1, 11 (1957).

19. 44 Misc. 2d at 28, 252 N.Y.S.2d at 706.

20. 331 F.2d 1000 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964).

21. It must be reiterated that, in the instant case, there was no doubt that respondent was a competent adult.

22. 331 F.2d at 1008.

23. Ibid.; see Cawley, supra note 8, at 68-69. Also discussed in the Georgetown College case was the fact that the dying woman had a seven-month-old child. Since the mother has a duty to society to care for her child, society has an interest in preserving the mother's life. 331 F.2d at 1008; accord, Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (per curiam), cert. denied, 377 U.S. 985 (1964).

24. 331 F.2d at 1008-09.

25. "Under the circumstances, it may well be the duty of a court of general jurisdiction . . . to assume the responsibility of guardianship for her . . . at least to the extent of authorizing treatment to save her life." Id. at 1008. In short, the court simply accepted the medical diagnosis without question.

26. 42 N.J. 421, 201 A.2d 537 (per curiam), cert. denied, 377 U.S. 985 (1964).

her life and that of her unborn child, the court may order the transfusions to the mother. This decision is not as comprehensive as *Georgetown College*, for, despite the fact the patient in that case did have a child who would have been left without a mother in the event of her death, that child's life did not depend upon the mother's continued existence.[27] The New Jersey Supreme Court expressly reserved opinion on whether a competent adult could be made to submit to blood transfusions to save his own life,[28] and the instant case is the only authority which has ruled directly on this problem. In New Jersey, however, the doctor's diagnosis once again was accepted. It would seem that this is the more reasonable view in the light of modern medical competence. Therefore, since the intent in the instant case was active, since any ancillary intent would not change the result, and since medical opinion is sufficiently definite, the instant court was in error in limiting its decision to such narrow grounds and should have proceeded to the essence of the problem—a grave constitutional question. It is assumed that, since respondent was a Jehovah's Witness, his refusal was based on that religion's prohibition against drinking blood.[29]

In *Cantwell v. Connecticut*,[30] the Supreme Court held that the provisions of the first and fourteenth amendments to the Constitution, guaranteeing the freedom of religion, must be regulated so as to balance this freedom with the welfare of society.[31] The Supreme Court, shortly thereafter, in *Prince v. Massachusetts*,[32] reiterated its stand as to the balance between religious freedom and the public welfare.[33] Mr. Justice Murphy, who dissented on the facts of the case, set forth a generally-accepted standard when he stated that the state could not interfere with religious activities unless the evils to the public were "grave, immediate, [and] substantial."[34] The facts of the instant case must be examined in the light of this statement. What is more important to society than its very components?[35] How can it be said that the freedom

27. For a discussion of both the Georgetown College and the Raleigh Fitkin cases, see 33 Fordham L. Rev. 80 (1964).

28. 42 N.J. at 423, 201 A.2d at 538.

29. See note 1 supra and accompanying text.

30. 310 U.S. 296 (1940).

31. Id. at 303-04. An example of a situation in which the state had a sufficient interest is the Georgetown College case, where the welfare of the seven-month-old child was considered by the court. See note 23 supra.

32. 321 U.S. 158 (1944).

33. Id. at 165.

34. Id. at 175 (Murphy, J., dissenting).

35. For an analysis of the philosophical background of this position see O'Sullivan, The Ethics of Suicide, 2 Catholic Law. 147 (1956). At one point the author states: "[S]ince each member is a part of the whole human body, it exists for the sake of the whole body, and hence it is to be treated in whatever way the good of the whole requires. A member which is healthy, therefore, and in its normal state, cannot be cut off without injury to the whole body. Yet, since the whole man is directed to the whole community of which he is a part, it may happen that the amputation of a member . . . may be directed to the good of the whole community, if it be inflicted as a punishment with a view

of religion provisions of the Constitution outbalance a "grave, immediate, [and] substantial" harm to a member, *i.e.*, his death? If a person's religious belief were that he should kill others, would this be permissible? Mr. Justice Jackson, in *Prince*, stated: "I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public."[36] The validity of drawing the line at this point is questionable. Why is one's own life less important to society than that of another?

Although not discussed in the court's opinion, variations of the problem in the instant case may arise. For example, suppose the superintendent refused to allow or the surgeon refused to perform the operation without the administration of the blood transfusion. Would they be civilly or criminally liable? The superintendent of a public general hospital shall "receive into the hospital . . . any person . . . who is sick . . . and who is in need of hospital care . . . ."[37] The board of managers must "provide for the medical care and treatment of all persons admitted to the hospital . . . ."[38] However, the superintendent may discharge a patient who "is no longer a suitable patient for treatment therein . . . ."[39] Would the hospital have been liable if respondent had been discharged? According to the language of this statute it would seem not, since it would appear that respondent was "no longer a suitable patient for treatment."

The problem may also be viewed in the language of another statute. The penal law provides that "a person who wilfully, in any manner, advises, encourages, abets, or assists another person in taking the latter's life, is guilty of manslaughter in the first degree."[40] It would appear here that the word "wilfully" would preclude the superintendent from having the requisite intent.[41] For the same reason, it is concluded that the physician would probably not be liable criminally.

There would be a greater chance of a successful suit against a doctor who unsuccessfully performed the operation without the transfusion than against one who did nothing. According to Dean Prosser, a physician, "by undertaking to render medical services . . . will ordinarily be understood to hold

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to the repression of certain crimes. . . . But a private person may never take such action, even with the consent of the victim. To do so would be to do an injury to the community to which the individual man in his integrity belongs." Id. at 148-49.

36. 321 U.S. at 177 (Jackson, J., dissenting). This idea has been stated in a slightly different way. "A working rule might be that the majority should abstain from obliging the minority to follow any practice which they condemn as immoral, provided abstention does not injure the common good." St. John-Stevas, Life, Death and the Law 47 (1961).

37. N.Y. Munic. Law § 129(5).

38. N.Y. Munic. Law § 128(4).

39. N.Y. Munic. Law § 129(7).

40. N.Y. Pen. Law § 2304.

41. The word "wilfully" as used in this section must be distinguished from "intentionally" as used in the suicide section. A wilful act when used in a criminal statute is an intentional act that is "done with a bad purpose." United States v. Murdock, 290 U.S. 389, 394 (1933). See People v. Weiss, 276 N.Y. 384, 12 N.E.2d 514 (1938).

himself out as having standard professional skill and knowledge."[42] A performance of the operation would not be in accord with medical opinion and would create the possibility of liability for malpractice.

From the authority of *Georgetown College*[43] and *Raleigh Fitkin*,[44] there seems little doubt that the definite opinion of doctors as to forthcoming death should be respected and that the patient in the instant case was committing a positive act of suicide. It is contended that, if respondent were forced to submit to the transfusion on the ground that he was violating the suicide provisions of the New York Penal Law,[45] this would not have been a violation of his constitutional rights under the first and fourteenth amendments. These rights should be compromised when a life—any life—is at stake.

Yet, this does not go far enough. It is wrong that the courts should have to use the extensive constitutional measures discussed in order to accomplish the goal sought. Perhaps a statute could be drafted that would effectively balance the rights involved. If the patient should refuse to submit to treatment where there is, in the consensus of competent medical opinion, a strong chance to save his life, the court should order the treatment. If there is only a questionable chance of success, he should be free to reject it.

Domestic Relations—Validity of Separation Agreement Conditioned Upon Divorce.—In an action by his former wife to recover arrears due under a separation agreement, the defendant pleaded that the agreement was made as an inducement to divorce and tended directly to promote the dissolution of the marriage. The agreement, executed after the couple had been living separately, provided for monthly payments to be made during the wife's life and termination only upon her subsequent remarriage.[1] At the trial, defendant's attorney testified that the separation agreement was executed after the parties had orally agreed that the plaintiff was to go to the Virgin Islands to obtain a divorce. He further stated that the obtaining of a divorce was a condition for execution of the agreement.[2] The trial court,[3] interpreting this oral agreement to be a violation of Section 51 of the New York Domestic Relations Law (now Section 5-311 of the New York General Obligations Law),[4] invalidated the entire agreement. The

42. Prosser, Torts § 32, at 165 (3d ed. 1964).
43. 331 F.2d 1000 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964).
44. 42 N.J. 421, 201 A.2d 537 (per curiam), cert. denied, 377 U.S. 985 (1964).
45. N.Y. Pen. Law §§ 2300-01.

1. Until the agreement was executed, the defendant had been paying $400 a month for plaintiff's support. The agreement called for payment of $458.33 monthly, to be reduced to $3,600 per annum should the husband's actual income fall below $10,000 per annum.
2. Viles v. Viles, 14 N.Y.2d 365, 367, 200 N.E.2d 567, 568, 251 N.Y.S.2d 672, 673 (1964).
3. 36 Misc. 2d 731, 233 N.Y.S.2d 112 (Sup. Ct. 1962).
4. The prohibitive words of the statute are: "A husband and wife cannot contract to alter or dissolve the marriage . . . ."

appellate division[5] and the court of appeals affirmed.[6] *Viles v. Viles*, 14 N.Y.2d 365, 200 N.E.2d 567, 251 N.Y.S.2d 672 (1964).

The New York cases respecting void separation agreements have been so unclear that one observer has stated that the conclusive force in determining the validity of the contract has been the personal prejudices and moral attitudes of the particular court.[7]

In the instant case, the husband, hoping to remarry, had asked his wife for a divorce. The wife at first agreed, but later refused to comply with his request. At a conference between the spouses and their attorneys,[8] the wife once again agreed to a divorce and the husband agreed to finance the wife's journey to the Virgin Islands, the proposed locus of the divorce action. The defendant also agreed to pay plaintiff's attorney fees and, soon after, mailed his check to her attorney to cover all her expenses. Two months later the wife obtained a divorce.

In *Lake v. Lake*,[9] one of the earliest and most frequently cited cases invalidating separation agreements, the wife, in return for 2,000 dollars, was to forgo all claims against her husband. She was to be paid only after the divorce was granted and, until that time, was to receive nothing. The court held that "it is clear beyond question that the effect of this contract was to stimulate

5. 20 App. Div. 2d 626, 245 N.Y.S.2d 981 (1st Dep't 1963) (memorandum decision).

6. The instant case raises a collateral question of some importance which the court has apparently decided by omission, viz., whether the issue of the validity of the separation agreement was properly before the New York court. In Rehill v. Rehill, 306 N.Y. 126, 135, 116 N.E.2d 281, 285 (1953), the court held that when a separation agreement is "'ratified, approved . . . [or] confirmed'" by a sister state or territory, New York must give full faith and credit to that holding and cannot consider the validity of that agreement. If the court tampered with the agreement, they would be affecting not only the contract, but also the foreign decree. Rehill must be contrasted with Flood v. Thiesing, 273 App. Div. 548, 78 N.Y.S.2d 453 (1st Dep't) (per curiam), aff'd mem. 298 N.Y. 700, 82 N.E.2d 790 (1948), where the wife, in her action for divorce in Nevada, specifically asked the court to "'make no orders concerning the matters covered by said agreement.'" 273 App. Div. at 549, 78 N.Y.S.2d at 454. It was held that where the parties specifically ask that the agreement not be ruled on in the foreign action, New York may properly rule on the contract. In the instant case, plaintiff presented the terms of the contract to the divorce court to rule on as it saw fit. The divorce decree provided for payment substantially similar to that stipulated in the parties' agreement, but the contract was neither incorporated into the decree, nor specifically ratified by it. See Viles v. Viles, 316 F.2d 31, 32-33 n.1 (3d Cir. 1963). The instant case, therefore, can be readily distinguished from both of these prior holdings. Since, in its decision, the court does not treat of the matter of its jurisdiction, it must be assumed that they equated the present case with Flood rather than with Rehill. Such a holding appears reasonable and fully within the court's discretion. See Schacht v. Schacht, 295 N.Y. 439, 68 N.E.2d 433 (1946); Fry v. Fry, 279 App. Div. 122, 108 N.Y.S.2d 227 (1st Dep't 1951), aff'd, 304 N.Y. 889, 110 N.E.2d 501 (1953).

7. Feld, An Appraisal of the Separation Agreement in New York, 15 Brooklyn L. Rev. 210, 213 (1949).

8. The purpose of the conference was to discuss financial arrangements.

9. 136 App. Div. 47, 119 N.Y. Supp. 686 (3d Dep't 1909).

her energies in bringing about [a divorce] . . ."[10] and refused to uphold the agreement.[11]

The husband in *Schley v. Andrews*[12] stipulated that if his wife would procure a divorce he would pay her 200 dollars per month during her life, have his life insured for 20,000 dollars, payable to her while she remained unmarried and, as collateral security, confess judgment for 35,000 dollars. The court held this agreement to be a fraud upon the law[13] and ruled that neither the separation agreement nor the confession of judgment were to have any legal effect.

These two decisions point out that where the only reasonable construction the court can give to the agreement is that it was made to encourage a divorce proceeding, the court has no other choice but to declare it invalid. The instant court would have been justified in reaching its decision had the facts of the instant case given rise to such a construction. However, more than one interpretation could have been given to the separation agreement, and where the facts admit of more than one reasonable interpretation, the authorities are split on whether to uphold or invalidate the agreement.[14]

In *Murthey v. Murthey*,[15] the husband did not agree to pay his spouse an exorbitant sum of money, nor was it a sum which the wife could not expect to receive in a divorce action.[16] Testimony of the oral negotiations of the parties showed, however, that the husband would not have executed a bond and mortgage to assure payment unless the wife agreed to get a divorce.[17] The court invalidated the agreement. This case clearly illustrates a situation where the court, in good conscience, could have found the agreement valid but, in choosing not to honor the contract, followed the form rather than the substance of the transaction. Had the court looked beyond the words of the parties to

10. Id. at 49, 119 N.Y. Supp. at 688.

11. It is clear that by this agreement the husband was relieving himself of his legal obligation to support his wife, as provided by § 51 of the Domestic Relations Law, and by this fact alone the agreement could have been voided. The court, however, did not mention this aspect of the case.

12. 225 N.Y. 110, 121 N.E. 812 (1919).

13. The court meant that the agreement was a conscious violation of the public policy of the state, rather than an agreement made in good faith but which ran afoul of the law. The court stated: "The agreement was entered into by the plaintiff for the sole purpose of inducing the defendant to procure a divorce. This the defendant at the time of the execution thoroughly understood, since the agreement provided that if she did not do so, it and the confession of judgment were to be of no effect." Id. at 113, 121 N.E. at 812.

14. See, e.g., Butler v. Marcus, 264 N.Y. 519, 191 N.E. 544 (1934) (memorandum decision), where the agreement was upheld, and Murthey v. Murthey, 287 N.Y. 740, 39 N.E.2d 941 (1942) (memorandum decision), where it was held invalid. For the facts of Murthey, see Record, vol. 182.

16. The agreement called for payment of $225 monthly during the joint lives of the parties or until the wife remarried. It also provided for payment of $2,500 to the wife's attorneys which included her transportation costs to Massachusetts, the locus of the divorce action. Record, vol. 182, pp. 269-70.

17. 287 N.Y. at 740-41, 39 N.E.2d at 941.

their intention, it could have seen that it was not the agreement which brought about the divorce, but rather the instability of the marriage. The agreement was designed more towards alleviating hardships attendant to divorce actions[18] than towards promoting divorce and did not violate Section 51 of the Domestic Relations Law.

The later case of *Niman v. Niman*,[19] though less of a borderline case than *Murthey*, serves to illustrate one of the factors used in determining whether the statute was violated, viz., the proximity of the execution of the agreement and the securing of a divorce. Here again the written agreement was valid but, as in the instant case, it was the oral negotiations which dealt a fatal blow to the contract. The facts showed that the husband's search for "peace of mind"[20] entailed breaking the matrimonial bonds and that when his wife learned of this she replied: "If it is peace of mind you want, will you pay for a divorce . . . ?"[21] The court did not rely solely on these words in refusing to enforce the agreement, but also took into account the fact that six weeks after the execution of the contract the parties were divorced. Proximity was also taken into account by the court in the instant case.

As was mentioned previously, there are authorities that support the proposition that if the terms of the agreement can be read so as to admit of its validity, the fact that it could be interpreted otherwise will not work to invalidate it. These cases cast some doubt on the propriety of the holding in the instant case. *Butler v. Marcus*,[22] decided in 1936, destroyed the myth that a separation agreement conditioned on divorce is void in New York. The pertinent provision in the agreement provided:

"In the event that the parties . . . are still united in the bonds of matrimony [in one year's time] it is mutually agreed that all the foregoing terms, covenants and agreements shall cease to be binding upon either of the parties for any purpose and they shall be at liberty to readjust their differences. If either party at that time shall have obtained an absolute divorce from the other, then all of the foregoing covenants and agreements shall continue in full force and effect."[23]

The court of appeals, in a memorandum decision, held that the agreement was not rendered invalid by this clause.

Nine years later the spirit of *Butler* was reaffirmed in *Matter of Rhinelander*.[24] The court upheld an agreement requiring payment by the husband of 3,600 dollars annually for the remainder of the wife's life[25] in return for the wife's reopening of a Nevada divorce action. The court stated that "we have moved

18. For example, determining: (1) ownership of property; (2) payment of support; and (3) remuneration of counsel.

19. 15 Misc. 2d 1095, 181 N.Y.S.2d 260 (Sup. Ct. 1958), aff'd mem. 8 App. Div. 2d 793, 188 N.Y.S.2d 948 (1st Dep't 1959).

20. 15 Misc. 2d at 1097, 181 N.Y.S.2d at 264.

21. Ibid.

22. 264 N.Y. 519, 191 N.E. 544 (1934) (memorandum decision).

23. Id. at 519-20, 191 N.E. at 544.

24. 290 N.Y. 31, 47 N.E.2d 681 (1943).

25. The husband's father was to guarantee payment.

in the direction of legalizing separation agreements made during marriage, so long as they are not agreements *to separate* or to release the husband from his obligation to support the wife."[26] With respect to section 51, the court stated that it would enforce the statute only against "agreements which have a *direct* tendency toward dissolving marriages."[27]

An attempt was made to clarify the reasoning of the New York courts in *Yates v. Yates*.[28] Judge Van Voorhis, then Justice Van Voorhis, who wrote the dissenting opinion in the instant case, upheld an agreement valid on its face but which was accompanied by an oral agreement that the wife was to obtain a Florida divorce.[29] Three weeks later the divorce decree was granted. Thus, in *Yates*, the proximity between the agreement and the divorce was not considered a controlling factor. The court distinguished between an agreement made in contemplation of divorce which, under the rule of *Werner v. Werner*,[30] is not illegal, and an agreement to promote divorce which is illegal. In *Werner*, the agreement was made after the divorce action had been commenced, fixing the amount of the wife's alimony should she be granted a divorce. The court distinguished these facts from *Lake v. Lake*, where the agreement was made to promote divorce, and held that although the agreement was conditioned on divorce, it could not be said that it was promoting divorce since that action was already pending.[31]

In *Yates*, Judge Van Voorhis stated that prior cases[32] demonstrate that New York, in its attempt to distinguish between the concepts of "promotion" and "condition," has been implicitly following the guide line set down in the federal case of *Moore v. Moore*.[33] The court in *Moore* stated that where the validity of the contract is in question and the wife is getting substantially more from the separation agreement than she would be entitled to in a divorce or separation action, this factor is valid evidence that the offer was made and the agreement was executed as an inducement to promote divorce. In *Yates*, though divorce was contemplated, it was not being induced since the wife was to receive, in substance, that to which she was entitled by law.

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26. 290 N.Y. at 37, 47 N.E.2d at 684.

27. Id. at 38, 47 N.E.2d at 684. In Gould v. Gould, 261 App. Div. 733, 27 N.Y.S.2d 54 (1st Dep't 1941), however, where the father guaranteed payment through a trust fund, such a trust was held unenforceable because it was a "procurement of a divorce." Id. at 736, 27 N.Y.S.2d at 57.

28. 183 Misc. 934, 51 N.Y.S.2d 135 (Sup. Ct. 1944).

29. The husband made arrangements for payment of the wife's expenses the day before the separation agreement was signed.

30. 153 App. Div. 719, 138 N.Y. Supp. 633 (1st Dep't 1912), approved, Hammerstein v. Equitable Trust Co., 156 App. Div. 644, 649-50, 141 N.Y. Supp. 1065, 1070 (1st Dep't), aff'd, 209 N.Y. 429, 103 N.E. 706 (1913).

31. 153 App. Div. at 722-23, 138 N.Y. Supp. at 635-36.

32. See, e.g., Murthey v. Murthey, 287 N.Y. 740, 39 N.E.2d 941 (1942) (memorandum decision); Schley v. Andrews, 225 N.Y. 110, 121 N.E. 812 (1919); Gould v. Gould, 261 App. Div. 733, 27 N.Y.S.2d 54 (1st Dep't 1941).

33. 255 Fed. 497, 502 (3d Cir. 1919).

This standard applied by Judge Van Voorhis has been followed either explicitly or implicitly by the courts[34] since the *Yates* decision. One authority has stated, however, that the standard in determining "the probable tendency of the agreement to induce a divorce . . . will not do, because all separation agreements have some such tendency."[35] Thus, even the seemingly workable rule laid down by New York in an attempt to solve the problem of determining the validity of separation agreements is too imprecise to be of sufficient aid.

It should be quite clear from the prior decisions that to hold a separation agreement invalid because it is conditioned on divorce is to misconstrue, not only the statute, but also the interpretation given it by the courts. In the instant case, the dissenting judges maintained that the separation agreement was not conditioned on divorce and that even if it were so construed, it was still not a "contract to alter or dissolve the marriage" according to the prohibitive terms of the statute.[36]

It appears from a consideration of the cases that the crucial factor determining whether the court will or will not uphold an agreement which does not provide for payment of an outrageous sum is whether the court is willing to accept the liberal *Butler* holding or the more restrictive *Murthey* decision.[37] The *Murthey* view, *i.e.*, invalidating agreements merely because it was the intention of the parties to dissolve the marriage at the time the contract was made, appears to be one of reaction, ignoring the distinctions made by *Werner*, *Butler* and *Yates*.

Although the instant case does not reverse the holding of *Butler v. Marcus*, it does detour from the liberalizing trend, thereby complicating further an already distressing situation. In some cases separation agreements are a necessary evil, and, therefore, the courts do not serve the public policy of the State by readily voiding these contracts where it is not a certainty that the spouses are violating the statute.

No doubt it is of little consolation to the New York Bar to know that the law of a vast majority of states is as unclear as that of New York. Thus, New Jersey proclaims that "all bargains which have for their object or tendency the divorce of married people are opposed to public policy," and are therefore

34. See, e.g., Koehler v. Koehler, 30 Misc. 2d 381, 382, 219 N.Y.S.2d 440, 441 (Sup. Ct. 1961); Niman v. Niman, 15 Misc. 2d 1095, 1096, 181 N.Y.S.2d 260, 263 (Sup. Ct. 1958), aff'd mem. 8 App. Div. 2d 793, 188 N.Y.S.2d 948 (1st Dep't 1959); Kroll v. Kroll, 4 Misc. 2d 520, 522, 158 N.Y.S.2d 930, 932 (Sup. Ct. 1956).

35. Clark, Separation Agreements, 28 Rocky Mt. L. Rev. 149, 160 (1956).

36. N.Y. Dom. Rel. Law § 51 (now N.Y. Gen. Oblig. Law § 5-311).

37. See, e.g., Abeles v. Abeles, 197 Misc. 913, 96 N.Y.S.2d 423 (Sup. Ct. 1950), 20 Fordham L. Rev. 208 (1951), where the wife was to receive $25,000 and a Lincoln automobile five days after she divorced defendant and was to get neither if she were still married to him. The court stated: "A substantial inducement to get and a reward for getting a divorce are thus held out to her; and it would thus seem to be an agreement which is 'promotive of divorce' and which 'stimulates a divorce' . . . . [However] I am unable to differentiate this case from Butler v. Marcus . . . and upon the authority of that case I am constrained to hold that the agreement here is valid . . . ." 197 Misc. at 914-15, 96 N.Y.S.2d at 425-26.

unlawful.[38] With this vague statement as its guide, New Jersey runs into the same problems as New York.

Not every state, however, has been content to rest upon a vague assertion of the law. In *Hill v. Hill*,[39] the Supreme Court of California held that where there is no evidence in a divorce action of collusion or an agreement not to defend, the condition of divorce behind a separation agreement will not invalidate the contract even though the condition may have been a factor in persuading the wife to bring the action. Public policy, the court stated, does not discourage divorce when all the legitimate objects of the marriage have been frustrated.[40]

Montana has recently followed the lead of California holding that

> any agreement, the purpose of which is to facilitate the granting of a divorce without proper grounds existing, is void, but . . . where proper grounds do exist, an agreement . . . when not brought about by duress or coercion, cannot be said to perpetrate a fraud upon the court and will not be held void.[41]

Therefore, in the absence of collusion, Montana, too, will allow the agreement to stand although it facilitates divorce.

In New York, when the courts invalidate such agreements, they are not saving faltering marriages, but instead are adding to the litigation and, as a corollary, to the bitterness of the spouses. By upholding the contract in cases involving fair negotiations between husbands and wives, the courts will not be violating public policy, as reflected by the words of the statute, but will be aiding both the spouses and themselves. The courts can function far more effectively when the litigants have validly settled their financial arrangements.

Taxation—Depreciation Deduction in Year of Sale.—In 1946, petitioner, an Oregon corporation, purchased a plot of land together with a building in downtown Portland, Oregon. The building was reconstructed and when completed in 1949, it was assigned a basis[1] of $2,835,161.55, and the land a basis

38. Staedler v. Staedler, 6 N.J. 380, 389, 78 A.2d 896, 901 (1951). See Ozmore v. Ozmore, 179 Ga. 339, 341, 175 S.E. 789, 790 (1934); Wolkovisky v. Rapaport, 216 Mass. 48, 51, 102 N.E. 910, 911 (1913); Farrow v. Farrow, 277 S.W.2d 532, 535 (Mo. Sup. Ct. 1955); Arrington v. Arrington, 196 Va. 86, 93-95, 82 S.E.2d 548, 552 (1954).

39. 23 Cal. 2d 82, 142 P.2d 417 (1943).

40. The court commented on the semantic confusion surrounding this field: "While it is true that contracts condemned by the courts usually have been termed 'promotive of divorce' as distinguished from those 'incidental to divorce' or 'conditioned upon divorce,' this terminology is not always accurate or descriptive. The validity of such contracts must be determined in the light of the factual background of each case and considerations of public policy appropriate thereto. Most property settlement agreements are . . . promotive of divorce in the sense that an amicable adjustment of property rights facilitates the completion of contemplated divorce proceedings." Id. at 93, 142 P.2d at 422.

41. Schulz v. Fox, 345 P.2d 1045, 1050 (Mont. Sup. Ct. 1959).

1. "The basis of property shall be the cost of such property . . . ." Int. Rev. Code of 1954, § 1012.

of $77,204.64. From 1949 through 1958, the year of sale, the market value of the property increased substantially. In 1957, the directors and shareholders of petitioner decided to sell the building and liquidate the corporation,[2] and on July 25, 1958, six days prior to the end of its fiscal year, petitioner sold the land and building for $3,900,000.[3] In its income tax return of 1958, petitioner depreciated the building for the entire year for a claimed deduction of $85,054.85 and reported a capital gain of $1,699,350.15.[4] The Commissioner disallowed the depreciation deduction on the building taken in the year of sale.[5] The Tax Court reversed the Commissioner's determination holding that the amount received on sale did not determine the salvage value of the building[6] and that depreciation was not required to be disallowed solely because the sale price exceeded the adjusted basis at the beginning of the year.[7] *Macabe Co.*, 1964 CCH Tax Ct. Rep. (42 T.C.) 3022 (Sept. 29, 1964).

The Commissioner here contended that the depreciation deduction on the building in the year of sale could not be taken because "the sales proceeds received by petitioner show that the building had not depreciated, but had appreciated in value and . . . petitioner had fully recovered before the end of

2. The motivating factor behind the sale of the building and liquidation of the corporation was the death of a principal stockholder in August of 1957.

3. The annual depreciation deduction taken on the building from 1949 through the end of the corporation's fiscal year in 1957 was $85,054.85, or a total of about $755,099.89 for the eight year period. "[A] reasonable allowance for the exhaustion, wear and tear, and obsolescence of property . . . held by the taxpayer for the production of income shall be allowed as a depreciation deduction." Treas. Reg. § 1.167(a)-1(a) (1957). The allowance is the amount set aside each year pursuant to a consistent plan, in the instant case, for example, the straight-line method, so that the aggregate amount plus salvage value at the end of the useful life of the asset will equal its cost or other basis. Ibid. Useful life "is the period over which the asset may reasonably be expected to be useful to the taxpayer . . . in the production of his income." Treas. Reg. § 1.167(a)-1(b) (1957). "Salvage value is the amount . . . which is estimated will be realizable upon sale or other disposition of an asset when it is no longer useful in the taxpayer's . . . production of his income . . . ." Treas. Reg. § 1.167(a)-1(c) (1957). For a discussion of the rationale for depreciation, see United States v. Ludey, 274 U.S. 295, 300-01 (1927).

4. Capital gain is the excess of the sale price over the basis of the land and depreciated basis of the building at the end of the fiscal year of sale.

5. The Commissioner determined a deficiency of $45,935.83 contending "that petitioner is not entitled to depreciation on the building in the year of sale because the aggregate depreciation taken by petitioner . . . in prior years, plus . . . the salvage value of the building, exceeds the . . . original cost . . . ." Macabe Co., 1964 CCH Tax Ct. Rep. (42 T.C.) 3022 (Sept. 29, 1964).

6. The petitioner estimated the useful life of the building to be thirty-three and one-third years and the salvage value at that time to be zero.

7. The court declined "to depart from the use of estimates and to equate salvage value with the actual sales price received in a situation where depreciable real property is unexpectedly sold substantially prior to the expiration of its estimated useful life . . . and where, as here, there has been no determination that useful life or salvage value had been incorrectly determined." 1964 CCH Tax Ct. Rep. at 3027.

that year . . . more than its undepreciated basis . . . ."[8] The Tax Court declined to accept the Commissioner's position because he failed to distinguish between the concept of depreciation of property through use and appreciation or depreciation as a result of market conditions.[9] The court ruled that depreciation, which occurs through wear and tear, use and passage of time,[10] is "separate and distinct from the computation of gain upon the sale of property"[11] held by the taxpayer in his business or for the production of income. Moreover, there was no showing that useful life or salvage value had been incorrectly *estimated*,[12] and the Commissioner sought to substitute the actual sale price of the building for the estimated salvage value without first redetermining useful life as required by the regulations.[13]

Five district courts have held that when property is sold for an amount in excess of its undepreciated cost or adjusted basis in the year of sale, the taxpayer is entitled to a depreciation deduction.[14] These courts have sustained

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8. Id. at 3024. This position was argued to carry out the intent of Int. Rev. Code of 1954, § 167. Otherwise, if the depreciation in the year of sale were allowed, the taxpayer would be recovering more than the cost or other basis of the asset because the sale price exceeded the undepreciated basis at the beginning of the year of sale.

9. 1964 CCH Tax Ct. Rep. at 3024.

10. Ibid.

11. Ibid. See also Int. Rev. Code of 1954, §§ 167, 1002, 1231 as a separate set of provisions.

12. In order to compute annual depreciation allowance, "useful life" and "salvage value" are used as estimates. Massey Motors, Inc. v. United States, 364 U.S. 92, 105 (1960); Cohn v. United States, 259 F.2d 371, 377 (6th Cir. 1958).

13. The court was of the opinion that the Commissioner misinterpreted Treas. Reg. § 1.167(b)-0(a) (1957), which says in part that "the reasonableness of any claim for depreciation shall be determined upon the basis of conditions known to exist at the end of the period for which the return is made."

"We believe . . . it is merely a general provision . . . especially in light of the more specific portions of the regulations explicitly (1) forbidding redetermination of salvage value after the time of acquisition of the asset merely because of changes in price levels and (2) providing for determination of salvage value only if the Commissioner is permitted to redetermine, and does in fact redetermine 'useful life.' . . . When that portion of the regulations setting forth the conditions under which 'useful life' may be redetermined is examined, it becomes clear that the Commissioner is authorized to redetermine merely the 'estimated remaining useful life' of the asset and not to reject a reasonable estimate in favor of a known factor, i.e., the period . . . the asset was actually held. See. 1.167(a)-1(b)." 1964 CCH Tax Ct. Rep. at 3028 n.16. (Emphasis omitted.)

14. Occidental Loan Co. v. United States, P-H 1964 Fed. Tax Serv. (14 Am. Fed. Tax R.2d 5911) ¶ 64-5283 (S.D. Cal. Nov. 13, 1964); Wyoming Builders, Inc. v. United States, 227 F. Supp. 534 (D. Wyo. 1964); S & A Co. v. United States, 218 F. Supp. 677 (D. Minn. 1963), aff'd, 338 F.2d 629 (8th Cir. 1964); Motorlease Corp. v. United States, 215 F. Supp. 356 (D. Conn. 1963), rev'd, 334 F.2d 617 (2d Cir. 1964); Kimball Gas Prod. Co. v. United States, 12 Am. Fed. Tax R.2d 5105 (1962) (W.D. Tex. 1962). See also Wier Long Leaf Lumber Co. v. Commissioner, 173 F.2d 549 (5th Cir. 1949). The decision of the court of appeals in S & A Co., supra, contains a comprehensive review of the law in this area.

the following argument: the taxpayer is entitled to depreciate an asset for wear and tear and use in his business according to estimates based upon useful life and salvage value.[15] The Treasury Regulations purportedly secure such estimates from mere changes in market value.[16] These estimates may be changed at the end of any period of depreciation when it becomes clear that the estimates were erroneous.[17] However, merely because an asset is sold prior to the end of its useful life does not necessitate a change in the estimates.[18] If the estimates were correct and the depreciation deductions were proper notwithstanding the sale, there is no reason to disallow the deduction in the year of sale. Depreciation occurs each day the asset is in existence and continues whether or not the market value goes up or down.

The Commissioner, on the other hand, has argued that the code and the regulations must be read in the light of congressional intent.[19] According to the Commissioner, if the sale price is greater than the undepreciated cost, clearly the asset had not depreciated. He reasoned that to allow the deduction in the year of sale would enable the taxpayer to convert otherwise ordinary income into capital gains taxed at a more favorable rate.[20] The sale price, according to this argument, should be determinative of salvage value. Such a result, it is argued, when placed into the scheme of depreciation, compels the conclusion that if sale price exceeds the undepreciated cost of the asset the recovery has already been made by the taxpayer and the depreciation deduction in the year of sale should be denied. The United States Court of Appeals for the Second Circuit sustained the Commissioner's position disallowing the deduction in the year of sale in *United States v. Motorlease Corp.*[21] and *Fribourg Nav. Co. v. Commissioner.*[22]

At an early date the Tax Court recognized that the sale price of an asset not fully depreciated is not indicative of a proper depreciation allowance. In *Wier Long Leaf Lumber Co.*,[23] the Tax Court decided that a taxpayer was not allowed to take a depreciation deduction in the year of sale when the sales price was in excess of the undepreciated cost of the asset. The case involved a sawmill and mill equipment which were used to cut timber that was removed from land owned by the taxpayer. Depreciation of the mill and equipment was based upon the number of years the tracts would be productive and at sale the tract was nearly exhausted. The court, however, affirmed the

15. Salvage value and useful life are estimated at the time of acquisition of the asset. See Treas. Reg. §§ 1.167(a)-1(b), -1(c) (1957). Consideration is given to the type of asset, period of intended use by the taxpayer, probable resale value and economic life of the asset.

16. Treas. Reg. § 1.167(a)-1(c) (1957).

17. Cohn v. United States, 259 F.2d 371 (6th Cir. 1958); Rev. Rul. 62-92, 1962-1 Cum. Bull. 29, 30.

18. See cases cited note 14 supra.

19. United States v. Motorlease Corp., 334 F.2d 617 (2d Cir. 1964).

20. Int. Rev. Code of 1954, §§ 1201-50 (subchapter P).

21. 334 F.2d 617 (2d Cir. 1964).

22. 335 F.2d 15 (2d Cir. 1964).

23. 9 T.C. 990 (1947), rev'd on other grounds, 173 F.2d 549 (5th Cir. 1949).

principle that mere appreciation in market value alone has no influence on the proper depreciation deduction.[24] The court stated that a redetermination is proper when there has been a miscalculation in useful life and salvage value and this will be shown at or near the end of estimated useful life or as in the case before it when the tract was substantially exhausted.

One of the leading cases on redetermination estimates is *Cohn v. United States*.[25] In *Cohn*, the taxpayers were partners in flying schools that trained pilots for army service. Various movable assets were depreciated from 1942-1944 on the basis of the useful economic life of the equipment which was the duration of the army contract. When depreciation was determined, however, no account was taken of salvage value at the end of useful life. The court held that salvage value may be adjusted by the Commissioner at the end of the useful life of an asset when an actual sale shows a substantial difference between the fact and the estimate.[26] The *Cohn* decision led to Revenue Ruling 62-92 which broadened the government's position by not limiting the redetermination of salvage value to the situation where the depreciable asset is sold near the end of its estimated useful life.[27] This ruling makes no reference, however, "to the effect of price level changes on the amount of salvage or the extent to which such changes will be taken into account."[28]

In the instant case, the taxpayer intended to use the building for the entire estimated period. *Massey Motors, Inc. v. United States*[29] and *Hertz Corp. v. United States*[30] do not indicate a different result in the treatment of the depreciation deduction in the year of sale. Those cases dealt with situations where the taxpayer did not intend to use the asset for its entire useful life. In *Massey Motors*, the court held that depreciation deductions taken on automobiles leased by the owner-taxpayer to others or used in the taxpayer's business and later sold as used cars should have been calculated on the basis of cost less resale value at the estimated time of sale. The court said "where the real salvage price and actual duration of use are relevant . . . adjustments may be made when it appears that a miscalculation has been made."[31] Judge Fay, speaking for the majority in the instant case, distinguished *Massey Motors*, noting that the Commissioner did not determine that the estimates made for useful life or salvage value of the building were inaccurate. Moreover, Mr. Justice Harlan, dissenting in *Massey Motors*, said that even the Commissioner's position is

24. 9 T.C. at 999.

25. 259 F.2d 371 (6th Cir. 1958).

26. Id. at 378.

27. Rev. Rul. 62-92, 1962-1 Cum. Bull. 29 says that "the depreciation deduction for the taxable year of disposition of an asset used in the . . . production of income . . . is limited to the amount, if any, by which the adjusted basis of the asset at the beginning of the year exceeds the amount realized from sale . . . ." See also Randolph D. Rouse, 1962 CCH Tax Ct. Rep. (39 T.C.) 3049.

28. See Egger, Depreciation Updated, 1963 Tulane Tax Institute 207, 212.

29. 364 U.S. 92 (1960).

30. 364 U.S. 122 (1960).

31. 364 U.S. at 105.

not that an asset disposed of prior to its physical exhaustion must be depreciated on the basis of equating useful life with the time it was actually used in the taxpayer's business: "It is only when the asset 'may reasonably be expected' to be disposed of prior to the end of its physical life that the taxpayer must base depreciation on the shorter period."[32]

In affirming the Tax Court, the court of appeals in *Fribourg Nav. Co. v. Commissioner*,[33] disallowed a depreciation deduction in the year of sale where the sale price exceeded the undepreciated cost. The court, citing Section 1.167(b)-0(a) of the Treasury Regulations, determined that the claimed depreciation deduction became unreasonable at the time it was known the estimates of useful life and salvage value were incorrect, *i.e.*, at the end of the year of sale. Since the entire cost would have been recovered by the sale, the "allowance [is] unreasonable, for it contravenes the basic purpose of the depreciation deduction."[34] The instant case expressly rejected the idea that the reasonableness of the taxpayer's claim for a depreciation deduction should be based on facts known at the end of the year of sale when the asset was unexpectedly sold prior to the end of useful life after appreciating in value.[35] Judge Moore, in a lengthy dissent in *Fribourg*, pointed out that salvage value should not be changed merely to reflect changes in price levels and should never be changed when there has not first been a change in useful life.[36] The dissent went on to say that Congress knew that taxpayers were receiving capital gains treatment from sometimes seemingly unreasonable deductions but it declined to adopt a change.[37] In *United States v. Motorlease Corp.*,[38] the same court of appeals that decided *Fribourg* held that a taxpayer using the straight-line method of depreciation could not take a depreciation deduction in the year of sale in excess of the amount by which the adjusted basis at the beginning of the year exceeded the sale price. The court stated that Congress' intent was to enable the taxpayer to recover any loss on the use of depreciable property but not to enable him to profit when the sale shows the estimate of salvage value to be inaccurate.

The Tax Court's position in the instant case was that if the *estimates* of useful life and salvage value were reasonable when the asset was acquired, they will not be redetermined because of an unexpected sale even though the asset appreciated in value. The instant case has been cited and approved by the Tax

32. Id. at 113 (Harlan, J., dissenting). Cf. Cohn v. United States, 259 F.2d 371 (6th Cir. 1958).

33. 335 F.2d 15 (2d Cir. 1964).

34. Id. at 17.

35. 1964 CCH Tax Ct. Rep. at 3024-25, 3027.

36. 335 F.2d at 18-23 (Moore, J., dissenting). This is specifically prevented by Treas. Reg. § 1.167(b)-0(a) (1957).

37. Id. at 21 (Moore, J., dissenting). Here, Judge Moore quoted from Evans v. Commissioner, 264 F.2d 502, 514 (9th Cir. 1959), rev'd on other grounds sub nom. Massey Motors, Inc. v. United States, 364 U.S. 92 (1960).

38. 334 F.2d 617 (2d Cir. 1964).

Court in *Smith Leasing Co.*,[39] *C. L. Nichols*,[40] *Harry Trotz*[41] and *Palmaneda Adams*.[42] Although the depreciation deduction was disallowed in *Smith Leasing Co.*, Judge Fay, in a concurring opinion, said the facts were similar to *Massey Motors* where the taxpayer knew he would sell prior to the end of estimated useful life. In *Smith*, there was no evidence of appreciation in market value, the sale occurred at the end of the taxpayer's first year and the Commissioner had in fact redetermined both useful life and salvage value. In the instant case the taxpayer had used the asset for several years before the unanticipated sale and there was a reasonable estimate of both useful life and salvage value. The Commissioner had not redetermined useful life and there was evidence that the gain on the sale was due to an appreciation in market value. The court in *Smith* said that there was no rule of law requiring disallowance of depreciation in the year of sale where the sale price exceeded the adjusted basis at the beginning of the year.[43]

In a recent case[44] where the taxpayer sold a shopping center prior to the end of its useful life, he was allowed to take a depreciation deduction in the year of sale even though the sale price exceeded the adjusted basis at the beginning of the year and the estimate of salvage value was zero. The sale price did not represent proof of salvage value. The Tax Court, relying on the instant case, said that the taxpayer's original estimate was not criticized nor did the sale take place near the end of useful life as in *Cohn*. Both *Cohn* and *Massey Motors*, where the estimates were erroneous, were recognized as exceptions.[45] Therefore, the taxpayer, in order to sustain his claim for depreciation, must show: (1) an intention to use the asset for the full estimate of useful life; (2) that the estimate of salvage value was reasonable; and (3) that the excess was the result of an appreciation in market value.[46]

As pointed out in the instant case, "the potentiality of abuse . . . inherent in the depreciation provisions has been curbed as of January 1, 1963, in the case of personal property and as of January 1, 1964, in the case of real property"[47] as a result of the passage of Sections 1245 and 1250 of the Internal Revenue Code. These sections, however, apply only to dispositions after the effective date of the respective statute. Prior to the Revenue Acts of 1962 and

39. 1964 CCH Tax Ct. Rep. (43 T.C.) 3075 (Oct. 20, 1964).

40. 1964 CCH Tax Ct. Rep. (43 T.C.) 3137 (Nov. 6, 1964).

41. 1964 CCH Tax Ct. Rep. (43 T.C.) 3132 (Nov. 6, 1964).

42. 1964 CCH Tax Ct. Mem. (23 Tax Ct. Mem.) 1743 (Oct. 30, 1964).

43. Smith Leasing Co., 1964 CCH Tax Ct. Rep. (43 T.C.) 3075, 3031 (Oct. 20, 1964). Accord, C. L. Nichols, 1964 CCH Tax Ct. Rep. (43 T.C.) 3137 (Nov. 6, 1964).

44. Palmaneda Adams, 1964 CCH Tax Ct. Mem. (23 Tax Ct. Mem.) 1743 (Oct. 30, 1964).

45. Id. at 1744. Rev. Rul. 62-92, 1962-1 Cum. Bull. 29 has been characterized by one court as broader than Cohn and limited to the facts of that case or "erroneous as a matter of law." S & A Co. v. United States, 218 F. Supp. 677, 685 (D. Minn. 1963), aff'd, 338 F.2d 629 (8th Cir. 1964).

46. Macabe Co., 1964 CCH Tax Ct. Rep. (42 T.C.) 3022 (Sept. 29, 1964). See Massey Motors, Inc. v. United States, 364 U.S. 92 (1960); Treas. Reg. § 1.167a-1(b) 1957.

47. 1964 CCH Tax Ct. Rep. at 3030.

1964, a taxpayer could, by taking what was basically excessive depreciation, convert what would otherwise be ordinary income into a capital gain after sale because depreciation deductions were taken against ordinary income and any gain or sale was taxed as a capital gain.[48] Pursuant to section 1250,[49] which applies only to depreciable real property, the amount of excess depreciation recaptured and taxed as ordinary income on the sale of real property[50] is the applicable percentage[51] of the lower of (a) the additional depreciation,[52] or (b) the excess amount realized from the sale or fair market value over adjusted basis.

Whether or not *Cohn v. United States*[53] is applicable, therefore, can also play a vital role in computations under section 1250.[54] Given a situation as that presented in the instant case, where the depreciation deduction in the year of sale was allowed, the depreciation will be subjected to the provisions of section 1250[55] unless the depreciable real property has been depreciated under the straight-line method and the property was held for longer than one year.[56] Conversely, if the depreciation is not allowed for the year of sale, there can be no additional increase in the amount of excessive depreciation to be recaptured for that year.

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48. S. Rep. No. 830, 88th Cong., 2d Sess. 132 (1964): "In the case of real estate, this problem is magnified by the fact that real estate is usually acquired through debt financing and the depreciation deductions allowed relate not only to the taxpayer's equity investment but to the indebtedness as well . . . . [and] this may permit the tax-free amortization of any mortgage on the property."

49. Int. Rev. Code of 1954, § 1250(c).

50. Section 1250 property includes tangible real property, other than included in Int. Rev. Code, § 1245, which is subject to the depreciation deduction of Int. Rev. Code, § 167. Recapture therefore would only apply to the building and not the land.

51. The applicable percentage is "100 percent minus one percentage point for each full month the property was held after the date on which the property was held 20 full months." Int. Rev. Code of 1954, § 1250(a)(2).

52. Int. Rev. Code of 1954, § 1250(b)(1) provides that: "The term 'additional depreciation' means, in the case of any property, the depreciation adjustments in respect of such property; except that, in the case of property held more than one year, it means such adjustments only to the extent that they exceed the amount of the depreciation adjustments which would have resulted if such adjustments had been determined for each taxable year under the straight line method of adjustment."

53. 259 F.2d 371 (6th Cir. 1958).

54. For a discussion see 97 T.M. Depreciation Recapture Sections 1245 and 1250, at A-44.

55. This will provide for only a partial recapture of the excessive depreciation because of the applicable percentage reduction after the property has been held for twenty months.

56. Taxpayers who depreciate § 1250 property under the straight-line method do not fall within that section if such property was held for over ten years and depreciated by some other method than straight line.