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Recent Decisions

RECENT DECISIONS

CORPORATIONS—CITIZENSHIP OF MULTI-STATE CORPORATIONS—JURISDICTION OF FEDERAL COURTS ON GROUND OF DIVERSITY OF CITIZENSHIP.—Plaintiffs, citizens of New Jersey, sued defendant railroad corporation, incorporated in both New York and New Jersey, in the United States District Court for the District of New Jersey alleging defendant to be a New York corporation. Defendant's motion to dismiss the action for lack of jurisdiction on the ground that there was no diversity of citizenship was granted. Upon appeal, *held*, judgment reversed. *Gavin v. Hudson & Manhattan R. R.*, 185 F. 2d 104 (3d Cir. 1950).

The instant case raises the problem: where a corporation exists under the laws of more than one state, of which state shall it be deemed a citizen for purposes of federal jurisdiction based upon diversity of citizenship? The diversity of citizenship requirement in the federal courts demands that each plaintiff be a citizen of a state different from each defendant.[1] This would usually be a practical impossibility in the case of corporate parties if the citizenship of the stockholders be determinative of the citizenship of the corporation. The federal courts solved the difficulty by regarding a suit by or against a corporation as one in reality by or against the stockholders and for the purposes of jurisdiction it is conclusively presumed that all of them are citizens of the state whose laws created the corporation.[2]

In the case of a corporation existing under the laws of more than one state, the effect of this conclusive presumption will depend upon the mode of existence of the corporation in the state of secondary incorporation. Thus, where a corporation, incorporated under the laws of one state, exists in another state by virtue of reincorporation therein the rule has been that there exists in each state a separate corporation and for purposes of diversity of citizenship the corporation will be regarded as a citizen of the state where suit is brought.[3]

But where existence in the state of secondary incorporation is by virtue of a mere license to do business there, the general rule is that no new corporation is created and, therefore, for purposes of federal jurisdiction the corporation will be regarded as a citizen of the state which first gave it life.[4] In *Southern Ry. v. Allison*,[5] a corporation, originally incorporated in Virginia, filed a copy of its charter and by-laws with the Secretary of State of North Carolina. By such acts, under a North Carolina statute it became a domestic North Carolina corporation and was entitled to the rights and privileges and was subject to the jurisdiction of the North Carolina courts as fully as if originally created there. The Court held that while for most purposes it might be a domestic North Carolina corporation the mere filing of a copy of its original charter and a copy of its by-laws did not make it a

1. 28 U. S. C. § 1332 (1948). Strawbridge *et al.* v. Curtiss *et al.*, 3 Cranch. 267 (U. S. 1806).

2. Muller v. Dows, 94 U. S. 444 (1876); Marshall v. Baltimore & Ohio R. R., 16 How. 314 (U. S. 1853); *cf.* Doctor v. Harrington, 196 U. S. 579 (1905), where in effect the fiction of citizenship in the state of incorporation is disregarded.

3. Geoffroy *et al.* v. New York, N. H. & H. R. R., 16 F. 2d 1017 (1st Cir. 1927); Peterborough R. R. v. Boston & M. R. R., 239 Fed. 97 (1st Cir. 1917); Missouri Pac. Ry. v. Meeh, 69 Fed. 753 (8th Cir. 1895); *see* Ohio & Mississippi R. R. v. Wheeler, 1 Black 286, 297 (U. S. 1861).

4. St. Louis & San Francisco Ry. v. James, 161 U. S. 545 (1896).

5. 190 U. S. 326 (1903).

"citizen" of North Carolina for purposes of federal jurisdiction. However, if the court finds as a fact that a *new* corporation was created in the second state, the federal courts will give it effect for jurisdictional purposes.[6]

Thus the fundamental test which will determine citizenship has been: has a new and distinct legal entity been created in the second state? If so, then the stockholders of each corporate entity will be deemed citizens of the state of incorporation or of reincorporation when the corporation is sued in the federal courts of the state of incorporation or of reincorporation.

The classification outlined above has become well-defined and adopted in later cases in other circuits. For example, in the *Town of Bethel v. Atlantic Coast Line R. R.*,[7] a suit by a railroad corporation, incorporated in both Virginia and North Carolina, brought in the Federal District Court for the Eastern District of North Carolina against a municipal corporation of North Carolina, it was held that plaintiff must be regarded as a "citizen" of North Carolina and, therefore, there was no diversity of citizenship. The court analyzes the development of the law on the subject, pointing out that where a corporation has reincorporated in another state, the corporation shall be deemed a "citizen" of that state, for purposes of jurisdiction of the federal courts, when sued in the federal courts of that state.[8]

In the instant case, the court rejects these holdings, in reaching the conclusion that the defendant may be regarded as a "citizen" of New York, even though incorporated in New Jersey, the state of plaintiff's citizenship and the state where suit is brought. The court recognizes that this holding is directly contra to the decided cases of the other circuits but offers no cogent argument to support its view other than it is "better in practice because it does not require useless ritual in instituting a suit away from home."[9]

One must agree with the court in the instant case that "what is needed here is a clear guide which will tell the parties where they may sue in federal court and where they may not."[10] But it is submitted that the refusal here to conform with the weight of authority, even though no rule of law necessitates such conformity, serves only to obfuscate an existing "clear guide."

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6. It must be noted further that where a corporation exists in a second state by virtue of a union with a domestic corporation in that state, the determination of the jurisdictional question depends on whether there is a consolidation or a merger. Where there has been a true consolidation or merger so that the old corporation has ceased to exist, the surviving corporation remains a corporation and citizen of the state which created it. Westheider v. Wabash R. R., 115 Fed. 840 (S. D. Ill. 1902). But if there has been a mere consolidation of management and control, then each of the corporations remains and the rules as to re-incorporation will determine the jurisdictional question. Patch v. Wabash R. R., 207 U. S. 277 (1907).

7. 81 F. 2d 60 (4th Cir. 1936), *cert. denied*, 298 U. S. 682 (1936).

8. *Accord*, Geoffroy *et al.* v. New York, N. H. & H. R. R., 16 F. 2d 1017 (1st Cir. 1927); Lake Shore & M. S. R. R. v. Eder, 174 Fed. 944 (6th Cir. 1909); Starke v. New York, Chicago & St. Louis R. R., 180 F. 2d 569 (7th Cir. 1950); Missouri Pac. Ry. v. Meeh, 69 Fed. 753 (8th Cir. 1895).

9. 185 F. 2d 104, 107 (3d Cir. 1950). It must be noted that in the principal case, there would have been no jurisdictional problem, even under the prevailing view, if plaintiff had instituted suit in the federal courts for the district of New York. This fact probably had some influence upon the court's decision.

10. *Id.* at 106.

The present decision is to be regretted, therefore, because it disturbs the unanimity of the federal courts and the stability of the law on this point. It would seem that a legal fiction or presumption of law, such as here involved, should be applied in a manner which will effectuate stability and predictability in the law, even where to do so provides "an effective means of promoting additional passenger business for the Hudson & Manhattan. . . ."[11]

DOMESTIC RELATIONS—ACTION AT LAW FOR DAMAGES—FRAUD—SEPARATION AGREEMENT.—Plaintiff commenced an action for divorce in New Jersey. During the pendency of said action, an agreement was made whereby plaintiff accepted $20,000 in lieu of support. This agreement was not incorporated in the New Jersey divorce decree but provided that in the case of a divorce, its provisions would have the same force and effect as though inserted at length in the decree. The complaint alleged that defendant falsely and fraudulently had represented his net worth to be $50,000, when in fact it was $500,000. Plaintiff sued at law for damages as a result of the alleged fraud. Defendant moved to dismiss the complaint pursuant to subdivisions (2) and (5) of Rule 106 of the Rules of Civil Practice upon the grounds that (1) the court had no jurisdiction of the subject matter of the action; (2) that the complaint did not state facts sufficient to constitute a cause of action. *Held*, judgment of the Appellate Division, reversing on the law an order of the Supreme Court at Special Term which denied defendant's motion, affirmed, one judge dissenting. *Weintraub v. Weintraub*, 302 N. Y. 104, 96 N. E. 2d 724 (1951).

The issue is whether a court has jurisdiction to entertain an action at law and award damages based upon defendant's true financial worth, which would have the effect of providing for plaintiff's maintenance and support. Since a married woman has a right to contract with her husband,[1] a valid contract for support and maintenance may be entered into if the parties have already contemplated a separation.[2] The agreement will be upheld unless it is unfair or unjust. The law is well settled that where a person has been induced to enter into a contract by fraud, he may pursue one of three remedies: rescind the contract absolutely and sue at law to recover the consideration paid; bring an action in equity to rescind the contract; or retain what he has received, and bring an action at law to recover the damages sustained because of the fraud.[3]

The courts have long recognized the right to bring an action in equity to set aside a separation agreement upon the ground of fraud and, if relief is granted, it must be set aside in its entirety.[4] In *Johnson v. Johnson*,[5] relied upon by the majority in

11. *Id.* at 105.

1. N. Y. DOM. REL. LAW § 51.

2. Winter v. Winter, 191 N. Y. 462, 84 N. E. 382 (1908); LaMontagne v. LaMontagne, 239 App. Div. 352, 267 N. Y. Supp. 148 (1st Dep't 1933), *aff'd without opinion*, 264 N. Y. 552, 191 N. E. 560 (1934); Kunker v. Kunker, 230 App. Div. 641, 246 N. Y. Supp. 118 (3d Dep't 1930); McGean v. Parsons, 150 App. Div. 208, 134 N. Y. Supp. 649 (1st Dep't 1912).

3. Goldsmith v. National Container Corp., 287 N. Y. 438, 40 N. E. 2d 242 (1942); Sager v. Friedman *et al.*, 270 N. Y. 472, 1 N. E. 2d 971 (1936); Vail v. Reynolds, 118 N. Y. 297, 23 N. E. 301 (1890); Gould v. Cayuga County Nat. Bank, 86 N. Y. 75 (1881).

4. Johnson v. Johnson, 206 N. Y. 561, 100 N. E. 408 (1912); Winter v. Winter, 191

support of its refusal of jurisdiction, the wife did not seek to set the agreement aside in its entirety, but sought increased alimony which the court could not grant so long as the agreement remained in effect. But in refusing to grant relief, it would seem that the court relied solely on general equitable principles. As in the case of any contract, a separation agreement if set aside for fraud or duress must be set aside in its entirety. The court cannot make a new agreement for the parties different from the one voluntarily adopted by them. Thus the *Johnson* case disposed of its problem as it would have done in any contract action and it did not appear that it refused jurisdiction over the subject matter.[6] The dissenting opinion, in the instant case, substantially concurs with this conclusion.

Since the courts have recognized the parties' right to contract in regard to support and maintenance and the cases affirm the wife's right to pursue her remedy in equity, it is a natural inference that she should be able to pursue her action at law for damages as in any other contract action. However, justification for the result reached by the majority in the instant case may be found in public policy. It has long been the policy of the state to regard the control and regulation of marriage and the necessary incidents thereto with special care and attention in the domestic relations courts. It was with this view in mind that the matrimonial statutes were enacted. Under such statutes a court was given broad powers to weigh the situation of both husband and wife and to make provisions for support and maintenance as part of a separation or divorce decree.[7] When the occasion arises which requires the consideration of such matters as a necessary element in awarding relief, it would appear to be more desirable to leave the deliberation in the hands of a judge in a matrimonial action than to throw open the door and intermingle these matters with other types of litigation by letting a jury pass upon them merely because a cause of action at law has been established. Decisions in equity actions, setting aside separation agreements for fraud and granting complete rescission in no way infringe upon matrimonial matters since they merely involve the freeing of plaintiff from the yoke of fraud and leave her as she would have been had she not entered into the fraudulently induced agreement. But in an action at law for damages it would be necessary for the jury to take into consideration matters of support and maintenance and give affirmative aid based thereon. This would appear to constitute infringement upon matrimonial jurisdiction. It is submitted that public policy demands the keeping of such matters in their natural environment and should prevent the opening up of an entirely new field of litigation.

DOMESTIC RELATIONS—SEPARATION—CONTINUED RESIDENCE OF SPOUSES IN SAME APARTMENT AS PRECLUDING ACTION.—Plaintiff wife brought an action for cruel and inhuman treatment and such conduct on the part of the defendant as rendered it unsafe and improper for plaintiff to live with him. On appeal from a judgment in favor of plaintiff, *held*, per curiam, one justice dissenting, reversed and complaint dismissed on the ground that the parties had continued to reside in the same apartment. *Berman v. Berman*, 277 App. Div. 560, 101 N. Y. S. 2d 206 (1st Dep't 1950).

N. Y. 462, 84 N. E. 382 (1908); Hungerford v. Hungerford, 161 N. Y. 550, 56 N. E. 117 (1900); Pelz v. Pelz, 156 App. Div. 756, 142 N. Y. Supp. 54 (1st Dep't 1913).

5. 206 N. Y. 561, 100 N. E. 408 (1912).

6. *Id.* at 567, 100 N. E. at 410.

7. N. Y. CIV. PRAC. ACT §§ 1169, 1180.

In dismissing the complaint the majority of the court imposed, as a prerequisite to the commencement of a separation action, the obligation of leaving the other party and maintaining a separate residence. The sole fact of continued residence in the same apartment was treated as conclusive evidence that the parties had not in fact separated despite a finding that they "have not been living together as husband and wife and . . . have been living as separate lives as two people could do within the confines of a small apartment."[1] Continued occupancy of the same apartment was considered by the dissent merely as evidential of the continuance of the marital relation. Thus upon a finding that the marital amenities no longer were observed by the spouses no value in the fact of identical residence could be discerned that would necessitate a denial of the relief sought.

No doubt can be entertained as to the incongruity of a judicial separation of parties who have not in fact separated from each other. It is on the proposition that continued residence indicates conclusively that the parties have not separated that a different criterion would appear to be warranted.

Authority for the position of the dissent may be found in the case of *List v. List*[2] where the question arose from facts similar to the principal case. The court in that case declined to adopt "a mere rule of thumb by saying that in every case moving out is a *sine qua non* of legal relief. . . ."[3] It was held that all the circumstances should be considered in determining the relationship of the parties. In *Pedersen v. Pedersen*,[4] where it was urged that a wife was prevented from maintaining a suit for limited divorce and alimony on the ground that the parties were still living under the same roof, the court determined that the spouse must withdraw, not from the marital residence, but from marital relations on the ground that "the essential thing is not separate roofs, but separate lives—that the parties so live, whether under one roof or two, as to abandon, with apparent permanency of intention, the relation of husband and wife. . . ."[5] As long as the marital relationship was terminated, and consequently any defense of condonation predicated upon conjugal cohabitation precluded,[6] the spouse was considered as having satisfied the requisite that the parties must first separate themselves before an action for a judicial separation will be entertained.[7]

1. 277 App. Div. 560, 101 N. Y. S. 2d 206, 207 (1950).

2. 186 Misc. 261, 61 N. Y. S. 2d 809 (Sup. Ct. 1946). *But see,* Collins v. Collins, 80 N. Y. 1 (1880).

3. *Id.* at 264, 61 N. Y. S. 2d at 811.

4. 107 F. 2d 227 (D. C. Cir. 1939).

5. *Id.* at 232.

6. ". . . all that is required of the wife is that she so segregate herself from her husband as to avoid condoning the acts which she charges as the basis for the divorce or other relief she seeks." *Ibid.* In answering defendant's contention that the defense of condonation had been established by a showing that the spouses resided together the court wrote in Graham v. Graham: "The general presumption is that the husband and wife living in the same house, live on terms of matrimonial cohabitation. . . . But this, as every other presumption, may be met and overcome by proof of facts or circumstances which destroy the probability, from which presumption springs, that married persons living in the same house maintain marital relations." 50 N. J. Eq. 701, 706, 25 Atl. 358, 363 (1892).

7. "The Pedersen case does not depart from the established rule that to entitle the wife to a temporary allowance for maintenance she must live separate and apart from the

The fact of continued residency would appear to be pertinent only as it is inferential of continued conjugal relations—*i.e.*, whether in fact the parties resided as husband and wife.[8] It would seem that the continuance of a human relationship which contemplates factors other than the incident of similar residence cannot be established conclusively by the fact of remaining in the same residence.[9]

A further consideration of the difficulty, if not impossibility, of acquiring separate accommodations, especially for persons within the jurisdiction of the court in the instant case, would appear to present a situation incapable of solution for a spouse even in a case where a preliminary motion for temporary alimony had been granted.[10] The requisite of a separate residence should be insisted upon only where the severance of the marital relationship could not otherwise be established by the spouse seeking judicial relief.[11]

DOMESTIC RELATIONS—VALIDITY OF SEPARATION AGREEMENT CONDITIONED ON DIVORCE.—In an action by a wife to recover sums due under a separation agreement, the husband pleaded as a defense that the agreement was void as it tended directly to promote the dissolution of the marriage. The agreement, which was made after a separation but prior to the commencement of an action for divorce, provided for weekly payments to the wife of $90.00 and further stipulated that on the sixth of June 1949 he would pay her $25,000 and transfer to her his automobile. It also provided that if the parties were still married on June first, the agreement would no longer bind either party. Plaintiff moved for summary

husband. All that the Pedersen case holds is that there may be separation of the parties even while they live under the same roof; that such fact of living under the same roof is only a circumstance to be weighed with all other facts and circumstances in determining whether the parties are in fact separated." Cooper v. Cooper, 30 F. Supp. 151, 152 (D. C. 1939).

8. In disregarding a husband's contention that he had not deserted his wife since he resided in the same house with her, one court has stated: "Matrimonial cohabitation must certainly comprehend a living together *as husband and wife,* embracing relative duties as such. Otherwise, all the married couples residing in a hotel, boarding or lodging house, might be said to be cohabitating promiscuously." Stern v. Stern, 5 Colo. 55, 56 (1879). *Accord,* Nixon v. Nixon, 127 Pa. Super. 407, 193 Atl. 132 (1937), *rev'd on other grounds,* 329 Pa. 256, 198 Atl. 154 (1938).

9. In Rector v. Rector, 78 N. J. Eq. 386, 79 Atl. 295 (1911), the court held that the fact of residing under the same roof did not of itself predicate the continuance of the conjugal relation. It stated "wherever one spouse, without justifiable reason, refuses for the statutory period to have sexual intercourse with the other, and withdraws from all other marital duties than merely living under the same roof in the same relationship that could exist between a man and his housekeeper or a woman and her boarder—a condition in which the fact that she is the wife and he is the husband is of no consequence whatever in their relation and method of living together—the desertion exists. . . ." *Id.* at 407, 79 Atl. at 303. *Cf.,* Pedersen v. Pedersen, 107 F. 2d 227 (D. C. Cir. 1939).

10. See Speltzer v. Speltzer, 125 N. Y. L. J. 961, Col. 7 (Sup. Ct. Mar. 16, 1951).

11. In a case decided subsequent to the principal case the Appellate Division, Second Department, in a memorandum opinion disapproved the ruling of the majority of the court in the principal case. Lowenfish v. Lowenfish, App. Div. , 103 N. Y. S. 2d 357 (2d Dep't 1951).

judgment. *Held,* motion granted upon the ground that the agreement was binding and enforceable although a substantial inducement for obtaining a divorce was held out to the plaintiff wife. *Abeles v. Abeles,* et al., 197 Misc. 913, 96 N. Y. S. 2d 423 (Sup. Ct. 1950).

The issue in the instant case[1] is expressly covered by Section 51 of the New York Domestic Relations Law which provides in part that "a husband and wife cannot contract to alter or dissolve the marriage. . . ." This provision has been interpreted as preventing the use of separation agreements by one spouse as a *direct* inducement for the dissolution of the marital bond.[2] In *Lake v. Lake*[3] the court, while recognizing the right of a separated husband and wife to provide by contract for the support and maintenance of the latter, refused to sustain the validity of a contract which would only benefit the wife in the event of a divorce.

In making its decision the court in the instant case was constrained to hold as it did on the authority of *Butler v. Marcus,*[4] admitting however, that the agreement in that case provided both an inducement and a reward for obtaining a divorce. The court was unable to find a distinction between the case before it and the *Butler* case. There is, however, a marked difference in the facts of the two cases which may form a sound basis for distinction. While in the *Butler* case, as in the instant case, the agreement provided for substantial payments during the period between separation and the institution of divorce proceedings and conditioned the fulfillment of the agreement upon a divorce, the agreement in the former case also provided for the establishment of a testamentary trust by the husband in return for the relinquishment by the wife of her dower right and her joinder in certain realty transactions.[5] In other words the divorce was not the sole inducement for the provision made by the husband. In the instant case the divorce decree constitutes the sole exchange for the large cash payment and the automobile.

A possible solution to the problem is offered in a distinction voiced by both the Federal and the New York courts. In *Moore v. Moore*[6] the court, when called upon

1. It should be noted that here the agreement was made after the separation and the question of the validity of a pre-separation agreement, presented in cases such as Winter v. Winter, 191 N. Y. 462, 84 N. E. 382 (1908), does not arise. La Montagne v. La Montagne, 239 App. Div. 352, 267 N. Y. Supp. 148 (1st Dep't 1933), *aff'd mem.,* 264 N. Y. 552, 191 N. E. 560 (1934), pointed out that a separation agreement executed by parties while living together contemplating an immediate separation is valid while one contemplating a possible future separation or one contingent on the happening of a future event is unenforceable. For cases sustaining the validity of separation agreements while a divorce action is pending see Werner v. Werner, 153 App. Div. 719, 138 N. Y. Supp. 633 (1st Dep't 1912); Hammerstein v. Equitable Trust Co., 156 App. Div. 644, 141 N. Y. Supp. 1065 (1st Dep't 1913).

2. Matter of Rhinelander, 290 N. Y. 31, 47 N. E. 2d 681 (1943).

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

4. 264 N. Y. 519, 191 N. E. 544 (1934).

5. These facts appear in the record on appeal.

6. 255 Fed. 497 (3d Cir. 1919), where the court said: "He undertook to support her for her life, and to do this, he bound 'his heirs, executors, and administrators' to continue payments for her support after his death. By this promise, the wife was shown, that if she succeeded in getting a divorce, she would receive more than the law would award her, even if the law were as she thought it. This was a substantial inducement to her to prosecute her divorce proceeding to the decree on which alone she could reap the

to determine the validity of a separation agreement conditioned upon divorce, adopted the test: Do the benefits of the separation agreement proffered to the wife *substantially* outweigh the provisions a divorce court would award her and thereby induce a divorce as the only means of obtaining the excess benefits offered. *Yates v. Yates*[7] indicates that New York is in accord with this view. Here a test is supplied which is much more specific than the one stated in the *Lake* case. Whether an agreement does or does not directly tend to promote a divorce can be more readily ascertained by determining whether or not the contractual benefits substantially outweigh the usual grant of a divorce court. A court, it is true, in applying the principle advanced, must pause and consider what it would award if a support action was before it, and then determine whether or not the agreement is substantially in excess of this amount, but this presents a more concrete test than attempting to decide generally whether the agreement directly tends to promote a divorce.

The principle advanced is not in conflict with existing decisions and can readily be applied to them. In *Gould v. Gould*[8] the extra benefit involved a guarantee of payment by the father which would be unobtainable in a separation action. In the *Lake* case, a lump sum settlement[9] was to be made after the divorce. In *Schley v. Andrews*[10] the agreement provided for $200 per month, the procurement of an insurance policy for $20,000 in favor of the wife, and the confession of a $35,000 judgment as collateral security for the monthly payments. In all these cases, the benefits offered to the wife would not be granted by a court in a separation action. The only way the wife could obtain the benefit held out to her was by fulfilling the agreement, and the courts held that the agreements were void as against public policy. These cases correspond strikingly with the instant case. The only way the wife in the instant case could obtain the automobile or the lump sum payment over and above the support payments was by fulfilling the agreement, for the provisions did not become effective until after the final decree had been granted. The agreement in the *Butler* case, on the other hand, can be distinguished in that it merely provided the wife with that to which she would be

promised reward." *Id.* at 502. See also Spreckels v. Wakefield, 286 Fed. 465 (9th Cir. 1923).

7. 183 Misc. 934, 51 N. Y. S. 2d 135 (Sup. Ct. 1944). In Goodman v. Goodman, 274 App. Div. 287, 83 N. Y. S. 2d 62 (1st Dep't 1948), after referring to the *Yates* case, the court found that the $5,000 which the husband agreed to pay to his wife in lieu of support in event of her obtaining an annulment decree was a reasonable amount and did not have a direct tendency to bring about an annulment which would not otherwise have occurred.

8. 261 App. Div. 733, 27 N. Y. S. 2d 54 (1st Dep't 1941).

9. For cases in point involving the validity of such agreements see Kyff v. Kyff, 286 N. Y. 71, 35 N. E. 2d 655 (1941); Heflin v. Heflin, 177 Misc. 290, 30 N. Y. S. 2d 412 (Sup. Ct. 1941), *aff'd mem.*, 263 App. Div. 714, 32 N. Y. S. 2d 123 (1st Dep't 1941). A distinction is made between cases where the parties are still married and those where the agreement is made after a termination of the marriage. In the former class of cases the court will set aside the agreement and provide for the support of the spouse if she is in danger of becoming a public charge, or if the sum agreed upon is deemed inadequate in the light of the husband's resources. In such cases it is deemed an attempt by the husband to purchase an exemption from his duties. In the latter class of cases, the agreement will be upheld in the absence of fraud.

10. 225 N. Y. 110, 121 N. E. 812 (1919).

legally entitled in an action for a divorce, *i.e.,* support from her husband. The additional trust arrangement *in lieu of dower rights,* does not operate to make an otherwise valid agreement into one inducing a divorce.

JOINT TENANCY—RIGHT OF SURVIVORSHIP WHERE ONE CO-TENANT MURDERS THE OTHER.—At the time the defendant murdered his wife they owned certain property as joint tenants. The wife's next of kin brought suit seeking a declaration that since the defendant unlawfully took the life of his wife, he holds the title to an undivided one-half of this property for the benefit of the plaintiffs and that the other one-half interest is held in trust for his own use during his lifetime and that after his death, the title vests in the plaintiffs. The lower court dismissed the complaint for failure to state a cause of action. On appeal, *held,* decree affirmed, on the ground that the declaration of a constructive trust would, in effect, work a forfeiture of defendant's vested property rights in violation of the state's constitutional provision forbidding forfeiture of estate as punishment for a crime. *Welsh v. James,* 95 N. E. 2d 872 (Ill. 1950).

The fundamental doctrine upon which the plaintiff's case is based is that equity will not permit a wrongdoer to profit by his own wrong.[1] As a corollary to this, another rule has been developed to the effect that whenever the legal title to property has been obtained under circumstances which render it unconscionable for the holder to retain and enjoy the beneficial interest, a constructive trust will be impressed on the property thus acquired in favor of the one who is equitably entitled to it, although he may never perhaps have had any legal estate therein.[2]

A group of cases, analogous to the one under consideration, in which both of the above principles are applicable, concern situations where a devisee or distributee feloniously kills his testator or intestate ancestor.[3] The view taken by the New York courts is that such a wrongdoer is not prevented from acquiring legal title to the property devised or inherited, but because of the iniquitous mode of acquisition, equity will declare him a constructive trustee of the property for the benefit of those otherwise entitled to take.[4] There are decisions to the contrary[5] which permit

1. "The principle is fundamental that no man shall be permitted to profit by his own wrong. It enters, by implication, into all contracts and all laws." People v. Schmidt, 216 N. Y. 324, 341, 110 N. E. 945, 950 (1915).

2. 4 POMEROY, EQUITY JURISPRUDENCE § 1053 (5th ed. 1941).

3. In a number of states, statutes have been enacted dealing with the rights of a murderer to inherit or take by devise from his victim. See generally, Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution,* 49 HARV. L. REV. 715 (1936); 3 BOGERT, TRUSTS AND TRUSTEES 53 (1946).

4. Ellerson v. Westcott, 148 N. Y. 149, 42 N. E. 540 (1896), modifying the decision in Riggs *et al.* v. Palmer *et al.,* 115 N. Y. 506, 22 N. E. 188 (1889), which had held that a gift in a will to one who murdered his testator to prevent the will's revocation was ineffectual to pass any title to him. For a critical analysis of Riggs v. Palmer, *supra,* and the similar case of Shellenberger v. Ransom *et al.,* 31 Neb. 61, 47 N. W. 700 (1891) see 4 HARV. L. REV. 394 (1891). See also Whitney *et al.* v. Lott *et al.,* 134 N. J. Eq. 586, 36 A. 2d 888 (1944) and Garner *et al.* v. Phillips *et al.,* 229 N. C. 160, 47 S. E. 2d 845 (1948).

5. Wall *et al.* v. Pfanschmidt *et al.,* 265 Ill. 180, 106 N. E. 785 (1914); McAllister *et al.* v. Fair *et al.,* 72 Kan. 533, 84 Pac. 112 (1906); Shellenberger v. Ransom *et al.,*

the murderer to retain the legal and beneficial interest in the property, on the ground that the judiciary is powerless to create an exception to the legislative fiat as embodied in the statutes on wills and intestacy.[6] Dean Ames points out that the courts in the latter cases have overlooked the principle that equity, acting in personam, can restrain the wrongdoer from beneficially enjoying such property by compelling him to hold it as constructive trustee for those persons, exclusive of himself, who would have taken, had the victim's death been natural.[7] The application of this equitable doctrine does not cause an exception to be made to the statutes, but on the contrary, admits of their efficacy as a conduit of title.[8] A similar problem is presented in a situation where the beneficiary of a life insurance policy murders the insured. There is practically unanimity of opinion that under such circumstances it would be a travesty of justice to permit such a person to profit because of his crime and accordingly the courts declare that he holds his interest under the policy upon a constructive trust for the benefit of the estate of the insured.[9]

In none of the foregoing instances has the wrongdoer been deprived, because of the imposition of the trust, of any beneficial rights which were vested in him prior to the homicide. In each case the court acted upon property the murderer obtained after and by virtue of the death of his victim. Consequently, the problem of forfeiture of estate[10] was not involved[11] any more than it would have been in a case where one obtained a title through fraud, undue influence or other circumstances which would render it unconscionable for him to retain the beneficial interest therein, and where a court of equity would have unhesitatingly lent its aid by imposing a constructive trust.[12]

In the instant case, however, the defendant did have a vested beneficial interest in the property involved, he and his victim having been joint tenants[13] long before the homicide was committed. If the court were asked to divest the wrongdoer of *all* his rights therein because of his crime, then concededly a true issue of

41 Neb. 631, 59 N. W. 935 (1894), in which the lower court's decision, *supra* note 4, was reversed; *In re* Carpenter's Estate, 170 Pa. 203, 32 Atl. 637 (1895). For a comparison between these cases and the ones cited in note 4, *supra,* see 30 HARV. L. REV. 622 (1917).

6. In Deem *et al.* v. Milliken *et al.,* 6 Ohio Cir. Ct. R. 357 (1892), *aff'd mem.,* 53 Ohio St. 668, 44 N. E. 1134 (1895), it was held that where there are explicit rules governing the descent of property and they contain nothing to justify exclusion, the one upon whom the law casts the property cannot, because of the murder by him of his ancestor, be divested of it by the court.

7. Ames, *Can A Murderer Acquire Title by His Crime and Keep It?* In LECTURES ON LEGAL HISTORY 311 (1913).

8. Ellerson v. Westcott, 148 N. Y. 149, 42 N. E. 540 (1896); Whitney v. Lott, 134 N. J. Eq. 586, 36 A. 2d 888 (1944).

9. New York Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591 (1886). See cases cited in VANCE, INSURANCE § 156 (2d ed. 1930).

10. A forfeiture is a "punishment annexed by law to some illegal act or negligence in the owner of lands, tenements or hereditaments, whereby he loses all his interest therein, and they become vested in the party injured as a recompense for the wrong which he alone, or the public together with himself hath sustained." 2 BL. COMM. *267.

11. RESTATEMENT, RESTITUTION § 187 comment *c* (1937).

12. For the scope of constructive trusts generally, see 4 POMEROY, EQUITY JURISPRUDENCE § 1044-1058a (5th ed. 1941).

13. See 2 TIFFANY, REAL PROPERTY § 418 (3d ed. 1939).

forfeiture would be present, and the decision denying this relief would be sound.[14] However, the plaintiffs here did not seek such an extended coverage in their prayer for a constructive trust. Actually they sought only that beneficial interest by which the wrongdoer's previously vested estate was enlarged by virtue of his crime.[15] But adhering strictly to the common law rules of property, the court maintained that to grant such relief would be to work a forfeiture of defendant's pre-existing right of survivorship, *i.e.*, his right to the whole of the estate was surviving joint tenant.[16]

The problem is substantially the same when either a husband or wife, holding property as tenants by the entirety,[17] feloniously kills the other. In the absence of statute,[18] the decisions are by no means in harmony as to the rights of the surviving spouse. Some states take the position reached in the instant case, that the murderer is entitled to retain the entire property.[19] Exactly the opposite result has been reached in New York. In *Van Alstyne* et al. *v. Tuffy* et al.,[20] the court ruled that the realty involved should pass to the heirs of the murdered wife. It was held in In re *Santourian's Estate*[21] that the entire property should be immediately turned over to the administrator of the deceased joint tenant, the court declaring: "It would be abhorrent of all the rules of equity and justice to permit the murderer to retain title under the circumstances."[22]

In *Bryant v. Bryant*[23] and *Sherman* et al. *v. Weber* et al.,[24] the courts of North Carolina and New Jersey, respectively, recognized that to divest the wrongdoer of all his interest in the property would involve an unlawful forfeiture, but on the other hand to permit him to retain the entire estate, as the surviving tenant by entirety, would be permitting him to reap a benefit by his crime. By applying the device of the constructive trust, the necessity of choosing one or the other of these

14. *But cf. In re* Santourian's Estate, 125 Misc. 668, 212 N. Y. Supp. 116 (Surr. Ct. 1925), *infra* note 21.

15. RESTATEMENT, RESTITUTION § 188 (1937) reads: "Where two persons have an interest in property and the interest of one of them is enlarged by his murder of the other, *to the extent to which it is enlarged* he holds it upon constructive trust for the estate of the other." (italics supplied).

16. 95 N. E. 2d 872, 875. *Accord,* Oleff *et al.* v. Hodapp *et al.,* 129 Ohio St. 432, 195 N. E. 838 (1935); Di Lallo v. Corea, 19 Pa. D. & C. 282 (1933).

17. See 2 TIFFANY, REAL PROPERTY § 430 (3d ed. 1939).

18. See note 3 *supra.*

19. Wenker v. Landon *et al.,* 161 Ore. 265, 88 P. 2d 971 (1939); Hamer v. Kennan, 16 Pa. D. & C. 395 (1931); Beddingfield *et al.* v. Estill & Newman *et al.,* 118 Tenn. 39, 100 S. W. 108 (1907).

20. 103 Misc. 455, 169 N. Y. Supp. 173 (Sup. Ct. 1918). "The social interest served by refusing to permit the criminal to profit by his crime is greater than that served by the preservation and enforcement of legal rights of ownership." CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 43 (1921).

21. 125 Misc. 668, 212 N. Y. Supp. 116 (Surr. Ct. 1925).

22. *Id.* at 670, 212 N. Y. Supp. at 118. This result was reached without mentioning the issue of forfeiture. Apparently the court's attention was not directed to § 512 of the N. Y. PENAL LAW which, like the Illinois constitutional provision in the principal case, prohibits forfeiture of estate for a crime. See also Bierbrauer *et al.* v. Moran, 244 App. Div. 87, 279 N. Y. Supp. 176 (4th Dep't 1935).

23. 193 N. C. 372 (1927).

24. 113 N. J. Eq. 451, 167 Atl. 517 (1933).

two undesirable extremes was avoided. The result reached was that the slayer kept his vested life interest in the property but held one-half the property during a period representing the life expectancy of his deceased wife as trustee *ex maleficio* for her heirs. In the *Bryant* case it was found that the victim had a greater life expectancy and the court accordingly decreed that upon the husband's death the entire estate would pass to the wife's heirs.[25] The murderer had the greater life expectancy in the *Sherman* case however and so the heir of the deceased wife was awarded only a one-half interest in the net income of the property for the number of years, computed by the standard mortality tables, that she would have lived had the murder not been committed.

In a similar case[26] in Missouri recently it was conceded that the common law relative to estates by entirety provides that the survivor take all. But the court said "one must not only be a survivor in fact but also a survivor in contemplation of law."[27] Since there was neither a lawful divestiture of the wife's interest, nor a lawful survivorship of the husband, it was decreed that the property "should go just as provided where there is a common calamity and both tenants die simultaneously."[28] Thus the wife's heir was awarded one-half of the estate and the husband permitted to retain the other half, both now holding as tenants in common. No forfeiture was caused since, although the husband, as surviving tenant by entirety, was said to have been seized of the whole estate under the original grant and not alone by virtue of his wife's death, in fact this was just a fiction of ownership which gave way when equitable principles intervened and individual interests were sought to be defined and declared.[29]

The results reached by either of these approaches, blending the common law rules of property and the equitable maxim above discussed, commend themselves as more desirable than that reached in the instant case.

POWERS OF APPOINTMENT—CREATION OF A SPECIAL POWER BY A DONEE OF A SPECIAL POWER.—Testator was the life beneficiary of a testamentary trust with power to appoint the remainder to his children and descendants "in such manner and in such proportions as my said son may direct and appoint by his last Will and Testament." He exercised this special power by appointing the remainder in equal shares to his five children in trust for life, giving each child a special power, substantially the same as the power he had received, to appoint the remainder of his or her share by will. The children first sought to have the trust declared invalid and to take the whole remainder in accordance with a provision over in default of appointment. This failing, and the children fearing an additional estate tax on their powers, they renounced the powers granted. The executors then petitioned the Surrogate to determine the validity of the testator's exercise of his power and of

25. The court stated that even in the absence of such a finding, equity would probably give the innocent victim the benefit of the doubt as to which one would have been the natural survivor. Compare this dictum with the more realistic view taken in Sherman v. Weber, *supra* note 24.

26. Grose *et al.* v. Holland *et al.*, 357 Mo. 874, 211 S. W. 2d 464 (1948).

27. *Id.* at 878, 211 S. W. 2d at 466.

28. *Id.* at 880, 211 S. W. 2d at 467.

29. See also Barnett v. Couey, 224 Mo. App. 913, 27 S. W. 2d 757 (1930), and Holmes v. Kansas City, 209 Mo. 513, 108 S. W. 9 (1908).

the children's renunciation of theirs. *Held,* the creation of a special power by virtue of the special power is valid, and the renunciation by the donees is also valid. In re *Finucane's Will,* —— Misc. ——, 100 N. Y. S. 2d 1005 (Surr. Ct. 1950).

The donee of a power[1] may exercise it in accordance with its terms. When doubt arises as to the power granted, the controlling factor is the intent of the grantor.[2] Where the exercise of a power calls for the use of the donee's discretion, and no delegation is authorized by the donor, a delegation of this exercise is generally said to be void, just as any duty of a trustee which entails the use of his personal discretion is said to be non-delegable.[3]

In the instant case, it clearly appeared that the testator was given the broad power to appoint the entire interest in the corpus, or any lesser interest, to any of his descendants.[4] The paramount question was whether the appointing of special powers to his children to dispose of the remainders after their life estates was a valid exercise of this power. To put it briefly, may a special power be created out of a special power? The court, however, said "the question is whether he (the testator) had the right to delegate the appointment to another or others."[5] Relying mainly on the *Restatement of the Law of Property,*[6] it was held that the testator

1. A power is an authority to do an act in relation to property which the owner might do. A general power authorizes the transfer of the property, or of any incumbrance on the property, to any grantee whatever. Any lesser authorization is a special power; *i.e.,* the power to grant anything less than a fee, or to grant only to certain persons, is a special power. A power is in trust or beneficial, depending on whether or not persons other than the grantee are entitled to any benefit from its execution. N. Y. REAL PROP. LAW § 131 *et seq.* These rules apply equally to personalty. *In re* Brooklyn Trust Co., 163 Misc. 117, 295 N. Y. Supp. 1007 (Sup. Ct. 1936).

2. N. Y. REAL PROP. LAW § 172. Schreyer v. Schreyer *et al.,* 101 App. Div. 456, 91 N. Y. Supp. 1065 (1st Dep't), *aff'd memo,* 182 N. Y. 555, 75 N. E. 1134 (1905).

3. Crooke *et al.* v. County of Kings, 97 N. Y. 421 (1884); *Chaplin, Express Trusts and Powers* § 593 (1897).

4. *In re* Hart's Will, 262 App. Div. 190, 28 N. Y. S. 2d 781 (1st Dep't 1941), holding that "in such manner refers to the estate which the donee may appoint."

5. 100 N. Y. S. 2d 1005, 1007 (Surr. Ct. 1950).

6. 3 *Restatement, Property* § 359 (2) (1940): "The donee of a special power can effectively exercise it by creating in an object an interest for life and a special power to appoint among persons all of whom are objects of the original power, unless the donor manifests a contrary intent."

7. The children in the instant case renounced the powers granted them in order to avoid payment of a tax on it. INT. REV. CODE § 811 (f) (2) (A) exempts from taxation special powers to be exercised in favor of a family group, but subparagraph (B) in the same section excepts from this exemption a power created from a power. See Eisenstein, *Powers of Appointment and Estate Taxes II,* 52 YALE L. J. 494 (1943). Any power may be renounced by the grantee by a release in writing delivered to any of the four classes of individuals mentioned in § 183 of the New York Real Property Law. It must be done within a reasonable time after knowledge of the power, as the court held it was done in this case. As the testator here had made provision for disposition of the remainder in default of appointment by his children (*i.e.,* remainder after the life estate of each to go to his or her issue, per stirpes, or, if no issue, then to the surviving brothers and sisters) the remainder was disposed of in this fashion in harmony with the testator's expressed intent.

had created a new and valid power in each of his five children.[7] Thus the court's phrasing of the question in the instant case suggests that the decision stands for the proposition that a power calling for the use of personal discretion may be delegated, contrary to the general rule stated above. This proposition merits further analysis.

The reason for the general rule against delegation is found in the intent of the donor of the power. If the power calls for the use of the personal discretion of the donee, it is presumed that only *his* discretion was intended to suffice and an attempt to substitute another's judgment is considered void, in accordance with the maxim "delegatus non potest delegare." This would appear to be a sound rule of construction, but the question remains as to what is a "delegation" within the meaning of the rule. If the reason for the rule is kept in mind, it will be seen that only such an exercise of a power as does violence to the testator's intent is invalid. Let us suppose a testator gives *X* a life estate and a power to appoint the remainder in any manner among such members of a class (of which *A* is a member) as *X* sees fit. Thus *X* could appoint either nothing, the whole, or any intermediate property interest to *A*. If *X* gave the remainder to *A* in fee simple, *A* would have the power to dispose of the property in *A's* discretion. Since this would be in accordance with the testator's intent, can it be said that it is any less in accordance with the testator's intent if, as first supposed, *A* only received a power to dispose of the property? There seems to be no valid reason for saying that it is contrary to the testator's intent that *A* should be able to dispose of the property in his discretion in the latter case but not in the former.

But if this is not a delegation of a discretionary power, and therefore invalid, what is? It is submitted that such delegation, within the meaning of the above rule, occurs only when the donee attempts to give the discretionary power over the property to one whom the donor never intended should have such discretion, *e.g.*, to one who is not a member of the class intended to be benefited by the donor. Thus appointing a power to a stranger to the original power would be an invalid delegation; but appointing a power to an intended beneficiary under the original power would be valid as a creation of a new power[8]—subject always to a contrary intent of the original donor.[9] Therefore, the general statement that, where not expressly provided for, "a delegation of discretionary power is invalid" is only accurate if a creation of a new power is distinguished from a delegation. That this is not always done by the courts will be seen from the instant case. It should be noted at this point that the fact that the new power is created in terms identical

8. Thus where a testator gave *A* and *B* each a life estate in one-half the corpus, remainder (if the first one dying died without issue) as the survivor should appoint, and the survivor appointed to his wife for life, remainder as she should appoint, this exercise of the original power was held valid. Duff v. Rodenkirchen, 110 Misc. 575, 182 N. Y. Supp. 35 (Sup. Ct. 1920), *aff'd without opinion*, Duff v. Fox, 193 App. Div. 898, 183 N. Y. Supp. 947 (1st Dep't 1920).

9. This contrary intent need not be expressed as a positive restriction—it may be inferred from the words of his grant. So, for example, when the donor instructed his trustees to "pay over the principal" as *X* should appoint by will, it was held that this power required the corpus to vest wholly on *X*'s death. Therefore, an attempt by *X* to create life estates in objects of the original power, remainder as the latter should appoint, was an invalid exercise of the original power. Matter of Kennedy, 279 N. Y. 255, 18 N. E. 2d 146 (1938).

with the original power does *not* transform this exercise of the original power into a delegation.

It is submitted that the instant case is not a violation of the general rule, since it does not truly come within the meaning of the rule. No inroad on the true principle is called for by its facts. The testator created new powers in individuals who were objects of the original power to the extent that they could have been given the power of alienation of the property under it. The donor of the original power did not manifest an intent that no new power should be created. Therefore, it seems that the testator exercised his discretion in a manner which was in conformity with the intent of the donor of the original power, and that the court was correct in its holding. The powers to the testator's children were worded similarly to the original power,[10] and this circumstance made the testator's act appear as a delegation of his own power. It is submitted, however, that the court should not have referred to this as a delegation, for the reasons stated above, but as a valid creation of new powers. If this appears to be a terminological quibble, consider the violence that could be done to testamentary intent should this case be understood as standing for the proposition that one to whom power to perform a discretionary act has been granted may appoint another to perform this act for him.

TAXATION—CONSTITUTIONAL LAW—STATE TAXATION OF FOREIGN CORPORATION ENGAGED SOLELY IN INTERSTATE COMMERCE.—Defendant, Tax Commissioner of Connecticut, assessed a franchise tax on plaintiff trucking firm, using net income attributable to local activities as a basis for determining the amount of tax. Plaintiff, a Missouri corporation with administrative headquarters in Illinois, was engaged solely in interstate commerce. The District Court issued an injunction, holding that the taxing statute was not intended to apply to plaintiff, for if it were it would be unconstitutional as a burden on interstate commerce. The Court of Appeals reversed, holding that the statute was intended to apply and was constitutional. The Supreme Court remanded the case to the District Court until the Connecticut courts had determined the application and constitutionality of the tax as applied to plaintiff under local law. The Connecticut Supreme Court of Errors held the tax to apply to plaintiff and to be a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business within the state. The District Court refused to dissolve its injunction and the Court of Appeals again reversed. On appeal, *held,* reversed, the tax constituted a violation of the Commerce Clause of the Constitution of the United States. *Spector Motor Service, Inc. v. O'Connor,* — U. S. —, 71 Sup. Ct. 508 (1951).

The decision of this case, one of considerable constitutional significance, has been eagerly awaited by the parties concerned (having taken eight years and requiring

10. Where the second power is broader than the original power granted (*e.g.*, a general power created out of a special power), this would also seem to be within the scope of the testator's intent by a parity of reasoning (*i.e.*, because the donee of the second power could have been given a fee, which would include the absolute power of disposition) 3 RESTATEMENT PROPERTY § 359 (1) (1940). But see *In re* McClellan's Estate, 221 Pa. 261, 70 A. 737 (1908). There, *X* was granted a power to appoint to anyone other than a member of his family. *X* gave *A* a life estate with power to appoint by will. Held, the same limitation would apply to *A*'s power.

decisions by eight courts); by students of constitutional law;[1] and by many states having statutes similar to the Connecticut statute involved.[2]

This decision is primarily noteworthy for its reaffirmation of the traditional doctrine of the exemption from state taxation of the privilege of engaging exclusively in interstate business. The Court in its opinion explicitly "restores to full vigor" the decisions in cases forming the foundation of that doctrine.[3] On both occasions when this case was before it, the Court of Appeals[4] based its decisions on the belief that these decisions were no longer controlling and that the present trend[5] in Supreme Court decisions seemed to indicate that a tax such as this would be sustained. The doubts raised by the Court of Appeals have been shown to be unfounded and the question answered with finality. The tax was for the privilege of doing business within the state and as the only business done was interstate the tax was invalid.

In the past, most of the cases which have considered the conflicting claims of the state taxing power and the commerce clause, as well as those authorities commenting on the cases,[6] have applied one of two criteria as a basis of judgment. The multiple burden test[7] invalidates those taxes on interstate commerce which are susceptible of being imposed with equal right by other states, so that interstate commerce is required to bear a heavier burden of taxation than intrastate commerce.[8] Fair apportionment and the non-discriminatory character of the tax are the foundations of this rule. The direct-indirect test[9] invalidates those taxes which directly burden interstate commerce.[10] The crux of this test is whether the tax is on net

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1. This case, in the various stages of its litigation, has been noted in: 20 NOTRE DAME LAW. 170 (1944); 44 COL. L. REV. 565 (1944); 57 HARV. L. REV. 573 (1944); 1 STAN. L. REV. 55 (1949); 96 U. OF PA. L. REV. 274 (1947).

2. The statute involved in this case is CONN. REV. GEN. STAT. § 1896 *et seq.* (1949).

3. Alpha Portland Cement Co. v. Commonwealth of Massachusetts, 268 U. S. 203 (1925); Ozark Pipe Line Corp. v. Monier *et al.*, 266 U. S. 555 (1925).

4. 139 F. 2d 809 (2d Cir. 1944); 181 F. 2d 150 (2d Cir. 1950).

5. The cases within the asserted trend are cited in notes 8 and 10 *infra*.

6. Dunham, *Gross Receipts Taxes on Interstate Transactions*, 47 COL. L. REV. 211 (1947); Powell, *More Ado About Gross Receipts Taxes*, 60 HARV. L. REV. 501 (1947); Lockhart, *Gross Receipts Taxes on Interstate Transportation and Communication*, 47 HARV. L. REV. 40 (1943).

7. Central Greyhound Lines, Inc. v. Mealey *et al.*, 334 U. S. 653 (1948); McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 (1940); Western Live Stock *et al.* v. Bureau of Revenue *et al.*, 303 U. S. 250 (1938).

8. Spector Motor Service, Inc. v. O'Connor, 181 F. 2d 150 (2d Cir. 1950). While an application of the multiple burden test was not required in the instant case, it would seem that the tax involved should have been invalidated if such an appraisal were made since there was present a great possibility of multiple taxation. In addition to the tax levied by Connecticut on the portion of its business within that state plaintiff would be liable to a tax on its entire net income by the state of its domicile and most probably to a similar tax by the state or states where it has a commercial domicile. ALTMAN AND KEISLING, ALLOCATION OF INCOME IN STATE TAXATION 32-4 (2d ed. 1950).

9. Joseph v. Carter & Weekes Stevedoring Co., 330 U. S. 422 (1947); Freeman v. Hewit, 329 U. S. 249 (1946); United States Glue Co. v. Town of Oak Creek, 247 U. S. 321 (1918).

10. Spector Motor Service, Inc. v. O'Connor, 181 F. 2d 150 (2d Cir. 1950).

or gross income.[11] The instant case brings forth very lucidly the fact that these tests are concerned with matters of a purely secondary nature. When the incidence of the tax has been established as valid it is then proper, and not before, to consider the fairness of the tax in order to determine whether it should be upheld. If a tax is of a type beyond the scope of the state taxing authority, no amount of effort taken to keep the levy within bounds will justify it.[12] Where the tax is on the privilege of engaging in interstate commerce it is invalid, no matter how justly apportioned.[13]

The financial burden is a secondary question, since the prime concern of the court is to determine whether the channel through which it is to be obtained is constitutional. A state may tax a state-conferred privilege, such as highway use,[14] property,[15] license or gasoline[16] taxes, but it may not acquire the same funds by levying a tax on the privilege of engaging in interstate commerce, for to do so would be to "levy an excise directly upon the privilege of carrying on an activity which is neither derived from the state, nor within its power to forbid."[17]

Also emphasized is the necessity of defining with precision the tax and the activities involved in a particular instance. A tax, invalid because the business was exclusively interstate, might be valid if there were both interstate and intrastate business.[18] A tax on business activity which is sufficiently local in nature would be valid while a tax on a "local event" which is so much a part of interstate commerce as to be

11. United States Glue Co. v. Town of Oak Creek, 247 U. S. 321 (1918). An analysis and application of this test, while not required for the decision, must also call for the invalidation of the present tax. While it is measured by net income, and thus merely creates an indirect burden, it amounts practically to a tax on gross income thereby creating a direct burden. This may be seen from the fact that the statute refused to allow a deduction for "rent" in arriving at net income, and that sixty per cent of plaintiff's operating expense was the cost of renting trucks. It is significant to note that during the course of this litigation the statute was amended so as to permit this deduction. CONN. REV. GEN. STAT. § 1898 (1949).

12. McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 (1940). Hughes, C. J., points out in his dissent that simply because a state could impose a direct tax on its own commerce it is not given the authority to levy a similar tax on interstate commerce. *Id.* at 66.

13. McLeod v. J. E. Dilworth Co. *et al.*, 322 U. S. 327 (1944).

14. Capitol Greyhound Lines *et al.* v. Brice, 339 U. S. 542 (1950).

15. Interstate Oil Pipe Line Co. v. Stone, 337 U. S. 662 (1949).

16. Dixie Ohio Express Co. v. State Revenue Comm'n *et al.*, 306 U. S. 72 (1939).

17. Spector Motor Service, Inc. v. Walsh, 139 F. 2d 809, 822 (2d Cir. 1944). This comment was made by Learned Hand, J., in his dissent.

18. In Matson Navigation Co. *et al.* v. State Board of Equalization of California, 297 U. S. 441 (1936), it was contended that the California Bank and Franchise Tax Act should only be applied to net income attributable to intrastate business whereas the Tax Commissioner included income derived from interstate and foreign commerce but attributable to California. The basis for this contention was that the Act failed to tax foreign corporations exclusively engaged in interstate and foreign commerce in California and thus constituted a denial of equal protection of laws. The Court stated that there was no merit to the contention since "A foreign corporation whose sole business in California is interstate and foreign commerce cannot be subjected to the tax in question." *Id.* at 446, citing Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203 (1925).

in effect a tax upon interstate business is invalid.[19]

Interstate commerce does not have the freedom from state taxation it once enjoyed.[20] "Interstate commerce must pay its way" is the maxim now being applied by the courts.[21] It would seem, however, as pointed out by the dissent in the instant case, that the proper label must be applied before interstate commerce can be compelled to pay its way.

WORKMEN'S COMPENSATION—DRINKING HARMFUL LIQUID AS RESULT OF A PRANK —INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT.—An employee, contrary to company rules, accepted a drink from a co-employee during working hours, thinking that it was gin. The bottle contained carbon tetrachloride, a fact known to the co-employee but deliberately concealed from claimant in order to perpetrate a prank upon him. Severe damage to claimant's internal organs resulted and he seeks compensation under the Workmen's Compensation Laws. *Held,* three judges dissenting, the injury arose out of and in the course of the claimant's employment since he was the innocent victim of horseplay. *Matter of Burns v. Merritt Engineering Co.* et al., 302 N. Y. 131, 96 N. E. 2d 739 (1951).

The purpose of the Workmen's Compensation Laws is to shift the burden of providing support and care for injured workmen from public and private charities to industry and ultimately to the consumer.[1] The right to compensation is not limited by the common law rules of negligence[2] but compensation is awarded for injuries "arising out of and in the course of the employment, without regard to fault. . . ."[3] "In the course of the employment" refers to the time, place and circumstances of the occurrence of the injury; "arising out of" the employment is concerned more with the origin and cause of the accident.[4] The proof of one without the other will not bring the case within the act.[5] Since claimant's injury clearly occurred in the course of his employment the sole question in the instant case, is, as the court points out, whether it arose out of his employment. This phrase has been construed broadly in order to effectuate the evident purpose and intent of the statute.[6] While there is no precise definition of the term, there must be at least a causal connection between the condition under which the work is required to be performed and the resultant injury.[7] This causal connection appears to be some-

19. Memphis Natural Gas Co. v. Stone, 335 U. S. 80 (1948).

20. Cooley v. Board of Wardens, 12 How. 298 (U. S. 1851).

21. Postal Telegraph Cable Co. v. Adams, 155 U. S. 688 (1895).

1. Stark v. State Industrial Acc. Comm'n, 103 Ore. 80, 204 Pac. 151 (1922).

2. New York Central R. R. v. White, 243 U. S. 188 (1917). "In support of the legislation, it is said that the whole common-law doctrine of employer's liability for negligence, with its defenses of contributory negligence, fellow-servant's negligence, and assumption of risk, is based upon fictions and is inapplicable to modern conditions of employment. . . ." *Id.* at 197.

3. N. Y. WORK. COMP. LAW § 10.

4. I. T. I. Co. *et al.* v. Lewis *et al.,* 165 Okla. 26, 24 P. 2d 647 (1933).

5. *In re* Employers' Liability Assur. Corp., Ltd., 215 Mass. 497, 102 N. E. 697 (1913).

6. Stark v. State Industrial Acc. Comm'n, 103 Ore. 80, 204 Pac. 151 (1922).

7. *In re* Employers' Liability Assur. Corp., Ltd., 215 Mass. 497, 102 N. E. 697 (1913).

thing less than the requirement of proximate cause in torts.[8]

In holding that the injury arose out of the employment, the court in the instant case considered the claimant an innocent victim of horseplay. It has generally been held that no recovery is allowed for injuries sustained through horseplay if these acts are not connected with the performance of any duty of the employment;[9] and the aggressor or initiator of the horseplay cannot recover if he is injured.[10] In some cases compensation has been denied even though the injured employee has not participated in the horseplay[11] but the better rule permits the non-participating victim of the horseplay to be compensated for his injuries.[12] Another well recognized exception to the general rule arises where the employer actually knew or should have known that his employees frequently engaged in horseplay while on the job and he took no steps to prevent it. It is then held that the horseplay is a natural hazard or element of the employment and recovery is allowed.[13]

In the instant case the majority brings the claimant within the horseplay rule by considering him as an innocent victim of the cruel joke of his fellow employee. Whether the claimant knew of the rule prohibiting drinking on the job or not was held not to be determinative in considering whether or not the injury arose out of the employment. In support of this position the court cited decisions which allowed recovery where the employee was performing an act which it was his duty to perform but which he was doing in a forbidden manner.[14] In *Matter of Chila v. New*

8. Truck Insurance Exchange v. Industrial Accident Comm'n *et al.*, 27 Cal. 2d 813, 167 P. 2d 705 (1946).

9. McKnight v. Houck *et al.*, 87 Colo. 234, 286 Pac. 279 (1930); Payne v. Industrial Comm'n *et al.*, 295 Ill. 388, 129 N. E. 122 (1920); DeFilippis v. Falkenberg, 170 App. Div. 153, 155 N. Y. Supp. 761 (3d Dep't 1915), *aff'd without opinion*, 219 N. Y. 581, 144 N. E. 1064 (1915).

10. Frost v. H. H. Franklin Mfg. Co., 204 App. Div. 700, 198 N. Y. Supp. 521 (3d Dep't 1923), *aff'd without opinion*, 236 N. Y. 649, 142 N. E. 319 (1923).

11. Porter v. New Haven, 105 Conn. 394, 135 Atl. 293 (1926); Steffes v. Ford Motor Co., 239 Mich. 501, 214 N. W. 953 (1927); Powers v. Y. M. C. A., 17 N. J. Misc. 261, 8 A. 2d 189 (1939).

12. In Pacific Employers Ins. Co. v. Industrial Accident Comm'n *et al.*, 26 Cal. 2d 286, 158 P. 2d 9 (1945), the court allowed a non-participating victim of horseplay to recover and thereby overruled a long line of cases denying recovery. See also Pekin Cooperage Co. v. Industrial Board *et al.*, 277 Ill. 53, 115 N. E. 128 (1917); Leonbruno v. Champlain Silk Mills *et al.*, 229 N. Y. 470, 128 N. E. 711 (1920). Where the injured employee has been the victim of horseplay and has turned on his aggressor only to receive his injury in the ensuing scuffle, he has been allowed to recover. Matter of Verschleiser v. Stern & Son *et al.*, 229 N. Y. 192, 128 N. E. 126 (1920). But if he counter-attacks with such viciousness that he abandons his employment, recovery is barred. Stein v. Williams Printing Co., 195 App. Div. 336, 186 N. Y. Supp. 705 (3d Dep't 1921).

13. Glenn *et al.* v. Reynold's Spring Co. *et al.*, 225 Mich. 693, 196 N. W. 617 (1924), Matter of Industrial Comm'r v. McCarthy *et al.*, 295 N. Y. 443, 68 N. E. 2d 434 (1946).

14. Matter of Burns v. Merritt Engineering Co. *et al.*, 302 N. Y. 131, 134, 96 N. E. 2d 739, 741 (1951). See Matter of Brenchley v. International Heater Co., 227 App. Div. 831, 237 N. Y. Supp. 733 (3d Dep't 1929), *aff'd without opinion*, 254 N. Y. 536, 173 N. E. 854 (1930) (Deceased crushed by a descending elevator while attempting to do some insulation work inside of the elevator shaft. He had been instructed not to enter the shaft).

York Central R. R.[15] the employee's duties included cleaning two towers. He was instructed not to cross the railroad tracks to go from one tower to another but to use the street. He was killed while using the tracks. It was held that as a matter of law the accident arose out of and in the course of decedent's employment. And in *Fox v. Truslow & Fulle, Inc.*[16] the deceased's duties included cleaning her machine but she was strictly forbidden to clean it while it was in motion. Although she received her fatal injury while disobeying this instruction recovery was allowed.

It is submitted that claimant's position is rather within that line of cases which forbids recovery to the employee who is injured while participating in an act which his employer has absolutely forbidden and which is not a part of his employment. In *Yodakis v. Smith & Sons Carpet Co.*[17] claimant was injured while attempting to put an abrasive on a machine belt to speed up the operation of the machine. An award was denied since his employer had provided a special group of men to do all repair work including the act claimant was performing while injured. In *Ebbermann v. Walther & Co.*[18] the employer had expressly forbidden his employees to use a certain elevator. Since deceased met his death while disobeying this rule there could be no recovery. And in *Matter of Redino v. Continental Can Co.*, et al.,[19] the claimant was employed to dip cans in a liquid. On the day of the accident, having finished his own work he attempted to operate a stamping machine in violation of the orders of his employer and received injuries. Recovery was denied since the injury did not arise out of the course of the employment.

The determining element seems to be whether the order which was disobeyed was a direction as to how to do certain things within the sphere of the employment or whether the order actually limited the sphere of the workmen's employment.[20] It would seem that the order in question limited the sphere of the employment and it would also seem that the employee left that sphere when he accepted the drink contrary to plant rules. Since recovery has been denied to injured employees because they have used a forbidden instrumentality or machine[21] or because the injury occurred while attempting to repair a machine contrary to orders,[22] it is extremely difficult to justify an award of compensation to one who in doing the prohibited act seems to have voluntarily abandoned his employment. It should be noted that the injury in the instant case would not have been sustained but for the voluntary act of the employee whereas in the usual horseplay case, the injury is the direct result of an act of a co-employee.

15. 251 App. Div., 575, 297 N. Y. Supp. 850 (3d Dep't 1937), *aff'd without opinion,* 275 N. Y. 585, 11 N. E. 2d 766 (1937).

16. 204 App. Div. 584, 198 N. Y. Supp. 735 (3d Dep't 1923), *aff'd without opinion,* 236 N. Y. 634, 142 N. E. 314 (1923).

17. 193 App. Div. 150, 183 N. Y. Supp. 768 (3d Dep't 1920), *aff'd without opinion,* 230 N. Y. 593, 130 N. E. 907 (1921).

18. 209 App. Div. 248, 204 N. Y. Supp. 406 (3d Dep't 1924).

19. 226 N. Y. 565, 123 N. E. 886 (1919), *mem. reversing,* 186 App. Div. 924, 172 N. Y. Supp. 916 (3d Dep't 1918).

20. Macechko v. Bowen Mfg. Co., 179 App. Div. 573, 166 N. Y. Supp. 822 (3d Dep't 1917).

21. Ebbermann v. Walther & Co., 209 App. Div. 248, 204 N. Y. Supp. 406 (3d Dep't 1924). Matter of Rendino v. Continental Can Co. *et al.,* 226 N. Y. 565, 123 N. E. 886 (1919), *mem. reversing,* 186 App. Div. 924, 172 N. Y. Supp. 916 (3d Dep't 1918).

22. Yodakis v. Smith & Sons Carpet Co., 193 App. Div. 150, 183 N. Y. Supp. 768 (3d Dep't 1920), *aff'd without opinion,* 230 N. Y. 593, 130 N. E. 907 (1921).

If the employee actually remains within the sphere of his employment, the fact that he breaks rules governing the manner of performing his duties will not bar recovery. Thus in *Matter of State Treasurer v. Ulysses Apartments, Inc.*[23] the employee met his death while smoking in violation of the orders of his employer while using an inflammable paint remover. The award was sustained since the death arose out of the employment. It would seem that this employee was furthering his master's interest and performing his duties of employment although doing it in a dangerous and forbidden manner. The claimant in the instant case did not appear to be performing any duty of his employment.

In its opinion the majority suggests that the test should be "whether the injurious horseplay may reasonably be regarded as an incident of the employment . . . rather than the foreseeability of a particular prank."[24] The rule is a sound one but it seems difficult to understand how the "prank" in the instant case can reasonably be regarded as an incident of any employment.

The instant case, along with other recent decisions, indicates the current tendency of the courts to permit recovery even in the absence of a causal connection between the injury and the conditions under which the work is required to be performed.[25] The trend indicates that the employer is becoming more and more an insurer of his employees instead of merely being liable for injuries arising out of and in the course of the employment.

23. 232 App. Div. 393, 250 N. Y. Supp. 190 (3d Dep't 1931).

24. 302 N. Y. 131, 135, 96 N. E. 2d 739, 741 (1951).

25. Southern Cotton Oil Co. v. Bruce, 249 Ala. 675, 32 So. 2d 666 (1947). Hillyard v. Lohmann-Johnson Drilling Co., 168 Kan. 177, 211 P. 2d 89 (1949); Dillon's Case, 324 Mass. 102, 85 N. E. 2d 69 (1949); Masse v. James H. Robinson Co. Inc. *et al.*, 301 N. Y. 34, 92 N. E. 2d 56 (1950).