Fordham Law Review

Volume 38 | Issue 1 Article 16

1969

Case Notes

CASE NOTES

Admiralty—Jones Act—Foreign Shipping Corporation Owned By Resident Alien Held Liable Under Flag-of-Convenience Doctrine.—Plaintiff, a Greek citizen, brought suit under the Jones Act[1] against Hellenic Lines, Ltd., a Greek corporation, and Universal Cargo Carriers, Inc., a Panamanian corporation, for a shipboard injury that had occurred in the Port of New Orleans upon a Greek registered vessel of the defendants. The vessel was owned by Universal Cargo Carriers which, however, was merely a holding corporation with no operational responsibilities in regard to the vessel. In reality, Universal Cargo Carriers was a wholly owned subsidiary of Hellenic Lines, and ninety-five per cent of Hellenic stock was held by a Greek citizen and his son who were resident aliens of Connecticut.[2] Hellenic Lines was actually the operator of the vessel, and its managerial and operational offices were located in New York City.[3] The district court, upon examining the contacts of the defendants with the United States, held the defendants liable under the Jones Act.[4] In affirming, the court of appeals concluded that defendants' economic and operational contacts with the United States were so substantial as to justify application of Jones Act liability. *Hellenic Lines, Ltd. v. Rhoditis*, 412 F.2d 919 (5th Cir. 1969).

Prior to the Supreme Court's decision in *Lauritzen v. Larsen*,[5] the determining factors for application of the Jones Act against a foreign shipowner was the place where the shipping articles were signed, or the locality of the injury.[6] In

1. 46 U.S.C. § 688 et seq. (1964). The Jones Act provides a seaman with a jury trial for personal injuries: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." Id. § 688.

2. The Greek citizen was admitted to permanent resident status in 1956-57. Tsakonites v. Transpacific Carriers Corp., 368 F.2d 426, 427 (2d Cir. 1966), cert. denied, 386 U.S. 1007 (1967); see 8 C.F.R. § 245 (1969).

3. The defendant maintained an office of 75 persons in New York City, and an office of 15 persons in New Orleans, as well as numerous other smaller offices throughout its trade route, including Greece. Hellenic Lines, Ltd. v. Rhoditis, 412 F.2d 919, 921 n.5 (5th Cir. 1969).

4. Rhoditis v. Hellenic Lines, Ltd., 273 F. Supp. 248 (S.D. Ala. 1967). The plaintiff brought suit in personam not only under the Jones Act, but also under the general maritime remedies of maintenance and cure and unseaworthiness. Furthermore, the cargo vessel itself was sued in rem. See 412 F.2d at 920-21 n.4.

5. 345 U.S. 571 (1953). For a general discussion of the case see H. Baer, Admiralty Law of the Supreme Court 59-62 (1963); 1 P. Edelman, Maritime Death and Injury 513-17 (1960); Note, 102 U. Pa. L. Rev. 237 (1953).

6. If the articles were signed in the United States, or the injury took place there, the

Lauritzen, however, the Court specifically held these factors not to be *per se* determinative. In *Lauritzen,* a Danish seaman, who signed on a Danish registered vessel in a United States port and who was injured in Cuban waters, sued the Danish corporate owner of the vessel under the Jones Act. The Court held that the law of the flag—*i.e.,* that of the vessel—would be the proper choice in such a case, since sufficient contacts with the United States to justify the application of the Jones Act were lacking. The Court outlined by way of dictum[7] seven factors to be considered in applying the Jones Act to alien seamen and foreign corporate defendants. Four of these factors—the place of the injury,[8] the place of the signing of the articles,[9] the inaccessability of the foreign forum to the seaman,[10] and the law of the forum[11]—were considered by the Court to be of minor importance. The three remaining factors prescribed were the law of the flag ("the most venerable and universal rule of maritime law relevant"),[12] the allegiance of the defendant shipowner,[13] and the allegiance or domicile of the injured seaman.[14] Since the law of the flag was considered to be of such "cardinal importance"[15]—because international law requires a mutual forbearance and respect for another country's flag—it was suggested that some overpowering counter-balance or weight must be found to offset it if the Jones Act were to be found applicable.[16]

Six years later, in *Romero v. International Terminal Operating Co.,*[17] a Span-

Jones Act was usually held applicable. See Kyriakos v. Goulandris, 151 F.2d 132 (2d Cir. 1945); Lunde v. Skibs A.S. Herstein, 103 F. Supp. 446 (S.D.N.Y. 1952). Contra, Sonneson v. Panama Transp. Co., 298 N.Y. 262, 82 N.E.2d 569 (1948).

7. The actual holding could be narrowly construed to cover only someone in Larsen's position and not applicable to all Jones Act suits involving aliens. See G. Gilmore & C. Black, The Law of Admiralty § 6-63, at 387 (1957).

8. See 345 U.S. at 583-84.

9. The place of contracting, although of prime importance in contract cases, is of relatively little importance in tort actions such as suits under the Jones Act. See id. at 588; Kontos v. S.S. Sophie C., 236 F. Supp. 664, 670 (E.D. Pa. 1964).

10. This factor is of importance only when a case of pendent or discretionary jurisdiction is involved, and may determine whether jurisdiction is to be retained or not, but it is not determinative of choice of law. See 345 U.S. at 589-90; Cuozzo v. Italian Line, 168 F. Supp. 304, 306-07 (S.D.N.Y. 1958); Markakis v. S.S. The Mparmpa Christos, 161 F. Supp. 487, 489 (S.D.N.Y. 1958).

11. This is generally a matter of statutory interpretation. See 345 U.S. at 590-92.

12. Id. at 584.

13. See id. at 587.

14. This factor has not been extremely influential. Although the Court in Lauritzen seemed to imply that an American citizen-seaman would have the Jones Act available to him in an action against a foreign steamship company, the courts have not consistently followed this. See id. at 586; Symonette Shipyards, Ltd. v. Clark, 365 F.2d 464 (5th Cir. 1966), cert. denied, 387 U.S. 908 (1967); Smith v. Furness, Withy & Co., 119 F. Supp. 369 (S.D.N.Y. 1953); Note, 47 Va. L. Rev. 1400 (1961).

15. 345 U.S. at 584.

16. Id. at 585-86. See also H. Baer, supra note 5, at 59-62; H. Meyers, The Nationality of Ships 52-58 (1967).

17. 358 U.S. 354 (1959).

ish seaman sued a Spanish shipping corporation under both the Jones Act and the general maritime law for an injury which occurred in New York harbor. Since the place-of-injury contact had been minimized in *Lauritzen*, the Court found that the law of the flag controlled the choice of law and held the Jones Act inapplicable. However, it further elaborated that the *Lauritzen* rationale was not limited solely to suits brought under the Jones Act, but that its principles regarding choice of law and jurisdiction would be extended to the general maritime law—*i.e.*, unseaworthiness and maintenance and cure actions. What is called for in these cases, the Court stated, is a weighing of those factors of international law which call for respect of the vessel's flag, against those of national interest served by the assertion of domestic authority over foreign defendants.[18]

In cases where an alien seaman brought suit against a United States corporation or vessel, our courts have found little difficulty in applying the Jones Act.[19] However, where the defendant is a foreign steamship corporation, it is then necessary, if the Jones Act is to apply, to look behind the corporate facade to determine the true, beneficial ownership of the vessel. The Jones Act has been applied in several cases where it appeared that the foreign corporation was owned and controlled by American citizens, and was organized primarily to circumvent rigid domestic controls, taxes, and high wage costs implicit in United States registry—the typical flag-of-convenience vessel.[20] The flag in order to control "must not be one of convenience merely but bona fide."[21] The courts have, however, become increasingly more liberal as to what constitutes a flag-of-convenience vessel. They have even termed the flag one of convenience when, for instance, less than a majority interest in the foreign corporation was held by American citizens, although the shares owned by the citizens were enough to permit control.[22]

---

18. Id. at 382-83; see 345 U.S. at 584-86.

19. See, e.g., In re Risdal & Anderson, Inc., 291 F. Supp. 353 (D. Mass. 1968).

20. See Southern Cross S.S. Co. v. Firipis, 285 F.2d 651 (4th Cir. 1960), cert. denied, 365 U.S. 869 (1961); Bartholomew v. Universe Tankships, Inc., 263 F.2d 437 (2d Cir.), cert. denied, 359 U.S. 1000 (1959); Pavlou v. Ocean Traders Marine Corp., 211 F. Supp. 320 (S.D.N.Y. 1962).

21. Southern Cross S.S. Co. v. Firipis, 285 F.2d 651, 653 (4th Cir. 1960), cert. denied, 365 U.S. 869 (1961).

22. Id. (20% American control); Pavlou v. Ocean Traders Marine Corp., 211 F. Supp. 320 (S.D.N.Y. 1962) (48½% American control). However, it should be noted that these corporations are not eligible for United States registry. See 46 U.S.C. §§ 11, 802 (1964); 19 C.F.R. §§ 3.2, 3.19 (1969). 46 U.S.C.A. § 11 (Supp. 1969) states: "Vessels built within the United States and belonging wholly to citizens thereof; and vessels which may be captured in war by citizens of the United States and lawfully condemned as prize, or which may be adjudged to be forfeited for a breach of the laws of the United States; and seagoing vessels, whether steam or sail, which have been certified by the Coast Guard as safe to carry dry and perishable cargo, wherever built, which are to engage only in trade with foreign countries, with the Islands of Guam, Tutuila, Wake, Midway, and Kingman Reef, being wholly owned by citizens of the United States or corporations organized and chartered under the laws of the United States, or of any State thereof, the president and managing directors of

The typical flag-of-convenience vessel is one whose ownership and management is predominantly exercised by American citizens and thus eligible to utilize United States registry, but which is registered, or its corporate owner is organized under a foreign nation's laws to avoid what is considered oppressive federal regulation, taxes or operating costs.[23] The national flags usually utilized are those of Panama, Liberia, and Honduras[24] since their regulations, taxes and wage costs are among the lowest in the world.[25] The flags of the Western European nations, including the Greek flag, do not usually provide such incentives and thus are not considered flags-of-convenience.[26]

The court's decision in *Rhoditis* is at odds with that of the Second Circuit in *Tsakonites v. Transpacific Carriers Corp.*,[27] which involved a Jones Act suit against the same corporate defendant by a Greek alien injured in Brooklyn harbor. The *Tsakonites* court expressly found that the defendant's Greek flag was not a flag-of-convenience. It relied upon the fact that the defendants had substantial contacts with Greece—*i.e.*, that they incorporated Hellenic Lines in that country, maintained its largest office there, called there for crews and provisions, that a majority of the officers and directors of the corporation, and all

---

which shall be citizens of the United States, and no others, may be registered as directed in this chapter and chapters 3, 4, 5, 6, 7, 8, and 9 of this title." See also The Tanamo, 83 F.2d 161 (2d Cir. 1936); United States v. The Meacham, 107 F. Supp. 997 (E.D. Va. 1952), aff'd, 207 F.2d 535 (4th Cir. 1953), cert. denied, 348 U.S. 801 (1954). 46 U.S.C.A. § 802(a) (Supp. 1969) states: "Within the meaning of this chapter no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president and managing directors are citizens of the United States and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or Possession thereof, but in the case of a corporation, association, or partnership operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum." By "controlling interest" is meant a 51% share-holding by American citizens.

23. See B. Boczek, Flags of Convenience 1-90 (1962); H. Meyers, supra note 16, at 57 n.1; Harolds, Some Legal Problems Arising Out of Foreign Flag Operations, 28 Fordham L. Rev. 295 (1959).

24. See B. Boczek, supra note 23, at 1-90; H. Meyers, supra note 16, at 57 n.1; Harolds, supra note 23, at 295. Costa Rico was formerly also a favorite. However, with the enactment of tougher regulations regarding safety and construction of vessels it has lost its role. H. Meyers, supra note 16, at 57 n.1. For the number of vessels under the PANLIBHON (Panama, Liberia and Honduras) block, and those under U.S. control see The Runaway-Flag Threat to the U.S. Merchant Fleet, Seafarers Int'l Union's Position Paper to the Maritime Advisory Committee (1964); for a favorable appraisal of flags-of-convenience see Report of the American Committee for Flags of Necessity (1964).

25. See J. Clark, Flags of Whose Convenience, in U.S. Naval Institute Proceedings 50 (Oct., 1968).

26. See Gkiafis v. S.S. Yiosonas, 387 F.2d 460 (4th Cir. 1967); Tjonaman v. A/S Glittre, 340 F.2d 290 (2d Cir.), cert. denied, 381 U.S. 925 (1965); Tsakonites v. Transpacific Carriers Corp., 368 F.2d 426 (2d Cir. 1966).

27. 368 F.2d 426 (2d Cir. 1966).

its shareholders, were Greek residents or citizens.[28] The Second Circuit thus concluded that the defendant-corporations had not simply utilized the Greek registry to evade United States regulation. On the contrary, the court in *Rhoditis* found that the defendants' flag was "more symbolic than real" and that it was "merely one of convenience."[29]

In utilizing the flag-of-convenience test as a factor in finding a counterbalance to the law of the flag, an increasing number of courts have focused on the foreign corporation's domestic economic ties or locus of control. These courts have stated that "[t]he mode and manner of the business arrangement adopted by defendants is such a substantial and far-reaching contact with the United States . . . as to reduce other factors to mere formal labels."[30] Thus, if an analysis of the corporation's base of business operations reveals that it is "substantial" within the United States, sufficient justification to impose Jones Act liability upon the foreign corporate defendant arises.[31] The Supreme Court[32] and the Second Circuit[33] both appear to have repudiated this business control or contact theory, although the Fifth Circuit in the case in point squarely rests its decision thereon.[34] The economic control doctrine is similar to the "nexus" theory currently utilized in other areas of the law.[35] Generally, a court employing this rationale analyzes and weighs the significant relationships in the case, and applies the law of the locality with the most compelling contacts. In a case such as *Rhoditis,* this may or may not be the place where the tort occurred.[36] The *Rhoditis* court found the most significant relationships of the defendant to be in the United States, thus concluding that the vessel's flag was merely one of convenience and that the Jones Act was the proper choice of law.[37] The court adopted *in toto* Circuit Judge Waterman's reasoning in his *Tsakonites* dissent that, since resident aliens, as the principal shareholders, are accorded many of the same rights and privileges as are United States citizens, they and the corpo-

28. Id. at 428.

29. 412 F.2d at 923.

30. Pavlou v. Ocean Traders Marine Corp., 211 F. Supp. 320, 324 (S.D.N.Y. 1962).

31. Compare Garis v. Compania Maritima San Basilio, 386 F.2d 155 (2d Cir. 1967) with Voyiatzis v. National Shipping & Trading Corp., 199 F. Supp. 920 (S.D.N.Y. 1961) and Firipis v. The S.S. Margaritis, 181 F. Supp. 48 (E.D. Va.), aff'd sub nom., Southern Cross S.S. Co. v. Firipis, 285 F.2d 651 (4th Cir. 1960), cert. denied, 365 U.S. 869 (1961).

32. McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963).

33. Tjonaman v. A/S Glittre, 340 F.2d 290, 292 (2d Cir.), cert. denied, 381 U.S. 925 (1965). See also Tsakonites v. Transpacific Carriers Corp., 368 F.2d 426 (2d Cir. 1966).

34. 412 F.2d at 926.

35. See, e.g., Humboldt Foods, Inc. v. Massey, 297 F. Supp. 236 (N.D. Miss. 1968) (when a corporation is considered to be doing business within a state); Longines-Wittnauer Watch Co. v. Barnes & Reinecke, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8, cert. denied, 282 U.S. 905 (1965) (jurisdiction of state court); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) (choice of law).

36. Scott v. Eastern Airlines, Inc., 399 F.2d 14 (3rd Cir.), cert. denied, 393 U.S. 979 (1968) (airliner crash); McClure v. U.S. Lines Co., 368 F.2d 197 (4th Cir. 1965) (nexus theory applied to suit in admiralty).

37. 412 F.2d at 926.

rations they own should also bear the burdens of the applicable United States statutes.[38] The courts in the past have only felt compelled to find Jones Act liability when the foreign corporation was owned by American *citizens* and not resident aliens.[39] However, the United States does indeed require a resident alien to comply with our statutes in the conduct of his personal actions,[40] and in return grants him various constitutional protections.[41]

Aside from a finding that a foreign steamship company flies a flag-of-convenience, either through citizenship or economic contacts, the courts have also generally required that the place of the alien seaman's injury be within United States territorial waters in order to outweigh the law of the flag.[42] In both the Second Circuit's *Tsakonites* decision and the present case, the injury occurred within United States waters. Thus, the only explanation for the contrary results hinges on the courts' differing determinations of what constitutes a flag-of-convenience, each reached by diverse interpretations of the business or economic control criteria.

The tendency of United States courts to disregard the law of the flag, especially in flag-of-convenience situations, has been the subject of severe criticism,[43] especially after the 1958 United Nations Conference on the Law of the Sea adopted the Convention on the High Seas[44] to which the United States is a signatory. The imposition of Jones Act liability against a foreign steamship corporation requires a careful analysis and interpretation of the Jones Act by the courts.[45] Imposing liability upon flag-of-convenience vessels operated by

38. 368 F.2d at 430; 412 F.2d at 925.

39. Brillis v. Chandris (U.S.A.) Inc., 215 F. Supp. 520 (S.D.N.Y. 1963); Voyiatzis v. National Shipping & Trading Corp., 199 F. Supp. 920 (S.D.N.Y. 1961). See also 2 M. Norris, The Law of Seamen § 681, at 841-42 (2d ed. 1962); Note, 102 U. Pa. L. Rev. 237, 238 (1953); Note, 47 Va. L. Rev. 1400, 1408 (1961).

40. See, e.g., Leonhard v. Eley, 151 F.2d 409 (10th Cir. 1945) (requiring aliens to serve in our armed forces).

41. See, e.g., Kwong Hai Chen v. Colding, 344 U.S. 590 (1953).

42. Compare Malanos v. Marsuerte Compania Naviera, S.A., 259 F. Supp. 646 (E.D. Va. 1966) with Kontos v. S.S. Sophie C., 236 F. Supp. 664 (E.D. Pa. 1964) and Filippou v. Italia Societa Per Azioni Di Navizione, 254 F. Supp. 162 (D. Mass. 1966).

43. See, e.g., H. Meyers, supra note 16, at 56.

44. Convention on the High Seas, Sept. 15, 1962, [1962] 2 U.S.T. 2315, T.I.A.S. No. 5200. The Convention attempted to deal with the flag-of-convenience problem by requiring that there exist a "genuine link" between the vessel and the flag states. Id. art. 5. See M. Sorenson, Law of the Sea 201 (1958) (reprinted in International Conciliation, Nov. 1958). However the precise meaning of a "genuine link" was never defined, and thus the problem of flag-of-convenience vessels was ineffectively dealt with by the Convention. Furthermore, the convention provided that the law of the flag was to be disregarded only in exceptional cases. [1962] 2 U.S.T. 2315, T.I.A.S. No. 5200, art. 6.

45. Some jurists and commentators have found an expression of congressional intent in the wording of the Jones Act that "[a]ny seaman who shall suffer personal injury in the course of his employment." 46 U.S.C. § 688 (1964). See 358 U.S. at 389 (Black, J. dissenting); H. Baer, supra note 5, at 59-60; Harolds, supra note 23, at 305. Legislative history pertaining to this section of the Jones Act is non-existent. However, the Supreme Court

American citizens is clearly justified since they have attempted to evade United States regulation.[46] However, when the foreign corporation is not controlled by American citizens, application of the *Rhoditis* rationale subjecting the defendant to Jones Act liability may be an unwarranted disregard of the law of the flag. The fact that corporations controlled by resident aliens will be subjected to the same Jones Act liabilities as domestic corporations removes one of the many advantages of registering a vessel under a foreign flag. This may cause such corporations to transfer their base of operations from the United States. However, the existing conflict between *Rhoditis* and *Tsakonites* makes it evident that a more clearly detailed set of guidelines in the area of flag-of-convenience vessels is obviously needed.

Conflict of Laws—Torts—Death of *DYM*; Governmental Interest Theory Reaffirmed.—Decedent, a New York domiciliary, was a student resident at Michigan State University. While a passenger in a car driven by a classmate, Marcia Lopez, the decedent was killed after the driver lost control of the vehicle while attempting to pass another car. The accident also seriously injured another passenger, Susan Silk, a Michigan domiciliary. The automobile which Miss Lopez was driving belonged to her father who resided in New York where the car was registered and insured. Decedent's father commenced a wrongful death action against the owner of the vehicle in New York. Defendant asserted as an affirmative defense the Michigan guest statute[1] which permits recovery by guests only by a showing of willful misconduct or gross negligence of the driver. The trial court dismissed the affirmative defense,[2] but the appellate division reversed,[3] stating that it was "constrained" by the holding in *Dym v. Gordon*.[4] The New York Court of Appeals reversed the appellate division, thereby casting serious doubt upon the further validity of *Dym*. *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

Prior to *Tooker* New York law was in a state of flux[5] with respect to tort actions involving a conflict of state laws. The seeds of this confusion were

noted in Lauritzen that the phrase should not be construed so broadly. 345 U.S. at 592-93. See also McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963).

46. See Harold, supra note 23, where the author advocates an even stronger disregard of the law of the flag which he believes will tend to equalize foreign shipping competition with that of the United States.

1. Mich. Comp. Laws Ann. § 257.401 (1967).

2. The trial judge concluded that: "New York State 'has the greatest concern with the specific issue raised in the litigation' and that New York law should apply." 24 N.Y.2d 569, 571, 249 N.E.2d 394, 395, 301 N.Y.S.2d 519, 521 (1969).

3. 30 App. Div. 2d 115, 290 N.Y.S.2d 762 (3d Dep't 1968).

4. 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

5. Miller v. Miller, 22 N.Y.2d 12, 15, 237 N.E.2d 877, 879, 290 N.Y.S.2d 734, 737 (1968). See also Currie, Comments On Reich v. Purcell, 15 U.C.L.A.L. Rev. 551, 595-98 (1968).

first sown by the contradictions apparent in the now famous trilogy of tort conflict cases—*Babcock v. Jackson*,[6] *Dym v. Gordon*,[7] and *Macey v. Rozbicki*.[8]

In *Babcock*, the plaintiff-guest was injured during a weekend trip to Canada when the defendant's vehicle swerved off the highway and crashed into a stone wall. In a New York action, defendant raised as a defense Ontario's guest statute[9] barring recovery. At the time of the accident, both plaintiff and defendant were New York domiciliaries and the vehicle was registered and insured in New York. The court rejected Ontario's guest statute, and applied New York law, noting that it was not prejudicing Ontario's interest since the purpose of the Ontario statute was merely to protect its own insurance companies against fraud.[10] The court also carefully pointed out that the statute was not concerned with the manner in which the driver operated the vehicle.[11] Presumably, had this been the concern of the statute, Ontario's interest would have been paramount and its own law applied.[12]

Thus, in *Babcock*, the strict lex locus delicti doctrine[13] was replaced[14] by the "center of gravity" or "grouping of contacts"[15] test, previously formulated and introduced into contract law in *Auten v. Auten*.[16] In describing the guidelines for the application of this test to tort actions, the court stated that controlling effect should be given to "the law of the jurisdiction which, because

---

6. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

7. 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

8. 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966).

9. Ont. Rev. Stat. c. 172, § 105(2) (1960). This statute acted as an absolute bar to recovery and provided that "the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in . . . the motor vehicle." Id.

10. 12 N.Y.2d at 482-83, 191 N.E.2d at 284, 240 N.Y.S.2d at 750. The Babcock court went on to state that "[w]hether New York defendants are imposed upon or their insurers defrauded by a New York plaintiff is scarcely a valid legislative concern of Ontario simply because the accident occurred there, any more so than if the accident had happened in some other jurisdiction." Id. at 483, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

11. Id.

12. See id.

13. According to the lex locus delicti or "vested rights" doctrine the liabilities arising out of a tortious occurrence are determinable by the law of the place of the tort. See Restatement of Conflict of Laws § 384 (1934); H. Goodrich, Conflict of Laws 260 (3d ed. 1949).

14. See generally Cavers, Cheatham, Currie, Ehrenzweig, Leflar & Reese, Comments On Babcock v. Jackson, A Recent Development In Conflict Of Laws, 63 Colum. L. Rev. 1212 (1963).

15. 12 N.Y.2d at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749. The phrases "center of gravity" and "grouping of contacts", however, were not universally accepted. See Babcock v. Jackson, 12 N.Y.2d at 486, 191 N.E.2d at 286, 240 N.Y.S.2d at 753 (Van Voorhis, J., dissenting) and Dym v. Gordon, 16 N.Y.2d at 135, 209 N.E.2d at 801, 262 N.Y.S.2d at 475 (Desmond, C.J., dissenting).

16. 308 N.Y. 155, 124 N.E.2d 99 (1954).

of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation."[17]

With the end of the lex locus delicti theory two distinct philosophies developed within the New York courts as to the meaning and application of the *Babcock* doctrine.[18] Under the "mechanical contacts" approach, the courts applied the law of the state having the most significant or numerous contacts with the matter in dispute, often without any discussion of the relevant policy considerations involved. On the other hand, the "public policy" or "governmental interest" approach rejected a strict adherence to such a mechanical formula. Instead, it looked to the interests of the respective states in determining which state law should be applied.

The confusing effects of this dichotomy in legal reasoning were first clearly evidenced in *Dym v. Gordon*.[19] In *Dym*, the plaintiff and defendant, both New York domiciliaries, traveled separately to Colorado to attend a college summer session. There, plaintiff was injured while a passenger in a car owned and negligently driven by the defendant.[20] At the time of this accident, a Colorado statute[21] barred an action against a host for ordinary vehicular negligence.[22] The New York court focused its attention upon the fact that the parties were dwelling in Colorado when the relationship was formed and also upon the fact that the accident arose out of a Colorado based activity.[23] It went on to distinguish *Babcock* by noting that, in addition to protecting local insurance carriers against fraud, the Colorado guest statute had as its purpose the preservation of the defendant's assets for the benefit of non-negligently injured parties in other vehicles.[24] Based upon these factors, the court concluded that since Colorado had the most significant contacts with the *"relationship itself* and the *basis of its formation,"* the application of its law was clearly warranted.[25]

Although *Dym* was decided by New York's highest court, the validity of its reasoning was considered in a number of subsequent New York cases beginning with *Long v. Pan American World Airways*,[26] an action for wrongful

17. 12 N.Y.2d at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749.

18. Baer, Two Approaches To Guest Statutes In The Conflict Of Laws: Mechanical Jurisprudence Versus Groping For Contacts, 16 Buffalo L. Rev. 537, 565-66 (1967).

19. 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

20. The other vehicle in the accident was operated by a Kansas driver and was registered in Kansas. 16 N.Y.2d at 130, 209 N.E.2d at 798, 262 N.Y.S.2d at 471 (Fuld, J., dissenting).

21. Colo. Rev. Stat. Ann. § 13-9-1 (1963).

22. In contrast to the Babcock statute which acted as an absolute bar to recovery, this statute was less severe in that it allowed a guest to recover upon a showing of gross negligence. See 16 N.Y.2d at 122, 209 N.E.2d at 793, 262 N.Y.S.2d at 465.

23. Numerous New York contacts were also considered by the court but were rejected as an attempt "to use a quantitative rather than a qualitative test . . . [which] tends to distort Babcock into a rule of domicile or one directed toward public policy." 16 N.Y.2d at 124, 209 N.E.2d at 794, 262 N.Y.S.2d at 466.

24. Id.

25. Id. at 125, 209 N.E.2d at 794, 262 N.Y.S.2d at 467.

26. 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965).

death[27] resulting from an airplane crash in Maryland. The court, relying on Pennsylvania's more numerous contacts,[28] held the law of Pennsylvania applicable rather than that of Maryland.[29] However, the court also stated that had Maryland demonstrated some public policy which needed protection, it would have considered applying her law, even though Maryland was only "fortuitously the situs of the accident."[30] Thus, the court, talking in terms of both contacts and interests, did little to clarify the confusion engendered by *Dym*.

The reasoning of *Dym*, however, was shortly to be challenged by Judge Keating in his concurring opinion in *Macey v. Rozbicki*.[31] Here the plaintiff, a New York resident, was visiting her sister and brother-in-law, also New York residents, at their summer home in Ontario. While in Ontario, the plaintiff was injured while a passenger in the defendant's motor vehicle. The New York court held the Ontario guest statute,[32] which barred actions by a guest-passenger, inapplicable and allowed the plaintiff to recover.[33] Although the majority opinion, written by Judge Fuld, did not discuss New York's public policy in relation to guest statutes,[34] Judge Keating, concurring, stated that the facts of the case could properly be considered only in the light of "relevant policy considerations."[35] Of special concern to Judge Keating was New York's strong public policy of indemnifying the victims of negligent drivers.[36] Noting the irreconcilability of the *Dym* and *Babcock* decisions, Judge Keating concluded that the court should no longer follow the decision of *Dym v. Gordon*.[37]

27. The court applied the Babcock ruling to the wrongful death action stating that "[i]t would be highly incongruous and unreal to have the flexible principle of Babcock apply in a case where the victim of the tort is injured but not where he is killed." Id. at 343, 213 N.E.2d at 799, 266 N.Y.S.2d at 518. A number of other cases relied on by the court had also previously indicated an expansion of the Babcock doctrine. See, e.g., Griffith v. United Air Lines, 416 Pa. 1, 203 A.2d 796 (1964).

28. The defendant was a common carrier doing business in Pennsylvania; the accident occurred in the course of that business; plaintiffs purchased their round-trip tickets in Pennsylvania; and the flight was to begin and terminate in Pennsylvania. The only Maryland contact was the fact that the plane fell on Maryland territory following a mid-air explosion.

29. 16 N.Y.2d at 343, 213 N.E.2d at 799, 266 N.Y.S.2d at 517.

30. Id. at 342, 213 N.E.2d at 798, 266 N.Y.S.2d at 516.

31. 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966).

32. Ont. Rev. Stat. c. 172, § 105(2) (1960).

33. 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591. In this case all the contacts were New York related except that the particular trip was between two points in Canada. This factor, however, was termed insignificant by the court. Id. at 292, 221 N.E.2d at 381, 274 N.Y.S.2d at 593.

34. Judge Fuld had previously considered the public policy argument in relation to guest statutes in Dym v. Gordon, 16 N.Y.2d at 129, 209 N.E.2d at 797, 262 N.Y.S.2d at 470 (dissenting opinion).

35. 18 N.Y.2d at 296, 221 N.E.2d at 384, 274 N.Y.S.2d at 597. See Currie, Comments On Babcock v. Jackson, 63 Colum. L. Rev. 1212, 1235 (1963).

36. 18 N.Y.2d at 293, 221 N.E.2d at 382, 274 N.Y.S.2d at 594.

37. Id. at 298, 221 N.E.2d at 385, 274 N.Y.S.2d at 598.

Following its decision in *Macey,* the court had an opportunity to reconsider the public policy argument in two non-tort cases[38]—*In re Crichton*[39] and *In re Clark.*[40] In *Crichton,* a New York domiciliary died leaving considerable assets in Louisiana. Under Louisiana law[41] the wife was entitled to one-half of the estate, while under New York law[42] she was entitled to one-third. In reaching its decision to apply New York law, the court rejected a quantitive grouping of contacts,[43] giving as its reason the fact that "Louisiana has no such interest in protecting and regulating the rights of married persons residing and domiciled in New York."[44] In *Clark,* the decedent, a domiciliary of Virginia, died leaving his estate to his widow, also a Virginia domiciliary. The decedent's will contained a provision that "this Will and the testamentary dispositions in it and the trusts set up shall be construed, regulated and determined by the laws of the State of New York.' "[45] Under the terms of the will a marital deduction trust was created for the benefit of the widow under which she would receive the income for life, with a general testamentary power of appointment over the principal of the trust.[46] In contrast, under Virginia law,[47] the widow had the unconditional right to renounce her husband's will and take her intestate share of the will outright.[48] Thus the issue clearly framed for the court was whether the provision in the decedent's will that it "and the testamentary dispositions in it" be determined by New York law could deprive the widow, a Virginia resident, of the more favorable right of election given her by the law of Virginia, her domicile. The court, following the reasoning of *Crichton,* held that it could not and declared that where a state has the predominant interest in upholding the rights of the parties, the law of that state should be applied.[49] Here "Virginia's overwhelming interest in the protection of surviving spouses domiciled there"[50] dictated the application of her law.

38. These cases are concerned with wills and estates. Nevertheless, their analysis of the conflict of laws problems involved are also relevant to tort law since their holdings have been used as a basis for subsequent tort conflict decisions. See, e.g., Miller v. Miller, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).

39. 20 N.Y.2d 124, 228 N.E.2d 799, 281 N.Y.S.2d 811 (1967).

40. 21 N.Y.2d 478, 236 N.E.2d 152, 288 N.Y.S.2d 993 (1968).

41. La. Civ. Code Ann. art. 2406 (West 1952).

42. N.Y. Deced. Est. Law § 18 (1949).

43. Under a quantitative "grouping of contacts" theory the courts place the main emphasis on the law of the place "which has the most significant contacts with the matter in dispute." Rubin v. Irving Trust Co., 305 N.Y. 288, 305, 113 N.E.2d 424, 431 (1953). See also Auten v. Auten, 308 N.Y. 155, 160, 124 N.E.2d 99, 102 (1954); Jones v. Metropolitan Life Ins. Co., 158 Misc. 466, 469-70, 286 N.Y.S. 4, 8 (Sup. Ct. 1936).

44. 20 N.Y.2d at 134, 228 N.E.2d at 806, 281 N.Y.S.2d at 820.

45. 21 N.Y.2d at 481, 236 N.E.2d at 153, 288 N.Y.S.2d at 995.

46. Id.

47. Va. Code Ann. § 64.1-16 (1950).

48. The Virginia law would allow the widow, in the absence of issue, to take one-half of her deceased husband's estate outright.

49. 21 N.Y.2d at 486, 236 N.E.2d at 156, 288 N.Y.S.2d at 998-99.

50. Id. at 489, 236 N.E.2d at 158, 288 N.Y.S.2d at 1001.

Miller v. Miller,[51] a wrongful death action, was the most recent New York Court of Appeals decision preceding *Tooker*. Here the decedent, a New York resident, was killed while on a trip to Maine when a vehicle driven by his brother, a Maine resident, crashed into a bridge railing. In the ensuing action, defendant's brother asserted as a partial defense the $30,000 limitation on recoveries in effect in Maine at the time of decedent's death.[52] The New York Court of Appeals held the Maine limitation inapplicable in New York,[53] even though the accident took place in Maine where the defendants then resided. The court attempted to resolve the prior *Dym* inconsistancy by reaffirming its rejection of a purely mechanical "grouping of contacts" theory in conflict of law cases.[54] More significantly, the court stated that it must look to the interests of the respective states as they relate to the purpose of a particular statute to determine which state's law should apply.[55]

Tooker presented the Court of Appeals with an excellent opportunity to reevaluate its prior holdings[56] in the light of some of these more recent decisions. In *Babcock* the court looked to the purpose of the Ontario guest statute and decided that New York had the sole interest to protect. Therefore, it applied her law.[57] *Dym* presented a situation similar to *Babcock*, except that *Dym* involved a two car collision and an injured non-guest third party. Again the court looked to the purpose of Colorado's guest statute and determined that Colorado, unlike Ontario in *Babcock*, had the sufficient interest to protect, namely, the preservation of defendant's assets for the benefit of the injured third party.[58] It should be noted, however, that the injured third party was not a resident of Colorado, but of Kansas.[59] Therefore, the governmental interest theory was again brought into dispute. In *Macey*, the court merely avoided this controversy by couching its language in terms of contacts,[60] a theory subsequently rejected by other court decisions.[61] Thus the issue clearly

51. 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).

52. The $30,000 limitation has since been repealed. See Me. Rev. Stat. Ann. tit. 18, § 2552 (1964), as amended, Me. Rev. Stat. Ann. tit. 18, § 2552 (1967).

53. 22 N.Y.2d at 19, 237 N.E.2d at 881, 290 N.Y.S.2d at 740.

54. Id. at 17, 237 N.E.2d at 880, 290 N.Y.S.2d at 738.

55. Id. at 15-16, 237 N.E.2d at 879, 290 N.Y.S.2d at 737. See also 43 St. John's L. Rev. 277 (1968).

56. At the outset of the majority opinion Judge Keating noted that Tooker "gives us the opportunity to resolve those inconsistencies in a class of cases which have been particularly troublesome." 24 N.Y.2d at 572, 249 N.E.2d at 395, 301 N.Y.S.2d at 521.

57. 12 N.Y.2d at 483, 191 N.E.2d at 284-85, 240 N.Y.S.2d at 750-51.

58. Colo. Rev. Stat. Ann. § 13-9-1 (1963).

59. 12 N.Y.2d at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749.

60. After considering the contacts of the respective states, the Macey court concluded that "[e]very fact in this case was New York related, save only the not particularly significant one that the particular trip on the day of the accident was between two points in Canada." 18 N.Y.2d at 292, 221 N.E.2d at 381, 274 N.Y.S.2d at 593. Thus, as Judge Keating noted in Tooker, the Macey court, ignoring the rationale of both Babcock and Dym, had reached the right decision but for the wrong reasons. 24 N.Y.2d at 575, 249 N.E.2d at 398, 301 N.Y.S.2d at 524.

61. Id. at 576, 249 N.E.2d at 398, 301 N.Y.S.2d at 524-25.

raised by *Tooker* was whether the state in which an auto accident occurs has any interest in applying its law where both parties to the dispute are domiciliaries of the forum state and the car is registered and insured in that state.

At the outset of its opinion, the court clearly distinguished *Tooker* from the facts in *Dym*.[62] In *Tooker* there was no non-guest injured third party and consequently no need to protect the defendant's assets from dissolution. However, the court found itself unable to place reliance on this difference when faced with its previous holding in *Macey*, where it refused to apply the Ontario guest statute on facts almost indistinguishable from *Dym*.[63] Thus the court was compelled to evaluate the interests of the respective states in the light of the interest test originally set forth in *Babcock*.

Colorado's interest in *Dym* was found to be the preservation of the defendant's assets for the benefit of injured non-guest third parties. The majority in *Tooker*, however, held that the construction placed on the Colorado statute in *Dym* was clearly mistaken,[64] and that even had its sole purpose been to protect local insurance carriers against fraud such a purpose could "never be vindicated when the insurer is a New York carrier and the defendant is sued in the courts of this State."[65] Under these circumstances, "the jurisdiction enacting such a guest statute has absolutely no interest in the application of its law."[66] New York's interest, however, can be found in its strong policy of indemnifying the innocent victims of automobile accidents regardless of any potential collusion between a guest-plaintiff and a host-defendant.[67] The court thus seemed to be establishing the rule that in order for New York to consider the interests of the situs state, at least one of the parties to the action must be a domiciliary of that state or the car must be registered or insured in that state.

Such a conclusion, however, must be considered in light of *Kell v. Henderson*,[68] an earlier appellate division case whose facts are almost directly con-

62. Id. at 574, 249 N.E.2d at 397, 301 N.Y.S.2d at 523.

63. Id.

64. Id. at 575, 249 N.E.2d at 397, 301 N.Y.S.2d at 523-24.

65. Id. at 575, 249 N.E.2d at 397, 301 N.Y.S.2d at 524.

66. Id. This same reasoning was employed by a lower New York court in Du Bois v. Siewert, 57 Misc. 2d 881, 293 N.Y.S.2d 802 (Sup. Ct. 1968). Here the court held that New York law would be applied to an Ohio automobile accident where the parties were domiciliaries and permanent residents of New York and the automobile was registered and insured in New York. The court held that Ohio's connection with the action from a public policy point of view was nothing more than fortuitous, and that none of its social purposes would be served by applying its guest statute.

67. New York's strong public policy of indemnifying the victims of automobile accidents is clearly set forth in its preface to New York's compulsory insurance law: "The legislature is concerned over the rising toll of motor vehicle accidents and the suffering and loss thereby inflicted. The legislature determines that it is a matter of grave concern that motorists shall be financially able to respond in damages for their negligent acts, so that innocent victims of motor vehicle accidents may be recompensed for the injury and financial loss inflicted upon them." N.Y. Veh. & Traf. Law § 310 (1960).

68. 47 Misc. 2d 992, 263 N.Y.S.2d 647 (Sup. Ct. 1965), aff'd, 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (3d Dep't 1966).

verse to those of *Tooker*. There the plaintiff brought an action in New York as a result of injuries sustained in a one car accident on a New York highway. All the parties involved in the accident were residents of Ontario, Canada. The automobile was registered and insured in Canada where the trip originated and was to terminate. The defendant raised as a defense the Ontario guest statute[69] which bars a negligence action brought by a nonpaying passenger against the owner or operator of a motor vehicle. The court, relying on the Vehicle and Traffic Law[70] of New York which establishes liability for any motor vehicle using the highways of New York, held that the owner could not plead the Ontario statute as a defense.[71] At first glance it might appear that, based upon *Tooker*, such a set of facts would dictate the opposite result. However, the court's decision can easily be justified by examining the purposes sought to be served by the statutes in conflict and relating them to the issue in dispute.[72] The purpose of the Ontario statute was to deprive gratuitous passengers from recovering damages in automobile accidents due to the negligence of the driver.[73] The purpose of New York's traffic law, on the other hand, was to insure safe conduct on its highways.[74] Since the issue herein involved was whether New York has the right to regulate the conduct of drivers within her borders, the court applied, New York's law while rejecting the guest statute of Ontario.[75]

Judge Breitel, in his dissenting opinion in *Tooker*, disagreed with the majority's application of New York law and raised the objection that the factors considered determinative by the majority were merely "adventitious" so far as the trip was concerned.[76] He maintained that the fact that the parties were New York domiciliaries and the car was registered and insured in New York in no way affected the conduct of the parties and, therefore, could not be determinative of the result reached in this case.[77] Using an analogy to *Babcock*

69. Ont. Rev. Stat. c. 172, § 105(2) (1960).

70. N.Y. Veh. & Traf. Law § 388 (1960), as amended, N.Y. Veh. & Traf. Law § 388 (1962).

71. 47 Misc. 2d at 995, 263 N.Y.S.2d at 650.

72. This is the same test as was set forth in Miller, 22 N.Y.2d at 15-16, 237 N.E.2d at 879, 290 N.Y.S.2d at 737.

73. See Baade, Counter-Revolution Or Alliance For Progress? Reflections On Reading Cavers, The Choice-Of-Law Process, 46 Tex. L. Rev. 141, 172 (1967).

74. See note 67 supra.

75. This conclusion was also reached in Babcock when it stated that "[w]here the defendant's exercise of due care in the operation of his automobile is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern." 12 N.Y.2d at 483, 191 N.E.2d at 284, 240 N.Y.S.2d at 750. Such a conclusion, however, may still be open to question. Although the courts have avoided a discussion of owner liability versus guest statutes, a possible argument could be made that in a case such as Kell the statutes would not be in conflict. Under this reasoning New York would have the right to impose liability upon the owner according to its Vehicle and Traffic Law, but since the accident involved solely Ontario residents, the Ontario guest statute should be admitted as a defense to protect the Ontario insurance companies against collusion and fraud.

76. 24 N.Y.2d at 593, 249 N.E.2d at 409, 301 N.Y.S.2d at 539-40 (dissenting opinion).

77. Id. at 593-94, 249 N.E.2d at 409, 301 N.Y.S.2d at 540 (dissenting opinion).

and *Macey*, where the situs of the accident was "wholly adventitious to the relationship or status among the parties," Judge Breitel concluded that the converse—the incidental domicile of the parties and the incidental registration and insurance of the car—should likewise be disregarded as adventitious.[78] However, such an argument, as pointed out by the majority, must clearly be rejected for it can be shown by *reductio ad absurdum* that almost every fact in the case could be considered "adventitious"[79] resulting in an incomprehensible choice of laws problem.

The much more difficult question of the status of Miss Silk, alluded to by the dissent,[80] is however, not so readily capable of solution. The majority stressed the concern which the New York State Legislature has demonstrated by requiring that insurance policies cover liability for injuries regardless of where the accident takes place.[81] Yet the possibility that Miss Silk might still be denied recovery[82] did not deter the court from reaching its decision. The fact that there may be innocent third parties who may be denied recovery would not affect the result, such a denial being merely " 'the implicit consequence' of a Federal system which . . . . does not arise from any choice-of-law rule."[83] Such an answer, however, does not go to a solution of the problem. Perhaps, as indicated by Judge Burke, the court is not yet prepared to consider this question[84] and has chosen instead to await the further development of this particular area of the law.

Despite these shortcomings, *Tooker* stands as a significant turning point in the realm of conflict of laws. With its decision, New York has firmly committed itself to the interest analysis approach of *Babcock* while finally eliminating many of the confusions and doubts so long cast by its holding in *Dym*.[85] But, like so many other cases, by resolving one problem the door is now open to many other problems. Perhaps Judge Burke was correct in envisioning that the very nature of automotive traffic today and the innumerable factual situations which can arise establishes the entire matter as one of "national concern which cannot be settled by any rule this court might proffer."[86] However, unless and until such a supervening federal answer should

78. Id.

79. The majority points out that Miss Tooker's "decision to go to Michigan State University as opposed to New York University" as well as "her decision to go to Detroit on the weekend in question instead of staying on campus and studying may equally have been 'adventitious.' " 24 N.Y.2d at 578, 249 N.E.2d at 399-400, 301 N.Y.S.2d at 527.

80. Id. at 597, 249 N.E.2d at 411, 301 N.Y.S.2d at 543 (dissenting opinion).

81. Id. at 577, 249 N.E.2d at 398-99, 301 N.Y.S.2d at 525-26.

82. This distinct possibility, although minimized by the majority, is clearly posed as a serious problem in both Judge Burke's concurring and Judge Breitel's dissenting opinions. Id. at 591, 597, 249 N.E.2d at 408, 411, 301 N.Y.S.2d at 538, 543.

83. Id. at 580, 249 N.E.2d at 400, 301 N.Y.S.2d at 528.

84. Id. at 591-92, 249 N.E.2d at 408, 301 N.Y.S.2d at 538-39 (concurring opinion).

85. The court's evident disapproval of Dym is further supported by the concurring opinion of Judge Burke who had written the majority opinion in Dym. Judge Burke states that "[f]rom all that has been written, it is apparent that our decision in Dym is overruled." 24 N.Y.2d at 591, 249 N.E.2d at 407, 301 N.Y.S.2d at 538 (concurring opinion).

86. 24 N.Y.2d at 592, 249 N.E.2d at 408, 301 N.Y.S.2d at 538 (concurring opinion).

arise, the state courts must continue to fulfill their obligation of deciding tort conflict cases under the more illuminating light of *Tooker*.

Criminal Procedure—Confessions—Doctrine of *Jackson v. Denno* Held Inapplicable in a Nonjury Trial.—Following a nonjury trial,[1] at which his confession was admitted in evidence, petitioner was convicted of manslaughter in the second degree.[2] The conviction was not appealed. Subsequently, *Jackson v. Denno*[3] was decided, and thereafter petitioner filed an application for a writ of error *coram nobis*,[4] arguing that his conviction should be set aside because his contested confession had not received a separate hearing on the issue of voluntariness as allegedly required by *Jackson*. The court denied relief and its decision was affirmed, without opinion, by the Appellate Division of the Supreme Court.[5] The New York Court of Appeals, in affirming the appellate division judgment, ruled that the *Jackson* doctrine concerns contested confessions in cases tried before a judge and jury only and is not applicable in nonjury trials. Thus, a separate hearing in a nonjury trial on the issue of the voluntariness of a contested confession is not required. *People v. Brown*, 24 N.Y.2d 168, 247 N.E.2d 153, 299 N.Y.S.2d 190 (1969).

In 1953, the Supreme Court, in *Stein v. New York*,[6] upheld the old New York procedure for determining the voluntariness of a confession. This procedure required that the trial judge exclude a contested confession only if there were no conflict in the evidence and, as a matter of law, the confession were found to be involuntary.[7] The jury was not required to be absent while

1. Petitioner waived the right to trial by jury. Record, People v. Brown, No. 571-63 (Sup. Ct., N.Y. County, Nov. 4, 1963).

2. Ch. 88, art. 94, § 1052, [1909] N.Y. Laws 137th Sess. 141, published as ch. 40, art. 94, § 1052, [1909] Consol. Laws of N.Y. 2681 (repealed 1965) (now N.Y. Penal Law § 125.15 (1967)).

3. 378 U.S. 368 (1964).

4. "[A]n emergency measure enabling a defendant to avoid the effects of a conviction procured by fraud or in violation of his constitutional rights when all other avenues of judicial relief are closed to him." Fuld, The Writ of Error Coram Nobis, 117 N.Y.L.J. 2212, 2248 (1947) (emphasis deleted). In People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965) the New York Court of Appeals ruled that: "[F]or the future we deem it preferable and hereby direct that in all cases heretofore tried and concluded and in which confessions were introduced and their voluntariness contested, and the normal appellate processes have been exhausted or are no longer available, defendants seek Jackson—Denno relief by coram nobis motion. While this is a departure from the traditional role played by coram nobis we deem its use in these cases appropriate since its employment will avoid burdening this court and the Appellate Division, as well as other appellate courts, with reargruments which do no more than withhold determination of such appeals pending remission to the trial court for the required hearing on the issue of voluntariness." Id. at 77, 204 N.E.2d at 182-83, 255 N.Y.S.2d at 842-43.

5. 29 App. Div. 2d 919, 289 N.Y.S.2d 150 (1st Dep't 1968) (mem.).

6. 346 U.S. 156 (1953).

7. Id. at 172; see People v. Weiner, 248 N.Y. 118, 122, 161 N.E. 441, 443 (1928).

the judge heard evidence on this issue.[8] If there were a question of fact, the issue of voluntariness was presented to the jury at the close of the case along with the determination of guilt or innocence with the direction that they should reject the confession if "upon the whole evidence" they determined it to be involuntary.[9]

Eleven years later, the Supreme Court in *Jackson* overruled *Stein* and held the New York procedure unconstitutional.[10] The Court ruled that the procedure violated the due process clause of the fourteenth amendment by failing to give a defendant a "fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession."[11] In analysing the procedure the Court found it constitutionally deficient since "the evidence given the jury inevitably injects irrelevant and impermissible considerations of truthfulness of the confession into the assessment of voluntariness."[12] Reasoning that a jury may find it "difficult" to appreciate the policy of excluding an involuntary confession, even though it may be truthful, the Court concluded that such a policy creates a "potent pressure" which makes objective consideration of the separate issues of voluntariness and guilt difficult since considerations of guilt might easily infect the determination of voluntariness.[13]

Thereafter, the New York Court of Appeals in *People v. Huntley*[14] adopted

---

8. Stein v. New York, 346 U.S. 156, 172 (1953); accord, People v. Brasch, 193 N.Y. 46, 54, 85 N.E. 809, 812 (1908). See also People v. Randazzio, 194 N.Y. 147, 159, 87 N.E. 112, 116-17 (1909) (dictum that the jury must actually be present during the taking of such evidence by the judge).

9. Stein v. New York, 346 U.S. 156, 172 (1953); People v. Doran, 246 N.Y. 409, 416-17, 159 N.E. 379, 381-82 (1927).

10. Arkansas, the District of Columbia, Georgia, Iowa, Michigan, Minnesota, Missouri, Ohio, Oregon, Pennsylvania, Puerto Rico, South Carolina, South Dakota, Texas, Wisconsin and Wyoming had employed similar procedures and were therefore directly affected by this decision. 378 U.S. at 414-17 (App. A to Black, J., dissenting).

11. Id. at 377. In Rogers v. Richmond, 365 U.S. 534 (1961), the Court had held that a determination of voluntariness must be made without consideration of the truthfulness of the confession. Id. at 543-44. In expressing the principle underlying this decision, Mr. Justice Frankfurter said: "Our decisions under that Amendment [referring to the due process clause of the fourteenth amendment] have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." Id. at 540-41.

12. 378 U.S. at 386.

13. Id. at 382-83. The Court also faulted the absence under the New York system of an explicit record of the findings upon the various issues, since the jury returned only a general verdict on the question of guilt or innocence. Id. at 379-80.

14. 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965).

the so-called "Massachusetts" or "humane" rule.[15] This procedure required the trial judge to make an independent determination on the issue of voluntariness prior to the trial. If the confession were found to be involuntary, it was excluded. Only if the judge determined the confession to be voluntary beyond a reasonable doubt[16] was it to be admitted at the trial. The defendant was then permitted to challenge the confession before the jury which could, despite the judge's prior determination, find the confession involuntary and reject it.[17]

Jackson, however, left unanswered the specific question of what procedure would be constitutionally acceptable for determining the voluntariness of confessions in nonjury trials. Four other courts[18] have dealt with this problem in the light of *Jackson,* and all have arrived at conclusions contrary to that reached by the New York Court of Appeals in *Brown.* Each court concluded that *Jackson* requires a separate hearing on the issue of voluntariness in a nonjury trial. One court, in fact, ruled that *Jackson* not only mandates a separate hearing but that the hearing must be conducted by a judge other than the trial judge.[19] These courts have held that the simultaneous consideration of the issues of voluntariness and of guilt by the fact-finding body violates the principle established in *Jackson.*[20] That the fact-finder is a judge rather than a jury has been deemed "a distinction without a difference."[21] These courts have similarly concluded that a judge who has heard evidence of guilt cannot objectively and reliably determine the voluntariness of a confession as an issue distinct

15. See Commonwealth v. Preece, 140 Mass. 276, 277, 5 N.E. 494, 495 (1885). The Supreme Court in Jackson v. Denno, 378 U.S. 368, 378 n.8 (1964) indicated that the Massachusetts rule "does not, in our opinion, pose hazards to the rights of a defendant." The Court also indicated approval of the "orthodox" procedure in which the judge's pretrial determination of the issue of voluntariness is final and the jury is not permitted to reexamine the issue. See 3 J. Wigmore, Evidence § 861 (3d ed. 1940).

16. The Jackson Court left in doubt whether the determination of voluntariness must be "beyond a reasonable doubt" or merely "on a preponderance of the evidence." See 378 U.S. at 404-05 (1964) (Black, J., dissenting).

17. 15 N.Y.2d at 78, 204 N.E.2d at 183, 255 N.Y.S.2d at 843 (1965).

18. Hutcherson v. United States, 351 F.2d 748 (D.C. Cir. 1965); United States ex rel. Spears v. Rundle, 268 F. Supp. 691 (E.D. Pa. 1967), aff'd, 405 F.2d 1037 (3d Cir. 1969). United States ex rel. Owens v. Cavell, 254 F. Supp. 154 (M.D. Pa. 1966); Commonwealth v. Patterson, 432 Pa. 76, 247 A.2d 218 (1968).

19. United States ex rel. Spears v. Rundle, 268 F. Supp. 691 (E.D. Pa. 1967) aff'd, 405 F.2d 1037 (3d Cir. 1969). However, in Commonwealth v. Patterson, 432 Pa. 76, 247 A.2d 218 (1968) the court said: "I am not at all certain that Spears, in interpreting Jackson, did not go too far in equating judge with jury by holding that Jackson v. Denno requires a separate judge to hear the question of voluntariness in every case. The minimum required, however, is that the trial judge rule on voluntariness before hearing the contents of the confession . . . ." Id. at 88, 247 A.2d at 224 (emphasis and footnote deleted).

20. See, e.g., United States ex rel. Spears v. Rundle, 268 F. Supp. 691, 695 (E.D. Pa. 1967), aff'd, 405 F.2d 1037 (3d Cir. 1969).

21. Commonwealth v. Patterson, 432 Pa. 76, 86, 247 A.2d 218, 223 (1968).

from its truthfulness.[22] Under such circumstances "[o]bjectivity cannot be guaranteed, and reliability must be questioned."[23] This reasoning represents a broad interpretation of *Jackson*, based on the premise that a judge is not entirely immune from the wrongful influences of evidence of the truthfulness of a contested confession. A judge, therefore, like a jury (although perhaps not to the same degree),[24] may have difficulty in rejecting an involuntary confession where he has heard evidence that shows the confession to be truthful.[25]

In *Brown* the New York Court of Appeals has given *Jackson* a narrow construction.[26] In analysing *Jackson*, it concluded that the Supreme Court based its decision upon a distrust of the ability of juries to understand and apply the legal intricacies involved in the separate issues of the voluntariness of a confession and the guilt of the accused.[27] The opinion distinguished judge from jury by stating that: "[A] Judge—unlike a jury—by reason of his learning, experience and judicial discipline, is uniquely capable of distinguishing the issues and of making an objective determination as to voluntariness, regardless of whether he has heard evidence on other issues in the case."[28] The court continued: "While a jury may sometimes be confused by the legal intricacies of deciding two questions together, a Judge will not be so disoriented."[29] Taking this position, the case rejected not only the assertion that in a nonjury case *Jackson* requires a judge other than the trial judge to hear the issue of voluntariness in a separate pretrial hearing, but also rejected the argument of the petitioner that: "[A]lthough the same Judge who tries the case can determine the issue of voluntariness, that determination should be made in a separate hearing before the commencement of the trial proper."[30] The court recognized the existence of authority to the contrary in other jurisdictions, but such authority was rejected as representing too broad an interpretation of *Jackson*.[31] The reasoning of *Brown* focuses upon the education and judicial experience of a judge, terming this "a critical difference between a jury and nonjury trial."[32] In support of its conclusion, the court noted that in other areas of the law, both civil and criminal, judges who must eventually determine the ultimate issues regularly rule on the admissibility of evidence.[33] The court also pointed out that it frequently reverses convictions after an

22. See, e.g., United States ex rel. Spears v. Rundle, 268 F. Supp. 691, 695 (E.D. Pa. 1967), aff'd, 405 F.2d 1037 (3d Cir. 1969).
23. Id. at 695.
24. Commonwealth v. Patterson, 432 Pa. 76, 88, 247 A.2d 218, 224 (1968).
25. See cases cited note 18 supra.
26. 24 N.Y.2d at 172, 247 N.E.2d at 155, 299 N.Y.S.2d at 193.
27. Id. at 171, 247 N.E.2d at 155, 299 N.Y.S.2d at 192.
28. Id. at 172, 247 N.E.2d at 155, 299 N.Y.S.2d at 193.
29. Id. at 172, 247 N.E.2d at 156, 299 N.Y.S.2d at 193.
30. Id. at 171, 247 N.E.2d at 155, 299 N.Y.S.2d at 192.
31. Id. at 172, 247 N.E.2d at 155, 299 N.Y.S.2d at 193.
32. Id. at 173, 247 N.E.2d at 156, 299 N.Y.S.2d at 194.
33. Id. at 172-73, 247 N.E.2d at 156, 299 N.Y.S.2d at 193-94.

objective consideration of questions of law, even though convinced by the entire record of the defendant's guilt.[34] As additional support for its conclusion, the court offered its opinion in *People v. Sykes*[35] where it had noted that: "[A] completely separate hearing on voluntariness may perhaps not be required in nonjury cases (cf. Code Crim. Pro., § 813-d, subd. 3) . . . . "[36] The section of the N.Y. Code of Criminal Procedure cited in *Sykes* provides that in the case of misdemeanors and violations a determination on a motion to suppress evidence obtained as the result of an alleged illegal search and seizure may be made by the trial judge during the course of the trial.[37]

There appear to be some shortcomings in the reasoning of *Brown* which render the opinion susceptible to criticism. A proper analysis of the issues must include consideration of several factors omitted by the court in its reasoning. In basing its opinion upon what it considered to be the superior abilities of a judge,[38] the *Brown* court neglected to deal with the legitimate

34. Id. at 173, 247 N.E.2d at 156, 299 N.Y.S.2d at 193.

35. 22 N.Y.2d 159, 239 N.E.2d 182, 292 N.Y.S.2d 76 (1968).

36. Id. at 163, 239 N.E.2d at 184, 292 N.Y.S.2d at 79-80; see People v. Brown, 24 N.Y.2d 168, 172-73, 247 N.E.2d 153, 156, 299 N.Y.S.2d 190, 193.

37. N.Y. Code Crim. Proc. § 813-d(3) (Supp. 1968).

38. 24 N.Y.2d 168, 172, 247 N.E.2d 153, 155, 299 N.Y.S.2d 190, 193. Contra, Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv. L. Rev. 165 (1929) [hereinafter cited as Morgan] where the author states: "If the rules excluding relevant testimony tendered by competent witnesses had their origin in a supposed inferiority of jurors to judges, they need serious reexamination in this country. The vast increase in literacy among the classes from which jurors are drawn, and the political selection and popular election of judges have greatly narrowed the gap between the capacities of the two." Id. at 191. This article was cited in another context by the Jackson Court, 378 U.S. at 388-89 n.15. It is well recognized that an ambivalent attitude exists about the relative reliability of juries. On the one hand, for example, there is language such as that of the Supreme Court in Duncan v. Louisiana, 391 U.S. 145 (1968) contrasting the "common-sense judgment of a jury" with the "perhaps less sympathetic reaction of the single judge". Id. at 156. On the other hand there is language such as that of the same court in Bruton v. United States, 391 U.S. 123 (1968) (decided the same day as Duncan): "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Id. at 135. Such conflict regarding the merits and limitations of the jury system is not of recent origin. "[V]irtually from its inception, it [i.e., the jury system] has been the subject of deep controversy, attracting at once the most extravagant praise and the most harsh criticism." H. Kalven & H. Zeisel, The American Jury 4 (1966). "[A]fter two hundred years, the debate over the jury system, with distinguished participants on both sides, is still going on apace." Id. at 7. For an excellent brief outline of the controversy over the relative merits of the jury system see id. at 7-9. See also Broeder, The Functions of the Jury Facts or Fictions?, 21 U. Chi. L. Rev. 386 which suggests that some of the ambivalence toward juries results from an imperfect understanding of juries' functions and abilities, despite the fact that the jury system "has been in vogue for more than three centuries." Id. at 386. An examination of the controversy as reflected in four recent decisions of the Supreme Court will be found in 69 Colum. L. Rev. 419 (1969).

consideration that the capacity to identify, understand, and distinguish intricate legal issues may not be equivalent to immunity from both conscious and subconscious influences created by the knowledge of evidence indicating guilt.[39] The court failed to recognize that the *Jackson* opinion, in approving the Massachusetts procedure for jury trials, was careful to note that the judge's determination on the issue of voluntariness is made at a "preliminary" hearing, "separate and aside from issues of the reliability of the confession and the guilt or innocence of the accused . . . ."[40] The reasoning of the court failed to consider that while the *Jackson* opinion did clearly evidence distrust of a jury's ability to separate the issues,[41] it also acknowledged that judges too have been known to fail to distinguish between the issues of voluntariness and truthfulness.[42] While this occurrence may be rare, the validity of a procedure which

39. See Jackson v. Denno, 378 U.S. at 402 where Mr. Justice Black, in his dissent, comments on the reasoning that a jury which is convinced of a defendant's guilt may be unwilling to disregard a coerced confession because they believe the guilty should be punished. He noted that: "This is a possibility, of a nature that is inherent in any confession fact-finding by human fact-finders—a possibility present perhaps as much in judges as in jurors." See also Morgan at 169 where the author states: "It is a familiar fiction that the trial judge in equity cases regularly performs this psychological feat [i.e., wiping his mind clean of objectionable evidence which he has heard]. But there is no trial lawyer . . . who is not convinced that the trial judge is purporting to strain out the water of prejudice from the milk of legitimate evidence through a totally ineffective mental sieve." In another article cited in another context by the Jackson Court, 378 U.S. at 382, the author in discussing this problem says: "This is not to suggest that the trial judge is necessarily immune to public pressure. . . . Nor is it to suggest that the judge can always prevent his judgment regarding the defendant's guilt from affecting his disposition of the voluntariness issue." Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U. Chi. L. Rev. 317, 327 (1954) [hereinafter cited as Meltzer]. See also C. McCormick, Evidence § 112 (1954); 11 S.D. L. Rev. 70, 81 (1966).

40. 378 U.S. at 378 n.8. The Wigmore or "orthodox" rule, the only other procedure explicitly approved by the Court, also provides for a separate hearing on the issue of voluntariness. See 3 J. Wigmore, Evidence § 861 (3d ed. 1940). It should also be noted that cross-examination of the defendant at the pretrial hearing may not go to "the merits," i.e., any issue which goes to the truth of the confession. United States v. Inman, 352 F.2d 954 (4th Cir. 1965); People v. Lacy, 25 App. Div. 2d 788, 270 N.Y.S.2d 1014 (3d Dep't 1966) (per curiam). As a further precaution to insure separation of the issues and to prevent the jury from being influenced by the judge's determination at the pretrial hearing, the judge's decision may not be made known to the jury at the subsequent trial. United States v. Inman, 352 F.2d 954 (4th Cir. 1965); People v. Stewart, 25 App. Div. 2d 483, 266 N.Y.S.2d 538 (4th Dep't 1966). "The fallacy of this attempt is obvious in that it is based on the assumption that the members of the jury neither know nor understand the operation of the procedure. Those jurors who do understand the procedure would certainly recognize that a confession would not be submitted to them unless it had already been deemed voluntary by the judge." Comment, An Analysis of the Procedures Used to Determine the Voluntariness of Confessions: and a Solution, 11 S.D. L. Rev. 70, 83 (1966). One writer maintains that the judge ought to withhold a written opinion on the pretrial hearing until after the trial. N. Sobel, The New Confession Standards, "Miranda v. Arizona" 120 (1966).

41. 378 U.S. at 378-89.

42. Id. at 386 n.13 citing Meltzer at 320-21.

gives the defendant adequate protection "most of the time" must be questioned. In addition, the *Jackson* Court, discussing the threats to a defendant's constitutional rights under the old New York system, observed that an accused may be deterred from testifying on the voluntariness issue in the presence of the fact-finding body which will decide the ultimate issue of guilt.[43] The Court stated that:

> The fear of . . . impeachment and extensive cross-examination in the presence of the jury that is to pass on guilt or innocence as well as voluntariness may induce a defendant to remain silent, although he is perhaps the only source of testimony on the facts underlying the claim of coercion. Where this occurs the determination of voluntariness is made upon less than all of the relevant evidence.[44]

It should also be noted that in offering its own dictum in *People v. Sykes* as support for its conclusion in *Brown*[45] the court referred to a section of the N.Y. Code of Criminal Procedure which does not deal with confessions.[46] The section cited deals specifically with motions for the suppression of evidence alleged to have been obtained as a result of an unlawful search and seizure in the case of misdemeanors and violations.[47] The doctrine of confessions has experienced an evolution distinct from that of search and seizure.[48] This fact is reflected in the Code itself which deals with motions for the suppression of alleged involuntary confessions in a separate section.[49] There is nothing in the sections dealing specifically with confessions which would lend support to the court's determination.[50]

Recent decisions of the Supreme Court, while recognizing the interest of society in apprehending and convicting the guilty by means of efficient criminal procedures, have established a trend in which major attention is also given to assuring adequate protection for the constitutional rights of the accused, especially in the delicate area of confessions.[51] The rationale of *Jackson*, viewed in light of this trend, requires, as a minimum, that the accused in a nonjury trial be afforded a "separate" hearing, prior to trial, on the isolated issue of the voluntariness of a contested confession.

---

43. Id. at 389 n.16.

44. Id.

45. 24 N.Y.2d at 172-73, 247 N.E.2d at 156, 299 N.Y.S.2d at 193.

46. N.Y. Code Crim. Proc. § 813-d(3) (Supp. 1968).

47. Id.

48. See 3 J. Wigmore, Evidence §§ 815-20 (3d ed. 1940).

49. N.Y. Code Crim. Proc. §§ 813-f-i (Supp. 1968). This section dealing with confessions constitutes Tit. II-C, Pt. VI of the Code while the section cited by the court is found in Tit. II-B, Pt. VI.

50. Id.

51. See Bruton v. United States, 391 U.S. 123 (1968); Mathis v. United States, 391 U.S. 1 (1968); Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Jackson v. Denno, 378 U.S. 368 (1964); Massiah v. United States, 377 U.S. 201 (1964); Haynes v. Washington, 373 U.S. 503 (1963); White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); Rogers v. Richmond, 365 U.S. 534 (1961); Spano v. New York, 360 U.S. 315 (1959). See also Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579 (1968).

Taxation—Taxpayer Must Establish That Tax Avoidance Was Not a Purpose For Accumulation of Earnings In Order to Obtain Refund of Accumulated Earnings Tax.—Taxpayer was a sole shareholder business corporation. The Commissioner of Internal Revenue assessed an accumulated earnings tax[1] deficiency for the years 1960 and 1961. Taxpayer paid the assessment and instituted a suit for a refund in the district court for the western district of Tennessee.[2] The jury found that, although taxpayer had accumulated its earnings "beyond the reasonable needs of the business,"[3] it had not done so "for the purpose of avoiding the income tax with respect to its shareholders."[4] On the basis of these findings, the trial court rendered judgment for taxpayer. On appeal to the Sixth Circuit, the Government contended that the trial court erroneously led the jury to believe that, in order to apply the tax, it was necessary that tax avoidance be the *sole purpose* for the unreasonable accumulation of earnings.[5] The court of appeals reversed, holding that the tax

1. The accumulated earnings tax is an additional tax, sometimes referred to as a penalty tax, imposed on certain domestic and foreign corporations formed or availed of to avoid an income tax on shareholders by permitting earnings and profits to accumulate beyond the reasonable needs of the business. 3 P-H 1969 Fed. Taxes ¶ 21,331. The tax is imposed on the accumulated taxable income at a rate of 27½% of the accumulated taxable income not in excess of $100,000, plus 38½% of the accumulated taxable income in excess of $100,000. Id. Int. Rev. Code of 1954, § 533 (at issue in the present case) establishes a presumption of the purpose to avoid the income tax with respect to shareholders in cases where the earnings and profits of a corporation are allowed to accumulate beyond the reasonable needs of the business. Int. Rev. Code of 1954, § 535 defines "accumulated taxable income" and provides for a credit for that portion of the earnings and profits retained for the reasonable needs of the business, with a minimum lifetime credit of $100,000. Int. Rev. Code of 1954, § 537 provides that the "reasonable needs of the business" shall include the "reasonably anticipated needs." See Int. Rev. Code of 1954, §§ 531-37.

2. When a deficiency is assessed, a taxpayer has three possible courses of action: (1) Without paying the assessment, he can appeal the Commissioner's findings in the Tax Court, where the proceedings would be held before a judge without a jury. An advantage of this procedure is that the judge is an expert in the tax field, and the taxpayer can avoid placing his case before an inexpert jury. However, if the taxpayer loses, he will be charged interest on the unpaid assessment. (2) The taxpayer can pay the assessment and file for a refund in the Court of Claims, where the proceedings would be held before a judge without a jury. Although this stops the running of interest, the judge may not be an expert in the tax field. The advantage of avoiding a lay jury would therefore be somewhat diminished by bringing the case before an inexpert judge. (3) The taxpayer can pay the assessment, as did plaintiff here, and file for a refund in a district court, where he would receive a jury trial.

3. Int. Rev. Code of 1954, § 533.

4. Int. Rev. Code of 1954, § 532. This finding concludes that the taxpayer had successfully rebutted the presumption of prohibited purpose of § 533(a).

5. "At the conclusion of the trial, the Government specifically requested that the jury be instructed that: '[I]t is not necessary that avoidance of shareholder's tax be the sole purpose for the unreasonable accumulation of earnings; it is sufficient if it is one of the purposes for the company's accumulation policy.' The instruction was refused and the Court instructed the jury in the terms of the statute that tax avoidance had to be 'the purpose' of the accumulations." United States v. Donruss Co., 393 U.S. 297, 298 (1969).

would apply if tax avoidance was the *"dominant, controlling, or impelling motive"*[6] for the accumulation. On certiorari, the Supreme Court reversed the court of appeals, holding that in order to rebut the presumption that an unreasonable accumulation of earnings and profits was for the purpose of avoiding the income tax with respect to individual shareholders, the taxpayer must establish that tax avoidance with respect to shareholders was not *a purpose* for the unreasonable accumulation of earnings. *United States v. Donruss Co.*, 393 U.S. 297, *rehearing denied*, 393 U.S. 1112 (1969).

Since the adoption of the first internal revenue statute in 1913,[7] it has been apparent that the corporate form, especially the close corporation,[8] can be used to lessen the tax burden on the individual taxpayer, as corporate income tax rates are generally lower than those on individuals.[9] However, any profits later distributed will be subject to double taxation, as corporate dividends in excess of $100 are taxed as ordinary income.[10] The obvious method of avoiding this double taxation is to allow corporate earnings to accumulate in the corporation rather than to distribute them to the individual shareholders, who would then have to pay the personal income tax rates on the funds distributed.[11] It should also be noted that if earnings are allowed to accumulate in a closely held corporation, the accumulated funds might readily be used to the shareholders' advantage, accumulated until the income position of the shareholders would make a distribution more desirable,[12] or reclaimed later at capital gains rates through liquidation of the corporation.[13] Congress, aware of these possibilities, began a series of attempts to prevent such use of the corporate form by imposing taxes upon unreasonably accumulated earnings. The history of these taxes shows a continuing congressional intent to make them more practically effective.

Originally, when an accumulated earnings tax was assessed, the individual shareholder was taxed as if he had received a proportionate share of the accumulated earnings, even where no income had been distributed.[14] The Internal Revenue Code of 1921 shifted the tax burden levied on accumulated

---

6. Donruss Co. v. United States, 384 F.2d 292, 298 (6th Cir. 1967), rev'd, 393 U.S. 297 (1969) (emphasis added).

7. Int. Rev. Code of 1913, 38 Stat. 114.

8. See Comment, Accumulated Earnings and the Reasonableness Test of Section 537, 43 Tul. L. Rev. 129, 130 n.13 (1968).

9. At present, there is a maximum income tax rate of approximately 70% on individuals and approximately 48% on corporations. See Int. Rev. Code of 1954, §§ 1, 11. This does not include the 10% surcharge now in effect.

10. Int. Rev. Code of 1954, §§ 116(a), 301(c), 316(a).

11. As an example, if a corporation has profits of $100,000 in 1968, it will pay an income tax of approximately $41,500. If the company then distributes the remaining $58,500 to its sole stockholder, he may have to pay up to 70%, or $41,000, of that as personal income tax, leaving him with approximately $17,500 of the original $100,000 the corporation earned. Int. Rev. Code of 1954, §§ 1, 11. This is an effective income tax rate of 82.5%, and does not include the 10% surcharge now in effect.

12. See Comment, supra note 8, at 129.

13. See Int. Rev. Code of 1954, §§ 331, 1001-02.

14. Int. Rev. Code of 1913, § II(A)(2), 38 Stat. 166 (now Int. Rev. Code of 1954, §§ 532-33).

earnings from the individual shareholder to the corporation, where it has remained until the present.[15] The original Internal Revenue Code also provided that accumulation beyond the reasonable needs of the business "shall be prima facie evidence of a fraudulent purpose to escape" the accumulated earnings tax.[16] Even so, difficulty in proving a fraudulent purpose made the tax largely ineffective, and in 1918 Congress deleted the word "fraudulent" from the Code.[17] Only minor changes were made until 1934,[18] when personal holding companies were exempted from the general accumulated earnings tax and subjected to a tax on all undistributed income, regardless of purpose.[19] In 1937, Congress established a separate method for taxing the United States shareholders of foreign personal holding companies, again without regard to corporate intent.[20] In 1938, Congress required the taxpayer corporation to prove, by a clear preponderance of the evidence, the *absence of the purpose* to avoid the tax on shareholders in order to avoid the accumulated earnings tax.[21] From 1938 to 1954, no significant changes were made in the accumulated earnings tax, even though there was considerable discussion of the problems involved in its administration.[22] In 1954, the new Code incorporated several new proposals, but no change was made in the degree of improper purpose required to impose the tax.[23]

Under the present tax provisions,[24] there are two preconditions to an accumulated earnings tax liability. First, there must be an unreasonable accumulation of earnings. Second, there must be some degree of purpose to avoid payment of individual income taxes by shareholders.[25]

---

15. Int. Rev. Code of 1921, § 220, 42 Stat. 247. See H.R. Rep. No. 350, 67th Cong., 1st Sess. 12-13 (1921). The change was prompted by the decision in Eisner v. Macomber, 252 U.S. 189 (1920) which held that corporate earnings cannot be taxed as ordinary income to the stockholders, but must be taxed as a capital gain.

16. Int. Rev. Code of 1913, § II(A)(2), 38 Stat. 166, 167 (now Int. Rev. Code of 1954, §§ 532-33).

17. Rev. Act of 1918, § 220, 40 Stat. 1072 (now Int. Rev. Code of 1954, § 532). See S. Rep. No. 617, 65th Cong., 3d Sess. 5 (1918).

18. 393 U.S. at 304. See Joint Comm. on the Economic Report, 82d Cong., 2d Sess., The Taxation of Corporate Surplus Accumulations 206 (Joint Comm. Print 1952).

19. Rev. Act of 1934, §§ 102, 351, 48 Stat. 702, 751 (now Int. Rev. Code of 1954, § 532). For the definition of "all undistributed income" see Int. Rev. Code of 1954, § 545(a).

20. Rev. Act of 1937, §§ 201, 337, 50 Stat. 818, 822 (now Int. Rev. Code of 1954, § 551).

21. Rev. Act of 1938, § 102, 52 Stat. 483 (now Int. Rev. Code of 1954, § 532). The change was thought to make it clear that the burden of proving intent, rather than the lesser burden of producing evidence on the question, was to be on the taxpayer. See S. Rep. No. 1567, 75th Cong., 3d Sess. 16 (1938).

22. See Joint Comm. on the Economic Report, supra note 18.

23. Int. Rev. Code of 1954, §§ 531-37. Congress was urged to adopt a test of purpose similar to that proposed by the taxpayer in the present case, but refused to do so. See Hearings on Forty Topics Pertaining to the Gen. Revision of the Int. Rev. Code Before the House Comm. on Ways and Means, 83d Cong., 1st Sess., pt. 3, at 2142 (1953).

24. Int. Rev. Code of 1954, §§ 531-37.

25. See Int. Rev. Code of 1954, § 532. Theoretically, it is possible that the accumulated

Generally, an accumulation is unreasonable if it exceeds the amount a prudent businessman would consider appropriate for present business needs, including the reasonably anticipated future needs of the business.[26] The determination of unreasonableness ultimately rests on an evaluation of the reasons for the accumulation; however, the test is an objective one in that the issue is not the subjective intent of the shareholders, but what actual plans were made and what affirmative actions were taken which show that the accumulation was for business purposes.[27] If it is found that the corporation has unreasonably accumulated earnings, this is determinative of the purpose to avoid the income tax with respect to shareholders unless the taxpayer proves otherwise.[28] In attempting to make the determination of subjective intent as objective and practical as possible, Congress established this presumption of improper purpose in those cases where an unreasonable accumulation of earnings had been proved. The burden to rebut this presumption is an intentionally heavy one.[29] The

earnings tax may be applied to a corporation even where the accumulation of earnings has been found to be reasonable. Section 532 imposes the tax on any corporation formed or availed of for the purpose of avoiding the income tax with respect to shareholders. Theoretically, should the accumulation of earnings be found to be reasonable, the burden of proof would still be on the taxpayer to show that its purpose in accumulating the earnings was not tax avoidance. In such a circumstance, the taxpayer's burden is eased by the fact that it has avoided the presumption of section 533(a). In addition, the absence of an undue accumulation is normally repugnant to the existence of the proscribed purpose. As a practical matter, however, where the taxpayer proves the reasonableness of its accumulation, it will almost surely avoid the accumulated earnings tax. See Duke Laboratories, Inc. v. United States, 222 F. Supp. 400 (D. Conn. 1963), aff'd, 337 F.2d 280 (2d Cir. 1964); John P. Scripps Newspapers v. Commissioner, 44 T.C. 453 (1965); Vuono-Lione, Inc. v. Commissioner, 24 CCH Tax Ct. Mem. 506 (1965) (dictum); Fotocrafters, Inc. v. Commissioner, 19 CCH Tax Ct. Mem. 1401 (1960); S. Rep. No. 1622, 83d Cong., 2d Sess. 72 (1954); Armstrong, Section 531—Recent Cases Suggest New Problems, 39 Taxes 853, 866-67 (1961); Canty, The Accumulated Earnings Tax 1954 Reforms: An Appraisal, 2 U. San Francisco L. Rev. 242, 247-53 (1968); Lowery, Accumulated Earnings Tax Under the 1954 Code, 44 Ill. B.J. 656, 658 (1956); Comment, supra note 8, at 132.

26. Treas. Reg. § 1.537-1(a) (1959). See also 3 P-H 1969 Fed. Taxes ¶ 21,323.

27. Treas. Reg. § 1.537-2(b) (1959) briefly outlines some of the grounds for accumulation which, if supported by sufficient facts, are considered reasonable. Such grounds include: provision for bona fide expansion of business or replacement of plant; acquisition of a business enterprise; provision for necessary working capital; provision for retirement of bona fide business indebtedness; and provision for investments or loans to suppliers or customers if necessary to maintain the business of the corporation. Treas. Reg. § 1.537-2(c) (1959) outlines certain objectives which are suspect as reasons for corporate accumulation. These include: loans to shareholders; the expenditure of corporate funds for the personal benefit of the shareholders; loans to relatives, friends, or shareholders having no reasonable relation to the conduct of the business; investments in properties or securities unrelated to the corporate business; and retention of earnings and profits to provide for unrealistic hazards. See also 3 P-H 1969 Fed. Taxes ¶ 21,328-37.

28. Int. Rev. Code of 1954, § 533(a).

29. Originally, the presumption of purpose to avoid the income tax was merely a prima facia presumption. Int. Rev. Code of 1913, § II(A)(2), 38 Stat. 167 (now Int. Rev. Code

effect of the presumption has been to establish the reasonableness test as the crucial consideration in nearly every accumulated earnings tax case,[30] even though the ultimate fact at issue is the purpose behind the accumulation.[31] Even so, taxpayers have occasionally chosen to admit the unreasonableness of the accumulation, as the taxpayer did here, and rely solely on their ability to rebut the presumption of prohibited purpose.

Section 533 states that the fact that earnings and profits are permitted to accumulate beyond the reasonable needs of the business shall be determinative of *the purpose* to avoid the income tax with respect to the shareholders. Since the establishment of this presumption, there has been a conflict over the meaning of the article "the." This conflict led to the establishment of four separate tests for determining the degree of purpose other than tax avoidance necessary to rebut the presumption.

The First[32] and Sixth[33] Circuits have adopted the *dominant purpose* test, holding that the purpose to avoid the income tax with respect to shareholders must be the *dominant, controlling or impelling motive* for the accumulation of earnings by a corporation. In *Young Motor Co. v. Commissioner*,[34] the First Circuit rejected the theory that Congress meant that tax avoidance could not be *one of the purposes* for accumulation, partially because section 532 reads "the purpose" and not "a purpose." The court instead relied on certain cases from the gift and estate tax areas,[35] apparently feeling that these areas of the law are analogous. The Sixth Circuit, in *Donruss*, discussed the conflict among the circuits and concluded, from a reading of section 532, that the *dominant purpose* test was the most reasonable test to apply.[36] The court rejected the *a purpose* test as having sprung from a misreading or stretching of the Supreme Court's decision in *Helvering v. Chicago Stock Yards Co.*[37]

---

of 1954, §§ 532-33). In 1938, the statute was revised and strengthened by replacing the phrase "prima facie evidence of the purpose" with the term "determinative." The change was "to strengthen this Section by requiring the taxpayer by a clear preponderance of the evidence to prove the absence of any purpose to avoid surtaxes upon the shareholders after it has been determined that the earnings and profits had been unreasonably accumulated." S. Rep. No. 1567, supra note 21, at 5.

30. See Weithorn, What Constitutes a "Reasonable" Corporate Accumulation?, N.Y.U. 17th Inst. on Fed. Tax. 299, 308 (1959); Comment, supra note 8, at 31.

31. Wallick, The § 531 Penalty Tax: What is an Unreasonable Accumulation?, 4 Prac. Law. 31-32 (Nov. 1958).

32. Young Motor Co. v. Commissioner, 281 F.2d 488, 491 (1st Cir. 1960); accord, Apollo Indus., Inc. v. Commissioner, 358 F.2d 867 (1st Cir. 1966).

33. Donruss Co. v. United States, 384 F.2d 292, 298 (6th Cir. 1967), rev'd, 393 U.S. 297 (1969); accord, Shaw-Walker Co. v. Commissioner, 390 F.2d 205 (6th Cir. 1968), vacated per curiam, 393 U.S. 478 (1969).

34. 281 F.2d 488 (1st Cir. 1960).

35. Commissioner v. Duberstein, 363 U.S. 278 (1960); Allen v. Trust Co., 326 U.S. 630 (1946); United States v. Wells, 283 U.S. 102 (1931).

36. 384 F.2d at 297-98.

37. 318 U.S. 693 (1943). See Donruss Co. v. United States, 384 F.2d 292, 297 (6th Cir. 1967), rev'd, 393 U.S. 297 (1969). The courts which adhere to the dominant purpose test

The Fourth,[38] Eighth,[39] Ninth[40] and Tenth[41] Circuits have adhered to the view that, in order for the accumulated earnings tax to apply, the purpose of avoiding the income tax with respect to shareholders must have been *one of the determinative purposes* of the corporation in accumulating its earnings. In developing this theory, both *World Publishing Co. v. United States*[42] and *Kerr-Cochran, Inc. v. Commissioner*[43] rejected the *sole purpose* test as unwarranted by the language of the statute. These circuits seem to accept this test as a workable one which is not inconsistent with congressional intent as exhibited in the language of the statute. While this appears to be an intermediate position[44] between the *dominant purpose* test and the *a purpose* test, the difference between it and the *dominant purpose* test is slight, if there is any practical difference at all.

The Fifth Circuit, like most of the lower courts, has been satisfied to rely solely on the wording of the statute,[45] and has left the interpretation of the statute to the finder of fact at the trial level.

The Second[46] and Third[47] Circuits had previously adopted the *a purpose* test, basing their decisions in large part on the language of Mr. Justice Roberts in *Helvering v. Chicago Stock Yards Co.*[48] These courts interpreted the phrase "induced or aided in inducing" the accumulation of earnings as meaning "a purpose" or "one of the purposes" for the accumulation.

---

construe the phrase "or aided in inducing" used by the Supreme Court, 318 U.S. at 699, as a parenthetical phrase which was not employed to deal with the issue of what degree of purpose to avoid income tax need be established in order to properly apply the accumulated earnings tax.

38. Fenco, Inc. v. United States, 234 F. Supp. 317 (D. Md. 1964), aff'd, 348 F.2d 456 (4th Cir. 1965).

39. Kerr-Cochran, Inc. v. Commissioner, 14 CCH Tax Ct. Mem. 304 (1955), aff'd, 253 F.2d 121 (8th Cir. 1958).

40. Cummins Diesel Sales, Inc. v. United States, 207 F. Supp. 746 (D. Ore. 1962), aff'd, 321 F.2d 503 (9th Cir. 1963).

41. World Publishing Co. v. United States, 72 F. Supp. 886 (N.D. Okla. 1947), aff'd, 169 F.2d 186, (10th Cir. 1948), cert. denied, 335 U.S. 911 (1949). For a recent decision adhering to World Publishing, see Henry Van Hummell, Inc. v. Commissioner, 364 F.2d 746 (10th Cir. 1966), aff'g 23 CCH Tax Ct. Mem. 1765 (1964).

42. 72 F. Supp. 886 (N.D. Okla. 1947), aff'd, 169 F.2d 186 (10th Cir. 1948), cert. denied, 335 U.S. 911 (1949).

43. 14 CCH Tax Ct. Mem. 304 (1955), aff'd, 253 F.2d 121 (8th Cir. 1958).

44. 393 U.S. at 299 n.1.

45. See Barrow Mfg. Co. v. Commissioner, 294 F.2d 79 (5th Cir. 1961), aff'g 19 CCH Tax Ct. Mem. 195 (1960), cert. denied, 369 U.S. 817 (1962). The Court of Appeals for the Fifth Circuit rejected the dominant purpose test as an emasculation of the congressionally imposed presumption, but it did not go any further toward clarifying its position.

46. Trico Products Corp. v. Commissioner, 46 B.T.A. 346 (1942), aff'd, 137 F.2d 424 (2d Cir.), cert. denied, 320 U.S. 799 (1943); accord, United States v. Duke Laboratories, Inc., 337 F.2d 280 (2d Cir. 1964), aff'g 222 F. Supp. 400 (D. Conn. 1963).

47. Times Publishing Co. v. United States, 11 Am. Fed. Tax R.2d 1228 (W.D. Pa. 1963).

48. 318 U.S. 693 (1943).

Donruss was an excellent case to resolve this conflict among the circuits. The issue before the Supreme Court was a narrow one.[49] Neither party challenged the trial court's instructions on the issue of the reasonableness of the accumulation, nor did they challenge the jury's finding that the accumulation was unreasonable.[50] The Supreme Court granted certiorari solely "to resolve a conflict among the circuits over the degree of 'purpose' necessary for the application of the accumulated earnings tax, and because of the importance of that question in the administration of the tax."[51]

The Court, in a 6-3 decision written by Mr. Justice Marshall, dealt solely with this narrow issue. The Government contended that in order to rebut the presumption, the taxpayer would have to establish that tax avoidance with respect to shareholders was not *one of the purposes* for the accumulation of earnings beyond the reasonable needs of the business. Plaintiff argued that the taxpayer could rebut the presumption by demonstrating that tax avoidance was not the *dominant, controlling or impelling motive* for the accumulation.[52]

The Court first investigated the language of the statute in an attempt to discover the congressional intent behind the use of the phrase "availed of for *the purpose*."[53] Both parties argued that the language of the statute supported their respective tests. Taxpayer argued that Congress could have used the article "a" in sections 532 and 533 if it had intended to adopt the Government's test. Instead, Congress used the article "the" in the operative part of the statute, thus indicating that, for the tax to apply, tax avoidance need be the *dominant motive* for the accumulation.[54] The Government argued that the taxpayer's construction would give too narrow a scope to the word "the." Instead, the Government contended that the Court should focus on the entire phrase "availed of for the purpose," stating that any language of limitation should logically modify "availed of" rather than "purpose." The Government also argued that Congress had dealt with similar problems before in other parts of the Code, and had used other terms such as "principal purpose,"[55] and "used principally,"[56] which could have been used in sections 532 and 533(a) if Congress had so intended.[57] The majority found both parties' arguments inconclusive.[58] The Court rejected taxpayer's claim that Congress would have used the article "a" instead of "the" if that were its intention, stating that

49. 393 U.S. at 301.

50. Id.

51. 393 U.S. at 299 (footnote omitted).

52. Id. at 301.

53. Int. Rev. Code of 1954, § 532 (emphasis added).

54. 393 U.S. at 301-02. This argument was adopted by the First Circuit in Young Motor Co. v. Commissioner, 281 F.2d 488 (1st Cir. 1960).

55. See Int. Rev. Code of 1954, §§ 269(a), 357(b)(1).

56. See Int. Rev. Code of 1954, § 355(a)(1)(B).

57. 393 U.S. at 302.

58. Id. The minority agreed with this conclusion. Thus, the Court was unanimous in reversing, and differed only on the critical issue of what degree of purpose is necessary.

"there is no indication in the legislative history that Congress intended to attach any particular significance to the use of the article 'the.' "[59]

The Court did not discuss the issue of whether the language and intent of sections 532 and 533 are analogous to those of section 2035(a) of the Code, which deals with estate taxes.[60] Taxpayer argued that the inclusion in the gross estate, under section 2035(a), of the amount of a gift made in contemplation of death is meant to accomplish the same objective as the accumulated earnings tax; that is, to keep individuals from avoiding the higher estate tax rates by making gifts at the lower gift tax rate just prior to death.[61] Taxpayer also argued that both sections establish presumptions of the prohibited purpose of tax avoidance which take effect once the Government has proven certain facts,[62] in which case the taxpayer must overcome the presumption by a clear preponderance of the evidence. The Court rejected both arguments, stating without further reasoning that the language, purpose, and legislative history of that area of the Code are entirely different from those of the accumulated earnings tax. The Court may have overstated the difference between these areas of the Code at the expense of the above stated significant similarities.[63] However, even if a proper analogy could be drawn and the Court persuaded of its validity, such an analogy would clearly not show that Congress intended this article "the" to have any particular significance. Even more tenuous was the attempt made by the court of appeals to draw an analogy between the cases interpreting the purpose test of section 532 and those interpreting the motive test of section 2035 to determine whether a gift was made "in contemplation of death."[64] Here, the analogy is stretched beyond the actual language of the statutes to the reasoning and interpretations of another court, without firsthand knowledge of the facts and reasoning upon which the court based its decision. This attempted analogy is far removed from the one between the actual language of the statutes. Given the admitted differences in history and language between the two statutes, therefore, the analogy is more difficult to establish and, even if established, less determinative of the issue than the one based on language. Thus, although the Court may have overstated its position, all nine Justices agreed that either the analogy could not be drawn, or if drawn, would not be determinative of the issue at bar.

---

59. Id.

60. Id.

61. See Denniston v. Commissioner, 106 F.2d 925 (3d Cir. 1939).

62. Int. Rev. Code of 1954, § 533(a) states that "the fact that earnings and profits . . . are permitted to accumulate beyond the reasonable needs of the business shall be determinative of the purpose to avoid the income tax." Int. Rev. Code of 1954, § 2035(b) states that "[i]f the decedent within a period of three years ending with the date of his death . . . transferred an interest in property . . . such transfer . . . shall, unless shown to the contrary, be deemed to have been made in contemplation of death . . . ."

63. But see Note, Accumulated Earnings Tax—Taxpayer's Purpose in Accumulating Income, 22 Sw. L.J. 495, 499-500 (1968).

64. See Donruss Co. v. United States, 384 F.2d 292, 297 (6th Cir. 1967), rev'd, 393 U.S. 297 (1969). See also Commissioner v. Duberstein, 363 U.S. 278 (1960).

The Court next attempted to discover the congressional intent behind the statutes. It was unanimous in finding the legislative history inconclusive as to the test to be applied to rebut the presumption. Nonetheless, it concluded that "the legislative history of the accumulated earnings tax demonstrates a continuing concern with the use of the corporate form to avoid income tax on a corporation's shareholders. Numerous methods were employed to prevent this practice, all of which proved unsatisfactory in one way or another."[65] The Court also concluded that Congress, in attempting to deal effectively with the problem, emphasized unreasonable accumulation as the most significant factor in applying the tax, principally because reasonableness may be determined objectively, while motive requires an investigation into the subjective intent of the shareholders.[66] The establishment of the presumption in section 533(a) was an attempt to make the necessarily subjective question of intent more objectively determinable. The Court rejected the *dominant purpose* test because allowing a taxpayer by his own testimony to rebut the presumption of section 533(a) merely by proving that at least one other motive was equal to tax avoidance would go a long way toward destroying the presumption that Congress created.[67] The final decision as to which test would be applied, therefore, was based not on precedent, but on practical necessity. Here, for the first time, the Court differed. The majority, after concluding that Congress desired the inquiry to be as objective as possible, and aware of the practical difficulties involved in the administration of a statute whose imposition depends in part on ascertaining the subjective intent of interested parties, adopted the *a purpose* test proposed by the Government. The language used by Mr. Justice Marshall in delivering this decision is significant: "[The relevant legislative] history leads us to conclude that the test proposed by the Government is *consistent with the intent of Congress* and is *necessary* to effectuate the purpose of the accumulated earnings tax."[68] The Court did not adopt the *a purpose* test because it was required by the statute, nor was it specifically required by the legislative history. The test was adopted because it was "consistent" with the majority's interpretation of the intent of Congress, and because it was "necessary" to effectuate the purpose of the accumulated earnings tax. The majority, in effect, adopted the most practical method of imposing the tax which was not inconsistent with its interpretation of the congressional intent. The Supreme Court has thus gone a long way toward ridding the courts, and the statute, of the difficult problem of subjectivity. In doing so, however, it

65. 393 U.S. at 307.

66. Id. The emphasis on the reasonableness of an accumulation at the expense of a determination of subjective motive would seem to put the conservative, perhaps overcautious, businessman at a disadvantage. Such a man might wish to accumulate earnings to protect his business against a hazard which might appear unrealistic to a tax investigator a year or two later. Thus, it is possible that an overcautious businessman may place himself in jeopardy, even where he is not considering the possible tax saving.

67. See Barrow Mfg. Co. v. Commissioner, 294 F.2d 79, 82 (5th Cir. 1961); United Business Corp. v. Commissioner, 62 F.2d 754, 755 (2d Cir. 1933).

68. 393 U.S. at 303 (emphasis added).

has also come very close to taking away from the taxpayer one edge of his double-edged sword.[69] The taxpayer is now faced with an almost impossible burden in attempting to rebut the presumption of prohibited purpose. In order to do so, he must show by a clear preponderance of the evidence that tax avoidance was not a *purpose* for the unreasonable accumulation. Recognizing this, the majority attempted to soothe the fears of taxpayers by stating in the last paragraph of the opinion that "purpose" means more than the mere knowledge of tax consequences, undoubtedly present in nearly every case.[70] Although it is true that mere knowledge is not purpose, the taxpayer is now faced with the burden of proving that, although he knew that he could save himself tax dollars by allowing earnings to accumulate, this was not even one of the purposes for the accumulation.

The minority, speaking through Mr. Justice Harlan, concurred with much of the analysis expressed by the majority, including its interpretation of congressional intent. However, Mr. Justice Harlan noted that Congress intentionally gave the taxpayer a "last clear chance"[71] to prove that, despite the unreasonableness of its accumulation, it was not for the proscribed purpose. The minority disagreed with the *a purpose* test because, as a practical matter, it would effectively deny to the taxpayer this "last clear chance." The minority's argument, admittedly based on common sense grounds,[72] is a strong and persuasive one. They argue that the accumulated earnings tax provisions are, in practice, applied only to close corporations. The few shareholders will almost always know that the accumulation of corporate earnings would result in individual tax savings. The jury will be instructed that the tax is to be imposed if avoidance of the shareholder's tax is one of the purposes for the accumulation. Given these circumstances, the minority believed that the semantic difference between the meanings of purpose and knowledge was so slight and difficult to establish as to be incomprehensible to jurors.[73] Also, the minority pointed out that the Court's opinion left some question as to whether the caution against confusing knowledge with purpose must be a part of the charge to the jury. If it were not to be a part of the Court's instructions, then there was little left of the taxpayer's "last clear chance." Even if the caution were included, it would be extraordinarily difficult for the taxpayer to convince a jury that the knowledge of a tax saving did not in any way contribute to the decision to accumulate earnings.

---

69. See Canty, The Accumulated Earnings Tax 1954 Reforms: An Appraisal, supra note 25, at 272.

70. "It is still open for the taxpayer to show that even though knowledge of the tax consequences was present, that knowledge did not contribute to the decision to accumulate earnings." 393 U.S. at 309.

71. Id. at 310.

72. Id.

73. Id. at 311. Black's Law Dictionary 1012 (rev. 4th ed. 1968) also lists willfully and intelligently as synonyms for knowingly and lists knowingly as a synonym for purposely. Id. at 1400.

The minority's conclusion, that the *a purpose* test would, in practice, deprive the taxpayer of his "last clear chance," is probably quite correct. The test proposed by the minority, however, is also open to criticism. The minority proposes that "the jury should be instructed to impose the tax if it finds that the taxpayer would not have accumulated earnings *but for* its knowledge that a tax saving would result."[74] This test is somewhere between the *a purpose* test and the *dominant purpose* test. Its effect would seem to be very close to that of the *dominant purpose* test in emasculating the presumption of prohibited purpose by requiring inquiry into subjective intent. Under the *but for* test, the taxpayer could avoid the penalty merely by proving that tax avoidance was not the instigating factor—that it did not initiate the accumulation. This is very close to saying that it was not the *dominant* or *controlling purpose*. Once again, the trier of fact would be required to look into the mind of the taxpayer to determine, first, whether tax avoidance was *a purpose*, and then, whether the taxpayer would have accumulated the earnings of the corporation *but for* the known fact that he would thereby save tax dollars. Therefore, though it may be almost impossible to separate purpose from knowledge under the *a purpose* test, the *but for* test would seem to require the same inquiry, and would add to it the equally difficult element of inquiry into subjective intent.

Thus, the *a purpose* test eases the burden of the trier of fact by making his inquiry more objective, while emphasizing the punitive intent of Congress. The *but for* test emphasizes the intent of Congress to give the taxpayer a "last clear chance," but it also partially defeats past congressional and judicial attempts to make the accumulated earnings tax provisions more efficiently applicable. Since the main legislative intent in establishing the accumulated earnings tax was to punish violators and to prevent violations by threat of punishment, as Congress only secondarily intended to give the taxpayer a "last clear chance" to avoid the tax, the *a purpose* test must prevail. Though the minority's criticisms of the *a purpose* test are valid, the test is not inconsistent with the intent of Congress and, if not practically necessary, it is at least the best one available to effectuate the purposes of the accumulated earnings tax.

The immediate effects of the *Donruss* decision will be to establish a single purpose test and make the administration of the tax uniform and more efficient. It should also encourage distribution of corporate accumulations, as it will put the taxpayer on notice that, in order to avoid the tax, he will now have to prove that the accumulation of earnings was for the reasonable needs of the business. Should he fail in this, he will face an almost impossible task in trying to rebut the presumption of prohibited purpose. Clearly, this is the result desired by both the Supreme Court and Congress. For those cases where the tax is assessed, it would seem that an even higher percentage of cases will be tried and decided solely on the issue of reasonableness. The taxpayer must now look upon the issue of purpose only as a last, desperate hope.

74. 393 U.S. at 313 (emphasis added).

Torts—New York Abolishes Parent-Child Immunity Doctrine.—Plaintiff-mother was seriously injured in a collision while riding as a passenger in an automobile owned by her and driven by her unemancipated sixteen-year-old son. Plaintiff commenced separate negligence actions against both her son and the driver of the other vehicle. Her son, represented by counsel of her insurance company and relying on the parent-child immunity doctrine, pleaded his status as an unemancipated child of the plaintiff as an affirmative defense. The trial court dismissed the complaint on that ground,[1] and its decision was affirmed by the appellate division.[2] However, the New York Court of Appeals reversed, holding that the parent-child immunity for non-willful torts should be abolished. *Gelbman v. Gelbman*, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

In its strictest form, the parent-child immunity doctrine bars an action "between parent and minor child for personal torts, whether they are intentional or negligent in character."[3] Apparently there was no such prohibition at common law,[4] although several American courts have disagreed.[5] The first American case to enunciate the doctrine was the 1891 Mississippi decision of *Hewlett v. George*,[6] which denied recovery in an action by a minor against a parent who had wrongfully committed her to an insane asylum. The court, citing no authority, reasoned that immunity was necessary to preserve "the repose of families and the best interests of society. . . ."[7] Adherence to this principle of preserving domestic tranquility led to the perpetration of serious injustice. Minor children were denied recovery for assault,[8] brutal beating,[9] and even rape.[10]

Recognizing the injustices that sometimes resulted from strict adherence to the family immunity doctrine, the courts soon began to recognize special circumstances that would allow such an action between parent and child. The first exception the courts allowed was an action involving injury to property.[11] The apparent reasoning was that the child was a separate legal person who had a right to property over which the parent had no control.[12]

1. Gelbman v. Gelbman, 52 Misc. 2d 412, 275 N.Y.S.2d 712 (Sup. Ct. 1966).

2. Gelbman v. Gelbman, 28 App. Div. 2d 826, 282 N.Y.S.2d 670 (2d Dep't 1967).

3. W. Prosser, Torts § 116, at 886 (3d ed. 1964) [hereinafter cited as W. Prosser]. Courts have not found any distinction between a suit of the parent against his child or the child against his parent. See, e.g., Ertl v. Ertl, 30 Wis. 2d 372, 141 N.W.2d 208 (1966).

4. W. Prosser § 116, at 886; see McCurdy, Torts Between Persons in Domestic Relations, 43 Harv. L. Rev. 1030, 1059-63 (1930).

5. See, e.g., Elias v. Collins, 237 Mich. 175, 211 N.W. 88 (1926); Redding v. Redding, 235 N.C. 638, 70 S.E.2d 676 (1952); Matarese v. Matarese, 47 R.I. 131, 131 A. 198 (1925). Contra, Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930).

6. 68 Miss. 703, 9 So. 885 (1891).

7. Id. at 705, 9 So. at 887.

8. Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924).

9. McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903).

10. Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

11. See W. Prosser § 116, at 886; McCurdy, supra note 4, at 1057-58. See also Lamb v. Lamb, 146 N.Y. 317, 41 N.E. 26 (1895).

12. See note 11 supra.

Later, the courts allowed actions when the parent had died or abandoned his child,[13] or when the child had become emancipated.[14] Here the courts argued that the parental relationship had been abandoned or destroyed. Finally, it was found that if there existed "between the parties a relationship additional to that of parent and child and the fact of parenthood (or the standing in loco parentis) is in the circumstances merely incidental, or perhaps logically irrelevant, the minor should be permitted to maintain his action if he could have maintained it had the parent and child relation not been present."[15] Thus the courts allowed an unemancipated minor to maintain a tort action against his parents when a master-servant or carrier-passenger relationship existed between the parties.[16] Likewise, in some cases they permitted actions against a non-parent serving in loco parentis, as when he failed to provide reasonable care or meted out unreasonable punishment.[17] These many exceptions have led a court recently to conclude that the immunity doctrine "has undergone a general erosion like the all-day sucker in the hands of a small child until there isn't much left but the stick itself."[18] Moreover, many courts have limited the immunity to unintentional torts, allowing recovery for personal injuries willfully inflicted. The limiting effects of the special circumstances exceptions and the intentional tort doctrine, combined with the constant movement towards abolition of all tort immunities and the growth of liability insurance, have led to serious doubt as to the further validity of the immunity. As a result, three states recently have totally abolished the family immunity[19] and three more have seriously limited the doctrine.[20] Yet, in New York, in *Cannon v. Cannon*,[21] the court stated that abolition of this immunity would place too great a burden on parenthood. This rule was further solidified by *Badigian v. Badigian*,[22] where the court found no decisions sustaining this type of action, restated the argument of family unity, and placed the burden of changing this rule upon the legislature.[23]

13. Ruiz v. Clancy, 182 La. 935, 162 So. 734 (1935); Dean v. Smith, 106 N.H. 314, 211 A.2d 410 (1965); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930). Contra, Lasecki v. Kabara, 235 Wis. 645, 294 N.W. 33 (1940).

14. See Wood v. Wood, 135 Conn. 280, 63 A.2d 586 (1948); Bulloch v. Bulloch, 45 Ga. App. 1, 163 S.E. 708 (1932); Taubert v. Taubert, 103 Minn. 247, 114 N.W. 763 (1908); Cannon v. Cannon, 287 N.Y. 425, 40 N.E.2d 236 (1942).

15. Annot., 19 A.L.R.2d 423, 433 (1951).

16. Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930) (master-servant); Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952) (business activity); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939) (carrier-passenger). Contra, Aboussie v. Aboussie, 270 S.W.2d 636 (Tex. Civ. App. 1954).

17. Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903); Steber v. Norris, 188 Wis. 366, 206 N.W. 173 (1925). Contra, Trudell v. Leatherby, 212 Cal. 678, 300 P. 7 (1931).

18. Schenk v. Schenk, 100 Ill. App. 2d 199, 204, 241 N.E.2d 12, 14 (1968).

19. Hebel v. Hebel, 435 P.2d 8 (Alas. 1967); Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966).

20. Schenk v. Schenk, 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968); Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

21. 287 N.Y. 425, 40 N.E.2d 236 (1942). See also Boem v. Gridley & Sons, 187 Misc. 113, 63 N.Y.S.2d 587 (Sup. Ct. 1946) (parent v. child).

22. 9 N.Y.2d 472, 174 N.E.2d 718, 215 N.Y.S.2d 35 (1961).

23. Id. at 473-74, 174 N.E.2d at 719-20, 215 N.Y.S.2d at 37.

Nevertheless, barring special circumstances, the majority of courts continue to uphold immunity for non-willful torts between parent and child,[24] although some courts have abrogated the rule for intentional torts.[25] Numerous reasons have been advanced for maintaining this rule. The most prevalent is that domestic harmony and tranquility would be disturbed by "the disruptive risk of tort liability between parents and their unemancipated children, in which relationship both parents and children—by nature and by law—have reciprocal duties to perform . . . ."[26] In many cases, however, family harmony already has been disturbed beyond repair or, under the special cirucmstances, harmony is not involved or endangered. In the case of willful torts, family peace normally has already been destroyed.[27] Even if no tort action is brought, "personal violence and abuse may be punished by the criminal law, which the child may be instrumental in setting in motion, or the custody of the child may be taken from the parent; and these things disrupt domestic tranquility."[28] Thus, it would seem that abrogation of the immunity would not seriously endanger family harmony.

A second argument advanced for the retention of the immunity claims that the family exchequer would be depleted to the detriment of the other minors in the family.[29] However, it is clear that there exists no right of a minor to equal distribution of his family's assets.[30] Furthermore, this argument ignores "the parent's power to distribute his favors as he will, and leaves out of the picture the depletion of the child's assets of health and strength through the injury."[31] Most importantly, the increase of compulsory insurance makes such a suit more likely to enrich rather than deplete the family coffers.[32]

A third reason given for the retention of immunity is the possibility that such a suit would endanger parental discipline and control.[33] The assumption underlying this argument is that the immunity will not produce abusive results, since a parent's natural love and affection assures protection of the child from injury. While this argument is usually valid in normal family intercourse, when an activity such as driving an automobile "has nothing to

24. See the cases cited in Hebel v. Hebel, 435 P.2d 8, 9 n.6 (Alas. 1967).

25. Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Cannon v. Cannon, 287 N.Y. 425, 40 N.E.2d 236 (1942); Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445 (1950). Seven states have not expressly overruled prior cases upholding the parent-child immunity for intentional torts. Chastain v. Chastain, 50 Ga. App. 241, 177 S.E. 828 (1934); Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924); Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); Cook v. Cook, 232 Mo. App. 994, 124 S.W.2d 675 (1939); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

26. Cannon v. Cannon, 287 N.Y. 425, 429, 40 N.E.2d 236, 238 (1942).

27. See note 14 supra.

28. McCurdy, supra note 4, at 1075.

29. Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

30. Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).

31. Dunlap v. Dunlap, 84 N.H. 352, 361, 150 A. 905, 909 (1930).

32. 33 St. John's L. Rev. 310, 313 (1959).

33. Rodebaugh v. Grand Trunk W. R.R., 4 Mich. App. 559, 145 N.W.2d 401 (1966); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927).

do with parental control and discipline, a suit involving such activity cannot be said to undermine those sinews of family life."[34] In such a case, it seems inequitable to bar compensation for injuries suffered. In addition, it appears that parental discipline has lessened in importance over the decades as the once rigorous restrictions upon family members have relaxed.[35]

The final argument for the retention of the immunity, one which has become more viable with the increased prevalence of liability insurance, is the danger of fraud and collusion from friendly suits.[36] Proponents of the abolition of this doctrine, recognizing this problem, place their reliance on a vigilant jury to ferret out such fradulent claims, since society's interest "in protecting people from losses resulting from accidents should remain paramount."[37] Moreover, if fraudulent claims increase alarmingly, legislatures have enacted appropriate legislation making the presentation of a fraudulent claim a criminal offense.[38] It also appears that insurance companies may include clauses in their contracts which would exclude members of the insured's family from coverage.[39] Such clauses have been construed strictly against the insurer but upheld on the ground that they deny "claims by persons in whose favor the insured would naturally be inclined to color the circumstances . . . ."[40] Furthermore, the experience of states where the immunity between spouses has been abolished indicates that such fears are largely unfounded.[41] When the immunity between spouses was abolished in New York,[42] the legislature simultaneously denied recovery by an insured's spouse "unless express provision relating specifically thereto is included in the policy."[43] In addition, it is widely recognized that the trend of the law is towards abolition of common law tort immunities. They "have been vanishing with the advent of modern means of transportation and the spread of insurance against liability of the wrongdoer and protection for the sufferer. We cannot bury our heads in the sand and ignore the new tendencies and conditions so notorious."[44]

34. Borst v. Borst, 41 Wash. 2d 642, 649, 251 P.2d 149, 153-54 (1952).

35. Rozell v. Rozell, 281 N.Y. 106, 109, 22 N.E.2d 254, 255 (1939).

36. Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960). See also W. Prosser § 116, at 889.

37. 23 N.Y.2d at 439, 245 N.E.2d at 194, 297 N.Y.S.2d at 532.

38. See, e.g., N.Y. Penal Code § 175.50 (1967): "A person is guilty of presenting a false insurance claim when, with intent to defraud an insurer with respect to an alleged claim of loss upon a contract of insurance, he knowingly presents to the insurer or to an agent thereof a written instrument containing a false material statement relating to such claim."

39. 7 Am. Jur. 2d Automobile Insurance § 131 (1963).

40. Dressler v. State Farm Mut. Auto. Ins. Co., 52 Tenn. App. 514, 517, 376 S.W.2d 700, 702 (Ct. App. 1963).

41. Balts v. Balts, 273 Minn. 419, 430-31, 142 N.W.2d 66, 73 (1966).

42. N.Y. Gen. Obligations Law § 3-313(2) (1964): "A married woman has a right of action against her husband for his wrongful or tortious acts resulting to her in any personal injury . . . as if they were unmarried, and she is liable to her husband for her wrongful or tortious acts resulting in any such personal injury to her husband . . . as if they were unmarried."

43. N.Y. Ins. Law § 167(3) (1941).

44. Rozell v. Rozell, 281 N.Y. 106, 113, 22 N.E.2d 254, 257 (1939).

In *Gelbman*, the court of appeals took notice of the gradual erosion of the parent-child immunity throughout the country in the seven years since *Badigian*.[45] It also noted that the legislature had failed to abolish this immunity, illustrating "the fact that the rule will be changed, if at all, by a decision of this court."[46] Finally, it found that an action by a parent against his child was not essential for the preservation of family unity. In fact it concluded that, since it would be a valid exercise of a parent's right to discipline his child, family unity would be preserved by this action.[47] The court then expanded its decision to abolish this immunity completely. It cited the many exceptions to the immunity rule that "neither permit reconciliation with the family immunity doctrine, nor provide a meaningful pattern of departure from the rule. Rather they attest the primitive nature of the rule and require its repudiation."[48] It also recognized that the state's compulsory automobile liability insurance effectively nullified the argument that family harmony would be disrupted by such an action, astutely observing that "[t]he present litigation is, in reality, between the parent passenger and her insurance carrier. Viewing the case in this light, we are unable to comprehend how the family harmony will be enhanced by prohibiting this suit."[49] Finally, the court concluded that a vigilant jury would prevent a rash of fraudulent and collusive claims.[50]

In spite of the total abolition of the immunity enunciated in *Gelbman*, in a rare case the arguments based on maintenance of family harmony and parental discipline remain valid, and retention of the immunity might be the wisest choice. Two states, for example, have abolished the immunity "except in two situations: (1) where the alleged negligent act involves an exercise of parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to provisions of food, clothing, housing, medical and dental services, and other care."[51] Unfortunately, *Gelbman* makes no provision for situations such as these, where a continued immunity may be beneficial. However, the court did point out the importance of compulsory insurance in this case. It therefore might reestablish this immunity when the child's or parent's activity is not insured. Nevertheless, for the great majority of cases, the justifications for maintaining the parent-child immunity have become antiquated and obsolete, especially with the prevalence of liability insurance. Thus, the court has taken a progressive and pragmatic step by eliminating it.

45. 23 N.Y.2d at 437, 245 N.E.2d at 193, 297 N.Y.S.2d at 530.

46. Id.

47. Id.

48. Id. at 438, 245 N.E.2d at 193, 297 N.Y.S.2d at 531.

49. Id. at 438, 245 N.E.2d at 194, 297 N.Y.S.2d at 531-32.

50. Id. at 439, 245 N.E.2d at 194, 297 N.Y.S.2d at 532.

51. Silesky v. Kelman, 281 Minn. 431, 442, 161 N.W.2d 631, 638 (1968); see Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1966). See also Tort Liability within the Family Area—A Suggested Approach, 51 Nw. U.L. Rev. 610, 619 (1956).