Fordham Law Review

Volume 25 | Issue 1 Article 9

1956

Recent Decisions

CASE NOTES

Civil Practice — Attachment Lien Not Property Subject to Attachment. —The defendant corporation had attached funds of the *X* corporation to satisfy any judgment which it might obtain in its action against *X*. Subsequently, the plaintiff brought separate actions against defendant for money claims and since defendant was a foreign corporation, procured warrants of attachment against defendant's property. Thereafter, on stipulation between defendant and *X*, the New York Supreme Court, Special Term, ordered the sheriff to release to *X* the fund defendant had attached. Plaintiff's companion motions to vacate this order and to restrain the sheriff from releasing the fund, *held* denied. While plaintiff's attachment of defendant's property reaches defendant's cause of action against *X*, the attached fund in that action is security alone, not part of the action, and therefore not an interest of defendant such as to be subject to plaintiff's attachment. *Reich v. Spiegel,* 208 Misc. 225, 140 N.Y.S. 2d 722 (Sup. Ct. 1955).

As employed in English courts as early as the fourteenth century the remedy of attachment was exclusively a punishment for contempt of court. Where an order or writ of the court had been disobeyed or an irregularity or contempt committed by an officer of the court a writ of attachment would issue. By virtue of this writ the sheriff would seize the offender and he would be jailed pending payment of whatever fine the court felt was justified.[1]

At early common law the attachment of property was a coercive device employed by the courts of common pleas to acquire jurisdiction over a defendant. The attachment of his possessions compelled his appearance since if he chose to remain outside the court's jurisdiction or would not furnish sureties for his appearance the seized property was forfeited.[2]

The contemporary concept of attachment, seizing in advance of judgment the property of a debtor as security for a debt, was unknown at common law. Its origin was rather in the civil law and arose from a custom of the London merchants whereby a creditor was enabled to reach debts of an absent debtor, even though the debtor himself was not available for personal service. This custom was recognized and enforced by the courts and gradually became incorporated into the common law where it was styled "foreign attachment."[3]

As developed in New York practice, attachment is a provisional remedy available only to a limited class of plaintiffs[4] and then only in certain actions.[5]

1. 3 Holdsworth, History of English Law 391-92 (3d ed. 1927).

2. 2 Pollock and Maitland, History of English Law 593 (2d ed. 1923).

3. Kneeland, Attachments 14-16.

4. N.Y. Civ. Prac. Act § 903 requires that a plaintiff, in order to be entitled to a warrant of attachment must show that defendant is: (1) a foreign corporation or a non-resident of the state; or (2) if a resident, that he has departed from the state with intent to defraud his creditors, avoid service of a summons, or is hiding in the state with like intent; or (3) if a natural person or a domestic corporation, has removed or is about to remove property from the state to defraud creditors, or has assigned or is about to assign property with like intent, or if a domestic corporation and no person can be found upon whom to serve a summons; or (4) has secured credit by a written false financial statement; or (5) if a

It exists purely by statute, and the courts have consistently strictly construed its provisions against the party seeking to utilize them.[6] The main purpose of an attachment proceeding is to provide a plaintiff with security. Through it, a debtor's property can be seized by the sheriff and held in *custodia legis* pending the outcome of the action. When the judgment is entered the attached property is either returned to a successful debtor or applied to the creditor's judgment. Because its literal effect runs contrary to the common law principle of not seizing a debtor's property before adjudication, its use is carefully circumscribed and the penalties for its misapplication strict.[7] The second and extremely important purpose of an attachment proceeding is to gain jurisdiction over a foreign debtor's property located within the state, thereby enabling the plaintiff to maintain an action.[8]

Over the years the interpretation of the New York attachment statutes by the courts severely limited many of their provisions, eliciting the comment in 1940 from one advocate of clarification, "in some cases 'complete befuddlement' has resulted from them [the attachment statutes] even after their subjection to judicial analysis."[9] The following year radical changes were made in the attachment articles; these took into effect the decided cases and greatly simplified procedures.[10] However clear the wording now is, the interpretation has continued, as evidenced by the instant case.

One well-settled principle of New York attachment law is that property-interests, substantially contingent in character are not attachable.[11] This concept

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resident, has been out of the state continuously for six months and has not designated a person on whom a summons may be served.

5. N.Y. Civ. Prac. Act § 902 restricts actions under which an attachment of defendant's property may be had to those to recover a sum of money only because of breach of contract, wrongful conversion of personal property, injury to person or property due to negligence, fraud, or other wrongful act, or in an action by an executor or administrator for wrongful death.

6. Penoyer v. Kelsey, 150 N.Y. 77, 44 N.E. 788 (1896); 37-01 31st St. Corp. v. Young, 200 Misc. 501, 106 N.Y.S. 2d 449 (Sup. Ct. 1951); Nowikos (London), Ltd. v. Petrousis, 186 Misc. 710, 60 N.Y.S. 2d 802 (Sup. Ct. 1946); Nolan v. Louis Workman Co., 146 Misc. 99, 261 N.Y. Supp. 534 (Sup. Ct. 1932).

7. In general, before a warrant of attachment will be granted security must be given by the creditor seeking the warrant. N.Y. Civ. Prac. Act § 819. Exceptions to the requirement of security are statutory and exist almost exclusively where the plaintiff creditor is the state or a political subdivision thereof. See N.Y. Civ. Prac. Act §§ 162 and 908. A failure by the plaintiff to secure judgment or a vacating of the warrant will normally subject him to liability on the undertaking for damages and costs. In addition the successful debtor or a third party having title to the attached property may bring an action for wrongful attachment on the theory of trespass or conversion.

8. United States of Mexico v. Schmuck, 294 N.Y. 265, 62 N.E. 2d 64 (1945).

9. Finn, The Streamlining of Attachment Procedure, 9 Fordham L. Rev. 1, 36 (1940).

10. The legislature in 1941 adopted the recommendations of the Judicial Council of the State of New York, such revisions effective Sept. 1, 1941. See The Judicial Council, Seventh Annual Report and Studies 455-77 (1940).

11. Sheehy v. Madison Square Garden Corp., 266 N.Y. 44, 193 N.E. 633 (1934); Herman and Grace v. City of New York, 130 App. Div. 531, 114 N.Y. Supp. 1107 (1st Dep't 1909),

is in line with the broader principle that the attachment of a debtor's property should give the attaching creditor no greater right in it than the debtor had himself.[12] Analogously, an attachment lien does not displace the equities or rights to which the attached property was subject in the hands of the debtor.[13] The attaching creditor, in a word, does not occupy the legally exalted position of a bona fide purchaser for value.[14]

To be subject to attachment, the property seized, in a suitable action, must be property of the defendant.[15] In the present case plaintiff attached a cause of action which defendant corporation was pursuing against *X* corporation. Though a cause of action is intangible and not property in the ordinary sense, the statutes specifically recognize it as an attachable interest, provided it arises under or on account of a contract.[16] Here, though, the plaintiff went further and sought to enjoin the disposition of an attached fund held under defendant's levy of attachment as security for the outcome of defendant's action against *X* corporation.

The plaintiff relied on the argument that the attached fund was a part of defendant's cause of action and therefore was within his reach under the Civil Practice Act, *i.e.*, "the levy of attachment thereupon is deemed a levy upon, and a seizure and attachment of *all the rights* of the defendant in and to such cause of action."[17] The court rejected this argument as it did a reference to a Court of Appeals' dictum[18] to the effect that ". . . a lien [attachment] is property in the broad sense of that word and although it has no physical existence it exists by operation of law so effectively as to have pecuniary value, and to be capable of being bought and sold."[19]

Though intangible interests subject to becoming completely valueless, *e.g.*, a cause of action, are attachable,[20] contingent interests decidedly are not. In the instant case the court properly held that defendant's interest in the fund levied upon was a contingent one since any number of happenings might occur to preclude a judgment in the defendant's favor and the consequent perfection of the attachment lien. Therefore, the court would not allow plaintiff's attachment of defendant's cause of action to reach the security fund and thereby violate the basic principle that the attaching creditor could not, by levying attachment, gain more rights in the attached property than those possessed by the debtor.

aff'd on opinion below, 199 N.Y. 600, 93 N.E. 376 (1910); Fredrick v. Chicago Bearing Metal Co., 221 App. Div. 588, 224 N.Y. Supp. 629 (1st Dep't 1927).

12. McLaughlin v. Swann, 18 U.S. (How.) 217 (1855).

13. Generally, where an attachment lien is levied after another lien exists on the property it is subordinate. See People v. St. Nicholas Bank, 44 App. Div. 313, 60 N.Y. Supp. 719 (1st Dep't 1899); Brooksville Granite Co. v. Latty, 83 Misc. 384, 144 N.Y. Supp. 1042 (Sup. Ct. 1913).

14. Westevelt v. Hagge, 61 Neb. 647, 85 N.W. 852 (1901).

15. N.Y. Civ. Prac. Act §§ 902, 904, 910, 912, 913.

16. N.Y. Civ. Prac. Act § 916(4).

17. Ibid. (Emphasis added.)

18. Haebler v. Myers, 132 N.Y. 363, 30 N.E. 963 (1892).

19. Id. at 368, 30 N.E. at 965.

20. See note 6 supra.

For the purpose of argument, even conceding that the fund might be reached by plaintiff's levy of attachment, the fund would still be subject to the rights and equities existing before the attachment. Thus *X* corporation and defendant's right to abate the action or relinquish security under it, as they saw fit, were rights prior to plaintiff's levy. In addition, the Court of Appeals' dictum condoning a broad interpretation of what constituted property was deemed inapplicable since there the facts were at wide variance with those of the present case.

In denying plaintiff the right to interfere with the fund's disposition the court did not thereby compromise plaintiff's rights. If a fraud existed in the dealings between *X* corporation and defendant relative to the release of the fund so as to compromise plaintiff's claim, plenary actions could be pursued by the plaintiff. The plaintiff's avenue of approach to the desired end was ill chosen however meritorious the cause. The courts being bound to a strict interpretation of the statutes will not tolerate the interposition of a provisional remedy to displace the prior rights and equities of others.

Conflict of Laws—Application of Section 167(3) of the New York Insurance Law to a New York Insurance Liability Policy where the Tort Occurs in a Foreign Jurisdiction.—Defendants, *H* (husband) and *W* (wife), were residents of New York where *W* had obtained an automobile liability insurance policy from plaintiff insurance company. While driving in Connecticut *W* negligently injured *H*, a passenger in the car. *H* initiated an action against *W* in Connecticut and plaintiff insurance company brought this action in New York for a declaratory judgment declaring that plaintiff was not liable to the defendants on the insurance policy and was not required to defend the Connecticut suit. *Held*, declaratory judgment denied. Section 167(3) of the New York Insurance Law does not apply to a New York insurance policy where the cause of action arises in a foreign jurisdiction. *New Amsterdam Casualty Co. v. Stecker*, 208 Misc. 858, 145 N.Y.S. 2d 148 (Sup. Ct. 1955).

At common law in New York neither spouse could sue the other for personal injury.[1] In 1937 the legislature amended section 57 of the Domestic Relations Law terminating this disability. At the same time the legislature enacted section 167(3) of the Insurance Law. It provides that a personal injury liability policy does not render the insurance carrier liable to the insured where the liability arose out of a suit by the insured's spouse, unless the policy expressly includes such coverage. Since there was no such express provision in the policy in the principal case, plaintiff insurance company would have been entitled to the declaratory judgment had the court found section 167(3) applicable. The court suggested three grounds for ruling the section inapplicable.

For one, the court reasoned that ". . . the law of the place where the tort or wrong is committed controls and the rights and liabilities arising out of an automobile accident are governed by the law of the state in which the accident

1. Allen v. Allen, 246 N.Y. 571, 159 N.E. 656 (1927).

occurs, regardless of where the insurance policy was issued."[2] If from this it was intended to conclude that the law of the place where the tort occurs will determine the liability under an insurance policy contracted in another state, the court's position may be criticized. The doctrine of *lex loci delecti* can be directed only at determining the liability of the tortfeasor to the injured party, which, in the principal case, means the liability of *W* to *H*. The liability of the insurance company is founded upon the contract of insurance. This vital distinction was not lost by the New York Supreme Court in *Bradford v. Utica Mutual Insurance Co.*[3] In that case *H* was insured by an insurance company in Massachusetts. While driving in New York as a passenger, he negligently caused *W's* death. Massachusetts, with the majority of American jurisdictions,[4] does not allow such a suit between spouses. The New York court stated that New York law determined the liability between *H* and *W*, but it also ruled that section 167(3) was not applicable to the contract of insurance since it was to be interpreted according to the law of Massachusetts where it was made. This distinction has also been noted and applied by the Connecticut courts[5] and other jurisdictions.[6]

It would be presumptuous, however, to conclude that the court's reference to the *lex loci delecti* in the instant case was a disavowal of the *Bradford* case. New York is here the place of contracting as well as the forum; a New York court is being asked to construe a contract made in New York. The court was obviously aware of the contractual aspects of the case for it turned to section 358 of the Restatement of the Law of Conflict of Laws as another basis of its decision, relying upon that part of the section which says that "the duty for the performance of which a party to a contract is bound will be discharged by compliance with the law of the place of performance of the promise with respect to: . . . (c) the person or persons by whom *or to whom* performance shall be made or rendered . . . ."[7] Assuming the soundness of this rule it does not follow, however, that its application was appropriate here so as to permit Connecticut law to determine whether or not the insurance company must perform. The Restatement rule itself presumes that there already exists a ". . . duty for the performance of which a party to a contract is bound . . . ."[8] The real question in controversy was whether or not the insurance company was bound by the contract to perform at all; this is a problem relating to the interpretation of the contract rather than of its performance. The comment supplementing the rules of the Restatement clearly indicates[9] that the acts

2. New Amsterdam Casualty Co. v. Stecker, 203 Misc. 358, 861, 145 N.Y.S. 2d 148, 151 (Sup. Ct. 1955).

3. 179 Misc. 919, 39 N.Y.S. 2d 810 (Sup. Ct. 1943).

4. See cases cited 43 A.L.R. 2d 632 (1955).

5. Levy v. Daniel's U-Drive Auto Renting Co., 108 Conn. 333, 143 Atl. 163 (1928).

6. Boisvert v. Boisvert, 94 N.H. 357, 53 A. 2d 515 (1947); Farrell v. Employer's Liability Assur. Corp., 54 R.I. 18, 168 Atl. 911 (1933).

7. Restatement, Conflict of Laws § 358 (1934). (Emphasis as supplied by the court.)

8. Ibid.

9. Restatement, Conflict of Laws § 358 (1934), comment (a), which states in part

which a party is bound to perform are determined by the law of the place of contracting whereas it is the form and manner of performing that are to be determined by the law of the place of performance.[10]

Until recently, New York seemed to adopt the Restatement rule with its attendant comment. It was "well settled"[11] that ". . . all matters bearing upon the execution, the interpretation and the validity of contracts . . . are determined by the law of the place where the contract is made. . . . All matters connected with its performance, including presentation, notice, demand, etc., are regulated by the law of the place where the contract, by its terms, is to be performed.[12] However, the recent Court of Appeals decision in *Auten v. Auten*[13] suggests a "center of gravity rule" under which the law of the place most intimately concerned with the legal relations arising out of the contract may be applied—presumably as to all matters. It would be difficult to forecast how the courts would apply the rule to the principal case.[14]

As a third basis of its decision the court cited a recent Connecticut decision,[15] which, under the identical facts of the principal case, rejected the applicability of section 167(3). The court there reasoned that the New York Legislature, in passing simultaneously section 57 of the Domestic Relations Law and section 167(3) of the Insurance Law, intended that the latter ". . . relate only to the newly created right of action, which was necessarily based on occurrences within the state of New York."[16] The Connecticut court cited a New York court's statement that these contemporaneous enactments manifested a ". . . considered legislative intent to create a right of action theretofore denied, and at the same time to protect insurance carriers against loss through collusive actions between husband and wife."[17] It would appear that wherever section 57 creates

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that ". . . *after* the language of the contract is made clear by interpretation and the *duty imposed by the law of the place of contracting is ascertained, there may still remain* problems connected with the details of performance of such duty. . . . The law of the place of performance determines the manner and method as well as the legality of . . . performance. . . ." (Emphasis supplied.) See note 10 infra.

10. "Thus, whether a duty of performance is to be conditional, and when, where and by whom the performance is to be made and exactly what act of performance a party is obliged by the contract to do are determined by the law of the place of contracting. However, certain questions pertaining to the form and manner of performance are governed by the law of the place of performance. . . ." Restatement, Conflict of Laws § 346, comment (a) (1934).

11. Duval v. Skouras, 181 Misc. 651, 653, 44 N.Y.S. 2d 107, 109 (Sup. Ct. 1943).

12. Union National Bank v. Chapman, 169 N.Y. 538, 543, 62 N.E. 672, 673 (1902).

13. 308 N.Y. 155, 124 N.E. 2d 99 (1955), 24 Fordham L. Rev. 268.

14. In Auten v. Auten, 308 N.Y. 155, 124 N.E. 2d 99 (1955), the Court of Appeals put considerable stress upon the place of residence of the parties and upon the place where the contract (separation agreement) was to be performed.

15. Williamson v. Massachusetts Bonding and Insurance Co., 142 Conn. 573, 116 A. 2d 169 (1955).

16. Id. at 576, 116 A. 2d at 172.

17. Fuchs v. London and Lancashire Indemnity Co., 258 App. Div. 603, 605, 17 N.Y.S. 2d 338, 340 (2d Dep't 1940), 9 Fordham L. Rev. 288. Section 57 of the Domestic Relations

a new cause of action, then and then only will section 167(3) apply. The application of this argument must depend upon what new causes of action were created by the enactment of section 57. Analysis presents four situations.[18] The first, and simplest, is where the tort occurs in New York and the action is brought in New York. Since the cause of action in such a case would depend upon section 57, section 167(3) may be interpreted to apply. The second situation is where the tort occurs in New York but the action is brought in a foreign jurisdiction. Here again, since the liability is determined by the law of the place where the tort occurs, the cause of action could only be sustained by section 57, and section 167 would apply. The third situation is where the tort occurs in a foreign jurisdiction but the action is brought in New York. Prior to the enactment of section 57, New York, on grounds of public policy, would not have entertained a personal injury action between spouses where the tort occurred in a foreign jurisdiction, even though the law of that jurisdiction allowed such a suit.[19] This prohibition ended with the passage of section 57 and so again 167(3) may be interpreted as applicable.[20] The fourth situation is where the tort occurs in a foreign jurisdiction and the action is brought in that foreign jurisdiction. Clearly in such a case the cause of action would not depend upon section 57 and so section 167(3) would not be applicable to the insurance policy.

The situation presented by the instant case falls into this last category.[21] Granting that section 167(3) is coextensive with section 57 the court properly precluded the operation of the New York insurance statute on the foreign cause of action.

Contracts—Exclusive Jurisdiction Provision in Bill of Lading Held Valid. —A New York corporation was the consignee of a shipment of cocoa beans which was being transported by sea from Sweden to Philadelphia aboard a Swedish vessel. The ship and its cargo were lost at sea, whereupon the consignee filed a libel in admiralty in the United States District Court against the shipping line to recover for the loss of cargo. The District Court granted the

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Law, section 167(3) of the Insurance Law and section 59 of the Vehicle and Traffic Law were passed simultaneously and were conceived from the same legislative frame of mind. Section 59 was later held by the New York courts to be applicable only to a tort occurring in New York. Cherwien v. Geiter, 272 N.Y. 165, 5 N.E. 2d 185 (1936).

18. In each of these four examples it is assumed that the contract of insurance was made in New York since otherwise the issue of whether section 167(3) is applicable is not pertinent.

19. Mertz v. Mertz, 271 N.Y. 466, 3 N.E. 2d 597 (1936).

20. This conclusion is in contradiction to the Connecticut court's statement in Williamson v. Massachusetts Bonding and Insurance Co., see note 16 supra, that the newly created right of action is ". . . necessarily based on occurrences within . . . New York."

21. The principal case was an action brought in New York, but it was an action for a declaratory judgment to decide what effect section 167(3) has upon a contract of insurance where the tort occurs in Connecticut and the action on the tort is brought in Connecticut.

carrier's motion to decline jurisdiction and dismissed the libel on the ground that effect should be given to the clause in the bill of lading providing for exclusive jurisdiction of the controversy in the Swedish courts. On appeal, *held*, affirmed. The reasonableness of the agreement conferring jurisdiction on the courts of the carrier's country properly justifies the court in declining to exercise its jurisdiction. *Muller & Co. v. Swedish American Line*, 224 F. 2d 806 (2d Cir.) cert. denied, 350 U.S. 903 (1955).

It is a generally accepted rule in the United States that an express provision in a contract which limits the jurisdiction of a controversy arising thereunder to a specific court, will not be enforced in another court where jurisdiction otherwise attaches.[1] Most decisions in this country have declared such contracts to be invalid and against public policy,[2] reasoning primarily that such agreements oust the courts of their proper jurisdiction and secondly, that matters of remedy, being created and regulated by law, are not subject to alteration by agreement of the parties prior to a breach of the contract. The rule has been applied with equal certainty in cases where the provision was intended to limit jurisdiction to a foreign country,[3] or to a state,[4] county[5] or city[6] of the United States, or to exclude the state courts in favor of the federal courts[7] and vice versa.[8] State statutes providing for exclusive jurisdiction agreements by foreign corporations operating therein, to limit disputes to the state, have been held unconstitutional.[9]

Except for two early Massachusetts cases, exclusive jurisdiction contracts have found little popularity in the United States.[10] Nevertheless, dissatisfaction

1. 6 Williston, Contracts § 1725 (rev. ed. 1938); 1 Benedict, Admiralty § 22a (6th ed. 1940); Stumberg, Conflict of Laws 270 (2d ed. 1951).

2. Insurance Co. v. Morse, 87 U.S. (20 Wall) 445 (1874); Jefferson Ins. Co. v. Cia. Colonial De Navegacao, 121 F. Supp. 828 (S.D. N.Y. 1954); Kuhnhold v. Compagnie Generale Transatlantique, 251 Fed. 387 (S.D. N.Y. 1918); Nashua River Paper Co. v. Flammermill Paper Co., 223 Mass. 8, 111 N.E. 678 (1916); Hurst v. Litchfield, 39 N.Y. 377 (1868); Nute v. Hamilton Mutual Ins. Co., 72 Mass. 174 (1856); Parker v. Krauss Co., 157 Misc. 667, 284 N.Y. Supp. 478 (App. T. 1st Dep't 1935), aff'd, 249 App. Div. 718, 292 N.Y. Supp. 955 (1st Dep't 1936). See note, 59 A.L.R. 1445 (1929); 25 Colum. L. Rev. 1063 (1925); Syke, Agreements in Advance Conferring Exclusive Jurisdiction on Foreign Courts, 10 La. L. Rev. 293 (1950).

3. Slocum v. Western Assur. Co., 42 F. 235 (S.D. N.Y. 1890).

4. Parker v. Krauss Co., 157 Misc. 667, 284 N.Y. Supp. 478 (App. T. 1st Dep't 1935), aff'd, 249 App. Div. 718, 292 N.Y. Supp. 955 (1st Dep't 1936).

5. Amesbury v. Bowditch Mutual Fire Ins. Co., 72 Mass. 596 (1856).

6. General Acceptance Corp. v. Robinson, 207 Cal. 285, 277 Pac. 1039 (1929).

7. Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills, 82 Fed. 508 (6th Cir. 1897).

8. Insurance Co. v. Morse, 87 U.S. (20 Wall) 445 (1874).

9. Insurance Co. v. Morse, supra note 8; Bish v. Employers' Liability Assur. Corp., 102 F. Supp. 343 (W.D. La. 1952).

10. Mittenthal v. Mascagni, 183 Mass. 19, 66 N.E. 425 (1903); Daley v. People's Building, Loan and Savings Ass'n, 178 Mass. 13, 59 N.E. 452 (1901). Both cases were subsequently limited to their facts by the Massachusetts court in Nashua River Paper Co. v. Hammermill Paper Co., 223 Mass. 8, 111 N.E. 678 (1916).

with the general rule has grown in recent years,[11] and several modern decisions[12] indicate at least a tendency for relaxation of the denunciatory rule, if not a definite preference for the minority view.[13] In England contracts conferring exclusive jurisdiction to a specific court have long been recognized as valid[14] and since the English Arbitration Act of 1889, based on the analogy between such contracts and agreements to submit disputes for arbitration to a specific group or tribunal, have been enforced as agreements to arbitrate.[15] The analogy was early evident in this country; both agreements were traditionally classed together and adjudged void as against public policy.[16] However, the widespread adoption of local and federal arbitration statutes in this country caused a change of position as to arbitration agreements and it has been suggested that the same result might follow with contracts conferring exclusive jurisdiction upon a specific court.[17]

Adopting a modification of the minority position, the court in the present case stated that, ". . . the parties by agreement cannot oust a court of jurisdiction otherwise obtaining . . . . But if . . . the court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented."[18] This

11. Krenger v. Pennsylvania R. Co., 174 F. 2d 556 (2d Cir. 1949); United States Refining Co. v. Trinidad Lake Petroleum Co., 222 Fed. 1006 (S.D. N.Y. 1915); Parker v. Krauss Co., 157 Misc. 667, 673, 284 N.Y. Supp. 478, 484 (App. T. 1st Dep't 1935) (dissent); Kelvin Engineering Co. v. Blanco, 125 Misc. 728, 210 N.Y. Supp. 10 (Sup. Ct. 1925). See also, Bickel, The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty, 35 Cornell L.Q. 36, n. 103 (1949).

12. Cerro De Pasco Copper Corp. v. Knut Knutsen, 187 F. 2d 990 (2d Cir. 1951); United States Merchants' & Shippers' Ins. Co. v. A/S Den Norske Afrika Og Australie Line, 65 F. 2d 392 (2d Cir. 1933); Sociedade Brasileira v. S.S. Punta Del Este, 135 F. Supp. 394 (D.C. N.J. 1955) (jurisdiction declined on other grounds). See also, Galban Lobo Trading Co. v. The Diponegoro, 108 F. Supp. 741 (S.D. N.Y. 1952).

13. ". . . I do not believe that, today at least, there is an absolute taboo against such contracts . . . , they are invalid only when unreasonable . . . . What remains of the doctrine is apparently no more than a general hostility, which can be overcome. . . ." Krenger v. Pennsylvania R. Co., 174 F. 2d 556, 561 (2d Cir. 1949) (concurring opinion).

14. Scott v. Avery. 5 H.L. 811, 10 Eng. Rep. 1121 (1856); Law v. Garret, 8 Ch. D. 26 (C.A. 1878).

15. Austrian Lloyd Steamship Co. v. Gresham Life Assur. Soc'y, [1903] 1 K.B. 249; Kirchner & Co. v. Gruban, [1909] 1 Ch. 413, 416; The Cap Blanco, [1913] P. Div. 130. See United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 Fed. 1006 (S.D. N.Y. 1915); 45 Yale L.J. 1150 (1936). For an American case treating an agreement to submit to a specific court as an agreement to submit to arbitration, see Kelvin Engineering Co. v. Blanco, 125 Misc. 728, 210 N.Y. Supp. 10 (Sup. Ct. 1925).

16. American Sugar Refining Co. v. The Anaconda, 138 F. 2d 765 (5th Cir. 1943); United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 Fed. 1006 (S.D. N.Y. 1915); Williams v. Branning Mfg. Co., 154 N.C. 205, 70 S.E. 290 (1911); Sutro v. Balk, Inc., 151 N.Y. Supp. 764 (App. T. 1st Dep't 1915). See 6 Corbin, Contracts § 1433 (1951); 45 Yale L.J. 1150 (1936).

17. Stumberg, Conflict of Laws 276 (2d ed. 1951).

18. Muller & Co. v. Swedish American Line, 224 F. 2d 806, 808 (2d Cir.) cert. denied, 350 U.S. 903 (1955). In addition, the court very properly refused to rule that § 1303(8)

does not go so far as to say the agreements are necessarily enforceable if reasonable, but only that the court may decline jurisdiction, wisely leaving an area of discretion in applying the rule. This is a salutary departure from an inflexible and, as such, outmoded rule. The effect is to allow the exclusive jurisdiction contract recognition where its application would achieve a just result.

Although not noted by the Circuit Court, it is significant that the District Court in the instant case[19] felt that since it found the agreement valid, it was not required to reach the question of *forum non conveniens* but that if it had, it would have come to the same conclusion based on the same facts which the Circuit Court considered in determining whether the agreement was reasonable, viz., that the ship was Swedish owned and built and that all the crew members resided there. Although it seems that the question of reasonableness will preclude consideration of *forum non conveniens,* the test of reasonableness under this decision includes the same factors and the result will often be the same. Considering another factor of which the court did not take cognizance, several cases have stated that although an American has no absolute right to be heard in an American court,[20] a court may not decline jurisdiction unless injustice would result.[21] These cases have been quite explicit in stating that mere inconvenience to the non-citizen is not ground for refusing to accept jurisdiction. Since inconvenience of the non-citizen under the present decision was a factor in ascertaining the reasonableness of agreements to submit to a foreign jurisdiction, by implication the broad rule favoring the acceptance of a cause is narrowed to the point that if an agreement to submit exists, inconvenience of the non-citizen may constitute grounds for declining jurisdiction.[22]

Certain practical justifications exist for allowing parties to select in advance the jurisdiction to which they will submit. Thus it may be arranged in advance that the contract will be interpreted by the courts of the country or state under whose laws it was written, that inconveniences, which may easily arise through

of the Carriage of Goods by Sea Act, 46 U.S.C.A. §§ 1300-15, which provides that an agreement lessening the carrier's liability is null and void, could be construed in such a way that an agreement limiting venue to a specific jurisdiction was a lessening of liability under it, as the courts have construed a somewhat similar provision in the Federal Employers Liability Act, 45 U.S.C.A. § 55. The FELA has been so construed in the light of a strong congressional intent to favor plaintiffs, no such intent being present in the enactment of the Carriage of Goods by Sea Act. See Boyd v. Grand Trunk Western R.R., 338 U.S. 263 (1949), 25 N.Y.U.L. Rev. 413 (1950).

19. Appendix to Brief for Appellant, p. 16, Muller & Co. v. Swedish American Line, 224 F. 2d 806 (2d Cir.), cert. denied, 350 U.S. 903 (1955).

20. The possibility of the existence of an absolute right has been suggested in a number of opinions but the question is ordinarily left open. See Swift & Co. Packers v. Compania Columbiana Del Caribe, 339 U.S. 684, 697 (1950).

21. Wheeler v. Societe Nationale Des Chemins De Fer Francais, 108 F. Supp. 652 (S.D. N.Y. 1952); The Saudades, 67 F. Supp. 820 (E.D. Pa. 1946).

22. It is of some interest to note that appellant's brief indicates that more than 53 other American cargo consignees were awaiting the outcome of this appeal to determine if all were to be relegated to the courts of Sweden.

the devices available in securing jurisdiction, *e.g.*, service on an agent and foreign attachment, will be avoided. Further it is urged that the risk of a bad bargain being present in every contract, there is no reason why the parties should not be held to such an agreement.[23] The argument that matters of remedy are not subject to change by agreement of the parties has little validity when one considers that a party may waive the statute of limitations, contract to limit the amount of damages recoverable with a liquidation clause, barter away in advance the right to a jury trial, or to an appeal, and that parties may settle their dispute out of court or neglect to pursue an existing suit.

The arguments against enforcing such agreements in admiralty bills of lading are equally cogent. A lack of equality in bargaining power does exist,[24] a factor which our courts always consider in determining the validity of contracts. Such contracts are consensual in name only since the steamship companies make the agreements and the individual shipper has little opportunity to repudiate the document agreed upon by the trade if he desires to have his goods shipped. Many American shippers will be relegated to foreign courts by enforcement of such agreements over which they have little control and, in situations where a small claim exists, the expense of litigating in a foreign court is prohibitive and would probably result in abandonment of such a claim.

Application of the strict rule prohibiting the enforcement of agreements specifying exclusive jurisdiction would in any number of situations fail to achieve a just result. For this reason it is submitted that the instant decision is sound in recognizing the need for discretionary powers in reviewing each such agreement on its own merits. It is further submitted, however, that on the facts of this case, specifically the non-mutuality of the so-called contract, the court in applying this rule of latitude might well have reached an opposite conclusion.

Corporations—Derivative Action—Liability of Controlling Stockholders for Profits from Sale of Stock.—Defendant corporation's minority stockholders brought a derivative action demanding an accounting for profits realized by defendants as a result of selling a corporate asset through the sale of controlling stock. The alleged asset was the ability to control the allocation of the corporate product in a time of short supply. Plaintiffs charged that defendant, who was dominant stockholder, chairman of the board of directors, and president of the corporation, breached his fiduciary duty to the corporation. The holding in the District Court concluded that the defendants were not liable. On appeal, *held*, one judge dissenting, reversed. Defendant was accountable to minority stockholders to the extent that the price paid represented payment for right to control distribution. *Perlman v. Feldman*, 219 F. 2d 173 (2d Cir. 1955).

Shares of stock in a corporation are the private property of the owner. A shareholder is therefore, permitted to sell his stocks at the best price obtain-

23. See 45 Yale L.J. 1150 (1936); 25 Colum. L.R. 1063 (1925).

24. United States v. Farr Sugar Corp., 191 F. 2d 370, 374 (2d Cir. 1951).

able and to whomever he may choose to sell.[1] Owners of a controlling block of stock have been permitted to demand a higher premium for their sale.[2] In view of the fiduciary relationship existing between majority shareholders and minority shareholders,[3] however, a duty is imposed upon the former to act in good faith and with due care in the transfer of their stock.[4] Generally, the cases involving the breach of the fiduciary relationship by corporate officers have been decided on two theories.[5] Under the first, the so-called "looting theory," a majority stockholder is held liable for the damage done to the corporation by those to whom he sold his controlling interest if he could have reasonably foreseen that these purchasers were not in good faith and would subsequently plunder the corporation.[6] Under the other, termed the "corporate opportunity theory," the majority shareholder is held responsible to the corporation if he should realize, through the sale of his stock, the value of an asset rightfully belonging to the corporation which is not attributable to his interest.[7] Primarily this type situation exists where a director-majority shareholder votes to reject a bid made to the corporation to purchase stock and then sells his own controlling shares for a higher premium. There he would certainly be intercepting an "opportunity" rightfully belonging to the corporation for his personal advantage.

The majority in the present decision, apparently proceeding on the corporate opportunity theory, found that the defendant director-shareholder aggrandized his personal gain by selling an advantage ascribable to the corporation.[8] Noting that the advantage—here the ability to allocate the corporate product—need merely be a *possible* source of corporate increase in order to support an action, the court placed upon the defendants the burden of negativing such possible gain by the corporation. Furthermore, while admitting the right of a dominant

1. Jacob v. Reynaud, 152 La. 353, 93 So. 121 (1922); Roosevelt v. Hamblin, 199 Mass. 127, 85 N.E. 98 (1908).

2. Gallagher v. Pacific American Co., 97 F. 2d 193 (9th Cir. 1938); Stanton v. Schenck, 140 Misc. 621, 251 N.Y. Supp. 221 (Sup. Ct. 1931).

3. Equity Corp. v. Groves, 294 N.Y. 8, 60 N.E. 2d 19 (1945); Pink v. Title Guarantee & Trust Co., 274 N.Y. 167, 8 N.E. 2d 321 (1937); Welt v. The Beachcomber, Inc., 166 Misc. 29, 1 N.Y.S. 2d 177 (Sup. Ct. 1937), where the court said that officers, directors and majority stockholders are in a fiduciary relationship with minority stockholders.

4. Insuranshares Corp. v. Northern Fiscal Corp., 35 F. Supp. 22 (E.D. Pa. 1940).

5. Comment, 22 U. Chi. L. Rev. 895 (1955); Note, 40 Corn. L.Q. 786 (1955); 68 Harv. L. Rev. 1274 (1955).

6. Insuranshares Corp. v. Northern Fiscal Corp., 35 F. Supp. 22 (E.D. Pa. 1940). See also Gerdes v. Reynolds, 262 App. Div. 944, 29 N.Y.S. 2d 622 (Sup. Ct. 1941).

7. Commonwealth Title Ins. & Trust Co. v. Seltzer, 227 Pa. 410, 76 Atl. 77 (1910).

8. The asset alleged to have been sold was the ability to allocate steel during this period of short supply. Allocation was important to the corporation because of its business practice of securing interest-free loans from prospective purchasers in exchange for firm commitments on future delivery. Thus the corporation was actually receiving a higher market price for its product and was using these profits to rebuild its antiquated facilities. The purchasing syndicate, after gaining control of the corporation allocated all the remaining steel to itself at the current market price. Hence, the corporation was deprived of the higher premium attained through the interest-free loans.

stockholder to dispose of his controlling block of stock without having to account to his corporation, the court held that where the corporation's product is bringing an unusually large premium, the fiduciary may not appropriate to himself the value of this premium. The majority also felt that since a recovery by the corporation would result in gain to the purchasing syndicate, its benefits should enure to the plaintiffs individually and not to the corporation.[9]

Extending the corporate opportunity theory by applying it to the facts of this case, would seem to be a liberalization of the rule not previously indulged in by the courts. The question to be answered before this doctrine should apply is whether or not the sale of the ability to allocate the corporate product constituted a sale of an interest which belonged solely to the corporation. Direction of the distribution of the corporate product would seem to be an inseparable ingredient of control and necessarily included in any sale of a controlling interest. If the defendants had turned down a proposal by the purchasing syndicate which would have been beneficial to the corporation in order that they might later sell their controlling stock at a premium there would be basis for valid application of the corporate opportunity doctrine.[10]

Reliance upon the corporate opportunity theory also poses a problem in damages. Since the defendant, as controlling stockholder, would be permitted to demand a higher price for his controlling block than the corporation's stock was bringing on the market,[11] the actual value of defendant's stock would have to be first determined and then subtracted from the total amount which defendant received for his stock. The remainder would be the value of the corporate asset which the defendant "wrongfully" sold. The court avoided this difficult computation by placing the burden upon the defendant, as a fiduciary, of proving that his controlling block of stock was actually worth the sale price and, therefore, that none of his profit resulted from sale of a corporate asset.[12] Under the looting theory the question of damages is considerably simplified, viz., the actual damage to the corporation rather than the difficult-to-ascertain value of a doubtful corporate opportunity. However, the trial court in the present case, found no bad faith on the part of the defendant in the sale to the syndicate-purchaser and that these purchasers consisted, not of looters, but of businessmen who were seeking to take advantage of an opportunity to procure more steel at a time of tight supply. For this reason the looting approach ought to be excluded as the basis for the decision.

Although the language of the majority opinion is vague and it is difficult to determine upon what theory this opinion was decided, the verdict does not seem to be inequitable. There is evidence to the effect that the principal defendant

9. Individual recovery would seem improper in this case since it is the plaintiff's contention that the defendant breached his fiduciary duty to the corporation by selling an asset belonging to the corporation. If, then, it is the corporation that is injured by this breach of fiduciary duty, it is the corporation which should recover the damages.

10. See Commonwealth Title Ins. & Trust Co. v. Seltzer, 227 Pa. 410, 76 Atl. 77 (1910).

11. Cases cited note 2 supra.

12. The dissenting opinion and the trial court held that the price was not unreasonable.

included in the sale an agreement to turn over control of the board of directors,[13] and while a bona fide sale of stock may incidently pass corporate control, the corporation's offices may not be directly sold;[14] nor may they be included for a consideration in the sale of a controlling block of stock.[15] Adding weight to the court's decision were the facts that the defendant not only received a high price for his stock but also knew or should have known that as a result of the sale the purchaser would not pay the premium that the corporation had been receiving for its product. On these grounds the decision is justified.

Corporations — Triple Derivative Suit Allowed in Absence of Controlling Interest.—Plaintiff, a stockholder in *A* corporation, brought a derivative suit in the name of *X* corporation against its directors alleging misuse of corporate funds. At the time of the alleged injury the plaintiff owned a small percentage of the common stock of *A* corporation and *A* corporation held a controlling percentage of the stock of *X* corporation. The plaintiff held none of *X's* stock directly. Before the suit was instituted *A* transferred all of its stock in *X* to *B*. *A* received in exchange a minority interest in *B*, but *B* became the parent in control of both *A* and *X*. The plaintiff owned no stock in *B*. He alleged that all three of the corporations were controlled by one of the individual defendants. *X* corporation moved to dismiss the complaint on the ground that the plaintiff at the time he instituted the action was neither a stockholder in *X* nor in any corporation which was a stockholder in *X*. *Held,* motion dismissed. The plaintiff has sufficient interest to bring a triple derivative suit, the benefit of which would redound to him through the parent corporation and the subsidiary in which he owned stock. *Kaufman v. Wolfson,* 132 F. Supp. 733 (1955).

In a derivative action the plaintiff is a mere instigator. The cause of action is that of the corporation and the recovery must run in its favor.[1] Under the Federal Rules of Civil Procedure[2] and under the New York General Corporation Law,[3] in order to prosecute a simple derivative suit, the complainant must have

13. ". . ., I will deliver to you, at the time you exercise the option, [to purchase my shares of stock] the resignation of all of the members of the Board of Directors of the . . . Corpn." Perlman v. Feldmann, 129 F. Supp. 162, 172 (D. Conn. 1952).

14. Moulton v. Field, 179 Fed. 673 (7th Cir. 1910); Fennessy v. Ross, 5 App. Div. 342, 39 N.Y. Supp. 323 (1st Dep't, 1896).

15. Mount v. Seagrave Corp., 112 F. Supp. 330 (S.D. Ohio 1953); McClure v. Law, 161 N.Y. 78, 55 N.E. 388 (1899).

1. Holmes v. Camp, 180 App. Div. 409, 167 N.Y. Supp. 840 (1st Dep't 1917).

2. Fed. R. Civ. P. 23(b) which states: "In an action brought to enforce a secondary right on the part of one or more shareholders . . . the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law. . . . The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for this failure to obtain such action or the reasons for not making such effort."

3. N.Y. General Corporation Law § 61 which is patterned on and substantially the same as Rule 23(b), Fed. R. Civ. P., supra note 2.

been a stockholder in the corporation at the time of the alleged wrong. Case law has added another requirement, namely, that he be a stockholder in the corporation at the time he instituted suit.[4] The same requirements apply to multiple derivative suits, the setting for which generally permits a stockholder in a parent corporation to maintain an action for the benefit and in behalf of a subsidiary company.[5] In the multiple derivative suits, however, the decisions have suggested another requisite, viz., that the parent corporation, in which the complainant owns stock, have a *controlling* interest in the subsidiary.[6]

There is some question, however, concerning the ultimate basis for this control requirement and its position in multiple derivative suits. In *United States Lines Co. v. United States Lines Inc.*,[7] the Second Circuit said that "the justification for allowing a double derivative suit . . . is that both the original corporation that is said to have suffered the wrong and its shareholder corporation which had the right to bring a derivative suit were in the control of those charged with inflicting the corporate injury."[8] Significantly, the courts have refrained from designating this control as either a substantive or a formal element of the cause of action, nor have they specified the time at which it must exist (*i.e.*, whether at the time of the injury or at the time of the action or at both).

Various theories have been advanced to justify the multiple derivative suit. To ascertain the validity of each, and to find what part "control" plays in such an action, it is necessary to look at the possible intercorporate structures which could give rise to such suits. The first of these possible arrangements involves a situation where the parent wholly owns the subsidiary. This situation is worthy of note only as the historical basis of a theory once advanced as justification of the multiple derivative suit, namely, that multiple derivatives were allowed solely on the basis that if plaintiff were unable to sue, no one could, since the wrongdoers would not allow the corporations to sue; and the wrong would go unrequited.[9] This reasoning is obviously weak; for in simple derivative suits other stockholders may be able to enforce the corporate right. In fact this theory is waylaid by those courts which have allowed suit where the subsidiary was not wholly owned.[10]

A possible alternative would be that the parent corporation simply control the

4. MacVeagh v. Denver City Water Works, 107 Fed. 17 (8th Cir. 1901); Hanna v. Lyon, 179 N.Y. 107, 71 N.E. 772 (1904); Kavanaugh v. Commonwealth Trust Co., 181 N.Y. 121, 73 N.E. 562 (1905).

5. Anything which would "estop the corporation from suing on a cause of action will estop a stockholder from suing as a representative of the corporation on the same cause of action." 13 Fletcher, Cyclopedia of Corporations § 5869, at 220 (1943 rev. vol.).

6. Marcus v. Otis, 168 F. 2d 649 (2d Cir. 1948); United States Lines Co. v. United States Lines Inc., 96 F. 2d 148 (2d Cir. 1938); Bloom v. National United Ben. Savings and Loan Co., 81 Hun 120, 30 N.Y. Supp. 700 (1897); Breswick and Co. v. Harrison-Rye Realty Corp., 280 App. Div. 820, 114 N.Y.S. 2d 25 (2d Dep't 1952), reargument and appeal denied, 280 App. Div. 892, 115 N.Y.S. 2d 302, appeal dismissed, 304 N.Y. 840, 109 N.E. 2d 712 (1953).

7. 96 F. 2d 148 (2d Cir. 1938).

8. Id. at 151.

9. 64 Harv. L. Rev. 1313 (1951). The writer therein treats this theory as wholly without merit.

10. Saltzman v. Birrell, 78 F. Supp. 778 (S.D.N.Y. 1948).

subsidiary. For a clear analysis it is necessary here to project this arrangement at the time the wrong occurred and then at the time the action was instituted.

If control be required at the time of the wrong its justification could only lie in "piercing the corporate veil."[11] If a court would allow suit only where it could pierce the corporate veil then in actuality every derivative would be converted into a simple derivative suit. The requirement of stock ownership at the time of the wrong was set up to protect corporations from vexations lawsuits brought by those buying stock after the accomplishment of the questioned transaction.[12] Though mentioning only simple derivative actions, these statutory limitations have been brought by analogy into the field of multiple derivative suits.[13] Furthermore, a requirement of control can be carried to a mathematical absurdity. Thus, if a party owned a miniscule of stock in a corporation which controlled another, he could maintain a multiple derivative action; whereas a party owning forty-nine percent of a corporation which owned forty-nine percent of another corporation, assuming neither holding constituted control, could not sue to protect his interest.

The evil at which the statutory requirements aim is the buying of a cause of action.[14] If this be so can it be said that a plaintiff who at the time of the wrong owned one percent of *A* corporation which in turn at the same time owned one percent of *X*, the injured corporation, purchased his stock for the purpose of bringing suit? Obviously not; but plaintiff's stock ownership in *A* corporation gives him an interest, albeit indirect in *X* corporation, and this interest should be sufficent to maintain the suit.

Where there are thus only two corporations involved—*A*, the shareholder corporation, and *X*, the injured corporation, no one would deny even when no control existed that the shareholding company has a right to bring a derivative suit against the wrongdoer. If it did not and as a result the value of the holding in the injured corporation diminished, the stockholders of the shareholding corporation could call the latter's directors to account for the diminution of its assets, and might well obtain an order forcing them to bring the action.[15] To avoid a multiplicity of suits, the more practical view[16] would be to allow the parent's stockholders themselves to bring suits, twice derived for and in behalf of the injured corporation.

If this be accepted as the basis of the multiple derivative suit, the incident of controlling interest, as set forth in *United States Lines* and other cases, must be rejected as a substantive element of the action. The result in all these cases, and in the instant case would stand on a firm basis without resort to the individual's control of the interlocking corporations.

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11. Hirshhorn v. Mine Safety Appliances, 54 F. Supp. 588 (W.D. Pa. 1944) (dictum).

12. Northbridge Co-op, Section No. 1 v. 32nd Ave. Construction Corp., 207 Misc. 164, 136 N.Y.S. 2d 737 (Sup. Ct. 1955).

13. See note 5 supra.

14. See note 12 supra.

15. Koral v. Savory Inc., 276 N.Y. 215, 11 N.E. 2d 883 (1937).

16. This theory was suggested in Goldstein v. Groesbeck, 142 F. 2d 422 (2d Cir. 1944), in respect of multiple derivative suits and was explicitly set forth in Koral v. Savory Inc., supra note 15, as the basis of simple derivative actions.

It is also interesting to note that the present case could have been decided without abandoning the control requirement as of the time the alleged wrongs were committed. At that time *A* had control of *X*. At the time suit was instituted *A* did not have control of *X* but it did have a minority interest in *B* which in turn had an interest in and, in fact, control of *X*. The court failed to distinguish between the stockholding requirements for the two times involved. Is there any reason why control should be required as of the time suit was instituted? For the complainant to institute suit it should be sufficient that he have an interest in the controversy. Complainant's stock ownership in *A*, no matter how small, combined with *A's* stock ownership in *B* (no matter how small) and *B's* stock ownership in *X* (again, no matter how small) gives complainant a sufficient interest and a standing to sue. It is not for the court to measure the value of the various stockholdings. Most certainly a recovery would enhance *B's* holdings and proportionately that of *A* and complainant. Complainant is thus purged of any "imputation of being a mere impertinent and officious intermeddler."[17]

Thus, in line with this reasoning, even if the court retained the control requirement as of the time the alleged wrongs were committed it would still not have had to resort to the individual defendant's controlling interest in the various corporations. It could simply have resolved the case by dispensing with any requirement of control as of the time suit was started and by ruling that the fact that complainant's stock interests were twice-removed from *X* did not render complainant a stranger to the controversy.

Corporations—Hospitals Illegally Engaged in the Corporate Practice of Medicine.—Plaintiffs, a group of charitable Iowa hospitals, paid salaries to radiologists and pathologists and charged patients for the services of these specialists. The Iowa Attorney General ruled that this constituted the illegal corporate practice of medicine. Plaintiffs brought an action to nullify this ruling, claiming that they were not practicing medicine, but that if they were, their charitable purposes entitled them to do so. *Held*, plaintiffs' employment of specialists constituted the illegal corporate practice of medicine, notwithstanding their charitable organization. *Iowa Hospital Ass'n v. Iowa State Board of Medical Examiners*, Equity No. 63095, Iowa Dist. Ct., Polk County, Dec. 5, 1955.

Although a corporation, as a legal entity, is in many respects treated as a person, there are certain rights and privileges which it cannot enjoy.[1] It is generally agreed that a corporation may not practice the learned professions.[2]

17. Holmes v. Camp, 180 App. Div. at 412, 167 N.Y. Supp. at 842 (1st Dep't 1917).

1. The United States Supreme Court has ruled that the due process and equal protection clauses of the fourteenth amendment apply to corporations. Liggett Co. v. Baldridge, 278 U.S. 105 (1928). However, the privilege against self-incrimination under the fifth amendment may not be claimed on behalf of a corporation by its officers. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

2. People v. Pacific Health Corp., 12 Cal. 2d 156, 82 P. 2d 429 (1938); In re Cooperative Law Co., 198 N.Y. 479, 92 N.E. 15 (1910); 1 Fletcher, Cyclopedia of Corporations § 97 (1931).

Statutes that permit incorporation for "any lawful purpose" are construed not to authorize the corporate practice of the professions. "Any lawful purpose" means anything lawful for all individuals to engage in, and only certain qualified individuals may practice the profession.[3]

This prohibition against corporate activity in the professions has been based on two different theories. One is that the practice is a purely personal privilege which inures only to qualified, licensed individuals.[4] A corporation cannot obtain a license, since it cannot pass an examination; it ". . . has neither education, nor skill, nor ethics."[5] It is urged that the confidential relationship that exists between a physician and patient or attorney and client cannot really exist between a corporation and the individual. The second theory is that a profession has a special status which should not be subjected to the vigorous and often unethical competition of the business world.[6]

The question as to what constitutes the practice of medicine, seems well settled. " 'Any person shall be regarded as practicing medicine . . . who shall operate or profess to heal or prescribe for or otherwise treat any physical or mental ailment of another.' "[7] Thus, medicine embodies diagnosis, prognosis, and the determination or application of a remedy.[8] Medicine is, therefore, practiced not only by physicians and surgeons, but also by other specialists such as pathologists who determine the cause of disease or death, and radiologists who employ X-rays and radioactive substances in the diagnosis and cure of diseases.

A corporation may hire a physician to give medical service to its employees,[9] just as an attorney may be employed by the corporation to handle its legal affairs. When, however, the corporation hires a physician to serve the public, its right to do so is less certain. The question of whether or not the corporation itself thereby practices medicine would seem to hinge on whether the physician is to be considered a servant of the corporation or an independent contractor. If the physician is a servant, the corporation is practicing medicine since a corporation cannot operate except through its directors and servants.[10] Several courts have applied this reasoning and seem to fear that the loyalty which a physician or dentist owes to his patient will be superseded by his loyalty to the corporate employer.[11]

3. People v. United Medical Service, 362 Ill. 442, 200 N.E. 157 (1936); In re Cooperative Law Co., 198 N.Y. 479, 92 N.E. 15 (1910).

4. People v. United Medical Service, 362 Ill. 442, 200 N.E. 157 (1936).

5. State v. Bailey Dental Co., 211 Iowa 781, 785, 234 N.W. 260, 262 (1931).

6. ". . . [P]ractice of the learned professions by a profit corporation tends to the commercialization and debasement of those professions. . . ." Bartron v. Codington County, 68 S.D. 309, 329, 2 N.W. 2d 337, 346 (1942).

7. State Electro-Medical Institute v. State, 74 Neb. 40, 103 N.W. 1078, 1079 (1905) (quoting from Nebraska statute).

8. Underwood v. Scott, 43 Kan. 714, 23 Pac. 942 (1890).

9. See Mrachek v. Sunshine Biscuit, Inc., 308 N.Y. 116, 123 N.E. 2d 801 (1954).

10. Parker v. Board of Dental Examiners, 216 Cal. 285, 14 P. 2d 67 (1932); People v. Parker, Dentist, 85 Colo. 304, 275 Pac. 928 (1929).

11. People v. Pacific Health Corp., 12 Cal. 2d 156, 82 P. 2d 429 (1938); Dr. Allison, Dentist, Inc. v. Allison, 360 Ill. 638, 196 N.E. 799 (1935).

The better reasoned cases hold that the physician is an independent contractor, since the corporation normally exercises no power over the method by which he performs his duties.[12] There should be no objection to the practicing of medicine by qualified corporate employees so long as the officers of the corporation do not interfere with the professional activity of these physicians.[13] "Making contracts is not practicing medicine. Collecting the compensation therefore is not practicing medicine. . . . No professional qualifications are requisite for doing these things."[14] The independent contractor theory has also permitted corporations to hire dentists,[15] chiropodists,[16] and optometrists[17] to serve the public.

It is paradoxical for the majority view to rule that a corporation practices medicine through its employees,[18] and at the same time to apply the independent contractor theory and deny a recovery when someone sues on a cause of action based on the tort of one of these employees.[19] The minority view which applies the independent contractor theory in both situations seems more consistent.

An exception to the rule that a corporation may not practice medicine exists in some jurisdictions in the case of public and charitable hospitals,[20] which admit both paying and non-paying patients. Proprietary hospitals, which are profit-making corporations, offer but space and incidental services to patients who are sent there by their own physicians and may not engage in the practice of medicine.[21]

The instant case not only rejects the independent contractor theory, but also refuses to make an exception in the case of charitable hospitals. The court took nearly all of the arguments raised against the practice of medicine by a profit-making corporation and applied them also to non-profit organizations. A widespread adoption of the holding of this case would have great practical effect upon the organization and operation of public and charitable hospitals,[22]

12. Group Health Ass'n v. Moor, 24 F. Supp. 445 (D. D.C. 1938); Pearl v. West End Street Ry., 176 Mass. 177, 57 N.E. 339 (1900). The Moor case took the very sensible view that licensing statutes have been passed to protect the public from "quacks," rather than to prevent corporations from hiring physicians.

13. State Electro-Medical Institute v. State, 74 Neb. 40, 103 N.W. 1078 (1905).

14. Id. at 43, 103 N.W. at 1079 (1905).

15. State v. Brown, 37 Wash. 97, 79 Pac. 635 (1905).

16. People v. Dr. Scholl's Foot Comfort Shops, Inc., 277 N.Y. 151, 13 N.E. 2d 750 (1938).

17. Dvorine v. Castelberg Jewelry Corp., 170 Md. 661, 185 Atl. 562 (1936); State v. Kind Optical Co., 235 Wis. 498, 292 N.W. 283 (1940).

18. People v. John H. Woodbury Dermatological Institute, 192 N.Y. 454, 85 N.E. 697 (1908).

19. Schloendorff v. The Society of the New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914).

20. People v. John H. Woodbury Dermatological Institute, 192 N.Y. 454, 85 N.E. 697 (1908); Goldwater v. Citizens Casualty Co., 7 N.Y.S. 2d 242 (N.Y. City Munic. Ct. 1938).

21. Johnson v. Stumbo, 277 Ky. 301, 126 S.W. 2d 165 (1938); Goldwater v. Citizens Casualty Co., 7 N.Y.S. 2d 242 (N.Y. City Munic. Ct. 1938).

22. N.Y. Times, Nov. 29, 1955, p. 31, col. 8.

forcing them to operate in the same manner as proprietary hospitals. They would not be permitted to employ resident physicians, surgeons, radiologists, pathologists or other specialists. A further effect of the ruling would be to cripple the present system of interne training.

State police power may be validly and reasonably exercised to prevent profit-making corporations from practicing medicine, since the incentive to make money might tend to reduce the quality of the services offered. The same reasons are not present in the case of non-profit organizations.[23] The latter do not debase and commercialize the profession because they have no motive to compete with individuals or with profit-making organizations.[24] On the contrary, they free the physician from paper work permitting him to concentrate on the actual practice of medicine, and offer to the public more efficient and less expensive medical care than they could obtain from individual physicians.[25]

Medico-legal concepts should keep abreast of their social and economic counterparts; there is no valid reason why a corporation should not be permitted to practice medicine. Since the law already attributes to a corporation the intent to make contracts and the specific intent to commit torts and crimes,[26] why should it not attribute to them the skill and ethics of their licensed employees? There is no reason to presume beforehand that a corporation would abuse the privilege. If it did so, the state could not only revoke the license of any physician involved, but could also revoke the charter of the corporation. Thus the public might be better served, and none of its protection would be lost.

Corporations—Rival Factions Permitted to Defray Proxy Fight Expenditures from Corporate Treasury Where "Policy" Contest Involved.—Rival factions in a proxy contest were reimbursed from the corporate treasury for expenditures incurred in a fight for control of the corporation. Plaintiff stockholders brought a derivative suit against both defeated and elected directors for the amount of corporate reimbursements granted to them from the corporate treasury. The New York Supreme Court dismissed the complaint. The Appellate Division unanimously affirmed on the grounds that (1) plaintiff failed to specify or to prove what portion of the expenditure was unlawful and (2) that payment of the insurgents' expenses was ratified by a majority of the stockholders. On appeal, *held*, one judge concurring, three dissenting, affirmed. In a contest over policy, as compared to a purely personal power contest, corporate directors have a right to make reasonable and proper expenditures in order to defend their position and solicit support for their policies. Moreover stockholders have the right to reimburse successful insurgents for the reasonable

23. "The police power may be exerted . . . only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare." Liggett Co. v. Baldridge, 278 U.S. 105, 111-12 (1928).

24. Hansen, Laws Affecting Group Health Plans, 35 Iowa L. Rev. 209 (1950).

25. Ibid.

26. Wormser, Corporations and the Practice of Law, 5 Fordham L. Rev. 207 (1936).

and bona-fide expenses incurred by them in any such policy contest. *Rosenfeld v. Fairchild Engine & Airplane Corp.*, 309 N.Y. 168, 128 N.E. 2d 291 (1955).

Management may expend reasonable sums in order to give widespread notice to stockholders of questions affecting the welfare of the corporation.[1] The directors may send out blank proxies printed at the expense of the corporation and provide postage paid for by the corporation, even where the persons named are selected by the directors.[2] Such expenditures are incidental to management's duties and properly chargeable to the corporation[3] because they advise stockholders of questions affecting the latter's interests and are aimed at insuring a quorum at meetings.[4] There are expenditures, however, which go beyond this. In recent years we have had the arrival of the professional proxy solicitors and public relations advisors to proxy contestants, active campaigning by candidates throughout the country, newspaper and radio advertising, entertaining of stockholders, etc. To what extent the corporate treasury should bear such costs is still an unanswered question.[5]

In *Lawyers' Advertising Co. v. Consolidated Ry. Lighting & Refrigerating Co.*,[6] the New York Court of Appeals disallowed recovery for the cost of publishing newspaper notices in a proxy contest in which the faction in control sought, so the court said, to perpetuate themselves in office. The court found that such expenditures were not authorized by the board of directors, nor legitimately incident to a corporate meeting, nor necessary for stockholder protection, and therefore not properly chargeable to the corporation.[7] The decision

1. ". . . there is no impropriety in charging the latter [corporation] with any expenses within reasonable limits which were incurred in giving sufficient notice of a special meeting at which the stockholders would be called upon to decide these questions." Lawyers' Advertising Co. v. Consolidated Ry. Lighting & Refrigerating Co., 187 N.Y. 395, 399, 80 N.E. 199, 200 (1907).

2. 5 Fletcher, Cyclopedia Corporations § 2058.1 (1952); see also Ballantine, Corporations § 180 (1946).

3. ". . . the company may legitimately do and may defray out of its assets the reasonable expense of doing all such acts as are reasonably necessary for calling the meeting and obtaining the best expression of the corporators' views on the questions to be brought before it." Peel v. London & North Western Ry. Co., 1 Ch. 5, 19 (1907).

4. See, In re Zickl, 73 N.Y.S. 2d 181 (Sup. Ct. 1947); McGoldrick v. Segal, 124 N.Y.L.J., p. 461, col. 2 (Sup. Ct. Sept. 13, 1950), Note, 64 Harv. L. Rev. 668 (1951). See also, Appeal Printing Co. v. Segal Lock & Hardware Co., 128 N.Y.L.J., p. 1563, col. 3 (City Ct. Dec. 21, 1952); Howard v. Segal Lock & Hardware Co., 129 N.Y.L.J., p. 496, col. 6 (City Ct. Feb. 12, 1953); and Kadel v. Segal Lock & Hardware Co., 130 N.Y.L.J., p. 488, col. 4 (Sup. Ct. Sept. 20, 1953).

5. Comment, 49 Mich. L. Rev. 605, 608 (1951).

6. 187 N.Y. 395, 80 N.E. 199 (1907) (the expenditures disallowed involved a follow-up newspaper solicitation in reply to a circular issued in behalf of an officer attempting to depose the directors from their control). But cf. Rascover v. American Linseed Co., 135 Fed. 341 (2d Cir 1905) (directors' duty was to notify stockholders, therefore, the corporation was liable for expenditures incurred in notifying stockholders of a proposed scheme of consolidation).

7. "This practice of proxy solicitation by the board of directors is tolerated by the courts, at least until there is an active contest for control and so long as the expense to

limited management's right to reimbursement solely to expenses incurred in informing the stockholders that a meeting would be held and that certain corporate policy issues would be presented. It denied management the right to make expenditures out of the corporate treasury beyond mere notification of a proxy contest. Notwithstanding the *Lawyers' Advertising* case a lower court in New York recently exhibited a preference for the Delaware rule of *policy vs. personnel*.[8] This rule allows management to make expenditures in a proxy contest in which the controversy is concerned with a question of policy as distinguished from one in which directors seek solely to secure their reelection.[9]

In the instant case three of the four judges who voted to affirm contended that the language in *Lawyers' Advertising* was dictum and chose to follow the Delaware rule.[10] These three judges ruled that management may incur reasonable expenses in the solicitation of proxies in order to overcome stockholder apathy and to secure a quorum; in addition, where there is a contest over policy, management may in good faith expend such sums reasonably necessary for defense of its position; however, such expenditures will be disallowed when the contest is purely a fight for power; furthermore, in a policy contest the stockholders by majority vote may reimburse successful insurgents for reasonable expenditures incurred.[11]

The dissenting opinion in the present decision took a different view of *Lawyers' Advertising*, viz., that payment by a corporation of the expenses of proceedings by one faction in its contest with another for the control of the corporation is ultra vires and unlawful and that, consequently, the successful directors can not seek reimbursement from the corporate treasury. The dissent recognized management's duty to make reasonable expenditures to inform stockholders of corporate matters, but denied that directors could make expenditures

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the corporation is small." Rohrlich, Law and Practice in Corporate Control 47 (1933) (citing Lawyers' Advertising).

8. McGoldrick v. Segal, 124 N.Y.L.J., p. 461, col. 2 (Sup. Ct. Sept. 13, 1950).

9. Hall v. Trans-Lux Daylight Picture Screen Corp., 20 Del. Ch. 78, 171 Atl. 226 (1934); accord, Hand v. Missouri-Kansas Pipe Line Co., 54 F. Supp. 649 (D. Del. 1944); Empire Southern Gas Co. v. Gray, 29 Del. Ch. 95, 46 A. 2d 741 (1946); Steinberg v. Adams, 90 F. Supp. 604 (S.D. N.Y. 1950). For full discussion see Friedman, Expenses of Corporate Proxy Contests, 51 Colum. L. Rev. 951 (1951). Apparently the only case in the United States allowing the insurgents to recover their expenditures in a proxy contest is Steinberg v. Adams, 90 F. Supp. 604 (S.D. N.Y. 1950), Note, 36 Cornell L.Q. 558 (1951), Comment, 49 Mich. L. Rev. 605 (1951), Note, 61 Yale L.J. 229 (1952).

10. The concurring opinion was based solely on plaintiff's failure of proof in not urging liability as to specific expenditures.

11. In the instant case the management group spent $106,000 out of corporate funds while still in office in defense of their position in said contest. The insurgents won the election and elected a new board of directors which reimbursed the old board of directors $28,000 for the remaining expenses of their unsuccessful defense and the insurgents $127,000 for expenses incurred in the proxy contest. Are these reasonable expenditures? It is noted that in Cullom v. Simmonds, 285 App. Div. 1051, 139 N.Y.S. 2d 401 (2d Dep't 1955) which was subsequent to the instant case it was held that where attack is made upon the reasonableness of specific expenditures that alone would make the complaint sufficient.

beyond that since such would serve no corporate purpose. It obviously follows that the dissent would disallow reimbursement of insurgents' expenses in their entirety since insurgents have no duty to notify stockholders concerning corporate matters. The minority further pointed out that it was no answer to interpose stockholder ratification as a ground for allowing the insurgents to recover since ultra vires acts of a corporation cannot be ratified by a mere majority of the stockholders.[12]

The present case is novel in New York in permitting the insurgent group to reimburse itself for its expenses in a proxy contest;[13] no previous case either allowed or disallowed an insurgent group to recover for campaign expenses. If such reimbursement be ultra vires unless the expenses were incurred for the purpose of informing stockholders of corporate affairs and corporate policies,[14] it is difficult to see how the interjection of a policy issue can validate the reimbursement. Certainly no group of insurgents is charged with a duty of informing stockholders of corporate policies. On the other hand, the three judges who voted to follow the Delaware line of cases adopted a fine sounding but nevertheless deceptive guide.[15] Is not the *policy-personnel* test an illusory one? Is it possible to sever questions of policy from those of personnel?[16] May they not be fused by raising policy issues in any given election? A corporation's policy is so identified with its supervisory personnel that any substantial policy change generally necessitates a change in personnel; the election of a new board of directors is the means of obtaining a new policy. Contestants in a proxy battle never admit that they have no new program to offer. The criticism directed at management is not directed at personnel as such but at personnel's policies, programs or actions. In the instant case the policy issue involved a long term salary and pension contract extended to one of the board of directors. In the much-publicized Sparks-Withington proxy contest management was ousted on charges that it was inefficient and decadent, that officers and directors

12. Davis v. Congregation Beth Tephilas Israel, 40 App. Div. 424, 57 N.Y. Supp. 1015 (1st Dep't 1899); Schwab v. E.G. Potter Co., 129 App. Div. 36, 113 N.Y. Supp. 439 (1st Dep't 1908).

13. See Steinberg v. Adams, supra note 9.

14. It should be added that as was said in the lower court in the Rosenfeld case ". . . the stockholders were bombarded, first by one side, then by the other, with literature, the old board defending itself from the attacks of the Fairchild committee, and this committee in turn vigorously presenting its objections to the old board's policy through letters, circulars and postcards. . . . The expenses incurred by both sides in this contest was for printing, stationery, postage, attorneys' fees, public relations counsel, and for an agency which made it a business to solicit, on behalf of corporations proxies for their meetings." 116 N.Y.S. 2d 840, 844-45 (Sup. Ct. 1952).

15. Comment, 49 Mich. L. Rev. 605, 608 (1951). See also, Note, 36 Cornell L.Q. 558 (1951); Note, 64 Harv. L. Rev. 668 (1951); Note 61 Yale L.J. 229 (1952); Friedman, Expenses of Corporate Proxy Contests, 51 Colum. L. Rev. 951 (1951).

16. See Hall v. Trans-Lux Daylight Picture Screen Corp., 20 Del. Ch. 78, 85, 171 Atl. 226, 229 (1934). See also, McGoldrick v. Segal, 124 N.Y.L.J., p. 461, col. 2 (Sup. Ct. Sept. 13, 1950).

owned too little stock, and that they had too many outside interests.[17] Recent proxy fights indicate that policy issues can skillfully be raised to camouflage what is essentially a personnel dispute.[18]

The Court of Appeals has done little to clarify the New York law respecting corporate expenditures.[19] The rule advanced by the three judges who voted to affirm may well beget continuing controversy and prove difficult to administer. It is also unfortunate that the count divided itself into a 3-1-3 split. The division of opinion in the court itself leaves us without a binding precedent.[20]

Damages—Conditional Additur Permitted in Personal Injury Action. —Plaintiff, having obtained a $1,000 verdict in a personal injury action in the New York Supreme Court, moved for a new trial on the grounds of an inadequate verdict. The motion granted, defendant appealed to the Appellate Division. That court modified the trial court's holding by granting a new trial unless defendant stipulated to pay $2,500, the maximum amount which the jury could have awarded as a matter of law. Defendant agreed and the judgment was entered. On appeal plaintiff alleged that the Appellate Division's modification was unwarranted and a violation of plaintiff's right to trial by jury. *Held,* affirmed. The Appellate Division's application of the conditional additur is a statutory power which is neither contingent upon a trial judge's abuse of discretion nor violative of the constitutional right to trial by jury. *O'Connor v. Papertsian,* 309 N.Y. 465, 131 N.E. 2d 883 (1956).

Early English courts allowed judges to change a jury's award in certain

17. Emerson and Latcham, Further Insight Into More Effective Stockholder Participation: The Sparks-Withington Proxy Contest, 60 Yale L.J. 429, 432-33 (1951).

18. See, e.g., the recent Montgomery Ward and New York Central proxy contests. See also, Bollt v. Eastwood, (Cir. Ct. Cook Cty., Ill.), no. 55C 17993, complaint filed 12-6-55, a suit instituted in Illinois by a stockholder against the directors of Montgomery Ward to require corporate reimbursement of money granted to successful management group and to enjoin directors from reimbursing the insurgent group. Plaintiff argues that there should be no reimbursement because there were no corporate policy issues involved in the proxy contest since management adopted all of the insurgents' policies; therefore, the contest was purely a personal power one for corporate control. Plaintiff also itemizes the expenditures that were unreasonable.

19. Steinberg v. Adams, 90 F. Supp. 604, 607 (S.D. N.Y. 1950) the court while discussing the Lawyers' Advertising Co. case acknowledged that the Delaware law contained more latitude than in New York by asserting that "the instant case is concerned with a Delaware corporation and the law of that state determines the scope of the corporation's powers. Both parties, as I have indicated, agree that this case is governed by a less stringent rule."

20. Since the concurring opinion apparently interpreted the Lawyer's Advertising Co. case as holding that payment by a corporation of the expense of proceedings by one faction in its contest with another for the control of the corporation is ultra vires and unlawful, the weight of the decision's authority is questionable.

limited cases.[1] This system was abandoned[2] and the English courts progressed from granting new trials where the jury's bias resulted in an excessive verdict,[3] to granting new trials solely on the grounds of an excessive verdict.[4] This was followed by the court's power to set aside an inadequate verdict and grant a new trial.[5] A method of avoiding further litigation by granting a new trial unless plaintiff remitted a portion of his excessive verdict was then established.[6] The granting of a new trial unless defendant agreed to increase an inadequate verdict was also given approval by way of dicta.[7] Ultimately, however, the House of Lords declared the courts to be without the authority to change conditionally by additur or remittitur a verdict without the consent of both parties.[8]

In the United States the conditional remittitur was first applied in 1822[9] and is now generally accepted by federal[10] and state[11] courts. The conditional additur, first allowed in 1866, has been considered by only a minority of jurisdictions with conflicting results.[12]

In *Dimick v. Schiedt*[13] the United States Supreme Court held that the federal courts, bound by the seventh amendment to the Constitution,[14] were restricted to the common law existing at the time of the adoption of the Constitution. Finding no precedents in common law at that time for a conditional additur, the federal courts were precluded from its use. While this theory has been uniformly criticized in academic circles[15] it has been consistently upheld.[16] The

1. Y.B. 8 Hen. IV, f. 23, pl. 9 (1407) mayhem; Y.B. 14 Hen. IV, f. 19, pl. 22 (1413) debt; McCormick, Damages § 6 (1935).

2. McCormick, Damages § 6 (1935).

3. Wood v. Gunston, Sty. 466, 82 Eng. Rep. 867 (K.B. 1655).

4. Wilford v. Berkeley, 1 Burr. 609, 97 Eng. Rep. 472 (K.B. 1758).

5. See Comment, 40 Calif. L. Rev. 276 (1952).

6. Belt v. Lawes, 12 Q.B.D. 356 (C.A.) (1884).

7. Id. at 358. See also Armytage v. Haley, 4 Q.B. 917, 114 Eng. Rep. 1143 (1843) in which an analogous device was used. ". . . plaintiff, obtained a rule to shew cause why a new trial should not be had, unless defendant would consent to the damages being increased to 10£ 5s. 6d."

8. Watt v. Watt, [1905] A.C. 115.

9. Blunt v. Little, 3 Fed. Cas. 760, No. 1578 (C.C. Mass. 1822).

10. Arkansas Cattle Co. v. Mann, 130 U.S. 69 (1889); Bucher v. Krause, 200 F. 2d 576 (7th Cir. 1952).

11. See cases collected in Annot., 11 A.L.R. 2d 1217 (1950).

12. See note 5 supra.

13. 293 U.S. 474 (1935).

14. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

15. 4 Fordham L. Rev. 344 (1935); 34 Colum. L. Rev. 1551 (1934); 48 Harv. L. Rev. 333 (1934); 33 Mich. L. Rev. 138 (1934).

16. See Miller v. Tennessee Gas Transmission Co., 220 F. 2d 434 (5th Cir. 1955); Southern Pac. Co. v. Guthrie, 186 F. 2d 926 (9th Cir. 1951); Reisberg v. Walters, 111 F. 2d 595 (6th Cir. 1940).

seventh amendment, however, is not binding upon the states[17] nor has it been incorporated into the "due process clause" of the fourteenth amendment,[18] with the result that state constitutions govern the validity of the additur within their respective jurisdictions.[19] A majority of the states that have considered the validity of the additur approve it,[20] some states allowing it whether the damages are liquidated or unliquidated, while others permit it only where the damages are liquidated.[21]

In New York a trial judge has the statutory authority to set aside an excessive or inadequate verdict and order a new trial.[22] This power is limited by the fact that the assessment of damages is ordinarily peculiarly within the province of the jury, at least where the damages are not susceptible to mathematical compilation.[23] It is not, therefore, sufficient that the trial judge merely disagree with the verdict.[24] The verdict must be unconscionable.[25] As a corollary of this power New York has allowed the conditional remittitur in both contract[26] and personal injury actions.[27] A trial judge may not, however, reduce the verdict to nominal damages,[28] dismiss a complaint for failure to remit,[29] or adjust the verdict against the will of both parties.[30] Nor where error in the trial gives the defendant an absolute right to a new trial, may the court attempt to remedy the error by ordering a reduction in the verdict.[31]

The New York appellate courts have either taken advantage of the conditional additur[32] or indicated approval.[33] However, if plaintiff has remitted a part of his verdict at the trial level and defendant appeals the verdict as still being excessive, the appellate court may increase the verdict appealed from but not so as to exceed the original verdict.[34] While it has been the practice of lower

17. Walker v. Sauvinet, 92 U.S. 90 (1876).

18. Hawkins v. Bleakly, 243 U.S. 210 (1917). See also Bute v. Illinois, 333 U.S. 640 (1948); Palko v. Connecticut, 302 U.S. 319 (1937).

19. Dorsey v. Barba, 38 Cal. App. 2d 350, 240 P.2d 604 (1952).

20. McCormick, Damages § 19 at 82 (1935).

21. See cases collected in 66 C. J. S. New Trial § 207(g) (1950).

22. N.Y. Civ. Prac. Act § 549.

23. Quillen v. Board of Education, 203 Misc. 320, 115 N.Y.S. 2d 122 (Sup. Ct. 1952).

24. Ibid.

25. Cesario v. Demetria Realty Corp., 250 App. Div. 272, 294 N.Y. Supp. 26 (1st Dep't 1937).

26. Herrman v. United States Trust Co., 221 N.Y. 143, 116 N.E. 865 (1917).

27. Williams v. Smith, 280 App. Div. 1033, 117 N.Y.S. 2d 101 (4th Dep't 1952).

28. Howard v. Bank of Metropolis, 115 App. Div. 326, 100 N.Y. Supp. 1003 (1st Dep't 1906).

29. Rosenthal v. Bellamy Trading, Inc., 63 N.Y.S. 2d 544 (Sup. Ct. 1946).

30. See note 28 supra.

31. Bishop v. New York Times Co., 233 N.Y. 446, 135 N.E. 845 (1922).

32. Iannotta v. Integrity Holding Corp., 269 App. Div. 1044, 58 N.Y.S. 2d 636 (2d Dep't 1945); Gablas v. Jones, 262 App. Div. 794, 27 N.Y.S. 2d 314 (3d Dep't 1941).

33. Kligman v. City of New York, 281 App. Div. 93, 117 N.Y.S. 2d 436 (1st Dep't 1952).

34. N.Y. Civ. Prac. Act § 584-a.

courts to apply the conditional additur[35] the consent of both parties was sometimes required.[36]

The instant case held that a trial judge or the Appellate Division may use the conditional additur in a personal injury action with defendant's consent alone. Furthermore, unlike some jurisdictions,[37] the appellate court's power is not contingent upon a trial judge's abuse of discretion.[38]

Having previously held that the right to trial by jury as granted by the Constitution of New York[39] is not limited by common law precedents existing at the time of its adoption,[40] the court is spared the necessity of rebutting or distinguishing the *Dimick v. Schiedt*[41] opinion in that respect. The *Dimick* case, unlike the instant case, expressly disallows any argument by analogy from the validity of the remittitur to the validity of the additur, arguing that the former is still within the jury's award while the latter is a mere addition by the court. This argument would seem to be questionable in so far as in either case the court substitutes its verdict for that of the jury.

In any event it might be argued that the instant case does not in fact involve a constitutional problem. Having the power to declare a monetary limit beyond which a jury may not find an award for damages and in setting an additur at that limit, the court would not seem to be encroaching upon the province of the jury.

A logical progression of the court's reasoning would clearly indicate that a conditional additur should be allowed in an appropriate contract action. Further, since a remittitur need only be set at an adequate sum,[42] it would appear that in either a contract or personal injury action, an additur might validly be set at an amount which, while more than an inadequate verdict, is less than the maximum amount a jury could award as a matter of law.

Domestic Relations—Full Faith and Credit Accorded Amended Nevada Divorce Decree.—Plaintiff and defendant went to Nevada where defendant obtained a default decree of divorce from his first wife. On the same day plaintiff and defendant were married. Two years later defendant and his first wife entered into a written agreement whereby she agreed to file a notice of appearance in the original divorce action. The appearance was filed and a decree issued in April, 1954, amending, nunc pro tunc, the decree of June, 1952. In September, 1954 the second wife began this action for an annulment on the

35. See note 23 supra.

36. Carrosseaux v. City of New York, 127 N.Y.S. 2d 761 (Sup. Ct. 1954).

37. McCann v. Omaha & Council Bluffs Street Ry., 117 Neb. 786, 222 N.W. 633 (1929).

38. Hogan v. Franken, 221 App. Div. 164, 223 N.Y. Supp. 1 (3d Dep't 1927).

39. "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever. . . ." N.Y. Const. art. I, § 2.

40. Middleton v. Whitridge, 213 N.Y. 499, 108 N.E. 192 (1915).

41. See note 13 supra.

42. Dembitz v. Orange County Traction Co., 147 App. Div. 588, 132 N.Y. Supp. 593 (2d Dep't 1911).

ground that defendant's first marriage had never been legally dissolved or, in the alternative, to obtain a separation on the ground of defendant's cruel and inhuman treatment. In denying plaintiff's right to attack the original decree, the court *held* that, since the nunc pro tunc appearance was permitted by the Nevada Rules of Civil Procedure, the full faith and credit clause of the United States Constitution requires recognition of the amended decree. *Chusid v. Chusid,* 207 Misc. 1039, 142 N.Y.S. 2d 846 (Sup. Ct. 1955).

The Supreme Court of the United States has held that a collateral attack on a foreign *ex parte*[1] divorce decree, based upon a finding that neither spouse was domiciled in that state at the time the decree was granted, is not a violation of the full faith and credit clause of the Constitution.[2] The right to make a collateral attack however, has been denied to a defendant who has appeared and participated in the divorce proceedings and who would not be permitted to attack the decree in the state in which it was rendered.[3] A third person's right of attack upon a judgment, binding on the parties themselves under the doctrine of res judicata, has been held to depend on the laws of the granting state.[4]

In the principal case, the court acknowledged the possibility of a jurisdictional defect in the original divorce proceedings but precluded any collateral attack because of a Nevada statute permitting default decrees to be amended nunc pro tunc by a subsequent appearance of the party in default.[5] Conceding that the defendant's second marriage was vulnerable because at the time it was contracted he was not duly divorced from his first wife, the court nevertheless decided that the amended decree had cured this defect and had rendered the marriage invulnerable. The effect which a Nevada court would say the statute had upon plaintiff's rights was not mentioned.

The Nevada statute expressly states that an appearance entered nunc pro tunc shall have the same effect as if it had been entered at the proper time and that the decree shall be amended only to the extent of showing such appearance. An immediate effect of such an appearance might be to bind the party so appearing by res judicata, but the court in the principal case denied a *third person* the right to make a collateral attack. Assuming that the parties to the divorce are bound, was this a proper determination of the plaintiff's status according to the laws of Nevada?

1. "Ex parte," as used in the context, has reference to a divorce action in which the court did not have personal jurisdiction over the defendant.

2. Williams v. North Carolina, II, 325 U.S. 226 (1945).

3. Sherrer v. Sherrer, 334 U.S. 343 (1948).

4. Johnson v. Muelberger, 340 U.S. 581 (1951).

5. Nevada Rules of Civil Procedure, Rule 60(d). "Default Judgments: Modification Nunc pro Tunc. Whenever a default judgment or decree has been entered, the party or parties in default therein may at any time thereafter, . . . enter general appearance in the action, and the general appearance so entered shall have the same force and effect as if entered at the proper time prior to the rendition of the judgment or decree. On such appearance being entered the court may make and enter a modified judgment or decree to the extent only of showing such general appearance . . . and it shall be entered nunc pro tunc as of the date of the original judgment or decree . . . ."

The right of a third party to attack a judgment has heretofore been litigated in several jurisdictions. In *Johnson v. Muelberger*[6] the United States Supreme Court noted that Florida will allow impeachment only by those strangers who, if the judgment were given full credit and effect, would be prejudiced in regard to some pre-existing right[7] and accordingly sister states are bound by full faith and credit. Other jurisdictions, including California,[8] Massachusetts[9] and South Carolina[10] have adopted the same rule. Nevada Reports however, give little indication as to whether that state would follow suit. *In re Veltri's Estate*[11] presented a New York court with the problem of an attempted third party collateral attack on a Nevada divorce decree. In the *Veltri* case petitioners sought to recover letters of administration issued to decedent's second wife by showing that her Nevada divorce from her first husband was invalid and that she was not therefore the decedent's surviving spouse. Because the divorce in question had been obtained in an *ex parte* action, the court, without recourse to the laws of Nevada, permitted the petitioners to attack the decree. The doctrine of *Johnson v. Muelberger* was limited to true adversary proceedings and was held inapplicable to situations where the court lacked personal jurisdiction of both parties. To augment its decision, the court expressed a belief that Nevada too, would permit the attack if presented with the same problem.[12] Although there was no controlling authority on the point the influence of California case law on Nevada law was deemed sufficient to dictate this result.

Applying the distinction set forth in the *Veltri* case, into which category does the present case fall? Is it to be considered an *ex parte* proceeding or one in which both parties submitted to the jurisdiction of the rendering court? If the former, the plaintiff's right of attack is established by the *Veltri* case; if the latter, her status must be determined according to the laws of Nevada. This second alternative again presents a problem without precedent. California has demanded that a third party be prejudiced in regard to a pre-existing right before being permitted to attack a divorce decree. If Nevada should once more follow California's lead,[13] the present plaintiff could not attack the decree since she had no rights existing prior to its rendition which she could protect by showing its invalidity. A conclusive answer to the problem awaits determination by the Nevada Supreme Court.

6. 340 U.S. 581 (1951).

7. Id. at 588, citing 1 Freeman on Judgments § 319 (5th ed. 1925).

8. Mumma v. Mumma, 86, Cal. App. 2d 133, 194 P. 2d 24 (1948).

9. Old Colony Trust Co. v. Porter, 324 Mass. 581, 88 N.E. 2d 135 (1949).

10. Ex parte Nimmer, 212 S.C. 311, 47 S.E. 2d 716 (1948).

11. 202 Misc. 401, 113 N.Y.S. 2d 146 (Surr. Ct. 1952).

12. In Sutton v. Leib, 342 U.S. 402 (1952), the concurring opinion of Mr. Justice Frankfurter recognized the inherent problem that any conjectural attempt to determine the law of another state could readily be supplanted by an official determination by that state to the contrary.

13. There is some support for this contention to be found in Zeig v. Zeig, 65 Nev. 464, 198 P. 2d 724, 730 (1948), where the broad principal is stated that: "It is elementary under our system of legal procedure, that everyone who may be materially affected by the action or a court in a legal proceeding is entitled to be heard . . . ."

Appearances entered nunc pro tunc in divorce actions are by no means novel. In 1931 Nevada enacted a similar statute,[14] and New York was called on to determine its effect on a second marriage.[15] The New York court held that since the original decree was invalid because the court lacked jurisdiction, a subsequent void marriage could not be validated by the amended decree. Prior to the decision in *Sherrer v. Sherrer*,[16] New York had generally refused to recognize a nunc pro tunc appearance as curative of a jurisdictional defect in a foreign divorce proceeding[17] and an attempt to do it in New York was declared to be against public policy.[18] In treating orders nunc pro tunc, Nevada has held that parties by their mutual consent, cannot give the court jurisdiction to do something which it could not have done originally.[19] In Missouri, a nunc pro tunc order has been declared incapable of giving life to a void judgment.[20] Neither the policy of New York nor of Nevada would seem to justify the effect given the subsequent appearance in the principal case.

While the requirement of domicile has been the target of much criticism,[21] it is still the foundation of jurisdiction in a divorce action.[22] To prevent collateral inquiry into this vital jurisdictional fact merely because the defendant has made a nunc pro tunc appearance would permit a waiver of jurisdiction by the parties, a practice condemned by the Nevada Supreme Court in 1949.[23] To allow a waiver by statute would contradict a well reasoned decision by the United States Circuit Court of Appeals in *Alton v. Alton*,[24] declaring invalid any statute making divorce a transitory action. Whether the court was correct or not in denying the plaintiff's right to attack her husband's divorce from his first wife, the reasoning if followed, would permit a perpetration of fraud by the parties to a divorce; for if the state, too, is to be bound by the amended decree, then the parties themselves can provide a collusive avenue of escape from prosecution for bigamy.

Thus, the decision of the principal case indicates that the plaintiff who at one time would have been permitted to impeach the judgment, is now to be denied that right because the amended decree is entitled to full faith and credit. It is difficult to see how a judgment, quite probably void in its inception, can,

14. Stat. Nev. 1931 c. 156.

15. Hinderman v. Hinderman, 245 App. Div. 246, 280 N.Y. Supp. 499 (2d Dep't 1935).

16. 334 U.S. 343 (1948).

17. In re Lindgren's Estate, 293 N.Y. 18, 55 N.E. 2d 849 (1944).

18. Oberlander v. Oberlander, 179 Misc. 459, 39 N.Y.S. 2d 139 (Dom. Rel. Ct. 1943).

19. Finley v. Finley, 65 Nev. 113, 189 P. 2d 334, modified in rehearing, 65 Nev. 122, 196 P. 2d 766 (1948).

20. State v. Pemberton, 235 Mo. App. 1128, 151 S.W. 2d 111 (1941).

21. Dissenting opinions in Granville-Smith v. Granville-Smith, 349 U.S. 1 (1955); Alton v. Alton, 207 F. 2d 667 (3d Cir. 1953), 23 Fordham L. Rev. 206 (1954).

22. Bell v. Bell, 181 U.S. 175 (1901).

23. Wilson v. Wilson, 66 Nev. 405, 212 P.2d 1066 (1949).

24. 207 F. 2d 667 (3d Cir. 1953), 23 Fordham L. Rev. 206 (1954). On certiorari to the Supreme Court the point of the case was held to be moot since, subsequent to the decision by the U.S. Court of Appeals, the parties had obtained a valid decree of divorce in Conn. 347 U.S. 610 (1954).

by a subsequent act of the parties, be validated even to the extent of denying certain strangers the right to attack it collaterally. The constitutionality of a statute which would permit this result is questionable and was the proper issue to be determined by the court.

Evidence — Federal Agent Enjoined From Testifying in State Criminal Action Where Evidence Was Obtained by Invalid Federal Process.—An indictment brought in a Federal District Court against petitioner for unlawful acquisition of marihuana was based upon evidence obtained by a federal agent through an improperly issued federal warrant. Petitioner made a motion to suppress the evidence which the District Court granted. On motion of the government, the indictment was dismissed. Subsequently, the federal agent swore to a complaint before a New Mexico judge who issued a warrant for petitioner's arrest for unlawful possession of marihuana in violation of New Mexico law. The Federal District Court denied petitioner's motion to enjoin the federal agent from testifying in the New Mexico action and to direct him to reacquire and dispose of the evidence. The United States Circuit Court of Appeals affirmed the denial. On appeal, *held,* four justices dissenting, reversed. Since the Federal Rules of Criminal Procedure prescribe the standards for federal law enforcement, over which the Supreme Court has supervisory powers, the federal courts have power to enjoin a federal agent from using evidence obtained in violation of those rules in a state criminal prosecution. *Rea v. United States,* 350 U.S. 214 (1956).

Prior to the Supreme Court's decision in *Boyd v. United States,*[1] evidence obtained illegally, if relevant, was admissible in both federal and state courts. The illegality involved in obtaining the evidence was considered a collateral issue and the only remedy available to one convicted on such evidence was against the officer responsible for the illegal seizure.[2] In the *Boyd* case it was held that under the fourth amendment[3] such evidence could be excluded in the federal courts. Although *Adams v. New York*[4] seemed virtually to obviate the rule of the *Boyd* case, the doctrine was reaffirmed and became firmly established by the Court's decision in *Weeks v. United States,*[5] wherein it was held that upon seasonable motion for its return, illegally acquired evidence may not be retained by the federal authorities and a conviction based upon such evidence must be reversed. Though the rationale involved in excluding the evidence was not without severe criticism,[6] the *Weeks* case has been consistently upheld by

1. 116 U.S. 616 (1886).

2. 8 Wigmore, Evidence § 2183 (3d ed. 1940).

3. U.S. Const. amend. IV.

4. 192 U.S. 585 (1904). The Court there drew a factual distinction taking the case before it out of the Boyd rule in that a valid warrant was issued to conduct a search for gambling equipment and incidental to this certain private papers of defendant were found. The Court said these papers could be admitted without negating the Boyd rule. However, the distinction is difficult to reconcile with the reasoning of the Boyd case.

5. 232 U.S. 383 (1914).

6. 8 Wigmore, Evidence § 2184, at 40 (3d ed. 1940); Plumb, Illegal Enforcement of the Law, 24 Cornell L.Q. 337, 354 (1938).

the federal courts[7] and is now embodied in the Federal Rules of Criminal Procedure.[8] The case has been instrumental in causing several of the states to follow the rule it established.[9] Nevertheless, most states have rejected the rule and have continued to admit relevant evidence obtained by illegal search and seizure.[10]

Noting the rejection of the *Weeks* doctrine in many of the states, the Court held in *Wolf v. Colorado*,[11] that due process of law as required by the fourteenth amendment[12] is not violated if conviction is had in a state court for a state offense upon evidence illegally obtained. The Court there noted with approval the prior decision in *Palko v. Connecticut*,[13] which held that the concept of "ordered liberty"[14] does not require that the fourteenth amendment protect against state action which would be violative of the fourth amendment if done by the federal government. The Court expressly indicated in the *Wolf* case that even though exclusion of evidence is an effective means of deterring unreasonable searches, it would not question a state's reliance upon other effective methods of accomplishing the same result.[15] Hence it is apparent that in the absence of coercion, the federal courts will not disturb a conviction of a state court on grounds of due process where the evidence has been obtained through illegal search and seizure.[16]

In the principal case, rejecting the applicability to the problem of constitutional considerations, the Court based its holding upon its supervisory powers over federal law enforcement agencies, referring to *McNabb v. United States*.[17] In that case, having expressly eliminated constitutional considerations, the Court confined itself to the formulation of a federal rule of evidence to be observed in the federal courts. By way of dicta, the Court further stated that review by it of state action regarding the administration of criminal justice demands appropriate respect for the judgment of a state in so basic an exercise of its jurisdiction.[18]

7. Agnello v. United States, 269 U.S. 20 (1925); Amos v. United States, 255 U.S. 313 (1921); Gouled v. United States, 255 U.S. 298 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

8. Fed. R. Crim. P. 41(e).

9. See appendix to Court's opinion in Wolf v. Colorado, 338 U.S. 25 (1949).

10. Ibid; see also opinion of Judge Cardozo in People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926).

11. 338 U.S. 25 (1949).

12. U.S. Const. amend. XIV.

13. 302 U.S. 319 (1937).

14. Id. at 325.

15. 338 U.S. 25, 31 (1949).

16. Rochin v. California, 342 U.S. 165 (1952), where there was the element of coercion since police officers assaulted the defendant. This the Court indicated was itself violative of the due process clause of the fourteenth amendment. See also Dawson, The Outstanding Decisions Of The United States Supreme Court In 1954, 24 Fordham L. Rev. 187, 196 (1955).

17. 318 U.S. 332 (1943) (Petitioners' admissions, obtained by constant and lengthy questioning before being brought before a committing magistrate, were improperly admitted in evidence against them).

18. Id. at 340.

In the instant case, is it logical to ignore the constitutional question and yet extend a federal rule of evidence so as to bar evidence which is the very foundation of a state criminal proceeding? It is difficult to comprehend how this can be done and it is certainly without precedent.[19]

Because the crime charged in the principal case violated a provision of the Internal Revenue Code,[20] the evidence seized was contraband and was therefore both non-repleviable and subject only to the orders and decrees of the courts of the United States.[21] This fact was apparently considered by the Court in its decision to grant the injunctive relief sought. However, it is well established that a federal court will not exercise its equity powers to enjoin a state criminal proceeding unless irreparable harm would result.[22] Accordingly, in *Stefannelli v. Minard*[23] the Court refused to enjoin the use of evidence in state criminal proceedings claimed to have been obtained by an unlawful search and seizure by state police. The decision was based upon the power of courts of equity to exercise discretion and expressed the Court's reluctance to enjoin criminal proceedings. Though the *Stefannelli* case may be factually distinguished from the principal case since the federal agent here acted upon federal process, the distinction seems tenuous in light of the precarious balance to be maintained between state and federal interests. Indeed the present injunction just as effectively terminates New Mexico's criminal prosecution as would enjoining a state official.

In view of the decisions of the Court which formulated the federal exclusionary rule regarding illegally obtained evidence, it appears that such exclusion is based upon a judicially propounded rule of evidence. This being so, it is difficult to perceive the propriety of invoking a federal statute regarding contraband in such a manner as to preclude a state criminal prosecution, thereby enforcing in reality, a federal rule of evidence upon a state court. It is submitted that the Court in the instant case should have either refused the injunctive relief sought or faced the constitutional questions considered in the *Wolf* case.

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19. The dissent in the principal case points out that the McNabb rule has not been extended to state criminal proceedings, citing Stein v. New York, 346 U.S. 156 (1953); Gallegos v. Nebraska, 342 U.S. 55 (1951).

20. 26 U.S.C.A. § 2593(a).

21. 28 U.S.C.A. § 2463.

22. Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943), where the Court said: "Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent injury which is clear and imminent. . . ."

23. 342 U.S. 117 (1951).

Insurance—Appraisal Agreement in Standard Fire Insurance Policy not Subject to Arbitration.—Petitioner was insured by several insurance companies. A fire occurred causing considerable damage to the insured's property. Each of the several fire insurance policies contained a provision for appraisal in the event of loss in the form required by section 168 of the New York Insurance Law. The insurance companies refused to consent to an appraisal. Thereupon the insured initiated an action to compel the insurers' compliance with the policies' appraisal provisions, pursuant to section 1450 of the New York Civil Practice Act, governing the enforcement of a contract or submission for arbitration. The New York Supreme Court, Special Term, granted an order directing the insurers to proceed to arbitration and appraisal; the Appellate Division reversed the order and dismissed the petition. Upon appeal, *held*, affirmed. The provisions for appraisals and valuations did not constitute enforceable agreements to arbitrate controversies in accordance with section 1448 of the Civil Practice Act. *In the Matter of Delmar Box Co.*, 309 N.Y. 60, 127 N.E. 2d 808 (1955).

The appraisal clause in a standard fire insurance policy[1] was adopted to offer a prompt and inexpensive method of adjusting disputes between the parties regarding values and extent of damage. Traditionally the courts have distinguished between an arbitration and an appraisal proceeding. Arbitration is a formal substitute for the judgment of a court wherein legal rules of evidence are applicable.[2] In most jurisdictions it is regulated by statute and involves disposition of the entire controversy. Conversely, an appraisal procedure is an informal inquiry to determine the amount of loss, and the strict rules governing arbitration are not applicable.[3]

In numerous instances the terms appraisal and arbitration have been used interchangeably because of their analogous characteristics.[4] Where the rules governing arbitrations are applied to proceedings of appraisal for determining the amount of loss under insurance policies, it is immaterial that the persons who are to fix the amount of the loss are called appraisers, referees, arbitrators, or otherwise.[5] Whether a provision in a fire insurance policy be designated an appraisal or an arbitration clause, the ultimate purpose of that agreement is to settle differences or disputes that may arise between the insured and the insurer without resort to the courts.[6]

Enacted in 1920, section 1448 of the New York Civil Practice Act in sub-

1. "*Appraisal.* In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected. . . . The appraisers shall then appraise the loss . . . and, failing to agree, shall submit their differences, only, to the umpire. . . ." N.Y. Insurance Law § 168(6).

2. 3 Richards, Insurance § 549 (1952).

3. 7 Couch, Cyclopedia of Insurance Law § 1604 (1930).

4. See note 2 supra.

5. Hanley v. Aetna Ins. Co., 215 Mass. 425, 102 N.E. 641 (1913); American Cent. Ins. Co., v. District Ct., 125 Minn. 374, 375, 147 N.W. 242, 243 (1914).

6. See note 2 supra.

stance authorizes persons to submit their controversies to arbitration.[7] Four years later, the Court of Appeals in *Matter of Fletcher*[8] held that a distinction existed, under the language of the arbitration law, between an appraisal and arbitration. The court reasoned that the statute did not pertain to matters incidental to a contract submitted to arbitration. By analogy, an appraisal clause which is incidental to a fire insurance policy would not constitute an arbitration clause. In 1941, the Association of the Bar of the City of New York considered the desirability of amending the arbitration law so as to avoid the ruling in the *Fletcher* case and cases which followed it.[9] Such an amendment[10] was recommended and later adopted by the legislature.[11] It was intended that the amendment permit other controversies incidental and related to the main issue to come within the purview of arbitration so long as the main issue itself was arbitrable under the statute.[12]

In *Matter of Fitzgerald*,[13] the Appellate Division, Third Department, seemingly went beyond this legislative intendment. The court there held that the amendment sufficiently broadened the scope of the arbitration law, to encompass agreements for appraisal under a fire insurance policy *independent* of any agreement to arbitrate. The following year, however, the Court of Appeals in *Syracuse Savings Bank v. Yorkshire Ins. Co.*[14] in dictum refused

7. "Except as otherwise prescribed in this section, two or more persons may submit to the arbitration of one or more arbitrators any controversy existing between them at the time of the submission, which may be the subject of an action, or they may contract to settle by arbitration a controversy thereafter arising between them and such submission or contract shall be valid, enforceable and irrevocable . . . ." N.Y. Civ. Prac. Act § 1448. "The making of a contract or submission for arbitration . . . . The court, . . . shall hear the parties and upon being satisfied . . . shall make an order directing the parties to proceed to arbitration in accordance with the terms of the contract or submission." N.Y. Civ. Prac. Act § 1450.

8. 237 N.Y. 440, 143 N.E. 248 (1924).

9. Association of the Bar of the City of New York, Annual Report of the Special Committee on Arbitration 315 (1940).

10. Id. at 415 (1941) provides: "Such submission or contract may include questions arising out of valuations, appraisals or other controversies which may be collateral, incidental, precedent, or subsequent to any issue between the parties."

11. Id. at 337. Report of the Special Committee on Arbitration: "The proposed bill was approved at a meeting of the association. Thereafter, the bill was introduced in the Assembly, and the Senate, with the result that it passed both Houses and has just been approved by the Governor."

12. Id. at 217 (1945).

13. 275 App. Div. 453, 90 N.Y.S. 2d 430 (1949).

14. 301 N.Y. 403, 94 N.E. 2d 73 (1951). The decision involved an appraisal and no question of right to appraisal arose. The court held that a mortgagee under the standard mortgagee clause attached to a fire insurance policy had a right to participate in the appraisal. A second question presented was whether a corporation could be an appraiser and the court held that it could so act. Lastly, the court weighed the sufficiency of the written oath signed by the corporation and attached to the appraisal. In this connection Judge Dye said, in passing, that it was well established that an appraisal was not an arbitration citing older cases prior to the 1941 amendment, and placed his decision on estoppel

to sanction this extension of the statute and stated that the amendment did not require an appraisal under the insurance law to be treated as an arbitration proceeding. It was at this point that the legislature again amended section 1448, and inserted the words *or independent of* in the sentence added in 1941. The legislature had apparently approved of the reasoning of the *Fitzgerald* case which was designed to remedy the inequitable situation then existing. While the insured was unable to compel the insurance company specifically to comply with the appraisal provisions, the insured himself was prevented from suing on the policy in the event of his failure to comply with the provisions.[15] It appears inescapable that the new phrase was an attempt to afford the insured an expeditious and inexpensive remedy and to settle the question of whether or not to allow controversies arising out of appraisals or valuations, which may be incidental to, or independent of the issue between the parties, also to come within the purview of the statute. In a memorandum to the Governor,[16] by the proposer of the amendment, it was explained that the reason for inserting the phrase was to allow valuations and appraisals to come within the arbitration law even though they were independent of any other controversy. The communication emphasized that evaluations and appraisals are necessary to commercial transactions and that the parties should be given an enforceable remedy, which they could not otherwise enjoy.

Disregarding the memorandum and stressing the procedural differences be-

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as to one party and the fire insurance mortgagee clause as to the other. The concurring and dissenting opinions did not discuss appraisals as arbitrations.

15. The insured, in order to maintain an action upon the policies, is bound to prove his compliance with all of the policy's conditions, and a refusal to accept the insurer's demand for an appraisal constitutes a non compliance fatal to his cause of action. See Silver v. Western Assurance Co., 164 N.Y. 381, 58 N.E. 284 (1900). If the insured demands an appraisal the only affect of the insurer's refusal is its subjection to an action at law on the policy. Matter of Fletcher, 237 N.Y. 440, 143 N.E. 248 (1924).

16. New York State Legislature Annual 40 (1953). The following is a copy of the memorandum filed by Assemblyman Teller with the Governor. ". . . [T]he second paragraph of section 1448 is amended by inserting the words 'or independent of' so as to clarify that valuations or appraisals come within the scope of the arbitration statute even though they are independent of any other controversy.

"The necessity for this amendment may be gleaned from the decision in Fitzgerald (case). . . . The New York arbitration statute did not formerly cover appraisals and valuations. Hence a provision for an appraisal was unenforceable. The sole remedy for breach of such provision was found in the law covering breach of contracts.

". . . [I]n the Fitzgerald case, the question was raised whether the amendment applied to a fire insurance contract clause which provided for appraisal for loss. The insurance company contended that the amendment was inapplicable since appraisal was not 'included' in any arbitration agreement. By a process of judicial legislation the Court denied this apparently correct contention, and held that an independent appraisal agreement may be enforced under the statute. . . .

". . . [I]t seems clear that evaluations and appraisals are vitally necessary transactions. . . . [T]he proposed amendment in this bill adopts the rationale of the Fitzgerald case and makes it clear that when parties agree to evaluations or appraisals the law will enforce such agreements because of the commercial desirability of doing so."

tween arbitration and appraisal the court in the present case has refused to allow the latter to come within the scope of the statute. It is manifest that the legislature was also aware of this distinction, yet it purposefully passed the 1952 amendment in order to engulf appraisals under the arbitration law. For what reason would the legislature amend a statute except to modify the existing law? Indeed, as this very Court of Appeals has so recently stated, ". . . [I]n the interpretation of a statute we must assume that the legislature did not deliberately place a phrase in the statute which was intended to serve no purpose."[17]

The Supreme Court of the United States in considering the constitutionality of a state enactment which required use of an appraisal clause similar to that adopted by New York, has held the enforcement of such provision to be advantageous as well as valid.[18] Elsewhere in states not providing for such statutes the courts have held that such agreements are binding upon the parties, reasoning that the law favors awards and adjustments of differences without litigation.[19]

While the section does not specifically mention appraisals under a fire insurance policy, the statute is a permissive one, and its terms are broad enough to include such appraisals. Unless the amendments to it be so construed they accomplish nothing; thus a construction by the court that they indicate no legislative intent to alter the statute seems unwarranted.

Parent and Child-Negligence — Child's Right to Recover for Loss of Consortium of Injured Parent.—Plaintiffs, five minor children, brought an action for the impairment of their rights (support, education, acts of kindness, and solace) proximately resulting from a personal injury to their mother caused by defendant's negligence. In denying defendant's motion to dismiss the court *held* that the complaint stated a cause of action upon which relief could be granted. *Scruggs v. Meredith,* 134 F. Supp. 868 (D. Hawaii 1955).

Support, education, care, attention, comfort, acts of kindness and solace are among those rights arising out of the family relationship[1] and can be referred

17. In the Matter of Smathers, — N.Y. —, — N.E.2d — (1956). See also, Matter of Zellner, 299 N.Y. 243, 247, 86 N.E. 2d 657, 659 (1949); People v. Dethloff, 283 N.Y. 309, 315, 28 N.E. 2d 850, 852 (1940).

18. Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U.S. 151 (1931).

19. Palatine Ins. Co. v. Gilleland 79 Ga. App. 18, 52 S.E. 2d 537 (1949); Johns v. Security Ins. Co., 49 Ga. App. 125, 174 S.E. 215 (1934); Ex parte Birmingham Fire Ins. Co., 233 Ala. 370, 172 So. 99 (1937).

1. See 41 Ill. L. Rev. 444, 445 n. 2 (1946) citing Green, Cases on Injuries to Relations (1940): "*Relation* is the best term available to express the value of one human being to another. It is distinct from the personality of either person to the relation and from tangible things outside the personality." See also, Green, "Relational Interests": Family Relations, 29 Ill. L. Rev. 460 (1934).

to collectively as consortium.[2] From the time these intra-family interests were first recognized, the rights of the various members of the family to enforce them against interfering third parties have received inconsistent treatment.[3]

A husband's action to recover for loss of consortium has been almost universally accepted whether the meddling defendant be guilty of a willful[4] or merely negligent[5] wrong. A wife's right of action in similar situations has not been so readily upheld, and has resulted in curious distinctions which were never alluded to when the husband's rights were under consideration. The common law theory, that a married woman could not maintain an action in her own name,[6] neatly avoided any need of judicial determination on the point, but with the passage of the married woman's emancipation acts,[7] decisions were forthcoming. With their enactment a conflict of authority appeared as a few jurisdictions continued to deny the wife's right of action for consortium on the theory that those statutes were not intended to add any new substantive rights.[8] The majority view maintained that the right, always extant, was now legally enforceable since the only impediment, a strictly procedural one, had been removed.[9] Among these latter states a further division resulted from holdings that if the defendant were guilty of criminal conversation,[10] or alienation of affection,[11] recovery was allowed. If the wrong done, however, was only a negligent one recovery was denied.[12] *Hitaffer v. Argonne Co.*,[13] decided in 1950, was the first case to recognize a wife's right of action for consortium where her husband had been injured by the negligence of another and this decision has since been followed in several jurisdictions.[14] As parents, the right of recovery of either the husband or the wife has been enforced where the child has been the victim of a

2. While the term "consortium" is generally restricted to the relationship of husband and wife it will herein refer also to the relationship of parent and child. See 6 Okla. L. Rev. 500 (1953); 6 Vand. L. Rev. 926 (1953).

3. Prosser, Torts, § 103, at 682-98 (2d ed. 1955).

4. Johnston v. Allen, 100 N.C. 131, 5 S.E. 666 (1888).

5. Cook v. Atlantic Coast Line R.R., 196 S.C. 230, 13 S.E. 2d 1 (1941).

6. "By the common law the suit for a tort to the wife could not be sued by her alone by preponderance of authority." Gross v. Gross, 70 W. Va. 317, 73 S.E. 961 (1912).

7. See 3 Vernier, American Family Laws § 150 (1935).

8. Duffies v. Duffies, 76 Wis. 374, 45 N.W. 522 (1890).

9. Haynes v. Nowlin, 129 Ind. 581, 29 N.E. 389 (1891).

10. Roberts v. Roberts, 230 Ky. 165, 18 S.W. 2d 981 (1929).

11. Red Eagle v. Free, 191 Okla. 385, 130 P. 2d 308 (1942).

12. Eschenbach v. Benjamin, 195 Minn. 378, 263 N.W. 154 (1935); Sheard v. Oregon Electric Ry., 137 Or. 341, 2 P. 2d 916 (1931); Emerson v. Taylor, 133 Md. 192, 104 Atl. 538 (1918).

13. 183 F. 2d 811 (D.C. Cir. 1950), cert. denied, 340 U.S. 852 (1950), 20 Fordham L. Rev. 342 (1951). Hipp v. E. I. DuPont De Nemours & Co., 182 N.C. 9, 108 S.E. 318 (1921) was the first case to recognize the wife's right to consortium, but the theory of the decision was substantially overruled by Hinnant v. Tide Water Power Co., 189 N.C. 120, 126 S.E. 307 (1925).

14. Brown v. Georgia-Tennessee Coaches, Inc. 88 Ga. App. 519, 77 S.E. 2d 24 (1953); Cooney v. Moomaw, 109 F. Supp. 448 (D. Neb. 1953), 41 Geo. L.J. 443 (1953); Brown v. Curtin & Johnson, Inc., 117 F. Supp. 830 (D.D.C. 1954).

physical injury,[15] abduction,[16] or seduction[17] but not for mere alienation of affection.[18]

An action by a child to recover for the loss of his parent's "consortium" is the latest development in this area of the law and has met with the least approval. No such action could be maintained at common law[19] and the courts reflect this attitude in their reluctance to sanction it now. The first case to permit a child to recover for the willful enticement of his father was *Daily v. Parker*.[20] While the decision in that case has been followed in several jurisdictions,[21] at least an equal number have adopted a contrary rule.[22] The difference seems to result from a choice between the theoretical reasons for, and the practical reasons against permitting such an action—a choice which has been called a matter of opinion.[23] *Hill v. Sibley Memorial Hospital*[24] is among the few cases to be found where an infant plaintiff has predicated his action for loss of consortium on the negligent conduct of the defendant. While expressing sympathy for the plaintiff's case, the court felt constrained by the trend of higher court decisions, concerning willful wrongs, to grant the defendant's motion to dismiss. Nowhere within the continental United States has relief been granted under these circumstances but the question has not as yet been posed in a jurisdiction where a child's action for willful enticement of its parent had been previously permitted. Striking indeed is the arbitrary treatment accorded the basic rights flowing from the family relationship. Where the basis of the action, loss of consortium, remains constant throughout, why should not each member of the family have an equal opportunity to be compensated?

Where a wife or child has been permitted to maintain an action for loss of consortium the courts have considered the practical objections advanced and dismissed them as uncontrolling. There can be no objection of a double recovery since the husband in his own action is not compensated for the loss of the sentimental aspects of consortium suffered by his family.[25] The injury is not too remote but is directly caused by the defendant's interference with the family relationship.[26] As to absence of precedent, it has been repeatedly held that this

15. Kasiski v. Central Power & Light Co., 4 N.J. Misc. 130, 132 Atl. 201 (Sup. Ct. 1926).

16. Howell v. Howell, 162 N.C. 283, 78 S.E. 222 (1913).

17. Beaudette v. Gagne, 87 Me. 534, 33 Atl. 23 (1895).

18. Pyle v. Waechter, 202 Iowa 695, 210 N.W. 926 (1926).

19. Pound, Individual Interests In the Domestic Relations, 14 Mich. L. Rev. 177, 185 (1916).

20. 152 F. 2d 174 (7th Cir. 1945).

21. Miller v. Monsen, 228 Minn. 400, 37 N.W. 2d 543 (1949); Johnson v. Luhman, 330 Ill. App. 598, 71 N.E. 2d 810 (1947).

22. McMillan v. Taylor, 160 F. 2d 221 (D.C. Cir. 1946); Taylor v. Keefe, 134 Conn. 156, 56 A. 2d 768 (1947).

23. See 162 A.L.R. 819, 826 (1946).

24. 103 F. Supp. 739 (D.D.C. 1952).

25. Hitaffer v. Argonne Co., 183 F. 2d 811 (D.C. Cir. 1950), cert. denied, 340 U.S. 852 (1950).

26. Miller v. Monsen, 228 Minn. 400, 37 N.W. 2d 543 (1949). See also, 23 A.L.R. 2d 1366, 1385-89 (1952).

alone is not sufficient reason for dismissing an action.[27] Nor are the damages too uncertain for it is the fact of damage that must be shown with certainty not the amount thereof.[28] Finally, it is objected that recognition of such actions would produce a flood of litigation. This reason has been summarily dismissed in cases of wrongful death where similar actions are constantly entertained.[29] Cases supporting the right in the child have chosen to base their decisions on principle rather than expediency, arguing that if the remedy for the harm done is available to one it should be available to all.

The instant case represents the most advanced attitude in Anglo-American jurisdictions towards recognition of relational interests. The decision rested on a logical application of decided principles,[30] supported by a Hawaiian statute that recognizes the intangibles of family-life as computable items of damage.[31]

The evolution of the law governing actions of this nature has been painfully slow and the decided cases cannot be reconciled. The archaic fiction of loss of services is no longer seriously contended to be the basis of the action.[32] More recent cases have recognized the loss of the elements of consortium as the true root of the injury but, where the action has already been denied, precedent is said to prevent change.[33] Legal writers, unhampered by precedent, have viewed the problem in its modern perspective.[34] It is argued, with reason, that the courts have failed to keep pace with fundamental changes in the concept of the family and the tendency toward equalizing the rights of all its members. Each has an interest in the preservation of the unity of the family and a right to have that unity remain undisturbed. Any unlawful interference, regardless of how it is caused, is to be guarded against and redressed when committed. Courts and authors alike have recognized the unsatisfactory state of the law on the subject and all agree that some uniformity should be achieved. Since a desirable solution lies beyond the power of many courts, the appeal of all has been directed to the legislature.[35]

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27. Morrow v. Yannantuono, 152 Misc. 134, 273 N.Y. Supp. 912 (Sup. Ct. 1934).

28. Miller v. Monsen, 228 Minn. 400, 37 N.W. 2d 543 (1949).

29. Ibid. See Cardozo, J., in Loucks v. Standard Oil Co., 224 N.Y. 99, 104, 120 N.E. 198, 199 (1918), "The family becomes a legal unit, invested with rights of its own, invested with an interest in the continued life of its members, much as it was in primitive law. . . ."

30. Scruggs v. Meredith, 134 F. Supp. 868 (D. Hawaii 1955) (cases cited showing the development of the Hawaiian law).

31. Rev. Laws Hawaii 1945, § 10494 as added by Laws Hawaii 1953, Act 206; Laws Hawaii 1955, § 205.

32. Hitaffer v. Argonne, 183 F. 2d 811 (D.C. Cir. 1950), cert. denied, 304 U.S. 852 (1950).

33. Hill v. Sibley, 108 F. Supp. 739 (D.D.C. 1952).

34. See, Prosser, Torts, § 103, at 696; § 104, at 705 (2d ed. 1955); Pound, Individual Interests In the Domestic Relations, 14 Mich. L. Rev. 177 (1916); Green, Relational Interests: Family Relations, 29 Ill. L. Rev. 460 (1934); 14 La. L. Rev. 713 (1954); 6 Okla. L. Rev. 500 (1953); 20 Corn. L.Q. 255 (1935).

35. The enactment of so-called Heart Balm statutes in a number of states has drastically curtailed actions for alienation of affection and related injuries. Also, the enactment of Dram-Shop acts have given the wife and child a right of action against those who sell the husband or father intoxicating beverages.

Torts—Federal Tort Claims Act—Liability of the United States for Negligent Maintenance of Lighthouse.—Plaintiff's tugboat ran aground on an island, resulting in the loss of its towed cargo of phosphate. The island was marked by a lighthouse maintained by the United States Coast Guard. Plaintiff, alleging the negligent operation and maintenance of the light as the proximate cause of the damage, commenced suit under the Federal Tort Claims Act. The District Court dismissed the complaint on defendant's motion, holding that the United States was not liable under the circumstances alleged. The Circuit Court affirmed, *per curiam*, and certiorari was granted. The Supreme Court, by an equally divided bench, sustained the courts below, but allowed a petition to reargue. Upon reargument, *held*, four justices dissenting, reversed. Where the United States undertakes to supply lighthouse service it must exercise reasonable care, and its failure to do so will subject it to liability under the act; the operation of a lighthouse is an activity for which a private individual under similar circumstances could incur liability in tort within the meaning of the statute. *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

At common law the sovereign was immune from suit.[1] With the growth of national states, the sovereign immunity was predicated of the national government and additionally, in the United States, of the governments of the several states.[2] The privilege was absolute and completely precluded suit against the state unless it consented to be sued by legislative act.[3] On the other hand, political sub-divisions of the state enjoyed only a qualified privilege which extended immunity solely to "governmental" functions and not to wrongs resulting from "proprietary" activities.[4] The injustices arising from the sovereign immunity doctrine led to the enactment of federal and state legislation waiving the immunity to a greater or lesser degree and allowing suit without the aid of special legislation which had proved a clumsy and ineffective vehicle.[5] The waiver of federal tort immunity[6] was embraced in the Tort Claims Act,[7] initially

1. Prosser, Torts § 109 (2d ed. 1955).

2. Reeside v. Walker, 52 U.S. (11 How.) 271 (1850); United States v. McLemore, 45 U.S. (4 How.) 286 (1845); Lewis v. State, 96 N.Y. 71 (1884).

3. United States v. Shaw, 309 U.S. 495 (1940); United States v. Eckford, 73 U.S. (6 Wall.) 484 (1867); Lewis v. State, 96 N.Y. 71 (1884).

4. 18 McQuillan, Municipal Corporations § 53.23 (3d ed. 1950). This distinction, granting immunity in some roles and withholding it in others, has led to much confusion and much criticism as noted by the Court in the instant case. 350 U.S. at 65.

5. Even where these statutes have allowed suit against the state, they have, in many jurisdictions, either specifically excluded tort claims or have been so construed. On the other hand, some statutes and court rulings have extended the waiver to tort suits. In New York, for example, not only has this statute been held applicable to tort claims, but also the waiver of state immunity has been extended to the political sub-divisions of the state. Bernardine v. New York, 294 N.Y. 361, 62 N.E. 2d 604 (1945); Holms v. County of Erie, 291 N.Y. 798, 53 N.E. 2d 369 (1944). See Leflar and Kantorwitz, Tort Liability of the States, 29 N.Y.U.L. Rev. 1363 (1954), for a definitive survey of the current state of the law in this matter.

6. The general waiver of federal immunity in other fields is codified in the Court of Claims Act, 28 U.S.C.A. c. 91.

7. 28 U.S.C.A. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80. As to

passed in 1946. Under the act liability is imposed on the United States for the negligence[8] of its employees and agents acting within the scope of their employment where a "private individual" would be liable, under the laws of the locality where the wrong occurred.[9] The liability however is limited by certain specific exceptions[10] and a broad general exception which renders non-actionable the acts or omissions of government agents in situations calling for the exercise of discretion.[11]

In the instant case, the government argued that no cause of action was maintainable since there was no private liability corresponding to that alleged against the government in the operation of a lighthouse. The Court, however, gave a literal reading to the language of the statute. The insistence of the defendant that private individuals do not and by law cannot operate lighthouses[12] is unconvincing, since the act does not demand exactly similar private liability but only "like" liability. To quote the Court: ". . . [w]e would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance—the presence or absence of identical private activity."[13] The dissent, in supporting the defendant's contention that no liability can attach where only the government could have performed the activity involved, relied heavily on the case of *Feres v. United States*[14] where recovery was denied servicemen injured through the alleged negligence of superior officers. The *Feres* case appears readily distinguishable, however, for there recovery was denied due to the "distinctly federal" character of the relationship existing between the wronged and the wrongdoer.[15] The emphasis was placed on the relationship, not the function or capacity of the government. This distinction is brought out in *Brooks v. United States*,[16] where even though the injured party was a serviceman, and was injured by an Army vehicle, recovery was allowed because the relationship did not exist, the soldier being off-duty when the wrong occurred.

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tort claims against the federal government prior to this act see Gottlieb, Tort Claims Against the United States, 30 Geo. L.J. 462 (1942). It had been held, prior to this legislation, that the United States had never consented to be sued at tort. Hill v. United States, 149 U.S. 593 (1893); Sultzbach Clothing Co. v. United States, 10 F. 2d 363 (W.D. N.Y. 1925).

8. Liability for wilful torts against the person is specifically excluded. 28 U.S.C.A. § 2680(h).

9. 28 U.S.C.A. § 2674.

10. 28 U.S.C.A. § 2680 (b) (loss of mail), (c) (assessment or collection of taxes), (d) (admiralty matters covered by other provisions of the Code), (e) (administering of §§ 1-31 of Title 50 of the Code), (f) (establishment of quarantine), (g) (injury to vessels in the Panama Canal Zone), (h) (wilful torts against the person), (i) (regulation of money by the Treasury), (j) (combat activities of the military in time of war), (k) (claims arising in a foreign country), (l) (activities of the Tennessee Valley Authority), (m) (activities of the Panama Railroad Company).

11. 28 U.S.C.A. § 2680(a).

12. 14 U.S.C.A. § 83.

13. 350 U.S. at 67.

14. 340 U.S. 135 (1950).

15. Id. at 143-44.

16. 337 U.S. 49 (1949).

The government in the present case did not invoke the "discretionary" exemption although it has done so in the past and generally has met with favorable response from the courts.[17] While not presented with this defense, the tenor of the Court in the instant decision seems to run contra in spirit to its holding in *Dalehite v. United States*,[18] where it was held that all the instances of negligence of government agents in the manufacture, handling and shipping of fertilizer which subsequently exploded, were covered by this exemption. In the course of that opinion, the Court specifically rejected the claimant's contention that the exemption existed only at the executive level and held that it covered all the acts of subordinates in the execution of plans and programs initiated by executives.[19] As a general statement of the law, this appears to be sound. It is reasonable to assume that the exemption was intended to absolve the government from liability for the results of ill-conceived plans and programs formulated by executives in the exercise of their discretion. It is also reasonable to extend this protection to the careful acts of subordinates in carrying out such plans and programs. But in the *Dalehite* case, among the items of negligence alleged was the failure of government agents to take suitable precautions in the handling of a known dangerous commodity. In particular, it failed to notify subsequent handlers of the dangerous characteristics of the fertilizer. The Court suggested that such lapses are not actionable because the choice to act or not to act involves discretion even where the defendant was on notice of the probable dangers involved. The Court found as matter of fact that there was no misfeasance involved but disregarded palpable non-feasance. It would seem to defeat the entire purpose of the act to hold that once the exemption is given to an activity, its protective cloak should cover all the failures to exercise even a modicum of care, and that a subordinate's strict adherence to executive directions affords an excuse for non-feasance. It is doubtful if the present Court would so argue. Here, one of the omissions of the government that the Court found actionable was the failure to give warning to others of a known dangerous condition. The overall plan for the operation and maintenance of lighthouses is assuredly well within the "discretionary" exemption at executive level and yet this Court finds in the failure of subordinates to act, a breach of a duty owed to others.[20] Certainly the agents in charge

17. Dalehite v. United States, 346 U.S. 15 (1953); Goodwill Industries v. United States, 218 F.2d 270 (5th Cir. 1954); National Manufacturing Co. v. United States, 210 F.2d 263 (8th Cir. 1954).

18. 346 U.S. 15 (1953).

19. The Dalehite Court said that discretion includes: ". . . more than the initiation of programs and activities. . . . Where there is room for policy judgment . . . there is discretion. It necessarily follows that the acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." Id. at 35-36. Carrying this line of reasoning to its logical conclusion, it may be possible to completely eliminate governmental liability. Where must the line be drawn? See Note, 66 Harv. L. Rev. 488 (1953), for a critical survey of the Dalehite decision and its possible inferences.

20. ". . . the Coast Guard was further obligated to use due care to discover this fact [that the light was not in working order] and to repair the light or give warning that it was not functioning." 350 U.S. at 69. See also, United States v. White, 211 F. 2d 79 (9th Cir. 1954).

of the manufacture and shipping of the fertilizer in the *Dalehite* case were under no less an obligation. It is submitted that the duty to act is inconsistent with the choice of whether to act or not to act, possibly even at executive level[21] and that once that duty is found the "discretionary" exemption dissappears.

The instant holding appears to indicate a significant expansion of the area of federal liability beyond the narrow restrictions imposed, by inference at least, in the *Dalehite* case. It may be suggested in passing that the fact that *Dalehite* was a test case upon the outcome of which depended the disposition of some two hundred million dollars in claims growing out of the Texas City disaster, may have had an important, though unexpressed effect on that decision. The instant result seems to be a fairer interpretation of the statute without doing violence to the limitations placed upon it by Congress.

Torts—Recovery for Physical Illness or Injury Resulting from Mental or Emotional Disturbance.—Plaintiff's daughter in Tulsa, Oklahoma, sent plaintiff, a resident of Dallas, Texas, a telegram stating that the daughter would arrive that evening in Dallas. Defendant Western Union Telegraph Company negligently transmitted the wire as a "death message" in which form it was delivered to the plaintiff. Immediately on receipt of the message plaintiff became violently ill and entered into a state of shock necessitating prolonged medical treatment and leaving her in generally poor health. Plaintiff alleged that defendant's negligence in transmission was the proximate cause of the physical illness she suffered. From a summary judgment for the defendant, plaintiff appealed. *Held,* one judge dissenting, reversed and remanded. Damages may be recovered for illness resulting from a negligently caused mental disturbance. *Kaufman v. Western Union Tel. Co.,* 224 F. 2d 723 (5th Cir. 1955), cert. denied, 24 U.S.L. Week 3191 (U.S. Jan. 16, 1956) (No. 533).[1]

Psychic stimuli with resultant physical harm are broadly divided into two groups in determining legal liability: those which are *intentionally* caused by the defendant and those which are the result of his *negligent* actions.[2] Where the defendant's act was intentional and where the emotional upset resulted in

21. See dissenting opinion, Dalehite v. United States, 346 U.S. 15, 57-60 (1953).

1. In the District Court defendant's motion for summary judgment on the pleadings was granted. Ruling that this judgment was error unless sustained by defendant's affirmative defenses, the Circuit Court reviewed each defense raised and rejected them all. The court contended that the only substantial point introduced by the defendant was his assertion that the federal courts do not recognize as compensable physical injury springing from a purely mental condition. The opinion exhaustively reviewed this contention, finally dismissing it as well.

2. See, Bohlen & Polikoff, Liability in New York for the Physical Consequences of Emotional Disturbance, 32 Colum. L. Rev. 409 (1932); Goodrich, Emotional Disturbance as Legal Damage, 20 Mich. L. Rev. 497 (1922); Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033 (1936); McNiece, Psychic Inquiry and Tort Liability in New York, 24 St. Johns L. Rev. 1 (1949); Smith, Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli, 30 Va. L. Rev. 193 (1944).

physical illness or injury, the courts almost universally find a compensable cause of action, straining at times to suggest a variety of theories on which to predicate liability.[3]

On the other hand, where the psychic stimuli are negligently produced and illness or injury results, there is a splintering of authorities. The early cases recognized no recovery for such injuries citing lack of foreseeability and the difficulties of valid medical proof. Harsh rules were developed in many jurisdictions to deny compensation for injuries of this nature in spite of the obvious harm that the plaintiff had suffered. In New York the controversial case of *Mitchell v. Rochester Ry.*[4] established the "impact rule" which is still nominally the law of New York after nearly sixty years. This doctrine denies recovery for fright and its physical and mental consequences where the cause is purely the defendant's negligence unless a physical contact with the plaintiff can be established. As a consequence of this much-criticized holding the New York courts have assiduously toiled to find contact or battery where under other circumstances, none would have been deemed to exist.[5]

3. Since the present case carries no suggestion that any wilful element was involved, the discussion here will be limited to negligently caused emotional distress. For a discussion of intentionally produced emotional distress see Prosser, Intentional Infliction of Mental Suffering: a New Tort, 37 Mich. L. Rev. 874 (1939).

4. 151 N.Y. 107, 45 N.E. 354 (1896). In this case plaintiff was denied recovery for physical injuries (miscarriage) produced by fright which was a result of the defendant's negligence. There was no impact with the plaintiff nor element of wilfulness on the part of the defendant. The court put its decision on a threefold basis: (1) the flood of litigation that would result if such injuries be compensated; (2) the impossibility of scientifically linking the injury with the mental condition; (3) because no recovery for fright alone is allowed there should be none for its physical consequences.

5. Analogous cases in which recoveries have been allowed may be classified into three main types.

(1) The food cases: Plaintiff, after discovering foreign material in food, is revolted to the point of nausea. Sider v. Reid Ice Cream Co., 125 Misc. 835, 211 N.Y. Supp. 582 (2d Dep't 1925) (cockroaches in a charlotte russe).

(2) The immediate impact cases: Closely following an emotional shock, a physical injury results to plaintiff. Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N.Y. Supp. 39 (1st Dep't 1914) (plaintiff, a mother, fainted and fell into an elevator shaft on seeing her children ascend in an unattended car).

(3) The slight impact cases: The technical battery to a passenger in an auto collision (though preceding nervous shock) held enough to allow recovery for subsequent emotional disturbance followed by bodily injury. Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931) (recovery allowed where woman pasenger, after accident, fainted from nervousness, fractured her skull and died).

See also the recent case of Williams v. State, 308 N.Y. 548, 127 N.E.2d 545 (1955). Here recovery was granted plaintiff where defendant's servants had negligently allowed a convict to escape from prison. The convict accosted plaintiff's decedent, resulting in fright and consequent death of decedent from a cerebral hemorrhage. The Court of Claims and the Appellate Division found a causal relationship between defendant's negligence and plaintiff's testator's injury. However, in the Court of Appeals the existence of defendant's negligence was denied to be the proximate cause as a matter of law. Referring to the state's contention that the Mitchell rule would preclude recovery in any case, the court nimbly sidestepped

Most federal courts[6] and those of the larger industrial states[7] follow the *Mitchell* case, while a scattering of federal jurisdictions and a majority of the state courts[8] allow recovery for injuries of the *Mitchell* type. Even though the array on the side of the minority still appears formidable, the decisions in these jurisdictions are rife with exceptions and hairline distinctions that are undoubted recognitions of the obsolete reasoning underlying the cases denying recovery. With modern medicine's advance in the treatment and understanding of the human mind and of the relationship between physical manifestations and mental processes, the old arguments of lack of foreseeability and the scientific inability to differentiate between actual and feigned mental distress have ceased to be valid reasons to deny compensation. In this regard, denying all recoveries as a matter of public policy to forestall a plaintiff falsely asserting mental or emotional injury can no longer be justified.

While the Circuit Court in the instant case conceded that an action cannot be maintained under federal law for mental suffering alone,[9] it underscored the

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the issue saying, "in the absence of any proximate causation between the State's act and Williams' death we do not reach this question." Williams v. State, supra at 557.

6. See note 9 infra. See also Mees v. Western Union Tel. Co., 55 F. 2d 691 (S.D. Fla. 1932); Jones v. Western Union Tel. Co., 233 F. 301 (S.D. Cal. 1916); Tyler v. Western Union Tel Co., 54 F. 634 (Cir. Ct. W.D. Va. 1893).

7. Elgin A. & S. Traction Co. v. Wilson, 217 Ill. 47, 75 N.E. 436 (1905); Spade v. Lynn & B. R.R., 168 Mass. 285, 47 N.E. 88 (1897); Alexander v. Pacholek, 222 Mich. 157, 192 N.W. 652 (1923); Porter v. Del. L. & W. R.R., 73 N.J.L. 405, 63 Atl. 860 (Sup. Ct. 1906); Miller v. Baltimore & O. S. W. R.R., 78 Ohio St. 309, 85 N.E. 499 (1908); Howarth v. Adams Express Co., 269 Pa. 280, 112 Atl. 536 (1921).

8. Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912); Sloane v. Southern Cal. Ry., 111 Cal. 668, 44 Pac. 320 (1896); Orlo v. Connecticut Co., 128 Conn. 231, 21 A. 2d 402 (1941); Williamson v. Central of Georgia Ry., 127 Ga. 125, 56 S.E. 119 (1906); Clemm v. Atchison, T. & S. F. Ry., 126 Kan. 181, 268 Pac. 103 (1928); Laird v. Natchitoches Oil Mill, Inc., 10 La. App. 191, 120 So. 692 (1929); Bowman v. Williams, 164 Md. 397, 165 Atl. 182 (1933); Purcell v. St. Paul City Ry., 48 Minn. 134, 50 N.W. 1034 (1892); Cashin v. Northern Pac. Ry., 96 Mont. 92, 28 P. 2d 862 (1934); Hanford v. Omaha & C. B. Ry., 173 Neb. 423, 203 N.W. 643 (1925); Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 Atl. 540 (1930); Kimberly v. Howland, 143 N.C. 398, 55 S.E. 778 (1906); Salmi v. Columbia & N. Ry., 75 Ore. 200, 146 Pac. 819 (1915); Simone v. Rhode Island Co., 28 R.I. 186, 66 Atl. 202 (1907); Mac v. South-Bound R.R., 52 S.C. 323, 29 S.E. 905 (1898); Sternhagen v. Kozel, 40 S.D. 396, 167 N.W. 398, (1918); Memphis St. Ry. v. Bernstein, 137 Tenn. 637, 194 S.W. 902 (1917); Gulf, C. & S. F. Ry. v. Hayter, 93 Tex. 239, 54 S.W. 944 (1900); Bowles v. May, 159 Va. 419, 166 S.E. 550 (1932); Frazee v. Western Dairy Products, 182 Wash. 578, 47 P. 2d 1037 (1935); Lambert v. Brewster, 97 W. Va. 124, 125 S.E. 224 (1924); Pankopf v. Hinkley, 141 Wis. 146, 123 N.W. 625 (1909).

9. For authority see: Western Union Tel. Co. v. Speight, 254 U.S. 17 (1920), where a misdirected wire caused plaintiff to fail to attend his father's funeral; Southern Express Co. v. Byers, 240 U.S. 612 (1916), in which mental pain and suffering are held too vague for redress where there was no physical injury to the person; Chesapeake and Potomac Tel. Co. v. Clay, 194 F. 2d 888 (D.C. Cir. 1952), worry owing to defendant's negligence in failing to change a phone number, held non-compensable if unaccompanied by a physical injury. In the case of Stanley v. Western Union Tel. Co., 23 F. Supp. 674 (S.D. Fla. 1938) it was

fact that here physical illness followed the mental distress and that the Supreme Court has not yet passed on a case containing this added element. Two cases are cited in the opinion to support the view that the injury suffered, though mentally induced, was compensable: *Baltimore & O.R.R. v. McBride*[10] and *Belt v. St. Louis-San Francisco Ry.*[11] In the former case, decided by the United States Court of Appeals Sixth Circuit, a railroad engineer jumped from his engine after a steam valve burst and flooded the cab with live steam. He was hurt by the fall and while lying across the track, was terrified by the sight of another train approaching him. The court held that the shock to his nervous system was compensable even though he was not hit by the second train since both the shock and the injury were proximately caused by the same negligent act. In the latter case, decided by the Tenth Circuit, the plaintiff, immediately after being struck by a train and immobilized, observed another engine bearing down on him from the opposite direction. Here the court reasoned that mental suffering and shock constitute physical injury and are therefore compensable. It stated that ". . . the majority of courts compensate for bodily injuries produced by or resulting from mental disturbances, although unaccompanied by any physical impact or concussion. In such cases, the right to recover is dependent upon the nature of the results rather than the nature of the tortious conduct."[12]

While the cited cases bear no close factual resemblance to the principal decision they do represent the highest federal authority the Fifth Circuit could muster to support a recovery. Because it agreed with the rationale of the *Belt* and *Baltimore* cases and since the ". . . injustice of denying legal redress to a person wrongfully and seriously injured as alleged in the present complaint outweighs in our minds the policy considerations which some courts have held to prevent a recovery . . .,"[13] the Fifth Circuit felt the complaint stated a cause of action.

While no mention of the fact is made in its opinion, the court may have felt that a greater than ordinary degree of care should have been exercised by defendant, a public communications company. In any case, by aligning itself squarely with the majority of jurisdictions and allowing a recovery for negligently caused psychic disturbance resulting in physical illness, the Fifth Circuit has dealt a worthy blow to an outmoded doctrine whose existence is no longer justified in a modern jurisprudence.

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urged by the plaintiff that since the Federal Communications Act, 47 U.S.C.A. §§ 205, 207, provided that the "full amount of damages sustained" should be recovered, this act enlarged the scope of damages to include mental anguish. The court held that this act was to be interpreted in the same way as language of the Interstate Commerce Act. 49 U.S.C.A. §§ 8, 9, thereby denying such recovery.

10. 36 F.2d 841 (6th Cir. 1930).

11. 195 F. 2d 241 (10th Cir. 1952).

12. Id. at 243.

13. Kaufman v. Western Union Tel. Co., 224 F. 2d 723, 731 (5th Cir. 1955), cert. denied, 24 U.S.L. Week 3191 (U.S. Jan. 16, 1956) (No. 533).

Workmen's Compensation — Indemnity Action Under Longshoremen's and Harbor Workers' Act.—Stevedoring contractor's longshoreman—employee was severely injured while working aboard ship. The employee accepted compensation, but without a formal award; he then instituted a third party suit against the shipowner, who impleaded the stevedore-employer. The United States District Court allowed a $75,000 recovery by the longshoreman against the shipowner but denied the shipowner's claim for indemnity from the stevedore. The Court of Appeals, Second Circuit, affirmed the longshoreman's recovery but reversed the dismissal of the indemnity suit and directed judgment to be entered for the shipowner. The stevedore contended this reversal was erroneous. Upon appeal to the Supreme Court, *held,* four justices dissenting, affirmed. Breach of the stevedore's contractual obligation to perform in a workmanlike manner entitled the shipowner to indemnity from the stevedore, notwithstanding the shipowner's failure to discover and correct the breach. Neither the Longshoremen's and Harbor Workers' Compensation Act nor the absence of an express indemnity agreement precludes such a recovery. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.,* 350 U.S. 124 (1956).

After holding that longshoremen were not included within the provisions of state workmen's compensation acts,[1] the Supreme Court, in an effort to afford longshoremen some relief, held them to be within the provisions of the Jones Act.[2] This proved unsatisfactory,[3] and Congress in 1927, enacted the Longshoremen's and Harbor Workers' Act[4] which required an employer to pay an employee, injured in the course of employment, compensation according to a fixed schedule, without regard to fault. While the longshoreman retained his rights against third parties,[5] the statutory liability of the employer was to be exclusive.[6]

Third party and related contribution and indemnity actions were rare for some time after the passage of the act because of two factors: (1) under the original act acceptance of compensation was an election of remedies[7] and, (2) a

1. Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). Two congressional attempts to reverse this result were declared unconstitutional. Washington v. Dawson & Co., 264 U.S. 219 (1924); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920).

2. International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926).

3. The longshoremen, through counsel, told Congress they wanted, "compensation as against employer's liability." Ambler, Seamen Are "Wards of the Admiralty" But Longshoremen Are Now More Privileged, 29 Wash. L. Rev. 243, 255 (1954).

4. 33 U.S.C.A. § 901.

5. 33 U.S.C.A. § 933(a), which provides, "If on account of a disability . . . the person entitled to such compensation . . . may elect . . . to receive such compensation or to recover damages against such third person."

6. 33 U.S.C.A. § 905, which provides, "The liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee, his legal representative . . . and anyone otherwise entitled to recover damages from such employer . . . on account of such injury . . . ."

7. 33 U.S.C.A. § 933(b), provided, "Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person. . . ." See American Stevedores v. Porrello, 330 U.S. 446, 454 (1947).

longshoreman had to establish negligence to recover from a shipowner.[8] Thus in most instances a longshoreman who was injured aboard ship, rather than chance an expensive and lengthy tort action against the shipowner accepted compensation. Then in 1938 Congress amended the act to provide that only an acceptance of compensation under a formal award by the Deputy Commissioner constituted such an election of remedies.[9] This allowed the longshoreman, after acceptance of an informal award, to sue also the shipowner for negligence.[10] The second factor limiting contribution and indemnity litigation was overthrown in 1946, when the Supreme Court in *Seas Shipping Co. v. Sierachi*[11] held that the absolute duty of seaworthiness a shipowner owes to seamen, also applies to longshoremen. Thus if the injury to the longshoreman is caused by the unseaworthy condition of the ship, the shipowner is absolutely liable to him.[12]

Where the shipowner and the stevedore were joint tortfeasors the shipowner sought contribution, arguing that since both were equally at fault, they should share the burden of damages. However, in 1952 the Supreme Court in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*,[13] held no right of contribution exists, on the ground that in admiralty the doctrine is confined to collision cases. But as the Court in the instant case points out, *Halcyon Lines* operates only as a bar to contribution suits.

It is clear that the Longshoreman's and Harbor Workers' Compensation Act does not preclude an express indemnity agreement between the parties, though even here problems of interpertation have arisen.[14] Furthermore, even in the absence of an express indemnity clause, there has been a growing body of case law allowing indemnity,[15] although the exact basis for recovery has been somewhat vague. Where a contractual relationship existed between the parties recovery has been based on either this relationship itself[16] or the relationship

8. Panama Mail S.S. Co. v. Davis, 79 F. 2d 430 (3d Cir. 1935); see citations collected in 34 Calif. L. Rev. 601, 602 n. 6 (1946).

9. 33 U.S.C.A. § 933(b).

10. Compensation in the usual case is not controverted but paid without a formal award. Weinstock, The Employer's Duty To Indemnify Shipowners For Damages Recovered By Harbor Workers, 103 U. Pa. L. Rev. 321, 322 n. 5 (1954).

11. 328 U.S. 85 (1946). For criticism of this case see Dickinson and Andrews, A Decade of Admiralty in the Supreme Court of the United States, 36 Calif. L. Rev. 169, 190 (1948). See also, 34 Calif. L. Rev. 601 (1946), 45 Colum. L. Rev. 957 (1945), 59 Harv. L. Rev. 127 (1945), 19 Temp. L.Q. 339 (1945).

12. This warranty of seaworthiness is not as narrow and confining as it may sound. Petterson v. Alaska S.S. Co., 205 F. 2d 478 (9th Cir. 1953), aff'd, 347 U.S. 396 (1954) (defective equipment supplied by a stevedore renders a ship unseaworthy); Strika v. Netherlands Ministry of Traffic, 185 F. 2d 555 (2d Cir. 1950) (permitting recovery for the unseaworthy condition of ship by longshoreman who was not aboard ship when injured).

13. 342 U.S. 282 (1952).

14. American Stevedores v. Porello, 330 U.S. 446 (1947) (holding such a clause ambiguous and remanding the case to trial court to ascertain the intention of the parties).

15. Weinstock, The Employer's Duty to Indemnify Shipowners For Damages Recovered By Harbor Workers, 103 U. Pa. L. Rev. 321 (1954).

16. Crawford v. Pope & Talbot, Inc., 206 F. 2d 784 (3d Cir. 1953); Read v. United States, 201 F. 2d 758 (3d Cir. 1953).

and a test of active, sole or primary negligence.[17] One case has allowed indemnity in the complete absence of a contractual relationship.[18]

The Court in the instant case predicated the stevedore-contractor's indemnity liability on the breach of his contractual duty, i.e., to perform the work in a reasonably safe manner. The shipowner's liability to the injured longshoreman was a proximate result of the stevedore's failure to perform safely, the promise for which implies a promise of indemnity. Such is the Court's reasoning, with the result that the stevedore, stripped of the exclusive liability that Congress enacted for its benefit, is at least liable for compensation and at most bears the ultimate loss of a large recovery by the longshoreman from the shipowner. The practical result of the decision, as the dissent points out, will be that the stevedoring contractor, by controverting the longshoreman's claim, will force him, if he accepts, to do so under a formal award and thus put the stevedore in control of any third party suit.[19] The act provides that where an employer controverts a claim he must, within a short time, state in writing to the commissioner his reasons for so doing.[20] Whether or not he can arbitrarily controvert a claim remains to be seen.[21] It would seem that the conclusion of the Court is violative of congressional intent as well as the intention of the parties to the contract. Notwithstanding, to deny a third party indemnity where he would otherwise be entitled to it, merely because the person he sues happens to be under a compensation act seems unjust. The third party receives no quid pro quo for surrendering his common law right of indemnification.[22]

Perhaps the interests of all parties would best be served by a compromise. The Supreme Court in the *Halcyon Lines* case, in denying the right of contribution stated that it was not opposed to such a doctrine but felt that any change should come through congressional action.[23] Legislation covering both contribution and indemnity suits in this field, apportioning damages according to the comparative fault of the shipowner and the stevedore, would perhaps be the flexible test required to reach an equitable result in all cases. The objection that a comparative test of fault would increase litigation has not been borne out by experience;[24] furthermore, applied to this specific field such a test might reduce

17. Berti v. Compagnie De Navigation Cyprien Fabre, 213 F. 2d 397 (2d Cir. 1954); Palazzolo v. Pan-Atlantic S.S. Corp., 211 F. 2d 277 (2d Cir. 1954).

18. States S.S. Co. v. Rothchild Int'l Stevedoring Co., 205 F. 2d 253 (9th Cir. 1953), 67 Harv. L. Rev. 884 (1954). Contra, Brown v. American-Hawaiian S.S. Co., 211 F. 2d 16 (3d Cir. 1954).

19. 33 U.S.C.A. § 933(b).

20. 33 U.S.C.A. § 914(d).

21. Assuming he can, most likely an insurance carrier, not the employer would gain control of any third party suit. 33 U.S.C.A. § 933(i). Then too, some organization might advance the longshoreman funds thereby enabling him to forego such an acceptance and retain control of any third party suit.

22. The longshoremen while surrendering their common law remedies against the employer did acquire the right to compensation regardless of fault.

23. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952).

24. Prosser, Torts, 297 (2d ed. 1955).

rather than increase litigation.[25] An alternative plan requiring the shipowner to carry compensation insurance and making him, as well as the stevedore, the employer of a longshoreman who is injured aboard ship for purposes of compensation might be feasible. In the absence of such legislation an express clause exemptive of indemnification would appear to be the stevedore's only recourse.

25. If Congress thought it advisable they could abolish the doctrine of the Sieracki case. In that event the shipowner's negligence would have to first be established before the issue of indemnity or contribution would arise.