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## Recent Cases

### Authors

Philip C. Valenti, John F. Hughes, Gennaro J. Consalvo, Natalie Yeager, William T. Duckworth, and Clarence H. Featherson

## RECENT CASES

CONFLICT OF LAWS—JURISDICTION IN PERSONAM—DUE PROCESS OF LAW—SERVICE OF PROCESS ON NON-RESIDENT OUTSIDE OF STATE—Petitioner, a non-resident of California, seeks a writ of prohibition to restrain the Superior Court of Los Angeles County from taking further proceedings in an action filed against him to recover damages arising out of an automobile accident in California. Petitioner, a *resident* of California at the time of the commencement of the action, was served personally with summons and complaint in Oregon. He appeared specially by filing a notice of motion to (1) quash the order for publication of summons on the ground that it was in excess of the power of the court, and (2) quash the service of summons and complaint on the ground that the court had not acquired jurisdiction over him because the action was *in personam*. The Supreme Court of California held that the Superior Court acquired *in personam* jurisdiction over the non-resident, who was a *resident* at the time of the commencement of the action, by virtue of service of process on him without the state as permitted by the California statute. *Allen v. Superior Court of Los Angeles County*, 259 P. 2d 905 (Cal. 1953).

At common law, in civil actions, only personal service of process on the defendant within the jurisdiction is recognized. *McDonald v. Mabee*, 243 U. S. 90 (1919); *Milliken v. Meyer*, 311 U. S. 457 (1940); *Southern Mills v. Armstrong*, 223 N. C. 495, 27 S. E. 2d 281 (1943); RESTATEMENT, CONFLICT OF LAWS §§47, 79; See Dodd, *Jurisdiction in Personal Actions*, 23 Ill. L. Rev. 427 (1929).

The California Legislature in 1951 enacted section 417 of the California Code of Civil Procedure, which reads:

Where jurisdiction is acquired over a person who is outside the State by publication of summons in accordance with section 412 and 413, the Court shall have the power to render a *personal judgment* against such person only if he was personally served with a copy of the summons and complaint, and was a *resident* of this State at the time of the commencement of the action or at the time of service. Stats. 1951, ch. 935, p. 2537. (Italics supplied)

At the suggestion of the California Bar Association, the Legislature enacted the above amendment to clarify sections 412 and 413 of the California Code of Civil Procedure. 22 Cal. S. B. J. 261 (1947). Section 412 provides:

Where the person on whom service is to be made resides out of the State; or has departed from the State; or conceals himself to avoid service of summons; . . . and it also appears . . . that a cause of action exists against the defendant . . . such Court, judge or justice, may make an order that the service be made by publication of the summons. . . .

Section 413 of the Code provides:

Where publication is ordered, personal service of a copy of the summons and complaint out of the State is equivalent to publication. . . .

Sections 412 and 413 of the Code authorize either service by publication or personal service outside the State, for the purpose of obtaining personal judgment against a California *resident* outside the State. In order that jurisdiction be acquired over a person outside California in accordance with these sections, it must appear by affidavit that the person on whom service is to be made resides out of the State, or has departed from the State. On the basis of such affidavit, an order is then made for service of summons by publication.

Prior to the enactment of section 417, it was impossible to acquire jurisdiction *in personam* of a non-resident in California. *De La Montanya v. De La Montanya*, 112 Cal. 101, 44 Pac. 345 (1896); *Frey & Horgan Corp. v. Superior Court*, 5 Cal. 2d 401, 55 P. 2d 203 (1936).

In the absence of statutory provisions, the court in *Pennoyer v. Neff*, 95 U. S. 714 (1878), held that in an *in personam* action for a money judgment, jurisdiction cannot be gained on a non-resident by service of process outside the territorial jurisdiction of the court. Accordingly, the court in *Allen v. Superior Court*, *supra*, stated:

The broad language in *Pennoyer v. Neff*, construed as prohibiting acquisition of personal jurisdiction over any person served with process outside the state, has since been re-examined in the light of its particular situation.

In *McDonald v. Mabee*, *supra*, Justice Holmes declared that the foundation of jurisdiction is physical power. However, in his now famous dictum, Holmes stated:

Perhaps in view of his technical position and the actual presence of his family in the State a summons left at his last and usual place of abode would have been enough. But it appears to us that an advertisement in a local newspaper is not sufficient notice to bind a person who has left a State intending not to return. To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done.

One of the main objections to service by publication on a person residing outside the state is that due process requires fair notice. This was a consideration in *Milliken v. Meyer*, *supra*, where the court seized upon Holmes' dictum, and held that domicile in the state is alone sufficient to bring an absent defendant within the state's jurisdiction for the purpose of a personal judgment by means of appropriate substituted service. Justice Douglas reasoned that the requirement of due process was fulfilled, in that, the substituted service provided for was such that gave the defendant actual notice of the proceedings and an opportunity to be heard.

The principal object or purpose of original process is to give the party to whom it is addressed notice of the proceedings against him. It is the means by which he is afforded opportunity to appear before, and to be heard by the court in the defense of his person, property and rights. *Windsor v. McVeigh*, 93 U. S. 274 (1876); *Southern Kansas Stage Lines Co. v. Holt*, 192 Ark. 165, 90 S. W. 2d 473 (1936). In the exercise of judicial jurisdiction in personam, there must be due process, which requires appropriate notice of the judicial action. *Blackmer v. United States*, 284 U. S. 421 (1932). The requirements for valid service of process are power and fair notice. GOODRICH, CONFLICT OF LAWS (2d ed. 1938), §69.

The California statute in question is analogous in principle to those statutes that provide and authorize constructive service upon the Secretary of State to accept service of process for automobile drivers using the state's highways. These non-resident motorist statutes permit an injured person to obtain effective redress against transient motorists. *Hess v. Pawloski*, 274 U. S. 352 (1927); *Kane v. New Jersey*, 242 U. S. 160 (1916); *Hendrick v. Maryland*, 235 U. S. 610 (1915). Also see Scott, *Jurisdiction Over Non-resident Motorists*, 39 Harv. L. Rev. 563 (1926). However, means must be employed to insure actual notice to a non-resident defendant of such service so as to make binding valid service within the

state upon the defendant's agent. *Wuchter v. Pizzutti*, 276 U. S. 13 (1928). Section 417 of the California statute does not limit service of process to gain jurisdiction to those using the state's roads. The instant statute advances further. It does not require a tort-feasor to be a domiciliary of the state but only a resident at the time of the commencement of the action or the service of process. A somewhat similar statute, although not as broad, was sustained in the case of *Dubin v. City of Philadelphia*, 34 Pa. D. & C. 61 (1938). In that case a statute was enacted providing the same methods of service as in the automobile cases for non-resident owners, tenants, or users of real estate located within the Commonwealth of Pennsylvania. The court used the same reasoning as propounded in those cases involving the non-resident motorist statutes.

In *Allen v. Superior Court*, *supra*, it is not clear whether the Court is using the term *resident* in its precise legal sense or whether it is using the term interchangeably with *domicile*. If the latter was intended, then the *Milliken* case controls. The Court cites the *Milliken* case, to support its decision that a *resident* can be personally served with process outside the State. The *Milliken* case, however, involved a *domiciliary* and not merely a *resident* of Wyoming. It is assumed, in view of the fact that the word *resident* is used within the frame of the California statute, and the Court in the instant case uses *resident* throughout the opinion in its reasoning and conclusion, the term *resident* is not being used by the Court as a substitute for *domicile*. Consequently, section 417 of the California Code creates a new right in a plaintiff. A defendant's contention that he is deprived of due process as guaranteed under the Fourteenth Amendment to the Federal Constitution cannot be sustained. The requirements of procedural due process are satisfied, in that, the defendant received actual personal service of the institution of litigation against him.

If the California Court interprets the word *resident* in the statute as meaning *non-domiciliary*, then the principal case indicates a definite extension on the force and effect on extra-territorial jurisdiction based on *in personam* service of process served outside the state on a non-domiciliary.

PHILIP C. VALENTI

CONSTITUTIONAL LAW—RIGHT TO UNANIMOUS JURY VERDICT IN FELONY CASE—EFFECT OF WAIVER—The defendant was on trial in a Federal District Court for committing two felonies. After a twenty-seven minute deliberation the jury returned and announced that it could not reach a verdict. The trial judge asked the defendant to waive his right to a unanimous jury verdict. Defendant's counsel, after consulting with defendant, waived the right and agreed to be bound by a majority verdict. The United States Attorney also waived the requirement. Defendant was thereafter convicted of both felonies, by nine to three and ten to two votes, and sentenced to five years on each offense. A motion to vacate the sentence was denied and defendant appealed.

HELD: The right to a unanimous jury verdict in felony cases cannot be waived in the Federal courts. *Hibdon v. United States*, 204 F. 2d 834 (6th Cir. 1953).

This case is one of first impression in the Federal courts. The Constitution of the United States contains two provisions concerning trial by jury in criminal cases, viz., (1) "The trial of all crimes, except in Cases of Impeachment, shall be by jury" U. S. CONST., ART. III, §2, cl. 3, and (2) "In all criminal prosecutions,

the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U. S. CONST., 6TH AMEND. The Federal Rules of Criminal Procedure provide "The verdict shall be unanimous." FED. RULES CRIM. PROC., rule 31 (a) 18 U. S. C. A.

These Federal Constitutional provisions concerning trial by jury apply only to trials in Federal courts. *Capital Traction Co. v. Hof*, 174 U. S. 1 (1899). State courts are not required to meet the Federal Constitutional standards of trial by jury. *Morin v. Becker*, 6 N. J. 457, 79 A. 2d 29 (1951). Nor do these provisions prohibit the states from regulating and restricting jury trials as they see fit, or even abolishing them altogether. *Walker v. Sauvinet*, 92 U. S. 90 (1875); *Voigt v. Webb*, 47 F. Supp. 743 (D. C. Wash. 1942); *White v. White*, 108 Tex. 570, 196 S. W. 508 (1917). The states, however, cannot in any way abridge the right to trial by jury in the Federal courts. *Diederich v. American News Co.*, 128 F. 2d 144, 146 (10th Cir. 1942). There the court pointed out that the right to trial by jury as guaranteed by the Federal Constitution is a substantive right, and not merely one of form or procedure.

Trial by jury, as guaranteed by the Federal Constitution, includes all the elements of a jury trial as understood and applied at common law.

. . . Those elements were—(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) *that the verdict should be unanimous*. *Patton v. United States*, 281 U. S. 276, 288 (1930). (Italics added).

The conclusion in the *Hibdon* case, *supra*, logically follows the rule set forth by the United States Supreme Court in *Andres v. United States*, 333 U. S. 740, 748 (1948), where it was held that the requirement of unanimity in criminal cases extends to all issues presented to the jury, including character or degree of crime, guilt, and punishment. In *Billeci v. United States*, 184 F. 2d 394, 403 (D. C. Cir. 1950), the court set down the reason for the unanimity rule in criminal cases:

. . . An accused is presumed to be innocent. Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt; if only one of them fixedly has a reasonable doubt, a verdict of guilty cannot be returned. . . . (T)hose rules mean that the prosecutor in a criminal case must actually overcome the presumption of innocence, all reasonable doubts as to guilt, and the unanimous verdict requirement.

The Federal rule applies in the Federal Courts and in the courts of the District of Columbia, *Billeci v. United States*, *supra*, and some of the territories, *Andres v. United States*, *supra*.

Trials in state courts are in accordance with due process as long as they are in accordance with the settled judicial proceedings of the respective states. *Walker v. Sauvinet*, *supra*; *Gunn v. Union R. Co.*, 27 R. I. 320, 62 Atl. 118 (1905). In many states it has been held that trial by jury includes, as one of the essential elements, the unanimous concurrence of all twelve jurors. *Randel v. State*, 153 Cr. 282, 219 S. W. 2d 689, 698 (Tex. 1949); *Branham v. Commonwealth*, 209 Ky. 734, 273 S. W. 489 (1925); *Power v. Williams*, 53 N. D. 54, 205 N. W. 9 (1925). The phrase "trial by jury shall remain inviolate," as used in state constitutions, refers to the right as it existed in the state at the time the constitution of the state was adopted. *Reece v. Montano*, 48 N. M. 1, 144 P. 2d 461, 464 (1943); *Ex parte Way*, 56 Cal. App. 2d 814, 133 P. 2d 637 (1943).

The status of the unanimous jury verdict requirement in criminal cases in the various states falls into one of five categories. (1) A few states, e. g. Maryland and Utah, require in their constitutions that there be a unanimous verdict in criminal cases. (2) Other states, e. g. Louisiana, Oklahoma and Oregon, by constitutional provision allow a departure from the unanimity rule for certain crimes. Oklahoma allows this departure for misdemeanors only, *Pierce v. State*, 248 P. 2d 633 (Okla. 1952); whereas Oregon allows a verdict of ten out of twelve to suffice in any criminal case except first degree murder. *State v. Osbourne*, 153 Ore. 484, 57 P. 2d 1083 (1936). (3) A number of states have interpreted their constitutional provision providing for trial by jury exactly as the Supreme Court of the United States did in the *Patton* case, *supra*, thus upholding the requirement of a unanimous jury verdict in a criminal case. *Commonwealth v. McNeil*, 328 Mass. 436, 104 N. E. 2d 153, 157 (1952); *Markham v. State*, 209 Miss. 135, 46 So. 2d 88, 89 (1950); *State v. Cordasco*, 2 N. J. 189, 66 A. 2d 27, 34 (1949); *People v. Hicks*, 287 N. Y. 165, 38 N. E. 2d 482, 485 (1941); *People v. Traeger*, 372 Ill. 11, 22 N. E. 2d 679, 681 (1939); *Gidley v. State*, 19 Ala. App. 113, 95 So. 330 (1923). (4) Some states, by statute, allow a criminal verdict to be less than unanimous for some types of crimes. But generally legislation which recognizes a non-unanimous verdict in criminal cases where a trial by jury is a matter of right, is not in accordance with state constitutions. *New York Central R. v. Hazelbaker*, 101 Ind. App. 414, 199 N. E. 425 (1935); *Renfro v. State*, 80 Tex. Cr. App. 157, 189 S. W. 137 (1916); unless that legislation is expressly authorized by the respective state constitutions, *Morin v. Becker*, *supra*. (5) Other states, e. g. Kentucky and South Dakota, have state statutes which affirmatively require unanimous verdicts in certain criminal cases, thus reiterating the common law. *Coomer v. Commonwealth*, 238 S. W. 2d 161, 162 (Ky. 1951); *State v. Keeble*, 49 S. D. 456, 207 N. W. 456 (1926).

The unanimity rule became firmly established in the latter half of the Fourteenth century. 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1905) 625-7. At least two reasons for the rule as it existed at common law in England are now extinct, viz., one accused of a felony did not have the right to counsel (*Patton* case, *supra* at 307), and the jurors were not given food or drink until they reached a verdict. 1 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1922) 318; See *Hack v. State*, 141 Wis. 346, 124 N. W. 492 (1910). Furthermore, continental law does not require a unanimous verdict in criminal cases. Mannheim, Trial by Jury in Continental Law, 53 L. Q. Rev. 99, 117 (1936). Opponents of the unanimity rule argue that there would be fewer hung juries; that it would be more difficult to bribe jurors; that a corrupt or stubborn juror would not be able to block a verdict; that unfair compromise verdicts would be avoided; and that the expense of criminal trials would be reduced considerably. Appellate courts require only a majority decision in deciding questions of law, therefore the opponents of unanimity say that only a majority verdict should be necessary in deciding questions of fact. The *Patton* case held that it was not against public policy to waive a jury trial altogether. On the other hand, several state cases have held that a state constitutional right of trial by jury cannot be waived by a defendant or his counsel in a felony case. *Ex parte Dawson*, 20 Ida. 178, 117 Pac. 696 (1911); *Jennings v. State*, 134 Wis. 307, 114 N. W. 492 (1908).

The *Billeci* and *Hibdon* cases, *supra*, held that an accused could not possibly be guilty beyond a reasonable doubt if any juror doubts his guilt. Justice Story, in his COMMENTARIES ON THE CONSTITUTION (3d ed. 1858) §1780, said that the

court is to protect the right of trial by jury, and, in protecting that right, is protecting the accused against oppression by the rulers and violence by the people. In *State v. Holt*, 90 N. C. 749, 752-3 (N. C. 1884), it was held that the court should keep strict watch over the constitutional right of trial by jury and that this right should not be limited for mere utilitarian reasons.

It is submitted that the safeguards of trial by jury as set forth in the *Patton* case, *supra* at 288, were intended for the protection of the accused. Any waiver by the accused is suspect, especially where, as in the instant case, the judge suggested the waiver. To allow a defendant in a felony case to waive his right to a unanimous jury verdict is against public policy, because to do so would allow him to waive the traditional measure of proof in a criminal case.

JOHN F. HUGHES

CORPORATIONS—GIFTS TO EDUCATIONAL INSTITUTIONS—ULTRA VIRES—STATUTE AUTHORIZING SUCH NOT IN VIOLATION OF U.S. CONSTITUTION—The Board of Directors of Plaintiff, a New Jersey corporation, having resolved that it was in Plaintiff's best interest to join with others in the 1951 Annual Giving to Princeton University, voted a gift of \$1,500 to that institution for general educational purposes. A group of stockholders challenged the power of the Board of Directors to make such a gift without consent of the stockholders and without express authority existing in the corporation charter.

In 1930, subsequent to the incorporation of Plaintiff, New Jersey enacted a statute authorizing corporations to contribute to community funds and charitable instrumentalities, subject to certain limitations and conditions. The stockholders contended that this statute could not be applied to a corporation created before its passage. The Plaintiff took the matter to court seeking a Declaratory Judgment. The Chancery Division of the New Jersey Superior Court upheld the gift. The Supreme Court of New Jersey affirmed this decision on the following grounds: (1) That the donation by the Plaintiff from its corporate funds to Princeton University for its general educational purposes was not *ultra vires*. The Court reasoned that the era of great individual benefactors of philanthropic and educational undertakings is past, and that dominating corporations with their control of economic wealth have a direct responsibility and a direct interest in repairing the loss; that this responsibility is one to be discharged socially as well as privately by such corporations as members of the communities in which they have grown; and that gifts by such corporations to educational institutions constitute dividend-paying investments in the very sources from which they must draw a substantial part of their personnel. The Court further pointed out that as a matter of actual practice, corporations did make such gifts on a wide scale, observing that annual corporate contributions aggregate over \$300,000,000, with over \$60,000,000 going to educational institutions, and very substantial amounts going to local community chests, and (2) The New Jersey Statute authorizing corporations to make charitable contributions is not unconstitutional as an impairment of the obligation of contracts, a deprivation of property without due process, or the taking of private property for public purposes without just compensation. This statute can properly be applied to a corporation created prior to its passage, under the reserved power of the State to amend corporate charters. *Smith Manufacturing Co. v. Barlow*, 97 A. 2d 186



(N. J. 1953). An appeal to the United States Supreme Court was dismissed for want of a substantial Federal question. 22 L. W. 3111 (1953).

In deciding this case—said to be the first test case in thirty years involving the authority of a corporation to contribute to education—the Court was faced with two important issues. The first concerned the power of a corporation to make contributions, more specifically contributions to educational institutions, in the absence of the unanimous consent of its stockholders. The second was whether the New Jersey Statute permitting a corporation to make a gift applied to a corporation chartered prior to its passage, and if so applied, whether it violated the Constitution of the United States.

At common law it was *ultra vires* for a corporation to make a gift, at least without the consent of all the stockholders. This was based on the theory that a corporation is operated exclusively for the benefit of its stockholders. Thus, in *Langolf v. Liberlitch*, 2 Pars. Eq. Cas. 64 (Pa. 1851), the Court stated:

Though all corporations aggregate have at common law an incidental right to alienate their property, a Court of Equity will interfere to prevent a disposition of corporate property for other than corporate purposes.

Seventy years ago, the Court of Chancery in England said: "Charity has no business to sit at Boards of Directors." *Hutton v. West Cork Co.*, 23 Ch. D. 654 (1883). However, fifty years later the same Court approved a substantial contribution voted by a chemical company to several English universities for furtherance of scientific research and education, citing the radical change in industry which had taken place in the intervening period. *Evans v. Brunner, Mond & Co.*, (1921) L. R. 1 Ch. D. 359.

The common law rule has been modified by statute in many jurisdictions, and is sometimes affected by provisions of corporate charters. Moreover, the Internal Revenue Code tacitly recognizes that corporations do in fact make charitable contributions by allowing them, to deduct such contributions not exceeding 5% of their net income. Hence the common law doctrine is presently in conflict with Federal Tax laws and permissive legislation passed by twenty-nine states. An interesting summation of the legal situation as it existed in New Jersey just prior to the decision in the *Smith* case may be found in the Princeton Alumni Weekly, Vol. LIII, No. 12 (January 16, 1953).

Some of the early decisions may be regarded as paving the way for the result reached in the *Smith* case. For example, in 1896 it was held not to be *ultra vires* for a corporation to give away some of its manufactured goods for the purpose of extending the reputation thereof. *Steinway v. Steinway*, 17 N. Y. Misc. 43, 40 N. Y. S. 718, 720 (1896). The Court stated:

As industrial conditions change, business methods must change with them and acts become permissible which at an earlier period would not have been considered to be within corporate power.

It has been held that business corporations may make donations to enterprises reasonably calculated to further their own general business interests. *Corning Glass Works v. Lucas*, 37 F. 2d 798 (D.C. Cir. 1930).

The rule that a corporation lacked the power to give away corporate funds, was never an absolute prohibition. Thus, in *Southern Hide Co. v. Best*, 174 La. 748, 141 So. 449 (1932) the Court said that an ordinary business corporation cannot give away part of its property if there is objection on the part of its stockholders and creditors. And in *Futurity Realty Corporation v. Passaic National Bank & Trust Co.*, 20 N. J. Super. 175, 62 A. 2d 706 (1949) it was held that the

rule that a corporation may not give away its property is established for the benefit of stockholders, and if they consent, the transaction is not objectionable. Wisconsin recognizes that the legislature has the discretionary power either to forbid or to permit a corporation to give away its corporate funds. *Western Industries v. Vilter Manufacturing Co.*, 257 Wis. 439, 43 N. W. 2d 430 (1951). In that case the Court held that a private corporation, even without receiving consideration therefor, may give away its assets if it is not expressly forbidden to do so by statute.

One of the leading cases adopting the more liberal view of public policy is *Greene County National Farm Loan Ass'n. v. Federal Land Bank of Louisville*, 152 F. 2d 215 (6th Cir. 1945), *cert. denied*, 328 U. S. 834. In that case it was held that a corporation was permitted to make substantial gifts where activity being promoted by the so-called gifts tended to promote the good will and the business of the contributing corporation. The Court stated:

Courts recognize in such cases that although there is no dollar and cent supporting consideration, yet there is often substantial indirect benefit accruing to the corporation, which supports such action. So-called contributions by corporations to churches, schools, hospitals and public improvement funds and the establishment of bonus and pension plans with the payment of large sums flowing therefrom have been upheld many times as *reasonable business expenditures* rather than being classified as charitable gifts.

Similar points of view may be found in: *American Rolling Mill Co. v. Commissioner of Internal Revenue*, 41 F. 2d 314 (6th Cir. 1930); *Corning Glass Works v. Lucas*, 37 F. 2d 798 (D. C. App. 1929); *Forbes Lithograph Mfg. Co. v. White*, 42 F. 2d 287 (1st Cir. 1930); *American National Assurance Co. v. Rickett's*, 230 Ky. 398, 19 S. W. 2d 1071 (1929).

There are a few recent cases which have invalidated gifts of corporate funds on the ground of fraud or because of the absence of permissive legislation. Thus, in *Candler-Hill Corp. v. Seminole Oil & Gas Corp.*, 96 A. 2d 557 (Del. 1953), the Court found that there was a fraudulent compact between two corporation executives concerning a gift under the guise of a salary. The Court ruled that corporate assets could not be given away or taken without consideration. In *Moore v. Keystone Macaroni Mfg. Co.*, 370 Pa. 172, 87 A. 2d 295 (1952), it was held to be *ultra vires* and illegal for a corporation, *unless authorized by statute*, to give away, dissipate, waste or divert corporate assets. In *Knox v. 1st Security Bank of Utah*, 196 F. 2d 112 (10th Cir. 1953) the Court went a step further and held that a corporation organized solely for commercial purposes could not alienate its property by gift or by indirect diversion, without consideration and when not in furtherance of its pecuniary interests, unless authorized by statute or express charter provisions.

In dealing with the second issue of the *Smith* case, the Court held that the New Jersey statute permitting corporations to make gifts did apply to a corporation chartered prior to the passage of the statute, since the New Jersey Constitution reserves to the State the "power of alteration, suspension and repeal of corporate charters in the discretion of the legislature." The courts of New Jersey have recognized that where justified by the advancement of the public interest, the reserved power to amend may be invoked to sustain later charter alterations, even though they affect contractual rights as between the corporation and its stockholders, or as among the stockholders *inter se*. In *Re Collins-Doan Co.*, 3 N. J. 382, 70 A. 2d 159 (1949). See also *Griffith v. State of Conn.*, 218 U. S. 563 (1910), and *Hudson-County Water Co. v. McCarter*, 209 U. S. 349 (1908).

The Supreme Court of the United States has many times held that an act passed by a State under its reserved power to amend does not impair the obligation of a charter-contract. *Miller v. State*, 15 Wall. 478 (1873); (voting rights changed) *Looker v. Maynard*, 179 U. S. 46 (1900); (charter repealed completely) *Greenwood v. Freight Co.*, 105 U. S. 13 (1881); (complete change was made in life insurance of every kind) *Polk v. Mutual Reserve Fund*, 207 U. S. 310 (1907).

In the *Smith* case the Court ruled that the New Jersey statute was not an impairment of the obligation of contracts, a deprivation of property without due process or the taking of private property for public purposes without just compensation, first, because the action on the part of the legislature was in pursuance of the reserved power to amend, and secondly, because from the nature of charitable contributions, the statute was sustainable under the police power of the State.

The problem should be approached in the light of present day economic and social conditions, as well as actual practice. The benefits afforded to both the donor-corporation and the donee-institution, and the public policy supporting charitable contributions, would appear to outweigh alleged pre-existing rights of stockholders, whose interest should not be limited to the receipt of dividends. The social responsibilities, both of the stockholders and of the corporations whose stock they hold, to communities in which they dwell preclude any such narrow and old-fashioned approach. In taking the broader view, it is believed that the Supreme Court of New Jersey was right.

GENNARO J. CONSALVO

CORPORATIONS—S. E. C.—STOCK OFFERING TO “KEY EMPLOYEES”—PUBLIC OFFERING—The Securities and Exchange Commission sought to enjoin the defendant, Ralston Purina Company, from offering its common stock to its “key employees” without complying with Section 5 of the Securities Act of 1933. The defendant claimed that the offering was exempt as a transaction “by an issuer not involving any public offering,” under Section 4(1) of the Act. The District Court dismissed the suit holding that Section 4(1) was applicable. 102 F. Supp. 964 (E. D. Mo. 1952). This decision was affirmed on appeal. 200 F. 2d 85 (8th Cir. 1952). The Supreme Court granted certiorari and reversed, in a 6 to 2 decision. *S. E. C. v. Ralston Purina Co.*, 346 U. S. 119 (1953).

Section 5 of the Securities Act of 1933, 48 Stat. 77, as amended, 15 U. S. C. §77e (1946), prohibits the offer or sale of any security in interstate commerce or through the mails unless a registration statement as to such security has been filed with the S. E. C. Under Section 4(1) “transactions by an issuer not involving any public offering” are exempt from registration. 15 U. S. C. §77d(1) (1946).

The defendant claimed that since the transaction involved an offer of its common stock in limited quantities to its “key employees”, made pursuant to a long established custom to encourage carefully selected employees to become stockholders, it was not a “public offering”. Anxious to avoid any unnecessary expenditures, in 1951 the issuer offered 10,000 shares of common stock to between 500 and 675 employees without filing a registration statement with the

Commission. The mails were used to carry out the plan. The offer was not confined to any one locality. Although orders were never solicited, managers of departments were told to acquaint suitable personnel of their opportunity to buy this stock. Such selected personnel, described as "key employees", were not confined to an organization chart but were defined as including "an individual who is eligible for promotion, an individual who especially influences others or who advises others, a person whom the employees look to in some special way, an individual, of course, who carries some special responsibility, who is sympathetic to management and who is ambitious and who management feels is likely to be promoted to a greater responsibility."

The question for determination was whether this offering by the defendant was public or private. In granting certiorari the Supreme Court recognized the need to more fully define the scope of the private offering exemption of Section 4(1). Defendant conceded that an offering to all its employees would be public.

The described purpose of the Securities Act of 1933, 15 U. S. C. §77A-77AA, is to safeguard the investing public from fraudulent devices and tricks in the sale of securities. *Campbell v. Degenther*, 97 F. Supp. 975 (W. D. Pa. 1951). Essentially, the statute protects investors by requiring the publication of pertinent information concerning securities before they are offered for sale. Anyone claiming an exemption from the Act under Section 4(1) has the burden of proof that his offer is not public. *Schlemmer v. Buffalo Ry. Co.*, 205 U. S. 1 (1906); *S. E. C. v. Sunbeam Gold Mines Co.*, 95 F. 2d 699 (9th Cir. 1938).

The question what is determinative of a public offer has arisen many times since the Act was passed. Congress has furnished no precise standard. The term is not defined in the statute. Every case has to be decided largely upon the precise facts and circumstances surrounding the offering. *In Re Leach*, 215 Cal. 536, 12 P. 2d 3, 7 (1932).

In the *Ralston* case the defendant based its claim to exemption on the manner of the offering and on the relationship of the offerees to the Corporation. As a rough rule of thumb, an offering to more than 25 persons has generally been regarded as public, although the converse is not necessarily true. But in view of the stated purpose of the Act, the Supreme Court was of the view that the applicability of the exemption should turn on whether the class of persons affected needed the protection of the Act; an offering to those shown to "be able to fend for themselves" should be exempt. Accordingly, the most important factor for consideration was whether these so called "key employees" had knowledge of or access to the information required to be included in a registration statement.

The principal factors to be considered include: (a) the number of offerees and their relationship to each other and the issuer; (b) the number of units offered; (c) the size of the offering; (d) the manner of the offering. Opinion of General Counsel of Commission, Sec. Act Release No. 285, Jan. 24, 1935, 11 Fed. Reg. 10952 (1946), CCH Fed. Sec. Law Rep. 1948-1952.

The Supreme Court indicated that if the Corporation had sustained the burden of proof that the offerees had access to all the information which would have been contained in a registration statement, there would have been no great difficulty in affirming the decision of the Court of Appeals. The fact that all the offerees were allegedly "key employees" is not of itself sufficient exemption. If all offerees had been officers of the corporation, then it would have been less difficult to uphold the defendant's claim to an exemption.

In deciding the case primarily on the ground that these so-called "key employees" constituted a class entitled to the protection of the Act, the court declined to accept the further argument of the Commission that any offering to a substantial number of persons was, by that fact alone, a public offering and hence, not entitled to exemption. While the Commission had originally ruled that an offering to an "unsubstantial" number of persons was entitled to exemption under section 4(1), it later qualified this ruling by pointing out that the relationship of the offerees to the issuer had to be considered as well. Thus, an offering to a given number of persons chosen from the general public as potential purchasers might be a public offering, whereas an offer to a larger number, but restricted to a particular class (e.g. high executive officers), might be non-public. *Opinion of General Counsel of Commission, Jan. 24, 1935, supra.*

At the same time, the Commission adhered to the view that any offering to a "substantial" number of persons, whatever their relation to the issuer, was "public" and therefore not entitled to exemption. *S. E. C. v. Mining Truth Publishing Co.*, (E. D. Wash. 1937), 1 SEC Jud. Dec. 469, CCH Fed. Sec. Law Rep. 1941-1944, Sec. Act Release No. 285.

In *S. E. C. v. Sunbeam Gold Mines Co.*, 95 F. 2d 699 (9th Cir. 1938), the court held that an offering to stockholders, other than a very small number, was a public offering, and especially so since in that case the offerees included the stockholders of another company who were seeking to become stockholders of the offeror. Since the company claiming the exemption offered no further proof concerning the offerees other than they were stockholders, the Court found it unnecessary to determine "whether such an offer becomes private rather than public if each of the 530 stockholders involved were shown to know everything about the mining properties, their operation, and the financial condition of the company, which would be disclosed if the management had complied with the Securities Act and furnished the information to the Commission." The exemption was accordingly denied.

Similar reasoning was followed in *Merger Mines Corp. v. Grismer*, 320 U. S. 794 (1943). There the transaction was between the issuer and the existing shareholder. Appearing as *amicus curiae*, the Commission argued that the proposed issue did not come within Section 4(1) because of the number of offerees involved. Citing the *Sunbeam* case, the Commission insisted that if an offer to 530 stockholders was a public offer, an offering to 1,100 stockholders would also be public. The court held that an offer restricted to a particular group or class may nevertheless be public if it is open to a sufficient number of persons even where the transaction is between the issuer and existing shareholders.

However, in the case of *Campbell v. Degenther*, 97 F. Supp. 975 (W. D. Pa. 1951), the court held that since the shareholders had an intimate knowledge of the Corporation's affairs, the need for registration did not exist. The Court described the relationship of the parties to the transaction as ". . . a close knit arrangement among friends and acquaintances," but also considered the fact that since the offer was made to only 32 persons, this group was not sufficient in size to fall within the definition of a public offering.

In the *Ralston* case, the Court of Appeals was satisfied that the offer was restricted to a particular class of offerees which did not need the protection of the Act. The Commission urged the Supreme Court to overrule the Court of Appeals on this point, arguing that "whatever the special circumstances, the Commission has consistently interpreted the exemption as being inapplicable

when a large number of offerees is involved." But the Supreme Court rejected this argument, pointing out that the statute applied to a "public offering" whether to few or many. The Court then administered a mild rebuke to the Commission for usurping the legislative function, stating that while the Commission might properly use a numerical test in deciding when to *investigate* particular exemption claims, there was "no warrant for superimposing a quantity limit on private offerings as a matter of statutory interpretation."

The scope of the exemption afforded by Section 4(1) has been more accurately defined as a result of this decision. However, the question still remains whether an offer made to a limited number of offerees, not shown to have had access to the information which a registration statement would disclose, would still be a private offering. The possibility still exists that an unregistered offer, made to but one offeree who did not have access to knowledge, would be considered a violation of Section 5 of the Securities Act. In such a situation, Viscount Sumner's frequently quoted *dictum* in *Nash v. Lynde*, could apply: "The public' . . . is of course a general word. No particular numbers are prescribed. Anything from two to infinity may serve; perhaps even one, if he is intended to be the first of a series of subscribers, but makes further proceedings needless by himself subscribing the whole." (1929) A. C. 158, 169.

#### NATALIE YEAGER

**EVIDENCE—PHYSICIAN-PATIENT PRIVILEGE—PHYSICIAN AS EXPERT WITNESS**—The defendant Industrial Commission disallowed the plaintiff's claim of additional compensation for injuries sustained while the plaintiff was in the employ of the Cambria Mining Company, a contributor to the State Insurance Fund. The plaintiff appealed this ruling and at the ensuing trial the defendant's counsel attempted to interrogate the plaintiff's physician concerning the plaintiff's injuries. An objection by the plaintiff's attorney that such communications are privileged was sustained. The defense was then granted permission to question the physician, not as the attending physician, but as an expert witness testifying to a hypothetical question, provided the physician was instructed to disregard what he had learned and observed while treating the plaintiff.

On appeal to the Supreme Court of Ohio, the plaintiff contended that the doctor's testimony was a privileged "communication" under Section 11194 of the Ohio General Code, and was, therefore, inadmissible. The defendant alleged that the statute was inapplicable to expert testimony based on hypothetical questions as long as the physician had disregarded all that he had learned and observed while attending the patient. The issue presented to the court was whether or not the admission of the physician's expert testimony violated the code privilege since the physician had treated the plaintiff professionally.

The Supreme Court, noting this to be a new question in Ohio, held in accordance with the majority American view, (see 70 C. J., Witnesses §605), that since the witness excluded all knowledge gained from his treatment of the plaintiff, such testimony did not violate the code privilege and was therefore admissible. *Strizak v. Industrial Commission*, 159 Ohio St. 475, 112 N. E. 2d 537 (1953).

In substance, the instant statute forbids a physician to testify to those matters communicated to him in order that he may treat the patient properly.

Such statutes have frequently been criticized by the courts and legal writers as being obstructions to justice and based upon *a priori* assumptions. 8 WIGMORE, EVIDENCE (3d ed. 1940) §2380. The principal decision seems to be another instance illustrating the inherent weakness of the privilege.

A physician, in determining his own ability to disregard any information he may have gained while treating the patient, is left with a measure of discretion notwithstanding the fact that the privilege is exclusively the patient's and subject to waiver only by the patient. The physician, by merely stating that he is able to exclude this knowledge, may evade the privilege and testify as an expert upon the identical set of facts posed in a hypothetical question. When a physician states he is unable to exclude this intimate knowledge he is not permitted to testify. *People v. Schuyler*, 106 N. Y. 298, 12 N. E. 783 (1889). In one state a presumption that the testimony would be adverse is permitted whenever the physician-patient privilege is exercised. *Thomas v. Maryland Casualty Co.*, 213 La. 615, 32 So. 472 (1947).

Since a witness is usually unable to prevent such knowledge from shading his answer, the real objection to the procedure permitted in the instant case is a fear that the jury would give undue weight to the physician's expert testimony. The courts, however, are agreed that this problem is a matter for the jury to decide and not to be obviated by rulings of the court. It should not be assumed as a matter of law that the physician could not exclude his personal knowledge of the patient's condition from his answer to any hypothetical question. *Meyer v. Standard Life & Accident Insurance Co.*, 8 App. Div. 74, 40 N. Y. S. 419 (1896). It has been held that a charge negating the jury's consideration of the witness' confidential knowledge sufficiently counterbalances whatever prejudice might have resulted from the physician's testimony. *Crago v. City of Cedar Rapids*, 123 Iowa 48, 98 N. W. 354 (1904).

The basic propriety of the privilege appears to have been in constant controversy ever since its first enactment by New York in 1828. Prior to that statute the settled common law of England and the United States placed the secrecy of private confidence given to a physician on no better grounds than that allowed to others, e.g., clerks, trustees, bankers, etc. 8 WIGMORE, EVIDENCE (3d ed. 1940) §§2380-90. Some courts, alluding to the similarity of the attorney-client relationship, have apparently failed to distinguish the purposes served by the respective privileges. The confidence imposed in a physician, if divulged, would affect his treatment of the patient only in a most remote and indirect manner. The confidence imposed in an attorney, however, if divulged in court, would often make it impossible for the attorney to protect adequately his client's legal interests. *Russell v. Jackson*, 9 Hare 387 (1851).

Following the epoch-making legal reform in New York, many of the states enacted similar statutes making physician-patient communications privileged. It is, however, only by a slight margin that the statutory privilege can be truly called the majority view. Thirty-two states have some form of statute covering physician-patient communications. See 8 WIGMORE, EVIDENCE (3d ed. 1940) §2380. Approximately nineteen of these states have statutes similar to the New York statute wherein such communications are given blanket privilege. N. Y. C. P. A. §352. Seven states have a modified form of the New York statute. Of this group the Pennsylvania statute is somewhat typical in that the statute applies only to civil cases and then only when the physician's testimony would tend to "blacken" the character of the patient. See PURDON'S STAT., TIT. 28, §328. The remaining six states having such a statute follow the very limited provisions

of the California statute, (see CAL. CODE OF CIV. PROC., §1881, par. 4), whereby the privilege does not apply to civil actions brought to recover damages for personal injuries. It has been observed that if every exception to the privilege were incorporated into one statute it would be void of any effective privilege and we would be right back at the common law. See *W. Va. L. Q.* 165 (1938).

Incongruous results have frequently followed the application of the privilege by the courts. Registered nurses have been included within the term "physician" and their communications privileged, while communications to unregistered nurses have been held not privileged. *Hobbs v. Hullman*, 183 App. Div. 743, 171 N. Y. S. 390 (1918). Some courts have held hospital records privileged even where the state law requires such records be kept. *Marx v. Parks*, 39 S. W. 2d 570 (Mo. 1931). Other courts have held such records not to be privileged. *Motley v. State*, 174 Miss. 568, 165 So. 296 (1936). Although a family physician could not testify as to the cause of death, it was held permissible for the hospital physician performing the autopsy to testify to this same fact. This result was reached from the determination that "a deceased body is not a patient." *Travelers Ins. Co. v. Bergeron*, 25 F. 2d 680 (8th Cir. 1928). Another court, however, concluded that a physician performing an autopsy "steps into the shoes of the attending physician." *Mathews v. Rex Health & Accident Ins. Co.*, 86 Ind. App. 335, 157 N. E. 467 (1927). A widow was unable to prove that her husband's death was caused by an accident because the physician who knew the facts was unable to testify. *Maine v. Maryland Casualty Co.*, 172 Wis. 350, 178 N. W. 749 (1920).

The courts, in rationalizing the privilege, have sometimes said that such "communications" by the patient to the physician were involuntary. *Arizona & New Mexico Ry. Co. v. Clark*, 235 U. S. 669 (1915). The fundamental reason advanced for the existence of the privilege, however, is that a patient is freed from any apprehension of disclosure of such confidential information by the physician. No state has a statute making it a crime to disclose such confidence. The only civil case concerning this point held that a physician is not liable for a breach of such confidence. *Simonsen v. Swensen*, 104 Neb. 224, 177 N. W. 831 (1920); see 9 A. L. R. 1254 (1920). The real fear of a patient is the spreading of intimacies among friends in the community rather than in the court, yet the real fear receives practically no protection. 52 *Yale L. Rev.* 607 (1943).

The physician-patient privilege has been vigorously attacked by some of the leading legal writers. Professor Wigmore discourages the privilege in the following words:

The real support for the privilege seems to be mainly the weight of professional medical opinion pressing upon the legislature, and that opinion is founded upon a natural repugnance to becoming the means of disclosure of a personal confidence. 8 WIGMORE, EVIDENCE (3d ed. 1940) 2380.

Professor Zachariah Chafee, Jr., in reviewing the privilege, concludes that it is unnecessary and based on a *priori* reasoning. He says:

Not a single New England state allows the doctor to keep silent on the witness stand. Is there evidence that any ill or injured person in New England has ever stayed from a doctor's office on that account? 52 *Yale L. Rev.* 607 (1943).



Recent serious consideration of the privilege has invariably resulted in a recommendation of modification of the privilege, if not abolition in toto. The American Bar Association Committee on the Improvement of the Law of Evidence recommended that the North Carolina rule be adopted, a rule which gives certain courts power to require disclosure where necessary. The Model Code of Evidence of the American Law Institute (1942) originally left out such a privilege but finally inserted rules 220-23 permitting the privilege only in civil or misdemeanor cases. A further exception was provided whenever the condition of the patient is a factor or element of the claim or defense.

The writer believes that there are sufficient indications to find a trend toward reverting to the common law where no privilege exists. The *Strizak* case, in limiting the scope of the physician-patient privilege, is merely another indication of this trend. Such a trend seems favorable in view of the many injustices resulting to third parties because of the unscrupulous use of the privilege. When considering the unstable reasons supporting these statutes, which declare that physician-patient communications are privileged, little distinction can be perceived between medical needs and any other equally urgent necessity of life.

#### WILLIAM T. DUCKWORTH

**TRUSTS—EXTRA COMPENSATION— COMPENSATION PAID FROM CORPUS OF TRUST FUND—TIME OF PAYMENT OF EXTRA COMPENSATION—**An action was brought by the plaintiff-trustee for compensation for extraordinary services rendered in the sale of a newspaper that was part of the trust estate, and for compensation for services of its attorney. The beneficiaries of the corpus of the trust fund neither approved nor disapproved the request for such compensation from the corpus of the trust, but left the matter to the discretion of the court. The main issues were: (1) whether the plaintiff-trustee was entitled to extra compensation, (2) should such extra compensation come from the corpus, and (3) may such compensation be paid immediately.

The District Court held, in the absence of any controlling statute, that (1) since the plaintiff rendered an extraordinary service in selling a trust asset at "highly advantageous" terms "without payment of a broker's fee, after arduous, prolonged, and intensive negotiations" he was entitled to extra compensation, (2) due to the nature of the extraordinary services such compensation should come from the corpus, and (3) the extra compensation can be paid immediately even though the usual compensation from the corpus would not be paid until the termination of the trust. *McLean v. American Security & Trust Co.*, 113 F. Supp. 427 (D. D. C. 1953).

A trustee is entitled to reasonable compensation for his services whether or not the trust instrument contains such provisions. *Barney v. Saunders*, 16 How. 535 (1854). If the amount of the compensation has not been fixed by statute, nor fixed by the discretion of the settlor, the amount of the award and the time of payment is determined by the court. *Magruder v. Drury*, 37 D. C. App. 519 (1911). Even when the amount has been fixed by statute, the trustee's right to receive the maximum amount rests within the discretion of the court. *Marsh v. Marsh*, 82 N. J. Eq. 176, 87 Atl. 91 (1913); *Baker's Heirs v. Dixon Bank & Trust Co.*, 292 Ky. 701, 168 S. W. 2d 24 (1943). In either situation, when a dispute arises, the question of what constitutes a reasonable compensation

is submitted to the court for determination. *Commerce Trust Co. v. Aylward*, 145 F. 2d 113 (8th Cir. 1944).

In deciding what is fair or reasonable compensation, there are certain factors which the court takes into consideration. The labor and services of the trustee in performance of his trust duties, *Louisville N. A. C. Ry. v. Hubbard*, 116 Ind. 193, 18 N. E. 611 (1888); the responsibility incurred and involved, *In re McGuffey's Estate*, 123 Pa. Super. 432, 187 Atl. 298 (1936); the amount of time and care rendered by the trustee, *In re Teasdale's Estate*, 261 Wis. 240, 52 N. W. 2d 366 (1952); and frequently, the amount of the trust estate, *Barney v. Saunders*, 16 How. 535 (1854), are a few circumstances which may aid the court in determining fair or reasonable compensation.

The court, in the instant case, was not concerned with the ordinary compensation of the trustee because the trustee had already received his commissions on income and principal for the performance of his ordinary duties under the terms of the trust. Rather, the problem was to determine whether or not he was entitled to extra compensation for the performance of the extraordinary duties.

Many courts have refused to allow extra compensation for extraordinary services because the trustee might create extra duties where they are not needed for the purpose of selling his services to the trust estate. *Charney v. First & Am. Nat. Bank of Duluth*, 231 Minn. 164, 42 N. W. 2d 400 (1950). In the principal case, the court observed whether the extra duties were thrust upon the trustee by the terms of the trust or whether he created them for the purpose of selling his services to the trust for his own unjust enrichment, and after considering the nature and the magnitude of the transactions, the unusual skill, and the prolonged negotiations in selling the newspaper, decided that the trustee was entitled to extra compensation.

Compensation for extra services which have been beneficial to the trust estate is payable out of the principal of the trust fund. *Sheffield v. Cooke*, 39 R. I. 217, 98 Atl. 161 (1916); *In re Snider's Estate*, 346 Pa. 615, 31 A. 2d 132 (1943). Where the trustee sold realty which proved to be advantageous to the trust estate without receiving a broker's fee, he was entitled to extra compensation out of the trust capital for his work. *In re Power's Estate*, 58 Pa. D. & C. 379 (Pa. 1947). Even when the trustee himself was an attorney, and performed work not usually performed by a trustee, he was entitled to extra compensation out of the trust capital for the fair value of his services. *Ontjes v. MacNider*, 234 Iowa 208, 12 N. W. 2d 284 (1944).

Generally, that part of a trustee's compensation which is payable out of the corpus of the trust is allowed only at the termination of the trust, but it has been held that an immediate allowance will be made from the corpus where the trustee's services have enhanced the value of the trust estate although the trust estate has a long time to run. *In re McMillin's Estate*, 120 N. Y. 432, 185 Atl. 913 (1936).

Where there has been an immediate allowance of a commission on the principal of the trust estate, in addition to a commission on the income for unusual services rendered by the trustee, it must be shown that the commission was determined as a matter of evidence and not as a matter of law. *Caldwell v. Hopkins*, 265 Fed. 972 (D. C. App. 1920). In determining the amount of compensation, the court in the *McLean* case, *supra*, received evidence from the trustee in addition to evidence from two independent trust officers and one law firm with many long years of experience in trust administration and broad experience in the appraisal, management and sale of various newspapers.

Research has revealed that a limited number of jurisdictions do not allow compensation for any services rendered by the trustee which are not in the line of ordinary duties. For example, it has been held that a trust agreement which fixed the trustee's compensation was binding on the parties and beneficiaries, and also controlled the action of the court. *In re Laree's Estate*, 24 N. J. Super. 604, 95 Atl. 435 (1953). Similarly, where there were no directions in the trust instrument, a commission from the corpus of the trust was not allowed until the fund was in the course of distribution. *In re William's Estate*, 368 Pa. 343, 82 A. 2d 49 (1951). The possible qualification is that there may be a commission from the corpus in favor of the retiring trustee. *In re Bosler's Estate*, 161 Pa. 457, 29 Atl. 57 (1894).

In conclusion, this writer feels that the instant decision was in accordance with the majority of the cases decided on this point. The majority of the cases will allow the trustee extra compensation for extraordinary services made necessary by the terms of the trust. The courts will consider the care, labor, skill and prolonged negotiations in awarding extra compensation, just as they do in awarding compensation for ordinary services. Award of extra compensation will be made from the trust principal when the extraordinary services have greatly benefited the trust corpus, and it is within the discretion of the court to make such allowances prior to the termination of the trust.

CLARENCE H. FEATHERSON