Notre Dame Law Review

Volume 39 | Issue 1 Article 6

12-1-1963

Recent Decisions

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RECENT DECISIONS

FEDERAL RULES OF CIVIL PROCEDURE — DISCOVERY — EXPERT'S REPORT HELD DISCOVERABLE AS TO FACTS BUT NOT CONCLUSIONS. — Plaintiff's son was injured on an escalator while descending from the main lobby of the New Orleans International Airport. Subsequent to the injury the insurer of Westinghouse Electric Company, which manufactured, installed, and maintained the escalator, engaged a firm of expert engineers to make an inspection report on the physical installation and present operating condition of the escalator. This report was transmitted to counsel for the defendant. Plaintiff then filed a motion for the production of the report under Rule 34 of the Federal Rules of Civil Procedure. The court held: the defendant must deliver the report to the plaintiff but may first remove the expert's conclusions stated therein. *Maginnis v. Westinghouse Electric Corporation,* 207 F.Supp. 739 (1962).

When the Supreme Court adopted the Federal Rules of Civil Procedure in 1938,[1] liberal discovery provisions were given formal recognition in the federal courts. Rule 34 has played a prominent part in this new era of expanded pretrial discovery by providing that "upon motion of any party

> showing good cause therefore, . . . the court in which an action is pending may . . . order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books . . . not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination."[2]

Depositions and interrogatories are further implementations of the concept of pretrial discovery.

The impact of the federal rules has been felt as well on the state level. In recent years there has been a trend toward uniformity among the states as more and more jurisdictions have altered their rules of civil procedure to correspond with the federal rules. At the present time, a substantial number of states have generally adopted the federal discovery provisions.[3] Others have accepted various portions of the federal rules.[4] Several of the states have modified their own procedural standards in light of the federal provisions.[5]

As our legal system advances it would seem that partisan ethics should not be allowed to shroud the essential truth in adjudicatory proceedings. Discovery may well be visualized as a "search for truth" which pierces the aura of secrecy beclouding the facts. It thereby enables a party to obtain before trial, information and other materials relevant to pending litigation. In so doing, the discovery provisions of the federal rules afford a triphased approach to the attainment of fair and expeditious judicial proceedings. In the first place, they can reduce the risk of surprise at the time of the trial. This is accomplished by the deposition-discovery procedure which simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it.[6] Secondly, they can facilitate an early narrowing of the issues through a fuller disclosure of the facts. In the final analysis, they can lead to the settlement of many cases without the necessity of having the parties incur expensive litigation. The recurrent criticism of the federal rules, and Rule 34 in particular, is predicated upon the assumption that the elimination of surprise destroys the usefulness of cross-examination by permitting unscrupulous counsel to have witnesses adjust their testimony to meet the exigencies of the trial. Opponents of the rules also suggest that broad dis-

1 308 U.S. 645 (1939).

2 Fed. Rules Civ. Proc. Rule 34, 28 U.S.C. (1958).

3 See, *e.g.,* CAL. CODE CIV. PROC. §§ 2016-34. The following states also have rules of civil procedure substantially patterned after the Federal Rules of Civil Procedure: Alaska, Ariz., Ark., Colo., Del., Fla., Ga., Hawaii, Idaho, Ill., Iowa, Ky., Me., Md., Minn., Mo., Mont., Neb., Nev., N.J., N.M., N.D., Ore., Pa., S.D., Tex., Utah, Vt., Wash., W.Va., Wyo.

4 See, *e.g.,* N.Y. CIV. PRAC. ACT § 324. Other such states are: Ala., Miss., and Tenn.

5 Conn., Mich., and Va.

6 See, Hickman v. Taylor, 329 U.S. 495, 507 (1947).

covery provisions permit counsel to go on a "fishing expedition," penalizing diligence, rewarding laziness and furnishing free to one party what his adversary has prepared at considerable expense of both time and money.[7]

In *Maginnis* the plaintiff sought discovery of the expert's report under Rule 34. Before allowing plaintiff's motion, the court had to consider grounds often relied upon by the courts for denial of discovery of expert information. These courts have based their refusals upon three basic concepts, the "work product" doctrine, the privileged communication theory and the "unfairness" rule. Both the privileged communication theory and the "unfairness" rule were pleaded by the defendant in *Maginnis*.

The "work product" doctrine originated with *Hickman v. Taylor* where the Supreme Court stated that the work of an attorney is reflected "in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways,"[8] and this "work product" of the lawyer should not be discoverable. In discussing the preparatory work of an attorney, this doctrine has been adhered to in subsequent cases. In *Carpenter-Trant Drilling Company v. Magnolia Petroleum Corporation*,[9] this doctrine was held applicable where the attorney relied upon the assistance of an expert. The court refused to grant a motion for discovery of the expert's report, relying upon the "work product" rationale. An expert had been retained by counsel to aid in the preparation of the case by submitting reports. The court decided that when an expert in an extremely technical field has been retained to advise counsel as to proper specialized interpretation of facts, and of the state of technical information, that this partakes of counsel's "work product." Another lower federal court has held that the adverse attorney's "work product" is discoverable under certain circumstances,[10] while other federal courts have held that expert's opinions[11] and reports[12] are subject to discovery proceedings. Upon close examination, there seems little justification in extending the "work product" doctrine to cover expert information. The opinions and conclusions of an expert are not those which *Hickman* sought to protect.[13] Unlike the attorney's impressions or those of the client or his investigators as to the veracity of a potential witness or the value of certain evidence, the opinions of an expert constitute evidence in themselves,[14] and may be the only available way to establish material facts.

Another commonly urged objection to the discovery of expert information is the theory of privileged communication. It is raised when a party transmits expert's reports to his counsel, or counsel himself procures expert assistance. In *Falsone v. United States*,[15] Circuit Judge Rives stated that if "the documents are not privileged while in the hands of a party, he does not make them privileged by merely handing them to his counsel." The *Maginnis* court found no privileged relationship between the defendant and the engineering firm it had engaged to make the expert report. It therefore adopted the rationale of Judge Rives and rejected the defendant's contention that the expert's report was to be protected by the privileged communication theory, notwithstanding that the report was

7 See generally, 39 A.B.A.J. 1075 (1953).
8 *Supra* note 6, at 511.
9 23 F.R.D. 376 (D.Neb. 1959).
10 Walsh v. Reynolds Metals Company, 15 F.R.D. 376 (D.N.J. 1954). The court said that the "work product" of the attorney is not sacrosanct. It is discoverable by the other side if there are special circumstances which make it essential to the preparation of his case and in the interests of justice that the statements be produced for his inspection or copying.
11 See, *e.g.*, Sachs v. Aluminum Company of America, 167 F.2d 570 (6th Cir. 1948), and Winner, *Procedural Methods to Attain Discovery* in *Seminar on Practice and Procedure*, 28 F.R.D. 97, 101-02 (1960).
12 See, *e.g.*, Leding v. U.S. Rubber Co., 23 F.R.D. 220 (D.Mont. 1958).
13 See 74 HARV. L. REV. 940, 1031-32 (1961).
14 See MCCORMICK, LAW OF EVIDENCE §§ 13-14 (1954); MORGAN, BASIC PROBLEMS OF EVIDENCE 197-98 (1962).
15 205 F.2d 734, 739 (5th Cir. 1953).

in its counsel's possession. But the privileged communication theory has been adopted by some federal courts which have prohibited discovery of expert's opinions[16] and reports.[17] Looking to *Hickman,* it seems a somewhat tenuous argument that experts' opinions, even though procured by counsel, are within the attorney-client privilege. Whereas the narrower issue before the Supreme Court in *Hickman* was the right to discovery of the statements of nonexpert witnesses, the court used broad language in disposing of the issue of privilege:

> . . . the protective cloak of this privilege does not extend to information which an attorney secured from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications, and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories.[18]

If memoranda prepared by counsel himself are not privileged, then reports prepared for him by an expert should not be privileged.[19] The privileged communication theory, it seems, should serve as a protection for communications only, not facts. However, the expert's observations and conclusions themselves, whether or not contained within a report, are facts which, if relevant, constitute evidence.[20] The attorney, in directing the work of an expert, is not engaging in any personal legal analysis but rather he is directing the investigation in the compilation of evidentiary material. "To the extent that knowledge of those directions reveals to the plaintiff theretofore unsuspected areas for factual investigation, the basic purposes of discovery are served."[21]

The chief ground for the refusal by courts to allow discovery under Federal Rule 34 is that discovery would be "unfair" to the adverse party. In *Maginnis,* the defendant contended that it would be unconscionable to allow plaintiff to profit at its expense. The court refused to be swayed by the "unfairness" plea and allowed the discovery motion. The rule of unfairness is a recognition of the unjust enrichment in discovery of a report paid for by a diligent adverse party.[22] Many trial attorneys, after an expenditure of time and money, feel that a court allowing discovery of their expert's reports is treating them unfairly. They contend that such liberalization of discovery is rewarding the laziness of opposing counsel and punishing their diligence. In many cases the federal benches have been receptive to this argument and have denied discovery of expert information.[23] Thus, in *Lewis v. United Air Lines Transport Corporation,*[24] the court said that discovery, in this instance, would be the equivalent of taking another man's property without compensation.

What then should be the basis for allowing or disallowing discovery of expert information? One proposal states that the proper solution is this:

> The courts should not ordinarily permit one party to examine an expert engaged by the adverse party, or to inspect reports prepared by such expert, in the absence of showing that the facts of the information sought are necessary for the moving party's preparation for trial and cannot be obtained by the moving party's independent investigation or research.[25]

An equitable solution might then be to permit the trial judge to utilize his dis-

16 See, *e.g.,* Cold Metal Process Company v. Aluminum Company of America, 7 F.R.D. 684 (D.Mass. 1947).
17 See, *e.g.,* Smith v. Washington Gas Light Co., 7 F.R.D. 735 (D.D.C. 1948).
18 *Supra* note 6, at 508.
19 See 4 MOORE, FEDERAL PRACTICE § 26.24 at 1528 (2d ed. 1962).
20 See generally, 14 STAN. L. REV. 455, 469 (1962).
21 See 62 HARV. L. REV. 269, 273 (1948).
22 See generally, 8 U.C.L.A. L. REV. 472, 473 (1961).
23 See, *e.g.,* Boynton v. R. J. Reynolds Tobacco Co., 36 F. Supp. 593 (D.Mass. 1941); Roberson v. Graham Corp., 14 F.R.D. 83 (D.Mass. 1952); Dipson Theatres, Inc. v. Buffalo Theatres, Inc., 8 F.R.D. 313 (W.D.N.Y. 1948); United States v. 88 Cases, 5 F.R.D. 503 (D.N.J. 1946).
24 32 F. Supp. 21, 23 (W.D.Pa. 1940).
25 4 MOORE, *op. cit. supra* note 7 at 1531.

cretion in ordering discovery if the moving party is willing to pay a reasonable portion of the expert's fees.[26] The judge's exercise of this discretion would accord with Rule 1 which states that the purpose of the federal rules is partly to have an inexpensive determination of causes.

It is interesting to note that the state courts have been much more reluctant to allow discovery of expert information than have the federal courts.[27] This might well be attributable to the statutory provision in some of the states which protects expert's conclusions.[28] Since such provisions are not found among all states, a more probable explanation is the states' relatively short experience with the discovery rules, coupled with the apprehensiveness of many bar members toward broad discovery provisions. Even in the federal courts the numerical weight of cases is still against discovery of expert information.[29] There is, however, a growing body of federal case precedent for allowing discovery of expert information.[30] The only case to reach the Circuit Court of Appeals,[31] *Sachs v. Aluminum Company of America,*[32] held that an expert is subject to the discovery process. In that case, a Federal District Court in Ohio rejected the plea of privilege, and pursuant to the expert's failure to abide by the court's decision, the Circuit Court of Appeals affirmed a contempt charge against the expert.[33]

Some courts, as in *Maginnis,* have limited discovery of expert's reports under Rule 34 to factual matter, excluding the conclusions.[34] Others,[35] following *Sachs v. Aluminum Company of America,*[36] have allowed discovery of both facts and conclusions. In *Leding v. U.S. Rubber,*[37] the plaintiff sought discovery of the results of analysis, inspection, or investigations made by an expert engaged by the defendant. The court allowed discovery and said:

> The primary concern of courts of justice is to elicit truth essential to correct adjudication. Certainly this end can best be achieved by a full disclosure of information available to either party.[38]

Probably due to the concern expressed by many bar members, fifteen of the states have added to their discovery provisions a rule which protects without quali-

26 See, *e.g.,* United States v. 50.34 Acres of Land, 13 F.R.D. 19 (E.D.N.Y. 1952).

27 See, *e.g.,* Dean v. Superior Court, 84 Ariz. 104, 324 P.2d 764 (1958); Empire Box Corp. v. Illinois Cereal Mills, 47 Del. (8 Terry) 283, 90 A.2d 672 (Super. Ct. 1952); Ford Motor Co. v. Havee, 123 So.2d 572 (Fla. Dist. Ct. App. 1960).

28 See, *e.g.,* N.J. SUPER. CT. CIV. PRAC. R. 4:16-:2. No discovery is to be had of "any part of a writing which reflects . . . the conclusions of an expert."

29 See, *e.g.,* United Air Lines Inc. v. United States, 26 F.R.D. 213 (D.Del. 1960); E. I. DuPont deNemours & Company v. Phillips Petroleum Company, 23 F.R.D. 237 (D.Del. 1959); Colonial Airlines Inc. v. Janas, 13 F.R.D. 199 (S.D.N.Y. 1952); United States v. 88 Cases, 5 F.R.D. 503 (D.N.J. 1946).

30 See, *e.g.,* Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792 (D.Del. 1954); Bergstrom Paper Co. v. Continental Insurance Co. of City of New York, 7 F.R.D. 548 (E.D. Wis. 1947); United States v. 300 Cans of Black Raspberries, 7 F.R.D. 36 (E.D. Ohio 1947); See *supra* note 26.

31 See generally, 62 HARV. L. REV. 269, 276 (1948). The absence of appeals from the Federal District Courts is attributable to the interlocutory nature of the discovery rules. Since they cannot be appealed, the party required to produce expert's reports must either do so or be subject to a contempt citation.

32 167 F.2d 570 (1947).

33 But see, Cold Metal Process Company v. Aluminum Company of America, 7 F.R.D. 684 (D.Mass. 1947). There the Federal District Court in Massachusetts upheld the plea of privilege and refused to allow discovery.

34 See, *e.g.,* Julius Hyman & Company v. American Motorists Insurance Co., 17 F.R.D. 386 (D.Colo. 1955); Walsh v. Reynolds Metals Company, 15 F.R.D. 376 (D.N.J. 1954); United States v. Certain Parcels of Land, 15 F.R.D. 224 (S.D.Cal. 1953).

35 See, *e.g.,* United States v. Nysco Labs, 26 F.R.D. 159 (E.D.N.Y. 1960); Leding v. U.S Rubber Co., 23 F.R.D. 220 (D. Mont. 1959); Golden v. Schofield Motors, 14 F.R.D. 521 (N.D.Ohio 1952); Cox v. Pennsylvania R. Co., 9 F.R.D. 517 (S.D.N.Y. 1949).

36 *Supra* note 31.

37 23 F.R.D. 220 (D.Mont. 1959).

38 *Supra* note 37 at 222.

fication not only the mental impressions and conclusions of an attorney but also the conclusions of experts.[39] This may well satisfy those bar members who are apprehensive as to the effects of modern discovery provisions upon their practices, but it does little to facilitate a full disclosure of the facts in such a manner that the trier of fact can make a judicious determination. In a recent Illinois case, the court adversely criticized just such a statutory provision.[40] There seems to be no persuasive reason for excluding expert's conclusions from discovery after a showing of good cause.[41] It has been suggested that permitting discovery of expert's conclusions would discourage both parties from seeking expert advice. This simply does not seem to be the case because the complexity of the problems involved necessitate expert assistance. Expert's conclusions are factual evidence in themselves and if it is acknowledged that cross-examination is necessary to bring out expert's weaknesses and inconclusiveness, then it seems apparent that successful cross-examination will often require pretrial discovery of the complicated matters or theories at the essence of an expert's testimony. Not allowing discovery of expert's conclusions may well subject the trial attorney to the shock of encountering technical testimony upon which he is neither qualified nor prepared to cross-examine. This seems to be in diametrical opposition to the underlying tenor of the Federal Rules of Civil Procedure which seek an avoidance of such shock tactics in an attempt to provide disclosure of all relevant information available to either party consonant with the maintenance of our adversary system. A functional judicial approach to legal problems looks to the *raison d'être* of the Rules, and seeks to establish in ascertainable criteria the totality of their purpose. Thus allowing discovery of expert's conclusions would seem a logical step forward for our legal system in advancing the "search for truth" in adjudicatory proceedings.

Douglas F. Spesia

TAXATION — TRUST — BENEFICIAL INTEREST OF INSURANCE PROCEEDS FROM POLICY ON EMPLOYEE HELD TAXABLE WHEN THE PROCEEDS PASS FROM THE EMPLOYER-BENEFICIARY TO THE EMPLOYEE'S WIDOW. — In 1955 Donald Dolbeer, general manager of the Springfield Laundry Company, entered into a written contract with his employer. The Company promised that it would take out and pay for $50,000 worth of insurance on Dolbeer's life, the Company to be the designated beneficiary, and pay his survivors $5000 per year from the proceeds until the total of $50,000 had been paid. In return Dolbeer agreed that he would not take part in any competing business. The contract further provided that the Company would continue to pay the premiums and keep the policy in force until: 1) Dolbeer's death, 2) a breach of the covenant by Dolbeer, or 3) both parties agree to the amendment or annulment of the covenant. When Dolbeer died in 1960 the Company received $75,000 in proceeds from the insurance it had carried on decedent. Of this amount, $50,000 was owed to decedent's widow under the contract. The Tax Commissioner of Ohio sought an exception to a prior determination that there could be no inheritance tax on the proceeds passing to the widow. The Probate court *held:* that the benefits received by the widow pursuant to an agreement between decedent and his employer, providing for insurance coverage of decedent maintained by the employer and payment of proceeds to the widow, constitute a beneficial interest, property, or a property right, and are, as such, subject

39 These states are: Idaho, Ill., Iowa, La., Me., Md., Minn., Mo., Nev., N.J., Pa., Tex., Utah, Wash., W.Va.

40 Kemeny v. Scorch, 22 Ill. App. 2d 160, 169-70, 159 N.E.2d 489, 493-94 (1959).

41 As a matter of fact, in *Maginnis* the defendant turned over to plaintiff both the expert's report and conclusions, notwithstanding the fact that the court had granted it permission to strike the conclusions before transferal. Letter from Jones, Walker, Waechter, Poitevent, Carrère & Denègre to NOTRE DAME LAWYER, March 8, 1963, on file in the Notre Dame Law Library.

to the Ohio succession tax; the benefits are not exempt on any theory that the covenant was an insurance contract or that an exempt trust had been created by the covenant. *In Re Dolbeer's Estate,* 88 Ohio L. Abs. 353, 183 N.E.2d 271 (Clark County P. Ct. 1962).

Ohio law[1] exempts the proceeds of life insurance policies, except those payable to the estate of the insured, from the State inheritance tax whether the policy is made payable directly to a beneficiary or to a trustee for him. Other states exempting insurance have included similar trust provisions in their statutes.[2] Insurance trusts are positively sanctioned elsewhere by Ohio law: "A trust is not invalid because the corpus thereof consists of . . . the . . . right to receive the proceeds of life insurance contracts . . . payable at death or by reason of death . . . ,"[3] and may be created by declaration[4] or agreement[5] just as other trusts. When the declaration is for consideration, the trust is valid although the existence of a trust is postponed; that is, it is not necessary that the declarant have possession of the corpus and be in a position to declare himself *in praesenti* a trustee for the benefit of another.[6]

In general, the beneficiary of an insurance policy may agree either with the insured,[7] or with the beneficiary of the trust,[8] to assume the responsibilities of taking the proceeds of a policy for another's benefit. The courts have found an express trust for the beneficiary of the agreement in the majority of these cases, even though the agreement contains only a bare promise to pay and does not employ the technical language of a trust agreement.[9]

The court in *Dolbeer* ruled that the proceeds passed indirectly to the widow, but not through the prescribed trustee, and were therefore taxable. Crucial to the result of the case was the finding by the court that the covenant between decedent and his employer did not constitute a declaration of trust by the latter. After explaining that the Ohio law on trusts is permeated with ambiguities and imperfections, four reasons are given by the court for its finding:

1. The Company is the sole beneficiary with complete control and ownership of the proceeds;

2. The promise was not made to the widow;

3. "The failure on the part of the decedent to give these property rights outright to his widow, and his failure to name his widow as beneficiary under the policies . . . tend to disprove an intention to create a trust."

4. "Nowhere, is there a declaration, oral or written, by anyone, concerning a trust, even though the right and capacity to create a trust existed. Nowhere is

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1 OHIO REV. CODE ANN. § 5731.06 (Page Supp. 1962):

> Proceeds of policies of life insurance and not to exceed two thousand dollars of the proceeds of any employer death benefit plans payable on the death of the insured or plan participant, other than to his estate, shall not be considered as property passing within the meaning of § 5731.02 of the Revised Code, whether paid directly to the beneficiaries designated or to a trustee designated to be held and managed by such trustee and distributed to designated beneficiaries under an agreement or declaration of trust. As used in this section "employer death benefit plan" means any uninsured plan, fund, or program either unfunded or funded which is established by any person, firm, or corporation to provide the beneficiaries of a participating employee with benefits payable upon the death of such employee.

2 CAL. REV. AND TAX. CODE § 13721-24 (West 1956); IND. STAT. ANN. § 7-2401 (Burns 1953); KY. REV. STAT. ANN. § 140.030 (1955); PA. STAT. ANN. tit. 72, § 2301 (1949); TENN. CODE ANN. tit. 30, § 1604 (1950).

3 Ohio REV. CODE ANN. § 1335.01 (2) (Page 1962).

4 Finney v. Hinkle, 106 Ohio App. 89, 153 N.E.2d 699 (1958). See also In Re Free's Estate, 327 Pa. 362, 194 Atl. 492 (1937).

5 Union Central Life Insurance Co. v. MacBrair, 66 Ohio App. 144, 31 N.E.2d 172 (1940). See also Hirsh v. Auer, 146 N.Y. Supp. 13, 40 N.E. 397 (1895).

6 Finney v. Hinkle, 106 Ohio App. 89, 153 N.E.2d 669, 703 (1958).

7 Clark v. Callahan, 105 Md. 600, 66 Atl. 118 (1907); Cowin v. Hurst, 124 Mich. 595, 83 N.W. 274 (1900).

8 Fahrney v. Wilson, 180 Cal. App. 2d 694, 4 Cal. Rptr. 670 (Dist. Ct. App. 1960); Finney v. Hinkle, 106 Ohio App. 89, 153 N.E.2d 669 (Ct. App. 1958).

9 Finney v. Hinkle, *supra* note 8, at 702.

there shown a clear intent or sufficient acts to construe a trust."[10]

To state that the Company is the sole owner of the proceeds and can control the funds as it pleases is a poor logical basis for a determination that no trust exists. When an equity court finds a trust in such cases, it is always decreed that the corpus of the trust must be managed by the trustee for the benefit of the trust beneficiary.[11] Only subsequent to a finding that there is not a trust can it be determined that the Company was the sole owner of the funds. It does not matter that the declaration was made to the insured rather than to the beneficiary of the trust.[12] The validity of the trust, then, is not negated because the widow was not the promisee. Nor is the existence of a valid trust affected by the revocability of the trust;[13] nor by the fact that the policy does not stipulate that the named beneficiary is to be trustee for another.[14] If the decedent had, as the court suggests, provided that the policies be paid directly to the widow, contrary to the reasoning of the court this would be a more substantial disproof of intent to create a trust than what was actually done by decedent. There is clearly no trust relationship intended where the would-be beneficiary herself is to hold the corpus. Conversely, where the Company is to hold the funds, payable to her, intent to set up a trust relationship is far more likely.

The legal standards specifying the words necessary to the creation of a trust, the words sufficient to make it clear to the court that a trust was intended, have been the subject of a long line of cases. *Finney v. Hinkle*[15] is a representative case. Here the defendant contracted with his son's employer to ". . . endorse and pay over any benefits that he may receive . . ." from an insurance policy on the son's life, paid for by the employer. The Court of Appeals of Ohio decided that the defendant held the proceeds in trust for the company, explaining that:

> The great majority of the cases upholding the validity and enforcibility of a promise by the beneficiary of life insurance to the insured to pay the proceeds of insurance, in whole or in part, to a third person, proceed upon the theory that such an arrangement raises a trust in favor of the third person which is enforcible in equity.[16]

The law has never attempted to prescribe even a loose formula of words as necessary for the creation of a valid trust. Any language the declarant may choose will establish the trust. The minimum requirement is that the words, or the words with the attendant circumstances,[17] show an intention of the parties to vest the legal estate in one person, but to be held in some manner or for some purpose on behalf of another.[18] A trust could easily have been found by the Dolbeer court. The Company, as beneficiary of the insurance, agreed to receive the proceeds, hold them for a time, and then pay them to Dolbeer's widow. The Company was not, by the plain meaning of the contract, to have more than legal title to the $50,000.

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10 183 N.E.2d at 275.

11 See Fahrney v. Wilson, 180 Cal. App. 2d 694, 4 Cal. Rptr. 670 (Dist. Ct. App. 1960); Coyne v. Conclave of I. of H., 106 Md. 64, 66 Atl. 704 (Ct. App. 1907); In Re Free's Estate, 327 Pa. 362, 194 Atl. 492 (1937).

12 *Supra* note 7.

13 Gurnett v. Mutual Life Ins. Co., 356 Ill. App. 612, 191 N.E. 250 (1934); Kendrick v. Ray, 173 Mass. 305, 53 N.E. 823 (1899); Bose v. Meury, 112 N.J. Eq. 62, 163 Atl. 276 (1932); Smyth v. Cleveland Trust Co., 172 Ohio St. 489, 179 N.E.2d 60 (1961).

14 See Gritz v. Gritz, 342 Pa. 516, 21 A.2d 713 (1941).

15 106 Ohio App. 89, 153 N.E.2d 669 (1958).

16 Finney v. Hinkle, *supra* note 15, at 702.

17 *E.g.*, Clark v. Callahan, 105 Md. 600, 66 Atl. 618 (1907); Gritz v. Gritz, 342 Pa. 516, 21 A.2d 713 (1941); In Re Free's Estate, 327 Pa. 362, 194 Atl. 492 (1937).

18 *E.g.*, Coyne v. Supreme Conclave of I. of H., 106 Md. 64, 66 Atl. 704 (Ct. App. 1907); Cowin v. Hurst, 124 Mich. 595, 83 N.W. 274 (1900). In Clark v. Callahan, *supra* note 17, at 621, the court elaborates on this doctrine:

> It is one of the fixed rules of equitable construction that there is no magic in particular words; and that any expressions that show unequivocally the intention of the parties to create a trust will have the same effect.
>
> In determining whether or not a trust has been created courts will take into consideration the situation and relation of the parties, the character of the property, and the purpose which the settlor had in making the declara-

Turning to the statutory exemption afforded insurance trusts, it is doubtful that the beneficial interest or property that the widow ultimately received was properly the subject of Ohio's succession tax.[19]

Death taxes are levied under one of two theories, "ownership theory" or "succession" theory.[20] The title, "succession," heading a statute, or the use of the word "succession" in the body of the enactment, does not necessarily mean that the assessment will be made in accordance with that theory. An ownership theory of inheritance tax allows property passing to the transferee at the decedent's death to escape the tax if the decedent had no interest in it at his death.[21] This concept is much akin to the principle governing the imposition of federal estate taxes: unless there is something which passed from the decedent upon death, it is impossible to collect either tax.[22] By the succession theory, a tax is assessed even though the decedent had no interest in or control over the property at death, when there is a transfer of property by reason of death.[23] Under both ownership and succession theories the tax is levied against the right of the transferee to receive, that is, against the transfer itself. Neither theory taxes the property involved.[24] Neither burdens the transferee with a tax on transfers made prior to death, unless made in contemplation of death.[25]

The court in *Dolbeer* decided that there was a tax due on the proceeds because "the Ohio inheritance tax is a *succession* tax on the beneficial interest of each heir, legatee, devisee, or other beneficiary of a decedent's estate . . . ,"[26] and the widow of decedent had received a beneficial interest on the death of her husband. By analogizing to death benefits under retirement and pension plans the court summarily dismissed the question of ownership rights of the decedent. The participants in these, reasoned the court, have an economic interest or property right that vests prior to or at death.

This is disconcerting because Ohio is unquestionably an ownership theory state.[27]

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tion. No technical terms or expressions are needed. It is sufficient if the language used shows that the settlor intended to create a trust, and clearly points out the property, the beneficiary, and the disposition to be made of the property.

19 OHIO REV. CODE ANN. § 5731.02 (Page Supp. 1962):

> A tax is hereby levied upon the succession to any property passing, in trust or otherwise, to or for the use of a person, instituttion, or corporation, in the following cases:
>
> (C) When the succession is to property from a resident, or to property within this State from a non resident, by deed, grant, sale, assignment, or gift, made without valuable consideration substantially equivalent in money or money's worth to the full value of such property:
>
> (2) Intended to take effect in possession or enjoyment at or after such death.

20 See In Re Patterson's Estate, 89 Ohio L. Abs. 271, 184 N.E.2d 562, 563 (P. Ct. 1962); Brink, *Minnesota Inheritance Tax: Some Problems and Solutions,* 43 MINN. L. REV. 443, 444 (1959).

21 In Re Patterson's Estate, *supra* note 21, at 564; Brink, *supra* note 21.

22 Tax Comm'n v. Lamprecht, 107 Ohio St. 535, 140 N.E. 333, 334 (1923):

> Throughout all the authorities on this subject there is found a discussion of the fact that the federal tax is levied against the estate and the right of the decedent to transfer property, and the state tax against the right to receive the property from the estate of the decedent.

Accord, Walker v. United States, 83 F.2d 103, 107 (8th Cir. 1936). For a discussion of federal estate taxes on life insurance, see 30 NOTRE DAME LAWYER 3 (1954).

23 See Cruthers v. Neeld, 14 N.J. 497, 103 A.2d 153 (1954); In Re Patterson's Estate, 89 Ohio L. Abs. 271, 184 N.E.2d 562, 563 (P. Ct. 1962); Brink, *Minnesota Inheritance Tax: Some Problems and Solutions,* 43 MINN. L. REV. 443, 444 (1959).

24 In Re Patterson's Estate, *supra* note 24; Werthan v. McCabe, 164 Tenn. 611, 51 S.W.2d 840 (1942); Brink, *supra* note 24, at 443.

25 See Welsh v. Commissioner of Corp. and Tax., 309 Mass. 293, 34 N.E. 611 (1941); In Re McGrath's Estate, 191 Wash. 496, 71 P.2d 395 cert. denied, 303 U.S. 651 (1938).

26 183 N.E.2d at 274 (emphasis added).

27 See In Re Patterson's Estate, 89 Ohio L. Abs. 271, 184 N.E. 2d 562, 563 (P. Ct. 1962); McDonald v. Evatt, 145 Ohio St. 457, 62 N.E.2d 164 (1945); Tax Comm'n v. Lamprecht, 107 Ohio St. 535, 140 N.E. 333, 334 (1923).

The court deciding *In Re Patterson's Estate*[28] makes the following classification with illustrative case law: "The states are about evenly divided in their acceptance of these two theories [ownership and succession]. However, Ohio, Illinois, Pennsylvania, and Delaware are clearly ownership states." The court in the instant case has in no way shown that the decedent actually did possess an ownership right to the transferred property which is necessary to the assessment of inheritance tax under that theory.

There is no set definition of "property interest" as applied to insurance policies and proceeds. Some of the tests employed have been: did decedent procure the policies,[29] did he pay the premiums,[30] did he have possession of the policies,[31] was he a party to the insurance contract,[32] did he have the power to take the surrender value,[33] the power to borrow on the policies,[34] to change the beneficiaries,[35] to assign,[36] or to cancel or withdraw the policies.[37] When the policy is held by a person other than the insured, the insured-decedent will fail most of these tests. Dolbeer is in this category, not meeting any of the prescribed standards. He is, in addition, in a critically different position from the annuitants referred to in the opinion.[38] In all of the retirement and pension plan cases the decedent had either an expectancy of acquiring a personal possession and enjoyment of the plan's proceeds,[39] or at least had exercised an option giving up this right of his to another.[40] The consideration Dolbeer gave, forbearance until death, by its nature precludes him from any expectancy or chance of personally enjoying the promised property as part of his estate. That the proceeds could have become his even constructively is impossible; they were not payable to his estate under the contract. The decedent had merely a contract right. He could not acquire a property interest except by a substantial modification of the contract with his employer.[41]

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28 *Supra* note 27.

29 Werthan v. McCabe, 164 Tenn. 611, 51 S.W.2d 840, 842 (1932).

30 *Ibid.*

31 Enbody Estate, 85 Pa. D. & C. 49, 53 (Orphan's Ct. 1953).

32 Werthan v. McCabe, *supra* note 29.

33 Walker v. United States, 83 F.2d 103, 108 (8th Cir. 1936); Blue Diamond Poultry Farms v. Commissioner of Tax., 253 Minn. 265, 91 N.W.2d 595, 598 (1958).

34 Walker v. the United States, *supra* note 33; Burke Estate, 85 Pa. D. & C. 56, 64 (Orphan's Ct. 1953).

35 Walker v. United States, *supra* note 33; Blue Diamond Poultry Farms v. Commissioner of Tax., 253 Minn. 265, 91 N.W.2d 595, 598 (1958); Werthan v. McCabe, 164 Tenn. 611, 51 S.W.2d 840, 842 (1932).

36 Enbody Estate, 85 Pa. D. & C. 49, 53 (Orphan's Ct. 1953); Burke Estate, 85 Pa. D. & C. 56, 64 (Orphan's Ct. 1953).

37 Walker v. United States, 83 F.2d 103, 108 (8th Cir. 1936); Enbody Estate, *supra* note 36; Burke Estate, *supra* note 36.

38 183 N.E.2d at 274:

> Our inheritance tax law has been interpreted to apply when death benefits are payable to designated beneficiaries under various pension and retirement plans. A reason for this is that a participant in any such plan has an economic interest, or property right which vests prior to or at death. It is not material that there is a postponement of actual possession or enjoyment and that death occurs before or after retirement.

39 See, *e.g.*, In Re Patterson's Estate, 89 Ohio L. Abs. 271, 184 N.E.2d 562, 565 (P. Ct. 1962); In Re Daniel's Estate, 159 Ohio St. 109, 111 N.E. 252 (1953).

40 See, *e.g.*, Dolak v. Sullivan, 145 Conn. 497, 144 A.2d 312 (1958); Borchard v. Connelly, 140 Conn. 491, 101 A.2d 497 (1953); Gould v. Johnson, 156 Maine 446, 166 A.2d 481 (1960); In Re Stone's Estate, 10 Wis. 2d 467, 103 N.E.2d 663 (1960).

41 At first glance it appears that the power to modify the employer-employee contract may itself constitute a property right. This is true under the Federal Estate Tax, Int. Rev. Code of 1954, § 2038, where a revocable transfer has been made; and under the Federal Income Tax, Int. Rev. Code of 1954, § 676, where a revocable trust has been created. In the first instance, a transfer must have actually been made. That is, there is no case law holding that the promisee's interest in the expected performance of a contract to a third party beneficiary is a property right in the performance.

By the Federal Income Tax statute the grantor of a revocable trust is treated as the owner for tax purposes if there is a possibility that the corpus can at some time be possessed

There is case law collateral to this reasoning holding that the beneficiary of an insurance policy takes property rights in the proceeds at the time he is designated beneficiary, and not at the time of the insured's death.[42] If we can say that the beneficiary acquired his rights by virtue of the insurance contract, it follows that: the death of the insured adds nothing to the beneficiary's rights, the transfer has taken place in the past, and the proceeds, therefore, are not taxable as a succession or inheritance.[43] This approach has not been unanimously adopted,[44] and presents a weak defense to the Ohio statute which taxes a succession to property "Intended to take effect in possession or enjoyment at or after . . . death . . ."[45] The usual insurance contract arrangement provides less firm ground for this argument than the Dolbeer covenant. Commonly the former contains a clause permitting the insured to change his designation of beneficiaries; he is free to divest the beneficiary at his whim. The insurer's acquiescence in the desired change is virtually automatic where the transferee has an insurable interest in the life of the insured. By the contractual structure in the *Dolbeer* case, though, the decedent could not change the beneficiary without amendment or alteration of the contract. This would have required the active consent of the employer. The common insurance contract and the instant contract differ at least in the degree of formality necessary to a reformation. The stability of the contract, plus the absence of personal expectancy in decedent or his estate, testifies to a firm vesting of rights in the widow prior to decedent's death.

Where there is a statutory exemption of insurance from the inheritance tax, the fine distinctions between contract rights and property rights should not dominate over the equitable design of the legislature. The statute specifies that the proceeds of insurance, payable other than to decedent's estate, shall not be considered as property passing within the meaning of the taxation section of the code. That Dolbeer's widow did not receive the proceeds by one of the two avenues contemplated by the legislature (directly or through a trustee), should not inevitably result in a taxation of that transfer. The aim of the insurance exemption is the promotion of insurance for the protection of dependents.[46] This purpose was not frustrated whether the decedent had property rights in the proceeds, the transfer took place at death, or the proceeds were transferred to the widow through an indirect route, absent a trustee.

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and enjoyed by him. There is no analogy between this law and the Ohio death tax as applied in this case for two reasons. First, the court has stated that there is no trust, and if there were one, it would be tax exempt by statute. Second, the sole purpose of the Federal Income Tax provision is to prevent the grantor from escaping a tax on property owned by him by creating a dummy trust, while here there is no possibility that the decedent himself could have enjoyed possession of the insurance proceeds.

The Federal Estate Tax Laws contain a provision, Int. Rev. Code of 1954, § 2042, under which the decedent's power to change the beneficiary is treated as a taxable incident of ownership, but decedent here had no power to revoke the beneficiary of the *insurance* contract. Therefore, the revocability of the insurance beneficiary as a test of ownership in the proceeds does not establish a property right in him under § 2042.

42 Wyeth v. Crooks, 33 F.2d 1018, 1020 (W.D. Mo. 1928); Welch v. Commissioner of Corp. and Tax., 309 Mass. 293, 34 N.E. 611 (1941); Bose v. Meury, 112 N.J. Eq. 62, 163 Atl. 276 (1932); In Re Killien's Estate, 178 Wash. 335, 35 P.2d 11 (1934).

43 In Re McGrath's Estate, 191 Wash. 496, 71 P.2d 395 (1937), *cert. denied*, 303 U.S. 651 (1938); Brink, *Minnesota Inheritance Tax: Some Problems and Solutions*, 43 MINN. L. REV. 443, 447:

> In the absence of a statute specifically taxing insurance payable to named beneficiaries, courts of other states [other than Minnesota] have usually held that the insurance proceeds are received by the beneficiary by virtue of the contract of insurance and not by virtue of decedent's death; death is simply the event giving rise to the maturity of the contract rights.

44 Borchard v. Connelly, 140 Conn. 491, 101 A.2d 497 (1953); Fagan v. Bugbee, 105 N.J.L. 85, 183 Atl. 807 (1928).

45 *Supra* note 19.

46 In Re Killien's Estate, 187 Wash. 335, 35 P.2d 11, 20 (1934).

SUBSTITUTED SERVICE — ADHESION CONTRACT — APPOINTMENT OF AN AGENT TO RECEIVE SERVICE OF PROCESS IN AN ADHESION CONTRACT. — Plaintiff, a Delaware corporation with its main offices in New York, leased certain farm equipment to defendant, a farmer in Michigan. The lease agreement was contained on a 1¼-page printed form provided by the plaintiff corporation. In the last paragraph was a clause which appointed one Florence Weinburg, a New York resident, as defendant's agent for the purpose of accepting service of process in New York. Neither that clause, nor the remainder of the contract contained any provision requiring that defendant be notified by the agent in the event of such service. The plaintiff corporation brought suit for alleged breach of the lease, and a summons and complaint were served upon defendant's New York "agent." Defendant was promptly notified of the service of process by the "agent" and also by the plaintiff. On appeal from a judgment quashing the service,[1] the court *held*: that the lack of any notification requirement in an adhesion contract is to be considered in interpreting the provisions of the contract, and that in this case the "agent" had no duty to act for the defendant and thus, the purported agency was not real but only "illusory."

National Equipment Rental, Ltd. v. Szukhent, 311 F.2d 79 (2d Cir. 1962), *cert. granted,* 372 U.S. 974 (1963).

Notification of impending suit is an essential element of a defendant's civil rights. Consequently, where in the ordinary course of business, consumers by signing standard form contracts submit to foreign jurisdiction and sign away both their right to be notified and other fundamental rights, constitutional policies necessitate careful scrutiny of these transactions.

As a general rule, no court can render a valid in personam judgment against anyone unless it first secures jurisdiction over his person.[2] The primary method of asserting such jurisdiction is by personal service of process,[3] which notifies defendant of the suit against him and thereby gives him an opportunity to defend.[4] Notice and opportunity for hearing are essential to due process of law as provided for in the Constitution.[5] Personal service cannot be made on a nonresident unless he is served while within the geographical jurisdiction of the court or has authorized someone within that jurisdiction to accept service on his behalf.[6] The appointment of another to accept service may be either by personal consent or by a statutory provision.

Many states have statutes requiring certain classes of nonresidents to appoint an agent for the service of process.[7] The most typical of these are the nonresident automobile statutes which effect the appointment of a particular state official as the nonresident's agent for the acceptance of service of process. For example, the Massachusett's nonresident motorist statute states that one's acceptance of driving privileges within the state

> shall be deemed equivalent to an appointment by him of the registrar, or his successor in office, to be his true and lawful attorney upon whom may be served all lawful process in any action or proceeding against him . . . growing out of any accident or collision. . . .[8]

This type of statute, however, has generally been held unconstitutional if it does not contain a provision making it reasonably probable that the notice of service on the state official would be communicated to the nonresident. In a well-known

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1 National Equipment Rental, Ltd. v. Szukhent, 30 F.R.D. 3 (E.D.N.Y. 1962).
2 LEFLAR, CONFLICTS § 26 (1959).
3 Green Mountain College v. Levine, 120 Vt. 332, 139 A.2d 822 (1958).
4 Haggerty v. Sherburne Mercantile Co., 120 Mont. 386, 186 P.2d 884 (1947).
5 Harloe v. Harloe, 129 W. Va. 1, 38 S.E.2d 362 (1946).
6 Goldey v. Morning News, 156 U.S. 518 (1895).
7 *E.g.,* IDAHO CODE ANN. § 30-502 (Supp. 1961).
> Such corporation must also within three months . . ., designate some person or persons in the county . . ., upon whom process . . . may be served. . . .
8 MASS. ANN. LAWS ch. 90, § 3A (Supp. 1962).

New Jersey case,[9] a resident brought suit against a nonresident under a New Jersey Statute[10] establishing the Secretary of State as agent for nonresident motorists who drove in New Jersey. This statute did not contain a provision for notification of the nonresident. The United States Supreme Court had no objection to the asserting of jurisdiction over the nonresident, but did find a denial of due process because the statute did not require the Secretary of State to notify the nonresident defendant.

In these cases dealing with the appointment of an agent by statute, it has been held immaterial that the defendant was in fact notified if notice was not specifically directed by the statute. The fact that the defendant was notified could not supply constitutional validity to the statute, or to the service under it.[11]

Aside from the statutes, jurisdiction may be obtained over a nonresident by his consent. It has been held that the nonresident may voluntarily appear,[12] may of his own volition appoint an agent to receive process,[13] may agree to any other method of service of process,[14] or waive the service of process requirement altogether by providing for confession of judgment.[15] The voluntary appointment of an agent to receive service of process is well illustrated in a case involving a suit against the District of Columbia for damages to adjacent property by construction work.[16] Defendant, the District of Columbia, sought to implead the engineering firm which had designed the plans for the building. The contract between the engineering firm and the District of Columbia contained a provision appointing the Clerk of the Municipal Court for the District of Columbia as the agent of the engineering firm to accept service of process. The United States Court of Appeals held that the service as provided for in the contract was valid.

In the absence of statutes the essential element inherent in the subjection of a nonresident to foreign jurisdiction is consent. As the court said in *Gilbert v. Burnstine*,[17] "Consent is the factor which imparts power."

The Majority in *National Equipment Rental Ltd.* v. *Szukhent* did not consider the fact that defendant had signed a contract, which contained no provision requiring that he be notified, as a waiver by him of his right to be notified. It would seem, however, that if the notification of service, and service of process itself, are personal rights which can be waived by consent,[18] but had not been waived here, then the purported agent had an "implied duty" to notify defendant. In fact defendant was notified by the agent and by the plaintiff, and it would appear that on this basis the substituted service could have been permitted. This, however, was not the line of reasoning taken in the cryptic majority opinion. The court noted that by the terms of the contract the agent was not required to notify the defendant, and, in fact, had no obligation at all to the defendant. This, coupled with the actual circumstances, that the agent was really under the supervision of the plaintiff (she was the wife of one of plaintiff's officers),[19] and that defendant had never dealt with the agent or even known of her existence until the process was received, resulted in a holding that there was no real agency, but only an "illusory agency." Since there was no appointment of an agent, defendant had not consented to the foreign jurisdiction.

The dissenting judge interpreted this opinion as reading into the Federal Rules of Civil Procedure, which permit service upon an agent appointed to receive service,

9 Wuchter v. Pizzutti, 276 U.S. 13 (1928).
10 N.J. Acts, ch. 232, Laws of 1924 (p. 517) (now N.J. Stat. Ann. § 39:7-2.2 (1953)).
11 Wuchter v. Pizzutti, *supra* note 9.
12 National Coal Co. v. Cincinnati Gas, Coke, Coal & Mining Co., 168 Mich. 195, 131 N.W. 580 (1911).
13 Green Mountain College v. Levine, *supra* note 3.
14 Gilbert v. Burnstine, 255 N.Y. 348, 174 N.E. 706 (1931).
15 Hazel v. Jacobs, 78 N.J.L. 459, 75 Atl. 903 (Ct. Err. & App. 1910).
16 Kenny Construction Co. v. Allen, 248 F.2d 656 (D.C. Cir. 1957).
17 *Supra* note 14, at 707.
18 Gotham Credit Corporation v. Powell, 22 N.J. Misc. 301, 38 A.2d 700 (Dist. Ct. 1944).
19 Brief for Appellee, p. 2, National Equipment Rental, Ltd. v. Szukhent, 311 F.2d 79 (2d Cir. 1962).

a requirement that the agent have a "contractually unassailable duty to send notice."[20] It is submitted that this interpretation of the opinion is too narrow, for, in the shadows of the majority's reasoning lurks what is apparently a crucial factor in the decision, the fact that the contract being interpreted is an adhesion contract.

As a historical concept, a contract is the culmination of bargaining by parties of nearly equal economic strength who have been brought together by the demands of the market.[21] A deeply ingrained notion of the freedom of competent parties to make a contract has developed within this traditional notion of contract. "Contracts made by mature men who are not wards of the Court should, in the absence of potent objection, be enforced."[22] Consistent with these well-founded principles is the doctrine that the written contract is the highest evidence of an agreement between parties, and each party has an obligation to know and understand its contents before he signs it.[23] If a party were permitted to make a contract and then refuse to perform on the grounds that he did not read it when he signed, or he did not know what it contained, the written contract would be of little value.[24]

Within this basic framework, the general rules of freedom of contract coupled with the objective interpretation of the parties' intent limiting the evidence to only their outward manifestations, *i.e.*, the written instrument,[25] has well served the needs of the community.

In many transactions in today's society, however, the fundamental "arm's-length" notion of contract has been eliminated. The standard form, mass-use contract has developed out of the needs of modern society. Most contracts which govern parts of our daily life — transportation, sales, leases, insurance — are standardized contracts. Where, as is often the case, the standardized contract is drafted and imposed by a party of superior bargaining strength, and the subscribing party can either adhere to the contract or reject it, it may be called an "adhesion contract."[26]

> The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all.[27]

German legal theory presents a concept of contract which points up the difference between the historical notion of contract and the modern adhesion contract. In this theory two operations are distinguished within the area of freedom of contract. One operation is the power to co-determine the actual terms of the contract, that is the *Gestaltungsfreiheit*. The other, the *Albschlussfreiheit*, is the choice of whether or not to enter into a contract and with whom.[28] It is clear that the adhesion contract reduces the consumer's freedom of contract to only the latter.

Thus, the adhesion contract, the progeny of big enterprise and mass-market selling, is not the result of give-and-take bargaining, where the desires of one party are balanced by those of the other,[29] nor is it the result of any meeting of minds,[30] but instead resembles law, wherein the stronger legislate to the weaker.

While the courts have generally avoided any drastic departure from age-old tenets of freedom of contract, they have been aware of the problems presented by

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20 National Equipment Rental, Ltd. v. Szukhent, *supra* note 1, at 82.
21 Kessler, *Contracts of Adhesion*, 43 COLUM. L. REV. 629 (1943).
22 Gilbert v. Burnstine, *supra* note 14, at 707.
23 Chicago, St. P., M. & O. Ry. Co. v. Belliworth, 83 Fed. 437 (8th Cir. 1897).
24 Upton v. Tribilcock, 91 U.S. 45 (1875).
25 3 CORBIN, CONTRACTS §§ 573-596 (1951).
26 Neal v. State Farm Insurance Companies, 10 Cal. Rptr. 781, 188 Cal. App. 2d 690 (Dist. Ct. App. 1961).
27 Kessler, *supra* note 21, at 632.
28 Lenhoff, *Contracts of Adhesion and the Freedom of Contract*, 36 TUL. L. REV. 481 (1962).
29 Fricke v. Isbrandtsen Company, 151 F. Supp. 465 (S.D.N.Y. 1957).
30 Siegelman v. Cunard White Star, 221 F.2d 189 (2d Cir. 1955).

those contracts which result from gross disparity in buyer-seller bargaining positions, and have mitigated much of the harshness of such contracts by adopting a doctrine of strict construction.[31] In a number of cases involving form contracts, the courts, staying within the domain of contract and utilizing the objective theory, have found a lack of consent to a particular clause because it was "hidden" or "not brought to the attention of the buyer." This has occurred, for example, in cases involving liability disclaimers on bills of lading,[32] parcel room checks,[33] and invoices.[34] In a case involving a purported confession of judgment, the court said: "The mere physical inclusion of the warrant of attorney in a mass of fine type verbiage on each reverse sheet does not of itself make it part of the contract."[35]

Still working within the contract framework some courts, when dealing with these form contracts, have said that even if the buyer does notice the one-sided clauses in the contract, it is questionable whether an ordinary layman would realize what he was relinquishing in return for what he was being granted.[36] Hence, in considering a statement that the contract was "subject to conditions on reverse side," Justice Musmanno said:

> While the word "condition" may conceivably embrace almost any circumstance, upon which, or, because of which, a right is created or a liability attaches, it cannot be used to mean surrender of fundamental personal and property absolutes unless the word appears within a setting which warns of the potency of the capitulation being made.[37]

A third line of approach which courts have taken in dealing with these contracts is to attack the provisions on grounds of public policy. For instance, where the bargaining positions of landlords and tenants had been greatly unequal, courts have ruled the exculpatory clauses, which purport to immunize the landlord from all liability, are void as being against public policy.[38]

One of the leading cases in this whole area of adhesion contracts, and particularly in this third approach, is *Henningsen* v. *Bloomfield Motors,*[39] wherein the court refused to accept a skeleton warranty on the grounds that it was contrary to public policy. The court pointed out that today an automobile is a necessity, and that all of the auto manfucturers used a similar skeleton warranty. The court said:

> The task of the judiciary is to administer the spirit as well as the letter of the law. On issues such as the present one, part of that burden is to protect the ordinary man against the loss of important rights, through what, in effect, is the unilateral act of the manufacturer.[40]

These cases, in which courts have grappled with adhesion contracts, are an indication that these contracts are sometimes treated in a different light than the ordinary arms-length contract.

In *National Equipment Rental, Ltd.,* the dissenting judge cited two cases as being contrary to the majority decision. The first, *Kenney Construction Co. v. Allen,*[41] is clearly distinguishable since it does not involve an adhesion contract. The second, *Green Mountain College v. Levine,*[42] arises from what appears to be an adhesion contract which included a promissory note. The note contained a clause appointing the Secretary of State of Vermont as the maker's agent to accept service of process. In reference to the lack of any duty upon the Secretary to notify defendant, the Vermont Supreme Court said:

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31 Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).
32 Hill v. Adams Express Co., 82 N.J.L. 373, 81 Atl. 859 (Ct. Err. & App. 1911).
33 Klar v. H & M Parcel Room, 270 App. Div. 538, 61 N.Y.S.2d 285 (1946).
34 Stevenson v. B.B. Krikland Seed Co., 176 S.C. 345, 180 S.E. 197 (1935).
35 Cutler Corp. v. Latshaw, 374 Pa. 1, 97 A.2d 234, 236 (1953).
36 Henningsen v. Bloomfield Motors Inc., *supra* note 31, at 92.
37 Cutler Corp. v. Latshaw, *supra* note 35, at 236. (Emphasis added.)
38 Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 111 A.2d 425 (Super Ct. 1955).
39 *Supra* note 31.
40 Henningsen v. Bloomfield Motors Inc., 32 N.J. 358, 161 A.2d 69, 94 (1960).
41 *Supra* note 16.
42 120 Vt. 332, 139 A.2d 822 (1958).

> The capacity of the Secretary of State to accept the appointment and the danger that he might not forward notice to the defendants were risks which they took in appointing him.[43]

If this is an adhesion contract, the Vermont Court did not make any distinction between it and a freely bargained contract.

The court in the *National Equipment Rental, Ltd.* case, recoiling from a result like that of *Green Mountain College,* where the chance of not being notified is just one of the "risks" that defendants take by entering into the contract, did not apply the rules of freedom of contract applicable to a mutually bargained contract to an adhesion contract.

The approach of the "hidden" clause cases was closed since the lower court had found that the agency provision "was no buried fine print clause."[44] Nonetheless, by refusing to interpret the signing of the contract, which did not require notification, as *consent* to a waiver of notification, the court implied that the words of the agency provision were insufficient to appraise the defendant of what he was giving up.

The real basis for the decision, however, is not whether or not defendant consented to this arbitrary form of notification, but rather that this type of provision in an adhesion contract is contrary to public policy. The underlying distaste for provisions which deprive a defendant of so basic a right as to be notified that proceedings have begun against him and the right to defend is evidenced by statutes[45] and court decisions[46] in many states disavowing confession of judgments and waivers of process in cognovit notes. The court in the *National Equipment Rental, Ltd.* case did not treat the adhesion contract as if it were a private agreement, but instead approached it with the rigor usually vented only on statutes and demanded of it the same safeguards of due process required of statutes. Thus, the general principle that a statute which does not provide for notice is violative of due process, even if notice was in fact given, was applied also to adhesion contracts.

The rule which emerges from the *National Equipment Rental, Ltd.,* then, is that a provision for the appointment of an agent for the acceptance of service in an adhesion contract, which does not provide for notification of the defendant when he is sued, will be rigidly scrutinized by the court and run a considerable risk of being struck down. As special principles develop for construing adhesion contracts, other hard provisions, such as a substituted service clause itself, may be brought under the judicial microscope. It may not be within the public interest to enforce clauses subjecting individual consumers to a foreign jurisdiction — perhaps more than a thousand miles away — merely because some company or corporation finds it more convenient to bring suit in that jurisdiction.

William A. Bish

JURISDICTION — FEDERAL DISTRICT COURT — JURISDICTION DENIED WHEN U.S. SUED STATE FOR THE NEGLIGENCE OF A STATE AGENT. — It was alleged by the United States that an agent of the State of California, an employee of the State Division of Highways, negligently started a fire in a national forest. It was further contended that state employees were negligent in attempting to extinguish the fire. The United States brought an action against the State for expenses incurred in suppressing the fire and for damages to the national forest reserves. On motion to dismiss, the United States District Court *held*: that it did not have "jurisdiction,

43 *Id.* at 824.

44 National Equipment Rental, Ltd. v. Szukhent, 30 F.R.D. 3, 4 (E.D.N.Y. 1962).

45 *E.g.,* TENN. CODE ANN. § 25-201 (1955): "Any power of attorney or authority to confess judgement which is given before an action is instituted and before the service of process in such action, is declared void; . . . ."

46 *E.g.,* A. B. Farquhar Co. v. Dehaven, 70 W. Va. 738, 75 S.E. 65, 69 (1912): "These considerations lead us to conclude that a judgement by confession in the clerk's office, on warrant of attorney, without process regularly issued and served upon or accepted by defendent is void on its face."

at the suit of the federal government, to impose liability upon a state for damages caused by alleged tortious conduct of the state's agents, in a case where the state is an involuntary defendant — is sued without sovereign consent."[1] *United States v. California,* 208 F. Supp. 861 (S.D. Cal. 1962).

It is axiomatic that the judicial power vested in the United States Federal Courts is derived from the United States Constitution.[2] In establishing the Judiciary the Constitution provides that Congress has the authority to establish such inferior federal courts as it might deem necessary.[3] Since the United States District Courts have only the power of jurisdiction that is granted to them by Congress,[4] they must be able to designate a specific statute as the one conferring the right of jurisdiction on them in a particular controversy.

In determining a district court's jurisdiction, the first issue for consideration is whether or not Congress has the Constitutional power to grant jurisdiction in a given case. Upon the affirmation of Congressional authority to so delegate, it is then to be ascertained in what statute this power is exercised.

Concretizing the first of these issues, it must be decided whether or not the United States Congress has the Constitutional power to confer jurisdiction upon a federal court in a case where the United States is plaintiff against the state, an involuntary defendant, when the tortious acts of state's agents are involved. Doubting such Congressional power, the district court fears:

> that to compel a state to submit to such an action in a district court of the United States would indeed deprive the Constitutionally-prescribed apportionment of jurisdiction among the Federal courts of any effective meaning at all, in face of the long accepted qualification that Congress can 'neither enlarge nor restrict the original jurisdiction of the Supreme Court.'[5]

Moreover, by adhering to this proposition that there is a Constitutional doubt as to Congressional power to give jurisdiction in this area, any statute from which this power might be inferred must be given a restrictive meaning.[6] The court's doubt is dependent upon its interpretation of article III, section 2, clause 2 of the United States Constitution.[7] To reach this conclusion, the court had to read a certain degree of "exclusiveness" into clause 2 with regard to the original jurisdiction of the Supreme Court in those cases in which a state is a party. Such an implication of "exclusiveness" would not be inconsistent with the First Judicature Act of 1789 which provided that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party. . . ."[8] This approach to Supreme Court jurisdiction was based upon the then vital concept of state sovereignty.[9] Emanating from this concept was the imputation of a certain dignity

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1 United States v. California, 208 F. Supp. 861, 862 (S.D. Cal. 1962).

2 Kansas v. Colorado, 206 U.S. 46, 82 (1906).

3 U.S. CONST. art. III, § 1: The Judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

4 Noland v. Noland, 111 F.2d 322 (9th Cir. 1940), *cert. denied,* 311 U.S. 670 (1940); Bumpus v. Remington Arms, 74 F. Supp. 788 (W.D. Mo. 1947), *affirmed,* 183 F.2d 507 (8th Cir. 1950); Louisville Provision Co. v. Glenn, 12 F. Supp. 545 (D. Ky. 1935).

5 United States v. California, 208 F. Supp. 861, 866 (S.D. Cal. 1962).

6 International Association of Machinists v. Street, 367 U.S. 740 (1961); United States v. Witkovich, 353 U.S. 194 (1957); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955).

7 U.S. CONST. art. III, § 2, cl. 2:

> In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

8 Judiciary Act of 1789, § 13, 1 Stat. 80 (1789).

9 THE FEDERALIST No. 31 at 239 (Wright ed. 1961) (HAMILTON). See generally Thorington, *Federal Constitution and the Sovereign States,* 19 ALA. L. REV. 362 (1958).

to each state in that it should not be subjected to having its suits heard in a lower federal court.[10]

At the same time that exclusive jurisdiction was given to the Supreme Court in matters where a state was a party, the First Judicature Act also provided that "the circuit courts shall have original cognizance — of all suits of a civil nature at common law or equity, where—the United States are plaintiffs or petitioners. . . ."[11] This grant of jurisdiction to lower federal courts where the United States are plaintiffs has been affirmed by subsequent legislative enactments.[12]

The district court recognized that this power of jurisdiction in matters where the United States are plaintiffs existed concurrently with the exclusive jurisdiction of the Supreme Court in civil cases where the state was a party. The court acknowledged that gradually there evolved:

> the view that the Supreme Court has always retained exclusive jurisdiction of all civil actions commenced by the United States against a state, excepting only those cases wherein the Congress has by grant within the ambit of Constitutional power specifically conferred concurrent jurisdiction upon the Federal district courts.[13]

From this acknowledgement it can be presumed that the court does not mean to interpret the "exclusiveness" of the Supreme Court's jurisdiction in matters between the United States and a state in the strict sense of allowing for no exception. But the court does at least contend by its "argument of Constitutional doubt" that there are to be restrictions placed on the Congressional power to grant to district courts jurisdiction where the United States is a plaintiff against a state in a civil suit.

This position would appear to be untenable in the light of other cases that uphold legislative delegation of jurisdiction to district courts in cases involving the United States and a state.[14] In *Ames v. Kansas ex rel. Johnson,* the court in speaking about the delegation of the Supreme Court's original jurisdiction said, "[I]t rests with the legislative department to say to what extent such grants shall be made. . . ."[15] It is provided in Title 28, section 1251(b), that the Supreme Court's jurisdiction is original but not exclusive in matters in which the United States were concerned.[16] This statute gives legislative recognition to existing practice, since the district courts had long exercised jurisdiction in cases where the United States was a plaintiff against a state. There appears to be no doubt of the Congressional power to grant jurisdiction covering the instant case or any other involving the United States and a state. Without destroying the original jurisdiction of the Supreme Court in cases where a state is a party, Congress simply bestows upon the federal district courts a concurrent power of jurisdiction whenever it makes such a delegation.

Assuming, then, that Congress does have the power to give jurisdiction to district courts in cases wherein the United States is plaintiff against a state involving the tortious acts of the state's agents, it must be determined what specific statute confers this right of jurisdiction upon the district courts. The relevant statutes are

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10 Wagner, *Original Jurisdiction of National Supreme Courts,* 33 ST. JOHN'S L. REV. 223 (1959).

11 Judiciary Act of 1789, § 11, 1 Stat. 78 (1789).

12 18 Stat. 470, *as amended,* 24 Stat. 552 (1887) and 25 Stat. 434 (1888); 36 Stat. 1091 (1911); 28 U.S.C. § 41(1) (1940), *as amended,* 28 U.S.C. § 1345 (1948).

13 United States v. California, 208 F. Supp. 861, 864 (S.D. Cal. 1962).

14 Case v. Bowles, 327 U.S. 92 (1945) (Emergency Price Control Act conferred jurisdiction on the federal district courts); United States v. California, 297 U.S. 175 (1935) (Jurisdiction under the Safety Appliance Act); Alabama v. United States, 304 F.2d 583 (5th Cir. 1962) (Jurisdiction conferred by the Civil Rights Act of 1957); United States v. Montana, 134 F.2d 194 (9th Cir. 1943), *cert. denied,* 319 U.S. 772 (1943) (Jurisdiction of district court under the National Industrial Recovery Act).

15 111 U.S. 449, 469 (1883).

16 28 U.S.C. § 1251(b) (1948):

> The Supreme Court shall have original but not exclusive jurisdiction . . . in all controversies between the United States and a state. . . .

Title 28, sections 1251(b) and 1345 of the United States Code. Section 1251(b) states that "the Supreme Court shall have original but not exclusive jurisdiction of: (2) All controversies between the United States and a State."[17] Section 1345 declares that "except as otherwise provided by an act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States or by an agency or officer thereof expressly authorized to sue by an act of Congress."[18] It was held, however, that Congress had not delegated jurisdiction to the district court in the instant case, based on the language and the legislative history of sections 1251(b) and 1345. Giving sections 1251(b) and 1345 their plain and ordinary meanings[19] and viewing these sections in relation to one another as Congressional enactments in the field of federal jurisdiction, one might well question the decision of the district court. As already indicated, the Supreme Court's original jurisdiction in controversies between the United States and a state is not exclusive. District courts have also been given original jurisdiction in all civil actions commenced by the United States except where otherwise provided. Logically then, by jointly construing sections 1251(b) and 1345 and giving to them a plain and ordinary construction, the inevitable conclusion would seem to posit jurisdiction in a district court in the instant case.

Section 1251(b) is a revision of sections 341 and 371 of the 1940 United States Code.[20] Section 1251(b) differs from its predecessors in specifying that the Supreme Court's jurisdiction in controversies involving the United States and a state is not exclusive. The district court argued that there was no material change in the language when section 1345 was enacted as successor to section 41(1) of the 1940 Code,[21] and that the alteration of section 1251(b) does not necessitate joint construction with section 1345, so that it should include cases based upon the tortious conduct of a state's agent. Thus, since section 1345 has not been materially altered, this section should continue to be interpreted as before.[22]

The district court is hesitant in recognizing its jurisdiction here because no prior decision was found in which the United States has brought an action against a state for the tortious conduct of its agents in a district court. This, however, is not to say that federal district courts have not been given jurisdiction in all con-

17 28 U.S.C. § 125(b) (1948).

18 28 U.S.C. § 1345 (1948).

19 Commissioner of Internal Revenue v. Hunt Foods, Inc., 204 F.2d 429 (9th Cir. 1953); Payne v. Ostrus, 50 F.2d 1039 (6th Cir. 1931); Lynch v. Alworth-Stephens Co., 294 Fed. 190 (8th Cir. 1923).

20 28 U.S.C. § 341 (1940):

> The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party except between a state and its citizens, or between a state and citizens of other states or aliens, in which latter cases it shall have original but not exclusive jurisdiction . . . .

28 U.S.C. § 371 (1940):

> The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several states . . .
>
> (7) of all controversies of a civil nature where a state is a party, except between a state and its citizens or between a state and citizens of other states, or aliens.

21 28 U.S.C. § 41(1) (1940):

> The District Court shall have original jurisdiction as follows:
>
> (1) the United States as plaintiff; civil suits at common law or in equity. First. Of all suits of a civil nature at common law or in equity, brought by the United States or by any other officer thereof authorized by law to sue, or between citizens of the same state claiming lands under grants from different states . . . .

22 Van Vranken v. Helvering, 115 F.2d 709 (2d Cir. 1940), *cert. denied,* 313 U.S. 585 (1941); Johnson v. Manhattan Railway Co., 289 U.S. 479 (1933).

troversies between the United States and a state wherein the United States is a plaintiff.[23]

In *United States v. Washington*,[24] the government appealed from a judgment dismissing an action against the State of Washington and other appellees to quiet title to certain Washington real property claimed by the United States as a trustee for certain Indian wards. The State of Washington argued that by virtue of sovereign immunity the district court had no jurisdiction over the person of the state. It further contended that the United States Constitution in article III, section 2, clause 2, provides that "in all cases . . . in which a state shall be a party the Supreme Court shall have original jurisdiction." Therefore, a state must consent to be sued in any other court than the United States Supreme Court. The significance of this case was that the Supreme Court held in favor of the jurisdictional grant to the federal court and cited sections 1251(b) and 1345 as the statutes conferring jurisdiction. The court stated that "the suit at bar . . . is clearly an action by the United States within the meaning of section 1345."[25] Thus there is recognition that sections 1251(b) and 1345 can operate to confer jurisdiction upon a federal district court.

Since section 1251(b) and section 1345 have been jointly construed to allow a quiet title action it may be argued that similar reasoning might be invoked in the area of tortious conduct of a state's agents. This contention is not in conflict with the court's proposition that section 1345 should be interpreted as it was heretofore construed. The court's argument presupposes that section 42(1) of the 1940 Code, predecessor to section 1345 of the 1948 Code, was not construed jointly with sections 341 and 371 of the 1940 Code.

Section 42 provided that where the United States is a plaintiff, district courts had jurisdiction. Sections 341 and 371 provided that the United States Supreme Court had exclusive original jurisdiction where a state is a party. Court decisions seem to indicate that only with reluctance did district courts assume jurisdiction where the United States was a plaintiff and the state a party defendant. They did so only when a specific Congressional enactment explicitly delegated such authority.[26] Those decisions, therefore, indicate a mitigation of the literal import of sections 341 and 371 and with it a certain compatibility with section 42(1). With the alteration of section 1345 proclaiming that the Supreme Court's jurisdiction where states are parties is original but not exclusive, there is no longer any need to lessen the impact of section 1251(b)'s literal import, for now a district court's jurisdiction can extend to all cases where the United States are plaintiffs "except as otherwise provided."[27]

In addition it would appear that public policy warrants the recognition of jurisdiction in cases such as this. In the 1961 October term 2,585 cases came before the Supreme Court and there was disposition of 2,157.[28] The Supreme Court is thus called upon to make an average of some ten decisions a day. This fact alone would promote the view that lower federal courts should be given jurisdiction in disputes

23 See United States v. Graham, 96 F. Supp. 318 (S.D. Cal. 1951), holding that a federal district court has jurisdiction in an action by the United States against private individuals to enforce tax liens, notwithstanding the state's intervention as a necessary party; and Minnesota v. United States, 125 F.2d 636 (8th Cir. 1942), that when Congress authorizes the bringing of a condemnation suit for the acquisition of land for the United States in the United States District Court wherein such land was located, jurisdiction is vested regardless of whether state lands are involved. See generally HART AND WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 228 (1953).

24 233 F.2d 811 (9th Cir. 1956).

25 233 F.2d 811, 813-14 (9th Cir. 1956).

26 *Supra* note 14.

27 28 U.S.C. § 1345 (1948). See the Revisionary Committee Note where this phrase is explained as follows: " 'Except as otherwise provided by an act of Congress' as the beginning of the section was inserted to make clear that jurisdiction exists generally in district courts in absence of special provisions conferring it elsewhere."

28 31 U.S.L. LEEK 3029 (July 10, 1962).

whenever feasible to relieve the Supreme Court of an overwhelming number of cases, especially in cases where the tortious acts of a state's agents are concerned. Adjudication of tort claims often requires local witnesses and a knowledge by the court of the locality wherein the alleged tort occurred.[29]

In light of the plain and ordinary meaning of sections 1251(b) and 1345 of the United States Code, the joint construction of these sections in the analogous area of real property, and the logically sound policy considerations, the court should have recognized its jurisdiction in this case.

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29 United States v. California, 297 U.S. 175, 188 (1935). In this case, where the United States brought action against a state-owned railroad, the Court argued in favor of district court jurisdiction on just such policy grounds. The Court said that this controversy "is essentially local in character . . . . Their adjudication often requires witnesses, railroad workers, shippers, and others of a locality."