Notre Dame Law Review

Volume 38 | Issue 1 Article 6

12-1-1962

Recent Decisions

Frank J. Duda

J. Russell Bley

Lawrence J. Gallick

Louis P. Pfeiler

RECENT DECISIONS

TAXATION — LIENS — LOCAL TAX LIEN GIVEN PRIORITY OVER FEDERAL LIEN IN MORTGAGE FORECLOSURE. — Buffalo Savings sued to foreclose its mortgage under Section 1087 of the New York Civil Practice Act,[1] which directs that local taxes be treated as expenses of the sale. The United States was joined as defendant because of a federal tax lien filed subsequent to the first mortgage but prior to the accrual of local real estate taxes. The County Court granted summary judgment in favor of the mortgagee and ordered the referee to pay as part of the expenses of the sale all real estate taxes, assessments and water rates which were liens upon the property.[2]

On appeal to the Court of Appeals, *held:* affirmed. The recorded tax lien for mortgagor's federal income tax was payable only out of surplus on the mortgage foreclosure sale after payment of subsequently accruing real estate taxes, assessments and water rate. *Buffalo Savings Bank v. Victory,* 226 N.Y.2d 382, 181 N.E.2d 413, *cert. granted,* 82 S.Ct. 1554 (1962).

The general federal tax lien was adopted to protect the federal government in the collection of revenue. This lien attaches to "all property and rights to property, whether real or personal, belonging to"[3] any taxpayer who is delinquent in payment. This lien arises and becomes fully perfected at the time the tax is levied.[4] There is no need for any action by the government, and except in cases of mortgagees, pledgees, purchasers and judgment creditors,[5] there is no need for public notice for the lien to be effective.

As often happens when a federal tax lien exists, there are other creditors who have or will have a lien on the property — for often the taxpayer is in financial difficulties. Congress, through the lien statutes, did not purport to confer a priority upon the federal lien except in the case of an insolvent taxpayer.[6] To fill the gap, courts have adopted the rule "first in time, first in right."[7] Strict application of this rule would give the first lien to arise preference over later arising liens. In applying this rule the problem arises: when do non-tax liens (such as real estate liens) become perfected? It was ruled that for one lien to be considered to have arisen before another it must have been choate or perfected. Such non-tax liens are choate when, at the time of insolvency, the identity of the lienor is known and the subject and amount of the lien are certain.[8] The Supreme Court has been very reluctant to find non-federal liens choate and has set down rigid rulings as to whether these liens have met the above tests and are certain.[9]

Whether or not the state lien is choate when in competition with a federal tax lien has been held to be a federal question to be determined by federal law.[10]

1 N.Y. CIV. PRAC. ACT § 1087.

> Where a judgment rendered in an action to foreclose a mortgage upon real property directs a sale of the real property, the officer making the sale must pay out of the proceeds, unless the judgment otherwise directs, all taxes, assessments and water rates which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments or water rates which have not apparently become absolute. The sums necessary to make those payments and redemptions are deemed expenses of the sale within the meaning of the expression as used in any provision of this article.

2 Buffalo Savings Bank v. Victory, 26 Misc. 2d 443, 206 N.Y.S.2d 518 (Erie County Ct. 1960).

3 INT. REV. CODE OF 1954, § 6321.

4 INT. REV. CODE OF 1954, § 6322.

5 INT. REV. CODE OF 1954, § 6323.

6 31 U.S.C. 191 (1958).

7 United States v. City of New Britain, 347 U.S. 81 (1954).

8 Illinois ex rel. Gordon v. Campbell, 329 U.S. 362 (1946).

9 United States v. City of New Britain, *supra* note 7.

10 See United States v. White Bear Brewing Co., 350 U.S. 1010 (1955); United States v. Scovil, 348 U.S. 509 (1960).

The law of the states operates only to determine if property exists to which the liens can attach.[11] After that has been determined, the federal law determines in what order the liens are to be satisfied.

The instant case is one in a series arising recently to determine the scope and extent of the federal law on tax lien priorities. The New York Court fully realized that the New York statute, if it characterized a state lien as choate against the federal tax lien, would not be binding as to the federal lien's priority.[12] However, the court felt that it was not adopting such a characterization but merely sanctioning a state foreclosure procedure, which only secondarily gave a state lien a preferential priority over the federal lien. The court made no pretense that the state lien was not being given a preferential priority, since they accrued after the federal lien was filed; but rationalized this result as an acceptable incident of adopting the state procedure.

In the most famous case dealing with tax lien priorities, *United States v. City of New Britain,*[13] it was held that a state law which gave water rent liens and real estate liens precedence over all other incumbrances could not affect the general federal tax lien priority as established by federal law. The Supreme Court, in reaching this result, stated:

> We do not agree. The United States is not interested in whether the State receives its taxes and water rents prior to mortgagees and judgment creditors. That is a matter of state law. But as to any funds in excess and judgment creditors, Congress intended to assert the federal lien. There is nothing in the language of 3672 (now § 6323) to show Congress intended antecedent federal tax liens to rank behind any but the specific categories of interest set out therein . . .
>
> This Court has repeatedly rejected the contention that because a fee owned by a taxpayer was already encumbered by a lien which enjoyed seniority under state law, the Government lien necessarily attached subject to that lien.[14]

It is nowhere suggested that state procedural laws which grant an unwarranted seniority to state liens are acceptable. On the contrary *any law* giving such priority is inoperative and the federal liens remain first in collection.

The same result is suggested by the *United States v. Acri,*[15] where state law designated an attachment lien as choate as of the day of filing, which was prior to the time of the federal lien. The Supreme Court held this characterization could not effectively stop the federal lien from having priority. The Court said:

> The relative priority of the lien of the United States for unpaid taxes is . . . always a federal question to be determined by the federal courts. The state's characterization of the liens while good for all state purposes does not necessarily bind this court.[16]

Such statements do not coincide with the ruling in the instant case, for in effect state law was allowed to determine the relative priorities of the competing liens.

Similar problems involving section 1087 of the New York Civil Practice Act have been before the courts on five previous occasions. Various lower state courts divided in their opinion as to whether the statute in question granted a priority to local liens in violation of the existing federal law.[17] In an enlightening case

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11 Aquilino v. United States, 363 U.S. 509 (1960).

12 United States v. Acri, 348 U.S. 211 (1955). The court cites no cases holding the state lien choate, and in fact does not try to show that this lien is choate within the federal test.

13 United States v. City of New Britain, *supra* note 7.

14 *Id.* at p. 88.

15 United States v. Acri, *supra* note 12.

16 *Id.* at p. 214.

17 *Compare* Metropolitan Life Ins. Co. v. United States, 9 App. Div. 2d 356, 194 N.Y.S. 2d 168 [Sup. Ct. (A.D.)]; *and* Dunkirk Trust Co. v. Dunkirk Laundry Co., 17 Misc. 2d 298, 182 N.Y.S.2d 381 (Chautauqua County Ct. 1959); *with* Rikoon v. Two Boro Dress Inc., 9 Misc. 2d 591, 171 N.Y.S.2d, modified 8 App. Div. 2d 298, 190 N.Y.S.2d 700 (Sup. Ct. 1959); Kronenberg v. Ellenville Nurseries & Greenhouse Inc., 22 Misc. 2d 247, 196 N.Y.S.2d 106 (Sup. Ct. 1960).

dealing with this section, *Stadelman v. Harnell Woodworking Corp.*,[18] the United States contended that its lien should be paid before the local lien despite the state procedure in question. The District Court agreed saying:

> The obvious effect of the quoted provisions of the New York Civil Practice Act is to give priority in payment to state and municipal liens over federal tax liens which are prior in time of filing . . . The relative priority of the lien of the United States for unpaid taxes is, the Supreme Court has said, always a federal question to be determined by the federal courts. Turning, therefore, to the federal decisions we find the rule firmly established that once a government lien is properly filed no subsequently recorded lien or claim may prevail . . . New York State cannot impair the standing of federal liens without consent of Congress.[19]

It is suggested that this is in accord with all federal precedents and should have been followed by the Court of Appeals.

The New York court relied very heavily on the *United States v. Bronson*[20] to support its contention that state procedure may be used in state foreclosure cases, despite the fact that it affects the federal tax lien's priority. In that case, it was held that state procedure as to divestiture of a junior federal tax lien was acceptable.

The Supreme Court in the *Bronson* case did not deal with tax lien priorities. In fact, the case supported the rule of *New Britain* and never sanctioned a stated test for priority. The court also stated:

> A fortiori, the property to which the federal lien can attach is not diminished by the particular means of enforcement possessed by a competing lienor . . .[21]

Such a statement gives no approval to the procedure invoked by the New York court, for treating the local liens as expenses of the sale surely diminishes the proceeds from which the federal liens can be satisfied. In view of these facts, reliance on the *Bronson* case is unwarranted.

In support of its findings, the New York court found a distinction between *New Britain* and the instant case. In the former, the court found the contest to be between the local and federal governments; while in the latter, the conflict was said to involve the mortgagee and the creditors of the mortgagor. From this distinction the court was able to find a difference in the essence of the local lien and that of the federal lien. It stated that the local real estate lien attached "to the property itself, in the very nature of the land . . ." while the federal lien attached to the property "merely because of an unconnected indebtedness."[22] From this the local court concluded that the local lien by its nature is choate at the time of the filing of the mortgage lien, while the federal tax lien did not become operative until the tax was assessed — admittedly after the filing of the mortgage lien. Such is not the case. This sort of ruling is exactly what has been prohibited by the Supreme Court and other courts many times before — a state inchoate test operates against a federal tax lien, in that the court states when a lien is choate.[23]

This can be better seen in the cases that hold that a mortgagee, who pays local tax liens, is not entitled to a lien for that additional amount — provided these liens accrued after the federal tax lien was filed.[24] The mortgagee was not allowed to improve the position of the local liens at the expense of the federal liens by such action. He was entitled to a lien only for the amount due at the time he filed his mortgage; no other sum was given priority over the federal tax

18 Stadelman v. Hornell Woodworking Corp., 172 F.Supp. 156 (W.D.N.Y. 1958).
19 *Id.* at 158.
20 United States v. Bronson, 363 U.S. 237 (1960).
21 *Id.* at 241.
22 Buffalo Savings Bank v. Victory, 226 N.Y.2d 382, 181 N.E.2d 413, 415 (1962).
23 United States v. City of New Britain, *supra* note 9.
24 United States v. Bond, 279 F.2d 837 (4th Cir. 1960), *cert. denied*, 364 U.S. 895; United States v. Christensen, 269 F.2d 624 (9th Cir. 1959).

lien. Therefore, in the instant case the only amount that was to be given priority over the federal tax lien was the amount due when Buffalo Savings filed its mortgage. The local tax liens had to be due at this time in order to gain the preference over the federal liens, no matter how they were to be paid. Such characterization of the lien by the state is a test for inchoateness which, as was pointed out, is ineffective.

It is submitted that the action in this case is an attempt by the New York Court of Appeals to do indirectly that which it could not do directly — have the state law determine priority of competing state and federal tax liens. Such action should not be allowed, as it violates the policy of assuring the payment of federal taxes. It is further suggested that the Supreme Court will reverse upon hearing the argument in this case.

Frank J. Duda

WARRANTIES — FITNESS OF FOOD — CAFETERIA HELD RESPONSIBLE FOR INJURY ARISING FROM SALE OF PRODUCT CONTAINING DELETERIOUS SUBSTANCE. — Plaintiff entered defendant's cafeteria and purchased a frankfurter on a bun which he was free to eat on the premises or to take outside of the establishment. While he was eating the frankfurter in the cafeteria, plaintiff's tooth struck a substance alleged to be bone or gristle. He suffered a broken tooth, bleeding, and physical pain for which he sought damages. Recovery was granted, and on appeal to the Supreme Court of New Jersey, *held:* affirmed. *Sofman v. Denham Food Service, Inc.*, 181 A.2d 168 (N.J. 1962).

The area of implied warranty in cases involving the service of food by restaurants and cafeterias has been characterized by sharp disagreement. The apparent simplicity of the problem is deceptive because of complications arising from historic doctrines regarding the nature of a "sale." Those who would deny a restaurateur's liability based on the theory of implied warranty declare that there is no actual "sale" of food in a restaurant and that therefore there can be no warranty. The case most often cited as authority for this proposition is *Parker v. Flint.*[1] The deference given this case seems unwarranted since the court which decided it was specifically concerned with a different issue.[2]

A more detailed explanation of the traditional concept of the service of food by an innkeeper is given by Professor Beale.[3] It is not difficult to understand why there was no true "sale" of food in days when an innkeeper supplied his guest with lodging and only that amount of food which the guest consumed. Just as there was no lease of the room, there was no sale of the food. Passage of title to the food could not transpire since the guest had no right to take his portion from the table or to offer it to another. At that time it was said that the innkeeper does not sell his food but simply "utters his provision."[4]

Since his occupation was one of service and accommodation rather than one of sale, the innkeeper could be held liable for knowingly or negligently furnishing bad food, but not for warranting the food and thus assuming a strict liability. It would seem apparent that this line of reasoning is outmoded today. Whereas the guest at an inn had to be content with whatever was served, today's restaurant patron selects the food he wants at a price fixed by the restaurateur.[5]

Although reluctant to impose liability in the absence of a sale of food, the common law did not hesitate to impose rigid responsibility once a sale could be

1 Parker v. Flint, 12 Mod. 254, 88 Eng. Rep. 1303 (1699).

2 The actual holding in Parker v. Flint was that a house for the reception of boarders and lodgers, with stabling for their horses, is not an inn, or alehouse, or public house, on which soldiers can be quartered. In closing the court noted that "an innkeeper, as such, cannot be a bankrupt, because he does not sell but utters his provision."

3 BEALE, INNKEEPERS & HOTELS § 169 (1906).

4 Parker v. Flint, 12 Mod. 254, 88 Eng. Rep. 1303 (1699).

5 Ford v. Waldorf System, Inc., 57 R.I. 131, 188 Atl. 633, 635 (1936).

established. In general it might even be said that the courts have always been liberal in allowing recovery in food cases. The privity rule, for example, has been relaxed in the area of deleterious food products at a time when privity is still a dominant requirement for recovery in other areas.[6] As early as 1266 there were criminal statutes imposing a special responsibility on the "purveyor of victuals for human consumption."[7] In fact, beginning about 1431, there were dicta in some decisions[8] and statements by text writers[9] to the effect that the seller of food incurred a strict liability, akin to that of an implied warranty. Later, Blackstone recognized liability for sale of defective food by saying that "in contracts for provisions it is always implied that they are wholesome, and if they be not, the same remedy (damages for deceit), may be had."[10]

Given the popular conception that the reasons for imposing liability on the seller of defective food are stronger than in any other kind of sale,[11] the historical hesitancy to recognize a sale of food in anything other than a retail store would seem to be an unnecessary limitation. Since, considerations of privity aside, courts almost universally grant recovery to one injured by deleterious food sold through a grocery store or supermarket,[12] it seems unreasonable for some of those same courts to deny recovery if the food is served in a restaurant.

Today the numerical majority[13] follows what is known as the Massachusetts-New York rule, holding that a restaurant owner does sell food and consequently assumes a strict liability. However, there is still a persistent minority[14] which contends that just as an innkeeper of the seventeenth century merely uttered his food, so, by analogy, the restaurateur of today merely serves, not sells, his food. This latter line of authority has become known as the Connecticut-New Jersey rule. New Jersey, among these states, had always followed the minority rule and denied recovery for damages arising from the service of harmful food. This is precisely what makes the *Sofman* case deserving of attention; for although the majority distinguishes *Sofman* from earlier New Jersey decisions, the distinction is a minor one, less satisfactory than in the result it is intended to substantiate.

The leading case in the jurisdiction is *Nisky v. Childs Co.*[15] in which the court relied upon the analogy between an old English inn and a modern day restaurant. Although the majority in *Sofman* took note of the widespread criticism of the *Nisky* decision, it avoided a head-on clash with the outmoded analogy by relying on a superficial distinction between restaurant and cafeteria. Service is consid-

6 Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913); Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939); Greenberg v. Lorenz, 7 App. Div. 2d 968, 183 N.Y.S.2d 46 (1959), *modified*, 9 N.Y. 2d 195, 173 N.E.2d 773 (1961).

7 Statute, 51 Hen. III (1266) of the Pillory & Tumbril & Assize of Bread and Ale. For a detailed discussion of this area, see Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1104 (1960).

8 Y.B. 9 Hen. VI, f. 53B, pl. 37 (1431); Keilwey 91 note, 72 Eng. Rep. 254 note (K.B. 1507).

9 Haley, annot., in Fitz-Herbert, Natura Brevium 94 (9th ed. 1793); *see* 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 386 (4th ed. 1936).

10 3 BLACKSTONE, COMMENTARIES *166.

11 1 WILLISTON, SALES § 242 (Rev. ed. 1948).

12 Sapiente v. Wattuch, 127 Conn. 224, 15 A.2d 417 (1940); Food Fair Stores of Florida, Inc. v. Macurda, 93 So. 2d 860 (Fla. 1957); Martin v. Great Atlantic & Pacific Tea Co., 301 Ky. 429, 192 S.W.2d 201 (1946); Ryan v. Progressive Grocery Stores, 255 N.Y. 388, 175 N.E. 105 (1931); D'Onofrio v. First Nat. Stores, 68 R.I. 144, 26 A.2d 758 (1942).

13 Arkansas, California, District of Columbia, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New York, Ohio, Pennsylvania, Rhode Island, Texas, West Virginia, Wisconsin. See PROSSER, TORTS § 83 (2nd ed. 1955).

14 Alabama, Connecticut, Delaware, Georgia, Maryland, New Hampshire.

15 103 N.J.L. 464, 135 Atl. 805 (Ct. Err. & App. 1927). This case has been followed in New Jersey by Corin v. S. S. Kresge Co., 10 N.J. Misc. 489, 159 Atl. 799 (Sup. Ct. 1932), *aff'd per curiam*, 110 N.J.L. 378, 166 Atl. 291 (Ct. Err. & App. 1933), and Rickner v. Ritz Restaurant Co. of Passaic, 13 N.J. Misc. 818, 181 Atl. 398 (Sup. Ct. 1935).

ered an essential element in the operation of a restaurant, while that element is minimal in a cafeteria. Thus, said the majority, there is a sale of food in a cafeteria, and therefore an implied warranty of its fitness. Granting that this constitutes an advance beyond the precise holding in *Nisky*, the court noted the state's legislative disapproval of that decision and yet refused to overrule it.

The concurring opinion in *Sofman* seems not only to be better reasoned, but to be more straightforward in approach. That opinion maintains that there is no sound reason for ruling in favor of recovery in cafeteria cases and against recovery in restaurant cases. Indeed, those courts which have allowed recovery for injuries arising from food served in a cafeteria made no mention of the cafeteria's being a unique operation.[16] After showing the similarities between restaurants and cafeterias, the minority in *Sofman* concluded that, in truth, the *Nisky* decision does cover the circumstances in the present case. However, the minority recognized *Nisky* as unsound and would have overruled that case by saying that a defendant engaged in the business of preparing and offering food designed primarily to be consumed on the premises, be it cafeteria or restaurant, is liable to an injured patron upon an implied warranty that the food is fit for human consumption. In effect, that is precisely what the New Jersey legislature had done by adopting the Uniform Commercial Code, to become effective January 1, 1963.[17]

Surely, this would seem to be the most reasonable attitude. Whether one be served his food in a restaurant or be sold his food over a counter, the "essence of the transaction," as noted in the concurring opinion, is "the quality and fitness of the food rather than the place where the food is to be eaten."

If one disregards the shibboleth of a technical "sale" and concentrates on the basic nature of dealings in food, there is little reason for distinguishing between the type of establishment in which the food is "served," "uttered," "sold," or whatever.

> Even though the transaction is not a sale, every argument for implying a warranty in the sale of food is applicable with even greater force to the serving of food to a guest or customer at an inn or restaurant. The basis of implied warranty is justifiable reliance on the judgment or skill of the warrantor, and to charge the seller of an unopened can of food for the consequences of the inferiority of the contents of the can, and to hold free from liability a restaurant keeper who opens the can on his premises and serves its contents to a customer, would be a strange inconsistency.[18]

Another authority in the field of sales has expressed similar opinions and suggested that the restaurateur's obligation need not be based on the fiction of calling the service of food a sale, but rather on the reality of the need for extending warranty protection to a diner.[19]

For such reasons as this, the decision in *Sofman* is a good one in so far as it contributes to the destruction of a tenacious doctrine buttressed more by tradition than by logic. Perhaps this decision, all but abrogating the Connecticut-New Jersey rule in this jurisdiction, will prompt other courts to a re-evaluation of their present position. Although states hitherto uncommitted have gradually joined the ranks of the majority during the past decade,[20] the minority has held firm, small in number but strong in adherence to seventeenth-century thinking.

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16 McAvin v. Morrison Cafeteria Company of Louisiana; Ltd., 85 So. 2d 63 (La. Ct. App. 1956); Franke's, Inc. v. Wallace, 219 Ark. 467, 242 S.W.2d 968 (1951).

17 N.J.S.A. § 12A:2-314 (1) (1961).

> Unless excluded or modified (12A:2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

18 I WILLISTON, SALES § 242b (Rev. ed. 1948).

19 VOLD, SALES § 94 (2nd ed. 1959).

20 Zorinsky v. American Legion, Omaha Post No. 1, 163 Neb. 212, 79 N.W.2d 172 (1956); Kyle v. Swift & Co., 229 F.2d 887 (4th Cir. 1956); Betehia v. Cape Cod Corp., 10 Wis. 2d 323, 103 N.W.2d 64 (1960).

It is interesting to note that there is another problem which the court in *Sofman* neglected to consider and which could have led to a denial of recovery to the plaintiff. The court took for granted that the "small piece of bone or gristle" responsible for the injury was a "foreign substance." There is a strong and clear line of authority which denies recovery for injuries arising from a non-foreign substance in food, whether that food be served in a restaurant or purchased in a grocery store. In the leading case of *Mix v. Ingersoll Candy Co.*,[21] it was held that the presence of chicken bones in a chicken pie did not make the food unfit for human consumption, and moreover, that a consumer had no right to expect such a perfect product. The vast majority of similar cases have been decided in the same manner with a denial of recovery for injuries arising from the presence of bits of bones, shells, or seeds in a food product to which such substances are natural.[22]

It is questionable whether or not one could say that a bone or gristle in a frankfurter is a foreign substance. Furthermore, if one were to apply the reasonable expectation test suggested by the Wisconsin court, it is likely that recovery could be granted whether or not the substance in this frankfurter be technically "foreign." In *Betehia v. Cape Cod Corp.*,[23] it was said that the test for recovery should be based upon what the consumer might reasonably expect in the food as served and not what might be natural to the ingredients of the food prior to preparation.

Although recovery might have been granted on the theories of reasonable expectation or foreign substance, the court in *Sofman* did not even touch upon these considerations. This causes one to speculate as to the intent behind the majority opinion. It is conceivable that by ignoring other possible grounds for recovery, the court was taking this opportunity to make an assault on the authority of *Nisky* and the Connecticut-New Jersey rule. If this is the case, it is to be regretted that the court chose to make an indirect offensive rather than to hazard a head-on clash. Had the court decided to follow that plan of attack, the rule would have been definitely defeated in New Jersey. As matters remain now, that rule stands tottering in this jurisdiction. One wonders whether it will continue to stand until the Uniform Commercial Code becomes operative in 1963.

At least it can be said that a restaurateur involved in an implied warranty case would not be amiss to consider the possible implications of *Sofman* and to realize that the New Jersey court has hinted at even further extensions of the ever-broadening field of warranty. It is significant to note that this is the same court which set judicial wheels spinning two years ago in *Henningsen v. Bloomfield Motors.*[24]

J. Russell Bley, Jr.

WITNESSES — COMPETENCY — CHILD WHO DENIED BELIEF IN GOD RULED COMPETENT WITNESS. The complaining witness in a trial for assault and battery was a ten-year-old girl, Susan Feinberg. She was examined on *voir dire* before being sworn and testified that she didn't always tell the truth, but that she did so "when it is important," "because it's the right thing to do," that she didn't know what happens to people who swear to tell the truth and don't, and said "no" when asked if she believed in God. On motion to suppress her testimony, the Middlesex County Court *held:* that Susan's testimony was admissible because she had the required "mental

21 6 Cal. 2d 674, 59 P.2d 144 (1936).

22 Lamb v. Hill, 112 Cal. App. 2d 41, 245 P.2d 316 (1952); Silva v. F. W. Woolworth Co., 28 Cal. App. 2d 649, 83 P.2d 76 (1938); Brown v. Nebiker, 229 Iowa 1223, 296 N.W. 366 (1941); Shapiro v. Hotel Statler Corporation, 132 F.Supp. 891 (S.D. Cal. 1955); Goodwin v. Country Club of Peoria, 323 Ill. App. 1, 54 N.E.2d 612 (1944); Courter v. Dilbert Bros., 19 Misc. 2d 935, 186 N.Y.S.2d 334 (Sup. Ct. 1958); Wieland v. C. A. Swanson & Sons, 223 F.2d 26 (2d Cir. 1955), *cert. denied*, 350 U.S. 862 (1955).

23 10 Wis. 2d 323, 103 N.W.2d 64 (1960).

24 32 N.J. 358, 161 A.2d 69 (1960).

capacity" and "moral responsibility" to take the oath, conclusions reached on the basis of the entire *voir dire;* and that even though the witness made "inconsistent statements" on the matter of her belief in God, the presumption supplied by law on the question of her competency, based on religious belief, was not overcome. *State v. Walton,* 72 N.J. Super. 527, 179 A.2d 78 (Middlesex County Court 1962).

This case does not overrule the leading case in New Jersey, stating the common law rule as to a witness' required religious belief.[1] That rule to the effect that no person could be a witness in a judicial proceeding unless he believed that there was a God and that God would punish him if he swore falsely, still obtains in six states,[2] in three of which[3] religious belief is an express qualification. In all but a few states, statutes allow a witness to affirm instead of taking an oath, but nowhere has the use of the oath been abolished by statute.[4] The affirmance is substantially similar to the oath, except that the punishment of the state rather than that of the Deity is invoked.[5] Even this variation of the oath is not open to atheists or agnostics in New Jersey but is rather meant for religious persons who have conscientious or religious scruples against oath-taking.[6]

The usual state provision changing the common law rule may be a statute or constitutional provision stating that "no person shall be rendered incompetent to be a witness or juror on account of his opinions on matters of religious belief."[7] Such a provision has been interpreted to render persons competent to testify without regard to any religious belief or unbelief, and also to prevent inquiry into that belief to affect the question of credibility.[8] Or the relevant language may be a broader statement; that, for example, "the civil rights, privileges or capacities of no person shall be taken away, or in any wise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching."[9] In some states want of religious belief goes only to the issue of the witness' credibility.[10]

Under the 1844 Constitution in New Jersey, declaring that "No person shall be denied the enjoyment of any civil right merely on account of his religious principles," it was held that a party cannot be deprived of the right to testify regardless of his religious beliefs, but that no person can be a witness unless he believes in some God.[11]

It is said that up to 1744 the common law rule was that only a Christian could testify in court.[12] But since *Omichund v. Barker*[13] the rule has been that any person who believes in a God Who will punish perjury is competent to testify. The English courts also decided that it was immaterial whether the witness believed liars would be punished in a future existence or in the present one. The courts in the United States have generally reached the same result.[14]

It is probably true that the oath no longer has the importance as a means of

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1 State v. Levine, 109 N.J.L. 503, 507, 162 Atl. 909, 911 (Sup. Ct. 1932).
2 Ala., Ark., Md., N.C., N.J., S.C.
3 Ark., Md., N.C.
4 6 WIGMORE, EVIDENCE § 1828 (3d ed. 1940).
5 An affirmation may read:
> Do you solemnly affirm and declare the testimony you shall give to the Court and jury in this case now on trial will be the truth, the whole truth, and nothing but the truth, and this do you under the pain and penalty of perjury? Gillars v. United States, 182 F.2d 962, 969. (D.C. Cir. 1950.)

6 State v. Levine, 109 N.J.L. 503, 162 Atl. 909 (Sup. Ct. 1932).
7 *E.g.,* CALIF. CONST. art. 1 § 4.
8 People v. Copsey, 71 Cal. 548, 12 Pac. 721 (1887).
9 KY. CONST. § 5.
10 *E.g.,* Snyder v. Nations, 5 Blackf. 295 (Ind. 1840); N.M. STAT. ANN. § 20-1-8 (1953).
11 N.J. CONST. art. 1, par. 4 (1844); State v. Levine, 109 N.J.L. 503, 162 Atl. 909 (Sup. Ct. 1932).
12 6 WIGMORE, EVIDENCE § 1817 (3d ed. 1940).
13 Omichund v. Barker, 1 Atk. 45; 125 Eng. Rep. 1310 (Ch. 1744). See Marshall v. State, 219 Ala. 83, 121 So. 72 (1929).
14 6 WIGMORE, EVIDENCE § 1818 (3d ed. 1940).

insuring that the truth be told as it had in a less secular age. It is also probably true that atheism or agnosticism is no longer equated in the public mind with grave moral defects. If then it is true that "The object of the law in requiring an oath is to get at the truth by obtaining a hold on the conscience of the witness,"[15] it is submitted that there are other means of obtaining such a hold on the witness.

> [S]uppose the Court should determine that the proposed witness, either an *atheist* or an agnostic would undergo punishment by *mental* anguish or by *loss of self respect,* perhaps *both,* if he should testify to an untruth, would not the Court be disposed to consider seriously an unorthodox assertion from the called witnesses in lieu of an oath?[16]

Putting aside constitutional questions for the moment, it is at least impractical now to require that all witnesses be religious men and women, when a substantial part of the population are agnostics or atheists. However it neither follows that the oath ought to be abolished, nor that nonbelievers ought to be accommodated by emasculating the oath, holding it open to all.[17] Instead, any person who has a valid religious objection to the oath, or any person who feels that an appeal to God is meaningless for him, ought to be allowed to affirm.[18]

In the case at hand, the complaining witness was administered the oath and ruled competent, a motion to suppress being denied because "the proof as to disbelief was not volunteered and was inconsistent with other statements." The presumption of religious belief, held by this court applicable to a child, was held not destroyed by the child's admissions on *voir dire* that she had read and believed only "some parts" of the Bible, that she did not go to Synagogue and did not believe in God.[19] She said she thought a person ought to tell the truth "because it's the right thing to do," and that when it's important, she tells the truth. However, there is nothing in these statements inconsistent with her denial of religious belief.[20] In the face of the child's testimony, the court's ruling on this issue is unfortunate, because at the same time it helps to undermine whatever value the oath retains as an effective instrument and provides an inappropriate means of allowing the nonreligious to testify as witnesses. In such a ruling are the seeds of a judicially created nontraversable presumption in favor of such witnesses, a fiction that could seriously impair the oath as an instrument of justice.

In our society it is plain that religious belief should not be a required test of competency. This is especially true in regard to children, whose theological notions are yet unformed. Whether or not the common law rule as to witnesses in general obtains, it seems that:

> [T]he crude and shadowy beliefs of small children concerning God and the hereafter are so uncertain that the tests based upon religious instruction, even though given by the trial judge himself, are of little or no moment and should rather be discarded than followed. . . . The whole purpose of the trial is to ascertain the truth, and the oath is in pursuance of that object. If the witness understands that this is demanded, and that punishment will follow its violation, it is sufficient.[21]

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15 BEST, EVIDENCE §§ 58, 161 (1849), quoted in 6 WIGMORE, EVIDENCE 1816 (3d ed. 1940).

16 6 WIGMORE, EVIDENCE § 1817 (Supp. 1962). "I recognize the right and the duty society has to furnish some means of being able to enforce members of its community to speak the truth. Such seems to me to be absolutely endorsed in the words of the affirmation." Gillars v. United States, 182 F.2d 962, 969 (D.C. Cir. 1950).

17 See Hronek v. People, 134 Ill. 139, 24 N.E. 861 (1890), holding that all religious tests and qualifications are abolished and that, by implication, the oath may be taken irrespective of belief.

18 Keeping the oath but allowing nonbelievers to testify eliminates this problem:

> If . . . he is incapable of telling the truth, he will deny his opinions, and what is the test worth? If he is honest enough to subject himself to the disability rather than tell a lie, why exclude him? Scott, J., in Perry v. Commonwealth, 44 Va. (3 Gratt.) 632, 642 (1846).

19 State v. Walton, 72 N.J. Super. 527, 179 A.2d 78, 85 (Middlesex County Court 1962).

20 *Id.* at 79-81.

21 Commonwealth v. Furman, 211 Pa. 549, 550, 60 Atl. 1089, 1090 (1905).

Assuming the infantile mind to be incapable of comprehending any difference between parental or other customary child discipline, and the punishment of God in another realm, it would seem that they ought not be required to swear, whether they profess religious belief or not. Rather the child in question ought to be examined as to his "capacity to communicate observations and experiences; to the capacity intellectually to understand; . . . [his] comprehension, discretion and intelligence as an aid to the court in determination of the preliminary inquiry."[22] If the child is thus intellectually able, appears to understand that the truth is desired, and that he is under obligation to tell the truth, he ought to be allowed to testify. The natural ingenuousness and candor of most children should be good insurance of the wisdom of admitting them. A child will no doubt be more impressed by an informal charge that he is to be truthful than by taking an oath at any rate. It is rather for adults and adolescents that the formal ceremony of the administration of an oath or affirmation is most impressive.

Another question is the matter of the constitutionality of requiring religious belief in a witness. One writer feels that the practice is no denial of "the equal protection of the laws."

> The inability of a person to obtain testimony from an unbeliever in religion is not the denial of the equal protection of the laws nor of any other civil right. That inability rests equally on a person who is a believer and on one who is not.[23]

The real constitutional problem involved, if any, is probably to be encountered in the First Amendment, which, it is now agreed, applies also to the states. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." In interpreting the amendment, the Supreme Court has said that "neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' "[24]

From this language, it would seem that the required religious qualifications under discussion do not, at least, contravene the free exercise clause, because no one is being forced to believe anything, nor being restrained from believing or practicing any religion or nonreligion. The decision of the Supreme Court in *Torcaso v. Watkins,* 367 U.S. 421 (1962), does not force a contrary result, broad as is the Court's language there. It was there held that Maryland's religious test for public office "unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him,"[25] and that this is so even though appellant need not have sought public office. It seems clear that this holding includes freedom from religion under the protections of the First Amendment.[26] The coercion involved in the *Torcaso* case lay in requiring a person to believe in some god, as a condition to holding public office. This is a restriction on the religious liberty of any person who desires at the same time to hold public office and to pro-

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22 State v. Walton, 72 N.J. Super. 527, 179 A.2d 78, 83 (Middlesex County Court 1962).
> The capacity of the infant, . . . depending upon the circumstances of its understanding as exhibited in each instance, is to be determined by the trial Court. In a few jurisdictions, however, a trace of the old notion is still preserved in a rule that children under a certain age — usually ten or fourteen years — will not be assumed to be capable, so that their capacity must first be shown. 6 WIGMORE, EVIDENCE § 1821 (3d ed. 1940).

23 TORPEY, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS 279 (1948). See State v. Levine, 109 N.J.L. 503, 508, 162 Atl. 909, 912 (Sup. Ct. 1932).

24 Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

25 *Id.* at 496.

26 But *Torcaso* is purportedly decided upon the "free exercise" clause. It is the appellant's freedom of religion which is said to be violated. Lower courts have specifically stated that the fourteenth amendment does *not* protect freedom *from* religion. Taken in total, this case apparently does extend the protection of the free exercise clause to nonbelievers, but just how it does so is not clear. Note, 37 NOTRE DAME LAWYER 649, 707 (1962).

fess his nonreligion. But there is no such element of public or private "right" in the situation of the "witness-agnostic" or "witness-atheist." No person not a party to an action has a "right" to be a witness therein, nor is any person deprived of a "right" by not being allowed to be a witness therein, whatever the reason for such a disability.

It has been asserted that the *Torcaso* decision "implicitly but necessarily invalidates any vestiges of statutory or judicial procedure that disqualifies or permits the impeachment of witnesses on grounds of religious disbelief."[27] It would seem that if this is so, it must then be because of the establishment clause of the First Amendment. Neither a state nor the federal government can constitutionally "pass laws or impose requirements which aid all religions as against non-believers and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[28] There need be no coercion involved in such "aid" for

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not.[29]

Obviously the religious requirement in question does decrease the civil capacities of the nonbelieving witness, but does this constitute "aiding" any or all religions or "establishing" any official religion? Such is certainly not their purpose, nor would it seem that they do so. It is not so much a violation of the Constitution that is the question here, but rather the reasonableness of such an evidentiary rule *qua* evidentiary rule.

Lawrence J. Gallick

ESCHEAT — CORPORATIONS — AMENDMENT OF THE CERTIFICATE OF INCORPORATION TO PROVIDE FOR THE REVERSION OF UNCLAIMED DIVIDENDS TO THE CORPORATION RATHER THAN TO THE STATE HELD INVALID. — Defendant, Jefferson Lake Sulphur Co., amended its certificate of incorporation to provide that any dividend declared by the corporation, but remaining unclaimed by the owner for three years, would revert to the corporation and the obligation to pay would thereby cease. The corporation took this action some five months after the enactment of the Custodial Escheat law by the state of New Jersey.[1] Almost seven years later the state instituted proceedings against defendant to recover all declared dividends which had been unclaimed for five years. The Chancery Division entered judgment for the state and on appeal, the Supreme Court of New Jersey *held:* affirmed. The amendment is invalid because it is opposed to the custodial escheat law and to public policy. *State v. Jefferson Lake Sulphur Co.,* 36 N.J. 577, 178 A.2d 329 (1962), *Appeal dismissed,* 370 U.S. 158 (1962).

At early common law the term "escheat" referred to the passage of real property to the crown when its owner died without heirs. Similarly, unclaimed personal property also passed to the crown under the theory of *bona vacantia.* However,

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27 Pfeffer, *Some Current Issues in Church and State,* 13 W. RES. L. REV. 9, 33 (1961).
28 Torcaso v. Watkins, 367 U.S. 488, 495 (1961).
29 Engel v. Vitale, 370 U.S. 421, 430 (1962).

1 N.J. REV. STAT. § 2A:37-29 (1952):
> . . . [T]he state may take into its protective custody property consisting of cash, dividends, interest or wages owed by any corporation organized or doing business under the laws of this state, belonging to any person remaining unknown, or whose whereabouts is unknown, or whose property remains unclaimed as defined herein for a period of 5 successive years; and after a period of protective custody has expired as herein prescribed, the state may proceed to escheat such property to itself.

today "escheat" is used to describe the acquisition by the state of both real and personal property.[2]

State escheat statutes are of two kinds: strict escheat statutes whereby title to the property is transferred to the state and the rights of the previous owners are extinguished; and custodial escheat statutes whereby the state takes the property into protective custody for a period, and then appropriates it if the owner still cannot be found.[3] Originally unclaimed property statutes were limited to tangible property,[4] but since 1946 at least twenty states have enacted or enlarged escheat laws to cover intangible property as well.[5]

New Jersey, one of the most aggressive states in the escheat field, adopted a Custodial Escheat law in 1951,[6] and has been embroiled in many disputes, especially with corporations. New Jersey's vigorous program in applying its escheat laws is indicated by *State v. Sperry & Hutchison Co.*,[7] in which the state attempted to escheat the cash value of unredeemed trading stamps issued by the defendant. The state lost the case only because the contract under which the stamps had been issued, provided that they were not redeemable unless tendered in certain prescribed minimum amounts. Since the state could not show any person who had accumulated the stamps in redeemable quantities, judgment was given for the defendant. When it is considered that there were over seven million dollars at stake,[8] the diligence of New Jersey can be understood. In 1957 the state grossed over one million dollars from the proceeds of escheated property from all sources;[9] and it is interesting to note that litigation costs have averaged from twenty-five to thirty-five per cent of the gross revenue realized from the contested cases.[10]

Although many disputes involving escheat have taken place in New Jersey, they have not been confined to that jurisdiction. Before the instant case, questions of due process,[11] impairment of the obligation of contracts,[12] and interstate jurisdictional disputes[13] had been decided by the courts in connection with escheat.

The present case, although novel in that it is the first attempt by a corporation to circumvent the state escheat law directly by amending the certificate of incorporation, is not surprising. It was inconceivable that corporations would not soon make some attempt to avoid the effect of the escheat laws. While the New Jersey court could not find any case on point, it had little trouble in deciding that the corporate amendment could not stand.

First, the court predicated its holding on the fact that since the corporation had declared the dividends and set funds apart in a separate account to pay them, the funds could no longer be used for any other purpose, regardless of what the articles of incorporation stated. It held that the funds became the property of the stockholders distributively and that the corporation held them as a trustee. This

2 McBride, *Unclaimed Dividends, Escheat Statutes and the Corporation Lawyer*, 14 BUS. LAW. 1062, 1063 (1959); Anderson Nat. Bank v. Luckett, 321 U.S. 233, 240 (1944). At common law the term *bona vacantia* described goods in which no one could claim a property right. At one time they belonged to the finder, but later to prevent strife and to contribute to the support of government they became the property of the king. 1 BLACKSTONE, COMMENTARIES *299.

3 62 COLUM. L. REV. 708, 709 (1962).

4 McBride, *supra* note 2 at 1063.

5 Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71, 79 (1961).

6 State v. Jefferson Lake Sulphur Co., 36 N.J. 577, 178 A.2d 329, 331 (1962).

7 56 N.J. Super. 589, 153 A.2d 691 (Super. Ct. 1959).

8 *Id.* at 693.

9 McBride *supra* note 2 at 1067.

10 McBride *supra* note 2 at 1068.

11 Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71 (1961); Connecticut Mutual Life Insurance Co. v. Moore, 333 U.S. 541 (1948); Anderson Nat. Bank v. Luckett, 321 U.S. 233 (1944).

12 Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951).

13 New Jersey v. American Sugar Refining Co., 20 N.J. 286, 119 A.2d 767 (1956). For a full discussion of escheat laws and their administration see 61 COLUM. L. REV. 1319 (1961); and 59 MICH. L. REV. 756 (1961).

interpretation is supported in several other jurisdictions.[14] In *Yeaman v. Galveston City Co.*,[15] the Texas court stated the rule very succinctly by saying:

> There can be no substantial difference between the trusteeship of a corporation as it relates to the stock of a shareholder and its duty to him in respect to the profits or dividends upon his stock. *He is under no obligation to draw or demand his dividends within any prescribed period.* He may leave them with the corporation, if he chooses, and be under no default. The debt which a declared dividend creates on the part of the corporation to the stockholder is one payable only on demand, as is the obligation of a bank to its depositors. It is not subject to limitation until there has been a demand upon the corporation and a refusal to pay.[16]

However, this rule might not apply if all of the stockholders voted to release the corporation from its role as trustee. But, in the instant case, since only slightly over two-thirds of the stockholders voted for the amendment, it is understandable that the New Jersey court would not allow them to eliminate the rights of all the stockholders.

A further reason for the court's decision was that the corporation lacked the power to amend its charter in such a way that it conflicted with the law of the state.[17] The judges pointed out that a corporation's authority comes from the state, and therefore, cannot rise higher than its source. The law on this subject was stated in *Rudolph Wurlitzer Co. v. Commissioner*[18] when the court said:

> Not only under state decisions, but also under federal decisions, the sovereignty which determines the existence or nonexistence of power in a state corporation is the state. A corporation is a mere creature of the law, and possesses only the powers conferred by the statute creating it and those necessarily implied. The granting of a corporate right or privilege rests entirely within the discretion of the state, and when granted may be accompanied by such conditions as the Legislature may judge most befitting to its interests and policy.[19]

Under the New Jersey General Corporation Act, a corporation is allowed to adopt any provision in its certificate of incorporation which is consistent with law.[20] Although the adoption of the particular amendment was not prohibited by any specific statute, the court decided that it was not consistent with law. It held that simply including provisions in the certificate of incorporation could not enlarge the corporation's powers if such provisions offended public policy or applicable general law.[21] The judges refused to give judicial approval to an amendment adopted for the avowed purpose of defeating the escheat laws and the public policy they represented.

Support for the New Jersey court's belief that this amendment was contrary to public policy is found in *Benintendi v. Kenton Hotel.*[22] In that case a bylaw requiring unanimous approval by the stockholders before any corporate action could be taken was declared invalid, although it was not specifically prohibited by any statute. The decision was bottomed on the fact that corporations were allowed

14 Smith's Estate v. C.I.R., 292 F.2d 478 (3d Cir. 1961); In re Interborough Consol. Corporation, 288 Fed. 334 (2d Cir. 1923); Yeaman v. Galveston City Co., 106 Tex. 389, 167 S.W. 710 (1914).

15 106 Tex. 389, 167 S.W. 710 (1914).

16 *Id.* at 724. (Emphasis added.)

17 N.J. REV. STAT. § 14:11-1 (1937). Part "r" states that the corporation may "Make such other amendment, change or alteration as may be desired."

18 81 F.2d 971, 973 (1936).

19 *Id.* at 973-74.

20 N.J. REV. STAT. 14:2-3 (1937):

> ***The certificate may contain any provision, consistent with law, which the incorporators may choose to insert, for the management of the business and the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, its directors and stockholders or any class of stockholders.

See also 6 FLETCHER, PRIVATE CORPORATIONS § 2491 (perm. ed. rev. repl. 1950).

21 Terwilliger v. Graceland Memorial Park Ass'n, 35 N.J. 259, 173 A.2d 33, 38 (1961).

22 294 N.Y. 112, 60 N.E.2d 829 (1954). See also Kaplan v. Block, 183 Va. 327, 31 S.E.2d 893 (1944).

by statute to fix the number of directors necessary to constitute a quorum and to require unanimous approval was thought to flout the legislature's purpose in providing a statutory scheme for corporate management. In *Commonwealth ex rel. Laughlin v. Green*,[23] where statute law was likewise silent on the subject, the court ruled invalid a bylaw requiring that votes could only be cast for a "nominee." The state constitution allowed a stockholder to cast all his votes for one "candidate," and the court interpreted this to mean that the policy of the state was to allow a man to be a candidate without being nominated. Additional authority for the New Jersey court's declaration is found in *Oregon Railway & Navigation Co. v. Oregonian Railway Co.*,[24] wherein the United States Supreme Court held that in determining the powers of a corporation under a grant by statute, the extent of the grant is to be determined by construing all doubtful points against the grantee and in favor of the government or public.

There does not seem to be anything improper in the decision of this case. Escheat of unclaimed property, including dividends, contributes to the common good of all the citizens of the state. It relieves the burden which the taxpayers must carry and at the same time it prevents anyone from receiving a windfall. As was said in *Standard Oil Co. v. New Jersey:*[25]

> As a broad principle of jurisprudence rather than as a result of the evolution of legal rules, it is clear that a state, subject to constitutional limitations, may use its legislative power to dispose of property within its reach, belonging to unknown persons. Such property thus escapes seizure by would-be possessors and is used for the general good rather than for the chance enrichment of particular individuals or organizations.[26]

The New Jersey Escheat law is also fair to the unknown stockholder in that it allows him to recover his property, with interest, at any time within seven years after judgment of escheat, upon a proper showing that he did not have knowledge of the escheat proceeding.[27]

The instant case presents an interesting problem. Where does the corporation go from here, having failed in this attempt to resist the escheat laws? The device used by the defendant was discussed in 1952.[28] It was then anticipated that such action might be declared contrary to public policy. But would the result be different if each certificate of stock contained a contract between the corporation and the stockholder, whereby the dividend would be automatically assigned to the corporation if it were not claimed within a prescribed period? This idea is brought to mind by what the United States Supreme Court said in *Standard Oil Co. v. New Jersey.*[29] In that case the court decided that the escheat law did not impair the obligation of contracts[30] because there was not an agreement between the holder and the owner of the abandoned property providing for its disposition in case of the owner's failure to make claim. Does this suggest that if there were a contract, the escheat laws could not apply? However, even if the laws could not apply to a private agreement, such an arrangement might not solve all problems. For example, such a contract might have an adverse effect on marketability and sales price of the stock.[31] There is authority for the proposition that even contract rights must bow before the police

23 351 Pa. 170, 40 A.2d 492 (1945).
24 130 U.S. 1 (1888).
25 341 U.S. 428 (1950).
26 *Id.* at 435-36. The New Jersey Court itself had stated this principle in State v. American Sugar Refining Co., 20 N.J. 286, 119 A.2d 767, 773 (1956) where it said:

> New Jersey's quest for legitimate revenues to be used for the good of all its citizens is in nowise to be condemned and its right to the unclaimed dividends is admittedly superior to that of the corporation which had custody, but no moral or legal claim to their retention.

27 N.J. REV. STAT. § 2A:37-40 (1952).
28 65 HARV. L. REV. 1408, 1409 (1952).
29 341 U.S. 428 (1951).
30 U.S. CONST. art. I, § 10.
31 62 HARV. L. REV. 295, 298 (1948).

power of the state. In *Zeuger Milk Co. v. School District of Pittsburgh,*[32] a law regulating the price of milk was passed and the state set the price higher than that contracted for between the milk company and the school district. The school district was required to pay the higher price, because the court held, if this were not the case, important and valuable reforms would be precluded simply by entering into contracts.

But whatever the outcome of future corporate attempts to thwart the escheat laws, there is something which every corporation can do to lessen the flow of gold into the state coffers. Every corporation can adopt a planned program to limit the amount of escheatable property it holds. One writer on the subject[33] believes that where the dividend history has been good and a planned search program has been employed, the amount of unclaimed dividends will be small. A large disbursing agent who acts on behalf of more than one hundred corporations reported that on a "rather large" dividend disbursement, less than two hundred dollars would be unclaimed after six months, most of which would be checks which were received, but not cashed.[34] This would indicate that the dividend escheat problem may be capable of being reduced to the point where it would not be worth the corporation's effort to try to prevent escheat. At any rate, every corporation should be aware of the escheat laws and plan accordingly, for as has been said: "Comprehensive escheat statutes are here to stay. More and more states are casting a green eye upon the pot-o-gold derived by their sister states from the administration of such statutes and they are beginning to follow the same rainbow."[35]

Louis P. Pfeiler

WARSAW CONVENTION — JURISDICTION AND VENUE — ARTICLE 28(1) INTERPRETED TO REFER TO VENUE. — Ray D. Spencer was injured in a forced landing in the Pacific during a flight from Okinawa to Hong Kong. He brought suit in a federal court in New York and the defendant airline contended that suit should have been brought in Minnesota pursuant to the provisions of Article 28(1) of the Warsaw Convention.[1] On consideration of motion to dismiss, *held:* Article 28(1) of the Convention for the Unification of Certain Rules Relating to International Transportation by Air (hereafter referred to as Article 28(1) and the Warsaw Convention respectively) did not set up special jurisdictional requirements, and therefore, the defendant's general appearance constituted a waiver of any possible objection to venue the defendant might have had. *Spencer v. Northwest Orient Airlines, Inc.,* 201 F. Supp. 504 (S.D.N.Y. 1962).

The special question presented to the court concerned the interpretation to be given to Article 28(1) which provides:

> An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.[2]

This was merely one of a number of provisions incorporated in an international agreement which attempted to set up a uniform system for the treatment of cases arising from accidents occurring in international aviation as defined in the convention. This convention was drawn up at Warsaw, Poland, in 1929 but was not

32 334 Pa. 277, 5 A.2d 885 (1939).
33 McBride *supra* note 2 at 1073-76.
34 McBride *supra* note 2 at 1074.
35 McBride *supra* note 2 at 1075.

1 49 Stat. 3000-3026, T.S. No. 876 (1934).
2 49 Stat. 3020, T.S. No. 876 p. 23 (1934).

adopted here until the Senate approved the President's Proclamation of 1934. The most disputable point under the Warsaw Convention is whether a separate and exclusive cause of action, contractual in nature, was created therein.[3] The present discussion will be restricted to the problem of jurisdiction. To date only a few courts[4] have been called on to decide this question. The *Rotterdamsche Bank*[5] case held that Article 28(1) was jurisdictional. The two American cases of any consequence arrived at contrary results. In the *Dunning*[6] case the judge transferred venue pursuant to the provisions of 28 U.S.C. § 1404(a) and thereby implicitly recognized the venue character of Article 28(1). In the *Winsor*[7] case, although the possibility of a lack of jurisdiction was recognized, it was held that the intended place of trial could be found to be one specified in the Article. Thus, it appears that this question is unsettled, at least in the United States, and the purpose of this comment is to indicate the considerations necessary to the correct interpretation.

As used herein, *jurisdiction* will refer to jurisdiction over the subject matter and may be equated with the competency of the court to hear and decide a case. This distinction is especially important in the United States because the federal courts are courts of limited jurisdiction — the subject matter must be specifically set out in the Constitution and specifically granted by Congress.[8] State courts presume jurisdiction based on the traditional power of the courts of a sovereign state. This concept of jurisdiction is essential because a case must be dismissed if, at any time, it appears that the court does not have jurisdiction. Also, a judgment entered by a court which does not have jurisdiction is void.

Venue will refer to the place of trial, designated for the convenience of the litigants. The crucial difference between jurisdiction and venue is that the place of trial is a privilege, personal to the defendant, which may be waived. Thus, jurisdiction goes to the heart of a court's power, while venue does not.

Presently, the investiture of federal jurisdiction is contained in 28 U.S.C. §§ 1331-1359. Ignoring for the time being Article 28(1), sections 1331 and 1332 would cover the present subject matter. Section 1331 deals with jurisdiction over civil actions arising under the Constitution, laws or treaties of the United States in which the matter in controversy exceeds $10,000 exclusive of interest and costs. If the argument[9] (the creation of a contractual cause of action under the Warsaw Convention) of G. Nathan Calkins, Jr., the Chairman of the U.S. Delegation, The Hague Conference to Amend the Warsaw Convention, 1955, is adopted, a plaintiff would rely on this section because the cause of action would then arise under a treaty[10] of the United States. The only effect of interpreting Article 28(1) as jurisdictional here would be to reduce the requisite jurisdictional amount. Under the provisions of the Convention, damages are restricted to approximately $8,300[11] in

3 The two United States cases which most definitively dealt with this point are Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir. 1957), *cert. den.*, 355 U.S. 907; and Komlos v. Compagnie Nationale Air France, 111 F.Supp. 393 (S.D.N.Y. 1952), *rev'd* 209 F.2d 436 (2d Cir. 1953), *cert. den.*, 348 U.S. 820; both of which stated that there was no new cause of action created. For a discussion of both these cases and a criticism of the result together with a strong contrary argument see CALKINS, *The Cause of Action Under the Warsaw Convention,* 26 J. AIR L. & COM. 217, 323 (1959).

4 Winsor v. United Air Lines, 153 F.Supp. 244 (E.D.N.Y. 1957); Scarf v. Allied Aviation Service Corp., 1956 U.S. & Can. Av. 28 (S.D.N.Y. 1955); Scarf v. Trans World Airlines, Inc. 1955 U.S. & Can. Av. 669 (S.D.N.Y. 1955); Dunning v. Pan American World Airways, 1954 U.S. & Can. Av. 70 (D.D.C. 1954); Rotterdamsche Bank v. British Overseas Airways Corp. and Aden Airways Ltd., (1953) 1 All E.R. 675 (Q.B.).

5 (1953) 1 All E.R. 675 (Q.B.).

6 1954 U.S. & Can. Av. 70 (D.D.C. 1954).

7 153 F.Supp. 244 (E.D.N.Y. 1957).

8 Kline v. Burke Construction Co., 260 U.S. 266, 233-4 (1922).

9 *Supra* note 3, 26 J. AIR L. & COM. 217 (1959).

10 BLACK, LAW DICTIONARY 401 (4th Ed. 1957).

11. 49 Stat. 3019, T.S. No. 876 p. 21 (1934). The statutory amount is 125,000 gold francs which is worth approximately $8,300 in American money.

the event of death unless the plaintiff can show wilful misconduct[12] on the part of the carrier.

If the plaintiff elects to sue in tort he must rely on section 1332. This section invests jurisdiction over:

> [A]ll civil actions where the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and is between:
> (1) Citizens of different States;
> (2) Citizens of a State, and foreign states or citizens or subjects thereof;
> (3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.
> (C) For the purposes of this section and § 1441 of this title, a corporation shall be deemed a citizen of any State by which it was incorporated and of the State where it has its principal place of business.

In the light of section 1332, a possible effect of interpreting Article 28(1) as jurisdictional could be the opening of the federal courts to two foreign litigants if the contract of carriage had been concluded between them with the United States as the final destination, or if a foreigner had maintained an office in the United States in which the contract was made.

The above discussion centered around the federal court system; the possible effect on state court jurisdiction must also be considered. It appears to have been held that Congress could not enlarge the jurisdiction of a state court;[13] however, the validity of this position has been questioned by a decision of the Supreme Court.[14] Admittedly, Congress can restrict the jurisdiction of the state courts[15] but only if jurisdiction has been given to the federal courts within the Constitutional limitations. However, to do this Congress must provide that the federal jurisdiction is exclusive as was done in 28 U.S.C. §§ 1333, 1334, 1338 and 1356. Since no such provision appears in Article 28(1), the jurisdiction in this area would be concurrent and all the state court remedies would be available even if Article 28(1) were construed to be jurisdictional in nature.

The other possible interpretation which might be applicable to Article 28(1) is that it pertains only to venue. The general venue provisions for the federal courts are now found in 28 U.S.C. §§ 1391, 1392. Section 1391 provides:

> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.
> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside.
> (c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

Article 28(1), as a venue provision, would provide one additional forum, *i.e.*, at the place of destination.

The primary argument in favor of interpreting Article 28(1) as jurisdictional

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12 49 Stat. 3018, T.S. No. 876 p. 21 (1934).

13 Ex parte Crandall, 52 F.2d 650, 654 (S.D.Ind. 1931), *cert. den.*, 285 U.S. 540 (1931). The Court said:

> Congress could not, and did not (referring to the Federal Employers' Liability Act, 45 Stat. U.S.C. § 56) enlarge the jurisdiction of the state courts. The jurisdiction of the state court is defined by the state which creates it. The most that Congress could do was to permit a state court to enforce the cause of action created by the federal act. Not being permitted to create a jurisdiction of the state court, it is needless to add that Congress did not, and could not, restrict the jurisdiction of a state court.

14 Testa v. Katt, 330 U.S. 386 (1946). A Comment appearing at 60 HARV. L. R 966, 970-1 (1947) offers a method of reconciling these cases. The author relies on the statutory use of the word *competent* (p. 971) to show that the state is still entitled to delimit the jurisdiction of its courts.

15 Healy v. Ratta, 292 U.S. 263, 270 (1934).

proceeds from an understanding of the purpose of the convention. The delegates convened to draw up rules designed to unify the procedural and substantive law relating to the world-wide aviation industry. It may be assumed that the delegates intended to cut across national boundaries so as to give one single action in a few specified courts. The courts had to be specified in order to achieve the uniformity of interpretation demanded. This assumption is reinforced by the argument espoused by Calkins[16] that a separate and exclusive cause of action was established by the Warsaw Convention.

On the other hand, a number of countervailing arguments must be considered. Paramount in these contentions is the fact that there appears no substantiating evidence that the delegates did intend to transcend any national judicial system. On the contrary, Dr. D. Goedhuis'[17] account of the delegates' discussion centering on Article 28(1) would negate this assumption. The theme of the comments concerned the place of trial with special reference to avoiding the designation of a country in which the law was not well organized. For example, the British and French delegates were worried that their fellow countrymen would be subjected to the law of such a country as Persia or Mesopotamia. There was no mention of any intention to alter or amend the judicial codes of the various contracting countries.

The subsequent developments relating to Article 28(1) also indicate that it was not intended to be jurisdictional in nature. In 1946 Mr. K. M. Beaumont, reporter for the International Technical Committee of Aerial Legal Experts (the organization under whose auspices the Warsaw Convention was written) submitted a proposed revision of the Warsaw Convention to the Provisional International Civil Aviation Organization. The proposed change of Article 28(1) clearly evidences its venue character:

> An action for damages may be brought only in the territory of a Contracting State. Subject to the fulfillment of this condition, the plaintiff shall have the option to take action either before a court having jurisdiction where the head office of the carrier concerned is situate or before a court having jurisdiction where the contract of carriage was made or before a court having jurisdiction at the place of destination specified in the contract or (of) carriage.[18]

As previously stated, the jurisdiction of the federal courts is limited and there must be both a constitutional and a statutory basis for increasing it. Admittedly, the Constitution would allow the federal courts to entertain cases arising under a treaty. However, it is more difficult to find the necessary statutory grant of power in Article 28(1) in the light of the apparent hesitancy on the part of the courts to find such a grant unless the language is clear and unambiguous,[19] and all doubts are to be resolved against finding such an investiture.[20]

In order to find such a jurisdictional investiture, it will be necessary to give a broad interpretation to an innocuous provision of an international convention at which the United States was not officially represented, although an observer was present. This method does not appear to be the logical procedure for altering or amending a long existing judicial system. The Supreme Court refused to find such an investiture when confronted with an analogous situation.[21] The Court was called upon to consider the effect of Section 20 of the Jones Act[22] which states, ". . . Jurisdiction in such actions shall be under the court of the district in which the defend-

16 Calkins, *supra* note 3.
17 GOEDHUIS, NATIONAL AIRLEGISLATION AND THE WARSAW CONVENTION, pp. 287-8 (1937).
18 *Warsaw Convention — Comparison of 1929 Text With Proposed Beaumont Revision (Draft of December, 1946)*, 14 J. AIR L. & COM. 87, 106 (1947).
19 Carroll v. U.S., 354 U.S. 394, 399 (1957); Sweet v. Goodrich Co. 68 F.Supp. 782 (N.D. Ohio 1946).
20 The Emma Giles, 15 F.Supp. 502, 508 (D. Md. 1936).
21 Panama R. Co. v. Johnson, 264 U.S. 375 (1924).
22 46 U.S.C. § 688 (1958).

ant employer resides or in which his principal office is located." The court stated its conclusion as follows:

> But as a general rule, where existing legislation on a particular subject has been systematically revised and restated in a comprehensive general statute, such as the Judicial Code, subsequent enactments touching that subject are to be construed and applied in harmony with the general statute, save as they clearly manifest a different purpose. An intention to depart from a course or policy thus deliberately settled is not lightly to be assumed.[23]

The circumstances of *Panama R. Co. v. Johnson, i.e.,* the more explicit language and the specifically enacted statute, forged a stronger case for finding jurisdictional investiture. Yet, the Court refused to accept that construction.

The other possible interpretation which this Article is open to is that of venue. The comments of the British and French delegates in discussing Article 28(1) pertain to venue. In addition, it is not unheard of to incorporate an ancillary special venue provision in a statute. The purpose of these special venue provisions is to establish another place of trial because of the particular subject matter of the statute. This was done in the Bankruptcy Act[24] and the Federal Employers' Liability Act.[25] Finally, the marginal description of Article 28(1)[26] which is, "Venue of Action."

Despite the fact that the possible effects of interpreting Article 28(1) as either jurisdictional or venue do not seem drastically different, some determination should be made. The legislative history, subsequent developments, a logical analysis, and the judicial treatment of analogous provisions all dictate the same decision. Article 28(1) is intended to relate to the place of trial and not to the competency of any particular court to hear a case arising under the terms of the Warsaw Convention.

Charles P. Sacher

23 264 U.S. at 384.
24 11 U.S.C. § 11 (1958).
25 45 U.S.C. § 56 (1958).
26 49 Stat. 3020, T.S. No. 876 p. 23 (1934).