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# Recent Decisions

# CASE NOTES

**Admiralty — Limitation Proceedings — Cross-libel Against Estates of Deceased Officers Whose Administrators File Claims as Representatives of Deceaseds' Dependents.**—Petitioner's vessel sank with the loss of thirty-seven crew members, three of whom were officers. It filed a petition in the United States District Court for the Southern District of New York, under General Admiralty Rule 54 for exoneration from, or limitation of, liability to meet claims of survivors and next of kin of decedents. Of the claims filed, three were by representatives of the next of kin of deceased officers, who were also the administrators of the deceased officers' estates. Petitioner filed cross-libels against the estates of the deceased officers for loss of the ship because of their negligence and asserted a claim for indemnity for amounts it might be forced to pay. All three representatives excepted to the cross-libels on the grounds that petitioner's claims abated with the officers' deaths and that no cross-libel may be filed to claims in limitation proceedings. The district court, acting upon the latter ground only, sustained the exceptions. Upon appeal, *held*, one judge dissenting, reversed. General Admiralty Rule 50 authorizes cross-libels arising out of the same contract or cause of action for which the original libel was filed. *Moore-McCormack Lines v. McMahon*, 235 F.2d 142 (2d Cir. 1956).

It has long been a world-wide maritime policy that a shipowner does not risk his entire fortune should disaster, occasioned without his privity or knowledge, overtake one of his sailing units.[1] This policy permitting limitation of liability[2] is currently given effect in the United States by statute.[3] General Admiralty Rule 54 provides that, in the absence of a claim or suit having been initiated against a ship in a particular district, the owner of a ship which may become subject to such suits or claims may, in any United States district court he chooses, petition for exoneration from, or limitation of, liability. Such was the procedure followed in the instant case.

Admiralty rules do not specifically regulate practice as to cross-libels, but General Admiralty Rule 50 provides for security for costs for a cross-libel filed upon any counterclaim arising out of the same contract or cause of action for which the original libel was filed. The instant court unanimously[4] rejected the proposition that no cross-libels may be filed in a limitation proceeding. The

1. Robinson, Admiralty § 117 (1939). "The maritime systems of the world have long agreed that the maritime entrepreneur does not put his whole fortune at risk."

2. 3 Benedict, Admiralty § 474 (6th ed. 1940) defines limitation proceedings as "the system by which owners of vessels are enabled to limit their liability to the value of their interest in the vessel and freight, plus, in some instances, a forfietary sum . . . against all manner of claims generally save seamen's wage claims occasioned without the shipowner's privity or knowledge."

3. 46 U.S.C.A. §§ 181-89 (1928). Practice under the statute is governed by General Admiralty Rules 51-54.

4. Moore-McCormack Lines v. McMahon, 235 F.2d 142, 144 (2d Cir. 1956): "I agree with my colleagues' interpretation of Admiralty Rule 50 and with their expressed attitude towards the survival of the alleged claims by appellant against the estates of the three deceased ship's officers."

court quoted Rule 50, noted that all the claims in the instant case arose out of the one accident and loss as a single cause, and interpreted the rule as authorizing cross-libels in such instances. As direct authority the court cited *The Steel Inventor*[5] and *In re United States Steel Products Co.*[6] Both cases arose out of the collision between the *Steel Inventor* and the destroyer *Woolsey*. Both vessels were at fault. In the *United States Steel Products Co.* case, in the limitation proceedings, cargo lien holders intervened as claimants. The United States Government was held to be in the position of a private party and cross-libels against it were allowed to be filed by the cargo lien holders. The district court below in the instant case, seized upon the fact that the money to be recovered by the Government in the *Steel Products* case was considered a substitute for the lost *Woolsey* and thus the *res*, and attempted to distinguish the case by stating that the basis of the cross-libel in the case before it was the relationship of the parties. The instant court saw no basis in reason or the authorities for such a distinction[7] and it would not appear to be of sufficient weight to overcome the conclusion that cross-libels may be filed against claimants in a limitation proceeding.[8]

Although the court in the instant case was unanimous in holding that *generally* cross-libels may be filed in limitation proceedings, the dissent, however, argued that they were not properly filed against the appellees.[9] The basis for the contention by the dissenting judge that the cross-libels were not properly filed in the present case was that they were filed against the *estates* of the three deceased ship's officers, whereas the appellees in the limitation proceedings did not claim in that capacity.

The appellees here derive their claims from the Jones Act[10] and the Death on the High Seas Act.[11] It is true that both of the above statutes give legal title to the actions under them to the personal representatives of the decedents,[12] and thus require that those persons asserting the claim be the same persons against whom claims owed by the estate will be asserted. However, any recovery had under the foregoing acts inures not to the benefit of the decedent's estate but exclusively to the benefit of decedent's dependent next of kin,[13] and

5. 43 F.2d 958 (2d Cir. 1930).

6. 24 F.2d 657 (2d Cir. 1928).

7. 235 F.2d at 143.

8. Cf. British Transp. Comm'n v. United States, 230 F.2d 139, 143-45 (4th Cir. 1956). Contra, 2 Benedict, op. cit. supra note 2 § 329, which cites both In re United States Steel Products Co. and The Steel Inventor but apparently does not grasp their significance for it states that "a damage claimant in a limitation proceeding who files an answer to the petition for limitation cannot be treated as a libellant for the purpose of subjecting him to a cross-libel."

9. 235 F.2d at 149.

10. 46 U.S.C.A. § 688 (1944).

11. 46 U.S.C.A. § 761 (1944).

12. See notes 10 and 11 supra.

13. The Jones Act, 46 U.S.C.A. § 688 (1944) incorporates by reference the Federal Employer's Liability Act, 45 U.S.C.A. § 51 (1954), which gives the action ". . . to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon

if none existed at the time of decedent's death, there could be no recovery under either act.[14]

Granting that the distinction made in the dissenting opinion is a valid one,[15] it should not prevail here. Courts of Admiralty are governed by equitable principles[16] and to uphold the distinction in the present case would be clearly inequitable to the appellant.

Of course, appellant can set up the negligence of appellees' decedents as a defense to appellees' claims or in reduction thereof on the basis of comparative negligence.[17] But appellant's cross-libels are not merely defensive. The allegations contained therein could be the basis of a large affirmative recovery. However, if the appellant has a cause of affirmative action against the estates of the three deceased officers, and the court is unanimously of that opinion,[18] and if a cross-libel against them in the limitation proceeding is prohibited, then appellant may recover on its cause of action only by impleading appellees in the present proceeding in their capacity as administrators of the decedents' estates, or, by bringing a separate suit against the appellees as administrators, both of which require personal service.[19]

Except where a statute of the United States provides otherwise (and they do not so provide here), service of all processes of a United States district court is limited to the territorial limits of the state in which the district court is held.[20] Appellees in the instant case have maintained themselves so as not to be subject to personal service in the district; appellant is thus denied the first enumerated method of recovery, impleader, and left with only the second, the bringing of a separate suit in another district. Since the claims and counterclaims of all parties arise out of the one accident and loss as a single cause, the testimony must be either identical or greatly overlapping.

To insist upon carrying to its logical conclusion the distinction between the appellees' capacities as administrators of decedents' estates and as representa-

such employee. . . ." The Death on the High Seas Act, 46 U.S.C.A. § 761 (1944), states that such action shall be ". . . for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative. . . ."

14. Lindgren v. United States, 281 U.S. 38 (1930).

15. In Chicago, B. & Q. R.R. v. Wells-Dicker Trust Co., 275 U.S. 161 (1927), in a suit brought under the Federal Employer's Liability Act which is incorporated by reference in the Jones Act, the Supreme Court said at 163: "While the suit thereon must be brought by the personal representative of the employee, he sues as trustee for the person or persons on whose behalf the Act authorizes recovery." Cf. Weiner v. Specific Pharmaceuticals, Inc., 298 N.Y. 346, 83 N.E.2d 673 (1949).

16. The Red Lion, 22 F.2d 329 (E.D.N.Y. 1927).

17. In Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1939), the Supreme Court said at 431: "Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine contributory negligence, however gross, is not a bar to recovery but only mitigates damages."

18. See note 4 supra.

19. Fed. R. Civ. P. 4(c), (d), (e), (f). 2 Benedict, op. cit. supra note 2 § 280, "The Civil Rules as to service are substantially the same as the admiralty practice. . . ."

20. Fed. R. Civ. P. 4(f).

tives of their surviving next of kin and thereby permit one party to recover judgment while his opponent, to recover on a valid counterclaim arising out of the same transaction, is forced to the expense of another complete trial of the issues, would seem inequitable and contrary to the modern trend in practice toward avoiding, wherever possible, multiplicity of suits and technical obstructionism.

**Anti-Trust — Sherman Act — Group Refusal to Deal.**—The rules of defendant's insurance board barred members from doing business with mutual companies or representing companies that operate direct sales branch offices or contribute to agents' overhead expenses. The Government brought this action, charging that the rules effected a boycott, and therefore were per se violative of the Sherman Act. The district court *held,* boycotts are not per se illegal restraints of trade, but require the application of the Rule of Reason. *United States v. Insurance Bd.,* 144 F. Supp. 684 (N.D. Ohio 1956).

Section one of the Sherman Anti-Trust Act provides that every contract, combination, or conspiracy in restraint of interstate or foreign trade is illegal.[1] Construction of the words "restraint of trade" led to the Rule of Reason which limited the statute's prohibition to "unreasonable" restraints.[2] Thus, the section was not directed at restraints reasonably ancillary to the doing of business,[3] but to undue restraints of competition ". . . either from the nature or character of the contract or act [the so called per se illegalities] or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade [the application of the Rule of Reason]. . . ."[4]

In the leading case against group boycotts, *Eastern States Retail Lumber Dealers Ass'n v. United States,*[5] the Supreme Court held the concerted action among a group of retailers, formed for the purpose of inducing wholesalers from selling directly to consumers by the circulation of blacklists to member potential customers, to be unlawful under the Sherman Act. Following the same reasoning the Court has held the following illegal: agreement among film distributors refusing to deal with an exhibitor, blacklisting him because he would not do business with all the members of the association;[6] refusal of film distributors to deal with exhibitors except on a standard form of contract providing among other things for the arbitration of controversies;[7] refusal to license films except

1. 15 U.S.C.A. § 1 (1951).

2. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

3. United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899).

4. Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).

5. 234 U.S. 600 (1914). See Loewe v. Lawlor, 208 U.S. 274 (1908); Montague & Co. v. Lowry, 193 U.S. 38 (1904).

6. Binderup v. Pathe Exchange, Inc., 263 U.S. 291 (1923).

7. Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930).

for cash to any exhibitor whose name appeared on a credit list issued by the association.[8] In none of the cited cases did the Supreme Court expressly rule that a boycott is a per se violation of the Sherman Act; but, since in each case the Court failed to discuss the problem of the reasonableness of the boycott, it would seem that the inference is properly drawn that the Court regarded them as such.[9]

Dicta in later cases indicated permissive scope to group refusals to deal, even though coercive, if motivated by desire to eliminate fraudulent business practices.[10] However, in *Fashion Originators' Guild v. FTC*,[11] in which a powerful combination of dressmakers refused to sell to manufacturers and retailers who dealt in designs "pirated" from the members, attempting to achieve its purpose of destroying such competition by means of blacklists, "snoopers," and fines, the Court held that such an intentional restraint on competition was unlawful even if style copying were a tort under the law of the state. Again, the Court did not explicitly state that this coercive boycott was a per se violation, but by denying the defendant manufacturers leave to show that their conduct was not unreasonable, the Court implied as much. Recent decisions of the Court have reiterated this position.[12] The essential characteristic of the above cited cases has been an intent to directly affect non-members through coercive means designed either to produce conformity or extinction.

With the *Associated Press v. United States*[13] decision, in which the legality of two defendant news-agency by-laws, prohibiting members from selling or furnishing news to non-members (refusal to deal) and imposing barriers upon the admission to membership of competing newspapers, was before the Court, the Court apparently extended its condemnation of concerted refusals to deal. In the district court,[14] Judge Hand distinguished the case from those previously cited, due to the lack of intent to coerce and concentrated his attention on the effect on trade in the light of the Rule of Reason, finding the membership by-law

8. United States v. First Nat'l Pictures, Inc., 282 U.S. 44 (1930). See Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) (use of threats by union officials against plaintiffs); Straus v. Victor Talking Machine Co., 297 Fed. 791 (2d Cir. 1924) (refusal to sell to retailer at other than retail prices).

9. See Kirkpatrick, Commercial Boycotts as Per Se Violations of the Sherman Act, 10 Geo. Wash. L. Rev. 302 (1942).

10. Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925); United States v. American Livestock Comm'n Co., 279 U.S. 435 (1929). Cf. Sugar Institute, Inc. v. United States, 297 U. S. 553 (1936).

11. 312 U.S. 457 (1941).

12. United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945) (combination of producers, wholesalers, and retailers to fix and maintain retail price of alcoholic beverages by adoption of a single course in making contracts of sale, refusing to deal with those who would not conform); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) (a conspiracy whereby Seagram refused to sell to plaintiff dealer and others unless they agreed to the maximum resale price fixed by Seagram).

13. 326 U.S. 1 (1945).

14. United States v. Associated Press, 52 F. Supp. 362 (S.D. N.Y. 1943).

to be unreasonable.[15] The Supreme Court affirmed without modification the decision of the lower court. But, Mr. Justice Black, giving the opinion for the majority, shifted the emphasis to the refusal to deal, and stressed the size of AP, constructing the "design to stifle competition"[16] (coercion) from the by-laws and effect thereof and hence relied on the cited group boycott cases. The opinion, without discussing the reasonableness of the action, is open to the interpretation that any combination of a powerful group refusing to deal, irrespective of purpose, is per se violative of the Sherman Act, the effect of injury to the public being conclusively presumed.[17] Apparently influenced by this decision, the Court took the final step in dictum in *United States v. Columbia Steel Co.*[18] and *Times-Picayune Publishing Co. v. United States*,[19] indicating that all group refusals to deal, regardless of purpose or effect, are per se illegal.

The Government in the instant case, relying on the cited cases and dictum (discussed supra), asserted that all boycotts (group refusals to deal) are per se illegal. Rejecting the Government's contention, the instant court drew a distinction between group refusals to deal exerting coercion and those that do not, declaring that in all the authorities cited by the Government the essential element was the common evil of coercive action against parties outside the group. Hence the court reasoned that if the dicta of the Court in the *Columbia Steel* and *Times-Picayune* cases are to be regarded as a prophecy of the adoption of the doctrine of per se illegality in future boycott cases, its application will be limited to cases where a combination seeks by coercion, intimidation, or threat to compel outsiders to do or refrain from doing that which the group approves or condemns and where the purpose or "necessary effect" of the combination is to unduly restrain or monopolize interstate commerce. Thus, the court maintained that the Rule of Reason must be applied to determine whether the rules of the Board, here under attack, were illegal.

In light of this reasoning, the court found the defendant's Mutual Rule[20] to be a group refusal to deal, motivated by legitimate business reasons, exerting no coercion on outsiders, since the mutual companies' agents remain free to compete with the defendant, and resulting in no unreasonable restraint of trade, thus not violative of the Sherman Act.

This conclusion is sound, halting the growth towards the unjustified adoption

15. The by-law concerning not selling to non-members (refusal to deal) was only condemned as a part of the exclusionary program, but standing alone would be reasonable. Id. at 373-74.

16. Associated Press v. United States, 326 U.S. 1, 19 (1945).

17. Mr. Justice Frankfurter, though concurring, issued a separate opinion, stressing the use of the Rule of Reason. Id. at 25. The dissent of Mr. Justice Roberts indicates that a group boycott may be legal. Id. at 29. For a complete discussion of the case, see Lewin, The Associated Press Decision—An Extension of the Sherman Act, 13 U. Chi. L. Rev. 247 (1946).

18. 334 U.S. 495, 522-23 (1948).

19. 345 U.S. 594, 625 (1953).

20. This rule barred defendant members from doing business with mutual insurance companies.

of universal condemnation.[21] It emphasizes the fact that coercion is not of the essence of group refusals to deal and that as to boycotts not coercive in their formation, the Rule of Reason must be applied to determine the legality. However, the court in its discussion of the Direct Writer Rule[22] goes further. Here the court, finding a group refusal to deal exerting coercion, nevertheless thought it necessary to discuss the reasonableness of the activity and concluded that the rule imposed an unreasonable restraint on trade. This leads to the interpretation that no boycott is per se illegal. The inference of the group boycott cases that a group action of coercion is per se illegal is not applicable, the court apparently feeling that the doctrine of per se illegality as to boycotts, even though coercive, is a thing of the future but certainly not of the present. Such a position, while reaching the same result, places the unnecessary burden on the court to evaluate the significance of the restraint (coercive or not) in the context of the particular industry against the standard of the Rule of Reason. This is contrary to prevailing opinion on the subject.[23]

**Arrest — Traffic Infraction — Failure to State Cause of Arrest.**—Plaintiff, while motoring in upstate New York, was stopped by defendant, a state trooper. Defendant, not answering plaintiff's query, "What did I do wrong?," directed plaintiff to follow him to the judge where an information was filed charging plaintiff with speeding for which offense he was later adjudged guilty. Plaintiff then brought an action for false arrest and the defendant was found guilty of an illegal arrest because he had failed to inform plaintiff of the cause of the arrest. The Appellate Division affirmed by a divided court. Upon appeal to the Court of Appeals, *held,* three judges dissenting, reversed. There was no necessity to state the cause of the arrest since the traffic infraction was a crime committed in the defendant's presence. *Squadrito v. Griebsch,* 1 N.Y.2d 471, 136 N.E.2d 504 (1956).

A peace officer may arrest a person for a felony committed in his presence without a warrant and without stating the cause of the arrest.[1] Where the crime is a misdemeanor, however, such arrest was originally limited to violations constituting a breach of the peace.[2] While this limitation has been retained by some

21. The concept is not novel. See Moore v. New York Cotton Exchange, 270 U.S. 593 (1926); Board of Trade v. United States, 246 U.S. 231 (1918). Both involved agreements limiting the freedom of members to deal with non-members. Cf. Anderson v. United States, 171 U.S. 604 (1898); Hopkins v. United States, 171 U.S. 578 (1898); Interborough News Co. v. Curtis Publishing Co., 127 F. Supp. 286 (S.D.N.Y. 1954).

22. By this rule, members were barred from representing insurance companies that operate branch offices and solicit or sell insurance directly to the insured or contribute to the overhead expense of agents.

23. See Kirkpatrick, supra note 9; Report of the Attorney General's National Committee to Study the Antitrust Laws 132-37 (1955); Comment, 58 Yale L.J. 1021, 1136 (1949).

1. Note, 25 Ky. L.J. 455, 456 (1953); Perkins, The Law of Arrest, 25 Iowa L. Rev. 201, 229 (1940).

2. People v. Phillips, 284 N.Y. 235, 30 N.E.2d 488 (1940); Machen, Arrest Without a

states, for the most part the authority has been extended to all other misdemeanors.[3]

In New York, sections 177 and 180 of the Code of Criminal Procedure govern the law of arrest and permit a peace officer to arrest a person for a crime committed in his presence provided he informs the person of his authority ". . . and the cause of the arrest, except when the person arrested is in the actual commission of a crime. . . ." Practical difficulties arise in other states where words other than "crime" are used,[4] but by statute in New York, "crime" comprehends both felonies and misdemeanors.[5]

The relation of traffic infractions, more particularly speeding violations which were unknown at common law,[6] to the law governing arrest presented itself with the advent of the automobile to the courts. Traffic infractions being criminal,[7] the courts upheld the right of a peace officer to arrest a person without a warrant and without stating cause for a traffic infraction committed in his presence.[8]

Speeding was apparently a misdemeanor in New York also,[9] but by section 2, subdivision 29 of the New York Vehicle and Traffic Law "a traffic infraction is not a crime" except that ". . . courts and judicial officers heretofore exercising jurisdiction over such acts and violations as misdemeanors or otherwise shall continue to exercise jurisdiction over traffic infractions as herein defined, and for such purpose such acts and violations shall be deemed misdemeanors and all provisions of law relating to misdemeanors . . . shall apply to traffic infractions. . . ." The lower courts had intimated that the concluding sentence of subdivision 29 related only to jurisdiction and procedure and in all other respects traffic infractions were not crimes.[10]

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Warrant in Misdemeanor Cases, 33 N.C.L. Rev. 17, 18 (1954); 25 So. Calif. L. Rev. 449, 450 (1952).

3. 6 C.J.S., Arrest § 6 (1937).

4. ". . . in some instances there is little to indicate that any thought was given to the significance of the particular phrase chosen. When we consider, however, the difficulties often encountered by the courts in determining such questions as whether the violation of every law is a 'crime,' . . . then the importance of selecting a phrase which exactly describes the type of misconduct to be included in the officer's power of arrest without warrant becomes quite apparent." Machen, Arrest Without a Warrant in Misdemeanor Cases, 33 N.C.L. Rev. 17, 21 (1954).

5. N.Y. Penal Law § 2.

6. 5 Am. Jur., Automobiles § 37 (1936).

7. 5 Am. Jur., Automobiles § 806 (1936); 9-10 Huddy, Encyclopedia of Automobile Law § 96 (9th ed. 1931). One court referred to such violations as quasi-criminal. State v. Willhite, 40 N.J. Super. 405, 412, 123 A.2d 237, 240 (County Ct. 1956).

8. Stevens v. State, 274 P.2d 402 (Okla. Crim. 1954); Brown v. State, 159 Tex. Crim. 306, 263 S.W.2d 261 (1953,; 9-10 Huddy, Encyclopedia of Automobile Law § 96 (9th ed. 1931).

9. Squadrito v. Griebsch, 1 A.D.2d 760, 761, 147 N.Y.S.2d 533, 534 (4th Dep't 1955).

10. "The summary arrest, however, of a person charged with such a violation, is not part of the exercise of jurisdiction by a court or judicial officer." Breland v. Gray, 37 N.Y.S.2d 291, 294 (Sup. Ct. 1942); cf. People v. Propp, 172 Misc. 314, 15 N.Y.S.2d 83 (County Ct. 1939), rev'd on other grounds, 284 N.Y. 491, 31 N.E.2d 915 (1940); People v. Gilberg, 21 N.Y.S.2d 920 (N.Y.C. Ct. Spec. Sess. 1940). Contra, People v. Space, 182 Misc. 783, 51 N.Y.S.2d 509 (County Ct. 1944).

In the instant case, the majority construed this provision of the Vehicle and Traffic Law to apply not merely to the procedure for the prosecution of traffic infractions, but also to the ". . . necessary steps preceding trial. . . ."[11] Two main reasons were given for this conclusion. First, the power given to the state police to make arrests for traffic infractions would be a nullity if such offenses were not crimes under section 180 of the Code. Secondly, a contrary decision would require an officer to obtain a warrant of arrest first which would impede ". . . prompt and effective enforcement . . . [and] would favor nonresidents over residents of the state without basis or reason."[12]

The dissent argued that by virtue of subdivision 29 speeding was a traffic infraction alone and that the last sentence meant ". . . only that for purposes of jurisdiction and procedure of 'courts and judicial officers,' traffic infractions continue to be handled like misdemeanors (but are not such for any other purpose)."[13] Thus, if the infraction was committed in the presence of the peace officer a warrant would still be necessary, whereas under the reasoning of the majority the lack of a warrant was immaterial since the infraction constituted a crime.

The majority opinion would seem contrary to the express language of subdivision 29. Undoubtedly the legislature did not contemplate the precise situation here involved when this provision of the Vehicle and Traffic Law was first adopted. Yet it seems clear that the legislature did intend to remove the penal nature which had formerly attached to traffic infractions except in relation to the practice of prosecution. Thus, the report of the Bureau of Motor Vehicles remarked that: "[T]he various amendments are made . . . in accordance with the general scheme of the chapter to take minor offenses out of the list of crimes and make them traffic infractions."[14]

However, while it is true that by adopting the dissenting opinion the effect upon enforcement of the vehicle and traffic laws would be greatly impaired and would permit many traffic violators to escape punishment, nevertheless it is impossible to escape the compelling language of subdivision 29 which renders hardly tenuous the reasons indulged in by the majority. The majority opinion begs the question in this instance by delving into the undesirable results which might otherwise ensue. The legislature has inadvertently caused a loophole to exist in the law which the majority has chosen to close, thus encroaching upon a legislative function.

**Conflict of Laws — Federal Tax Lien — State Recording Acts.**—Certain real property originally owned by A, was sold at public sale to the county commissioners by the county treasurer on May 1, 1940, because of delinquency in real estate taxes. The deed from the treasurer to the commissioners was recorded. On May 27, 1947, the commissioners sold the property to B. This deed was never recorded. A federal tax lien was filed against B on October 19,

11. 1 N.Y.2d at 477, 136 N.E.2d at 508.
12. 1 N.Y.2d at 478, 136 N.E.2d at 508.
13. 1 N.Y.2d at 481, 136 N.E.2d at 510.
14. N.Y. Leg. Doc., 158th Leg. Sess., Vol. I, No. 11 (1935).

1949, with the county prothonotary. On November 14, 1949, the county treasurer again sold the property, as A's, to the plaintiff's intestate. This deed was properly recorded. Plaintiff brought this action against various defendants, including the United States, to quiet title to the property. On plaintiff's motion for summary judgment in the federal district court, *held,* motion granted. The filing of a federal tax lien against an intervening purchaser who never recorded his deed is not constructive notice to a subsequent innocent purchaser. *Reiter v. Kille,* 143 F. Supp. 590 (E.D. Pa. 1956).

Under the recording acts of Pennsylvania all deeds, conveyances and contracts purporting to transfer an interest in real property should be recorded.[1] The purpose of this system is ". . . to give public notice in whom the title resides; so that no one may be defrauded by deceptious appearance of title."[2] Accordingly, the effect of properly filing a deed is to limit the rights of a subsequent purchaser, mortgagee or creditor with the same force as if he had joined in the prior conveyance.[3] Such registration is not essential, however, for the valid transfer of title between the parties to the deed.[4] The failure to record a deed is not available as a defense to a third party who subsequently acquires an interest, where he had actual notice of the prior transaction,[5] or the constructive notice of another party in real, visible and exclusive possession.[6] But the failure to record a deed renders it void as to subsequent purchasers, mortgagees or creditors who have innocently acquired their interests and recorded them.[7] In *Pennsylvania Range Boiler Co. v. Philadelphia,*[8] the court considered the question of whether a subsequent innocent purchaser of real estate could be charged with notice of an award of damages to his predecessor in title to cover future losses, when the only record was contained in the notes of testimony before an administrative board. The court held that a subsequent purchaser could not be bound by the award if it had not been recorded. Admittedly, application of this Pennsylvania law alone to the facts of the present case shows that the unrecorded deed and any interest relying upon it was not an effective incumbrance on plaintiff's title.

A federal statute[9] provides that a lien shall arise in favor of the United States for neglect or refusal to pay taxes, against all property, whether real or personal, of the tax delinquent. Normally the relative priority of interests is determined by the application of the principle that the first in time is the first in right.[10] But

1. Pa. Stat. Ann. tit. 21, §§321-471 (1955). See N.Y. Real Prop. Law §§ 290-336 (1945) for similar provisions.

2. Salter v. Reed, 15 Pa. 260, 263 (1850).

3. Pa. Stat. Ann. tit. 21, § 357 (1955); Finley v. Glenn, 303 Pa. 131, 154 Atl. 299 (1931).

4. Malamed v. Sedelsky, 367 Pa. 353, 80 A.2d 853 (1951); In re Cray's Estate, 353 Pa. 25, 44 A.2d 286 (1945).

5. Jennings v. Bloomfield, 199 Pa. 638, 49 Atl. 135 (1901).

6. Smith v. Miller, 296 Pa. 340, 145 Atl. 901 (1929); Lazarus v. Lehigh & Wilkes-Barre Coal Co., 246 Pa. 178, 92 Atl. 121 (1914).

7. Pa. Stat. Ann. tit. 21, §§ 351, 444 (1955).

8. 344 Pa. 34, 23 A.2d 723 (1942).

9. 26 U.S.C.A. § 6321 (1954).

10. United States v. New Britain, 347 U.S. 81 (1954).

the statute provides that the lien shall not be valid against a subsequent purchaser, mortgagee or creditor, until notice of the lien has been filed in accordance with the law of the jurisdiction in which the property is located.[11] In *United States v. Security Trust & Sav. Bank*,[12] for example, the Supreme Court upheld the validity of the federal tax lien where it had been filed in accordance with the local law before the creditor obtained judgment. Conversely, in *United States v. Beaver Run Coal Co.*,[13] where the filing of a government lien followed the execution of a mortgage, the court upheld the priority of the mortgagee's interest, because the Government had disregarded the "positive legislative enactments prescribing conditions essential to the existence and preservation of a statutory lien."[14] By application of these federal rules to the facts of the present case, the federal tax lien was perfected by its filing in the office designated by the law of Pennsylvania,[15] prior to the accrual of the interest of plaintiff's predecessor in title.

In the present case the court followed the purpose of the Pennsylvania recording acts in granting plaintiff's motion for summary judgment, because "it is clear that Congress in enacting Section 3672 of the Internal Revenue Code [of 1939] intended to give effect to the recording statutes of the several states."[16]

As it originally stood, the federal tax lien statute contained no exceptions or limitations.[17] Subsequent purchasers, mortgagees or creditors were not exempted from the incumbrance of a tax lien on property in which they had innocently acquired an interest. Nor was the federal government required to observe the local procedure for the filing of liens against property. In *United States v. Snyder*[18] a lien arose in favor of the Government against the real property of the defendant. The property was subsequently conveyed to an innocent purchaser who maintained that, since the lien was not recorded in compliance with Louisiana law, it was void against him, as the statute provided. The Court, in answer to the self-posed question of ". . . whether the tax system of the United States is subject to the recording laws of the States,"[19] said that "if the United States . . . in the collection of a tax admitted to be legitimate, can be thwarted by the plea of a state statute prescribing that such a tax must be assessed and recorded under state regulation . . . it would follow that the potential existence of the government of the United States is at the mercy of state legislation."[20] The Court, recognizing the difference and conflict among the laws of the states, held that to subject the federal tax law to the laws of the states would be a violation of the constitutional direction to assess and enforce taxes with uniformity. This same

11. 26 U.S.C.A. §6323 (a) (1) (1954).
12. 340 U.S. 47 (1950).
13. 99 F.2d 610 (3d Cir. 1938).
14. Id. at 613.
15. Pa. Stat. Ann. tit. 53, § 2046 (1955).
16. Reiter v. Kille, 143 F. Supp. 590, 593 (E.D. Pa. 1956).
17. Rev. Stat. § 3186 (1875).
18. 149 U.S. 210 (1893).
19. Id. at 213.
20. Id. at 214.

harsh result followed in *United States v. Curry*,[21] where the defendant was also an innocent subsequent purchaser. The court said that the ". . . government's lien is unaffected by the fact that a subsequent incumbrancer or purchaser became such without knowledge that the government had any interest in the property or claim upon it."[22] Because of the inequities caused by this section, Congress, in 1913, provided amendments designed to remove this element of secrecy from the federal tax lien.[23] The amendments exempted subsequent purchasers, mortgagees and creditors from the incumbrance of the tax lien until notice of such lien was filed with the appropriate local official, or, in the absence of state law to that effect, with the clerk of the federal district court for that area.

Following a judicial direction to construe this section in favor of the Government,[24] and considering the conditions which gave rise to the amendments, it is submitted that the added limitations and exemptions effected only a procedural change. Congress attempted to remove the secrecy from the lien by requiring the Government to file notice of the lien. But once this limitation has been observed by the Government, as it was in the instant case, the full force and effect of the substantive basis of the *Snyder* case should apply.[25]

The present case, therefore, presents ". . . another of the recurring conflicts between the power to tax and the right to be free from taxation which are inevitable where two governments function at the same time and in the same territory."[26]

While the courts have not previously been confronted with the exact problems of the instant case, they have in the application of this federal tax lien statute generally upheld the superiority of the federal law when direct and indirect conflicts with state law have appeared. In *Littlestown Nat'l Bank v. Penn Tile Works Co.*,[27] the United States acquired a lien for unpaid taxes prior in time to a lien of the state. Although a state statute provided that its lien should have priority, the Supreme Court of Pennsylvania decided that the federal law, as an exercise of its constitutional power, was superior to the state law. In the case of *In re Dartmont Coal Co.*,[28] after the Government filed a tax lien with the clerk of the federal district court, the legislature of West Virginia enacted legislation which made it mandatory that all such liens be filed with the county clerk. In

21. 201 Fed. 371 (D. Md. 1912).

22. Id. at 374.

23. 37 Stat. 1016 (1913).

24. In re Dartmont Coal Co., 46 F.2d 455, 458 (4th Cir. 1931).

25. Cf. United States v. Security Trust & Sav. Bank, 340 U.S. 47, 52 (1950).

26. United States v. Allegheny County, 322 U.S. 174, 175 (1944). For decisions upholding superiority of federal law, see, Commissioner v. Tower, 327 U.S. 280 (1946); United States v. Pelzer, 312 U.S. 399 (1941); Morgan v. Commissioner, 309 U.S. 78 (1940); Lyeth v. Hoey, 305 U.S. 188 (1938); Burnet v. Harmel, 287 U. S. 103 (1932). For decisions subordinating federal law to state law, see R.F.C. v. Beaver County, 328 U.S. 204 (1946); Helvering v. Stuart, 317 U.S. 154 (1942); Helvering v. Fuller, 310 U.S. 69 (1940); Poe v. Seaborn, 282 U.S. 101 (1930); Crooks v. Harrelson, 282 U.S. 55 (1930); United States v. Cambridge Loan & Bldg. Co., 278 U.S. 55 (1928).

27. 352 Pa. 238, 42 A.2d 606 (1945).

28. 46 F.2d 455 (4th Cir. 1931).

deciding the superiority of the federal lien over a subsequent deed of trust the court stated that "it is well settled that no state has the power to enact legislation affecting federal tax liens, except as permitted by an act of Congress."[29]

The court, in its decision of the present case, placed great emphasis on the purpose of the Pennsylvania recording system. The chaotic effects of allowing the government lien to incumber plaintiff's title are implied. And yet there are relevant issues not accorded the weight which they deserve. The aspects of constitutional law and statutory construction outlined above might well afford a basis for reversal. The objection as to harmful effects on the states' recording structures by holding that the government lien does attach to a subsequent purchaser's property even where the prior deed was unrecorded could well be answered by Chief Justice Marshall's reply to a similar objection in *United States v. Fisher:* "The mischief suggested, so far as it can really happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of congress extends."[30]

**Constitutional Law — Congressional Immunity — Power of Courts to Enjoin Publication of Defamatory Document Published Pursuant to Joint Congressional Resolution.**—The Senate Internal Security Subcommittee prepared a document concerning the Communist Party of the United States, which contained material allegedly defaming plaintiff. Plaintiff brought this action against members of the Subcommittee, seeking a declaration that the congressional resolution directing publication of the Senate document was unconstitutional, and an order enjoining defendants from printing and distributing the document. The three judge district court, one judge dissenting, *held,* the courts had no power to prevent congressional publication of defamatory material, and the complaint, as to members of the Senate Subcommittee, must be dismissed for lack of jurisdiction. *Methodist Federation for Social Action v. Eastland,* 141 F. Supp. 729 (D.D.C. 1956).

Legislative immunity originated out of the struggle for supremacy between the King and Parliament.[1] In England it vested in members of Parliament an absolute privilege from civil or criminal proceedings, for statements made in their places in the House.[2] No absolute privilege attached, however, to republication outside the legislature, through unofficial distribution of reprints;[3] nor to private publication by order of Parliament of documents that would have

29. Id. at 457. See also, Knox v. Great West Life Assur. Co., 212 F.2d 784 (6th Cir. 1954); United States v. Greenville, 118 F.2d 963 (4th Cir. 1941); United States v. Ryan, 124 F. Supp. 1 (D. Minn. 1954); United States v. Rosenfield, 26 F. Supp. 453 (E.D. Mich. 1938).

30. 6 U.S. (2 Cranch) 358, 397 (1805).

1. Methodist Federation for Social Action v. Eastland, 141 F. Supp. 729, 733 (D.D.C. 1956).

2. Ex parte Wason, L.R. 4 Q.B. 573 (1869).

3. Rex v. Abingdon, 1 Esp. 226, 170 Eng. Rep. 337 (K.B. 1794); Rex v. Creevey, 1 M. & S. 273, 105 Eng. Rep. 102 (K.B. 1813).

been absolutely privileged within its walls.[4] Later, by an act of Parliament,[5] the privilege was extended to include such private publication by order of Parliament, and subsequent decisions[6] have held that where publication is by a member of the legislature, in good faith and for the information of his constituents, a privilege prevails. "The basis of so drastic and rigid a rule is the overbalancing of the individual hurt by the public necessity for untrammeled freedom of legislative and administrative activity. . . ."[7]

In the American colonies the immunity was recognized in the state legislatures and Houses of Burgesses,[8] and was later incorporated into the Constitution in art. I, section 6 which provides, "Speech or Debate in either House . . . shall not be questioned in any other Place."[9] An early Massachusetts' case, *Coffin v. Coffin*,[10] construing a similar provision in that state's constitution, extended the immunity beyond mere speech and debate, ". . . to every other act resulting from the nature and in the execution of the office."[11] Thus, anything said within the walls of the legislature and within the legislative role was absolutely privileged. The "legislative role" has been liberally defined, by state[12] and federal[13] decisions, to include whatever is said in the course of the legislative proceedings themselves. In *Kilbourn v. Thompson*,[14] the Supreme Court, in adopting the view of *Coffin v. Coffin*, quoted with approval a dictum of that case to the effect that ". . . there are cases in which he [the legislative member] is entitled to this privilege when not within the walls of the representatives' chamber."[15] The Supreme Court further noted that in the event of "an utter perversion" of the legislators' powers to "a criminal purpose"[16] the Court was not prepared to say that they would be protected by the constitutional privilege, thus indicating that there might be a limit to the liberal rule in an extreme case. The Supreme Court stated, however, in *Tenney v. Brandhove*,[17] that the rights of private individuals would be sustained when Congress was found to be acting "outside its legislative role," noting that in order to find that a committee had acted outside its legislative role ". . . it must be obvious that

4. Stockdale v. Hansard, 9 A. & E. 1, 112 Eng. Rep. 1112 (Q.B. 1839).

5. 3 & 4 Vict., c. 9 (1840).

6. Davison v. Duncan, 7 El. & Bl. 229, 233, 119 Eng. Rep. 1233, 1234 (Q.B. 1857); Wason v. Walter, L.R. 4 Q.B. 73, 95 (1868).

7. Barsky v. United States, 167 F.2d 241, 250 (D.C. Cir. 1948).

8. Yankwich, Immunity of Congressional Speech, 99 U. Pa. L. Rev. 960, 965 (1951).

9. U.S. Const. art. I, § 6, cl. 1.

10. 4 Mass. 1 (1808).

11. Id. at 27.

12. Cole v. Richards, 108 N.J.L. 356, 158 Atl. 466 (1932); Field, Constitutional Privileges of Legislators, 9 Minn. L. Rev. 442 (1925).

13. Kilbourn v. Thompson, 103 U.S. 168 (1880); Cochran v. Couzens, 42 F.2d 783 (D.C. Cir. 1930).

14. Kilbourn v. Thompson, supra note 13.

15. Id. at 203-04.

16. Id. at 205.

17. 341 U.S. 367, 377 (1951).

there was a usurpation of functions exclusively vested in the Judiciary or the Executive."[18]

The majority, in the instant case, based its decision upon art. I, section 6 of the Constitution. They argued further that just as there is nothing in the Constitution which authorizes anyone to prevent the President of the United States, or the Supreme Court, from publishing any statement, so also there is no authority for enjoining the publication of any statement by Congress. The court maintained that the judicial power to declare legislation unconstitutional does not import a power to censor congressional language considered libelous. The majority cited a federal court of appeals case, *Hearst v. Black*,[19] which held that it would be an encroachment upon the constitutional separation of powers for a court to enjoin members of a Senate Committee from publishing telegrams allegedly acquired by unconstitutional means. In the instant case this proposition was given added weight because the publication had been ordered by a joint resolution rather than by a committee as in the *Hearst* case. The majority opinion concluded that if a congressional publication should contain erroneous and defamatory statements with unfortunate results for the persons affected, Congress alone has the power to rectify the wrong.

The dissenting opinion argued that the publication of the document in question, being for general distribution throughout the United States, is an activity beyond the legislative function and is, therefore, beyond absolute privilege. The dissent cited *Tenney v. Brandhove* in support of the contention that the privilege is absolute only with regard to acts within the scope of the legislative activity.

The dissenting opinion is primarily concerned with the potentially harsh effects of the liberal immunity rule. The conflict, however, between the rights of an individual and the necessity that legislators be immune from deterrents to the discharge of their duties, has been resolved by the courts in favor of the latter. Regarding abuse of the privilege the court in *Cochran v. Couzens*[20] stated that the legislators will presumably be restrained in the exercise of the privilege by the responsibilities of their office. In the event of their failure in that regard, they are by constitutional provision[21] subject to discipline by their colleagues. In the *Hearst* case, in which the court held itself without jurisdiction to restrain the Federal Communications Commission from using or disclosing the contents of messages seized without authority, it was also said, "If it be insisted that this is the acknowledgment of a power whose plenitude may become a cataclysm, the answer is that the Congress 'is as much the guardian of the liberties and welfare of the people as the courts. . . .' "[22] The fundamental consideration on which the majority decision is based, however, is that the constitutional immunity provision is grounded on a public policy which protects unlimited freedom in speeches and debates. The interests of the people

18. Id. at 378.
19. 87 F.2d 68 (D. C. Cir. 1936).
20. 42 F.2d 783, 784 (D. C. Cir. 1930).
21. U.S. Const. art I, § 5, cl. 2.
22. 87 F.2d at 72.

are best supported by enabling their representatives to exercise the functions of their office without fear of civil or criminal prosecution.

The principal question on which the majority and dissenting opinions disagree seems to be whether or not the publication by Congress of the particular document in question was an act within the legislative role. The majority fails to mention that the privilege applies only to acts within the scope of the legislative functions, while the dissent contends that the act in question was not within this scope. It would seem that any document which relates to a subject within the legitimate scope of Congress' investigative power and which is ordered published by concurrent resolution of Congress, for the general information and protection of its nationwide constituency, constitutes an act within the legislative role. The distribution of the documents would, therefore, be an official legislative function for the protection of the general welfare. Thus, despite the failure of the majority to make mention of it, the limitation relied upon by the dissenting opinion would appear to be inapplicable in the instant case.

**Constitutional Law — Full Faith and Credit — Jurisdiction Over Custody of Infants.**—Husband and wife, domiciliaries of California, entered into a separation agreement, wherein the husband agreed to support their children and the wife was given custody, provided that she would not remove them from that state without the written consent of the husband or an order of a California court. The following year the wife secured a Nevada consent divorce decree which awarded her custody of the children. The wife returned to California and remarried. Subsequently she instituted a California action against the first husband to enforce the provision of the separation agreement requiring his support of the children. While that action was pending, the second husband, the wife, and the children moved to New York without permission of either the first husband or a California court. The first husband then counterclaimed in the California support action and obtained a default judgment against the wife whereby the wife was required to return the children to California pursuant to the terms of the separation agreement. The wife's appeal of this California judgment was pending when her present New York equity suit was instituted, in which she sought a determination fixing the residence of the children in New York. Special Term denied the petition. Upon appeal to the Appellate Division, First Department, *held,* all justices concurring, reversed. A state in which the children reside is not required to give full faith and credit or accord comity to the custody decree of a sister state, ". . . when it conflicts with the dominant domestic duty of the courts to guard the welfare of its wards." *Hicks v. Bridges,* 2 A.D.2d 335, 155 N.Y.S.2d 746 (1st Dep't 1956).

In early England the king, as *parens patriae,* exercised the right to care for "infants, lunatics and idiots, that cannot take care of themselves."[1] This power was delegated to the Chancellor, and ultimately to the courts of chancery.[2] Thus

1. Shaftsbury v. Shaftsbury, Gilb. Rep. 172, 25 Eng. Rep. 121 (Ch. 1725).
2. 4 Pomeroy, Equity Jurisprudence § 1304 (5th ed. 1941).

equity has always extended special protection to infants. New York's equity court was early recognized as possessing this power; the Court of Appeals held it to be "one of its most sacred, and most worthy and most important duties,"[3] having its origin in "the protection that is due to the incompetent or helpless."[4] A court of equity may exercise this power quite freely where the custody of the child is being adjudicated for the first time, but where a prior adjudication has taken place in another state, the constitutional requirement of full faith and credit must be considered.

The Constitution provides that full faith and credit shall be given in each state to the judicial proceedings of every other state.[5] Congress, in implementing this clause, has provided that the judicial proceedings ". . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State. . . ."[6] The Supreme Court has further defined full faith and credit by holding that a court must give full faith and credit where the original court had proper jurisdiction of the parties and of the subject matter,[7] and where the proceeding was binding within that state, and was not subject to modification or collateral attack.[8] If the plenary court's adjudication lacks either jurisdiction or finality, the court of a sister state is not bound to give it full faith and credit.

A court seeking to relitigate a custody judgment must first consider whether the foreign court had proper jurisdiction. Custody of an infant is usually decided as part of a matrimonial action,[9] and since jurisdiction over matrimonial actions is based upon the legal concept of domicile,[10] this concept has often been applied to infants as well. At common law the domicile of the child was held to be with the father, regardless of the residence of the child.[11] Some states have provided by statute that the child's domicile is with both parents when the family is together,[12] and when separated with the parent with whom the child is residing.[13] In *May v. Anderson*[14] a family was domiciled in Wisconsin, and the wife, without the husband's consent, removed the children to Ohio, and took up domicile there. The husband obtained an *ex parte* divorce decree in Wisconsin granting him custody of the children. The Supreme Court, acknowledging the validity of the divorce decree, refused to give full faith and credit to the custody portion of the decree, stating: "We find it unnecessary to determine the children's legal domicile because, even if it be with their father, that does not give Wisconsin . . . the

3. Wilcox v. Wilcox, 14 N.Y. 575, 578 (1856).
4. Finlay v. Finlay, 240 N.Y. 429, 431, 148 N.E. 624, 625 (1925).
5. U.S. Const. art. IV, § 1.
6. 28 U.S.C.A. § 1738 (1950).
7. Williams v. North Carolina, 325 U.S. 226, 229 (1945).
8. New York ex rel. Halvey v. Halvey, 330 U.S. 610, 614 (1947).
9. See N.Y. Civ. Prac. Act §§ 1140, 1170.
10. See note 7 supra.
11. Restatement, Conflict of Laws § 30 (1934).
12. N.Y. Dom. Rel. Law § 81.
13. Matter of Thorne, 240 N.Y. 444, 148 N.E. 630 (1925); Restatement, Conflict of Laws § 32.
14. 345 U.S. 528 (1953).

personal jurisdiction that it must have in order to deprive their mother of her personal right to their immediate possession."[15] Where parents are domiciled in separate jurisdictions, the parent seeking a custody decree must have either in personam jurisdiction over the other party or immediate physical possession of the child. Thus jurisdiction sufficient to sustain a matrimonial judgment is not necessarily enough to sustain a custody decree, and, to some extent at least, in personam jurisdiction has replaced domicile as the basis for a custody decree.

If the foreign court had proper jurisdiction, then the court in the state in which relitigation is sought must determine whether the judgment or order issued was a final one, or whether it was subject to modification. Most jurisdictions provide by statute that a custody judgment may be altered or modified at any time after judgment.[16] However, most courts in interpreting these statutes have applied what is known as the change of circumstances rule, requiring that the petitioner establish some additional facts upon which the courts can justify a modification of the decree. Courts of sister states have rightly concluded that where an infant is brought within their jurisdiction they can also modify or alter the decree, provided that circumstances would have justified the original court in doing so. Such a relitigation does not violate the full faith and credit clause, since ". . . a judgment has no constitutional claim to a more conclusive or final effect in the State of the forum that it has in the State where rendered."[17] In most jurisdictions, the absence of a change of circumstances renders a decree binding.[18]

Where a custody decree is issued with proper jurisdiction and is binding within the state, the question of whether it is entitled to full faith and credit in a sister state is not entirely settled. The Supreme Court has not given a conclusive answer,[19] and courts of equity have exercised their power as they saw fit. In *People ex rel. Allen v. Allen*,[20] New York's Court of Appeals refused to grant full faith and credit to a foreign custody decree, regarding it simply as ". . . a fact or circumstance bearing upon the discretion to be exercised without dictating or controlling it."[21] Later in *Ansorge v. Armour*[22] the same court held that a foreign custody decree was entitled to full faith and credit. The court asserted that ". . . the custody may be changed when circumstances or treatment since the decree render it necessary for the child's best interests, but until some such facts appear our courts cannot change the . . . decree simply because they do not

15. Id. at 534.

16. See N.Y. Dom. Rel. Law § 70; Cal. Civ. Code § 138 (Deering Supp. 1955).

17. 330 U.S. at 614.

18. In New York ex rel. Halvey v. Halvey no change of circumstances was shown, but the husband had not appeared personally in the Florida action. Under Florida's laws the husband had the right to attack the judgment collaterally at any time. Therefore the United States Supreme Court held that it could be attacked in New York without violating full faith and credit.

19. 330 U.S. at 615-16.

20. 105 N.Y. 628, 11 N.E. 143 (1887).

21. Id. at 628, 11 N.E. at 144.

22. 267 N.Y. 492, 196 N.E. 546 (1935).

agree with the decision."[23] Numerous decisions followed based on the principles laid down in *Ansorge v. Armour*, and it seemed to be the settled law of New York.[24]

However, in *Bachman v. Mejias*[25] the Court of Appeals recently reconsidered the question, and refused to abide by the custody order of a foreign court, asserting that "the full faith and credit clause does not apply to custody decrees."[26] The court stated: "The responsibility for the welfare of infants endows the court with the power to determine custody irrespective of the residence and domicile of the parents and prior custody orders in a foreign jurisdiction."[27]

In the instant case the infant had been removed from the foreign jurisdiction and brought to New York while litigation was pending in the foreign jurisdiction. The foreign court had in personam jurisdiction, and the petition which the wife made in New York could have been made in the foreign court of plenary jurisdiction. The instant case, however, citing the *Bachman* case as authority, held that New York could hear the petition. Admitting that the foreign court had valid jurisdiction over the parties, the court still maintained that the physical presence of the children gave it a paramount jurisdiction, "albeit limited in basis to the health and welfare of the children."[28]

New York bases its right to deny full faith and credit to a foreign custody decree on the equitable power inherited from the English equity courts. However the Constitution is the supreme law of the land, and where it conflicts with the common law the latter must yield. New York claims a duty to act where the health and welfare of the infant within the state is affected. In *Sherrer v. Sherrer*[29] the Supreme Court considered the somewhat analogous plea that the state had the duty to protect the marital and family relationships of its residents, and could therefore refuse to grant full faith and credit to a foreign decree. The Court held that the full faith and credit clause applied, and ruled: "If in its application local policy must at times be required to give way, such 'is part of the price of our federal system.' "[30]

The rule enunciated in *Ansorge v. Armour* is more consistent with the

23. Id. at 499, 196 N.E. at 548.

24. People ex rel. Herzog v. Morgan, 287 N.Y. 317, 39 N.E.2d 255 (1942); People ex rel. Scanlon v. Ciaravalli, 2 A.D.2d 702, 152 N.Y.S.2d 494 (2d Dep't 1956); Sutera v. Sutera, 1 A.D.2d 356, 150 N.Y.S.2d 448 (2d Dep't 1956); Finston v. Bernstein, 275 App. Div. 928, 90 N.Y.S.2d 201 (1st Dep't 1949); Young v. Roe, 265 App. Div. 858, 37 N.Y.S.2d 714 (2d Dep't 1942); Bradstreet v. Bradstreet, 256 App. Div. 1032, 10 N.Y.S.2d 699 (4th Dep't 1939); People ex rel. Tull v. Tull, 245 App. Div. 508, 283 N.Y. Supp. 183 (1st Dep't 1935), aff'd, 270 N.Y. 619, 1 N.E.2d 359 (1936). Contra, Matter of Bull (Hellman), 266 App. Div. 290, 42 N.Y.S.2d 53 (1st Dep't 1943); People ex rel. Turk v. Turk, 86 N.Y.S.2d 139 (Sup. Ct. 1949).

25. 1 N.Y.2d 575, 136 N.E.2d 866 (1956).

26. Id. at 580, 136 N.E.2d at 868.

27. Id. at 581, 136 N.E.2d at 869.

28. 2 A.D.2d at 340, 155 N.Y.S.2d at 752.

29. 334 U.S. 343 (1948).

30. Id. at 355.

Supreme Court's reasoning in *Sherrer v. Sherrer* and in *May v. Anderson.* The court being petitioned should first determine whether the prior decree was made with valid jurisdiction. If it was, then the court should determine whether it was a final adjudication as to the facts raised by the petition. Once jurisdiction and finality are established, the custody decree should be binding on the court by virtue of the full faith and credit clause. Where a modification would be justified under the law of the sister state, New York could modify also.

The New York position, exemplified in the *Bachman* case and the instant case, may well result in attempted evasions of judicial process. It may encourage parents to ignore court custody orders, and to flee a restraining judgment in other jurisdictions, seeking a relitigation in New York in hope of a more favorable result. The constitutional requirement of full faith and credit was designed to prevent such practices, and it seems unlikely that the Supreme Court will allow an exception in the case of custody decrees.

**Criminal Law — Pleading — Right of Appeal by the United States to the Supreme Court from a Motion Dismissing the Indictment.**—Defendant, indigent because his assets had been subjected to a jeopardy assessment by the Government, was indicted for attempted evasion of income tax. The court-appointed defense attorney moved to dismiss the indictment on the ground that, since the Government proposed to use the "net worth" method in proving its case, he could not effectively defend his client without the aid of a competent accountant. During the argument of the motion the district court indicated that unless the Government released sufficient funds to defendant to enable him to hire an accountant, the indictment would be dismissed. The Government claimed that it was legally unable to release such funds and the court dismissed the indictment. Upon appeal to the Court of Appeals, *held,* one judge dissenting, the Government's motion for certification to the Supreme Court, denied. Defendant's motion below, for dismissal of the indictment, was, in substance, a "plea in abatement" and, therefore, could not be appealed to the Supreme Court. *United States v. Brodson,* 234 F.2d 97 (7th Cir. 1956).

Originally there was no right of appeal to the Supreme Court of the United States and cases were brought before it by a writ of error.[1] However, in 1928 the writ of error was abolished and all relief which could be obtained thereby could thereafter be taken on appeal.[2] This right of appeal, both in criminal and civil cases, has always been given only by express statutory provision.[3] On appeal an important distinction was made between "pleas in bar" and "pleas in abatement." A plea in abatement, as understood at common law, was a dilatory plea which brought to the attention of the court some fact or circumstance, not

1. 34 Stat. 1246 (1907).

2. 45 Stat. 54 (1928).

3. Ex parte Pennsylvania, 109 U.S. 174 (1883); Castro v. United States, 70 U.S. (3 Wall.) 46 (1865); Raytheon Mfg. Co. v. Radio Corp. of America, 76 F.2d 943, (1st Cir.), aff'd, 296 U.S. 459 (1935); In re Gelino's, Inc., 51 F.2d 875 (7th Cir. 1931); In re Maryanov, 20 F.2d 939 (E.D.N.Y. 1927).

disclosed on the face of the record, which would temporarily suspend the action without defeating it absolutely. Pleas in abatement were not to the merits but to the form of the action.[4] A plea in bar on the other hand raised matters, not appearing on the face of the complaint, which went to the merits of the cause of action and barred its prosecution absolutely.[5] Though a sustained plea in bar had been appealable to the Supreme Court since 1928,[6] a plea in abatement was not appealable until 1942 and then only in certain cases.[7] This restrictive policy seems to have stemmed from the unwillingness of the appellate courts to review anything but final decrees.[8]

Shortly before the revision, in 1948, of the section governing appeals by the Government to the Supreme Court in criminal cases,[9] the terms "plea in bar" and "plea in abatement" were abolished by the Federal Rules of Criminal Procedure.[10] Consequently the present section governing appeals by the United States makes no mention of the terms "plea in bar" and "plea in abatement." It does, however, provide that an appeal can be taken by or on behalf of the United States in all criminal cases "from a decision or judgment sustaining a *motion in bar*, when the defendant has not been put in jeopardy."[11]

The majority opinion does not discuss the meaning of the term "motion in bar" but assumes that it has precisely the same meaning as the term "plea in bar" as understood prior to its abolition by the Federal Rules of Criminal Procedure. The dissenting opinion, on the other hand, takes a different view. It points out that no statutory definition of the words "motion in bar" is available and that ". . . nothing in the relevant legislative history bearing upon section 3831 [sic] sheds any light on the meaning of a 'motion in bar.' "[12] This statement of the dissent casts some doubt on the unhesitating assumption

4. For definitions of plea in abatement see: McCray v. Barth, 34 Ariz. 43, 267 Pac. 421 (1928); Whitaker v. Wright, 100 Fla. 282, 129 So. 889 (1930); Curl v. Ingram, 121 W. Va. 763, 6 S.E.2d 483 (1939); Binsfeld v. Home Mut. Ins. Co., 245 Wis. 552, 15 N.W.2d 828 (1944). See also 41 Am. Jur., Pleading §§ 124, 130 (1942).

5. For definitions of a plea in bar see: Carter v. Solomon, 54 Ga. App. 517, 188 S.E. 545 (1936); David v. David, 161 Md. 532, 157 Atl. 755 (1932). See also 41 Am. Jur., Pleading § 131 (1942); 71 C.J.S., Pleading § 140 (1941); 40 C.J., Pleading § 263 (1930).

6. See note 2 supra.

7. 56 Stat. 271 (1942).

8. Shoenamsgruber v. Hamburg Line, 294 U.S. 454 (1935); Collins v. Metro-Goldwyn Pictures Corp., 106 F.2d 83 (2d Cir. 1939); United States v. Broude, 299 Fed. 332 (D. Minn. 1924). The reason for this policy seems to have been well stated in the oft cited case of Forgay v. Conrad, 47 U.S. (6 How.) 201 (1898), where the Court said, "In limiting the right of appeal to the Supreme Court to final decrees, it was obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same suit; and to have the whole case and every matter in controversy in it decided in a single appeal." However this reasoning has been criticized. See Stern and Gressman, Supreme Court Practice, at 371-73 (2d ed. 1954) and The Final Judgment as a Basis for Appeal, 41 Yale L.J. 539 (1932).

9. Title 18 of the United States Code was completely revised by Act of June 25, 1948, c. 645, 62 Stat. 683 (1948).

10. Fed. R. Crim. P. 12.

11. 18 U.S.C.A. § 3731 (1953). (Emphasis added.)

12. 234 F.2d at 100. The opinion was obviously referring to § 3731.

of the majority. However, even if we grant this assumption, the decision still presents some difficulty.

The majority, in considering the classification of the motion below, set out definitions of the terms plea in bar and plea in abatement. It then concluded that the motion in question, because it does not go to the merits of the charge, is, in substance, a plea in abatement and therefore not appealable. The Government, however, argued that though the motion has some characteristics of a plea in abatement, nevertheless, because it could not legally release funds to the defendant in this case, the motion had the effect of a plea in bar and should be held to be in bar of the action. The court cryptically rejected this argument saying that the Government's statement of inability to release funds was surely not the last word on the subject.

The dissent was of the opinion that it should be assumed, for the purposes of deciding this case, that the Government is correct in claiming to be legally unable to release funds to the defendant, thus deciding the question before the court ". . . within the framework of the challenged ruling and . . . [refraining] from speculation about the future."[13] From this premise the dissent concluded that the plea effectively dismisses the action and should have been ruled a motion in bar. However, since there has been no definite ruling on this question of the Government's ability to release funds to the defendant, the conclusion of the dissent seems as much based on speculation as that of the majority. It is suggested that neither conclusion can be judged valid until it is finally determined as a matter of law whether the Government may or may not release funds to the defendant.

From the governing statute it would appear that the Government is unable to release funds in this case.[14] The statute provides for release of all property subject to liens of the Bureau of Internal Revenue when the liability for the amount assessed plus interest has been satisfied or becomes unenforceable or when a bond has been furnished which is conditioned upon payment of the full amount assessed plus interest within the time prescribed by law. The statute also provides for release of part of the property subject to a lien in certain cases, but these provisions seem inapplicable because of the nature of a jeopardy assessment.

It is submitted that, upon a finding that the Government cannot release funds to the defendant in the instant case, the motion in question must be adjudged a motion in bar. In the light of recent legislative attempts to free pleading from the abstruse formalism by which it had so long been hindered it is difficult to imagine a motion such as this, which finally determines an action, as being anything but a motion in bar.

13. Id. at 101.

14. Int. Rev. Code of 1954 § 6325.

**Criminal Law — Writ of Error Coram Nobis.**—Defendant was convicted of first degree robbery and sentenced in 1940 to a term of ten to thirty years. The conviction was affirmed on appeal. Defendant moved for a writ of error coram nobis to vacate the judgment of conviction upon the ground that his rights were violated since he was not present in the courtroom for the reading to the jury of certain testimony which it had requested to hear during its deliberations. The facts upon which defendant based his application appeared as part of the printed record. *Held,* motion denied. The writ of error coram nobis will not lie to correct an error of fact appearing on the record. *People v. Shapiro,* 153 N.Y.S.2d 438 (N.Y. Ct. Gen. Sess. 1956).

Coram nobis, which may be translated literally "before us, ourselves," is an ancient common law writ, dating from before the sixteenth century. At common law, it was directed to the court of King's Bench, requiring that court to inquire into a judgment rendered by it on account of some error of fact affecting the validity of the proceedings.[1]

The writ fell into disuse in England, but it was brought into the jurisprudence of the United States at an early date.[2] It has been abolished in a number of jurisdictions[3] where other, statutory methods of relief, such as a motion to vacate a judgment, are prescribed. In those states where coram nobis is still available, the writ will lie only to correct errors of fact, not apparent on the record, for which no other legal remedy exists.[4]

Although necessarily connected with the judgment it seeks to correct, coram nobis is in the nature of a new civil suit, and differs from the ordinary writ of error in that it does not remove the case to a higher court for review, but is directed to the court rendering judgment.

A defendant, moving for a writ of error coram nobis, is entitled to a trial upon any issues of fact not conclusively refuted by unquestionable documentary proof. A denial of the motion, without a trial, where there has been no such refutation, would constitute a deprivation of due process.[5]

Some courts have held that the writ must be filed before the end of the court term, and that a court may not recall its adjudications after a lapse of term,[6] while other courts have held that there is no limitation as to when the application may be made.[7]

In New York, until recently, no appeal could be made from an order granting

1. Address by Associate Judge Stanley H. Fuld, Broome County Bar Association, 117 N.Y.L.J. No. 130, p. 2212 (June 5, 1947), No. 131, p. 2230 (June 6, 1947), No. 132, p. 2248 (June 7, 1947).

2. Ibid.

3. Young v. United States, 138 F.2d 838 (5th Cir. 1943); State v. Hayslip, 90 Ohio St. 199, 107 N.E. 335 (1914); State v. Rathie, 101 Ore. 368, 200 Pac. 790 (1921).

4. People v. Kendricks, 300 N.Y. 544, 89 N.E.2d 257 (1949); People v. Sadness, 300 N.Y. 69, 89 N.E.2d 188 (1949); Alexander v. State, 20 Wyo. 241, 123 Pac. 68 (1912); State v. Asbell, 62 Kan. 209, 61 Pac. 690 (1900).

5. People v. Langan, 303 N.Y. 474, 104 N.E.2d 861 (1952); People v. Richetti, 302 N.Y. 290, 97 N.E.2d 908 (1951).

6. State v. Stanley, 225 Mo. 525, 125 S.W. 475 (1910).

7. People v. Richetti, 302 N.Y. 290, 97 N.E.2d 908 (1951).

or denying a motion for a writ of error coram nobis in a criminal action.[8] The state, however, could avoid this restriction somewhat, by obtaining an order from a higher court in the nature of a prohibition, to prevent the lower court from acting on the application.[9] This has now been remedied by statute, and an appeal may be made by both the defendant and the state.[10]

The instant case is the first, in New York, for which a writ of error coram nobis has been sought on the basis of defendant's absence when testimony was read to the jury at its request.

Most cases in which coram nobis has been granted involve either the perpetration of a fraud upon the court, or a clear denial of the defendant's constitutional rights. Thus, in New York, the writ has been granted in cases where the defendant's plea of guilty has been induced by fraud or misrepresentation.[11] Judgments have been vacated under this writ where the court has failed to advise the defendant of his right to counsel,[12] and where a conviction has been obtained by the use of testimony known by the prosecutor to be perjured.[13]

While it is true that a fundamental right of defendant was violated at the trial, at least two legal remedies existed for the correction thereof. His conviction could have been reversed upon either of two sections of the New York Code of Criminal Procedure.[14] The appeal, based on different grounds, raised neither section, and it is clear that New York courts will not set aside a judgment, years after its entry, for errors which could have been presented upon appeal.[15] Therefore, since the defect was apparent on the record, and one for which an adequate means of relief existed, the writ of error coram nobis was properly denied.

**Descent and Distribution — Pretermitted Children — No Contest Clause.** —Plaintiff's father's will left his estate to his widow. The will provided that ". . . if any person who if I die intestate would be entitled to share in my estate, shall, in any manner whatsoever, directly or indirectly contest the will . . . then I hereby bequeath to each such person the sum of One Dollar." Plaintiff's claim that she was a pretermitted heir and entitled to share in the estate was rejected in the Superior Court. Upon appeal to the Supreme Court of California, *held,* two justices dissenting, affirmed. The statement in the will, that any person who, if testator had died intestate, would be entitled to share in his estate, was a provision which included the testator's daughter and she was not, therefore, a pretermitted child. *Van Strien v. Jones,* 46 Cal. 2d 705, 299 P.2d 1 (1956).

8. People v. Gersewitz, 294 N.Y. 163, 61 N.E.2d 427 (1945).
9. Hogan v. Court of General Sessions, 296 N.Y. 1, 68 N.E.2d 849 (1946).
10. N.Y. Code Cr. Proc. §§ 517-19.
11. Lyons v. Goldstein, 290 N.Y. 19, 47 N.E.2d 425 (1943).
12. Bojinoff v. People, 299 N.Y. 145, 85 N.E.2d 909 (1949).
13. Morhous v. Supreme Court, 293 N.Y. 131, 56 N.E.2d 79 (1944).
14. N.Y. Code Cr. Proc. §§ 427, 465.
15. See note 9 supra.

At common law a pretermitted[1] heir, that is, an omitted heir, has no rights in the estate disposed of in the will.[2] This common law rule in most states has been altered or abrogated by statute in order to guard against testamentary thoughtlessness.[3] The statutes usually provide that an omitted child is entitled to a share in the estate of the testator equivalent to that which he would have received had the decedent died intestate.[4] While these statutes vary, all courts are in accord that where the claimant is expressedly named or specifically identified by the language of the will, or where a nominal gift is made to a named child, such child is not pretermitted and the statute does not apply.[5] The applicability of the statute is also precluded by the use of words such as "children" or "relatives" in a will since they are generally considered as a sufficient identification of the claimant.[6] Here the unanimity of the courts ends and the effect of more generic terms used in a will can be determined only by resorting to the provisions of the statute of the particular state in which the question arises. These statutes, however, may be divided into two major classes.

The first class[7] generally provides that if a person dies leaving a child not named or provided for in his last will, the testator shall be deemed to have died intestate as to the child. These statutes omit all reference to intention. Under this class the courts have generally held that the child was not named or provided for, and therefore, as pretermitted, entitled to share in the estate as if the testator had died intestate in the following instances: where the will provided that "heirs" be disinherited,[8] or where it contained a general disinheriting clause, formulated in the broadest and most general terms, comprising provisions by which all others than those specifically named in the will were declared to be excluded from sharing in the estate,[9] or where the will contained a "no contest" clause.[10] The reasoning in such cases is that there is a presumption

1. From the Latin pretermission which at Roman law meant the omission by a testator to mention an heir in his will.

2. 1 Page, Wills § 525 (3d ed. 1941); Easterlin v. Easterlin, 62 Fla. 468, 56 So. 688 (1911).

3. McLean v. McLean, 207 N.Y. 365, 101 N.E. 178 (1913); Porter v. Porter's Ex'r, 120 Ky. 302, 86 S.W. 546 (1905).

4. Rowe v. Allison, 87 Ark. 206, 112 S.W. 395 (1908).

5. Miller v. Aven, 327 Mo. 20, 34 S.W.2d 116 (1930); Achelis v. Musgrove, 212 Ala. 47, 101 So. 670 (1924); In re Barter's Estate, 86 Cal. 441, 25 Pac. 15 (1890); Terry v. Foster, 1 Mass. 146 (1804).

6. In re Phillips' Estate, 193 Wash. 194, 74 P.2d 1015 (1938); In re Dooling's Will, 158 Misc. 333, 285 N.Y. Supp. 603 (Surr. Ct. 1936); In re Trickett's Estate, 197 Cal. 20, 239 Pac. 406 (1925); Shackelford v. Houghton, 180 Ala. 675, 60 So. 320 (1912); Rhoton v. Blevin, 99 Cal. 645, 34 Pac. 513 (1893).

7. Ala., Ark., Ga., Ky., Mo., N.C., N.H., N.M., Ore., Pa., Wash., N.Y. (applicable only to children born after the making of the will).

8. Bowman v. Bowman, 49 Fed. 329 (9th Cir. 1892); In re Bauer's Estate, 5 Wash. 2d 165, 105 P.2d 11 (1940).

9. Grace v. Hildebrandt, 110 Okla. 181, 237 Pac. 98 (1925); In re Barker's Estate, 5 Wash. 83, 31 Pac. 976 (1892); Hargadine v. Pulte, 27 Mo. 423 (1858); Block v. Block, 3 Mo. 594 (1834).

10. Goff v. Goff, 352 Mo. 809, 179 S.W.2d 707 (1944); Yeates v. Yeates, 179 Ark. 543, 16 S.W.2d 996 (1929); Wadsworth v. Brigham, 125 Ore. 428, 259 Pac. 299 (1927).

that the child was omitted unintentionally and that the words are not sufficient to rebut the presumption, and therefore cannot be held as to include the particular child. In the case of a "no contest" clause the child is held pretermitted also on the theory that the child claimed under the statute and hence was not a contestant of the will but takes independently of it.

The statutes of the second class[11] provide that if the testator omits to provide in his will for any of his children, such child shall receive a share of the estate as in the case of intestacy *unless it appears that the omission was intentional* and not occasioned by accident or mistake.[12] Under this class it is generally held that the child is not pretermitted, where the testator disinherits his "heirs,"[13] or all other persons in a general disinheriting clause,[14] because such provisions are considered as showing an intention of the testator to exclude his children from participating in his estate. The courts seem to wrestle with the construction of wills with "no contest" clauses in determining the intention of the testator. While the courts agree, where the "no contest" clause contains the word *anyone* or its like that this is not sufficient to exclude the child from taking his legal share from the estate,[15] they are divided where the disinherited group in the "no contest" clause is described by the word "heirs" or words of similar import. Thus in *In re Allmaras's Estate,*[16] where a testator described himself in his will as a single man without living issue and declared that the omission of any other persons than those designated as beneficiaries, whether claiming to be an heir or not, was intentional and provided that ". . . 'if *any person,* whether a beneficiary under this will *or not* . . . shall contest this will, . . . such person should receive $1.00 and no more' . . . ,"[17] the California court reasoned that the two sons of the testator were intentionally excluded and hence were not pretermitted heirs. The same court in *In re Dixon's Estate,*[18] where the will contained a provision that if " '. . . *any other person who, if I died . . . intestate, would be entitled to share in my estate,* shall, in any manner whatsoever, directly or indirectly, contest this Will or attack, . . . I hereby bequeath to such person or persons the sum of One Dollar . . .,' "[19] held that a child of the testator was mentioned in the will.

11. Cal., Conn., Ill., Me., Mass., Mich., Minn., Mont., Neb., Nev., N.J., Okla., R.I., Utah, Wis.

12. For a general discussion of the statutes see Dainow, Inheritance by Pretermitted Children, 32 Ill. L. Rev. 1 (1937); Mathews, Pretermitted Heirs: An Analysis of Statutes, 29 Colum. L. Rev. 748 (1929).

13. In re Minear's Estate, 180 Cal. 239, 180 Pac. 535 (1919); In re Hassel's Estate, 168 Cal. 287, 142 Pac. 838 (1914).

14. In re Cochem's Estate, 112 Cal. App. 2d 634, 247 P.2d 131 (1952); Smith v. Smith, 62 R.I. 52, 2 A.2d 896 (1938); Ritger v. Montefusco, 94 N.J. Eq. 652, 120 Atl. 791 (Ch. 1923).

15. In re Cochran's Estate, 116 Cal. App. 2d 98, 253 P.2d 41 (1953); In re Price's Estate, 56 Cal. App. 2d. 335, 132 P.2d 485 (1942).

16. 24 Cal. App. 2d 457, 75 P.2d 557 (1938).

17. Id. at 461, 75 P.2d at 559.

18. 28 Cal. App. 2d 598, 83 P.2d 98 (1938).

19. Id. at 599, 83 P.2d at 98.

The court said: "It is our duty to give some meaning to this clause if we can reasonably do so."[20] Under an almost identical clause in a will an opposite result was reached in the Nevada case, *In re Ray's Estate*.[21] In that case the court held that this was insufficient to disinherit a son for the lack of a clear intent to disinherit this particular plaintiff. The court said that the criterion should not be whether the person is a member of the class excluded by the will, but rather whether there is a clear indication of testamentary intent to disinherit any particular person of the class or group mentioned in the "no contest" clause.

The instant case on review was governed by a statute of the second class.[22] The court was of the opinion that the testator disinherited the plaintiff intentionally because she was a person who would be entitled to share in the estate had her father died intestate and that the father, using the language he did, meant his heirs, and distinguished this case from those cases in which "no contest" clauses related to *anyone* and not to *heirs*. The dissenting opinion argued that the testator did not show in his will that he had his child in mind and intentionally omitted to provide for her, and that he had apparently forgotten her. There is no doubt that the decision is in accord with the California law. However, California's position is not free from doubt since the statute is designed to protect the child unless there is convincing proof that the testator had his child in mind but nevertheless intentionally excluded him from sharing in the estate. The position taken by the Nevada court[23] more accurately reflects the spirit and purpose of the statute.

**Taxation — Procedure in the Net Worth Method of Prosecution.**—Appellant was convicted of willful evasion of income taxes for the years 1946 through 1949. Among the 580 exhibits admitted during the complicated trial was a statement of the combined net worth of the defendant, his wife and others who were not charged under the indictment. The court instructed the jury as to the occasions when the use of the net worth method is permissible but restricted its charge on the nature of the method to an instruction which implied that the difference in the amount of the taxpayer's assets between the opening and closing dates was net income. On appeal, *held*, conviction reversed, the charge was inadequate. The 1954 decisions of the Supreme Court prescribing a

20. Id. at 601, 83 P.2d at 99. Accord: In re Lombard's Estate, 16 Cal. App. 2d 526, 60 P.2d 1000 (1936); In re Kurtz's Estate, 190 Cal. 146, 210 Pac. 959 (1922); In re Lindsay's Estate, 176 Cal. 238, 168 Pac. 113 (1917).

21. 69 Nev. 204, 245 P.2d 990 (1952).

22. West's Ann. Prob. Code § 90 (Cal. 1931). § 90 provides: "When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, whether born before or after the making of the will or before or after the death of the testator, and such child or issue are unprovided for by any settlement, and have not had an equal proportion of the testator's property bestowed on them by way of advancement, unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate."

23. See note 21 supra.

standard for the instructions to be given to the jury in all net worth prosecutions are applicable to all such cases pending review irrespective of their relative dates of trial. *United States v. O'Connor,* 237 F.2d 466 (2d Cir. 1956).

The term net worth refers to the inferential process utilized by the Government, in both civil and criminal proceedings, to establish taxable income. If the taxpayer's increased net worth for the period examined plus non-deductible expenditures minus his non-taxable receipts exceeds his reported income, then unreported income is indicated.[1] In a civil action to recover the deficiency the Commissioner's determination is given prima facie validity.[2] If, however, the action is a criminal prosecution for willful evasion under section 145 (b) of the Code[3] the burden of proof as to all the elements of the crime rests upon the Government.[4]

At present in over 50 per cent of the prosecutions for the willful evasion of income tax the Government utilizes the net worth method.[5] However, in the early days of criminal actions of this nature the increased net worth or unexplained expenditures of the taxpayer had been used merely to corroborate some direct proof of specific unreported income.[6] The use of the net worth method of proof became more frequent with the prosecutions of persons whose sources of income were apparently illegal.[7] The first such conviction to be reviewed by the Supreme Court was that of "Big Bill" Johnson in 1943.[8] The defendant, a notorious gambler, had a record of expenditures considerably in excess of his reported income. The Supreme Court held that the jury was justified in finding that the defendant's expenditures were attributable to his unreported income from his gambling enterprises; it further held that it was unnecessary for the Government to prove the exact amount of such income. "To require more . . . proof than . . . that there were unreported profits from an elaborately concealed illegal business would be tantamount to holding that skillful concealment is an invincible barrier to proof."[9]

Utilization of the net worth method of prosecution had in effect been sanctioned but how it was to be utilized caused conflict and consternation within the circuit courts for the next eleven years.[10] Three different theories arose as to the burden of proof.[11] Two circuits held that the Government must establish the

1. Avakian, Net Worth Computations as Proof of Tax Evasion, 10 Tax L. Rev. 431 (1955).

2. Commissioner v. Tower, 327 U.S. 280 (1945); Helvering v. Taylor, 293 U.S. 507 (1934).

3. Int. Rev. Code of 1939, § 145 (b).

4. Holland v. United States, 348 U.S. 121 (1954).

5. Avakian, op. cit. supra note 1, at 434 n. 10.

6. Guzik v. United States, 54 F.2d 618 (7th Cir.), cert. denied, 285 U.S. 545 (1931); Capone v. United States, 51 F.2d 609 (7th Cir.), cert. denied, 284 U.S. 669 (1931).

7. See Mills, The Net Worth Approach in Determining Income, 41 Va. L. Rev. 927 (1955).

8. United States v. Johnson, 319 U.S. 503 (1943).

9. Id. at 517-18.

10. See Krasilovsky and Stein, An Evaluation of Net Worth Prosecutions of Income Tax Evaders, 7 Okla. L. Rev. 49 (1954).

11. United States v. Caserta, 199 F.2d 905 (3rd Cir. 1952); Jelaza v. United States, 179 F.2d 202 (4th Cir. 1950); United States v. Fenwick, 177 F.2d 488 (7th Cir. 1949).

taxpayer's opening net worth with certainty[12] whereas the majority held that reasonable certainty was all that would be required. Some courts were of the opinion that section 41 of the Code[13] confined utilization of the method to situations where the taxpayer had no books or where his books were inadequate.[14] As late as 1954 one circuit court expressed the opinion that use of the net worth method should only be permitted where the unreported income had a suspicious origin.[15]

After consistently denying certiorari to net worth cases, the Supreme Court, apparently conscious of the mounting apprehension of both practitioners and prosecutors concerning the validity of the method, decided four important cases in the fall of 1954.[16] Among the four was the case of *Holland v. United States*[17] in which the Government relied on evidence which tended to show that the petitioners received profits from the operation of a hotel, far in excess of their reported income; that during the period under examination the petitioners' net worth had increased in excess of their reported income; and that the only plausible explanation for this increased net worth was unreported taxable income. Although the Court unanimously affirmed petitioners' convictions and sanctioned the utilization of the net worth method it cautioned the lower courts to "closely scrutinize its use."[18] The necessity for such an admonition is clear in view of the latitude allowed the prosecution. The Court held that the opening net worth, an indispensable element, need only be established with reasonable certainty.[19] Similarly, willfulness may be inferred from "conduct the likely effect of which would be to mislead or to conceal."[20] It is unnecessary that the Government preclude with absolute certainty all possibility of a non-taxable source as the origin of the increased evaluation.[21] And although the burden of proof never shifts to the taxpayer, once the Government has sustained a basis for an inference of guilt the taxpayer "remains quiet at his peril."[22]

Aware that a jury might easily become hopelessly confused when confronted with the evidential complexities inherent in such a method of prosecution, the Supreme Court requires an "adequate instruction" of the jury in the net worth method. "Charges should be especially clear, including, in addition to the formal instructions, a summary of the *nature* of the net worth method, the

12. Bryan v. United States, 175 F.2d 223 (5th Cir. 1949), aff'd, 338 U.S. 552 (1950); United States v. Fenwick, 177 F.2d 488 (7th Cir. 1949).

13. Int. Rev. Code of 1939, § 41.

14. United States v. Williams, 208 F.2d 437 (3d Cir. 1953); United States v. Riganto, 121 F. Supp. 158 (E.D. Va. 1954).

15. United States v. Clark, 123 F. Supp. 608 (S.D. Cal. 1954).

16. Holland v. United States, 348 U.S. 121 (1954); Friedberg v. United States, 348 U.S. 142 (1954); Smith v. United States, 348 U.S. 147 (1954); United States v. Calderon, 348 U.S. 160 (1954).

17. 348 U.S. 121 (1954).

18. Id. at 125.

19. Id. at 132.

20. Id. at 125, citing Spies v. United States, 317 U.S. 492, 499 (1943).

21. Id. at 137-38.

22. Id. at 139.

assumptions on which it rests and the inferences available both for and against the accused."[23]

In June of 1955, on an appeal from a conviction which pre-dated the *Holland* decision, the seventh circuit in *United States v. Bardin*,[24] having awaited the determination of the former, held that the application of the standard for jury instruction prescribed therein was intentionally limited by the Supreme Court to prospective net worth prosecutions. The court reached this conclusion after finding that although the instructions actually given in the *Holland* trial and to which the defendants specifically objected fell short of the Supreme Court standard, the convictions were unanimously affirmed.

In the instant case the second circuit unanimously rejected the *Bardin* theory[25] and held that the latest rules of the Supreme Court are determinative in all cases on appeal irrespective of their relative dates of trial. To sustain its holding the court in the instant case noted that at the time the Supreme Court announced its decision in the *Holland* case, it also granted certiorari to nine other net worth cases, vacated the judgments therein, and remanded them for reconsideration in the light of the *Holland* decision.[26] Although none of the other circuit courts have specifically considered this question the instant case is in accord with the weight of authority in analogous cases.[27]

The present case raises an interesting question as to the propriety of the utilization of combined net worth statements in criminal prosecutions. The Government's net worth statement joined the assets of the defendant with assets of his wife and children, assets of a co-partnership of which he was a member, and at least one asset of a corporation not owned by the defendant. At no time in the trial did the Government segregate the assets of the defendant so as to reflect his individual net worth. For this reason the defendant charged that the Government's computations constituted serious error. On this point a critical distinction must be made between civil and criminal actions. In the former the determination of the Commissioner is given prima facie validity and if the Commissioner in his calculations consolidates the assets of a whole family the taxpayer has the burden of proving that the determination is erroneous.[28] In a criminal action, however, the burden of proof is on the Government as to every element of the offense; a mere statement by the Government of individual or combined net worth is, of itself, of no evidential value. In order

23. Id. at 129. (Emphasis added.) For an instance where a juror completely misunderstood the implications of the net worth method see United States v. Benham, 215 F.2d 472 (5th Cir. 1954).

24. 224 F.2d 255 (7th Cir.), cert. denied, 350 U.S. 883 (1955).

25. In the opinion of the instant case it is interesting to note that the adequate instruction on the net worth method, mandatory in all such prosecutions, may be given either in the charge to the jury or during the trial itself.

26. For a list of the cases remanded see Avakian, op. cit. supra note 1, at 432 n.5.

27. See Warring v. United States, 222 F.2d 906 (4th Cir.), cert. denied, 350 U.S. 861 (1955); Watts v. United States, 220 F.2d 483 (10th Cir.), cert. denied, 349 U.S. 939 (1955); United States v. Adonis, 221 F.2d 717 (3d Cir. 1955); Vloutis v. United States, 219 F.2d 782 (5th Cir. 1955).

28. See William G. Lias, 24 T.C. 280 (1955).

to have the items of the net worth statement accepted the Government must prove that they are assets of the defendant or that they evidence a taxable expenditure made by the defendant.

Since the enumerated items of a combined net worth statement are relevant to the prosecution of a single defendant only when it has been established that they in some way effect an increase in his individual net worth and since such a combined statement often tends to confuse and mislead a jury, the propriety of introducing a combined net worth statement in a criminal prosecution is questionable. Without specifically so indicating, the court, in the instant case, through its general adverse criticism of the Government, by criticizing the nature of its combined net worth statement and its subsequent failure to segregate the assets enumerated therein, implied that the practice of consolidating assets in a net worth statement will hereafter be treated with suspicion in a criminal case.

**Torts — Suits Against Public Corporations — Constitutionality of Statute Conferring Authority on the Court of Claims to Hear Suits Against the New York Thruway Authority.**—Plaintiff commenced an action in the New York State Supreme Court, Albany County, to recover damages for negligence against the New York State Thruway Authority. Special term granted defendant's motion to dismiss the complaint since section 361-b of the New York Public Authorities Law conferred exclusive jurisdiction on the Court of Claims to hear and determine claims against the Thruway Authority, rejecting plaintiff's contention that the section was unconstitutional. On appeal to the Court of Appeals, *held,* one judge dissenting, affirmed. Article VI, section 23 of the state constitution was not intended to and did not deprive the legislature of the power to confer jurisdiction on the Court of Claims to hear and determine suits against the Thruway Authority, and hence the statute is constitutional. *Easley v. New York State Thruway Authority,* 1 N.Y.2d 374, 135 N.E.2d 572 (1956).

At common law the king could do no wrong[1] and the state, therefore, when performing its governmental functions was immune to suits for its torts and the torts of its officers and agents.[2] Public[3] and municipal[4] corporations, since they perform state governmental work, the former on a functional basis[5] and

1. See Moore v. Walker County, 236 Ala. 688, 185 So. 175 (1938).

2. Brown v. Board of Trustees, 303 N.Y. 484, 104 N.E.2d 866 (1952); In re Hoople's Estate, 179 N.Y. 308, 72 N.E. 229 (1904); Hughes v. State, 252 App. Div. 263, 299 N.Y. Supp. 387 (3d Dep't 1937); Condon v. State, 169 Misc. 666, 8 N.Y.S.2d 544 (Ct. Cl. 1938).

3. Pantess v. Saratoga Springs Authority, 255 App. Div. 426, 8 N.Y.S.2d 103 (3d Dep't 1938). See also Breen v. Mortgage Comm'n, 285 N.Y. 425, 35 N.E.2d 25 (1941); Buck v. State, 198 Misc. 575, 96 N.Y.S.2d 667 (Ct. Cl. 1950).

4. Brown v. Board of Trustees, 303 N.Y. 484, 104 N.E.2d 866 (1952); Wilcox v. Rochester, 190 N.Y. 137, 82 N.E. 1119 (1907); Maxmilian v. Mayor, 62 N.Y. 160 (1875); McCarthy v. Saratoga Springs, 269 App. Div. 469, 56 N.Y. Supp. 600 (3d Dep't 1945). But see Herman v. Board of Education, 234 N.Y. 196, 137 N.E. 24 (1922).

5. Dartmouth College v. Woodward, 17 U.S. (4 Wheat) 517 (1819); Economic Power

the latter in a geographic area, derivatively shared in the state's immunity.[6] However, the state may waive its immunity, either absolutely or conditionally.[7] This was done in New York by section 12(a) of the Court of Claims Act, upon condition, however, that all claims against the state be brought in the Court of Claims.[8]

The immunity of municipal and public corporations, it has been held, was also impliedly waived by section 12(a).[9] But the legislature did not see fit to condition the right to sue municipalities on the bringing of that suit in any special court.[10] This is based on the reasoning that, though municipal corporations perform a governmental function for the state, a suit against the municipal corporation is not a suit against the state. The state is not acting through municipalities, but rather it has delegated some of its power to them so that they may perform some of its duties. In the case of *Pantess v. Saratoga Springs Authority*, the Appellate Division applied this doctrine to public corporations, holding that a suit against a public corporation such as the Saratoga Springs Authority was not a suit against the state.[11] The appellation "public corporation" seems to be not alone controlling, but the criterion is whether the state has chosen to act directly in the carrying out of its governmental function ". . . even though it create and use a corporation for that purpose . . ." or whether the state has delegated some of its power for the performance of a governmental function, while ". . . the agency exercises its independent authority as delegated, as does a city. . . ."[12] In the former instance the state is responsible for the conduct of its agent, whom it is employing for a certain purpose.[13] In the latter, the corporation, since it is acting independently, must be liable for its own actions apart from any liability on the part of the state. For that reason, the court in the *Pantess* case, held that such suits must be brought into the Supreme Court, since the jurisdiction of the Court of Claims covered only suits directly against the state.

Though in drafting section 12(a), the state had not chosen to place any

& Constr. Co. v. Buffalo, 195 N.Y. 286, 88 N.E. 389 (1909); Van Campen v. Olean Gen. Hosp., 210 App. Div. 204, 205 N.Y. Supp. 554 (4th Dep't 1924). See 1 Fletcher, Cyclopedia of Corporations §§ 57-62 (rev. ed. 1931).

6. Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945).

7. Brown v. Board of Trustees, 303 N.Y. 484, 104 N.E.2d 866 (1952).

8. N.Y. Sess. Laws 1929, c. 467, § 12(a), now, N.Y. Court of Claims Act § 8 (N.Y. Sess. Laws 1939, c. 860).

9. Bloom v. Jewish Board of Guardians, 286 N.Y. 349, 36 N.E.2d 617 (1941).

10. Such suits were generally brought in the Supreme Court, the court of general jurisdiction. See Pantess v. Saratoga Springs Authority, 255 App. Div. 426, 8 N.Y.S.2d 103 (3d Dep't 1938); Buck v. State, 198 Misc. 575, 96 N.Y.S.2d 667 (Ct. Cl. 1950).

11. Pantess v. Saratoga Springs Authority, 255 App. Div. 426, 8 N.Y.S.2d 103 (3d Dep't 1938).

12. Id. at 428, 8 N.Y.S.2d at 105. See also Glassman v. Glassman, 309 N.Y. 436, 131 N.E.2d 721 (1956); Breen v. Mortgage Comm'n, 285 N.Y. 425, 35 N.E.2d 25 (1941); Paige v. State, 269 N. Y. 352, 199 N.E. 617 (1936); Sadigur v. State, 173 Misc. 645, 18 N.Y.S.2d 356 (Ct. Cl. 1940).

13. Paige v. State, 269 N.Y. 352, 199 N.E. 617 (1936).

condition on the right to sue corporations to which it had delegated some of its governmental powers, it nevertheless retained the right to do so.[14] That right was first exercised in 1939, after the *Pantess* case had been decided, when the legislature passed section 1306-a of the Public Authorities Law, vesting exclusive jurisdiction in the Court of Claims to hear claims against the Saratoga Springs Authority. It was again exercised in 1954 when section 361-a was passed, giving the Court of Claims exclusive jurisdiction over suits against the Thruway Authority. The constitutionality of this section was attacked in the instant case.

In reaching its decision, the majority of the Court of Appeals properly rejected appellant's contention that section 361-b violated article VI section 1[15] of the state constitution by depriving the Supreme Court of jurisdiction previously vested in it.[16] The jurisdiction which the legislature took from the Supreme Court by 361-b, the majority held, was legislative in origin, not a part of the court's constitutional jurisdiction.[17] Thus, what was vested in the court by the legislature could be revoked by that same power.

The Court of Appeals rejected appellant's further contention that section 361-b violates article VI section 23 of the constitution. By this section, added to the constitution in 1948, the Court of Claims was continued and made a court of record, with its original jurisdiction ". . . to hear and determine claims against the state or by the state against the claimant or between conflicting claimants as the legislature may provide," left unchanged.[18] No provision was made for suits against public corporations, though the amendment was passed after the passage of section 1306-a. It was appellant's contention that the legislature after considering the possibility of including suits against public corporations within the court's jurisdiction, decided against it. In rejecting this argument, the majority pointed to the fact that the same legislature which originally proposed the constitutional amendment had passed section 1306-a.

14. See Brown v. Board of Trustees, 303 N.Y. 484, 104 N.E.2d 866 (1952).

15. This section reads: "The supreme court is continued with general jurisdiction in law and equity. . . ."

16. See Decker v. Canzoneri, 256 App. Div. 68, 9 N.Y.S.2d 210 (3d Dep't 1939).

17. See Mulkins v. Snow, 232 N.Y. 47, 133 N.E. 123 (1921).

18. In regard to the provision granting jurisdiction to hear claims "between conflicting claimants as the legislature may provide," the following colloquy took place at the 1938 Constitutional Convention when this amendment was first introduced:

"Mr. G. C. Lewis: On line 21, where the way is opened for additional jurisdiction of the Court of Claims, that expression between conflicting claimants is intended to mean where there are conflicting claimants in one of these cases that come ordinarily before the Court of Claims.

Mr. Sears: Certainly.

Mr. G. C. Lewis: It would not mean just between conflicting claimants in any ordinary civil action.

Mr. Sears: Oh, no. This relates to claimants before the Court of Claims, and the purpose of the provision is to allow complete and final determination of all the controversies giving out of the particular matter which is the subject to the claim or claims." Revised record of the Constitutional Convention of 1938, pp. 2001-02.

Further, even after the amendment had been passed the legislature passed section 361-b in 1954 and in 1955 it put through section 163-a giving the Court of Claims exclusive jurisdiction over suits against the Jones Beach State Parkway Authority. The court places great emphasis on these facts stating, "statutes are presumed to be constitutional, Legislatures are presumed to know what statutes are on the books and what is intended by constitutional amendments approved by the Legislature itself."[19]

The principal reason in support of the majority position is that the legislature, in proposing section 23, article VI, was not concerned with the question of the court's jurisdiction. For years the Court of Claims had been a "political football."[20] Since it had been created by legislative enactment, it could be abolished by that same power. Therefore, as control over the legislature switched from one political party to another, the Court of Claims was abolished and replaced by a board of claims, which in turn was abolished and the Court of Claims recreated. The purpose of each change was to permit the party in power to replace the justices then on the court.[21] To obviate such maneuverings in the future and to put justices of the Court of Claims on the same footing with justices of the Supreme Court, the legislature determined to amend the constitution making the Court of Claims a constitutional court. An "abstract," submitted to the voters when the amendment was passed in 1949, stated: "The purpose and effect of this proposed amendment is to make the Court of Claims a constitutional court and thereby deprive the legislature of its present power to abolish that court at any time."[22]

This amendment did little more than insert the old Court of Claims Act into the constitution. While the old act was in effect, section 1306-a of the Public Authorities Law had been passed vesting exclusive jurisdiction in the Court of Claims to hear suits against a public corporation. It is reasonable, then, to assume that the legislature believed that the new amendment, having the same jurisdictional provision as the old act, was similarly flexible. This in all likelihood was their intent since they thereafter passed two other statutes vesting

19. 1 N.Y.2d at 379, 135 N.E.2d at 575. The majority further stressed the closeness of the Authority's relationship to the state, citing Glassman v. Glassman, 309 N.Y. 436, 131 N.E.2d 721 (1956). In Glassman, however, though the state agency was endowed with the powers and privileges of a corporation, the court held that its relationship to the state was so close that suit against the agency was suit against the state. See Sunlit Gardens v. Moore, 183 Misc. 343, 48 N.Y.S.2d 376 (Sup. Ct. 1944). Such is not the situation with the Thruway Authority. In Strang v. New York, 206 Misc. 734, 134 N.Y.S.2d 871 (Ct. Cl. 1954), appeal dismissed, 285 App. Div. 1117, 143 N.Y.S.2d 615 (4th Dep't 1955), it was held that the Thruway Authority is within the rule of Pantess. Indeed, if it were not within that rule section 361-b would be unnecessary since suits against it would then be automatically within the jurisdiction of the Court of Claims. Breen v. Mortgage Comm'n, 285 N.Y. 425, 35 N.E.2d 25 (1941).

20. Revised record of the Constitutional Convention of 1938, p. 2001.

21. See People ex rel. Swift v. Luce, 204 N.Y. 478, 97 N.E. 850 (1912).

22. An abstract similar in import had been submitted to the voters when the amendment was first proposed and rejected in 1938. See the document issued by the New York Secretary of State, Sept. 8, 1938, p. 95.

exclusive jurisdiction in the Court of Claims to hear suits against public corporations.

**Workmen's Compensation — Waiver of Immunity by Employer in an Action at Law.**—Plaintiff's intestate died as a result of injuries suffered in a collision between a city owned truck, in which he was riding, and an automobile. Suit was instituted against the driver of the automobile who joined the driver of the city's truck and the city as additional defendants. The trial of the negligence issue and liability therefor resulted in a jury's verdict against the defendants jointly in the sum of $40,000. The plaintiff collected $15,000 from the automobile driver's insurance carrier and caused a writ of mandamus execution to be issued against the city-employer for the balance of the judgment. The city petitioned to quash execution and to have the judgment marked satisfied claiming that its liability under the Workmen's Compensation Act was exclusive. The plaintiff argued that by failing to raise the defense of immunity at the trial, defendant had waived its rights thereunder. The Court of Common Pleas entered an order for the employer. Upon appeal, two justices dissenting, *held,* affirmed. An employer, joined as a third party defendant in an action brought by his employee, does not waive his immunity under workmen's compensation by failing to assert such immunity prior to an attempt to execute judgment. *Socha v. Metz,* 385 Pa. 632, 123 A.2d 837 (1956).

It is generally held that when an employer complies with the requirements of his state's workmen's compensation law his liability to an employee for injuries suffered in the course of employment is strictly defined by the terms of that act and it is the exclusive remedy available to an employee.[1] However, in an action at law instituted by the employee against his employer, the employer must affirmatively plead the protection offered him by the act[2] and the burden of proving that he is within the act is upon him.[3] The compensation acts, generally, do not prohibit an employer from waiving any rights that he may have under them.[4]

A failure to raise a defense will generally preclude its use in any further proceeding in the same action.[5] Thus a defendant in a proceeding to enforce the collection of a judgment is estopped to plead matters which might properly have been urged as a defense prior to the judgment.[6] However, this rule does

1. 2 Larson, Workmen's Compensation § 76:21 (1952).

2. Behringer v. Inspiration Consol. Copper Co., 17 Ariz. 232, 149 Pac. 1055 (1915); Gorrell v. Battelle, 93 Kan. 370, 144 Pac. 244 (1914); Solvuca v. Ryan & Reilly Co., 131 Md. 265, 101 Atl. 710 (1917); Kemper v. Gluck, 327 Mo. 733, 39 S.W.2d 330 (1931); Warren v. American Car & Foundry Co., 327 Mo. 755, 38 S.W.2d 718 (1931); Murphy v. Elmwood Country Club, Inc., 50 N.Y.S.2d 331 (Sup. Ct. 1944); Hammet v. Vogue, Inc., 179 Tenn. 284, 165 S.W.2d 577 (1942).

3. 71 C.J., Workmen's Compensation § 1501 (1935).

4. Henson Robinson Co. v. Industrial Comm'n, 386 Ill. 232, 53 N.E.2d 831 (1944).

5. 34 C. J., Judgments § 1267 (1924).

6. Rolls County Court v. United States, 105 U.S. 733 (1881); Allen v. Parker, 175 N.C. 190, 95 S.E. 170 (1918); Continental Title Co. v. Devlin, 209 Pa. 380, 58 Atl. 843 (1904);

not apply where the defendant is precluded from interposing his defense by reason of law or ruling of the court.[7]

In the case of *McIntyre v. Strausser*,[8] the plaintiff was a passenger in his employer's automobile when it collided with defendant's automobile. The defendant joined the plaintiff's employer as a joint tort-feasor, as permitted by Pennsylvania law,[9] in the plenary suit for negligence. The employer interposed the affirmative defense of workmen's compensation but was not permitted to introduce any proof at the trial of the existence of the employer-employee relationship. A verdict was returned in favor of the original defendant but against the employer who thereupon moved for judgment n.o.v. The motion was denied, expressly reserving to the employer the right to move to have the judgment marked satisfied of record. On appeal the Supreme Court affirmed the ruling of the lower court stating: "Since it is clear that the employer-defendant at the trial was properly precluded from establishing the facts concerning the employer-employee relationship, we agree with the learned court below that the proper procedure is for the employer-defendant to rule the plaintiff to show cause why the judgment should not be satisfied of record."[10]

In the earlier case of *Maio v. Fahs*,[11] where the employer, also joined as a third party defendant, moved for judgment n.o.v., it was held that to grant the employer's motion would nullify the original defendant's right to contribution from his joint tort-feasor.[12] In that case the employer had entered into a stipulation with the plaintiff specifically limiting the employer's liability to that provided by the compensation act.[13]

The court in the instant case held that the employer did not waive his limited liability under workmen's compensation because he had neither the duty nor the right to interpose such protection prior to plaintiff's attempt to execute the judgment.[14] The court interpreted the *Strausser* and *Fahs* cases as establishing the rule that 1) the employer may not introduce evidence establishing the employer-employee relationship at the trial,[15] and 2) a motion for judgment n.o.v. may not be granted the employer since the granting of such motion would vitiate the original defendant's right to contribution.[16]

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Harkness v. Hutcherson, 90 Tex. 383, 38 S.W. 1120 (1897); Smith v. Ormsby, 20 Wash. 396, 55 Pac. 570 (1898).

7. See note 3 supra.

8. 365 Pa. 507, 76 A.2d 220 (1950).

9. Uniform Contribution Among Tort-feasors Act, Pa. Stat. Ann. tit. 12, § 2083 (1951); Shaull v. A. S. Beck N.Y. Shoe Co., 369 Pa. 112, 85 A.2d 698 (1952).

10. McIntyre v. Strausser, 365 Pa. 507, 509, 76 A.2d 220, 221 (1950).

11. 339 Pa. 180, 14 A.2d 105 (1940).

12. "The entry of judgment n.o.v. in favor of [the employer] . . . would destroy Fah's right of contribution against that corporation in spite of the fact that the jury found that all three defendants were jointly and severally liable for Sell's death." 339 Pa. at 188-89, 14 A.2d at 109.

13. Id. at 190, 14 A.2d at 110.

14. 385 Pa. at 642, 123 A.2d at 842.

15. "Such proof would be likely to work to the advantage of the non-employer defendant by way of a reduced verdict." 385 Pa. at 640, 123 A.2d at 841.

16. Id. at 642, 123 A.2d at 842.

It is to this interpretation that the dissenting opinions so vigorously object.[17] They distinguish the earlier cases by pointing out that in each there was some affirmative step taken by the employer to preserve his right under the compensation law. In each case the employer pleaded workmen's compensation as an affirmative defense and after verdict was rendered moved for judgment n.o.v. which was denied. In *Maio v. Fahs*,[18] the court took cognizance of the stipulation between plaintiff and employer limiting the latter's liability to that provided for by the compensation act.[19] In the present case the employer took no affirmative steps to protect itself; on the contrary, it offered to settle for an amount greater than it would be required to pay under the compensation act.[20] The dissenters argue that the employer here by failing to invoke the protection of the compensation act as soon as it was joined, waived its rights.[21]

The majority interprets the two earlier cases as laying down clear rules of law, the effect of which is to deny to an employer, joined as a defendant, the right to interpose the protection afforded him by the workmen's compensation statute, at anytime prior to an attempt to execute judgment against him. If that is true it follows necessarily that the defendant-employer cannot be held to have waived such protection.[22] A right to contribution among joint tort-feasors exists under Pennsylvania law.[23] The present case appears to have harmonized the conflict of rights arising between the original defendant seeking contribution and a joint tort-feasor employer protected by the compensation law. Jurisdictions which do not permit an employer to be joined in an action at law by his employee, even for the purpose of protecting an original defendant's right of contribution are not, of course, faced with this problem.[24]

17. 385 Pa. at 644, 123 A.2d at 843 (dissent); 385 Pa. at 647, 123 A.2d at 844 (dissent).

18. 339 Pa. 180, 14 A.2d 105 (1940).

19. Id. at 190, 14 A.2d at 110.

20. 385 Pa. at 648, 123 A.2d at 844.

21. Id. at 650, 123 A.2d at 846.

22. See note 3 supra.

23. Uniform Contribution Among Tort-feasers Act, Pa. Stat. Ann. tit. 12 § 2033 (1951). "Whatever may be the law in the majority of other jurisdictions, . . . it is established in our own State that a tort-feasor has a right to contribution against a joint tort-feasor even though . . . for some reason, the plaintiff who has obtained a judgment against both of them is precluded from enforcing liability thereunder against the joint tort-feasor." Puller v. Puller, 380 Pa. 219, 221, 110 A.2d 175, 177 (1955).

24. See note 1 supra.