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Case Notes

CASE NOTES

Admiralty — Jones Act Three Year Statute of Limitations Applied to a Conjoined Count for Unseaworthiness.—The petitioner, a seaman, was injured on Oct. 19, 1950 as a result of a fall on the respondent's vessel. On Aug. 27, 1953, almost three years after the occurrence of the injury, a state court action was filed by the petitioner in a Texas district court. The bases alleged for recovery of damages were negligence under the Jones Act,[1] unseaworthiness,[2] and maintenance and cure under the general maritime law.

The trial court ruled that the petitioner's actions were not barred by the statute of limitations, nor by laches. The Texas Court of Civil Appeals held that the action for unseaworthiness was barred by the two year Texas statute of limitations[3] applicable to actions involving a personal injury.[4] The Supreme Court of the United States granted certiorari, and, with three Justices dissenting, held that where an action for unseaworthiness is joined with one under the Jones Act in a single proceeding, a court cannot apply to the former (unseaworthiness action) a shorter period of limitations than Congress has prescribed for the latter, regardless of whether the action is at law or in admiralty, in the state or the federal courts. *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958).

Before the enactment of the Jones Act, the injured seaman had only two remedies: the ancient one for maintenance and cure, which is self-descriptive, and the more recent one for unseaworthiness.[5] The latter was based on the employer's breach of warranty, implied in the employment agreement, as to the fitness of the ship and its appurtenant appliances, and liability was imposed without regard to fault.[6] In 1920, however, with the passage of the Jones Act, a seaman injured during the course of his employment as a result of the negligence of the officers or crew members on board ship was given an additional action.[7] There was, thus, a variation in the requisites of each action, as well as a variation in the origin of each remedy. Whether the remedies were distinct, overlapping, or concurrent presented a troublesome problem both to the courts and the litigants involved.[8] There is no doubt that

1. Merchant Marine Act § 33, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).

2. See Daniels v. Pacific-Atlantic S.S. Co., 120 F. Supp. 96, 99 (E.D.N.Y. 1954): "The mere presence of grease or oil or other transitory substance on a deck of a vessel, causing one to slip and sustain injuries has been held not to constitute unseaworthiness." The court makes a distinction between a "transitory unsafe condition" (not unseaworthiness) and an "inherently defective condition" (unseaworthiness).

3. Tex. Rev. Civ. Stat. Ann. art. 5526, § 6 (1952).

4. 290 S.W.2d 313 (Tex. Civ. App. 1956).

5. The seaman's right to damages for personal injuries due to the unseaworthy condition of his employer's vessel was first recognized in The Osceola, 189 U.S. 158 (1903).

6. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 90-94 (1946); The Osceola, supra note 5.

7. 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952); 35 Stat. 65 (1908), 45 U.S.C. § 51 (1952).

8. For the different interpretations as to their relationship to one another, see Premeaux v. Socony-Vacuum Oil Co., 144 Tex. 558, 192 S.W.2d 138, 142 (1946), where the court

the Jones Act created a so-called cumulative right and remedy.[9] However, due to the practice which evolved of joining these two causes of action, the plaintiff created numerous procedural traps for himself.[10] More significant was the fact that there was a definite period (three years) of limitations under the Jones Act,[11] while the action for unseaworthiness was limited only by the vague and discretionary[12] admiralty doctrine of laches.[13] This made inevitable the type of conflict involved in the instant case.[14]

Another underlying, but nonetheless primary, source of confusion is the vari-

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stated: "And the failure [of an employer] to furnish such maintenance and care [to a seaman who is injured or becomes ill during a voyage], during such time as the duty exists, is a personal injury for which recovery may be had under the Jones Act." See also Cortes v. Baltimore Insular Line, 287 U.S. 367 (1932); McCarthy v. American E. Co., 175 F.2d 727 (3d Cir. 1949); and Jenkins v. Roderick, 156 F. Supp. 299, 304 (D. Mass. 1957), where that court stated: "If the seaman prevails on the Jones Act or unseaworthiness count and gets judgment upon all types of damage available to him . . . there is nothing left for him to recover on account of cure and maintenance up to the time of the trial, at least."

9. That is, the right of action created by the statute was in addition to the remedy based on unseaworthiness. See, e.g., Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942).

10. Gilmore & Black, Admiralty §§ 6-25 (1957).

11. When the Jones Act was passed in 1920, the stipulated period of limitation was two years. However, by the Act of Aug. 11, 1939, the period of limitation in the Federal Employers' Liability Act was extended in the following language: "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." 53 Stat. 1404 (1939), 45 U.S.C. § 56 (1952). It became a well established rule that this amendment also extended the period of limitations of the Jones Act to three years by reference. See Cox v. Roth, 348 U.S. 207, 210 (1955), where the Court stressed that the Jones Act was remedial legislation and should be liberally construed to effect its purpose. See also Streeter v. Great Lakes Transit Corp., 49 F. Supp. 466 (W.D.N.Y. 1942); Gahling v. Colabee S.S. Co., 37 F. Supp. 759 (E.D. Pa. 1941); and Pope v. McCrady Rogers Co., 164 F.2d 591, 593 (3d Cir. 1947), where the court stated: "If a plaintiff sues in an action at law to gain benefits under the Jones Act the three year statute [of limitations] applies, as libellant admits in this case. It would certainly be an incongruous result if, by heading a paper 'in admiralty' and calling it a 'libel' instead of a 'complaint' the unequivocal language of limitation could be escaped . . . . [W]hen the entire foundation of one's claim is an enactment by a legislative body which, itself, contains a limitations provision [of three years], it cannot be thought that the legislature would have chosen to give people different rights under its legislation depending upon the court in which they seek enforcement." Contra, 3 Benedict, Admiralty § 469 (6th ed. 1940); and 4 Benedict, Admiralty § 612 (6th ed. 1940) where it is argued that "the legislative history of the amendment does not suggest that there was any thought of extending the time [for bringing suit] under the Jones Act."

12. Gardner v. Panama R.R., 342 U.S. 29 (1951).

13. Compare Henderson v. Cargill, Inc., 128 F. Supp. 119 (E.D. Pa. 1954) and Untersinger v. Keystone Tankship Corp., 1948 Am. Mar. Cas. 1899 (1948), with Oroz v. American President Lines, 154 F. Supp. 241 (S.D.N.Y. 1957) and Bonam v. Southern Menhaden Corp., 284 Fed. 362 (S.D. Fla. 1922), where it was held that since the injured seaman did not bring his unseaworthiness action in admiralty, but at law, the state statute of limitations applied and not the equitable doctrine of laches.

14. Gilmore & Black, Admiralty §§ 6-25 (1957).

ous jurisdictional provisions governing maritime personal injury litigation. The plaintiff could choose to bring his unseaworthiness action in the state courts. However, the state forum is mandatory where the plaintiff brings his unseaworthiness action at law and the jurisdictional prerequisites of the applicable federal judiciary act are not present.[15] The federal district courts have original jurisdiction over civil actions in admiralty for unseaworthiness[16] and also if the suit is brought at law and a diversity of state citizenship existed between the litigants.[17] The Jones Act[18] expressly recognized, and indeed required, concurrent jurisdiction in the federal and state courts.[19] Where a combined Jones Act and unseaworthiness suit was brought on the law side (or civil as distinguished from admiralty side) of a federal court and there was no diversity of citizenship, the circuit courts were in disagreement[20] as to whether jurisdiction existed over the conjoined unseaworthiness action.[21] Thus, when

15. "The [federal] district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between: (1) Citizens of different States." 28 U.S.C. § 1332 (1952).

16. 28 U.S.C. § 1333 (1952). This is the well known "saving to suitors" clause which, besides giving the district court original jurisdiction, "exclusive of the courts of the States," over an action in admiralty, allows a person to pursue, in any other state or federal court, any additional remedies available.

17. 28 U.S.C. § 1332(a)(1) (1952).

18. The Jones Act was, in fact, a complete and unqualified adoption by reference of the Federal Employers' Liability Act, 35 Stat. 65, 66 (1908), as amended, 45 U.S.C. §§ 51-60 (1952). The pertinent part of the Jones Act reads as follows: "[A]nd in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).

19. 62 Stat. 989 (1948), 45 U.S.C. § 56 (1952). See Engel v. Davenport, 271 U.S. 33 (1926).

20. The dispute revolves around the question of whether unseaworthiness, as part of the general maritime law, arises under the Constitution or laws of the United States. 28 U.S.C. § 1331 (1952).

21. Compare Doucette v. Vincent, 194 F.2d 834 (1st Cir. 1952), with Paduano v. Yamashita Kisen Kabushiki Kaisha, 221 F.2d 615 (2d Cir. 1955), and Jordine v. Walling, 185 F.2d 662 (3d Cir. 1950). For a detailed discussion see Gilmore & Black, Admiralty §§ 6-62 (1957). Another treatment of this problem is found in Jenkins v. Roderick, 156 F. Supp. 299 (D. Mass. 1957). In this non-diversity case, the court held: "[P]laintiff is not entitled to go to the jury on his unseaworthiness count by virtue of 28 U.S.C. § 1331 [which gives a federal district court jurisdiction over controversies arising under the Constitution or laws of the United States]. He is, however, entitled to go to the jury on that count because it is pendent to a Jones Act count." Id. at 304. The court here is utilizing the doctrine of pendent jurisdiction which was applied first in Hurn v. Oursler, 289 U.S. 238 (1933). Essentially this doctrine states that if the set of facts or grounds which go to make up a single cause of action involve federal questions, a federal court, having thus acquired jurisdiction, may decide on all matters involved in the controversy. Therefore, in Jenkins v. Roderick, supra, the court was reasoning that the Jones Act count involves a federal question, and that it, combined with a count for unseaworthiness, went to make up a single cause of action as was held in Baltimore S.S. Co. v. Phillips, 274 U.S. 316 (1927). Thus, having acquired jurisdiction by virtue of the Jones Act count, it may render judgment on the unseaworthiness count also.

the suitor combined his actions for negligence under the Jones Act and for unseaworthiness, different procedures would have to be followed depending on the forum chosen, although "regardless of the forum where the question arises, federal law creates the substantive principles governing a cause of action based on unseaworthiness."[22]

The majority in the instant case stressed the point that it was a practical necessity for the injured seaman to combine his actions for unseaworthiness and negligence under the Jones Act in a single proceeding. The majority also desired to mitigate, as far as possible, the confusing distinctions existing between actions at law and those in admiralty, and to create a uniform time limitation for the pursuit of the allied remedies. In reaching its decision, it relied heavily on *Baltimore S.S. Co. v. Phillips*.[23] In that case a Jones Act suit was held barred by a prior judgment entered against the libellant in a prior action for unseaworthiness. The court held that the facts as alleged described only a single wrongful invasion of a single right and, therefore, he was barred from a subsequent recovery on the grounds of actionable (Jones Act) negligence by the rules of res judicata. As a result of the *Baltimore S.S. Co.* ruling, the seaman was, as a practical matter, compelled to join the two remedies in a single proceeding. With this established relationship between the actions in mind, the majority concluded that Congress, having determined the limitation for an action under the Jones Act,[24] could not have its expressed intent in this remedial legislation[25] qualified by contrary or limiting[26] state court rulings.[27]

22. Jenkins v. Roderick, 156 F. Supp. 299, 301 (D. Mass. 1957). The doctrine of Erie R.R. v. Tompkins, 304 U.S. 64 (1938) has no applicability here, even though the action was brought on the law side of the federal court and not in admiralty, as no questions of state law are involved. See Pavlakis v. Seacrest Shipping Co., 136 F. Supp. 553 (D. Md. 1955) involving a Jones Act suit for negligence. See also Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 415 (1953), where Mr. Justice Frankfurter, in a concurring opinion, stated: "Erie R.R. Co. v. Tompkins, 304 U.S. 64, is irrelevant in that unseaworthiness is a federally created right, so state law on a state cause of action is not an issue." Compare this with the dissent of the instant case concurred in by Mr. Justice Frankfurter.

23. 274 U.S. 316 (1927).

24. Engel v. Davenport, 271 U.S. 33, 39 (1926), where the Court said: "And, as a provision affecting the substantive right created by Congress in the exercise of its paramount authority in reference to the maritime law, it [the three year statute of limitations] must control in an action brought in a state court under the Merchant Marine Act [i.e., the Jones Act], regardless of any statute of limitations of the State."

25. Cox v. Roth, 348 U.S. 207 (1955); Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1939); Panama R.R. v. Johnson, 264 U.S. 375 (1924).

26. See Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942), where it was stressed that the common-law defenses of contributory negligence and assumption of the risk are not available in a proceeding in admiralty or under the Jones Act. See also Western Fuel Co. v. Garcia, 257 U.S. 233 (1921); Bogdanovich v. Gasper, 41 F. Supp. 457 (S.D. Cal. 1941); and Frame v. City of New York, 34 F. Supp. 194 (S.D.N.Y. 1940).

27. Southern Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917), where the majority stated: "Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country . . . . And further, that in the

The purpose of the majority holding was to defend and further seamen's rights, they being traditionally classified the "wards of admiralty".[28] This could only be realized by means of uniform law[29] and by equality and universality in the application thereof[30] to cases involving personal injury.[31]

Mr. Justice Brennan, who concurred with the majority, pointed out that the state statute of limitations need not be applied here by default as was found practical in other federal cases but rather, following equity practice,[32] an applicable and analogous limitation should be applied, and the logical choice should be the one governing Jones Act remedies. As he concluded: "The mischief to be avoided is the possibility of shopping for the forum[33] with the most favorable period of limitations."[34]

The dissenting opinion stressed the distinctions between the two actions, particularly as to the liabilities imposed. Emphasis was placed on the fact that an unseaworthiness action is based upon a breach of warranty of the employment contract as to fitness of the vessel and its appurtenant appliances, and imposed an absolute liability upon the employer;[35] while under the Jones Act, actual fault must be shown, and the basis of liability is tortious negligence.[36] This argument does not, however, escape the definitive precedent of *Baltimore S.S. Co. v. Phillips*[37] which, in effect, welded the actions together. The dissenters further argued that, in the absence of an express limitation

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absence of some controlling statute the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction." Cf. Le Gate v. The Panamolga, 221 F.2d 689 (2d Cir. 1955).

28. Garrett v. Moore-McCormack Co., 317 U.S. 239, 246 (1942). See also 4 NACCA L.J. 242 (1949), discussing McCarthy v. American E. Corp., 175 F.2d 727 (3d Cir. 1949).

29. See Western Fuel Co. v. Garcia, 257 U.S. 233 (1921). See also Panama R.R. v. Johnson, 264 U.S. 375 (1924); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918); Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917); Westerburg v. Tide Water Associated Oil Co., 304 N.Y. 545, 110 N.E.2d 395 (1953).

30. "And plainly, we think, no such [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself." Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917).

31. The benevolent attitude of the Court in the instant case can be readily seen by examining other areas where a different spirit was displayed. See, e.g., Cope v. Anderson, 331 U.S. 461 (1947); Campbell v. Haverhill, 155 U.S. 610 (1895).

32. Russell v. Todd, 309 U.S. 280 (1940).

33. For example, where a state has a longer statute of limitation than provided in a federal statute. See Atlantic Coast Line R.R. v. Burnette, 239 U.S. 199, 201 (1915).

34. 357 U.S. 221, 230 (1958).

35. Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944).

36. 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).

37. 274 U.S. 316 (1927).

imposed by Congress,[38] a federally created right is subject to the applicable one set down by the state in which the action is brought.[39] However true this proposition may be in other areas, there is ample authority to the effect that a state's procedure may not be invoked to alter or defeat a seaman's rights under maritime law.[40] And lastly, it was contended that Congress, not the Court, should make such a change. In answer to this assertion, it may be argued that Congress has expressed its will so far as the Jones Act is concerned and that the Court is simply finding that Congress never intended the Jones Act limitation to be restricted to the narrow confines of that remedy alone.

The Court is dealing here with remedial legislation which has become an integral part of the maritime law, and which is to be liberally construed to effect its purpose.[41] Although some may offer the criticism that the Supreme Court is again legislating, it cannot be denied that the Court's approach is a realistic one. At the same time, it cannot be too strongly emphasized that the only firm legal basis for the decision is the *Baltimore S.S. Co.* precedent, in the absence of which the position taken by the dissent might have been valid.

It has recently been predicted that the Jones Act will be replaced by unseaworthiness as the important maritime personal injury action.[42] However,

38. Part of the respondent's argument concerned itself with the fact that the statute of limitations which governed the Jones Act was substantive. In opposition are the procedural type statutes of limitation which are not a part of the right and only effect the remedy. These are set down by the particular forum involved. The respondent contended that the action for unseaworthiness was subject to the latter type statute of limitations and cited the following cases in support: John v. Paullin, 231 U.S. 583 (1913); Campbell v. Haverhill, 155 U.S. 610 (1895); Socony-Vacuum Oil Co. v. Aderhold, 150 Tex. 292, 240 S.W.2d 751 (1951); Tilliard v. Hall, 11 Tex. Civ. App. 381, 32 S.W. 863 (1895). Brief for Appellee, pp. 10-13, McAllister v. Magnolia Petroleum Co., 290 S.W.2d 313 (Tex. Civ. App. 1956). However, upon examining these authorities it will be seen that they are either not in point or cover situations where there was no applicable federal statute of limitations, and so the one set down by the state was used by default.

39. Cope v. Anderson, 331 U.S. 461 (1947); Rawlings v. Ray, 312 U.S. 96 (1941); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906). But see McClaine v. Rankin, 197 U.S. 154 (1905) on which the dissent relied to support its argument that since Congress has not stipulated a time limit the state should have this right. However, in the McClaine case a federal statute without a stated limitation was involved. Whereas, the remedy for unseaworthiness is part of the general maritime law, a compilation of court decisions. Therefore, the case may be distinguished on its facts as to the importance of the congressional silence involved.

40. "Their purpose [the framers of the Constitution in enacting § 2 of Article 3 which extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction'] was not to strike down or abrogate the system [of maritime jurisprudence], but to place the entire subject—its substantive as well as its procedural features—under national control." Panama R.R. v. Johnson, 264 U.S. 375, 386 (1924). See also Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942).

41. The Arizona v. Anelich, 298 U.S. 110 (1936).

42. "Since most courts no longer require an election between the Jones Act and unseaworthiness, a Jones Act count, where available, is usually tagged on to an unseaworthiness

future litigation based on the decision in the instant case will probably belie the prediction. The Jones Act has here been given new significance. The ruling of the instant case assures the seaman that if he includes a count based on the act, he will have a three year guarantee on his unseaworthiness action. The next logical step in this judicial course of events is for the Supreme Court to determine what limitation will govern when an unseaworthiness action is brought alone. If Congress does not legislate before this question is raised, the Supreme Court might very well use the decision in the instant case as a precedent for a further "extension." If Congress fails to act, it will then quite cogently be argued that congressional silence is the equivalent of acquiescence in the present decision.

Conflict of Laws — Foreign Tort — Effect of Subsequent Marriage of Litigants.—Plaintiff brought suit for personal injuries sustained as a passenger in defendant's auto when it collided with a truck in New York State. Subsequently, but before trial, plaintiff and defendant were married. A motion for summary judgment by the defendant was granted. The superior court reversed. The New Jersey Supreme Court, three justices dissenting, reversed, holding that the subsequent marriage of the parties extinguished the plaintiff's cause of action even though the action could have been maintained in New York where the accident occurred. *Koplik v. C. P. Trucking Corp.*, 27 N.J. 1, 141 A.2d 34 (1958).

At common law, neither spouse could sue the other for torts committed before[1] or during[2] coverture. New Jersey courts have held that the Married Persons Act[3] did not remove this ban on torts committed during coverture.[4] The instant case was the first time that the Supreme Court of New Jersey was asked to pass on an ante-nuptial tort.[5]

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count. This is done, however, more from habit than from need; in almost all cases the pleader would be better off to rely exclusively on unseaworthiness and merely complicates his case and the proof required by dragging in the Jones Act. It is safe to predict, unless the Supreme Court reverses its field a second time, that in another ten years the Jones Act will have become a faint and ghostly echo and the law of recovery for maritime injuries will be stated in terms of unseaworthiness alone. The law is always improving when one cause of action is made to grow where two grew before. If such a simplification is to be the end result of the labors of the Supreme Court, the present large degree of confusion will not have been too dear a price to pay." Gilmore & Black, Admiralty §§ 6-38, at 316-17 (1957).

1. Gottliffe v. Edelston, [1930] 2 K.B. 378.

2. Thompson v. Thompson, 218 U.S. 611 (1910). See generally McCurdy, Torts Between Persons in Domestic Relation, 43 Harv. L. Rev. 1030 (1930).

3. N.J. Stat. Ann. §§ 37:2-1-29 (1937).

4. Kennedy v. Camp, 14 N.J. 390, 102 A.2d 595 (1954); Von Laszewski v. Von Laszewski, 99 N.J. Eq. 25, 133 Atl. 179 (Ch. 1926). Accord, Clement v. Atlantic Cas. Ins. Co., 13 N.J. 439, 100 A.2d 273 (1953); Hudson v. Gas Consumers' Ass'n, 123 N.J.L. 252, 8 A.2d 337 (Ct. Err. & App. 1939).

5. But see Wolfer v. Oehlers, 8 N.J. Super. 434, 73 A.2d 95 (L. 1950).

Section 5 of the New Jersey Married Persons Act provides: "Nothing in this chapter contained shall enable a husband or wife to contract with or sue each other, except as heretofore, and except as authorized by this statute."[6] This provision, appearing in only a few statutes of other jurisdictions,[7] has at various times been viewed as an incorporation of the common law by reference or a mere disclaimer of legislative intent to change the rule.[8] The latter construction is more appealing and would leave the courts free to change the common-law disabilities unmolested by statute,[9] though the former is certainly more traditional.

Recent decisions in jurisdictions denying interspousal suits for post-nuptial torts have allowed spouses to sue for torts committed prior to coverture.[10] Typical of these cases is *Curtis v. Wilcox*,[11] where the British Court of Appeals reasoned that the cause of action which the plaintiff had against her fiancé for personal injuries was personal property and, therefore, preserved by the Married Women's Act of 1882 which reserves to a woman the property with which she enters marriage.

Could statutory authorization be found in the present case? Section 12 of the New Jersey Married Person's Act provides: "The real and personal property of a woman which she owns at the time of her marriage . . . shall be her personal property as if she were a feme sole."[12] In view of the ample modern authority which considers a cause of action personal property,[13] the instant court should have had compelling reasons before disallowing the instant cause of action. It is doubtful that such reasons existed. In addition, section 7 provides: "If a female party to an action in any court of this state marries

6. N.J. Stat. Ann. § 37:2-5 (1937).

7. See 3 Vernier, American Family Laws §§ 167, 180 (1935). The presence of this provision has led the New Jersey courts to curtail rather strictly, suits between husband and wife. See Bendler v. Bendler, 3 N.J. 161, 69 A.2d 302 (1949) (refused to enforce interspousal contracts at law); Smith v. Smith, 4 N.J. Misc. 596 (Cir. Ct. 1926) (confined property actions between spouses to courts of equity). But see Clement v. Atlantic Cas. Ins. Co., 13 N.J. 439, 100 A.2d 273 (1953) (husband's liability insurer); Hudson v. Gas Consumers' Ass'n, 123 N.J.L. 252, 8 A.2d 337 (Ct. Err. & App. 1939) (husband's employer).

8. Compare Bendler v. Bendler, 3 N.J. 161, 69 A.2d 302 (1949), and Drum v. Drum, 69 N.J.L. 557, 55 Atl. 86 (Sup. Ct. 1903), with Kennedy v. Camp, 14 N.J. 390, 102 A.2d 595 (1954); Clement v. Atlantic Cas. Ins. Co., 13 N.J. 439, 100 A.2d 273 (1953), and Hudson v. Gas Consumers' Ass'n, 123 N.J.L. 252, 8 A.2d 337 (Ct. Err. & App. 1939).

9. Cf. Funk v. United States, 290 U.S. 371 (1933) (right of a wife to testify in behalf of her husband); State v. Culver, 23 N.J. 495, 129 A.2d 715 (1957); Cowan, Torts, 10 Rutgers L. Rev. 115, 119-20 (1955).

10. Carver v. Ferguson, 115 Cal. App. 2d 641, 254 P.2d 44 (1953); Hamilton v. Fulkerson, 285 S.W.2d 642 (Mo. Sup. Ct. 1955); Shirley v. Ayers, 201 N.C. 51, 158 S.E. 840 (1931); Curtis v. Wilcox, [1948] 2 K.B. 474.

11. [1948] 2 K.B. 474.

12. N.J. Stat. Ann. § 37:2-12 (1937).

13. Carver v. Ferguson, 115 Cal. App. 2d 641, 254 P.2d 44 (1953); Hamilton v. Fulkerson, 285 S.W.2d 642 (Mo. Sup. Ct. 1955); Curtis v. Wilcox, [1948] 2 K.B. 474; accord, Cusick v. Feldpausch, 259 Mich. 349, 243 N.W. 226 (1932); Mizell v. Atlantic Coast Line R.R., 181 N.C. 36, 106 S.E. 133 (1921).

after action brought, the action shall not abate by reason thereof, but shall proceed to final judgment in the name of the female as plaintiff or as defendant, as the case may be, notwithstanding such marriage."[14] In light of the over-all intent of the legislature to liberate married women from the common-law restrictions, the statute should have been susceptible of a broader construction in order to give expression to its plain meaning.

There is a growing amount of dissatisfaction with the rule of interspousal tort disability.[15] Founded in the mores of earlier society, its theoretical basis, the legal unity of husband and wife, is no longer realistic. Recognizing this, the retention of the rule is now often based upon the necessity for preserving domestic tranquillity. This is a flight from reality. Where there is actual ill will some courts paradoxically pretend that there is domestic tranquillity because there is nothing on the judicial record to the contrary; and there is nothing on record because nothing is permitted to be put on record. Further, it ignores the fact that an insurance company is often the real defendant and not the other spouse.

The presence of insurance in the present case raises an interesting question. Almost all interspousal tort cases that have come before the courts involve insurance.[16] To preclude collusion by husband and wife against the insurance companies, the New York Legislature, when it amended the Domestic Relations Law[17] to allow interspousal suits, also amended the Insurance Law[18] to provide that personal liability policies would not cover injuries to a spouse unless there be a specific clause so providing. However, the New York Court of Appeals, taking cognizance of a lower court decision[19] to the contrary, has allowed a wife to recover from her husband's insurer for injuries sustained in an automobile accident which occurred before their marriage on the grounds that the plaintiff's right against the insurer vested at the time of the accident.[20]

The instant court, while noting that spouses are permitted to sue for torts

14. N.J. Stat. Ann. § 37:2-7 (1937). Apparently this provision was enacted primarily to overcome the common-law rule requiring a married woman to join her husband as a party plaintiff in any action instituted by her before coverture, Philhower v. Voorhees, 12 N.J.L. 69 (Sup. Ct. 1830), though a search of the record fails to disclose any interpretation of this section.

15. See, e.g., 1 Harper & James, Torts § 8.10 (1956); Prosser, Torts § 101 (2d ed. 1955); Albertsworth, Recognition of New Interests in the Law of Torts, 10 Calif. L. Rev. 461 (1922).

16. Chief Justice Kimball of the Supreme Court of Wyoming, dissenting in McKinney v. McKinney, 59 Wyo. 204, 252-53, 135 P.2d 940, 958 (1943), said: "Negligence actions by wives against husbands, without any noticed exception, have involved automobile accidents, and have arisen since it has become a common practice for owners of such vehicles to carry insurance . . . ."

17. N.Y. Dom. Rel. Law § 57.

18. N.Y. Ins. Law § 167(3) provides: "No policy or contract shall be deemed to insure against any liability of an insured because of death of or because of injuries to his or her spouse. . . ."

19. Fuchs v. London & Lancashire Indem. Co., 171 Misc. 908, 14 N.Y.S.2d 387 (Sup. Ct.), aff'd, 258 App. Div. 603, 17 N.Y.S.2d 338 (2d Dep't 1939), appeal denied, 259 App. Div. 731, 19 N.Y.S.2d 311 (2d Dep't 1940).

20. Stonborough v. Preferred Acc. Ins. Co., 292 N.Y. 154, 54 N.E.2d 342 (1944).

committed against one another in New York, held that the question was to be determined by the law of New Jersey. The problem involved in this determination is best illustrated by making the case a companion of two New York decisions which are typical of the reasoning, results, and confusion existing in this area of the law throughout the country. In *Mertz v. Mertz*,[21] decided before the New York Legislature permitted interspousal tort suits, the plaintiff brought an action against her husband for an auto injury that occurred in Connecticut where such suits were permitted. The court of appeals held that the right of a wife to prosecute an action against her husband is a question of *remedy* governed by the law of the forum and dismissed the complaint. Subsequent to the amending of the New York Domestic Relations Law, a plaintiff brought suit against her fiancé for an auto injury which had occurred in Massachusetts. The parties were married prior to judgment. The court of appeals, in *Coster v. Coster*,[22] held that the right of a wife to sue her husband is a matter of *substantive law* and since the marriage of the parties had extinguished the plaintiff's right to prosecute the action in Massachusetts, the *locus delicti*, she could not prosecute the action in New York. The court dismissed the action without prejudice to the plaintiff's right to bring the action in another jurisdiction.[23] It is impossible to determine whether the instant court decided that the public policy of New Jersey precluded the tribunals of that state from entertaining such an action as did the *Mertz* case or whether the court determined the rights of the plaintiff as a matter of substantive law because it involved the question of the marital disabilities of two domiciliaries of New Jersey. The latter alternative would be opposed to the reasoning of the *Coster* case that substantive questions were to be determined by the *lex loci delicti*. This distinction is important for if the instant court were merely denying the availability of a remedy, judgment would not be on the merits and hence a subsequent action by the plaintiff in New York would not be barred.[24] However, if the court decided the issue as one involving the marital disabilities of two residents, it added a comparatively new note[25] by removing the conflict of laws problem from the field of torts to that of domestic relations. It is unfortunate that the court did not give a fuller consideration to this question. As it stands, the decision only serves to add to the confusion which has resulted from the dissimilar married women's acts.

21. 271 N.Y. 466, 3 N.E.2d 597 (1936); 5 Fordham L. Rev. 496 (1936).

22. 289 N.Y. 438, 46 N.E.2d 509 (1943); 12 Fordham L. Rev. 182 (1943).

23. There appears to be no reason why the court should not have given judgment on the merits instead of the judgment it did.

24. "The fact that a suitor has been denied a remedy by one state because it does not afford a remedy for the particular wrong alleged may not bar recovery in another state which does provide a remedy." Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 444 (1943). See Restatement, Judgments § 49, comment a (1942).

25. Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955) which applied the law of the domicile to an accident which occurred in Idaho. See Ford, Interspousal Liability for Automobile Accidents in the Conflicts of Laws: Law and Reason Versus the Restatement, 15 U. Pitt. L. Rev. 397 (1954), where the rule of applying the lex loci delicti is criticized and argument is made for determining the marital disability according to the law of the domicile.

Constitutional Law — Authority of Secretary of State To Determine Standards for Issuance of Passports.—Petitioner's application for a passport was denied in accordance with State Department regulations[1] upon his refusal to submit the required affidavit regarding present and past communist affiliations.[2] He thereupon brought suit for declaratory relief, but the district court granted summary judgment for respondent, and the court of appeals affirmed by a divided vote. On appeal,[3] the United States Supreme Court, with four Justices dissenting, reversed, holding that the Secretary does not have the authority to deny a passport on the basis of alleged communist membership or affiliation, nor on the basis of a refusal to execute a non-communist affidavit. *Kent v. Dulles,* 357 U.S. 116 (1958).

A passport is essentially a political document addressed to foreign nations requesting them to accord the bearer safe and free passage.[4] Although originally considered merely a convenience and not requisite for travel abroad,[5] it is within the power of the Executive to make it illegal for a citizen to leave the country without a passport in time of war,[6] or presidentially declared national emergency[7] and such power has been expressly invoked and is in effect at the present time.[8]

The traditional rule placing the issuance of passports within the discretion of the Secretary of State[9] has been codified and reads: "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports."[10] In *Perkins v. Elg,*[11]

1. 22 C.F.R. § 51.135 (1952) provides in substance that no passport shall be issued to any member of the Communist Party, nor to any person, regardless of their formal affiliation, who acts under the control of the Communist Party, nor to one as to whom there is reason to believe will engage in activities advancing the communist movement.

2. 22 C.F.R. § 51.142 (1952) which provides that any applicant may be required to subscribe, under oath, to a statement regarding present or past membership in the Communist Party, as a part of his application for a passport.

3. Certiorari granted, 355 U.S. 881 (1957).

4. Urtetiqui v. D'Arcy (which the instant court cited as Urtetiqui v. D'Arbel), 34 U.S. (9 Pet.) 692, 698 (1835).

5. Comment, Authority of the Secretary of State to Deny Passports, 106 U. Pa. L. Rev. 454 (1958).

6. 66 Stat. 190 (1952), 8 U.S.C. § 1185 (1952).

7. Act of June 21, 1941, ch. 210, § 1, 55 Stat. 252, made effective by the President in Proc. No. 2487, 6 Fed. Reg. 2617 (1941). Even though the emergency then in force was terminated in 1952, Proc. No. 2974, 17 Fed. Reg. 3813 (1952), this did not affect the Korean emergency declared in Proc. No. 2914, 15 Fed. Reg. 9029 (1950).

8. The existent powers were restated in 66 Stat. 190 (1952), 8 U.S.C. § 1185 (1952), which was specifically invoked by Proc. No. 3004, 18 Fed. Reg. 489 (1953). 8 U.S.C. § 1185 provides in substance that when the United States is at war, or during a national emergency, it shall, subject to limitations and exceptions as prescribed by the President, be unlawful for any citizen to depart from or enter the United States without a valid passport.

9. Shachtman v. Dulles, 225 F.2d 938, 942 (1955).

10. 44 Stat. 887 (1925), 22 U.S.C. § 211(a) (1952).

11. 307 U.S. 325 (1939).

the Supreme Court, while recognizing that the substantive standards a person must meet to obtain a passport are determined by the Secretary, also indicated an unwillingness to interfere with the Secretary's determinations in this matter.

In the instant case, the Court denied that Congress had delegated to the Secretary the authority to make communist membership or affiliation a valid substantive ground for denial of a passport. The Court emphasized that the right to travel is a part of the "liberty" protected by the due process clause of the fifth amendment, and that any delegated powers which would curtail a constitutionally protected activity must necessarily be narrowly construed. Although the Secretary's authority in this matter has often been expressed in broad terms,[12] the majority concluded that only passport refusals based upon illegal conduct or non-allegiance[13] may be regarded as having received congressional adoption through long standing administrative practice. The Court dismissed the precedents involving the Secretary's use of his discretion during wartime as irrelevant,[14] and held that the existing statutes do not indicate that Congress intended to grant the claimed discretion to the Secretary.

The dissenting opinion reasoned that if the subject matter of the required affidavit was relevant to any grounds on which the Secretary may deny a passport, then the regulations were valid.[15] It argued that the intent of Congress in passing the Immigration and Nationality Act of 1952[16] was to preserve the security of the United States by denying passports to those considered to be security risks.[17] Therefore, the dissenting Justices concluded that the Secretary was authorized to deny passports to communists and that the regulations in question were a lawful exercise of the Secretary's discretion.

As the dissent pointed out, the Court's refusal to consider the wartime use of the Secretary's discretion in determining congressional intent was unwarranted because the applicable statute requiring a passport for entry or departure is operative only in time of war or national emergency.[18] It is hardly reasonable for a court to restrict itself to a consideration of peacetime precedents in determining the congressional intent in enacting legislation which only becomes effective when peace no longer exists.

The dissent would appear to be factually correct also in its criticism of the Court's conclusion that there are only two congressionally approved grounds for withholding a passport. The Secretary has utilized his discretionary power to grant or withhold passports throughout our history,[19] as is evidenced by

12. See, e.g., 11 Stat. 52, 60-61 (1856).

13. 32 Stat. 386 (1902), 22 U.S.C. § 212 (1952), provides: "No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States."

14. The Court cites Youngstown Co. v. Sawyer, 343 U.S. 579 (1952), which dealt with presidential seizure of private property during a Korean war labor strike.

15. Accord, Briehl v. Dulles, 248 F.2d 561, 574 (D.C. Cir. 1957).

16. 66 Stat. 190 (1952), 8 U.S.C. § 1185 (1952).

17. 357 U.S. 116, 143 (1958).

18. 66 Stat. 190 (1952), 8 U.S.C. § 1185 (1952).

19. Brief for Respondent, pp. 32-33 & Appendix C; Report of the Commission on Government Security, 445-82 (1957); 3 Moore, International Law Digest § 512 (1906).

his peacetime denials of passports to those whom he had reason to believe desired them for an unlawful or improper purpose.[20] Passports were denied to communists from 1917 to 1931 as a matter of State Department policy, and after 1945, they were also denied to those communists whose purpose abroad was believed to be contrary to the national interests.[21]

It would seem reasonable to conclude that Congress did intend to curtail the continued use of American passports in a manner beneficial to communism. There have been numerous findings by governmental agencies and independent committees to the effect that communism today poses a grave threat to our security[22] and they uniformly conclude that the control of passports is a necessary step in the defense of this country.[23] In the Internal Security Act of 1950,[24] Congress, in a formal finding, pointed out that the communist goal is world conquest, and that unfettered travel is necessary for them to fulfill their purposes.[25] This legislation, then, was a clear expression of the congressional intent that no communist be issued a passport. The Immigration and Nationality Act of 1952, which the President invoked in 1953, was also enacted to prevent security risks from foreign travel in periods of national emergency and indicated that Congress approved the discretion of the Secretary.[26] The majority's reasoning renders the contemporaneous enactments of Congress irrelevant. It would require a specific statement by Congress of the specific grounds for the denial of a passport, a requirement which is not only unprecedented, but one which would destroy the discretion admittedly vested in the Secretary of State.

The instant decision enables communists to travel freely under the protection afforded by a United States passport.[27] It is submitted that Congress intended to authorize the Secretary of State to use his discretionary powers to control the travel of citizens in the national interest, and in particular to restrict the travel of members of the communist movement. Although such

20. 3 Moore, op. cit. supra note 19, § 503 (1906).

21. Report of the Commission on Government Security, 470-75 (1957).

22. Ibid. In Galvan v. Press, 347 U.S. 522, 529 (1954), the Court recognized that Congress, on the basis of extensive investigation, had made a formal finding, in the Internal Security Act of 1950, that communism is a world-wide revolutionary movement aimed at the overthrow of governments of the various nations of the world including that of the United States, and that travel of communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the communist movement.

23. Jaffe, The Right to Travel—The Passport Problem, 35 Foreign Affairs 17 (Oct. 1956).

24. 64 Stat. 987 (1950), 50 U.S.C. § 781 (1952).

25. See note 21 supra.

26. United States v. Powers, 307 U.S. 214, 217 (1939). In United States v. Harriss, 347 U.S. 612, 623 (1954), the Court said: "In construing the Act narrowly to avoid constitutional doubts, we must also avoid a construction that would seriously impair the effectiveness of the Act in coping with the problem it was designed to alleviate."

27. Were Kent denied a passport, he could still go to Mexico without a passport, and travel to Europe via Mexico.

restrictions may impinge slightly on the right to travel, they must be tolerated where the overriding requirements of our security demand it. Upon urgent presidential request,[28] remedial legislation is now pending in Congress.[29]

Constitutional Law — Effect of Possible Federal Prosecution Upon State Grant of Immunity.—Petitioner, subpoenaed before a New York grand jury, refused to answer a particular question on the ground that the answer might tend to incriminate him. The grand jury granted him immunity from prosecution under New York law,[1] and demanded an answer. Petitioner persisted in his refusal because the immunity granted did not protect him against federal prosecution, and he was thereupon adjudged in contempt of court. The New York Court of Appeals affirmed the appellate division which in turn had affirmed special term's dismissal of his petition for review. The Supreme Court of the United States granted certiorari and, with three Justices dissenting, affirmed. The fifth amendment does not protect from contempt conviction a witness who, after a grant of immunity, refuses to testify before a state grand jury on the ground that his answer might subject him to federal prosecution. *Knapp v. Schweitzer,* 357 U.S. 371 (1958).

The privilege against self-incrimination is guaranteed to persons under questioning before federal tribunals by the fifth amendment to the United States Constitution, and the constitutions of most states accord similar protection to those faced with state prosecution.[2] The privilege, however, is inapplicable where the incriminating matter will not subject the witness to any legal penalty, as in the case where he is granted statutory immunity from prosecution in return for his testimony.[3]

Although state immunity statutes afford full and complete protection from

28. H.R. Doc. No. 417, 85th Cong., 2d Sess. 20011 (1958).

29. See, e.g., S. Doc. No. 4110, 85th Cong., 2d Sess. — (1958), and delay of action thereon, Cong. Quar., Vol. XVI, No. 32, p. 1052 (1958).

1. N.Y. Penal Law § 2447(1) provides: "In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order."

2. U.S. Const. amend. V provides: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." An almost identical provision is found in N.Y. Const. art. I, § 6, which provides: "no person . . . shall . . . be compelled in any criminal case to be a witness against himself . . . ."

3. N.Y. Penal Law § 2447(1). See generally N.Y. Penal Law § 2447(2), which provides: "'Immunity' . . . means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding."

prosecution within the jurisdiction of the state granting such immunity,[4] the Supreme Court in *Jack v. Kansas*[5] held that no state has the authority to immunize a person from federal prosecution in return for testimony given to the state. In *Feldman v. United States*[6] the Supreme Court decided that in the absence of complicity between federal law enforcement agents and state authorities, the evidence elicited from a reluctant witness under a state grant of immunity may be used against that witness in a federal prosecution. However, the mere possibility that testimony might be used by authorities in another jurisdiction does not impair the legal validity of such immunity.[7]

In the instant case, petitioner, having been precluded from claiming the privilege guaranteed him by the state constitution[8] by reason of the grant of immunity, attempted to assert his privilege under the fifth amendment to the federal constitution. It has been settled since *Barron v. Baltimore*[9] that the first ten amendments to the United States Constitution restrict the federal government alone, and, since *Twining v. New Jersey*,[10] it has been accepted that the fourteenth amendment does not incorporate the self-incrimination clause of the fifth amendment to make it applicable to the states. The majority adhered to the *Twining* decision, and noted further that the result of a ruling in petitioner's favor would be to render ineffective state investigation of state crimes whenever Congress enacted a criminal statute covering the same subject.[11] The Court concluded that such an unrestricted use of the fifth amendment would destroy for all practical purposes the authority of the individual states to expose wrongdoing.[12]

4. United States v. Murdock, 284 U.S. 141, 149 (1931) held that, "full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination."

5. 199 U.S. 372, 380 (1905). The Court held that the state "could not prevent the testimony given by the party in the State proceeding from being used against the same person in a Federal court . . . ." In the reverse situation, where it was claimed that the privilege against self-incrimination was violated because certain federal immunity provisions failed to preclude the use in state courts of evidence federally compelled, it was decided that the immunity provision is not defective because it does not extend protection beyond its own jurisdiction. Hale v. Henkel, 201 U.S. 43 (1906). Cf. Brown v. Walker, 161 U.S. 591 (1896).

6. 322 U.S. 487 (1944). For the test as to whether official federal participation renders such evidence unusable in a federal prosecution, see Byars v. United States, 273 U.S. 28 (1927).

7. "The English rule of evidence against compulsory self-incrimination, on which historically that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country." United States v. Murdock, 284 U.S. 141, 149 (1905). But where a witness is examined about an offense for which he stands indicted in the same jurisdiction the testimony sought comes within the scope of the privilege against self-incrimination. See Foot v. Buchanan, 113 Fed. 156 (C.C.N.D. Miss. 1902).

8. N.Y. Const. art. I, § 6.

9. 32 U.S. (7 Pet.) 242 (1833).

10. 211 U.S. 78 (1908).

11. 357 U.S. at 378.

12. Id. at 379.

The dissenting opinion preferred to remand the case to the courts of New York because the New York decision was premised upon a holding that the evidence obtained could not, by reason of the cooperation of federal officers, be used against petitioner in a federal prosecution. The majority opinion here suggested that the evidence would be admissible.[13] The dissent felt that the New York court should be given the opportunity to reconsider its judgment[14] because the premise was now found to be erroneous.

The minority opinion stressed the dilemma with which the witness is faced. If he refuses to answer after a grant of state immunity, he may be held in contempt of court. On the other hand, if the witness should answer, federal authorities may use such testimony in federal prosecution provided that there is no complicity between federal authorities and state agents.[15] Thus, although the witness is protected against federal prosecution under the fifth amendment, and against state prosecution under a similar provision in the state constitution, he is placed in the precarious position that he may not effectively avail himself of either remedy.

A resolution of the dilemma may be in the offing. It should be noted that the *Feldman* case was a 4-3 decision.[16] Mr. Justice Brennan, concurring in the instant case, indicated some disagreement with the *Feldman* decision and stated expressly his opinion that it required reconsideration.[17] Mr. Justice Black's dissenting opinion expressed strong disapproval of the *Feldman* rule.[18] It would be reasonable to speculate that a reconsideration of the *Feldman* case by the present Court would result in its reversal. Should this materialize, the minority's objection in the instant case would vanish, and although a witness could still not employ the fifth amendment to evade answering questions in a state proceeding, he would after a grant of immunity be spared the threat of having such testimony used against him in a subsequent federal prosecution. However, it is to be noted that the overruling of the *Feldman* case would, to a considerable extent, enable the states to hamper federal prosecutions. A state grant of immunity would not, of course, result in a complete ban of federal proceedings, but would simply prohibit the use of such testimony in federal courts. This "compromise" of federal and state interests would really be a limitation on federal power without any curtailment of state power.

13. Id. at 382. However, it is interesting to note that the New York courts had already decided that all the state is required to do under its constitutional provision against self-incrimination is to give immunity against its own processes. Dunham v. Ottinger, 243 N.Y. 423, 154 N.E. 298 (1926).

14. However, the appellate division in the instant case recognized the situation and stated that, "The solution, at bottom, lies in co-operation in good faith between the two governments [federal and state] and their judicial and prosecuting establishments, both of which live in quite the same tradition." The court's decision to compel the testimony, however, remained unshaken. 2 App. Div. 2d 579, 585, 157 N.Y.S.2d 158, 165 (1st Dep't 1956), aff'd mem., 2 N.Y.S.2d 913, 141 N.E.2d 825, 161 N.Y.S.2d 437 (1957).

15. Byars v. United States, 273 U.S. 28 (1927).

16. Justices Rutledge, Black, and Douglas joined in the dissenting opinion.

17. 357 U.S. at 381.

18. Id. at 384.

Damages — Personal Injuries — Damages for Impairment of Plaintiff's Earning Capacity Awarded Without Proof of Prior Employment.—Plaintiff, an opera singer about to make her professional debut was injured as a result of the defendant's negligence so that she was no longer capable of pursuing her career. Damages were awarded for impairment of her earning capacity as an opera singer even though she had never sung professionally. Defendant's motion to set aside the verdict was denied. A fully trained opera student about to embark on a professional career may properly be awarded damages for impairment of her earning capacity as an opera singer even though she has never been employed in that capacity. *Grayson v. Irvmar Realty Corp.*, 12 Misc. 2d 38, 173 N.Y.S.2d 71 (Sup. Ct. 1958).[1]

The principal case presents a problem of proving damages with reasonable certainty in a personal injury case. While rather rigid and formalized rules control the award of damages in an action on a contract, the nature of the damages sought in a personal injury case preclude exactness of proof. The damages awarded to plaintiff in the principal case were objected to on the ground that they were speculative and uncertain since plaintiff had no history of past earnings as an opera singer.

Earning capacity does not necessarily concern itself with that which an individual has earned in the past. "It refers to that which, by virtue of his training, the experience, and the business acumen possessed, an individual is capable of earning."[2] Although originally considered to be a species of pain and suffering,[3] the courts have now come to regard the impairment of one's ability to earn a distinct and separate item of personal damages.[4]

Impairment of earning capacity is usually concerned with the diminution of the skill of a person already employed in a certain occupation or profession,[5] but even where the injured plaintiff is temporarily unemployed, he may be compensated for the deprivation of his personal right to exercise that capacity.[6] Plaintiff's earnings prior and subsequent to the injury are properly stressed by the courts because they ordinarily comprise the best evidence available for computing the diminution of the injured party's earning capacity.[7]

1. Grayson v. Irvmar Realty Corp. is now on appeal in the first appellate department.

2. Texas Elec. Ry. v. Worthy, 250 S.W. 710, 712 (Tex. Civ. App. 1923). "The ability to earn, and not former or present earnings is the test." Holmes v. California Crushed Fruit Co., 69 Cal. App. 779, 780, 232 Pac. 178, 179 (1924).

3. American Fid. & Cas. Co. v. Farmer, 77 Ga. App. 187, 48 S.E.2d 137 (1948).

4. Cameron v. Vandgriff, 53 Ark. 377, 13 S.W. 1092 (1890); Evansville Hoop & Stave Co. v. Bailey, 43 Ind. App. 153, 84 N.E. 549 (1908); McGarrahan v. New York, N.H. & H. R.R., 171 Mass. 211, 50 N.E. 610 (1898); Rosenkranz v. Lindell Ry., 108 Mo. 9, 18 S.W. 890 (1891); Quinn v. O'Keeffe, 9 App. Div. 68, 41 N.Y. Supp. 116 (2d Dep't 1896); Brown v. Foster, 1 App. Div. 578, 37 N.Y. Supp. 502 (1st Dep't 1896).

5. Leave v. Boston Elevated Ry., 306 Mass. 391, 28 N.E.2d 483 (1940).

6. Mississippi Cent. R.R. v. Smith, 176 Miss. 306, 168 So. 604, cert. denied, 299 U.S. 518 (1936). Recovery has been allowed where plaintiff's salary has increased rather than decreased by the time of the trial. Saganowich v. Hachikian, 348 Pa. 313, 35 A.2d 343 (1944).

7. Saganowich v. Hachikian, supra note 6. This court held evidence of earnings to be merely an aid in determining the diminution of the plaintiff's earning capacity.

In the principal case, the court held that the plaintiff was entitled to damages for the impairment of her earning capacity since she was fully trained and qualified to pursue an operatic career. Evidence of the plaintiff's training and ability were admitted, the court reasoning that where the amount of damages cannot be estimated with certainty, "no objection is perceived to placing before the jury all the facts and circumstances of the case having any tendency to show damages or their probable amount, so as to enable them to make the most intelligible and accurate estimate which the nature of the case will permit."[8]

The instant court could point to only two appellate decisions, both of which affirmed without opinion lower court judgments, in support of its holding.[9] Neither decision was precisely in point because in each, there was some evidence of past earnings in their field of study, whereas here there was none. However, the holdings do indicate that the courts will consider the studies, intentions and capabilities of a person to determine what his future earning capacity might be even where the plaintiff's success or failure will depend upon public acceptance.

To recover damages for loss of earning capacity, a plaintiff must prove its worth with reasonable certainty, for recovery will be denied where the evidence submitted is too remote, speculative or uncertain.[10] The plaintiff here was about to enter a profession in which it is rather difficult to predict future earnings with any exactitude since the future of an entertainer varies with whim and taste. However, where a person has studied for many years and is fully trained for a particular profession, and then is deprived of the opportunity to pursue this line of endeavor, it is certainly proper to allow the jury to consider evidence of studies, training and ability in evaluating the plaintiff's earning capacity.

8. Duane Jones Co. v. Burke, 306 N.Y. 172, 117 N.E.2d 237 (1954).

9. McDade v. Fuller Canneries Co., 259 App. Div. 809, 20 N.Y.S.2d 646 (1st Dep't 1940). A financially unsuccessful art student was allowed to submit evidence of her studies and ability and the court charged the jury that they could consider the evidence in determining whether there had been any impairment of her earning capacity. Magee v. National Broadcasting Co., 270 App. Div. 754, 59 N.Y.S.2d 916 (1st Dep't 1946), cited in the instant case 12 Misc. 2d at 40, 173 N.Y.S.2d at 73. The plaintiff, a forty-three year old woman, had sung as a soloist in her youth. At the time of the accident she was employed in a chorus but continued to study for operatic solos. The court permitted the jury to consider the plaintiff's ability and training not only as a member of a chorus but as an operatic soloist, in determining earning capacity.

10. Gauble v. Central Vt. Ry., 216 Fed. 712 (S.D.N.Y. 1914). Evidence of mere intention to study a course in the future or to pursue a new field has been held improper. The plaintiff teacher was injured after winning a scholarship for graduate study. Evidence of future intention for more advance study after her present program was deemed improper in that they were entirely too remote and speculative. Cauble v. Central Vt. Ry., supra; Freeland v. Brooklyn Heights Ry., 54 App. Div. 90, 66 N.Y. Supp. 321 (2d Dep't 1900); see Richmond & D.R. Co. v. Allison, 86 Ga. 145, 12 S.E. 352 (1890). Mere loss of opportunity will ordinarily be considered too speculative and uncertain for recovery. But see Geary v. Metropolitan St. Ry., 73 App. Div. 441, 77 N.Y. Supp. 54 (1st Dep't 1902), reargued on another issue, 84 App. Div. 514, 82 N.Y. Supp. 1019 (1st Dep't 1903), aff'd mem., 177 N.Y. 535, 69 N.E. 1123 (1903).

Several jurisdictions[11] have awarded damages to a party injured while training for a particular profession but who had not at the time of the accident earned any money in his chosen field. The decisions may be put into two related categories: the apprentice-trainee, or on the job trainee, and the student.[12] The controlling factor in both would seem to be the time element. If the plaintiff has just begun his studies when the injury occurs, his future earning capacity in that profession will be deemed too speculative to warrant granting him a recovery for its impairment.[13] On the other hand, if the student or trainee has only a few months remaining to complete a three or four year training period, the court will charge the jury to consider the plaintiff a member of the profession and to consider his earning capacity in that field.[14] "Whether or not one would earn anything in the future cannot be definitely determined."[15] However, it can be assumed that but for the injury, the plaintiff under normal conditions would have pursued the profession for which he was trained and thus could be considered a member of that profession in assessing damages.[16]

In *Calihan v. State*,[17] a New York court following this reasoning, awarded recovery to a medical student for impairment of his earning capacity as a surgeon. Future earning capacity of a medical student is generally less speculative than that of an untried entertainer, but the difference is not critical and several jurisdictions have so held. In *Rhinesmith v. Erie R.R. Co.*,[18] a school teacher who was training to be an operatic singer was injured by the defendant and her voice impaired. The court properly charged the jury to consider the damage to her earning capacity as an operatic singer. Under similar circumstances, a Massachusetts court held a voice student entitled to damages for impairment of her future earning capacity as a singer.[19]

It is a generally accepted rule that a minor may recover for diminution of his future earning capacity during majority.[20] The reasoning is that although

11. State ex rel. Pryor v. Miller, 180 Fed. 796 (D. Md. 1910), modified in other respects by 194 Fed. 775 (4th Cir. 1911); Kalland v. Brainerd, 141 Minn. 119, 169 N.W. 475 (1918); Howard Oil Co. v. Davis, 76 Tex. 630, 13 S.W. 665 (1890).

12. Briscoe v. United States, 65 F.2d 404 (2d Cir. 1933) (engineering student); Dafoe v. Grantski, 143 Neb. 344, 9 N.W.2d 488 (1943) (pre-law student); Calihan v. State, 36 N.Y.S.2d 840 (Ct. Cl. 1942), aff'd mem., 266 App. Div. 815, 42 N.Y.S.2d 440 (4th Dep't 1943) (medical student); Brink v. Kessler, 310 Pa. 506, 165 Atl. 836 (1933) (engineering student).

13. Central Foundry Co. v. Bennett, 144 Ala. 184, 39 So. 574 (1905); Bonnet v. Galveston, H. & S.A. Ry., 89 Tex. 72, 33 S.W. 334 (1895).

14. Nicholas v. Maxwell Motor Corp., 237 Mich. 612, 213 N.W. 128 (1927).

15. Dafoe v. Grantski, 143 Neb. 344, 345, 9 N.W.2d 488, 489 (1943).

16. Ibid.

17. 36 N.Y.S.2d 840 (Ct. Cl. 1942), aff'd mem., 266 App. Div. 815, 42 N.Y.S.2d 440 (4th Dep't 1943).

18. 76 N.J.L. 783, 72 Atl. 15 (1909).

19. Halloran v. New York, N.H. & H. R.R., 211 Mass. 132, 97 N.E. 631 (1912).

20. Virginian Ry. v. Armentrout, 166 F.2d 400 (4th Cir. 1948); Traver v. Eighth Ave. Ry., 4 Abb. App. Dec. 422 (N.Y. 1867); Lieberman v. Third Ave. Ry., 25 Misc. 704, 55 N.Y. Supp. 677 (Sup. Ct. 1899); City of Miami v. Finley, 112 Okla. 97, 240 Pac. 317

there is nothing from which to estimate earning capacity, "the jury should do the best it can, taking into consideration such matters as average earnings. They can also consider that the child is bright and intelligent and with proper education may be able to develop high earning capacity in intellectual pursuits."[21]

If an award may be made to a child for impairment where there is no way of determining future earnings, then certainly the plaintiff in the principal case, who had expended a great deal of time and effort learning a profession and had been fully trained at the time of the injury, should be allowed to submit evidence of her ability, training, and intentions in her chosen career. Where the ordinary means of proving values are not available, the court "will resort to some practical means that will be just to both parties."[22]

Since it is damage to plaintiff's ability to earn and not his actual loss of earnings that is being compensated,[23] evidence which is probative of plaintiff's ability to earn is material. It is submitted that the principal case is sound and consistent with the certainty requirement in the proof of damages in a personal injury case.

Evidence — Admissibility of Confession Obtained by Interrogation Subsequent to Indictment.—On February 3, 1957, at 7:15 P.M., defendant, accompanied by his attorney, surrendered to the district attorney after a previous admission that he had killed the decedent. He was taken into custody under a bench warrant[1] issued upon an earlier indictment for first degree murder. Defendant's attorney departed after he had cautioned the defendant to reveal nothing other than his name. The defendant was detained and interrogated by the police until approximately 3:30 A.M. at which time he made a complete confession. The defendant was then arraigned on the opening of court that morning. Neither physical nor psychological coercion had been employed against defendant nor had any inducement been offered to him to confess. Defendant was convicted of murder in the first degree. On appeal, the New York Court of Appeals with three judges dissenting affirmed the conviction. The court held that a confession obtained by pre-arraignment interrogation of one who has been indicted is admissible as evidence against him. *People v. Spano,* 4 N.Y.2d 256, 150 N.E.2d 226, 173 N.Y.S.2d 793 (1958).

The question here determined—whether the interrogation of one in custody under an indictment for felony, without the presence of counsel and prior to arraignment would render a confession so obtained inadmissible as evidence

(1925). In most jurisdictions the minor is allowed recovery for impairment of earning capacity after he has reached majority, but denied the right during minority unless an emancipated minor.

21. Virginian Ry. v. Armentrout, supra note 20.

22. Industrial & Gen. Trust Ltd. v. Tod, 180 N.Y. 215, 231, 73 N.E. 7, 12 (1904).

23. Holmes v. California Crushed Fruit Co., 69 Cal. App. 779, 232 Pac. 178 (1924).

1. N.Y. Code Crim. Proc. § 301.

against him—heretofore had not been passed upon by the New York Court of Appeals. The admission of defendant's confession under such circumstances involved two distinct problems; first, the admissibility of a confession under the criteria of the Code of Criminal Procedure,[2] and secondly, the admissibility of the confession as violative of the right against self-incrimination.[3] Under the Code, a confession is admissible as evidence unless it was obtained by coercion or by virtue of an inducement offered by the district attorney that he shall not be prosecuted for that crime. The New York courts have strictly construed this provision of the Code.[4] Consequently, the majority allowed the defendant's contention that he had been illegally detained merely to show that illegal detention does not, of itself, vitiate a confession which is otherwise admissible.[5] In the instant case, it must be remembered, the defendant was interrogated secretly while he was in custody pending arraignment.[6] It has been argued that secret interrogation is essential for effective prosecution of criminals, and that if any brutality be involved it will not be cured or discouraged by excluding the confession but rather by punishment and discipline of the offending police officers.[7] The New York Court of Appeals has decided that a confession obtained as the result of secret interrogation is not, for that reason alone, inadmissible.[8]

The majority further held that the mere absence of counsel at the pre-arraignment interrogation will not vitiate a confession which is otherwise voluntary. The majority, in justifying this position, emphasized that the Code guarantees

2. N.Y. Code Crim. Proc. § 395.

3. The privilege against self-incrimination in a New York proceeding is guaranteed by N.Y. Const. art. I, § 6; N.Y. Code Crim. Proc. § 10; N.Y. Civ. Prac. Act § 355. The right is not guaranteed in a state court by U.S. Const. amend. V nor by U.S. Const. amend. XIV, § 1. Palko v. Connecticut, 302 U.S. 319 (1938); Twining v. New Jersey, 211 U.S. 78 (1908).

4. See People v. Mummiani, 258 N.Y. 394, 180 N.E. 94 (1932); People v. Scott, 195 N.Y. 224, 88 N.E. 35 (1909); People v. White, 176 N.Y. 331, 68 N.E. 630 (1903).

5. People v. Alex, 265 N.Y. 192, 192 N.E. 289 (1934); People v. Mummiani, supra note 4; People v. Doran, 246 N.Y. 409, 159 N.E. 379 (1927); People v. Trybus, 219 N.Y. 18, 113 N.E. 538 (1916); Balbo v. People, 80 N.Y. 484 (1880). Whereas illegal detention of itself will not render a confession so obtained inadmissible, such illegal detention will be considered in determining the voluntariness of a confession. People v. Alex, supra; People v. Mummiani, supra; People v. Trybus, supra.

The mere fact that the person who confesses is in custody at the time he makes the confession will not render the confession inadmissible as evidence. People v. Garfalo, 207 N.Y. 141, 100 N.E. 698 (1912); People v. Chapleau, 121 N.Y. 266, 24 N.E. 469 (1890); Murphy v. People, 63 N.Y. 590 (1876); People v. Rogers, 18 N.Y. 9 (1858).

6. In England, interrogation under such circumstances has been discouraged. Royal Commission on Police Powers and Procedure Report, 144 (1929), which provides in substance, that after one has been arrested on a criminal charge, the English police are not to question him except to clarify ambiguities in his voluntary statements. Nevertheless, a confession will not be rendered inadmissible because obtained in violation of this rule. Inbau, Restrictions in the Law of Interrogation and Confessions, 52 Nw. U.L. Rev. 77 (1957).

7. 3 Wigmore, Evidence § 851 (3d ed. 1940).

8. People v. Wentz, 37 N.Y. 303 (1867).

counsel *"upon arraignment"*[9] and since this was a pre-arraignment interrogation there was no violation of defendant's right to counsel under the Code.

The dissent conceded that the confession was admissible under the criteria of the Code, but maintained that defendant's right against self-incrimination had been violated since the "defendant . . . [was] compelled in the course of a criminal prosecution to incriminate himself by his own utterances."[10] The dissent employed the term "judicial proceeding" to designate that period after the indictment had been found,[11] and concluded that since the privilege was applicable to judicial proceedings, it was applicable here. However, the term "judicial proceeding" when used in reference to the privilege against self-incrimination is restricted to those proceedings "where incriminatory disclosure had been extorted by the constraint of legal process directed against the witness."[12] Thus, not every proceeding which follows the indictment would necessitate the application of the privilege. It would seem that the dissent was too liberal in its use of the term "judicial proceeding." Indeed, the privilege may be applicable within a loose construction of the term, but this is not necessarily so in every instance. The proceeding at which the confession was obtained was not a judicial proceeding involving the exercise of legal process against the defendant. On the contrary, the proceeding was conspicuous for its absence of any remote resemblance to a legal proceeding within the scope of the privilege. Consequently, since the privilege did not apply to the proceeding at which the defendant confessed, the defendant could hardly evoke the privilege to exclude his confession given therein.

Under the present criteria, the confession of the defendant was properly admitted in evidence against him. Nevertheless, the very circumstance under which the confession was obtained dictates the need for prohibiting this practice in the future or at least safeguarding against its unrestricted use. Indeed, the difference between the instant confession and one which might be extracted during the course of the trial itself is tenuous. The courts, as previously seen, will not refuse to exclude a confession merely because it was given while in

9. N.Y. Code Crim. Proc. §§ 188, 699.

10. 4 N.Y.2d 256, 266, 150 N.E.2d 226, 232, 173 N.Y.S.2d 793, 801 (1958).

The privilege against self-incrimination arose out of the practice of ecclesiastical and civil courts to compel one who was suspect to appear before the court and testify under oath against himself. Consequently, evidence against an accused might easily be obtained by virtue of the legal compulsion employed against him. Such a practice failed to recognize the distinct judicial nature of the court's function and assigned to it rather the inquisitorial function of extracting from a witness's own lips evidence which would lead to his conviction. As a result of this confusion, brutal abuses arose in an attempt to obtain evidence to which the court thought itself legally entitled. Thus, the institution of the privilege was primarily to remove the reason which led to these abuses, the reason being the right of the court to compel a person to testify against himself. See 8 Wigmore, op. cit. supra note 7, § 2250 for a thorough discussion of the history of the privilege.

11. "A prosecution is commenced . . . when an indictment is duly presented by the grand jury in open court, and there received and filed." N.Y. Code Crim. Proc. § 144.

12. People v. Defore, 242 N.Y. 13, 25, 150 N.E. 585 (1926).

custody[13] or as the result of secret interrogation.[14] Here the court went one step further and in so doing came close to denying the fundamental fairness which permeates our entire system of criminal procedure.[15] The majority, while conceding that reservations may be entertained in admitting the confession, properly assigned the task of remedying the situation to the legislature. In the light of the abuse which can result from an extension of this practice, the legislature would do well to define the limits within which the present practice may be employed.

Federal Taxation — Income Suit for Refund in the Federal Courts.—His claim for refund of a partial payment of a deficiency assessment levied by the Commissioner of Internal Revenue having been disallowed, petitioner sued for refund in the United States District Court pursuant to section 1346(a)(1), Title 28 of the United States Code. The district court's judgment for the United States was vacated by the court of appeals which remanded with instructions to dismiss. On certiorari, the Supreme Court of the United States, with one Justice dissenting, affirmed. The Court held that a taxpayer must pay the full amount of an income tax deficiency before challenging its correctness by a suit for refund. *Flora v. United States,* 357 U.S. 63 (1958).

Under present law, an aggrieved taxpayer has several remedies for contesting a deficiency assessment levied by the Internal Revenue Service.[1] Within ninety days after the receipt of the deficiency notice, he may file a petition with the Tax Court for a judicial redetermination of his tax liability prior to payment.[2] The taxpayer may elect to pay the deficiency assessment and then attempt to recover the alleged overpayment in the Court of Claims or in the district courts.[3] Finally, an action may be brought personally against the district director to whom the tax was paid.[4]

The problem in the instant case centered around the significance of the terms "any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws" as set forth in the jurisdictional

13. People v. Garfalo, 207 N.Y. 141, 190 N.E. 698 (1912); People v. Chapleau, 121 N.Y. 266, 24 N.E. 469 (1890); Murphy v. People, 63 N.Y. 590 (1876); People v. Rogers, 18 N.Y. 9 (1858).

14. People v. Wentz, 37 N.Y. 303 (1867).

15. See Rochin v. California, 342 U.S. 165 (1952); Brown v. Mississippi, 297 U.S. 278 (1936).

1. See 10 Mertens, Federal Income Taxation § 58A.18, at 46 (1958).

2. Int. Rev. Code of 1954, §§ 6212-13.

3. See 3 Rabkin & Johnson, Federal Income, Gift and Estate Taxation § 72.04 (1956).

4. This action is based on common-law assumpsit for money had and received. An informative treatment of this subject is given in Plumb, Tax Refund Suits Against Collectors of Internal Revenue, 60 Harv. L. Rev. 685 (1947). Collector suits can now be brought against the Directors of Internal Revenue. See Brodsky, Suits for Refund: The Nature of the Suit and the Procedure To Be Followed, Eleventh Annual N.Y.U. Institute on Federal Taxation 749 (1953).

statute, section 1346(a)(1) of title 28 United States Code.[5] Does the payment of "any sum" comprehend only complete payment of a deficiency assessment before the district courts may entertain suit for a refund?

Speaking for the majority, Mr. Chief Justice Warren declared that the language of section 1346(a)(1) could be termed "a clear authorization to sue for the refund of 'any sum.' "[6] Despite this admittedly lucid provision, the Court found ambiguity therein because of the "principle of strict construction to waivers of sovereign immunity . . . and the sharp division of opinion among the lower courts on the meaning of the pertinent statutory language . . . ."[7]

The Court therefore declined to accept the plain meaning with its "clear authorization." It chose instead to delve into the congressional intent by "a thorough consideration of the relevant legislative history. . . ."[8] Since the language of the jurisdictional statute is essentially similar to that found in the claim-for-refund statute, Internal Revenue Code of 1954, section 7422(a),[9] and its predecessor, Revised Statutes section 3226 (1875),[10] the Court asserted that

5. As amended, ch. 648, § 1, 68 Stat. 589 (1954):

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

"(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws. . . ." As amended, 28 U.S.C. § 1346(a)(1) (Supp. V, 1958).

6. 357 U.S. at 65.

7. Ibid. The fact that the lower courts disagreed in their findings as to the significance of statutory provisions does not necessarily denote the presence of ambiguity in the statutes. If the Court's contention is true, then almost all legislation brought before the Supreme Court could be said to be somewhat ambiguous.

8. Ibid. Mr. Justice Brown commented in Hamilton v. Rathbone, 175 U.S. 414, 419-21 (1899), that "the general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it. . . . The whole doctrine applicable to the subject may be summed up in the single observation that resort may be made to prior acts to solve, but not to create an ambiguity."

9. The statute reads: "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof."

10. "No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue. . . . "

the significance of the language as employed in the claim-for-refund statutes provided "the key to what Congress intended when it used that language in the jurisdictional provision."[11]

Section 19 of the Revenue Act of July 13, 1866, the original claim-for-refund statute, provided that "no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue according to the provisions of law in that regard. . . ." At that time, refund suits could not be brought against the United States Government directly because of its sovereign immunity.[12] A taxpayer was, therefore, required to initiate a personal action in assumpsit against the collector to whom the tax had been paid, a maneuver still employed.[13]

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11. 357 U.S. at 65.

12. With the passage of the Tucker Act, Act of Mar. 3, 1887, ch. 359, 24 Stat. 505, the United States Government became directly suable in the federal district courts. The latter were granted concurrent jurisdiction with the Court of Claims over all suits "founded upon the Constitution of the United States or any law of Congress, . . . or upon any contract, expressed or implied, with the Government of the United States. . . ." Act of Mar. 3, 1887, ch. 359, § 1, 24 Stat. 505. This broad terminology was construed as including income tax refund suits. United States v. Emery, Bird, Thayer Realty Co., 237 U.S. 28 (1915). While the jurisdiction of the district courts was limited to suits not in excess of $1,000, this ceiling was raised to $10,000 in 1911. Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1093. Suits in excess of $10,000 could be brought in the court of claims in Washington. The jurisdictional limitation of the district courts was finally eliminated by a 1954 amendment to 28 U.S.C. § 1346(a)(1) (Supp. V, 1958).

The Revenue Act of 1921, ch. 136, § 1310(c), 42 Stat. 310-11, contained the language currently employed in section 1346(a)(1), the tripartite categories of claims enumerated previously in Rev. Stat. 3226 (1875). Section 1310(c) read: "Paragraph 'Twentieth' of section 24 of the Judicial Code is amended by adding at the end thereof the following new paragraph: 'Concurrent with the Court of Claims, of any suit or proceeding, commenced . . . for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected, under the internal revenue laws, even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead at the time such suit or proceeding is commenced.'"

This latter part of the statute was an amendment proposed by Senator Jones of New Mexico during debate on the Revenue Bill of 1921. It was intended to counteract the Supreme Court decision of Smietanka v. Indiana Steel Co., 257 U.S. 1 (1921), which held that a collector must be sued personally, thus disallowing any suit against the office or successor in office of a deceased collector in the district courts. In this situation, if the tax claim exceeded $10,000, recourse had to be had to the Court of Claims in Washington. The Jones Amendment alleviated this problem by permitting the taxpayer to bring his suit in the district court against the United States. See 61 Cong. Rec. 7506-07 (1921); H.R. Rep. No. 486, 67th Cong., 1st Sess. 57 (1921). This statute is the predecessor of the current jurisdictional provision found in 28 U.S.C. § 1346(a)(1) (1952).

13. The action for money had and received was effectively utilized in the absence of legislation authorizing suits against the United States for erroneous or unjust taxation. As the United States Government ultimately paid in cases decided against the collector, its

The majority in the instant case relied heavily upon the 1875 Supreme Court decision in *Cheatham v. United States*.[14] That case was, in fact, a suit brought against the collector to recover an alleged illegal exaction of tax.[15] The Court disallowed the action because the assessment had not been contested by an appeal to the commissioner before instituting suit.[16] Departing from the facts before it, the *Cheatham* Court commented upon the remedies afforded a tax litigant who wished to contest a tax assessment. This dictum was quoted at length by the Court in the instant case. The *Cheatham* Court observed that "while a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, the general government has wisely made the payment of the tax claimed, whether of customs or of internal revenue, a condition precedent to a resort to courts by the party against whom the tax is assessed."[17] From these extraneous remarks, the present Court inferred that judicial interpretation of the statutes at the time of the *Cheatham* decision required "full payment of an assessed tax as a condition precedent to the right to sue the collector for a refund."[18]

Yet, at the time *Cheatham* was decided, the provisions of section 19 of the Revenue Act of 1866 had been restated in the Revised Statutes of 1875.[19] What should have been significant was the triple categories contained in Revised Statutes section 3226 (1875), the successor to section 19.[20] There for the first time was set the essential language currently contained in the jurisdictional statute. Section 3226 provided that: "No suit shall be maintained for the recovery of . . . any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue. . . ." The *Cheatham* opinion failed to comment on the addition of the clause beginning with "any sum" and its apparent significance in view of the more restrictive terminology of section 19 of the Revenue Act

sovereign immunity did not remain unimpaired. The advantages of a suit against the collector included the right to a jury trial. See Plumb, supra note 4, at 705. A judicial discussion of this common-law action is given in Sirian Lamp Co. v. Manning, 123 F.2d 776 (3d Cir. 1941), and Hanchett v. Shaughnessy, 126 F. Supp. 769 (N.D.N.Y. 1954). As the court of appeals observed in Sirian Lamp Co. v. Manning, supra at 778: "The important factor is that retention of the money would be unjust because there was no tax legally due. The common-law liability of the collector to refund the money thus unjustly retained is still enforced and the action remains as a personal one against him."

14. 92 U.S. 85 (1875).

15. The taxpayer had appealed from a first assessment which had been turned aside by the commissioner on October 7, 1867, and a new assessment ordered. This second assessment was paid by installments, final payment being made on October 29, 1868. The suit to recover the money so paid was filed on January 15, 1869.

16. Under § 19 of the statute, suit could not be brought later than six months from the date of the decision rendered on appeal. An appeal from the second assessment before payment thereof was deemed by the Court a condition precedent to suit. This the taxpayer failed to do.

17. 92 U.S. at 89, quoted with approval in the Flora opinion, 357 U.S. at 68.

18. 357 U.S. at 68.

19. Rev. Stat. § 3226 (1875). See note 10 supra.

20. Ibid.

of 1866. This omission was construed in the instant case as indicating that the provisions of section 3226 effected no change in the principle of "pay first and litigate later."[21] Yet, in the *Cheatham* case, the immediate issue was the procedural aspect of the Act of 1866; the lower court was not even concerned with the refund statute, section 3226. Even if the so-called Cheatham principle of "pay first and litigate later" be conceded, the question still remains as to whether one has to pay all or part of the deficiency assessment in order to institute a suit for refund. The present Court concluded that full payment of taxes is a condition precedent to litigation against the collector and that such a statutory scheme was recognized by the *Cheatham* Court.[22]

The present Court alleged that prior to 1940, "there does not appear to be a single case . . . in which a taxpayer attempted a suit for refund of income taxes without paying the full amount the Government alleged to be due."[23] However, in *Cook v. Tait*,[24] decided in 1924, the Supreme Court exercised jurisdiction over a case involving an American resident living in Mexico who had paid part of an income tax assessment and then sued the collector for a refund in the federal district court. In *Bowers v. Kerbaugh-Empire Co.*,[25] judgment was affirmed for a taxpayer who had sued for a refund after paying only part of the income tax assessment. Failure to pay the full tax assessed before litigation was not raised by the Government. On the lower judicial level, there may be found several pre-1940 tax cases in which the taxpayer sued for refunds without first paying the total amount of the tax said to be due by the Government.[26]

Nevertheless, due to the similarity in language between the jurisdictional statute and the claim-for-refund statute, which remains to the present, the Court in the instant case arrived at an interpretation of the jurisdictional provisions of section 1346(a)(1) by reference to the judicial construction given the claim-for-refund statute. Thus, it contended that "the fact that this language had for many years been considered to require full payment before suing the collector, and the fact that the avowed purpose of the 1921 amendment was merely to cure an inadequacy in the suit against the collector, combine

21. The Court, therefore, assumed that the Cheatham Court had considered the new statutes and would have referred to them if they felt that an alteration had been effected in the alleged requirement of full payment of the tax assessment. This judicial inference is rather questionable.

22. 357 U.S. at 68.

23. Id. at 69.

24. 265 U.S. 47 (1924).

25. 271 U.S. 170 (1926).

26. See, e.g., Hassett v. Welch, 303 U.S. 303 (1938) (estate tax); Baldwin v. Higgins, 100 F.2d 405 (2d Cir. 1938) (income tax); Heinemann Chem. Co. v. Heiner, 92 F.2d 344 (3d Cir. 1937) (corporate income tax); Tsivoglou v. United States, 31 F.2d 706 (1st Cir. 1929) (income tax); Sampson v. Welch, 23 F. Supp. 271 (S.D. Cal. 1938), opinion vacated on other grounds, 40 F. Supp. 1014 (S.D. Cal. 1941) (estate tax); McFadden v. United States, 20 F. Supp. 625 (E.D. Pa. 1937); cf. Charleston Lumber Co. v. United States, 20 F. Supp. 83 (S.D.W.Va.), appeal dismissed by agreement, 93 F.2d 1018 (4th Cir. 1937) (corporate income tax); Peerless Paper Box Mfg. Co. v. Routzahn, 22 F.2d 459 (N.D. Ohio 1927) (income and profits tax).

as persuasive indications that no change was intended in the full-payment principle declared in Cheatham v. United States. . . ."[27]

To further bolster its views, the present Court examined the rationale for the creation of the Board of Tax Appeals in 1924.[28] According to the House report on the measure, "the taxpayer may, prior to the payment of the additional assessment of income . . . or estate taxes, appeal to the Board of Tax Appeals and secure an impartial and disinterested determination of the issues involved."[29] The report goes on to state that "he [the taxpayer] is entitled to an appeal and to a determination of his liability for the tax prior to its payment."[30]

Today, the Tax Court enables a taxpayer to contest a deficiency notice issued by the Internal Revenue Service prior to its assessment.[31] It is rather significant that Tax Court proceedings restrain the collection of the tax until the decision of the court has become final.[32] An examination of the legislative history of the Tax Court would seem to indicate that Congress sought to alleviate the hardship of pre-litigation payment of taxes.[33] Until the creation of the Board of Tax Appeals, there was no method by which a taxpayer could restrain collection of taxes before an independent redetermination of his tax liability. While the committee reports could lead to the inference, made in the instant case, that Congress meant to offset the burden of full payment before litigation, the legislative intent is not so clear as to preclude the suggestion that a taxpayer paying only a part of the tax assessed could not have brought a suit for refund in the federal courts.[34]

No doubt, the alternate avenues open for tax litigation has served to foster some confusion and discord in the lower courts. But with the exception of the instant case, the courts of appeals that have dealt directly with the question

27. 357 U.S. at 72.

28. Rev. Act of 1924, ch. 234, § 900, 43 Stat. 336. The Board is now known as the Tax Court. It has undergone little substantive change and remains basically unaltered by subsequent re-enactments. Its present existence is provided for in Int. Rev. Code of 1954, § 7441.

29. H.R. Rep. No. 179, 68th Cong., 1st Sess. 8 (1924).

30. Id. at 7.

31. 3 Rabkin & Johnson, Federal Income, Gift and Estate Taxation § 72.01 (1956).

32. Int. Rev. Code of 1954, § 6213: "[N]o assessment of a deficiency . . . and no levy or proceeding in court shall be made, begun, or prosecuted . . . until the decision of the Tax Court has become final." However, under § 6861, an exception exists where the commissioner deems a jeopardy assessment advisable. The Tax Court can determine if there is a deficiency or overpayment, or an absence of any liability. Int. Rev. Code of 1954, § 6214. Moreover, it is authorized to increase the deficiency claimed by the commissioner. Ibid. Its jurisdiction, however, is confined to the taxes and years for which a petition is filed. Ibid.

33. H.R. Rep. No. 179, 68th Cong., 1st Sess. 7 (1924). A similar view is expressed in the Report of the Senate Committee on Finance, S. Rep. No. 398, 68th Cong., 1st Sess. 8-9 (1924).

34. At the time of the creation of the Board of Tax Appeals in 1924, the Supreme Court had exercised jurisdiction in Cook v. Tait, 265 U.S. 47 (1924), where a suit for refund had been brought against the collector without full payment of the tax assessment.

of full payment as a condition precedent to tax litigation have generally denied the existence of such a prerequisite.[35]

The underlying rationale of the instant decision can be found in the Court's belief that refund suits in the federal courts for partial payments of tax deficiencies would restrain or impede the assessment or collection of other taxes.[36] But the liability of the taxpayer for the balance of the tax due has been explicitly enunciated in the federal courts.[37] Under present law, moreover, except when the Tax Court is reviewing a tax deficiency determination, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."[38] In effect, this provision would enable the Commissioner of Internal Revenue to assess or collect remaining taxes still outstanding while a suit was pending for refund of the partial payments already made.

Since the Tax Court lacks jurisdiction over excise taxes, the alternate remedies delineated by the instant Court[39] are not available to this class of taxpayers. Accordingly, to meet the full prepayment prerequisite outlined in the instant case, it has been held that the requirement of full payment of a deficiency assessment is met "by payment in full of the tax on any independent taxable item or event even although this payment may constitute but a partial payment of the entire assessment."[40] The divisible nature of the excise tax,

35. In Sirian Lamp Co. v. Manning, 123 F.2d 776 (3d Cir. 1941), the court of appeals reversed the lower court and allowed a refund suit instituted against the collector where only partial payment of the deficiency assessment had been effected. This was contrary to an earlier sentiment expressed by the same court in Suhr v. United States, 18 F.2d 81 (3d Cir. 1927). There, in dictum, it was asserted that "there is no provision for refund to the taxpayer of any excess payment of any installment or part of his tax, if the whole tax for the year has not been paid." Suhr v. United States, supra at 83. In the Sirian case, the appellate court disallowed the reasoning below that recovery of a portion of a tax would necessarily prevent the collection of the remainder due while suit was pending. Sirian Lamp Co. v. Manning, supra at 778-79.

A similar attitude was manifested earlier in Coates v. United States, 111 F.2d 609 (2d Cir. 1940), where suit was started to recover two installments paid on an income tax return. The court of appeals allowed the suit and denied that the taxpayer had to "pay the remaining installments indicated by the incorrect return on pain of losing his remedy to recover the overpayment." Coates v. United States, supra at 610. While the suit was pending, the taxpayer had paid the remaining installments due on his tax return at the demand of the collector. This fact was not mentioned by the court. But cf. Bendheim v. Commissioner, 214 F.2d 26, 28 (2d Cir. 1954), where the court claimed that "the payment of the amount claimed to be due is the prerequisite to a suit in a federal court for a refund"; and Rogers v. United States, 155 F. Supp. 409 (E.D.N.Y. 1957), which followed the Bendheim ruling. The division in the Second Circuit was again evident in Hanchett v. Shaughnessy, 126 F. Supp. 769 (N.D.N.Y. 1954), which adhered to the partial payment view enunciated in the Sirian case. The Hanchett decision was cited with approval in Bushmiaer v. United States, 230 F.2d 146 (8th Cir. 1956).

36. 357 U.S. at 75. See note 35 supra.

37. See, e.g., Sirian Lamp Co. v. Manning, 123 F.2d 776 (3d Cir. 1941); Coates v. United States, 111 F.2d 609 (2d Cir. 1940).

38. Int. Rev. Code of 1954, § 7421.

39. 357 U.S. at 75-76.

40. Jones v. Fox, 162 F. Supp. 449, 468 (D. Md. 1958).

as distinct from the inseparable and single character of income taxes, renders such an approach possible.[41]

While the present Court denied the existence of hybrid remedies for contesting tax deficiencies, provision is made for such in the current Internal Revenue Code. Until the passage of Internal Revenue Code of 1954, section 7422(e),[42] concurrent jurisdiction could be exercised by both the federal district court (or the Court of Claims) and the Tax Court. This situation would arise where the taxpayer had filed a suit for refund in the federal court, and while the suit was pending, a notice of deficiency was subsequently issued by the Internal Revenue Service and the same was then appealed to the Tax Court.[43] Section 7422(e) gives the taxpayer an election of remedies, if the notice of deficiency is issued *before* the case is heard in federal court.[44] If appeal is made to the Tax Court, the federal court will lose jurisdiction; in the absence of an appeal, the taxpayer has the same burden of proof as though he had appealed to the Tax Court. In this manner, the taxpayer will have succeeded in bringing a suit in the federal courts for a judicial determination of his entire tax liability without having paid the entire additional tax deficiency demanded by the Government.[45]

It is submitted that the decision in the instant case has not fully resolved the confusion existing in the field of tax refund litigation. While the Court recognized that its opinion would result in hardships to some taxpayers,[46] it referred any remedial action to Congress. The Court chose to undertake a construction of the statutes that enhances and supports the governmental fiscal policy. Nonetheless, the Court arrived at its conclusions by way of an unwar-

41. Ibid. This point was discussed at length in Friebele v. United States, 20 F. Supp. 492, 493 (D.N.J. 1937), where the court commented that "income taxes and estate taxes flow from calculations involving complicated considerations of credits, exemptions . . . . The resulting tax has been influenced by and reflects these considerations. They are not normally separable as in the case of the stamp tax. It is a wise law that governs their prepayment before suit can be brought. Otherwise, the power of collection of taxes would be continuously impeded and rendered practically useless. But in the case of these separable items the issue is clear-cut. There can be no complicated questions of credits, exemptions, and the like. It is simply an issue of whether or not the stamp should be applied and in what amount." This emphasis on the inseparable character of an income tax assessment would seem to support the contention of the instant opinion that full payment of income taxes is a prerequisite to litigation. But there is nothing to prevent governmental collection of the balance of taxes due, in the absence of an appeal to the Tax Court.

42. See S. Rep. No. 1622, 83d Cong., 2d Sess. 610-11 (1954).

43. Ibid.

44. Ibid.

45. Yet this explicit choice granted by Congress is subject to defeat by the administrative act of asserting a deficiency prior to the commissioner's rejection of the refund claim, since the latter is a prerequisite to any suit in the courts. This aspect of the problem was pointed out by the court in Jones v. Fox, 162 F. Supp. 449, 468 (D. Md. 1958).

46. Since claims for refunds must be filed within three years after the due date for the filing of the return, or within two years after the payment of the tax, whichever comes later, a taxpayer paying his taxes in installments may lose his right of appeal if the entire tax is not paid until after the relevant statute of limitations for such claims has elapsed. See Int. Rev. Code of 1954, §§ 6511, 6532; 3 Rabkin & Johnson, Federal Income, Gift and Estate Taxation, §§ 72.04, 76.03 (1956). See criticism of Dean Erwin Griswold of Harvard Law School as reported in N.Y. Times, October 27, 1958, p. 27, col. 1.

ranted dependence upon the *Cheatham* dictum. Its examination of the legislative history of the relevant statutes was apparently colored by what it asserted was the commonly accepted statutory scheme of full payment before litigation as expressed in the *Cheatham* case.[47] Starting out from its self-pronounced assumption of full payment, the Court endeavored to bolster its position by drawing inferences from congressional documents that could have also been employed to support the opposite viewpoint. A proper solution would seem to require legislative reformation to clarify congressional intent, rather than judicial legislation.

Labor Relations — Effect of Hot Cargo Clauses in Collective Bargaining Agreements.—In three separate cases, the National Labor Relations Board issued cease and desist orders against three unions for violation[1] of section 8(b)(4)(A) of the Taft-Hartley Act, notwithstanding the existence of hot cargo clauses[2] in the collective bargaining agreements between the respective unions and their employers. The United States Court of Appeals for the Ninth Circuit enforced the Board's order against one of the unions. The court of appeals for the District of Columbia enforced it against another because it was not a party to the collective bargaining agreement and could not rely on the hot cargo clause as a defense, but it set aside the order against the third, accepting the hot cargo clause as a defense to charges filed under section 8(b)(4)(A) of the act. The United States Supreme Court granted certiorari because of con-

47. See note 26 supra and accompanying text. Following the decision in Sirian Lamp Co. v. Manning, 123 F.2d 776 (3d Cir. 1941), there were again several tax refund suits in which full payment of the tax claimed by the government as due was not made prior to litigation. The jurisdictional issue over nonpayment was not raised by the Government in these cases. See, e.g., Kavanagh v. First Nat'l Bank, 139 F.2d 309 (6th Cir. 1943) (corporation and excess profits tax); Snyder v. Westover, 107 F. Supp. 363 (S.D. Cal. 1952), rev'd on other grounds, 217 F.2d 928 (9th Cir. 1954) (income tax); Jack Little Foundation v. Jones, 102 F. Supp. 326 (W.D. Okla. 1951) (corporate income tax); Terrell v. United States, 64 F. Supp. 418 (E.D. La. 1946) (estate taxes). Subsequent to Hanchett v. Shaughnessy, 126 F. Supp. 769 (N.D.N.Y. 1954), the Government again failed to raise the issue of jurisdiction. See, e.g., Perry v. Allen, 239 F.2d 107 (5th Cir. 1956) (income tax); Gallagher v. Smith, 223 F.2d 218 (3d Cir. 1955) (income tax); Lewis v. Scofield, 57-1 U.S. Tax. Cas. ¶ 9251 (W.D. Tex. 1956), aff'd, 251 F.2d 128 (5th Cir. 1958) (income tax); Wheeler v. Holland, 120 F. Supp. 383 (N.D. Ga. 1954), aff'd per curiam, 218 F.2d 482 (5th Cir. 1955) (income tax); Dickstein v. McDonald, 149 F. Supp. 580 (M.D. Pa. 1957), aff'd per curiam, 255 F.2d 640 (3d Cir. 1958) (income tax); Freeman v. United States, 58-1 U.S. Tax Cas. ¶ 9309 (S.D. Cal. 1958) (income tax); Peters v. Smith, 54-2 U.S. Tax Cas. ¶ 9543 (E.D. Pa. 1954), rev'd on other grounds, 221 F.2d 721 (3d Cir. 1955) (income tax).

1. The complaint was that the unions induced and encouraged employees not to handle certain non-union material over the objection of employers. 357 U.S. 93, 95 (1958).

2. A hot cargo clause is an agreement by an employer as part of a collective bargaining contract with the union to permit his employees to refuse to handle the goods of an "unfair employer," that is, an employer involved in a labor dispute. McAllister Transfer, Inc., 110 N.L.R.B. 1769, 1777 (1954).

flicts among the circuits as to the meaning of the section and affirmed as to the first two, but reversed as to the third union. A provision in a labor agreement by which an employer agrees that his employees shall not be required to handle non-union material is not a defense to union actions which would otherwise be violative of section 8(b)(4)(A) of the Labor Management Relations Act. *Local 1976 United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958).

At common law a neutral employer not involved in a labor dispute could enjoin work stoppages designed to pressure him into boycotting the products of another employer who was engaged in a labor controversy.[3] Such work stoppages were immunized from injunction by the provisions of the Norris LaGuardia Act of 1932,[4] but Congress nullified this immunity with the enactment of the Labor Management Relations Act of 1947 (Taft Hartley Act)[5] which made it an unfair labor practice for a union to encourage or induce employees to engage in a "strike or a concerted refusal" to work for the purpose of forcing an employer to cease doing business with another party.

Since the language of section 8(b)(4)(A) of the Labor Management Relations Act contains a prohibition against specific types of coerced secondary boycotts, it has been generally accepted that voluntary secondary boycotts do not come within the condemnation of the act. However, the courts, the NLRB, and the individual members of the Board have been at odds in construing the act with respect to a case in which the collective bargaining agreement contains a hot cargo clause.[6]

When first presented with the problem, the NLRB in *Conway's Express*[7] enunciated what might be called the "consent in advance" theory. Reasoning that the act nowhere expressly forbids an employer's voluntary agreement to boycott non-union material, the Board concluded that there was no violation of the act when the employer in effect consented to the boycott in advance by agreeing to the hot cargo clause.[8] "Consent in advance to honor a hot cargo

3. Frankfurter & Greene, The Labor Injunction 43 (1930).

4. 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1952).

5. 61 Stat. 136 (1947), 29 U.S.C. §§ 141-88 (1952). Section 158(b)(4)(A) provides:

"(b) It shall be an unfair labor practice for a labor organization or its agents . . .

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer . . . or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person. . . ."

6. For an excellent discussion of the problems posed by the hot cargo clause see Comment, 26 Fordham L. Rev. 522 (1957).

7. 87 N.L.R.B. 972 (1949), enforcement granted sub nom., Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952).

8. 87 N.L.R.B. at 982. The Conway Doctrine was followed in Pittsburgh Plate Glass Co., 105 N.L.R.B. 740 (1953). There the Board introduced the further point that in order to have a violation of the act the employees' refusal must have been within their "course of employment." Handling unfair goods was not in the course of employment since it was excluded under the hot cargo clause in the bargaining agreement.

clause is not the product of the union's 'forcing or requiring any employer . . . to cease doing business with any other person.' "[9] The Court of Appeals for the District of Columbia[10] as well as the court of appeals for the Second Circuit[11] followed this line of reasoning.

A second approach to the question was illustrated by the majority of the Board in the *Sand Door & Plywood Co.* case.[12] Here, the decision to honor the hot cargo clause was held to be within the exclusive discretion of the employer exercised at the time the specific dispute arose. Under this view, any union attempt to influence the neutral employer's decision by appealing to his employees to assert their rights under the contract would be violative of the act. This position was adopted by the courts of appeal for the Sixth and Ninth Circuits.[13]

In *McAllister Transfer, Inc.*,[14] the two members of the Board viewed hot cargo clauses as contrary to public policy and therefore void. By interpreting the act as prohibiting all secondary boycotts, the Board could not but conclude that the secondary employer is incapable as a matter of law to acquiesce in advance to the enforcement of a hot cargo clause.[15]

In the instant case, Mr. Justice Frankfurter, following the rationale underlying the second approach, found the hot cargo clause to be legal but unenforceable. He reasoned that the act did not ban all secondary boycotts but only those brought about as a result of union inducement or coercion. It follows that any union inducement of employees which would violate the act in the absence of a hot cargo clause is likewise prohibited when such a clause is incorporated into the collective bargaining agreement. In brief, the hot cargo clause was considered to be legally irrelevant on the issue of an alleged violation of section 8(b)(4)(A).

In the Court's view, the Taft Hartley Act reserved to the employer the

9. Rabouin v. NLRB, 195 F.2d 906, 912 (2d Cir. 1952).

10. General Drivers Union v. NLRB, 247 F.2d 71 (D.C. Cir. 1957).

11. Milk Drivers Union v. NLRB, 116 N.L.R.B. 1408 (1956), rev'd, 245 F.2d 817 (2d Cir. 1957); Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952).

12. 13 N.L.R.B. 1210 (1955), aff'd sub nom. NLRB v. Local 1976, United Brotherhood of Carpenters, 241 F.2d 147 (9th Cir. 1957). This is one of the cases on appeal in the instant case.

13. NLRB v. Local 11, United Brotherhood of Carpenters, 242 F.2d 932 (6th Cir. 1957); NLRB v. Local 1976, United Brotherhood of Carpenters, 241 F.2d 147 (9th Cir. 1957). In the American Iron and Machine case, 115 N.L.R.B. 800 (1956), the Board extended the Sand Door doctrine so that any inducement or appeal to employees to refuse to handle hot goods is a violation of the Labor Management Relations Act, whether or not the employer acquiesces in the union's demands.

14. 110 N.L.R.B. 1769 (1954). The Board reasoned that secondary employees should not be allowed to accomplish by agreements that which is clearly inimical to the public interest by congressional enactment. This view was first introduced by Member Reynolds in his partly concurring and partly dissenting opinion in Conway's Express, 87 N.L.R.B. 972 (1949).

15. See Member Rodgers' concurring opinions in the Sand Door & Plywood Co. case, 113 N.L.R.B. 1210 (1955) and the American Iron case, 115 N.L.R.B. 800 (1956). See also Comment, 26 Fordham L. Rev. 522 (1957).

right to choose whether to acquiesce in the boycott when the concrete situation arose, and such a choice must, as a matter of federal policy, be available to the neutral employer regardless of any previous agreement on his part. The Court also noted the possibility that an employer might have been forced to agree to a hot cargo clause by coercion in the form of threatened strikes at the time of the bargaining, and concluded that, "to allow the union to invoke a provision to justify conduct that in the absence of such a provision would be a violation of the statute might give it the means to transmit to the moment of boycott, through the contract, the very pressures from which Congress has determined to relieve secondary employers."[16] However, it is hardly valid to argue that the act condemned coercion in the abstract, that the collective bargaining agreement may have resulted from coercion and, therefore, consent given *cannot* be carried forward to the time of the actual boycott. There is no reason why a collective bargaining agreement, like any other contract, should not be accorded prima facie validity.

Mr. Justice Douglas, dissenting, stated that enforcement of a collective bargaining agreement is not one of the coercive practices at which the statute is aimed. In his view, the statute outlaws all coerced secondary boycotts, and whereas the reason an employer agrees to a hot cargo clause can only be surmised, it is certain that where he voluntarily agrees to it, he is not coerced in the statutory sense.[17] The dissent considered the present decision capricious in that it makes the legality or illegality of a boycott depend upon whether or not the employer decides to live up to his collective bargaining agreement.

In view of the purpose of the Taft Hartley Act, "to promote the full flow of commerce . . . and to protect the rights of the public in connection with labor disputes affecting commerce,"[18] it is reasonable to conclude, as the Court did, that section 8(b)(4)(A) of the act was intended to assure the secondary employer, as a matter of federal policy, the right freely to choose whether to engage in a secondary boycott at the time the concrete situation arises. Such an interpretation would preclude an enforceable consent in advance such as is proposed by Mr. Justice Douglas in the instant case. But does not such an interpretation also, by necessary implication, import that Congress likewise intended to declare hot cargo clauses themselves within the condemnation of the act?

The Court's position is a middle ground between outright condemnation of the hot cargo clause and Mr. Justice Douglas' dissent which is in effect an outright acceptance of the clause as a defense to charges brought under section 8(b)(4)(A) of the act. As a result of the Supreme Court's holding in the principal case, we are left with the somewhat anomalous situation wherein the clause is legal of itself but incapable of enforcement.[19] Since the Court considered the hot cargo clause a legal but unenforceable agreement aimed at accomplishing a result the statute was enacted to prevent, it might logically

16. 357 U. S. at 106.

17. 357 U.S. at 113, 114 (dissenting opinion).

18. 61 Stat. 136 (1947), 29 U.S.C. § 141(b) (1952).

19. See Shelley v. Kraemer, 334 U.S. 1 (1948), where a racially restrictive covenant was unenforceable although not held to be illegal.

have escaped this anomaly by declaring such provisions illegal per se. Such a result would be justified were the contractual consent in advance considered an inducement which the act prohibits. So to conclude would vitiate any contractual consent made in advance, but, unlike the position of the Board in *McAllister Transfer, Inc.*,[20] it would still recognize that a neutral employer can voluntarily engage in a secondary boycott.

Labor Relations — State Courts' Jurisdiction Where Tortious Conduct Constitutes an Unfair Labor Practice.—A picket line, by threats of violence, prevented the plaintiff from entering his employer's plant. He brought suit in a state court against the union for malicious interference with the employee's lawful occupation. The Alabama Supreme Court affirmed a judgment in favor of the plaintiff, which the United States Supreme Court, with two Justices dissenting, also affirmed. A common-law right of action for damages resulting from conduct which constitutes an unfair labor practice under Section 8(b)(1)(A) of the Labor Management Relations Act, is not destroyed, regardless of the possibility of obtaining partial relief under the federal act. *United Auto Workers, CIO v. Russell,* 356 U.S. 634 (1958).

When Congress, acting in an area of dominant federal concern and as part of a comprehensive scheme of federal regulation, confers rights and creates remedies with respect to certain conduct, state action conflicting with[2] or supplementing it[3] is invalid. It is often important, however, to determine whether Congress intended to pre-empt the field to share concurrent jurisdiction with the states[4] since, "the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action."[5] The Supreme Court has said that the Labor Management Relations Act "leaves much to the states, though Congress has refrained from telling us how much."[6]

The statute granting the NLRB the authority to prevent any unfair labor practice affecting interstate commerce[7] provides a comprehensive federal procedure for aggrieved parties to follow in such cases. Recognized exceptions exist in cases involving conduct which is neither prohibited nor protected

20. See note 14 supra and accompanying text.

1. Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 141 (1947), 29 U.S.C. § 158(b) (1952). It is "an unfair labor practice for a labor organization . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 157 . . ." of the federal act.

2. Pennsylvania v. Nelson, 350 U.S. 497 (1956).

3. Charleston & W. Carolina Ry. v. Varnville Furniture Co., 237 U.S. 597 (1915).

4. Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 157 (1942).

5. Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 480 (1955).

6. Garner v. Teamsters Union, AFL, 346 U.S. 485, 488 (1953).

7. Section 10(a), 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1952). See U.S. Const. art. I, § 8, cl. 3.

by the Labor Management Relations Act, and is therefore "governable by the State or . . . entirely ungoverned,"[8] and also in cases concerning the state's "historic powers over such traditionally local matters as public safety and order and the use of streets and highways."[9] It is important to note that where Congress has entrusted the NLRB with jurisdiction and the Board refuses to assume it for one reason or another,[10] a state may not automatically receive such jurisdiction.[11]

United Constr. Workers v. Laburnum Constr. Corp.[12] decided in 1954 held that even where the activities of the union constitute an unfair labor practice, the federal act does not deprive the employee of his common-law tort action. Stressing the primary purposes of the act[13] and the fact that it does not provide extensive compensatory procedures,[14] the Court in the instant case concluded that Congress did not intend it to constitute an exclusive pattern of money damage for private injuries.[15] The majority reasoned that if Congress intended to confer such exclusive jurisdiction on the Board, it would have endeavored to provide an adequate substitute for state court procedures for collecting damages.

The majority refused to consider *Garner v. Teamsters Union, AFL*[16] con-

8. United Auto Workers v. Wisconsin Employment Relations Bd., 336 U.S. 245, 254 (1949).

9. Allen-Bradley Local 1111, United Elec. Workers v. Wisconsin Employment Relations Bd., 315 U.S. 740, 749 (1942); accord, United Auto Workers v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956).

10. Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947). The National Labor Relations Board declined jurisdiction because it believed that intervention would not be in furtherance of the purposes of the act. Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957). Budgetary reasons were principally responsible for the NLRB's refusal to accept jurisdiction.

11. 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1952). The ceding by the NLRB of its jurisdiction over an unfair labor practice affecting commerce to a state agency is the exclusive means whereby states may be enabled to act concerning matters which Congress has entrusted to the NLRB. The NLRB can cede jurisdiction only when the employer's operations are predominantly local in character and if the applicable provisions of the state or territorial statute and the rules of decision thereunder are consistent with the corresponding provision of the national act, as interpreted by the board and the courts.

12. 347 U.S. 656 (1954). In the Laburnum case a union demanded recognition in such a violent manner that the employer was forced to abandon a construction project, thereby suffering a monetary loss. A subsequent award of damages to the employer in a Virginia court was affirmed by the United States Supreme Court.

13. 61 Stat. 136 (1947), 29 U.S.C. § 141(b) (1952).

14. 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1952). The NLRB may take "affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, . . . responsible for the discrimination suffered by him. . . ."

15. See Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941). See also Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

16. 346 U.S. 485 (1953). In the Garner case a firm obtained an injunction from a state

trolling. The Court, quoting the *Laburnum* case, declared: "To the extent that Congress prescribed preventive procedure against unfair labor practices, that case [the *Garner* case] recognized that the Act excluded conflicting state procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated."[17] In *International Ass'n of Machinists v. Gonzales*,[18] a related case decided on the same day as the instant case, the Supreme Court reaffirmed the principle that certain wrongful acts, while unfair labor practices, are not pre-empted by the federal act and are, therefore, within the jurisdiction of the state courts.

The dissenting Justices in the instant case argued that the state court lacked jurisdiction, even if the NLRB had no authority to award back pay, and that the existence of such a gap in the remedial scheme of federal regulation is not to be taken as a license for the state to fashion corrective measures.[19] Assuming the Board had authority to compensate for the loss of wages, the dissent reasoned that state action would then be a duplication of remedies and an invalid interference with rights protected by the federal act,[20] and that the states cannot curtail federal power even though the reasons for state intervention be different from that on which federal supremacy has been exercised.[21]

In the minority view, the *Laburnum* case was distinguishable because it involved a suit by an employer against a stranger union for damages caused by interference with the contractual relationship between the employer and a third party while the instant case involved a union recognized as the employee's bargaining agent and with which the employer would have continued relations. In addition, it was noted that here the plaintiff had federal procedures at his disposal, while in the *Laburnum* case no corrective machinery was available. Therefore, there was no compensatory or administrative federal relief with which the state remedy conflicted.[22] Finally the dissenting Justices felt that

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court enjoining a union from attempting by peaceful picketing to coerce the employees into joining their union. The state supreme court reversed the order and the United States Supreme Court affirmed, declaring: "Congress evidently considered that centralized administration . . . was necessary to obtain uniform application of its substantive rules and to avoid . . . conflicts likely to result from a variety of local procedures and attitudes toward labor controversies."

17. 347 U.S. at 665.

18. 356 U.S. 617 (1958). The Court reasoned that since "in the Laburnum case, certain state causes of action sounding in tort are not displaced simply because there may be an argumentative coincidence in facts adducible in the tort action and a plausible procedure before the National Labor Relations Board, a state remedy for breach of contract also ought not be displaced by such evidentiary coincidence, when the possibility of conflict with federal policy is similarly remote." Id. at 621.

19. Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957).

20. See note 16 supra.

21. Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955).

22. The minority believes the rule of the Laburnum case is simply that "a tortfeasor

approval of a state court damage award "assures that the consequence of engaging in an unfair labor practice will vary from state to state."[23] Some courts allow punitive damages. Some do not. Obviously, complaining parties will not seek a cease and desist order and an award of back pay, which the NLRB could grant, if it is possible to secure from a state court compensatory damages plus substantial punitive damages.

The *Laburnum* case opened the door, however slightly, to state regulation. The ruling was necessary since, "Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct."[24] The remedy in the *Laburnum* case, did not conflict in any way with the remedy provided by the federal act. No such reason exists for justifying the holding in the instant case, since here the actual damages suffered were lost wages. Thus, two separate remedies are brought to bear on the same activity.[25]

The NLRB has authority to take affirmative action by awarding back pay if the award will help effectuate the purposes of the federal act.[26] The states can award even punitive damages regardless of its effect on existing labor relations in that state and elsewhere. This, coupled with the length of time necessary to settle a state court case will frustrate the promotion of labor peace and the solution of labor disputes.

The Supreme Court has here placed an important phase of labor regulation in the hands of individual states. The differing attitudes which the various states have toward labor controversies is certain to beget a diversity of decision and a lack of uniformity in labor regulation. Congress created all the relief it thought necessary to accomplish its purpose when it provided for a recovery of lost wages by the injured party. The additional redress under state law will exercise an unwarranted restraint upon labor organizations. The authority thus given to the states is a strategic weapon to hammer out local policy in what was regarded as an area pre-empted by federal law.

Labor Relations — Union's Liability for Wrongful Expulsion.—Plaintiffs were expelled from defendant union after a trial committee's determination adjudging them guilty of dual unionism was adopted at a regular meeting of the membership and upheld by the local Executive Board. A further appeal to the National Executive Committee was still pending when plaintiffs instituted this action for reinstatement and reimbursement for wages lost.[1] The appellate division reversed special term's decision dismissing the com-

should not be allowed to immunize himself from liability for a wrong having no relation to federal law simply because the means he adopts to effect the wrong transgress a comprehensive code of federal regulation." 356 U.S. at 655.

23. 356 U.S. at 651 (dissenting opinion).

24. 347 U.S. at 663-64.

25. 346 U.S. at 498.

26. See note 14 supra.

1. The national union, its affiliated local and the latter's two principal officers were the defendants named in the complaint.

plaint and ordered the union to reinstate the plaintiffs but refused to award damages. The court of appeals modified the appellate court holding and affirmed as modified. Establishing an intra-union group to work for better trade unionism does not constitute dual unionism and is not a proper ground for expulsion and, where wrongful expulsion is accomplished in accordance with the union's constitution, the union is liable in damages for the loss of wages sustained. *Madden v. Atkins,* 4 N.Y.2d 283, 151 N.E.2d 73, 174 N.Y.S.2d 633 (1958).

Courts generally are reluctant to interfere in disputes involving private organizations and their members on the theory, "that the members are, in a sense, one family, and entitled to settle their family jars without outside interference, and in their own way."[2] An appeal, therefore, for judicial settlement of such a dispute will usually be entertained only after the plaintiff has completely exhausted the remedies available to him within the organization.[3] Courts, however, have disregarded the so-called "exhaustion of remedies" rule and assumed jurisdiction where necessary to insure impartiality,[4] or the availability of adequate relief,[5] and also where an unusual delay is involved in procuring a hearing.[6] It was on this latter basis that the court in the instant case assumed jurisdiction. One wrongfully expelled from a union need not futilely continue to seek relief beyond a reasonable time, and should the appellate body fail to hear an appeal within a reasonable time, the plaintiff can be said to have no further adequate remedy within the union and he is entitled to make application to the courts.[7]

Once a court decides to assume jurisdiction in such a dispute, its function is to test the actions of the parties involved against certain objective criteria. The union constitution, considered as a contract of membership, is one such criterion. Where one is expelled for acts not made expellable offenses by the constitution or by-laws, his contract has been violated and the court will order reinstatement.[8] Another criterion would be to determine whether the union proceeding adhered to the elementary requirements of due process.[9]

2. Bricklayers' Union v. Bowen, 183 N.Y. Supp. 855, 858-59 (Sup. Ct. 1920), aff'd mem., 198 App. Div. 967, 189 N.Y. Supp. 938 (4th Dep't 1921).

3. In Havens v. King, 221 App. Div. 475, 480, 224 N.Y. Supp. 193, 199 (3d Dep't 1927), aff'd mem. sub nom., Havens v. Dodge, 250 N.Y. 617, 166 N.E. 346 (1929), where the expelled plaintiff had used only two of the three appeals open to him, the court dismissed the complaint, stating, "it was his duty to exhaust his remedy by appeal within the order."

4. Rodier v. Huddell, 232 App. Div. 531, 250 N.Y. Supp. 336 (1st Dep't 1931).

5. Brown v. Order of Foresters, 176 N.Y. 132, 68 N.E. 145 (1903).

6. Ibid. But cf. Keller v. Lindelof, 268 App. Div. 877, 50 N.Y.S.2d 705 (2d Dep't 1944), aff'd mem., 294 N.Y. 717, 61 N.E.2d 452 (1945), where it was held that plaintiff had to exhaust his remedies even though he would be unable to conduct his next appeal for more than two years.

7. The plaintiffs in the instant case had waited four to six months to obtain a hearing before resorting to the courts.

8. Polin v. Kaplan, 257 N.Y. 277, 281, 177 N.E. 833, 834 (1931), declared: "The Constitution and by-laws of an unincorporated association express the terms of a contract which define the privileges secured and the duties assumed by those who have become members."

9. In Glauber v. Patof, 183 Misc. 400, 47 N.Y.S.2d 762 (Sup. Ct.), aff'd mem., 269

The principal case involved an expulsion for a cause set forth in the constitution, and due process was observed. In such a case, as the concurring opinion pointed out, the only question posed is whether there is sufficient evidence for an honest mind to reach the conclusion of the union, or whether the record is so bare of evidence to sustain the decision as to show the union's decision to be purely arbitrary. This, of course, is largely a factual determination and it was on this factual basis that the appellate division reversed in the case at bar.

The contrary conclusions reached by special term and the appellate courts in the principal case evidence completely divergent philosophies of trade unionism. Whereas the trial court stressed the divisive effects of criticism within the union, and concluded that the union membership should be allowed to decide what is or is not for the good of the union, the court of appeals took a broader view, and wisely upheld "the right to criticize current union leadership and, within the union, to oppose such leadership and its policies"[10] on the ground that "a labor union profits, as does any democratic body, more by permitting free expression and free political opposition than it may ever lose from any disunity that it may thus evidence."[11] The trial court's decision would in effect give unchecked powers to the union and would deprive the membership of protection against the oppressive measures of intolerant majorities or high-handed union officers. To curtail the right of fair criticism could never be for the good of the union no matter what the majority of its members may have decided, and any provisions in the union constitution suppressing this right would be declared void and unenforceable.[12]

Having determined that the plaintiffs be reinstated for wrongful expulsion, the court awarded damages against the union. To sue a union at common law, all of its individual members had to be named and joined.[13] By statute in New York,[14] however, the plaintiff has been relieved of the necessity of naming all the members, but not of showing the liability of all.

Some cases have interpreted the requirement that all members be liable quite literally. In a relatively early case,[15] the court of appeals reversed a lower court which had awarded damages for wrongful expulsion, holding that

App. Div. 687, 54 N.Y.S.2d 384 (1st Dep't 1944), rev'd on other grounds, 294 N.Y. 583, 63 N.E.2d 181 (1945), the court observed that the proceedings need not take on the formalities of a court proceeding, but must satisfy the elementary requirements of any judicial proceeding, viz., notice of charges, a hearing, and a fair trial with impartial judges.

10. 4 N.Y.2d at 293, 151 N.E.2d at 78, 174 N.Y.S.2d at 640.

11. Ibid.

12. Schrank v. Brown, 192 Misc. 80, 83, 80 N.Y.S.2d 452, 455 (Sup. Ct. 1948).

13. The federal rule is an exception. United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1932).

14. N.Y. Gen. Ass'ns Law § 13: "An action or special proceeding may be maintained, against the president or treasurer of such an association . . . upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of . . . their liability therefor, either jointly or severally."

15. People ex rel. Solomon v. Brotherhood of Painters, 218 N.Y. 115, 112 N.E. 752 (1916).

facts must be alleged and proven which render all the members of the association liable for the sum claimed. As *Browne v. Hibbets*[16] stated, "plaintiff's right to recover damages depends upon proof of facts rendering all the members of the association liable for the sum claimed. . . . In the absence of allegations and proof of fraud or bad faith on the part of the membership as a whole, no recovery of damages may be obtained."[17] The court of appeals in the instant case declined to follow *Browne v. Hibbets* and similar cases, finding them distinguishable on a factual basis which they did not mention. An examination of the cases that were relied on, however, discloses that not one of them took up the issue of whether damages could be awarded against an unincorporated association.

The court in the instant case did discuss the issue and laid down the rule that "where it [wrongful expulsion] is brought about by action on the part of the membership, at a meeting or otherwise, in accordance with the union constitution, the act of expulsion will be regarded as the act of the union for which damages may be recovered from the union funds."[18] The problem of the liability of all the members is clearly disposed of by the court's statement that, "the requisite participation of the membership was sufficiently shown to justify liability against the organization, even though not against individual members."[19] Thus, it will no longer be necessary to show actual personal liability of all or any percentage of the membership, for, under the union constitution, considered as a contract of membership, all the members are liable jointly but not necessarily severally[20] for the wrongs committed by those to whom they have delegated authority when that authority is exercised in accordance with the constitution. The decision, then, is a recognition both of the necessity for allowing honest dissension within a union and of the need for judicial curbs on the power of a union over its membership, especially where wrongful deprivation of union membership may be a serious interference with a member's ability to earn a living.

Although the court of appeals maintained that it was merely following established law, its precedents were vague and of dubious authority, so that the instant case must be taken as the first clear statement of the law of New York on the point of damages. The rationale behind the awarding of damages in such cases is given for the first time, namely, that it is not too much to require the union to assume responsibility for the wrongful expulsion of a member by a number less than all where the membership has expressly provided for such a delegation of disciplinary power. By sanctioning the delegation of authority,

16. 290 N.Y. 459, 49 N.E.2d 713 (1945).

17. Id. at 467, 49 N.E.2d at 717.

18. 4 N.Y.2d at 296, 151 N.E.2d at 79, 174 N.Y.S.2d at 642.

19. Ibid.

20. The concurring opinion saw no reason why the defendant, being sued individually as well as in his capacity as an officer, was not held individually liable for damages. It does appear that the association and the individual can both be liable. April v. Baird, 32 App. Div. 226, 52 N.Y. Supp. 973 (2d Dep't 1898); Lubliner v. Reinlib, 184 Misc. 472, 50 N.Y.S.2d 786 (Sup. Ct. 1944).

the membership subjects the funds of the union to liability for the abuse of such power by those entrusted with it . . . a contrary result would have far-reaching consequences. If one wrongfully expelled has no redress for damage suffered, little more is needed to stifle all criticism within the union.[21]

Negligence — Intervening Insanity of Third Person Unforeseeable by Defendant.—One Richard Springstead sustained injuries as the result of the negligent operation of an automobile driven by the defendant. Seven years later Springstead shot and injured the plaintiff. Plaintiff alleged that as a result of the initial automobile accident, Springstead at the time of the shooting was unable to realize the nature and consequences of his act, was not able to resist pulling the trigger of the rifle, and was deprived of his capacity to govern his conduct in accordance with reason. The New York Supreme Court, Special Term, granted the defendant's motion for a judgment on the pleadings. The court held as a matter of law that the defendant's negligence was not of such a nature as to be the proximate cause of the plaintiff's injuries. *Firman v. Sacia,* 11 Misc. 2d 243, 173 N.Y.S.2d 440 (Sup. Ct. 1958).

The question of proximate cause arises when it has been decided that the defendant's act was in fact one of the causes of the plaintiff's injuries.[1] There are many widely varying concepts as to what should be the proper formula for determining proximate cause.[2] The New York courts have variously employed the "but for" test,[3] the "substantial factor" test,[4] the "direct results" test,[5] the "natural and probable consequences" or "foreseeability" test,[6] and have at times used some of these tests jointly.[7] In the instant case the court relied

21. 4 N.Y.2d at 296, 151 N.E.2d at 80, 174 N.Y.S.2d at 643.

1. See Prosser, Torts § 47 (2d ed. 1955).

2. See generally, 2 Harper & James, Torts §§ 20.4-20.6 (1956); Prosser, op. cit. supra note 1, §§ 47-50; James & Perry, Legal Cause, 60 Yale L.J. 761 (1951).

3. The "but for" test is generally used in those cases where there are concurring causes contributing to the injury. See, e.g., Thompson v. Town of Bath, 142 App. Div. 331, 126 N.Y. Supp. 1074 (4th Dep't 1911), aff'd, 205 N.Y. 573, 98 N.E. 1117 (1912).

4. "The negligent act must be regarded as one of the actual causes of the injury if it was a substantial factor in bringing the injury about (Restatement, Torts § 431)." Rugg v. State, 284 App. Div. 179, 182, 131 N.Y.S.2d 2, 6 (3d Dep't 1954).

5. The court said in McCahill v. New York Transp. Co., 201 N.Y. 221, 223; 94 N.E. 616, 617 (1911): "[A] negligent person is responsible for the direct effects of his acts . . . ." "'Direct' consequences are those which follow in sequence from the effect of the defendant's act upon conditions existing and forces already in operation at the time, without the intervention of any external forces which come into active operation later." Prosser, op. cit. supra note 1, § 48.

6. See, e.g., Saugerties Bank v. Delaware & Hudson Co., 236 N.Y. 425, 430, 141 N.E. 904, 905 (1923), where the court said that if the consequences were only made possible by the intervening act of a third person which could not have reasonably been anticipated, the act of the defendant would not be the proximate cause of the consequences. This test is used primarily in those cases where an independent intervening force comes into play after the defendant's negligence.

7. In Hartman v. Berlin & Jones Envelope Co., 71 Misc. 30, 127 N.Y. Supp. 187 (Sup.

upon the foreseeability doctrine to grant the defendant's motion, ruling that "an act or omission does not constitute actionable negligence, unless a reasonably prudent person, placed in the position of the actor, would have foreseen the probability of harm resulting from his acts or omissions."[8]

Proximate cause will always depend upon the particular facts of each case,[9] and the court must be expected to base its decision upon those prior cases involving those facts which most closely resemble the factual situation before it.[10] Was the foreseeability criterion properly suited to the instant facts?

In a substantially similar decision, *Lynch v. Fisher*,[11] the Court of Appeals of Louisiana was confronted with a situation wherein the plaintiff, while aiding the parties to an accident, was shot minutes after the accident by one of the injured parties who had become delirious as a result of the accident caused by the negligence of the defendants. The court held that the doctrine of foreseeability did not protect a defendant whose negligent act set in motion a chain of circumstances leading to the resultant injury.[12]

There is an analogous line of cases in which a party, by reason of his insanity[13] or derangement[14] caused by the defendant's negligence, commits suicide.[15] The landmark in this type of case is *Daniels v. New York, N.H. &*

Ct.), aff'd mem., 146 App. Div. 926, 131 N.Y. Supp. 1119 (2d Dep't 1911), where plaintiff, while trying to lift a barrel was struck by the barrel and thrown onto an unguarded revolving belt, the court required that both the "but for" and the "foreseeability" tests be complied with in order to establish proximate cause. See also Babcock v. Fitzpatrick, 221 App. Div. 638, 642, 225 N.Y. Supp. 30, 33 (3d Dep't 1927), aff'd, 248 N.Y. 608, 162 N.E. 543 (1928), where the court required that the consequence so "directly result" from the negligent act that it might reasonably be expected.

8. 11 Misc. 2d 243, 245, 173 N.Y.S.2d 440, 442.

9. See O'Neill v. City of Port Jervis, 253 N.Y. 423, 433, 171 N.E. 694, 697 (1930); 38 Am. Jur. Negligence § 53 (1941); 1 Street, Foundations of Legal Liability 110 (1906).

10. See Annot., 29 A.L.R.2d 692 (1953).

11. 34 So. 2d 513 (La. Ct. of App. 1947). The court made no reference to this decision, notwithstanding that it was considered in the plaintiff's brief. See Answering Brief for Plaintiff, pp. 6, 7.

12. 34 So. 2d at 518. It might reasonably be argued that this case is distinguishable from the case at hand in that the plaintiff was a rescuer. A negligent act which invites rescue is the proximate cause of injuries sustained by one attempting to rescue those imperiled by the said negligent act. Id. at 517. See also Annot., 19 A.L.R. 13 (1922).

13. "Insanity. . . . In law, such a want of reason, memory, and intelligence as prevents a man from comprehending the nature and consequences of his acts or from distinguishing between right and wrong conduct." Black, Law Dictionary 929 (4th ed. 1951). "Legal insanity . . . is a mental deficiency with reference to the particular act in question and not a general incapacity." Bouvier, Law Dictionary 555 (Baldwin's Century ed. 1926).

14. "This term includes all forms of mental unsoundness, except of the natural born idiot." Black, Law Dictionary 930 (4th ed. 1930).

15. There is also a similar line of decisions where liability for injuries sustained by one who is in a dazed or stunned condition as a result of previous injury is placed on the person responsible for such previous injury. See Wisotsky v. Frankel, 165 N.Y. Supp. 243 (Sup. Ct., App. T. 1917); Annot., 29 A.L.R.2d 690 (1953).

H.R.R.,[16] which set forth the requirement "that the liability of a defendant for a death by suicide exists only when the death is the result of an uncontrollable impulse, or is accomplished in delirium or frenzy caused by the collision, and without conscious volition to produce death, having knowledge of the physical nature and consequences of the act."[17] An act performed in such a mental condition is an involuntary act, and as such does not disturb the line of causation from accident to death.[18] If the act is voluntary, it is considered as an independent intervening cause which breaks the chain of causation.[19] The criterion for determining the defendant's liability for the subse-

16. 183 Mass. 393, 399-400; 67 N.E. 424, 426 (1903) (dictum). The court in this case did not hold the defendant liable because the act of suicide was voluntary and wilful. Thus, the act was such a new and independent agency as to dissever the line of causation from accident to death. Id. at 399, 67 N.E. at 426. The rule enunciated by the Daniels case is at variance with the rule set down in Scheffer v. Railroad, 105 U.S. 249, 252 (1881), where in a similar fact situation the Court held without reservation that suicide was not a natural and probable consequence reasonably to be foreseen, that both the insanity and the suicide were unexpected causes intervening between the initial negligence and subsequent death. The Daniels rule has been referred to as the law in several decisions. Brown v. American Steel & Wire Co., 43 Ind. App. 560, 88 N.E. 80 (1909) (dictum); Long v. Omaha & C.B. St. Ry., 108 Neb. 342, 187 N.W. 930 (1922) (dictum); Arsnow v. Red Top Cab Co., 159 Wash. 137, 292 Pac. 436 (1930) (dictum). It has been applied as the basis of decision in at least one jurisdiction. Elliot v. Stone Baking Co., 49 Ga. App. 515, 176 S.E. 112 (1934).

17. The rule is set out in Restatement, Torts § 455 (1934):

If the actor's negligent conduct so brings about the delirium or insanity of another as to make the actor liable for it, the actor is also liable for harm done by the other to himself while delirious or insane, if his delirium or insanity

(a) prevents him from realizing the nature of his act and the certainty or risk of harm involved therein, or

(b) makes it impossible for him to resist an impulse caused by his insanity which deprives him of his capacity to govern his conduct in accordance with reason.

18. See Elliot v. Stone Baking Co., 49 Ga. App. 515, 176 S.E. 112 (1934), where the court held that an act of suicide while in an insane condition as a result of the defendant's negligence is an involuntary act which does not break the causal connection between the initial negligence and the suicide. "An intervening act which is involuntary and the result of the primary negligence is not sufficient to dissever the chain of causation." 65 C.J.S. Negligence § 111 (1950).

19. While there are no New York decisions which have held the defendant's negligence to be the proximate cause of the plaintiff's suicide, it would seem that if there is sufficient evidence to warrant a finding that the defendant's negligence caused the plaintiff's insanity, thus depriving him of his reason, and consequently causing suicide, the defendant will be liable. See Koch v. Fox, 71 App. Div. 288, 298-99, 75 N.Y. Supp. 913, 920-21 (1st Dep't 1902) (dictum), where the court said that it was not necessary to decide whether the injury was the proximate cause of death as there was not sufficient evidence of insanity, but it did indicate a willingness to hold defendant liable if there had been sufficient evidence. The court observed that an involuntary act of an insane man could not be an efficient independent cause. See also McMahon v. City of New York, 141 N.Y.S.2d 190, 192 (Sup. Ct. 1955), aff'd, 3 App. Div. 2d 713, 159 N.Y.S.2d 266 (2d Dep't 1957), where the court, while holding that the defendant was not liable for a suicide committed by a sane man, did say: "This is not a case where one, who is injured, becomes insane, loses

quent killing of another by one rendered insane through the defendant's negligence should be the same as that applied in determining the defendant's liability for a subsequent suicide.

Of some interest are the workmen's compensation cases involving an employee who commits suicide while in a state of insanity caused by an injury sustained in the defendant's employ. In this type of case the defendant's liability need not be predicated upon any negligence, but only upon an injury arising out of and in the course of employment.[20] Thus, the decisions are of little value in determining whether the foreseeability doctrine is applicable to the instant case.[21] However, the decisions are indicative of the courts' policy in regard to causal connection, i.e., what consequences the court will deem caused by the work-connected injury. The New York courts have held that if the injury causes mental disease,[22] and because of this the plaintiff commits suicide, the employer will be liable.[23] As in the negligence decisions, the courts reason that an act committed in such a state of mind is not an independent intervening force which disturbs the chain of causation between the initial injury and the subsequent suicide.[24]

In the case at hand the defendant's motion for a judgment on the pleadings was granted. On such a motion the allegations in the complaint and the bill of particulars are accepted as true and are construed liberally.[25] They are to be given every fair and reasonable intendment to support the complaint.[26] The court ruled as a matter of law that the shooting of the plaintiff was not a natural and probable consequence that could have been foreseen. The decisions cited by the court in support of its use of the foreseeability test do not involve

his control over his mind and body and takes his life." This would certainly indicate a tendency by the court to find the defendant liable if such elements were present.

20. N.Y. Workmen's Comp. Law § 10.

21. Obviously, where there is no negligence there are no consequences of a negligent act to be foreseen, and furthermore, there is no negligent actor to foresee them.

22. In not mentioning the issue of the knowledge of the nature of the act, and in requiring only a state of mental derangement at the time of the suicide, the New York courts implicitly refute the majority view as stated in the Workmen's Compensation decision of In re Sponatski, 220 Mass. 526, 108 N.E. 466 (1915), which adopted the requirement set forth in the tort case of Daniels v. New York, N.H. & H.R.R., 183 Mass. 393, 399-400, 67 N.E. 424, 426 (1903) (dictum), that in order to hold the defendant liable for the plaintiff's suicide, the plaintiff must have been impelled to act by an uncontrollable impulse, or must have been acting in a state of frenzy or delirium and must not have known the nature of his act.

23. See Maricle v. Glazier, 283 App. Div. 402, 128 N.Y.S.2d 148 (3d Dep't), aff'd, 307 N.Y. 738, 121 N.E.2d 549 (1954); Pushkarowitz v. A. & M. Kramer, 275 App. Div. 875, 88 N.Y.S.2d 885 (3d Dep't 1949), aff'd, 300 N.Y. 637, 90 N.E.2d 494 (1950); Sulfaro v. Pellegrino & Sons, 2 App. Div. 2d 426, 156 N.Y.S.2d 411 (3d Dep't 1956).

24. 1 Larson, Workmen's Compensation § 36.10 (1958).

25. Carmody, New York Practice § 462(b) (7th ed. 1956). See Green v. Doniger, 300 N.Y. 238, 90 N.E.2d 56 (1949); Didier v. MacFadden Publications, 299 N.Y. 49, 85 N.E.2d 612 (1949); Reppert v. Hunter, 180 App. Div. 680, 167 N.Y. Supp. 857 (4th Dep't 1917).

26. Ibid.

the liability of a defendant for the acts of a person insane by reason of the defendant's negligence.[27] Might not the court have cited, with at least equal validity and perhaps greater pertinence, those cases which have held that the act of a person, insane or bereft of reason because of the defendant's negligence, is involuntary, and as such does not disrupt the line of causation from negligence to subsequent injury?

In the instant case there was an interval of seven years between the defendant's negligent act and the injuries to the plaintiff.[28] This lapse of time certainly affords increased opportunity for the intervention of independent causes to break the chain of causation from act to injury. However, as the court observed, the passing of time, by itself, does not prevent the negligent act from being the proximate cause of the subsequent injury.[29] Thus, it would seem that the allegations in the complaint concerning Springstead's mental condition[30] at the time of the shooting were, if not expressly so, at least by implication, sufficient to establish the necessary mental condition required to state a cause of action.

27. O'Neill v. City of Port Jervis, 253 N.Y. 423, 171 N.E. 694 (1930) (injuries resulting from negligent blocking of street); Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928) (explosion on platform); Laidlaw v. Sage, 158 N.Y. 73, 52 N.E. 679 (1899) (explosion in building).

28. The N.Y. Civ. Prac. Act § 49(6) provides that an action to recover damages for a negligent personal injury must be commenced within three years after the cause of action has accrued. It would seem that this limitation is not applicable to the present case as the cause of action did not accrue until the plaintiff was injured. Otherwise, a cause of action might be barred before liability arose. See Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936) (dictum); Giles v. Sears Roebuck & Co., 281 App. Div. 95, 120 N.Y.S.2d 258 (3d Dep't 1953). Furthermore, the plaintiff was an infant. N.Y. Civ. Prac. Act § 60 extends the period of limitation by the period of infancy.

29. 11 Misc. 2d 243, 244, 173 N.Y.S.2d 440, 442. See Brush v. Lindsay, 210 App. Div. 361, 367, 206 N.Y. Supp. 304, 308 (2d Dep't 1924), wherein it is stated that time is immaterial except as it affords an increased opportunity for the assertion of other intervening causes. See Restatement, Torts § 433, comment h (1934), where it is stated that "where it is evident that the influence of the actor's negligence is still a substantial factor, mere lapse of time, no matter how long, is not sufficient to prevent it from being the legal cause of the other's harm." See 1 Warren, Negligence in the New York Courts § 3, at 37 (1941), where it is said that a substantial interval between the act and the injury will not prevent the former from being regarded as the proximate cause of the latter. The defendant in the instant case conceded that the time element was of no significance upon the motion. See Reply Brief for Defendant, pp. 2, 3.

30. The prevailing view in regard to the required mental condition is set forth in the Daniels case. See pp. 458-59 and note 16 supra. The New York workmen's compensation cases require only mental disease at the time of the act, but it must be noted that the court will not necessarily so hold in a tort case. In Koch v. Fox, 71 App. Div. 288, 75 N.Y. Supp. 913 (1st Dep't 1902), a negligence case, the court indicated that if a defendant was to be held liable for the plaintiff's suicide, the plaintiff must have acted under an uncontrollable impulse, or he must not have known the nature and consequences of his act. Nevertheless the allegations in the instant case were sufficient to state a cause of action whether or not the court would follow the majority view or that taken by the New York workmen's compensation decisions.

Workmen's Compensation — Award for Disability Caused by Cerebral Thrombosis Brought About by Mental and Emotional Strain.—Claimant collapsed at her desk while organizing work for the next day. She had a past history of hypertension and was of an overly conscientious nature, often working harder than her duties demanded. The mental and emotional strain of the work aggravated the hypertension and brought about the cerebral thrombosis. An award made by the attorney-referee was affirmed by the workmen's compensation commission and the circuit court. On appeal the Supreme Court of Mississippi, with two justices dissenting, affirmed. The court held that where the mental and emotional strain of an employee's work aggravated a pre-existing hypertension, and such aggravation was a factor contributing to the employee's disability, a workmen's compensation award is proper. On a suggestion of error the court again, with two justices dissenting, affirmed. The court elaborated on its original opinion, and held that the exertions which brought about the collapse included both bodily and mental activities accompanied by stress and strain, all of which are physical in nature. It was held, moreover, that an injury which develops gradually over a reasonably definite and not too remote time is compensable. *Insurance Dep't v. Dinsmore,* — Miss. —, 102 So. 2d 691, *suggestion of error overruled,* No. 40,790, Miss. 1958.

It is quite generally held that to sustain a recovery under workmen's compensation the employment need not be the sole or even the primary cause of the disability so long as it is at least a contributing factor.[1] Moreover, a pre-existing disease or weakness will not bar a claim if it can be shown that the employment aggravated[2] or combined with the previous infirmity to produce disability.[3]

Mississippi is one of the majority of American jurisdictions[4] that has an "accidental injury"[5] requirement in its workmen's compensation statute. The basic ingredient of the accident idea is the unexpected[6] which may inhere

1. An attempt is sometimes made to compare the causation of the employment to the disability in workmen's compensation with the "proximate cause" requirement of torts. This is not very profitable. In torts the primary object is to fix fault and an injury is not compensable unless it is first shown that there was an act or failure to act under circumstances where harm was foreseeable. In workmen's compensation what is first sought is not an act but a relationship between the work and the injury. Moreover lack of foreseeability is not a defense. See 1 Larson, Workmen's Compensation Law § 6.50 (1952) [hereinafter cited as Larson]. Thus, if an employee is struck down by stray bullets fired by persons having no connection with the employer, it is unthinkable that he would have a tort action against his employer. But in some jurisdictions he has an action in workmen's compensation. See, e.g., Baran's Case, 145 N.E.2d 726 (Sup. Judicial Ct. Mass. 1957).

2. See, e.g., Dixie Pine Prod. Co. v. Bryant, 89 So. 2d 589 (Miss. Sup. Ct. 1956); W. G. Avery Body Co. v. Hall, 224 Miss. 51, 79 So. 2d 453 (1955); Ingalls Shipbuilding Corp. v. Byrd, 215 Miss. 234, 60 So. 2d 645 (1952).

3. The injury must, however, arise out of and in the course of employment. 1 Larson § 12.20.

4. 1 id. § 37.10.

5. Miss. Code Ann. § 6998.02 (1952).

6. 1 Larson § 37.20.

either in the cause of the disability or in the effect,[7] the latter being the disability itself. Older decisions show that the courts were once prone to look for the unexpected, that is, the "accidental" in the cause. In practice this meant that a worker could not hope for a recovery unless something in the nature of physical violence happened to him.[8] This was a stringent construction of what was accepted as progressive and "insurance like" legislation, and in most jurisdictions the requirements were soon liberalized. A manifestation of the more liberal view of the accident requirement is seen in the so-called "breakage rule"[9] which holds that if the effect itself is some unexpected, that is *drastic* and *dramatic,* change in the body structure such as a ruptured aorta,[10] a slipped disc,[11] or a cerebral hemorrhage,[12] this itself is enough of an accident without looking for the unusual in the cause. The corollary of this theory is, of course, that where the damage is something more subtle such as a coronary (or cerebral) thrombosis or a myocardial infarction where something merely clogs up or ceases to function instead of breaking, there must be something unusual for a cause.[13]

To hold that a cerebral hemorrhage is more of an accident than a coronary thrombosis is, of course, to enter the domain of medicine rather than law and on rather dubious grounds.[14] In the instant case the appellants attempted to make such a distinction[15] and the court, in its second opinion, found the dis-

7. Ibid.

8. In O'Connell v. Adirondack Elec. Power Corp., 193 App. Div. 582, 185 N.Y. Supp. 455 (3d Dep't 1920), the chief operator of an electrical system who had suffered a heart attack from the exertion of restoring power after an electrical failure could not recover. It was held that no accident had occurred because power failures and the strain of repairing them were to be expected as a normal part of the job.

9. 1 Larson § 38.20.

10. See, e.g., Kayser v. Erie County Highway Dep't, 276 App. Div. 789, 92 N.Y.S.2d 612 (3d Dep't 1949).

11. See, e.g., Pioli v. Crouse-Hinds Co., 281 App. Div. 737, 117 N.Y.S.2d 734 (3d Dep't 1952).

12. See, e.g., Cowart v. Pearl River Tung Co., 218 Miss. 472, 67 So. 2d 356 (1953).

13. "A majority, but a much narrower majority, accept usual exertion as leading to accidental injury when it involves coronary thrombosis, myocarditis, dilation of the heart . . . and the like. Here there is fairly definite structural change in the body in most instances, but the change is a little more subtle than the breaking of an arm or an aorta." 1 Larson § 38.30.

14. "[A]s to the great majority of heart failure cases it seems to be arbitrary and artificial, and may be depended upon to produce some of the most subtle medico-legal distinctions ever attempted." 1 Larson § 38.73. The same author criticizes the whole theory on four grounds: (1) British courts have not required it; (2) "unusual" is not synonymous with "unexpected"; (3) there is seldom any yardstick to measure the usualness or unusualness of the exertion of any occupation; (4) mere unusualness does not connote a greater possibility of medical causation. Id. §§ 38.60-63, 38.81.

15. "It must be borne in mind that claimant suffered a cerebral clot as distinguished from a cerebral hemorrhage, and there was no 'breaking, herniating, or letting go,' as was found necessary in order to meet the 'accident' requirement in Ingalls Shipbuilding Corp., et al., vs. (sic.) Byrd (1952), 215 Miss. 234, 60 So. 2d 645. The Byrd decision necessarily implied

tinction impractical and unrealistic.[16] The instant decision is one of a line of cases which establish that Mississippi does not follow the "breakage rule" and that it would permit recovery without the necessity of proving any unusual exertion.[17] The courts have consistently regarded such a question as medical rather than legal[18] and, in each case, have simply affirmed the conclusion of the triers of the fact provided it was supported by substantial evidence.[19]

The court's first opinion merely implied that the case was decided on the question of physical exertion, but the second opinion stated that holding expressly.[20] The court seemed in its first opinion to trace the cause of the collapse to a specific incident; namely, the fact that before her collapse the claimant was working "above and beyond the call of duty"[21] either because she would be absent the next day or because her superior was expected to check the accounts. The second opinion makes it clear that it did not premise its affirmance on that theory.[22] This factor might have even been enough to satisfy the "breakage test." However, the court seemed to be straining slightly to decide the case on the question of emotional strain. Had it done so it would have entered a new and relatively unexplored field of law. For while

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a force or exertion of some nature by the employment causing a 'breaking, herniating, or letting go'. In the instant case we have a clotting resulting from the inevitable and relentless formation of arteriosclerosis. The clot resulted not because of effort or exertion but in spite of same. The effort or exertion would have deterred the clotting, if anything." Brief for Appellants, pp. 56-57.

16. "The experience of other courts in this field demonstrates that any subtle medico-legal distinction between a cerebral hemorrhage and thrombosis would be impractical and unrealistic." No. 40,790, Miss. Sup. Ct., 1958, p. 3.

17. See, e.g., Pennington v. Smith, — Miss. —, 100 So. 2d 569 (1958) (heart attack from usual exertion); Schilling v. Mississippi State Forestry Comm'n, 226 Miss. 858, 85 So. 2d 562 (1956) (myocardial infarction); W. G. Avery Body Co. v. Hall, 224 Miss. 51, 79 So.2d 453 (1955) (hypertensive encephalopathy or "black-out").

18. See Southern Eng'r & Elec. Co. v. Chester, 226 Miss. 136, 83 So. 2d 811 (1955), as modified, 226 Miss. 136, 84 So. 2d 535 (1956).

19. The substantial evidence requirements are construed very liberally in favor of the claimant and include any evidence which is not inherently unreasonable or unbelievable. See Pearson v. Dixie Elec. Power Ass'n, 219 Miss. 884, 70 So. 2d 6 (1954); Reyer v. Pearl River Tung Co., 219 Miss. 211, 68 So. 2d 442 (1953). The Mississippi Workmen's Compensation statute provides that the commission shall be bound by none of the usual legal rules as to the admissibility of evidence and that the testimony of the claimant, himself, if corroborated by other circumstances, is sufficient to award compensation. Miss Code Ann. § 6998-28(a) (1952).

20. "Mrs. Dinsmore had a strenuous administrative job manifestly involving considerable physical exertion, which phrase includes both bodily effort and mental activity." No. 40,790, Miss. Sup. Ct., 1958, p. 1. "Of course 'work activities' comprehend both bodily and mental activities accompanied by stress and strain, all of which are physical in nature, and all of which are present in this case." Id. at 4.

21. — Miss. —, —, 102 So. 2d 691, 694.

22. "Appellants are in error in interpreting our original controlling opinion as basing compensability upon a specific emotional disturbance of May 4, 1955, or of any prior time period." No. 40,790, Miss. Sup. Ct., 1958, p. 4.

the court has in the past allowed recovery for emotional injuries which were the result of some prior physical injury.[23] The instant case involved the reverse situation—physical injury caused by emotional exertion.

There have been cases where awards were allowed for a disability resulting from naked emotional stress. However, these cases almost invariably involved some extraordinary event, such as an accident to another person, which was found to have produced such fright or alarm in the claimant as to cause a heart attack or other injury.[24] It should be noted that such disabilities ensued from "accidental" causes, thus satisfying the accidental factor.

The instant case would have been novel had it allowed a recovery for what would have been a usual emotional exertion of an occupation rather than some extraordinary emotional strain.

The second opinion, however, makes it obvious that the court's initial use of emotional strain as the only causative factor of the disability was dicta. Those definitive statements, nevertheless, may well be persuasively employed in the future by courts which may find themselves confronted with a case which turns upon sheer emotional stress.

Certainly, as Professor Larson points out,[25] workmen's compensation is a field which is as much the province of the medical profession as the legal. If the expert medical witnesses and the semi-expert commissioners can find a causal connection between the emotional stress of the employment and the injury, there is no reason for the courts to bar the way. From the "fright" cases, it is clear enough that some courts have been willing to accept the basic proposition that mental stress can be productive of compensable injury. Once the courts have accepted disabilities resulting from mental strain as compensable, there seems to be no reason why they should be less willing to allow compensation for injuries caused by routine mental exertion than by routine physical exertion. As pointed out above, the "fright" cases present no problem because there is an "accidental" quality in the cause of the injury. However, in the case of physical exertion, the more liberal jurisdictions such as Mississippi do not require that there be any such "accidental" factor in the cause if a causal connection can be established between the exertion and the injury, such connection being regarded as a question of fact rather than law. It is reasonable to apply the same principle to cases of emotional stress and thus avoid an attempt to find something extraordinary in the exertion itself if the triers of the fact can find a causal relation between it and the disability.

23. See Harper Foundry & Mach. Co. v. Harper, — Miss. —, 100 So. 2d 779 (1958), where claimant suffered a heart attack from the nervous strain of the treatment for a burn which was itself an industrial accident. See also Reyer v. Pearl River Tung Co., 219 Miss. 211, 68 So. 2d 442 (1953), where claimant's disability was partially psychological in nature but which was brought about by a highway accident.

24. See, e.g., Roberts v. Dredge Fund, 71 Idaho 380, 232 P.2d 975 (1951) (heart attack from nearby explosion); Reynolds v. Public Serv. Coordinated Transp., 21 N.J. Super 528, 91 A.2d 435 (App. Div. 1952) (excitement of minor traffic accident causing cerebral hemorrhage).

25. 1 Larson § 12.20.

It has been said that emotions are too speculative[26] to be posited as a basis for compensation. It might also be questioned whether the medical acumen of appellate tribunals is such, as to certify that the *physical* exertion in any particular workmen's compensation case is not too speculative to serve as the cause of compensable injury. Yet in such cases the question of medical causation is left to the triers of the fact.[27] Certainly there would seem to be no reason to believe that the triers of the fact would be less capable of reaching an intelligent determination in the case of emotional stress.

In addition to the unexpectedness criterion most jurisdictions have added to the accident concept the requirement that the injury be traceable to a definite time or occasion.[28] This too may apply to either the cause or the effect.[29] When, as in the instant case, there is a disability which occurs fairly suddenly and which can be pinpointed to a specific point of time, there is usually no problem.[30] When dealing with the instant type of disability, even in those jurisdictions which follow the "breakage rule" and look to the cause rather than the effect, there is still a question of degree as to how definite is "definite."[31] The cause does not have to be confined to a single instant but some reasonable latitude[32] from a few hours to a few weeks is allowed.

The cause of the instant injury occurred over a four month period and, although time is not too important in the instant case since there was a sudden collapse, Mississippi has shown in the past that it is as liberal in the definiteness requirement as it has been in the unexpectedness requirement. Indeed,

26. Odell v. McGovern, 283 App. Div. 585, 129 N.Y.S.2d 115 (3d Dep't), aff'd per curiam, 308 N.Y. 678, 124 N.E.2d 319 (1954).

27. See note 16 supra.

28. 1 Larson § 37.20.

29. 1 id. § 39.10.

30. "As to suddenness of result: in various situations an otherwise gradual kind of deterioration may culminate in an obvious and sudden collapse or structural change whose incidence can fix the date of accident clearly. Weeks of overwork and strain may lead to coronary thrombosis. . . . An examination of the unsuccessful cases will reveal very few in which a clean-cut collapse occurred." 1 id. § 39.30.

31. See, e.g., Masse v. James H. Robinson Co., 301 N.Y. 34, 92 N.E.2d 56 (1950) (a week of unusually hard work); Furtado v. American Export Airlines, Inc., 274 App. Div. 954, 83 N.Y.S.2d 745 (3d Dep't 1948) (working seven days a week, twelve hours a day for an unspecified time).

32. "Put negatively, this is merely to say that injury, to be accidental, need not be instantaneous. If, then, the exposure or other cause is brief and sudden, there is usually no further difficulty about time, and the consequence may be gradual deterioration. . . . The tendency to recognize longer and longer periods as sufficiently identifiable times of accident has in some of the cited cases carried the permissible duration of the cause far beyond a few hours or days, to weeks or even months in some instances." 1 Larson § 39.20.

four months is rather conservative when compared with the time element in some of the cases[33] which have found favor with the court.[34]

33. In the instant case the court cited Hardin's Bakeries, Inc. v. Ranager, 217 Miss. 463, 64 So. 2d 705 (1953) where the claimant developed his disability somewhere over the course of three years. In the latter case the court cited with approval a great many foreign cases including Scobey v. Southern Lumber Co., 218 Ark. 671, 238 S.W.2d 640 (1951) (a year and a half) and Webb v. New Mexico Publishing Co., 47 N.M. 279, 141 P.2d 333 (1943) (six months).

34. It has been argued that once the unexpectedness test is met the further requirement of definiteness is unnecessary. In Macklanburg-Duncan Co. v. Edwards, 311 P.2d 250, 253-54 (Okla. 1957), where the claimant developed neuritis from handling steel wool over an eight year period, the court said: "The adjective 'accidental' is not a technical term but a common one, whose popular usage would not necessarily mean that the words 'accidental injuries' indicated the existence of an accident, but rather the idea that the injury was either unintended or unexpected."

Larson also points out that: "When the phrase 'accidental injury' is used, or the equivalent phrase 'injury by accident,' there is no occasion as a matter of grammar, to read the phrase as if it referred to 'an accident,' and then proceed to conduct a search for 'the accident'." 1 Larson § 37.20.