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Case Notes

CASE NOTES

Constitutional Law — Freedom of the Press Not Affected by New York City's Gross Receipts Tax.—The Comptroller of the City of New York determined that the petitioner was liable for payment of the New York City General Business and Finance Tax ("gross receipts tax")[1] for the sale or license of his literary works within New York City. The court unanimously affirmed, holding that while the literary activities of an author[2] fall under the protection of the constitutional guarantee of freedom of the press, a gross receipts tax on all trades, businesses, professions, and commercial activities does not contravene constitutional guarantees when applied to the sale or license of rights in literary works. *Steinbeck v. Gerosa,* 4 N.Y.2d 302, 151 N.E. 170, 175 N.Y.S.2d 1 (1958).

The first amendment to the Federal Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[3] There is no similar express limitation on the power of the state governments in the Federal Constitution, but freedom of the press is considered one of the fundamental rights protected by the due process clause of the fourteenth amendment,[4] which is binding upon the states.[5] Although the primary purpose of this guarantee in the Constitution is to prevent prior restraints on publication,[6] the framers of the Federal Constitution meant to prohibit any means by which the government might prevent "such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."[7]

In *Grosjean v. American Press Co.*,[8] the Court dealt with a state tax on the

1. The court of appeals referred to the New York City General Business and Finance Tax as the "gross receipts tax." It is imposed pursuant to § 24-a of the Gen. City Law which authorizes New York City to impose "a tax upon persons carrying on or exercising for gain or profit within such city, any trade, business, profession, vocation or commercial activity . . . or making sales within such city . . . ."

2. Freedom of the press is not confined to newspapers and periodicals, but necessarily embraces pamphlets, leaflets and every other sort of publication affording a vehicle of information. Winters v. New York, 333 U.S. 507 (1948); Lovell v. City of Griffin, 303 U.S. 444 (1938).

3. U.S. Const. amend. I.

4. "Nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1.

5. Powell v. Alabama, 287 U.S. 45 (1932); Gitlow v. New York, 268 U.S. 652 (1925); see 16 Boston L. Rev. 919 (1936).

6. Near v. Minnesota, 283 U.S. 697 (1931); Patterson v. Colorado, 205 U.S. 454, 462 (1907); see 2 Cooley, Constitutional Limitations 886 (8th ed. 1927).

7. 2 Cooley, supra note 6, at 886.

8. 297 U.S. 233 (1936). The United States Supreme Court in deciding cases involving religious freedom used some language which might tend to indicate that a tax may never be imposed on the exercise of any constitutional privilege. "The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is . . . obnoxious." Follett v. Town of McCormick, 321 U.S. 573, 577 (1944). "Freedom of press, freedom of speech, freedom of religion are in a preferred position." Murdock v.

advertising of newspapers having a circulation of more than 20,000 copies per week. The tax was not measured by the amount of advertising, but by the extent of circulation.[9] Since the biggest source of revenue for newspapers is the income received from its advertising, a more proper tax would have been one which was measured by the income from advertising or even the income received from all sources. Each newspaper would then pay a tax directly proportionate to the amount of income received.[10] After reviewing the history and surrounding circumstances of the tax, the Court found that its objective was not revenue, but suppression of newspapers hostile to the incumbent administration of the state. The tax was, therefore, held unconstitutional as a violation of the due process clause. The court deemed it unnecessary to consider whether it was also a violation of the equal protection clause of the fourteenth amendment.[11]

In the instant case, the court dealt with a general tax.[12] The petitioner did not contend that the amount of the tax was harsh or oppressive, or that the tax served to curtail his freedom to write or disseminate his works. Thus, the petitioner's position was reduced to the contention that literary works were free from all burdens of taxation.[13] Where commercial activities in general

Pennsylvania, 319 U.S. 105, 115 (1943). This language when read out of context may give superficial support to a contention that no tax may ever be imposed on constitutional privileges, but it was uttered in regard to a license tax, laid for the privilege of distributing religious literature, thereby imposing a prior restraint on the exercising of the privilege.

In the instant case the Court dealt with a tax which did not impose any prior restraints. Anyone had the right to exercise the privilege of entering into the business of writing. A tax was merely laid on the gross receipts derived from such enterprise. The tax is on a commercial aspect unrelated to the constitutional privileges. Moreover, in the Murdock case, "We do not mean to say that religious groups and the press are free from all financial burdens of government . . . it is one thing to impose a tax on the income . . . of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon." 319 U.S. at 112. These statements more accurately express the context into which the previous statements were intended to be read.

9. There were thirteen newspapers in Louisiana which had a circulation of more than 20,000 copies per week, four other newspapers circulating slightly less; and 120 weekly newspapers also in competition.

10. If a 2% tax were laid on the total income received by all newspapers, the tax would be measured by the commercial aspects of the business. By measuring the tax only by circulation, it is the vital press aspect of publishing that would be taxed.

11. 297 U.S. at 251.

12. See note 1 supra. The terms used in the statute were interpreted very broadly by the court. The tax is so broad in its scope that it was deemed necessary to provide that the phrase " 'exercising any profession, vocation, trade, business or commercial activity' does not include labor or services rendered by an individual for a wage or salary." New York City Adm. Code, § B46—1.0, § 5.

13. This position has never been sustained. Taxes substantially similar to New York's gross receipts tax, on appeal to the United States Supreme Court, have either been denied certiorari or dismissed for want of a substantial federal question. Giragi v. Moore, 48 Ariz. 33, 58 P.2d 1249 (1936), appeal dismissed for want of substantial federal question, 301 U.S. 670 (1937); City of Corona v. Corona Daily Independent, 115 Cal. App. 2d 382, 252 P.2d 56, cert. denied, 346 U.S. 833 (1953); Tampa Times Co. v. City of Tampa,

and literary activities incidentally are the subject of a general tax, it can not, as a practical matter, be said that freedom of the press is being suppressed.[14] This is because a tax on gross receipts is a source of revenue from the truly commercial aspect of the enterprise and not from the privilege of writing itself. The press itself is not subject to control or regulation in any manner. Since the press has business aspects, it should have no special immunity from laws applicable to business in general.[15]

With reference to the equal protection clause of the Constitution the press stands in the same position as other persons or businesses.[16] Thus, if an arbitrary distinction were drawn so that the tax would apply only to certain authors or newspapers, and the distinction had no reasonable basis, then even if the tax applied to other persons or businesses as well, it would still deny equal protection of the laws.[17] The courts have recognized the difficulty and danger in attempts to define precisely the limitations of the equal protection clause.[18] Absent the finding of an abridgement of freedom of the press, the tax in the *Grosjean* case would seem to have denied the affected newspapers the equal protection of the laws.[19] Thus the tax would have been unconstitutional even if the press were not involved. A tax, such as in *Grosjean,* applying to those who do much business, while not applying to others engaging in the same enterprise, but doing less business, will deny the equal protection of the laws, when no reasonable basis for the distinction exists.[20] In the instant case the tax

158 Fla. 589, 29 So. 2d 368, appeal dismissed for want of substantial federal question, 332 U.S. 749 (1947); In re Jaeger, 29 S.C. 438, 7 S.E. 605 (1888); City of Norfolk v. Norfolk Landmark Publishing Co., 95 Va. 564, 28 S.E. 959 (1898). A dismissal for want of substantial federal question is a decision on the merits and has the force of precedent. It is distinguished from a denial of certiorari. Frankfurter and Hart, The Business of the Supreme Court at October Term, 1934, 49 Harv. L. Rev. 68, 77 (1935).

14. See A. S. Abell Co. v. City of Baltimore, 145 A.2d 111 (Md. Ct. App. 1958).

15. Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946); see Associated Press v. NLRB, 301 U.S. 103 (1937).

16. If the press or persons employed by it were subjected to a special tax upon their gross receipts only, not applicable to others that tax would be discriminatory. See A. S. Abell Co. v. City of Baltimore, 145 A.2d 111 (Md. Ct. App. 1958).

17. See Colgate v. Harvey, 296 U.S. 404 (1935); Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32 (1928); Puget Sound Power & Light Co. v. King County, 264 U.S. 22 (1924); Kentucky Fin. Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544 (1923); Truax v. Corrigan, 257 U.S. 312 (1921).

18. Various generalizations have been enunciated which serve as useful guideposts. No person or groups shall be denied the same protection of the laws which is enjoyed by other persons or groups in like circumstances. A law must treat all alike with uniformity and equality and without unreasonable distinctions. See cases cited in note 17 supra.

19. No reasonable basis existed for taxing only the newspapers with a large circulation. This measure for taxing resulted in a discrimination against the thirteen largest, because there were approximately 124 other newspapers in competition to a greater or lesser degree, which were not subject to the tax at all. No material differences existed between the newspapers circulating more than 20,000 copies weekly and other newspapers of the state.

20. A tax which derives more revenue from those doing much business than it does from those doing less business, is not discriminatory. Businesses in some enterprises will be taxed in varying amounts, but the inequality of the obligation has a reasonable distinction

escaped the stricture of the equal protection clause since it did not single out the press as a whole nor any of its members for a tax not applicable to other members. The instant tax applied to the press and its members equally and uniformly, affording to all the equal protection guaranteed in the fourteenth amendment.

The concept of freedom of the press is not limited to preventing prior restraints but extends to any means by which the government might prevent "such free and general discussion of public matters as seems absolutely"[21] necessary to preserve the press as a vital source of public information. Any tax is a burden to some extent, but that alone is insufficient to constitute an impairment of freedom of the press. The courts must look to the circumstances surrounding each case to determine whether the predominant purpose of the free press guarantee[22] is preserved. If a tax or law or any other governmental requirement does not serve to frustrate that end, then there is no impairment of the constitutional guarantee of freedom of the press.[23]

Criminal Law — Issuance of Handbooks to Federal Jurors.—Part of an interstate railroad track was dynamited during a labor dispute. Horton, Johnson and Million were indicted for the crime and a conspiracy to commit it. Million pleaded guilty and became a witness for the United States. The jury returned a verdict of guilty on both counts against appellant Horton and on the conspiracy count against appellant Johnson. Subsequently, the appellants discovered that the members of the jury panel had been given copies of the "Handbook for Jurors Serving in the United States District Courts." Based on this discovery appellants moved for a new trial. The trial court denied the

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for its basis, i.e., the amount of the tax owed, is determined by the ability of the business to pay. See Finley v. California, 222 U.S. 28 (1911); Nicol v. Ames, 173 U.S. 509 (1899); 12 Am. Jur. Constitutional Law §§ 481, 485 (1938).

21. 2 Cooley, Constitutional Limitations 886 (8th ed. 1927).

22. For a good discussion see Donnelly, Government and Freedom of the Press, 45 Ill. L. Rev. 31 (1950).

23. Another interesting aspect of the case was the petitioner's contention that even if he is not exempt from the gross receipts tax, that part of his income which consists of royalties paid to him by publishers, cannot be taxed because his writing and licensing for publication either induced or commenced interstate commerce which is governed by the commerce clause. U.S. Const. art. 1, § 8, Cl. 3. However, the instant court found that Mr. Steinbeck was, in fact, not involved in interstate commerce himself, but was merely a creditor of the publisher who was. Since the facts indicated no contractual arrangements which would constitute a joint venture, the parties had not joined their interest and skills in such a way "that for the purpose of the particular adventure their respective contributions have become as one. . . ." Hasday v. Barocas, 10 Misc. 2d 22, 28, 115 N.Y.S.2d 209, 215 (Sup. Ct. 1952). Nor were Mr. Steinbeck's activities so closely related to interstate commerce as to constitute participation therein. Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938). A local business or occupation may be taxed even though it induces or commences interstate commerce, so long as it is separate and distinct from the transportation and intercourse which is interstate commerce. Western Live Stock v. Bureau of Revenue, supra at 253.

motion. On appeal the United States Court of Appeals for the Sixth Circuit affirmed. The distribution of the handbook did not deny the appellants a fair and impartial trial. *Horton v. United States,* 256 F.2d 138 (6th Cir. 1958).

The practice of issuing jury handbooks has been adopted in recent years[1] by a number of trial courts[2] as a means of instructing jurors in the machinery of jury trial. The lack of such instruction is often assigned as one of the obstacles to reliable jury verdicts.[3] The handbook distributed to federal jurors has been drafted by a committee of the Judicial Conference of the United States[4] and is distributed only with the approval of the individual district judges.[5] It opens with a note on the importance of jury duty in the administration of justice, outlines the steps in the trial of a civil action, discusses the arguments of counsel and the importance of the judge's charge. The manual then discusses criminal cases, stating that they are somewhat like civil cases, and finally discusses indictments and sentencing.

In the *United States v. Gordon,*[6] the first federal case to consider the practice, the Court of Appeals for the Seventh Circuit reversed a conviction by a jury to whom the handbook had been issued. Such a policy of indoctrinating jurors, the court felt, would require legislative authorization. The court also pointed out that the manual inadequately distinguished between the shades of proof required in civil and criminal actions and that the paragraph discussing sentencing[7] was an invitation to the jury to return a verdict of guilty, leaving

1. A jury primer was used in the Second Judicial District of New York as early as 1925. See Primary Lessons for Jurors, 11 A.B.A.J. 401 (1925).

2. See, e.g., Knight v. State, 50 Ariz. 108, 69 P.2d 569 (1937); People v. Lopez, 32 Cal. 2d 673, 197 P.2d 757 (1948); Ferrara v. State, 101 So. 2d 797 (Fla. 1958); Richardson, The Jury, And Methods of Increasing Its Efficiency, 14 A.B.A.J. 410 (1928) (Kansas); Preliminary Instruction to Jurors, 17 A.B.A.J. 282 (1931) (Wash.). A number of trial courts have adopted the practice of having the judge merely give such instructions orally. See, e.g., Dowd, General Instructions to the New Venire of Jurors, 9 Law Society Journal of Mass. 99 (1940); Lehigh, Statement to Petit Jurors, 15 Ky. S.B.J. 106 (1951); Moore, Preliminary Remarks to Jurors, 47 W. Va. L.Q. 323 (1941); Ulman, A Judge Takes the Stand 23 (1930); 2d Rep. of the Conn. Judicial Council 12 (1930).

3. See Galston, Civil Jury Trials and Tribulations, 29 A.B.A.J. 195 (1943); Richardson, supra note 2, at 411. The Judge-Jury Relationship in the State Courts, 23 Ore. L. Rev. 3 (1943); Report, Committee on Trial by Jury Including Methods of Selecting Jurors, 63 A.B.A. Rep. 559, 560 (1938).

4. For a history of the handbook see United States v. Gordon, 253 F.2d 177, 186 (7th Cir. 1958); Report to the Judicial Conference of the Comm. on Selection of Jurors 10 (1942).

5. The handbook has not received the unanimous approval of the federal district judges. See Knox, Jury Selection, 22 N.Y.U.L.Q. Rev. 433, 443 (1947): "Some judges, however, seem to believe that my Committee is another New Deal Bureaucracy, and is attempting to tell them how to run their courts. Nothing, of course, could be farther from the fact, and the handbook has been and will be distributed to such courts as wish to use it. Such judges as think the manual is tomfoolery and a waste of public funds are not compelled to use it . . . ."

6. 253 F.2d 177 (7th Cir. 1958).

7. The paragraph provides that: "'A verdict of guilty does not necessarily mean that the defendant will receive a long sentence or that he will be required to serve any sentence

the consequences to the court. An instruction in that language would have constituted reversible error. The opinion was withdrawn and, on rehearing, the majority held that the issue of the handbook had not been properly raised. A concurring opinion held that the use of the handbook was valid and its contents were not prejudicial. Two dissenting opinions, however, maintained the position of the original opinion. In the instant case, the first actually to hold on the use of the handbook, the appeal was based on the grounds set forth in the dissent of the *Gordon* case. The court did not discuss the legality of the handbook but limited itself to a consideration of prejudice, holding that the charge of the trial judge on the question of the burden of proof was more than fair. The court refused to agree with the dissent in the *Gordon* case on the paragraph discussing sentencing, asserting that it contained nothing which was not an accurate statement of the powers of a sentencing judge. The court further pointed out that there was no showing that the jurors had in fact read the pamphlet.

In *United States v. Allied Stevedoring Corp.*,[8] decided within a month after the instant case, an appeal was taken to the Court of Appeals for the Second Circuit upon the showing that one juror had read a pamphlet[9] distributed on a prior occasion and had introduced its contents into the jury's deliberations on recommending leniency. The court refused to find prejudice since the jury subsequently asked for further instructions on this point. The court expressly refused to find anything in the pamphlet which would prejudice the accuseds' trial and concurred with the views of the concurring opinion in the *Gordon* case on the constitutionality and legality of the handbook.

Patently the mere issuance of a handbook is not a violation of the seventh amendment guaranteeing trial by jury as it existed at common law.[10] Since the accused's right to be present at all stages in the proceedings against him extends only to the impaneling of the jury[11] it is not a technical violation of that right. Nor would it be a real violation unless it is shown that its contents prejudiced the jurors.

Whether its issuance is the prerogative of the Congress or the courts is not without some dispute.[12] However, most of the state appellate courts have con-

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at all. The judge may impose such sentence as appears to him to be just within the limits fixed by law or in a proper case he may suspend sentence and place the defendant on probation.'" 253 F.2d at 190.

8. 258 F.2d 104 (2d Cir.), cert. denied, 358 U.S. 841 (1958).

9. That handbook, "A Handbook for Petit Jurors," was an earlier version of the one distributed in the principal case.

10. Cf. Galloway v. United States, 319 U.S. 372 (1942), rehearing denied, 320 U.S. 214 (1943).

11. Fed. R. Crim. P. 43 provides: "The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence . . . ." See also Diaz v. United States, 223 U.S. 442 (1912).

12. In addition to the dissent in the Gordon case, note 6 supra, see People v. Schoos, 399 Ill. 527, 78 N.E.2d 245 (1948), where it was held that a proposed quiz of the jury on the contents of the handbook was in effect adding to the qualifications for jury and hence in the domain of the legislature. But cf. People v. Izzo, 14 Ill. 2d 203, 151 N.E.2d 329

ceded the power to be within the inherent powers of a court to control its own proceedings.[13] This would appear to be the sounder view particularly in the federal system as long as the handbook is not too extensive. Congress sets the general qualifications of jurors[14] but their actual selection is largely within the discretionary power of the trial court.[15]

The vital question in any consideration of the handbook must ultimately be whether its contents prejudice the accused's right to a fair trial. Prejudicing the minds of jurors because of statements which are irrelevant or inaccurate when applied to a particular case is the danger necessarily inherent in issuing general instructions. There is some conflict in the state courts over the approach which should be taken towards such statements. The early tendency was to examine them as if they were specific instructions given by the judge at the close of a trial[16] but the prevailing view refuses to measure them against

(1958). The Schoos case is criticised in 62 Harv. L. Rev. 139 (1948) as failing to distinguish between qualifications to select jurors and the subsequent qualification of those selected.

13. See, e.g., Knight v. State, 50 Ariz. 108, 69 P.2d 569 (1937); People v. Lopez, 32 Cal. 2d 673, 197 P.2d 757 (1948); Ferrara v. State, 101 So. 2d 797 (Fla. 1958).

14. 28 U.S.C. § 1861 (Supp. V, 1958).

15. The list of names from which the panel is drawn is prepared by the Jury Commissioner who is appointed by the district court. 28 U.S.C. § 1864 (1952). Decisions on challenges to any of these jurors are made by the trial judge who also has the right to examine the jurors. Fed. R. Crim. P. 24(a). In this respect the judge has a rather wide discretion which is subject to reversal only if abused. Fredrick v. United States, 163 F.2d 536 (9th Cir. 1947), cert. denied, 332 U.S. 775; Butler v. United States, 191 F.2d 433 (4th Cir. 1951). The trial judge's discretion also extends to allowing the jury to take his written instructions to the jury room if he has given written instructions. Copeland v. United States, 152 F.2d 769, cert. denied, 328 U.S. 841 (1945).

"In the national courts, however, the judge is more than an umpire. He may discuss, explain, and analyze the testimony to the jury, and may express an opinion as to the guilt or innocence of the accused . . . ." Ryan v. United States, 99 F.2d 864, 873 (8th Cir. 1938). This wider discretion of federal trial judges is assigned as one of the reasons why the federal jury trial has escaped much of the criticism that has been directed at trial by jury. See Palmer, On Trial: The Jury Trial, 20 F.R.D. 65, 80 (1957); Report, Committee of the Section of the Judicial Administration of the A.B.A., Instructions to Jurors, 10 F.R.D. 409, 413 (1951).

16. See, e.g., People v. Weatherford, 160 P.2d 210 (Cal. App.), aff'd, 27 Cal. 2d 401, 164 P.2d 753 (1945); People v. Schoos, 399 Ill. 527, 78 N.E.2d 245 (1948). In People v. Weatherford, supra, the lower court sustained an objection to a jury manual "particularly in view of the fact that the pamphlet contained certain statements entirely inapplicable to the case on trial, such as the following: 'A verdict of guilty does not necessarily mean a term of imprisonment in the state prison, but may, in some cases, result in a county jail sentence, a fine, or proceedings under the provisions of the probation law.'" 160 P.2d at 216. This case has been effectively overruled by People v. Lopez, 32 Cal. 2d 673, 197 P.2d 757 (1948).

The courts do not often assign reasons for treating the instructions as specific instructions. However, the dissenting opinion in People v. Lopez said: "Because these instructions are placed in the possession of jurors so that they have access to them while they are not actually performing jury duty, they have an opportunity to become more conversant with them than with the specific instructions read by the court to the jury at the conclusion of the trial. It may be assumed, therefore, that the instructions contained in the appendix of

so exacting a standard.[17] In this difference of approach lies the explanation for the conflict between the judges who dissented in the *Gordon* case and the instant case. Approached as a charge given to the jury in the course of a trial, the paragraph complained of, as inviting a verdict of guilty, might be held to require a reversal,[18] yet is an accurate statement of the power of a sentencing judge.

The refusal of the federal courts to treat the handbook as an instruction means that they will afford no presumption that the contents were read out of context or that they were misapplied. Though not the safest approach, it appears to be sound in respect to the federal handbook and, no doubt, was dictated to an extent by the practical necessity of not opening the federal courts to appeals from the innumerable convictions which have been gained from "instructed" juries.

This, however, is not an argument for the continued contribution of the handbook in its present form. The failure to properly emphasize the difference in civil and criminal actions should be corrected. There is also a need for greater care in the wording of the manual. Perhaps a greater accuracy would be achieved by allowing the bar as well as the bench to participate in the drafting of the handbook. The final safeguard would be to submit copies of the handbook to counsel prior to the trial so that they could object to anything which might prejudice jurors.

Damages — Recovery for Mental Anguish in Malpractice Suit.—Defendant doctors negligently administered X-ray treatments to plaintiff's shoulder. Subsequently, serious burns, diagnosed as chronic radiodermatitis caused by the X-ray therapy, appeared in the treated area. Approximately two years thereafter and before the burns had fully healed, plaintiff consulted a dermatologist who, according to plaintiff's testimony at the trial, advised her to have the shoulder periodically checked because the inflamed area might become cancerous. The plaintiff thereafter developed cancerophobia, a severe phobic apprehension that the injured area would become cancerous. In a malpractice suit,[1] the jury awarded plaintiff $25,000, of which $15,000 was compensation for the mental anguish resulting from the cancerophobia. This verdict was affirmed unanimously, without opinion, by the appellate division.[2] By a 4-3 majority, the court of appeals affirmed. An award of compensatory damages may include

the majority opinion will have greater influence upon the average juror than any other instructions read by the court to the jury during the trial." 197 P.2d at 768.

17. See note 13 supra.

18. Ordinarily the sentence to be imposed on the accused is no concern of the jury and if the trial judge mentions to the jury that the full penalty might not be given or that the accused will be eligible for parole the conviction will be reversed on the grounds that the way was open for a compromise verdict, Lovely v. United States, 169 F.2d 386 (4th Cir., 1948), unless called forth by the remarks of counsel, Ryan v. United States, 99 F.2d 864 (8th Cir. 1938).

1. No opinion was rendered by the supreme court at trial term.

2. Ferrara v. Galluchio, 3 App. Div. 2d 829, 161 N.Y.S.2d 832 (1st Dep't 1957).

a recovery for mental anguish endured in contemplation of a possible future illness developing from a negligently inflicted physical injury, provided there is adequate proof of the mental anguish and a reasonable basis for its existence. *Ferrara v. Galluchio*, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958).

New York has long recognized that mental suffering may form an element of damages where the victim has sustained an immediate personal injury or some physical impact as the result of the negligent act of another.[3] Where the subsequent intervening negligence of a physician aggravates the original injury, a recovery against the original wrongdoer may include damages for the added physical and mental suffering endured.[4] In the absence of physical impact, however, no recovery for mental suffering based on negligence has been allowed[5] even where the injured party subsequently suffered bodily harm.[6] The present case is unique in two respects: first, the act of the intervening physician who advised periodic examinations for cancer apparently was not negligent under the circumstances; secondly, the additional harm to the plaintiff was entirely mental in nature. The decision to allow recovery against the negligent defendants for the added mental injury undoubtedly has widened the scope of liability. It must be noted, however, that the holding of the instant case has not swept away the prerequisite of physical impact or immediate personal injury.

Chief Judge Conway, writing for the majority, reasoned that the plaintiff's conduct after she sustained the physical injury was reasonable; the advice she received from the dermatologist and its effect upon her mind were causally connected with the negligent act of the defendant[7] and were not so tenuous or remote as to free the defendants from liability. Under the circumstances the majority found a reasonable basis for plaintiff's mental suffering, and was satisfied with the genuineness of the mental anguish claim.[8] In cases where

3. Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931); Ransom v. New York & E. R.R., 15 N.Y. 415 (1857); Berg v. New York Soc'y for Relief of the Ruptured & Crippled, 136 N.Y.S.2d 528, 531 (Sup. Ct. 1954), rev'd on other grounds, 286 App. Div. 783, 146 N.Y.S.2d 548 (1st Dep't 1955), rev'd on other grounds, 1 N.Y.2d 499, 136 N.E.2d 523, 154 N.Y.S.2d 455 (1956).

4. Milks v. McIver, 264 N.Y. 267, 270, 190 N.E. 487, 488 (1934).

5. Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896); Stahl v. Necker, Inc., 184 App. Div. 85, 171 N.Y. Supp. 728 (1st Dep't 1918).

6. Comstock v. Wilson, supra note 5; Mitchell v. Rochester Ry., supra note 5.

7. As authority for its position, the court cited Milks v. McIver, 264 N.Y. 267, 270, 190 N.E. 487, 488 (1934), stating that the "rule is now well established that a wrongdoer is liable for the ultimate result, though the mistake or even negligence of the physician who treated the injury may have increased the damage which would otherwise have followed from the original wrong." However, the principal case has extended this rule to allow recovery against the wrongdoer for the ultimate result when the act of the intervening physician is not negligent and the added injury is purely mental.

8. The court took judicial notice of the fact that "it is common knowledge among laymen and even more widely among laywomen that wounds which do not heal over long periods of time frequently become cancerous." 5 N.Y.2d at 22, 152 N.E.2d at 252, 176 N.Y.S.2d at 1000. Additionally, it was observed that plaintiff was told by a doctor specializing in dermatology that the radiation burns possibly would become cancerous. Thus,

there is no reasonable basis for mental anguish, the courts will decline to trace its cause to the negligent act. The majority, however, expressly declined to lay down a principle concerning a wrongdoer's liability for mental anguish caused his victim as a result of information received from a doctor during the treatment of a physical injury.

The dissent objected to the recovery for mental anguish on the ground that it flowed from a statement attributed to the dermatologist (that cancer may develop) which was established solely on the strength of hearsay testimony of the plaintiff.[9] Even if the evidentiary objection was invalid, the dissent would hald that damages for mental anguish should not have been imposed because it was based on the speculative opinion of a medical expert as to the mere possibility of cancer. Furthermore, it was argued that recovery was made dependent upon the subjective state of mind of the litigating plaintiff without even the safeguard of an expert opinion.

The reasoning of the dissent sidesteps the true issue. The plaintiff sought to prove with reasonable certainty that she suffered from cancerophobia (not cancer), and that this was a reasonable and actual fear of a future illness proximately caused by the negligent act of the defendants. Whether the dermatologist's opinion was sound or speculative was not a crucial point, nor was its truth or falsity relevant. In this case it made no difference whether the development of cancer was a reasonable certainty or a possibility. The significance of the opinion of the dermatologist was the mere fact that it was made and that it was one of the events naturally flowing from the defendant's negligent act. It laid a reasonable basis for the actual mental anxiety which the plaintiff thereafter endured. It is true, as maintained by the dissent, that the cancerophobia was subjective in that its extent and duration was necessarily dependent upon the make-up of plaintiff's personality. An objective determination of the reality of the anguish and its reasonableness, however, could be and was made. Mental anguish should form an element of damages when it is a reasonable and natural consequence of the negligent act.[10] In other words,

the court found a reasonable basis for the plaintiff's cancerophobia. Moreover, at the trial a neuropsychiatrist testified that she was suffering from severe cancerophobia. The jury observed the plaintiff's demeanor on the stand and accepted her testimony as true. In all of this the court of appeals found a "guarantee of genuineness" of the cancerophobia.

9. The majority contended that plaintiff's testimony as to the statement made by the dermatologist was introduced not for the purpose of proving that cancer would develop but merely for the purpose of establishing that there was a reasonable basis for her mental anxiety. The court reasoned that the truth of the statement was not in issue and, therefore, the testimony was not regarded as objectionable hearsay. It is interesting to note that at the trial, the plaintiff was not permitted to testify as to the dermatologist's statement that cancer might develop until after her doctors testified. The court did not allow the dermatologist to express an opinion as to the development of cancer unless he could say he was reasonably certain of this result. Although the dermatologist testified that he advised plaintiff to have her shoulder examined periodically, it appears that he understood he was not to testify as to his reason for this advice, i.e., the possibility of cancer. Subsequently, the plaintiff was recalled to the stand and testified as to the reason the dermatologist gave her for this advice.

10. A factual situation which seems to represent an instance where recovery for mental

there must be a reasonable basis for the actual mental anguish to be redressed.[11]

Perhaps the most important difference in the divergent opinions of the court does not pertain directly to the *ratio decidendi* of the case. It is whether damages for a purely mental injury ought to be awarded. Both opinions recognize the danger of fraud and the difficulties of proof that arise if an award of compensatory damages is allowed in such actions. Each side appeals to public policy and common sense to support its position; however, this sort of argument does not solve the problem. No doubt all the justices would agree that a remedy for a substantial wrong ought to be sanctioned when all the elements of the cause of action are established with proper proof. The difficulty is whether a purely mental injury can be proven with reasonable certainty as to justify the courts in distinguishing the spurious claim from the genuine. The majority declared that, "freedom from mental disturbance is now a protected interest in this State."[12] This statement is dictum but it may be a signpost pointing the way to a new road of tort liability in New York. In support of this dictum the majority added:

> [T]he only valid objection against recovery for mental injury is the danger of vexatious suits and fictitious claims, which has loomed very large in the opinions as an obstacle. The danger is a real one, and must be met. Mental disturbance is easily simulated, and courts which are plagued with fraudulent personal injury claims may well be unwilling to open the door to an even more dubious field. But the difficulty is not insuperable. Not only fright and shock, but other kinds of mental injury are marked by definite physical symptoms, which are capable of clear medical proof. It is entirely possible to allow recovery only upon satisfactory evidence and deny it when there is nothing to corroborate the claim, or to look for some guarantee of genuineness in the circumstances of the case. The problem is one of adequate proof, and it is not necessary to deny a remedy in all cases because some claims may be false. The very clear tendency of the recent cases is to refuse to admit incompetence to deal with such a problem, and to find some basis for redress in a proper case.[13]

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anguish should be denied is St. Louis, I.M. & So. Ry. v. Buckner, 89 Ark. 58, 115 S.W. 923 (1909) cited in the dissenting opinion. Plaintiff was a passenger on defendant's railroad. On arriving at the station, she went into the waiting room. It was a cold, rainy day and there was no heat in the room. Plaintiff alleged she got a chill and that body aches subsequently developed, followed by a cold, fever and stomach trouble which lasted several months. Thereafter, plaintiff claimed she went to a sanitarium with a fear of dying of consumption (her sister died of consumption and she thought she had all the symptoms). In ordering a new trial, the court said: "Now mental anguish of the character shown by this evidence is, at most, but a remote consequence of the physical injury which appellant is alleged to have caused. The jury in such cases should be allowed to consider only that mental anguish which accompanies the injury itself, which is fairly and reasonably the natural consequence that flows from it." 89 Ark. at 60, 115 S.W. at 924.

11. Many other jurisdictions have handed down decisions which are in accord with the instant case. Merrill v. Los Angeles Gas & Elec. Co., 158 Cal. 499, 111 Pac. 534 (1910); Figlar v. Gordon, 133 Conn. 577, 53 A.2d 645 (1947); Watson v. Augusta Brewing Co., 124 Ga. 121, 52 S.E. 152 (1905); Buck v. Brady, 110 Md. 568, 73 Atl. 277 (1909).

12. 5 N.Y.2d at 21, 152 N.E.2d at 252, 5 N.Y.S.2d at 999.

13. 5 N.Y.2d at 21, 152 N.E.2d at 252, 5 N.Y.S.2d at 999-1000. The majority was here quoting from Prosser, Torts § 34, at 212-13 (1941).

Domestic Relations — Survival of Alimony Rights After a Valid Ex Parte Divorce.—Plaintiff, then a New York domiciliary, and defendant husband, a Vermont domiciliary, were married in Connecticut in 1942. In 1944 they established a matrimonial domicile in Vermont. In 1951 defendant deserted plaintiff, but continued to provide for her support and for that of their child. Defendant secured an ex parte divorce decree in Nevada in 1952 and thereafter discontinued his support of plaintiff who then instituted a Vermont action seeking support for herself and the child and challenging therein the validity of the Nevada decree. In 1953, while the action in Vermont was pending, plaintiff reestablished her New York domicile and one year later sequestered defendant's New York property seeking, pursuant to section 1170-b of the New York Civil Practice Act, relief identical to that sought in Vermont. The appellate division affirmed, without opinion, the judgment of the supreme court dismissing the complaint. On appeal, the New York Court of Appeals held, two judges dissenting, that section 1170-b is inapplicable to a wife who becomes domiciled in New York subsequent to a valid ex parte divorce decree of another state. *Loeb v. Loeb,* 4 N.Y.2d 542, 152 N.E.2d 36, 176 N.Y.S.2d 590 (1958).

It is now familiar law that a divorce decree may be completely effective to dissolve a marriage yet ineffectual to alter the support and custody incidents of that marriage.[1] The Supreme Court of the United States in *Estin v. Estin,*[2] found "divorce divisible." It held that alimony rights under a prior separation decree could not be adjudicated in an ex parte divorce proceeding without personal jurisdiction over the wife.[3] In the *Estin* case, the wife's right to support was embodied in a prior separation decree. To preserve the alimony rights of a wife who had not obtained, prior to the husband's ex parte divorce, any support order, the New York Legislature added section 1170-b to the Civil Practice Act. The section reads:

> In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife.[4]

The court in the present case denied plaintiff relief, reasoning that section 1170-b was enacted to protect *New York* wives[5] which plaintiff was not, since at no time during the course of her marriage was she domiciled in New York.

1. Lynn v. Lynn, 302 N.Y. 193, 200, 97 N.E.2d 748, 751 (1951).

2. 334 U.S. 541 (1948).

3. Ibid. In some states a support order does not survive divorce. In these cases, the efficacy of an ex parte decree is decisive. Esenwein v. Pennsylvania, 325 U.S. 279, 280 (1945).

4. N.Y. Civ. Prac. Act § 1170-b.

5. The Law Revision Commission recommended the statute "to protect a New York wife whose right to support from her husband may . . . be completely cut off by an ex parte foreign decree, in the absence of a previous New York separation decree, with provision for maintenance. . . ." Report of N.Y. Law Rev. Comm. 463, 468 (1953).

The majority noted that while plaintiff satisfied the residence requirement,[6] she came to New York divorced, having sought to enforce her marital rights in the courts of another state.[7] *Vanderbilt v. Vanderbilt*[8] was distinguished, since in *Vanderbilt* the wife was not yet divorced when she established her New York domicile.[9] While the appellate division in *Vanderbilt* noted that, "an entirely different question might be presented if the Nevada divorce had been rendered before the wife took residence in New York,"[10] the statute itself suggests no such limitation. The legislature, in fact, gave the courts power to do "as justice may require" for the maintenance of the wife. Only in the recommendation of the Law Revision Commission do the words *New York wife*[11] appear and its meaning is left ambiguous. It is questioned whether a "New York wife" cannot be one who is domiciled in New York at the time she seeks relief pursuant to section 1170-b or must she further prove a New York domicile at some time prior to the divorce? Even with the added condition plaintiff would qualify for relief since she was a New York domiciliary prior to her marriage. The majority imposed a further limitation that she prove a New York domicile subsequent to her marriage and prior to the ex parte divorce. But New York would have a sufficient interest in any event so long as the wife was domiciled in New York when she instituted her action. New York is rightly concerned lest the spouse be left impoverished and perhaps become a public charge.[12] Her present domicile gave New York reason to act and at the same time an interest sufficient to repel any attack on jurisdictional or constitutional grounds.[13]

6. Where the parties were married without the state, New York requires that the plaintiff or the defendant be a resident of the state when the action is commenced and that such party have resided therein for at least one year continuously at any time prior to the commencement of the action. N.Y. Civ. Prac. Act § 1165-a(3).

7. The Vermont Supreme Court affirmed the validity of the Nevada divorce and custody and support of the child, but reversed the lower court as to support for the wife. 118 Vt. 472, 114 A.2d 518 (1955). The Vermont court having no statute similar to section 1170-b held itself to be without jurisdiction to award the wife alimony.

8. 1 N.Y.2d 342, 135 N.E.2d 553, 153 N.Y.S.2d 1 (1956), aff'd, 354 U.S. 14 (1957). This case held that a state, in the absence of personal jurisdiction cannot adjudicate the absentee spouse's right to support, and a state having appropriate jurisdiction is thereafter free to award alimony; cf. Armstrong v. Armstrong, 350 U.S. 568, 575-81 (1956) (concurring opinion).

9. The wife in the Vanderbilt case came to New York in February, 1953. In March, 1953, her husband commenced an action for divorce which was granted in June, 1953, and in April, 1954, the wife began her action in New York.

10. 1 App. Div. 2d 3, 11, 147 N.Y.S.2d 125, 132 (1st Dep't 1955), aff'd, 1 N.Y.2d 342, 135 N.E.2d 553, 153 N.Y.S.2d 1 (1956), aff'd, 354 U.S. 416 (1957).

11. Report of N.Y. Law Rev. Comm. 463, 467-68 (1953).

12. Estin v. Estin, 334 U.S. 541, 546 (1948).

13. The right to support of the New York domiciliary would in any situation be considered a personal right and granting alimony would not violate the full faith and credit clause. Estin v. Estin, 334 U.S. 541, 549 (1948). An analogous situation arose in May v. Anderson, 345 U.S. 528 where the husband, a domiciliary of Wisconsin, instituted a divorce action against the wife, a domiciliary of Ohio, who did not appear. An ex parte decree was granted the husband including custody of the children. The Supreme Court held

On the other hand the husband here obtained his divorce over a year before section 1170-b went into effect.[14] The court did not allude to this fact. It is nonetheless pertinent. For it might plausibly be argued that plaintiff would have been denied relief even had she come to New York prior to the divorce. Is section 1170-b retroactive? It might be that the section did not revive rights in the wife which for all practical purposes were terminated by the ex parte divorce. Two lower court cases so reasoned.[15] There is also support in the Law Revision Commission statement recommending the adoption of section 1170-b that: "The Commission believes that legislation is necessary to protect a New York wife whose right to support from her husband may now be completely cut off by an ex parte foreign divorce decree, in the absence of a previous New York separation decree with provision for maintenance."[16] But this misconstrues the effect of the ex parte decree or at least begs the question. The ex parte decree does not "cut off" the wife's right to support[17] as the Commission asserts. It does not affect the right to support at all. For only a court with personal jurisdiction over the wife could adjudicate her right to support even in the absence of a pre-existing alimony decree.[18] New York in enacting section 1170-b did not confer a right upon the wife. It simply recognized that her rights, whatever they might be, were not the proper subject for adjudication by the court entering the ex parte decree and New York chose to give the wife a means to have those rights adjudicated. Since the statute is, therefore, remedial in nature there is no serious objection to according it retroactive effect.

The majority expressed the fear that a more liberal construction of section 1170-b might make New York an attraction for alimony seeking wives, that New York might become a mecca for the alimony seeker just as states with lax or liberal divorce laws have become attractive to the divorce seeking spouse. But there is a very practical difference in that the spouse who seeks a divorce can go to any state. Domicile alone satisfies the jurisdictional requirements for divorce.[19] The wife who seeks alimony will come to New York only if she can obtain personal jurisdiction over the husband in New York or if the husband has property in New York upon which *quasi in rem* jurisdiction can be based.[20] Personal jurisdiction or an equivalent of personal jurisdiction over

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that an Ohio court does not have to give full faith and credit to a Wisconsin decree awarding custody of the children to their father when that decree is obtained by their father in an ex parte divorce action in a Wisconsin court which had no personal jurisdiction over the mother. Id. at 528, 529.

14. The divorce took place in July 1952, whereas the effective date of the statute was April 1953.

15. Edell v. Edell, 6 Misc. 2d 631, 159 N.Y.S.2d 855 (Sup. Ct. 1957); Methfessel v. Methfessel, 124 N.Y.S.2d 633 (Sup. Ct. 1953). But see Meenan v. Meenan, 286 App. Div. 775, 147 N.Y.S.2d 122 (1st Dep't 1955), appeal dismissed per curiam, 1 N.Y.2d 269, 135 N.E.2d 30, 153 N.Y.S.2d 268 (1956).

16. Report of N.Y. Law Rev. Comm. 463, 468 (1953).

17. Estin v. Estin, 334 U.S. 541 (1948).

18. Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957).

19. Williams v. North Carolina, 317 U.S. 287 (1942).

20. N.Y. Civ. Prac. Act § 1171-a.

the husband is necessary in order to obtain relief under section 1170-b. It would seem, therefore, that there is considerable exaggeration in the fear that New York might become a mecca for migrant wives.

Incompetency — Right of Unadjudicated Incompetent To Sue or To Hire Attorneys in His Own Behalf.—Plaintiff wife instituted an action for separation in which she alleged that although she left her husband's abode in New York, she did so while she was mentally incompetent and incapable of recognizing the nature or consequences of her action. The appellate division affirmed an order of special term which denied the defendant's motion to dismiss the complaint, awarded temporary alimony, appointed a special guardian and directed payment of counsel fees. The court of appeals, one judge dissenting, affirmed, holding that a court may entertain the action of an unadjudicated incompetent even where the incompetency is alleged by the plaintiff herself. *Sengstack v. Sengstack,* 4 N.Y.2d 502, 151 N.E.2d 887, 176 N.Y.S.2d 337 (1958).

Section 236 of the New York Civil Practice Act allows a party of full age who has not been judicially declared incompetent to prosecute or defend a civil action either in person or by an attorney.[1] The section, obviously enacted for the benefit and protection of the incompetent, has been construed literally so that only a *judicially* declared incompetent is barred from prosecuting and defending in his own name. Thus, a plaintiff committed to a mental hospital and certified as mentally ill pursuant to section 70 of the New York Mental Hygiene Law has capacity to sue in his own name since such certification does not amount to an adjudication of mental incompetency.[2]

In the instant case, the court was faced with the problem of deciding whether an admission of incompetency by the plaintiff was tantamount to an adjudication of her incompetency.

The facts showed that the plaintiff went to Minnesota accompanied by her son by a former marriage and upon her petition and allegation of incompetency, a Minnesota probate court in an ex parte proceeding without a hearing appointed her son general guardian of her person and estate. The defendant in a prior action relied on this Minnesota decree to vacate the appointment of a guardian ad litem in New York, successfully contending that the plaintiff was not a judicially declared incompetent. Thereafter the Minnesota court refused upon the plaintiff's petition to decree a restoration to capacity. The defendant in the present case attempted to rely on this refusal for the proposition that his wife was judicially declared incompetent by the Minnesota court.

1. An inquisition is made before a jury to determine the party's incompetency and, if found, a committee is appointed to manage the incompetent and his affairs. Such an adjudication of incompetency in legal parlance is commonly referred to as "office found." Finch v. Goldstein, 245 N.Y. 300, 303, 157 N.E. 146, 147 (1927).

2. "A certification that a person is afflicted with a mental disease requiring care and treatment is not the same thing as an adjudication that he is incompetent to manage himself or his affairs." Anonymous v. Anonymous, 3 App. Div. 2d 590, 592, 162 N.Y.S.2d 984, 987 (2d Dep't 1957).

The jurisdiction of the New York Supreme Court to extend a foreign adjudication of incompetency depends upon whether it was sufficiently shown that the alleged incompetent had been adjudged incompetent in the state of her domicile.[3] If the foreign court "be found to have acquired jurisdiction full faith and credit must be given to its decree."[4] The plaintiff, who was in fact incompetent, could not be presumed to have the requisite intent which would be necessary to acquire a valid Minnesota domicile. The defendant's attempted reliance on the Minnesota decree was therefore disallowed because a foreign adjudication of incompetency is not binding in New York upon a party who has never relinquished her New York domicile.[5]

It was argued by the dissent in the present case,[6] that the plaintiff conceded her incompetency and, therefore, she lacked the capacity to sue, that because of her admitted mental incapacity she was not qualified to make a determination concerning her own interests, and that the proper procedure to protect the plaintiff required an adjudication of incompetency and the appointment of a committee pursuant to article 81 of the New York Civil Practice Act.

Heretofore, where the mental capacity of the plaintiff has been challenged, it was the defendant who raised the issue. Thus, a plea by the defendant alleging that the plaintiff was incompetent at the time of the suit and incapable of suing but failing to allege that the plaintiff had been so found by judicial determination or that a committee had been appointed was considered bad.[7] Until judicial determination of incompetency "any person is presumed to be sane with the burden of a contrary demonstration resting upon him who alleges incompetency."[8]

In rejecting the dissent's contention the court of appeals concluded that the problem of how best to protect the interests of the plaintiff was adequately handled by special term when it duly appointed a special guardian.[9] There is further support for the court's action in view of the fact that the supreme

3. Matter of Curtiss, 134 App. Div. 547, 119 N.Y. Supp. 556 (1st Dep't 1909), aff'd mem., 197 N.Y. 583, 91 N.E. 1111 (1910).

4. Id. at 551, 119 N.Y. Supp. at 559. In the Curtiss case a party who was a resident of Connecticut was adjudged incompetent and a committee was duly appointed. New York gave full faith and credit to the Connecticut decree.

5. Matter of McHie, 233 App. Div. 388, 253 N.Y. Supp. 166 (1st Dep't 1931), aff'd mem., 258 N.Y. 589, 180 N.E. 345 (1932); Gasper v. Wales, 223 App. Div. 89, 227 N.Y. Supp. 421 (1st Dep't 1928).

6. Judge Van Voorhis of the court of appeals dissented without further opinion on the basis of the dissenting opinion of Judges Peck and Botein of the appellate division.

7. Dudgeon v. Watson, 23 Fed. 161 (S.D.N.Y. 1885). In Williams v. Empire Woolen Co., 7 App. Div. 345, 39 N.Y. Supp. 941 (4th Dep't 1896) an answer to a complaint submitted by a defendant which alleged that the plaintiff was incompetent when he brought an action on a promissory note was held to be frivolous inasmuch as the plaintiff had never been judicially declared insane.

8. Matter of Palestine, 151 Misc. 100, 103, 270 N.Y. Supp. 844, 847 (Surr. Ct. 1934).

9. N.Y. Civ. Prac. Act § 207 provides: "The Supreme Court may appoint a guardian ad litem or special guardian for an infant or an incompetent person, at any stage in any action or proceeding, when it appears to the court necessary for the proper protection of the rights and interests of such infant or incompetent person. . . ."

court may appoint a special guardian even where there has been an appointment of a committee after an adjudication of insanity if there is some conflict of interest between the incompetent and the committee.[10] Clearly where one is in fact incompetent but not judicially declared so, the courts must take cognizance of the situation and protect the litigant's interests.[11]

The majority cited the highly controversial decision of the court of appeals in *Matter of Frank*[12] in which there was some language to the effect that a special guardian could be appointed for an adjudicated incompetent only. However, the *Frank* case was concerned with the power of the court to pay a special guardian's fee from the estate of an alleged incompetent who died during a proceeding for the appointment of a committee. There was no objection made by the court to the initial appointment of the special guardian. The holding in *Frank* was that the court never acquired jurisdiction over the property of the alleged incompetent's estate because the proceeding ended with that party's death. The present court distinguished *Matter of Frank* by restricting the language used therein to its precise facts.

There would seem to be no reason for section 207 of the New York Civil Practice Act[13] if it were confined to adjudicated incompetents by virtue of the fact that an adjudicated incompetent would be represented by his committee and there would be no reason to appoint a special guardian for his protection. This section obtains usefulness only if it is read in regard to persons who have not been adjudged incompetent but are in fact so.[14]

If one is declared incompetent pursuant to article 81 of the New York Civil Practice Act and a committee has been duly appointed to protect his interests, a contract made by the incompetent with a lawyer is void since one may not assume the relation of an attorney for an adjudged incompetent.[15] In *Finch v. Goldstein*[16] it was held that the acts of a person of unsound mind before a committee has been appointed are voidable, not void. If the party is in fact incompetent when he acts, such acts may be set aside at his election either by himself or a committee when appointed. The *Finch* case, however, has not been applied in New York to the question of the authority of an unadjudged incompetent to hire an attorney.

Where one is in fact incompetent but not judicially declared so, the decisions conflict as to the authority of an attorney to act for the incompetent. In *Merritt v. Merritt*[17] the authority of an agent acting under a power of attorney

10. N.Y. Civ. Prac. Act § 208.

11. "Incompetent persons become the wards of the court, upon which a duty devolves of protection both as to their persons and property. This duty is not limited to cases only in which a committee has been appointed, but extends to all cases where the fact of incompetence exists. . . ." Wurster v. Armfield, 175 N.Y. 256, 262, 67 N.E. 584, 585 (1903).

12. 283 N.Y. 106, 27 N.E.2d 801 (1940).

13. See note 9 supra.

14. See McCabe v. State, 208 Misc. 485, 144 N.Y.S.2d 488 (Ct. Cl. 1947).

15. Matter of Deimer, 274 App. Div. 557, 85 N.Y.S.2d 506 (4th Dep't 1948).

16. 245 N.Y. 300, 157 N.E. 146 (1927). The court here stated that a deed executed by an unadjudicated incompetent was not void, but voidable.

17. 27 App. Div. 208, 50 N.Y. Supp. 604 (1st Dep't 1898).

was held to be suspended by the insanity of his principal. In the recent case of *Matter of Lanham*[18] the purported consent given on behalf of an incompetent to her attorneys in a compensation suit to act in her behalf was not allowed to be exercised since, in that court's view, incompetence terminated any prior authority. This case also held that the plaintiff could not bring an action until a committee or next friend be appointed. In *Runberg v. Johnson*[19] a beneficial association got one of its members to sign a release from obtaining sick benefits while the member was *non compos mentis*. In an action by the member to recover the sick benefits the defendant association contended that the plaintiff was incompetent to appoint an attorney who was therefore without authority to appear in the plaintiff's behalf. There was a judgment for the plaintiff and that court concluded that, since a lunatic has the power to appear in his own name until a committee has been appointed, he can be represented by an attorney.

The present court accepted the *Runberg* reasoning and held that since an unadjudged incompetent may sue, it follows that such incompetent should be represented by attorneys who have authority to prosecute the action.

This case points out the latitude of the New York Supreme Court when exercising jurisdiction as a court of equity in dealing with a person in need of the protection of the court because of incompetency. It would certainly be bad practice for a court to allow a defendant to challenge the plaintiff's mental capacity, unless it appears to the court that the plaintiff is in need of the court's protection due to his mental condition. The abuses which might result from such a practice would indeed be disastrous.[20]

The court of appeals upheld the special term's order to the special guardian to investigate and to report the plaintiff's position and what necessary steps should be taken to protect her. The merits of the plaintiff's separation action were never reached. After the instant case was decided, upon recommendation by the special guardian, a proceeding under article 81 of the New York Civil Practice Act[21] was subsequently instituted to declare the plaintiff judicially incompetent.

It would, therefore, seem more practical where incompetency is alleged in the complaint for the supreme court to stay the action until an inquisition is instituted under article 81 of the New York Civil Practice Act. By such a stay the court would decrease the amount of time spent in litigation while awaiting the report of a special guardian if the party is in fact incompetent. Furthermore, it would also lessen the possibility of sham regarding the merits of the case by reason of the fact that where incompetency is alleged, as in the instant case, it becomes essential in order to sustain the plaintiff's cause of action that incompetency be clearly shown.[22]

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18. 1 Misc. 2d 264, 144 N.Y.S.2d 401 (Sup. Ct. 1955).
19. 11 N.Y. Civ. Proc. 283 (City Ct. 1886).
20. Dudgeon v. Watson, 23 Fed. 161 (S.D.N.Y. 1885).
21. See note 1 supra.
22. See Sobel v. Sobel, 180 Misc. 618, 42 N.Y.S.2d 467 (Sup. Ct. 1943).

Insurance — Applicability of New York State Standard Fire Insurance Statute to "Jewelers' Block Policy".—Plaintiff, a retail jeweler, sued the defendant insurance company for fire loss under an all-risk "Jewelers' Block Policy." Certain warranties, not included in the standard fire insurance policy, were incorporated in the block policy, and concededly were breached. The trial court entered judgment for the insurer. The appellate division reversed, holding that the all-risk "Jewelers' Block Policy" is a severable grouping of separate risks, which remains subject to the standard fire policy statute[1] as to fire coverage, and is not voided by breach of warranties in the policy which are not specified in the standard fire policy. *Woods Patchogue Corp. v. Franklin Nat'l Ins. Co.*, 5 App. Div. 2d 577, 173 N.Y.S.2d 859 (2d Dep't 1958).

A "Jewelers' Block Policy" provides all-risk coverage against loss of stock on the jeweler's premises or in transit, with fire coverage optional. It is a type of inland marine insurance[2] authorized by section 46 of the New York Insurance Law,[3] but for which no standard policy form is prescribed. A standard fire policy form, however, is set out in section 168 of the Insurance Law, with the stipulation that, "no policy or contract of fire insurance shall be made . . . on any property in this state, unless it shall conform as to all provisions, stipulations, agreements and conditions, with such form of policy."[4]

The insuring clause of the standard fire insurance policy limits its coverage to property at a fixed or specified location.[5] Although termed "floater coverage," the "Jewelers' Block Policy" is also primarily intended to insure property located on the jeweler's premises.[6] In a block policy, the standard fire rate is used and forms the basis of the insurance rate.[7]

Whether the legislature intended to class the inland marine insurance contract as an independent species of insurance, or merely as a severable grouping of separate risks has never been adjudicated heretofore in New York. The Wisconsin Supreme Court, in an analogous situation, held that a fine arts

1. N.Y. Ins. Law § 168.

2. This term refers to a combination of marine, fire, and casualty insurance which was originally designed to provide transportation insurance on land, similar to marine insurance. Later, it was developed under the names of "floater" or "block" policy to provide coverage, often all-risk, on property, floating or movable in nature, as well as at fixed locations where there was need for adequate and broader protection than might be obtained under the forms of fire and casualty insurance. Appleman, Inland Marine Insurance 1-12, 110-12 (1st ed. 1934).

3. N.Y. Ins. Law § 46(20)(c).

4. N.Y. Ins. Law § 168.

5. The policy does not cover property other than at the location described. Forms attached to the policy may extend a portion of the coverage to other locations, or on a blanket basis to any other location, but such extension must be given specifically for such coverage to be effective. Rodda, Fire & Property Insurance 49 (1956).

6. The block policy does provide transportation coverage on goods in hands of salesmen and in transit to and from customers and supply houses, but the limits of liability are so specified that the principal coverage is at insured's premises described in the policy. Rodda, op. cit. supra note 5, at 333.

7. Id. at 287.

policy,[8] which by its terms insured permanently located property against fire and other risks, was not marine insurance for the purpose of rate regulation, and was, therefore, governed by the statutory provisions regulating fire insurance contracts.[9] Similarly, in *Fireman's Fund Ins. Co. v. Vermes Credit Jewelry*,[10] the Court of Appeals for the Eighth Circuit, on facts virtually identical to those of the principal case, held that the Minnesota legislature, in authorizing the writing of inland marine policies,[11] did not intend to permit the insurer to condition his liability for fire loss other than by warranties authorized by the standard fire statute.[12] The court stated:

> Whether a policy of insurance is a fire insurance contract . . . depends not upon what the policy is labeled or how the insurance is classified, but upon the risk or risks which are insured against. . . . [A] Minnesota policy insuring a stock of goods at a fixed location against loss by fire is, to that extent at least, a fire insurance contract, even though it covers other risks and provides broader coverage in some respects against a fire loss than does the standard form.[13]

The court in the instant case adopted the same rationale. It recognized that the label given a particular contract was merely an arbitrary designation with no effect on the substantive rights of the parties;[14] thus the classification of the policy as marine insurance does not destroy the protection afforded the insured by the fire insurance statute. The policy was held to be severable as to the risks because had the insured elected to forego the convenience of a combined policy and to take his fire coverage in a separate policy, such policy would have been written in the standard statutory form, and, therefore, the standard fire insurance policy was applicable to the fire coverage involved.

Judicial authority for severing the coverages of the block policy was found in cases dealing with automobile insurance. In *American Sur. Co. v. Rosenthal*,[15] the contract stated the risks separately and fixed the rates accordingly,

8. This policy form provides all-risk coverage on private or public collections of paintings, sculpture, and other articles of rarity, historical value, and artistic merit. Magee, General Insurance 313 (5th ed. 1957).

9. Northwestern Nat'l Ins. Co. v. Mortensen, 230 Wis. 377, 284 N.W. 13 (1939).

10. 185 F.2d 142 (8th Cir. 1950). Here the insured sought recovery for a fire loss under a "Jewelers' Block Policy" although he had breached a warranty which was not within the standard fire insurance policy.

11. Minn. Stat. Ann. § 70.61(4) (Supp. 1957). Here inland marine insurance is defined generically, while in New York it is defined by enumeration of specific coverages.

12. Minn. Stat. § 65.01 (1945), as amended, (now Minn. Stat. Ann. § 65.011 (Supp. 1957)).

13. 182 F.2d 142, 144-45 (8th Cir. 1950).

14. Stecker v. American Home Fire Assur. Co., 299 N.Y. 1, 84 N.E.2d 797 (1949). This case cited with approval Blair v. National Sec. Ins. Co., 126 F.2d 955, 957 (3d Cir. 1942), which found that § 46 of the N.Y. Ins. Law licensed certain types of corporate forms to do certain classified kinds of business, and that such classification was negative to any substantive rule of law governing a particular risk. The terminology "inland marine" is partly historical and partly statutory, and is often arbitrarily applied to risks which are not popularly thought to be such risks. Davis Yarn Co. v. Brooklyn Yarn Dye Co., 293 N.Y. 236, 247-48, 56 N.E.2d 564, 569 (1944).

15. 206 Misc. 485, 133 N.Y.S.2d 870 (Sup. Ct. 1954), aff'd mem., 1 App. Div. 2d 652, 147 N.Y.S.2d 678 (1st Dep't 1955).

although the total premium could be paid in gross. The court held that the property damage section of the contract was severable from the personal injury section, and that the condition applied to the former only.[16] A similar question arose in *International Indem. Co. v. Duncan*,[17] a suit brought upon a combination automobile insurance policy protecting against loss by fire or theft. Contrary to a "no mortgage" clause in the said contract, the plaintiff placed an encumbrance on the insured vehicle. The court held that the legal effect of the combination policy was the same as if two separate policies had been issued to the insured. Therefore, since the contract was divisible, and since a "no mortgage" clause in a separate fire policy was prohibited by statute, the court refused to apply it to the fire provisions of the combination policy.[18]

Acceptance of the principles of these decisions, the majority felt, was necessary to forestall widespread circumvention of the fire insurance statute and preserve the rights of insurer and insured—the insurer with respect to the imposition of warranties for protection against fraud on the part of the insured, the insured with respect to adequate protection under the imposed conditions of the insurer.[19] The majority further found that the substantive rights of the parties were unaffected by the approval of the form of the policy given by the Superintendent of Insurance.[20]

The dissent found in section 46 of the New York Insurance Law statutory authority for subjecting the fire coverage of the contract to the general terms contained therein. This section, it reasoned, authorizes a form of insurance independent of the standard fire policy, which should not be limited by the statutory provisions applicable to another form. The entire discussion of the applicability of the fire policy statute was considered immaterial by the dissenting justices since both the standard fire insurance contract and the block policy would be avoided by the misrepresentations of the insured. The opinion noted that, "the standard fire policy provides that it shall be void if the insured has 'wilfully concealed or misrepresented' any material fact."[21]

16. In Fantozzi v. Security Mut. Fire Ins. Co., 247 App. Div. 686, 289 N.Y. Supp. 458 (3d Dep't 1936), the court had already noted the severability of the fire and supplemental theft coverages in an automobile insurance policy.

17. 254 S.W. 233 (Tex. Civ. App. 1923).

18. Accord, Hartford Fire Ins. Co. v. Owens, 272 S.W. 611 (Tex. Civ. App. 1925); 44 C.J.S. Ins. § 336 (1945). Contra, Motors Ins. Corp. v. Stowers, 206 Okla. 692, 246 P.2d 341 (1952). Here the court stressed that the "no mortgage" clause in the automobile insurance policy covering among other casualties, fire, was binding on the parties as the contract did not purport to be in the standard form to which the fire insurance statute applied.

19. The policy underlying the fire statute is set out in Nelson v. Traders' Ins. Co., 181 N.Y. 472, 474-75, 74 N.E. 421, 422 (1905); Hicks v. British Am. Assur. Co., 162 N.Y. 284, 291-92, 56 N.E. 743, 745 (1900).

20. Kocak v. Metropolitan Life Ins. Co., 237 App. Div. 780, 263 N.Y. Supp. 283 (3d Dep't), aff'd mem., 263 N.Y. 518, 189 N.E. 677 (1933); Metropolitan Life Ins. Co. v. Conway, 252 N.Y. 449, 451, 169 N.E. 642 (1930).

21. 5 App. Div. 2d 577, 586, 173 N.Y.S.2d 859, 867 (2d Dep't 1958). Although the block policy in its provision for avoidance of the contract omits the word "wilfully," the dissent found it difficult to conceive a misrepresentation not wilful.

The majority in the instant case found the *Vermes*[22] decision persuasive. In that case, however, there was the additional fact that the legislature had expressly excepted from the standard fire policy statute, motor vehicle insurance covering loss or damage by fire when combined in a single policy with other risks.[23] The court there felt that, in the absence of express legislative exemption, the multiple risk policy at issue was within the fire policy statute, in so far as the policy covered loss by fire. *Northwestern Nat'l Ins. Co. v. Mortenson*[24] provided a close analogy for the present court. If a combination policy, including coverage of risk of loss by fire at a fixed location, is found to be a fire policy for rating purposes, it would appear to be a fire policy for standard form purposes.[25]

The coverage of goods in a fixed location, and only incidentally in transit, under the "Jewelers' Block Policy" does not constitute, with respect to the fixed location, a risk different from that involved in the standard fire contract. If a contrary decision had been reached in the instant case, a premium would have been placed on form rather than substance. Combination policies, regardless of extent of coverage, could then be interpreted as distinct forms of insurance. They would, therefore, as entireties be exempt from the provisions enunciated by the legislature for the severable risks therein. For such policies, the statutory fire form would be impliedly repealed. Thus, insurance companies would become the sole judges of what combination policies against fire and other risks should contain, and the legislative mandate embodied in section 168 of the Insurance Law would be nugatory.

Insurance — The Meaning of the Word "Accident" in a Liability Insurance Policy.—Plaintiffs, undertaking a construction contract with the City of New York, agreed to assume all liability for physical injury and property damage caused by acts of construction regardless of negligence. To insure themselves against this liability, plaintiffs obtained from the defendant insurance company a general liability policy with an endorsement limiting liability to $50,000 for each accident and $100,000 for the aggregate operation.

In the course of construction the plaintiffs dug a continuous trench parallel and adjacent to two buildings and built two temporary cinder block walls to protect the sub-basement level of each building. An unusual rainfall flooded the trench causing the restraining walls to collapse and the sub-basements of the two buildings to be flooded, thereby damaging the property of the tenants located therein.

The defendant refused to indemnify the plaintiffs in excess of $50,000, claiming there had been only one accident. The appellate division held that because the operative hazards insured against within the meaning of the policy were

22. See note 10 supra.

23. Minn. Stat. § 65.02 (1945), as amended.

24. 230 Wis. 377, 284 N.W. 13 (1939).

25. Both Wisconsin and Minnesota have since changed the effect of these decisions by statutory amendments. Wis. Stat. Ann. § 203.06(5), (6) (1957); Minn. Stat. Ann. § 65.02 (Supp. 1957).

acts of the insured, there were two accidents, damage having been caused by the collapse of the two restraining walls. *Johnson Corp. v. Indemnity Ins. Co.*, 6 App. Div. 2d 97, 175 N.Y.S.2d 414 (1st Dep't 1958).

How are we to construe the word "accident" used in the limitation clause of the standard third party liability policy? Two theories have been suggested. The so-called "cause theory" equates "each accident" with the proximate cause of the injury so that one cause equals one accident no matter how many parties are injured or properties damaged.[1] The "effect theory" considers each injury or damage suffered by a property owner a separate accident.[2] The weight of authority in this country has adopted the "cause theory"[3] and it has been said that the "effect theory" rests upon an antiquated English decision and a distinguishable American case.[4] The problem has been dealt with extensively in texts, law review articles and annotations.[5]

The policy here in question was a standard third party liability policy,[6] ex-

1. The cases which follow this theory, in proceeding on the ground that the policy is to be construed according to the intention of the parties, have determined that the intention of the ordinary man taking out an insurance policy is to interpret the word "accident" in the limitation clause to mean the act or event which has caused the injury. The leading cases are St. Paul-Mercury Indem. Co. v. Rutland, 225 F.2d 689 (5th Cir. 1955); Hyer v. Inter-Ins. Exch., 77 Cal. App. 343, 246 Pac. 1055 (2d Dist. 1926); Truck Ins. Exch. v. Rohde, 49 Wash. 2d 465, 303 P.2d 659 (1956). See also Denham v. La Salle-Madison Hotel Co., 168 F.2d 576 (7th Cir.), cert. denied, 335 U.S. 871 (1948); Tri-State Roofing Co. v. New Amsterdam Cas. Co., 139 F. Supp. 193 (W.D. Pa. 1955).

2. The rationale behind this position is that the insured party wishes to protect himself against claims of parties injured through the insured's instrumentality. See Anchor Cas. Co. v. McCaleb, 178 F.2d 322 (5th Cir. 1949); South Staffordshire Tramways Co. v. Sickness & Acc. Assur. Ass'n, [1891] 1 Q.B. 402.

3. Anchor Cas. Co. v. McCaleb, supra note 2, which is the leading American authority for the "effect theory," was expressly rejected by the court in St. Paul-Mercury Indem. Co. v. Rutland, 225 F.2d 689 (5th Cir. 1955). It is significant that both cases were heard in the same circuit and that Judge Holmes wrote both opinions.

4. The English decision referred to is South Staffordshire Tramways Co. v. Sickness & Acc. Assur. Ass'n, [1891] 1 Q.B. 402. Anchor Cas. Co. v. McCaleb, 178 F.2d 322 (5th Cir. 1949) has been distinguished on its facts. See St. Paul-Mercury Indem. Co. v. Rutland, supra note 3. In the Anchor case an oil well "blew in" and damage was caused to several surrounding properties by oil which was blown about together with sand and mud for a period of fifty hours.

5. 8 Appleman, Insurance § 4891 (1942). See also Comment, 26 Fordham L. Rev. 506 (1957). For a note on St. Paul-Mercury Indem. Co. v. Rutland see 2 U.C.L.A. L. Rev. 423 (1955). The problem is also the subject of an annotation in 55 A.L.R.2d 1300 (1957).

6. The policy issued to the plaintiff was a Comprehensive General Liability policy which provided as follows:

"I . . .

"Coverage B—Property Damage Liability.

"To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, or assumed by him under contract as defined herein, for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident." Brief for Plaintiff, p. 3, Johnson Corp. v. Indemnity Ins. Co.

tended by endorsement to insure all of the plaintiffs' contractual liability with the City of New York, regardless of negligence.[7] The effect of this endorsement was not to convert the policy into one of indemnification against loss,[8] but merely to remove the question of negligence in determining the plaintiffs' legal liability. In other words, the hazard insured against was not property loss, but acts of construction resulting in loss.

The New York court here rejected both the cause and effect theories and fashioned a test based on the operative hazard insured against.[9] Since the operative hazard insured against was acts of construction regardless of negligence, the court concluded that there were two separate acts of construction, two separate walls erected which collapsed at separate times, and that though there was but one flood, there were two accidents.

In the two leading and most recent decisions dealing with this problem, *St. Paul-Mercury Indem. Co. v. Rutland*[10] and *Truck Ins. Exch. v. Rohde*,[11] where more than one person was injured by one act of negligence, the question was whether there was one or multiple accidents.[12] The lower courts in both instances found that there were multiple accidents even though there was but one act of negligence on the part of the insured. Thus the effect theory was followed.[13] The appellate courts in reversing held that the word "accident" should be equated with the cause of liability, the negligent act of the insured, viz., one negligent act causing injuries, no matter how many, should equal one accident. The higher courts espoused the cause theory.

In the instant case, however, there were clearly two acts,[14] namely the build-

7. "Contractual Liability and Property Damage Endorsement No. 1.

"It is agreed that . . . such insurance . . . shall also apply to the liability assumed by the insured under Contract . . . between the named Insured and the City of New York . . . ."

Article XLVII of the contract referred to further states, "whether such damage or injuries be attributable to negligence of the Contractor or his employees or otherwise." Brief for Plaintiff, pp. 3, 4, Johnson Corp. v. Indemnity Ins. Co.

8. A liability policy by its nature insures a party against any acts for which he may become legally liable; the insurance company's obligation arises when such act, resulting in liability, occurs. Indemnity insurance, on the other hand, directly insures against loss; legal liability is not a condition precedent to the company's obligation. See 1 Richards, Insurance § 166 (5th ed. 1952).

9. 6 App. Div. 2d 97, 103, 175 N.Y.S.2d 414, 420 (1st Dep't 1958).

10. 225 F.2d 689 (5th Cir. 1955).

11. 49 Wash. 2d 465, 303 P.2d 659 (1956).

12. In the St. Paul-Mercury case a truck, operated by an employee of the insured, collided with a freight train causing damage to sixteen cars belonging to fourteen owners. In the Rohde case, an automobile, driven by the plaintiff, struck three motorcycles.

13. St. Paul-Mercury Indem. Co. v. Rutland, 225 F.2d 689 (5th Cir. 1955). The case was reported in the Federal Reporter Advance Sheets, 217 F.2d 585 (5th Cir. 1955), but did not appear in the bound volume of the Federal Reporter system because the opinion was set aside on March 22, 1955. Prior to the decision in Truck Ins. Exch. v. Rohde, 49 Wash. 2d 465, 303 P.2d 659 (1956), the Superior Court, Yakima County, Washington, had entered judgment against the insurer. The case is unreported.

14. The court in the instant case is very explicit on the point that the retaining walls

ing of two restraining walls at different times which collapsed separately. To bring this case within the problem area, so to speak, dealt with in the prior decisions, the question would have to be whether there were two (cause theory) or several (effect theory) accidents since several property owners suffered loss. This, however, is not the question stated by the court.[15]

The question presented by the court was whether there was *one* or *two* accidents. The only possible theory under which it could be held that there was one accident under the set of facts in this case, is that the proximate cause of the damage to the two buildings was the single cause of rain or flood. The court, however, pointed out that neither rain nor flood was the proximate cause of the damage[16] and that the insurance which the plaintiffs had did not cover these hazards.[17] This is indisputable. It is elementary insurance law that a liability policy covers acts by the insured for which he may become legally liable, as distinguished from a policy to indemnify against loss,[18] and it is an accepted principle of tort law that where an act of God such as rain or flood concurs with a negligent act to produce injury, and the consequences of the act of God can reasonably be foreseen, as here, then the proximate cause of the injury is the negligent act and not the act of God.[19]

The only other conclusion, then, is that there were two accidents, which is what the court held, on the ground that the hazard insured against was acts of construction, and two of these acts, the construction and collapse of the two walls, caused the injury to the two properties. Is this not an adoption of the "cause theory" when the court states the test: "What is the event of liability here, the operative hazard which brings the policy into play?"[20]

It is submitted that the court in this case has not really dealt with the problem which faced the courts in the *St. Paul-Mercury* and *Rohde* cases simply because it was not necessary to decide the issue. Under either the effect theory or cause theory the court would have found that there were two accidents because *two* causes (ruling out the flood as the cause) caused *two* injuries. What then is the theory on which this decision rests? The court poses the question whether there was one or two accidents. By making this the issue, it is merely asking what was the cause of the injury; the single cause of rain or flood or the double cause of two acts? As a question of fact, it finds that the collapse of the two walls caused the injury. Therefore the word "accident" is equated with the number of causes—a clear espousal of the "cause theory." This is made quite clear when the court states that if a

were separately built by the plaintiff, and collapsed separately. 6 App. Div. 2d at 104, 175 N.Y.S.2d at 421.

15. "There is no doubt that there was an accident in this case; the question is whether there was more than one." 6 App. Div. 2d at 100, 175 N.Y.S.2d at 417.

16. 6 App. Div. 2d at 104, 175 N.Y.S.2d at 421.

17. Id. at 103, 175 N.Y.S.2d at 421.

18. "It is the purpose of Liability Insurance to indemnify the insured against the consequences of negligent maintenance, operation, or use of property or the business operations of manufacturers and contractors . . . ." 1 Richards, Insurance § 17, at 60 (5th ed. 1952).

19. Prosser, Torts § 49, at 275 (2d ed. 1955).

20. 6 App. Div. 2d at 103, 175 N.Y.S.2d at 420.

single blow of a pickaxe wielded by one of the plaintiffs' employees caused the two injuries, there would have been but one accident.[21]

Is the test then to be the cause of the injury? This case would seem to say so—with the additional requirement that the cause be also the hazard insured against, or, more properly, that the hazard insured against be a substantial factor in causing the injury. The New York Court of Appeals has held that when the hazard insured against is the factor causing the injury or loss then policy coverage ensues,[22] and when the hazard insured against is not the cause of the damage, then the policy does not operate.[23] Thus, if the policy will not operate unless the hazard insured against caused the injury or loss, it is not illogical to conclude that this "covered cause" should be the factor to determine the limitation of a liability policy. This is a proper test when it is considered that the nature of a liability policy is to insure against legal liability and this liability does not arise until the insured's act causes injury.

It is a valid conclusion that the court in this case has clearly adopted the "cause theory" but with a slightly different approach. The hazard insured against, as a substantial causal factor is the test. In the light of the reasoning of *Tonkin v. California Ins. Co.*[24] and *Bird v. St. Paul Fire & Marine Ins. Co.*,[25] it is felt that if a situation such as in the instant case comes before the court of appeals, the reasoning of this decision would be followed.

Labor Relations — Effect of Grievance Procedure and Arbitration Provisions of Collective Agreement on Individual Employee.—Plaintiff brought an action against her employer for wrongful discharge in violation of a collective bargaining agreement. She alleged that her union arbitrarily refused to take up her claim with the employer pursuant to the grievance procedure of the collective bargaining agreement. The defendant employer demurred. The trial court sustained the demurrer on the ground that the collective agreement barred the action. On appeal, the Court of Appeals of Maryland unanimously reversed, and held that an employee will not be barred from maintaining an action for wrongful discharge against the employer where the union, as the collective bargaining representative, acted arbitrarily or in a discriminatory manner in refusing to arbitrate the employee's grievance with the employer. *Jenkins v. Wm. Schluderberg-T. J. Kurdle Co.*, 217 Md. 556, 144 A.2d 88 (1958).

21. Id. at 104, 175 N.Y.S.2d at 422.

22. Tonkin v. California Ins. Co., 294 N.Y. 326, 62 N.E.2d 215 (1945).

23. Bird v. St. Paul Fire & Marine Ins. Co., 224 N.Y. 47, 120 N.E. 86 (1918).

24. 294 N.Y. 326, 62 N.E.2d 215 (1945). Under a policy insuring "Loss of or Damage to the Automobile, Except by Collision but including Fire, Theft and Windstorm," a collision caused by smoke from a fire in the car, getting into the eyes of the driver, was held to be covered by the policy because, as the hazard insured against, it caused the collision.

25. 224 N.Y. 47, 120 N.E. 86 (1918). Under a policy insuring against fire, the court found that damages caused to the plaintiff's building by a concussion from an explosion caused by fire, was not covered because the cause of loss was not the hazard insured against.

For the purposes of enforcement, authorities have made a distinction between various classes of rights created or guaranteed by the collective agreement. Certain rights, such as receipt of wages, vacation pay, overtime, and, possibly,[1] protection from discharge (except for cause), are considered as inhering peculiarly in the individual and not enforceable except by him or with his consent. Other provisions, such as closed shop clauses and dues check-off, are for the exclusive benefit of the union so that individual members cannot sue to enforce them.[2] Such distinctions must be approached with care. The interests of employee and union are far too interdependent to permit such a neat separation.[3] Moreover, the fairly recent *Lincoln Mills*[4] case makes this distinction even more tenuous. It is now apparently possible for an arbitration clause to be made wide enough to bring hitherto individual rights within the scope of union enforcement.[5]

Today nearly all collective agreements contain a procedure for resolving disputes and problems arising under the agreement.[6] These procedures usually

1. Not all authorities are agreed that such provisions are to be construed as creating a right to job security in the individual. E.g., "However, a different answer might be given where the term restricts—conditionally—the common law right of an employer to discharge his employees, and the condition consists of giving only the union the right to challenge the propriety of such a discharge upon the grounds of the absence of a 'just and proper cause.'" Lenhoff, The Effect of Labor Arbitration Clauses Upon the Individual, 9 Arb. J. (n.s.) 3, 12 (1954) [hereinafter cited as Lenhoff]. But see Parker v. Borock, 6 CCH Lab. L. Rep. ¶ 65159 at 65591 (36 CCH Lab. Cas.) (N.Y. 1959) where the court held the right belonged to the individual.

2. See Elgin, J. & E. Ry. v. Burley, 325 U.S. 711 (1945), aff'd on rehearing, 327 U.S. 661 (1946) (union settling members' claims without authorization); Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 210 F.2d 623 (3d Cir. 1954), aff'd, 348 U.S. 437 (1955) (attempt by union to enforce vacation pay clause); MacKay v. Loew's Inc., 182 F.2d 170 (9th Cir. 1950) (employees attempting to enforce closed shop clause); Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601, 605-16 (1956) [hereinafter cited as Cox]; Lenhoff 5-6.

3. If, for instance, wages and hours were the exclusive concern of the employee then by simply refusing to enforce his collective rights he could, in effect, make an independent contract with his employer. But all individual contracts of hire must conform to the collective agreement. See J. I. Case Co. v. NLRB, 321 U.S. 332 (1944).

4. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1956).

5. "A claim is made by the union that the men are receiving improper wages. This is made a grievance; the grievance procedure then becomes operative. If an arbitration clause covers this particular claim, arbitration should be requested; if the company refuses arbitration, an action to enforce the arbitration clause will then be decided on the merits. But if the arbitration clause does not cover the gravamen of the grievance so that the suit must be based on other clauses of the contract not related to the arbitration clause, the action will be dismissed without consideration of the merits, and the underlying argument is not settled; the employees, to the extent that such an action is available, must sue on the contract in the respective state courts. The obvious approach, therefore, for those so interested, is to achieve a broader arbitration clause, if it is intended to try to process all germane contractual claims via the arbitration route." Kramer, Arbitration Under the Taft-Hartley Act 6 (1958) (presented to the N.Y.U. 11th Annual Conference on Labor).

6. It has been pointed out that this phenomenon has been caused partly by the early distaste and later confusion with which the collective agreements were received by the

provide for a discussion between the aggrieved employee, a shop steward or other union official, and some representative of management ending, if unresolved earlier, in arbitration.[7] The arbitration is usually between the union and the employer, the employee not being considered a party.[8]

The arbitration clause, like the collective agreement itself, is generally enforceable, at least to the extent that an employee will be barred from bringing an action against his employer, unless it can be shown that all remedies available under that agreement have been exhausted.[9]

If the union is willing to take the employee's case through the various stages of the grievance procedure, refusal of management to cooperate is usually no obstacle since refusal to bargain is an unfair labor practice under the Taft-Hartley Act.[10] Also, in some jurisdictions there are statutory methods to force a party to such an agreement to arbitrate.[11] In a fairly recent case the Supreme Court specifically enforced an agreement to arbitrate.[12] In one federal case a suit was permitted against a reluctant employer despite the arbitration clause.[13] When, however, it is the union which refuses to arbitrate, the situation becomes more complicated.

Congress has not under the NLRA completely subjected the rights of the individual to arrangement between union and management.[14] If the employee can establish a violation of the NLRA or the Railway Labor Act[15] he can proceed on his own before the appropriate administrative board.[16] To allow, therefore, the parties to a collective agreement to deprive the employee of his individual rights merely by inserting an arbitration clause does seem to "border

courts so that the parties, like the merchants of the Middle Ages, set up what amounted to their own judicial system. See Cox 604-05; Gregory, Labor and the Law 467 (2d ed. rev. 1958) [hereinafter cited as Gregory].

7. See Cox 627-30; Gregory 481-82.

8. See Cox 629.

9. It is understandable that such arbitration clauses should find favor with courts since they relieve the courts of what would be a heavy burden of litigation, insure a hearing before parties familiar with the problems of a particular field, and promote a spirit of law and order in what too often has been an economic jungle. See, e.g., Transcontinental & Western Air, Inc. v. Koppel, 345 U.S. 653 (1953); Cone v. Union Oil Co., 129 Cal. App. 2d 558, 277 P.2d 464 (1954); Jorgensen v. Pennsylvania R.R., 25 N.J. 541, 138 A.2d 24 (1958); Parker v. Borock, 6 CCH Lab. L. Rep. ¶ 65159 (36 CCH Lab. Cas.) (N.Y. 1959). Contra, Alabama Power Co. v. Haygood, 266 Ala. 194, 95 So. 2d 98 (1957); Dufour v. Continental So. Lines, 219 Miss. 296, 68 So. 2d 489 (1953).

10. 65 Stat. 601 (1951), 29 U.S.C. § 158 (1952). See, e.g., Allied Mills, Inc., 23 L.R.R.M. 1632 (1949); Tide Water Associated Oil Co., 24 L.R.R.M. 1518 (1949); Vanette Hosiery Mills, 23 L.R.R.M. 1198 (1948).

11. See, e.g., N.Y. Civ. Prac. Act §§ 1448-51.

12. See note 4 supra.

13. United Protective Workers v. Ford Motor Co., 223 F.2d 49 (7th Cir. 1955).

14. See, e.g., Conley v. Gibson, 355 U.S. 41 (1957); NLRB v. Augusta Chem. Co., 187 F.2d 63 (5th Cir. 1951); Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945); see also Lenhoff 15-17.

15. 64 Stat. 1238 (1951), 45 U.S.C. § 152 (1952).

16. See note 14 supra.

on the incredible."[17] However, while recognition must be accorded individual rights, the bargaining position of the union must also be preserved.

The undesirability of allowing the employee to be completely dominated by agreement between union and management is obvious.[18] Yet, the position of the union in the collective bargaining arena will be weakened if it cannot exercise some discretion over what grievances shall be presented to management and how far they shall be pressed.[19] Acting in complete good faith, the union may believe the grievance unjustified or of such small importance as not to justify the expense and effort of an arbitration fight. Or, though the matter be both just and weighty, yet, in the interests of the group as a whole, the union may not want to see it pressed.[20]

A New York case[21] has laid down three possible roads for an aggrieved employee to follow if he is not willing to leave his claim to the discretion of his union. Assuming jurisdiction, he might take his case before the appropriate federal board. He might sue his union for damages, should it fail to handle his case properly. Or, should the union agree to arbitrate, he might move to intervene. Another lower New York court case simply gave the employer a choice between arbitrating with the employee in place of the union or facing a court action.[22] The latter solution[23] was mentioned but neither commented on nor relied upon by the instant court.

A related problem, though not considered in the instant case, is whether the employee has a remedy should the union actually take his case to arbitration and then negligently or maliciously fail to press it effectively. Unless he can have the arbitrators' award set aside on rather narrow statutory grounds,[24] his case has been effectively destroyed if the courts will not permit him to intervene. There is authority pointing both ways.[25] The general trend today

17. See Lenhoff 15.

18. See, e.g., Time, Sept. 15, 1958, p. 16; Aug. 18, 1958, p. 14-15; id., July 21, 1958, p. 15; July 14, 1958, p. 18. Recent press scandals have pointed out that not all union officials are fit guardians of the employee's interests. See note 14 supra.

19. See Parker v. Borock, 6 CCH Lab. L. Rep. ¶ 65159 at 65592 (36 CCH Lab. Cas.) (N.Y. 1959) (concurring opinion); Gregory 494.

20. See Cox 625-27; Gregory 482.

21. Donato v. American Locomotive Co., 283 App. Div. 410, 127 N.Y.S.2d 709 (3d Dep't), aff'd mem., 306 N.Y. 966, 120 N.E.2d 227 (1954).

22. Matter of Julius Wile Sons & Co., 199 Misc. 654, 102 N.Y.S.2d 862 (Sup. Ct. 1951).

23. Accord, Cox 652. Contra, Lenhoff 15.

24. N.Y. Civ. Prac. Act §§ 1462-62(a). But cf. Soto v. Lenscraft Optical Corp., 7 App. Div. 2d 1, 180 N.Y.S.2d 388 (1st Dep't 1958).

25. In Matter of Iroquois Beverage Corp., 159 N.Y.S.2d 256 (Sup. Ct. 1955), intervention was permitted. But in I. Miller & Sons v. United Office Workers, 195 Misc. 20, 88 N.Y.S.2d 573 (Sup. Ct. 1949), an opposite result was reached. In Cox v. R. H. Macy & Co., 152 N.Y.S.2d 858 (Sup. Ct. 1956), and in Sholgen v. Lipsett, Inc., 116 N.Y.S.2d 165 (Sup. Ct. 1952), the court refused to direct arbitration between employer and union at the prayer of the individual employee. Despite its statutory provisions the law is in a "state of flux" on this entire question, but there seems to be a trend toward granting more protection to the employee. Manson, Labor Relations Law, 32 N.Y.U.L. Rev. 1365, 1374-75 (1957). Most of the law on this subject is New York law. Lenhoff 5.

is toward recognizing that, whether it becomes the employee's or the union's prerogative to press the issue, the other is entitled to some voice in the matter.[26]

The solution in the instant case, based on a fiction of trust, seems to be commendable. The court showed itself solicitous for the bargaining position of the union and the value of private arbitration by affirming as a general rule that an employee cannot proceed against his employer unless all the remedies available under the collective agreement have been exhausted. It is only where the union has acted wrongfully in refusing to champion his cause that the employee himself will be permitted to enforce the agreement. The case is open to attack on the pragmatic ground that an employee, by merely pleading wrongful conduct by his union, can take his employer to court to decide at least the question of the union's good faith. At least to this extent the union's bargaining position is weakened.

Whether or not the instant case is viewed as sound,[27] one principle clearly emerges. An employee has a *substantive* right, which can be the basis of at least an action for damages, to honest, nondiscriminatory representation from his collective bargaining representative.[28] There is, however, a *procedural* difficulty. Unions are invariably unincorporated associations. At common law[29] such associations could neither sue nor be sued without joining each and every member. In the case of something like the UAW this would obviously be impossible. In some jurisdictions, an employee still faces this problem.[30] Section 301 of the NLRA[31] removes this problem for employers and unions by letting them sue each other in federal courts without regard to diversity or amount of compensation. This privilege, however, does not extend to the em-

26. To illustrate the right of the employee to be represented see note 21 supra and accompanying text. For the right of the union see 63 Stat. 107 (1949), 29 U.S.C. § 159(a) which specifically gives it the right to be consulted in any settlement between employer and employee.

27. From a view of strict stare decisis we cannot say whether the case is sound or unsound. As authority in support of the decision see Marranzano v. Riggs Nat. Bank, 184 F.2d 349 (D.C. Cir. 1950) where the court held that the right of an employee to sue did not depend upon any grant by the agreement itself; NLRB v. Bull Insular Lines, 233 F.2d 318 (1st Cir. 1956) where a union and employer were held jointly and severally liable for discriminatory practices; Pattenge v. Wagner Iron Works, 275 Wis. 495, 82 N.W.2d 172 (1957) where under facts similar to the instant case employees were permitted to sue; Cox 645; Lenhoff 17. But for authority contra see Guszkowski v. United States Trucking Corp., 162 F. Supp. 847 (D.N.J. 1958), and Marchitto v. Central R.R., 9 N.J. 456, 88 A.2d 851 (1952), where under somewhat similar circumstances the court refused to permit an action; see also Parker v. Borock, 6 CCH Lab. L. Rep. ¶ 65169 (36 CCH Lab. Cas.) (N.Y. 1959), where the facts were almost identical with the instant case and the court refused to allow the employee to sue; see also Gregory 493.

28. See, e.g., Conley v. Gibson, 355 U.S. 41 (1957); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944) (discrimination by white union against negro employee).

29. See, e.g., Karges Furniture Co. v. Amalgamated Woodworkers, 165 Ind. 421, 75 N.E. 877 (1905); International Bhd. of Boilermakers v. Wood, 162 Va. 517, 175 S.E. 45 (1934).

30. See Marchitto v. Central R.R., 9 N.J. 456, 88 A.2d 851 (1952).

31. 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1952).

ployee.[32] He is left to the state courts or to federal courts in one of the instances where one of them can sit as another state court[33] because of diversity and amount claimed. Were this section amended to apply to individuals or were similar statutes enacted by the states, this, along with his right to appear before federal boards, might afford the employee ample protection in his rights without undue interference with the workings of union and management. Until then, the rule laid down by the highest court of Maryland is doubtless the best safeguard the employee can have.

Trusts — Allocation of Dividends Payable in Stock or Cash at Option of Trustee.—The codicil to testator's will provided "that any and all cash dividends . . . upon shares of stock . . . shall be deemed income and that any and all dividends payable in stock of the corporation declaring same shall be deemed principal."[1] These shares, held by trustees, were in investment companies[2] which gave their shareholders the option of taking current capital gains distributions[3] in either cash or stock. The trustees periodically exercised their option by taking stock instead of cash, and distributed said stock to income beneficiaries under the will. In an accounting proceeding the remainderman filed objections based on the claim that the stock distributions by the investment companies constituted principal rather than income. The court held that dividends payable out of the annual earnings of an investment company in stock or cash at the option of the trustee are cash dividends, regardless of the manner in which trustee shareholder elects to receive them, and that such dividends are payable to the income beneficiary unless the will contains different directions. *In re Appleby's Estate,* 175 N.Y.S.2d 176 (Surr. Ct. 1958).

In general, the principal of a trust estate includes not only the property which

32. 1 Werne, Law and Practice of the Labor Contract § 10.22 (1957).

33. 1 Werne, op. cit. supra note 32, §§ 9.13, 10.24.

1. In re Appleby's Estate, 175 N.Y.S.2d 176, 177-78 (Surr. Ct. 1958). Testator, a citizen of the United States, was a domiciliary of Nassau in the Bahama Islands. The will was probated both in the domicile, and in New York where most of the assets were located, in accordance with N.Y. Surr. Ct. Act § 138. While the will contained no explicit direction that the law of New York should govern its construction as foreseen in N.Y. Deced. Est. Law § 47, and while every reference to New York law was in derogation of its obligations, it was, nevertheless, held to apply. This ruling was proper since the parties themselves argued in terms of New York law. The general plan of the will and the location of testator's assets indicated that it was testator's understanding and intent that New York law would govern except where otherwise explicitly provided. The court was of the opinion that the decision of the issue would not have been different had the law of the domicile been applied. See 12 Fletcher, Private Corporations § 5405 (perm. ed. rev. repl. 1957).

2. Companies electing to qualify as regulated investment companies under Int. Rev. Code of 1954, § 851, for special tax purposes are required to distribute to their shareholders as dividends 90% or more of their gross income, derived from interest, dividends and gains from the sale of stock or securities, during each taxable year. 26 U.S.C. § 851 (Supp. V, 1958).

3. Such a distribution is a "gain or profit from the sale or exchange of capital assets." N.Y. Tax Law § 350(13).

comes into the trustee's hands, but also its enhancement in value and whatever subsequently takes its place and represents it;[4] income, on the other hand, represents the earnings of the trust property and embraces only net profits after deducting all current expenses and charges.[5] What is included within the terms principal and income is, however, primarily a question of intention on the part of the creator of the trust. The creator's intention finds manifestation in the terms of the trust instrument, construed in the light of the condition of his affairs and the circumstances attendant upon the creation of the trust.[6]

A stock dividend does not distribute the property of the corporation, but simply dilutes the shares as they existed before the dividend so that each share now represents a smaller fractional interest in the total amount of the corporate property.[7] A cash dividend, on the other hand, diminishes the property of the corporation by the amount paid out and leaves the fractional interest in the corporate property represented by each share of stock precisely what it was before.[8] At common law, in the absence of settlor's exhaustive determination as to the distribution of cash and stock dividends on corporate shares held in the trust, three rules of "presumable intention"[9] were formulated by the courts to aid in the allocation of such dividends between principal and income beneficiaries. Under the Kentucky rule, which was not followed elsewhere and is no longer in vogue, all dividends declared during the life estate and payable out of earnings were allocated to income.[10] The Pennsylvania rule[11] required dividends to be allocated to income if declared out of earnings accruing to the corporation during the period of the trust, but to principal if declared out of earnings prior to the creation of the trust. Under the Massachusetts rule,[12] all cash dividends

4. 90 C.J.S. Trusts § 355 (1955).

5. Ibid.

6. Ibid. The intention of the settlor is the "controlling consideration in all cases, except where for one reason or another it would be against public policy to carry out his intentions." 3 Scott, Trusts § 236.3 (2d ed. 1956). See 18 C.J.S. Corp. § 471, at 1123 (1938).

7. Equitable Trust Co. v. Prentice, 250 N.Y. 1, 12, 164 N.E. 723, 725 (1928). See Ballantine, Corporations § 208 (rev. ed. 1946).

8. 11 Fletcher, op. cit. supra note 1, § 5355. If a cash dividend is declared out of the corporation's surplus, the ownership of the asset has passed from the control of the corporation to the control of the shareholder. Warren, Taxability of Stock Dividends as Income, 33 Harv. L. Rev. 885, 891 (1920).

9. Equitable Trust Co. v. Prentice, 250 N.Y. 1, 9, 164 N.E. 723, 724 (1928); See 42 Cornell L.Q. 595, 600 (1957).

10. This was so regardless of the time of accumulation of the fund out of which the dividends were paid. Hite v. Hite, 93 Ky. 257, 20 S.W. 778 (1892). See 3 Scott, op. cit. supra note 6, at 1816. In 1956 Kentucky adopted a Uniform Principal and Income Act. Ky. Rev. Stat. §§ 386.190-386.340 (1956).

11. Dividends are designated income in so far as they do not impair the "intact value" of the shares at the time of the creation of the trust. Earp's Appeal, 28 Pa. 368 (1857). See 18 C.J.S., Corp. § 471, at 1129. This rule has been abandoned by Pennsylvania. Pa. Stat. Ann. tit. 20, § 3470.5 (Supp. 1957).

12. Minot v. Paine, 99 Mass. 101 (1868). See 3 Scott, op. cit. supra note 6. This rule has been adopted by Restatement, Trusts § 236 (Supp. 1948) and the Uniform Principal and Income Act § 5 (1931).

are treated as income belonging to the life beneficiary and stock dividends of the declaring corporation as principal going to the remainderman. Therefore, when a corporation issues a dividend which the trustee is entitled to receive at his option in cash or stock, a different result is reached by the courts according to the rule followed at common law.[13] Under the Pennsylvania rule, if the action of the corporation were associated with an ordinary cash dividend, such dividend would not be apportionable; while if it were associated with an extraordinary cash dividend or stock dividend, such dividend would be allocated according to its source and effect on trust capital.[14] Under the Massachusetts rule, it has been held that such action on the part of the corporation is the declaration of a cash dividend, with the granting of a separate option to buy corporate stock at a given figure.[15]

New York, in the absence of any direction given by the settlor, has at one time or another embraced all three rules of construction. Originally, the New York courts allocated all dividends based on earnings or profits to income.[16] In 1913 the court of appeals modified this rule so as to apportion stock dividends between principal and income.[17] Finally, in 1926, New York, in section 17-a of the Personal Property Law, provided that in the absence of a contrary directive from the creator of the trust, "any dividend which shall be payable in the stock of the corporation or association declaring or authorizing such dividend . . . in respect of any stock of such corporation composing, in whole or in part, the principal of such trust, shall be principal and not income of such trust."[18] As the legislature did not elaborate on the meaning of a stock dividend, it left the area open for judicial interpretation as to what was encompassed

13. Under all three rules, ordinary dividends are allocable to income; with respect to other dividends, the Kentucky rule looked to the time of the dividend, the Pennsylvania rule the source, and the Massachusetts rule the form. 12 Fletcher, op. cit. supra note 1, § 5403.

14. 4 Bogert, Trusts and Trustees § 846 (1948). See, e.g., Ballantine v. Young, 79 N.J. Eq. 70, 81 Atl. 119 (1911); In re Thompson's Estate, 262 Pa. 278, 105 Atl. 273 (1918). These two cases held that the rule of source and apportionment applied to extraordinary cash dividends, when coupled with an option to buy the stock of the issuing corporation at less than market price.

15. 4 Bogert, op. cit. supra note 14, at 340. If the trustee took the stock, he would be treated as having bought it with the cash dividend, and not as having received the stock direct from the corporation as a distribution of corporate property in the form of stock. Davis v. Jackson, 152 Mass. 58, 61, 25 N.E. 21, 22 (1890). See 2 Perry, Trust and Trustees § 545b (7th ed. 1929).

16. See Equitable Trust Co. v. Prentice, 250 N.Y. 1, 9, 164 N.E. 723, 724 (1928); McLouth v. Hunt, 154 N.Y. 179, 48 N.E. 548 (1897); 18 C.J.S., Corp. § 471, at 1129.

17. 250 N.Y. at 8, 164 N.E. at 723; Matter of Osborne, 209 N.Y. 450, 103 N.E. 723 (1913). This rule is still applicable to trusts created prior to 1926 which saw the adoption of § 17-a of the Personal Property Law. See, e.g., Matter of Hagen, 262 N.Y. 301, 186 N.E. 792 (1933); In re Fahnestock's Estate, 156 N.Y.S.2d 797 (Surr. Ct. 1956), aff'd mem., 5 App. Div. 2d 860, 172 N.Y.S.2d 531 (1st Dep't 1958).

18. N.Y. Pers. Prop. Law § 17-a. The legislature by its enactment endeavored to put an end to the accounting complexities that had arisen in the administration of the law of trusts. People ex rel. Clark v. Gilchrist, 243 N.Y. 173, 182, 153 N.E. 39, 41 (1926).

within its scope. One lead as to the legislative mind at the time of adoption of the section was found in section 350(8) of the Tax Law adopted the same year.[19] In view of the confusion thereafter engendered by the attempts of the courts to distinguish between regular and extraordinary dividends,[20] the court of appeals in *Matter of Ryan*[21] finally held that the legislature did not intend section 17-a of the Personal Property Law to be limited by the definition of stock dividends in section 350 of the Tax Law, and that all stock dividends, regular and extraordinary, were allocable to principal. The testator, however, can still defeat the operation of the statute by contrary provisions in the will.[22]

There are two decisions in New York pertaining to the question raised in the instant case. In *Kellogg v. Kellogg*,[23] the trust agreement, executed prior to the adoption of the statute, directed that any stock dividend or dividends other than cash received by the trustees upon the stock of a certain corporation should be considered principal. There, the corporation on one particular occasion declared its dividend payable in cash or stock at the election of the trustee. The trustee made no election and received stock, which he distributed to the income beneficiary. The court in that case held: "This dividend was not a 'stock dividend' as that term is used in law. . . . A stock dividend is declared only by the directors, and, therefore, it cannot be that the character of a dividend is to be determined by the actions of the stockholders. . . . Moreover, this dividend was paid not out of surplus but out of profits made during the current year, and it has none of the other usual attributes of a stock dividend. It was not simply a dilution of the existing shares, but it was an actual distribution of the property of the corporation to those who elected to take cash. After its payment the stockholders did not continue to own the same proportionate share of the assets

19. This statute defined stock dividends as "new stock issued, for surplus or profits capitalized, to shareholders in proportion to their previous holdings" and excluded therefrom "any distribution made by a corporation out of its earnings or profits." N.Y. Tax Law § 350(8).

20. In Matter of Villard, 147 Misc. 472, 264 N.Y. Supp. 236 (Surr. Ct. 1933), the court held that the statute was limited only to extraordinary stock dividends and not to stock dividends which were paid regularly from current annual earnings and were sold. In that case, the court was influenced by the fact that for years, testatrix herself, with one exception, had sold the stock dividends which she received, and that her primary object was income for the life beneficiary. See City Bank Farmers Trust Co. v. Ernst, 263 N.Y. 342, 347, 189 N.E. 241, 243 (1934). See also 3 Scott, op. cit. supra note 6, § 236.7.

21. 294 N.Y. 85, 60 N.E.2d 817 (1945).

22. See, e.g., Matter of Lloyd, 292 N.Y. 280, 54 N.E.2d 825 (1944) (testator directed executors to treat all dividends as income); Matter of Matthews, 280 App. Div. 23, 111 N.Y.S.2d 405 (1st Dep't 1952), aff'd mem., 305 N.Y. 605, 111 N.E.2d 731 (1953) (trust instrument provided that all stock dividends be deemed principal except that regular stock dividends paid in lieu of or in conjunction with regular cash dividends be deemed income); Matter of Thoms, 4 Misc. 2d 987, 163 N.Y.S.2d 95 (Sup. Ct. 1957) (trust agreement provided that no dividend, ordinary or extraordinary, whether in cash, stock or other property, should be considered principal). Discretionary power of trustee under the will is also within the exception to the statute. In re Liebmann's Trust, 131 N.Y.S.2d 144 (Sup. Ct. 1954).

23. 166 Misc. 791, 4 N.Y.S.2d 219 (Sup. Ct. 1938), aff'd mem. sub nom, Kellogg v. Neale, 254 App. Div. 812, 5 N.Y.S.2d 506 (4th Dep't 1938).

of the corporation."[24] In *Matter of Hurd*[25] the court was faced with a situation virtually identical to that of the instant case. The will, made after 1926, directed that stock dividends in shares of the declaring corporation were to be regarded as principal and cash dividends as income. The testamentary trustee received dividends from investment companies, some of which were capital gains distributions, payable in cash or stock at the option of the owner. The trustee failed to make election and received the dividends in the form of stock, some of which he later sold and the proceeds of which he allotted to the income beneficiary. The court held that the dividends received from the investment trusts were income and properly allocated to the life beneficiary. The corporation's designation of the distribution as a stock dividend was not considered to have made it a true stock dividend as contemplated by section 17-a of the Personal Property Law. It distinguished this situation from that before the court in the *Ryan* case[26] and found that the distribution at issue was "an ordinary dividend declared by the company in the regular course of its business."[27]

The court in the present case reasoned that the option which entitled the trustee to receive the dividends of the investment companies in stock or cash could not reasonably be construed so as to give him discretion to distribute the dividend among the beneficiaries in whatever way he chose[28] in the absence of such explicit authorization by will.[29] It concluded that the dividend was payable to one beneficiary or another under a fixed and definitive rule, or was apportionable between them on an equitable basis. Influenced by the fact that the legislature had discarded the application of the rule of apportionment to stock dividends for trusts created after 1926,[30] the court rejected the latter alternative for the case at bar. Relying on the decisions reached in the *Kellogg* and *Matter of Hurd* cases, the court stated that only a holding that the distribution was a cash dividend and as such allocable to income would be consonant with the policy of the state as formulated by the legislature, and would be in the best interests of the estate beneficiaries. In arriving at its decision that the allocation of this dividend should not be affected by the composition of the annual earnings, the court was influenced by two lower court cases[31] in which cash dividends

24. 166 Misc. at 792, 4 N.Y.S.2d at 221.

25. 203 Misc. 966, 120 N.Y.S.2d 103 (Surr. Ct. 1953).

26. The court felt that the decision in that case was based on the extra stock dividend declared. It did not find an option on the part of the stockholder to receive payment in cash or in stock, or upon failure of election payment in stock, but rather a declaration of both a cash and stock dividend.

27. Matter of Hurd, 203 Misc. at 972, 120 N.Y.S.2d at 109. The court felt that "the option given to the stockholder in nowise changed the nature of the dividend. It only provided a method for those stockholders who so desired, and who had confidence in the future of the company to reinvest the dividend in the stock of the company by taking these dividends in stock instead of cash, thereby obtaining a greater . . . share of the profits and earnings of the company in the future." Id. at 973, 120 N.Y.S.2d at 109.

28. Davis v. Jackson, 152 Mass. 58, 25 N.E. 21 (1890).

29. See, e.g., In re Liebmann's Trust, 131 N.Y.S.2d 144 (Sup. Ct. 1954).

30. N.Y. Pers. Prop. Law § 17-a.

31. Matter of Byrne, 192 Misc. 451, 81 N.Y.S.2d 23 (Surr. Ct. 1948); Matter of Bruce, 192 Misc. 523, 81 N.Y.S.2d 25 (Sup. Ct. 1948). In both these cases, however, there were

paid by investment companies were held to constitute income, whether or not the earnings distributed were derived from interest and dividends or from capital gains. The court was not unaware that its holding in the instant case was in accord with the rule generally prevailing elsewhere on the question.[32]

In failing to revive the Pennsylvania rule of apportionment in the instant situation, the court gave its approval to the "rule of convenience and simplicity." While this rule might not accomplish in all cases precisely what the testator had in mind when he created the trust,[33] it was said, however, that "a trustee needs one plain principle to guide him." The court found justification for its holding in the fact that the distribution of the income would be expedited, extensive litigation avoided, and the trust in general benefited.[34] This approach might aptly be called an economic one or a practical economic justification.

By extending the rule established in situations where the trustee, having an option to elect his dividends in cash or stock upon failure of election received stock which he sold for the benefit of income beneficiary, to the case where the trustee exercises his option and takes stock for the income beneficiary, the court has moved with the trend away from the Pennsylvania rule.[35] It is clear that New York, in the absence of testator's express intention to the contrary, will treat capital gains distributions of investment trusts payable in cash or stock as income payable to life beneficiaries. The New York courts are not prepared, in the absence of further legislation, to give assent to the argument that dividends representing the annual earnings of a corporation, where the buying and selling of securities is the operating procedure, should be allocated to principal.[36]

Waiver — Right of Accused To Waive Jury Trial.—Infant petitioner, having been refused a severance of the trial of the indictment against him from that of his co-defendants, sought to waive trial by jury. When his request was denied by the county court judge, petitioner sought a joint writ in the nature

no stock dividends at issue. These decisions have evoked the criticism of those who look upon the purchase of investment company shares, as akin to the retention of an agent or investment counsellor, and regard capital gains distributions as a return of capital, no matter how frequently made. See Ewart, Mutual Fund Dividends, 95 Trusts and Estates 1025 (1956).

32. See Restatement, Trusts § 236 (Supp. 1948); Uniform Principal and Income Act § 5; 3 Scott, op. cit. supra note 6, at 1821-22.

33. The rule may work great hardship and injustice in many cases. 2 Cook, Corporations § 555 (8th ed. 1923). Indeed, it was the attempt to attain a "fair and just" ideal that was the strongest reason in favor of the Pennsylvania rule, and explains its deep-rooted popularity for so many years. See 3 Scott, op. cit. supra note 6, § 236.3.

34. In this particular case, it appears testator intended to provide the maximum benefits of the trust for the immediate family during their respective lives.

35. With the exception of the application of the rule of apportionment to extraordinary cash dividends, New York has abandoned the Pennsylvania rule. Matter of Osborne, 209 N.Y. 450, 477, 103 N.E. 723, 731 (1913).

36. See note 32 supra.

of prohibition and mandamus to forestall being tried before a jury. The court held that under the New York State Constitution, a defendant in a non capital criminal case who is sufficiently aware of the implications of his request, is entitled to waive trial by jury as a matter of right. *Scott v. McCaffrey*, 12 Misc. 2d 671, 172 N.Y.S.2d 954 (Sup. Ct. 1958).

Many early state constitutional provisions[1] prohibited an accused from waiving trial by jury because they considered it a prerequisite to the court's acquiring jurisdiction over a criminal defendant. Most states have since repudiated this view, and have express provisions permitting waiver. However, the majority of jurisdictions with such provisions do not allow a criminal defendant to waive by his own unilateral act, but they require consent of the prosecution,[2] concurrence of the trial judge,[3] or both.[4]

In New York, at common law, a criminal defendant could not waive his "privilege" because of the public interest in the outcome of a criminal prosecution.[5] In order to nullify the effect of this doctrine, the New York State Constitution was amended in 1938 to permit waiver in all cases except those involving capital punishment, "by a written instrument signed by the defendant in person in open court before and with the approval of a judge . . . having jurisdiction to try the offense."[6]

The court in the case at bar interpreted the provision to mean that the request of a criminal defendant to waive his right to a jury trial must be approved once the judge has ascertained that the defendant was fully aware of the consequences of his act. The court reasoned that the wording of the amendment clearly indicates that it is the instrument and the act of execution of that instrument which required the trial court's approval, and not the resulting waiver. Such a conclusion makes the term "approval" look to the exercise of merely an administrative or ministerial act.[7] Although the term is susceptible of different mean-

1. See, e.g., Ga. Const. art. I, § 1; N.H. Const., part 1st, art. 15.

2. "A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel. . . ." Cal. Const. art. I, § 7.

3. The Oregon constitution permits waiver in cases other than capital cases if the trial judge consents. Ore. Const. art. I, § 11.

4. Virginia allows waiver in any criminal case on the consent of both parties and the concurrence of the court. Va. Const. art. I, § 8. The federal rule also requires trial by jury "unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." Fed. R. Crim. P. 23(a). Patton v. United States, 281 U.S., 276, 312 (1930), commenting on this rule stated, "the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant."

5. Cancemi v. People, 18 N.Y. 128 (1858). In that case one of the jurors was withdrawn with the consent of defendant, his counsel, and the prosecutor. The court held that defendant did not have the right to determine the manner in which he was to be tried by waiving a jury of twelve persons and that the remaining jurors could not render a valid verdict.

6. N.Y. Const. art. I, § 2. The amendment goes on to stipulate that "the legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver."

7. See In re State Bank, 84 Utah 147, 30 P.2d 211 (1934). Here, the court, in inter-

ings, it generally implies the final affirmative sanction of the acts of one person by and in the discretion of another person.[8] However, the instant court apparently felt that the language of the amendment, when viewed in the light of the revised record of the 1938 Constitutional Convention, justified a departure from the ordinary meaning of the word.

Emphasis was placed on the report of the proposing committee to the effect that, "the proposal . . . is intended . . . to assure him (the defendant) by the necessity for an approval by the judge of full opportunity to understand what he is doing."[9] The court therefore concluded that stipulation for judicial approval was made solely as a guarantee that a defendant would be fully apprised of his rights before permitted to waive trial by jury.[10]

The constitutional provisions in respect of trial by jury have been uniformly regarded as a valuable privilege bestowed upon an accused to safeguard him from the arbitrary judgment of the court.[11] Since this privilege was intended primarily for the protection of the defendant,[12] it should be construed as a personal right and the defendant alone should have the right to determine whether or not to demand it, subject, of course, to reasonable judicial regulation to insure an intelligent exercise thereof. It is hardly consistent to require the consent of the court before the "privilege" can be waived.[13] A defendant can part with his other constitutional safeguards[14] without the consent of the court, and it would seem reasonable to put trial by jury on the same ground as his other privileges.

Since the right to trial by jury is a personal guarantee accorded a defendant for his protection, the defendant's exercise of it should not be conditioned upon the consent of another unless such consent is unequivocally provided for in the amendment in question. In view of the somewhat ambiguous wording of the amendment at bar, the court was correct in construing it for the benefit of the individual defendant.

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preting a statutory provision which read in part "subject to the approval of the district court of the county in which the office of such bank was located," accorded the word "approval" merely a ministerial meaning.

8. See In re Rooney, 298 Mass. 430, 11 N.E.2d 591 (1937) where the court stated that the term "approval," when it appears in statutes, generally implies the exercise of judicial discretion. See 22 Chi.-Kent L. Rev. 138 (1943) where the New York Constitutional amendment was interpreted to require concurrence of the trial judge.

9. 2 N.Y. State Const. Convention, Rev. Record 1274 (1938).

10. Having once determined that the defendant can waive trial by jury as a matter of right, the court concluded that whether or not the waiver attempt may have been a subterfuge to obtain a severance which had already been denied the defendant is immaterial. 12 Misc. 2d at 676, 172 N.Y.S.2d at 960.

11. See Patton v. United States, 281 U.S. 276, 296 (1930). "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. Const. amend. VI.

12. See Patton v. United States, supra note 11, at 298.

13. See Oppenheim, Waiver of Trial by Jury in Criminal Cases, 25 Mich. L. Rev. 695, 712 (1927).

14. For example, a defendant is free to waive his right to confront witnesses, the right to cross examine witnesses, etc. See Oppenheim, op. cit. supra note 13, at 703.

Zoning — Termination of Prior Nonconforming Use.—In 1924, petitioners established a cooperage business in an unzoned area of the City of Buffalo. In 1926, the area was zoned for residential use. In 1953, the city's ordinances[1] were amended whereby existing nonconforming uses were allowed to continue with certain exceptions. The petitioners' business fell within one of the excepted categories and, by the provisions of the amendment, they were allowed three years to liquidate the use. In 1956, the petitioners were notified that their business operation must terminate at once. The petitioners initiated a proceeding in the nature of mandamus[2] to compel the city to issue a wholesale junk license to them. The appellate division unanimously affirmed the order of special term directing the issuance of a license on the ground that the ordinance requiring a cessation of the nonconforming use was not a valid exercise of the police power.[3] The court of appeals, three judges dissenting, reversed and remanded the case to special term for a final determination of the issues. A zoning ordinance which provides for a reasonable period for the amortization[4] of the owner's investment in a prior nonconforming use is a valid and constitutional exercise of the police power. *Harbison v. City of Buffalo,* 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958).

In recent years,[5] municipal corporations, exercising the police powers delegated to them by their respective states,[6] have enacted comprehensive zoning ordinances[7] to promote the general health, safety, welfare and morals through the careful planning of the community.[8] Because of population shifts and the commingling of business and residential areas, zoning commissions, in forming and administering the various districts, have made allowances for existing nonconforming uses, for, if such uses were retroactively legislated out of existence, this might involve a violation of the due process clauses of the federal and state constitutions.[9] The state or municipality has the alternative of doing nothing and hoping such uses will gradually disappear of their own accord or, on the positive side, of legislating a solution. Since taking by eminent domain

1. Buffalo, N.Y., Ordinances, ch. LXX, § 18 (July 30, 1953).

2. This action is provided for in N.Y. Civ. Prac. Act §§ 1283-1306, more commonly known as an Article 78 proceeding. For similar cases pursuing the same remedy, see Larson v. Howland, 124 N.Y.S.2d 754 (Sup. Ct. 1953); Pelham View Apartments, Inc. v. Switzer, 130 Misc. 545, 224 N.Y. Supp. 56 (Sup. Ct. 1927).

3. People v. Harbison, 4 App. Div. 2d 999, 169 N.Y.S.2d 598 (4th Dep't 1957).

4. Amortization is a term which has only lately been adapted to the law of zoning. It is used to describe a process which involves a determination of the normal useful remaining life of a building and a prohibition of the owner thereof from using it in the proscribed manner beyond the time so ascertained.

5. The first comprehensive zoning ordinance was passed in New York City in 1916. See 35 Va. L. Rev. 348 n.1 (1949).

6. See, e.g., N.Y. Const. art. IX, § 12.

7. The constitutionality of zoning itself as a valid exercise of police powers of a municipal corporation was first upheld in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

8. City of Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953).

9. "The overwhelming weight of present authority holds unconstitutional municipal attempts to zone out prior uses." 1 Antieau, Municipal Corporation Law § 7.03(3), at 423 (1955). See also 1951 Wis. L. Rev. 685.

involves large expenditures of money on the part of the municipality,[10] the solution denominated as "amortization" has of late been widely employed.[11] Here the owner of the nonconforming use is allowed a "reasonable" period of time either to conform his use or to liquidate his interest. New York had not followed the other jurisdictions which espoused this latter alternative.[12] Its position was reaffirmed as recently as 1952 in *People v. Miller,* where the court stated: "It is the law of this state that nonconforming uses or structures, in existence when a zoning ordinance is enacted, are, as a general rule, constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance."[13]

The majority in effect[14] sanctioned the solution of amortization.[15] To avoid overruling *People v. Miller,* it stressed that the rule contained therein must be considered in light of the fact that zoning contemplates the gradual elimination of all nonconforming uses.[16] However, ordinances passed to accom-

10. Grant v. Mayor of Baltimore, 212 Md. 301, 129 A.2d 363 (1957).

11. See, e.g., Ill. Rev. Stat. c. 24, § 73-1 (1957); Kan. Gen. Stat. Ann. § 19-2919 (1949); Minn. Stat. Ann. § 462.12 (1947); Va. Code Ann. §15-843 (1950). This solution of the amortization of nonconforming uses has been included in the zoning ordinances of several large American cities. See Livingston Rock & Gravel Co. v. County of Los Angeles, 43 Cal. 2d 121, 272 P.2d 4 (1954).

12. "It was stated by the zoning Commission that the purpose of [zoning] was to stabilize and protect lawful investments and not to injure assessed valuations or existing uses. This has always been the view in New York. No steps have been taken to oust existing nonconforming uses." Bassett, Zoning 113 (1940). The same author, however, looking at the situation from a negative point of view states: "The charter of the City of New York and the three enabling acts (i.e. those acts which permit nonconforming uses to continue in existence) of the state of New York omit any provision prohibiting retroactive regulations." Id. at 116.

13. 304 N.Y. 105, 107, 106 N.E.2d 34, 35 (1952), noted in 19 Brooklyn L. Rev. 149 (1953). In this case the defendant was required to terminate his nonconforming use of keeping pigeons as a hobby. This use was held to be an insubstantial investment. As the court stated: "This [protective] rule, with its emphasis upon pecuniary and economic loss, is clearly inapplicable to a purely incidental use of property for recreational or amusement purposes only." 304 N.Y. at 109, 106 N.E.2d at 36.

14. Judges Desmond and Fuld concurred with the majority, but relied on the principles stated in People v. Miller, 304 N.Y. 105, 106 N.E.2d 34 (1952).

15. The leading out-of-state cases are Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (5th Cir. 1950); Livingston Rock & Gravel Co. v. County of Los Angeles, 43 Cal. 2d 121, 272 P.2d 4 (1954); City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954); Spurgeon v. Board of Comm'rs, 181 Kan. 1008, 317 P.2d 798 (1957); State ex rel. Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929); State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929); Grant v. Mayor of Baltimore, 212 Md. 301, 129 A.2d 363 (1957). The California cases cited seem to hold that any exception for nonconforming uses which does not provide for its automatic termination would be reasonable. See also 35 Va. L. Rev. 348, 357 (1949).

16. "But . . . the policy of the law is the gradual elimination of a nonconforming uses [sic], and, accordingly, ordinances should not be given an interpretation which would permit an indefinite continuation of the nonconforming use." 8 McQuillin, Municipal Corporations § 25.189, at 488 (3d ed. rev. 1957). Accord, O'Connor v. City of Moscow, 69

plish this ultimate goal must always be reasonable otherwise, they will be violative of due process.[17] The majority pointed out that reasonableness must be interpreted in the light of the specific facts of each case and in terms of the balance between the private injury to the owner of the use and the social harm which the continuance of the use would have on the community. If the loss to the private owner, therefore, is relatively insubstantial[18] compared to the communal benefit[19] and, if the period of amortization is justly proportionate to the extent of the private investment involved,[20] the zoning ordinances will be construed as a valid exercise of the police power. The absence of any one of these prerequisites which safeguard the owner will render an ordinance subject to attack by the courts as an unconstitutional deprivation of a vested property right.[21]

Without writing a separate opinion, Judges Desmond and Fuld concurred in the result reached by the majority upon the principles stated in *People v. Miller*.[22] Their determination apparently was not upon the ground that the

Idaho 37, 202 P.2d 401 (1949). As to the effect of an amendment in this regard see City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954).

17. See notes 8 and 12 supra. Cf. Town of Somers v. Camarco, 308 N.Y. 537, 127 N.E.2d 327 (1955). For a detailed discussion of this concept see Noel, Retroactive Zoning and Nuisances, 41 Colum. L. Rev. 457 (1941).

18. See, e.g., New York Trap Rock Co. v. Town of Clarkstown, 3 N.Y.2d 844, 144 N.E.2d 725, 166 N.Y.S.2d 82 (1957); People v. Miller, 304 N.Y. 105, 106 N.E.2d 34 (1952); Rice v. Van Vranken, 225 App. Div. 179, 232 N.Y. Supp. 506 (3d Dep't), aff'd mem., 255 N.Y. 541, 175 N.E. 304 (1930); Fox Lane Corp. v. Mann, 216 App. Div. 813, 215 N.Y. Supp. 334 (2d Dep't), aff'd mem., 243 N.Y. 550, 154 N.E. 600 (1926).

19. See Bassett, Zoning 115-16 (1940). Compare People v. Kesbec, Inc., 281 N.Y. 785, 24 N.E.2d 476 (1939) and People v. Wolfe, 272 N.Y. 608, 5 N.E.2d 355 (1936), with Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930).

20. However, some of the cases cited by the majority in support of the theory of amortization do not appear to consider this aspect of the problem. See, e.g., State ex rel. Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929); State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929). In both those cases, the owners of business establishments (a grocery and a drugstore) which were deemed nonconforming uses, were given just one year to amortize their uses.

21. The leading New York case is Town of Somers v. Camarco, 308 N.Y. 537, 127 N.E.2d 327 (1955). However, it is interesting to note that Grant v. Mayor of Baltimore, 212 Md. 301, 129 A.2d 363 (1957), also cited by the majority, specifically declares itself to be contra to Town of Somers v. Camarco, supra. For other cases where the investments made or the liabilities incurred by the owner were too substantial to defeat his use or, in other words, his rights were vested, see Crossroads Recreation v. Broz, 4 N.Y.2d 39, 149 N.E.2d 65, 172 N.Y.S.2d 129 (1958); 440 E. 102d St. Corp. v. Murdock, 285 N.Y. 298, 34 N.E.2d 329 (1941); City of Buffalo v. Chadeayne, 134 N.Y. 163, 31 N.E. 443 (1892); People ex rel. Ortenberg v. Bales, 224 App. Div. 87, 229 N.Y. Supp. 550 (2d Dep't), aff'd mem., 250 N.Y. 598, 166 N.E. 339 (1929). In City of Buffalo v. Chadeayne, supra, which involved a fire ordinance of the city of Buffalo, the court, in its holding, stressed that the state may delegate its police powers to the city to enable it to pass such an ordinance. However, it further pointed out such ordinance referred to future buildings and not to those existing at the time of its enactment. See also 10 Fordham L. Rev. 116 (1941).

22. 304 N.Y. 105, 106 N.E.2d 34 (1952).

petitioners were allowed a reasonable time to amortize their use, but rather that the use did not represent a substantial monetary investment. This reasoning is questionable for the exceptions to the general rule of the *Miller* case involve only incidental uses of land.[23] This reasoning, nonetheless, may limit the precedent value of the instant case, since it may plausibly be argued that the concurring opinion did not indorse the broad theory of amortization, but instead, expressed a willingness to extend the strict rule[24] of *People v. Miller* to an appropriate case.

The dissent drew attention to the fact that, the petitioners' use was a lawful one[25] and represented a substantial business investment lately made. It argued that these factors were completely ignored and the refusal to permit the petitioners to continue their use was justified solely on the ground that the business was, by the terms of the ordinance, a junk yard.[26] However, the greatest concern expressed was over the adverse effects of retroactive zoning[27] and the anticipated uncertainty and confusion which would result. As regards the former, the dissenting opinion stated that, "Retroactive zoning, as this clearly is, resembles slum clearance more than zoning, which is for the future."[28] It was further pointed out that, by circumventing the proper procedure of acquiring such property by an eminent domain proceeding, this was, at best, a deprivation of a vested property interest without just compensation.[29] But, the latter consideration is, by far, the more critical. Muncipal councils, by the letter of this new trend in the law, will have a wide latitude in determining the durations of the particular nonconforming uses within their jurisdictional limits "without any workable [objective] standards" except the very dubious one of reasonableness. A likely result would be a situation where the same type of nonconforming use, not far removed geographically, would have a different tolerance period.[30]

In determining whether the police powers were exercised within the constitutional limits, each case must be decided individually on the basis of the

23. Ibid.

24. See Grant v. Mayor of Baltimore, 212 Md. 301, 129 A.2d 363 (1957).

25. "Generally speaking, a nonconforming use existing at the time a zoning ordinance goes into effect cannot be prohibited or restricted by statute or ordinance, where it is a lawful business or use of property and is not a public nuisance . . . ." 8 McQuillin, op. cit. supra note 16, § 25.181, at 467 (3d ed. rev. 1957). For an interesting discussion of the concept of nuisance in relation to the present problem, see Hadacheck v. Sebastian, 239 U.S. 394 (1915), which is reviewed in Noel, Retroactive Zoning and Nuisances, 41 Colum. L. Rev. 457 (1941).

26. For an analogous case involving a junk yard see City of Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953).

27. See 8 McQuillin, op. cit. supra note 16, § 25.184 (3d ed. rev. 1957).

28. 4 N.Y.2d 553, 567, 152 N.E.2d 42, 49, 176 N.Y.S.2d 598, 609 (1958).

29. "There are also statutes in some states permitting municipal corporations to eliminate nonconforming uses in residential zones by eminent domain proceedings, and this seems both an effective way to deal with the scourge of nonconforming uses and just to the owner of the property." 1 Antieau, op. cit. supra note 9, § 7.03(3), at 425 (1955).

30. A similar situation existed in Vernon Park Realty, Inc. v. City of Mount Vernon, 307 N.Y. 493, 121 N.E.2d 517 (1954), noted in 68 Harv. L. Rev. 1089 (1955).

effect of the ordinance on the particular property involved.[31] In addition, the burden of showing that the ordinance is an abuse of said powers is upon the attacking party,[32] as a presumption of validity attends the enactment of zoning ordinances.[33] Certainly, then, the amortization of nonconforming uses should not be chosen by default as the solution to the administrative problems of zoning unless definite controls are instituted. One such control would be the enactment of legislation creating uniform conformity schedules, graduated on the basis of the assessed value of the property.[34] A compromise system known as "performance standards" regulation has been advocated.[35] This entails the setting up of workable standards by which the damaging effects of nonconforming uses on adjoining property can be eradicated. But, "when the use first fails to meet the standard requirements, the owner will be ordered either to abate such conditions or amortize his use."[36]

Real property and the possessory interests of the landowner have always enjoyed a protected position in the law, and rightly so. Therefore, in the absence of controls, unless the rule of the instant case is strictly limited to instances where the investment has been nominal, many small businessmen will suffer. It might well be that, by reason of the split among the majority judges, the case may hereafter be treated simply as a reaffirmation of *People v. Miller*. Judge Froessel's opinion is nevertheless, in its indorsement of the amortization theory, a studied departure from the reasoning of the earlier New York case.

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31. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). See also City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954); Livingston Rock & Gravel Co. v. County of Los Angeles, 43 Cal. 2d 121, 272 P.2d 4 (1954). The preceding is given greater significance in the light of this declaration of a unanimous United States Supreme Court speaking through Mr. Justice McKenna: "We do not notice the contention that the ordinance is not within the city's charter powers nor that it is in violation of the state constitution, such contentions raising only local questions which must be deemed to have been decided adversely to petitioner by the Supreme Court of the State." Hadaheck v. Sebastian, 239 U.S. 394, 414 (1915). Accord, Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (5th Cir. 1950).

32. "Upon parties who attack an ordinance such as the present rests the burden of showing that the regulation assailed is not justified under the police power of the state by any reasonable interpretation of the facts. 'If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.'" Shepard v. Village of Skaneateles, 300 N.Y. 115, 118, 89 N.E.2d 619, 620 (1949).

33. Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (5th Cir. 1950); Spurgeon v. Board of Comm'rs, 181 Kan. 1008, 317 P.2d 798 (1957); Grant v. Mayor of Baltimore, 212 Md. 301, 129 A.2d 363 (1957).

34. In this way similar types of nonconforming uses will receive equal treatment no matter where they are located. Also, as regards the time period for amortization, the larger the investment made or represented, the greater the amount of time allowed for the owner to conform his use.

35. 30 Ind. L.J. 521, 528 (1955).

36. Id. at 529.