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Case Notes

CASE NOTES

Admiralty — Cause of Action Arising in Airspace Under Death on the High Seas Act.—Plaintiff, as administratrix of the estate of her deceased husband, brought an action against the defendant, a New York corporation, for wrongful death. The deceased, a resident of Puerto Rico, was a passenger on defendant's airflight from Puerto Rico to New York and allegedly suffered shock when the pilot "feathered" the plane's engine while it was over the high seas. Deceased died four days later in New York. Plaintiff contended that since death occurred in New York, and the defendant was a New York corporation, the New York Decedent Estate Law[1] was applicable and not the Federal Death on the High Seas Act.[2] The action, however, was heard in admiralty under the Death on the High Seas Act, and a decision was rendered in favor of defendant. The Court of Appeals for the Second Circuit affirmed. The Federal Death on the High Seas Act gives a right of action in admiralty for death caused by wrongful act, neglect or default occurring in the airspace over the high seas. *D'Aleman v. Pan Am. World Airways,* 259 F.2d 493 (2d Cir. 1958).

At common law wrongful death was not considered an actionable injury either in the civil courts[3] or in admiralty.[4] Today, however, a statutory right of action for wrongful death has been granted in every state. Where the wrongful act which causes death occurs on the high seas, i.e., beyond a marine league from the shore of any state, the right of action is given by the Federal Death on the High Seas Act. The purpose of this statute, as of those of each state, is to give a remedy where none existed at common law.[5] Section 1 provides: "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State . . . the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty . . . ."[6]

Prior cases have held that, where wrongful death was occasioned by the crash of an aircraft into the sea, the Act conferred a right of action.[7] In other cases[8] the Act was said to apply to a plane lost at sea where the passengers were presumed dead. In the former cases the courts were not called upon to decide whether "on the high seas" may be construed to include the airspace *over*

1. N.Y. Deced. Est. Law § 130.

2. 41 Stat. 537 (1920), 46 U.S.C. §§ 761-67 (1952).

3. Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (N.P. 1808). But see Holdsworth, History of English Law 331-36 (3d ed. 1927).

4. The Harrisburg, 119 U.S. 199 (1886). See also Robinson, Admiralty 135 (1939); Tiffany, Death by Wrongful Act § 204 (2d ed. 1913).

5. 59 Cong. Rec. 4482 (1920) (remarks of Representative Volstead).

6. 41 Stat. 537 (1920), 46 U.S.C. § 761 (1952).

7. Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir. 1957); Higa v. Transocean Airlines, 230 F.2d 780 (9th Cir. 1956); Wilson v. Transocean Airlines, 121 F. Supp. 84 (N.D. Cal. 1954).

8. Choy v. Pan Am. Airways, 1941 Am. Mar. Cas. 483 (S.D.N.Y. 1941); Wyman v. Pan Am. Airways, 293 N.Y. 878, 59 N.E.2d 785 (1944), cert. denied, 324 U.S. 882 (1944). Both cases arose out of the same accident.

the high seas. The instant case is the first to give a right of action under the Act where there was no possible contact with the sea or inference thereof. The court here adopted the reasoning of *Choy v. Pan Am. World Airways,*[9] where it was stated that the phrase "on the high seas" was intended only as a geographical expression "capable of expansion to, *under,* or *over,* as scientific advances change methods of travel."[10] This court, as in the *Choy* case, specifically extended the purview of the statute, reasoning that a cause of action arising above the high seas demanded as adequate a remedy as one arising in a vessel on the seas, and that the statute was not intended by its nature to be restrictive in its application.

While it does not expressly appear that the legislature intended to apply the Act to aircraft,[11] the extension is a reasonable one. Generally, admiralty will hear tort actions as long as the place of the wrong is on the high seas,[12] and the test of admiralty jurisdiction is one of locality, not the nature of the circumstances surrounding the wrong.[13] Further, since the purpose of the Act was to give a remedy in an area not adequately covered by existing statutes, a construction restricting the remedy to wrongs occurring on the surface of the sea and denying it to wrongs occurring in the airspace above the sea would seem an arbitrary distinction, and certainly at odds with the familiar canon that remedial statutes should be liberally construed.

Prior to the enactment of the Death on the High Seas Act, there was, as noted, no statute giving an action for wrongful death on the sea.[14] Many states, however, had wrongful death statutes which, at first, were applied to a state's territorial waters. In the absence of conflicting federal legislation, this action was sustained by the United States Supreme Court.[15] Subsequently, the Supreme Court confirmed the power of a state to create an enforceable right of action for death occurring beyond the state's territorial waters, i.e., on the high seas.[16] This power, however, was a limited one because the state could impose liability only on a vessel or person over whom it had jurisdiction. Jurisdiction was usually predicated on one of two grounds; that a vessel on which a wrongful act occurred was constructively part of the territory of the state, or that the wrongdoer was a vessel or citizen of the state and subject to its jurisdiction even beyond the territorial limits. These theories generated considerable confusion and conflict.[17] The purpose of the Federal Death on the High Seas Act was

9. 1941 Am. Mar. Cas. 483 (S.D.N.Y. 1941).

10. Id. at 484. (Emphasis added.)

11. 59 Cong. Rec. 4482-86 (1920).

12. 1 Benedict, Admiralty § 127 (6th ed. 1940); Robinson, Admiralty § 11 (1939).

13. 1 Benedict, Admiralty § 127 (6th ed. 1940). See also The Plymouth, 70 U.S. (3 Wall) 20 (1866).

14. See note 4 supra.

15. Sherlock v. Alling, 93 U.S. 99 (1876); Steamboat Co. v. Chase, 83 U.S. (16 Wall) 522 (1872). This position was also taken by the New York Court of Appeals in McDonald v. Mallory, 77 N.Y. 546 (1879).

16. The Hamilton, 207 U.S. 398 (1907).

17. See Hughes, Death Actions in Admiralty, 31 Yale L.J. 115 (1921); Robinson, Wrongful Death in Admiralty and the Conflict of Laws, 36 Colum. L. Rev. 406 (1936);

to end conflicts by establishing a uniform right of action pre-empting state jurisdiction.[18] Though some controversy exists, generally it is held that the Act, when applicable, gives an exclusive right to sue in admiralty and pre-empts any right to sue in a civil court.[19]

The Court of Appeals of New York has held, under circumstances where plaintiff's testator disappeared over the high seas in defendant's aircraft, that the New York Decedent Estate Law is inapplicable, the sole right of action being under the Death on the High Seas Act.[20] Had the court in the instant case refused to extend the Death on the High Seas Act to the situation here presented, the plaintiff might have been without a remedy. At least until such time as the issue would have been resolved by the United States Supreme Court, there would have then existed the anomalous situation of both state and federal courts recognizing the existence of a cause of action but denying, each to itself, authority to entertain it.[21]

The court in the instant case determined that the law governing airspace over the high seas is the province of admiralty. Jurisdictions following this decision would deny a plaintiff an action under state law when a wrongful act resulting in death occurs over the high seas. The effect of this position is to hold state wrongful death statutes inapplicable when the wrongful act occurs beyond the state's territorial limits.

Magruder & Grout, Wrongful Death Within the Admiralty Jurisdiction, 35 Yale L.J. 395 (1926).

18. 59 Cong. Rec. 4485 (1920) (remarks of Representative Volstead).

19. An amendment to the bill in the course of passage raised uncertainty as to whether the act gave exclusive remedy. The original bill provided that the provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this Act as to causes of action accruing within the territorial limits of any state. 59 Cong. Rec. 4482 (1920) (remarks of Representative Volstead). At this point it was clear that the Act was to be exclusive. Illinois Representative Mann, in the course of debate, offered an amendment to strike the last phrase from the section quoted above. This amendment passed with the bill and § 7 provides that "the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter." 41 Stat. 538 (1920), 46 U.S.C. § 767 (1952). The prevailing judicial opinion seems to be that the Act gives an exclusive remedy. See Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir. 1957); Higa v. Transocean Airlines, 230 F.2d 780 (9th Cir. 1956); Wilson v. Transocean Airlines, 121 F. Supp. 84 (D.C. Cal. 1954). But cf. Choy v. Pan Am. Airways Co., 1941 Am. Mar. Cas. 483 (S.D.N.Y. 1941).

20. Wyman v. Pan Am. Airways, 181 Misc. 963, 43 N.Y.S.2d 420 (Sup. Ct. 1943), aff'd, 267 App. Div. 947, 48 N.Y.S.2d 459 (1st Dep't), aff'd, 293 N.Y. 878, 59 N.E.2d 785, cert. denied, 324 U.S. 882 (1944).

21. Under the Wyman case, where the court held that the New York Decedent Estate Law was inapplicable because the cause of action did not arise within the territorial limits of the state, a New York court, in such a situation as the instant case, could not give a remedy for lack of jurisdiction.

Antitrust — Defenses to Robinson-Patman Act Section 2(e).—Petitioner, a manufacturer, furnished free displays to preferred customers while charging others. Finding the discrimination per se violative of section 2(e) of the Robinson-Patman Act, the Federal Trade Commission ordered the manufacturer to cease and desist. The Court of Appeals for the District of Columbia, one judge dissenting, reversed. The court held that cost justification may be proved as a defense to an alleged violation of section 2(e), but that competitive injury need not be shown. *Simplicity Pattern Co. v. FTC,* 258 F.2d 673 (D.C. Cir.), *cert. granted,* 358 U.S. 897 (1958).

In the early 1930's an investigation by the Federal Trade Commission and the Patman Committee of the House of Representatives disclosed that large chain stores were eliciting discriminatory concessions from their suppliers.[1] This situation flourished beyond the reach of section 2 of the Clayton Act. To strike at such practices the Robinson-Patman Act was enacted as an amendment to the Clayton Act.[2] Section 2(e) as amended was directed against the discriminatory practices of furnishing services to one buyer and not to the other buyers on proportionally equal terms.

Section 2(e) reads as follows:

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.[3]

One of the first questions raised by the present case was whether competitive injury is an essential ingredient to a section 2(e) violation. Representative Wright Patman discusses in his book, *The Robinson-Patman Act,* the problem of competitive injury and its application to sections 2(a), (c), (d) and (e).[4] He concluded that the phrase "to all purchasers" in section 2(e) represented all purchasers throughout the country so long as they were on the same purchasing level—jobbers, wholesalers, retailers, etc.[5] Thus, a seller offering a service to a buyer in New York must offer the same service on proportionally equal terms to a buyer in California, regardless of whether or not such buyers are in actual competition.

The cases are in accord with Representative Patman's view. The Supreme Court has held that furnishing advertisements to one purchaser upon terms not accorded to other purchasers violates section 2(e).[6] In *Elizabeth Arden,*

1. H.R. Rep. No. 2287, 74th Cong., 2nd Sess. (1936).
2. 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1952).
3. 49 Stat. 1526 (1936), 15 U.S.C. § 13(e) (1952).
4. Patman, The Robinson-Patman Act (1938).
5. Id. at 52. This distinction dismissing the action because the discrimination was between two purchasers on different competitive levels was followed by the court of appeals in Chicago Sugar Co. v. American Sugar Refining Co., 176 F.2d 1 (7th Cir. 1949).
6. Corn Products Refining Co. v. FTC, 324 U.S. 726 (1945).

Inc. v. FTC,[7] the court expressly refused to carry into section 2(e) the requirement of adverse effect upon competition which is found in section 2(a), reasoning that Congress made a decision which was not for the court to change. The rule was affirmed in numerous subsequent cases.[8]

Some confusion as to injury stems from treble damage actions[9] brought for violation of section 2(e). The violation of section 2(e) remains unchanged, the variable being the remedy. If the Government brings the action for a cease and desist order or to impose a penalty, competitive injury is not involved.[10] While in an action by an individual for treble damages, such injury is obviously the essence of the recovery because damages are measured by the extent of the injury.[11]

Although the courts have consistently held that competitive injury is not essential in a section 2(e) violation, this view has been criticized as being in conflict with the broader antitrust objectives.[12] It is contended that not only is it out of line with other antitrust legislation but that it fosters inefficient competition.[13] These writers believe that a change is required either by legislation[14] or through judicial interpretation.[15] In view of the judical precedents,[16] it would appear that any change would have to come from Congress. Thus, the ruling of the present court that competitive injury is not essential for a violation of section 2(e) is but another illustration of stare decisis.

The court here, however, further held that the justification in the first part of section 2(b)[17] included cost justification and made such applicable to section 2(e). The latter position is quite questionable. Typical of services or facilities violative of section 2(e) are the providing of a demonstrator, paying

7. 156 F.2d 132, 134 (2d Cir.), cert. denied, 331 U.S. 806 (1946). Accord, Corn Products Refining Co. v. FTC, 324 U.S. 726 (1945).

8. Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp., 178 F.2d 150 (2d Cir. 1949); United Cigar-Whelan Stores Corp. v. H. Weinreich Co., 107 F. Supp. 89 (S.D.N.Y. 1952); Myers v. Shell Oil Co., 96 F. Supp. 670 (S.D. Cal. 1951). But cf. Chicago Sugar Co. v. American Sugar Refining Co., 176 F.2d 1 (7th Cir. 1949) (dictum).

9. 38 Stat. 731 (1914), 15 U.S.C. § 15 (1952).

10. Corn Products Refining Co. v. FTC, 324 U.S. 726 (1945).

11. 178 F.2d at 153.

12. Att'y Gen. Nat'l Comm. Antitrust Rep. 191-92 (1955).

13. Comment, 50 Mich. L. Rev. 1139, 1199 (1952).

14. Id. at 1202.

15. See note 12 supra.

16. Cases cited note 8 supra.

17. "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services of facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing contained . . . [herein] shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1952).

the salary of a saleswoman or beauty counselor, providing special containers or labels or the furnishing of advertising and demonstrator's aids. Such services are mutually beneficial to both buyer and seller or merely to the buyer alone. A distinction on the basis of the parties benefited was made in *State Wholesale Grocers v. Great A. & P. Co.*,[18] where the seller advertised in *Women's Day*, a magazine published and distributed solely by the buyer, A. & P. It was held that section 2(e) would not be violated if the service furnished benefited the supplier alone or if there were but incidental benefit to the buyer. The court went on to state that where the benefit inures primarily to the buyer or equally to the buyer and seller, there is a violation of section 2(e), unless proportionally equal treatment is given to all buyers on the same level. This rule has been limited somewhat by *American Can Co. v. Russellville Canning Co.*,[19] where the seller wished to furnish a service to its purchasers, such service being more efficiently rendered to some purchasers than to others. The seller may render such service as efficiently as possible to each purchaser regardless of the difference in the ultimate cost to the seller, and such difference may be reflected in the price to the buyer.

The use of cost justification as a defense to a section 2(e) violation has opened the door to the problems[20] which existed under the old section 2 of the Clayton Act. Thus, discrimination by giving competitive preference to one purchaser over another is possible through the use of cost justification. Hence, in the furnishing of advertising, the seller, by proving benefit in proportion to the money invested, would thereby have eliminated the thing to be justified. The one furnished the advertising is also benefited while his competition is not. This same rationale would be applicable where the cost of the service is less when purchased by the seller, than if purchased directly by the customer.

The majority in the present case held that the cost justification defense to section 2(e) is developed from the justification in the first clause of section 2(b). It was argued that if the first justification in section 2(b) is not given substantive meaning, section 2(b) would be read out of the case. The majority, therefore, states that "cost justification *under the circumstances here* may affirmatively be shown in order to dispel the charge of unlawful discrimination."[21] This would make each new case one of first impression in relation to the new found defenses. The effect is to give the courts the power to enlarge or contract the defenses of section 2(b), as applied to each case. This leaves us without a standard and adds to the already existing confusion. In *Automatic Canteen Co. v. FTC*,[22] it was held that the first part of section 2(b) was procedural and merely a reiteration of the common law rule of evidence. It is left now for the Supreme Court to eliminate the defense of cost justification, while preserving for the defendant the defense that the facilities were furnished on proportionally equal terms.

18. 154 F. Supp. 471 (N.D. Ill. 1957).
19. 191 F.2d 38 (8th Cir. 1951).
20. Rowe, The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective, 57 Colum. L. Rev. 1059, 1063-64 (1957).
21. 258 F.2d at 681. (Emphasis added.)
22. 346 U.S. 61, 78 (1953).

Antitrust—Merger Under Section 7 of the Clayton Act.—Bethlehem Steel Corporation and Youngstown Sheet and Tube Company, the second and sixth largest steel producers in the nation,[1] executed a merger agreement in 1956. The Government, charging a violation of Section 7 of the Clayton Act,[2] sued to enjoin the proposed merger because of its probable adverse effect on competition in the steel industry. The defendants claimed that there was little actual or potential competition between the two merging corporations, and that the merger would in fact stimulate competition in the steel industry because the merged companies would be in a better position to challenge the dominant status of United States Steel.

The court held that the proposed merger would, in its horizontal aspects,[3] violate Section 7 because there was a reasonable probability that it would substantially lessen present and potential competition between the two corporations as well as eliminate Youngstown as an alternative source of supply for steel consumers, some of whom compete with Bethlehem. In its vertical aspects, it also violated Section 7 because it would eliminate Youngstown as a substantial buyer of certain steel products. *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958).

Section 7 of the Clayton Act as amended in 1950 provides: "No corporation shall acquire . . . the whole or any part of the stock or . . . assets of one or more corporations . . . where in any line of commerce in any section of the country, the effect . . . may be substantially to lessen competition, or tend to create a monopoly."[4]

In any Section 7 proceeding, the court must necessarily determine what constitutes the line of commerce, i.e., the relevant product market in which the effect of the merger is to be measured.[5] The defendants, in the instant case, urged a broad product market, one in which there were many products, seeking thereby to minimize the effect of the merger by reducing the percentage of the product market affected by it. The Government definition fixed narrower lines of commerce, thus increasing, on a percentage basis at least, the effect of the merger upon competition.[6]

1. United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 585 (S.D.N.Y. 1958). Bethlehem's steel ingot capacity (the common measuring stick of size in the industry) was 23 million tons which represented 16.3% of total industry capacity, while Youngstown had a capacity of 6.5 million tons or 4.6% of industry capacity.

2. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1952).

3. A horizontal merger is one in which organizations on the same production or distribution levels combine. The primary effect of an acquisition of one producer by another producer is to deprive consumers of a source of supply. There is also, of course, a lessening of competition among the rival producers.

Vertical mergers, on the other hand, take place between organizations on different distribution levels. Here the merger would most likely affect the sellers who, after losing a market for their product, would be forced to find new customers.

4. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1952).

5. Brillo Mfg. Co., Trade Reg. Rep. (C.C.H. Transfer Binder) ¶ 27243 (FTC May 23, 1958).

6. Percentage of market, however, is not the sole test used by the courts in ascertaining

The court sustained the Government's proposed lines of commerce relying on the rule laid down by the Supreme Court in *United States v. du Pont & Co.*,[7] the most authoritative definition of a relevant product market under the Clayton Act. There the Court defined a line of commerce as that product or series of products which have sufficient peculiar characteristics and uses to constitute them sufficiently distinct from all other products.[8]

The court, in the present case, found that many of the individual steel products produced by the defendants constituted separate lines of commerce. At the same time, however, it held that the steel industry as a whole must also be considered as a single line of commerce. The court, in arriving at this conclusion, used the same test. The apparent inconsistency in finding each end steel product a separate line of commerce and, at the same time, the entire industry itself a line of commerce, was resolved by the court by declaring that "the products of the iron and steel industry are generally distinct one from the other and *as a group distinct from the products of other industries*."[9]

The defendants offered two concepts in an effort to determine the "line of commerce," production flexibility and product interchangeability. Both concepts would put many divers products in the same market. Production flexibility was the test employed by the trial court, and later endorsed by the Supreme Court, in defining a product market within the meaning of Section 2 of the Sherman Act[10] in *United States v. Columbia Steel Co.*,[11] an antimerger action brought prior to the amendment of Section 7. This theory defines a line of commerce on the basis of the producer's over-all production capabilities.[12]

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substantial effect on the market. Indeed, courts have espoused the test of "qualitative substantiality," thereby taking into consideration all other economic factors which affect the industry in question. In fact, these courts reject the theory that percentages alone are the determining factor in finding monopolies, lessening of competition or centralization of economic power. See United States v. Columbia Steel Co., 334 U.S. 495 (1948); Brillo Mfg. Co., supra note 5.

7. 353 U.S. 586 (1957). It is interesting to note that this was the first action in which § 7 was employed in an effort to defeat a vertical merger. See Note, 26 Fordham L. Rev. 583 (1957).

8. 353 U.S. at 593-94. In applying this principle the Supreme Court found that automotive finishes and fabrics are sufficiently distinct from all other finishes and fabrics to constitute them a line of commerce, thus drawing narrow lines of commerce. The Court obviously intended that automotive finishes and automotive products each constituted separate lines of commerce, although a strict reading of the Court's words could lead to a conclusion that the two obviously dissimilar products were to be grouped together.

9. 168 F. Supp. at 594. (Emphasis added.) Thus, a determination that the entire steel industry is a line of commerce is not based on a production flexibility concept but rather on the idea that the steel industry is peculiar unto itself and each product of it is in turn peculiar unto itself.

10. 26 Stat. 209 (1890), 15 U.S.C. § 2 (1952).

11. 334 U.S. 495 (1948).

12. Ibid. The Court in the Columbia Steel case found that "if rolled steel producers can make other products as easily as plates and shapes, then the effect of the removal of Consolidated's demand for plates and shapes must be measured not against the market for plates and shapes alone, but for all comparable rolled products." Id. at 510.

For example, where a company has a large production capacity which can be easily allocated to the production of many finished products of the same general class, the line of commerce should not be the particular finished products but the entire line of finished products for which the company's facilities can be readily adapted or converted. Applying this theory to the legal concept of a line of commerce, the share of a market of a producer would be measured against all the finished and potential products which come from the same production source.

Judge Weinfeld, in the present case, held that production flexibility, although a proper test in a Section 2 action, was not the applicable test in this Section 7 proceeding.[13] The court reasoned that since the purpose of Section 7 was to nip monopolistic tendencies in the bud, a test narrower than production flexibility was required.[14] In addition, it was observed that since the proposed merger had substantial effects on all distribution levels of the steel industry, the test of production flexibility, which focused primarily on the producer's capabilities, was sterile.[15]

The test of interchangeability of products was used by the Supreme Court in *United States v. duPont & Co.*,[16] to ascertain the market in which cellophane

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13. Support is given to this position in that Congress did not intend that the courts apply the Sherman Act tests to § 7. S. Rep. No. 1775, 81st Cong., 2d Sess. 4 (1950).

14. The courts in applying the antitrust laws use different standards in determining different markets where the objectives of action before them are different. Thus, where an action is brought under § 2 of the Sherman Act alleging a conspiracy to monopolize a particular product, the court found the relevant product market to be very narrow. If, however, the action was to determine if a monopoly exists in a certain area of trade, because of the difference in the nature of the action the product market would be much broader. Compare United States v. du Pont & Co., 351 U.S. 377 (1956), with Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931).

The difference in purpose between § 7 and § 2 is great. The former has as its objective prevention of monopoly by enjoining any merger which would probably substantially lessen competition. Section 2, on the other hand, is directed at monopolization or attempts to monopolize. In determining what product markets should be it would seem, if only a substantial lessening of competition is required to find violation, that the product markets should be narrower while, if monopoly is to be found, the product market should be broader. Thus, different tests to different markets must be the method used to fulfil the different purposes of the sections.

15. The court reasoned that producers, even when they do have the ability, are reluctant to shift their production facilities, and hence, it would be unrealistic to determine the market by that concept. The FTC, in Matter of Crown Zellerbach Corp., Trade Reg. Rep. (C.C.H. Transfer Binder) ¶ 26923 (FTC Jan. 10, 1958), like the court in the instant case, looked not at the economic concept and its theoretical probabilities, but rather at the reasonable probability that producers would shift their production facilities after the proposed merger had taken place.

Where the test employed by the Supreme Court in the Columbia Steel case determined the market on the theoretical ability of the producers to continue substantial competition by realigning their facilities, the test under § 7 would necessarily be applied only if there is a strong probability that in fact producers will switch their capabilities.

16. 351 U.S. 377 (1956).

competed. This action, like *Columbia Steel*,[17] was brought under Section 2 of the Sherman Act. The theory of interchangeability of products suggests that all products which have substantially the same uses and can be interchanged by the consumer to fit his needs should be considered a single market. In order to employ this theory as a legal test, the products supposedly interchangeable must have additional similarities.[18] The products must not only be functionally interchangeable but also must have such common characteristics so far as quality and price are concerned that fluctuations in any of these would result in consumers shifting from one product to the other to fulfil their needs.

The present court emphatically rejected the interchangeability test, holding it inapplicable to a Section 7 proceeding.[19] Its refusal to place nonsteel products in the same line of commerce with steel products was predicated on the finding that steel products have characteristics which make them distinct from all other comparable products.[20] The court did not, however, reject the possibility that in certain situations two distinct products made from different substances might be included in the same Section 7 line of commerce, for it said that "interchangeability . . . [cannot] be ignored—a high degree of interchangeability may under certain circumstances make . . . [several similar products] more or less the same product."[21] The test which must ultimately be met, in Section 7 actions, is that of peculiar characteristics. The fact that products are sufficiently interchangeable to be placed in a Section 2 market will not necessarily require their inclusion in the same line of commerce in a Section 7 action.[22] The court seemed to recognize a certain elasticity in the peculiar characteristics test which allows for its reasonable application to varying factual situations. The application of any Section 2 criteria, it would seem, is limited, however, to the extent that it must be compatible with the standards inherent in the test of peculiar characteristics.[23]

In this respect, the decision is at odds with the reasoning of *American*

17. United States v. Columbia Steel Co., 334 U.S. 495 (1948).

18. A track spike plated with gold which costs twenty dollars and a track spike of steel, costing one dollar, might have the same function and can be used interchangeably. However, it would be incongruous to claim they are in the same product market for the purposes of an antitrust suit because there would be no cross-elasticity of demand between the two products. See United States v. du Pont & Co., supra note 16, at 396; Note, 54 Colum. L. Rev. 580 (1954).

19. 168 F. Supp. at 593.

20. The court in this regard declared that "each has unique physical characteristics, is distinct one from another, has different end uses, and is recognized by steel producers and consumers as a distinct product. Each has its own competitive standards and markets. Finally, there are no effective substitutes for any of them." Id. at 593.

21. Id. at 594 n.36.

22. Cf. Matter of Brillo Mfg. Co., Trade Reg. Rep. (C.C.H. Transfer Binder) ¶ 27243 (FTC May 23, 1958).

23. United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958); Matter of Brillo Mfg. Co., Trade Reg. Rep. (C.C.H. Transfer Binder) ¶ 27243 (FTC May 23, 1958).

Crystal Sugar Co. v. Cuban-American Sugar Co.[24] In the latter case, both the trial and appellate courts, applying the criterion of interchangeability to a Section 7 action, reasoned that cane sugar and beet sugar were in the same line of commerce. If this is to be accepted as a proper test for determining a Section 7 line of commerce, the conclusion to be drawn is that courts, in determining Section 7 actions might occasionally revert to a Section 2 criterion. One of the dangers inherent in the adoption of a rule allowing courts wide discretion in the use of the several tests employed in suits brought under different sections of antitrust laws is that a corporation may justifiably hesitate to merge because of the uncertainty of the test which might be applied in a Section 7 proceeding. Thus, a corporation, which could legitimately merge, may hesitate for fear of becoming engaged in costly litigation with no reasonable certainty of success.[25]

The present court's refusal to apply the test of interchangeability, and its opinion that, in any circumstances, it can only effect products so alike as to be almost the same, would seem, in view of congressional intent and the test laid down in *du Pont,* the more reasonable approach.

A collateral question arises from the application of the peculiar characteristics test in Section 7 actions. Is that test to be employed in determining product markets in actions brought under other sections of the antitrust laws? The purpose of Section 7 is basically different from the purpose of, for instance, Section 2.[26] In the first instance, the courts must merely find a lessening of competition in *any* line of commerce in *any* section of the country. In the second instance, the court must find a monopoly or an intent to monopolize. Just as it would be improper to apply Section 2 tests to a Section 7 market, it would seem equally incorrect to do the converse.

Defendants contended that the proposed merger would have a beneficial effect on the steel industry insofar as the new corporation would challenge the dominant position of the giant United States Steel Corporation. The court ruled that this contention could not be considered where the merger violated Section 7 by substantially lessening competition in the relevant line of commerce in some section of the country.[27] Will the courts, however, adhere to this position in all situations? Although Judge Weinfeld's opinion here is sweeping and strongly worded, it does not follow that under any circumstances a merger in the steel industry would not be allowed. It would be quite reasonable to assume that a merger of two small steel producers, or a merger of a giant the size of Bethlehem Steel and a very small producer, would be permissible where the beneficial effects of that merger would so outweigh any possibility of a lessening in competition within the industry itself.[28]

24. 152 F. Supp. 387 (S.D.N.Y. 1957), aff'd, 259 F.2d 524 (2d Cir. 1958).

25. Cf. Comment, 58 Colum. L. Rev. 1269 (1958).

26. 168 F. Supp. at 592.

27. Id. at 617.

28. In comparing the Government's proposed decree with the final decree in the instant case, it is interesting to note that the court rejected the Government's proposed final decree which provided a restraint against the defendants from acquiring any other organization

Assault — Single Act Against Two Individuals Constitutes One Crime.— Petitioner, upon completion of the first of two consecutive ten year sentences imposed after a conviction on two different counts of assaulting two federal officers with a deadly weapon, in violation of a federal statute,[1] moved to correct the second consecutive sentence on the ground that the firing of a single discharge from a shotgun wounding two federal officers was a single assault within the meaning of the statute and rendered him liable to one punishment only. Petitioner's motion was denied by the District Court for the Southern District of Mississippi, and the Fifth Circuit Court of Appeals affirmed. On certiorari, the Supreme Court of the United States, one Justice dissenting,[2] reversed. The Court held that a single discharge of a shotgun, although affecting more than one federal officer, constituted a single violation of the statute. *Ladner v. United States,* 358 U.S. 169 (1958).

The question before the Supreme Court was whether a single act in violation of a single criminal statute producing multiple consequences is a single or multiple violation of the statute involved.

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in the steel industry without first showing affirmatively to the court that the acquisition would not substantially lessen competition. Instead, the court decreed that the two defendants were enjoined from merging and expressly limited its direction to that extent. The court seems to indicate that possibly, in some situations, a merger between one of the defendants and another steel producer would not be unreasonable.

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1. Petitioner was convicted of violating the Act of March 4, 1909, ch. 231, § 62, 35 Stat. 1100 (now 18 U.S.C. § 111 (1952)) which provided: "Whoever shall forcibly resist, oppose, impede, intimidate, or interfere with any person . . . [who is a federal officer] while engaged in the performance of his official duties . . . shall be . . . imprisoned not more than three years . . . and whoever, in the commission of any of the acts described in this section, shall use a deadly or dangerous weapon shall be . . . imprisoned not more than ten years. . . . "

2. Mr. Justice Clark dissented on a procedural issue without reaching the merits of the case. It was his contention that the petitioner could not make a motion to correct the second sentence because this remedy was not available under the circumstances. According to the dissent, the main issue was a factual one which the lower court should have considered (the lower court record was unclear as to how many shots were fired by the petitioner), and this error should have been raised by appeal. Mr. Justice Clark, to support his position, cited the case of Sunal v. Large, 332 U.S. 174, 181-82 (1947), where it was said that "if defendants who accept the judgment of conviction and do not appeal can later renew their attack on the judgment by habeas corpus, litigation in these criminal cases will be interminable."

The majority disposed of this issue, in what Mr. Justice Clark considered an ad hoc manner, by deciding that inasmuch as the availability of the collateral remedy hadn't been raised in the courts below, and the fact that there was only meager argument of the issue, the Court would decide the merits of the case and construe the statute whereunder the collaterally attacked conviction was had without formulating a view as to availability of a collateral remedy in another case where the question is properly raised. The procedural question is not considered further in this casenote.

The Supreme Court originally affirmed the Court of Appeal for the Fifth Circuit in a 4 to 4 decision without opinion. Ladner v. United States, 355 U.S. 282, rehearing granted, 356 U.S. 969 (1958).

This problem is to be distinguished from several other closely related situations. First to be distinguished is a situation in which there is a violation of a single statute by a number of acts. In such a case the defendant is guilty of a separate offense for each act; the test applied is whether each offense requires a modicum of proof or intent that the others do not, or, in other words, will each stand on its own feet.[3] The second situation is that in which the defendant violates a number of statutes by a single act; the Supreme Court has reasoned that when separate punishments are prescribed for two or more criminal statutes enacted at different times, it is not the intent of Congress that a single act violating all should be treated as a single offense.[4] The final situation is encountered when an attempt is made to sever a single continuing act so that it can become several distinct offenses in violation of a single statute. The latter situation is illustrated by the case of *In re Snow,*[5] wherein the defendant, under three separate indictments, was convicted of cohabiting with seven women for three different years. Three separate consecutive sentences were imposed, one for each year involved. The Supreme Court held that there was only one violation of the statute and the division into three separate periods was arbitrary because the offense was a continuing one and could be committed but once from the time it commenced until it ended with the prosecution of the defendant. In the old English case of *Crepps v. Durden,*[6] a baker was convicted of four separate offenses by selling four loaves of bread to four different people in violation of a statute prohibiting the exercise of an ordinary trade or calling on a Sunday. On appeal, Lord Mansfield found only one offense. He construed the legislative intent as simply punishing a man for doing work on a Sunday.

The problem in the instant case arises whenever Congress, in enacting a particular statute, fails to set out the allowable unit of prosecution. The "leniency" approach was first employed in *United States v. Universal Credit Corp.,*[7] where the sole question before the court was "what Congress has made the allowable unit of prosecution. . . ."[8] Faced with two possible interpretations of the statute then under consideration, the Supreme Court noted that "when choice has to be made between two readings of what conduct Congress has

3. Ebeling v. Morgan, 237 U.S. 625 (1915), where defendant was convicted of violating a federal statute which proscribed the cutting or injuring of any mail bag with felonious intent. The defendant cut six bags on the same day in the same transaction and was given consecutive sentences for each offence. The Court construed the statute as a protection for each mail bag inasmuch as the evidence of the cutting of one bag would have been insufficient to warrant conviction upon the others without proof of additional facts though the intent of the defendant was the same.

4. Gore v. United States, 357 U.S. 386 (1958). See also Blockburger v. United States, 284 U.S. 299 (1932).

5. 120 U.S. 274 (1887).

6. Cowper 640, 98 Eng. Rep. 1283 (K.B. 1777). "There is no idea conveyed by the act itself, that, if a tailor sews on the Lord's day, every stitch he takes is a separate offence [sic] on one and the same day." 120 U.S. at 284.

7. 344 U.S. 218 (1952).

8. Id. at 221.

made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication."[9]

That rationale was again applied in *Bell v. United States*,[10] where the defendant on one trip transported two women across state lines for immoral purposes. He was indicted and convicted upon two counts for a violation of the Mann Act[11] and sentenced to two and a half years on each count, the sentences to run consecutively. The Supreme Court, not finding any explicit evidence in the legislative history of the statute which would indicate a determinable unit of prosecution, held that the defendant committed a single offense and concluded that where "Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses. . . ."[12]

In the instant case the Court was for the first time presented with this problem in an assault case. Here the question of fact was whether the defendant wounded both officers with a single discharge of his shotgun or whether several shots were fired. The lower courts found it unnecessary to decide that question, holding that a single firing of a gun resulting in the wounding of two officers constituted two separate offenses under the statute. The prosecution contended that the statute was designed to protect federal officers from the infliction or threat of personal harm while in the performance of their duties. There had, therefore, to be an offense for each officer threatened and each officer was, in effect, a unit of prosecution. The Fifth Circuit Court of Appeals, adopting this view, held that "the evidence here would have been sufficient to warrant the conviction of an assault upon either of the officers without any showing of the fact of an injury to the other."[13] There is some authority, but only in a minority of state courts, for the proposition that there are as many separate and distinct offenses as there are persons affected.[14] In reviewing the legislative history of the statute the Supreme Court found nothing to enlighten it. Mr. Justice Brennan, speaking for the majority, felt that just as plausible an argument could be made that

9. Id. at 221-22.

10. 349 U.S. 81 (1955).

11. 18 U.S.C. § 2421 (1952).

12. Bell v. United States, 349 U.S. 81, 84 (1955).

13. Ladner v. United States, 230 F.2d 726, 729 (5th Cir. 1956).

14. In People v. De Casaus, 150 Cal. App. 2d 274, 309 P.2d 835 (1957), an involuntary manslaughter by operation of an automobile was held to constitute a separate offense for each person killed and defendant was given one year for each of six persons killed. See People v. Lagormarsino, 97 Cal. App. 2d 92, 217 P.2d 124 (1950); People v. Brannon, 70 Cal. App. 225, 233 Pac. 88 (1925); Hearn v. State, 55 So. 2d 559 (Fla. 1951) (larceny from different owners by the same act at the same time); People v. Allen, 368 Ill. 368, 14 N.E.2d 397 (1938), cert. denied, 308 U.S. 511 (1939); Commonwealth v. Browning, 146 Ky. 770, 143 S.W. 407 (1912) (malicious shooting, both parties being wounded by the same bullet); Keeton v. Commonwealth, 92 Ky. 522, 18 S.W. 359 (1892) (assault and robbery); State v. Martin, 154 Ohio St. 539, 96 N.E.2d 776 (1951); Fay v. State, 62 Okla. Crim. 350, 71 P.2d 768 (1937); State v. Taylor, 185 Wash. 198, 52 P.2d 1252 (1936).

the congressional aim was to prevent hindrance to the execution of official duty, and thus to assure the carrying out of federal purposes and interests, and was not to protect federal officers except as incident to that aim . . . [the statute also makes it unlawful] forcibly to resist, oppose, impede, intimidate or interfere with such officers. . . . For example, the locking of the door of a building to prevent the entry of officers intending to arrest a person within would be an act of hindrance denounced by the statute. We cannot find clearly from the statute, even when read in the light of its legislative history, that the Congress intended that the person locking the door might commit as many crimes as there are officers denied entry.[15]

The Court concluded that, since both interpretations were possible because of the unclear legislative history, they would apply the rule of *United States v. Universal Credit Corp.*, and would accept the less harsh alternative. By taking this position the Supreme Court of the United States has aligned itself with the majority of the state courts which have held in like circumstances that a single offense was committed.[16]

The purpose of criminal prosecution is punishment of offenses against the

15. 358 U.S. at 175-76. Such a result might indeed be ludicrous where the legislative intent is supposedly clear. Thus, in a case where the statutory offense was betting, it was held that seventy-five rounds of poker at a single sitting constituted seventy-five separate offenses. Johnson v. Commonwealth, 201 Ky. 314, 256 S.W. 388 (1923).

16. Hurst v. State, 24 Ala. App. 47, 129 So. 714 (1930); State v. Gardner, 112 Conn. 121, 151 Atl. 349 (1930) (libel against two persons in a single writing constitutes but one criminal offense); State v. Wheelock, 214 Iowa 1428, 250 N.W. 617 (1933) (automobile manslaughter with more than one victim); State v. Cosgrove, 103 N.J.L. 412, 135 Atl. 871 (1927); People ex rel. Flinn v. Barr, 259 N.Y. 104, 181 N.E. 64 (1932), wherein the accused was charged with separate indictments for the crime of manslaughter for the death of several persons in a fire resulting from his wrongful act of failing to install a system of automatic sprinklers in the building in which the fire occurred, the New York Court of Appeals held that there was only one crime and that there could only be one indictment; Smith v. State, 159 Tenn. 674, 21 S.W.2d 400 (1929); Sadberry v. State, 39 Tex. Crim. 466, 46 S.W. 639 (1898) (one shot wounded four men); State v. Levand, 37 Wyo. 372, 262 Pac. 24, rehearing denied, 37 Wyo. 372, 263 Pac. 623 (1928). Cf. People v. Moran, 246 N.Y. 100, 158 N.E. 35 (1927), where an assault on two officers merged for purposes of a felony murder prosecution. Some enlightened lower federal courts have also taken this position. See Rayborn v. United States, 234 F.2d 368 (6th Cir. 1956), where defendant, a fugitive from justice, transported in interstate commerce a number of firearms and ammunition simultaneously on a single trip from Kentucky to New York. This was held to be but one offense under a statute proscribing interstate transportation of any firearm or ammunition by a fugitive from justice, and there could be no prosecution on separate counts for each of the various weapons and pieces of ammunition contained in the shipment. In Smith v. United States, 211 F.2d 957 (6th Cir. 1954), a mailman stole two letters and was indicted and convicted on two counts under a federal statute proscribing such theft. The indictment failed to indicate whether there was any difference in the time or place of the letter's theft or that either was taken in response to separately formed criminal intent. The theft of both letters was either simultaneous or continuous. The court held that although the letters were addressed to different persons, there was but a single offense and the mailman was entitled to release after completion of his first sentence. For other similar cases see Kerr v. Squier, 151 F.2d 308 (9th Cir. 1945); Johnston v. Lagomarsino, 88 F.2d 86 (9th Cir. 1937).

state, the people as a whole or the government itself. It seeks not to requite injuries done to separate individuals who can secure proper redress in separate civil actions. It is perhaps the failure to observe this elementary distinction which has produced the minority position that there are as many distinct offenses as there are persons affected.[17]

Contracts—Seller's Ability Unilaterally To Change Rates Under Natural Gas Act.—Petitioner, a natural gas company transporting gas in interstate commerce, entered into service contracts with respondents[1] to supply gas. The agreements obligated the buyer to pay for all gas delivered during the term of the contract at the designated seller's rate schedule, "or any effective superseding rate schedules, on file with the Federal Power Commission."[2] Subsequently, petitioner filed with the Federal Power Commission, pursuant to section 4(d) of the Natural Gas Act, revised schedules effecting increased rates, and the Commission thereupon authorized the changes.[3] The Court of Appeals for the District of Columbia reversed.[4] The United States Supreme Court, with three Justices dissenting, reinstated the holding of the Commission. Under the Natural Gas Act, a natural gas company has the right to change its rates unilaterally, unless it has undertaken by contract not to do so. *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103 (1958).

In 1938 Congress deemed federal regulation of the transportation and sale of natural gas in interstate commerce necessary in the public interest.[5] To this end, the Federal Power Commission was established and given authority, under the Natural Gas Act, to suspend the effectiveness of a schedule pending its decision on the reasonableness of the rates.[6]

17. See Commonwealth v. Velez, 63 Pa. Super. 489 (1916).

1. Respondent Memphis Light, Gas and Water Division, a subpurchaser of the gas, is a municipal agency not in contractual privity with the petitioner.
2. Brief for Petitioner, p. 5.
3. Federal Power Commission Order No. 295, Docket No. 9547 (1956).
4. 250 F.2d 402 (D.C. Cir. 1957).
5. Natural Gas Act, 52 Stat. 821 (1938), 15 U.S.C. § 717 (1952).
6. In accordance with the provisions of the Natural Gas Act §§ 4(c), (d), every natural gas company is required to file a schedule of its rates with the Commission, and such do not become effective until thirty days after filing. Section 4(a) of the Act authorizes the Commission to pass upon the rates charged for natural gas to assure that such charges "shall be just and reasonable, and any such rate or change that is not just and reasonable is declared to be unlawful." That section further provides: "Whenever any such new schedule is filed, the Commission shall have authority . . . to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and pending such hearing and the decision thereon, the Commission . . . may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a period longer than five months beyond the time when it would otherwise go into effect: . . . the Commission may, by order, require the natural-gas company to furnish a bond . . . and, upon the completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified."

In *United Gas Co. v. Mobile Gas Corp.*,[7] the Supreme Court noted that the Act "evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts."[8] In denying the seller's ability to file new rates with the Commission where a contract expressly provided for fixed rates, the Supreme Court there found nothing in the Act from which can be inferred any right, not otherwise possessed, in a natural gas company unilaterally to change its contract.[9] This holding was construed by the lower court, in the instant case, to mean that the seller, where there is a contract involved, can never unilaterally change the rate, regardless of the provisions of that contract.[10]

The seller, in *Mobile,* had by contract bound itself to furnish gas throughout the contract term at a fixed and specified price. In the present case, however, the agreement provided for rates pursuant to the schedule then on file or subsequently fixed by "effective superseding rate schedules."[11] It is precisely this difference which the majority found controlling. Mr. Justice Harlan, speaking for the Court, interpreted *Mobile* to mean not that the Act precluded a seller from changing its rates, but rather it did not authorize the seller to abrogate the specific price provisions of the contract.[12] Thus, where the buyer has bound itself to pay a "going" rate as determined by the schedules filed with and approved by the Commission, the seller is contractually free to alter its rates pursuant to the provisions of the Act. According to the majority, the Natural Gas Act was enacted to serve a dual purpose, viz., the protection of consumers from excessive charges, and also to safeguard the natural gas industry in whose stability the public has a vital stake.[13] Thus, the Court reasoned, if economic

7. 350 U.S. 332 (1956).

8. Id. at 338. This is in marked contrast to the Interstate Commerce Act, which requires that rates to all shippers be uniform. Armour Packing Co. v. United States, 209 U.S. 56 (1908).

9. The Mobile Court simply interpreted § 4(d) as meaning "that no change—neither a unilateral change to an ex parte rate nor an agreed-upon change to a contract—can be made by a natural gas company without proper notice to the Commission." 350 U.S. at 343.

10. "Under the rule in Mobile, for the Commission to review rates under the more expeditious procedure of § 4(e), the seller must bring to the Commission a negotiated agreement." 250 F.2d at 406.

11. Brief for Petitioner, p. 5.

12. "The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: to establish ex parte, and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer." United Gas Co. v. Mobile Gas Corp., 350 U.S. 332, 343 (1956).

13. 358 U.S. at 113. "The rate-making process under the Act, i.e., the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests. . . . From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock." Federal Power Comm'n v. Hope Gas Co., 320 U.S. 591, 603 (1944).

conditions necessitate an increase in rates, to deny the seller the initial right to bargain for this increase might well cause a deterioration in the financial position of the companies with resultant loss in products for consumer enjoyment. The buyer is not without remedy. The schedules must be submitted to the Commission for review and approval.[14] The Act provides further safeguards even where the buyer has agreed to the changes.[15]

The minority found no fundamental difference between the contract before the Court in *Mobile* and the present agreements; in both, the principle remained that the seller can not ex parte alter the rates. Reasoning that Congress sought to protect *consumer* interest under the Act, the dissent would therefore require bilateral agreement with respect to new charges.[16] The minority did not consider a "going" rate clause as an agreement by the buyer to pay a new rate. Rather, the dissenting Justices construed the clause as a mere agreement to agree, and that until the seller had secured the buyer's consent to a new rate, no new schedule could be filed with the Commission.

Limiting the *Mobile* decision to its facts, it appears that the holding therein was based upon contract law. However, the minority treated it as a policy decision, and would preclude the seller from unilaterally changing its rates regardless of contract provisions. The minority is on shaky grounds when it suggests that Congress' sole purpose in enacting the Natural Gas Act was the protection of consumer interest. It seems more reasonable to agree with the majority that Congress intended a balance of buyer and seller interests, providing the means whereby the seller might establish new rates under section 4 of the Act, and, at the same time, permitting the buyer to show cause why such proposed rates might be unreasonable, and also the right to initiate proceedings for a reduction in rates under section 5. In any case, the authority to strike down any new schedule, even where the contract provides for the filing of new rates, remains with the Commission. Under the minority view, the Commission would take on responsibility for initiating new rates under section 4; however, section 5(a) specifically grants such authority.[17] As a practical matter, then, new rates could become effective only after Commission hearings, whereas section 4(d) provides that a schedule becomes operative thirty days after filing.

It does not appear that Congress intended by the Natural Gas Act to destroy the contractual rights of either party. If not, both parties are free to fix contract terms, subject always to the authority of the Commission to deal with that situation where one party, because of circumstances, may be in a position to dictate terms to the other.

14. Natural Gas Act §§ 4(a), (c), (d), supra note 6.

15. The paramount regulatory authority of the Commission could alter these rates under § 5(a) which provides: "Whenever the Commission, after a hearing had upon its own motion . . . shall find that any rate . . . by any natural-gas company . . . is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate . . . and shall fix the same by order. . . ."

16. In support of its opinion, the minority argued that because the controlling powers of the Commission were slight, Congress must have intended the full protective weight of the Act to be employed in favor of the consumer. 358 U.S. at 120.

17. Natural Gas Act § 5(a), supra note 15.

Copyrights — Right of Administrator c.t.a. To Renew and Extend Copyright.—By his will, the decedent, an author domiciled in New York, gave the royalties accruing on his copyrights to his home town. Defendant committee was organized to receive said royalties on behalf of the town. In the twenty-eighth year of the original copyrights, the administrators c.t.a. and the sister of decedent, his sole surviving next of kin, duly filed for and received copyright renewal certificates. Controversy existed only as to who would receive the benefits of the copyright renewals. The district court held that an administrator c.t.a. has the statutory power of copyright renewal for the benefit of the decedent's legatees, and, on appeal, the United States Court of Appeals for the Second Circuit affirmed. Section 24 of the Copyright Law entitles an administrator c.t.a. to renew a copyright. *Gibran v. National Comm. of Gibran*, 255 F.2d 121 (2d Cir.), *cert. denied*, 358 U.S. 828 (1958).

Under the original Copyright Act of 1790, the right of renewal was given to the author, his executor, administrator or assignee. However, the act of 1831 and all subsequent acts omitted the assignee and administrator from the list.[1] The congressional committee report on the Act of 1909 stated that "it was not the intention to permit the administrator to apply for renewal, but to permit the author who had no wife or children to bequeath by will the right to apply for renewal."[2] Consistent with this expressed purpose are sections 24 and 28 of the present Copyright Law.[3] The former permits "the author . . . if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executor, or in the absence of a will, his next of kin . . . " to apply for copyright renewal in the twenty-eighth year of the original copyright. The latter section provides that "copyrights secured under this title or previous copyright laws of the United States . . . may be bequeathed by will."

Analysis of the decedent's testamentary disposition[4] in the case at bar led the surrogate's court and the district court[5] in turn to hold that the testator's intention was clearly to bequeath all rights with respect to his copyrights, original and renewal, to his home town.[6] Decedent's sister contested the right

1. Barnes, Federal Code § 9045 (1919).

2. H.R. Rep. No. 2222, 60th Cong., 2d Sess. 14-15 (1909); adopted as the report of the Senate Committee on Patents, S. Rep. No. 1108, 60th Cong., 2d Sess. 1 (1909).

3. 17 U.S.C. §§ 24, 28 (1947). The Act has since been amended in several particulars, but none of the changes are pertinent to the present case.

4. The will stated that "the royalties on my copyrights, which copyrights I understand can be extended upon request by my heirs for an additional period of twenty-eight years after my death, are to go to my home town." The construction of the Surrogate's Court of New York County set forth that "the gift of the royalties on the copyrights . . . carries with it the gift of the copyrights to the town of Bechari . . ." the testator's home town. 255 F.2d at 122.

5. Gibran v. Alfred A. Knopf, Inc., 153 F. Supp. 854 (S.D.N.Y. 1957).

6. Federal courts generally lack jurisdiction to entertain probate proceedings and actions pertaining to the administration of decedents' estates. They have assumed jurisdiction of actions between citizens of different states involving the validity and construction of wills. 1 Heaton, Surrogate's Courts § 31, at 144 (6th ed. Warren 1958).

of the administrators c.t.a.[7] to renew the copyright for the town's benefit, since the Act limited the privilege to the executors of the deceased author. She argued that the renewal right should pass by intestacy to her as sole surviving next of kin, citing *Silverman v. Sunrise Pictures Corp.*[8] as authority for the proposition that an administrator c.t.a. is without power to renew a copyright under section 24 of the Act. In that case, however, the administrator c.t.a. sought a renewal after the twenty-eighth year of the original copyright, at which time *no one* is permitted to renew the original copyright and, thus, the administrator c.t.a. was barred not by section 24 but rather by lapse of time.

Where an author dies intestate his administrator has no right of copyright renewal, since the right to renew does not flow from the author's estate but is derived from the statute.[9] It has been said that the statute prohibits renewal by an administrator because he, unlike an executor, may represent no relative and no wish of the author.[10] An administrator with will annexed is, however, generally held to have powers co-extensive with those of an executor.[11] The distinction between them is largely one in name only.[12] The administrator c.t.a. may be appointed where no person is named as executor in the will, or if for any reason there is no executor qualified to act during the administration of the testator's estate.[13] "Where letters of administration with will annexed are granted, the will of the deceased shall be observed and performed; and the administrators with such will have the rights and powers, and are subject to the same duties, *as if they had been named executors in the will.*"[14] In *Page v. Patton*,[15] the United States Supreme Court also held that an administrator with will annexed was entitled to exercise all of the powers of an executor.

7. More commonly termed an administrator with will annexed.

8. 273 Fed. 908 (2d Cir. 1921), cert. denied, 262 U.S. 758 (1923). The authoress died, leaving no surviving spouse or children, and bequeathed her residuary estate "including copyright on my books" to her next of kin. When the statutory renewal year began, the estate had already been distributed and the executors had been discharged. Several of the next of kin applied for copyright renewal during the renewal period. Sometime afterwards, an administrator c.t.a. was appointed. The court held that the next of kin, although acting through a fraction of their number, had a right to secure renewal. "The power of applying for copyright which springs into existence after the executor's discharge must vest somewhere. It cannot vest in the executor because there is none . . . and similarly it cannot vest in legatees as such. It must therefore vest in the next of kin." Silverman v. Sunrise Pictures Corp., 290 Fed. 804, 805 (2d Cir. 1923).

9. Danks v. Gordon, 272 Fed. 821 (2d Cir. 1921); White-Smith Music Publishing Co. v. Goff, 180 Fed. 256 (1st Cir. 1910).

10. Harris v. Coca-Cola Co., 73 F.2d 370, 371 (5th Cir. 1934).

11. Hollenbach v. Born, 206 App. Div. 533, 202 N.Y. Supp. 170 (2d Dep't 1923). Other jurisdictions have similarly held that administrators c.t.a. have the same power as executors. Green v. Russell, 103 Mich. 638, 61 N.W. 885 (1895); Scott v. Monks, 16 R.I. 225, 14 Atl. 860 (1888).

12. In re Murphy, 144 N.Y. 557, 562, 39 N.E. 691, 692 (1895); Robins v. McClure, 100 N.Y. 328, 340, 3 N.E. 663, 669 (1885).

13. N.Y. Surr. Ct. Act § 133.

14. N.Y. Surr. Ct. Act § 225. (Emphasis added.)

15. 30 U.S. 304 (1831).

Judge Hand's opinion in the instant case placed considerable emphasis on the proposition that if the administrator c.t.a. was not given the power of copyright renewal, no one could exercise the power since there would not be the "absence of a will" which expressly conditions the privilege of the next of kin. The court distinguished the *Silverman* case, wherein the next of kin were given the power of copyright renewal, although the author's will had, on its face, bequeathed the benefits of copyright renewal. The *Silverman* court reasoned that the estate had already been distributed and the executor named in the will had been discharged prior to the one year renewal period. Although the "rights of the next of kin under the statute arise 'in the absence of a will' . . . there is here a complete absence of a will affecting this renewal right."[16]

If the instant decision had not given an administrator c.t.a. the power of copyright renewal, although a decedent may have clearly expressed his intent to bequeath the benefits of copyright renewal, his failure to name an executor, or the death or incompetency of a named executor, would preclude his bequest, since a strict statutory interpretation requires that only the *executor* exercise the right. To permit such a result would frustrate not only testator's bequest, but also the clearly expressed congressional purpose of permitting an author to bequeath the power of copyright renewal.

Equity—Enjoining a Crime.—Defendants, the owner of a chain of supermarkets and a wholesale drug dealer, were charged with selling or conspiring to sell, in violation of a state statute, certain popular patent medicines (among them Alka-Seltza, Pepto-Bismol and Vick's Va-Tro-Nol) in self-service supermarkets without the supervision of a licensed pharmacist. The state sought to enjoin the sales. The trial court found that the acts were in violation of the pertinent statute[1] but refused injunctive relief on the ground that the state had failed to show that public health was endangered or that the statutory remedy was inadequate. The Supreme Court of Minnesota, one justice dissenting, reversed and granted a new trial. The court held that the statute, though exclusively penal in nature, was primarily designed for the protection of public health, and a prima facie case for equitable relief is made out where organized resistance to enforcement of the statute is offered by wholesale druggists, and enforcement of the penal sanctions would produce a multiplicity of suits. *State v. Red Owl Stores, Inc.*, — Minn. —, 92 N.W.2d 103 (1958).

In medieval England, due to the disorders of the times and the weakness of the central government, the chancellor undertook to protect lives and property by enjoining lawless activities. As times became more peaceful, popular distrust

16. 290 Fed. at 805. Whether this reasoning is truly consistent with that advanced by Judge Hand in the present case is perhaps open to debate. The former relies on the assumption that where the estate covered by a testamentary disposition has been distributed and the executor discharged prior to the copyright renewal period, the right of copyright renewal passes by intestacy although the author may have expressed a clear testamentary intent that it be bequeated to named legatees.

1. Minn. Stat. Ann. §§ 151.15, .25 (1946).

of the king and parliamentary opposition caused the chancellor to exercise sparingly this power to restrain crime.[2] In the nineteenth century, however, the courts of equity again began to restrain purprestures, i.e., the interference by individuals with public highways or waterways.[3] These powers were extended to embrace most public nuisances[4] which were also usually crimes.[5] Today, the criminality of an act is a neutral factor as far as equity is concerned. Equity will not enjoin an act simply because it is a crime; but neither will criminality bar equitable relief[6] if the act is also one inimical to public health or safety.[7]

2. Mack, The Revival of Criminal Equity, 16 Harv. L. Rev. 389 (1903).

3. See, e.g., Attorney General v. Forbes, 2 My. & Cr. 123, 40 Eng. Rep. 587 (Ch. 1836); Attorney General v. Richards, 2 Anst. 603, 145 Eng. Rep. 980 (Ex. 1795).

4. "Aside from purprestures, the most common type of public nuisance is the use of the property of the plaintiff in such a manner as to injure health, safety, morals or general welfare of the public. During the Nineteenth Century the practice of enjoining such nuisances at the suit of the state or some other authorized party became established. There was little difficulty with the relief when the nuisance affected the health or safety of the public. It was early determined that the court of equity could itself determine the existence of such a nuisance without the aid of a decision at law." McClintock, Equity § 163 (2d ed. 1948).

5. "The modern doctrines with reference to enjoining crimes did not develop from the ancient equity practice, but grew out of the jurisdiction of equity to enjoin nuisances. The vagueness of the definition of a 'nuisance' has offered a wide opportunity for the enlargement of the scope of equity in dealing with acts which may be crimes. . . .

"After the courts had generally come to recognize their powers to restrain the use of property in such a way as to interfere with the morals or general welfare of the community, conduct which was almost always made a crime, it became easier to extend the same relief to other cases where no use of property was involved, but where the defendant was pursuing a course of criminal conduct which inflicted injury upon the public." McClintock, Equity § 164, at 443-44 (2d ed. 1948).

6. "The mere fact that an act or conduct is in violation of penal statute does not render such act or conduct a public nuisance. Equity will not enjoin an act merely because its commission will constitute a crime. The act or conduct must be such as would constitute a public nuisance even in the absence of statute, to warrant enjoining the act or conduct. If to allow the commission or continued commission of certain acts or conduct will result in irreparable injury to the public, equity will enjoin such commission even though the commission thereof is described by statute as a crime." De Funiak, Equity § 36 (1950). See also Fitchette v. Taylor, 191 Minn. 582, 254 N.W. 910 (1934); State v. Nelson, 189 Minn. 87, 248 N.W. 751 (1933); Town of Linden v. Fischer, 154 Minn. 354, 191 N.W. 901 (1923); People ex rel. Bennett v. Laman, 277 N.Y. 368, 14 N.E.2d 439 (1938).

7. "In the case at bar the People would not be entitled to an injunction upon a mere showing that the statute had been violated or that acts prohibited by the statute had been performed, in the absence of special statutory authority. However, they go much further than that. They allege facts showing that the acts of defendant imperil the health of the people of the community. . . . The relators invoke only the ordinary powers of a court of equity. The power . . . to restrain acts which are dangerous to human life, detrimental to the public health and the occasion of great public inconvenience and damage is . . . possessed by all courts of equity." People ex rel. Bennett v. Laman, 277 N.Y. 368, 384, 14 N.E.2d 439, 446 (1938).

The Minnesota courts have encouraged strict enforcement of the statutes in question. They have included, for example, harmless household chemicals within the prohibitions if there was any likelihood of medicinal use.[8] It can hardly be contended that a violation of the statute automatically menaces public health so as to require equity's extraordinary remedies. The instant court, however, reasoned that the pharmacy laws were enacted for the general purpose of protecting public health, and that *any* violation thereof would create a prima facie case for injunctive relief.[9] The mere existence of the statute was considered as conclusive evidence that a violation would endanger public health. The penal sanctions set forth in the statute were, in the court's opinion, insufficient to compel compliance. Thus, it was reasoned that the court was required to use its injunctive powers to protect the public health. This seems to be tantamount to making the mere violation or threatened violation of the statute cause for equitable relief. When equity acts, it does so primarily to protect rights or property against infringement; punishment of the defendant being a secondary, though essential, consideration. Where there is no showing that such rights or property are irreparably endangered, courts have been loath to use injunctive powers, primarily because the equity suit does not usually accord the defendant a trial by jury.[10] In a criminal action it denies the defendant the benefit of the higher burden of proof imposed upon the state.[11] It has also been suggested that an equity suit will make possible the imposition of a double penalty, one for contempt of the injunction if violated, and another fixed by the criminal statute.[12]

Even were there some showing of specific harm to the public it would be

8. "The mere fact that they are harmless household remedies does not except the sale of the products from the operation of our statute unless they are also sold exclusively for nonmedicinal purposes. . . . Even if they are not sold principally for medicinal purposes, they come within the pharmacy law unless they are sold exclusively for nonmedicinal purposes." Culver v. Nelson, 237 Minn. 65, 73, 54 N.W.2d 7, 12 (1952). See also State v. F. W. Woolworth Co., 184 Minn. 51, 237 N.W. 817 (1931) (milk of magnesia); State v. Zotalis, 172 Minn. 132, 214 N.W. 766 (1927) (aspirin).

9. "But, even conceding that the state has not on the record established evidence of specific harm to the public, we are of the view that the state has a prima facie case, in view of the public policy in our state that the uncontrolled sale of drugs and medicines is inimical to public health." State v. Red Owl Stores, Inc., — Minn. —, —, 92 N.W.2d 103, 113 (1958).

10. "Another effect of the injunction would be to deny one cited for contempt a trial by jury in what is in effect a criminal case. In other words, a court, without a jury, might convict persons of an offense which the statutes of the state make a felony, and, upon conviction, might inflict such punishment as to the court seemed proper.

"This fact alone should limit the right to an injunction to cases in which its direct effect is the protection of rights or property, and where it is necessary to such protection." Heber v. Portland Gold Mining Co., 64 Colo. 352, 357, 172 Pac. 12, 14 (1918).

11. "The defendant also loses the protection of the higher burden of proof required in criminal prosecutions and, after imprisonment and fine for violation of the equity injunction, may be subjected under the criminal law to similar punishment for the same acts." People v. Lim, 18 Cal. 2d 872, 880, 118 P.2d 472, 476 (1941).

12. Ibid.

questionable whether an injunction would, as a practical matter, afford the public sufficient protection by simply preventing violations of the pharmacy statutes. The dissent pointed out that no material difference exists between the method of sale of the items in question used in supermarkets and that employed in drug stores.[13] It is also questionable whether a customer has superior legal redress against a druggist than against a grocer.[14]

The state pharmacy board had banned the sale of the items in supermarkets. The defendants ignored the board's orders and urged their customers and subsidiaries to do likewise, offering legal services to those who fell afoul of the authorities. The court reasoned that the organized resistance rendered the penal sanctions inadequate. The trial court and the dissent took issue with this finding.[15] The difficulty in enforcing a penal statute has never been considered sufficient to justify injunctive relief unless the acts complained of were also public nuisances.[16] Furthermore, as equity deals with unique situations and dispenses extraordinary remedies, much necessarily must be left to the discretion of the trial court.[17] Thus, the reversal of the trial court's findings is questionable. It is a truism that an appellate court should not pass upon the decision of a trial court to give or withhold an equitable remedy unless there has been an abuse of discretion.[18]

There seems to be a contradiction in the majority's position. It finds im-

13. "If it is true that it is inherently dangerous for the public to be able to purchase drugs in a self-service fashion, then it is apparent that curing the alleged evil which now occurs in supermarkets and grocery stores solves only part of the problem. We cannot shut our eyes to the fact that almost any item which does not require a prescription may be in the same manner in a drug store without any restriction at all upon its quantity. Moreover, it is a matter of common knowledge that in many instances it is not a pharmacist who dispenses the merchandise but rather an inexperienced employee or the customer himself in a self-service manner." — Minn. at —, 92 N.W.2d at 116 (1958).

14. If a customer were injured by a defective patent medicine sold under its trade name and in the manufacturer's container, it is doubtful that the druggist would be liable in negligence. See Tiedje v. Haney, 184 Minn. 569, 239 N.W. 611 (1931); Commissioners of State Ins. Fund v. City Chemical Corp., 290 N.Y. 64, 48 N.E.2d 262 (1943); Singer v. Oken, 193 Misc. 1058, 87 N.Y.S.2d 686 (N.Y. City Ct. 1949). He might, of course, have an action for the breach of implied warranties, but such warranties could be enforced as easily against a grocer as a druggist. See Gimenez v. Great A. & P. Tea Co., 264 N.Y. 390, 191 N.E. 27 (1934); Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 175 N.E. 105 (1931).

15. The trial court and the dissent pointed out that, as the state had never undertaken any criminal proceeding against the defendants, there was no evidence that a multiplicity of suits would result, and that an injunction in the instant case would reach no more parties than a criminal action. — Minn. at —, 92 N.W.2d at 108, 115.

16. People v. Fritz, 316 Ill. App. 217, 45 N.E.2d 48 (1942); People ex rel. Shepardson v. Universal Chiropractors' Ass'n, 302 Ill. 228, 134 N.E. 4 (1922); State v. Maltby, 108 Neb. 578, 188 N.W. 175 (1922); Town of Clinton v. Ross, 226 N.C. 682, 40 S.E.2d 593 (1946).

17. E.g., Reliable Transfer Co. v. Blanchard, 145 F.2d 551 (5th Cir. 1944); Hotel Employees' Union v. Tzakis, 227 Minn. 32, 33 N.W.2d 859 (1948).

18. Love v. Atchison, T. & S.F. Ry., 185 F. 321 (8th Cir.), cert. denied, 220 U.S. 618 (1911).

plicit in the statutes a legislative purpose to protect public health, and, at the same time, rejects as inadequate the remedy, i.e., criminal prosecution, established by the legislature. If this court has found defendants' acts or threatened acts detrimental to public health because the legislature has said so, and if the remedy provided by the legislature is inadequate, then it is for the legislature, not the court, to provide more severe penal sanctions, or to authorize injunction by statute.

Landlord and Tenant—Tenant's Liability for Negligence Where Lease Contains Fire Excepting Clause.—In an action by plaintiff lessor to recover the cost of repairs necessitated by a fire allegedly caused by lessee's negligence, the lessee alleged as an affirmative defense that he covenanted to make all repairs to the interior of the premises with "reasonable wear and tear and damage by fire and unavoidable casualty excepted." The defense was stricken as being legally insufficient and the defendant's motion to amend his answer was denied by the trial court.[1] On appeal, the court held that the lessee was liable to the lessor for fire damages caused to the premises through the former's own negligence notwithstanding the excepting clause in the lease. *Galante v. Hathaway Bakeries, Inc.*, 6 App. Div. 8d 142, 176 N.Y.S.2d 87 (4th Dep't 1958).

At common law a tenant was not required to make repairs necessitated by accidental fires[2] since he merely owed the lessor a duty to exercise reasonable care and diligence in the use of the leased premises.[3] However, he was held responsible for damages resulting from fires he negligently caused.[4] This common law duty may be modified by a general covenant to repair which binds the lessee to make all repairs,[5] but a tenant will usually demand the inclusion of excepting provisions to exculpate him from liability for injury to the premises due to ordinary wear and tear,[6] unavoidable casualty and fire.

Where "fire" is specifically excepted, it has been held that the covenant relieves the tenant from liability for accidental fires,[7] but whether it exculpates the negligent tenant depends upon the *intentions* of the parties to the lease.

In the principal case the court, following the well recognized rule[8] that a "con-

1. 9 Misc. 2d 19, 167 N.Y.S.2d 277 (Sup. Ct. 1957). Defendant wished to amend his answer to allege that the plaintiff, subsequent to the making of the lease, acquired insurance to protect himself against such contingencies and he recovered thereunder.

2. Patton v. United States, 139 F. Supp. 279 (W.D. Pa. 1955).

3. United States v. Bostwick, 94 U.S. 53 (1876).

4. Ibid.

5. Anderson v. Ferguson, 17 Wash. 2d 262, 135 P.2d 302 (1943). See 32 Am. Jur. Landlord & Tenant § 791 (1941).

6. Where the provision includes ordinary wear and tear it imposes the common law duty of care upon the tenant. 51 C.J.S. Landlord & Tenant § 368, at 1102 (1947).

7. Basketeria Stores v. Shelton, 199 N.C. 746, 155 S.E. 863 (1930).

8. Boll v. Sharp & Dohme, Inc., 281 App. Div. 568, 121 N.Y.S.2d 20 (1st Dep't 1953), aff'd, 307 N.Y. 646, 120 N.E.2d 836 (1954); Howard v. Handler Bros. & Winell, 279 App. Div. 72, 107 N.Y.S.2d 749 (1st Dep't 1951), aff'd, 303 N.Y. 990, 106 N.E.2d 67 (1952); Gordon & Cohen, Inc. v. Rose, 211 App. Div. 808, 206 N.Y. Supp. 910 (2d Dep't 1924).

tract will not be construed to exempt a party from liability for his negligent act unless such intention is expressed in unequivocal terms,"[9] held that the fire excepting provision in the lease did not clearly and explicitly exempt the tenant from liability for negligently caused fires. Nor was the fact that the landlord subsequently took out a fire insurance policy[10] on the premises considered indicative of a general understanding between the parties that the tenant was thereby relieved of his liability for negligently setting fire to the premises. In the absence of further evidence of an attempt to relieve the tenant of his obligation to make good damages suffered as a result of his negligence, the court affirmed his liability. The court also noted that section 227 of the New York Real Property Law[11] has been interpreted to relieve the tenant of his duty to repair under a fire exempting provision,[12] provided it occurs without the fault or negligence of the tenant.[13]

Excepting provisions in a lease have been variously interpreted. Some jurisdictions have reasoned that since the landlord is generally the draftsman of the lease and in a better bargaining position, an unconditional excepting clause should be strictly construed against him.[14] Where the lease provision exempts both "fire and unavoidable casualty" these courts have reasoned that the parties must have intended the provision to extend to negligently caused fires since if "it had been intended that the fire must also be an unavoidable casualty it would seem that there was no occasion for mentioning fire at all."[15] The phrase "loss by fire" when used in a fire insurance policy includes both accidental and negligent fires,[16] and some courts have applied the same interpretation to similar provisions in a lease, inferring that business men entering into a contract relating to property, which in the normal course of business is covered by fire insurance, would so construe it.[17]

On the other hand, courts which have strictly construed the exculpation clause have relied on the rule that although a person may contractually exempt himself from his own negligence, it must be done in clear and unequivocal terms,[18] following the view that it is generally against public policy to favor exculpatory provisions.[19] They imply that "by fire excepted" is too general an

9. See Thompson-Starrett Co. v. Otis Elevator Co., 271 N.Y. 36, 41, 2 N.E.2d 35, 37 (1936).

10. The agreement to lease was entered into in March of 1953, and the fire insurance policy was purchased in August of 1955.

11. N.Y. Real Prop. Law § 227. This section relieves the tenant of his common law duty to pay rent even when the building has been destroyed.

12. Butler v. Kidder, 87 N.Y. 98 (1881).

13. Marcy v. City of Syracuse, 199 App. Div. 246, 192 N.Y. Supp. 674 (4th Dep't 1921).

14. 51 C.J.S. Landlord & Tenant § 232(1) (1957).

15. Slocum v. Natural Products Co., 292 Mass. 455, 456, 198 N.E. 747, 748 (1935).

16. Brewer, An Inductive Approach to the Liability of the Tenant for Negligence, 31 B.U.L. Rev. 47 (1951).

17. United States Fire Ins. Co. v. Phil-Mar Corp., 166 Ohio St. 85, 139 N.E.2d 330 (1956).

18. 17 C.J.S. Contracts § 262 (1957).

19. Ibid.

exception to relieve a tenant of his tort liability. Similar clauses do not exempt the landlord from liability for negligent acts.[20]

In recent years the courts in determining the intentions of the contracting parties have gone outside the contract and interpreted the provision taking into consideration the acts and circumstances surrounding the agreement. The essential element which has affected their decisions has been the absence or existence of fire insurance on the premises paid for by the lessor.[21] The defendant in the instant case relies heavily upon the decision in *General Mills, Inc. v. Goldman*,[22] and the recent cases in accord with its reasoning.[23] The federal court there held that the fire excepting provision relieved the tenant from liability to make repairs to the premises damaged by a fire negligently caused by that tenant, where the parties, when entering into the lease, mutually agreed that the lessor should take out a fire insurance policy on the premises. It may be inferred from this that the landlord by taking out the policy would relieve the tenant from liability, thereby implying that the tenant was in a sense paying for the policy through the payment of rent.[24]

Although a tenant has an insurable interest in leased premises,[25] he is at a disadvantage in obtaining insurance which will not only cover this interest but protect the landlord's property from the tenant's negligence.[26] Standard fire insurance policies generally are not issued to protect the property of another.[27] Therefore, to protect the tenant it is submitted that at the time of the leasing agreement the tenant and landlord should obtain one fire insurance policy which would provide coverage for both parties' interests.

Where the surrounding circumstances indicate that the parties to the contract intended that fire insurance be taken out by the landlord, it seems more reason-

20. Kessler v. The Ansonia, 222 App. Div. 148, 225 N.Y. Supp. 589 (1st Dep't 1927), aff'd, 253 N.Y. 453, 171 N.E. 704 (1930); accord, Lewis Co. v. Metropolitan Realty Co., 112 App. Div. 385, 98 N.Y. Supp. 391 (2d Dep't 1906); Levin v. Habicht, 45 Misc. 381, 90 N.Y. Supp. 349 (Sup. Ct. 1904).

21. 18 Ohio St. L.J. 423 (1957).

22. 184 F.2d 359 (8th Cir. 1950), cert. denied, 340 U.S. 947 (1951).

23. Cerny-Pickas & Co. v. C. R. Jahn Co., 7 Ill. 2d 393, 131 N.E.2d 100 (1955); Kansas City Stock Yards Co. v. A. Reich & Sons, 250 S.W.2d 692 (Mo. 1952); United States Fire Ins. Co. v. Phil-Mar. Corp., 166 Ohio St. 85, 139 N.E.2d 330 (1956).

24. Brewer, supra note 16, at 428.

25. Commercial Union Assur. Co. v. Jass, 36 F.2d 9 (5th Cir. 1929).

26. Brewer, supra note 16, at 57.

27. Ibid. Where the tenant protects his interest by the purchase of a standard fire insurance policy, the insurance company stands to gain double premiums as the average business-wise landlord will generally take out insurance on the property to protect his interest. When insurance premiums are calculated, damage due to negligent fires are included in the premiums. If the insurance company cannot sue the landlord for his negligence, why should it be allowed, under the circumstances, to subrogate under the plaintiff-landlord and recover the loss from the tenant, which he has already included in his premiums? 18 Ohio St. L.J. 423 (1957).

Since the General Mills decision, insurance companies have made some effort in providing special policies to give the tenant the necessary coverage. Brewer, supra note 16, at 51.

able to hold that the excepting provision be interpreted to exculpate the tenant from his negligently caused fires. At the present time this is about as far as the courts have extended the rule.

The instant case is in accord with the jurisdictions which have not exculpated the tenant for his negligence.[28] Although these cases have generally been prior to the recent trend[29] indicated by the *General Mills* decision, they are distinguishable in that there was no fire insurance policy at the time of the lease. In the principal case where the existence of the insurance policy was subsequent to the lease and without evidence of an intent that it be purchased to exculpate the tenant, the court could do nothing but render the lessee liable for his negligence.

Patents — Right to Bring Suit While a Patent Is Withheld Under a Secrecy Order.—Plaintiff filed an application for a patent in March of 1945. The Commissioner of Patents refused to issue the patent[1] and entered a secrecy order pursuant to statute.[2] The secrecy order was renewed periodically and was still pending when plaintiff instituted the present suit[3] in the District Court for the Southern District of New York under the Invention Secrecy Act of 1951,[4] after having failed to obtain a satisfactory award from the Department of Defense. The district court dismissed the complaint for lack of jurisdiction, holding that an action cannot be maintained during the pendency of a secrecy order on a patent. On appeal, the United States Court of Appeals for the Second Circuit unanimously reversed and remanded. The court held that the Invention Secrecy Act of 1951 authorizes suit during the pendency of a secrecy order, and permits the district court, if it finds that a trial would not jeopardize the national security, to conduct its proceedings *in camera*. *Halpern v. United States*, 258 F.2d 36 (2d Cir. 1958).

The right to compensation for an inventor whose patent has been withheld or delayed under section 181 of the Invention Secrecy Act of 1951 is dealt with in section 183.[5] The instant case is the first to have been brought during the

28. Morris v. Warner, 207 Cal. 498, 279 Pac. 152 (1929); Sears, Roebuck & Co. v. Poling, 248 Iowa 582, 81 N.W.2d 462 (1957); Brophy v. Fairmont Creamery Co., 98 Neb. 307, 152 N.W. 557 (1915); Carstens v. Western Pipe & Steel Co., 142 Wash. 259, 252 Pac. 939 (1927).

29. The recent trend which has followed the General Mills decision has been in industrial states and is concerned with manufacturing lessees. If, in the instant case, the landlord had intended to take out fire insurance at the time of the lease agreement and the tenant knew this intention, the result might have been different.

1. The plaintiff was notified that the refusal was due to the nature of the invention and its importance to national security.

2. Act of July 1, 1940, ch. 501, § 1, 54 Stat. 710.

3. Plaintiff sought to recover damages resulting from the secrecy order and compensation for use of his invention by the United States.

4. 35 U.S.C. §§ 181-88 (1952).

5. The relevant portions of that section are as follows: "An applicant . . . whose patent is withheld as herein provided, shall have the right . . . to apply to the head of any de-

pendency of a secrecy order. The decision, therefore, necessarily turned upon the proper interpretation to be given section 183.

The statute provides alternate remedies. The first permits the applicant to apply for compensation to the department which caused the secrecy order to be issued after he is notified that, *except for the secrecy order,* his application is otherwise in condition for allowance; failing settlement by mutual agreement, he may bring suit in the Court of Claims or in a district court. The second remedy provides that an owner of a patent who did not avail himself of the first remedy shall have the right, *after the date of issuance of a patent,* to bring suit in the Court of Claims. The qualifying phrase in the second remedy, limiting it to cases where the patent has already been issued (and, therefore, the secrecy order lifted), does not appear in the first remedy. The Government, however, contended that where the secrecy order was still pending, the inventor was to be allowed only part of the first remedy, namely, the right to apply for compensation to the proper department, but not the subsequent suit in the courts. The court refused to accept this interpretation. Where one part of the statute is so explicit as to include an express condition precedent to suit, namely, "after the date of issuance of a patent," the court felt that it should not presume a legislative oversight and read a similar clause into the earlier part of the statute, silent as to any such condition. It was on this ground primarily that the court relied in interpreting the statute as allowing the suit to proceed.

The predecessor of the present statute[6] provided only one remedy which is carried over as the second remedy under section 183. Under the former statute the inventor's right to sue was limited to an action only "if and when he ultimately receives a patent." Had Congress intended to incorporate this restriction into the first remedy, it necessarily would have included it in the wording of that part of the section. Since it did not, the conclusion is irresistible that it did not intend such restriction to apply as a condition precedent to an action under that part of the section.

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partment or agency who caused the order to be issued for compensation for the damage caused by the order of secrecy and/or for the use of the invention by the Government, resulting from his disclosure. . . . The head of the department or agency is authorized, upon the presentation of a claim, to enter into an agreement with the applicant . . . in full settlement for the damage and/or use. . . . If full settlement of the claim cannot be effected, the head of the department or agency may award and pay to such applicant . . . a sum not exceeding 75 per centum of the sum which the head of the department or agency considers just compensation for the damage and/or use. A claimant may bring suit against the United States in the Court of Claims or in the District Court of the United States for the district in which such claimant is a resident for an amount which when added to the award shall constitute just compensation for the damage and/or use of the invention by the government. The owner of any patent issued upon an application that was subject to a secrecy order issued pursuant to section 181 of this title, who did not apply for compensation as above provided, shall have the right, after the date of issuance of such patent, to bring suit in the Court of Claims for just compensation for the damage caused by reason of the order of secrecy and/or use by the Government of the invention resulting from his disclosure."

6. Act of July 1, 1940, ch. 501, § 1, 54 Stat. 710.

A further manifestation that Congress in section 181 intended a distinction in remedies between that situation where a patent had been issued and where it had not is evidenced by the terms used by the legislature in designating the inventor in the two remedies: the first refers to the "applicant" and the "claimant," whereas the second specifically uses the term "owner of the patent."

The Government argued that permitting a suit before the secrecy order has been lifted would be contrary to the whole purpose of the Act which was to preserve the secrecy of inventions affecting national security.[7] To the plaintiff's contention that such difficulty could be overcome by an *in camera* trial the Government argued[8] that such an extraordinary procedure[9] could be used only when expressly provided for by statute, and that even then such a closed trial would not satisfy the nondisclosure requirement of the statute. The court nevertheless found that since Congress provided for a trial during the pendency of a secrecy order, such provision could not be illusory and, therefore, the trial court is empowered to use its discretion to grant a trial whenever it can also guarantee the overriding interest of national security.

The court also declined to adopt the Government's restricted interpretation of the term "disclosure" as meaning that any disclosure was proscribed and, therefore, mitigating against any *in camera* proceeding, finding that the Act deals with *unauthorized* disclosure and expressly *permits* disclosure to an officer of any department of the Government concerned directly with the subject matter. Such an attitude is a realistic one. An invention like the one in question[10] must be disclosed to hundreds of government scientists and technicians in the course of its use. Testimony at a closed trial should carry no greater danger of public disclosure. Nevertheless, the decision is merely permissive in nature, and still leaves the trial judge power to deny trial where he feels that it cannot be "carried out without substantial risk that secret information will be publicly divulged."[11]

This decision will be welcomed by inventors dealing in military products whose right to full compensation might otherwise have been postponed indefinitely under a secrecy order. More significant, however, is its long-range effect. Inventors should be encouraged to work in the field of military products and to deal with the government.[12] That encouragement will have a more salubrious

7. Section 182 of the Act declares an inventor's right to a patent is forfeit if he discloses it without authorization; the inventor is also subject to criminal penalties under section 186 for willful disclosure.

8. Brief for Appellee, pp. 14-16.

9. There is little case history on trials in camera. This is not surprising when it is considered that records of such trials, and usually their appeals, would not be reported.

10. The invention was described only as one which deals with a manner and means whereby an object may escape observation and detection by radar. 258 F.2d at 37.

11. 258 F.2d at 44.

12. See Schmidt, Compulsory Licensing and National Defense: Danger in Abandoning Our Patent System, 35 A.B.A.J. 476 (1949), where it was argued that the secrecy provisions of the Atomic Energy Act of 1946 would discourage new inventions in the field. It seems probable that Congress, in enacting the Invention Secrecy Act of 1951, intended to compensate for the discouraging effect of a secrecy order by giving the inventor the

effect on national security than any blanket prohibition of *in camera* trials could have had.

Release—Effect of Release of Original Tort-Feasor on Claim Against Physician Who Aggravated Injury.—Plaintiff, seriously injured in an automobile accident in Ohio, was transferred for treatment to a New Jersey hospital, where he was placed under the care of defendants. He then instituted an action in the United States District Court for the Southern District of New York against the original Ohio tort-feasor, seeking recovery for all injuries resulting from the accident. That action terminated in a mistrial. Pending retrial, plaintiff instituted the present action, charging defendant doctors with negligence in treatment which aggravated his pre-existing injuries.[1] Plaintiff then concluded a settlement of his case against the Ohio tort-feasors, and delivered to defendants therein a formal release. This release was executed in New Jersey.

Defendant doctors asserted the release as a defense in plaintiff's action, contending that the effect of the release was governed by Ohio law. In Ohio the release would bar the malpractice action. The law division,[2] upholding defendant's contention, gave summary judgment against the plaintiff and plaintiff appealed.

The Supreme Court of New Jersey reversed and remanded. The court held that the release, executed in New Jersey, of the Ohio tort claim against the original tort-feasor is governed by Ohio law insofar as the Ohio tort claim is concerned, but its effect on the New Jersey tort claim against defendant doctors is governed by the law of New Jersey. Moreover, under New Jersey law, a physician who aggravates a pre-existing injury is an independent tort-feasor, and a general release given to the original tort-feasor will not release the negligent physician from liability, except to the extent that the original settlement was full compensation for the malpractice claim, or intended as such. *Daily v. Somberg,* 28 N.J. 372, 146 A.2d 676 (1958).

A release is the surrender of a cause of action, which may be gratuitous or given for a consideration.[3] Its validity is generally governed by the law of

greater assurance of adequate reward for his efforts by means of the right of judicial review.

1. The second count in the complaint alleged that defendant doctors had failed to live up to their obligations under contract, and thereby aggravated plaintiff's injuries. In Von Blumenthal v. Cassola, 166 Misc. 744, 3 N.Y.S.2d 246 (Sup. Ct.), aff'd, 254 App. Div. 857, 6 N.Y.S.2d 342 (1938), the court found that a release, which barred an action in negligence against a technical joint tort-feasor who allegedly aggravated the original injury, did not release him from the contract claim alleged as a separate cause of action. The court in the instant case did not get to this question, having found liability on the first count.

2. 49 N.J. Super. 469, 140 A.2d 429 (L. 1958).

3. For an excellent discussion of the distinction between release and satisfaction, and the unfortunate judicial confusion of the two, see 1 Harper & James, Torts § 10.1 (1956) [hereinafter cited as Harper & James].

the place where executed,[4] but its effectiveness in barring a cause of action is determined by the law of the place of injury.[5] At common law, when given to one of two joint tort-feasors[6] who had acted in concert, it necessarily released the other; the reasoning followed was that there was but one cause of action against the two.[7] On the other hand, independent wrongdoers who were liable for the same loss were not absolved from liability by a release of one of them, except so far as the release constituted actual satisfaction of the claim.[8] In time, however, some jurisdictions extended the rule governing joint tort-feasors to independent tort-feasors.[9] Therefore, a general release of the one responsible for the original injury precluded an action by the injured party against a physician for damages incurred from negligent treatment of the injury.[10] These courts regarded the aggravation of the injury as part of the original injury for which the original tort-feasor was liable.[11]

4. 76 C.J.S. Release § 39 (1952).

5. Ibid. In Preine v. Freeman, 112 F. Supp. 257 (E.D. Va. 1953), an action by residents of New York against residents of Virginia for injuries and damages suffered in a collision of vehicles in Virginia, the court determined that "since the cause of action arose in Virginia, and the suits were instituted in Virginia, the laws of that state which give the plaintiff the cause of action also control in determining the effect of the releases." Id. at 260. In that case one of the instruments had been executed in New York, the other in Colorado. See Butler v. Norfolk Southern Ry., 140 F. Supp. 601 (E.D.N.C. 1956); Western Newspaper Union v. Woodward, 133 F. Supp. 17 (W.D. Mo. 1955); Shapiro v. Embassy Dairy, 112 F. Supp. 696 (E.D.N.C. 1953); Goldstein v. Gilbert, 125 W. Va. 250, 23 S.E.2d 606 (1942).

6. While the concept of "joint torts" has been employed under varying circumstances, it should strictly be used "where the behavior of two or more tort-feasors is such as to make it proper to treat the conduct of each as the conduct of the others as well." 1 Harper & James § 10.1, at 692. See Salmond, Torts § 27 (12th ed. 1957). This, in effect, requires the existence of a concert of action, or breach of a joint duty and the wrongdoers will be held jointly and severally, or entirely, liable for the harm proximately resulting. For the development of independent concurring torts, not within the above definition, as joint torts in practical effect. See note 9 infra.

7. The release barred any suit against any of the other joint wrongdoers for the same wrong, since the injured party was entitled to one satisfaction from whatever source. Prosser, Torts § 46 (2d ed. 1955) [hereinafter cited as Prosser].

8. Ibid.

9. 76 C.J.S. Release § 50 (1952). Thus, the idea of joint and several liability was extended to situations where there was neither concert of action nor breach of common duty, but where a single indivisible harm had been sustained as a result of the independent, separate but tortious acts of two or more persons. 1 Harper & James § 10.1. As for the development of judicial failure to maintain the difference between joint tort-feasors, who were jointly and severally liable, and concurrent tort-feasors, who were originally only severally liable, see Note, 18 U. Cinc. L. Rev. 378 (1949). Prosser severely criticizes the American judicial confusion of release and satisfaction that followed upon the diminished effect given to the seal, and especially takes issue with the designation of concurrent wrongdoers as joint tort-feasors. Prosser § 46.

10. This position has been adopted by the following jurisdictions: Colorado, Florida, Georgia, Illinois, Iowa, Kansas, Minnesota, New York, North Carolina, Pennsylvania, Texas, Washington, West Virginia, and Wisconsin. See Annot., 40 A.L.R.2d 1075 (1955).

11. 41 Am. Jur. Physicians and Surgeons § 137 (1942). It would be an undue compli-

This view prevails in Ohio. In *Tanner v. Espey*[12] the court reasoned that since full recovery could have been obtained against the original wrongdoer, and it was not, the partial settlement constituted full compensation for all damages arising out of the accident.[13] A distinction was engrafted on this rule in *Mainfort v. Giannestras*.[14] There the court declared that "the sole question is whether the negligence of the defendant surgeon aggravated the original injury or created an independent injury, unassociated with the original wrong and not reasonably foreseeable by the original wrongdoer as a natural sequence of his wrong."[15]

A different approach is taken in the California case of *Ash v. Mortensen*,[16] where the court stated that it would be unreasonable and unjust to discharge defendants on account of the release given the original wrongdoer. Pointing out that the independent acts of the wrongdoers gave rise to two distinct causes of action, the court said: "In their [defendants'] view, the amount of damages sustained by plaintiff, the sum received as consideration for the release, and the relation between the two, the intention of the parties, and the fact that . . . [the tort-feasors] are independent rather than joint wrongdoers, are immaterial."[17] The court reasoned that the rule releasing both tort-feasors if one is released was arrived at by treating the independent wrongdoers as joint tort-feasors, or by applying, analogously, the common law rule of unity of discharge affecting joint tort-feasors. The court concluded that "a release of a cause of action against a wrongdoer is . . . a release of a separate or distinct cause of action against another independent wrongdoer . . . [only] 'if there has been full compensation for both injuries, but not otherwise.' "[18]

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ment to the medical profession to say that bad surgery or treatment is not part of the foreseeable risk of the original injury. Thompson v. Fox, 326 Pa. 209, 192 Atl. 107 (1937). Some courts have reasoned that since the one causing the original injury is liable for the consequences of physician's negligence, which would not have occurred but for the original negligence, the release of the original tort-feasor is a release of the physician as well. Annot., 40 A.L.R.2d 1075 (1955).

12. 128 Ohio St. 82, 190 N.E. 229 (1934).

13. Knight v. Strong, 101 Ohio App. 347, 140 N.E.2d 9 (1955), accepted and followed the reasoning of the Tanner case.

14. 49 Ohio Op. 440, 111 N.E.2d 692 (C.P. 1951).

15. Id. at 442, 111 N.E.2d at 694. There is no unanimity on the part of the courts respecting what constitutes a new injury. Annot., 40 A.L.R.2d 1075, 1083 (1955). See 41 Am. Jur. Physicians and Surgeons § 137 (1942), which points out that here settlement with the injured party discharges only that claim for which the wrongdoer is liable.

When confronted with the present situation the lower New Jersey court, reasoning that Ohio law controlled, held that the release of the original tort-feasor automatically released defendant doctors, unless plaintiff could establish that defendants' alleged negligent conduct produced a new and independent injury, rather than an aggravation of the injuries sustained in the accident. 49 N.J. Super. 469, 476, 140 A.2d 429, 433 (L. 1958).

16. 24 Cal. 2d 654, 150 P.2d 876 (1944). Here plaintiff successfully sued defendant doctors after having given a release for an amount less than the judgment to the original tort-feasors.

17. Id. at 656, 150 P.2d at 878.

18. 24 Cal. 2d at 656, 150 P.2d at 878. This decision was subsequently extended by the

Prior to the case under consideration, New Jersey had only one lower court opinion, *Adams v. De Yoe*,[19] which adopted the majority view. The court there treated defendants as joint tort-feasors, so that a release of one constituted a release of the other. Substantial doubt, however, was cast upon this decision by *Breen v. Peck*,[20] which rejected the strict common law release rule for joint tort-feasors. The *Breen* court reasoned that a general release will not discharge other joint tort-feasors, unless it is so intended, or unless the consideration for it constitutes full compensation, or is accepted as such. The court, in the present case, first determined that the law of the *locus delicti* governed the effect of the release.[21] But, it reasoned, Ohio was the locus only of the original injury, while New Jersey was the locus of the intervening tort committed by the defendant doctors. Thus, it concluded that New Jersey law determined the effect of the release with respect to the present action.[22] Applying the law of New Jersey, therefore, to the severable New Jersey wrong, the court concluded that there was no reason for disabling the plaintiff from maintaining his malpractice claim in that state unless he had released it in accordance with that law. The release of the original tort-feasor could not automatically release the subsequent tort-feasor without payment or contribution on his part. The court recognized that if the release of the original wrongdoer was intended to release the doctors, or if the amount paid actually constituted full compensation for plaintiff's claim, or was accepted as such, plaintiff could not fairly or equitably seek further recovery. Since the questions of intent and full compensation are factual in nature, and could not be determined by the trial court on defendants' motion for summary judgment, the case was remanded for trial.

The fact that the original tort-feasor is wholly liable for all the damages resulting from his negligence, including those incurred by virtue of negligent

courts to the situation where the plaintiff had settled with the original tort-feasor and released him without entry of judgment. See, e.g., Dickow v. Cookinham, 123 Cal. App. 2d 81, 266 P.2d 63 (1954); Gerald v. San Francisco Unified School Dist., 121 Cal. App. 2d 761, 264 P.2d 90 (1953). Cf. Alexander v. Hammarberg, 103 Cal. App. 2d 872, 230 P.2d 399 (1951).

19. 11 N.J. Misc. 319, 166 Atl. 485 (Sup. Ct. 1933).

20. 28 N.J. 351, 146 A.2d 665 (1958).

21. For inherent difficulties in application of such a rule, see Shuman & Prevezer, Torts in English and American Conflict of Laws: The Role of the Forum, 56 Mich. L. Rev. 1067, 1072-73 (1958).

22. The court was fully aware that if the tortious conduct in a foreign state were followed by injurious consequences in the state of the forum the choice of law would be troublesome, for the state of the forum would be vitally interested and would have adequate cause for applying its own law. Cheatham & Reese, Choice of the Applicable Law, 52 Colum. L. Rev. 959, 976 (1952). See also, Goodrich, Conflict of Laws § 93 (3d ed. 1949). Determining the situation to be one where the tortious conduct in the foreign state was followed in the state of the forum, not only by injurious consequences, but also by independent tortious conduct of other tort-feasors, the court felt that New Jersey, as the state of the forum rather than the foreign state, was the one with the dominant interest and the stronger policy reasons for applying its own just legal principles. See Rheinstein, The Place of Wrong: A Study in the Method of Case Law, 19 Tul. L. Rev. 4 (1944).

medical treatment of the original injuries, does not, of course, contradict the existence of two causes of action.[23] The injured person may pursue either,[24] but is limited to one satisfaction.[25] That the person wronged may receive but one satisfaction should be of primary concern, but assurance of this should not lie necessarily in the application of a stereotyped formula. Granted that the rule followed by the majority of jurisdictions has a practical utility, nonetheless, it would appear that New Jersey, in looking to the extent of the settlement, and in considering the intention of the parties negotiating the release, has adopted a more desirable criterion.

Under such a rule which credits the amount paid by the first tort-feasor for the medical injury *pro tanto* to the second tort-feasor, any fear of double recovery is dispelled.[26] Any other criterion would tend to discourage compromises which the law favors, and give physicians an advantage wholly inconsistent with the nature of their liability.

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23. Restatement, Torts § 879, illustration 3 (1939). But see Milks v. McIver, 264 N.Y. 267, 190 N.E. 487 (1934), where the court said: "It may be argued that the original wrongdoer who caused the injury and the physician whose negligence aggravated the injury are not, in technical sense, joint tort-feasors. Nevertheless their wrongs coalesced and resulted in damage which would not have been sustained but for the original injury." Id. at 269, 190 N.E. at 488-89.

24. Thompson v. Fox, 326 Pa. 209, 211, 192 Atl. 107, 109 (1937).

25. It is submitted that dissatisfied plaintiffs will not be able to turn from the primary wrongdoer to their treating physician, and that treating physicians will not be forced to be noncommunicative for fear that their reports and opinions may later be used against them in a malpractice suit. Nor need they be overeager to see that their plaintiff obtain a large settlement so that the issue of complete satisfaction in the event of a later malpractice claim will be clear.

26. Prosser, Joint Torts and Several Liability, 25 Calif. L. Rev. 413, 425 (1937).