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Case Notes

CASE NOTES

Admiralty — Action by Seaman Not Maintainable on Law Side of Federal District Courts Under General Maritime Law.—Plaintiff, a Spanish seaman who was a member of the crew on a vessel of Spanish registry, was injured aboard ship as it lay in harbor in the port of New York. An action under the Jones Act,[1] as well as an action for maintenance and cure, unseaworthiness and a maritime tort brought under section 1331 of the Judicial Code,[2] were instituted on the law side of the district court against Compania Transatlantica, the Spanish owner of the ship, and others.[3] The district court[4] dismissed both actions against Compania Transatlantica, and the court of appeals affirmed.[5] On certiorari, the Supreme Court of the United States affirmed, four Justices dissenting. In the absence of diversity of citizenship, the district court has no jurisdiction on the law side of a general maritime action under section 1331. The Court further held, three Justices dissenting, an alien seaman sailing on a foreign vessel may not recover against the alien owner under the Jones Act for injuries suffered in the territorial waters of the United States. *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959).

The Court in the present case was confronted with two problems. The first was whether a maritime action might be instituted on the law side of the district court under section 1331, which provides: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws or treaties of the United States."[6] Any solution to this problem, of course, would depend to a great extent on the

1. 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952) provides: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. . . ."

2. 28 U.S.C. § 1331 (1952).

3. In addition to the actions against Compania Transatlantica, the plaintiff instituted identical actions in the same proceeding against Garcia & Diaz, Inc., the husbanding agent for Compania Transatlantica's ships in New York. The plaintiff further alleged liability of the International Terminal Operating Co. and Quin Lumber Co., who were working aboard ship at the time plaintiff sustained his injury, pursuant to an oral contract with Garcia & Diaz, Inc.

4. 142 F. Supp. 570 (S.D.N.Y. 1956). The court reasoned that there were four possible grounds for jurisdiction in this matter: (1) The Jones Act, (2) a federal question, (3) diversity, and (4) discretion under the general maritime law. The court held that it could not entertain jurisdiction on any of these grounds.

5. 244 F.2d 409 (2d Cir. 1957). On appeal to the circuit court, plaintiff argued that by virtue of the Treaty with Spain of Friendship and General Relations, July 3, 1902, art. VI, 33 Stat. 2105 (effective April 14, 1903), the district court might entertain the action under the Jones Act. The court answered: "We find nothing in the text of that Article which confers upon the appellant, a Spanish subject, the substantive rights created by the Jones Act." 244 F.2d at 410.

6. 28 U.S.C. § 1331 (1952).

exclusiveness of section 1333 of the Judicial Code,[7] which provides: "The district courts shall have original jurisdiction . . . of . . . any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."[8] This problem has been the subject of conflicting decisions in the circuit courts.[9]

The majority here, employing the reasoning of *Paduano v. Yamashita Kisen Kabushiki Kaisha*,[10] concluded that the sweeping grant of jurisdiction embodied in section 1331 is subject to an implied exception in admiralty and maritime cases. Mr. Justice Frankfurter, for the majority, maintained that article III of the Constitution,[11] which establishes the jurisdictional power of the federal courts, contemplated that jurisdiction over cases in admiralty be separate and exclusive of jurisdiction over cases arising under the Constitution, laws or treaties of the United States. This exclusive classification of judicial power was first noticed by the courts in *American Ins. Co. v. Canter*,[12] wherein Chief Justice Marshall wrote that "the Constitution certainly contemplates these as . . . distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The discrimination made between them, in the Constitution, is . . . conclusive against their identity."[13] Since congressional history is silent[14] as to whether jurisdiction over maritime and admiralty cases is included in the "arising under" provision[15] from which section 1331 was ultimately derived, the Court concluded that such jurisdiction was not contemplated within that vehicle of federal judicial jurisdiction.[16]

7. 28 U.S.C. § 1333 (1952).

8. The Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76, from which 28 U.S.C. § 1333 is derived, provided: "Saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." For the purpose of facilitating this discussion, we will employ the wording of the original enactment.

9. Doucette v. Vincent, 194 F.2d 834 (1st Cir. 1952) (sustained jurisdiction on the law side). Contra, Paduano v. Yamashita Kisen Kabushiki Kaisha, 221 F.2d 615 (2d Cir. 1955) (denied jurisdiction); Jordine v. Walling, 185 F.2d 662 (3rd Cir. 1950) (denied jurisdiction).

10. 221 F.2d 615 (2d Cir. 1955).

11. U.S. Const. art. III, § 2, cl. 1 provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority . . . to all Cases of admiralty and maritime Jurisdiction. . . ."

12. 26 U.S. (1 Pet.) 511 (1828). The exclusive classification of jurisdiction, criticized by the dissent, has been subject to criticism by legal periodicals also. See, e.g., Note, The Expansion of Federal Question Jurisdiction to Maritime Claims: A New Jurisdictional Theory, 66 Harv. L. Rev. 315 (1952); Note, Maritime Cases as Civil Actions in the United States District Courts, 32 Tul. L. Rev. 696 (1958). But see Abbott, The United States Courts and Their Practice 60 (3d ed. 1877).

13. 26 U.S. (1 Pet.) at 544.

14. Frankfurter & Landis, The Business of the Supreme Court 65-69 (1928); Chadbourn & Levin, Original Jurisdiction of Federal Questions, 90 U. Pa. L. Rev. 639, 642-44 (1942).

15. See note 19 infra.

16. Such was the understanding of the early courts. See Steamboat Co. v. Chase, 83

The merit of the foregoing argument is in the precept that the federal government, including the judiciary, has no power unless granted by the Constitution,[17] and such power cannot be assumed but must be expressly shown. Hence, the failure to show intent by the framers of the Constitution to include admiralty jurisdiction within the power to try cases arising under the Constitution, laws or treaties, although such maritime rights may incidentally arise thereunder, is fatal. Nevertheless, any solution which does not consider the possibility of maritime jurisdiction within the terms of the "arising under" clause of section 1331 is incomplete. Failure to do this has given rise to criticism of the *Paduano* decision,[18] and such criticism might well apply to the case under consideration.

The Judiciary Act of 1875 granted jurisdiction to the federal district courts "of all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States. . . ."[19] For the federal district court to entertain a case under this statute the case must not only "arise under" but it must be a suit of a "civil nature at common law or in equity. . . ."[20] The court in *Doucette v. Vincent*[21] reasoned that a maritime action was a "civil action at common law" and, consequently, fulfilled that provision. The court reached this conclusion on an understanding that at the time of the adoption of the Constitution there was concurrent jurisdiction in common law and admiralty courts to try maritime claims of an in personam nature, and the Constitution merely preserved the judicial procedure existing at that time.[22] Mr. Justice Brennan, dissenting in the present case, reached the same conclusion. He reasoned that since the saving clause of section 1333 saved to suitors a "common law remedy," and section 1331 granted jurisdiction over cases of a civil nature at common law, the maritime cause of action saved from the former would fall within the provision of the latter. The defect in this reasoning is dual. It ignores the exclusive nature of the distribution of judicial power as

U.S. 522, 533 (1872); Leon v. Galceran, 78 U.S. 185 (1870); The Belfast, 74 U.S. 624, 642 (1868).

17. Sheldon v. Sill, 49 U.S. 440, 444 (1850). See also Hanford v. Davies, 163 U.S. 273, 279 (1896); Mansfield C. & L.M. Ry. v. Swan, 111 U.S. 379, 382 (1884); The Lottawanna, 88 U.S. 558, 576 (1874).

18. Note, Maritime Cases as Civil Action in the United States District Courts, 32 Tul. L. Rev. 696, 711 (1958).

19. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470. Section 1331 of the Judicial Code, 28 U.S.C. § 1331 (1952), provides: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws or treaties of the United States." This terminology was not intended to change the meaning of the original Act, but was made in conformity with Fed. R. Civ. P. 2. Reviser's note to 28 U.S.C. § 1331 (1952).

20. Doucette v. Vincent, 194 F.2d 834, 843 (1st Cir. 1952). See also Note, Maritime Cases as Civil Actions in the United States District Courts, 32 Tul. L. Rev. 696, 706 (1958).

21. 194 F.2d 834 (1st Cir. 1952).

22. Id. at 841. The court based this reasoning on Panama R.R. v. Johnson, 264 U.S. 375 (1924); Schoonmaker v. Gilmore, 102 U.S. 118 (1880).

embodied in the Constitution,[23] and ignores the principle that neither the maritime remedy of maintenance and cure nor that of unseaworthiness falls within the saving clause, since neither is a "common law remedy" within the meaning of the saving clause of section 1333.[24]

Mr. Justice Brennan further reasoned that the plaintiff's general maritime cause of action fell within the "arising under" provision of section 1331 and, consequently, fulfilled that provision of the statute. In order that a maritime remedy be afforded under section 1331 the dissent realized what it thought to be the necessity of removing the action from the scope of section 1333.[25] This was accomplished not by adhering to a literal interpretation of the saving clause and attempting to remove the action thereunder, but rather by reasoning that since section 1332 of the Judicial Code[26] constituted an exception to the admiralty and maritime jurisdiction, section 1333 was not an exclusive grant of admiralty jurisdiction, but was subject to exception.[27] Being capable of exception, the dissent concluded that an action for a general maritime remedy constituted such an exception. Relying on a long series of decisions tracing from *Southern Pac. Co. v. Jensen*,[28] the dissent argued that since the

23. See note 12 supra.

24. It is convincingly argued by Judge Dimock, in his concurring opinion in Paduano v. Yamashita Kisen Kabushiki Kaisha, 221 F.2d 615, 619 (2d Cir. 1955), that the remedies contemplated within the saving clause of § 1333 were not federal maritime remedies but state common law remedies. Judge Dimock stated: "I cannot escape the conclusion that the Congress which made that provision [the saving clause] felt that the district courts to which it applied had been given no jurisdiction to enforce the maritime civil law by a common law remedy. The provision seems to me to indicate the intention of Congress that the district courts should have jurisdiction to enforce substantive maritime law only by maritime remedies." 221 F.2d at 621. See also Note, The Expansion of Federal Question Jurisdiction to Maritime Claims: A New Jurisdictional Theory, 66 Harv. L. Rev. 315 (1952).

25. The fallaciousness of the dissent's reasoning in this regard is apparent. If a maritime action is an action of a civil nature at common law within the meaning of § 1331, there is no need to resort to the saving clause of § 1333 in the first place. The action would be originally cognizable under § 1331.

26. 28 U.S.C. § 1332 (1952).

27. The dissent in so reasoning differed from the approach taken in Doucette v. Vincent, 194 F.2d 834 (1st Cir. 1952). In that case the court reasoned that the saving clause excepted from § 1333 common law remedies which were provided by state law. Nevertheless, where the federal element was sufficient, the law to be applied would be federal maritime law. Then, by virtue of the adoption of maritime law by the Constitution as the law of the United States, a maritime action would be a federal question and would warrant the bringing of the action in a federal court. This reasoning relied heavily on Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917), wherein the Court held that there existed a body of federal maritime law which suspended any state law operating in the same sphere. The weakness of the Doucette reasoning, supra, lies in the criticism to which the Jensen case, supra, has been subjected. See Helvering v. Griffiths, 318 U.S. 371 (1943); Davis v. Department of Labor, 317 U.S. 249 (1942). Mr. Justice Frankfurter referred to the Jensen case, supra, as "that ill-starred decision." 317 U.S. at 259.

28. 244 U.S. 205 (1917). See, e.g., Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953);

substantive law was federal maritime law, the right was a federally created right or one arising under the "laws . . . of the United States" within the meaning of section 1331.[29]

This argument is open to criticism. Assuming first that section 1333 does not vest exclusive maritime jurisdiction in admiralty courts, does this mean that an action under general maritime law falls outside of the purview of the statute? To argue that it does since an express statutory exception shows that it is capable of exception, is a *non sequitur.*

An additional difficulty in the reasoning of the dissent involves the validity of the statement that an action under general maritime law is an action arising under the laws of the United States. It is indeed true that the complaint, to meet the requirement of the statute, "should show that he [the plaintiff] asserts a right under the Constitution or laws of the United States."[30] Contrary to the reasoning of the dissent, however, this alone does not suffice to make the action one arising under the laws of the United States. By the greater weight of authority, for an action to be included under the provision of section 1331 the case must involve either the validity, the construction or the application of the Acts of Congress.[31] Since an action under general maritime law as alleged here is itself not statutory and nor has it been incorporated into any federal statute, it follows that such an action does not fall within section 1331.

In addition to the jurisdictional question presented by section 1331, the Court determined that in the light of the criteria enumerated in *Lauritzen v. Larsen,*[32] the plaintiff could not maintain an action against his Spanish employer under the Jones Act. The sole factor connecting the alien seaman to the United States was the *locus delecti,* which was the port of New York. The Court reasoned that since the *locus delecti* was an almost irrelevant factor,

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Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918).

29. See note 6 and accompanying text.

30. Tennessee v. Union & Planter's Bank, 152 U.S. 454, 461 (1894). If a question involving the Constitution or laws of the United States is raised by defendant's reply, this will not justify maintaining the action within the "arising under" provision of § 1331. "The question whether a party claims a right under the Constitution or laws of the United States is to be ascertained by the legal construction of its own allegations, and not by the effect attributed to those allegations by the adverse party." New Jersey Cent. R.R. v. Mills, 113 U.S. 249, 257 (1885).

31. Gully v. First Nat'l Bank, 299 U.S. 109, 112 (1936); Shulthis v. McDougal, 225 U.S. 561, 569 (1912); Tennessee v. Davis, 100 U.S. 257, 264 (1879). But see Note, The Expansion of Federal Question Jurisdiction to Maritime Claims: A New Jurisdictional Theory, 66 Harv. L. Rev. 315, 324 (1952), wherein it was stated that such a "limiting conception of federal jurisdiction [is] attacked by most modern commentators . . . ." Nevertheless, it would appear that such a "limited conception" still remains the law.

32. 345 U.S. 571 (1953). The criteria therein enumerated were: (1) the place of the wrongful act, (2) law of the flag or the nation under which the ship sailed, (3) allegiance or domicile of the injured party, (4) allegiance of the defendant shipowner, (5) place where the articles were signed, (6) inaccessibility of foreign forum, and (7) the law of the forum. Id. at 583-91.

according to the *Lauritzen* case,[33] in determining the applicability of the Jones Act, the plaintiff could not recover under that Act.

Recovery under the Jones Act, without exception, will be granted to any seaman aboard an American vessel.[34] Such recovery has been allowed, although the vessel is foreign, the injury occurring within the territorial waters of the United States, where the seaman was either a citizen of the United States[35] or a resident alien.[36] However, where the seaman was an alien aboard a foreign vessel, and the injury occurred outside the territorial waters of the United States, recovery under the Jones Act has not been allowed.[37] The case under consideration lies in-between. Here the Spanish seaman who had been injured within the territorial waters of the United States sought recovery under the Jones Act against the Spanish owner of the vessel. Although these facts present a question of first impression for the Supreme Court, the District Court for the Southern District of New York in *The Magdapur*,[38] and the Second Circuit in *The Paula*,[39] had previously come to the same conclusion as the Supreme Court did here. It should also be noted that the Second Circuit was not unwilling to apply the Act where the articles had been signed within the United States,[40] a factor not present in *The Magdapur* and *The Paula*. This factor is also absent in the principle case. It seems only reasonable that the *locus delecti* should not be controlling as far as the application of the Jones Act or the maritime tort statute of any other country is concerned. As the Court observed, "to impose on ships the duty of shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would be not only an onerous but also an unduly speculative burden."[41]

The Court's decision as to the distribution of admiralty jurisdiction among the lower federal courts is the only solution consonant with the historical understanding of the matter and in accord with reasonable statutory construction. The Court, in the second problem, in denying the applicability of the Jones Act by virtue of the criteria in *Lauritzen*, might have more forcibly made its point by a review of those decisions which previously had considered this question.

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33. "The test of location of the wrongful act or omission, however sufficient for torts ashore, is of limited application to shipboard torts, because of the varieties of legal authority over waters she may navigate." 345 U.S. at 583.

34. Gerradin v. United Fruit Co., 60 F.2d 927 (2d Cir. 1932).

35. Uravic v. Jarka Co., 282 U.S. 234 (1931).

36. Gambera v. Bergoty, 132 F.2d 414 (2d Cir. 1942), cert. denied, 319 U.S. 742 (1943).

37. Lauritzen v. Larson, 345 U.S. 571 (1953).

38. 3 F. Supp. 971 (S.D.N.Y. 1933).

39. 91 F.2d 1001 (2d Cir. 1937).

40. Kyriakos v. Goulandris, 151 F.2d 132 (2d Cir. 1945).

41. Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).

Conflict of Laws — *Lex Loci Contractus* as Governing Contract Rights.— Defendant issued a personal property floater policy in Chicago to plaintiff, then a resident of Illinois. The premium was remitted in a lump sum necessitating no further payment. Thereafter, plaintiff moved to Florida where certain of the insured property was either destroyed or stolen. Defendant declined to honor a claim under the policy, and two years later the assured instituted suit in a federal district court in Florida. On trial, judgment was rendered in favor of plaintiff after a ruling that a stipulation in the policy banning an action unless commenced within twelve months after discovery of the loss was void under Florida law. On appeal, the circuit court held, one judge dissenting, reversed. Florida's connections with the contract in question were too slight to permit that state to give effect to its statutes so as to deprive the defendant, who had secured a valid contract obligation under Illinois law, of its property right, and such action was a violation of due process. *Sun Ins. Office, Ltd. v. Clay*, 265 F.2d 522 (5th Cir. 1959).

Although the contract in question was valid and binding in Illinois, the *locus contractus* it was partially illegal under the law of Florida, the *locus fori*.[1] It has often been said, and equally as often held, that "the validity of a contract is determined by the law of the jurisdiction where made, and if legal there is generally enforcible anywhere."[2] Nevertheless, the district court was of the opinion that Florida's interest in the agreement was sufficient to override the interest of Illinois, the place where the contract was executed. In doing so, one provision of the contract was negated, and the remainder enforced in terms never consented to by the defendant, a holding which broadened the scope of its original obligations.

The circuit court, in reversing, concluded that while a court in a jurisdiction declaring illegal the acts to be performed under a contract may relegate litigants to another forum by refusing enforcement,[3] it may not so readily alter contract obligations by chosing to enforce it according to its own laws.[4] The majority held that the application of Florida law to "rewrite" the contract would constitute a denial of due process.[5] It found *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.*[6] squarely in point and controlling. The circuit court

1. Fla. Stat. Ann. § 95.03 (1943).

2. Straus & Co. v. Canadian Pac. R.R., 254 N.Y. 407, 414, 173 N.E. 564, 567 (1930).

3. Home Ins. Co. v. Dick, 281 U.S. 397 (1930); Rubin v. Irving Trust Co., 305 N.Y. 288, 113 N.E.2d 424 (1953). It is to be noted that a state may not bar such an action under all circumstances. First Nat'l Bank v. United Air Lines, 342 U.S. 396 (1952).

4. "But to deny judicial enforcement of a contract through its courts when such contract sufficiently offends local policy is a very different thing from rewriting a contract and enforcing it in a manner contrary to the undertaking of the makers." Watson v. Employers Liab. Assur. Corp., 348 U.S. 66, 76 (1954) (concurring opinion), rehearing denied, 348 U.S. 921 (1955).

5. The court having so ruled never arrived at the question of whether or not the full faith and credit clause, U.S. Const. art. IV, § 1, or impairment of contract clause, U.S. Const. art. I, § 10, had been violated. It would appear, however, that considerations which govern a decision as regards either of these clauses apply with equal force to the others. See Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532 (1935).

6. 292 U.S. 143, rehearing denied, 292 U.S. 607 (1934).

reasoned that as late as 1954 the Supreme Court[7] cited with approval the *Hartford* case and, therefore, the principle established in that decision was still unquestionably the law, namely, that a state's interest derived from connections with a foreign contract would govern that state's right to strike down a part thereof as repugnant to public policy.

In light of recent developments, however, it is highly debatable whether the facts of the *Hartford* case dictate a like result today. Those decisions cited by the court as reaffirming the *Hartford* case are clearly distinguishable and erosive of the proposition which it purportedly supports. *Lauritzen v. Larsen*[8] involved a personal injury to a foreign seaman occurring aboard a foreign vessel in alien waters. The Court there refused to ignore the stipulation in the contract, although made in New York, that Danish law would apply in determining the compensation to be awarded to the seaman for injury sustained. Significantly, the Court pointed out that it was cognizant of *no public policy* which would dictate a contrary decision.[9] In the present case the Florida statute clearly spelled out the public policy of that state which called for an application of its own laws.[10]

In *Ex rel. United Commercial Travelers v. Wolfe*,[11] which was relied upon by the circuit court, it was determined that the overriding interest of the state of incorporation of a fraternal benefit society in such an organization forbade the application of the law of the forum.[12] Apparently, just the fact of incorporation of such a society under the laws of a given state results in a sufficient interest on the part of that state to dictate, absent extraordinary circumstances, a choice of its laws over those of a foreign forum in determining the rights of members. It is of special note that Mr. Justice Burton, writing for the majority in this 5 to 4 decision, distinguished the *Hartford* case on the ground that although it involved an insurance contract it did not involve a fraternal benefit corporation.[13]

In citing *Watson v. Employers Liab. Assur. Corp.*[14] the circuit court apparently took little note that there the Supreme Court distinguished the *Hartford* case and held in favor of applying the lex fori.[15] More significant than the lip service approval given *Hartford* by the *Watson* Court is the statement in the decision that future cases may well warrant a different approach. In

7. Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954), rehearing denied, 348 U.S. 921 (1955).

8. 345 U.S. 571 (1953).

9. State court decisions following Hartford, supra note 6, often note that there is no public policy which dictates a contrary holding. Mandle v. Kelly, 229 Miss. 327, 90 So. 2d 645 (1956); Buzzone v. Hartford Acc. & Indem. Co., 23 N.J. 447, 129 A.2d 561 (1957).

10. Fla. Stat. Ann. § 95.03 (1943) provides: "No court in this state shall give effect to any provision or stipulation of the character mentioned in this section."

11. 331 U.S. 586 (1947).

12. Id. at 606.

13. Id. at 608-09.

14. 348 U.S. 66 (1954), rehearing denied, 348 U.S. 921 (1955).

15. In Pink v. A.A.A. Highway Express, 314 U.S. 201 (1941), rehearing denied, 314 U.S. 716 (1942), also cited by the circuit court, the Court was likewise in favor of applying the law of the forum.

Watson the state government's special relation to insurance matters was the factor which balanced the interests involved in favor of the law of the jurisdiction in which the issues were being tried at the instance of a citizen of that state. The factors connecting the state of the forum with the insurance in the *Watson* case were of equal weight with those in *Hartford,* and yet the decision was contrary.[16]

In addition to those opinions which supposedly support its view, the circuit court makes note of several others which in fact argue convincingly for a contrary decision. *Hoopeston Canning Co. v. Cullen*[17] reiterates appropriately to the facts of the present case the well established rule that a state has a particular interest in the insurance of property within its borders, hence its power to regulate such matters is expansive.[18]

In *Hanson v. Denckla*[19] we are confronted with a Supreme Court decision which with its attendant implications casts serious doubt upon the precedent value of *Hartford.* In that action to determine the validity of a trust, the Florida Supreme Court, while holding that although there were insufficient contacts with that state to allow it to assume jurisdiction over nonresidents, reasoned that it was unquestionable that had the contacts been sufficient to sustain jurisdiction the law of Florida could have been applied denying the validity of the trust arrangement. This despite the fact that the agreement was made in Delaware, and a court of that state had declared it valid according to the Delaware law. The Court clearly noted that for "choice-of-law purposes" the Florida court's theory might well apply, but something more was required to allow the state to extend its jurisdictional arm over nonresidents who had not been served personally.[20] The conclusion is, therefore, that circumstances which suffice for jurisdiction can hardly do less for allowing that state to apply its law in a conflicts situation. With this in mind, then, it is difficult to see how the majority in the case under consideration can be considered sound in light of *McGee v. The Int'l Life Ins. Co.*[21] In the *McGee* case a policy of insurance was issued in Texas and mailed to California, from whence the assured mailed premiums to an out of state office. Relying heavily upon the state's interest in insurance matters and with a showing of no other connection with the State of California, the Supreme Court held that California could obtain jurisdiction over the foreign corporation by substituted service.

In the instant case, although the contract was entered into out of the state,

16. In Watson, supra note 14, the insurance policy involved was negotiated in Massachusetts and delivered in Massachusetts and Illinois. The contract was between an employer and his insurance carrier. An employee injured in Louisiana attempted to take advantage of that state's direct suit statute, and commenced an action against the insurance carrier, despite a clause in the policy prohibiting such an action. In Hartford, supra note 6, the insurance agreement was negotiated in Tennessee between two companies doing business there at the time. The loss occurred in Mississippi, and suit was commenced there.

17. 318 U.S. 313 (1943).

18. Id. at 318.

19. 357 U.S. 235 (1957), rehearing denied, 358 U.S. 858 (1958).

20. 357 U.S. at 250-53.

21. 355 U.S. 220 (1957).

the assured and the property which was the subject of the policy subsequently moved to Florida, where permanent residency was established. The defendant obviously did business in the state since it was served there. The loss occurred and was investigated in that jurisdiction. In light of this it would seem that the requirements of *McGee* had been met, and the dissent's finding that in this instance the court can legitimately prefer its own laws even to the extent of changing obligations under the contract might today be sanctioned by the United States Supreme Court.

Constitutional Law—Deprivation of Social Security Benefits Under Section 202(n).—In November of 1955, plaintiff commenced receiving payments pursuant to the Social Security Act.[1] On July 7, 1956, plaintiff was deported to Bulgaria because of his past membership in the Communist Party.[2] On August 31, 1956, on receiving notice of the deportation from the Attorney General, the Department of Health, Education and Welfare terminated plaintiff's social security payments. In this action[3] to review the suspension order plaintiff's motion for summary judgment was granted and the payments reinstated. The court held that the benefits constituted "accrued property rights," and that section 202 (n) of the Social Security Act,[4] under which plaintiff's benefits were suspended by reason of his deportation, was violative of due process of law. *Nestor v. Folsom*, 169 F. Supp. 922 (D.C. Cir. 1959).

Social security payments are distributed from the United States Treasury and are financed by contributions, in the nature of taxes, from both employers and employees.[5] Eligibility for social security benefits depends upon fulfillment of the three conditions precedent prescribed in the Act.[6] In the original Social

1. 70 Stat. 819 (1956), 42 U.S.C. § 401 (Supp. V, 1952).

2. Plaintiff was deported under the authority of Immigration and Nationality Act § 241(a), 66 Stat. 204 (1952), 8 U.S.C. § 1251(a) (1958).

3. Plaintiff's action was brought under 53 Stat. 1370-71 (1939), 42 U.S.C. § 405(g) (1952), which provides for judicial review of determinations refusing old age insurance benefits.

4. 70 Stat. 818 (1956), 42 U.S.C. § 402(n) (Supp. V, 1952) provides that no monthly social security benefits shall be paid to any individual who has been deported under certain designated sections of the Immigration and Nationality Act, 66 Stat. 204 (1952), 8 U.S.C. § 1251(a) (1958).

5. Helvering v. Davis, 301 U.S. 619 (1937); Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Cain v. United States, 211 F.2d 375 (5th Cir.), cert. denied, 347 U.S. 1013 (1954); Abney v. Campbell, 206 F.2d 836 (5th Cir. 1953), cert. denied, 346 U.S. 924 (1954); Int. Rev. Code of 1954, § 1301.

In New York the rights of public employees in a pension system are vested by virtue of N.Y. Const. art. V, § 7. The constitutional provision prohibits any change in rights acquired by employees who were members of a pension system as of July 1, 1940. However, as to future members the legislature can prescribe their rights. Fisher v. State Employees Retirement Sys., 279 App. Div. 315, 110 N.Y.S.2d 16 (3d Dep't 1952), aff'd, 304 N.Y. 899, 110 N.E.2d 733 (1953).

6. "Every individual who—(1) is a fully insured individual . . . (2) has attained retirement age . . . (3) has filed application for old-age insurance benefits or was entitled to disability insurance benefits for the month preceding the month in which he attained

Security Act, however, Congress expressly reserved "the right to alter, amend, or repeal any provision"[7] of the Act.

In *Steinberg v. United States*[8] the plaintiff, who was receiving an annuity under the Civil Service Retirement Act,[9] was subpoenaed before a federal grand jury and pleaded the fifth amendment during the proceeding. His annuity was then suspended. The court of claims held that even though an annuity is a gratuity and Congress may revise payments, nevertheless, the " 'constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.' "[10] Judge Whitaker's concurring opinion reasoned that "a Federal employee who has retired from the service has a vested right in the retired pay to which he was entitled at the time of his retirement."[11] Judge Whitaker's reasoning was accepted *in toto* as authority for the result reached here. But *Steinberg* is factually distinguishable, since there an annuity was abrogated after he availed himself of a constitutional privilege, while in the instant case plaintiff's benefits were terminated after being deported under a statute the validity of which has withstood constitutional challenge.[12] Furthermore, Steinberg had been receiving his annuity for several years prior to the enactment of the statute under which his annuity was suspended; while section 202 (n) of the Social Security Act,[13] which caused suspension of plaintiff's benefits in the instant case, was enacted and took effect prior to his becoming eligible to receive such benefits.

It is to be noted that Judge Whitaker, in *Steinberg*, distinguished between inchoate rights and payments accrued. The court and indeed a vast preponderance of authorities recognize the right to alter, revise or terminate payment schedules prior to the time the pensioner commences to receive his benefits.[14]

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the age of 65, shall be entitled to an old-age insurance benefit. . . ." 70 Stat. 815 (1956), 42 U.S.C. § 402(a) (Supp. V, 1952).

7. 49 Stat. 648 (1935), 42 U.S.C. § 1304 (1952).

8. 163 F. Supp. 590 (Ct. Cl. 1958).

9. 62 Stat. 48 (1948), 5 U.S.C. § 691 (1958).

10. 163 F. Supp. at 591, citing Wieman v. Updegraff, 344 U.S. 183, 192 (1952).

11. 163 F. Supp. at 594. However, Dodge v. Board of Educ., 302 U.S. 74 (1937), appears to be directly in conflict with Judge Whitaker's conclusion.

12. Galvan v. Press, 347 U.S. 522 (1954); Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

13. 70 Stat. 818 (1956), 42 U.S.C. § 402(n) (Supp. V, 1952).

14. In the leading case of Pennie v. Reis, 132 U.S. 464 (1889), the Court declared that until the pension or retirement pay is due, the employee's right is "a mere expectancy created by the law, and liable to be revoked or destroyed by the same authority." Id. at 471. See Dodge v. Board of Educ., 302 U.S. 74 (1937); MacLeod v. Fernandez, 101 F.2d 20 (1st Cir. 1938), cert. denied, 308 U.S. 561 (1939). In Roston v. Folsom, 158 F. Supp. 112 (E.D.N.Y. 1957), the court stated that "social security has the ear marks of a benefit rather than a right . . . . It is beyond reason to refer to Social Security benefits as property rights to which one might succeed." Id. at 120. See Mullowney v. Folsom, 156 F. Supp. 34 (E.D.N.Y. 1957). The courts have held that pensions are the bounties of government which Congress has the power to grant, revise, withhold, distribute or terminate, in whole or in part, at its discretion. United States v. Cook, 257 U.S. 523, 527 (1922); United States v. Teller, 107 U.S. 64, 68 (1882).

In fact, a majority allow such action until a particular payment is due.[15] But here, it is reasoned, once payments commence a property right is acquired by the pensioner.[16] If it be a property right, that right obviously cannot be taken away in a manner inconsistent with the due process clause.[17] In effect, the present court infers that deprivation of such a right is patently arbitrary and, therefore, violative of due process.

There are serious doubts raised by the court's reasoning. First of all, what difference does it make whether it is called a property right, a contract right or a gratuity? In any event, Congress lacks the power to grant or withhold arbitrarily.[18] If plaintiff's payments were, in other words, suspended pursuant to an arbitrary enactment of Congress, he has reason to complain about a denial of due process. At any rate, it seems clear that the plaintiff had complied with the conditions precedent and had acquired the right to receive payments.[19] That was in the nature, at least, of a vested right, but a right which was subject always to reasonable or non-arbitrary modification by Congress. It is non-essential if this be characterized as a property right, since the due process clause protects *all* rights against arbitrary acts. The importance the court places on the distinctions between the different rights is immaterial and serves only to becloud the real issues involved. What this court was required to determine was the reasonableness of the exclusion of deported aliens. However, the question of reasonableness was never raised by the court. It simply assumed—quite arbitrarily—that the exclusion of deportees was unreasonable.

Secondly, the court discussed the possibility that plaintiff's exclusion imposed a "penalty." The due process clause of the fifth amendment protects property rights, contract rights and rights of individuals howsoever classified. That this might be characterized as a "penalty" does not make it the more a violation of due process. The imposition of a penalty raises necessarily the question as to the bill of attainder clause[20] or the ex post facto clause.[21] However, the court

15. Dodge v. Board of Educ., 302 U.S. 74 (1937); MacLeod v. Fernandez, 101 F.2d 20 (1st Cir. 1938), cert. denied, 308 U.S. 561 (1939); Roston v. Folsom, 158 F. Supp. 112 (E.D.N.Y. 1957); Mullowney v. Folsom, 156 F. Supp. 34 (E.D.N.Y. 1957). Contra, Dismuke v. United States, 297 U.S. 167 (1936); Ewing v. Gardner, 185 F.2d 781 (6th Cir. 1950). See also United States v. Teller, 107 U.S. 64 (1882).

16. See note 14 supra.

17. U.S. Const. amend. V.

18. Due process of law means that a law shall not be unreasonable, arbitrary or capricious. Minski v. United States, 131 F.2d 614 (6th Cir.), cert. denied, 319 U.S. 775 (1942). Arbitrary discrimination between persons in similar circumstances is a denial of due process of law. Wallace v. Currin, 95 F.2d 856 (4th Cir. 1938), aff'd, 305 U.S. 1 (1939). If the regulation is reasonable in relation to its subject, and is adopted in the interest of the community, due process of law has been preserved. Smolowe v. DeLendo Corp., 46 F. Supp. 758 (S.D.N.Y. 1942).

19. See note 6 supra.

20. U.S. Const. art. I, § 9, cl. 3. "Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." United States v. Lovett, 328 U.S. 303, 315-16 (1946).

21. U.S. Const. art. I, § 9, cl. 3.

did not rely on either clause, perhaps deliberately. Nevertheless, it merits discussion. A bill of attainder relates to the imposition of criminal punishment without a judicial trial.[22] The ex post facto clause refers to a law which alters or inflicts greater punishment than that existing at the time the act was committed.[23] The determinative factor then is whether the suspension of benefits provision is penal in nature.[24] The court here fails to give an answer. Other cases are of little value as each set of facts is peculiar unto itself.[25] In part the Social Security Act refers to the deprivation of benefits as a penalty.[26] Whether it connotes the same meaning as that intended by the bill of attainder clause has yet to be determined. Obviously, a Supreme Court decision is necessary as substantial provisions of the Social Security Act, beside the one in issue, will be effected by whether the deprivation of benefits provision can be construed as a penalty.[27] Whether penal or not, no ex post facto law is here involved, since at the time plaintiff acquired his right to the benefits the statute was already in force. Furthermore, Congress reserved the right to alter, amend or repeal the Act. If Congress acts but does so unreasonably, we should

22. Dodez v. United States, 154 F.2d 637 (6th Cir.), rev'd on other grounds, 329 U.S. 338 (1946). See Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948).

23. United States ex rel. Forino v. Garfinkel, 166 F.2d 887 (3d Cir. 1948). In a restricted sense ex post facto law is understood to refer only to criminal cases. Bugajewitz v. Adams, 228 U.S. 585 (1913); Johannessen v. United States, 225 U.S. 227 (1912). Ex post facto law applies only to penal legislation. Harisiades v. Shaughnessy, 342 U.S. 580, rehearing denied, 343 U.S. 936 (1952); United States v. Bize, 86 F. Supp. 939 (D. Neb. 1949).

24. Deportation proceedings are not criminal in nature and retroactive legislation in this field is not violate of the ex post facto law. United States ex rel. Barile v. Murff, 116 F. Supp. 163 (D. Md. 1953). Deportation for past membership in the communist party has been specifically sustained by the Supreme Court. Galvan v. Press, 347 U.S. 522 (1954); Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

25. See, e.g., the following cases involving citizenship and naturalization: Marcello v. Ahrens, 212 F.2d 830 (5th Cir. 1954), aff'd sub nom. Marcello v. Bonds, 349 U.S. 302 (1955); Bauer v. Acheson, 106 F. Supp. 445 (D.D.C. 1952); United States v. Mansour, 170 Fed. 671 (S.D.N.Y. 1908); United States v. Chew Cheong, 61 Fed. 200 (N.D. Cal. 1894). Domestic Relations: Murphy v. Ramsey, 114 U.S. 15 (1885). Increase in punishment: Beland v. United States, 128 F.2d 795 (5th Cir.), cert. denied, 317 U.S. 676, rehearing denied, 317 U.S. 710 (1942); United States v. Salzano, 138 F. Supp. 72 (S.D.N.Y. 1956), aff'd, 241 F.2d 849 (1957). Labor Relations: American Communications Ass'n v. Douds, 339 U.S. 382, rehearing denied, 339 U.S. 990 (1950); Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948). Sentence and Parole: Kuczynski v. United States, 145 F.2d 310 (7th Cir. 1944); Chandler v. Johnston, 133 F.2d 139 (9th Cir. 1943); Story v. Rives, 97 F.2d 182 (D.C. Cir.), cert. denied, 305 U.S. 595 (1938). Taxes: Banker Trust Co. v. Blodgett, 260 U.S. 647 (1923).

26. 70 Stat. 838 (1956), 42 U.S.C. § 402(u)(b) (Supp. V, 1952) provides that "the court may, in addition to all other penalties provided by law, impose a penalty . . ." terminating social security payments. This section refers to individuals engaged in espionage, sabotage or subversive activities.

27. It would adversely affect 70 Stat. 835 (1956), 42 U.S.C. § 402(t) (Supp. V, 1952), which, with certain reservations, requires the suspension of benefits of any alien voluntarily absent from the United States for over six months and who is not a fully covered individual.

concern ourselves with the due process clause and not the bill of attainder or ex post facto clauses.

What the court should have concentrated upon was the issue of reasonableness. It is not lightly to be inferred that Congress has acted arbitrarily. The purpose of social security was and is to provide for the elderly, lest they become a financial burden unto themselves and a burden upon the state. Congress reserved in advance the right to modify the Act. Congress could exclude *all* nonresident aliens from social security benefits.[28] Obviously, the exclusion would be reasonable and consistent with the prime purpose of the Act. But Congress chose not to exclude all non-residents, or even all deportees, but only certain classes of deportees.[29] Is this an arbitrary classification? That question required explanation as well as an answer. The court here gave an answer. Unfortunately, it gave no explanation.

Defamation—Publication of Defamatory Statements Made By United States Senator At Press Conference Is Qualifiedly Privileged.—Plaintiff, a radar scientist, brought a libel action against the Newark Star-Ledger for publishing articles containing allegedly defamatory statements made by a United States Senator. The Senator's statements concerning the plaintiff were made during press conferences held subsequent to Senate investigating committee hearings.[1] Pending appeal to the appellate division of the superior court from a judgment entered upon a jury verdict for the defendants, the case was brought before the New Jersey Supreme Court by its certification, sua sponte. The court, Chief Justice Weintraub dissenting in part, affirmed. A United States Senator has a qualified privilege to disclose, and a newspaper has a qualified privilege to report, defamatory charges made at legislative committee hearings, private or public. *Coleman v. Newark Morning Ledger Co.*, 29 N.J. 357, 149 A.2d 193 (1959).

28. Congress differentiated between deported aliens and those who voluntarily absent themselves from the United States. The former are covered by 70 Stat. 818 (1956), 42 U.S.C. § 402(n) (Supp. V, 1952), which provides for immediate suspension in certain cases, while the latter are covered by 70 Stat. 835 (1956), 42 U.S.C. § 402(t) (Supp. V, 1952). See note 27 supra.

29. The deportees whose benefits are suspended were characterized by H.R. Rep. No. 1698, 83d Cong., 1st Sess. 77 (1953), as those involving "deportation because of unlawful entry, conviction of a crime, or subversive activity." Of the eighteen grounds for deportation provided in 66 Stat. 204 (1952), 8 U.S.C. § 1251(a) (1958), fourteen are cited in 70 Stat. 818 (1956), 42 U.S.C. § 402(n) (Supp. V, 1952). Whether this is an arbitrary distinction between different classes of deportees was not discussed by the present court.

1. At the first press conference, Senator McCarthy, who alone constituted at the time the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations, issued statements pertaining to testimony given at an executive or closed session of the Subcommittee which linked the plaintiff with a convicted atom spy. At a later conference, the Senator accused the plaintiff of having rendered perjurious testimony at a public hearing. 29 N.J. 357, 367-71, 149 A.2d 193, 198-99 (1959). While unanimously upholding the privileged nature of the second press conference, the Court differed as to the status of the first.

The Federal Constitution gives members of Congress an absolute immunity for statements made during speeches or debates in either House.[2] This legislative immunity, of English origin,[3] has also been accorded state legislators by virtue of constitutional provision, legislative enactment or as part of accepted common law.[4] Federal and state courts have liberally construed the constitutional immunity,[5] and have extended its protection to defamatory statements

2. "The Senators and Representatives . . . for any Speech or Debate in either House . . . shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. "In origin, the privilege was less concerned with civil redress for defamation than with criminal prosecution for sedition, an area of the law with which the constitutional fathers had accumulated a considerable experience as colonists under British rule." Editorial, A License to Defame, 82 N.J.L.J. 348 (1959).

Wilson staunchly defended legislative immunity as imperative for an unfettered functioning of representative democracy. He argued that "in order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." 2 Works of James Wilson 38 (Andrews ed. 1896).

3. Legislative immunity was the culmination of a prolonged power struggle between Parliament and the Crown which guaranteed freedom of debate without the threat of royal interference or recrimination. For an excellent summary of the English background of the privilege see Veeder, Absolute Immunity in Defamation: Legislative and Executive Proceedings, 10 Colum. L. Rev. 131, 132-34 (1910). As was noted by Mr. Justice Story, "the next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual. This privilege, also, is derived from the practice of the British Parliament, and was in full exercise in our colonial legislatures, and now belongs to the legislature of every State in the Union as matter of constitutional right." 1 Story, Commentaries on the Constitution § 866 (5th ed. 1891).

4. Yankwich, The Immunity of Congressional Speech—Its Origin, Meaning and Scope, 99 U. Pa. L. Rev. 960, 966 (1951). See 30 Neb. L. Rev. 107, 108 n.3 (1951), for a list of those states providing constitutional guarantees for legislative immunity. Most of the state provisions employ the same language as that found in the Federal Constitution. See, e.g., N.J. Const. art. IV, § 4, para. 8. See also Cole v. Richards, 108 N.J.L. 356, 158 Atl. 466 (Ct. Err. & App. 1932) (slanderous statements made on the floor by state senator). Members of minor legislative bodies, such as city councils, possess only a qualified privilege. See, e.g., Mills v. Denny, 245 Iowa 584, 63 N.W.2d 222 (1954); Ivie v. Minton, 75 Ore. 483, 147 Pac. 395 (1915).

5. In the celebrated case of Coffin v. Coffin, 4 Mass. (3 Tyng) 1 (1808), Chief Justice Parsons delineated the latitude afforded legislators by virtue of their constitutional immunity: "I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a . . . written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases in which he is entitled to this privilege, when not within the walls of the representatives' chamber." Id. at 27. The

made off the floor during committee hearings[6] and congressional investigations,[7] which today comprise the greater bulk of legislative activity. This immunity is grounded in the argument that legislators must be allowed to discharge the duties of their office through free and unfettered discussions, insulated from the fear of legal harassment or interference on the part of those who may be affected by legislative action. Yet, it has been suggested that this purpose could still be served, and the rights of the individual protected, by granting a qualified privilege[8] or by permitting persons defamed by a member of Congress to sue the United States Government.[9]

The courts have declined to find an absolute privilege immunizing members of Congress from liability for defamatory statements made beyond the confines of the House and the committee rooms.[10] Neither is there an absolute privilege in a legislator's off-the-floor repetition or republication of defamatory remarks originally made within the protective scope of his legislative function.[11]

Coffin case, supra, was subsequently praised by the United States Supreme Court as "perhaps, the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies, and being so early after the formation of the Constitution of the United States, is of much weight." Kilbourn v. Thompson, 103 U.S. 168, 204 (1880). The Court reaffirmed the breadth of legislative activity encompassed within the constitutional immunity. "The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it." Id. at 204 (dictum). See also Cochran v. Couzens, 42 F.2d 783 (D.C. Cir. 1930).

6. Van Riper v. Tumulty, 26 N.J. Misc. 37, 56 A.2d 611 (Sup. Ct. 1948). As the court noted: "These alleged [defamatory] statements were made by the defendant while a member of the General Assembly before a duly constituted Judiciary Committee of said General Assembly in the performance of his duties as an Assemblyman, and therefore, he enjoyed the constitutional privilege granted to a member of the General Assembly and Legislature." Id. at 41, 56 A.2d at 614.

7. Tenney v. Brandhove, 341 U.S. 367 (1951). See also Kilbourn v. Thompson, 103 U.S. 168 (1880); Congressional Investigations: Defamation Immunity, 18 U. Chi. L. Rev. 591 (1951). An absolute privilege is also enjoyed by counsel and witnesses testifying at a legislative hearing. See, e.g., Kelly v. Daro, 47 Cal. App. 2d 418, 118 P.2d 37 (1941). See also 33 Am. Jur. Libel and Slander § 142 (1941).

8. See, e.g., Field, The Constitutional Privileges of Legislators, 9 Minn. L. Rev. 442 (1925). Field maintains that a "conditional privilege allows the legislator all the freedom of debate which is of any benefit to representative government, and the interest of the individual in preserving his reputation is of sufficient importance to warrant the doctrine of a conditional privilege, that he may retain some measure of protection from defamation by a legislator . . . ." Id. at 445-46.

9. Yankwich, The Immunity of Congressional Speech—Its Origin, Meaning and Scope, 99 U. Pa. L. Rev. 960, 974 (1951).

10. See, e.g., Cole v. Richards, 108 N.J.L. 356, 158 Atl. 466 (Ct. Err. & App. 1932). See also Congressional Investigations: Defamation Immunity, 18 U. Chi. L. Rev. 591 (1951).

11. In Long v. Ansell, 69 F.2d 386 (D.C. Cir.), aff'd on other grounds, 293 U.S. 76 (1934), a United States Senator had reprinted and distributed to persons in Louisiana copies of the Congressional Record containing a defamatory speech he had delivered on

At common law there was no privilege for the reprinting of legislative proceedings containing defamatory matter,[12] although the existence of a qualified privilege to report judicial proceedings had been acknowledged in *Rex v. Wright,*[13] despite judicial cognizance of the attendant notoriety thus attached to private litigation.[14] In *Stockdale v. Hansard*[15] the defendant publisher was held liable for printing a libelous parliamentary report, although he had been ordered by the House of Commons to publish all parliamentary reports. Alarmed over this decision, Parliament enacted the Parliamentary Papers Act,[16] which granted a stay of proceedings to those publishing parliamentary papers under the direct authority of that body.[17]

Not until the English case of *Wason v. Walter,*[18] in 1868, was the voluntary publication of parliamentary proceedings vested with a privileged character. The *Wason* court held that an accurate newspaper report of a parliamentary debate enjoyed a qualified privilege, and for the first time equated newspaper reporting of legislative proceedings with those of judicial proceedings.[19] Public interest in the affairs and functions of Parliament was cited in justification of this judicial innovation.[20]

In the United States it is generally recognized that newspapers have a qualified privilege to publish fair and accurate reports of official proceedings when the reporting is made in good faith.[21] The press is also entitled to "fair comment"[22] with regard to the matters treated. There must be some indication

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the Senate floor. The Court of Appeals for the District of Columbia held that the constitutional exemption of members of Congress from arrest did not preclude service of legal process. In a strong dictum, the court declared that had the Senator proffered the defense of absolute immunity for his speech which had been originally made on the Senate floor, the defense would be without force, for while the "published articles were in part reproductions of the speech, the offense consists not in what was said in the Senate, but in the publication and circularizing of the libelous documents." 69 F.2d at 389.

12. 8 Holdsworth, History of English Law 376-77 (1926).

13. 8 T.R. 293, 101 Eng. Rep. 1396 (K.B. 1799).

14. The court acknowledged that "the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of Justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings." Id. at 298, 101 Eng. Rep. at 1399.

15. 9 Ad. & E. 1, 112 Eng. Rep. 1112 (Q.B. 1839).

16. 1840, 3 & 4 Vict., c. 9.

17. See Ball, The Law of Libel as Affecting Newspapers and Journalists 71-72 (1912).

18. L.R. 4 Q.B. 73 (1868).

19. Ball, op. cit. supra note 17, at 107.

20. Wason v. Walter, L.R. 4 Q.B. 73, 82 (1868).

21. See, e.g., Bank v. Goodwin, 148 Mo. App. 364, 128 S.W. 220 (1910). See also 33 Am. Jur. Libel and Slander § 158 (1941); Restatement, Torts § 611 (1938); Note, 69 Harv. L. Rev. 875, 928 (1956).

22. "In a word, 'fair comment' (a) must be based on facts truly stated, and (b) must not contain imputations of corrupt or dishonourable motives on the person whose conduct or work is criticized, save in so far as such imputations are warranted by the facts, and

that the newspaper report is an account of a governmental proceeding, otherwise the privilege will be forfeited.[23] Press reports of legislative proceedings, therefore, whether held in plenary session or in committee, are qualifiedly privileged, although incorporating therein libelous material.[24]

In the instant case, the defendant newspaper claimed a qualified privilege on the ground that its articles pertaining to revelations made at an executive session constituted a report of a legislative proceeding, since Senator McCarthy's remarks were the best evidence, in the absence of any available transcript, of what had transpired before the Subcommittee.[25] Moreover, it was asserted that in speaking to the press the Senator was acting in an official capacity, as the Subcommittee itself, *pro hac vice,* informing the public of the results of an investigation committed to his supervision, and hence was himself privileged.[26]

In accepting these arguments, the majority of the New Jersey Supreme Court thus extended to the Senator a qualified privilege, viewing the revelations made at the press conferences as an authorized committee publication of the executive hearings.[27] The court held that it was within the discretion of the Subcommittee to release such information as it believed related to the general good.[28] The fact that the information was acquired in the course of a closed or executive hearing was deemed not to exclude communication to the public of matters affecting internal security and defense or other areas of legitimate public concern.[29] While cognizant of the possible harm that such privileged public communication might inflict upon individual reputations, the court argued that to disregard the exigencies of the "collective interest" would "plainly subvert the imperative principle and policy of privilege in the service of the essential public welfare."[30] Since Senator McCarthy was privileged in

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(c) must be the honest expression of the writer's real opinion; and if the comment complies with these conditions, it is fair comment, however incorrect be the views expressed by the critic, or however exaggerated or even prejudiced be the language of the criticism . . . ." Leers v. Green, 24 N.J. 239, 254-55, 131 A.2d 781, 789 (1957).

23. Hughes v. Washington Daily News Co., 193 F.2d 922 (D.C. Cir. 1952). See also Note, 69 Harv. L. Rev. 875, 929 (1956).

24. 53 C.J.S. Libel and Slander § 126 (1948). See also Annot., 155 A.L.R. 1346, 1348 (1945); Prosser, Torts § 95, at 623 (2d ed. 1955).

25. Brief for Respondents, p. 20.

26. Id. at 22.

27. 29 N.J. at 381, 149 A.2d at 206. Evidence of the Committee's authorization stood uncontroverted at the trial. Ibid. See also Brief for Respondents, p. 22.

28. 29 N.J. at 381, 149 A.2d at 205-06.

29. "It cannot be that evidence adduced and information acquired in the course of an executive session of a congressional investigating committee are sealed against public disclosure for all time save as unprivileged communications subjecting the members of the committee to the risk of suit and personal civil liability for libel and slander and the like, even though the publications are made in what the committee conceived to be the interest of internal security and defense or other public exigency or matter of legitimate common concern." 29 N.J. at 381, 149 A.2d at 205.

30. Ibid.

speaking to the press, the defendant newspaper was also qualifiedly privileged in publishing his statements.[31]

Sharply disagreeing with his associates, Chief Justice Weintraub asserted that there should be no privilege to report a secret proceeding.[32] Terming the majority's position as "an invitation to irresponsibility,"[33] he proposed that if public interest dictated the disclosure of testimony given at a secret or closed hearing, then the whole record, rather than a summary or mere excerpts, should be released for public scrutiny.[34] Since Senator McCarthy's statements were devoid of any privileged status, Weintraub concluded, a newspaper could assert no privilege on its part in disseminating an unprivileged communication.[35]

The instant decision, in effect, accords for the first time a limited privilege to official press conferences reporting on matters discussed during a closed session of a legislative investigating committee. This appears to be a reasonable extension of the privilege. The court has at once localized the immunity possessed by the legislator, rendering him liable for any abuse of his conditional privilege,[36] and fostered public communication of information considered to be of public interest. At the same time the individual right to redress for

31. "The 'instruments of communication, such as the newspaper, are themselves privileged to aid in the publication, wherever the privilege in fact exists.'" Id. at 380, 149 A.2d at 205. New Jersey grants the press a statutory qualified privilege to report "official statements issued by police department heads, county prosecutors and coroners in investigations in progress or completed by them." N.J. Rev. Stat. § 2a:43-1 (1952). This extension of the privileged character accorded publication of judicial proceedings was strictly construed in Rogers v. Courier Post Co., 2 N.J. 393, 66 A.2d 869 (1949), to apply only to statements issued by the heads of the respective departments and not to those issued by subordinates.

32. Id. at 387, 149 A.2d at 209 (Weintraub, C.J., dissenting).

33. Id. at 388, 149 A.2d at 209.

34. Ibid.

35. Ibid. Chief Justice Weintraub argued that "to extend . . . [constitutional immunity] on either an absolute or qualified basis to press conferences held by legislators, and to boot, where the hearing was and remains secret, is, in my view, a disservice to society. It being wholly unnecessary for the legislative function, the extension is a needless waste of human rights and can only serve to aggravate the already troublesome problem of trial by publication." Id. at 392, 149 A.2d at 211.

36. See King v. Patterson, 49 N.J.L. 417, 421, 9 Atl. 705, 707 (Ct. Err. & App. 1887), where the court maintained that while a subject may be privileged, "a communication on that subject [may] be unprivileged if the restraints and qualifications imposed by law upon the publicity to be given the communication be not observed." Actual malice is needed to destroy a qualified privilege, as distinguished from legal or constructive malice which the law infers from the unjustifiable publication of defamatory material. See Prosser, Torts § 95, at 625-29 (2d ed. 1955); Harper & James, Torts § 5.27, at 450-56 (1956). See also Restatement, Torts §§ 599-605 (1938).

"Unlike an absolute privilege, a qualified privilege can be lost by abuse on the part of the defendant. Generally speaking, he must not say more or communicate to a larger audience than is reasonably necessary to serve a socially desirable purpose, must have reasonable grounds for belief in the truth of what he says, and must not be actuated by an improper motive." Note, 69 Harv. L. Rev. 875, 924 (1956).

defamation is protected. The decision is a welcome deviation from the current judicial trend of liberalizing the absolute privilege granted governmental executive officials with regard to defamatory press releases, as exemplified by the recent Supreme Court decision in *Barr v. Matteo*.[37]

Evidence — Admissibility of Conviction of Traffic Offense in Subsequent Civil Action.—Upon trial, the court refused to admit into evidence, as probative of defendant's negligence, his conviction for a traffic violation arising from the same circumstances. The supreme court denied plaintiff's motion for an order setting aside the verdict in favor of defendant and held that a conviction for a traffic infraction is inadmissible as substantive evidence in a civil action. *Ando v. Woodberry*, 15 Misc. 2d 774, 181 N.Y.S.2d 905 (Sup. Ct. 1958).

The few decisions in New York concerning the admissibility of a conviction for a traffic infraction as evidence in a civil action reflect the confusion surrounding the issue. By statute in New York a traffic infraction is not a crime, and is not admissible in evidence merely to challenge the credibility of the witness.[1] However, the statute does not affect the admissibility of such evidence when offered for other purposes.[2] For these situations, the courts have considered certain general principles as determinative of admissibility.

Where the convicted party is seeking affirmative relief the court will not

37. 358 U.S. 917 (1959). This case has an interesting history. A verdict for the plaintiff had been returned against the defendant, the acting director of rent stabilization, in the trial court. On appeal, the court of appeals affirmed, holding that since the press release went beyond the defendant's line of duty, the absolute privilege claimed by the defendant, even if assumed available, did not attach. 244 F.2d 767 (D.C. Cir. 1957). The Supreme Court granted certiorari and vacated the court of appeals judgment, remanding the case with directions to "pass upon petitioner's claim of a qualified privilege." 355 U.S. 171, 173 (1957). On remand, the court of appeals found that the press release did enjoy a qualified privilege, but held there was sufficient evidence from which a jury might reasonably find that the privilege was forfeited; the case was therefore remanded to the district court for retrial. 256 F.2d 890 (D.C. Cir. 1958). The Supreme Court again granted certiorari to consider the petitioner's contention that his claim of an absolute privilege precluded the maintenance of the suit despite allegations of actual malice. In holding that the petitioner, acting director of rent stabilization, did enjoy an absolute privilege, a sharply divided Court declared that the "complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy." 358 U.S. at 922.

1. N.Y. Vehicle & Traffic Law § 2(29). N.Y. Civ. Prac. Act § 355 provides in part that no "witness [shall] be required to disclose a conviction for a traffic infraction, as defined by the vehicle and traffic law nor shall conviction therefor affect the credibility of such witness in any action or proceeding."

2. But see N.Y. Code Crim. Proc. § 392(a) which provides: "A pleading in a civil action cannot be used in a criminal prosecution against the party, as proof of a fact admitted or alleged therein."

hesitate to admit his prior conviction arising out of the same set of facts.[3] In such a case, the court will permit proof of the conviction as prima facie evidence of the facts involved against the civil action plaintiff, reasoning that "one may not profit by his own wrongdoing, and may not maintain an action to which he must trace his title through his own breach of the law. . . ."[4]

The type and gravity of the offense of which the defendant has been convicted is a determinative factor of admissibility. While there is no consistency in the cases, it seems likely that the more serious the offense the greater are the chances of the admissibility of the conviction.[5] Illustrative of this fact traffic infractions, the least serious of violations, are seldom admitted in evidence in a subsequent trial.[6]

Where, as in the instant case, the conviction of a traffic infraction is based on a plea of guilty this factor may tend to increase the admissibility of evidence of the conviction as evidence.[7] It is not clear in this case whether admissibility of the evidence is due to a belief that the plea of guilty increases the probative value of the conviction,[8] or that the plea itself is admissible as an informal judicial admission.[9] Without specifying whether the conviction, or the plea, or both, was being offered in evidence, the court in the present case rested its decision against admissibility, at least in part, on the conclusion that

3. Schindler v. Royal Ins. Co., 258 N.Y. 310, 179 N.E. 711 (1932). Accord, Everdyke v. Esley, 258 App. Div. 843, 15 N.Y.S.2d 666 (1st Dep't 1939). See also In re Rechtschaffen's Estate, 278 N.Y. 336, 16 N.E.2d 357 (1938); Giessler v. Accurate Brass Co., 271 App. Div. 980, 68 N.Y.S.2d 1 (2d Dep't 1947); Roach v. Yonkers Ry., 242 App. Div. 195, 271 N.Y. Supp. 289 (2d Dep't 1934).

4. Roach v. Yonkers Ry., 242 App. Div. 195, 197, 271 N.Y. Supp. 289, 292 (2d Dep't 1934).

5. Holding such evidence admissible: Hart v. Mealey, 287 N.Y. 39, 38 N.E.2d 121 (1941); McDowell v. Birchett, 126 N.Y.S.2d 78 (Sup. Ct. 1953). Against admissibility: Sims v. Union News Co., 284 App. Div. 335, 131 N.Y.S.2d 837 (1st Dep't 1954); Walther v. News Syndicate Co., 276 App. Div. 169, 93 N.Y.S.2d 537 (1st Dep't 1949); See v. Wormser, 129 App. Div. 596, 113 N.Y.S. 1093 (2d Dep't 1908); Loeper v. Roberts, 199 Misc. 1095, 106 N.Y.S.2d 158 (Sup. Ct. 1951).

6. See note 1 supra; Sims v. Union News Co., 284 App. Div. 335, 131 N.Y.S.2d 837 (1st Dep't 1954).

7. Stanton v. Major, 274 App. Div. 864, 82 N.Y.S.2d 134 (3d Dep't 1948); Same v. Davison, 253 App. Div. 123, 1 N.Y.S.2d 374 (4th Dep't 1937); Markett v. Gemke, 154 N.Y. Supp. 780 (Sup. Ct. 1915). Contra, Max v. Brookhaven Dev. Co., 262 App. Div. 907, 28 N.Y.S.2d 845 (2d Dep't 1941); Michitsch v. Stimfel, 7 Misc. 2d 960, 164 N.Y.S.2d 246 (Sup. Ct. 1957).

8. This would seem to be inferred in the instant case. 15 Misc. 2d at 775, 181 N.Y.S.2d at 906.

9. The court does not seem, in the instant case, to have considered such a proposition. However, some other jurisdictions have held that all such evidence of a conviction of a traffic infraction is inadmissible, except where it is introduced for the primary purpose of showing that a present position is inconsistent with a former contention. See Breitenbach v. Trowbridge, 64 Mich. 393, 31 N.W. 402 (1887); Spain v. Oregon-Washington R. & Nav. Co., 78 Or. 355, 153 Pac. 470 (1915); Interstate Dry Goods Stores v. Williamson, 91 W. Va. 156, 112 S.E. 301 (1922). Contra, Morrissey v. Powell, 304 Mass. 268, 23 N.E.2d 411 (1939); 2 Freeman, Judgements § 653 (5th ed. 1925).

the probative value of evidence of the prior conviction for violation of a traffic infraction was small, since it is known that a guilty plea in minor offenses may be made as a matter of convenience to the defendant, rather than as a true admission of guilt. It is suggested, however, that since this practice is so universally known and accepted, the better procedure would be to admit the evidence and leave the determination of its weight to the jury.

In addition to refusing to admit the evidence on the basis of lack of probative value, the court held the evidence of the prior conviction of a traffic infraction inadmissible due to its prejudicial nature.[10] It would seem, however, that any possible prejudicial effect of such evidence on the jury could be counteracted by the awareness of the jury of the facts surrounding such a conviction. Furthermore, as such evidence is no more than prima facie proof of the facts, the convicted party may explain to the satisfaction of the jury the factors which caused the conviction and motivated the plea, if any. Therefore, it would appear that both objections of the court in the principal case might be overcome by admission of the evidence under proper instructions.

The clear trend of the courts today is toward more general admissibility,[11] based on the individual facts of the specific case. Where all the relevant factors have been considered, it is urged that admission should not be denied solely because the offense is of lesser gravity, but that, absent clear legislative direction, the evidence should be admitted and considered by the jury, with whatever importance they may, from their own experience, place on it.

Evidence—Admissibility of Exculpatory Statements Obtained During Illegal Detention.—The defendant, whose principal defense was insanity, was found guilty of second degree murder. An exculpatory statement obtained nine hours after defendant's arrest and prior to the time he was brought before a committing magistrate was admitted in evidence for the sole purpose of showing his sanity at the time of the arrest. The court of appeals, four judges dissenting, sustained the district court's conviction.[1] The court held

10. 15 Misc. at 775, 181 N.Y.S.2d at 906.

11. New York & Cuba Mail S.S. Co. v. Continental Ins. Co., 117 F.2d 404 (2d Cir. 1941); Willson v. Manhattan Ry., 2 Misc. 127, 20 N.Y. Supp. 852 (C.P. 1892), aff'd on opinion below, 144 N.Y. 632, 39 N.E. 495 (1894). Section 5 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 16 (1952), specifically permits a criminal judgement rendered under the antitrust laws to be prima facie evidence against the defendant in a subsequent civil action. Model Code of Evidence, rule 521 (1942), provides: "Evidence of a subsisting judgement adjudging a person guilty of a crime or a misdemeanor is admissible as tending to prove the facts recited therein and every fact essential to sustain the judgement." See also Annot., 31 A.L.R. 261 (1924); Annot., 18 A.L.R.2d 1287 (1951); Cowen, The Admissibility of Criminal Convictions in Subsequent Civil Proceedings, 40 Calif. L. Rev. 225 (1952); Comment, 50 Yale L.J. 499 (1941); Note, 39 Va. L. Rev. 995 (1953).

1. A possible ground for reversal discussed by the court was the trial judge's charge to

that error, if any, in the admission of exculpatory statements obtained during an illegal detention was not prejudicial as other substantial evidence existed from which the jury could conclude that the accused was sane at the time of the crime. *Starr v. United States,* 264 F.2d 377 (D.C. Cir. 1958), *cert. denied,* 359 U.S. 936 (1959).

Rule 5(a) of the federal criminal procedure provides that arrested parties are to be brought before a committing magistrate without unnecessary delay.[2] The failure to observe the above rule brings into play the doctrine promulgated in the series of Supreme Court cases from *McNabb v. United States*[3] to *Mallory*

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the jury wherein he said: "'In the event your verdict is not guilty by reason of insanity, the defendant will be committed to St. Elizabeths Hospital, there to remain until such time as it is established that he is no longer insane.'" Starr v. United States, 264 F.2d at 382. Error was assigned to the omission in the charge concerning public safety, since a person who is free from mental illness cannot be confined in an institution merely because he is potentially dangerous. Lyles v. United States, 254 F.2d 725 (D.C. Cir. 1957), cert. denied, 356 U.S. 961 (1958), provided that when instruction is given the jury as to the effect of a verdict of not guilty by reason of insanity the jury should simply be informed that such verdict means that the accused will be confined in a hospital for the mentally ill until the superintendent has certified and the court is satisfied that the individual has recovered his sanity, and will not in the reasonable future be dangerous to himself or others, in which event, and at which time, the court shall order his release either unconditionally or under such conditions as the court may see fit. 254 F.2d at 728. The majority concluded that the instructions in the instant case were not prejudicial as the public safety element is implied in the charge. Furthermore, the majority said the Lyles case, supra, was prospective in application. The minority pointed out that the public safety element has been necessary since Taylor v. United States, 222 F.2d 398 (D.C. Cir. 1955), held that when an accused has pleaded insanity, the judge should inform the jury that if he be acquitted by reason of insanity he will be confined in an institution for the insane as long as public safety and welfare require. 222 F.2d at 404. In fact, Catlin v. United States, 251 F.2d 368 (D.C. Cir. 1957), expressly declared that where an insanity defense is fairly raised the failure to inform the jury of the consequences of a verdict of not guilty by reason of insanity constituted error. 251 F.2d at 369.

2. Fed. R. Crim. P. 5(a).

3. 318 U.S. 332 (1943). The McNabb Court held that incriminating statements obtained from the accused during an illegal detention after arrest and before arraignment were inadmissible in federal courts and conviction based thereon must be set aside. 318 U.S. at 347. The McNabb rule caused confusion in the lower courts as to whether illegal detention alone invokes the exclusionary rule of McNabb, or whether it is merely another element to consider in determining the voluntariness of the confession. See, e.g., United States v. Grote, 140 F.2d 413 (2d Cir. 1944); Runnels v. United States, 138 F.2d 346 (9th Cir. 1943); United States v. Hoffman, 137 F.2d 416 (2d Cir. 1943). In Mitchell v. United States, 322 U.S. 65 (1944), a confession was admitted in evidence though the accused was not promptly arraigned, and the conviction was not reversed. This case is distinguishable, however, since the incriminating statements were found to have been made before any illegal detention occurred. In Upshaw v. United States, 335 U.S. 410 (1948), a confession obtained during an illegal detention was held inadmissible and the conviction was set aside. But this case also left the same problem that existed after McNabb, supra, unresolved. See note 4 infra.

v. United States.[4] Though conflicting interpretations of the rule exist,[5] it can be clearly enunciated that incriminating statements elicited from an accused during a period of unlawful detention are inadmissible, and a conviction resting upon such evidence must be set aside. The purpose of such a rule is to prevent individuals from being subjected to coercive and unfair treatment by rendering it impracticable for law enforcement agencies to resort to tactics violative of an individual's fundamental rights.[6]

The initial view expressed by the court in the instant case is that the *Mallory* rule excludes *only incriminating* statements obtained during an illegal detention of the accused. Therefore, reasoned the court, the rule is inapplicable here as defendant's statements were not incriminatory, but clearly exculpatory. The court reasoned that "the rules governing the reception in evidence of such admissions [exculpatory statements] are much less onerous than those concerning confessions."[7] The majority's position was complicated by the United States Supreme Court decision of *Opper v. United States*,[8] which involved the question of whether exculpatory statements require corroboration as do incriminating statements. The *Opper* Court declared: "We conclude that exculpatory statements . . . may not differ from other admissions of incriminating facts. Given when the accused is under suspicion, they become questionable just as testimony by witnesses to other extrajudicial statements of the accused."[9] The majority attempted to distinguish *Opper* by reasoning that the case merely applied to exculpatory statements which denied guilt but admitted facts essential to the crime charged. Here the statements were introduced in evidence merely to show the conduct of the accused shortly after the crime occurred.

The court's reasoning is dubious. As the minority pointed out: "[S]anity, once placed in issue, as it was here, becomes an 'element necessary to constitute the crime' and the defendant cannot be declared guilty of the crime unless the Government proves his sanity beyond a reasonable doubt, just as it must with respect to every other element of the crime . . . . Evidence tending to prove sanity is, therefore, incriminating evidence in the circumstances here."[10]

Realizing that their contentions were susceptible to argument, the majority hedged, and concluded that even if the *Mallory* opinion were construed to hold

4. 354 U.S. 449 (1957). The Mallory Court clearly held that unlawful delay alone required exclusion. However, the problem as to what constitutes unnecessary delay remains in controversy. For the aftermath of Mallory see, e.g., Morse v. United States, 256 F.2d 280 (5th Cir. 1958); Carter v. United States, 252 F.2d 608, 613-14 (D.C. Cir. 1957); Metoyer v. United States, 250 F.2d 30 (D.C. Cir. 1957); Watson v. United States, 249 F.2d 106 (D.C. Cir. 1957). Accord, Hogan & Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo. L.J. 1 (1958); Comment, 27 Fordham L. Rev. 396 (1958); Comment, 68 Yale L.J. 1003 (1959).

5. See notes 3 & 4 supra.

6. Mallory v. United States, 354 U.S. 449 (1957); Upshaw v. United States, 335 U.S. 410 (1948); McNabb v. United States, 318 U.S. 332 (1943).

7. Ercoli v. United States, 131 F.2d 354, 356 (D.C. Cir. 1942).

8. 348 U.S. 84 (1954).

9. Id. at 92.

10. 264 F.2d at 384 (Bazelon, J., dissenting).

inadmissible an exculpatory statement taken during an unnecessary delay in arraignment, nevertheless, the error was nonprejudicial.[11] The court contended that the *Mallory* holding necessitated a finding of prejudice since the statements there were incriminating. But, the court reasoned, the statements here were not incriminating and also not prejudicial. Thus, the court deemed it proper to apply the harmless error rule, which provides that any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.[12] The harmless error rule was enacted by Congress because courts of review had come to " 'tower above the trials of criminal cases as impregnable citadels of technicality.' "[13] It destroyed the presumption often indulged in by the courts "that error being shown, prejudice must be presumed,"[14] and established "the more reasonable rule that if, upon an examination of the entire record, substantial prejudice does not appear, the error must be regarded as harmless."[15]

The determinative factor then is whether the wrongful admission of the exculpatory statements obtained from the defendant during an illegal detention is a mere technicality, not substantially prejudicing the rights of the accused. Sanity was the issue here. The statements related to defendant's sanity at the time of the commission of the crime. The prosecution had the burden of proving sanity.[16] Certainly the statements, though exculpatory, were incriminating, and being incriminating were prejudicial. No doubt exists that they reflect on the guilt or innocence of the defendant. The capacity in law of the accused to commit the crime is essential to a guilty verdict.[17] The fact that there was substantial independent evidence of defendant's sanity at the time the crime was committed does not detract from the possibility that the jury placed substantial reliance on the statements by the accused. The harmless error rule would seem to have been misused here.

The court was willing to extend the *Mallory* rule to exculpatory statements obtained during an illegal detention. Nevertheless, if such statements are admitted in evidence, the court contends it is necessary to apply the harmless error rule where such statements are, as here, nonprejudicial. The prime purpose of *Mallory* was to protect the individual from overzealous law enforcement. However, there does not appear to be much danger of this in the present case since the statements were exculpatory in nature when elicited and did not take on their incriminatory character until the accused pleaded insanity as a defense. An extension of the rule would certainly not be in accord with the spirit of the *McNabb* and *Mallory* cases.

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11. Id. at 380.

12. Fed. R. Crim. P. 52(a).

13. Kotteakos v. United States, 328 U.S. 750, 759 (1946).

14. Berger v. United States, 295 U.S. 78, 82 (1935).

15. Id. at 82.

16. "If the whole evidence . . . does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal . . . ." Davis v. United States, 160 U.S. 469, 488 (1895).

17. Ibid.

Insurance—Admissibility of Evidence To Determine Amount of Recovery on Fire Policy.—Plaintiff, a lessee of vacant land under a year to year tenancy terminable upon thirty days notice by the lessor, erected a building on the leased land at his own expense. The lease gave plaintiff the right to remove this building within five days after notice of termination of the lease. In the event of failure to remove the building was to become the property of the lessor. The plaintiff took out fire insurance on the building from the defendant insurance company. Subsequently, the lessor served notice on the plaintiff to remove, and, after a summary proceeding to dispossess, a final order and warrant were served on the plaintiff. Thereafter, the building was completely destroyed by fire. In an action by the plaintiff-insured to recover the full value of the building under the policy which limited recovery "in no event for more than the interest of the insured," the appellate division held that evidence of the plaintiff's tenancy, the dispossess order and plaintiff's subsequent plans to destroy the building was admissible to show whether the plaintiff had any insurable interest in the building at the time of the fire, but was not admissible as affecting the amount of plaintiff's recovery under the quoted provision in the policy. *Federowicz v. Potomac Ins. Co.*, 7 App. Div. 2d 330, 183 N.Y.S.2d 115 (4th Dep't 1959).

A contract of fire insurance is personal to the insured[1] and is one of indemnity against loss.[2] The insurance company bargains to reimburse the insured for any loss of interest caused by destruction by fire of the subject of the insurance.[3] If there is to be a recovery, it is necessary for the insured to have an insurable interest in the subject matter at the time of loss.[4] Hence, in the instant case the court properly ruled that evidence tending to prove that at the time of the fire the insured had forfeited his interest in the building to the lessor, was admissible, since if the insured's interest was extinguished he could not recover.[5] Assuming that the plaintiff had an insurable interest in the building, the greater question in the principal case is whether the facts of the tenancy and of the insured's intention to destroy the building should be admissible as affecting the amount of plaintiff's recovery. The court held this evidence inadmissible for this purpose on the ground that the clause limiting recovery in no event for more than the interest of the insured contemplated a situation where the insured has a limited interest,[6] and, since the interest here was not limited but absolute,[7] recovery should be for full value. The policy, it said, was not one of indemnity against financial loss but was insurance against physical loss. Once it can be shown that the insured has an insurable interest, "the triers of the fact should

1. 4 Appleman, Insurance Law and Practice § 2107 (1941).

2. McAnarney v. Newark Fire Ins. Co., 247 N.Y. 176, 181, 159 N.E. 902, 903 (1928); 1 Richards, Insurance §§ 64, 153 (5th ed. 1952).

3. 1 Richards, Insurance § 64 (5th ed. 1952).

4. Id. § 68. See also Foley v. The Mfr's & Builders' Fire Ins. Co., 152 N.Y. 131, 46 N.E. 318 (1897).

5. 4 Appleman, Insurance Law and Practice § 2241 (1941).

6. 7 App. Div. 2d 330, 336, 183 N.Y.S.2d 115, 121 (4th Dep't 1959).

7. Id. at 336, 183 N.Y.S.2d at 121.

not be permitted to speculate as to the extent of his financial loss by the remoteness or imminence of the termination of his insurable interest."[8]

The clause, "nor in any event for more than the interest of the insured," first appeared in New York in the revised standard policy of 1943.[9] Prior to this, a fire policy could be voided in either of two situations: (1) if the interest of the insured was other than unconditional and sole ownership, or (2) if the subject of the insurance was a building on ground not owned by the insured in fee simple.[10] These clauses were eliminated in the 1943 revision, and the above clause was added. The court in the principal case reasoning that the insured's interest was not limited but absolute, construed the latter clause as applying to a situation envisaged by the first voiding clause, that is, where the insured was not the sole and unconditional owner. The clause does not limit recovery when the insured comes under the second situation, i.e., where he owns a building on land not owned by him. It is not too unreasonable to conclude that when the standard fire policy was revised, the "interest" referred to in the addition was the "interest" encompassed in the deleted clauses, namely, what will be referred to herein as partial and limited interest, respectively.[11] Hence, the revision was intended to give the insurance company protection for those situations which, before the revision, warranted a voiding of the policy. This logic is more compelling in view of the intrinsic nature of fire insurance, namely, that of indemnification against financial loss.

The insurance company merely promises to indemnify the insured to the extent of his insurable interest in the subject matter at the time of loss, and it is not unreasonable for the companies to limit recovery to the extent of this interest. New York cases, however, both before and after the 1943 revision, have been inclined to depart from the indemnity principle in certain cases, and grant full recovery regardless of actual financial loss.[12] Where the insured-lessee has a contract with a third party

8. Ibid.

9. N.Y. Ins. Law § 168.

10. N.Y. Sess. Law 1917, ch. 440, § 121.

11. In stating that the interest of the plaintiff was not limited but absolute, the court, in the instant case, seems to apply the phrase "limited interest" to the situation covered in the first "moral hazard" clause, i.e., where the insured is other than a sole or unconditional owner. Perhaps the classification of such an insured as a partial owner, and the use of the phrase "limited interest" in connection with a lessee who owns property on leased hand, is a more proper distinction.

12. Whereas the true nature of indemnity insurance is to reimburse the insured to the extent of his financial loss, the insured has been given recovery even where he has in fact suffered no financial loss. 1 Couch, Cyclopedia of Insurance Law § 27 (1929). This has been done in cases where there was, in addition to the insurance, a separate contract with a third party to repair or replace the property destroyed. Savarese v. Ohio Farmers Ins. Co., 260 N.Y. 45, 182 N.E. 665 (1932); Foley v. The Mfr's & Builders' Fire Ins. Co., 152 N.Y. 131, 46 N.E. 318 (1897); Alexandra Restaurant v. New Hampshire Ins. Co., 272 App. Div. 346, 71 N.Y.S.2d 515 (1st Dep't), aff'd, 297 N.Y. 858, 79 N.E.2d 268 (1948); Rosenbloom v. Maryland Ins. Co., 258 App. Div. 14, 15 N.Y.S.2d 304 (4th Dep't 1939); Tiemann v. Citizens' Ins. Co., 76 App. Div. 5, 78 N.Y. Supp. 620 (1st Dep't 1902). But cf. Larner v. Commercial Assur. Co., 127 Misc. 1, 215 N.Y. Supp. 151 (Sup. Ct. 1926). The reasoning

whereby the latter is obligated to repair the insured property, the courts will not allow the insurance company to use this contract as a defense to payment.[13] This would appear to be an exception to the indemnity principle.[14] In other cases, where a lessee owns buildings or improvements on leased property, and has a right to use for the term of the lease with right of removal within a stated time after termination of the lease, the courts have held the insured's interest in the buildings or improvements to be that of owner and not merely an interest limited by a right to use[15] or right to remove.[16] Therefore, while there is opinion to the contrary in other jurisdictions,[17] New York is inclined to give recovery for the full cash value of the destroyed property despite the limited interest of the insured. This reasoning was applied even where the policy included the clause "nor in any event for more than the interest of the insured."[18] This could be interpreted as a tendency to construe this clause as one restricted to partial interests, distinguished from limited interests.

While New York cases have stretched the indemnity principle so as to allow recovery of full cash value even where the insured's interest is limited, this departure is tempered by the rule laid down in *McAnarney v. Newark Fire Ins. Co.*[19] In that case, the court of appeals, in referring to the indemnity nature of fire insurance, stated that while full value should be given the jury must be allowed to consider all factors which affect this cash value.[20] This is to say that when an insured is entitled to recover the full cash value of the subject of the insurance, and this must include the cases mentioned above, the value is not a fixed figure as in the case of a valued policy,[21] or merely the replacement

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of these cases seems to be that an insured should not be denied recovery because of a contract which does not concern the insurance company.

13. See note 12 supra and cases cited therein.

14. Comment, Fire Insurance Recovery on a Limited Interest in Property, 50 Colum. L. Rev. 960 (1950).

15. Modern Music Shop, Inc. v. Concordia Fire Ins. Co., 131 Misc. 305, 226 N.Y. Supp. 630 (N.Y. Munic. Ct. 1927).

16. Girard Ins. Co. v. Taylor, 6 App. Div. 2d 359, 177 N.Y.S.2d 42 (3d Dep't 1958); Laurent v. Chatham Fire Ins. Co., 1 N.Y. Super. (1 Hall) 41 (N.Y. Super. Ct. 1828). But cf. Beekman v. Fulton & M. Counties Farmers' Mut. Fire Ins. Ass'n, 66 App. Div. 72, 73 N.Y. Supp. 110 (3d Dep't 1901); Larner v. Commercial Union Assur. Co., 127 Misc. 1, 215 N.Y. Supp. 151 (Sup. Ct. 1926); Niblo v. North Am. Fire Ins. Co., 3 N.Y. Super. (1 Sandf.) 551 (N.Y. Super. Ct. 1848).

17. Harrington v. Agricultural Ins. Co., 179 Minn. 510, 229 N.W. 792 (1930); Sievers v. Union Assur. Soc'y, 20 Cal. App. 250, 128 Pac. 771 (1912).

18. Girard Ins. Co. v. Taylor, 6 App. Div. 2d 359, 177 N.Y.S.2d 42 (3d Dep't 1958).

19. "Indemnity is the basis and foundation of all insurance law . . . . Where insured buildings have been destroyed, the trier of the fact may, and should, call to its aid, in order to effectuate complete indemnity, every fact and circumstance which would logically tend to the formation of a correct estimate of the loss." McAnarney v. Newark Fire Ins. Co., 247 N.Y. 176, 184, 159 N.E. 902, 904-05 (1928).

20. Ibid.

21. A valued policy is distinguished from an indemnity policy in that the parties in the former may agree to set an advance value on the property insured which will be the amount of recovery in the event of loss. 1 Richards, Insurance § 21 (5th ed. 1952).

value, but is relative to the financial loss of the insured. For this reason, the court in the instant case should have followed the *McAnarney* decision in determining the admissibility of the evidence of the plaintiff's tenancy so as to arrive at the true value to the insured of his destroyed interest.[22] The *McAnarney* case is controlling on the admissibility question, although not so on the question of limited interest.

The court in the principal case also erred in holding that the policy was not one of indemnity. The fact that New York will give full recovery to a lessee with a limited interest is not to say that full replacement value of the insured property should be given merely on proof of physical loss.[23] The standard fire policy, in the absence of special provision, does not promise to replace the building absolutely, but to reimburse the insured for his loss of interest. To hold otherwise would radically change the nature of fire insurance. New York cases merely hold that the lessee's interest in a building or other improvements on leased land is not limited for purposes of recovery, but is absolute.[24] The determination of the value of this lost interest is another question.

Both the circumstances surrounding the addition of the "interest clause" to the standard fire policy and the true nature of indemnification and insurable interest indicate that the clause, "nor in any event for more than the interest of the insured," ought to be interpreted as limiting recovery to the extent of the insured's partial or limited interest. However, it seems that in New York the amount of recovery in cases of limited interest, at least, will be determined to be the full cash value on the ground that the lessee who owns either a building or improvements on the premises leased will be considered the absolute owner without reference to the impending loss of interest. The determination of the cash value, however, as stated in the *McAnarney* case, is to be made with all the factors before the court. If the rule in the *McAnarney* case is applied to limit recovery in a situation presented by the instant case, then the differences in approach between New York and those jurisdictions which consider the lessee's interest as limited will become academic, at least in so far as the amount of recovery is concerned.

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22. The court in the instant case was faced with the question of whether to admit the controversial evidence to determine the amount of recovery. In the course of its decision, the court reasoned that in New York a lessee who owns a building on leased land with the right to remove on termination of the lease is an absolute owner and should recover the full cash value of the building when it is destroyed. 7 App. Div. 2d at 336, 183 N.Y.S.2d at 121. But the evidence which the triers of fact may consider to determine the actual cash value was squarely ruled upon in the McAnarney case, supra note 19.

23. To give absolute recovery merely on proof of physical loss is either to construe the policy in the instant case as a valued policy or to completely reject the indemnity nature of fire insurance. The former position is untenable because the policy here was in the standard form, which, in the absence of special provision, is unquestionably considered to be a contract of indemnity. See note 2 supra. To reject the indemnity nature of fire insurance is contrary to all authority. See, e.g., McAnarney v. Newark Fire Ins. Co., 247 N.Y. 176, 184, 159 N.E. 902, 904-05 (1928).

24. Girard Ins. Co. v. Taylor, 6 App. Div. 2d 359, 177 N.Y.S.2d 42 (3d Dep't 1958).

Insurance—Variable Annuity Policies Subject to SEC Regulation.—In an action by the Securities and Exchange Commission to enjoin the issuers of variable annuity policies from offering their contracts to the public without registering them under the Securities Act, and without complying with the Investment Company Act, the district court dismissed the complaint, and the court of appeals affirmed. On certiorari, the Supreme Court of the United States, four Justices dissenting, reversed. Variable annuity contracts which guarantee to the policy holder annuitant periodic payments upon reaching a certain age, the amount of which will vary according to the success of the investment policy of the insurer, are not contracts of insurance. Issuers of such contracts, therefore, are not exempt from compliance with the above mentioned Acts, and are subject to regulation by the Securities and Exchange Commission. *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959).

The Securities Act of 1933[1] and the Investment Company Act of 1940[2] subject dealers in securities in interstate and foreign commerce to federal control, but specifically exempt insurance companies from their provisions.[3] This

1. 48 Stat. 74 (1933), 15 U.S.C. § 77a (1952). The Act was passed to protect the unwary buyer of securities from the devices of the security salesmen who attempt to avoid the state "blue sky" laws through the use of interstate and foreign commerce. Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n, 339 U.S. 643, 653 (1950) (concurring opinion of Douglas, J.). The Act provides for full disclosure of the details of the enterprise by companies or individuals desiring to sell securities through the mails or in interstate commerce by requiring registration with the SEC, and the transmittal of a prospectus to every purchaser so that the investor can make an intelligent appraisal of any risks involved. 48 Stat. 78 (1933), 15 U.S.C. § 77e (1952). The prospectus is required to contain complete financial statements, detailed information as to the type of venture, risks involved, underwriting expenses, amount of capital needed, the interests of the management and promoters in financial transactions and other matters. 48 Stat. 81 (1933), 15 U.S.C. § 77J (1952).

2. 54 Stat. 789 (1940), 15 U.S.C. § 80a (1952). In order to protect investors from purchasing securities from investment companies without adequate information of the financial responsibilities and capabilities of these companies, Congress passed the Investment Company Act. This Act requires investment companies who use the mails or instrumentalities of interstate commerce to register with the SEC. Such registration subjects the company to regulations restricting personnel, capital structure and other various activities of the investment company. 54 Stat. 803-05, 816, 817 (1940), 15 U.S.C. §§ 80a 8-10, 17, 18 (1952).

3. 48 Stat. 75 (1933), 15 U.S.C. § 77c (1952) provides:

(a) Except as hereinafter expressly provided, the provisions of the subchapter shall not apply to any of the following classes of securities:

. . . .

(8) Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any state or Territory of the United States or the District of Columbia.

54 Stat. 797 (1940), 15 U.S.C. § 80a-3(c) (1952) provides that an investment company does not include any insurance company, savings and loan association or similar institution.

48 Stat. 74 (1933), 15 U.S.C. § 77b (1952) provides:

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or in-

congressional policy was reinforced in 1945 by the enactment of the McCarran-Ferguson Act,[4] which provides that "no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . . ."[5]

The question presented was whether the Variable Annuity Life Insurance Company was in reality an investment company, or an insurance company initiating a new mode of insurance. If it were the former, it would be subject to SEC regulations, and would be obliged to make full disclosure of its investment activities. If it were the latter, it would under the applicable statutes be exempt from making disclosure.

All states regulate both the ordinary life insurance policy and the standard fixed annuity policy.[6] The ordinary life insurance contract involves the payment of premiums by an insured over a number of years in return for which the insurance company creates an immediate estate for a fixed amount in the event of the insured's death. The benefits of the policy are paid to the named beneficiary. This contract puts an immediate risk of loss upon the insurance company. The annuity type of insurance contract is almost diametrically opposed to the ordinary life policy. The annuitant pays either a single fixed premium or staggered premiums over a period of years to the insurer, in return for which the company must then perform a series of obligations (payment to the insured of a certain sum) over a period of years at designated intervals. The risk of

strument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

54 Stat. 797 (1940), 15 U.S.C. § 80a-3 (1952) provides:

(a) When used in this subchapter . . . "investment company" means any issuer which—

(1) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities;

. . . .

(3) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash terms) on an unconsolidated basis.

All states have laws and regulations covering the type and amount of securities which insurance companies, given their charter by the state, may invest in. New York requires that investments of foreign insurance companies doing business in New York must comply in substance with the investment requirements of New York insurance companies. N.Y. Ins. Law § 90.

Life insurance company investments have been and continue to be rigidly regulated, most states limiting investments to the so-called "legal" securities of bonds and preferred stocks. The modern tendency, however, has been, subject to state regulation, to broaden the investment field for life insurance companies to include "equity" securities or common stocks. See Vance, Insurance § 5, at 43 (3d ed. 1951).

4. 59 Stat. 33 (1945), 15 U.S.C. § 1011 (1952). The Act was passed to offset the possible effects of United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944), which held that insurance companies can be engaged in interstate commerce for the purposes of the antitrust statutes.

5. 59 Stat. 34 (1945), 15 U.S.C. § 1012 (1952). The McCarran-Ferguson Act also applies to the District of Columbia.

6. See note 3 supra.

loss is not on the company but on the annuitant who may die before the benefits are received. An annuity policy does not create an immediate estate for the benefit of others as does the ordinary life policy, but it reduces the annuitant's immediate estate in favor of a future contingent income. The annuity is insurance for life, as opposed to insurance against death, and is in reality an investment.[7]

Though ordinary annuities are really investments, they have been traditionally sold by insurance companies, and are regulated in all states as a recognized feature of the insurance business. An insurance contract requires that a risk be borne by the insurance company. This is found in the ordinary annuity contract, wherein the insurer is required to pay a sum certain to the annuitant over fixed intervals for life. The amount of annuitant's premiums is determined by use of mortality tables. If the annuitant outlives the lifetime normally predicted for him, the insurer will be required to pay the fixed periodical benefits until the death of the annuitant.[8] The insurer thereby undertakes and stands to suffer the risk that the applicant will outlive his life expectancy as predicted by the mortality tables, i.e., the mortality risk.

The variable annuity added a distinctive feature to the ordinary fixed annuity. The benefit payments are dependent upon the success of the insurance company's investment policy. The annuitant gives the insurance company carte blanche for investment purposes, subject always to state regulation, by allowing his premiums to be invested in securities for which he accrues certain "accumulation units." The obligation owed to the annuitant by the insurance company is measured in terms of these "units." The value of the unit is recomputed at fixed intervals to determine the amount payable to the several annuitants when the time has arrived to receive the benefits. These amounts are determined by the investment experience of the company. The underlying theory of the variable annuity is "that returns from investments in common stocks would over the long run tend to compensate for the mounting inflation."[9]

7. 1 Appleman, Insurance Law and Practice § 83 (1941). In other words, "under the ordinary life insurance policy the insured pays to the insurer an 'annuity' and his beneficiary receives at the insured's death the lump sum payment [whereas] under the usual form of annuity the lump sum is paid to the insurance company immediately and the annuitant receives the annuity payments so long as he lives." Vance, Insurance § 200, at 1020 (3d ed. 1951).

8. There are, of course, many varieties of annuities. The annuity payments may continue throughout the life of the annuitant or for a stated term only. The policy can cover joint lives, with payment of a fixed sum to be made to one person as long as he lives, and the payment of the same sum or a lesser amount can be made to the survivor upon the death of the first payee. The contract can provide that the insurer will be discharged fully by periodic payments during the insured's life with nothing payable thereafter (no refund annuity), or the contract may provide for total guaranteed annual payments which are equal to the consideration paid for the contract, the refund being payable to the designated beneficiary. Annuities can be incorporated into regular life policies or issued separately. Quite a number of life policies have provisions for annuity options. See Vance, Insurance § 200, at 1020-21 (3d ed. 1951).

9. 359 U.S. at 70. The first variable annuity was created in 1952, when New York initiated the College Retirement Equities Fund.

Clearly, the variable annuity is not a conventional insurance policy. It was not contemplated by Congress when it enacted the Securities Act and the Investment Company Act. The variable annuity contains both insurance and security aspects. Variable Annuity Life Insurance Company bears a resemblance to that institution intended to be regulated by the Investment Company Act. The "units" of the variable annuity are somewhat akin to the shares of an investment company, except that the shareholder therein has a beneficial ownership up to the amount of his shares, whereas the annuitant does not own any part of the insurance company. Both the "unit" and the share will determine the actual cash value of the investment. However, the variable annuity policy subjects the issuer to the same mortality risk as the ordinary annuity issuer which is, of course, an insurance feature.

The only prior judicial determination concerning variable annuities was *Spellacy v. American Life Ins. Ass'n*,[10] where the Connecticut Commissioner of Insurance brought an action for a declaratory judgment to restrain American Life, a domestic fraternal benefit society, from issuing to its members a proposed variable endowment policy[11] with an option therein for a variable annuity. American Life was licensed under the insurance laws of Connecticut, and authorized to issue term, life, endowment and annuity certificates and combinations thereof. The Supreme Court of Errors of Connecticut upheld the State Insurance Commissioner, deciding that the type of policy proposed involved such a basic change in insurance procedure that it would require a legislative act to sanction it.[12]

In the instant case the Company was authorized to issue variable annuity policies by the Insurance Commissioner of the District of Columbia, wherein it was chartered, and the Commissioners of Arkansas, Kentucky and West Virginia. After the trial the Company received authority from the Commissioners of Alabama and New Mexico. These Commissioners, by their approval, thereby impliedly disagreed with Connecticut, and appeared to conclude that the variable annuity constitutes a valid insurance agreement.

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10. 144 Conn. 346, 131 A.2d 834 (1957).

11. An endowment policy is similar to an annuity in that the insured pays a premium or premiums over a period of years to the company in return for a single lump sum benefit at the end of the payin period rather than the smaller yearly benefits, which is the distinguishing feature of the annuity. The endowment is usually payable to the insured or his beneficiary.

12. That court, after hearing the insurance company's argument concerning the depreciation of the dollar, and that the insured had no assurance that the value of his endowment or annuity would remain constant, stated:

There is a real distinction, however, between the general depreciation in the value of the dollar and the depreciation which may occur in the value of units in a variable endowment or annuity fund such as is contemplated in the present case. The former is due to widespread economic factors affecting all alike. The latter may be due to such factors, reflected in a general decline in the market value of securities . . . but it may also be due to possible poor judgment or lack of skill in the management of the investments in the particular fund. When an endowment or annuity is payable in a specified number of dollars, an insured runs the risk of depreciation of the dollar. When it is payable in variable endowment or annuity units, he runs the risk of depreciation of the unit, measured in dollars, including the added risk that it may be depreciated by reason of factors not traceable to general economic conditions. The defendant escapes this type of risk and transfers it to the insured. 144 Conn. at 357-58, 131 A.2d at 840.

In the immediate case Mr. Justice Douglas, speaking for the majority, reasoned that "the issuer of a variable annuity that has no element of a fixed return assumes no true risk in the insurance sense . . . . They guarantee nothing to the annuitant except an interest in a portfolio of common stocks or other equities—an interest that has a ceiling but no floor."[13] The Court concluded that the investment risk traditionally on the insurer has now been placed on the insured. The Company was, therefore, an investment company, and not an insurance company, though it had some elements of insurance. It was, consequently, subject to SEC regulation.

Mr. Justice Brennan, in joining the majority, wrote a separate concurring opinion in which he contended that the administration of the variable annuity contracts involved to a large extent the business of an investment company, and was completely alien to the ordinary life annuity insurance company as traditionally regulated by the states. He reasoned that the regulations requiring full disclosure, rather than close supervision of assets, were more suited to protect the investor. Hence, he concluded, Congress did not intend to exempt the variable annuity.[14]

The dissenting opinion took the position that legitimate insurance experimentation should be encouraged, even though a feature of the particular development may contain security aspects. Mr. Justice Harlan argued that the law of insurance is not and should not remain static. As new concepts of the insurance business are developed the states must follow suit, and modify and adjust their controls to meet the exigencies of new developments. The dissent concluded that the variable annuity should be exempt from federal regulation of securities, unless Congress specifically enacts a statute to the contrary.[15]

Is the investment risk an insurable risk as stated by the majority? It does not appear so. Duly licensed insurance companies are governed by the states in which they are chartered. State regulations fix the type and amount of investments by statute. Constant supervision is maintained by the Insurance Commissioners of the various states and of the District of Columbia. Indeed "the business of insurance has been more generally regulated than any other sphere of business activity not a public utility."[16]

The primary risk that the annuitant attempts to shift when he contracts for an annuity, variable or not, is that he will live longer than his monetary supply will last. The insurer assumes the risk of the annuitant's death, i.e., the mortality risk. There is much to be said for the underlying theory of the variable annuity, that is the risk of depreciation of the dollar. Holders of traditional annuity policies in Germany lost all their protection in the inflation of the twenties. Similar results occurred in other European countries.[17]

The dissenting opinion would appear to present a more realistic approach to the problem. The variable annuity contract has many of the standard provisions

13. 359 U.S. at 71-72.

14. Id. at 85 (concurring opinion of Brennan, J.).

15. Id. at 100 (Harlan, J., dissenting).

16. American Hospital Life Ins. Co. v. FTC, 243 F.2d 719, 721 (5th Cir. 1957).

17. SEC v. Variable Annuity Life Ins. Co., 257 F.2d 201, 205 (D.C. Cir. 1958), rev'd, 359 U.S. 65 (1959).

of insurance. It was not formulated as a device to avoid the above mentioned Acts of 1933 and 1940. Traditionally, the states have been free to regulate insurance. "[T]he McCarran Act was designed to assure that existing state power to regulate insurance would continue."[18] If the Insurance Commissioner of the state recognizes the variable annuity as being primarily insurance, the Securities Act and the Investment Company Act should not apply because of the specific exemptions given to insurance companies therein, and because of the provisions of the McCarran Act. "Courts are pointedly told to leave states free to regulate 'the business of insurance' in the absence of some congressional act that 'specifically relates' to the same subject."[19] This, Congress has not done. Hence, the primary responsibility for the supervision of the variable annuity should rest with the Insurance Commissioners of the various states.

Statute of Frauds—Promise Not Within Statute Where Promisor Is Independently Liable.—Defendant Wishnetzky, the holder of a chattel mortgage on certain fixtures of the Elberon Restaurant Corporation, informed the plaintiff, conditional vendor of other fixtures in Elberon's restaurant, of his desire to take over and manage the said restaurant business, and promised the plaintiff that if he would forbear taking any action on the conditional sales contract, the defendant would pay all Elberon's notes in full. Wishnetzky foreclosed his mortgage, took over the business, and had in fact paid ten notes up to the time the business was closed. This action was brought for the balance due on the remaining notes. The appellate term, holding that nothing indicated that the parties intended the defendant to be the principal debtor primarily liable, reversed the municipal court's finding for the plaintiff.[1] The appellate division reversed, holding that the promise made the defendant independently liable, and that he was receiving a definite business benefit, thereby taking the promise out of the Statute of Frauds. *Biener Contracting Corp. v. Elberon Restaurant Corp.*, 7 App. Div. 2d 391, 183 N.Y.S.2d 756 (1st Dep't 1959).

By the express terms of the New York statute, an oral promise to pay the debt of another is void.[2] This, like most rules of law, is not without exception.[3] One exception is the main purpose or beneficial consideration rule, which makes a promise enforceable provided a new and beneficial consideration runs to the promisor.[4] The New York Court of Appeals, although at one time

18. Wilburn Boat Co. v. Fireman's Ins. Co., 348 U.S. 310, 319 (1955).

19. Maryland Cas. Co. v. Cushing, 347 U.S. 409, 437 (1954) (Black, J., dissenting).

1. Biener Contracting Corp. v. Elberon Restaurant Corp., 13 Misc. 2d 436, 179 N.Y.S.2d 941 (Sup. Ct. App. T. 1958).

2. N.Y. Pers. Prop. Law § 31 provides: "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking . . . is a special promise to answer for the debt, default or miscarriage of another person . . . ."

3. Professor Calamari delineates the exceptions in his article, The Suretyship Statute of Frauds, 27 Fordham L. Rev. 332 (1958).

4. Nelson v. Boynton, 44 Mass. (3 Met.) 396 (1841).

endorsing this majority view,[5] has added a requirement where a prior obligation by the original debtor exists at the time of the promise.[6] The resultant New York main purpose rule is definitely set forth in the oft'cited and oft'quoted case of *White v. Rintoul*,[7] wherein it is stated:

> [W]here the primary debt subsists, and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor.[8]

In New York, therefore, for a promise to be construed as original[9] there is the additional requirement that the defendant promisor be independently liable irrespective of the liability of the principal debtor.[10]

In relatively few instances have New York courts found compliance with the rule.[11] A determination that the promisor's liability was contingent upon the default of the original debtor, rather than independent of and irrespective of the liability of the debtor, has usually been the reason for the courts holding the promise collateral.[12] Whether the defendant in the imme-

5. Mallory v. Gillett, 21 N.Y. 412 (1860). The court pointed out the fallacy in the test laid down in Leonard v. Vredenburgh, 8 Johns. R. 29 (N.Y. 1811), where it was said that the mere receipt of new consideration by the promisor would take the case out of the statute. 21 N.Y. at 417. Such a rule would effectively eliminate the Statute of Frauds, as consideration is always necessary to support a promise.

6. In Brown v. Weber, 38 N.Y. 187 (1868), the court, by way of dictum, said that "the test to be applied to every case is, whether the party sought to be charged is the principal debtor, primarily liable, or whether he is only liable in case of the default of a third person; in other words, whether he is the debtor, or whether his relation to the creditor is that of surety to him for the performance, by some other person, of the obligation of the latter to the creditor." Id. at 189. Professor Calamari contended that the additional requirement is not necessary to take the promise out of the statute where there is no obligation owing from the contemplated debtor to the plaintiff at the time of the promise. Calamari, supra note 3, at 343.

7. 108 N.Y. 222, 15 N.E. 318 (1888).

8. Id. at 227, 15 N.E. at 320.

9. The terms "original" and "collateral" are used to distinguish between cases "without" and "within" the statute. Arnold, The Main Purpose Rule and the Statute of Frauds, 10 Cornell L.Q. 28 (1924).

10. Professor Williston simply suggests that "the true test . . . of a new oral promise should be: Is the new promisor a surety"? 2 Williston, Contracts § 475, at 1368 (rev. ed. 1936). This view was mentioned with approval in Witschard v. A. Brody & Sons, Inc., 257 N.Y. 97, 177 N.E. 385 (1931). The "surety" test seems to be consonant with the rule of White v. Rintoul, note 7 supra, since a finding that the promisor is a surety will necessitate a determination of whether the promisor is promising to pay his own or another's obligation. A surety is one who has become liable to discharge another's debt. 4 Williston, Contracts § 1211 (rev. ed. 1936).

11. Conway, Subsequent Oral Promise To Perform Another's Duty and The New York Statute of Frauds, 22 Fordham L. Rev. 119, 130 (1953).

12. In Richardson Press v. Albright, 224 N.Y. 497, 121 N.E. 362 (1918), the court seemingly could have found the promise collateral based upon the remoteness of the benefit to the promisor; but the court preferred to base its decision upon the failure of the promisor to assume an independent duty of payment.

diate case assumed an independent duty of payment is, therefore, the prime consideration in determining whether his promise is within or without the statute.[13] Precedents are of little help in ascertaining the factors necessary for compliance with this distinctive New York requirement.

The court of appeals, in *Raabe v. Squier*,[14] relied upon by the appellate division in the instant case, in quoting and following the rule of *White v. Rintoul*[15] held the defendant's promise original. However, the meaning of the "independent duty of payment irrespective of the liability of the principal debtor" requirement was not in the least clarified by the *Raabe* case. Except for its quotation from *White v. Rintoul*, the court did not discuss the requirement,[16] and there is some question as to whether the requirement was pertinent.[17]

Whereas the agreement between the principal and surety is ordinarily determinative of their relationship,[18] the agreement between the creditor and surety is for Statute of Frauds purposes determinative of whether the promisor becomes primarily liable.[19] In *Richardson Press v. Albright*,[20] notwithstanding that the promisor absolutely promised to pay the debt, the court looked to the intention of the parties as evidenced by their subsequent dealings, and held the promise unenforceable. The fact that the credit was extended primarily to the

13. The court in the instant case was somewhat concerned with the benefit accruing to the defendant promisor. The defendant made this promise solely for his own benefit. He intended to immediately take over the business, the fixtures subject to the conditional sales contract being an essential part. Since the consideration was a definite business advantage to the promisor, it would seem sufficiently beneficial to take the promise out of the Statute of Frauds.

14. 148 N.Y. 81, 42 N.E. 516 (1895).

15. 108 N.Y. 222, 15 N.E. 318 (1888).

16. The court said the existence of a new consideration beneficial to the promisor brought the case within the rule of White v. Rintoul, supra note 7. 148 N.Y. at 87, 42 N.E. at 518.

17. Professor Calamari contends that the only time the additional requirement of White v. Rintoul, supra note 7, is necessary is when there is a prior obligation of the original debtor owing to the plaintiff at the time of defendant's promise. Calamari, supra note 3, at 343. In the Raabe case, supra note 14, the plaintiff had refused to deliver any further installments of woodwork under the contract because, although he had been paid for the delivered installments, the payments had been late. Professor Calamari, supra note 3, at 349, submits that the judge in Raabe v. Squier, in finding all the elements of the White decision met, is saying that "debt" as used in the rule should not be taken in the strict sense, but is used synonymously with the broader word "obligation." See 2 Corbin, Contracts § 347 (1950). There would, therefore, be the necessary antecedent debt.

However, Professor Conway, supra note 11, at 131, says that "the promise was not to pay an antecedent debt but rather a debt created after and in consideration of the promise." If this were the correct view there would be no need for a finding of the additional requirement of the White case.

18. Conway, Subsequent Oral Promise to Perform Another's Duty and the New York Statute of Frauds, 22 Fordham L. Rev. 119, 138 (1953).

19. Id. at 140.

20. 224 N.Y. 497, 121 N.E. 362 (1918).

original debtor, and that recovery was sought from the promisor only after the resources of the original debtor were exhausted, indicated that the promise was intended by the promisor and accepted by the creditor to be collateral to the original debtor's liability.[21] The mere unconditional form of the promise was held insufficient to take the case out of the statute,[22] but where the form of a promise is itself conditional it will be deemed collateral without further inquiry.[23]

The appellate division in the *Biener* case quoted the defendant's promise verbatim and concluded that it made him independently liable.[24] While the unequivocal promise of the defendant here was certainly strong evidence of an intention to become a principal debtor primarily liable, it alone should not be controlling.[25] It appears that the court, properly following the lead suggested in the *Richardson Press* decision, looked to the subsequent dealings of the creditor and promisor to determine the intention of the parties. Whereas in the *Richardson Press* case the creditor looked first to the original debtor for payment, here the creditor not only looked to the promisor for payment, but was in fact paid in part by the promisor. The fact that the plaintiff first pursued the defendant for payment is significant in demonstrating that credit had been extended principally to the defendant promisor, and that the defendant was accordingly the principal debtor primarily liable.[26] The court has thereby found the independent duty of payment requirement of *White v. Rintoul* satisfied by resorting to an examination of the subsequent dealings between the creditor and the promisor to determine their intention at the time of the promise in issue.

Taxation—Attorney's Lien as Property.—The City of New York instituted a condemnation proceeding to acquire title to realty. The condemnee entered into a retainer contract assigning to his attorney twenty percent of the award for services. After the decree of condemnation was signed, the Bureau of Internal Revenue filed a lien for taxes owed by the condemnee. The attorney moved at special term to have his lien enforced and the Government cross-moved for an order to declare its tax lien. The appellate division affirmed the lower court's order that the tax lien of the United States was subordinate to the tax lien of the attorney. Upon appeal, the New York Court of Appeals, one judge dissenting, affirmed. An attorney by virtue of an assignment of a portion of a condemnation award under a retainer contract is a purchaser of property or rights to property within the meaning of federal tax lien statutes, and,

21. The court recognized that the promisor's beneficial interest was remote. Id. at 501, 121 N.E. at 362. However, the decision was based upon the fact that the promisor did not have an independent duty of payment irrespective of the liability of the principal debtor. Bulkley v. Shaw, 289 N.Y. 133, 137-38, 44 N.E.2d 398, 400 (1942).

22. Richardson Press v. Albright, 224 N.Y. 498, 121 N.E. 362 (1918).

23. Conway, supra note 11, at 137.

24. 7 App. Div. 2d, 391, 392, 183 N.Y.S.2d 756, 757 (1st Dep't 1959).

25. Conway, supra note 11, at 137.

26. Conway, supra note 11, at 136.

therefore, the attorney's lien is superior to the tax lien of the United States. *In re Washington Square Slum Clearance,* 5 N.Y.2d 300, 157 N.E.2d 587, 184 N.Y.S.2d 585 (1959).

Liens for taxes owing to the federal government attach only to property and rights to property belonging to the taxpayer.[1] Prior to the Supreme Court's decision in *Commissioner v. Stern,*[2] federal courts, following the principle that the right of the Government to levy and collect taxes uniformly may not be defeated by state regulation,[3] held that the relative priority of a lien for unpaid taxes was always a question for the federal courts, and the state's characterization of its liens, while good for all state purposes, did not necessarily bind the federal courts.[4] The *Stern* case held, however, that the task of defining "property" as the term is used in the federal tax statutes is the function of the state wherein the taxpayer resides.[5] As a result of this distinction, the priority of liens remained a federal question,[6] yet the state could determine what was not taxable in the first instance by defining what rights under local law were property or rights to property. In the latter situation, then, the question of priority is never reached by the federal courts.

In the principal case the condemnee did not assign an interest in his leasehold to his attorney, but rather a percentage of his cause of action.[7] Granting the leasehold is property,[8] the question remains whether the percentage of the cause of action assigned represents property. The majority, without citing any authority, without further explanation and without adding any reasons for its

1. 53 Stat. 449 (1939), 26 U.S.C. § 3672 (1952) provides: "Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector. . . ." 53 Stat. 448 (1939), 26 U.S.C. § 3670 (1952) provides: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." Such liens are not valid against any purchaser until notice thereof has been duly filed by the collector. 53 Stat. 449 (1939), 26 U.S.C. § 3671 (1952).

2. 357 U.S. 39 (1958).

3. United States v. White Bear Brewing Co., 350 U.S. 1010, rehearing denied, 351 U.S. 958 (1956); United States v. Colotta, 350 U.S. 808 (1955); United States v. Scovil, 348 U.S. 218 (1955); United States v. City of New Britain, 347 U.S. 81 (1954).

4. Lyeth v. Hoey, 305 U.S. 188 (1938); Heiner v. Mellon, 304 U.S. 271 (1937); Bankers Coal Co. v. Burnet, 287 U.S. 308 (1932); Burnet v. Harmel, 287 U.S. 103 (1932).

5. The Supreme Court declared that "since Congress has not manifested a desire for uniformity of liability [in the Revenue Act], we think that the creation of a federal decisional law would be inappropriate in these cases . . . the federal courts must now apply state decisional law in defining state-created rights, obligations, and liabilities." 357 U.S. at 45.

6. United States v. Acri, 348 U.S. 211 (1955); United States v. Waddill Co., 323 U.S. 353 (1945).

7. The contract between the parties provided that the client agrees "'to pay, and . . . assign to said Bernard W. Coblentz for his services in the matter Twenty (20%) per cent of the award and interest that may be paid or awarded for the said property.'" 5 N.Y.2d at 305, 157 N.E.2d at 589, 184 N.Y.S.2d at 588.

8. Matter of Ehrsam, 37 App. Div. 272, 55 N.Y.S. 942 (4th Dep't 1889).

conclusion, held that a cause of action was property.[9] New York courts have held that a vested right of action is property in the sense that tangible things are property. This is so whether it springs from contract or principles of common law.[10] In the instant case the United States did not deny that the condemnee's cause of action was property within the meaning of section 3670 of the Internal Revenue Code.[11] It asserted, however, that the attorney's lien was not property because it was contingent upon the outcome of the trial, and was but a caveat of a more perfect lien yet to come. The United States based its contention upon a series of similar cases[12] decided before the *Stern* decision. In *United States v. Pay-O-Matic Corp.*,[13] the District Court for the Southern District of New York decided, on facts for all practical purposes indistinguishable from the instant case, that under New York law the attorney's lien was inchoate and, thus, the question was one of priority. The importance of this decision is academic today in the light of the *Stern* case since it is for the state to define the nature of property.[14]

The attorney's lien, a creature of statute in New York,[15] requires no express

9. N.Y. Gen. Constr. Law § 39 provides: "The term personal property includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, wholly or in part, and everything, except real property, which may be the subject of ownership." While a cause for certain actions may not be within the definition of a thing in action, courts have held that a cause of action is embraced in the broadest sense of that term. Bennett v. Bennett, 116 N.Y. 584, 23 N.E. 17 (1889). Accord, Wilson v. Aeolian Co., 64 App. Div. 337, 72 N.Y. Supp. 150 (2d Dep't 1901), aff'd, 170 N.Y. 618, 63 N.E. 1123 (1902). We may conclude that a cause of action, broadly considered as a thing in action, is property. However, the purpose of the General Construction Law is to define statutory terms used in the laws of New York. People v. New York Cent. & H.R.R., 156 N.Y. 570, 51 N.E. 312 (1898). It is questionable whether Congress intended that the provisions of the federal tax statutes be construed by the state according to definitions intended by the state legislature to prescribe state statutes. There is ample argument that the Stern case, supra note 2, should not be so loosely construed as to permit such a result. It is, perhaps, better to reason that the Stern Court decided in favor of state decisional law rather than statutory law.

10. Minch v. American Radiator Co., 263 App. Div. 573, 34 N.Y.S.2d 16 (4th Dep't), appeal granted, 264 App. Div. 828, 35 N.Y.S.2d 600 (4th Dep't), aff'd, 289 N.Y. 681, 45 N.E.2d 333 (1942). Accord, Citron v. Mangel Stores Corp., 50 N.Y.S.2d 416 (Sup. Ct.), aff'd, 268 App. Div. 905, 51 N.Y.S.2d 754 (1st Dep't), appeal denied, 268 App. Div. 978, 52 N.Y.S.2d 579 (1st Dep't 1944).

11. 53 Stat. 448 (1939), 26 U.S.C. § 3670 (1952). Indeed the United States hastened to assert that the condemnee's cause of action was property in order that the Government might have a basis for its lien.

12. United States v. Ball Constr. Co., 355 U.S. 587 (1958); United States v. Scovil, 348 U.S. 218 (1955); United States v. Acri, 348 U.S. 211 (1955); United States v. Hawkins, 228 F.2d 517 (9th Cir. 1955).

13. 162 F. Supp. 154 (S.D.N.Y.), aff'd sub nom. United States v. Goldstein, 256 F.2d 581 (2d Cir. 1958).

14. See note 5 supra.

15. N.Y. Judiciary Law § 475 provides: "From the commencement of an action, special

notice to bring it into existence.[16] The attorney's lien vests at the time the action is commenced.[17] The fact that recovery must await judgment does not render the lien inchoate. It merely affects the amount of recovery. The majority, using this approach, argued that the attorney's lien, being vested, is a cause of action in itself and, therefore, property.[18] Judge Fuld, relying in his dissent upon federal decisional law, contended that since there was no assurance of recovery the attorney's lien did not vest, and further, that it was erroneous to presume the attorney to be a purchaser within the ordinary meaning of the word where there was no vendor-vendee relationship.[19]

Clearly, in the light of *Stern* and of the famous *Erie R.R. v. Tompkins*[20] decision, federal "common law" is not determinative of matters of exclusive state jurisdiction. The statutory and case law of New York define property broadly as anything that may be the subject of ownership. However, it is questionable whether Congress intended to allow the individual states to proscribe the effective enforcement of liens for unpaid taxes. It is not unreasonable to assume that many of the state-created rights which heretofore had not taken the status of property will, in the future, be construed as property under local law so as to avoid the federal question of lien priority.

In the instant case the court held that the attorney had a property interest by virtue of his retainer contract. The question remains, in the absence of an express assignment in a retainer contract, whether a lien arising solely by virtue of section 475 of the Judiciary Law of New York will be construed as property. It would appear, in view of the present decision, that the court of appeals might be ready to classify the lien as property simply because it is vested.

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or other proceeding in any court . . . the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination."

16. At common law the lien of the attorney on the judgment secured by his client is in its inception merely an inchoate one, not ripening into an actual lien until the attorney asserts it and gives notice thereof to the judgment debtor. Jennings v. Bacon, 84 Iowa 403, 51 N.W. 15 (1892); Manning v. Leighton, 65 Vt. 84, 26 Atl. 258 (1892). Cf. Peri v. New York Cent. & H.R.R., 152 N.Y. 521, 46 N.E. 849 (1897).

However, an exception to the doctrine that no lien exists on the mere cause of action pertains to cases where the attorney has contracted with his client for a lien on the cause of action. Here the effect is as if the lien were one conferred by law. Carpenter v. Myers, 90 Mich. 209, 51 N.W. 206 (1892); Button's Estate v. Anderson, 112 Vt. 531, 28 A.2d 404 (1942).

17. See note 15 supra.

18. 5 N.Y.2d at 307, 157 N.E.2d at 590-91, 184 N.Y.S.2d at 590.

19. 5 N.Y.2d at 315-16, 157 N.E.2d at 595-96, 184 N.Y.S.2d at 597-98 (Fuld, J., dissenting).

20. 304 U.S. 64 (1937).