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Case Notes

CASE NOTES

Arbitration and Award—Corporation Directed Specifically To Perform Personal Service Contract.—Defendant corporation retained petitioner as manager of production and engineering.[1] Pursuant to the arbitration provision of the employment contract,[2] a dispute[3] as to petitioner's permanent disability and the resulting termination of his services[4] was submitted to arbitrators who found in favor of the petitioner and ordered his reinstatement by specific performance[5] of the contract. The appellate division,[6] affirming the supreme court,[7] confirmed the award and denied defendant's cross-motion to vacate. The New York Court of Appeals, two judges dissenting, one concurring and one not taking part in the determination, affirmed.[8] The award directing specific performance of the employment contract was valid notwithstanding the claim that it violated settled principles of equity,[9] and that it was against

1. The petitioner and defendant corporation in 1954 entered into an eleven year contract employing the petitioner at an annual salary of $40,000. The petitioner was also former president of the defendant corporation, and at the time of the litigation he was the largest single shareholder.

2. The employment agreement provided that if the petitioner was unable to substantially attend to his duties for a period of three months, the board of directors should meet at the expiration of such period to determine whether the disability is permanent or temporary. If the petitioner should be declared permanently disabled, he would receive reduced compensation for the next three years, and then the contract would end. Staklinski v. Pyramid Elec. Co., 10 Misc. 2d 706, 707-08, 172 N.Y.S.2d 224, 226 (Sup. Ct. 1958).

3. The disputes were to be settled in accordance with American Arbitration Association rules. Section 42 of these rules authorized specific performance and provided that "the arbitrator may grant any remedy or relief which he deems just and equitable and within the scope of the agreement of the parties, including but not limited to specific performance of a contract."

4. The board of directors had made the determination that the petitioner was permanently disabled, and his services should be terminated. There was testimony before the arbitrators indicating that a leave of absence obtained by the petitioner in January, 1956, was not for reasons of health, but policy differences between the petitioner and the corporation's president. 10 Misc. 2d at 708-09, 172 N.Y.S.2d at 226-27. As a result of the award the petitioner, a high executive, will be reinstated to a position of great discretion and confidence, a position in which the petitioner's judgment and policies must either harmonize with the board of directors or ruin the corporation.

5. Judge Froessel, in a concurring opinion, interpreted the arbitration award as not directing specific performance. Staklinski v. Pyramid Elec. Co., 6 N.Y.2d 159, 164, 160 N.E.2d 78, 80, 188 N.Y.S.2d 541, 543 (1959).

6. Staklinski v. Pyramid Elec. Co., 6 App. Div. 2d 565, 180 N.Y.S.2d 20 (1st Dep't 1958) (3-to-2 decision).

7. Staklinski v. Pyramid Elec. Co., 10 Misc. 2d 706, 172 N.Y.S.2d 224 (Sup. Ct. 1958).

8. Burke and Van Voorhis, JJ., dissented; Froessel, J., concurred. Chief Judge Conway took no part.

9. Equity will not grant specific performance of personal service contracts. Clyatt v. United States, 197 U.S. 207 (1905); Marble Co. v. Ripley, 77 U.S. (10 Wall.) 399 (1870);

public policy to compel a corporation to continue to employ an officer whose services were unsatisfactory to the directors.[10] *Staklinski v. Pyramid Elec. Co.*, 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1959).

Although arbitration as a form of settling controversies is an ancient practice,[11] it was not until 1920, when New York passed the first arbitration law,[12] that agreements to submit future controversies to arbitration became enforceable.[13] Under the present statutory scheme,[14] the New York courts must confirm[15] the arbitration award unless it is vacated,[16] modified[17] or corrected[18] on the prescribed grounds. Thus, it is said, that if the arbitrator has not exceeded his authority under the parties' agreement,[19] and is not guilty of fraud, corruption or other misconduct affecting his award, his determination is unassailable and cannot be set aside for mere errors of judgment, either as

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Bethlehem Eng'r Export Corp. v. Christie, 26 F. Supp. 121 (S.D.N.Y.), aff'd, 105 F.2d 933 (2d Cir. 1939).

10. N.Y. Gen. Corp. Laws § 27 bestows on directors the power to control and manage the business of a corporation. N.Y. Stock Corp. Laws § 60 bestows on directors the power to remove managerial personnel at their pleasure.

11. Jones, Three Centuries of Commercial Arbitration in New York: A Brief Survey, 1956 Wash. U.L.Q. 193. At common law an agreement to submit an existing dispute to arbitration was enforceable. Webster v. Van Allen, 217 App. Div. 219, 216 N.Y. Supp. 552 (4th Dep't 1926). However, any agreement at common law to submit future disputes to arbitration was not enforceable. The Anaconda v. American Sugar Ref. Co., 322 U.S. 42 (1944); Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924); Feuer Transp., Inc. v. International Bhd. of Teamsters, 295 N.Y. 87, 65 N.E.2d 178 (1946).

12. N.Y. Sess. Laws 1920, ch. 275, §§ 1-10.

13. Other states which have generally followed the New York Arbitration Law of 1920 include Arizona, California, Connecticut, Louisiana, Massachusetts, Michigan, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, Washington and Wisconsin. See Kellor, Arbitration and The Legal Profession 38-39 (1952); Jones, The Nature of the Court's "Jurisdiction" in Statutory Arbitration Post-Award Motions, 46 Calif. L. Rev. 411 (1958). Arbitration statutes of 47 states, the District of Columbia and the Federal Act are cited in 7 Arb. J. (n.s.) 182 (1952). See also a brief summary of the statutes governing arbitration prepared by Dean Sturges in Kellor, Arbitration in Action 217 (1941).

14. In 1937 the provisions of the 1920 Arbitration Law were transferred by N.Y. Sess. Laws 1937, ch. 341, to the Civil Practice Act which presently covers the entire subject in detail. N.Y. Civ. Prac. Act § 1449 (Supp. 1959) requires that a contract to arbitrate a controversy arising in the future must be in writing. N.Y. Civ. Prac. Act § 1450 (Supp. 1959) allows either party to petition the supreme court to compel arbitration as provided for in the contract. N.Y. Civ. Prac. Act § 1452 provides that the supreme court may appoint arbitrators should one of the parties refuse to do so.

15. N.Y. Civ. Prac. Act § 1461 (Supp. 1959).

16. N.Y. Civ. Prac. Act § 1462 (Supp. 1959).

17. N.Y. Civ. Prac. Act § 1462-a.

18. Ibid.

19. The authority of the arbitrator is coextensive with the terms of the parties' agreement. Transport Workers Union v. Fifth Ave. Coach Co., 187 Misc. 247, 63 N.Y.S.2d 657 (Sup. Ct. 1946); 3 Am. Jur. Arbitration and Award § 85 (1936).

to law or as to facts.[20] The New York courts, however, have qualified this rule by refusing to enforce an award[21] or an agreement to arbitrate[22] if based on an illegal contract or if violative of public policy.

On only three occasions, prior to the present case, have courts been confronted with the problem of confirming or vacating an arbitration award which conflicted with some principle of public policy. In *Western Union Tel. Co. v. American Communications Ass'n*[23] arbitrators found that a collective bargaining agreement had not been breached by the defendant labor union. The court of appeals vacated the award since it sanctioned a refusal to deliver messages and, thereby, violated public policy as expressed in the New York Penal Law.[24] In *Publishers' Ass'n v. Newspaper Union*[25] the appellate division

20. Wilkins v. Allen, 169 N.Y. 494, 62 N.E. 575 (1902); Spectrum Fabrics Corp. v. Main St. Fashions, Inc., 285 App. Div. 710, 139 N.Y.S.2d 612 (1st Dep't), aff'd mem., 309 N.Y. 709, 128 N.E.2d 416 (1955).

21. Ruppert v. Egelhofer, 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958) (award confirmed notwithstanding existence of an opposing public policy); Western Union Tel. Co. v. American Communications Ass'n, 299 N.Y. 177, 86 N.E.2d 162 (1949) (alternative holding) (award directing reinstatement of employees vacated as it violated Penal Law); Publishers' Ass'n v. Newspaper Union, 280 App. Div. 500, 114 N.Y.S.2d 401 (1st Dep't 1952) (part of award granting punitive damages for breach of contract set aside).

22. Kramer & Uchitelle, Inc. v. Eddington Fabrics Corp., 288 N.Y. 467, 43 N.E.2d 493 (1942) (arbitration stayed where provision in agreement violated Price Control Administration); Abbey v. Meyerson, 274 App. Div. 389, 83 N.Y.S.2d 503 (1st Dep't 1948) (arbitration provision depriving directors of powers and functions against public policy and unenforceable); Harold Levinsohn Corp. v. Cloak Union, 273 App. Div. 469, 78 N.Y.S.2d 171 (1st Dep't 1948), rev'd on other grounds, 299 N.Y. 454, 87 N.E.2d 510 (1949) (arbitration stayed where agreement to arbitrate violated National Labor Relations Act); Sanders v. M. Lowenstein & Sons, Inc., 264 App. Div. 367, 35 N.Y.S.2d 591 (1st Dep't), aff'd mem., 289 N.Y. 702, 45 N.E.2d 457 (1942) (arbitration stayed where agreement violated Price Control Administration); Metro Plan, Inc. v. Miscione, 257 App. Div. 652, 15 N.Y.S.2d 35 (1st Dep't 1939) (alternative holding) (where contract is usurious, arbitration provisions fail); Pfeiffer v. Berke, 4 Misc. 2d 918, 121 N.Y.S.2d 774 (Sup. Ct. 1953) (agreement to arbitrate issues arising in a shareholder's derivative suit unenforceable as against public policy). See Kingswood Management Corp. v. Salzman, 272 App. Div. 328, 70 N.Y.S.2d 692 (1st Dep't 1947) (statutory remedy excludes remedy by arbitration); Hammerstein v. Shubert, 127 N.Y.S.2d 249 (Sup. Ct. 1953) (statute of limitations controlled arbitration agreement). See also Michelman v. Michelman, 5 Misc. 2d 570, 135 N.Y.S.2d 608 (Sup. Ct. 1954) (motion to compel arbitration denied where controversy arose with respect to right to visit child); Hill v. Hill, 199 Misc. 1035, 104 N.Y.S.2d 755 (Sup. Ct. 1951) (arbitration provision for child's custody and visitation privileges in separation agreement failed); Robinson v. Robinson, 186 Misc. 974, 618 N.Y.S.2d 859 (Sup. Ct. 1945), rev'd, 271 App. Div. 98, 62 N.Y.S.2d 785 (1st Dep't), reargument denied, 270 App. Div. 1014, 63 N.Y.S.2d 831 (1st Dep't 1946), aff'd mem., 296 N.Y. 778, 71 N.E.2d 214 (1947) (arbitration with respect to maintenance and support not allowed).

23. 299 N.Y. 177, 86 N.E.2d 162 (1949) (alternative holding) (4-to-3 decision).

24. N.Y. Pen. Laws §§ 522(2), 1423(6), (9). These sections forbid telegraph employees, while they occupy their positions, to wilfully refuse to transmit telegrams.

25. 280 App. Div. 500, 114 N.Y.S.2d 401 (1st Dep't 1952).

vacated part of an award which granted punitive damages[26] for violation of a collective bargaining agreement. The court held arbitration awards to be within the rule that contractual provisions for punitive damages are against public policy and as such unenforceable. The court of appeals, in *Ruppert v. Egelhofer*,[27] upheld an arbitrator's award granting an injunction ordering a union officer to take the necessary steps to end slowdowns notwithstanding the existence of an opposing public policy under the Civil Practice Act which precludes a court, except under prescribed conditions, from issuing "any restraining order or a temporary or permanent injunction in any case involving or growing out of a labor dispute."[28] Although there had been no compliance with the statute, the court affirmed the arbitration award, stating that since the collective bargaining agreement contained a provision calling for "speedy arbitration," nothing short of an injunction would have accomplished the evident intent of the parties.[29] The court noted that "Section 876-a and article 84 (Arbitration) are both in our Civil Practice Act. Each represents a separate public policy and by affirming here we harmonize those two policies."[30]

In the instant case two arguments were advanced to set aside the arbitrator's award: first, that the award was against the public policy which bestowed on directors the power to control the business of a corporation and the power to remove managerial personnel;[31] and second, that the award violated the rule of equity that personal service contracts will not be specifically enforced.[32]

26. Other New York cases have allowed enforcement of awards containing what seemed to be punitive damages by characterizing them as compensatory. See, e.g., East India Trading Co. v. Halari, 280 App. Div. 420, 114 N.Y.S.2d 93 (1st Dep't 1952).

27. 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958).

28. N.Y. Civ. Prac. Act § 876-a. By this section, sometimes called the "Little Norris-LaGuardia Act," the power of New York courts to enjoin strikes and other similar forms of concerted activity is greatly limited.

29. 3 N.Y.2d at 581, 148 N.E.2d at 130, 170 N.Y.S.2d at 787.

30. Id. at 582, 148 N.E.2d at 131, 170 N.Y.S.2d at 788. See also Wholesale Laundry Bd. of Trade v. Tarrullo, 103 N.Y.S.2d 23 (Sup. Ct. 1951). "Concededly, Sec. 876-a C.P.A. is expressive of profound public policy. That policy, however, is not so commanding as to override the public policy underlying Article 84, C.P.A." Id. at 29.

31. See note 10 supra.

32. See note 9 supra. The principal case was the first of its kind in New York; the New York courts had never decided whether arbitrators could grant specific performance of an employment contract. This is true despite the decision in Freydberg Bros. v. Corey, 177 Misc. 560, 31 N.Y.S.2d 10 (Sup. Ct. 1941), aff'd, 263 App. Div. 805, 32 N.Y.S.2d 129 (1st Dep't), reargument denied, 263 App. Div. 858, 32 N.Y.S.2d 783 (1st Dep't 1942), which has often been cited as upholding the affirmance of an arbitration award granting specific performance of an employment contract. The appellate division in its opinion in the instant case cited this decision as authority for granting the relief. In the Freydberg case, supra, a salesman sought arbitration of the claim that a corporation had breached its contract of employment. Special term denied a motion to stay arbitration; the result merely was that the salesman's proposal to seek reinstatement from the arbitrators was not a ground for halting the proceeding at its threshold. The appellate division made a similar point in relation to prearbitration motions to compel and stay in Carey v.

Judge Desmond, speaking also for Judges Dye and Fuld, reasoned that since the long term employment contract was valid,[33] so must be the arbitration award based thereon.[34] The majority, relying on *Ruppert*, summarily dismissed the contention that the award should be vacated since it offended the principle of equity which prohibits the granting of specific performance of personal service contracts. The *Ruppert* decision has only a surface similarity to the present case.[35] In the former, the court upheld an arbitration award granting relief which could not have been given originally by the court.[36] There, however, the only obstacle to direct judicial action was certain procedural requirements of the Civil Practice Act.[37] In the principal case the court could under no circumstances grant the relief sought since equity will not grant specific performance of personal service contracts. *Ruppert*, moreover, involved a

Westinghouse Elec. Corp., 6 App. Div. 2d 582, 180 N.Y.S.2d 203 (1st Dep't 1958). The court on a motion to compel or stay arbitration can only consider the validity of the arbitration agreement and not the possible validity or invalidity of an award based on such an agreement. Id. at 583-84, 180 N.Y.S.2d at 205.

33. The issue was not raised as to the validity of the employment contract from the standpoint of its duration. Longterm employment contracts hiring officers and employees beyond the term of the board of directors have been held invalid. See, e.g., Heaman v. E. N. Rowell Co., 261 N.Y. 229, 185 N.E. 83 (1933). Contra, Realty Acceptance Corp. v. Montgomery, 51 F.2d 636 (3d Cir. 1930), wherein an employment contract hiring a man as president for five years was valid and not against public policy. The court relied on the officer's familiarity with the corporation's business in reaching its decision. In the instant case the petitioner was also familiar with the operation of the corporation, having had experience as president and manager in charge of production and engineering. It would seem, therefore, that the eleven year employment contract in the principal case is also valid.

34. As a result of the award of specific performance, the defendant corporation and its directors can no longer terminate the petitioner's services without cause and pay damages for the breach of the contract. Would this be violative of N.Y. Stock Corp. Laws § 60, which gives the directors the power to remove corporate officers at their pleasure and without cause in the absence of a valid contract that the officers are not to be removed except for cause? See In the Matter of Stylemaster Dep't Store, Inc., 7 Misc. 2d 207, 154 N.Y.S.2d 58 (Sup. Ct. 1956); In re Roosevelt Leather Hand Bag Co., 68 N.Y.S.2d 735 (Sup. Ct. 1947). Assuming a violation of this public policy in the form of a statute, however, the question would still be whether it is sufficient to override the public policy in favor of arbitration.

It should be noted that the petitioner must still perform his part of the employment contract and, if he should fail to do so, the decree may be vacated and the petitioner discharged. See Cincinnati Exhibition Co. v. Marsans, 216 Fed. 269 (E.D. Mo. 1914).

35. The supreme court in deciding the instant case stated that the result was undesirable but that under the reasoning of Ruppert v. Egelhofer, 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1959), such a result was required. 10 Misc. 2d at 711-12, 172 N.Y.S.2d at 228-29.

36. But see Publishers' Ass'n v. Newspaper Union, 280 App. Div. 500, 114 N.Y.S.2d 401 (1st Dep't 1952). "The court will not lend its power to the enforcement of the kind of a decision in arbitration which it would neither allow nor enforce as the subject of an action maintained before it directly." Id. at 507, 114 N.Y.S.2d at 407.

37. N.Y. Civ. Prac. Act § 876-a.

collective bargaining agreement which has been said to "[differ] as much from the common contract as Humpty Dumpty differs from a common egg."[38] The difference is a very basic one. New York courts will grant specific performance of collective bargaining agreements,[39] but not of an individual personal service contract. This distinction was readily recognized in the leading New York case of *Schlesinger v. Quinto*.[40] By abandoning the distinction the court is allowing private parties to enlarge its equitable jurisdiction. It would also seem that under the agreement in the immediate case the corporation itself could seek specific performance against the employee, a result which is at odds with the thirteenth amendment to the United States Constitution.[41]

Equity's emphatic denial of specific performance of personal service contracts is postulated upon the adequacy of a remedy at law,[42] the difficulty of supervision[43] and the repugnance of involuntary servitude.[44] In the principal case the remedy of damages at law is clearly adequate, and there seems to be no valid reason for violating such a well established principle[45] simply because

38. Summers, Judicial Review of Labor Arbitration, or Alice Through The Looking Glass, 2 Buffalo L. Rev. 1, 17 (1952). "The failure of the courts to see and remember the difference causes confusion and leads them to blunder." Id. at 17-18.

39. J. I. Case Co. v. NLRB, 321 U.S. 332 (1944) (collective bargaining agreement not a contract of employment); Goldman v. Cohen, 222 App. Div. 631, 227 N.Y. Supp. 311 (1st Dep't 1928); Schlesinger v. Quinto, 201 App. Div. 487, 194 N.Y. Supp. 401 (1st Dep't 1922). The courts will similarly uphold specific performance of arbitration awards made under collective bargaining agreements. Ruppert v. Egelhofer, 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958); United Culinary Employees v. Schiffman, 272 App. Div. 491, 71 N.Y.S.2d 160 (1st Dep't 1947), modified mem., 299 N.Y. 577, 86 N.E.2d 104 (1949) (reinstatement of counterman and dishwasher); Devery v. Daniels & Kennedy, Inc., 266 App. Div. 213, 41 N.Y.S.2d 293 (1st Dep't 1943), aff'd mem., 292 N.Y. 596, 55 N.E.2d 370 (1944) (reinstatement of truck driver); Atlantic Basin Iron Works, Inc. v. Industrial Union of Marine and Shipbuilding Workers, 59 N.Y.S.2d 662 (Sup. Ct. 1945) (reinstatement of employee). See Samuel Adler, Inc. v. Local 584, International Bhd. of Teamsters, 282 App. Div. 142, 122 N.Y.S.2d 8 (1st Dep't 1953) (proceeding to vacate award reinstating a discharged driver).

40. 201 App. Div. 487, 194 N.Y. Supp. 401 (1st Dep't 1942). The court distinguished the ordinary cases of contracts for personal services: "The instant case does not arise out of contract for individual employment. Two organizations, one composed of employers and the other of employees, have entered into an agreement." Id. at 498-99, 194 N.Y. Supp. at 410.

41. This amendment prohibits involuntary servitude.

42. Bethlehem Eng'r Export Corp. v. Christie, 26 F. Supp. 121 (S.D.N.Y.), aff'd, 105 F.2d 933 (2d Cir. 1939); McMenamin v. Philadelphia Transp. Co., 356 Pa. 88, 51 A.2d 702 (1947).

43. Marble Co. v. Ripley, 77 U.S. (10 Wall.) 339 (1870); Standard Fashion Co. v. Siegel-Cooper Co., 157 N.Y. 60, 51 N.E. 408 (1898); Beck v. Allison, 56 N.Y. 366 (1874); Stern v. Freeport Acres, Inc., 107 N.Y.S.2d 810 (Sup. Ct. 1951); Restatement, Contracts § 379, comment d (1932).

44. Clyatt v. United States, 197 U.S. 207 (1905); Boyer v. Western Union Tel. Co., 124 Fed. 246 (E.D. Mo. 1903). See Stevens, Involuntary Servitude by Injunction, 6 Cornell L.Q. 235, 244-45 (1921).

45. It is suggested that the result of the principal case can be effectively avoided by

the relief granted is in the form of an arbitration award.[46] Heretofore, the New York courts have refused to enforce an award or an agreement to arbitrate if violative of public policy.[47] This limitation on the general rule that arbitrators are not bound by substantive law seems to be basically sound and urgently necessary. The courts should not be a mere ministerial adjunct which faithfully rubber stamps the awards of arbitrators.

Curiously, there was no necessity to determine the issue decided by the majority. The more discerning opinion of Judge Froessel avoided the problems which the majority felt compelled to decide by interpreting the award[48] as not directing specific performance but only as determining that the petitioner was not permanently disabled. Accordingly, he reasoned that by affirming the award, the corporation was not compelled to retain the petitioner in any event under the force of an equitable decree,[49] but that "the board of directors of the corporation may discharge petitioner for good cause and any discharge without good cause will be at the peril of damages."[50] While prior New York decisions have always construed such arbitration awards as directing specific performance, those decisions are readily distinguishable from the present case

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the insertion in the contract of a provision negating the power of the arbitrators to grant specific performance.

46. Some courts retain their equitable jurisdiction and hold that the general rules applicable to specific performance of contracts apply equally to specific performance of arbitration awards. United Fuel Gas Co. v. Columbian Fuel Corp., 165 F.2d 746 (4th Cir. 1948); Industrial Trades Union v. Dunn Worsted Mills, 131 F. Supp. 945 (D.R.I. 1955); Levy v. Superior Court, 15 Cal. 2d 692, 104 P.2d 770 (1940); Ringling v. Ringling Bros., 29 Del. Ch. 318, 49 A.2d 603 (Ch. 1946), modified, 29 Del. Ch. 610, 53 A.2d 441 (Sup. Ct. 1947); Myer v. Gray, 188 Iowa 373, 176 N.W. 258 (1920); Goldstein v. International Ladies' Garment Workers' Union, 328 Pa. 385, 196 Atl. 43 (1938). The California Supreme Court, considering a provision in its arbitration act which excluded contracts pertaining to labor said: "There was undoubtedly a basic reason for excluding labor agreements. A contract to perform labor is not specifically enforceable. . . . The same considerations pertaining to the personal relations between employer and employee would indicate that contracts between them should not be subject to the provisions of the arbitration title in the Code of Civil Procedure." Levy v. Superior Court, 15 Cal. 2d 692, 696, 104 P.2d 770, 774 (1940).

47. It is suggested that a particular judicial policy as well as a particular public policy may be of such urgency as to demand vacation of an award or stay of arbitration proceedings. See Notes 23 & 24 supra and accompanying text where the public policy vacating the award was also a strong judicial policy.

48. The award of the arbitrators stated: "[T]he . . . arbitrators direct that the Respondent . . . restore and reinstate Staklinski as manager . . . in accord with the terms of the employment agreement . . . ." Record, p. 36.

49. It should be noted that Judge Froessel's interpretation avoided the problem of enforcement. Would the majority enforce the award by contempt proceedings?

50. 6 N.Y.2d at 164, 160 N.E.2d at 80, 188 N.Y.S.2d at 543. Although Judge Froessel concurred in affirming the award, it is difficult to see how his opinion can really be called concurring since it is so diametrically opposed to that of the majority. It would seem to be more in accord with the opinion of the minority. An interesting problem could possibly arise if enforcement of the decree of specific performance became necessary. With whom would Judge Froessel then concur?

since they involved collective bargaining agreements.[51] In a collective bargaining contract such an interpretation does not present any problem since the courts have always allowed specific performance of such contracts.[52] Here, however, an interpretation of the award as directing specific performance leaves the court with a conflicting problem of confirming an award of arbitration ordering specific performance of a personal service contract. Either arbitration or equity must suffer; both cannot prevail under the majority's interpretation. It would seem, therefore, that Judge Froessel's construction is a logical solution under which both the arbitrator's authority and equity's jurisdiction remain undisturbed.[53]

Constitutional Law—Authority of Secretary of State To Determine Standards for Issuance of Passports.—Appellant's application for renewal of his passport was refused by the Secretary of State because appellant declined to agree to abide by restrictions against travel in certain communist controlled countries. The Secretary took this action also because appellant, a newspaperman, had violated similiar restrictions in his former passport. The United States District Court for the District of Columbia rendered judgment for the Secretary. The court of appeals affirmed. The power of the executive to designate certain areas of the world as forbidden to American travelers falls within the power to conduct foreign affairs. The Secretary of State, acting on behalf of the President, has statutory authority to deny a passport in such a case. *Worthy v. Herter,* 270 F.2d 905 (D.C. Cir.), *cert. denied,* 361 U.S. 918 (1959).

In recent years the passport has become more than a document of identity and nationality or a badge of protection for the foreign traveler.[1] It has become a requisite for travel abroad, and a citizen who travels outside the contiguous areas of the United States without one is guilty of a crime.[2] The authority to issue passports is vested by statute in the Secretary of State subject to the rules and regulations the President may from time to time prescribe.[3] Relying

51. See note 39 supra.

52. See note 40 supra and accompanying text.

53. There is some evidence of a trend following the reasoning of the majority in the instant case. Simon v. Vogel, 9 App. Div. 2d 63, 191 N.Y.S.2d 248 (1st Dep't 1959) (specific performance of a partnership agreement); Grayson-Robinson Stores, Inc. v. Iris Constr. Co., 7 App. Div. 2d 367, 183 N.Y.S.2d 695 (1st Dep't 1959) (specific performance of a building contract); Astey v. Smith, 189 N.Y.S.2d 2 (Sup. Ct. 1959) (award providing for stock options).

1. See generally 3 Hackworth, Digest of International Law 435 (1952).

2. See Immigration and Nationality Act § 215, 66 Stat. 190 (1952), 8 U.S.C. § 1185 (1958). See also Proc. No. 3004, 18 Fed. Reg. 489 (1953). There are still a few countries where passports are not required by the United States nor by the country entered. Even if the United States were to allow global travel without a passport, it would still be a necessity since most foreign countries require one.

3. Passport Regulation Act, 44 Stat. 887 (1926), 22 U.S.C. § 211(a) (1958). See Im-

on the broad language of the statutory grant and the inherent power of the executive over foreign affairs, the Secretary has consistently maintained that the issuance of passports is a matter wholly within his discretion. This claim went almost unchallenged in the courts and without criticism from textwriters[4] until February, 1951, when the Secretary denied a passport without a hearing on the ground that the issuance was not in the "best interests" of the United States.[5] Prior to 1951 passports had been denied for a variety of reasons, usually affecting particular individuals rather than a representative group of people. Denial was based on conduct and character, prior convictions of crime, unlawful activities and detrimental participation in the politics of friendly foreign governments.[6] The Secretary's "best interests" refusals, however, precipitated a great deal of comment. At first the courts put procedural limitations on the Secretary's authority.[7] Then, in *Shachtman v. Dulles*,[8] the court came to grips with the Secretary's substantive authority. Appellant had received a "best interests" refusal on the ground that he was a member of a subversive organization, a basis not set forth in the regulations. The court emphasized that a passport was no longer a purely political document allied to the conduct of foreign affairs, and that, while the executive responsibility in this area must be given due regard, there cannot be a deprivation of liberty without a reasonable relation to the conduct of foreign affairs. Since the unanswered complaint alleged that the organization was erroneously listed as subversive, and inasmuch as this ground did not bring the appellant within existing regulations for passport denial, the court found that the refusal was not related to foreign affairs on the level which is beyond the power of the courts to review. The

migration and Nationality Act § 215(b), 66 Stat. 190 (1952), 8 U.S.C. § 1185(b) (1958). The authority of the President is exercised through Exec. Order No. 7856, 3 Fed. Reg. 799 (1938). See also Act of Aug. 18, 1856, ch. 127, 11 Stat. 52. See generally 3 Hackworth, Digest of International Law 467-68 (1952).

4. See, e.g., Bodin, The Constitutional Right to Travel, 56 Colum. L. Rev. 47 (1956); Parker, The Right to Go Abroad: To Have and To Hold a Passport, 40 Va. L. Rev. 853 (1954). The only significant prewar test was in Perkins v. Elg, 307 U.S. 325 (1939), where the Court disallowed a refusal on the ground that Miss Elg had lost her American citizenship. It is interesting to note the cases of Edwards v. California, 314 U.S. 160 (1941); Williams v. Fears, 179 U.S. 270 (1900); and Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867), which, although they dealt with interstate travel restrictions, reflect a philosophy of basic rights which could readily apply to foreign travel.

5. N.Y. Times, May 25, 1952, p. 29, col. 3-4 (statement by the State Department, authorized by then Secretary Acheson).

6. See 3 Hackworth, Digest of International Law 266 (1952).

7. Bauer v. Acheson, 106 F. Supp. 445 (D.D.C. 1952) (the Secretary was required to give notice and an opportunity to be heard). In Dayton v. Dulles, 237 F.2d 43 (D.C. Cir. 1956) (per curiam), it was held that the appellant must be factually shown to be in the class denied passports. Subsequently, the plaintiff prevailed. Dayton v. Dulles, 357 U.S. 144 (1958), reversing 254 F.2d 71 (1957), which had affirmed 146 F. Supp. 876 (1956). See also Kraus v. Dulles, 235 F.2d 840 (D.C. Cir. 1956); Nathan v. Dulles, 129 F. Supp. 951 (D.D.C. 1955) (informal investigations and meetings did not satisfy the hearing requirement).

8. 225 F.2d 938 (D.C. Cir. 1955).

culmination of subsequent attacks on the Secretary's broad authority came in 1958 when the Supreme Court, in *Kent v. Dulles*,[9] actually limited the authority to establish the substantive standards for the issuance of passports. Emphasis was placed on the fact that the freedom to travel was a constitutional right, and that the delegated powers curtailing it must be narrowly construed. The Court found that the congressional grant to the Secretary did not authorize him to deny a passport on the basis of individual beliefs and associations.

The instant case afforded a fact situation to test the scope of the *Kent* decision. Is an express statutory grant necessary for the Secretary to restrict travel on a basis other than personal beliefs? This court answered the question in the negative. In a multipoint decision, the court at the outset distinguished the facts from those in *Kent*,[10] giving two grounds for its position. First, the right to restrict passports is part of the President's constitutionally derived foreign affairs power. That power the President has delegated to the Secretary, and his action is not reviewable by the courts.[11] Inasmuch as the designation of certain areas as trouble spots[12] and the extrication of Americans from difficulties abroad involves the conduct of foreign affairs,[13] the denial of a passport to travel in such areas is also a part of the conduct of foreign affairs. Secondly, if the power to act rests upon statutes, the Secretary had such power. The court pointed to the very statutes which *Kent* held should be narrowly construed.[14] The withholding of a passport was deemed justified because "there is a grave, clear and present danger . . . [but] the courts are the least able of all organs of government to make such evaluations, and they are wholly without authority to make them."[15]

In past years the Secretary has relied heavily on this "foreign affairs" argument, but since the case of *Bauer v. Acheson*,[16] and the procedural limitation of the Secretary's power, it has lost most of its old vigor. Passport issuance does not fit the description of a foreign affair given in *Marbury v. Madison*.[17] "The subjects are political: They respect the nation and not individual

9. 357 U.S. 116 (1958). See Note, 27 Fordham L. Rev. 426 (1958).

10. Worthy v. Herter, 270 F.2d 905, 907 (1959).

11. Id. at 910-11.

12. Rev. Stat. § 2001 (1875), 22 U.S.C. § 1732 (1958).

13. 270 F.2d at 910.

14. Those statutes are: Immigration and Nationality Act § 215, 66 Stat. 190 (1952), 8 U.S.C. § 1185 (1958); Passport Regulation Act § 1, 44 Stat. 887 (1926), 22 U.S.C. § 211(a) (1958). See Kent v. Dulles, 357 U.S. 116, 129 (1958).

15. 270 F.2d at 913.

16. 106 F. Supp. 445 (D.D.C. 1952). In the past the Secretary had relied on Chicago & So. Airlines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948); and United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). Doman, Do Citizens Have the Right to Travel, 43 A.B.A.J. 307, 309 (1957), where the author notes that the "Secretary of State has pleaded in vain . . . that the issuance or denial of passports is in the field of conducting foreign policy. . . . [T]he courts seem to be more impressed with the importance of the citizen's constitutional right to travel than with the foreign policy aspects of the issue."

17. 5 U.S. (1 Cranch) 137 (1803).

rights."[18] A passport is a means of control over a citizen's freedom of movement, and hence affects the individual directly, indeed, more intimately than the ordinary conduct of foreign affairs.[19] Whether or not the issuance of a passport is part of the conduct of foreign affairs, it is generally agreed that the courts have some measure of review and control over arbitrary executive action and are not at all reluctant to enter that delicate area.[20]

In finding sufficient authority in the existing statutes for the Secretary's denial in the present case, Judge Prettyman limited sharply the scope of the *Kent* decision. The Supreme Court had emphasized that in order to restrict travel a congressional grant was necessary, and any such grant would be narrowly construed. Speaking about the same statutes which this court deems as the source of the Secretary's power, the Supreme Court stated that "we hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen."[21] *Kent* was properly understood to mean that a specific statement by Congress of the particular grounds for the denial of a passport is necessary.[22] The decision, however, created a gap in our national defense by allowing communists to travel freely, unhampered by any check on their activities.[23] The instant decision although inconsistent with the rationale of *Kent,* is a welcome limitation of what promised to be a dangerous doctrine. It will help to prevent undesirable individuals, communist or otherwise, from entering restricted areas and igniting a conflagration between the antagonistic forces in the world which the court described as "susceptible of erupting into a fatal cataclysm."[24] Judge Prettyman's exposition of the restricted nature of freedom is worth a careful reading, and demonstrates that the Secretary's

18. Id. at 166.

19. In Shachtman v. Dulles, 225 F.2d 938, 944 (D.C. Cir. 1955), the court said that "even though his application might be said to have come within the scope of foreign affairs in the broad sense, it is also within the scope of the due process clause . . . ." In Bauer v. Acheson, 106 F. Supp. 445, 452 (D.D.C. 1952), it was stated that "this court is not willing to subscribe to the view that executive power includes any absolute discretion which may encroach on the individual's constitutional rights. . . ."

20. Perkins v. Elg, 307 U.S. 325 (1939); Shachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955). See Carrington, Political Questions: The Judicial Check on the Executive, 42 Va. L. Rev. 175 (1956).

21. 357 U.S. at 129.

22. That it was so understood is clear from the language of the President's request for remedial legislation. "[T]he Secretary should have clear statutory authority to prevent Americans from using a passport for travel to areas where there is no means of protecting them. . . ." H.R. Doc. No. 417, 85th Cong., 2d Sess. 20011 (1958). Passport refusals based on nonallegiance have received congressional adoption. Rev. Stat. § 4076 (1875), 22 U.S.C. § 212 (1958).

23. See Cohn & Bolan, The Supreme Court and the A.B.A. Report and Resolutions, 28 Fordham L. Rev. 233, 282 (1959), quoting John W. Hanes, Jr., Internal Security Administrator, to the effect that "[Kent v. Dulles] is a gap in our defense which our enemies have not been slow to take advantage of. Since the Supreme Court decision in June 1958, many leading Communists have been able to travel to the Soviet Union because of the easing of restrictions in the issuance of American passports."

24. 270 F.2d at 910.

action in this matter does not unduly restrict the individual's rights but merely subordinates them "for the sake of good order in the Community."[25]

This case has neither clarified nor settled the question of how to achieve the delicate balance that must be maintained between the legitimate interests of the Government in foreign policy, national defense and security, and the individual's freedom to travel. The decision is merely another ill-fitting piece in the passport puzzle for which the President urged a congressional solution.[26] It is interesting to note that the most recent legislative development, upon which Congress has not yet acted, prescribes among the grounds for passport denial the very ground sanctioned by the court in the present case.[27]

Constitutional Law—Jurisdiction of Court-Martial Over Civilians in Peacetime.—Petitioner, the wife of a serviceman stationed in Germany, was convicted by a general court-martial of involuntary manslaughter.[1] Petitioner's motion challenging the jurisdiction of the court-martial was denied. The conviction was upheld by the United States Court of Military Appeals. Appellee, petitioner's mother, obtained her daughter's discharge from custody by a writ of habeas corpus from the federal district court.[2] The Government appealed. The Supreme Court, two Justices dissenting, affirmed. A wife of a serviceman is not subject to court-martial in peacetime even for a noncapital offense committed while accompanying her husband on duty overseas. *Kinsella v. United States ex rel. Singleton,* 361 U.S. 234 (1960).

On the same day the Court announced, as detailed in this note, *Grisham v. Hagan,*[3] and the companion cases of *McElroy v. United States ex rel. Guagliardo* and *Wilson v. Bohlender.*[4] The former decision declared that civilian employees of the armed forces overseas cannot be tried by court-martial for a capital offense, while the latter cases extended this holding to include noncapital crimes.

25. Id. at 908.

26. In response to the President, various bills were introduced. S. 3344, 85th Cong., 2d Sess. § 104 (1958). Generally, the proposed legislation would give express authority to the Secretary.

27. S. 2287, 86th Cong., 1st Sess. §§ 203, 401 (1959). Under this bill, introduced by Senator Fullbright, the Secretary could deny a passport on the grounds of escape from criminal justice, national security or indebtedness to the United States for previous transportation home from a foreign country. The President would have the power to refuse passports and restrict travel to foreign countries with which the United States was at war, in which armed hostilities were in progress, in which travel was not in the interest of the United States or where the United States could not provide the citizen adequate protection. The applicant, upon refusal, would be allowed judicial and administrative review.

1. Uniform Code of Military Justice art. 118(2), 10 U.S.C. § 918(2) (1958).

2. 164 F. Supp. 707 (S.D.W. Va. 1959). Upon conviction by court-martial, petitioner was returned to the United States and committed to the Federal Reformatory for Women at Alderson, West Virginia.

3. 361 U.S. 278 (1960).

4. 361 U.S. 281 (1960).

Article I, section 8, clause 14 of the federal constitution provides that Congress shall have the power "to make rules for the government and regulation of the land and naval forces." The power and jurisdiction of court-martial over civilians has been presented intermittently to the Supreme Court since the leading case of *Ex parte Milligan*.[5] A majority of the Court there was of the opinion that neither the President nor Congress[6] had the power to set up military courts for the trial of civilians except in the actual theatre of war where the civil courts were no longer functioning.[7] This decision, by severely limiting military jurisdiction, guaranteed civilians even in time of war a trial in a civil court with the attendant safeguards specified in the Bill of Rights.

The rule of the *Milligan* decision extended only to those of civilian status. The possibility exists that a person might be in the armed forces for purposes of court-martial even though he has not been formally inducted into the service. Hence, it has been held that a civilian employed as a paymaster's clerk in the navy could be properly court-martialed on the ground that his services were such as to bring him into the United States Navy.[8] The Court has also declared that enemy belligerents, subject to the law of war, do not enjoy the status of civilians.[9] An ex-serviceman, however, having no present relationship of any kind with the armed forces, is a civilian and cannot be tried by court-martial.[10] This latter holding was extended to cover, in capital cases, the wife of a serviceman accompanying her husband overseas.[11] When there is acute danger to national security, however, even a civilian may be subject to military action though the civil courts are still open and functioning,[12] notwithstanding *Milligan*.

5. 71 U.S. (4 Wall.) 2 (1866). Milligan, an Indiana resident, had been convicted by a court-martial of initiating insurrection and certain other treasonable and disloyal practices during the Civil War.

6. Four of the Justices, however, were of the opinion that such power could be exercised by Congress. Ex parte Milligan, 71 U.S. (4 Wall.) 2, 132 (1866) (concurring opinion).

7. In Duncan v. Kahanamoku, 327 U.S. 304 (1946), the Court held that two civilians in Hawaii could not be tried by a military court once the danger of invasion was removed and the civil courts were again functioning.

8. Johnson v. Sayre, 158 U.S. 109 (1895); Ex parte Reed, 100 U.S. 13 (1879).

9. Ex parte Quirin, 317 U.S. 1 (1942). One of eight saboteurs convicted by a military commission claimed United States citizenship. The Court, leaving the question of his citizenship unresolved, stated that even citizens of the United States may be enemy belligerents and subject to trial by a military commission for violations of the law of war.

10. United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955), wherein an ex-serviceman was arrested five months after discharge on charges of murder committed while an airman in Korea, and was taken to Korea to stand trial by court-martial.

11. Reid v. Covert, 354 U.S. 1 (1957).

12. Korematsu v. United States, 323 U.S. 214 (1944), held the compulsory evacuation of Japanese-American citizens from military areas on the west coast constitutional. See also Hirabayashi v. United States, 320 U.S. 81 (1943), where a curfew regulation affecting only Japanese-Americans was held valid as a temporary emergency war power. Since violators of the curfew were tried in civil courts, the case is distinguishable from Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).

Once the loyalty of an American citizen of Japanese ancestry was proven, he could not

Closely connected to the problem of military jurisdiction is that of the effect of the Constitution on American citizens abroad. The Court has held that article III stating that "the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution"[13] has no operation outside the United States.[14] Thus, an American seaman in *In re Ross*[15] had no right to a civil trial for a crime committed abroad, and could be properly tried by a consular tribunal without the attendant guarantees of the fifth[16] and sixth[17] amendments. This doctrine was reinforced by the *Insular Cases*,[18] wherein the Court stated that the granting of United States citizenship to the inhabitants of an unincorporated territory, such as Puerto Rico, did not in and of itself bestow the safeguards of the Constitution and the Bill of Rights on those inhabitants. Nor do the rights and benefits accruing under the Constitution extend to the high seas, since traditionally the power of disciplinary action under the law of the sea has been placed in the commander of the ship when at sea or in a foreign port.[19]

In *Reid v. Covert*,[20] however, the Supreme Court, repudiating the doctrine of the *Ross* case, recognized for the first time the constitutional right of a civilian to a civil trial for an offense committed while outside the United States. This does not prevent the Government, when there is a treaty so providing, from turning the case of an American soldier or civilian over to the civil authorities of a foreign country for trial of an offense committed there.[21]

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thereafter be detained in a War Relocation Center, and he was entitled to an unconditional release. Ex parte Endo, 323 U.S. 283 (1944).

13. U.S. Const. art. III, § 2(1). U.S. Const. art. III, § 2(3) provides that "the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ."

14. In re Ross, 140 U.S. 453 (1891). See also Balzac v. Porto Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903).

15. 140 U.S. 453 (1891). Though accused was actually a British subject, the Court stated that upon entering the American merchant marine he became subject to the laws of the United States governing its vessels and seamen.

16. U.S. Const. amend. V provides in part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger. . . ."

17. U.S. Const. amend. VI provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

18. These cases effectively held that the Constitution did not extend to newly acquired territories while they remained unincorporated. Balzac v. Porto Rico, 258 U.S. 298 (1922) (no right to trial by jury in a prosecution for criminal libel); Dorr v. United States, 195 U.S. 138 (1904) (no right to jury trial in the Philippines); Hawaii v. Mankichi, 190 U.S. 197 (1903) (conviction by a jury not unanimous upheld in Hawaii); Downes v. Bidwell, 182 U.S. 244 (1901) (duties, imposts and excises in Puerto Rico need not be uniform with those in the United States). Compare Duncan v. Kahanamoku, 327 U.S. 304 (1946).

19. Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857) (court-martial had jurisdiction to try seaman for desertion). See also Johnson v. Sayre, 158 U.S. 109 (1895); Ex parte Reed, 100 U.S. 13 (1879).

20. 354 U.S. 1 (1957).

21. Wilson v. Girard, 354 U.S. 524, 529 (1957), where the Court stated: "A sovereign

Military courts may exercise greater authority over civilians in wartime than would be permitted in times of peace. *Milligan* states that military jurisdiction extends to all areas in the actual theatre of war. This authority of the military is not, however, ended by the cessation of hostilities.[22] Court-martial jurisdiction in areas occupied by the armed forces after the actual fighting has been terminated may continue over civilians until the formal establishment of peace by proclamation or treaty.[23] Though the constitutionality of the Reconstruction Acts setting up a military government after the Civil War was never determined,[24] the Court nevertheless refused to enjoin the President from enforcing these Acts, deciding it lacked the jurisdiction to do so.[25]

In the instant case, a question arose as to what extent the nature of the crime charged determines jurisdiction. It has been held that violations of the law of war are properly tried before military tribunals.[26] In *Reid* four of the Justices were of the view that civilian dependents could not be tried by court-martial for either capital or noncapital offenses, while the two concurring Justices limited the holding to capital cases.[27] The basis for the latter's distinction between the two types of offenses lies in the special procedural safeguards bestowed on those who are charged with capital crimes. One such instance is the fourteenth amendment compelling a state to appoint counsel

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nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." To a similar effect see The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812), where the above rule was proposed by Chief Justice Marshall.

22. In re Yamashita, 327 U.S. 1 (1946). The Court, after recognizing the right of a military commission to try a Japanese for a violation of the law of war, observed that "the practical administration of the system of military justice under the law of war would fail if such authority were thought to end with the cessation of hostilities." Id. at 12.

23. See Madsen v. Kinsella, 343 U.S. 341 (1952), where the Court held that both courts-martial and occupation courts in Germany had concurrent jurisdiction to try a civilian dependent charged with murder. See also In re Yamashita, supra note 22.

24. In Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869), the issue was presented to the Court on appeal, but Congress by statute took away the Court's jurisdiction.

25. Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867).

26. Ex parte Quirin, 317 U.S. 1 (1942). The Court declared that Congress validly exercised its constitutional authority "to define and punish . . . Offenses against the Law of Nations" by sanctioning the jurisdiction of military commissions to try persons for offenses against the law of war. U.S. Const. art. I, § 8. Accord, In re Yamashita, 327 U.S. 1 (1946).

27. This result was reached in a 6-to-2 decision with four Justices joining in announcing the judgment, two concurring in the result, two dissenting and one Justice taking no part in the decision. The Court in effect left unsettled the question of military jurisdiction over noncapital offenses.

Earlier the Court had decided that article 2(11) of the Uniform Code of Military Justice, 10 U.S.C. § 802(11) (1958), was a valid exercise of congressional power, and that courts-martial had jurisdiction to try civilian dependents. Kinsella v. Krueger, 351 U.S. 470 (1956); Reid v. Covert, 351 U.S. 487 (1956). Later on rehearing the Court withdrew its opinion in these cases and recognized the right of a civilian to a civil trial. Reid v. Covert, 354 U.S. 1 (1957).

for an indigent defendant in a capital case,[28] though there is no such absolute right in noncapital cases.[29]

In the present case the Court swept away the distinction between capital and noncapital offenses. Article 2(11) of the Uniform Code of Military Justice[30] was declared to be unconstitutional as applied in time of peace to civilian dependents charged with noncapital offenses under the Code.[31] Justice Clark, writing the opinion for the majority, reasoned that if clause 14, supplemented by the necessary and proper clause, did not grant military tribunals jurisdiction over civilians for capital crimes, then there is no logical basis for granting such jurisdiction for noncapital offenses. Clause 14 cannot be expanded by the necessary and proper clause to give a military court jurisdiction. If the exercise of such power is valid, it is because it is granted by clause 14 and not because of the necessary and proper clause.[32]

It is not the nature of the crime charged which determines jurisdiction. Rather the test, Justice Clark declared, is one of status, that is, "whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval forces.' "[33] The Court noted that to permit prosecution of noncapital offenses, while rejecting capital crimes, would be granting the military an unreviewable discretion to exercise jurisdiction over civilian dependents simply by reducing the offense, thus taking from the accused the protections afforded him by the Bill of Rights.[34] Nor would discipline in the armed forces be so affected that considerations of expanding military jurisdiction be warranted at the expense of the normal and constitutionally preferable system of trial by jury.[35]

28. Powell v. Alabama, 287 U.S. 45 (1932).

29. Betts v. Brady, 316 U.S. 455 (1942). There may be additional factors which would compel a court to appoint counsel in a noncapital offense where, because of idiocy or other reasons, the defendant does not comprehend the seriousness of the crime charged nor the legal process by which he is tried.

30. Uniform Code of Military Justice art. 2(11), 10 U.S.C. § 802(11) (1958) provides: "Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States" are subject to the Code.

31. Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 249 (1960). In this case, Justice Clark completely reversed his dissenting position in Reid v. Covert, 354 U.S. 1, 78 (1957). Voting with Justice Clark were Chief Justice Warren and Justices Douglas, Black and Brennan. Justices Whittaker and Stewart concurred in the result. Both Justices Harlan and Frankfurter dissented.

32. The Court remarked that the necessary and proper clause "is not itself a grant of power, but a caveat that the Congress possesses all of the means necessary to carry out the specifically granted 'foregoing' powers of § 8 'and all other Powers vested by this Constitution. . . .' " 361 U.S. at 247.

33. Id. at 241.

34. In this connection the Court said: "By allowing this assumption of 'garb of mercy,' we would be depriving a capital offender of his constitutional means of defense and in effect would nullify the second Covert case." Id. at 244-45.

35. Id. at 240. The Court expressed doubt that a critical impact upon discipline will result from the small number of noncapital cases actually arising.

The dissenters, Justices Harlan and Frankfurter, took issue with the basic premise of the majority that only persons occupying a military "status" are within court-martial jurisdiction. They argued that a person's status is but a factor and not alone determinative of the exercise of a constitutional power.[36] The contention that the difference between capital and noncapital offenses is not constitutionally significant was rejected. Though an analogy is drawn to fourteenth amendment cases[37] making such a distinction, it would appear that these cases are limited to restricting state action in certain phases of due process and do not purport to lay down rules affecting jurisdiction.

Grisham v. Hagan extended the decision in the instant case to include civilian employees, holding that a United States civilian employed by the armed forces in a foreign country cannot constitutionally be tried by court-martial for any capital offense committed abroad in time of peace. Justices Harlan and Frankfurter concurred in the result, drawing no distinction between the army wife in the instant case and the civilian service employee in *Grisham*.

In a dissenting opinion, Justices Whittaker and Stewart distinguished between civilian dependents accompanying the armed forces and other civilians employed by the armed forces at military bases in foreign countries. While the former perform no services for and have no military relationship with those forces, the latter "perform essential services for the military and, in doing so, are subject to the orders, direction and control of the same military command as the 'members' of those forces. . . ."[38] Both Justices would extend to the military the power to exercise jurisdiction over all those directly connected with the armed forces though not actually members of such.[39]

Finally, in *McElroy v. United States ex rel. Guagliardo* and *Wilson v. Bohlender*, the Court, in a 5-to-4 decision, ruled that civilian employees of the armed forces are not subject to the jurisdiction of courts-martial even for noncapital offenses committed abroad. Justices Harlan and Frankfurter dissented, stating that since the offense was not capital, petitioners were properly tried by court-martial. Justices Whittaker and Stewart dissented in a separate opinion, and took the position that as civilians employed by the army, petitioners were subject to military jurisdiction under clause 14.

Several problems have been created, however, by these decisions. One question left unanswered is where and how these civilians would be tried for crimes committed abroad. Several solutions have been offered. Congress might by treaty grant jurisdiction to the countries where the offenses were committed.[40] Employees of the armed forces could either be made members of the armed forces or given a quasi-military status as was done in World War II.

36. Id. at 255.

37. Betts v. Brady, 316 U.S. 455 (1942); Powell v. Alabama, 287 U.S. 45 (1932).

38. 361 U.S. at 265.

39. The dissent bases this contention largely on various materials supporting the prosecution of civilians by courts-martial, particularly during the Revolutionary War. The majority dismissed the argument by stating that such instances were too episodic and meager to form a solid basis in history for constitutional adjudication.

40. See note 22 supra.

The alternative, which is perhaps most in keeping with safeguarding constitutional freedoms, would be for Congress to provide that accused persons be brought back to the United States for trial in the federal courts.

The effect of these four decisions of the Supreme Court is to limit, if not eliminate, court-martial jurisdiction of civilians in peacetime. Article 2(11) of the Code no longer has application to persons of a nonmilitary status for either capital or noncapital offenses. It may be said that these decisions all reflect and manifest "the deeply rooted and ancient opposition in this country to the extension of military control over civilians. In each instance an effort to expand the jurisdiction of military courts to civilians was repulsed."[41] The Court has once again reincarnated the spirit of the *Milligan* case.

Constitutional Law—Validity of "Lord's Day" Statute Under Guarantee of Fourteenth Amendment.—A petition was filed before a federal court of equity seeking a preliminary and final injunction restraining the defendant, Chief of Police of Springfield, Massachusetts, from enforcing against the plaintiffs[1] the criminal provisions of that state's "Lord's Day" statute.[2] The corporate plaintiffs' supermarket offers for sale all categories of foods, all of its meats are kosher and the vast preponderance of the rest of its stock is also kosher. As such, it is the only store of its kind in the Springfield area. The due observance of the Jewish Sabbath requires total abstinence from business and work of all types. Thus, the Crown Market is not open for business between sundown, Friday, and sundown, Saturday. To make up for this loss of business, the Crown Market is open from 8:00 A.M. to 6:00 P.M. every Sunday, and has been open every Sunday since it was established in 1953. This is in direct violation of Massachusetts law.[3] The equity court, one judge dissenting, held the Lord's Day statute unconstitutional on the grounds that it is a law respecting the establishment of a religion, denying the free exercise thereof, and it is violative of the due process and equal protection clauses of the fourteenth amendment.[4] *Crown Kosher Super Market, Inc. v. Gallagher*, 176 F. Supp. 466 (D. Mass.), *appeal docketed*, 28 U.S.L. Week 3167 (U.S. Nov. 17, 1959) (No. 532).

There can be no question but that the earliest statutes passed in the colonies

41. Reid v. Covert, 354 U.S. at 33.

1. Plaintiffs were the Crown Kosher Super Market, a corporation operating a kosher supermarket in Springfield, Massachusetts, three of its customers suing on behalf of themselves and others similarly situated and a rabbi suing on behalf of himself and other rabbis similarly situated.

2. Mass. Ann. Laws ch. 136, § 5 (1957).

3. Mass. Ann. Laws ch. 136, § 5 (1957) provides: "Whoever on the Lord's day keeps open his shop . . . except for works of necessity and charity, shall be punished by a fine of not more than fifty dollars."

4. The motion for a preliminary injunction was not pressed after the parties had informally agreed that the plaintiffs would not be prosecuted until after the decision of this case.

were motivated by religious principles.[5] By 1800, however, statutes were passed in various states which no longer emphasized the religious but rather the rest and relaxation aspects of the legislation.[6] At the present time all but a few states have some sort of Sunday legislation[7] which either prohibit certain specific activities otherwise permissible[8] or prohibit Sunday activity generally, allowing certain exceptions.[9] The latter class, into which the present statute falls, is most often the subject of attack on constitutional grounds.

The Supreme Court has made it clear that the fourteenth amendment will protect the individual against any state statute which infringes upon his individual beliefs or convictions.[10] However, the entire judicial history of the "blue" laws shows that they have not been interpreted as laws establishing or infringing upon religion, but rather have been viewed as welfare legislation which provides for a general day of rest and relaxation.[11] The Supreme Court, although not faced with the religious problem at the time, adopted this viewpoint in *Hennington v. Georgia*[12] and *Petit v. Minnesota*.[13] In *Petit* the Court stated: "We have uniformly recognized state laws relating to the observance of Sunday as enacted in the legitimate exercise of the police power of the State."[14] Subsequently, the Supreme Court has been presented with the question of Sunday legislation and its possible infringement on the first amendment, but has appeared reluctant to change its original interpretation. In the last ten years the Court has dismissed, for want of a substantial federal question, four cases in which the lower court upheld the constitutionality of such legislation.[15]

One case deserves special mention because of its striking similarity to the present decision. In *People v. Friedman*[16] the Supreme Court refused to hear an appeal of an Orthodox Jew convicted under the New York Sunday statute[17] for the sale of uncooked kosher meats on Sunday.[18] The majority here at-

5. For a history of the Sunday laws from the time of Constantine down through the original statutes passed in this country see Johnson, Sunday Legislation, 23 Ky. L.J. 131 (1934).

6. See, e.g., 12 Laws of Va. 336 (Hening 1823).

7. Iowa has recently repealed its statute. Iowa Code § 729.1 (1955). Alaska has never passed one.

8. See, e.g., Ariz. Rev. Stat. Ann. § 32-357 (1956) (barbering); Nev. Comp. Laws § 201.206 (1919) (disturbing sports and amusements).

9. See, e.g., Ala. Code tit. 14, § 420 (1940); Va. Code Ann. § 18-329 (Supp. 1958).

10. McCollum v. Board of Educ., 333 U.S. 203 (1948); Everson v. Board of Educ., 330 U.S. 1 (1947).

11. 83 C.J.S. Sunday § 3 (1953).

12. 163 U.S. 299 (1896).

13. 177 U.S. 164 (1900).

14. Id. at 165.

15. Kidd v. Ohio, 358 U.S. 132 (1958); Ullner v. Ohio, 358 U.S. 131 (1958); Gundaker Cent. Motors v. Gassert, 354 U.S. 933 (1957); Friedman v. New York, 341 U.S. 907 (1951).

16. 341 U.S. 907 (1951), denying appeal of 302 N.Y. 75, 96 N.E.2d 184 (1950).

17. N.Y. Pen. Laws § 2147.

18. Friedman contested the New York statute on the grounds: (1) it was an infringe-

tempted to distinguish this case on the grounds that the New York law has few characteristics or roots in history tending to indicate that it is a religious regulation, that the New York courts have consistently interpreted it as a civil regulation, and that its provisions are neither prolix nor irrational as is the Massachusetts statute. Each of these distinctions seems unusually ill-founded.[19]

The Supreme Judicial Court of Massachusetts has never passed upon the validity of the present statute under the federal constitution. The court has, however, on numerous occasions upheld the statute against attacks based upon the state constitution.[20] The court in these cases regarded the Sunday statute as "essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and amusements of the community."[21] The majority in the present case regarded the construction given the Sunday law as a characterization and an *ad hoc* improvision, thus concluding that under the rule of *Society for Sav. v. Bowers*,[22] they were not bound by the state court's interpretation of the law. In using this approach the court circumvented the real problem. Under the great weight of authority the better rule would be that the federal court accept the construction given the statute by the state court.[23] Accepting the Massachusetts statute as welfare legislation designed to set out a day of rest and relaxation for the community, the question remains whether it violates the guarantee of the first amendment. In dealing with this problem it must be realized that neither the police power of the state to provide for the general welfare nor the guarantee of religious freedom is absolute.[24] Of the two, freedom of religion ought to be more closely safeguarded. Under the blue laws in general it would seem that those who observe another sabbath are discriminated against in favor of the more numerous Christian sects.[25] Thus, if there might be an alternate method of effectuat-

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ment on religious freedom and a law respecting the establishment of religion; and (2) denied him equal protection of the law and deprived him of his liberty and property without due process of law.

19. For the religious origin of the New York "Sabbath" Law see Joint Legislative Committee, Preliminary Report, N.Y. Legislature Doc. No. 50, p. 10 (1952). For New York cases stressing the religious purpose see People v. Binstock, 7 Misc. 2d 1039, 170 N.Y.S.2d 133 (N.Y.C. Ct. Spec. Sess. 1957); People v. Law, 142 N.Y.S.2d 440 (N.Y.C. Ct. Spec. Sess. 1955). That parts of the New York statute are considered illogical and inconsistent see Governor Dewey's Annual Message to the New York Legislature, N.Y. Times, Jan. 10, 1952, p. 23, col. 6.

20. Commonwealth v. Chernock, 336 Mass. 384, 145 N.E.2d 920 (1957); Commonwealth v. Has, 122 Mass. 40 (1877).

21. 122 Mass. at 42.

22. 349 U.S. 143 (1955). There may be some question as to the applicability of this case to the present situation since it has never been cited in other than a tax decision.

23. United States v. Burnison, 339 U.S. 87 (1950); Minnesota v. Probate Court, 309 U.S. 270 (1940).

24. Cantwell v. Connecticut, 310 U.S. 296 (1940); Reynolds v. United States, 98 U.S. 145 (1878).

25. It would appear that the legislature by designating Sunday as the mandatory day of rest has given special protection to the dominant Christian sects without providing equal

ing the result sought to be attained by these statutes which would obviate the present discrimination, it would be preferable. A common suggestion has been to provide generally for one day of rest a week and allow the individual to choose his own day.[26] This suggestion is both impractical and unenforceable since it would be impossible for any police agency to keep an account of which day a given store might select as its day of rest. A more feasible suggestion has been to exempt those who observe another sabbath from Sunday legislation. Since in this country, generally speaking, the only other day of worship is Saturday, there would not be any great problem in enforcement of a statute of this type. By enacting such legislation the states would certainly remedy any harm now being endured by those who do not regard Sunday as their sabbath. In this sense, this particular reform would certainly seem preferable. There is, however, another consideration. The object of Sunday legislation is to provide a uniform day of rest and relaxation for the community. In providing a choice of days, the law might be defeating its own purpose. The majority cite as evidence of the hardship inflicted upon the corporate plaintiff that more than one-third of his gross sales each week were made on Sunday. While this may be indicative of the harm done, it is even more illustrative of the competitive advantage of being the only supermarket open on Sunday in the town of Springfield. This is not to say that a person of the Jewish faith ought to be deprived of profits he might earn on this day, but it is suggested that the speculative business man who might choose his day of worship according to his situation would be the real beneficiary of such legislation.[27] This situation would clearly be in conflict with the best interest of the state and the purpose of the legislation.

The majority in the present case also found the statute unconstitutional as violative of the due process and equal protection clauses of the fourteenth amendment.[28] The court viewed the various regulations and exceptions set forth in the Massachusetts Lord's Day statute[29] as an almost unbelievable

protection to those who worship on another day. Under the broad dicta of Zorach v. Clauson, 343 U.S. 306 (1952), and Everson v. Board of Educ., 330 U.S. 1 (1947), the Sunday laws would appear unconstitutional. However, a distinction may be drawn between those statutes in which the entire effect and purpose is to give substantial aid to one or more religions, e.g., McCollum v. Board of Educ., 333 U.S. 203 (1948), and those statutes which primarily involve a secular or welfare benefit for the community as a whole and incidentally create an advantage to one religious sect. This seems to be the distinction drawn in Everson v. Board of Educ., supra.

26. See, e.g., Note, 61 Yale L.J. 427 (1952).

27. Experience has shown that Sunday is the most profitable day for roadside and other merchants. In Gundaker Cent. Motors v. Gassert, 23 N.J. 71, 127 A.2d 566 (1956), appeal denied, 354 U.S. 933 (1957), the court found that competitive conditions in the automobile sales business were causing many dealers to remain open Sunday. In a poll taken of members of the New Jersey State Automobile Trade Association, of the 80.3% who cast ballots, 77.4% favored compulsory Sunday closing.

28. The reasoning of the court on the problem of due process is almost identical with those arguments set forth under the first amendment.

29. Mass. Ann. Laws ch. 136, § 6 (1957), as amended, Mass. Ann. Laws ch. 136, § 6 (Supp. 1959).

"hodgepodge" which were discriminatory on their face. This conclusion seems unwarranted. The state under its police power is allowed a wide scope of discretion in its classification and adoption of laws.[30] The majority of courts hold that the legislature has the constitutional power to make classifications of what should or should not be prohibited on Sunday.[31] Some form of discrimination is the basis of all classification, and is not objectionable unless founded on distinctions which the courts are compelled to pronounce unreasonable or purely fictitious.[32] In cases of this type the one assailing the classification has the burden of proving that they do not have any reasonable basis and are essentially arbitrary.[33] The majority here considers whimsical and arbitrary the different provisions of the statute which allow certain stores to remain open while requiring others be closed. A closer examination of these provisions will show, however, that they were passed at different times by a majority of the state legislature with an eye toward changing socio-economic conditions. They concern themselves for the most part with businesses which the legislature has determined are necessary[34] or which add to the general rest and relaxation of the community.[35] Since all rational presumption is in favor of the constitutionality of the legislature's acts,[36] it would appear the court here was guilty of an unwarranted intrusion into the sphere of the legislature in substituting what it considered should be the law for that which stands as the law.

In the final analysis the question presented is whether the state in order to provide for a general day of rest and relaxation for the community as a whole might incidently restrict the rights of a certain minority. One day out of seven reserved for the recreational and social phase of community life would seem to be a desirable end in itself. Since there appears to be no adequate substitute, it would seem that Sunday legislation is necessary if the legitimate social functions which it seeks to fulfill are to be realized.

Nothing in this conclusion is meant to indicate that Sunday laws are adequate as they stand. Many of the objections raised by the majority are well taken. Liberalization of certain restrictive provisions[37] might well be a step in the right direction. Some of the classifications contained in the statute, while they do not seem unconstitutionally arbitrary, are certainly capable of improvement and clarification. It is suggested, however, that it is not the role of the judiciary to bring about these changes but rather the duty of the legislature.

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30. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

31. State v. Kidd, 167 Ohio St. 521, 526, 150 N.E.2d 413, 418 (1958).

32. Ibid.

33. 220 U.S. at 78.

34. E.g., Mass. Ann. Laws ch. 136, § 6 (1957), which allows, among other things, the retail sale of drugs, medicines or articles ordered by the prescription of a physician.

35. E.g., Mass. Ann. Laws ch. 136, § 4A (1957) (amusement parks and beaches); Mass. Ann. Laws ch. 136, § 4B (1957) (bowling alleys).

36. Pacific States Box Basket Co. v. White, 296 U.S. 176, 185 (1935).

37. Mass. Ann. Laws ch. 136, § 6 (Supp. 1959), allows a kosher store which closes Saturday to open between the hours of six o'clock and ten o'clock in the forenoon, Sunday.

Corporations—Presumptive Authority of President of Corporation To Prosecute Suit in Corporate Name.—The president of the plaintiff company, a close corporation, instituted suit on its behalf against the defendant corporation and its two remaining officers and stockholders.[1] At the time of suit the individual defendants were not only the sole stockholders of the defendant corporation but also held two-thirds of the plaintiff's stock and constituted a majority of the latter's board of directors. The president had not consulted, nor did he have the approval of, his board of directors prior to commencing the litigation. In its complaint plaintiff sought to recover the amount which it had wrongfully been required to pay for work and services rendered a building owned and built by defendant corporation. The defendants moved to set aside service of process and dismiss the complaint on the ground that the president had no authority to commence litigation in the corporation's name. The appellate division, one justice dissenting, affirmed special term's order denying the motion.[2] The court of appeals, two judges dissenting, affirmed. Notwithstanding the lack of a specific enumeration of power in the articles of incorporation or bylaws, the president of plaintiff corporation at the time action was instituted had authority in the discharge of his duties to institute action on behalf of the corporation. *West View Hills, Inc. v. Lizau Realty Corp.*, 6 N.Y.2d 344, 160 N.E.2d 622, 189 N.Y.S.2d 863 (1959).

It is generally recognized that the management and control of a corporation's business rests in its board of directors.[3] The officers of the corporation are the board's agents and are generally appointed and controlled by it.[4] Power to act may be conferred upon a corporate president directly, through the articles of incorporation, the bylaws or express delegation of the board,[5] or indirectly, through implied,[6] incidental,[7] apparent[8] or presumptive[9] authority. While

1. Plaintiff's president had formerly been president and one-third owner of the defendant, Lizau Realty Corporation, but had disposed of his interest to the individual defendants several months prior to suit.

2. 6 App. Div. 2d 844, 175 N.Y.S.2d 879 (2d Dep't 1958).

3. N.Y. Gen. Corp. Laws § 27 provides: "The business of a corporation shall be managed by its board of directors . . . ."

4. Ballantine, Corporations § 49 (1946).

5. Express authority is that explicitly specifying the scope of an agent's activity, either in writing or orally. Restatement (Second), Agency § 7, comment c (1958). N.Y. Stock Corp. Laws § 60 provides that the directors may appoint officers "who . . . shall have such powers and perform such duties in the management of the property and affairs of the corporation, subject to the control of the directors, as may be prescribed by them or in the bylaws."

6. Implied, or inferred, authority refers to what the agent reasonably believes he may do, based upon his principal's conduct or upon the words used, custom or the relations of the parties. Restatement (Second), Agency § 7, comments b, c (1958). The most common conduct in this respect is acquiescence, which may be the basis of real (implied) as well as apparent authority. Restatement (Second), Agency § 43, comments b, c (1958).

7. Incidental authority is that authority which is reasonably necessary to carry out authority expressly or impliedly conferred. Restatement (Second), Agency § 35 (1958).

8. Apparent authority is that which third persons have a right to rely on because the

remarkably few cases have directly determined whether power to sue in the corporate name inheres in a president by virtue of his office, a majority of the courts have held that a president possesses prima facie authority to exercise general litigatory power in the performance of his duties. Where necessity demands, he may accept service of process,[10] employ counsel in the name of the corporation[11] and prosecute[12] and defend[13] suits. A minority view,[14] however, has strictly limited the presumptive powers of a president, deeming him to possess only such authority as is expressly conferred in the bylaws or by direct authority of the board of directors.

The New York Court of Appeals has been disposed to find a presumption of authority to institute litigation in the discharge of his duties where, in the absence of direct prohibition by the board of directors, the president has been managing head of the corporation.[15] Other New York courts have applied this same principle where circumstances have demanded immediate protection of the corporation's legal interests.[16] This question of authority is compounded, however, when the particular suit arises out of factional disputes dividing rival corporate interests or is directed against officers or directors of the corporation. The problem was first broached in the early

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principal has given to its agent the appearances of authority. See Restatement (Second), Agency § 8 (1958).

9. Presumptive, or prima facie, authority is something of an anomaly in the classification of agency authorization. While somewhat akin to inherent agency power, which exists purely as a product of the agency relation, the term as used by the courts in resolving corporation questions is more precisely classified as a species of implied authority. Its essence consists in authority to act by virtue of the office held. As the term itself imports, however, such presumption is only prima facie, and may be overcome by direct showing of lack of authority. Restatement (Second), Agency § 8A, comment a (1958).

10. Hart Land & Improvement Co. v. Odd Fellows Hall Ass'n, 142 La. 487, 77 So. 125 (1917).

11. Potter v. New York Infant Asylum, 44 Hun 367 (N.Y. 1887).

12. Dent v. People's Bank, 118 Ark. 157, 175 S.W. 1154 (1915) (dictum); Reno Water Co. v. Leete, 17 Nev. 203, 30 Pac. 702 (1882).

13. Regal Cleaners & Dyers, Inc. v. Merlis, 274 Fed. 915 (2d Cir. 1921); Beebe v. G. H. Beebe Co., 64 N.J.L. 497, 46 Atl. 168 (Sup. Ct. 1900); Matter of Bernheimer, 4 Misc. 2d 503, 43 N.Y.S.2d 300 (Sup. Ct.), aff'd, 266 App. Div. 868, 43 N.Y.S.2d 277 (2d Dep't 1943). See 2 Fletcher, Corporations § 618 (1954).

14. Ney v. Eastern Iowa Tel. Co., 167 Iowa 525, 144 N.W. 383 (1913); Ashuelot Mfg. Co. v. Marsh, 1 Cush. 507 (Mass. 1844); Legion Against Vivisection, Inc. v. Grey, 63 N.Y.S.2d 920 (Sup. Ct. 1946).

15. Twyeffort v. Unexcelled Mfg. Co., 263 N.Y. 6, 188 N.E. 138 (1933) (president had power to make contracts for legal services whether or not the board could have authorized or ratified the contract); Hardin v. Morgan Lithograph Co., 247 N.Y. 332, 160 N.E. 388 (1928) (president, absent restrictions, may make such ordinary contracts as custom and the necessities of business justify or require).

16. Regal Cleaners & Dyers, Inc. v. Merlis, 274 Fed. 915 (2d Cir. 1921); Matter of Bernheimer, 4 Misc. 2d 503, 43 N.Y.S.2d 300 (Sup. Ct.), aff'd, 266 App. Div. 868, 43 N.Y.S.2d 277 (2d Dep't 1943).

lower court cases of *Recamier Mfg. Co. v. Seymour*[17] and *Church v. Bowden*,[18] and has recently been examined in three decisions of the court of appeals, each involving a situation where the plaintiff corporation's board of directors was evenly divided on the question of instituting suit.

In *Sterling Indus. v. Ball Bearing Pen Corp.*[19] the court of appeals determined that a president could not, in the absence of any evidence to indicate that a crisis was at hand or that immediate or vital injury threatened the corporation, institute suit after the board had directly refused to authorize its prosecution. Express refusal, together with the fact that the corporation was deliberately established with equally balanced interests, destroyed the possibility of a reasonable inference of authority.[20] *Rothman & Schneider v. Beckerman*[21] distinguished the *Sterling* case, calling attention to the fact that

17. 5 N.Y. Supp. 648 (1889). In deciding the question whether a corporate president, being a trustee, might authorize and maintain an action in the name of the corporation without the authority and against the express direction of the board, the court stated that ordinarily he may not since authority to undertake litigation on behalf of the corporation is vested in the board of directors or trustees. But the court went on to say that "this rule has manifestly no application where a majority of the directors or trustees are engaged in the wrongful diversion of the corporate funds, or other injury to its business . . . ." Id. at 650.

18. 14 Abb. N. Cas. 356 (N.Y. App. Div. 1883). The court found that the majority of the trustees, by their conduct, had virtually abdicated their official functions so far as the bringing of suit was concerned and, therefore, the remaining trustee might sue in the name of the corporation.

19. 298 N.Y. 483, 84 N.E.2d 790 (1949). Plaintiff corporation was formed by two groups of men, one group representing the defendant faction and the second group composed of the corporation president and his faction. Control was intended to be shared equally by the two groups. There were four directors, two from each group, and each director owned twenty shares of stock. The bylaws provided that the affairs of the corporation were to be managed by a board of four directors, and action by a majority of the entire board was required to constitute an act of the board. No reference was made in the bylaws to any authority on the part of the president or any other officer to institute litigation. At a special meeting, the president's proposal to institute such an action was put to a vote and declared lost when two of the four directors voted in opposition. Subsequently, plaintiff's president instituted an action, but the summons and complaint were vacated due to a lack of authority in the president.

20. The court held that "any actual or implied authority which Middleman may have had as president to commence this action was terminated when a majority of the board of directors at the special meeting refused to sanction it." Id. at 490, 84 N.E.2d at 793.

21. 2 N.Y.2d 493, 141 N.E.2d 610, 161 N.Y.S.2d 118 (1957). Again corporate management was evenly split. The president and secretary-treasurer of plaintiff corporation, along with their respective wives, each owned 50% of the corporate stock, all four being directors. The corporate bylaws vested control and general management of the affairs and business of the company in the board of directors, but as a practical matter no directors' meetings were held. The president and secretary-treasurer conducted business as equals, more on a partnership than corporate basis. At the time of suit the president had given up active participation in the business, and the secretary-treasurer exercised all the powers normally devolving upon the president. He had no express authority to institute litigation in the corporation's name, nor did the bylaws give him any such power. No action was taken

the suit in *Sterling* was against insiders of the corporation, and that the board had actually refused permission to the president to prosecute suit.[22] The court then set forth the principle that a president will be presumed to have authority to institute suit in the absence of any direct prohibition, stating:

> [O]ur decision in *Sterling* does not mean that a corporation may not institute suit without a formal vote of authorization by the board of directors. Where there has been no direct prohibition by the board, then, it has been held, the president has presumptive authority, in the discharge of his duties, to defend and prosecute suits in the name of the corporation.[23]

This latter view was reemphasized by the court of appeals in *Matter of Paloma Frocks*.[24] Referring to its unanimous decision in *Rothman*, the court stated by way of dictum:

> We do not suggest that the board of directors could not forbid a particular arbitration but there was no prohibition here. Even as to lawsuits . . . [where] there has been no direct prohibition by the board . . . the president has presumptive authority, in the discharge of his duties, to defend and prosecute suits in the name of the corporation.[25]

Seeming to state categorically that a corporate president possesses litigatory powers unless his authority is expressly curtailed, *Sterling*, *Rothman* and *Paloma* presented two other questions. While the court specifically referred to the president's authority as *presumptive*,[26] it appears that the authority in these cases was not based on a presumption as such. In *Sterling* there was an express negation of authority precluding any presumptions at all. The secretary-treasurer in *Rothman* was sole manager of the business and had previously prosecuted several suits which were acquiesced in by his board of directors, properly forming a basis for implied power to sue rather than one arising by virtue of his office, and the *Paloma* court found incidental authority to act embodied in an express agreement by the directors to arbitrate

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by the board of directors since they were not requested to pass on the matter. The court held that, under the facts and circumstances of the case, the secretary-treasurer did have implied authority to proceed against the defendants.

22. Id. at 497, 141 N.E.2d at 613, 161 N.Y.S.2d at 121.

23. Ibid. The court cited Regal Cleaners & Dyers v. Merlis, 274 Fed. 915 (2d Cir. 1921); Lydia E. Pinkham Medicine Co. v. Gove, 298 Mass. 53, 9 N.E.2d 573 (1937); Elblum Holding Corp. v. Mintz, 120 N.J.L. 604, 1 A.2d 204 (Sup. Ct. 1938); Matter of Bernheimer, 266 App. Div. 868, 43 N.Y.S.2d 277 (2d Dep't 1943); Warwick Sportswear Co. v. Simons, 4 Misc. 2d 482, 13 N.Y.S.2d 321 (Sup. Ct. 1939).

24. 3 N.Y.2d 572, 147 N.E.2d 777, 170 N.Y.S.2d 509 (1958). Ownership and control of plaintiff corporation rested half in the president of the plaintiff corporation and half in the president of the defendant corporation. By the terms of their contract, disputes between the corporations were to be settled by arbitration. Defendant was served with a demand for arbitration, but moved to stay the proposed arbitration on the ground that plaintiff had never been authorized by its directors. The matter had never been brought before the board for approval or disapproval.

25. Id. at 575, 147 N.E.2d at 781, 170 N.Y.S.2d at 511-12.

26. Matter of Paloma Frocks, 3 N.Y.2d 572, 575, 147 N.E.2d 779, 781, 170 N.Y.S.2d 509, 513 (1958); Rothman & Schneider v. Beckerman, 2 N.Y.2d 493, 497, 141 N.E.2d 610, 613, 161 N.Y.S.2d 118, 121 (1957).

their disputes with defendant corporation. The distinction between presumptive power to sue "insiders" as contrasted with "outsiders," enunciated in *Rothman,* casts further shadow on the conclusiveness of this principle. While such distinction would seem to be irrelevant,[27] it was made the basis for two subsequent appellate division rulings denying a president the right to sue fellow board members in the corporate name.[28]

As in *Sterling, Rothman* and *Paloma,* the directors of the plaintiff corporation in the instant case were substantially affected by the proposed litigation. Also, as in *Rothman* and *Paloma,* the directors were never asked to pass on the institution of suit. In the present case, however, there was no danger of a deadlock situation that might result in corporate paralysis over controversial legal matters. Rather, the potentially dissenting directors were in a position to defeat suit altogether since they constituted a majority of the corporation's governing body. While the majority of the court in the instant case alluded to this difference, it continued to apply the rule, advanced in *Rothman,* that where there is no direct prohibition the president has authority, in the discharge of his duties, to defend and prosecute suits in the name of the corporation.[29] The court stressed the independent legal existence of the corporation, with its concomitant separate, independent legal rights. While recognizing that the president, as an individual, was a minority stockholder, the court went on to say "that fact does not deprive him of his right and duty to perform the obligations and functions of his office as president, nor does it prevent the corporation, as a corporation, from commencing an action in its own behalf simply because a majority of its board of directors are in a position to withhold authorization."[30]

The dissent strongly objected to this extension of presidential power, viewing it as a circumvention of the express statutory provision that the business of a corporation is to be managed by its board of directors. It felt that any such presumption of authority in the face of majority opposition could only serve to remove corporate control from the hands of its directors and invest it in one man, who happened to be president.[31] Rather than contravene statutory requirements by expanding the scope of presumptive authority,

27. Though the suit in Rothman, supra note 26, was prosecuted against outsiders, the dissenting board members were motivated by self-interest, their son-in-law being one of the defendants.

28. Tidy-House Paper Corp. v. Aldman, 4 App. Div. 2d 619, 168 N.Y.S.2d 448 (1st Dep't 1957); Matter of Paloma Frocks, 1 App. Div. 2d 640, 152 N.Y.S.2d 652 (1st Dep't 1956). But see Hillcrest Paper Co. v. Ohlstein, 10 Misc. 2d 286, 172 N.Y.S.2d 827 (Sup. Ct.), aff'd mem., 6 App. Div. 2d 864, 175 N.Y.S.2d 1021 (1st Dep't 1958), wherein the court stated that strangers to a corporation may not question the authority of the managing officer to institute suit in the corporation's name.

29. West View Hills, Inc. v. Lizau Realty Corp., 6 N.Y.2d 344, 346, 160 N.E.2d 622, 623, 189 N.Y.S.2d 863, 864 (1959).

30. Id. at 347, 160 N.E.2d at 624, 189 N.Y.S.2d at 865. See Lydia E. Pinkham Medicine Co. v. Gove, 298 Mass. 53, 65, 9 N.E.2d 573, 585 (1937), where the court commented that the president was not obliged to resort to the indirect method of a stockholder's derivative suit to accomplish the preservation of the corporate interests.

31. 6 N.Y.2d at 348-50, 160 N.E.2d at 625, 189 N.Y.S.2d at 866-67 (dissenting opinion of Froessel, J.).

plaintiff's president should have sought relief under a stockholder's derivative suit.[32]

By its decision in this case the court of appeals has significantly enlarged the power of the president of a corporation in the management of corporate affairs. While the holding is somewhat qualified by reference to the alleged improper furtherance of selfish motives by the majority,[33] it would appear from the court's reasoning that it is establishing as a conclusive principle the rule that absent any provisions in the articles of incorporation, the by-laws or any direct prohibition by the board of directors, a president will be presumed to have authority in the ordinary discharge of his duties to institute and defend litigation in the corporation's name. By this reaffirmation, the court has reconciled the conflict stemming from its prior enunciation of the rule. As the instant suit was brought against insiders, the distinction formerly drawn between insiders and outsiders would no longer appear material, and since the court found no other basis for authority to sue, its vesting in the president by virtue of his office alone would appear conclusive.

In reaffirming the president's power to sue, however, the court leaves one pertinent question unanswered. Will a majority of a corporation's directors, who disapprove of the president's action in commencing suit, be precluded from terminating its prosecution by board resolution?[34] Where such action by the board is motivated by good faith, there appears no reason why it would not since the business of a corporation is to be managed by its board of directors.

The advantage of the enunciated rule is readily apparent. The preservation of corporate interests ought to be one of the highest aims of the corporation, and denying a corporate officer *any* right to institute litigation on behalf of the corporation, without prior approval of his board of directors, would often be clumsy and prejudicial to the best interests of the corporation. While vesting authority in the president might prove a powerful weapon in the settlement of factional disputes, and will require careful consideration in the formation of the corporate structure, the court's decision reflects an important aspect of the problem of adopting the corporate form to the realities of partnership operation. Where failure or refusal by the board is motivated by purely selfish interests aimed at their own benefit or at the detriment of the corporation, the slight impingement upon board authority occasioned by this rule would seem to be warranted.

32. It should be observed that under New York law, at least in theory, the president of a corporation might not be a stockholder. See N.Y. Stock Corp. Laws § 55 which provides that the president of a corporation be elected from its directors, and that each director be a stockholder unless otherwise provided in the certificate of incorporation or in a bylaw adopted by a stockholders' meeting. See also N.Y. Stock Corp. Laws § 60.

33. 6 N.Y.2d at 347, 160 N.E.2d at 624, 189 N.Y.S.2d at 865.

34. The question is moot as regards the instant case since the parties agreed that "the present Board of Directors [of plaintiff] have not now to this date [June 28, 1957] and will not in the future adopt a resolution to withdraw the [within action]." Brief for Respondent, p. 7. Where the directors being sued appear to have been impelled by improper motives, however, they might reasonably be disqualified from voting because of breach of their fiduciary duties with regard to the plaintiff corporation.

Criminal Law—Double Jeopardy a Bar to Prosecution for Greater Offense After Reversal of Conviction for Lesser Offense.—The defendant, charged with murder in the first degree, was convicted of murder in the second degree by a jury which had been instructed that, under the evidence, it could find the defendant guilty of murder in the first degree, murder in the second degree, manslaughter or not guilty. Upon a new trial, granted by the trial judge, defendant moved for dismissal of the first degree murder charge on the ground that he had been acquitted of first degree murder by the jury's verdict in the prior trial, and retrial on that charge would constitute double jeopardy. The motion was denied and defendant was convicted of first degree murder. On appeal, the Supreme Court of Washington, four judges dissenting, reversed and remanded for a new trial on the second degree murder charge. A verdict finding defendant guilty of murder in the second degree operates, for purposes of guarantees against double jeopardy, as an acquittal of murder in the first degree and the accused cannot be retried for the latter offense. *State v. School*, — Wash. 2d —, 341 P.2d 481 (1959).

The prohibition against double jeopardy in criminal prosecutions, a protection growing out of the common law pleas of autrefois acquit and autrefois convict,[1] is written into the federal constitution and nearly all of the state constitutions. It is designed to safeguard an individual against multiple punishment for the same offense and against successive prosecutions for a single crime.[2] Simply stated, once placed in jeopardy a defendant may not be tried again for the same offense. When a defendant has been convicted, however, and thereafter obtains a new trial at his own instance either by motion in the trial court or by a successful appeal, he may be retried for the same offense on the theory that he has waived his right to the defense of former jeopardy.[3] If the defendant, however, is tried for a crime involving a lesser offense, can the state retry the defendant for the greater offense after a conviction of the lesser offense is set aside on defendant's appeal?

Until the decision of the Supreme Court in *Green v. United States*,[4] of the thirty-six states which had passed upon the issue, nineteen allowed retrial for the greater offense.[5] Some decisions permitting retrial were compelled by the specific provisions of a state statute.[6] The remainder proceeded on the theory that the defendant, by obtaining a new trial, waived his defense of former jeopardy both as to the greater offense of which he was implicitly acquitted as well as the offense of which he had been convicted. The states prohibiting retrial limited the waiver to the offense of which the defendant had been convicted, namely the lesser offense.

1. The pleas of autrefois acquit and autrefois convict were made to bar a criminal action where the defendant had been once indicted and tried for the same offense and either acquitted or convicted thereof. 2 Chitty, Blackstone's Commentaries 271-72 (1851).

2. 22 C.J.S. Criminal Law § 238 (1940).

3. United States v. Ball, 163 U.S. 662 (1896).

4. 355 U.S. 184 (1957).

5. Green v. United States, 355 U.S. 184, 216-18 n.4 (1957) (Frankfurter, J., dissenting).

6. Ibid. For a comprehensive coverage of all phases of the subject see Annot., 61 A.L.R.2d 1119 (1958).

On facts essentially identical to the principal case, the Supreme Court, in *Trono v. United States*,[7] permitted retrial. The *Green* decision in 1957 overturned the result of the *Trono* case and explicitly limited that case to its peculiar facts. In *Green* the Court in a 5-to-4 decision, with a strong dissent by Mr. Justice Frankfurter, held that retrial on the charge of first degree murder of which the defendant had been acquitted by his conviction of second degree murder, was barred by the constitutional provision against double jeopardy.[8]

While the *Green* case does not bind the states,[9] its influence has been notable. Since the decision was handed down in 1957, California,[10] New Jersey[11] and Washington,[12] which had permitted retrial, have since prohibited it. Massachusetts,[13] which had never ruled on the point before, has since intimated that it would follow the *Green* holding. Florida,[14] in a dictum, recently reaffirmed its position prohibiting retrial for the greater offense.

Originally in *State v. Murphy*,[15] Washington barred a retrial for the greater offense. The court, in *State v. Ash*,[16] faced with the choice of overruling

7. 199 U.S. 521 (1905).

8. Green v. United States, 355 U.S. 184 (1957), has been the subject of extensive comment in legal periodicals. See, e.g., Note, 24 Brooklyn L. Rev. 349 (1958); Note, 7 Catholic U.L. Rev. 114 (1958); Note, 72 Harv. L. Rev. 156 (1958); Note, 9 Syracuse L. Rev. 331 (1958); Note, 33 Wash. L. Rev. 447 (1958); Note, 66 Yale L.J. 592 (1957).

9. Palko v. Connecticut, 302 U.S. 319 (1937). The note on Green v. United States, supra note 8, in 33 Wash. L. Rev. 447, 449 (1958), suggests that the holding therein is an "extension of the felony-murder situation to include the doctrine that an implied acquittal of one separate offense is not waived by appeal from the conviction of another separate offense. The question remains whether the court is now prepared to: (1) adopt the position of the minority of the state courts that a conviction of a lesser-included offense bars a charge of the greater offense on retrial or (2) whether the Green case will be limited to its facts—the felony-murder situation." This conclusion is based on the footnote in Mr. Justice Black's opinion written for the Court. 355 U.S. at 194 n.14. However, a further reading of the same footnote reveals that the Court has already decided the question where it says: "It is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not." Thus, it is immaterial whether the conviction is of a lesser included offense or of a distinct and separate offense in so far as the prohibition of retrial for the greater offense is concerned.

10. Gomez v. Superior Court, 50 Cal. 2d 640, 328 P.2d 976 (1958). In California if a defendant was tried for robbery, and convicted of larceny, double jeopardy prohibited him from being retried for robbery on a new trial secured by his appeal; but if the defendant had been found guilty of second degree murder, he could be retried for first degree murder, since the earlier rule was that a plea of former jeopardy would apply if a defendant was convicted of a lesser but included crime, but would not apply if charged with a certain degree of a crime and was convicted of a lesser degree of the same crime. The Gomez case, supra, abolished that distinction and a plea of former jeopardy applies now in both instances.

11. State v. Williams, 30 N.J. 105, 152 A.2d 9 (1959).

12. State v. Schoel, — Wash. 2d —, 341 P.2d 481 (1959).

13. Metcalf v. Commonwealth, — Mass.—, —, 156 N.E.2d 649, 653 (1959).

14. Greene v. City of Gulfport, 103 So. 2d 115 (Fla. 1958).

15. 13 Wash. 229, 43 Pac. 44 (1895).

16. 68 Wash. 194, 122 Pac. 995 (1912). Here the court said:

It is contended . . . that the verdict of manslaughter is in legal effect an acquittal of the

Murphy or allowing the defendant, of whose guilt the court was apparently convinced, to go free altogether, followed *Trono* and allowed the defendant to be retried for first degree murder on the absolute waiver theory. In the instant case, the court in returning to its earlier rule, noted the Washington practice of giving to a state constitutional provision the same interpretation as the Supreme Court of the United States gives to a like provision in the federal constitution.[17] The court expressly accepted Mr. Justice Black's reasoning in the *Green* case:

> [T]hat the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[18]

That this rule might set some guilty parties free, the court agreed, but found it better occasionally to set a guilty person free than to place an innocent man twice in jeopardy of being convicted.

The dissent argued the absolute waiver theory, and emphasized the fact that a new trial, which places both parties on the same footing and affords the defendant the right to assert the same defenses which may have been erroneously denied at the first trial, does injustice neither to the defendant nor to society. It likewise urged that since all the arguments for and against the rule had been determined in the *Ash* decision, and no new or compelling reason had been introduced requiring a change, there was no need to discard the rule of stare decisis.[19]

The principal case and the *Green* decision, acceptable as they may be, create a number of problems. The rule does not appear unjust where the defendant may be convicted of the lesser offense on the new trial. There is patent injustice, however, where a defendant, of whose guilt a court is convinced, can neither be tried for the greater offense nor punished for the lesser offense as when an accomplice to the crime is tried for felony murder and is erroneously convicted of murder in the second degree.[20] In such a case the

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higher degree of homicide; and appellant cannot again be tried for those crimes without being twice put in jeopardy for the same offense; and, as there was no evidence upon which to justify a conviction of manslaughter, the result must be the discharge of the defendant. One of these rules must be departed from, or else in this case, as in many others where the verdict results from an erroneous view of the law by the court below and the submission of improper verdicts, the appellate court, in correcting the error and thus seeking to do justice as between the state and the defendant, must lay down a rule which results in the greatest injustice, and turns loose murderers and other violators of the law to prey upon other victims of their criminal lust. Id. at 197, 122 Pac. at 996.

17. — Wash. 2d at —, 341 P.2d at 482. See also State v. James, 36 Wash. 2d 882, 897, 221 P.2d 482, 491 (1950).

18. 355 U.S. at 187-88.

19. — Wash. 2d at —, 341 P.2d at 486-88 (dissenting opinion).

20. This happens when there is an improper submission of the lesser offense to a jury where the evidence cannot sustain such a verdict. See note 16 supra. It also occurs where the jury, out of a misguided sense of leniency, returns a verdict for a lesser offense in the teeth of both the law and the facts. See, e.g., Note, 66 Yale L.J. 592, 593-601 (1957), dealing with this problem where "a nature of the error" test is suggested. In essence, if the conviction of the lesser offense is due to an error by the trial court, which necessarily

court will be thrown back to the *Ash* dilemma of either allowing retrial for the greater offense or setting the defendant free.

Furthermore, is retrospective effect to be given to the holding in the instant case? Generally, a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation. In effect, the former decision is not bad law but rather never was the law.[21] There is some authority that Washington will follow this principle with regard to the retrospective application of the instant case.[22] Conceivably, one who is now imprisoned under the *Ash* holding could have his conviction set aside, and obtain either a resentencing or perhaps freedom altogether.

The principal case represents no novel development in the law. The point had heretofore been settled one way or the other in thirty-six states. It is noteworthy, however, with respect to the influence which *Green v. United States* may have on future state reconsiderations of this point, as well as for the important issues created and left unresolved, issues which must await future determination.

Damages—Depreciation and Cost of Repairs As Elements of Damages for Injury to Chattels.—Plaintiff contracted with a manufacturer to purchase transformers which were not commonly sold on the open market. They were

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influences the jury's determination of innocence of the higher degree to the prejudice of the state's case, as well as requiring a reversal of the conviction of the lesser offense, retrial for the greater offense should not be barred. Otherwise it should be barred. See Note, 33 Wash. L. Rev. 447 (1958), which is substantially in accord, but which places emphasis on the proposition that if the error is prejudicial to the defendant, former jeopardy applies, but if the error is to his benefit, absolute waiver applies. Both of these proposed tests appear to be impracticable because of the admitted uncertainties involved in determining: (1) whether the jury was influenced by the error of the trial court to acquit of the greater offense and convict of the lesser offense in prejudice to the government; and (2) what in fact caused the jury to render the verdict it did.

21. Application of McNeer, —Cal. 2d —, —, 343 P.2d 304, 306 (1959). See also 14 Am. Jur. Courts § 130 (1938). The McNeer case, supra, was concerned with an application for a writ of habeas corpus as a result of Gomez v. Superior Court, 50 Cal. 2d 640, 328 P.2d 976 (1958). The petitioner, having been incarcerated since 1934 on conviction of murder in the first degree after reversal of a second degree murder conviction and denial of his plea of former jeopardy as to the first degree charge, was resentenced for second degree murder because the holding in the Gomez case, supra, was retrospective in effect and the plea of former jeopardy should have been allowed.

22. In re Nolan, 21 Wash. 395, 58 Pac. 222 (1899). In this case the defendant was prosecuted for rape of a female under the age of 16 years. The defendant contended that as the statute under which he was being prosecuted was void, he could not be convicted of the crime charged under it. In answer to this the court said:

Had there been no statute defining the crime of rape, and fixing its punishment, upon the statute books of this state at the time the petitioner was tried and convicted, other than this void act, the argument would be conclusive, and the result contended for naturally follow. . . . Id. at 395, 58 Pac. at 222.

Similarly, if State v. Ash, 68 Wash. 194, 122 Pac. 995 (1912), is considered as never having been the law, then the same principle would seem to apply in Washington as in California.

shipped to a subvendee but were damaged in transit. Although plaintiff had the transformers repaired and urged the subvendee to accept them at the original price, the subvendee refused. Plaintiff subsequently sold them at a reduced price and brought this action against defendant carrier seeking as damages the cost of repairs plus depreciation. The district court[1] held that when goods destined for resale are damaged by a carrier but are by repair restored to their original condition upon the subvendee's refusal to purchase, the damages recoverable by the vendee against the carrier include only the cost of repairs and not depreciation in the value of the goods. The court of appeals, one judge dissenting, affirmed. *Kirkhof Elec. Co. v. Wolverine Express, Inc.*, 269 F.2d 147 (6th Cir. 1959).

This action was brought pursuant to the Cummins Amendment to the Interstate Commerce Act[2] which provides: "Any common carrier . . . receiving property for transportation . . . shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it. . . ."

The majority in the instant case reasoned that insofar as plaintiff had urged the sale of the repaired transformers for full value, this indicated that he was satisfied that they were equivalent to new transformers and, therefore, he should not be permittted to recover any damages other than the cost of repair.[3] The dissent argued that where the reasonable value of the damaged property, after being repaired, is less than its reasonable value immediately before the accident, this depreciation is a proper element of damages in addition to the cost of repairs. The minority pointed out that because the goods were once damaged, even though subsequently restored to their original condition, there was a reluctance on the part of the buyer to purchase at the same price as if the goods had never been damaged. Insofar as this reluctance affected the sale price, reasoned the dissent, it is a factor in computing damages.[4]

The purpose of awarding damages is to make the plaintiff whole, that is, to restore him to the same position as if there had been no breach. The measure

1. Kirkhof Elec. Co. v. Wolverine Express, Inc., 175 F. Supp. 43 (W.D. Mich. 1958). The decision in the instant case is substantially a rewriting of District Judge Kent's opinion.

2. Interstate Commerce Act § 13(b), 54 Stat. 919 (1940), 49 U.S.C. § 20(11) (1958).

3. Compare Restatement, Torts § 928 (1939), with Jennings v. Piwinski, 136 Misc. 447, 241 N.Y. Supp. 349 (County Ct. 1928), and Patane v. State, 114 Misc. 713, 186 N.Y. Supp. 225 (Ct. Cl. 1921).

4. Kirkhof Elec. Co. v. Wolverine Express, Inc., 269 F.2d 147, 149 (6th Cir. 1959) (Shackelford, J., dissenting). Many courts have held that even though goods have been repaired, they do not command as high a price on the open market as the original goods. Broadie v. Randall, 114 Kan. 92, 216 Pac. 1103 (1923). In General Constr. Co. v. Kemplin, 309 Ky. 587, 588-89, 218 S.W.2d 384, 385 (1949), the court said: "However, we have held in numerous cases that the cost of repair to a damaged motor vehicle is not the true criterion of the amount of damage to it that may be recovered by its owner, since the fact that it has been in a wreck, necessitating repair, depreciates its marketable value after being repaired. . . . Moreover, if plaintiff's truck after being repaired was equally as serviceable, or better thereafter . . . there would still remain the depreciation in its marketable value, resulting from the fact of its having been wrecked and repaired." See Cooper v. Knight, 147 S.W. 349 (Tex. 1912); Metcalf v. Mellen, 57 Utah 44, 192 Pac. 676 (1902).

of damages under the Cummins Amendment merely incorporates the general common law rule[5] that a plaintiff may recover the difference between the value of the chattel before and after the harm[6] or, at his election, the reasonable cost of repair or restoration where feasible, with due allowance for any difference between the original value and the value after repair.[7] Courts have allowed recovery for the cost of restoring two mules to salable condition, in addition to the difference in market value of the mules at the time and place they should have been delivered and their actual market value after restoration.[8] Recovery was allowed for the difference between the market value of grain in the condition in which it should have arrived at destination and its market value after preparation for market, with reasonable and necessary expenses of caring for and preparing it.[9] Applying this reasoning to the instant case, would it not seem that the proper measure of damages would include the difference in value of the transformers as they should have been delivered and their value after restoration with due allowance for any expenditure made for repair? If this is the correct test, and it appears that it is, it becomes apparent that the court in ignoring depreciation disregarded an important factor of damages.

Furthermore, awarding damages not only for the cost of repairs but also for depreciation complies more fully with the rule of *Hadley v. Baxendale*.[10] There the court reasoned that the damages recoverable for breach of contract are "such . . . as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."[11] In the present case the court did not discuss whether the carrier was on notice of any special circumstance. Had the carrier been advised at the time of the contract that the transformers being shipped were the subject of resale to a subvendee, clearly the measure of damages em-

5. Yazoo & M.V.R.R. v. Delta Grocery & Cotton Co., 134 Miss. 846, 98 So. 777 (1924); Thompson v. H. Rouw Co., 237 S.W.2d 662 (Tex. 1951). The measure of damages in the instant case is a federal question, determined by the rules of common law as interpreted and applied by federal courts and as modified by federal statute.

6. Gulf C. & S.F. Ry. v. Texas Packing Co., 244 U.S. 31 (1917); Illinois Cent. Ry. v. Zucchero, 221 F.2d 934 (8th Cir. 1955); Reider v. Thompson, 197 F.2d 158 (5th Cir. 1952); Weirton Steel Co. v. Isbrandtsen-Moller Co., 126 F.2d 593 (2d Cir. 1942); Meltzer v. Baltimore & O.R.R., 38 F. Supp. 391 (E.D. Penn. 1941); S. G. Palmer Co. v. Illinois Cent. Ry., 164 Minn. 68, 204 N.W. 566 (1925); Aurora Fruit Growers Ass'n v. Saint Louis-San Francisco Ry., 220 Mo. App. 1316, 297 S.W. 440 (1927).

7. Illinois Cent. Ry. v. Zucchero, 221 F.2d 934 (8th Cir. 1955); Atchison T. & S.F. Ry. v. Jarboe Livestock Comm'n Co., 159 F.2d 527 (10th Cir. 1947); Davis v. Standard Rice Co., 293 S.W. 593 (Tex. 1926).

8. Morrow v. Wabash Ry., 219 Mo. App. 62, 265 S.W. 851 (1924).

9. Panhandle & S.F. Ry. v. Shell, 265 S.W. 758 (Tex. 1924).

10. 9 Ex. 341, 156 Eng. Rep. 145 (1854). The Interstate Commerce Act has not changed the underlying theory of an action as here involved, i.e., a breach of contract of safe carriage. See Strachman v. Palmer, 177 F.2d 427 (1st Cir. 1949); Acme Fast Freight v. Chicago, M. St. P. Ry., 166 F.2d 778 (2d Cir. 1948). Damages for a breach of safe carriage can be determined under the Hadley rule. McCormick, The Contemplation Rule As A Limitation Upon Damages For Breach Of Contract, 19 Minn. L. Rev. 497, 507 (1935).

11. 9 Ex. at 354, 156 Eng. Rep. at 151.

ployed by the court in the instant case would not apply, and the reluctance on the part of the buyer to take the repaired transformers would most properly have been an element of damages.[12]

The attitude of the buyer toward repaired goods is an accepted element in computing damages. The reluctance of a purchaser to accept repaired goods insofar as it actually diminishes the value of the goods as repaired, dictates that the cost of repairs alone does not make the seller whole.[13]

Grand Jury—Subpoenaing Prospective Defendant As Violative of Privilege Against Self Incrimination.—Defendant, a public official, was subpoenaed to appear before a grand jury investigating corrupt practices on the part of public officers. He signed a waiver of immunity regarding all matters pertaining to his official conduct and, having been advised of his rights, defendant testified to matters unrelated to his official conduct but without first invoking his constitutional privilege against self incrimination. On the basis of defendant's testimony concerning his unofficial conduct, he was indicted for conspiracy to bribe public officers. On appeal from a judgment of the appellate division granting defendant's motion to dismiss the indictment, the court of appeals, three judges dissenting, affirmed. The testimony of a prospective defendant who had appeared pursuant to grand jury subpoena may not be used as the basis of an indictment against him, notwithstanding such testimony was given voluntarily after full advisement of his rights. *People v. Steuding*, 6 N.Y.2d 214, 160 N.E.2d 468, 189 N.Y.S.2d 166 (1959).

The New York constitution states that no person shall be compelled in any criminal case to be a witness against himself.[1] At the turn of the century the New York Court of Appeals did not treat the subpoenaing of a prospective defendant before a grand jury or any other official investigating group as violative of this constitutional provision.[2] The testimony of a prospective defendant, therefore, given freely before a grand jury after full advisement of his rights, could be used against him in a subsequent criminal prosecution.[3] In 1908, in *People v. Gillette*,[4] however, the appellate division reasoned that "a person against whom the inquiry of the grand jury is directed should not be required to attend before that body, much less be sworn by it, and if he is and an indictment be found, it should be set aside upon motion." In *Gillette*, as well as in *People v. Ferola*,[5] wherein the court of appeals in 1915 adopted the

12. Schlottman v. Pressey, 195 F.2d 343 (10th Cir.), cert. denied, 344 U.S. 817 (1952).

13. Littlejohn v. Elionsky, 130 Conn. 541, 36 A.2d 52 (1944); Madden v. Nippon Auto Co., 119 Wash. 618, 206 Pac. 569 (1922).

1. N.Y. Const. art. I, § 6.

2. See, e.g., People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901) (coroner's inquest); Teachout v. People, 41 N.Y. 7 (1869) (coroner's inquest).

3. See also People ex rel. Hummel v. Davy, 105 App. Div. 598, 603, 94 N.Y. Supp. 1037, 1040 (1st Dep't 1905) (dictum).

4. 126 App. Div. 665, 670, 111 N.Y. Supp. 133, 136 (1st Dep't 1908).

5. 215 N.Y. 285, 109 N.E. 500 (1915).

rule laid down by *Gillette,* the courts were confronted with prospective defendants who were either unaware of the purpose of their testimony or ignorant of the nature of the privilege against self incrimination.

By the enactment of section 2447 of the Penal Law in 1953, the New York Legislature established the procedure for granting immunity from subsequent prosecution to *witnesses* before official investigating groups. The immunity was granted in return for testimony and other evidence produced by the witness. The court of appeals, in *People v. De Feo,*[6] summarized the procedure under section 2447 by stating that in order to obtain the immunity the witness must first claim his privilege, then be directed to answer and finally testify.[7] This procedure constitutes a departure from prior immunity statutes which conferred automatic immunity upon witnesses who gave incriminating testimony without having signed a waiver.[8]

The majority in the instant case reasoned that since the defendant was not summoned before the grand jury as an ordinary witness, but rather as a prospective defendant, the procedure for obtaining immunity under section 2447 as enumerated in *People v. De Feo* had no application. Falling back on the reasoning of *Gillette,* the majority concluded that the defendant was automatically immune because his constitutional right against self incrimination had been violated. In other words, the subpoenaing of a prospective defendant to appear before a grand jury is tantamount to "compelling" him to be "a witness against himself" within the meaning of the New York constitution.

The dissent contended that merely subpoenaing a prospective defendant before a grand jury and requiring him to invoke his privilege against self incrimination under the sanction of an oath, does not compel the defendant to be a witness against himself. The minority reasoned that section 2447 is constitutional even as applied to prospective defendants, because the legislature did not curtail the privilege, but merely set up a new procedure whereby it might be conferred. The dissenting judges further argued that under the corresponding provision of the United States Constitution[9] a prospective defendant may be subpoenaed before a federal grand jury and his testimony, freely given with prior knowledge of his rights, as in the instant case, may be used against him as such conduct amounts to a waiver of the right against self incrimination.[10]

6. 308 N.Y. 595, 127 N.E.2d 592 (1955).

7. Id. at 602, 127 N.E.2d at 595.

8. These prior statutes are N.Y. Pen. Laws §§ 380, 381, 584. These sections have been amended so that their former automatic immunity features are now supplanted by a provision that immunity may be conferred pursuant to § 2447 of the Penal Law. N.Y. Sess. Laws 1953, ch. 891, §§ 1, 5, 8. See People v. De Feo, 308 N.Y. 595, 602, 127 N.E.2d 592, 595 (1955), where the court of appeals held that § 2247 is now controlling with regard to the procedure for granting immunity to witnesses.

9. U.S. Const. amend. V. See, e.g., People v. Reiss, 255 App. Div. 509, 8 N.Y.S.2d 209 (1st Dep't 1938), aff'd mem., 280 N.Y. 539, 20 N.E.2d 8 (1939).

10. In Rogers v. United States, 340 U.S. 367 (1951), the petitioner, a prospective defendant, appeared before a grand jury pursuant to a subpoena. Petitioner was advised of her rights and she gave self incriminating answers, without objection, to questions posed by the grand jury. Petitioner later invoked the privilege in refusing to answer a

To the extent that the *Gillette* and *Ferola* cases dealt with a situation wherein the defendant testified freely after full knowledge and understanding of his rights, they are dictum. *Gillette* and *Ferola* conferred automatic immunity upon prospective defendants who gave incriminating testimony where it appeared that they were not advised of their rights or did not understand the nature or extent of the privilege. The instant decision relies upon this dictum to confer automatic immunity upon a defendant who, with full knowledge and understanding of his right to invoke the privilege, testified freely.

The majority, in making the distinction between "witnesses" and "prospective defendants" under section 2447, opens the door to a great deal of confusion. Where a person, initially subpoenaed as a "witness," gives self incriminatory testimony after advisement of his rights, his status would thereby change to that of a prospective defendant.[11] Since the mere presence of a prospective defendant before a grand jury pursuant to subpoena makes him a witness against himself, would it not follow that such a person must be automatically immune?[12] Whether the prospective defendant is initially compelled to appear before the grand jury or is forced to remain after he has assumed that status, his rights would be infringed. If it be contended that the witness waives his privilege under such circumstances,[13] why does it not follow that a person called initially as a prospective defendant, who voluntarily gives testimony with knowledge of his rights, also waives his privilege?

If the legislature intends to avoid future hasty grants of immunity to prospective defendants, the only means of so doing would be to amend article I, section 6 of the constitution which, it is suggested, might read as follows:

The mere compulsory appearance of a defendant pursuant to lawful subpoena before a grand jury, coroner's jury or other similar body, shall not be deemed a violation of his rights and privileges under this section and by his incriminating testimony, given freely after full advisement and understanding of his rights and privileges, he shall be deemed to have waived such rights and privileges.

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question. Her conviction for contempt was affirmed by the Supreme Court because she had waived the privilege by testifying freely to self incriminating matter.

11. In People v. Freistadt, 6 App. Div. 2d 1053, 179 N.Y.S.2d 633 (2d Dep't 1958) (per curiam), defendants were subpoenaed and testified before the grand jury as to transactions which became the basis of indictments against them. Defendants testified without a warning as to self incrimination. The prosecutor did not consider these individuals as prospective defendants when they were initially subpoenaed. The court dismissed the indictments holding that they had been placed in the status of prospective defendants. Compare People v. Dooling, 14 Misc. 2d 907, 180 N.Y.S.2d 618 (County Ct. 1958).

12. See note 11 supra.

13. In People v. Dooling, 14 Misc. 2d 907, 180 N.Y.S.2d 618 (County Ct. 1958), defendants appeared under subpoena before the grand jury investigating the death of defendants' adopted child. Defendants were not advised of their rights, testified freely and were indicted for manslaughter. The court upheld the indictment, stating that defendants had been called as witnesses and had waived the privilege.

Insurance—Powers of Appraisers.—Plaintiff purchased from defendant a policy of fire and extended coverage insurance on his house.[1] Subsequently, a windstorm occurred, damaging the insured structure and, because the parties to the policy could not agree on the amount of the award, appraisers were appointed. The appraisers made their report in which they determined the actual cash value of the structure before the storm, the consequent loss and the amount of the award.[2] Plaintiff insured, however, refused to accept the sum tendered pursuant to the appraisal. Instead he filed a bill in the chancery court attacking the appraisal on the ground that the appraisers, in failing to include in the award compensation for the walls of the residence which plaintiff argued had been twisted by the storm, were not merely ascertaining and fixing damage but were determining the cause of the damage which it was not within their province to do. The chancery court ruled for defendant. On appeal, the Supreme Court of Mississippi reversed, and held that appraisers have no power to determine the cause of damage to insured property, but their power is limited to a determination of the money value of the property before and after the insured-against event. *Munn v. National Fire Ins. Co.*, — Miss. —, 115 So. 2d 54 (1959).

In contrast to arbitration clauses, which go to the question of liability, appraisal clauses provide only for the placing of money values on the property of the insured both before and after the occurrence of the insured-against hazard.[3] Insofar as they do not trespass on the jurisdiction of the courts by determining liability, they have been held valid and enforceable.[4]

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1. There were two identical policies involved, giving a total coverage of $4,000 on plaintiff's dwelling house, $1,500 on his barn and $200 on his chicken house. The plaintiff did not dispute the awards on the latter two structures.

2. The appraisal was conducted approximately eight months after the windstorm, and the following values were found:

	Actual Cash Value	*Loss*
House	$ 7,500.00	$ 783.60
Barn	$ 3,000.00	$ 65.00
Chicken House	$ 800.00	$ 200.00
	$11,300.00	$1,048.60

Brief for Appellee, p. 4.

3. The distinction between appraisal and arbitration is discussed in Matter of Delmar Box Co., 285 App. Div. 398, 137 N.Y.S.2d 491 (3d Dep't), aff'd, 309 N.Y. 60, 127 N.E.2d 497 (1955). The case is criticized in Sturges & Sturges, Appraisals of Loss and Damage Under Insurance Policies, 13 U. Miami L. Rev. 1, 17-45 (1958). "[T]he rule persists that an agreement for the appointment of appraisers under the provisions of a policy of insurance . . . does not constitute an arbitration, since the appraisers are not authorized to pass on the question of the whole liability, but are restricted to the question of damages arising from the loss." In the Matter of Am. Ins. Co., 208 App. Div. 168, 170, 203 N.Y. Supp. 206, 208 (1st Dep't 1924).

4. Hamilton v. Liverpool, London & Globe Ins. Co., 136 U.S. 242 (1890); Hartford Fire Ins. Co. v. Connor, 223 Miss. 799, 79 So. 2d 236 (1955); Liverpool, L. & G. Ins. Co. v. Wolff, 50 N.J.L. 453, 14 Atl. 561 (Sup. Ct. 1888); Scott v. Avery, 5 H.L. 811, 10 Eng. Rep. 1121 (1856). An award made by appraisers acting within the scope of their authority is binding on both parties and may be set aside by a court only on limited grounds of

The appraisal clause contained in the policy in the principal case provided: In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then . . . appraisers shall . . . appraise the loss, stating separately actual cash value and loss to each item; and . . . an award in writing, so itemized . . . shall determine the amount of the actual cash value and loss.[5]

By the terms of the clause, appraisers were required to set an actual cash value on the insured property.[6] Judicial interpretation has defined actual cash value as the market value just prior to the occurrence of the hazard causing the loss.[7] Because appraisers do not come upon the scene until after there has been some damage to the insured property, their determination of actual cash value cannot be based on an examination of the property in its "market value" condition. They are, nonetheless, required to determine what that condition was and to set a corresponding money value.

The appraisers, bound by the terms of the clause ordering that they state "separately actual cash value and loss," made a judgment as to the condition of the walls prior to the insured-against event. Their conclusion was that the walls were leaning at the time of the windstorm,[8] and this was reflected in their award to the insured. In short, their refusal to award funds to straighten the walls was not "because they were not damaged, but because they thought the storm did not cause the damage."[9]

The plaintiff's position was that the appraisers had exceeded their authority in determining that the windstorm was not the cause of the leaning walls. The majority agreed with this contention, reasoning that any determination that certain damage was not a result of the insured-against hazard is also a determination of liability of the insurer for such damage. Since it was not within the appraisers' power to determine liability,[10] the award was not binding.

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fraud or mistake or the misfeasance or malfeasance of the appraisers. In re Waters, 93 F.2d 196 (5th Cir. 1937); Phoenix Ins. Co. v. Everfresh Food Co., 294 Fed. 51 (8th Cir. 1923); Glens Falls Ins. Co. v. Garner, 229 Ala. 39, 155 So. 533 (1934); Johnson v. State Mut. Rodded Fire Ins. Co., 232 Mich. 204, 205 N.W. 163 (1925); Robertson v. Boston Ins. Co., 184 Minn. 470, 239 N.W. 147 (1931).

5. Munn v. National Fire Ins. Co., — Miss. —, —, 115 So. 2d 54, 58-59 (1959).

6. Failure to state actual cash value will result in an invalid award. Azar v. Eureka-Security F. & M. Ins. Co., 4 F. Supp. 574 (1933); Branch v. Springfield F. & M. Ins. Co., 198 La. 720, 4 So. 2d 806 (1941); Lee v. Farmers' Ins. Co., 72 S.D. 127, 32 N.W.2d 188 (1948); 6 Appleman, Insurance Law and Practice § 3945 (1942).

7. New York Cent. Mut. Fire Ins. Co. v. Diaks, 69 So. 2d 786 (Fla. 1954); Lee v. Providence-Washington Ins. Co., 82 Mont. 264, 266 Pac. 640 (1928); Patriotic Order v. Hartford Fire Ins. Co., 305 Pa. 107, 157 Atl. 259 (1931); Newark Fire Ins. Co. v. Martineau, 26 Tenn. App. 261, 170 S.W.2d 927 (1943).

8. The appraisers decided that the walls were leaning as a result of the settling of the foundation. — Miss. at —, 115 So. 2d at 59. (Ethridge, J., dissenting.)

9. Id. at —, 115 So. 2d at 57.

10. In support of this proposition the court cited: Mork v. Eureka-Security F. & M. Ins. Co., 230 Minn. 382, 42 N.W.2d 33 (1950); Harrington v. Agricultural Ins. Co., 179 Minn. 510, 229 N.W. 792 (1930); Itasca Paper Co. v. Niagara Fire Ins. Co., 175 Minn. 73, 220 N.W. 425 (1928); 45 C.J.S. Insurance § 1110 (1946); 3 Am. Jur. Arbitration and Award § 3, at 830-31 (1936).

The dissent found the appraisers' award proper. The appraisers, the dissent reasoned, had merely made a determination of actual cash value, a determination which they were bound to make under the terms of the policy, and that determination necessarily required consideration of the condition of the property resulting from age or deterioration.

There is, in the principal case, an apparent conflict between the duty of the appraisers to fix actual cash value, on the one hand, and the principle that appraisers cannot determine liability, on the other. In fact, here the appraisers fixed actual cash value and determined liability as well, the latter as a necessary incident to the former, but it should be noted that this latter determination was the result of their finding on a question of fact only, as opposed to a question of law.

It was plaintiff's contention that the damage was caused by the insured-against hazard which brought into focus the liability issue. The dissent, by ignoring the dual nature of the appraisers' finding which is the distinguishing feature of the case, upheld the validity of the award on the basis that it is founded on a determination of actual cash value alone. The majority, while correct in holding that the appraisers did in fact determine liability, ignored the underlying question of whether or not this limitation on the power of the appraisers can be properly applied to the unique situation before the court—unique in that such determination was a necessary incident to the exercise of the undisputed power of the appraisers to fix cash value. Fixing liability by means of appraisal is legally frowned upon in that it does not afford the parties a suitable arena[11] for the litigation of legal questions.[12] This rule is ground on the idea that the liability of the insurer involves questions of law, manifestly an area in which the appraisers would be less than expert.[13] In the principal

11. Appraisers are allowed to proceed in an informal and summary manner. In re Waters, 93 F.2d 196 (5th Cir. 1937); Oakes v. Franklin Fire Ins. Co., 122 Me. 361, 120 Atl. 53 (1923) (dictum); Dufresne v. Marine Ins. Co., 157 Minn. 390, 196 N.W. 560 (1923); Carlston v. Saint Paul F. & M. Ins. Co., 37 Mont. 118, 94 Pac. 756 (1908) (dictum). It is not necessary for the appraisers to give the parties notice of their meetings or to receive evidence. Phoenix Ins. Co. v. Everfresh Food Co., 294 Fed. 51 (8th Cir. 1923); Franklin Fire Ins. Co. v. Brewer, 173 Miss. 317, 159 So. 545 (1935). Appraisers are not required to take an oath. Syracuse Sav. Bank v. Yorkshire Ins. Co., 301 N.Y. 403, 94 N.E. 2d 73 (1950) (dictum). "Appraisers . . . are generally expected to act upon their own knowledge and investigation, without notice of hearings, are not required to hear evidence or to receive the statements of the parties, and are allowed a wide discretion as to the mode of procedure and sources of information." 3 Am. Jur. Arbitration and Award § 3, at 831 (1936).

12. This would be considered a trespass on the jurisdiction of the courts. See note 4 supra and accompanying text.

13. Mork v. Eureka-Security F. & M. Ins. Co., 230 Minn. 382, 42 N.W.2d 33 (1950); Harrington v. Agricultural Ins. Co., 179 Minn. 510, 229 N.W. 792 (1930); Itasca Paper Co. v. Niagara Fire Ins. Co., 175 Minn. 73, 220 N.W. 425 (1928). See In re Waters, 93 F.2d 196 (5th Cir. 1937); Bryson v. American Eagle Fire Ins. Co., 132 Me. 172, 168 Atl. 719 (1933); Oakes v. Franklin Fire Ins. Co., 122 Me. 361, 120 Atl. 53 (1923); F & M Skirt Co. v. Rhode Island Ins. Co., 316 Mass. 314, 55 N.E.2d 461 (1944); Hawkinson

case, however, the appraisers merely made a determination which, under ordinary circumstances,[14] they would clearly be competent to make, that is, they merely made a decision on the factual question of the pre-existing condition of the walls. Because there is this distinction, it is submitted that the court was not justified in bringing this case within the prohibition on liability determination.

Labor Relations—Availability of Injunction Restoring *Status Quo Ante* Pending Determination of Minor Dispute by NRAB.—Plaintiffs, railroad carriers operating in and about New York Harbor, notified defendant unions that five days from notification they would abolish the position of oiler on diesel powered tugboats. The unions immediately served notice that they considered such action a violation of their collective bargaining agreements and authorized a strike effective on the date of abolition of the jobs in question. Plaintiffs then made an ex parte submission of the dispute to the National Railroad Adjustment Board pursuant to procedures of the Railway Labor Act,[1] and filed suit in a federal district court to enjoin the threatened strike. Although a temporary restraining order was issued, a serious work stoppage occurred due to the picketing by the workers whose jobs no longer existed. The district court[2] granted plaintiff's injunction restraining the strike and also granted defendant's cross-motion for a mandatory injunction to restore the oilers to their former positions, both injunctions to remain in effect until the procedures of the Act for settlement of the dispute were exhausted. The court of appeals reversed the mandatory injunction and affirmed the preliminary injunction on plaintiff's cross-appeal. An order reinstating laid off railway employees pending determination by NRAB of a minor dispute was improper, but an injunction preventing the union from striking to protest employer's action in a minor dispute was proper. *Baltimore & O.R.R. v. United R.R. Wkrs., T.W.U.*, 271 F.2d 87 (2d Cir. 1959).

The Railway Labor Act was passed by Congress "to avoid any interruption to commerce . . . [and] to provide for the prompt and orderly settlement of all disputes . . . ."[3] The Act recognizes two types of disputes between employers and employees—major and minor. A major dispute is one which centers on the formation of a collective agreement or the effort to secure such a contract

Tread Tire Serv. Co. v. Indiana Lumbermen's Mut. Ins. Co., 362 Mo. 823, 245 S.W.2d 24 (1951); In the Matter of Am. Ins. Co., 208 App. Div. 168, 203 N.Y. Supp. 205 (1st Dep't 1924); Williams v. Hamilton Fire Ins. Co., 118 Misc. 799, 194 N.Y. Supp. 793 (Sup. Ct., App. T. 1922).

14. In the absence of a dispute over whether the windstorm caused the damage, there is no question but that a conclusion by the appraisers as to the pre-existing condition of the walls, as a necessary prelude to the setting of actual cash value, would be valid and unassailable.

1. 48 Stat. 1185 (1934), 45 U.S.C. §§ 151-88 (1958).
2. Baltimore & O.R.R. v. United R.R. Wkrs., T.W.U., 176 F. Supp. 53 (S.D.N.Y. 1959).
3. 48 Stat. 1186-87 (1934), 45 U.S.C. § 151a (1958).

or an attempt to change the terms of an agreement where there is no issue as to whether the existing agreement between the parties controls the controversy. This type of dispute looks to the acquisition of rights for the future and not to the assertion of rights claimed to have vested in the past. Thus, where there is no agreement between the parties or where there is an effort to change an existing contract, a major dispute exists. A minor dispute arises when the dispute in question contemplates the existence of a collective bargaining agreement already concluded or involves a situation in which no effort is made to bring about a formal change in terms or to create a new agreement. Rather, the dispute relates either to the meaning or to the proper application of a particular provision of the agreement with reference to a particular situation or an omitted case.[4] As set forth by the Act,[5] the procedural processes for the settlement of the two types of railway disputes differ radically. Following a breakdown of negotiations between the parties themselves the dispute is handled by the National Mediation Board, if major, or the NRAB, if minor. If the negotiations under the aegis of the NMB do not result in a settlement, the parties may accept or reject arbitration. Once arbitration has been rejected, the parties following statutory freeze periods are allowed to use self help and economic coercion. Thus, after such period a union may strike. However, during the pendency of determination of settlement the employer must keep the *status quo ante*.[6] In the case of a minor dispute the decision of the NRAB is binding on the parties and judicially enforceable. During the time such dispute is before the NRAB the parties are enjoined from striking. Unlike a major dispute, there is no duty on the employer to maintain the *status quo ante*.[7]

The problem raised in the present case poses a serious question with regard to the equity powers of the court when dealing with minor disputes. Although the employer has no duty to maintain the *status quo ante*, the question arises whether, in a particular situation as faced here where the public interest is directly affected, the court can at its discretion enjoin him to do so. This precise question has never been directly before the courts.

In *Order of Ry. Conductors v. Pitney*[8] the Supreme Court in a minor dispute refused to issue a mandatory injunction requiring the railroad to maintain the *status quo ante*. The Court stated that the NRAB had initial jurisdiction and, therefore, federal courts should refrain from passing on the dispute until it has been adjudicated by the NRAB. This case dealt with a very complex factual situation involving the rights of two unions which had entered into

4. Brotherhood of R.R. Trainmen v. Chicago R. & I.R.R., 353 U.S. 30, 33 (1957); Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 722-24 (1945). In the latter case the Court stated that the difference between the disputes was clear from the Act itself and the history of railway labor disputes, as well as being the intent of Congress. See Comment, 47 Mich. L. Rev. 984 (1949); Note, 72 Harv. L. Rev. 354, 360 (1958).

5. 48 Stat. 1189-98 (1934), 45 U.S.C. §§ 153, 154 (1958).

6. 325 U.S. at 724-27.

7. Ibid.

8. 326 U.S. 561 (1945).

collective bargaining agreements with the railroad. The Court indicated that in such a situation the problem would be better handled by the NRAB because of its experience with disputes of such a technical nature.[9] There was no specific finding, however, that the situation involved was not one in which the interest of the public was clearly affected. Subsequently, in *Missouri-Kansas-Texas R.R. v. Brotherhood of Locomotive Eng'rs*[10] the court was faced with facts similar in many respects to the instant case. Finding the dispute to be minor, the court held that while the issuance of an injunction restraining the strike was proper, the union was not entitled to an injunction requiring the maintenance of the *status quo ante*. In refusing to grant the injunction the court reasoned it would not be proper to pass upon the merits of a minor dispute over which the NRAB had been given primary jurisdiction by the Act. The court stated that in the case of a minor dispute pending before the NRAB, it could not issue such an injunction for any reason.[11] In a recent district court decision[12] both the *Pitney* and *Missouri-Kansas-Texas* case were cited as controlling authority. Here the court also found that an order to the railroad to restore the *status quo ante* in a minor dispute would be a preliminary judgment on the merits of the case, a right the court could not exercise since the dispute was committed to the exclusive jurisdiction of the NRAB.[13]

The majority in the instant case determined that the dispute was minor and, therefore, the court was without power to compel the railroads to restore the *status quo ante*. In the opinion the majority painstakingly pointed to the fact that the primary jurisdiction of a railroad labor dispute has been given to the NRAB in such a situation. Consequently, the NRAB and not the district court had authority to resolve the merits of the case. Issuance of the mandatory

9. Id. at 566. Here the Court stated that it was the intent of Congress to leave a minimum responsibility to the courts in such disputes.

10. 266 F.2d 335 (5th Cir. 1959).

11. "To hold otherwise would permit the district court, in every case where either a railroad company or a labor organization seeks an injunction to protect the jurisdiction of the National Railroad Adjustment Board to lift itself by its bootstraps into some kind of jurisdiction to pass preliminary judgment upon the merits of disputes committed to the exclusive jurisdiction of the Board." Id. at 341. The Supreme Court, in granting certiorari in this case, limited the question to "whether a district court under circumstances where a dispute arising under the Railway Labor Act has been submitted by a railroad to the National Railroad Adjustment Board and an injunction against a strike by employees is sought . . . may on the granting of an injunction impose reasonable conditions designed to protect the employees against a harmful change in working conditions during pendency of the dispute before the Adjustment Board by ordering that the railroad restore the status quo, or, in the alternative, pay the employees the amount they would have been paid had changes in working conditions giving rise to the dispute not been made." Brotherhood of Locomotive Eng'r v. Missouri-Kansas-Texas R.R., 361 U.S. 810 (1959).

12. Pennsylvania R.R. v. Local 2013, United R.R. Wkrs., 178 F. Supp. 53 (E.D. Pa. 1959).

13. Id. at 61-62. Here relief was granted to the railroad "in vindication of the public policy declared by Congress in the Railway Labor Act and the duties enjoined on the defendant's thereunder and to prevent irreparable loss and grave harm to the plaintiff and the public. . . ."

injunction by the trial court had in effect determined the issue without submission to the NRAB as required by the Act. Finding that the lower court had no authority to reinstate, the court held that even though the trial judge was so impelled due to the resultant tie-up of New York Harbor, nothing in the Act authorized his doing so.[14] In so holding the court here adhered to a strict interpretation of the Act as promulgated in the earlier cases.

Chief Judge Clark, in his dissent, would have affirmed the holding of the district court in its entirety and not merely the part directed against the unions. He questioned the curtailment of the court's equity powers, referring to instances in which the court has used its broad injunctive powers to carry out the purposes and policies of the Act.[15] The dissent argued that there is nothing in the Act itself to limit these powers. As in the lower court decision, Judge Clark maintained that the "sole function here is to further the *public* interest in avoiding a disruption of interstate commerce"[16] and, therefore, the granting of an injunction would be proper.

In the cases cited by the majority the courts did not have to take into account the effect of their action on the public interest. Here, however, that interest was directly affected by the court's refusal to enjoin the railroad to maintain the *status quo ante* while the dispute was pending before the NRAB. It would seem that these decisions are, therefore, readily distinguishable from the instant case. It should be noted that one of the avowed purposes of the Act is to protect the public from the effects of industrial strife. This purpose would be served more faithfully by allowing the court the discretionary power to enjoin in such a situation, for without the power to enjoin the railroad the court here has only one other alternative which would be an injunction restraining the laid off employees from picketing. The validity of such an injunction would be doubtful.[17]

Libel and Slander—Distinction Abolished.—Plaintiffs brought consolidated actions for slander alleging that defendant in a speech to union members had referred to them as communists. On appeal from a judgment of the trial court for the plaintiffs, the Supreme Court of Washington affirmed and held

14. Baltimore & O.R.R. v. United R.R. Wkrs., T.W.U., 271 F.2d 87, 91 (2d Cir. 1959). The court reasoned that as far as the unions are concerned no irreparable harm will be done them by the injunction. Such harm, however, would befall the railroad if the court granted the injunction and was later proven to be in error by the finding of the NRAB. Nothing is said with regard to the public interest and to its effect on the injunctive power of the court.

15. Brotherhood of R.R. Trainmen v. Chicago R. & I.R.R., 353 U.S. 30, 41-42 (1957); Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515 (1937); Railroad Yardmasters v. Pennsylvania R.R., 224 F.2d 226 (3d Cir. 1955).

16. 271 F.2d at 94. The dissent further states that in none of the cases cited in the majority opinion did such an interest exist. See Pennsylvania R.R. v. Local 2013, United R.R. Wkrs., 178 F. Supp. 53 (E.D. Pa. 1959).

17. 176 F. Supp. at 62. The court here states that the railroads have conceded the right of the laid off employees to call their plight to the attention of the public by picketing.

that an oral imputation of membership in the Communist Party is defamation actionable without proof of special damage. *Grein v. La Poma*, — Wash. 2d —, 340 P.2d 766 (1959).

The court was here confronted with the problem of whether orally calling a person a communist was actionable without proof of special damages.[1] Under the existing laws of Washington such a publication is actionable per se and, therefore, does not require proof of special damages.[2] The court went further and examined the rationale underlying the distinction between libel and slander,[3] only to conclude that such distinction "is the result of historical accident for which no reason can be ascribed."[4] The court thereupon held that the distinction ought to be abolished and all defamation be actionable without proof of special damages.[5]

The distinction between libel and slander and the technical rules surrounding actions for slander and for libel are long on history but short on reason. In the fifteenth century, before widespread communication became possible through the development of printing, both oral and written defamation were considered spiritual wrongs punishable in ecclesiastical courts.[6] Since ecclesiastical decrees of penance and retraction bestowed upon the injured party no compensation, cases that resulted in pecuniary loss were soon brought to the civil courts wherein compensatory damages were awarded. Later, with the increasing

1. Whether a statement is actionable per se is a question of law for the court. Graham v. Star Pub. Co., 133 Wash. 387, 233 Pac. 625 (1925).

Slander per se, i.e., oral defamation that is actionable without proof of special damage, is comprised of four general categories: (1) an imputation of a serious crime; (2) loathsome disease; (3) unchastity to a woman; and (4) statements that affect a person's business, trade or occupation. All other slander requires proof of pecuniary damage in order to be actionable. Prosser, Torts § 93 (2d ed. 1955). Some states have added the fifth category of imputation of membership in the Communist Party, but the principal case is one of first instance in Washington. See Joopanenko v. Gavegan, 67 So. 2d 434 (Fla. 1953); Parmelee v. Hearst Pub. Co., 341 Ill. App. 339, 93 N.E.2d 512 (1950) (dictum).

2. Since membership in a subversive organization is a crime by Washington law, Wash. Rev. Code § 9.81.020 (1958), and it had previously been held in Nostrand v. Balmer, 53 Wash. 2d 460, 335 P.2d 10 (1959), that the Communist Party was a subversive organization as a matter of common knowledge, an imputation of such membership would be an accusation of a serious crime and, thus, actionable per se.

3. The distinction is generally made that written defamation or libel is actionable without proof of special damage, whereas slander or oral defamation requires such damage unless slanderous per se. See Marion v. Davis, 217 Ala. 16, 114 So. 357 (1927); Craig v. Proctor, 229 Mass. 339, 118 N.E. 647 (1918); Prosser, Torts § 93 (2d ed. 1955).

4. Grein v. La Poma, — Wash. 2d —, —, 340 P.2d 766, 768 (1959). For a contrary view see Ostrowe v. Lee, 256 N.Y. 36, 175 N.E. 505 (1931), where Chief Judge Cardozo stated: "The schism in the law . . . between the older wrong of slander and the newer one of libel is not the product of mere accident." Id. at 37, 175 N.E. at 506.

5. While the express holding of the court was that slander should be treated in the same manner as libel, the logical inference created by its rationale abolishes also the distinction between libel per se and libel per quod. For an outline of the law of libel in Washington see Comment, 30 Wash. L. Rev. 6 (1955).

6. 8 Holdsworth, History of English Law 335 (3d ed. 1926); Donnelly, History of Defamation, 1949 Wis. L. Rev. 99.

circulation given printed matter, punishment for written defamation became the prerogative of the Court of the Star Chamber as a combination tort and crime.[7] With the dissolution of this court in 1641 however, jurisdiction over all defamation was again given to the common law courts, but rather than subject written defamation to the technical distinctions encumbering oral defamation, the courts retained libel as a separate form of action.[8] In deference to its prior status libel was considered the more serious offense and, therefore, actionable without proof of special damages, whereas the requirement of proof of pecuniary damage in actions for slander was retained. This distinction has become imbedded in the law.[9] Some authorities have supported the perpetuation of the distinction out of a reluctance to overturn established rules of law, while others have attempted to justify it. Of the several theories advanced none are satisfactory. Some argue that since the act of writing necessarily imports time for reflection it shows greater malice and should be considered the more serious.[10] This contention ignores the fact that liability is not dependent upon intent to defame.[11] Others maintain that since what is written is permanent in form it perpetuates the scandal and is more likely to cause damage.[12] This reasoning has an understandable appeal, but certainly it has no universal application. Consider, for example, the widespread publication given a statement made over the radio as compared with the restricted publication given an epistle between friends.[13] In addition, the practical difficulties presently being encountered in determining what is permanent in form and what is not give sufficent reason to reject a rule based on that distinction.[14] A final objection to treating all defamation as actionable per se is the suggestion that such a rule might generate a rash of litigation over petty statements not worthy of judicial cognizance.[15] Since damages must ordinarily be proven, although not necessarily special damages, the objection loses much of its force.[16]

7. Holdsworth, Defamation in the Sixteenth and Seventeenth Centuries, 40 L.Q. Rev. 302, 398-401 (1924).

8. Pluckett, History of the Common Law 427-45 (2d ed. 1936); Veeder, The History and Theory of the Law of Defamation (pt. 1), 3 Colum. L. Rev. 546 (1903), (pt. 2), 4 Colum. L. Rev. 33 (1904).

9. See Thorley v. Kerry, 4 Taunt. 355, 128 Eng. Rep. 367 (C.P. 1812).

10. 1 Street, Foundations of Legal Liability 293-94 (1906).

11. Polakoff v. Hill, 261 App. Div. 777, 27 N.Y.S.2d 142 (1st Dep't 1941); 53 C.J.S. Libel and Slander § 75 (1948).

12. "What gives the sting to the writing is the permanence of form. The spoken word dissolves, but the written one abides and perpetuates the scandal." Ostrowe v. Lee, 256 N.Y. 36, 37, 175 N.E. 505, 506 (1931).

13. A strict application of the permanence of form test would result in the presuming of damage in the personal letter case and not in that of a radio broadcast.

14. Sorensen v. Wood, 123 Neb. 348, 243 N.W. 82 (1932); Hartmann v. Winchell, 296 N.Y. 296, 73 N.E.2d 30 (1947); Locke v. Gibbons, 164 Misc. 877, 299 N.Y. Supp. 188 (Sup. Ct.), aff'd mem., 253 App. Div. 887, 2 N.Y.S.2d 1015 (1st Dep't 1937); Miles v. Wasmer, 172 Wash. 466, 20 P.2d. 847 (1933); Donnelly, Defamation by Radio: A Reconsideration, 34 Iowa L. Rev. 12 (1948).

15. See Veeder, op. cit. supra note 8, at 54.

16. If the defamation be actionable per se the plaintiff need not prove that he has been

The court has recognized that, regardless of the mode of publication, an individual's right to reputation is violated when a defamatory statement is published concerning him. It is the encroachment upon the right of the defamed to enjoy his good reputation which ought to give rise to the cause of action and not the fact that he was financially injured as the result of being defamed. The practice of determining the existence of a cause of action on the basis of the form of the defamation, anomalous in inception, has become even more untenable in recent years.[17] Form, permanence and extent of publication are more properly considered when ascertaining the extent, rather than the existence, of injury to reputation.[18] In arriving at a well-reasoned solution that avoids the problem of distinguishing between libel and slander[19] which is today surrounded by uncertainty, the court here places the emphasis where it belongs, that is, upon the violation of the plaintiff's rights, and at the same time gives hope that a measure of stability will eventually be given to a traditionally unstable area of the law.[20]

Public Welfare—Workers Laid Off Due to Labor Dispute Ineligible To Receive Unemployment Compensation.—The Champion Spark Plug Company maintains its principal plant in Toledo, Ohio, and has a division at Hamtramck, Michigan, approximately fifty miles distant. The production schedule at the Michigan plant is under the control of the Toledo office where

injured and is not, prima facie, restricted to nominal damages. In practice, however, to insure adequate compensation it is incumbent upon him to introduce evidence of actual loss upon which the jury may estimate damages. See Clark, Damages § 411 (1925); McCormick, Damages § 116 (1935). If no actual harm to character and reputation has resulted he may well receive only nominal damages. See Amory v. Vreeland, 125 App. Div. 850, 110 N.Y. Supp. 859 (1st Dep't 1908).

17. See Gurtler v. Union Parts Mfg. Co., 285 App. Div. 643, 140 N.Y.S.2d 254 (1st Dep't 1955), aff'd per curiam, 1 N.Y.2d 5, 132 N.E.2d 889, 150 N.Y.S.2d 4 (1956), in which it was stated that even though a person might be deprived of employment opportunities because of a charge of communism, he had no cause of action unless special damage resulted or it was said of him concerning his trade. This recognition of the existence of a wrong with no remedy is the chief criticism of the present law.

18. The advent of each new medium of communication has caused difficulty in the law of libel and slander. The development can be traced through the advent of printing, art, the theatre, radio and television. This solution would cure any present difficulties and also be unaffected by changes and developments in the mode of communication. For example, how would the present rules cope with defamation by means of subliminal advertising? For other proposed reforms see Paton, Reform and the English Law of Defamation, 33 Ill. L. Rev. 669 (1939); Williams, Committee on the Law of Defamation: the Porter Report, 12 Modern L. Rev. 217 (1949). See also Note, 66 Harv. L. Rev. 476 (1953).

19. This has long been the law of Louisiana, Tarlton v. LaGarde, 46 La. Ann. 1368, 16 So. 180 (1894), and Scotland, Normand, The Law of Defamation in Scotland, 6 Camb. L.J. 327 (1938).

20. A proposed bill in the New York State Legislature would make defamatory statements on television and radio subject to the same criminal libel laws that now apply to newspapers. This is perhaps another step toward abolishing the distinction between libel and slander. N.Y. Times, March 2, 1960, p. 31, col. 2.

the sales, personnel and advertising departments of the company are located. The payroll, banking and accounting departments for both plants are also located in Toledo. The Michigan plant manufactures insulators and its entire output is transported daily to the Toledo plant where the insulators are assembled as component parts of the completed spark plugs. In 1956 a strike at the Michigan division deprived the Toledo plant of needed components and caused the company to lay off 630 workers at the Toledo plant.[1] The Ohio Unemployment Compensation Act[2] provides compensation for workers who are involuntarily unemployed, but a worker is ineligible if his unemployment results from "a labor dispute, other than a lockout at the factory, establishment or other premises at which he was employed . . . ." The Toledo employees, laid off solely by reason of the strike at Hamtramck, petitioned for unemployment compensation. The Board of Review rejected the claim. On appeal, the Court of Common Pleas and the Court of Appeals of Lucas County, one judge dissenting, affirmed.[3] Where two plants of a single employer are functionally integrated from the standpoint of management and production, and the plants are geographically proximate to one another, they comprise a single "factory, establishment or other premises" within the meaning of the Unemployment Compensation Act. *Adamski v. State,* 108 Ohio App. 198, 161 N.E.2d 907 (Ct. App. 1959).

The Federal Social Security Act of 1935 provided the impetus for the enactment of the various state unemployment compensation statutes by imposing upon every employer an excise tax equal to three per cent of total wages paid to his employees, but allowing a credit of ninety per cent of total wages to any employer who made payments to a state unemployment compensation fund pursuant to legislation approved by the Secretary of Labor.[4] Within two years every state had passed such legislation.[5] These statutes generally provide that workers unemployed due to a labor dispute, other than a lockout, are ineligible for benefits.[6] Most state acts not only require that the dispute occur at the establishment in which the worker was last employed but also that the worker be participating, financing or directly interested in the dispute.[7] Nine states, including Ohio and New York,[8] have enacted stricter provisions. They disqualify all workers laid off due to a labor dispute at the

1. The Michigan division manufactured insulators and cement drives without which the Toledo plant could not make the finished product.

2. Ohio Rev. Code Ann. § 4141.29 (Page Supp. 1959).

3. Judge Smith wrote the opinion for the court. Presiding Judge Fess wrote a separate concurring opinion. Judge Deeds dissented.

4. 49 Stat. 639-40, 643 (1935), 26 U.S.C. §§ 3301-06 (1958).

5. The various state statutes are listed in Comment, 10 Ohio St. L.J. 238 (1949).

6. See Note, 49 Colum. L. Rev. 550 (1949), which enumerates various differences in the language of representative state statutes. The court in Nordling v. Ford Motor Co., 231 Minn. 68, 42 N.W.2d 576 (1950), took the position that these changes in terminology do not affect the meaning of disqualification provisions.

7. See, e.g., Mich. Comp. Laws § 421.29 (1948).

8. Alabama, California, Delaware, Kentucky, Minnesota, Utah and Wisconsin have similar provisions. New York, under some circumstances, limits the time during which this disqualification operates to seven weeks. N.Y. Lab. Laws § 592(1).

establishment in which they are employed. Quite obviously, these provisions seek to prevent labor unions from calling strikes of key personnel secure in the knowledge that others who would subsequently be laid off at the same establishment would receive unemployment benefits without drain on the union treasury.[9] Several tests have been used to construe the terms "factory, establishment or other premises." Some early decisions emphasized the functional integration or total dependence of one plant upon another. Others have considered the geographic proximity of the plants. Still others have approved both these criteria in addition to other factors in the scheme of management and the circumstances of employment.[10]

Judge Smith's opinion for the court rejected any single test as absolute. It subscribed to the so-called comprehensive test set forth in the Michigan case of *Park v. Appeal Bd. of Employment Security Comm'n.*[11] The comprehensive test takes into account functional integrality, physical proximity and general or supervisory unity. The test of functional integrality was satisfied since the Toledo plant controlled production at Hamtramck, the insulators produced at Hamtramck were components of the final product manufactured at Toledo, and the Toledo plant could not continue to function without the supplies from the Michigan division.[12] The test of physical proximity was complied with since the Hamtramck division was "some 50 or 60 miles distant, and . . . trucks are sent daily from [the] Toledo plant to transport the insulators from [the] Hamtramck plant to the Toledo plant."[13] General unity was evident since the management and all supervisory personnel for both plants were located in Toledo. While recognizing that the statute was remedial and should be liberally construed in favor of the persons to be benefited, the court reasoned that this "should not result in the exercise of the legislative power of amendment under the mask of so-called interpretation."[14]

The concurring opinion of Presiding Judge Fess rejected the "comprehensive test" proposed by Judge Smith in favor of the tests of functional integrality and geographic proximity which have long been used by the Ohio Unemployment Compensation Board of Review. Judge Fess argued that the long continued administrative interpretation should not be disregarded unless "judicial construction makes it imperative to do so."[15] His opinion also attempted to find support in the fact that the Ohio statute, unlike statutes in most other states, contains a blanket disqualification clause and does not require that the worker

9. In all states, except Alabama and New Jersey, employers are the sole contributors to the unemployment benefit funds. The amount which an employer must pay generally rises as his layoffs increase. See generally Note, 33 Minn. L. Rev. 758 (1949).

10. See Annot., 28 A.L.R.2d 287, 324-30 (1953).

11. 355 Mich. 103, 94 N.W.2d 407 (1959).

12. Adamski v. State, 108 Ohio App. 198, 207, 161 N.E.2d 907, 915 (Ct. App. 1959).

13. Ibid.

14. Id. at 204, 161 N.E.2d at 913.

15. Id. at 216, 161 N.E.2d at 920. See generally 82 C.J.S. Statutes § 359 (1953). The test used by Judge Fess is that found in McGee v. Timken Roller Bearing Co., 161 N.E.2d 905 (Ohio 1956). For a defense of this test see Comment, 10 Ohio St. L.J. 238 (1949).

be participating, financing or directly interested in the strike which causes his unemployment.[16] It is difficult to determine how the absence of such a provision should make any difference in the construction of the terms in question. Under both types of statutes the worker, if he is to be disqualified from receiving benefits, must be unemployed by reason of a labor dispute at the establishment in which he works. Is it not in fact more logical to construe blanket disqualification provisions even more strictly against the employer since an innocent worker, having taken no action to support a strike against his employer, can be more easily deprived of benefits?

The dissenting opinion, while quoting at length from the *Park* case, did not approve any test for defining a single "factory, establishment or other premises." The minority reasoned that under no circumstances could a plant outside the state be considered part of a single establishment within Ohio.[17] The dissent reached this conclusion from the definition of "single employer" in the Ohio law.[18] Under this definition, a person who maintains two or more establishments within the state is considered a single employer. Judge Fess, in his concurring opinion, argued that this provision was enacted to prevent an employer from avoiding the provisions of the Act by employing two persons in each of several establishments within the state.[19] Since the Ohio Act makes such payments mandatory only for those employing three or more workers, an employer, in the absence of such a provision, could avoid the operation of the law by operating several independent establishments and employing less than three workers in each.[20]

The decision of the Board of Review and the holding of the lower court were reversible only if there were an error of law or if they were clearly against the weight of evidence.[21] On the basis of the facts given in the opinion it is impossible to state that there was insufficient factual evidence to support the judgment. It may be asked, however, were the theories advanced in the respective opinions adequate? The "functional integration" test is clearly unsatisfactory since obviously the production at two separate plants must be integrated if a labor dispute at one is to cause a work stoppage at the other.[22]

16. 108 Ohio App. at 218-19, 161 N.E.2d at 921-22.

17. Id. at 227-28, 161 N.E.2d at 926-27.

18. Ohio Rev. Code Ann. § 4141.01 (Page Supp. 1959).

19. 108 Ohio App. at 217, 161 N.E.2d at 920.

20. In 1949 a strike at the Ford plant in Dearborn, Michigan, caused layoffs in subassembly plants throughout the country. Most of the courts, in the cases growing out of this incident, held that the workers were entitled to compensation benefits. These cases rejected functional integrality as an absolute test to determine whether a single establishment exists. The courts also refused to hold that the out-of-state location of the Dearborn plant of itself necessitated a finding that two establishments existed. See, e.g., Ford Motor Co. v. Division of Employment Security, 326 Mass. 757, 96 N.E.2d 859 (1951); Ford Motor Co. v. Department of Labor & Indus., 5 N.J. 494, 76 A.2d 256 (1950). Contra, Ford Motor Co. v. Abercrombie, 207 Ga. 464, 62 S.E.2d 209 (1950).

21. Brown-Brockmeyer Co. v. Roach, 148 Ohio St. 511, 76 N.E.2d 79 (1947).

22. For cases employing this test see, e.g., Chrysler Corp. v. Smith, 297 Mich. 438, 298 N.W. 87 (1941); Speilman v. Industrial Comm'n, 236 Wis. 240, 295 N.W. 1 (1940). The Chrysler case, supra, was overruled by Park v. Appeal Bd. of Employment Security Comm'n, 355 Mich. 103, 94 N.W.2d 407 (1959).

The criterion proposed by the dissent seems to be without statutory support, and even if its reasoning were correct, this test could not be applied to cases where the plants in question were in the same state. The theory proposed by Judge Smith is perhaps the most satisfactory. The "comprehensive test" requires the court to consider all relevant circumstances. It is submitted that these circumstances should be considered not from the point of view of management but from the "standpoint of employment."[23]

It is possible, and often economically sound, to operate two plants as a single establishment. Centralization of sales, purchasing and advertising departments at one location can avoid unnecessary duplication and waste. These departments, however, are principally concerned with the external affairs of the business, and since they have no direct relation to the worker, it is submitted that these factors should be of secondary importance. On the other hand, the machinery for hiring and firing workers, the manner in which they are paid, the existence of overlapping provisions regarding seniority, vacations, sick leave and other fringe benefits should be of paramount concern since these circumstances directly affect the individuals for whose benefit the statute was enacted. The latter, therefore, should receive primary consideration in determining whether two plants constitute a "single factory or establishment."

23. For cases employing this test see, e.g., Nordling v. Ford Motor Co., 231 Minn. 68, 42 N.W.2d 576 (1950); Machinski v. Ford Motor Co., 277 App. Div. 634, 102 N.Y.S.2d 208 (3d Dep't 1951); Ford Motor Co. v. Unemployment Compensation Comm'n, 191 Va. 812, 63 S.E.2d 28 (1951).