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Case Notes

CASE NOTES

Administrative Law—Enforcement of Subpoenas Duces Tecum Issued by Administrative Agency.—Pursuant to the Labor-Management Reporting and Disclosure Act of 1959,[1] subpoenas duces tecum were issued by the United States Department of Labor directed to the respondent unions to determine whether any member had violated any provision of the act,[2] and to verify certain organizational and financial reports required to be filed with the Secretary of Labor.[3] The unions failed to comply with these subpoenas, alleging that they were too broad, and that being voluntary associations, the law pertaining to the amenability of corporations to administrative subpoenas was not applicable to them. Thereupon, on the application of the Secretary of Labor the District Court for the Eastern District of Michigan issued an order to show cause why the subpoenas should not be enforced.[4] Enforcement of the subpoenas was denied because the Secretary did not show that he had any reasonable basis for the investigation. *Mitchell v. Truck Drivers Union*, 191 F. Supp. 229 (E.D. Mich. 1961).

While never using the precise words "probable cause," the court has nevertheless interpreted the words of the act, "when he believes it necessary in order to determine whether any person has violated or is about to violate any

1. 73 Stat. 539 (1959), 29 U.S.C. § 521(a) (Supp. II, 1959-1960) provides: "The Secretary shall have the power when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this chapter . . . to make an investigation . . . and inspect such records and accounts and question such persons as he may deem necessary to enable him to determine the facts relative thereto."

2. 73 Stat. 539, 29 U.S.C. § 521(a) (Supp. II, 1959-1960). See 191 F. Supp. 229, 230 (E.D. Mich. 1961).

3. 73 Stat. 524 (1959), 29 U.S.C. 431(b) (Supp. II, 1959-1960) provides that "every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers . . . in such detail as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year. . . ." Both unions filed such reports for the fiscal year 1959, but refused to produce the records from which these reports can be verified and checked for accuracy.

4. 73 Stat. 539 (1959), 29 U.S.C. § 521(b) (Supp. II, 1959-1960) makes the provisions of 38 Stat. 722 (1914), as amended, 15 U.S.C. §§ 49, 50 (1958), "applicable to the jurisdiction, powers, and duties of the Secretary or any officers designated by him." 38 Stat. 722 (1914), 15 U.S.C. § 49 (1958) provides in part: "[A]nd the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. . . . Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. Any of the district courts of the United States . . . may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person . . . to produce documentary evidence if so ordered . . . and any failure to obey such order of the court may be punished by such court as a contempt thereof."

provision of this chapter . . ."[5] to mean when he has probable cause to believe any person has violated or is about to violate any provision of this chapter, and thus makes a showing of probable cause a prerequisite to the enforcement of these subpoenas. What other meaning can be gathered from the words of the court in interpreting this phrase when it says "this court feels that the requirement of when 'he deems it necessary' . . . has its foundation in some reason or purpose, rather than being an excuse for merely looking into the matters of union affairs, relevant or irrelevant, in the hope of something turning up, be it of any nature, without some reasonable foundation or valid purpose . . ."?[6] The fact that the instant court stresses the points that no charge or complaint had ever been filed with the Secretary of Labor involving the respondent unions,[7] nor did he "have any reason to believe any violation of law . . . [had] been committed or contemplated by the respondent unions . . ."[8] emphasizes further that the court is requiring a showing of probable cause.

The instant court has based its decision on *FTC v. American Tobacco Co.*,[9] where similar subpoenas, issued pursuant to the Federal Trade Commission Act, were held to be too broad because the Commissioner did not show that he had reason to believe that the papers called for would disclose any violation of the Act,[10] *i.e.*, he did not have probable cause to believe that the act had been violated. Mr. Justice Holmes, speaking for the Court, condemned the broad subpoena power exercised by administrative agencies stating that "anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire . . . and to direct *fishing expeditions* into private papers on the possibility that they may disclose evidence of crime."[11] Mr. Justice Holmes, however, did not deny that Congress had the power to direct fishing expeditions, but stated that it would take "the

5. 73 Stat. 539 (1959), 29 U.S.C. § 521(a) (Supp. II, 1959-1960).

6. 191 F. Supp. at 234. Nor is the language of the court inconsistent with this interpretation for it says that "if the words 'when he deems it necessary' are to be given any meaning, then there must be some showing beyond the mere action of proceeding by the Secretary of Labor, i.e., the showing of necessity." Id. at 232. This showing of necessity which the court is calling for can mean nothing else, if these words are to be given any meaning, than a showing of probable cause.

7. In the very beginning of the opinion the court stated: "In the hearings before this court, together with arguments of respective counsel and through the briefs, pleadings and exhibits, the Secretary of Labor has never indicated that there was any complaint or charge either filed with or pending before him involving the respondents." 191 F. Supp. at 229.

8. Id. at 230.

9. 264 U.S. 298 (1924).

10. 38 Stat. 719, as amended, 15 U.S.C. §§ 45-46(a) (1958) (Supp. II, 1959-1960). The Court stated: "Some ground must be shown for supposing that the documents called for do contain it [evidence]. . . . A general subpoena in the form of these petitions would be bad. Some evidence of the materiality of the papers demanded must be produced." 264 U.S. at 306. See also Consolidated Rendering Co. v. Vermont, 207 U.S. 541 (1908); Hale v. Henkel, 201 U.S. 43 (1906); Harriman v. ICC, 211 U.S. 407 (1908).

11. 264 U.S. at 305-06. (Emphasis added.)

most explicit language" before the Court would attribute to Congress such an intent.[12]

The ruling of *American Tobacco* that reasonable cause to believe that the act has been violated must first be shown before subpoenas will be enforced was whittled away by a number of lower court decisions.[13] Eventually in *Oklahoma Press Publishing Co. v. Walling*,[14] where subpoenas duces tecum were issued to determine whether the publishing company was violating the Fair Labor Standards Act,[15] the Court found the requisite "explicit language" to which Mr. Justice Holmes had alluded.[16] As in *American Tobacco* the subpoenas were resisted on the grounds that no charge or complaint had been filed and that the proceeding was merely a "fishing expedition," and thus violative of petitioner's rights under the fourth amendment. The Court rejected this argument, pointing out that the fourth amendment "if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant."[17] It is not necessary that a specific charge or violation of law be pending as in the case of a warrant.[18] Enforcement of such subpoenas does not constitute an illegal search and seizure thus violative of the fourth amendment, provided:

12. In discussing whether or not Congress has the power to authorize administrative agencies to issue subpoenas without a showing of probable cause, Justice Holmes stated: "We do not discuss the question whether it [Congress] could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent." 264 U.S. at 306.

13. Fleming v. Montgomery Ward & Co., 114 F.2d 384 (7th Cir. 1940), was one of the first cases to hold that a showing of probable cause was not required. There the court stated that "the scope and purpose of the Act, the proper exercise of the authority conferred upon the Administrator, and the effective performance of his duties, are inconsistent with an intention to limit inspection of books and records to cases in which the Administrator has reasonable cause to believe an employer is violating the provisions of the Act." Id. at 387. See also Walling v. La Belle S.S. Co., 148 F.2d 198 (6th Cir. 1945); Walling v. American Rolbal Corp., 135 F.2d 1003 (2d Cir. 1943); Fleming v. Easton Publishing Co., 38 F. Supp. 677 (E.D. Pa. 1941).

14. 327 U.S. 186 (1946).

15. 52 Stat. 1066 (1938), as amended, 29 U.S.C. § 211(a) (1958). Section 211(a) is substantially the same as that in the instant case, and provides that "The Administrator . . . may investigate . . . such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter."

16. The Court distinguishes this statute from that involved in American Tobacco and concludes that here is a case of "'explicit language' which leaves no room for questioning Congress' intent." 327 U.S. at 201.

17. Id. at 208.

18. "The very purpose of the subpoena and of the order, as of the authorized investigation, is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so." Id. at 201. See also Sherwood, The Enforcement of Administrative Subpoenas, 44 Colum. L. Rev. 531 (1944); Note, 71 Harv. L. Rev. 1541 (1958).

(1) The documents ordered are relevant to the inquiry, are specifically described, and the enforcement is not unduly burdensome; (2) The investigation is one which the agency is authorized to make.[19]

This is the norm which has been used by the courts in deciding the constitutional question.[20] It is not even necessary for the agency, seeking enforcement, to prove that the enabling statute has given it jurisdiction over those against whom the subpoenas have been issued. All that it required is merely an allegation of "coverage."[21]

An examination of the legislative history of the Labor-Management Reporting and Disclosure Act shows that Congress never intended that the Secretary be required to make a showing of probable cause. The Landrum-Griffin bill as originally presented provided that "the Secretary shall, *when he has probable cause to believe that any person has violated any provision of this Act* . . . make an investigation."[22] Similarly, the original Kennedy-Ervin bill contained almost identical language.[23] The bill as finally reported to the Senate, and as passed, however, deleted the words "probable cause" and inserted the phrase "when he believes it necessary."[24] After it passed the Senate, the bill was sent to a House

19. United States v. Morton Salt Co., 338 U.S. 632 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943); Detweiler Bros. v. Walling, 157 F.2d 841 (9th Cir. 1946); SEC v. Vacuum Can Co., 157 F.2d 530 (7th Cir. 1946).

20. United States v. Morton Salt Co., supra note 19; Endicott Johnson Corp. v. Perkins, supra note 19; Westside Ford Inc. v. United States, 206 F.2d 627 (9th Cir. 1953); Detweiler Bros. v. Walling, supra note 19; Walling v. La Belle S.S. Co., 148 F.2d 198 (6th Cir. 1945); Cudahy Packing Co. v. Fleming, 122 F.2d 1005 (8th Cir. 1941); United States v. Household Goods Movers Investigation, 184 F. Supp. 689 (D.D.C. 1960).

21. United States v. Morton Salt Co., supra note 19; Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Walling v. Benson, 137 F.2d 501 (8th Cir. 1943); Martin Typewriting Co. v. Walling, 135 F.2d 918 (1st Cir. 1943); Application of Walling, 50 F. Supp. 560 (S.D.N.Y. 1943); Walling v. W.G. Golebiewski, Inc., 47 F. Supp. 448 (W.D.N.Y. 1942); In re Standard Dredging Corp., 44 F. Supp. 601 (S.D.N.Y. 1942), aff'd, 132 F.2d 322 (2d Cir. 1943). But cf. General Tobacco & Grocery Co. v. Fleming, 125 F.2d 596 (6th Cir. 1942); Application of Walling, 49 F. Supp. 659 (D.N.J. 1943); Fleming v. G & C Novelty Shoppe, Inc., 35 F. Supp. 829 (N.D. Ill. 1940).

22. H.R. 8400, 86th Cong., 1st Sess. § 601(a) (1959). (Emphasis added.)

23. The original Kennedy-Ervin bill provided that "the Secretary shall have the power and is directed, when he has probable cause to believe that any person or labor organization has violated any provision of this title, to make an investigation. . . ." S. 505, 86th Cong., 1st Sess. § 106(c) (1959).

24. S. 1555, 86th Cong., 1st Sess. § 206(c) (1959) provides: "The Secretary shall have power and is directed when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this Act . . . to make an investigation. . . ." The minority opinion which accompanied the report of the Senate Committee on Labor and Public Welfare explained why the words "probable cause" had been deleted. "On the surface, the term 'probable cause' would appear to give the Secretary all of the investigatory power that he needed. But the words 'probable cause' would throw a monkey wrench into the Secretary's investigatory machinery." S. Rep. No. 187, 86th Cong., 1st Sess. 91 (1959).

conference committee. The committee issued a report stating that the "conference adopted the broader Senate language with respect to investigations and enforcement powers of [the] Secretary of Labor."[25] Thus the court, in the instant case, in requiring a showing of probable cause, is raising a problem which Congress tried to avoid.

In the light of this history, and the holdings of *Oklahoma Press Publishing Co.*,[26] *Endicott Johnson Corp. v. Perkins*,[27] and *United States v. Morton Salt Co.*,[28] where the Court held that it was not necessary for the Commissioner to believe that the act had been violated in order to enforce the subpoenas, it is difficult to understand the reluctance of the instant court to enforce similar ones. The subpoenas were clearly not irrelevant on their face. The documents were specifically described[29] and were those which were required to be kept for five years after the reports based on these records had been filed.[30]

The court attempts to reconcile this conflict by limiting the rulings of *Oklahoma Press Publishing Co.*, *Endicott Johnson*, and *Morton Salt* to subpoenas issued against corporations.[31] The court appears to take the view that a corporation has no rights whatsoever under the fourth amendment, for it states that "the [Union's] voluntary association does have the elements of individual persons sufficiently so that the Fourth Amendment does give some protection, if we are to give any meaning to that Fourth Amendment."[32] *Oklahoma Press* did not deny corporations the protection of the fourth amendment.[33] A corporation is protected by the fourth amendment if the examination is not authorized by an act of Congress, or if the subpoena is too broad, or is clearly irrelevant on its face.[34] Moreover, the court in the instant case recognizes the fact that the

25. 105 Cong. Rec. 18022 (1959) (remarks of Congressman Griffin). Senator Goldwater in commenting on the difference between the House and the Senate bill stated that "the provisions in the Senate bill do not hamper the investigatory power by requiring probable cause. . . . [T]he House bill restricts the Secretary's power to investigate . . . ." 105 Cong. Rec. 16490 (1959).

26. 327 U.S. 186 (1946).

27. 317 U.S. 501 (1943).

28. 338 U.S. 632 (1950).

29. See subpoenas, 191 F. Supp. at 230.

30. 73 Stat. 529 (1959), 29 U.S.C. § 436 (Supp. II, 1959-1960) requires that every person required to file reports shall maintain records on the matters required to be reported from which the documents filed with the Secretary may be verified, explained and checked for accuracy, for a period of not less than five years from the filing of the reports.

31. "This court would be loath to extend any further the doctrines enunciated in the Oklahoma Press case. Corporations, perhaps, because they are artificial creatures, have fallen to the onslaught, but we note that the court there took great pains to emphasize and re-emphasize that the application of the principles set forth there should apply only to corporations." 191 F. Supp. at 233. This statement by the instant court is misleading, for Oklahoma Press did not limit its ruling specifically to corporations, but only corporations as opposed to individuals.

32. 191 F. Supp. at 233.

33. See note 17 supra and accompanying text.

34. United States v. Morton Salt Co., 338 U.S. 632 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Endicott Johnson Corp. v. Perkins, 317 U.S. 501

rule regarding the fifth amendment is the same for both a corporation and a union.[35] No officer of a corporation or of a union, acting in his official capacity, can assert the privilege of the fifth amendment in producing the books and records of the corporation or the union, even if their production would tend to convict the officer of a crime.[36]

The application of the fifth amendment rule to unions was pointed out most vividly in *United States v. White*,[37] where a grand jury, investigating alleged irregularities in the construction of a naval supply depot, issued a subpoena duces tecum against the union involved. A union official, in pursuance of an order of the district court, appeared with the records in his possession and claimed the privilege of the fifth amendment on behalf of himself and the union. He was then held in contempt of court. It was held that the records of the unions were not the private records of the individual members and, therefore, no claim of personal privilege existed either under the fourth or fifth amendments.[38]

There is no justification for holding that the fourth amendment is different for a union than for a corporation when the fifth applies to both. As pointed out in *Boyd v. United States*[39] the fourth and fifth amendments run almost into each other. The Court stated that they had been "unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."[40] There is not such a disparity between the structure of a union and that of a corporation to warrant two separate rules, for as stated in the *White* case both are separate entities.[41] Both own separate personal and real property; both keep books which are distinct from the personal books of its members,[42]

(1943); Consolidated Rendering Co. v. Vermont, 207 U.S. 541 (1908); Hale v. Henkel, 201 U.S. 43 (1906).

35. In considering whether or not the fifth amendment afforded the union any protection, the court stated: "The arguments made in Oklahoma Press concerning the Fifth Amendment to the United States Constitution are not applicable here. . . . [S]uch an argument would not 'hold water' in light of the doctrines enunciated there and in United States v. White. . . ." 191 F. Supp. at 231.

36. United States v. White, 322 U.S. 694 (1944); Essgee Co. v. United States, 262 U.S. 151 (1923); Wilson v. United States, 221 U.S. 361 (1911); Hale v. Henkel, 201 U.S. 43 (1906).

37. 322 U.S. 694 (1944).

38. The Court stated: "We hold, however, that neither the Fourth nor the Fifth Amendment, both of which are directed primarily to the protection of the individual and personal rights, requires the recognition of a privilege against self-incrimination under the circumstances of this case." Id. at 698. "Such records and papers are not the private records of the individual members or officers of the organization. . . . They therefore embody no element of personal privacy and carry with them no claim of personal privilege." Id. at 699-70.

39. 116 U.S. 616 (1886).

40. Id. at 633.

41. See note 38 supra. See also note 42 infra.

42. 322 U.S. at 702. See also United States v. B. Goedde & Co., 40 F. Supp. 523 (E.D. Ill. 1941), where the court pointed out that the papers of the association were in no wise

and both are capable of suing and being sued in its own name.[43] Thus there is no sound reason for holding that *Oklahoma Press Publishing Co.* is not controlling here and for refusing enforcement of the subpoenas.

Antitrust—Complete Divestiture Necessary to Eliminate Violation of Section 7 of Clayton Act.—In 1949 the United States instituted an action charging E. I. du Pont de Nemours & Company with violations of sections 1 and 2 of the Sherman Antitrust Act[1] and section 7 of the Clayton Act.[2] The District Court for the Northern District of Illinois dismissed the complaint,[3] but the Supreme Court reversed,[4] holding du Pont's acquisition and retention of twenty-three per cent of the stock of the General Motors Corporation and the resultant domination by du Pont of General Motors' suppliers of automotive finishes and fabrics to constitute a tendency to monopolization of a line of commerce and hence a violation of section 7 of the Clayton Act. The Court remanded the case to the district court for a determination of the remedy necessary to rectify the situation. Accordingly, the district court conducted extensive hearings, appointed amici curiae to represent the corporations' shareholders and finally issued a decree[5] rejecting the Government's request for complete divestiture as having "serious adverse consequences."[6] Instead, it

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the papers of the individual members, but belonged to the separate legal entity, the union, and were not immune from production.

43. United Mine Workers v. Coronado Co., 259 U.S. 344 (1922). Here the union argued that it could not be sued in its own name but only in the name of its members. It was held otherwise, the Court pointing out that their strike funds were subject to execution for torts committed by them in strikes. Id. at 385-86.

1. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1958).

2. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1958), which provides in pertinent part as follows: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . . This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition."

3. United States v. E. I. du Pont de Nemours & Co., 126 F. Supp. 235 (N.D. Ill. 1954).

4. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957). It is interesting to note that this was the first action in which section 7 was employed to defeat a vertical merger. See 26 Note, Fordham L. Rev. 583 (1957). The decision has been properly criticized for confusing the "relevant market" concept as found in the earlier du Pont "Cellophane Case," United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956), 71 Harv. L. Rev. 165 (1957), 66 Yale L.J. 1251 (1957).

5. 177 F. Supp. 1 (N.D. Ill. 1959).

6. Id. at 42. The district court had expert testimony that individual du Pont shareholders could, under the Government's plan for complete divestiture, be liable for taxes

adopted the du Pont plan to retain ownership of its General Motors stock but to "pass through" the voting rights to the du Pont shareholders.[7] The Supreme Court, again on direct appeal by the Government,[8] in a four to three decision, held the relief granted below inadequate to accomplish removal of the section 7 violation, and vacated the decree. The case was remanded to the district court with instructions to devise a plan embracing complete divestiture of du Pont's General Motors stock within ten years.[9] *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961).

The Sherman Antitrust Act of 1890 clearly enunciated a congressional intent to foster free competition by making it unlawful to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States, or with foreign nations. . . ."[10] The Clayton Act of 1914[11] was enacted to supplement the Sherman Act by specifying particular acts as antitrust violations which, if permitted to continue, might well develop into more serious monopolistic offenses under the Sherman Antitrust Act. The United States Supreme Court has pointed out that, "the end

amounting to over $1,000,000,000 (based on a fair market value of $50.00 for each share of General Motors). This was calculated from statistical surveys showing that the average du Pont shareholder would have to pay income taxes in the 50-60% tax brackets. An additional $200,000,000 in taxes might have to be paid by Christiana and Delaware for the stock allocable to them—even using the lower capital gains tax rate of 25%.

7. In substance, du Pont would retain all the attributes of ownership of the General Motors stock except the power to vote. This would be "passed through" to the du Pont shareholders pro rata, with the exception of the Christiana Securities Corp. and the Delaware Realty and Investment Co. (two holding companies long identified with the du Pont family) and the officers and directors and members of their immediate families. None of the latter would be allowed to vote the General Motors stock which they owned or would be otherwise allocable to them. Du Pont, Christiana, and Delaware were forbidden to acquire any additional General Motors stock. No officer or director of du Pont, Christiana, or Delaware might be an officer or director of General Motors; nor might any of the former nominate or attempt to influence in any way the election of such persons in General Motors. Furthermore, du Pont and General Motors were enjoined (for as long as the former owned stock of the latter) from having any business dealings which required General Motors to purchase a fixed percentage of the former's production, or which would give du Pont any sort of a preference.

8. Direct appeal from the trial court to the United States Supreme Court in antitrust cases is provided for by the Expediting Act, 32 Stat. 823 (1903), as amended, 15 U.S.C. § 29 (1958).

9. Petition by du Pont for modification of the ten year period for completion denied, 366 U.S. 956 (1961). "Du Pont filed its proposal for disposal of the shares on Sept. 2. The Department of Justice handed its suggestions today [Oct. 2] to the United States District Court in Chicago. The points of similarity are these: Dupont can choose its methods of disposal. . . . It must start ninety days after Judge Walter J. La Buy enters the final judgment and must complete the divesting process in ten years. . . . The court will retain jurisdiction until the transfers are completed." N.Y. Times, Oct. 3, 1961, p. 53, col. 6.

10. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 2 (1958). Section 4 authorizes proceedings by a court of equity to eliminate monopolistic practices and restore competition. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 4 (1958).

11. 38 Stat. 730 (1914), 15 U.S.C. §§ 12-27 (1958) (Supp. II, 1959-1960).

to be served is not punishment of past transgression, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints."[12] It is left to the courts to devise effective remedies to restore or safeguard free competition. Section 7 of the Clayton Act forbids the acquisition by one corporation of the shares of another where the result "may be to substantially lessen" competition within the economy or the creation of a tendency to create a monopoly of any line of commerce.[13] Where the violation involves a *tendency* towards monopoly, the decree must be such as to remove that tendency, and where the tendency arises from the acquisition and retention of another corporation's stock, the most obvious and effective, albeit most drastic, forms of relief from violations of section 7 is divestiture, divorcement, or dissolution.[14] Section 11 of the Clayton Act specifically mentions divestiture as a remedy for an offense to section 7,[15] and, as noted by the Court, "of the very few litigated section 7 cases which have been reported, most decreed divestiture as a matter of course."[16] Where the control of corporations was merely a device to carry out illegal combinations and the heart of the violations was the conspiracy of the defendants who controlled the corporations, and not merely the fact of the relationship of the defendants to the corporation,[17] then some alternative to dissolution or divestiture has been employed—usually in the form of injunctive relief or royalty-free licensing.[18]

12. International Salt Co. v. United States, 332 U.S. 392, 401 (1947).

13. 38 Stat. 731 (1941), as amended, 15 U.S.C. § 18 (1958).

14. "Divestiture refers to situations where the defendants are required to divest themselves of property, securities, or other assets. Divorcement is . . . used to indicate the effect of a decree where certain types of divestiture are ordered; it is especially applicable to cases where the purpose of the proceeding is to secure relief against antitrust abuses flowing from integrated ownership or control. The term 'dissolution' is generally used to refer to any situation where the dissolving of an allegedly illegal combination or association is involved, including the use of divestiture and divorcement as methods of achieving that end. While the foregoing definitions differentiate three aspects of remedies, the terms are frequently used interchangeably without any technical distinctions in meaning." Oppenheim, Cases on Federal Anti-Trust Laws 885 (1948).

15. Section 11 authorizes the Federal Trade Commission to enforce sections 2, 3, 7, and 8, providing that if the Commission find that any of those sections have been or are being violated, it shall make a written report of its findings, and shall: "issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets held, or rid itself of the directors chosen contrary to the provisions of sections [7 & 8] of this title, if any there be, in the manner and within the time fixed by said order." 38 Stat. 735 (1914), as amended, 15 U.S.C. § 21(b) (Supp. II, 1959-1960).

16. 366 U.S. at 330.

17. In Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951), a domestic corporation conspired with two foreign corporations in which it had financial interests to restrain interstate and foreign trade in the single product manufactured by the corporation.

18. See Timken Roller Bearing Co. v. United States, supra note 17; United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912); United States v. Minnesota Mining & Mfg. Co., 96 F. Supp. 356 (D. Mass. 1951).

This was the nature of the relief decreed by the lower court: injunctive prohibitions plus the novel plan to "pass through" most of du Pont's voting rights to its shareholders.

Both the majority and minority of the Court approved the criteria of proper relief enumerated in *United States v. American Tobacco Co.*:[19]

> In considering the subject . . . three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning.[20]

However, the adequacy of the relief decreed below divided the Court. The majority stressed that the first and most important attribute of relief in such a case is to give "complete and efficacious effect to the prohibitions of the statute,"[21] and only then might the other consequences be considered. The Court did not think the decree of the district court met this primary requirement. Although du Pont's direct influence over General Motors would have been at least weakened by the disfranchisement of the du Pont corporation and family and the "pass through" of the vote to the other more scattered shareholders, still, approximately two-thirds of the 63,000,000 shares of General Motors now held by du Pont would continue to be voted by du Pont shareholders. It would be unreasonable not to assume, argued the Court, that these would continue to be voted for the intermingled interests of the two giant corporations, and that the officials of General Motors would take cognizance of the relatively unchanged relationship to du Pont.[22] Thus, the very conditions section 7 had been designed to eradicate,[23] and which the Supreme Court had ordered the district court to eliminate, would remain, *i.e.*, substantial ownership by one corporation of the stock of another in the same line of commerce, whereby the former has the ability to exercise undue control in restraint of trade. Control might well be continued without the voting rights.[24] Therefore, with partial divestiture

19. 221 U.S. 106 (1911).

20. Id. at 185. Defendant monopolized the tobacco industry. The remedy decreed, despite the hardship that had been feared, was the celebrated three-way dissolution in which the corporation was divided into three roughly equal parts, thereby replacing the monopoly with an oligopoly.

21. 366 U.S. at 327.

22. Id. at 331-32.

23. "The intent here . . . is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding. . . . To make clearer the intent to give the bill broad application to acquisitions that are economically significant, its wording has been broadened in certain respects." S. Rep. No. 1775, 81st Cong., 2d Sess. 4-5 (1950).

24. "Historical ties and associations, combined with strategic holdings of stock, can on occasion serve as a potent substitute for the more obvious modes of control." North American Co. v. SEC, 327 U.S. 686, 693 (1946).

via the "pass through" of the voting rights an inadequate remedy, the Court found no occasion to consider the second and third criteria, to wit, the protection of public and private interests, which it had set forth in *American Tobacco*. Said Mr. Justice Brennan for the Court:

The adverse tax and market consequences which the District Court found would be concomitants of complete divestiture cannot save the remedy of partial divestiture through the "pass through" of voting rights if, though less harsh, partial divestiture is not an effective remedy. We do not think that the "pass through" is an effective remedy and believe that the Government is entitled to a decree directing complete divestiture.[25]

In a persuasive dissent, Mr. Justice Frankfurter stressed the fact that the district court held exhaustive hearings and reviewed every circumstance of the case to determine the most appropriate and effective relief. He found its decree more likely to protect the general public and the shareholders of du Pont and of General Motors from the predicted market slump and heavy tax levies which would accompany complete divestiture. The dissent preferred to give effect to the second and third criteria of *American Tobacco*.[26] Noting that du Pont did not stand guilty of any violation of the Sherman Antitrust Act,[27] as did many of the corporations in the cases cited by the Government as precedents for divestiture,[28] the dissent argued that:

Once all of du Pont's ties to General Motors, save its stock interest, were severed the record is barren of justification for an inference of reasonable probability of restraint of trade. Conversely . . . the tax and market consequence of divestiture would be so onerous that, in the absence of any serious anticompetitive danger, it would have constituted an abuse of discretion to enter such a decree.[29]

The main concern of the district court and of the dissent was the effect divestiture would have taxwise on the shareholders of du Pont, and marketwise

25. 366 U.S. at 328. Concurring were Chief Justice Warren and Justices Douglas and Black. Justices Clark and Harlan took no part in the decision.

26. United States v. American Tobacco Co., 221 U.S. 106 (1911). Note that in American Tobacco the Court, due to the public welfare and the effect on shareholders, felt constrained to avoid an order restraining interstate activity by the conspiracy until the monopoly had been destroyed; nor would the Court appoint a receiver to destroy the conspiracy by means of sale. Id. at 186-87. Still the Court ordered a hearing at which an effective remedy was to be determined and a condition in harmony with the law established.

27. The district court had dismissed all charges against the defendants. The Supreme Court disposed of the case by holding du Pont guilty of a violation of section 7 of the Clayton Act. It did not find it necessary to determine the question of Sherman Antitrust Act violations which had also been charged. See 353 U.S. at 583 n.5.

28. See, e.g., United States v. Lehigh Valley R.R., 254 U.S. 255 (1920); United States v. Reading Co., 253 U.S. 26 (1920); United States v. Union Pac. R.R., 226 U.S. 61 (1912); United States v. American Tobacco Co., 221 U.S. 106 (1911); Standard Oil Co. v. United States, 221 U.S. 1 (1911).

29. 366 U.S. at 375 (Frankfurter, J., dissenting). The dissent noted the basic fairness of a decree less harsh, terming the lower court's decree entirely adequate. See FTC v. National Lead Co., 352 U.S. 419, 429 (1957); United States v. United States Gypsum Co., 340 U.S. 76, 89-90 (1950).

on the national economy.[30] But, in their anxiety to avoid harsh consequences, they failed to consider adequately the primary criterion of antitrust relief—the public's interest in continued free competition. If this case is an example, it can be seen how difficult and time-consuming is the Government's case to prove antitrust violations especially in vertical acquisition cases where it is expected that the parties will continue doing business with each other. So it is that once the Government has successfully established a violation, all doubts as to the proper remedy are resolved in its favor.[31] Considering the size and influence possessed by the parties defendant, and their past conduct, there is well-founded reason to doubt the sufficiency of the district court's decree.[32]

In antitrust actions, more so than in others, the remedy is crucial. Where a choice of effective remedies exists, the least oppressive is to be decreed, but with only one effective remedy, its harshness will not be reason to choose a less adequate one.[33] The remedy chosen must eliminate the *cause* as well as the resulting illegal tendency to restraint, and "go beyond the narrow limits of the proven violation."[34] The cause of the illegal tendency to restrain competition was du Pont's ownership of General Motors stock. As long as this ownership continued, there would be a constant motive for anti-competitive inter-company favoritism. Hence, complete divestiture of its ownership was the only effective remedy.

The tax consequences of complete divestiture are obviously severe. Under the present law the General Motors stock distributed by du Pont to its shareholders will be taken at its fair market value and then added to the declared income of the du Pont shareholder on his income tax return.[35] Thus the "dividend" would have to be taxed according to the tax bracket of the shareholder (from twenty per cent to ninety-one per cent) in a year picked, not by the taxpayer, but by du Pont or some court appointed trustee. The resultant tax comes close to being a punishment, but, what is more, it is a hindrance to

30. Actually the general market situation is much improved, and du Pont, which was selling at $220 per share on May 19 closed at $235 on August 21, 1961. See N.Y. Times, Aug. 22, 1961, (Financial), p. 38, col. 4; id. May 20, 1961 (Financial), p. 27, col. 5.

31. See United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 726 (1944); Local 167, Int'l Bhd. of Teamsters v. United States, 291 U.S. 293, 299 (1934).

32. Furthermore, since its decree was fashioned in obedience to the Supreme Court's judgment reversing that lower court's dismissal of all charges, the Court has plenary power to review completely in determining whether its judgment had been executed fully and scrupulously by the district court.

33. 366 U.S. at 328.

34. United States v. United States Gypsum Co., 340 U.S. 76, 90 (1950).

35. "On May 9, 1958 the Commissioner ruled as follows . . . : The General Motors stock distributed by du Pont would be taxable to its stockholders as dividend income. For du Pont's non-corporate stockholders, the fair market value of General Motors stock on date of distribution would be the measure of the income received. For du Pont's tax-paying corporate stockholders, du Pont's tax basis for its General Motors stock (about $2.09 a share . . .) would be the measure of the income received." Brief for United States as Appellant, p. 10, United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316 (1961).

the proper enforcement of the antitrust laws. For, even where the circumstances demand it, courts are hesitant to order a divestiture which they deem harsh,[36] or "extraordinarily difficult and expensive."[37] When Mr. Justice Douglas was Chairman of the Securities and Exchange Commission he testified:

> [O]ur big job at the Commission is to put the private utility house in order. We think we can do it expeditiously and constructively if this tax barrier is removed . . . . We down at the Commission do not desire to put the gun at the head of a utility company and say "transfer these," and then have another branch of the Federal Government collect $2,000,000. or $1000. or $250,000. as a result of doing what we are forcing it to do.[38]

Should not court-ordered sales be entitled to special tax treatment and special relief?

When, as in this case, the proper decree of divestiture might mean the forfeiture of as much as one billion dollars in taxes—about one-third of the value of the General Motors stock held by du Pont—revision of the tax laws, to take court ordered sales into account, for the benefit of both the shareholder so affected, and of free competition seems necessary.[39]

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36. Timken Roller Bearing Co. v. United States, 341 U.S. 593, 607 (1951).

37. United States v. General Elec. Co., 115 F. Supp. 835, 870 (D.N.J. 1953). See also Report of the Att'y Gen. Nat'l Comm. to Study the Antitrust Laws, March 31, 1955, p. 354.

38. Hearings on H.R. 9682 Before the Senate Committee on Finance, 75th Cong., 3d Sess., pt. 12, at 73 (1938).

39. A letter from C. H. Greenewalt, President, to the Stockholders of du Pont, Aug. 14, 1961, stating in part: "Several bills are pending in Congress. The one which appears to have the most favorable chance to become law was introduced by Senators Williams of Delaware and Bennett of Utah as S. 2266, and by Representative Mason of Illinois as H.R. 8190. . . . As you know, we began urging Congress in 1958 to enact corrective legislation. The first bills, supported by precedents established by Congress in connection with the Public Utility Holding Company Act and the Bank Holding Company Act, would have permitted Du Pont to divest by distributing the G.M. stock at little or no tax to you. . . . The new bills take a different approach. For tax purposes, they would treat a stock distribution pursuant to an antitrust order—like ours—as a return of capital to the individual stockholder. . . . If Congress approves this legislation, the Du Pont Company could distribute G.M. shares to you without the market consequences which would be inevitable under present law, even though some shares would have to be sold for tax purposes. I believe the distribution could be carried out without tax for a majority of our stockholders—including 50,000 of our 87,000 employees. The remaining individual stockholders—principally those who acquired Du Pont shares prior to 1949 when they first sold for as much as $60 a share—would be subject to a capital gains tax at the time of distribution. We estimate these taxes, plus those paid by corporate stockholders, would total about $350 million. To sum up, unless Congress enacts corrective legislation, you will suffer severe economic loss through any method available to Du Pont in divesting its 63 million shares of G.M. stock."

Conflict of Laws—Limitation on Damages for Wrongful Death Against Public Policy.—Plaintiff's intestate, a New York domiciliary, was killed in a plane crash in Nantucket, Massachusetts. An action was brought against defendant carrier in contract and tort, the former quite obviously to escape the $15,000 limitation specified in the Massachusetts wrongful death statute.[1] The appellate division, reversing the trial court,[2] granted defendant's motion to dismiss the contract count. The court of appeals in affirming stated, in a strong dictum, that the $15,000 limitation need not be applied, since it was contrary to the public policy of New York. *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

Where a tort occurs in one state and the action is brought in another, traditional conflict of laws rules require that the substantive law of the *locus delicti* be applied by the forum.[3] Exceptions to this rule occur where the cause of action is contrary to the public policy of the forum[4] or the forum lacks the adequate judicial machinery to grant relief,[5] in either of which event the action need not be entertained. Procedure, on the other hand, is governed by the rules of the forum,[6] and it is the forum which determines whether or not a matter is procedural.[7]

With respect to wrongful death actions, the overwhelming weight of authority supports the view that a limitation on a measure of damages, contained in the statute of the *locus delicti*, is a part of the substantive right and will be enforced by the forum.[8] New York took exception to this view in *Wooden v. Western*

1. Mass. Ann. Laws ch. 229, § 2 (1955). "If the proprietor of a common carrier of passengers . . . by reason of . . . its negligence . . . causes the death of a passenger . . . it shall be liable in damages in the sum of not less than two thousand nor more than fifteen thousand dollars, to be assessed with reference to the degree of culpability of the defendant. . . ." This section has been amended effective Jan. 1, 1959. See Mass. Ann. Laws ch. 229, § 2 (Supp. 1960).

2. Kilberg v. Northeast Airlines Inc., 10 App. Div. 2d 261, 198 N.Y.S.2d 679 (1st Dep't 1960) (per curiam).

3. Baldwin v. Powell, 294 N.Y. 130, 61 N.E.2d 412 (1945); Johnson v. Phoenix Bridge Co., 197 N.Y. 316, 90 N.E. 953 (1910); In the Matter of Estate of Petrasek, 191 Misc. 9, 79 N.Y.S.2d 561 (Surr. Ct. 1948). Restatement, Conflict of Laws §§ 391-92 (1934).

4. Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932); Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509 (1943); Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936).

5. Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904).

6. Murray v. New York, Ont. & W.R.R., 242 App. Div. 374, 376, 275 N.Y. Supp. 10, 12 (1st Dep't 1934); 3 Beale, Conflict of Laws §§ 584.1-4.2 (1935); Goodrich, Conflict of Laws §§ 80-81 (3d ed. 1949).

7. Authorities cited note 6 supra.

8. The issue was foreclosed in the federal courts in Western Union Tel. Co. v. Brown, 234 U.S. 542, 547 (1914). See Annot., 15 A.L.R.2d 765 (1951) for the states in accord; Restatement, Conflict of Laws § 391, comment b (1934). Contra, Higgins v. Central New England & W. R.R., 155 Mass. 176, 29 N.E. 534 (1892) (dictum). Courts have limited recoveries in accord with their own laws but under a principle of waiver and not procedure. Armbruster v. Chicago, R.I. & P. Ry., 166 Iowa 155, 147 N.W. 337 (1914); Rochester v. Wells Fargo & Co. Express, 87 Kan. 164, 123 Pac. 729 (1912) (punitive damages waived). See also Walton School of Commerce v. Stroud, 248 Mich. 85, 226 N.W.

N.Y. & Penn. R.R.[9] where it was stated that the limitation contained in the New York statute restricting the amount recoverable in wrongful death actions was procedural.[10] Shortly thereafter, the New York constitution was amended to strike the statutory limitation and prohibit any monetary restrictions in such actions.[11] The most often cited case for a rejection of the *Wooden* reasoning is *Loucks v. Standard Oil Co.*[12] *Loucks*, however, did not overrule *Wooden*, but merely suggested that its authority be restricted.[13] The instant court seized upon this point and stated that whether the measure of damages was substantive or procedural was an open question,[14] but then, adding another dictum as well as elliptical logic, reasoned that since the *limitation* was contrary to *public policy*, it would characterize the *measure* of damages as *procedural*.[15] It thereupon concluded that the Massachusetts *limitation* need not be applied. This conclusion, however, has left in doubt the law to be applied with respect to the *measure* of damages. If the measure of damages is procedural, as the court implied, the law of New York is applicable. If, as may be inferred from its conclusion, the court merely intended to characterize the limitation as procedural, the measure of damages to be applied is that of Massachusetts. In that event, the measure of damages is calculated with reference to the degree of culpability of the defendant, and not, as in New York, with reference to the pecuniary loss of the plaintiff.[16] The confusion is due in part to the court's use of the terms "measure of damages" and "limitation" interchangeably. Taking together the court's treatment of public policy and of the procedural issue it would appear, however, that the court intended to excise the limitation in the Massachusetts statute.

In discussing public policy the court reasoned that the New York constitution was amended to prohibit any limitation on the amount recoverable under the

883 (1929) (lex loci contractus determines right of recovery and lex fori the rule of damages).

9. 126 N.Y. 10, 26 N.E. 1050 (1891).

10. Id. at 17, 26 N.E. at 1051. The action was predicated on a Pennsylvania statute which did not have a limitation.

11. N.Y. Sess. Laws 1849, ch. 256, § 1 provided for a $5,000 limitation on wrongful death actions which was subsequently removed by N.Y. Const. art. I, § 18 (1894), now art. I, § 16.

12. 224 N.Y. 99, 120 N.E. 198 (1918).

13. Id. at 109, 120 N.E. at 201.

14. See Isola v. Weber, 147 N.Y. 329, 41 N.E. 704 (1895) (limitation is substantive); Royal Indem. Co. v. Atchison, T & S.F. Ry., 272 App. Div. 246, 70 N.Y.S.2d 697 (1st Dep't), aff'd mem., 297 N.Y. 619, 75 N.E.2d 631 (1947) (locus delicti is not only the ground of recovery but measure of damages); Kiefer v. Grand Trunk Ry., 12 App. Div. 23 (4th Dep't 1896), aff'd mem., 153 N.Y. 688, 48 N.E. 1105 (1897) (measure of damages is substantive). See also Riley v. Capital Airlines, Inc., 24 Misc. 2d 457, 199 N.Y.S.2d 515 (Sup. Ct. 1960) (Wooden rule expressly rejected); Tobinick v. Checker Taxicab Co., 12 Misc. 2d 724, 174 N.Y.S.2d 508 (Sup. Ct. 1957) (Illinois statutory limit controlled). Federal courts construing New York law are in accord. Frasier v. Public Service Interstate Transp. Co., 254 F.2d 132 (2d Cir. 1958); Maynard v. Eastern Airlines, 178 F.2d 139 (2d Cir. 1949).

15. 9 N.Y.2d at 41, 172 N.E.2d at 529, 211 N.Y.S.2d at 137.

16. Compare N.Y. Deced. Est. Law § 130, with Mass. Ann. Laws ch. 229, § 2 (1955).

New York wrongful death statute because it was unjust to measure "the pecuniary values of all lives, to the next of kin, by the same arbitrary standard."[17] This rationale is valid today, the court continued, and it is, therefore, contrary to New York public policy to enforce the Massachusetts damage ceiling.[18] Unfortunately the court's readiness to strike the limitation provision leaves unsolved the problem encountered in applying the Massachusetts culpability rule as a measure of damages.

The court overlooked two significant factors. First, while the rationale for prohibiting limitations may be valid where the damages are compensatory, it is questionable if it can be applied where damages are assessed with reference to the culpability of the defendant. The Massachusetts act does not seek to measure the pecuniary value of an individual to his next of kin, but seeks to punish the defendant for his negligence by imposing a liability upon him, irrespective of any pecuniary loss suffered by the beneficiaries of the deceased. It is clear that the reasoning which sustains the prohibitions of limitations on wrongful death actions arising in New York is not applicable where the limitation in a foreign statute is founded on a completely different theory.

Secondly, *Loucks* had the same statute before it and found "nothing in the Massachusetts statute that outrages the public policy of New York."[19] Since public policy is an ever changing concept, the court may well decide that the *Loucks* view is no longer tenable, but it should at least state reasons for its rejection of that view.

The present decision would seem to lack consistency. To hold the limitation contrary to public policy is, in effect, to characterize the limitation as substantive. For public policy is a reason advanced to deny effect to the *substantive law* of the *locus delicti.* If the issue in question were procedural, it was one to be decided by the forum's law and considerations of public policy had no place in the discussion. The court, it is to be noted, did not decide the case by posing alternatives—public policy reasoning or a characterization of the Massachusetts limitation as procedural—for refusing to enforce the limitation, but coalesced the two into a single approach and left it distinctly unclear whether a limitation on recovery found in a wrongful death statute will now be considered a matter of procedure in New York or whether it will be rejected for reasons of public policy. It is true that the result, under the facts here presented, would be the same in either case regardless of the alternative selected for rejecting the Massachusetts limitation. But that is so only because New York was the forum—thus permitting the application of New York's procedural law—and New York was also the domicile of the decedent—thus sanctioning the imposition of New York's public policy. But what right, it might validly be asked, would New York have to apply its public policy if the decedent were not a domiciliary of New York? The pertinency of New York's public policy to a non-domiciliary would be all the more unrealistic if the law of the decedent's domicile were

17. 9 N.Y.2d at 40, 172 N.E.2d at 528, 211 N.Y.S.2d at 137.

18. The court indicated that this protection would extend only to New York domiciliaries. Id. at 40, 172 N.E.2d at 528, 211 N.Y.S.2d at 136.

19. 224 N.Y. at 111, 120 N.E. at 202.

identical to the law of Massachusetts. It would seem incongruous for New York to reject—on public policy grounds—a limitation imposed by both the *locus delicti* and the decedent's last domicile. Yet if a limitation on damages is classified as a matter of procedure, then, following traditional conflicts rules, both the law of the *locus delicti* and that of the decedent's domicile become irrelevant because New York as the forum would have the right to apply its own procedural rules.

The traditional place of injury rule which would compel the forum to apply the law of the *locus delicti* has not escaped attack by both the judiciary[20] and legal commentators.[21] Some courts have rejected the rule outright, giving the plaintiff a cause of action where none existed at the *locus delicti*.[22] The justification for such action was the sufficiency of the contacts which the forum had with the parties to the action. This reasoning, which would enable a court to create a liability where none existed at the *locus delicti*, has a definite persuasiveness to it. If the court were free to apply its own law where it had sufficient contacts, it would be necessary neither to resort to the device of labelling segments of a foreign statute nor to rest its result on ill-defined considerations of public policy. Thus, in the instant case, the court would be free to reject the Massachusetts measure of damages as well as the Massachusetts limitation on damages and apply its own law were sufficient contacts found.

Constitutional Law—Evidence Obtained by State Officers in Violation of Fourteenth Amendment Inadmissible in State Court.—Appellant was convicted in an Ohio court of possession of lewd and lascivious books, pictures and photographs in violation of a state criminal statute.[1] The conviction was obtained primarily on the strength of evidence seized by state officers in the course of an unlawful search of appellant's home.[2] The United States Supreme Court reversed the conviction, holding that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Mapp v. Ohio*, 367 U.S. 643 (1961).

The rule excluding relevant evidence in a criminal trial because it had been

20. Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957) (liability predicated on forum's statute although no liability at the locus delicti). Similarly in Noel v. Airponents, Inc., 169 F. Supp. 348 (D.N.J. 1958), a wrongful death action, the court refused to apply maritime rules where no liability would have resulted.

21. Lorenzen, Selected Articles on the Conflict of Laws, 303-70 (1947); Stumberg, Conflict of Laws, 201-12 (2d ed. 1951); Beale, Social Justice and Business Costs, 49 Harv. L. Rev. 593 (1936) (offers a theory of rationalization); Harper, Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays, 56 Yale L.J. 1155, 1161 (1947) (importance of sufficient contacts); Morris, The Proper Law of a Tort, 64 Harv. L. Rev. 881 (1951); Stumberg, Torts and the Conflict of Laws, 34 Wash. L. Rev. 383 (1959).

22. See cases cited note 20 supra.

1. Ohio Rev. Code Ann. § 2905.34 (1953) (Supp. 1960).

2. State v. Mapp, 170 Ohio St. 427, 166 N.E.2d 387 (1960).

illegally obtained by the police was unknown at common law.[3] In federal courts, however, introduction of evidence seized by federal[4] or state[5] officers in an unlawful search,[6] as well as any indirect use of such evidence,[7] has long been prohibited.[8] Until the instant decision, the state judiciary was unaffected by the federal exclusionary policy,[9] except that a federal officer could be enjoined from transferring illegally seized evidence to state authorities or from testifying thereto in a state criminal trial.[10] But with respect to state admission of evidence obtained by state officers in violation of the fourteenth amendment, federal injunctive relief was denied.[11] In the meantime, the states themselves differed widely regarding adoption of the exclusionary rule as well as the extent of adherence to the federal policy.[12]

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3. At common law, logically relevant evidence was admissible without regard to the collateral issue of the means by which it was obtained. 8 Wigmore, Evidence §§ 2183-86 (McNaughten rev. 1961); see People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926).

4. Weeks v. United States, 232 U.S. 383 (1914).

5. Elkins v. United States, 364 U.S. 206 (1960), 29 Fordham L. Rev. 381.

6. In Elkins, supra note 5, the Court held the same federal test applicable in the case of state officers as that used to determine whether federal officers had illegally obtained evidence introduced in a federal court.

7. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) ("fruit-of-poisonous tree doctrine").

8. With respect to searches conducted without a search warrant, the "reasonableness" of the search is adjudged according to certain exceptions and the particular circumstances of the case. It is accepted law that a search incident to a lawful arrest may extend beyond the person of the one arrested to the premises under his immediate control. However, this rule is modified by the prohibition against general, exploratory searches for incriminating evidence. The application of the rule to specific cases has resulted in some confusion and occasional inconsistencies. See Jones v. United States, 362 U.S. 257 (1960); United States v. Rabinowitz, 339 U.S. 56 (1950); Trupiano v. United States, 334 U.S. 699 (1948); Harris v. United States, 331 U.S. 145 (1947); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Marron v. United States, 275 U.S. 192 (1927).

9. Irvine v. California, 347 U.S. 128 (1954); Wolf v. Colorado, 338 U.S. 25 (1949). While illegally obtained evidence was held admissible in state courts, the fourteenth amendment was held to bar the use of evidence obtained by coercion and brutality to the person such as to "shock the conscience" and offend "a sense of justice." Rochin v. California, 342 U.S. 165, 172-73 (1952). However, this decision is unique and its principle is peculiar to the circumstances of the case, the evidence having been obtained through physical assault upon the person of the defendant.

10. Rea v. United States, 350 U.S. 214 (1956). But see Wilson v. Schnettler, 365 U.S. 381 (1961) (memorandum decision).

11. Stefanelli v. Minard, 342 U.S. 117, 123 (1951). See Note, 29 Fordham L. Rev. 586 (1961).

12. See, e.g., Salsburg v. Maryland, 346 U.S. 545 (1954). The federal exclusionary rule also prohibits introduction of evidence obtained via wiretapping in violation of a federal statute, 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958); see Benanti v. United States, 355 U.S. 96 (1957). However, state use of wiretap evidence is not barred by federal law. Schwartz v. Texas, 344 U.S. 199 (1952); see Pugach v. Dollinger, 365 U.S. 458 (1961). The result has been a maze of state legislation varying from complete prohibition to a system of limited law enforcement wiretapping. See Hearings on Wiretapping, Eavesdrop-

The present decision marks the inevitable step from the Court's rejection of the "silver platter" doctrine in *Elkins v. United States*[13] to the imposition of the *Weeks*[14] exclusionary rule on the state judiciary. The basic theme of that transition was the gradual elimination of any distinction in the treatment of the guaranties of privacy under the fourth and fourteenth amendments. "Exclusion" was adopted by the Court in 1914 as the "only sound deterrent" against procurement of evidence by federal agents through means violative of the fourth amendment.[15] The same Court, however, refused to prohibit federal prosecutors from using state-seized evidence, on the ground that the fourth amendment was not directed to the individual misconduct of state officers.[16] But in *Wolf v. Colorado*, decided in 1949, the Supreme Court avowed that the right of privacy which is at the "core" of the fourth amendment, was embodied in "the concept of ordered liberty," and, therefore, enforceable against the states through the due process clause of the fourteenth amendment.[17] At the same time, this basic right to protection against "arbitrary intrusion" by state officers was held not to prohibit state admission of logically relevant evidence obtained in the course of the unlawful search.[18] The basis for this decision was that the fundamental guaranty of privacy secured by the due process clause was not co-extensive with the specific restrictive protections of the fourth amendment and, therefore, not governed by federal precedents regarding those protections.[19] The Court also expressed doubt whether the *Weeks* exclusionary rule, in any event, was a constitutional requirement rather than a policy emanating from the Court's supervisory power respecting evidence used in federal courts.[20] Thus the fundamental right of privacy embodied in the due process clause would require a separate standard and independent evaluation of the conduct of state officers without reference to the body of law surrounding the fourth amendment. Therefore, that which was deemed necessary to enforce the specific provisions of the fourth amend-

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ping, and the Bill of Rights Before the Subcommitte of the Senate Committee on the Judiciary, 85th Cong., 2d Sess., pt. 1, app., 35-39 (1958).

13. 364 U.S. 206 (1960).

14. Weeks v. United States, 232 U.S. 383 (1914).

15. Id. at 393.

16. Id. at 398.

17. 338 U.S. 25, 27 (1949).

18. Ibid. However, Mr. Justice Frankfurter, writing for the majority, did state that: "[W]ere a state affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment." Id. at 28. Short of such affirmative sanction, the states could have passively admitted illegally seized evidence in state courts.

19. Id. at 26.

20. While the Court recognized the exclusionary rule to be a judicially implied constitutional requirement, it was stated that a different question would be presented "if Congress under its legislative powers were to pass a statute" expressly permitting the admission of such evidence. Id. at 33. In a concurring opinion, Justice Black took the view that the rule was one of evidence and not a constitutional mandate. Id. at 39; see discussion in People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

ment might not be required under the flexible standards of due process to insure compliance with the "core" of the fourth amendment.[21]

This constitutional distinction was abandoned in 1960 when the Court again considered the propriety of admitting in a federal prosecution evidence seized by state officers in the course of an unlawful search.[22] Citing *Wolf* as authority, the Court first declared that the same right of privacy secured by the fourth amendment against arbitrary police intrusion was embodied in the due process clause of the fourteenth amendment.[23] Secondly, the federal exclusionary rule was construed to be a constitutional mandate, and not merely a judicially created rule of evidence.[24] Therefore the conduct of state officers in the procurement of evidence was subject to the same scrutiny and restrictions demanded by the fourth amendment in order to enforce the guaranty of privacy under the fourteenth amendment. Nevertheless, the decision to exclude the state-seized evidence was finally rested on the narrower ground of the Court's supervisory power to prescribe federal rules of evidence.[25] Accordingly, evidence obtained by state officers, in a search which would violate the fourth amendment if conducted by federal officers, was held inadmissible in federal courts. Thus the present decision merely affirms the dictum in *Elkins* by squarely holding that the due process clause renders inadmissible evidence obtained in violation of that same constitutional provision.[26]

The instant case is in line with the established policy of the present Court regarding application of the due process clause. The *Wolf* decision itself recognized the Court's power to go beyond existing precedents and to extend the prevailing limits of the principle of due process by redefining its scope.[27]

21. 338 U.S. at 28-33.

22. Elkins v. United States, 364 U.S. 206 (1960).

23. Id. at 213. The Court ignored the Wolf distinction between the requirements of the fourth amendment and the requirements of the core of that amendment as embodied in the due process clause of the fourteenth amendment. See Note, 29 Fordham L. Rev. 381, 382 (1960).

24. 364 U.S. at 213-14.

25. Under Fed. R. Crim. P. 26, governing admissibility of evidence and rights of witnesses in federal courts, the Court ruled that federal law would be the test of admissibility of state-obtained evidence in federal courts. Prior to the Elkins decision, state seized evidence was admissible in federal court unless seized by a state officer solely on behalf of the federal government, Gambino v. United States, 275 U.S. 310 (1927); or illegally obtained through the participation of federal officers, Lustig v. United States, 338 U.S. 74 (1949); see Feldman v. United States, 322 U.S. 487 (1944); Byars v. United States, 273 U.S. 28 (1927); Burdeau v. McDowell, 256 U.S. 465 (1921). See also Benanti v. United States, 355 U.S. 96, 102 (1957).

26. Mapp v. Ohio, 367 U.S. 643 (1961).

27. "Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. . . . It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights. . . . [The standard of due process] is to be drawn by the gradual and empiric process of 'inclusion and exclusion.'" 338 U.S. at 27. See Palko v. Connecticut, 302 U.S. 319 (1937).

"The gradual and empiric process of 'inclusion and exclusion'" approved in *Wolf*[28] did not bar extension of the doctrine of exclusion to the states, if that rule was, as the Court held, a constitutional command.[29] From a practical standpoint it is an absurdity that the enforcement of the same constitutional guaranty should be measured against a double standard depending on jurisdiction. To insist that due process must remain that vague principle embodying all that is implicit in "the concept of ordered liberty"[30] without further definition and specificity belies the reality of a single constitution, guarantying certain and specific rights to the individual. If the present decision has the disadvantage of crystallizing the guaranty of privacy previously lodged in the "undefined range" of due process,[31] it has the advantage of eliminating the inexplicable dichotomy of two distinct standards for protection of the same right.

Essentially that which divides the Court on the present issue is not confined to the wisdom of extending a federal application of the fourth amendment to the states. The real question, once it is conceded that a right guarantied in the first eight amendments is enforceable against the states through the due process clause, is whether the traditional generalities of due process are to be exchanged for the specific safeguards of the appropriate provision of the Bill of Rights. The dissenters argue that the scope and effect of these distinct constitutional provisions cannot be equated. Mr. Justice Frankfurter has said that the "basic principles" underlying the specific guaranties of the Bill of Rights are "implied limitations" upon the states,[32] but not the particular protections spelled out therein. Under this view, the standard of due process is said to be "civilized conduct" and not federal precedents respecting the Bill of Rights.[33] The ultimate result of this double standard concept has been a watered-down version of rights under due process as compared with the specific protections of the same right under the first eight amendments, and consequent confusion in application.[34] In *Elkins*[35] and in the present decision the majority has clearly rejected any such interpretation which would permit a less stringent enforcement of rights under due process.

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28. 338 U.S. at 27.

29. Mapp v. Ohio, 367 U.S. 643 (1961). While the Court held that the exclusionary rule is an essential ingredient of the right of privacy embodied in the fourth and fourteenth amendments, the Court also relied on the theory that the rule is a constitutional command resulting from the interplay of the fourth and fifth amendments. This approach, first mentioned in dictum in Boyd v. United States, 116 U.S. 616 (1886), is based on the premise that admission of illegally seized evidence violates the privilege against self incrimination. See Davis v. United States, 328 U.S. 582 (1946). But see Adams v. New York, 192 U.S. 585 (1904).

30. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

31. See Stefanelli v. Minard, 342 U.S. 117, 123 (1951).

32. Rios v. United States, 364 U.S. 253 (1960).

33. Ibid.

34. See Wilson v. Schnettler, 365 U.S. 381 (1961); Frank v. Maryland, 359 U.S. 360 (1959); Rea v. United States, 350 U.S. 214 (1956); Irvine v. California, 347 U.S. 128 (1953); Stefanelli v. Minard, 342 U.S. 117 (1951); Lustig v. United States, 338 U.S. 74 (1949).

35. 364 U.S. 206 (1960).

Corporations—Liability of an Insider and His Investment Partnership for Profits Realized on a Short Swing Speculation.—Lehman Brothers, an investment partnership, purchased 50,000 shares of the common stock of the Tide Water Oil Company with the purpose of converting to dividend-paying preferred stock[1] and selling the latter at a profit. Before the purchase was completed one of the partners of Lehman Brothers, who was serving as a director of the Tide Water Corporation, waived his share of contemplated profits from the venture. The partnership completed the purchase, converted the common stock to preferred, and within six months sold the stock and realized a profit. A stockholder of Tide Water brought this derivative suit under section 16(b) of the Securities Exchange Act of 1934[2] to recover the "short swing" profits from both the director and his stock brokerage firm. The Court of Appeals for the Second Circuit held that an investment firm, a partner of which is a director of a corporation, is not liable under section 16(b) for "short swing" profits realized from the purchase and sale of that corporation's stock, but that the partner-director, despite his waiver, is liable to the corporation for the proportionate share of the profits "realized" by him. *Blau v. Lehman*, 286 F.2d 786 (2d Cir.), *cert. granted*, 366 U.S. 902 (1961).

Section 16(b) of the Securities Exchange Act embodies an objective standard to be rigidly applied in order to prevent stock manipulation by fiduciaries of a corporation to whom confidential information is available and "might be used."[3] Under this statute a corporation can recover all profits realized[4] by "in-

1. The board of directors of Tide Water had approved a proposal to allow shareholders to exchange common stock for new dividend paying preferred stock. 286 F.2d at 788.

2. 48 Stat. 896 (1934), 15 U.S.C. § 78p(b) (1958), provides in part: "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner [of over 10% of stock], director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. . . ."

3. "We must suppose that the statute was intended to be thoroughgoing, to squeeze all possible profits out of stock transactions, and thus to establish a standard so high as to prevent any conflict between the selfish interest of a fiduciary officer, director, or stockholder and the faithful performance of his duty." Smolowe v. Delendo Corp., 136 F.2d 231, 239 (2d Cir.), cert. denied, 320 U.S. 751 (1943). See also Park & Tilford, Inc. v. Schulte, 160 F.2d 984 (2d Cir.), cert. denied, 332 U.S. 761 (1947).

4. In Smolowe v. Delendo Corp., supra note 3, at 239, the rule was set forth for measuring the profits realized: "The only rule whereby all possible profits can be surely recovered is that of lowest price in, highest price out—within six months. . . ." "Under this rule, the profits are calculated in the following fashion: Listed in one column are all the purchases made during the period for which recovery of profits is sought. In another column is listed all of the sales during that period. Then the shares purchased at the lowest price are matched against an equal number of the shares sold at the highest price within six months of such purchase, and the profit computed. After that the next lowest

siders"[5] from purchases and sales of that corporation's stock[6] within a period of six months.[7] No question of intention or subjective good faith is raised by the statute, and a corporation may recover such profits even though there had been no actual use of confidential information by the fiduciary.[8] On the other hand, no matter how much proof of the unfair use of inside information is offered, liability is restricted to the six month, "short swing" profit[9] and affects only "insiders" as that term is defined in the statute.[10] Thus the statute offers no guaranty against evasion of its purpose by the exchange of non-public

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price is matched against the next highest price and that profit is computed. Then, the same process is repeated until all the shares in the purchase column which may be matched against shares sold for higher prices in the sales column have been matched off. Where necessary to accurate computation, it would seem proper to split a larger denomination or lot of shares in order to match off part of the lot against an equal amount on the other side. The gross recovery is the sum of the profits thus determined." Rubin & Feldman, Statutory Inhibitions Upon Unfair Use of Corporate Information by Inciders, 95 U. Pa. L. Rev. 468, 482-83 (1947). The court concluded that this rule was essential to achieve the purpose of the statute. If the "first in first out" rule of accounting were used to figure the profit realized, then insiders who owned large amounts of the corporation's stock could obtain a short swing profit without liability by selling only stock held longer than six months. If the average cost system of accounting were used then those who had bought large amounts of stock previously at a high rate could be said to have made no profit. E.g., insider A owns ten shares of XYZ Company stock which he bought at $10 a share and which is now worth only $5 a share. He then buys one more share at $5 and sells within six months at $6. Under the average cost rule, since the average cost of the stock to him was $9.60, he has made no profit. All dividends received within this period are also included in accounting the profits realized, thereby removing all opportunity for profit by the insider. See Meeker & Cooney, The Problem of Definition in Determining Insider Liabilities Under Section 16(b), 45 Va. L. Rev. 949, 954 (1959).

5. An "insider" is defined in § 16 as a director, officer or beneficial owner of over 10% of the stock of the corporation.

6. Section 16(b) only applies to stock registered on a National Securities Exchange.

7. Cf. Hearings Before the House Committee on Interstate Comm. and Foreign Comm. on H.R. 7852 & H.R. 8720, 73rd Cong., 2d Sess. 133 (1934). "That [section 16(b)] is simply an application of an old principle of the law that if you are an agent and you profit by inside information concerning the affairs of your principal, your profits go to your principal."

8. Smolowe v. Delendo Corp., 136 F.2d 231, 239 (2d Cir.), cert. denied, 320 U.S. 751 (1943); see Ferraiolo v. Newman, 259 F.2d 342, 344 (6th Cir. 1958), cert. denied, 359 U.S. 927 (1959); Magida v. Continental Can Co., 231 F.2d 843 (2d Cir.), cert. denied, 351 U.S. 972 (1956); Pellegrino v. Nesbit, 203 F.2d 463, 468 (9th Cir. 1953); Walet v. Jefferson Lake Sulphur Co., 202 F.2d 433, 434 (5th Cir.), cert. denied, 346 U.S. 820 (1953); Gratz v. Claughton, 187 F.2d 46 (2d Cir.), cert. denied, 341 U.S. 920 (1951); Hearings Before the Senate Committee on Banking and Currency on S. 56 & S. 97, 73rd Cong., 1st and 2d Sess. 6557 (1934) where it is said: "You hold the director, irrespective of any intention . . . because it will be absolutely impossible to prove the existence of such intention or expectation. . . ."

9. See note 2 supra.

10. See note 3 supra.

information among insiders of different corporations, or the transfer of such knowledge to associates and relatives trading in such stock.[11]

The majority of cases interpreting section 16(b) have been concerned with the simple form of "short swing" transactions in which the insider was the only person to make a profit.[12] However, the courts have uniformly described the statute as a "broadly remedial" measure, designed to protect outside shareholders against insider trading by squeezing "all possible profits out of [insider] stock transactions."[13] Nevertheless, in *Rattner v. Lehman*,[14] the only other case involving facts similar to those of the instant case, the court refused to extend the remedy of section 16(b) beyond its literal application. There it was held that neither the partnership nor the partner,[15] who served as director of the

11. See H.R. 7852, 73rd Cong., 2d Sess. (1934). The original draft of the bill included a provision [15(b)(3)] forbidding any director, etc. "to disclose, directly or indirectly, any confidential information regarding or affecting any such registered security not necessary or proper to be disclosed as a part of his corporate duties. Any profit made by any person, to whom such unlawful disclosure shall have been made, in respect of any transaction or transactions in such registered security within a period not exceeding six months after such disclosure shall inure to and be recoverable by the issuer unless such person shall have had no reasonable ground to believe that the disclosure was confidential or was made not in the performance of corporate duties." Hearings, op. cit. supra note 7, at 9. The purpose of the above omitted section was to enable the corporation to sue a non-insider who had made a profit due to information given him by an insider. "That is the director can not evade having to turn over his own profit under section 15 [now 16(b)] by tipping off somebody else to do the job for him, nor can he tip off a friend, or friends, and let them make a killing on inside information at the expense of other people." Id. at 135. There followed a debate on whether it would be practically possible to discover whether a director had tipped off the seller, and the sponsors conceded that perhaps only 5% of the cases could be caught. The section was, therefore, deleted due to the practical impossibility of enforcing it. Congress thus had no intention of covering transactions involving use of inside information by non-insiders merely because these people were so closely associated with the insider as to be able to get inside information. Something more was necessary. See Loss, Securities Regulation 564 (1951).

12. See cases cited in note 8 supra. But see Truncale v. Blumberg, 80 F. Supp. 387, 391-92 (S.D.N.Y. 1948) which stated in a dictum that where the person who sold the stock did so within six months of its purchase by the director who then transferred it to him, the director should be held liable for the profit, if it appeared that this donee was the alter ego of the director.

13. Smolowe v. Delendo Corp., 136 F.2d 231, 239 (2d Cir.), cert. denied, 320 U.S. 751 (1943). As an example of how far the courts have extended liability see Adler v. Klawans, 267 F.2d 840 (2d Cir. 1959) (insider held liable for profits realized on sale of stock purchased prior to his becoming a director); Colby v. Klune, 178 F.2d 872 (2d Cir. 1949). In the latter case, a corporate employee, not an officer of the company, but "performing important executive duties of such character that he would be likely, in discharging these duties, to obtain confidential information . . ." was found to be an "insider" under § 16(b). Id. at 873.

14. 193 F.2d 564 (2d Cir. 1952).

15. The defendant firm in Rattner, supra note 14, was the same Lehman Brothers appearing as defendant in the principal case. The defendant partner in Rattner was the predecessor of the present defendant partner as a director of Tide Water.

corporation, was liable for the "short swing" profits realized by the firm. The decision was based on the "plain meaning" of the statute[16] and its legislative history which revealed the deletion of a provision in an earlier draft of section 16(b) which made any person liable who had acted on confidential information from a director.[17] On the basis of the deletion of this subjective standard of liability for persons other than "insiders" the court reasoned that Congress had intentionally omitted investment partnerships from liability for short swing profits under section 16(b).[18]

In a concurring opinion in *Rattner*, Judge Learned Hand intimated that a different result might have been reached had it been established that the firm had "deputed a partner to represent its interests as a director on the board. . . ."[19] Where such "deputizing" was established, the court would not be precluded from considering the firm an "insider" within the meaning of section 16(b) on the theory that a partnership under certain circumstances may be treated as a "jural person."[20]

In the instant decision, the majority was content to abide by the strict application of the statute as adopted in *Rattner*.[21] The legislative history[22] and the arbitrary nature of the test of liability embodied in the statute clearly support a strict interpretation. There is no provision in the statute to curb the transfer and use of confidential information by non-insiders.[23]

It is clear that extension of the section's objective test would involve questions of both interpretation and policy. It is interesting to note in this regard that the court denied the Securities and Exchange Commission's petition to participate as amicus curiae, thus indicating that application of a strict standard of accountability to persons associated with a director in an investment partnership would be a question for the legislature rather than the judiciary.[24] In view of this attitude, the only logical alternative for the

16. "Section 16(b) contains no provision requiring the partners of a director to account for profits realized by them." 193 F.2d at 566.

17. See note 11 supra.

18. "[T]he legislative history indicates that the omission of any provision for such liability was intentional." 193 F.2d at 566.

19. Id. at 567.

20. Ibid.

21. 286 F.2d 786, 789-90 (2d Cir.), cert. granted, 366 U.S. 902 (1961).

22. See note 11 supra.

23. Ibid.

24. At the time of the Rattner decision, the Commission Rule [X 16 A-3(b), 17 C.F.R. § 240.16a-3(b) (1949)] required that a partner need disclose only his proportional share of the corporate stock held by his investment partnership. The Commision as amicus curiae in Rattner argued that the rule impliedly excepted the firm itself from liability under § 16(b). The court rejected this possibility and held that the firm did not come under § 16(b). The Commission subsequently amended Rule X 16 A-3 to require the partner to report the entire amount of security owned by the partnership. 17 C.F.R. § 240.16a-3(b) (Supp. 1961). It is now clear that the position of the Commission on the judicial interpretation of the rule is to include investment firms under the coverage of § 16(b).

court would have been the "deputed" director theory which was indicated by Judge Hand in the *Rattner* decision.[25] The majority, however, rejected this dictum, reasoning that no amount of "deputizing" of partners could render the partnership itself a "director" within the meaning of section 16(b).[26]

Whatever may be the propriety of this conclusion, certainly the insertion by judicial implication of this subjective element into the statutory test is open to the same criticism which dictated the objective form of the final enactment of section 16(b), *i.e.*, the practical impossibility of enforcing a subjective standard of liability.[27] The legislative history, however, does not warrant the court's conclusion that investment firms were "intentionally" omitted from the coverage of the statute.[28] The omission of investment firms having access to inside information through representation on boards of directors appears to be rather a legislative oversight than an intentional exception.

It is clear that the partnership itself cannot be considered a director. However, as indicated by Judge Clark,[29] a partner, under New York law is a tenant in common with the other members of the firm and hence is deemed to have an undivided interest in the entire partnership profits.[30] "[I]t may thus be said that each 'realizes' the entire profit [within the meaning of section 16(b)], subject only to division at periodic intervals."[31] Such a construction would permit recovery of the entire profit by the corporation and thus preclude the real possibility of circumvention in an area of stock trading where incentive to use inside information is strongest.[32]

A requirement of strict accountability from corporate fiduciaries is by no

25. 193 F.2d at 566-67.

26. 286 F.2d at 789.

27. See note 11 supra. The difficulty in applying this theory is manifested in the instant case. The majority and the dissent disagree as to the degree of proof necessary to establish deputization. The majority would require a showing of "affirmative action" by the firm to cause the partner to be made a director. 286 F.2d at 789. The dissent argued that the mere fact of the "mutually beneficial management" was sufficient to establish the firm's liability under section 16(b). Id. at 795.

28. See note 11 supra.

29. 286 F.2d at 794.

30. N.Y. Partnership Law § 51. See also Uniform Partnership Act § 25.

31. Cook & Feldman, Insider Trading Under The Securities Exchange Act, 66 Harv. L. Rev. 612, 629 (1953). Mr. Cook is a former Chairman of the SEC. See Walet v. Jefferson Lake Sulphur Co., 202 F.2d 433 (5th Cir.), cert. denied, 346 U.S. 820 (1953), where an insider who engaged in short swing trading was held liable for all profit realized despite the fact that he claimed his wife had an undivided one-half interest in the profits under the law of a community property state.

32. It would be naive to doubt that investment partnerships will make use of available inside information. Though the individual partner-director will lose his share of the profits in a transaction involving his corporation's stock, the high percentage of profit realized by the firm as a whole will more than offset this personal disadvantage. Moreover, a firm may be represented on several boards of directors by its partners, and thus a system of mutual exchange of non-public information concerning various corporations might be utilized to circumvent the effect of the present decision.

means unprecedented. It has been held,[33] for example, in a reorganization proceeding, that the firm of an attorney whose wife, acting without benefit of any inside information, had bought stock of the bankrupt company, was disqualified from receiving compensation for its services under section 249 of the Bankruptcy Act.[34] If the court in the present case doubted the wisdom of such a policy toward investment firms, certainly its refusal of the SEC's petition to be heard regarding the judicial interpretation of the rule was ill-advised.[35] The increased probability of conflicts of interest where corporate fiduciaries are members of stock investment firms and of banking houses heightens proportionately the need for protection against insider trading at this level.[36]

Criminal Law—Insanity as a Defense to a Federal Criminal Charge.—Defendant, who had pleaded not guilty by reason of insanity, was convicted of a violation of the National Motor Vehicle Theft Act.[1] The United States District Court for the Western District of Pennsylvania charged the jury concerning the defendant's criminal responsibility in terms of the *M'Naghten* rules, in addition commenting on temporary insanity and irresistible impulse. The Court of Appeals for the Third Circuit reversed, reasoning that there existed no satisfactory test of insanity; that the jury must be presented with understandable evidence of defendant's mental condition and provided with a standard with which to judge the evidence thus given. The court, in a partial application of the test of the American Law Institute's Model Penal Code,[2] held proof that defendant, as a result of mental disease, so lacked control of his actions as to be unable to conform them to accepted standards of behavior, to constitute a defense of insanity. *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961).

Few problems have provoked as much discussion as that of the legal responsibility of persons afflicted with mental disease, mental deficiency, or other form of mental abnormality. In early England such an individual was regarded as possessed of demons; one was not criminally responsible if unable to distinguish good or evil, or as Justice Tracy[3] so cruelly put it: "[if he] doth not

33. Surface Transportation, Inc. v. Saxe, Bacon & O'Shea, 266 F.2d 862 (2d Cir.), cert. denied, 361 U.S. 862 (1959). Section 249 forbids allowance to persons who, while acting in a fiduciary or representative capacity in reorganization proceedings, had purchased or sold stock of the debtor. See also In re Midland United Co., 159 F.2d 340 (3d Cir. 1947); In re Inland Gas Corp., 73 F. Supp. 785 (E.D. Ky. 1947).

34. 52 Stat. 901 (1938), 11 U.S.C. § 649 (1958).

35. See note 24 supra. See also Cook & Feldman, Insider Trading Under The Securities Exchange Act, 66 Harv. L. Rev. 385, 388 (1953), where it is stated that permission to file a brief had been granted in every instance up to that time—1953.

36. See note 24 supra.

1. 18 U.S.C. § 2312 (1958) (Dyer Act).

2. Model Penal Code § 401 (Tent. Draft No. 4, 1955); see 290 F.2d at 774.

3. Rex v. Arnold, 16 How. St. Tr. 695 (1724).

know what he is doing, no more than . . . a wild beast."[4] The element of bestiality was eliminated in time and "right and wrong" substituted for "good and evil," but it was not until the *M'Naghten* case[5] in 1843 that much of the uncertainty inherent in such determinations was eliminated. When M'Naghten was found "not guilty, on the ground of insanity,"[6] the judges of England, before an inquiry by the House of Lords, rendered what was to become one of the most important advisory opinions of common law history.[7] They defined as insanity proof that "at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."[8] This so-called "right and wrong" test has become the sole test of criminal responsibility in England and in the overwhelming majority of American jurisdictions[9] and has been approved by the United States Supreme Court in *Davis v. United States*.[10] It has been greatly criticised over the years,[11] but still prevails in its original

4. Id. at 764.

5. 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843). Daniel M'Naghten, a Scotsman, shot Edward Drummond, the principal secretary to Prime Minister Robert Peel, mistaking him for Peel. It was clear that M'Naghten was insane, being subject to hallucinations and delusions of persecution. The medical evidence showed that his delusions had left him with no perception of right and wrong and that he was unable to control any act connected with his delusions.

6. See Weihofen, Mental Disorder as a Criminal Defense 59 (1954).

7. See Biggs, The Guilty Mind 101-07 (1955).

8. 10 Cl. & Fin. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843). In the instant case Chief Judge Biggs indicates that the substance of the M'Naghten test was published nearly 257 years earlier in an ancient book, the Eirenarcha, by William Lambard of Lincolns Inn. 290 F.2d at 764.

9. See Model Penal Code § 4.01, app. A (Tent. Draft No. 4, 1955). In New York, for example, the M'Naghten rules were adopted in People v. Klein, 1 Edm. Sel. Cas. 13 (N.Y 1845). The legislature codified them in N.Y. Sess. Laws 1881, ch. 676, amended by N.Y Sess. Laws 1882, ch. 384 §§ 20, 21, as amended, N.Y. Penal Law § 1120. The New York courts have applied them without modification. But see the criticism by Cardozo, J. in People v. Schmidt, 216 N.Y. 324, 338-39, 110 N.E. 945, 946 (1915). See also People v. Horton, 308 N.Y. 1, 16-23, 123 N.E.2d 609, 616-21 (1954) (Van Voorhis, J., dissenting).

10. 160 U.S. 469, 478 (1895). The rule was reapproved in a dictum in the second Davis case, 165 U.S. 373, 378 (1897), and in Matheson v. United States, 277 U.S. 540, 543 (1913). See 290 F.2d at 767-69, arguing that the Supreme Court has not held the M'Naghten test the only one which may be applied in the federal courts.

11. Stewart v. United States, 214 F.2d 879 (D.C. Cir. 1954); Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954); United States v. Baldi, 192 F.2d 540, 549 (3d Cir. 1951) (Biggs, J., dissenting), aff'd, 344 U.S. 561 (1953). For criticism from the legal profession see Laub, Insanity as a Defense to Homicide in Pennsylvania, 20 Temp. L.Q. 345 (1947); Polsky, Present Insanity—From the Common Law to the Mental Health Act and Back, 2 Vill. L. Rev. 504 (1957); Wechsler, The Criteria of Criminal Responsibility, 22 U. Chi. L. Rev. 367 (1955). See also medical criticism in Hall & Meninger, Psychiatry and the Law, 38 Iowa L. Rev. 687 (1953); Roche, Criminality and Mental Illness—Two Faces of the Same Coin, 22 U. Chi. L. Rev. 320 (1955).

form in most of the states, although fourteen,[12] retaining *M'Naghten* as the basic test, have supplemented it with the "irresistible impulse doctrine."[13] Until 1954 only the Supreme Judicial Court of New Hampshire had completely rejected *M'Naghten*. That court, in *State v. Pike*,[14] had held that there could be no clearly defined test of mental disease as a matter of law, but that all symptoms and tests of mental disease were purely matters of fact to be determined by the jury.[15] In 1954 the United States Court of Appeals for the District of Columbia Circuit, in *Durham v. United States*,[16] admittedly followed New Hampshire in repudiating both the *M'Naghten* and the irresistible impulse doctrines and held that "an accused is not criminally responsible if his unlawful act was a product of a mental disease or mental defect."[17] Although heralded as bringing the rule of law closer to the newly discovered facts of medical science, this test never received judicial support.[18] Prior to the instant case it stood rejected by the United States Court of Military Appeals,[19] three federal courts of appeals,[20] and thirteen states.[21]

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12. See Model Penal Code § 4.01 app. A (Tent. Draft No. 4, 1955).

13. See, e.g., Commonwealth v. Chester, 337 Mass. 702, 711-12, 150 N.E.2d 914, 919 (1958), where the rule is stated: "[A] person may be able to discriminate between right and wrong yet his mind may be in such a diseased condition that his reason, conscience and judgment are overwhelmed by the disease to such an extent that he 'acted from an irresistible and uncontrollable impulse.' In such a case 'the act [is] not the act of a voluntary agent' and the person committing it is not criminally responsible." This rule is applied along with M'Naghten in the following jurisdictions; Alabama, Colorado, Connecticut, Delaware, Georgia, Indiana, Kentucky, Massachusetts, Michigan, Montana, and Wyoming. See also Smith v. United States, 36 F.2d 548, 549 (D.C. Cir. 1929).

14. 49 N.H. 399 (1869). See also State v. Jones, 50 N.H. 369 (1871).

15. 49 N.H. at 399.

16. 214 F.2d 862 (D.C. Cir. 1954). This decision caused a great tide of discussion and criticism of tests for legal insanity. See Kalven, Insanity and the Criminal Law—A Critique of Durham v. United States, 22 U. Chi. L. Rev. 317 (1955); 54 Colum. L. Rev. 1153 (1954); Note, 24 Fordham L. Rev. 273 (1955). See also note 13 supra. It is interesting to note that the substance of the Durham rule was announced prior to M'Naghten in Hadfield's Case, 27 St. Tr. 1281 (1800). Convinced that he was the saviour of mankind, Hadfield tried to assassinate George III so that his resultant execution would become a sacrifice as had that of Jesus Christ. His attempt was unsuccessful and he wounded an equerry instead.

17. 214 F.2d at 874-75.

18. See, e.g., Sauer v. United States, 241 F.2d 640 (9th Cir.), cert. denied, 354 U.S. 940 (1957). "Modern psychiatry to the contrary, the criminal law is grounded upon the theory that, in the absence of special conditions, individuals are free to exercise a choice between possible courses of conduct and hence are morally responsible. Thus, it is moral guilt that the law stresses." Id. at 648. See Hakeem, A Critique of the Psychiatric Approach to Crime and Correction, 23 Law & Contemp. Prob. 650 (1958).

19. United States v. Kunak, 5 U.S.C.M.A. 346, 17 C.M.R. 346 (1954), rev'd on other grounds sub nom. Reid v. Covert, 354 U.S. 1 (1957).

20. Voss v. United States, 259 F.2d 699 (8th Cir. 1958); Andersen v. United States, 237 F.2d 118 (9th Cir. 1956); Howard v. United States, 232 F.2d 274 (5th Cir. 1956).

21. People v. Nash, 52 Cal. 2d 36, 338 P.2d 416 (1959); People v. Carpenter, 11 Ill. 2d

The Model Penal Code, which previously had been adopted by only Vermont,[22] and from which the instant case drew heavily, provided that:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.[23]

In the instant case Judge Biggs rejected the phrase "appreciate the criminality of his conduct"[24] saying first, that emphasis of the cognitive element would distract the jury from the crucial issues, and secondly, that the cognitive element would rarely be significant.[25] The test propounded in the instant case lies between the strict *M'Naghten* test and the liberal "product" rule of *Durham*. The former had limited psychiatric testimony to a few specific questions; the latter had permitted an outright conclusion by the medical expert concerning the production of the defendant's behavior by his mental condition. The present case would permit a wide range of testimony to depict the defendant's mental condition, allowing the jury, in the last analysis, to determine the ultimate question of criminal responsibility.

The significance of this test is apparent when the shortcomings of both *M'Naghten* and *Durham* are realized. *M'Naghten* did not treat the human mind as an integrated whole composed of volitional and cognitive elements, but restricted an accurate determination of criminal responsibility by limitation of its probe to the element of knowledge, thus compelling the psychiatrist to answer categorically, in terms not meaningful to his profession, whether defendant knew the difference between right and wrong.[26] The jury was not provided with evidence from which to conclude as to defendant's sanity. On the other hand, because it failed to indicate any standard to the jury, *Durham*

60, 142 N.E.2d 11 (1957); Flowers v. State, 236 Ind. 151, 139 N.E.2d 185 (1956); Bryant v. State, 207 Md. 565, 115 A.2d 502 (1955); Commonwealth v. Chester, 337 Mass. 702, 150 N.E.2d 914 (1958); State v. Kitchens, 129 Mont. 331, 286 P.2d 1079 (1955); State v. Goza, 317 S.W.2d 609 (Mo. Sup. Ct. 1958); Sollars v. State, 73 Nev. 248, 316 P.2d 917 (1957); State v. Wolak, 26 N.J. 464, 140 A.2d 385 (1958); State v. Andrews, 86 R.I. 341, 134 A.2d 425, cert denied, 355 U.S. 898 (1957); State v. Goyet, 120 Vt. 12, 132 A.2d 623 (1957); State v. Collins, 50 Wash. 2d 740, 314 P.2d 660 (1957); Kwosek v. State, 8 Wis. 2d 640, 100 N.W.2d 339 (1960).

22. Vt. Stat. Ann. tit. 13, § 4801 (1959). The Model Code has been under legislative study in several states, including New York and Massachusetts. See New York Governor's Conference on the Defense of Insanity (1958); Judicial Council of Massachusetts, H. 2086, 56 (1957).

23. Model Penal Code § 4.01 (Tent. Draft No. 4, 1955).

24. 290 F.2d at 774 n.32.

25. Ibid.

26. "A very large part of the confusion which almost invariably results in the trial of the criminal defendant alleged to be insane, lies in the fact that the law insists that the psychiatrist deal with mental states and conditions which do not exist save as legal conceptions." United States v. Baldi, 192 F.2d 540, 567 (3d Cir. 1951) (Biggs, C.J., dissenting).

placed solely on the psychiatrist the burden of determining the existence of a mental disorder and its effect upon defendant. To the psychiatrist alone was given the power to determine the defendant's mental state, thus relegating the jury's task to a determination of whether his conclusion should be accepted. Its "product" concept was so logically ambiguous as to have been criticised as fatally defective as an administrative standard.[27] Furthermore, *Durham* eliminated the ethical concept[28] which for centuries had been the very basis of criminal responsibility. In this respect it was extreme, although many modern psychiatrists felt the rule medically sound.[29] The rule of the principal case goes beyond *M'Naghten* by recognizing both volition and cognition. The defendant must not only know what he is doing but must also be able to control his faculties. Where *M'Naghten* and the irresistible impulse doctrine had required total impairment of volition, the present case would require merely "substantial" impairment. Thus the psychiatrist would be permitted to present evidence as to any and all possible causes of the criminal act and to show their independence. Furthermore, the "substantial impairment" rule provides a better standard whereby the jury can "translate that mental condition into an answer to the ultimate question of whether the defendant possessed the necessary guilty mind to commit the crime charged."[30] Without question the subject case makes a deep inquiry into accused's condition with the result that many more factors are considered in reaching a final determination as to his criminal responsibility.

The Supreme Court of the United States has impliedly encouraged the development of a better rule of criminal responsibility.[31] The result of the

27. The leading critic of the Durham test, Prof. Herbert Wechsler, Chief Reporter for the Model Penal Code, has argued:

(1) If it means that a defendant is not criminally responsible if he would not have committed the act alleged "but for" the illness it could be construed to cover every case where mental illness is present.

(2) If it means "product" in the sense of the illness completely excluding volition by the defendant, then Durham represents no advance over the right-and-wrong rule of M'Naghten. Wechsler, The Criteria of Criminal Responsibility, 22 U. Chi. L. Rev. 367, 370-73 (1955). See also Model Penal Code § 4.01, comment at 159 (Tent. Draft No. 4, 1955). In Carter v. United States, 252 F.2d 608, 617 (D.C. Cir. 1956), the court of appeals responded to this criticism by explaining that there must be proof that the illness "critically" or "decisively" affected the defendants behavior. This wording appears to lean towards the "substantial impairment" test of the instant case.

28. Hall, Responsibility and Law: In Defense of the M'Naghten rules, 42 A.B.A.J. 917, 918 (1956). The traditional concepts of free will and individual responsibility have always been the basis of criminal law; overemphasizing the influence of the emotions or the unconscious is regarded as tending toward determinism and subordinating the role of the intellect.

29. See, e.g., Waelder, Psychiatry and the Problem of Criminal Responsibility, 101 U. Pa. L. Rev. 378 (1952).

30. 290 F.2d at 773.

31. See the reasoning of the instant court. 290 F.2d at 769-70. In the concurring opinion of Kwosek v. State, 8 Wis. 2d 640, 656, 100 N.W.2d 339, 346 (1960), three Judges advocated a change from the M'Naghten rule to that of the Model Penal Code. See also Fisher v.

measured study of a problem, complex, but of vital and practical importance, the decision here is realistic; the question of criminal responsibility is a jury determination; the adequate presentation of facts thus is essential. The danger of confusion due to a welter of unintelligible terminology, eschewed by the instant court,[32] is scarcely reason to retain *M'Naghten*; it is rather an excuse. However, the present case may be found objectionable by many courts on the reasoning of the New York Governor's Commission on the Defense of Insanity,[33] that the *M'Naghten* rules ought to be retained until a stricter view of mental disease is applied.[34] The commission found essential a clarification of that diagnosis of psychopathy which would be insufficient to exempt a defendant from criminal responsibility.[35] There remains the valid fear that relinquishment of tried norms of criminal responsibility might create a laxity of enforcement which would undermine the entire administration of criminal law.[36]

Insurance—Excess Liability of Insurer for Bad Faith Refusal to Settle. —Defendant Standard Accident and Insurance Company, under the terms of its $10,000 liability policy, assumed the defense of an action brought against its insured for damages resulting from his negligence. Travellers' Insurance Company, which had issued a $5,000 liability policy to the insured's joint tortfeasor joined in the defense.[1] In the face of evidence not only that claimant

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United States, 328 U.S. 463, 476 (1946). But see Leland v. Oregon, 343 U.S. 790, 801 (1952). Mr. Justice Frankfurter has declared that he fails to see "why the rules of law should be arrested at the state of phychological knowledge of the time when they were formulated. . . ." Royal Commission on Capital Punishment, 1949-1953, Reprt, Cmd. No. 8932, at 102 (1953). Mr. Justice Douglas asserted that "the only warrant for the M'Naghten rule of insanity was tradition." Douglas, The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists, 41 Iowa L. Rev. 485, 494-95 (1956).

32. 290 F.2d at 772.

33. New York Governors' Conference on the Defense of Insanity (1958).

34. Id. at 9.

35. Id. at 10. However, the instant case, in considering whether a psychopath may be insane, was careful to disapprove of the definition of a psychopath as one "who is a habitual criminal but whose mind is functioning normally." 290 F.2d at 761.

36. Further cause for hesitation among courts and legislatures has been the uncertainty as to the disposition of a defendant found not guilty by reason of insanity. See 290 F.2d at 775-76. See also Order of Issuance of New Mandate, 285 F.2d 81 (6th Cir. 1960); Pollard v. United States, 282 F.2d 450, 464 (6th Cir. 1960); Howard v. United States, 229 F.2d 602, 608 (5th Cir. 1956) (Rives, J., dissenting). Confinement to a psychiatric institution does not necessarily result in rehabilitation and cure. In the past it has not been uncommon to note repeated criminal behavior by individuals after supposed cure and release from psychiatric care.

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1. Insured collided with a taxicab, causing it to mount the sidewalk where it ran down claimant, who sued the drivers and owners of both vehicles.

would succeed on trial and that the resultant judgment might exceed policy coverage, but also that Travellers was willing to contribute the full amount of its coverage to a settlement, Standard met claimant's repeated compromise offers with the arbitrary formula of contribution of a sum no greater than the contribution of Travellers. A judgment of $105,000 resulted.[2] The insured's trustee in bankruptcy instituted the instant action against Standard for that amount of the judgment in excess of policy coverage,[3] alleging that Standard had failed to exercise good faith in its consideration of claimant's overtures of settlement. On trial in the District Court for the Southern District of New York, the evidence of defendant's bad faith was held sufficient to impose liability. *Harris v. Standard Acc. & Ins. Co.*, 191 F. Supp. 538 (S.D.N.Y. 1961).

Under the ordinary liability policy the insurer has the right to control the defense of actions against the insured and the option, but not the duty, to settle rather than risk a judgment in excess of policy coverage. Generally, the insured may not settle without the consent of the insurer.[4] The company, however, may be held liable for either a negligent[5] or bad faith[6] failure to settle. The courts hold, where liability is found, that there is a duty to settle either as an implied term of the contract of insurance,[7] or as arising from the

2. 191 F. Supp. 538, 539 (S.D.N.Y. 1961).

3. Travelers' paid $5,000, Standard $10,000 and the cab owner, who received a release, $1,000. An excess of $89,000 remained.

4. See, e.g., Rumford Falls Paper Co. v. Fidelity & Cas. Co., 92 Me. 574, 43 Atl. 503-04 (1899); St. Joseph Transfer & Storage Co. v. Employers' Indem. Corp., 224 Mo. App. 221, 223, 23 S.W.2d 215, 216 (1930); McDonald v. Royal Indem. Ins. Co., 109 N.J.L. 308, 310, 162 Atl. 620 (1932); Auerbach v. Maryland Cas. Co., 236 N.Y. 247, 250, 140 N.E. 577, 578 (1923). As to the usual terms see Keeton, Liability Insurance and Responsibility for Settlement, 67 Harv. L. Rev. 1136, 1137 n.1 (1954); Note, 2 Syracuse L. Rev. 112 n.1 (1950). The company is bound to defend but may settle or pay incurred the amount of the policy coverage. See, e.g., Brassil v. Maryland Cas. Co., 210 N.Y. 235, 104 N.E. 622 (1914); Annot., 126 A.L.R. 898 (1940). See also Radcliffe v. Franklin Nat'l Ins. Co., 208 Ore. 1, 298 P.2d 1002 (1956).

5. See, e.g., Douglas v. United States Fid. & Guar. Co., 81 N.H. 371, 127 Atl. 703 (1924); Cavanaugh Bros. v. General Acc. Fire & Life Assur. Corp., 79 N.H. 186, 106 Atl. 604 (1919). The company's duty of care has been held to be that of the reasonable man, Dumas v. Hartford Acc. & Indem. Co., 94 N.H. 484, 56 A.2d 57, 60 (1947), and not that of the reasonable insurer, American Indem. Co. v. G. A. Stowers Furniture Co., 39 S.W.2d 956-57 (Tex. Civ. App. 1931).

6. See, e.g., Noshey v. American Auto. Ins. Co., 68 F.2d 803 (6th Cir. 1934) (rejecting negligence); Byrnes v. Phoenix Assur. Co., 178 F. Supp. 488 (E.D. Wis. 1959) (rejecting negligence); Murach v. Massachusetts Bonding & Ins. Co., 339 Mass. 184, 158 N.E.2d 338 (1959) (rejecting negligence); Radio Taxi Serv. Inc. v. Lincoln Mut. Ins. Co., 31 N.J. 299, 157 A.2d 319 (1960).

7. See Hilker v. Western Auto. Ins. Co., 204 Wis. 1, 231 N.W. 257 (1930) (company's duty is by reasonable implication from the terms of the contract.) See also Brassil v. Maryland Cas. Co., 210 N.Y. 235, 241, 104 N.E. 622, 624 (1914) ("there is a contractual obligation of universal force which underlies all written agreements.") But see Noshey v. American Auto. Ins. Co., supra note 6, at 809-10 (no liability in negligence or contract); Best Bldg. Co. v. Employers' Liab. Assur. Corp., 247 N.Y. 451, 160 N.E. 911

agency relationship allegedly created by the contract[8] or the conflict of interests inherent in the situation.[9] Although no court has imposed upon insurer an absolute duty to accept an offer of compromise,[10] decisions have varied from those unfavorable to insurers, easily finding liability,[11] to those strongly unfavorable to policyholders.[12] Neither the duty itself[13] nor the evidence necessary to show a violation of the standard[14] has been too clearly defined. While some states have recognized both the bad faith and negligence tests,[15] other states have confused the elements of the one with those of the other.[16] Courts apply-

(1928). Cf. American Mut. Liab. Ins. Co. v. Cooper, 61 F.2d 446 (5th Cir. 1932), cert. denied, 289 U.S. 736 (1933).

8. Traders & Gen. Ins. Co. v. Rudco Oil & Gas Co., 129 F.2d 621, 627 (10th Cir. 1942); Douglas v. United States Fid. & Guar. Co., 81 N.H. 371, 127 Atl. 708 (1924). But see Wisconsin Zinc Co. v. Fidelity & Deposit Co., 162 Wis. 39, 155 N.W. 1081 (1916), overruled by Hilker v. Western Auto. Ins. Co., supra note 7.

9. See, e.g., Fidelity & Cas. Co. v. Gault, 196 F.2d 329 (5th Cir. 1952). The insurance company controls the case. Settlement within policy limits averts the possibility of judgment in excess of policy coverage, for which excess insured will be liable. The insurer, however, is liable for about the same amount in either case and thus has little to risk in trying the action. See Keeton, Liability Insurance and Responsibility for Settlement, 67 Harv. L. Rev. 1136, 1138 (1954).

10. See Kingan & Co. v. Maryland Cas. Co., 65 Ind. App. 301, 115 N.E. 348 (1917); C. Schmidt & Sons Brewing Co. v. Travelers' Ins. Co., 244 Pa. 286, 90 Atl. 653 (1914).

11. Tennessee Farmers Mut. Ins. Co. v. Wood, 277 F.2d 21 (6th Cir. 1960); American Fid. & Cas. Co. v. G. A. Nichols Co., 173 F.2d 830 (10th Cir. 1949) (insurer is in fiduciary relationship); Henke v. Iowa Home Mut. Cas. Co., 250 Iowa 1123, 97 N.W.2d 168 (1959).

12. City of Wakefield v. Globe Indem. Co., 246 Mich. 645, 225 N.W. 643, 645 (1929) (insurer need only make an "honest" judgment); Johnson v. Hardware Mut. Cas. Co., 108 Vt. 269, 187 Atl. 788, 796 (1936) (equating bad faith with actual fraud); Wisconsin Zinc Co. v. Fidelity & Deposit Co., 162 Wis. 39, 155 N.W. 1081 (1916) (insurer may not act recklessly and contumaciously). But see Johnson v. Hardware Mut. Cas. Co., 109 Vt. 481, 1 A.2d 817 (1938).

13. See Keeton, Liability Insurance and Responsibility for Settlement, 67 Harv. L. Rev. 1136, 1142 (1954).

14. The likelihood of success must be slim and a judgment in excess of policy coverage probable. Springer v. Citizens Cas. Co., 246 F.2d 123 (5th Cir. 1957) (insurer tried to force insured to contribute to settlement); Maryland Cas. Co. v. Cook-O'Brien Constr. Co., 69 F.2d 462 (8th Cir.), cert. denied, 293 U.S. 569 (1934) (additional evidence of admissions by insurer that settlement was the better course considered necessary to establish insurer's liability); Henke v. Iowa Home Mut. Cas. Co., 250 Iowa 1123, 97 N.W.2d 168 (1959) (failure to follow advice of counsel); Garcia & Diaz, Inc. v. Liberty Mut. Ins. Co., 147 N.Y.S.2d 306 (Sup. Ct. 1955) (rejection of offer after verdict); Radcliffe v. Franklin Nat'l Ins. Co., 208 Ore. 1, 298 P.2d 1002 (1956) (failure to inform insured of settlement offer).

15. See, e.g., Dumas v. Hartford Acc. & Indem. Co., 94 N.H. 484, 56 A.2d 57 (1947); Douglas v. United States Fid. & Guar. Co., 81 N.H. 371, 127 Atl. 708 (1924); G. A. Stowers Furniture Co. v. American Indem. Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929). The distinction between the two is in actuality rather nebulous. See Keeton, Liability Insurance and Responsibility for Settlement, 67 Harv. L. Rev. 1136, 1140-42 (1954).

16. E.g., Hilker v. Western Auto. Ins. Co., 204 Wis. 1, 231 N.W. 257 (1930) found a

ing the negligence test have imposed upon the insurer the duty to exercise reasonable or due care in the consideration of settlement offers.[17] Those following the bad faith rule have not demanded so stringent a regard for the interests of insured, some even requiring insured to show actual fraud by the insurer.[18] In the majority of "bad faith" jurisdictions, however, proof of actual fraud has not been required, but the standard of bad faith has varied.[19] The insurer has been held in good faith, even though it had adversely affected the interests of the insured, as long as its actions did further its own interests.[20] Thus the insurer might not act arbitrarily to the exclusion of the interests of insured but its duty to settle has been held little more than that imposed by the contract. Other courts have found bad faith where the insurance company had handled settlement negotiations differently than it would have were it to have been completely liable for any judgment in the case.[21]

The present action, tried without a jury in federal district court, was controlled by New York substantive law.[22] While the New York Court of Appeals has not spoken on the subject in some thirty years, it has refused to hold an insurer liable for a negligent refusal to settle,[23] and, although New York cases

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duty of good faith but quoted with approval cases following the negligence rule and held that insurer's duty was that of the reasonably prudent man. Negligence has been held evidence of bad faith. American Fid. & Cas. Co. v. Greyhound Corp., 258 F.2d 709 (5th Cir. 1958).

17. G. A. Stowers Furniture Co. v. American Indem. Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929), found insurer to be the agent of insured and hence held "to that degree of care and diligence which an ordinarily prudent person would exercise in the management of his own business. . . ." Id. at 547. See Fidelity & Cas. Co. v. Robb, 267 F.2d 473, 476 (5th Cir. 1959). In Dumas v. Hartford Acc. & Indem. Co., 94 N.H. 484, 56 A.2d 57 (1947), the court indicated that insurer must stand ready reasonably to expend monies to purchase immunity from judgment for insured. See Wilson v. Aetna Cas. & Sur. Co., 145 Me. 370, 76 A.2d 111 (1950); American Indem. Co. v. G. A. Stowers Furniture Co., 39 S.W.2d 956 (Tex. Civ. App. 1931).

18. See Bartlett v. Travelers' Ins. Co., 117 Conn. 147, 167 Atl. 180, 183 (1933); St. Joseph Transfer & Storage Co. v. Employers' Indem. Corp., 224 Mo. App. 221, 23 S.W.2d 215 (1930); Johnson v. Hardware Mut. Cas. Co., 108 Vt. 269, 187 Atl. 783 (1936).

19. See 62 Harv. L. Rev. 104, 105-06 (1948). See also Keeton, Liability Insurance and Responsibility for Settlement, 67 Harv. L. Rev. 1136, 1139-40 n.6 (1959).

20. American Sur. Co. v. J. F. Schneider & Son, 307 S.W.2d 192 (1957). See Auerbach v. Maryland Cas. Co., 236 N.Y. 247, 140 N.E. 577 (1923); Countryman v. Breen, 241 App. Div. 392, 271 N.Y. Supp. 744 (4th Dep't 1934), aff'd mem., 268 N.Y. 643, 198 N.E. 536 (1935).

21. See American Fid. & Cas. Co. v. L. C. Jones Trucking Co., 321 P.2d 685 (Okla. Sup. Ct. 1957); Cowden v. Aetna Cas. & Sur. Co., 389 Pa. 459, 134 A.2d 223 (1957). See also Bell v. Commercial Ins. Co., 280 F.2d 514 (3d Cir. 1960).

22. See, e.g., Ballard v. Citizens Cas. Co., 196 F.2d 96, 100 (7th Cir. 1952), where the court applied Illinois law "irrespective of which of the conflicting views we might think preferable."

23. Best Bldg. Co. v. Employers' Liab. Assur. Corp., 247 N.Y. 451, 455-56, 160 N.E. 911, 912-13 (1928).

have found an "obligation of good faith in carrying out"[24] the insurance contract, the tendency of New York decisions has been to adhere strictly to the written contract, with liability in tort only grudgingly granted.[25] No New York court has found evidence of bad faith sufficient to impose liability upon an insurer for its failure to settle an action within policy limits, but the court of appeals, in a broad dictum in *Best Bldg. Co. v. Employers' Liab. Assur. Corp.*,[26] stated it was the well settled rule that an insurer would be liable for a bad faith or fraudulent refusal to settle.[27] In addition the Supreme Court, New York County, in *Brunswick Realty Co. v. Frankfort Ins. Co.*,[28] has held valid a complaint alleging facts indicative of a bad faith refusal to settle by insurer,[29] adopting the reasoning of *Wisconsin Zinc Co. v. Fidelity & Dep. Co.*,[30] that an insurer acted in bad faith where it had "abuse[d] the power vested in it and recklessly and contumaciously refuse[d] to settle if it was apparent that in all reasonable probability its conduct would not only result in damage to the plaintiff but also in loss to itself."[31] Thus, while New York has recognized a duty to settle, it has carefully limited its scope.

A duty to settle has been most readily found where a verdict greatly in excess of policy coverage is highly probable, and insured's liability obvious.[32] Not only were these factors present in the instant case but there was also evidence that, during the trial of the negligence action, Standard's counsel had admitted that he "*couldn't*" win the case.[33] Further, at no time was the insured informed of the fact that a settlement offer had been made.[34] The court found defendant's attitude intransigent and arbitrary,[35] stating that its position "cannot con-

24. Brassil v. Maryland Cas. Co., 210 N.Y. 235, 241, 104 N.E. 622, 624 (1914). This duty was said to be contractual. Ibid.

25. The New York Court of Appeals has never held an insurer to be under a good faith duty to settle. Brassil v. Maryland Cas. Co., supra note 24, at 241-42, 104 N.E. at 624, imposed a general duty of good faith and the court has indicated in dicta that there is a duty to act in good faith when considering a settlement offer. Best Bldg. Co. v. Employers' Liab. Assur. Corp., 247 N.Y. 451, 160 N.E. 911 (1928); Streat Coal Co. v. Frankfort Gen. Ins. Co., 237 N.Y. 60, 142 N.E. 352 (1923); Schencke Piano Co. v. Philadelphia Cas. Co., 216 N.Y. 662, 110 N.E. 1049 (1915) (per curiam). But see Auerbach v. Maryland Cas. Co., 236 N.Y. 247, 140 N.E. 577 (1923); McAleenan v. Massachusetts Bonding & Ins. Co., 219 N.Y. 563, 114 N.E. 114 (1916) (per curiam).

26. 247 N.Y. 451, 160 N.E. 911 (1928).

27. Id. at 453, 160 N.E. at 912.

28. 99 Misc. 639, 166 N.Y. Supp. 36 (Sup. Ct. 1917).

29. Id. at 642-43, 166 N.Y. Supp. at 38-39. Claimant, who had suffered permanently laming injuries, had offered to settle for the amount of policy coverage. Insurer allegedly had neither defense nor witnesses and knew that judgment in excess of policy coverage would be in claimant's favor.

30. 162 Wis. 39, 155 N.W. 1081 (1916).

31. Id. at 51, 155 N.W. at 1087.

32. See 191 F. Supp. 538, 540.

33. Id. at 541 n.4. (Emphasis added.)

34. Id. at 543.

35. Id. at 542.

ceivably be reconciled with a good-faith consideration of the interests of the insured."[36] On such facts Standard's bad faith was patent even under the standard of the duty owing from the insurer to its insured in New York, and certainly under a standard of reasonable care.[37] Nevertheless, the instant court applied the standard,[38] broader than any New York had exacted, of *Bell v. Commercial Ins. Co.*,[39] requiring the insurer to "accord the interest of its insured the same faithful consideration it gives its own interest" and indicating that "the fairest method of balancing the interests is for the insurer to treat the claim as if it were alone liable for the entire amount."[40]

The application of the *Bell* reasoning is indicative of the trend to expand the insurer's duty to settle. Many courts have rejected the negligence test and its standard of reasonable care while at the same time the bad faith rule has found greater acceptance.[41] The duty exacted under the latter theory is almost co-extensive with that formerly demanded by the negligence theory—tantamount to a standard of reasonable care. We are now apparently at the point of recognizing that "reasonable care" is the ultimate test of liability—whether we cast the insurer's duty in terms of negligence or in terms of an agency or fiduciary relationship.[42]

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36. Ibid.

37. See Chancey v. New Amsterdam Cas. Co., 336 S.W.2d 763 (Tex. Civ. App. 1960), where the court went so far as to imply a duty to negotiate from a duty to exercise reasonable care.

38. 191 F. Supp. at 543, 544.

39. 280 F.2d 514 (3d Cir. 1960). In this diversity action, applying the law of Pennsylvania, a directed verdict in favor of insurer was reversed, the court finding the evidence of defendant's bad faith sufficient to warrant submission of the question to a jury. On a $10,000 liability policy, insurer had refused to accept a settlement offer of $25,000. Only the extent of insured's liability was in question. The court indicated that insurer should have further explored the possibility of settlement. Id. at 516.

40. Id. at 515.

41. See Hall v. Preferred Acc. Ins. Co., 204 F.2d 844 (5th Cir. 1953); Nochey v. American Auto. Ins. Co., 68 F.2d 808 (6th Cir. 1934); Christian v. Preferred Acc. Ins. Co., 89 F. Supp. 888 (N.D. Cal. 1950); Georgia Cas. Co. v. Mann, 242 Ky. 477, 46 S.W.2d 777 (1932); Murach v. Massachusetts Bonding & Ins. Co., 339 Mass. 184, 158 N.E.2d 338 (1959); City of Wakefield v. Globe Indem. Co., 246 Mich. 645, 225 N.W. 643 (1929); Georgia Cas. Co. v. Cotton Mills Prods. Co., 159 Miss. 396, 132 So. 73 (1931); Zumwalt v. Utilities Ins. Co., 360 Mo. 362, 228 S.W.2d 750 (1950); Wynnewood Lumber Co. v. Travelers' Ins. Co., 173 N.C. 269, 91 S.E. 946 (1917); Radio Taxi Serv., Inc. v. Lincoln Mut. Ins. Co., 31 N.J. 299, 157 A.2d 319 (1960); Best Bldg. Co. v. Employers' Liab. Assur. Corp., 247 N.Y. 451, 160 N.E. 911 (1928); Hart v. Republic Mut. Ins. Co., 152 Ohio St. 185, 87 N.E.2d 347 (1949); Johnson v. Hardware Mut. Cas. Co., 103 Vt. 269, 187 Atl. 788 (1936); Berk v. Milwaukee Auto. Ins. Co., 245 Wis. 597, 15 N.W.2d 834 (1944).

42. There is actually no need to choose between one rule and the other. For example, Alabama has held that "there may be liability under both rules. . . ." Waters v. American Cas. Co., 261 Ala. 252, 73 So. 2d 524, 528 (1953). Arkansas has recently refused to "align . . . [itself] exclusively with either . . ." the rule of negligence or that of bad faith. Southern Farm Bureau Cas. Ins. Co. v. Parker, 341 S.W.2d 36, 40 (Ark. Sup. Ct. 1960).

Labor Law—Hiring-Hall Referral System Not Illegal "Per Se"—Coercion Must Be Proven for Reimbursement.—An association of motor truck operators entered into a collective bargaining agreement with the Brotherhood of Teamsters and several of the latter's local unions which, in effect, required the operators to employ "casual" employees on a seniority basis through a hiring-hall operated by one of the unions, "*irrespective of whether such employee is or is not a member of the Union.*"[1] A union member, who had obtained casual employment with an employer who was a party to the agreement, was discharged by the employer on complaint of the union that he had not been referred through the hiring-hall. Subsequently charges were filed with the National Labor Relations Board by the employee against the union and employer. The Board held[2] that the exclusive hiring-hall system was per se illegal and that the employer had violated sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act.[3] The union was found to have committed unfair labor practices under sections 8(b)(1)(a) and 8(b)(2)[4] and was ordered, jointly and severally with the employer, to reimburse all "casual employees" for dues paid by them to the union. The court of appeals, one judge dissenting, affirmed the ruling of a per se violation but reversed the reimbursement order.[5] The United States Supreme Court, with two justices concurring and two justices dissenting,[6] held that the hiring-hall system was not illegal per se and that the refund order, absent specific evidence of coercion of union membership, was beyond the Board's power. *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667 (1961).

1. 365 U.S. 667, 668 (1961). The trial examiner distinguished the "casual" from regular employee on the following bases: written application for employment; physical examination; compliance with bonding requirements; irregular work shifts and pay for holidays. Los Angeles-Seattle Motor Express, Inc., 121 N.L.R.B. 1629, 1639 (1958).

2. Los Angeles-Seattle Motor Express, Inc., supra note 1.

3. 49 Stat. 452 (1935), amended by 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158 (1958) (Supp. II, 1959-1960).

4. Section 8b(1)(a) of the National Labor Relations Act provides in part: "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ." Section 8(b)(2) provides that it shall be an unfair labor practice for a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ."

5. Local 357, Int'l Bhd. of Teamsters v. NLRB, 275 F.2d 646 (D.C. Cir. 1960) (per curiam). The Board's reimbursement order includes all monies paid to the union commencing six months prior to the filing of the unfair labor charges with the Board by the discharged employee. In reversing the order of the Board, the circuit court upheld that part of the reimbursement order concerning the complainant employee.

6. Mr. Justice Clark in his dissenting opinion concurred with the majority regarding the general reimbursement remedy. 365 U.S. at 685 n.1.

Section 8(a)(3) of the National Labor Relations Act made it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."[7] Under this section refusal to hire on the ground that the applicant lacks union membership has been held an unlawful act of discrimination.[8] A hiring system, however, utilizing the union on a nonexclusive basis[9] or reserving to the employer the right to discharge for nondiscriminatory reasons has been held proper.[10] Nor have all forms of discrimination by an employer been forbidden. The statute condemned only those discriminatory practices tending "to encourage or discourage" union membership.[11]

The divergence of views between the Board and the courts regarding the legality of the hiring-hall system was earlier reflected in *NLRB v. Swinerton*,[12] where the court refused to follow the Board's finding that a union clearance arrangement, absent a guarantee of nondiscrimination, was illegal. The *Swinerton* decision, however, relied on a dictum in *Hunkin-Conkey Constr. Co.*[13] to the effect that there could not be an unfair labor practice under section 8(a)(3), if there had been a bargaining agreement whereby workers were to be secured through a union, without specific evidence of unlawful discrimination. In *Mountain Pacific Chapter of Associated Gen. Contractors Union*,[14] however, the NLRB ruled that an exclusive union referral system was per se illegal. The Board there said that a referral-hiring system would be nondiscriminatory only if the following standards were incorporated expressly in the contract:

> (1) Selection of applicants for referral to jobs shall be on a nondiscriminatory basis. . . . (2) The employer retains the right to reject any job applicant referred by the union. (3) The parties to the agreement post in places where notices . . . are customarily posted, all provisions relating to the functioning of the hiring arrangement. . . .[15]

The courts have not been in agreement with regard to acceptance of this doctrine of per se illegality of an exclusive hiring-hall system.[16] In the instant case the court refused to apply the *Mountain Pacific* doctrine. The majority's reason for denying application of the doctrine was the inclusion in the contract of a protective clause which specifically provided that referral would be based

7. 49 Stat. 452 (1935), amended by 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158 (1958) (Supp. II, 1959-1960).

8. CCH Lab. L. Rep. ¶¶ 4020.12, 4020.123 (2 Lab. Rel.) (1961).

9. Id. at ¶ 4020.14.

10. Id. at ¶ 4060.

11. Id. at ¶ 4065; see, e.g., NLRB v. McGahey, 233 F.2d 406 (5th Cir. 1956).

12. 202 F.2d 511 (9th Cir. 1953).

13. 95 N.L.R.B. 433 (1951).

14. 119 N.L.R.B. 883 (1957), remanded, 270 F.2d 425 (9th Cir. 1959).

15. 119 N.L.R.B. at 896-97.

16. E.g., NLRB v. Int'l Hod Carriers' Union, 287 F.2d 605 (9th Cir. 1961); NLRB v. E & B Brewing Co., 276 F.2d 594 (6th Cir. 1960); Morrison-Knudsen, Co. v. NLRB, 275 F.2d 914 (2d Cir. 1960).

on seniority with a minimum of three month's service and that there would be no discrimination on the basis of union membership. Application of the doctrine, said the Court, would necessitate the assumption that "a union conducts its operations in violation of law or that the parties to this contract did not intend to adhere to its express language."[17] Thus the presence of the protective clause prevented any such assumption of illegality until specific evidence of illegal operation was offered. Although there was no protective clause[18] in *Mountain Pacific*, was there any real distinction between the two contracts? In both cases the union was in the exclusive position of determining the referrals. In reasoning that the "discrimination" prohibited by the act must be based on union membership,[19] the majority misinterpreted the *Mountain Pacific* doctrine. There it was the act of transferring to the union what was ultimately the exclusive power to hire or fire which constituted the "discrimination" under section 8(a)(3); "here all that appears is unilateral union determination and subservient employer action with no aboveboard explanation. . . ."[20] Thus there was no need to assume "illegal operation" (i.e., specific acts of discrimination by the union) under the contract, since the referral system was found to be illegal per se. By establishing the union as the "hiring lord" with the inevitable result of encouraging union control over employment there was created a closed shop environment which is prohibited under the National Labor Relations Act.[21] For

> it is reasonable to infer that the Union will be guided in its concession by an eye towards winning compliance *with a membership obligation or union fealty in some other respect.* . . . From the final authority over hiring vested in the Respondent Union . . . the *inference of encouragement of union membership is inescapable.*[22]

Clearly, discrimination existed in the present contract where the employers by entering into the hiring arrangement announced to prospective applicants that they would not accept applicants who were not referred by the union. The majority and concurring opinions agreed that the hiring system inevitably encouraged applicants to believe their prospects of employment were dependent on and would be enhanced by membership in or fealty to the union.[23] Mr. Justice Clark in his dissenting opinion aptly stated the effects of the system:

> Does the ordinary applicant for casual employment, who walks into the union hall at the direction of his prospective employer, consider his chances of getting dispatched for work diminished because of his non-union status or his default in dues payment?[24]

17. 365 U.S. at 676.

18. The majority in the instant case stated there was a nondiscrimination clause. Id. at 671. But an examination of the contract revealed none. See Mountain Pacific Chapter of Associated Gen. Contractors Union, 119 N.L.R.B. 883, 894, 902 (1957).

19. 365 U.S. at 675.

20. 119 N.L.R.B. at 896.

21. 2 Legislative Hist. of the Labor-Management Relations Act of 1947, p. 1010.

22. 119 N.L.R.B. at 896. (Emphasis added.)

23. 365 U.S. at 675, 679.

24. Id. at 691.

The result is a restriction of the worker's right of freedom to engage in or to refrain from union activities guaranteed under section 7 of the N.L.R.A.[25] Therefore in order to insure that the present arrangement would not result in the encouragement of union membership in violation of section 8(a)(3) it is necessary, at the very least, that the applicants be apprised of their rights under the contract and more especially—their rights to employment without regard to union activities. Application of *Mountain Pacific*'s safeguard that the parties "post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement . . ."[26] would adequately fulfill this requirement.

The majority in the instant case stated that "there being no express ban of hiring-halls in any provisions of the Act, those who add one, whether it be the Board or the courts, engage in a legislative act."[27] This position lies at the basis of the court's misinterpretation of the issue, for it was not the hiring-hall but rather the *exclusive* hiring-hall which was the subject of dispute. Although, as the Court pointed out, Senator Taft viewed the hiring-hall as not necessarily illegal, he did not believe that the exclusive referral system should be protected under the N.L.R.A. Senator Taft stated, "But he [the employer] cannot make a contract in advance that he will only take the men recommended by the union."[28] It is clear from Congress' express acceptance of,[29] and the NLRB's consistent adherence[30] to the *Mountain Pacific* doctrine, that the majority has disregarded congressional intent and engaged in a legislative rather than a judicial act.[31]

25. 49 Stat. 452 (1953), amended by 61 Stat. 140 (1947), as amended, 29 U.S.C. § 157 (1958).

26. 119 N.L.R.B. at 897.

27. 365 U.S. at 674.

28. S. Rep. No. 1827, 81st Cong., 2d Sess., 13-14 (1950).

29. 1 Legislative Hist. of the Labor-Management Reporting and Disclosure Act of 1959. The House Managers' report stated: "Nothing in such provision [new amendment] is intended to restrict the applicability of the hiring hall provisions enunciated in the Mountain Pacific case. . . ." Id. at 946.

30. See, e.g., Local 176, United Bhd. of Carpenters, 122 N.L.R.B. 920 (1959); Consolidated Western Steel Div., 122 N.L.R.B. 859 (1959); Hod Carriers Union, 121 N.L.R.B. 508 (1958); K.M. & M. Constr. Co., 120 N.L.R.B. 1062 (1958).

31. In NLRB v. News Syndicate Co., 365 U.S. 695 (1961), a companion case to the instant one, the foremen who were union members did the hiring but themselves were subject to removal by the employer. A "saving clause" provided that the general laws of the International Typographical Union not in conflict with the contract or with federal or state law would govern conditions not specifically enumerated in the contract. These general laws required union membership for certain positions. The court ruled that the contract was not unlawful on its face, due to the provision for hiring by foremen and the "saving clause." Although under the law foremen are considered the employer's agents, it cannot be denied that this system is the equivalent of the union hiring-hall. Under Mountain Pacific, the absolute delegation of the selection of employees to the foreman who, while technically the employer's agent, nevertheless is a union member, constitutes a discriminatory practice resulting in the encouragement of union membership. The effect of a "saving clause" has itself been controversial. A distinction between a contract illegal

Prior to *Radio Officers' Union v. NLRB*[32] there had been considerable authority for the requirement that there be a showing of specific evidence that the employer, when discriminating, intended to encourage or discourage union membership.[33] In *Radio Officers'* where the complainant, as in the instant case, obtained employment without union clearance and subsequently was refused referral,[34] the Court rejected the specific evidence requirement. The Court recognized that motivation of the employer to encourage or discourage membership is essential to a section 8(a)(3) unfair practice but applied the common-law rule that a man is deemed to intend the foreseeable consequences of his acts,[35] and therefore, upon consideration of the facts the Board may infer the requisite intent.[36] The Court in the instant case misconstrued the issue when it said: "But surely discrimination cannot be inferred from the face of the instrument [the contract]. . . ."[37] Discrimination was present in the instant hiring system per se. It is not the discrimination in selecting applicants for referral but rather the employer's motivation in encouraging union membership which may be inferred by the Board.[38]

Related to the findings of unfair labor practices have been the remedies of cease and desist as well as reimbursement orders authorized by section 10(c)[39] of the N.L.R.A. With regard to reimbursements, *Local 60, United Bhd. of Carpenters v. NLRB*[40] held, upon an affirmative finding that there was no evidence of coercion of membership or dues, that the Board was not authorized to require reimbursement under section 10(c). Here two applicants were denied employment because of a lack of referral from the union. This decision restricted the *Brown-Olds*[41] case, where the court after finding a closed shop

on its face and one which is valid on its face has led to contrary rulings. The former cannot be validated by a "saving clause" whereas the latter may. A clause illustrative of one illegal on its face would be one expressly providing for a closed shop. Relying on Mountain Pacific Chapter, the delegation in the News case would appear to be illegal per se.

32. 347 U.S. 17 (1954), affirming NLRB v. Gaynor News Co., 197 F.2d 719 (2d Cir. 1952).

33. See 347 U.S. at 23 n.8 for collection of authorities.

34. NLRB v. Gaynor News Co., 197 F.2d 719 (2d Cir. 1952), involving a similar factual background, was one of several conflicting opinions in the lower courts reviewed by Radio Officers' in an exhaustive treatment of section 8(a)(3).

35. 347 U.S. at 45. Mr. Justice Frankfurter in his concurring opinion discussed the variant positions. Id. at 55-56.

36. Id. at 44, 49.

37. 365 U.S. at 675.

38. 347 U.S. at 44, 48.

39. 49 Stat. 454 (1935), amended by 61 Stat. 147 (1947), as amended, 29 U.S.C. § 160(c) (1958).

40. 365 U.S. 651 (1961). The refund order was the only one challenged on appeal by the union. Id. at 653.

41. United Ass'n of Journeymen, 115 N.L.R.B. 594 (1956). Brown-Olds based its order on Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533 (1943), which in a divided opinion, settled the dispute concerning reimbursement orders then raging in five circuits. In this case there was a check-off system utilized to collect dues in a company-controlled union. The company check-off was the factor which led to the inference of coercion.

referral hiring system illegal, ordered the refunding of dues and assessments paid by all employees retroactive to six months prior to the date of the amended charge. The rationale was that the dues were coerced from the members as the price for retaining their jobs. The Board reasoned that the refunding of the dues would best effectuate the policies of the N.L.R.A. as well as remove the fruits of the unfair labor practice from the wrongdoer. *Local 60, United Bhd. of Carpenters* reiterated the prerequisite for the issuance of a reimbursement order—there must be evidence that the dues were coerced.

That coercion is necessary before a reimbursement order will be decreed has been undisputed.[42] The degree of evidence necessary to establish coercion has been in issue. The circuit courts have required a showing of actual coercion, yet inferences of coercion have been made where the hiring was under a check-off or closed shop system.[43] Thus if the hiring system is illegal per se, i.e., check-off or closed shop, coercion may be inferred[44] unless, as in the *Carpenters* case, the court makes an affirmative determination of lack of evidence of coercion.

Negligence—Damages Recoverable for Injuries Due to Fright Without Impact.—A complaint before the court of claims alleged that the attendant at a state operated skiing center had failed to secure and lock the safety belt on a chair lift upon which plaintiff, a nine-year-old girl, was a passenger. Plaintiff claimed that during the descent of the lift she became hysterical and suffered severe emotional injury with "residual physical manifestations." A motion to dismiss the complaint for failing to state a cause of action was denied[1] but the appellate division reversed.[2] The court of appeals, overruling *Mitchell v. Rochester Ry.*,[3] upheld the court of claims decision. Negligently

Id. at 545 (concurring opinion). The Brown-Olds decision held that the company domination of the union in the Virginia Electric case was unnecessary "in order for collection of dues to be unlawful under a closed-shop contract." United Ass'n of Journeymen, 115 N.L.R.B. 594, 601.

42. See, e.g., Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533 (1943); Morrison-Knudsen Co. v. NLRB, 276 F.2d 63 (9th Cir. 1960); Morrison-Knudsen Co. v. NLRB, 275 F.2d 914 (2d Cir. 1960); Building Materials Teamsters v. NLRB, 275 F.2d 909 (2d Cir. 1960); Western Union Tel. Co. v. NLRB, 113 F.2d 992 (2d Cir. 1940).

43. For an excellent synopsis see NLRB v. United States Steel Corp., 278 F.2d 896, 901-03 (3d Cir. 1960).

44. Judge Jones, in Dixie Bedding Mfg. Co. v. NLRB, 268 F.2d 901 (5th Cir. 1959), presented this view: "We agree that there must be some showing of coercion . . . as a prerequisite to the Board's issuance of a reimbursement order. . . . [H]owever, the existence of the . . . provision requiring the petitioner's employees to become members of the union . . . was in and of itself sufficient coercion . . . ." Id. at 907.

1. The court relied on Ferrara v. Galluchio, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958).

2. Battalla v. State, 11 App. Div. 2d 613, 200 N.Y.S.2d 852 (3rd Dep't 1960). The decision was based on Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896).

3. 151 N.Y. 107, 45 N.E. 354 (1896).

caused injuries consisting of emotional disturbance and resultant physical damage are recoverable without impact in New York. *Battalla v. State,* 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

When injury results from the wrongful conduct of another and the traditionally necessary elements of a tort action exist—a foreseeable duty, its breach, and proximate causation—an award of damages has generally been allowed.[4] The negligence rule in New York has held a wrongdoer liable in damages for the proximate consequences of that conduct which he might reasonably have foreseen would result in injury.[5] New York, however, in *Mitchell v. Rochester Ry.*,[6] had held that there might be no recovery for physical injuries sustained through fright occasioned by the negligence of another in the absence of an immediate physical injury.[7] In that case defendant's horse car had careered through a street upon which plaintiff was waiting to board another of defendant's cars. The team halted only inches from plaintiff, allegedly causing her such fright that she subsequently suffered a miscarriage. The court reasoned that this could not form the basis of an action and thus no recovery could be had for any physical consequences of defendant's act[8] and further that defendant's act could not be held to be the proximate cause of the physical injury.[9] Finally, the court reasoned: "If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned. . . . To establish such a doctrine would be contrary to principles of public policy."[10] In the sixty-five years[11] since *Mitchell,* the clear majority of American courts[12] and England[13] have refused to apply its

4. See Ehrgott v. Mayor, 96 N.Y. 264, 282 (1884). See also Prosser, Torts § 35 (2d ed. 1955).

5. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

6. 151 N.Y. 107, 45 N.E. 354 (1896).

7. Ibid.

8. Id. at 109, 45 N.E. at 354.

9. Id. at 110, 45 N.E. at 355.

10. Id. at 110, 45 N.E. at 354.

11. Lehman v. Brooklyn City R.R., 47 Hun. 355 (N.Y. Sup. Ct. 1888) had earlier dealt with the impact problem. "We have been unable to find either principle or authority for the maintenance of this action. . . ." Id. at 356.

12. Of those states which have considered the question, twenty-four have allowed recovery, fourteen denied it. For an alignment of American jurisdictions see Annot., 64 A.L.R.2d 100, 134, 143 (1959).

13. In 1888 the Privy Council, in Victorian Railways Comm'rs v. Coultas, [1888] 13 App. Cas. 222 (Vict.) denied liability without impact reasoning that there was no precedent for the action and no proximity between the injury and the ordinary consequences of fright. This doctrine was subsequently repudiated in Dulieu v. White & Sons, [1901] 2 K.B. 669, where the court allowed recovery for damages due to nervous shock and premature birth. In Coyle v. Watson [1915] A.C. 1, 13 (Scot. 1914) the court states, "the case [Coultas] can no longer be treated as a decision of guiding authority."

rule. Numerous legal scholars[14] and the American Law Institute[15] have aligned themselves in opposition to the *Mitchell* rule. While imposing liability for physical injuries due to nervous shock alone, it seems well established that there may be no recovery for fright without concomitant physical injury.[16] A distinction has been drawn regarding those cases where there has been some physical injury and it has been said that "because there were no physical injuries, recovery for mental suffering was not authorized."[17]

A minority of jurisdictions have followed the *Mitchell* rule and refused to impose liability for physical injury without impact.[18] These jurisdictions, however, have softened the strict effect of the rule by finding exceptions to it.[19] In New York recovery has heretofore been granted, regardless of "impact," if defendant's acts were intentional or wanton.[20] Recovery has also been granted when defendant's conduct constituted a breach of contract,[21] or when

14. No exaustive collection of authorities is attempted. See Bohlen, Right to Recover for Injury Resulting From Negligence Without Impact, 50 U. Pa. L. Rev. 141 (1902); Campbell, Injury Without Impact, 1951 Ins. L.J. 654; Goodrich, Emotional Disturbance as Legal Damage, 20 Mich. L. Rev. 497 (1922); Hallen, Damages for Physical Injuries Resulting from Fright or Shock, 19 Va. L. Rev. 253 (1933); Magruder, Mental and Emotional Disturbances in the Law of Torts, 49 Harv. L. Rev. 1033 (1936); McNiece, Psychic Injury and Tort Liability in New York, 24 St. John's L. Rev. 1 (1949); Smith, Relation of Emotions to Injury and Disease, 30 Va. L. Rev. 193 (1944); Throckmorton, Damages for Fright, 34 Harv. L. Rev. 260 (1921); Wilson, The New York Rule as to Nervous Shock, 11 Cornell L. Q. 512 (1926).

15. Restatement, Torts § 436 (1934), presents the facts of Mitchell v. Rochester Ry., and suggests a recovery in this situation.

16. See, e.g., Espinosa v. Beverly Hosp., 114 Cal. App. 2d 232, 249 P.2d 843 (1952); Kuhr Bros. v. Spahos, 89 Ga. App. 885, 81 S.E.2d 491 (1954); Brown v. Crawford, 296 Ky. 249, 177 S.W.2d 1 (1943).

17. Espinosa v. Beverly Hosp., 114 Cal. App. 2d 232, 234, 249 P.2d 843, 845 (1952).

18. See, e.g., Spade v. Lynn & B. R.R., 168 Mass. 285, 47 N.E. 88 (1897); Ewing v. Pittsburgh, C.C. & St. L. Ry., 147 Pa. 40, 23 Atl. 340 (1892). See also Annot., 64 A.L.R.2d 134 (1959). The cases rely on the reasoning that the impact provides a guaranty against fabricated claims. "To allow recovery for fright, fear, nervous shock, humiliation, mental or emotional distress—with all the disturbances and illnesses which accompany or result therefrom—where there has been no physical injury or impact, would open a Pandora's box." Bosley v. Andrews, 393 Pa. 161, 168-69, 142 A.2d 263, 266 (1958). See also Ward v. West New Jersey & S.R.R., 65 N.J.L. 383, 47 Atl. 561 (1900) (the court reasoned in this instance that the physical injury caused by the fright or shock was too remote).

19. Intentional or reckless acts causing mental distress is the major exception recognized by the minority jurisdictions. See, e.g., Wilson v. Wilkins, 181 Ark. 137, 25 S.W.2d 428 (1930); Gadbury v. Bleitz, 133 Wash. 134, 233 Pac. 299 (1925), Annot., 44 A.L.R. 425 (1926).

20. Beck v. Libraro, 220 App. Div. 547, 221 N.Y. Supp. 737 (2d Dep't 1927) (firing of a loaded gun into the plaintiff's apartment); Preiser v. Wielandt, 43 App. Div. 569, 62 N.Y. Supp. 890 (2d Dep't 1900) (landlord commenced proceedings to tear down house while tenant was ill and unable to move); see Restatement, Torts § 46 (Supp. 1948). The courts have reasoned that if the conduct of the actor was willful or wanton he should be held strictly accountable.

21. Boyce v. Greeley Square Hotel Co., 228 N.Y. 106, 126 N.E. 647 (1920); Gillespie v.

food contamination[22] was involved. Damages for physical injury to the plaintiff's person which were the natural and immediate result of defendant's negligence have also been held recoverable regardless of whether "impact" had occurred.[23] If the fright had caused an immediate faint an award was held proper.[24] Finally the New York courts had established an exception that all but abrogated the rule. Upon a showing that some injury, battery, or impact was coincident in point of time with the fright, recovery was allowed for *resultant* physical injuries regardless of whether the impact had caused the injury for which redress was sought.[25] The most trivial form of impact was held a sufficient basis for the imposition of liability for injuries due to concurrent fright or shock.[26] The instant court, in rejecting the *Mitchell* rule and its festoon of exceptions, and aligning New York with the majority of jurisdictions, reasoned that a negligent defendant must be held responsible for his acts regardless of actual contact or its absence; a duty had been breached and a right violated, thus the right to bring an action existed. The court rejected the theory that

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Brooklyn Heights R.R., 178 N.Y. 347, 70 N.E. 857 (1904) (breach of duty by a common carrier toward a passenger); cf. Kellogg v. Commodore Hotel, Inc., 187 Misc. 319, 64 N.Y.S.2d 131 (Sup. Ct. 1946) (element of abuse or insult is necessary to the action; mere failure to provide a room as promised is insufficient). The contract right provides the court with something external so the emotional disturbance may be added. Recovery has not been extended to breaches of ordinary contracts. Frank v. Justine Caterers, Inc., 271 App. Div. 980, 68 N.Y.S.2d 198 (2d Dep't 1947).

22. Carroll v. New York Pie Baking Co., 215 App. Div. 240, 213 N.Y. Supp. 553 (2d Dep't 1926) (recovery permitted for illness suffered as a result of the sight of contaminated food); Sider v. Reid Ice Cream Co., 125 Misc. 835, 211 N.Y. Supp. 582 (2d Dep't 1925). The rule was adopted for public policy reasons to prevent the perpetration of fraud. Some workmen's compensation cases also involve fright. See, e.g., Thompson v. City of Binghamton, 218 App. Div. 451, 218 N.Y. Supp. 355 (3d Dep't 1926) (heart attack caused by fright—recovery allowed). Compensation rules do not require natural and probable consequences but only actual injury traceable to an accident in the course of employment.

23. Mundy v. Levy Bros. Realty Co., 184 App. Div. 467, 170 N.Y. Supp. 994 (2d Dep't 1918) (the court could have found a slight impact but rather relied on immediate personal injury). Because the injury is immediate there is little fear of fabrication and thus the courts have a guaranty of the worthiness of the claim. Schachter v. Interborough Rapid Transit Co., 146 App. Div. 139, 130 N.Y. Supp. 549 (1st Dep't 1911) (defendant's negligence caused a subsequent panic).

24. Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N.Y. Supp. 39 (1st Dep't 1914) (plaintiff fainted from a shock).

25. Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931). The court cited with approval Chief Justice Holmes' opinion in a landmark Massachusetts case, Homans v. Boston Elevated Ry., 180 Mass. 456, 62 N.E. 737 (1902). "But when there has been a battery and the nervous shock results from the same wrongful management as the battery, it is at least equally impracticable to go further and to inquire whether the shock comes through the battery or along with it." 257 N.Y. at 238, 177 N.E. at 433.

26. See, e.g., Sawyer v. Dougherty, 286 App. Div. 1061, 144 N.Y.S.2d 746 (3rd Dep't 1955) (blast of air filled with glass and wooden splinters sufficient impact); Hack v. Dady, 142 App. Div. 510, 511, 127 N.Y. Supp. 22, 23 (2d Dep't 1911) (a few drops of melted lead falling upon the plaintiff held sufficient contact).

the fabrication of claims would result, as argued in *Mitchell*,[27] and stated that it is the duty of the courts to ascertain the worthiness of a cause of action and to compensate real injuries.[28]

The instant case left undecided whether recovery may be had in New York where emotional disturbance alone results from negligently caused fright. Those jurisdictions allowing recovery without impact have done so only where plaintiff has been able to prove some physical injury.[29] Obviously the law has endeavored to be practical. "[T]he damages suffered where the only manifestation is fright are too subtle and speculative to be capable of admeasurement by any standard known to law; but when the damages are physical and objective . . . the damages are quite as capable of being measured by a jury as if they had ensued from an impact or blow."[30] It has also been argued that there is no legal duty on the part of the defendant to refrain from negligent interference with plaintiff's peace of mind.[31] Upon trial of the instant case, then, plaintiff must show evidence of "residual physical manifestations," unless recovery in New York now be possible for emotional disturbance caused by fright or shock without concomitant physical disability. In recent years the court of appeals has indicated a tendency to liberalize rules of liability,[32] expanding the possibility of recovery in negligence cases involving prenatal injury,[33] hospitals,[34]

27. 151 N.Y. 107, 45 N.E. 354 (1896). In his dissent to the instant case Judge Van Voorhis would follow "the practical reason mentioned by Judge Holmes and Judge Lehman . . ." that fictitious claims must result from the overruling of Mitchell. 10 N.Y.2d at 244, 176 N.E.2d at 733, 219 N.Y.S.2d at 40.

28. Id at 242, 176 N.E.2d at 731, 219 N.Y.S.2d at 36-37.

29. Reed v. Ford, 129 Ky. 471, 112 S.W. 600 (1908) (no cause of action for fright alone caused by defendant's assault of third party); Lambertson v. Consolidated Traction Co., 60 N.J.L. 457, 38 Atl. 684 (1897) (fright alone from bus accident will not sustain a cause of action but where there is personal injury the fright may then be considered); Huston v. Borough of Freemansburg, 212 Pa. 548, 61 Atl. 1022 (1905) (fright caused by an explosion without physical injuries does not sustain a cause of action); Memphis St. Ry. v. Bernstein, 137 Tenn. 637, 194 S.W. 902 (1917) (fright coupled with bodily pain from accident sufficient as damages). In the last cited case the court stated that "mere fright cannot be made the basis of a cause of action, and that damages cannot be allowed for fright alone." 137 Tenn. at 637, 194 S.W.2d at 902.

30. Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 320, 73 So. 205, 207 (1916). But see Goodrich, Emotional Disturbance as Legal Damage, 20 Mich. L. Rev. 497 (1922).

31. Wilcox v. Richmond & D.R.R., 52 Fed. 264 (4th Cir. 1892); Smith v. Gowdy, 196 Ky. 281, 244 S.W. 678 (1922).

32. Following the recent New Jersey decision of Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), dispensing with the need to show privity of contract in a breach of warranty situation, New York may well alter the time honored rule of MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), and no longer require a showing of privity.

33. See Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951), overruling Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921), and allowing recovery for negligently caused injuries to an unborn infant.

34. See Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957), holding that hospitals must answer under the rule of respondeat superior for the negligence of employees.

food warranty,[35] aggravation through mental disturbance of a physical injury,[36] and blasting.[37] On a complaint alleging "residual physical manifestations," the question was not before the court and there is no reason why, if the mental injury is, in fact, real, the right to bring a cause of action for mental disturbance caused by fright should not be allowed.

Taxation—Mortgagee's Payment of Mortgagor's Defaulted Local Taxes Inferior to Recorded Federal Tax Lien.—Defendant mortgagor became insolvent,[1] and defaulted in the payment of his 1957 and 1958 real estate taxes. Mortgagee, authorized by the terms of the mortgage[2] to make disbursements necessary for protection of his lien, paid these taxes, to which local law gave priority over the mortgage.[3] Prior to mortgagee's payment, notice of a federal tax lien had been recorded and the government subsequently commenced foreclosure proceedings. Mortgagee claimed his payment of the local taxes had priority over the federal lien because made pursuant to the terms of a mortgage filed prior to the recordation of the federal tax liens.[4] The decision of the United States District Court for the Eastern District of Virginia in favor of mortgagee[5] was reversed by the United States Court of Appeals. Where a competing lien is inchoate and unperfected at the time notice of a federal tax lien is filed, the competing lien is junior to the tax lien although originating pursuant to the provisions of a pre-existing mortgage. *United States v. Bond*, 279 F.2d 837 (4th Cir.), *cert. denied*, 364 U.S. 895 (1960).

35. See Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961), dispensing with the need for infant plaintiff to show privity of contract in food warranty cases where the father purchased the food.

36. See Ferrara v. Galluchio, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958). Plaintiff suffered a burn caused by defendant's negligence. Subsequently, her dermatologist in treating the burn warned her to have regular checkups since cancer might develop. Plaintiff was allowed to recover damages for the mental anguish she suffered from resultant development of a "cancerophobia." The court stated in broad dictum that "freedom from mental disturbance is now a protected interest in this State." Id. at 21, 152 N.E.2d at 252, 176 N.Y.S.2d at 999. The court went on to note that this "appears to be the first case in which a recovery has been allowed against the original wrongdoer for purely mental suffering. . . ." Ibid.

37. See Schlansky v. Riegel, 146 N.Y.L.J., No. 45, Sept. 5, 1961, holding evidence of use of excessive amounts of explosives to constitute a prima facie case of negligence.

1. The Government did not claim priority under Rev. Stat. § 3466 (1875), 31 U.S.C. § 191 (1958), which gives the United States priority over other creditors when the debtor is insolvent. 279 F.2d 837, 841 (4th Cir.), cert. denied, 364 U.S. 895 (1960).

2. The mortgagor was to pay all taxes promptly and keep title free of liens and litigation.

3. 279 F.2d at 840.

4. The mortgagee also claimed priority for an attorney's fee paid to protect the mortgage lien. This claim was also defeated because of its uncertain nature at the time the federal notice was filed.

5. United States v. Bond, 172 F. Supp. 759 (E.D. Va. 1959).

Priority for debts due the Crown was a prerogative well known to the common law.[6] In the United States, however, this right was tempered by early Supreme Court decisions[7] which subordinated federal claims to other previously existing encumbrances on the principle of "first in time, first in right." In 1865 Congress created a federal tax lien,[8] the statute granting no priority of itself but in effect favoring the government by perfecting the lien against all interests arising subsequent to the time of the tax assessment. The statute resulted in a secret lien superior to all other claims, causing, *e.g.*, an unfiled federal tax lien to defeat a subsequent purchaser for value without notice of the lien.[9] This situation led to the enactment of section 6323(a)[10] invalidating federal liens as to mortgagees, pledgees, purchasers, and judgment creditors until recordation of such liens. The instant court limited the protection granted the mortgagee to cover only those sums actually expended before the recordation of the assessment by the federal collector via an application of the "inchoate lien test."[11]

6. See United States v. State Bank, 31 U.S. (6 Pet.) 29, 35 (1832).

7. E.g., Brent v. Bank of Washington, 35 U.S. (10 Pet.) 596 (1836); United States v. Hack, 33 U.S. (8 Pet.) 271 (1834); Conard v. Atlantic Ins. Co., 26 U.S. (1 Pet.) 386 (1828). See Marshall, C.J., in Rankin v. Scott, 25 U.S. (12 Wheat.) 177 (1827), where it was stated that "a prior lien gives a prior claim, which is entitled to prior satisfaction. . . ." Id. at 179.

8. 13 Stat. 470-71 (1865). Its provisions are presently incorporated in Int. Rev. Code of 1954, § 6321, which provides: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any cost that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." As to this federal tax lien see Anderson, Federal Tax Liens—Their Nature and Priority, 41 Calif. L. Rev. 241 (1953); Cross, Federal Tax Claims: Nature and Effect of the Government's Weapons for Collection, 27 Fordham L. Rev. 1, 9-26 (1958); Kennedy, The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien, 63 Yale L.J. 905, 919-30 (1954); Peppin, Priority of Tax and Special Assessment Liens, 23 Calif. L. Rev. 264, 265-67 (1935); Plumb, Federal Tax Collection and Lien Problems (pts. 1 & 2), 13 Tax L. Rev. 247, 459 (1958); Reiling, Priority of Federal Tax Liens, 36 Taxes 978 (1958); Spencer, Federal Tax Liens, 38 B.U.L. Rev. 181, 184-203 (1958); Wolson, Federal Tax Liens—A Study in Confusion and Confiscation, 43 Marq. L. Rev. 180 (1959). Rev. Stat. § 3466 (1875), 31 U.S.C § 191 (1958) provides: "Whenever any person indebted to the United States is insolvent . . . the debts due to the United States shall be first satisfied. . . ." In the instant case the debtor was insolvent but the court did not consider the effect of this section because the Government had not raised the issue on the trial. 279 F.2d at 841. Cf. United States v. Texas, 314 U.S. 480, 486 (1941); New York v. Maclay, 288 U.S. 290, 294 (1933); Brent v. Bank of Washington, 35 U.S. (10 Pet.) 596 (1836).

9. United States v. Snyder, 149 U.S. 210 (1893).

10. Int. Rev. Code of 1954, § 6323(a) provides: "Except as otherwise provided . . . the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary. . . ."

11. A lien will be treated as unperfected or inchoate under federal law unless definite as to the amount of the lien, the identity of the lienor, and the subject to which the lien attaches. See United States v. Gilbert Associates, 345 U.S. 361 (1953); United States v. Waddill, Holland & Flinn, Inc., 323 U.S. 353 (1945); United States v. Knott, 298 U.S. 544 (1936).

Although this test was evolved to guarantee collection of federal claims against insolvents,[12] it expanded over the past decade to defeat "unperfected" liens in solvent situations as well. Beginning with *United States v. Security Trust & Sav. Bank*,[13] where the test was applied to a solvent taxpayer to defeat a prior statutory attachment lien which had not been reduced to judgment, the Court has reaffirmed the principle and extended its application to a variety of statutory lien situations,[14] giving full weight to section 6321's[15] lien for assessed taxes.

In a case analogous to the instant situation, *United States v. R. F. Ball Constr. Co.*,[16] the test was expanded to cover a competing contractual lien. There the taxpayer, a subcontractor, had assigned sums receivable to his surety as security for any future indebtedness he might incur. Notice of a federal tax lien was recorded before any actual indebtedness to the surety occurred, but because of the prior assignment, considered by the lower courts as the equivalent of a mortgage,[17] the surety claimed a right of priority to the sums receivable. The Supreme Court rejected this argument in a disappointingly short per curiam opinion. "The instrument involved being inchoate and unperfected, the provisions of section 3672(a) . . . do not apply."[18] The Court's

12. See Kennedy, The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien, 63 Yale L.J. 905, 911-12 (1954). In early insolvency cases the Supreme Court held that previously executed mortgages were entitled to priority over a debt due the United States, notwithstanding the provisions of the insolvency test. E.g., Conard v. Atlantic Ins. Co., 26 U.S. (1 Pet.) 386 (1828). The Court apparently operated on the theory that the mortgaged property had passed to the mortgagee and no longer was part of the mortgagor's estate. See United States v. Texas, 314 U.S. 480 (1941). Whether a federal claim against an insolvent is entitled to priority over a pre-existing choate lien has not yet been decided by the Supreme Court.

13. 340 U.S. 47 (1950). Mr. Justice Jackson, in his concurring opinion, went a step further and argued that the federal tax lien should be accorded preference over all liens other than those expressly mentioned in section 6323(a). In effect, this view would restrict choate liens solely to those four classes of interest. However, the Court in United States v. City of New Britain, 347 U.S. 81 (1954), indicated that it was not willing to go that far, and granted priority to a municipal tax lien which it deemed perfected. Between two or more choate liens, priority will be based on the time at which they became choate. Although by this reasoning choate liens other than those protected under section 6323(a) may gain precedence if prior in time, the problem remains to find a competing lien to meet the Court's standard of choateness.

14. United States v. Vorreiter, 355 U.S. 15 (1957) (per curiam) (mechanic's lien); United States v. White Bear Brewing Co., 350 U.S. 1010 (1956) (per curiam) (mechanic's lien); United States v. Colotta, 350 U.S. 808 (1955) (per curiam) (mechanic's lien); United States v. Scovil, 348 U.S. 218 (1955) (landlord's distress lien); United States v. Liverpool & London & Globe Ins. Co., 348 U.S. 215 (1955) (garnishment lien); United States v. Acri, 348 U.S. 211 (1955) (attachment lien).

15. Int. Rev. Code of 1954, § 6321.

16. 355 U.S. 587 (1958) (per curiam), 27 Fordham L. Rev. 284.

17. R. F. Ball Constr. Co. v. Jacobs, 140 F. Supp. 60 (W.D. Tex.), aff'd sub nom. United States v. R. F. Ball Constr. Co., 239 F.2d 384 (5th Cir. 1956).

18. 355 U.S. at 587.

brevity left uncertain whether the inchoate test was also to be applied to the specifically protected interests of section 6323(a) as indicated by the Court's reliance on *Security Trust* and *United States v. City of New Britain*.[19] In the latter decision the Court held a competing statutory lien sufficiently perfected to defeat a federal lien because it was first in time. The reasoning of *Ball* could be said to have been that the "instrument" involved was not a mortgage and hence that the surety, since not a mortgagee, was not protected by section 6323(a). Weight was added to the latter interpretation by the reasoning of the *Ball* dissent to the effect that the instrument was in fact a mortgage and hence the mortgagee was protected.[20] Thus the dichotomy of opinion in the instant case: the dissent found *Ball* not determinative—interpreting it as holding that the instrument was not a mortgage and so not within the purview of the statute. Thus freed of the *Ball* holding, the dissent argued that the words of section 6323(a) should be used in their "usual, conventional sense" to protect not *mortgages* but *mortgagees*.[21] The majority of the present court found *Ball* to require perfection of the lien before section 6323(a) could be applied, reasoning that the *Ball* Court had determined that, although a mortgage, the "instrument" had been inchoate.[22]

Because the instant case places the mortgagee in a quandary when the mortgagor defaults in the payment of local taxes—local laws subordinate his lien to local tax claims but his payment of them will go unrecompensed if a federal tax lien has been recorded—the reasoning of the dissent has great appeal and its solution is apparently fairer to the parties. Still, the majority's interpretation of *Ball* is more reasonable. The use, in *Ball*, of the word "instrument" was unfortunate but the Court's language can only be construed to mean "mortgage." For, whether choate or inchoate, perfected or unperfected, had the instrument not been a mortgage, there would have been no question of the application of section 6323(a). Neither the lower courts nor the parties themselves doubted that the surety was a mortgagee. The question, therefore, was whether the "inchoate lien test" was applicable to a mortgagee, and, if so, did he pass the test. The Court impliedly answered the first question in the affirmative by answering the second in the negative. While strongly disagreeing with the decision, the dissent there apparently did not object to the application of the test to what they considered a prior mortgage.[23]

The reasoning of the majority in the present case is logically consistent with

19. 347 U.S. 81 (1954).

20. 355 U.S. at 588-94 (dissent).

21. "[T]he preference cannot be limited to the mortgagee's right to repayment of the principal. . . . It extends to all those rights which the Congress must have known the mortgagee commonly and usually possesses. Provisions in mortgages requiring or permitting the mortgagee to discharge ad valorem tax liens and extending the mortgage lien to such disbursements, as well as to the expense of enforcement of the mortgagee's rights, are commonplace." 279 F.2d at 851 (dissent). See Cross, Federal Tax Claims: Nature and Effect of the Government's Weapons for Collection, 27 Fordham L. Rev. 1, 27, 30 (1958).

22. 279 F.2d at 845.

23. United States v. R. F. Ball Constr. Co., 355 U.S. 587, 588-94 (dissent).

the evolving policy of the Supreme Court,[24] indicating the federal trend of imposition of the priority of section 3466[25] on the tax lien of section 6321. This construction limits but does not end the protection provided by Congress in section 6323(a). Free alienation of property is still safeguarded from the danger of a secret lien, but, just as one who becomes a mortgagee after notice of a federal tax lien has been filed will not be protected, so also a mortgagee will not be protected for additional expenditures made subsequent to notice of a federal lien.[26] Legislation has been suggested for the protection of prior mortgagees who are forced to expend monies (even after notice of federal tax liens) in order to protect their investment.[27] Until the enactment of such legislation, it behooves a mortgagee to check closely before making any disbursements, regardless of the terms of the mortgage.

24. "We have derived an indelible impression from the cases (involving determination of priority of federal tax liens over competing liens) decided by the Supreme Court, which reveal the persistent application of the choate lien test, first in insolvency cases, then in statutory lien cases, and finally in nonstatutory contractual lien cases." 279 F.2d at 845.

25. Rev. Stat. § 3466 (1875), 31 U.S.C. § 191 (1958).

26. In United States v. Christensen, 269 F.2d 624 (9th Cir. 1959), the court of appeals held that a filed federal tax lien was superior to a prior mortgagee's claim for realty taxes which the mortgagee had paid after the recordation of the federal lien. However, section 6323(a) was not considered.

27. See, e.g., Cross, Federal Tax Claims: Nature and Effect of the Government's Weapons for Collection, 27 Fordham L. Rev. 1, 30 (1958).