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# Case Notes

# CASE NOTES

**Administrative Law—Administrative Procedure Act Rejected as Means for Production and Inspection of Statements Voluntarily Made to Internal Revenue Service.**—Defendant appealed from a conviction on two counts of willful tax evasion[1] on the ground that the trial court had erred in denying defendant's motion under Rules 16 and 17(c) of the Federal Rules of Criminal Procedure[2] and Section 6(b) of the Administrative Procedure Act[3] for *inspection* of the transcripts of statements made by defendant to the Internal Revenue Service.[4] The court of appeals affirmed the conviction. *United States v. Murray*,—F.2d—(2d Cir. 1962).

The court's denial of motion under Rule 16 of the Federal Rules of Criminal Procedure[5] was based on the majority view of the federal courts that rule 16 is not a proper vehicle for inspection of defendant's *own* statements.[6] The court also denied the motion under Rule 17(c)[7] on the theory that it had not been shown that the statements were evidentiary and relevant.[8]

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1. Int. Rev. Code of 1939, § 145(b), 53 Stat. 62 (now Int. Rev. Code of 1954, § 7201).

2. Fed. R. Crim. P. 16-17(c).

3. 60 Stat. 240 (1946), 5 U.S.C. § 1005(b) (1958).

4. Defendant's appeal also alleged insufficiency of the Government's evidence, errors in the admission and exclusion of evidence, and that the trial court erred in permitting the Government to contradict its bill of particulars in summation.

5. Rule 16 provides: "Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable."

6. Schaffer v. United States, 221 F.2d 17 (5th Cir. 1955); Shores v. United States, 174 F.2d 838 (8th Cir. 1949); United States v. Gogel, 19 F.R.D. 107 (S.D.N.Y. 1956); United States v. Gim Hall, 18 F.R.D. 384 (S.D.N.Y. 1956), rev'd on other grounds, 245 F.2d 338 (2d Cir. 1957); United States v. Peltz, 18 F.R.D. 394 (S.D.N.Y. 1955); United States v. Pete, 111 F. Supp. 292 (D.D.C. 1953); United States v. Brumfield, 85 F. Supp. 696 (W.D. La. 1949); United States v. Chandler, 7 F.R.D. 365 (D. Mass. 1947); United States v. Black, 6 F.R.D. 270 (N.D. Ind. 1946). The words of rule 16, "obtained from," have been construed to apply only to documents and objects which were in existence and in the custody of the defendant prior to the Government's procurement of them. See United States v. Black, supra at 271. Thus, under this section, courts have denied discovery of statements or confessions, either written or oral, given by the defendant to a Government agency.

7. Rule 17(c) provides: "A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. . . . The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

8. "Evidentiary" has been construed to mean admissible in evidence. United States v. Iozia, 13 F.R.D. 335 (S.D.N.Y. 1952). See Fryer v. United States, 207 F.2d 134

Section 6(b) of the Administrative Procedure Act provides in relevant part: "Every person compelled to submit data or evidence [in a proceeding conducted by an administrative agency] shall be entitled to . . . procure a copy or transcript thereof . . . ."[9] The court in denying defendant's motion under the Administrative Procedure Act focused its attention on the requirement that the person be *compelled* to submit the statements.[10] The court felt that since defendant's appearances before the Internal Revenue Service "were not pursuant to summons issued under Section 7602 of the Internal Revenue Code . . ."[11] there had been no compulsion and hence the act was not applicable.[12] The court thereby implied, however, that the APA would support a motion for discovery where the element of compulsion was satisfied. Difficulty arises in determining the degree of compulsion required by the act.

The court's implication that an involuntary submission of the documents is a prerequisite under the Administrative Procedures Act is not reconcilable with the legislative history of the act, nor with the practical functions of the Internal Revenue Service in conducting a tax investigation. The House and Senate reports on section 6(b) stated unequivocally that "it applies to any demand, whether or not a formal subpena [*sic*] is actually issued."[13] Furthermore, would not a request by the Internal Revenue Service that a defendant appear be tantamount to a demand in view of the power of summons available under the Internal Revenue Code,[14] and the penalties[15] provided for failure to obey? Would not failure to acquiesce invariably result in the issuance of a summons?

The propriety of employing Section 6(b) of the Administrative Procedure Act as a vehicle for discovery of such statements was accepted by Judge Timbers in *United States v. Fancher*,[16] recently noted herein.[17]

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(D.C. Cir.), cert. denied, 346 U.S. 885 (1953), where the court by implication would arrive at a different result than the finding in the instant case. For a review of the court's discretionary powers to grant a motion under Rules 16 and 17(c) of the Federal Rules of Criminal Procedure, and the applicability of the Administrative Procedure Act to Internal Revenue investigations see United States v. Fancher, 195 F. Supp. 448 (D. Conn. 1961), 30 Fordham L. Rev. 343.

9. 60 Stat. 240 (1946), 5 U.S.C. § 1005(b) (1958).

10. Ibid.

11. — F.2d —, — (1962).

12. Id. at —.

13. S. Rep. No. 752, 79th Cong., 1st Sess. 19 (1946); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 32 (1946).

14. Int. Rev. Code of 1954, § 7602. This section provides in relevant part: [T]he Secretary or his delegate is authorized . . . (2) To summon the person liable for tax or required to perform the act. . . ."

15. Int. Rev. Code of 1954, § 7210. This section provides for a fine of "not more than $1,000," or imprisonment for not "more than 1 year, or both, together with costs of prosecution . . ." upon conviction for failure to appear when summoned.

16. 195 F. Supp. 448 (D. Conn. 1961).

17. Note, 30 Fordham L. Rev. 343 (1961).

**Antitrust—Twenty-Year Total Coal Requirements Contract Held Valid Under Clayton Act Section 3.**—Petitioner, a public utility firm engaged in the supplying of electricity to the Tampa, Florida area, entered into a contract with respondent whereby the latter was to furnish the total coal requirements for two new generating units for a twenty-year period. The contract provided for the use of not less than 225,000 tons of coal per unit per year. It was estimated that petitioner's needs would increase tenfold to an amount greatly in excess of the total annual coal consumption of the entire Florida peninsula. The estimated maximum requirements did not amount to more than one per cent of the total amount of coal of the same type produced and marketed by the 700 coal suppliers in respondent's producing area. Both parties expended large sums preparing to carry out the contract, but prior to the first delivery, respondent advised petitioner that it would not perform, claiming that the contract was unenforceable as it violated Section 3 of the Clayton Act.[1] Petitioner sued in the United States district court for a judgment declaring the contract valid and enforceable. The district court held that the contract violated Section 3 of the Clayton Act because its great duration and large tonnage and dollar volume would substantially lessen competition.[2] The court of appeals affirmed.[3] On certiorari, the United States Supreme Court reversed.[4] Even though a contract is an exclusive-dealing arrangement, it does not violate section 3 unless the competition foreclosed by it constitutes a substantial share of the relevant market. In so determining, the Court abandoned the "quantitative substantiality" test[5] previously used, and held that to determine substantiality of foreclosure of competition, consideration must be given not merely to substantiality of volume but also to the relative strength of the parties, the probable immediate and future effects in the relevant market, and other economic factors and particularized circumstances. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961).

Section 3 of the Clayton Act[6] specifically prohibits in their incipiency

1. 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958).

2. Tampa Elec. Co. v. Nashville Coal Co., 168 F. Supp. 456 (M.D. Tenn. 1958).

3. Tampa Elec. Co. v. Nashville Coal Co., 276 F.2d 766 (6th Cir.), cert. granted, 363 U.S. 836 (1960).

4. The opinion was written by Mr. Justice Clark and was joined in by six other Justices. Justices Douglas and Black noted their dissent.

5. See Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 314 (1949), often referred to as Standard Stations.

6. "[I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States . . . , or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. . . ." 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958). Thus, section 3 consists of two parts: (1) a mechanical part, and (2) a qualifying

certain types of agreements which had not been condemned by the broadly phrased Sherman Act.[7] Under this section Congress has prohibited tying agreements[8] and requirements or exclusive-dealing contracts,[9] the effect of which "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[10] Since "tying agreements serve hardly any purpose beyond the suppression of competition . . . ,"[11] they have been considered unreasonable in and of themselves whenever the party has "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected."[12] Requirements contract provisions, because they may be of economic advantage to both buyers and sellers,[13] are not

clause which in effect states that although the mechanical part may exist, there will be a violation of the section only if the effect of the transaction "may be to substantially lessen competition or tend to create a monopoly in any line of commerce. . . ."

7. 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1958). See Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 355-56 (1922); Henry v. A.B. Dick Co., 224 U.S. 1 (1912); S. Rep. No. 698, 63d Cong., 2d Sess. 1, 6-9 (1914); H.R. Rep. No. 1168, 63d Cong., 2d Sess. 11-12 (1914); Purdy, Lindahl & Carter, Corporate Concentration and Public Policy 363-64 (1942); Levy, The Clayton Law—An Imperfect Supplement to the Sherman Law, 3 Va. L. Rev. 411 (1916); Lockhart & Sacks, The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act, 65 Harv. L. Rev. 913, 933-35 (1952).

8. "[A] tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. . . ." Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958).

9. H.R. Rep. No. 1168, 63d Cong., 2d Sess. 11-12 (1914). See Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922); United States v. Pullman Co., 50 F. Supp. 123 (E.D. Pa. 1943).

10. 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958). See Standard Fashion Co. v. Magrane-Houston Co., supra note 9.

11. Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 305-06 (1949).

12. Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958). See also United States v. Paramount Pictures, Inc., 334 U.S. 131, 156-59 (1948); United States v. Griffith, 334 U.S. 100 (1948); International Salt Co. v. United States, 332 U.S. 392 (1947).

13. "Requirements contracts . . . may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public. In the case of the buyer, they may assure supply, afford protection against rises in price, enable long-term planning on the basis of known costs, and obviate the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand. From the seller's point of view, requirements contracts may make possible the substantial reduction of selling expenses, give protection against price fluctuations, and—of particular advantage to a newcomer to the field to whom it is important to know what capital expenditures are justified—offer the possibility of a predictable market. . . . They may be useful, moreover, to a seller trying to establish a foothold against the counterattacks of entrenched competitors. . . ." Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 306-07 (1949). See Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353 (1931); Houston Texas Oil Corp., 16 F.P.C. 118, 124-26 (1956), aff'd sub nom. Florida Economic

considered illegal per se.[14] In the leading case of *Standard Oil Co. of Cal. v. United States*,[15] requirements contracts between Standard Oil and thousands of independent dealers who sold 6.7 per cent of the gasoline marketed in the western area of the United States were declared illegal under section 3 because they foreclosed competition in a substantial line of commerce.[16] The Supreme Court in that case enunciated the so-called "quantitative substantiality" test of proof of foreclosure of competition.[17] Under this test, since the Court considered itself "ill-suited"[18] to become involved with the intricacies of economic evidence, such evidence was deemed irrelevant and unnecessary for proof of foreclosure of competition. Size and quantity alone became the criteria for satisfying the qualifying clause. In effect the doctrine of quantitative substantiality ruled out, because irrelevant to the determination of illegality, any economic justification or any showing of the lack of seller's dominance in the market. Size and quantity being the sole criteria, the Court in effect came very close to declaring a per se violation of section 3 from the mere fact that the contracts involved a large volume of goods, regardless of the economic context. The "quantitative substantiality" test, although criticized by many commentators,[19] was followed in later decisions,[20] and was applied by the district court[21] and circuit court[22] in the instant case.

The Supreme Court in the present case however, enunciated a new mode of operation which is quite incompatible with and considerably different in tone from that of *Standard Stations*. Using a technique rather reminiscent of a "rule of reason" approach, Mr. Justice Clark declared:

To determine substantiality in a given case, it is necessary to weigh the probable

Advisory Council v. FPC, 251 F.2d 643 (D.C. Cir. 1957), cert. denied, 356 U.S. 959 (1958).

14. United States v. Columbia Steel Co., 334 U.S. 495, 523-24 n.23 (1948); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 728-29 (1944); Beloit Culligan Soft Water Serv., Inc. v. Culligan, Inc., 274 F.2d 29, 33 (7th Cir. 1959).

15. 337 U.S. 293 (1949), often referred to as Standard Stations.

16. Accord, Dictograph Prods., Inc. v. FTC, 217 F.2d 821 (2d Cir. 1954), cert. denied, 349 U.S. 940 (1955).

17. 337 U.S. at 298.

18. Id. at 310.

19. Note, 18 Fordham L. Rev. 306, 312 (1949); Note, 25 Notre Dame Law. 179, 181 (1949); Note, 3 Vand. L. Rev. 156, 159 (1949); Note, 52 W. Va. L. Rev. 71 (1949). But see Schwartz, Potential Impairment of Competition—The Impact of Standard Oil Co. of California v. United States on the Standard of Legality Under the Clayton Act, 98 U. Pa. L. Rev. 10 (1949).

20. See United States v. Sun Oil Co., 176 F. Supp. 715 (E.D. Pa. 1959); Handler, Antitrust in Perspective 38 (1957).

21. "A contract to supply the total coal requirements of an operation of such magnitude for such a protracted exclusionary period clearly falls within the purview of the statute." Tampa Elec. Co. v. Nashville Coal Co., 168 F. Supp. 456, 458 (M.D. Tenn. 1958).

22. "A 'requirements' contract of some companies over a short period of time might well avoid the effect proscribed by the statute, while such a contract of large proportions and extending over a long period of years would clearly fall within the provisions of the statute." Tampa Elec. Co. v. Nashville Coal Co., 276 F.2d 766, 771 (6th Cir. 1960).

effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of the share of the market might have on effective competition therein. It follows that a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence.[23]

It is significant to note that the factors which Mr. Justice Clark now deemed worthy of judicial investigation are almost identical to those which Mr. Justice Frankfurter had mentioned in *Standard Stations*[24] but then refused to consider because they were "if not virtually impossible to meet, at least most ill-suited for ascertainment by courts."[25]

Mr. Justice Clark then declared that even though a contract is an exclusive-dealing arrangement, it is not violative of Section 3 of the Clayton Act "unless the court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected."[26] Three basic guides were set forth by the Court to decide whether such is the case. First, the line of commerce must be determined;[27] second, "the area of effective competition in the known line of commerce . . ." must be ascertained by a careful delineation of the "market area in which the seller operates, and to which the purchaser can practicably turn for supplies . . .";[28] third, the competition which the contract forecloses must be found to constitute a "substantial share of the relevant market."[29]

Applying these guides to the case at bar, the Court accepted, without deciding its validity, the lower courts' finding that the line of commerce was bituminous coal.[30] In determining the area of effective competition, however, the Court found that both the district and circuit courts had delineated the relevant market area too narrowly by restricting it to peninsular Florida, stating that "we do not believe that the pie will slice so thinly."[31] Since the 700 suppliers of the kind of coal involved effectively competed in a much larger area extending as far north as Pennsylvania, and since the Florida area used coal which came from sources in no less than seven states, the relevant market area was not peninsular Florida, nor the entire state of Florida, nor Florida and Georgia combined, but the larger area in which the respondents and the 700 other producers effectively competed.[32] The Court then took judicial notice of Government statistics showing that in 1954 the amount of bituminous coal and lignite produced in the larger area and sold on the open market was

23. 365 U.S. at 329.
24. Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 308 (1949).
25. Id. at 310.
26. 365 U.S. at 327.
27. Ibid.
28. Ibid.
29. Id. at 328.
30. Id. at 330.
31. Id. at 331.
32. Ibid.

290,567,000 tons,[33] which was more than one hundred times the maximum requirements anticipated annually by the petitioner under the contract in question. It thus clearly appeared to the Court that the proportionate volume of competition which the contract foreclosed was "quite insubstantial."[34] Although the contract pre-empted competition to the extent of purchases worth $128,000,000, "the dollar volume, by itself, is not the test . . . ."[35]

In the case at bar the contract extended for a period of twenty years, and it is the first in which the Supreme Court has found a requirements contract of such prolonged duration to be legal under section 3. The Supreme Court in earlier cases had never upheld requirements or exclusive-dealing contracts which were to last more than one year.[36] It must be emphasized, however, that the Court seemed to justify its decision on this particular aspect of the case largely upon the fact that the commodity involved was of peculiar importance to the general public: "The 20-year period of the contract is singled out as the principal vice, but at least in the case of public utilities the assurance of a steady and ample supply of fuel is necessary in the public interest."[37] In view of this statement, it is doubtful that the Court will in the future expand its holding to a contract of such lengthy duration where the nature of the product involved is of less consequence to the public. Nonetheless, the import of the decision is considerable. It reflects a notable change in the *modus operandi* of the Court with regard to cases under Section 3 of the Clayton Act. The Court has in effect emerged from the chasm into which it had fallen with the *Standard Stations*' "quantitative substantiality" test. Putting forth a pure "rule of reason" approach, which could perhaps aptly be described as a "*qualitative* substantiality" test, the Court has adopted a more flexible procedure. It has served notice that no longer does it consider the particularized circumstances of the parties' operations irrelevant in its determination of whether the performance of the contract probably would foreclose competition in a substantial share of the line of commerce affected.[38]

**Bankruptcy—Parent and Subsidiary Allowed as Separate Creditors in Involuntary Petition.**—Gibraltor Amusements Ltd., the alleged bankrupt, operated numerous "juke-box" routes on Long Island. The Wurlitzer Company, its principal creditor, filed an involuntary petition in bankruptcy against Gibraltor, alleging fewer than twelve creditors. Gibraltor's answer denied this[1] and the court, upon motion, allowed Wurlitzer to amend its petition,

33. Id. at 332 n.10, citing 1 U.S. Census of Mineral Industries: 1954, Series: M1-12B, p. 4 (1957), cited also in Brief for Petitioner, p. 42 n.24, Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

34. 365 U.S. at 333.

35. Id. at 334.

36. See FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 396 (1953); United States v. American Can Co., 87 F. Supp. 18, 32 (N.D. Cal. 1949).

37. 365 U.S. at 334.

38. Id. at 335.

1. Gibraltor submitted a list of its creditors in support of their contention. The answer

granting leave for William Wadsworth, Joseph Rae, and Wurlitzer Acceptance Corp. (WAC),[2] a wholly-owned subsidiary of Wurlitzer, to file as intervening creditors.[3] Gibraltor was duly adjudged bankrupt. Upon petition for review, the United States District Court for the Eastern District of New York upheld the referee's findings but disallowed the Rae claim,[4] leaving only three petitioning creditors. Upon Gibraltor's contention, *inter alia*, that WAC could not properly file as a creditor since it was a wholly-owned subsidiary of Wurlitzer, the United States Court of Appeals for the Second Circuit, Judge Friendly dissenting, affirmed the district court's decision, holding that a creditor corporation's wholly-owned subsidiary, to which the corporation has assigned claims against the debtor, could be counted as one of the required number of petitioning creditors where the corporation and the subsidiary had strictly honored the corporate form as to assets and intercorporate transactions, there being no evidence of any attempted subversion of the Bankruptcy Act. *In the Matter of Gibraltor Amusements, Ltd.*, 291 F.2d 22 (2d Cir. 1961).

Basically, an involuntary petition in bankruptcy may be filed only by creditors, in the number and amount specified in Section 59(b) of the Bankruptcy Act,[5]

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also contained a denial of Gibraltor's indebtedness and challenged Wurlitzer's stand on the ground that Wurlitzer had been the recipient of preferential payments. The bankruptcy court found against Gibraltor on these latter contentions. Although a preferred creditor may not be a petitioner in involuntary proceedings, the preferred creditor may surrender his preference and obtain the allowance of his claim, 52 Stat. 866 (1938), 11 U.S.C. § 93(g) (1958).

2. WAC was incorporated in 1957 to finance the sales of the parent's products. It obtained its own bank financing based on the strength of its own credit and was a separate corporate taxpayer for the purpose of the federal income tax. The evidence showed that both the parent and its subsidiary had scrupulously honored the separate corporate entity of the latter. WAC's claim was for $17,000 on two notes guaranteed by Gibraltor. These notes had been purchased long before the filing of the petition.

3. This intervention was necessary since Bankruptcy Act § 59(b), 66 Stat. 425 (1952), 11 U.S.C. § 95(b) (1958) requires three or more creditors to file the petition in involuntary bankruptcy where the bankrupt has twelve or more creditors. An involuntary petition will not be dismissed however, because there is only one petitioner and it develops that there are twelve or more creditors, and hence that there must be at least three petitioners. Section 59(d), 52 Stat. 868 (1938), 11 U.S.C. § 95(d) (1958). See In re Plymouth Cordage Co., 135 Fed. 1000 (8th Cir. 1905). Even if an amended petition in bankruptcy joining qualified creditors were improper because of failure to obtain leave of court to file it, it was beyond the court's power to deny a motion for leave to file a further amended petition joining the requisite qualified creditors. In re Acord Ventilating Co., 221 F.2d 899 (7th Cir. 1955). See also In re Eastern Supply Co., 267 F.2d 776 (3d Cir.), cert. denied, 361 U.S. 900 (1959); Providence Box & Lumber Co. v. Goodrich-Daniell Lumber Corp., 80 F. Supp. 61 (D. Vt. 1948).

4. In the Matter of Gibraltor Amusements, Ltd., 187 F. Supp. 931 (E.D.N.Y. 1960). The court held Rae's claim contingent as to liability, thereby disqualifying him as a petitioner. Since there were three petitioning creditors remaining, the court confirmed the adjudication of bankruptcy.

5. 66 Stat. 425 (1952), 11 U.S.C. § 95(b) (1958) provides that: "Three or more creditors who have provable claims liquidated as to amount and not contingent as to liability against any person which amount in the aggregate in excess of the value of securities held by them,

who have provable[6] claims against the debtor whose adjudication is sought.[7] Anyone who owns a debt, demand, or claim provable in bankruptcy, is deemed a creditor for this purpose.[8] Section 59(e)[9] of the Act lists those creditors who may not be counted in computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in a petition of involuntary bankruptcy. Section 59(b)[10] requires that where the creditors number twelve or more, a minimum of three creditors is necessary to sustain the petition.

The present day section 59(b) has changed considerably since its original incorporation as Section 2 of the Bankruptcy Act of 1800.[11] That act provided that one creditor with a minimum claim of $1,000 might file an involuntary petition. Two creditors with a claim for $1,500 could qualify as petitioners and if more than two creditors joined in the petition, the aggregate of their claims had to equal $2,000.[12] Section 1 of the act of 1841 liberalized these requirements, providing that a petition might be filed by one or more creditors

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if any, to $500 or over, or, if all of the creditors of such person are less than twelve in number, then one or more of such creditors whose claim or claims equal such amount, may file a petition to have him adjudged a bankrupt."

6. Gerstenberg, Bankruptcy 20 (1917) explains provable and allowable claims: "Claims arising before, but payable after the petition is filed, are provable. Claims wholly arising after adjudication are not affected in any way by the bankruptcy proceedings and therefore are not provable." Two classes of provable claims which are not allowed are: "[1] Secured claims will be allowed only to the extent of the difference between the amount of the claim and the value of the bankrupt's property securing the claim . . . . [2] Claims of creditors who have received a preference. Where a bankrupt, within four months of the filing of the petition and while insolvent, transfers any of his property to pay a debt theretofore incurred, the creditor receiving the transfer has been preferred . . . . [I]f it can be established that the creditor knew he was being preferred, he may be compelled by the trustee to surrender the preference and his claim will not be allowed till he has surrendered the preference." Id. at 21-22. See also 1 Remington, Bankruptcy § 203 (5th ed. 1950).

7. Frederic L. Grant Shoe Co. v. W. M. Laird Co., 212 U.S. 445 (1909).

8. 52 Stat. 841 (1938), 11 U.S.C. § 1(11) (1958).

9. 52 Stat. 869 (1938), 11 U.S.C. § 95(e) (1958) provides as follows: 1) such creditors as were employed by the bankrupt at the time of the filing of the petition; 2) creditors who are relatives of the bankrupt or, if the bankrupt is a corporation, creditors who are stockholders or members, officers or members of the board of directors or trustees or of other similar controlling bodies of such bankrupt corporation; 3) creditors who have participated, directly or indirectly, in the act of bankruptcy charged in the petition; 4) secured creditors whose claims are fully secured; and 5) creditors who have received preferences, liens, or transfers void or voidable under this act.

10. 66 Stat. 425 (1952), 11 U.S.C. § 95(b) (1958).

11. 2 Stat. 21 (1800).

12. Ibid. "Among the most important laws of the session thus terminated, viz., the Bankruptcy Act. . . . Its object is, in the first place, to support mercantile credit by protecting the rights of creditors against the fraud of the dishonest and the folly of imprudent debtors . . . ." Robert G. Harper to His Constituents, May 15, 1800, "Papers of James A. Bayard," in 2 American History Ass'n Report 101-02 (1913).

whose claims equalled in amount $500.[13] A conflict arose in 1866 in the Thirty-ninth Congress over the question of a Bankruptcy Act, and the Congress, facing demands for alteration of the act, divided into four factions: "[T]hose who opposed any bankruptcy law at all, those who opposed any bill providing for involuntary bankruptcy, those who favored a bill largely for benefit of creditors [and] those who advocated a complete and permanent bill for both debtor and creditor."[14] In the resulting compromise section 39 of the act of 1867[15] provided that one or more creditors could file an involuntary petition so long as the aggregate claim amounted to $250. An amendment in 1874,[16] however, completely reversed this trend and provided that an involuntary petition might only be filed by no less than one-fourth of the creditors in number, whose claims, provable in bankruptcy, amounted to at least "one-third of the debts so provable."[17] The 1890's saw a revival of furious agitation[18] concerning the Bankruptcy Act. The resultant act of 1898[19] was a compromise between the provisions of the acts of 1800 and 1841, which were favorable to creditors, and the more stringent sections of the 1874 amendment to the act of 1867. The present day section 59(b) is basically this section.[20] No provision was made as to a corporation and its separate subsidiary qualifying as two distinct creditors. The problem of whether a subsidiary should be counted as a separate and distinct creditor from the parent corporation for the purposes of sustaining an involuntary petition is one of first impression. The courts have in the past been liberal in their construction of the term creditor. A partner may file a petition against his copartners and the firm,[21] and since a joint obligor's claim for contribution from a co-obligor is provable in bankruptcy,[22] he is allowed to join with other creditors in the involuntary petition. In the decision of *In re Bevins*,[23] a bona fide assignee who purchased a claim for value was allowed to join in an involuntary petition against the debtor, even though the claim was purchased

13. 5 Stat. 440 (1841).

14. Warren, Bankruptcy in United States History 103 (1935).

15. 14 Stat. 536 (1867).

16. 18 Stat. 180 pt. 3 (1874).

17. 18 Stat. 181 pt. 3 (1874).

18. See Warren, Bankruptcy in United States History 140-43 (1935).

19. 30 Stat. 544 (1898).

20. Slight alterations were made by § 59 of the Chandler Act of 1938, 52 Stat. 868, 11 U.S.C. § 95(b) (1958). The following is this section as it was in 1898. The words in brackets were added by the Chandler Act and the words in parenthesis were the words deleted in 1938: "Three or more creditors who have provable claims [fixed as to liability and liquidated as to amount] against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to $500 (five hundred dollars) or over. . . ." The act of 1952 amended subdivision (b) by substituting the words "not contingent" in lieu of "fixed." See note 5 supra for the exact wording of this section today,

21. In re J. M. Ceballos & Co., 161 Fed. 445 (D.N.J. 1908).

22. Carter v. Lechty, 72 F.2d 320 (8th Cir. 1934).

23. 165 Fed. 434 (2d Cir. 1908). See also Security Bank & Trust Co. v. Tarlton, 294 Fed. 698 (D. Tenn. 1923).

for the sole purpose of having a sufficient number of creditors to file a petition. A creditor, however, who purchased a number of claims was still considered as only one individual creditor.[24] Where a single creditor with two distinct claims against a debtor made a bona fide transfer to two separate parties of these claims, the transferees could properly join in a petition with a third creditor.[25] It is important to note, however, that the courts have disapproved of a creditor dividing an individual claim for the purpose of obtaining the number of creditors required under the Bankruptcy Act.[26] General Order 5(2), which was promulgated and became effective in 1939, is a check against assignments executed for the purpose of subverting the Bankruptcy Act.[27] Consideration, therefore, coupled with an absence of manipulation appears to be the key to acceptance by the courts of an assignee as a creditor.

Since it was established that the Wurlitzer Acceptance Corporation was a valid, separate, legal entity, the majority in the present case reasoned that it was entitled to recognition as a bona fide creditor in its own right.[28] The majority saw no conflict between its conclusion and the congressional intent, as expressed or implied in the Bankruptcy Act.[29] The court reasoned that Congress had not acted to exclude a subsidiary when it could have done so specifically,[30] and therefore, that Congress had not "meant to alter ordinary

24. Myron M. Navison Shoe Co. v. Lane Shoe Co., 36 F.2d 454 (1st Cir. 1929).

25. In re Glory Bottling Co., 278 Fed. 625 (E.D.N.Y. 1921). "[T]he mere fact that the claims of two of the petitioning creditors are based upon trade acceptances received from the same source does not invalidate the petition." Id. at 626.

26. Stroheim v. Lewis F. Perry & Whitney Co., 175 Fed. 52 (1st Cir. 1910), where the owners of certain notes against an alleged bankrupt assigned one of them without substantial consideration to S, in order to enable her brother to use S as a petitioning creditor on an involuntary bankruptcy petition. B came into possession of another note from the same source, under the same circumstances, and for the same reason. Neither were qualified to join as petitioning creditors. See also Leighton v. Kennedy, 129 Fed. 737 (1st Cir. 1904).

27. General Order 5(2), as amended, 11 U.S.C. app., p. 1812 (1958) provides: Petitioners in involuntary proceedings for adjudication, whose claims rest upon assignment or transfer from other persons, shall annex to one of the triplicate petitions all instruments of assignment or transfer, and an affidavit setting forth the true consideration paid for the assignment or transfer of such claims and stating that the petitioners are the bona fide holders and legal and beneficial owners thereof and whether or not they were purchased for the purpose of instituting bankruptcy proceedings.

28. See 1 Fletcher, Private Corporations § 43 (perm. rev. ed. 1931); Ballantine, Separate Entity of Parent and Subsidiary Corporations, 14 Calif. L. Rev. 12 (1925); Wormser, Piercing the Veil of Corporate Entity, 12 Colum. L. Rev. 496 (1912). Control of the subsidiary by the parent, whether openly or secretly, is the key factor in determining the status of the subsidiary. Taylor v. Standard Gas & Elec. Co., 306 U.S. 307 (1939); Stone v. Eacho, 128 F.2d 16 (4th Cir. 1942)(per curiam); In re Kentucky Wagon Mfg. Co., 71 F.2d 802 (6th Cir.), cert. denied, 293 U.S. 612 (1934). See also Note, 54 Harv. L. Rev. 1045 (1941).

29. 291 F.2d at 25. The court reasoned that § 59 of the Bankruptcy Act allowed "three or more creditors . . . [to] file a petition" and that the act defined a creditor as "anyone who owns a debt . . . ."

30. "While Congress has repeatedly added to and amended the Federal taxing laws to

judicial rules governing corporations. . . ."[31] The court argued that section 59(b) was a compromise between the forces aiming at restriction of creditors and those attempting to lighten their burden and that the policy evinced in *Bevins* indicated a judicial construction which "sanction[ed] traffic in claims merely for the purpose of creating a sufficient number of petitioning creditors" and that "no such machinations . . . [were] presented in the instant case."[32]

Judge Friendly dissented on the ground[33] that the mood of Congress, gleaned from congressional debates, in passing the later Bankruptcy Acts, was one of conservatism, aimed at protecting the debtor as much as possible and providing creditors only that minimum necessary to protect their interests.[34] As to the majority's argument that a subsidiary could have been specifically excluded by Congress, Judge Friendly noted that it would have been at least impractical, if not impossible, for Congress to do so at the time.[35] It was concluded that Congress could not have intended that a wholly-owned subsidiary be treated as separate from the parent. More importantly, Judge Friendly saw in this decision a portent of more serious problems. He expressed the fear that

> a single creditor corporation may insure its ability to initiate an involuntary bankruptcy by the simple expedient of organizing two financing subsidiaries—perhaps with independent creditors—and seeing to it that claims against each debtor are parceled out in advance of bankruptcy.[36]

And noted:

> It could be said in such a case also that there was no evidence of abuse of the corporate form with a purpose fraudulently to subvert the Bankruptcy Act; bankruptcy of the debtor might have been the furthest thing from contemplation when the claims were placed and there may have been good business reasons for doing so.[37]

As has been shown, nothing in the Bankruptcy Act per se excludes a subsidiary from being counted as a bona fide creditor together with its parent. The majority opinion is obviously aimed at giving a creditor protection at least equal to that accorded the debtor. As to whether or not the decision in the instant case is an overextension of the intent of the Congress, there is valid ground for argument on both sides. Is the fear of a future evil, a situation wherein a parent might create two valid subsidiaries which eventually become two of the three creditors required for filing a petition in

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deal with problems posed by the multiple corporations means of doing business, it has not seen fit similarly to tinker with the Bankruptcy Act." Ibid.

31. Ibid.

32. Id. at 26.

33. The dissent assumed the validity of WAC as a separate legal entity. Ibid.

34. Id. at 27-28.

35. "[I]t is hard to suppose the House managers would have imperiled the bill by sanctioning any such proposal and quite impossible to believe it would have been enacted." Id. at 29.

36. Ibid.

37. Id. at 29 n.6.

involuntary bankruptcy,[38] a valid fear? And is this necessarily an evil? The potential situation which Judge Friendly contemplated is essentially no different from the present case. If a proper determination is made of the parent-subsidiary question, if it is established that each subsidiary is an independent entity, legally distinct from the parent, should they not be allowed to stand as separate creditors? The status of a bona fide subsidiary should be no less than that of a bona fide assignee. Though the majority implied,[39] and the dissent spelled out[40] dissatisfaction with the status accorded the assignee-creditor,[41] it is still accepted law. The policy evinced by the courts in the assignee situation is to allow assignees to stand as separate creditors where the assignments are bona fide. In the instant case, this reasoning is merely extended to allow corporate entities, which are bona fide separate in the eyes of the law, to join as distinct petitioning creditors.

**Constitutional Law—Establishment of Religion—Legislation Resulting in Obvious Secular Benefit Which Incidentally Aids Religion Does Not Offend Constitution.**—Defendants were convicted of violating Maryland's Sunday Closing Laws.[1] The Maryland Court of Appeals[2] in affirming the conviction rejected defendants' contention that the statute involved violated the "establishment of religion" clause of the first amendment.[3] The Supreme Court of the United States, on certiorari, affirmed, holding that the purpose of the statute was not to aid religion but to set aside Sunday as a day of rest and recreation and therefore, primarily to promote public health. When legislation results in an obviously secular benefit the fact that it may at the same time coincide or harmonize with the tenets of some or all religions does not render it unconstitutional. *McGowan v. Maryland*, 366 U.S. 420 (1961).[4]

Within the past few months the highest courts in three states have handed down decisions involving, directly or indirectly, an interpretation of the

38. Id. at 29.
39. Id. at 25.
40. Id. at 29 n.5.
41. See note 23 supra.

1. Md. Ann. Code art. 27, § 521 (1957). "No person in this State shall sell, dispose of, barter, or deal in, or give away any articles of merchandise on Sunday, except retailers, who may sell and deliver on said day [certain necessities] . . . and any person violating any one of the provisions of this section shall be liable to indictment . . . and . . . conviction. . . ."

2. McGowan v. State, 220 Md. 117, 151 A.2d 156 (1959).

3. U.S. Const. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

4. In a companion case, Braunfeld v. Brown, 366 U.S. 599 (1961), 50 Geo. L.J. 161, the Court held that the constitutional guarantee of freedom of religion is not violated by Sunday closing laws. Compare the recent decision of the Supreme Court in Torcaso v. Watkins, 367 U.S. 488 (1961), with Hamilton v. Regents of the Univ. of Calif., 293 U.S. 245 (1934).

establishment clause of the first amendment. In *Matthews v. Quinton*,[5] the Supreme Court of Alaska held that a state statute[6] which provided free transportation for all children, including pupils attending church-related schools, violated the state constitutional prohibition against direct benefits to non-public schools.[7] The Supreme Court of Oregon, in *Dickman v. School District*,[8] held that the Oregon constitutional prohibition against use of public funds for the benefit of religious institutions[9] barred local school districts from furnishing free secular textbooks to parochial school children. Finally, in New York, the court of appeals in *Engel v. Vitale*[10] held that the voluntary recitation of a nonsectarian prayer[11] in a public school violated neither the state[12] nor federal constitutions.

The constitutionality of "aid to religion" and thus the interpretation of the establishment clause of the first amendment, first came before the United States Supreme Court in *Bradfield v. Roberts*.[13] The *Bradfield* Court held that an agreement between the District of Columbia and a church-affiliated hospital was not in conflict with the establishment clause. The agreement called for the erection, at government expense, of two hospital buildings for the treatment of poor patients sent there by the district commissioners. The Court stated that the language of the first amendment, "an establishment of religion," was not synonymous with "a religious establishment."[14] The Court found that the church-related hospital was a secular corporation formed pursuant to federal law, and that it was really immaterial that it was under the direction and control of a particular religious group. The *Bradfield* court directly repudiated the argument that the establishment clause prohibited governmental aid to church-related institutions which performed a secular public function.[15]

While it is true that the Sisters of the Roman Catholic Church who operated the hospital did receive some benefit, it was only incidental to the public purpose served by the federal appropriation. The same distinction was

5. — Alaska —, 362 P.2d 932 (1961), cert. denied, 30 U.S.L. Week 3256 (U.S. Feb. 16, 1962).

6. Alaska Comp. Laws Ann. §§ 37-11-4 to -11-6 (Supp. 1958).

7. Alaska Const. art. VII, § 1; art. IX, § 6.

8. — Ore. —, 366 P.2d 533 (1961).

9. "No money shall be drawn from the treasury for the benefit of any religious or theological institution . . . ." Ore. Const. art. I, § 5.

10. 10 N.Y.2d 174, 176 N.E.2d 579, 218 N.Y.S.2d 659, cert. granted, 82 Sup. Ct. 367 (1961).

11. "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." Id. at 179, 176 N.E.2d at 580, 218 N.Y.S.2d at 660.

12. N.Y. Const. art. I, § 3. "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind . . . ."

13. 175 U.S. 291 (1899).

14. Id. at 297.

15. Id. at 298-99.

again recognized in *Cochran v. Louisiana State Bd. of Educ.*[16] where the Supreme Court stated, "Individual interests are aided only as the common interest is safeguarded."[17] It is true that the appropriation in *Cochran* was challenged under the due process clause of the fourteenth amendment[18] and thus no question of establishment was before the Court.[19] However as one author has stated:

> It is more reasonable to conclude that the *Cochran* Court necessarily found that whatever impairment of the first amendment there may have been present, it was not serious enough to require the annulment of the state statute. It is equally reasonable to conclude that the Court found no impairment of the first amendment at all because the educational interests which the state promoted by supplying secular textbooks to children attending sectarian schools served a public purpose.[20]

The same reasoning was applied in *Everson v. Board of Educ.*[21] *Everson* decided that the use of public funds to provide bus transportation for children attending church-related schools did not constitute "an establishment of religion." The court spoke of transportation in terms of a "safety measure"[22] which, it might be argued, is quite obviously to state a public purpose. If the transportation provided for in *Everson* had been transportation to a church rather than to a school, then it would have been, according to Mr. Justice Black's reasoning, unconstitutional.[23] This would appear to be a "preference to religion over irreligion." Thus it was the fact that it was transportation *to a school* which preserved the statute's constitutionality. But the transportation per se does not serve the public purpose. Rather education serves a public purpose and therefore transportation given to achieve a public purpose itself serves a public purpose only as a means to an end.

The gift of buildings to care for the sick in *Bradfield* and the gift of textbooks and transportation for child education in *Cochran* and *Everson* were benefits conferred for public purposes and the mere fact that the expenditure of public funds resulted at the same time in an aid to a religious institution

16. 281 U.S. 370 (1930).

17. Id. at 375.

18. Appellants contended that private property—money derived from taxation—was used for private purposes in supplying free books to children in private as well as public schools. Id. at 371.

19. The first amendment was not operative on the states until so decided in Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), and West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). Since Cochran was decided in 1930, the Court did not consider the Louisiana statute as presenting a question of "establishment."

20. Manning, Aid to Education—Federal Fashion, 29 Fordham L. Rev. 495, 516 (1961).

21. 330 U.S. 1 (1947).

22. Id. at 17-18.

23. "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion." Id. at 15.

did not compel the conclusion that the state or federal appropriation constituted "an establishment of religion."

But what, if any, public purpose was served in *Zorach v. Clauson?*[24] Four years prior to the Supreme Court's decision in *Zorach, McCollum v. Board of Educ.*[25] had held that a system of voluntary religious instruction in the public school during hours the children were *compelled* to attend school violated both the establishment clause and the free exercise clause.[26] The Court found that the religious instruction was integrated with and aided by a compulsory school attendance law and that such compulsion constituted the heart of the violation.[27] But this was not a case of aid to church-related institutions such as appeared in *Bradfield, Cochran,* and *Everson.* On the contrary, it involved the teaching of religion itself within the public school system. It was not the mere use of the school building which constituted the aid to religion. Mr. Justice Frankfurter in his concurring opinion stated that the constitutionality of any released time program must be decided on an *ad hoc* basis.[28] If the use of the buildings constituted the "establishment" then *all* released time programs would *not* have to be examined on their own facts. Further, Mr. Justice Reed's dissent[29] made it quite clear that the use of public property does not, ipso facto, constitute a violation of the establishment clause. What, then, constituted the aid to religion proscribed by the establishment clause? And absent the element of compulsion, how would the Court have decided *McCollum?*[30]

The answer to the first question is found in *Zorach v. Clauson.*[31] In *Zorach,* the Supreme Court held that the released time program established in New York, under which the religious instruction was given outside of the public school buildings during regularly scheduled school hours but devoid of the element of compulsion, did not constitute "an establishment of religion." Since use of the public facilities was irrelevant in light of Mr. Justice Frankfurter's[32] and Mr. Justice Reed's[33] opinions, the aid to religion which was found repugnant in *McCollum* and absent in *Zorach* was *compulsion.* Absent the element of compulsion, and thus no aid to religion, it is not necessary to find the *public purpose* that was present in *Bradfield, Cochran,* and *Everson.*

24. 343 U.S. 306 (1952).

25. 333 U.S. 203 (1948).

26. Id. at 209-10.

27. Id. at 212.

28. "We do not now attempt to weigh in the Constitutional scale every separate detail or various combination of factors which may establish a valid 'released time' program." Id. at 231.

29. Id. at 238, 251-56. "When actual church services have always been permitted on government property, [for example, military chapels] the mere use of the school buildings by a non-sectarian group for religious education ought not to be condemned as an establishment of religion." Id. at 255.

30. See note 55 infra and accompanying text.

31. 343 U.S. 306 (1952).

32. See note 28 supra.

33. See note 29 supra.

The element of compulsion, however, was present in the instant case. The statute made it a criminal offense to sell merchandise on Sunday.[34] However, the Court found that the statute was not a direct aid to religion. Rather it served a public purpose. Acknowledging the law's religious origin, the Court reasoned that to consider the law violative of the establishment clause would produce a result hostile to the public welfare rather than favorable to the doctrine of separation of church and state.[35] When legislation results in an obvious secular benefit an incidental aid to religion does not offend the constitution. Thus the emphasis has shifted from *McCollum's* concern for statutory *aids to religion* to a determination of whether the statute serves a *public purpose.*

There is a direct and irreconcilable conflict between the state court decisions in *Matthews*[36] and *Dickman*[37] and the Supreme Court's holdings in *Bradfield, Cochran,* and *Everson.* The *Matthews* court reasoned that the free transportation of pupils of church-related schools constituted a *direct* aid to religion and thus violated the state constitution. The court relied upon the New York Court of Appeals decision in *Judd v. Board of Educ.*[38] The *Judd* court, however, found that free bus transportation given by the state to children attending church-related primary schools constituted an *indirect* aid to the church-related school.[39] The New York constitution,[40] unlike that of Alaska,[41] prohibited *indirect* as well as *direct* aid. The Supreme Court of Alaska not only reached a decision directly at odds with the *Everson* case, but, in relying on the dissenting opinion of Mr. Justice Rutledge, totally ignored the majority's reasoning.[42] The state statutes in both cases were for all practical purposes identical.[43] Mr. Justice Black in *Everson* stated:

The fact that a state law, passed to satisfy a public need, coincides with the

34. Md. Ann. Code art. 27, § 521 (1957).

35. 366 U.S. at 445.

36. — Alaska —, 362 P.2d 932 (1961).

37. — Ore. —, 366 P.2d 533 (1961).

38. 278 N.Y. 200, 15 N.E.2d 576 (1938).

39. "Aid furnished 'directly' would be that furnished in a direct line, both literally and figuratively, to the school itself, unmistakably earmarked, and without circumlocution or ambiguity. Aid furnished 'indirectly' clearly embraces any contribution, to whomsoever made, circuitously, collaterally, disguised, or otherwise not in a straight, open and direct course for the open and avowed aid of the school . . . ." Id. at 212, 15 N.E.2d at 582.

40. N.Y. Const. art IX, § 4 (1894). "Neither the State nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination, or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or which any denominational tenet or doctrine is taught."

41. Alaska Const. art. VII, § 1. "No money shall be paid from public funds for the direct benefit of any religious or other private educational institution."

42. — Alaska —, —, 362 P.2d 932, 941 (1961), quoting Mr. Justice Rutledge's dissent, 330 U.S. 1, 28 (1947).

43. Compare N.J. Rev. Stat. § 18:14-8 (Supp. 1961), "Whenever in any district there

personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need.[44]

Thus the Supreme Court found that the transportation statute served such a public purpose and that the first amendment was not intended to cut off the citizen—the parochial school child—from such benefits.

The Supreme Court of Oregon in the *Dickman* case, while recognizing that its constitution did not prohibit the conferring of *any* benefit upon religious institutions, nevertheless held unconstitutional its statute which provided free textbooks to pupils of public and parochial schools. The *Dickman* court also relied on the *Judd* decision and the dissenting opinion of Mr. Justice Rutledge in *Everson*. Further the court stated:

> Assuming that the court's reasoning in *Everson* is sound, it is not applicable to the case at bar. The expenditure of public funds for text books supplied to pupils of parochial schools is clearly identified with the educational process, and does not warrant the assumption made in the *Everson* case that the expenditure is for the general welfare. . . .[45]

The Oregon court thereby overlooked the fact that education per se was the public purpose which was being served. The court passed over the decisions of the Supreme Court in *Cochran* and in *Bradfield* by stating that in those cases there had not been "any real analysis of the problem."[46]

While both the *Matthews* and *Dickman* courts relied on the *Judd* decision, neither court found it important that the majority of four in *Judd*[47] had noted that it could find no case which upheld the validity of free bus transportation for pupils attending church-related schools. While the *Judd* court was denied the Supreme Court's reasoning in *Everson* the courts in *Matthews* and in *Dickman* were not without the privilege.[48]

Petitioners in *Engel v. Vitale*[49] contended that the program calling for the voluntary recitation of a nonsectarian prayer[50] in the public schools

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are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part . . . ," with Alaska Comp. Laws Ann. § 37-11-5 (Supp. 1958), "In those places in Alaska where transportation is provided . . . for children attending public schools, transportation shall likewise be provided for children who, in compliance with the compulsory education laws of Alaska, attend non-public schools . . . ."

44. 330 U.S. at 6.

45. — Ore. at —, 366 P.2d at 541.

46. Id. at —, 366 P.2d at 539.

47. "No authority has been called to our attention nor has one been found in any jurisdiction to the effect that a statute purporting to be enacted in the exercise of the police power of the State may be held valid if repugnant to any constitutional provision or restriction." 278 N.Y. at 216, 15 N.E.2d at 584 (1938).

48. Judd v. Board of Educ., 278 N.Y. 200, 15 N.E.2d 576 (1938), was decided nine years earlier than Everson v. Board of Educ., 330 U.S. 1 (1947).

49. 10 N.Y.2d 174, 176 N.E.2d 579, 218 N.Y.S.2d 659 (1961).

50. See note 11 supra.

was repugnant to the New York[51] and federal constitutions. The *Engel* court summarily dismissed any possible violation of the free exercise clause stating that "no pupil need take part in or be present during the act of reverence, so any question of 'compulsion' or 'free exercise' is out of the case. . . ."[52] The court found a different problem in the establishment clause. Reasserting the nation's religious heritage,[53] the court reasoned that the establishment clause of the first amendment was not intended to prohibit a mere acknowledgement of a belief in God. The court stated:

> No historical fact is so easy to prove by literally countless illustrations as the fact that belief and trust in a Supreme Being was from the beginning and has been continuously part of the very essence of the American plan of government and society.[54]

Three theories can be advanced to reconcile the *Engel* decision with the Supreme Court cases discussed herein. First, absent the element of compulsion, no aid to religion was found by the *Engel* court. This interpretation brings *Engel* within the holding of the *Zorach* decision.[55] Further it allows speculation as to what the Supreme Court would have decided if the element of compulsion were not present in *McCollum*. *McCollum*, under this changed set of facts would be analagous to the factual situation in the *Engel* case. Following the reasoning of *Zorach, i.e.*, absent compulsion there is no question of aid to religion, *Engel* and *McCollum* as supposed, can be reconciled with the decisions of *Bradfield, Cochran, Everson*, and the instant case, since no *public purpose* need be found to justify the result.[56] Second, even if the *Engel* court found an aid to religion, even in the absence of compulsion, the public purpose theory put forth by *Bradfield, Cochran, Everson*, and expanded by the instant Court[57] was met. It would seem quite arbitrary for the Supreme Court to hold that a general day of rest and relaxation served a public purpose but the acknowledgement of a God by people "whose institutions presuppose a Supreme Being"[58] was not a public purpose. Thirdly, even if we were to concede the presence of aid to religion—at least over irreligion—in the *Engel* decision and even if we were to concede that no public purpose was being served, it is proper to balance the free exercise clause against the establishment clause. Judge Burke, in his concurring opinion in *Engel*[59] made this point:

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51. See note 12 supra.

52. 10 N.Y.2d at 179-80, 176 N.E.2d at 581, 218 N.Y.S.2d at 660.

53. Id. at 180-82, 176 N.E.2d at 581-82, 218 N.Y.S.2d at 661-62.

54. Id. at 180-81, 176 N.E.2d at 581, 218 N.Y.S.2d at 661.

55. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

56. Further, no public purpose need be affirmatively established to justify state legislation on another basis. State legislation is presumed to be valid and is valid until it is found to violate a specific provision of the pertinent constitution or the United States Constitution. Green v. Frazier, 253 U.S. 233, 239 (1920).

57. See notes 34 and 35 supra and accompanying text.

58. "We are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313 (1952).

59. 10 N.Y.2d at 183, 176 N.E.2d at 583, 218 N.Y.S.2d at 664.

> According to the [dissenting] opinion, the separation of church and State which was intended to encourage *religious* interests among our people would become the constitutional basis for the *compulsory exclusion of any religious element* and the consequent promotion and advancement of atheism. It is not mere neutrality to prevent voluntary prayer to a Creator; it is an interference by the courts, contrary to the plain language of the Constitution, on the side of those who oppose religion.[60]

Would this not be the most sensible solution to end the confusion which has permeated the majority of cases, state and federal, which have considered the meaning and effect of the establishment clause?

**Constitutional Law—State Statute Authorizing Grants in Aid to Private Segregated Schools After a Partial Closing of Public Schools Under "Local Option Plan" Held Unconstitutional.**—Plaintiffs, Negro children, sought an injunction[1] restraining the enforcement of a Louisiana statute[2] which authorized school boards, upon the vote of the qualified electors in each parish, to close the public schools and which further provided for the leasing or sale of school facilities to a system of purportedly private schools, supported by state educational grants to the individual students.[3] A three judge federal district court granted the injunction, holding the act unconstitutional as a violation of the equal protection clause of the fourteenth amendment:[4] *Hall v. St. Helena Parish School Bd.*, 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, — U.S. — (1962).[5]

Since the fourteenth amendment has no application to private discrimina-

60. Id. at 184, 176 N.E.2d at 583, 218 N.Y.S.2d at 664.

1. Prior to the enactment of the legislation in issue, the plaintiffs sought and obtained an injunction against the school board prohibiting the further operation of the public schools on a segregated basis. St. Helena Parish School Bd. v. Hall, 287 F.2d 376 (5th Cir.), cert. denied, 368 U.S. 830 (1961). On the same day that the order was affirmed by the circuit court, the Governor of Louisiana called the second extraordinary session of the state legislature, which session resulted in the enactment of the legislation under attack.

2. La. Rev. Stat. § 17:350.1 (Supp. 1961) provides: "In each parish of the state, and in each municipality having a municipally operated school system, the school board shall have authority to suspend or close, by proper resolution, the operation of the public school system in the elementary and secondary grades in said parish or municipality, but no such resolution shall be adopted by any such board until the question of suspending or closing the operation of such public school system in such grades shall have been submitted to the qualified electors of the parish or municipality, as the case may be, at an election conducted in accordance with the general election laws of the state, and the majority of those voting in said election shall have voted in favor of suspending or closing the operation of such public school system."

3. La. Rev. Stat. § 17:2901 (Supp. 1961) provides: "It is the purpose of the State of Louisiana to make available, under the conditions and qualifications set out in this Chapter, education expense grants for the private education of any child residing in this State."

4. U.S. Const. amend. XIV, § 1 provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

5. (Sup. Ct. Feb. 19, 1962) in N.Y. Times, Feb. 20, 1962, p. 1, col. 2.

tion,[6] but binds only the states, state action or participation is the *sine qua non* of the violation.[7] State action is not limited to acts of the state legislature.[8] The term covers discrimination by state officers,[9] whether pursuant to state law[10] or in direct violation of that law.[11] Although private invasions of civil rights are not directly prohibited,[12] private discrimination will, nevertheless, constitute a denial by the state of equal protection of the laws where it is enforced by the state courts,[13] or where the wrongdoer derives his interest from the state.[14]

The present case presents one of the many attempts by Southern States to escape the Supreme Court's desegregation order in *Brown v. Board of Educ.*[15] In the instant case the legislative plan was rather transparent. In substance it amounted to no more than a change of labels. What was a "public" school, was designated a "private" school but the "private" school received its total support from the state and remained under the complete supervision of the state appointed and state authorized board of education.

*James v. Almond*[16] presented an analogous case in point. There the Governor of Virginia, pursuant to statute, closed all white public schools to which Negroes had been admitted under a desegregation order. The court held that

6. Civil Rights Cases, 109 U.S. 3 (1883). "Individual invasion of the individual rights is not the subject-matter of the amendment." Id. at 11.

7. Barrows v. Jackson, 346 U.S. 249 (1953); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Shelley v. Kraemer, 334 U.S. 1 (1948); Orleans Parish School Bd. v. Bush, 242 F.2d 156 (5th Cir.), cert. denied, 354 U.S. 921 (1957); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947). See Ex parte Virginia, 100 U.S. 339 (1879) where the Court said that the thirteenth amendment and the due process and equal protection clauses "were intended to take away all possibility of oppression by law because of race or color." Id. at 345. For an excellent discussion of state action see Manning, State Responsibility Under the Fourteenth Amendment: An Adherence to Tradition, 27 Fordham L. Rev. 201 (1958).

8. Shelley v. Kraemer, 334 U.S. 1 (1948); Ex parte Virginia, supra note 7; Strauder v. West Virginia, 100 U.S. 303 (1879).

9. In Ex parte Virginia, supra note 7, the Court stated: "Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." Id. at 347. See also Pennsylvania v. Board of Directors, 353 U.S. 230 (1957); Baldwin v. Morgan, 251 F.2d 780 (5th Cir. 1958); Adams v. Lucy, 228 F.2d 619 (5th Cir. 1955) (per curiam), cert. denied, 351 U.S. 931 (1956).

10. Virginia v. Rives, 100 U.S. 313 (1879); Strauder v. West Virginia, 100 U.S. 303 (1879).

11. Shelley v. Kraemer, 334 U.S. 1 (1948); Ex parte Virginia, 100 U.S. 339 (1879); Valle v. Stengel, 176 F.2d 697 (3d Cir. 1949).

12. Shelley v. Kraemer, supra note 11; Civil Rights Cases, 109 U.S. 3 (1883).

13. See note 11 supra and accompanying text.

14. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Plummer v. Casey, 148 F. Supp. 326 (S.D. Tex. 1955), aff'd sub nom. Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956), cert. denied, 353 U.S. 924 (1957).

15. 347 U.S. 483 (1954); 349 U.S. 294 (1955).

16. 170 F. Supp. 331 (E.D. Va. 1959).

even though a state may not be required to maintain a public school as such,[17] the closing of one public school to avoid compliance with a court order, while others in the state remained open, created an unreasonable classification and was, therefore, violative of the equal protection clause. A similar attempt by the Governor of Arkansas to close a public school and lease it to a private association, while the school board was under a court order to integrate, was enjoined as unconstitutional.[18] Thus, the closing of a public school for the sole reason of avoiding integration is a discriminatory act so long as other schools in the state are left open. The discrimination is not eliminated by making the school closing a matter of local option. The statute itself in authorizing the local option, taken in conjunction with the exercise of the option by the parish or local district, constitutes state action and is in direct violation of the desegregation order of *Brown*.[19]

The statute in the present case also provided for financial support and state control of the private school system immediately and automatically upon the closing of the public schools. There were extensive provisions, *e.g.*, for the continuance of free lunch and transportation to children enrolled in the private schools;[20] provisions for the maintenance of teachers' salaries at the scale prevailing in the public school system;[21] and further provisions providing for state grants to children enrolled in the private schools.[22] Thus there was little or no difficulty in finding state participation in any discrimination by the private schools. But the court here seemed to go a step beyond that which was required. It indicated that the mere closing of the schools, without any financial assistance by the state to the public-private schools, would constitute state action.[23] That is a questionable proposition. It is one thing to recognize the sham in a "private school" label and to recognize that the

17. The court stated, "We do not suggest that, aside from the Constitution of Virginia, the state must maintain a public school system. That is a matter for state determination. We merely point out that the closing of a public school, or grade therein, for the reasons heretofore assigned violates the right of a citizen to equal protection of the laws. . . ." Id. at 337.

18. Aaron v. Cooper, 261 F.2d 97 (8th Cir. 1958). The court expressed no opinion regarding the constitutionality of the enabling statute, but limited its ruling to the point that the school board could not disable itself from carrying out the court approved plans of integration.

19. The Court stated that "all provisions of federal, state, or local law requiring or permitting such discrimination must yield. . . ." 349 U.S. at 298. The Court in Cooper v. Aaron stated that "the constitutional rights of children not to be discriminated against in school admission on grounds of race or color . . . can neither be nullified openly and directly . . . nor nullified indirectly . . . through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'" 358 U.S. 1, 17 (1958). See also Smith v. Texas, 311 U.S. 128 (1940); Holland v. Board of Pub. Instruction, 258 F.2d 730 (5th Cir. 1958).

20. La. Rev. Stat. § 17: 350.12 (Supp. 1961).

21. La. Rev. Stat. § 17: 2831 (Supp. 1961).

22. La. Rev. Stat. § 17: 2901 (Supp. 1961).

23. The court stated, "When a parish wants to lock its school doors, the state must turn the key. If the rule were otherwise, the great guarantee of the equal protection clause would be meaningless." 197 F. Supp. at 658.

private school is in reality a public school continuing to foster a system of forbidden segregation. But it is another thing to suggest that, even in the absence of subterfuge created to avoid the *Brown* decision, a state *must* maintain a public school system of education.[24] There is no precedent for the latter proposition and it is an historical fact that the public school is a creature of the states and not of the federal government or of the United States Constitution.

The court's implication, however, may well be academic, if not meaningless. For, even in the absence of continuous state aid, *Burton v. Wilmington Parking Authority*[25] adequately supports the conclusion that the mere selling or leasing of the school facilities to private individuals or associations for the purpose of escaping the integration order of *Brown* would constitute state participation. In the *Burton* case the Supreme Court in finding state participation in the leasing of a portion of a public building (without a covenant not to discriminate) to a restaurant which discriminated against Negroes, stated that "no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be."[26] Taken literally this would impose an affirmative duty on the state to insure nondiscrimination by anyone deriving his interest from the state. The same duty would certainly accompany the giving, leasing, or selling of public schools to a private corporation or association.

It is obvious that there is for the Southern States no alternative to *Brown* except the permanent closing of their public schools with the assurance that never again will they be used as "separate but equal" facilities. It is safe to prophesy that any future attempts to avoid integration in public education, however "ingenious or ingenuous"[27] they may be, will meet the fate of Louisiana's scheme for St. Helena Parish.

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24. It might be argued, however, that a function which has been performed by a state and has become impressed with the mark of state origin, though not a strict governmental function cannot be abandoned by the state without constituting state participation. See Manning, State Responsibility Under the Fourteenth Amendment: An Adherence to Tradition, 27 Fordham L. Rev. 201, 207 (1958).

25. 365 U.S. 715 (1961). In Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947) the State of South Carolina abandoned the holding of primary elections to private individual clubs which discriminated against Negroes. The court found state action in that the primary elections were an integral part of the election system and found that the private clubs which held the primaries were instruments of the state.

26. 365 U.S. at 725.

27. Cooper v. Aaron, 358 U.S. at 17. A variety of schemes have been devised to prevent integration in public education, but none have met with success. In Board of Supervisors v. Ludley, 252 F.2d 372 (5th Cir.), cert. denied, 358 U.S. 820 (1958), a state statute requiring a student seeking entrance to a state college to obtain an eligibility certificate from his parish superintendent of education, although innocuous on its face, was held to violate the equal protection clause, because the certificates were being denied to Negro applicants. Similarly, pupil assignment plans have been struck down in Gibson v. Board of Pub. Instruction, 272 F.2d 763 (5th Cir. 1959); Orleans Parish School Bd. v. Bush, 242 F.2d 156 (5th Cir.), cert. denied, 354 U.S. 921 (1957), as have zoning programs in Clemons v. Board of Educ., 228 F.2d 853 (6th Cir.), cert. denied, 350 U.S. 1006 (1956).

**Damages—Measure of Damages in Anticipatory Breach of Voyage Charter.** —On May 17, 1957, Liberty Navigation & Trading Company, as owner, and Kinoshita & Company, as charterer, entered into a charter[1] of the American steamer S.S. Josefina. On June 10, 1957 the Kinoshita Company cancelled the charter. Subsequently, plaintiff-owner notified the defendant-charterer that it regarded the notice of June 10 as a repudiation of the charter; that it would seek other employment for the S.S. Josefina, and would hold defendant liable in damages. The plaintiff did not succeed in obtaining other cargoes but by paying an indemnity of $12,000 to another vessel it was able to arrange a charter from the Philippines to the east coast of the United States on relatively unfavorable terms. The substitute charter consumed eighty-two days and resulted in an overall loss of $71,735. However, it had the advantage of returning the ship to the United States where she had to be in October when the articles of her crew expired. *Liberty Nav. & Trading Co. v. Kinoshita & Co.*, 285 F.2d 343 (2d Cir. 1960).

The defendant admitted liability and therefore the only essential question remaining was the measure of damages to be awarded for breach of the charter. Both the district court[2] and the majority in the court of appeals held that the amount of damages to be awarded was the value of defendant's performance (the gross freight—$121,740), *less the plaintiff's saving from being relieved of performing his part.*[3] Both courts found that the plaintiff's only "savings" were those expenses which would have been incurred in making the

1. The estimated length of the chartered voyage was 38½ days.
2. Liberty Nav. & Trading Co. v. Kinoshita & Co., 178 F. Supp. 729 (S.D.N.Y. 1959).
3. In determining the damages, the court of appeals arrived at the following figures:

| | | | | |
|---|---|---|---|---|
| A) Gross freight to be received on performance of the charter. | | $121,740.00 | | |
| B) Total cost of performance. (B(1) plus B (2)) | $86,784.50 | | | |
| (1) Fixed Costs—operating cost of vessel for period of performance (wages, supplies, repairs, and minor fuel costs in port). | $58,135.00 | | | |
| (2) Variable Costs—voyage expenses above operating costs (fuel, dunnage, port charges, and commissions). | $28,649.50 | $ 28,649.50 | | |
| C) Difference between gross freight and expenses exclusive of operating costs. (A less B (2)). | | | $93,090.50 | |
| D) Operating cost estimated by court to have been recouped from the substitute charter. | | | $19,454.82 | |
| E) Total recovery in the court of appeals (C less D). | | | | $73,635.68 |

voyage (variable),[4] over and above the amount that would have been necessary to maintain the vessel for the same length of time in a foreign port (fixed expenses).[5] The trial court awarded damages in the amount of $98,616 (freight less variable costs). The court of appeals affirmed with some modifications.[6]

The leading case on the problem of anticipatory breach of a voyage charter is *The Gazelle & Cargo*.[7] There the charterers refused to order a ship to such port as the charter specified and, as a result, the vessel was forced to remain at the loading port with the cargo on board. The plaintiff-owner of the vessel was compelled, while in port, to pay expenses equal to those that would have been incurred had the charter been performed. The Court in awarding damages to the plaintiff stated:

> Nothing, therefore, is shown to take the case out of the general rule, that a ship-owner, who is prevented from performing the voyage by a wrongful act of the charterer, is *prima facie* entitled to the freight that he would have earned, less what it would have cost him to earn it.[8]

The Court then applied the doctrine of foreseeability set forth in *Hadley v. Baxendale*;[9] that the plaintiff was entitled to all damages which might reasonably be supposed to have been in contemplation of both parties at the time the contract was made. It therefore found that plaintiff was entitled to recover not only his lost profits[10] but also those expenses actually incurred

4. See note 3 supra at B(2).

5. See note 3 supra at B(1).

6. The court of appeals found that the "savings" to the plaintiff were $28,649.50 rather than $23,124 as found by the trial court. It based this modification on its finding that one extra day had to be added to the estimated total time it would have taken to perform the charter. The new period was adjudged to be 38½ days. The court of appeals further reduced plaintiff's award by $19,454.82, constituting those additional "savings" contributed by the substitute charter.

In allowing defendant to deduct only those expenses which were determined to be "savings" to the plaintiff, the courts, in effect, permitted plaintiff to recover not only his lost profits under the first charter, but also those fixed costs which the court determined he would have incurred in port for the same period of time. The estimated profits plaintiff would have earned under the first charter were $34,955.50, and the fixed expenses he had to incur were $58,135. Adding these figures, the sum of $93,090.50 was reached. This is the amount found by the court of appeals to be the measure of damages (freight less variable expenses) before any deduction was made as to the substitute charter. See note 3 supra at B(2) & C.

7. 128 U.S. 474 (1888).

8. Id. at 487.

9. 9 Welsb., H.&G. 341, 156 Eng. Rep. 145 (Ex. 1854).

10. See Ashburner v. Balchen, 7 N.Y. 262 (1852); Smith v. M'Guire, 3 H. & N. 554, 157 Eng. Rep. 589 (Ex. 1858). See also United Transp. Co. v. Berwind-White Coal-Mining Co., 13 F.2d 282 (2d Cir. 1926); Venus Shipping Co. v. Wilson, 152 Fed. 170 (2d Cir. 1907); Aaby v. States Marine Corp., 107 F. Supp. 484 (S.D.N.Y. 1951); Cornwall v. J. J. Moore & Co., 125 Fed. 646 (N.D. Cal. 1903). See generally United States v. Behan, 110 U.S. 338 (1884), where the Court in discussing the breach of a construction contract said, "If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage namely: first, what he has already expended toward per-

in port;[11] *i.e.*, gains prevented and losses sustained.

In the instant case, the court applied a "savings-to-plaintiff" theory, while in *Gazelle*, damages were awarded on the basis of gains prevented and losses sustained. If in the instant case, the court had used the gains prevented theory (disregarding the substitute charter for the present) the result attained would have been the same as that actually reached, since in both instances plaintiff would have received his lost profits (gains prevented) and his fixed expenses (losses incurred).[12] Granting then, that if the vessel had never left port for the entire thirty-eight and one-half days of the charter, either standard could have been used to attain the same amount of damages, the question remains whether both methods will serve as a proper standard when in fact a substitute charter is introduced into the case.

The district court in the present case found that since the substitute charter had resulted in an overall loss to the plaintiff, it should not have been considered in a way relevant in computing the measure of damages.[13] The court of appeals, on the other hand, held that the second charter was a reasonable attempt to mitigate damages, and therefore had to be taken into consideration before any accurate award could be made. Again applying its "savings" theory, the court found that the difference between the total freight and the variable expenses under the substitute charter was $41,436.[14] The court prorated this sum over the eighty-two days of the substitute charter, and then, by multiplying the result ($505.32) by thirty-eight and one-half days (estimated length of first charter), it arrived at a figure of $19,454.82.[15] This latter sum was held to constitute the prorated contribution applicable to mitigate the fixed expenses for thirty-eight and one-half days of the first charter, thereby reducing further the plaintiff's damages.[16] The court thus arrived at a figure of $73,635.68 ($93,090.50 less $19,454.82) to be awarded as damages.

A third measure of damages was advanced by Chief Judge Lumbard in his dissent.[17] In Judge Lumbard's opinion, the amount of damages should have been determined by adding to the anticipated profits under the first charter ($34,955.50) the actual loss incurred during the first thirty-eight and one-half days of the substitute charter ($33,680.19), thus allowing damages in the amount of $68,635.69.

It will be noted that the majority in the court of appeals when considering the substitute charter, employed the "savings" theory, while Judge Lumbard in his dissent employed the *Gazelle* rule—gains prevented and losses sustained. It would seem, however, that the disparity between the majority and the dissent can only be explained by the fact that there was some change in the prorated

formance . . . ; secondly, the profits that he would realize by performing the whole contract." Id. at 344.

11. 128 U.S. at 487.
12. See note 6 supra.
13. 178 F. Supp. at 731.
14. 285 F.2d at 348.
15. See D, note 3 supra.
16. 285 F.2d at 348.
17. Id. at 349.

amount of "*fixed*" expenses in the first and second charters. For, if the owner's "*fixed*" expenses under the first charter had actually remained constant throughout the entire length of the second charter, then, the result reached when using either the "savings" or "gains prevented" theories would have been identical.[18] Therefore, in the instant case, the so-called "*fixed*" expenses were not truly fixed. That is to say, one or more of the elements of these expenses (possibly food costs or minor fuel expenses) differed (decreased in the instant case) under the second charter from what they would have been, under the first charter.[19]

In the present case, the majority's "savings" theory, would have been a perfectly valid measure, had the rate of fixed expenses remained constant for both the first and the second charters.[20] However, since the "*fixed*" expenses actually changed during the substitute charter, the proper measure of damages

18. Using a hypothetical situation:

(A) Charter #1 has been breached by defendant charterer:

| | |
|---|---|
| 1. Gross freight | $25,000 |
| 2. Total cost of performance | 20,000 |
| 3. Fixed costs | 15,000 |
| 4. Variable costs | 5,000 |
| 5. Gains prevented | 5,000 |
| 6. Time for performance | 10 days |

(B) Charter #2 has been entered into by plaintiff in a reasonable attempt to mitigate defendant's damages:

| | |
|---|---|
| 1. Gross freight | $35,000 |
| 2. Total cost | 42,000 |
| 3. Fixed cost | 30,000 |
| 4. Variable cost | 12,000 |
| 5. Total loss on charter #2 | 7,000 |
| 6. Time for performance | 20 days |

(It will be noted that the fixed costs have remained constant, since when the total time for the performance doubled, the fixed costs also doubled).

Using the gains prevented theory as our measure, we would add to the lost profits (gains prevented) (A)(5) ($5,000), the prorated loss incurred under the second charter $3,500 (½ of $7,000), thus arriving at a figure of $8,500.

Using the "savings" theory, subtract from the gross freight of charter #2, (B)(1) ($35,000), the variable expenses, (B)(4) $12,000, thus giving $23,000. Divide this latter sum by the total length of charter #2 (20 days), thus giving $1,150. Multiply by the length of the first charter (10 days), thus giving $11,500. Add this latter sum to the variable expenses ("savings") under the first charter ($5,000), thus giving $16,500 as the total "savings" to the plaintiff. Subtract this latter sum from the gross freight of charter #1 ($25,000), giving a final amount of $8,500. Thus the same result is reached under the gains prevented theory.

19. Using the hypothetical situation presented in note 18 supra: It will be seen that if we were to lower the amount of fixed expenses incurred under the second charter from $30,000 to $25,000, then the prorated loss under this charter would only have been $1,000; using the gains prevented measure, this would have lowered the final award to only $6,000 ($5,000 plus $1,000). However, if we were to make a similar lowering of the fixed expenses under charter #2, when using the "savings" theory, the award of $8,500 would still remain the same, since under this theory, the computation is confined to consideration of gross freight and variable (rather than fixed) expenses.

20. See note 18 supra.

would seem to be the gains prevented theory which takes into consideration any variation which had occurred, in expenses.[21] Thus it would appear that since the majority's hypothetical "*fixed* expenses" rule has no basis in reality when the vessel is at sea, and since the dissent's theory is a much more simplified method of computation, the better course would have been to abandon the "savings" theory and rely completely upon the *Gazelle* measure of damages (gains prevented, losses sustained).

**Double Jeopardy—Finality of Judgment of Acquittal in a Criminal Prosecution.**—Defendant corporation and two of its employees were indicted for federal crimes.[1] Shortly after the commencement of trial but prior to the conclusion of the government's case the trial judge, upon the motions of defendants' counsel, directed a verdict of acquittal. The United States Court of Appeals for the First Circuit issued a writ of mandamus[2] directing that the judgment of acquittal be vacated and that the case be reassigned for trial. Since the trial judge lacked the power or jurisdiction to enter a judgment of acquittal such judgment afforded no basis for the defense of double jeopardy, the judgment being a nullity. *In re United States*, 286 F.2d 556 (1st Cir.), *cert. granted sub nom. Fong Foo v. United States*, 366 U.S. 959 (1961).

Though several questions are presented by this case, none is so far reaching or fundamental as that of double jeopardy. Of the cases dealing with the protection given by the double jeopardy clause of the fifth amendment,[3] none has sanctioned the issuance of a writ of mandamus[4] to vacate a judgment of acquittal and to order a new trial.[5]

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21. See note 19 supra.

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1. Defendants were charged with violations of 18 U.S.C. §§ 371, 1001 (1958). Section 371 provides that "if two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof . . . and one or more of such persons do any act to effect the object of the conspiracy each, shall be fined . . . or imprisoned . . . or both." Section 1001 provides that any one who, while dealing with any department or agency of the United States, knowingly and willfully falsifies, conceals or covers up a material fact or makes or uses any false writing or document knowing it to be false is liable to fine, imprisonment or both.

2. 28 U.S.C. § 1651(a) (1958) provides that "the Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

3. U.S. Const. amend. V declares, "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The fifth amendment binds only the federal government and its agencies and does not extend to the states by way of the fourteenth amendment. See Twining v. New Jersey, 211 U.S. 78, 87-88 (1908).

4. Mandamus may be defined as a writ "directed to some person, corporation or inferior court, requiring them to do some particular thing, therein specified, which appertains to their office or duty, and which is supposed to be consonant to right and justice, and where there is no other adequate specific remedy." Kendall v. United States, 37 U.S. (12 Pet.) 522, 613 (1838).

5. For even if it is assumed that the district court judge had no authority to enter

> The general rule is that a person is not in jeopardy until he has been arraigned on a valid indictment or information, has pleaded, and a jury has been impaneled and sworn; and where a case is tried to a court without a jury, jeopardy begins after accused has been indicted and arraigned, has pleaded and the court has begun to hear evidence.[6]

Thus "double jeopardy does not depend upon the result of the trial, but upon the fact of the trial . . . ."[7] The United States Supreme Court, in *United States v. Ball*,[8] defined the prohibition as "not against being twice punished, but against being twice put in jeopardy . . . ."[9] As early as 1904 in *Kepner v. United States*,[10] and as recently as 1957, in *Green v. United States*,[11] the Supreme Court pointed out that the finality of a verdict of acquittal was well

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an acquittal judgment prior to the close of the Government's case, and if it is further assumed that the district court's acquittal judgment is reviewable by petition for writ of mandamus, the question still remains whether or not the double jeopardy clause is a bar to a new trial of the defendants. That is, if, upon a second trial, defendants would have a valid defense by way of a plea of former acquittal, mandamus would not lie, for it is a fundamental principle that the writ will not issue unless it will be effective. See United States ex rel. Greathouse v. Dern, 289 U.S. 352 (1933) (an idle act); In the Matter of Skinner & Eddy Corp., 265 U.S. 86 (1924) (waste of time and effort); Brownlow v. Schwartz, 261 U.S. 216 (1923) (wholly ineffectual).

6. McCarthy v. Zerbst, 85 F.2d 640, 642 (10th Cir. 1936).

7. Remaley v. Swope, 100 F.2d 31, 33 (9th Cir. 1938). Petitioner was convicted on three counts of an indictment and was sentenced to two years on each count to run consecutively. He then sought his release on a writ of habeas corpus on the ground that the second and third counts of the indictment were for the same offense and, therefore, he had been placed in jeopardy twice for the same offense. The order of the lower court denying petitioner's application was affirmed, the court holding that the two counts of the indictment stated different offenses.

8. 163 U.S. 662 (1896).

9. Id. at 669. See Carter v. McClaughry, 183 U.S. 365, 395 (1902), where it was stated that "the test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense." This concept of double jeopardy was more fully discussed in United States v. Wills, 36 F.2d 855, 857 (3d Cir. 1929): "Jeopardy implies an exposure to a lawful conviction for an offense of which a person has already been acquitted. . . . [B]ut 'a former acquittal is no bar to a subsequent prosecution unless . . . the accused could have been convicted upon the first indictment upon proof of the facts averred in the second. . . . The criterion . . . is not what testimony was introduced, but what might have been, and the determinative feature is whether the facts alleged in one charge would support a conviction under the other,' . . . or, stated differently, whether the same evidence would sustain both indictments."

10. 195 U.S. 100 (1904). Defendant was charged with embezzlement. Upon trial he was acquitted. The United States appealed to the Supreme Court of the Philippine Islands and the judgment of the trial court was reversed and the defendant found guilty and sentenced. The United States Supreme Court reversed and dismissed.

11. 355 U.S. 184 (1957). The defendant was tried for murder in the first degree and convicted of murder in the second degree, the verdict being silent as to the charge of murder in the first degree. Defendant appealed and obtained a reversal and new trial. He was retried under the original indictment and convicted of murder in the first degree. The Supreme Court, however, reversed the conviction for murder in the first degree.

settled law under the fifth amendment, even where a judgment had not been entered on the verdict or where the acquittal appeared erroneous.[12] Yet, in the recent case of *Gori v. United States*,[13] the Supreme Court, in a five to four decision, upheld the petitioner's conviction upon a second trial. *Gori* and the instant case, however, are readily distinguishable in that the former dealt with the trial judge's declaration of a mistrial sua sponte in the exercise of his discretion out of regard for petitioner's interest, absent any express or active consent by the petitioner, while the latter dealt with a judgment of acquittal. To equate the declaration of a mistrial with a judgment of acquittal would be to disregard established precedents and established practice although the effect of each might be the same under given circumstances.[14]

The present court was faced with three questions: (1) did the trial judge have the authority to enter a judgment of acquittal prior to the close of the Government's case if the court believed that justice so required; (2) was the judgment of acquittal entered by the district court reviewable by petition for a writ of mandamus; and (3) did the double jeopardy clause of the fifth amendment bar a new trial for the defendants who never moved for mistrial, even if the federal district court had no power to enter a judgment of acquittal?[15] The court found that the trial judge had assumed the role of counsel,[16] had improperly criticized the Assistant United States Attorney for speaking to his witness during a recess while the witness was undergoing direct exami-

12. The Court, in the Green case, said that the majority opinion in Kepner was in complete agreement "with the deeply entrenched principle of our criminal law that once a person has been acquitted of an offense he cannot be prosecuted again on the same charge. This Court has uniformly adhered to that basic premise." Id. at 192.

13. 367 U.S. 364 (1961). Defendant was charged with knowingly receiving and possessing stolen goods. During the presentation of the Government's case, the presiding judge, on his own motion, the defendant remaining silent, withdrew a juror and declared a mistrial. Defendant was convicted upon a second trial. A majority of this Court affirmed the conviction holding that where substantial justice cannot be obtained without discontinuing the trial, the court may, without the defendant's consent and even over his objection, declare a mistrial, and the defendant may be retried without violating the double jeopardy clause of the fifth amendment. Mr. Justice Douglas wrote a rather vigorous dissent in which he was joined by three other Justices.

14. When, in a criminal action, the jury is discharged because of some legal necessity, the discharge amounts to a mistrial and does not bar a second trial of the accused before a new jury. However, if the discharge was not occasioned by some pressing necessity and there is no consent by the defendant, the discharge has the same effect as an acquittal. In such circumstances, a plea of former jeopardy would be a defense to a subsequent trial for the same offense. The rule was laid down in United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824) and was reaffirmed in Wade v. Hunter, 336 U.S. 684, 690 (1949), wherein the Court stated: "The rule announced in the Perez case has been the basis for all later decisions of this Court on double jeopardy. It attempts to lay down no rigid formula. Under the rule a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice." See also Gori v. United States, supra note 13.

15. 30 U.S.L. Week 3008 (July 4, 1961).

16. 286 F.2d 556, 561 (1st Cir. 1961).

nation,[17] and had passed on the question of credibility of the Government's witnesses.[18] The appellate court was of the opinion that in all of these acts the trial judge committed error prejudicial to the Government's case.[19] It was impossible, however, to determine with certitude whether the trial judge directed the verdict of acquittal because he found the testimony of two of the Government's witnesses unworthy of belief or because he believed that the Assistant United States Attorney had violated "some basic civil right" of the defendants when he spoke to his witness. "But whether the judge acted as he did for one reason or for the other, or for both reasons in combination . . ." the court felt "his action was not only erroneous but beyond his jurisdiction."[20] Having made this determination, the court then faced the question of whether or not mandamus would lie to correct the prejudicial error committed by the trial judge, for, as the court said: "[T]he United States obviously cannot appeal. Nor may it resort to mandamus as a substitute for appeal."[21] The court found it necessary to distinguish between " 'a mere error in the exercise of conceded judicial power' "[22] in which event mandamus would not lie, and the "usurpation of power"[23] in which event mandamus would lie. The decision of the court to issue the writ of mandamus was predicated upon this distinction. In conclusion, the court touched on former jeopardy by very briefly stating that, although the question was not "strictly speaking" before the court,[24] it could be anticipated as a defense at any subsequent trial. The court reasoned that since it had determined that the trial judge had "no jurisdiction, to enter judgment of acquittal, it follows . . . that the judgment is void—a nullity—and hence affords no basis for the defense of double jeopardy."[25]

Judge Aldrich, in a concurring opinion made it clear that if the trial judge acted because he felt a fatal defect "in the government's evidence irrevocably" appeared, then the judge had acted within his power and mandamus would not lie even if the judge had committed error in the exercise of his discretion. He stated, however, that it was evident to him that this was not the cause of the trial judge's action, but rather that the trial judge had been motivated to so act because of the Assistant United States Attorney's conversation with his witness. Even if this was error on the part of the Assistant United States Attorney, Judge Aldrich felt it "was anything but deliberate"[26] and certainly

17. Id. at 562.
18. Ibid.
19. Ibid.
20. Id. at 560.
21. Id. at 562.
22. Ibid.
23. Ibid.
24. In view of the fundamental principle that mandamus will not lie unless it will be effective, the holding is illogical. For determinative of whether or not the writ will be effective is the issue of double jeopardy. See note 5 supra.
25. 286 F.2d at 565.
26. Id. at 567 (concurring opinion).

not permanently prejudicial to the defendants' case, and thus he concluded that the trial judge had no power to so act.

In *United States v. Ball*,[27] three defendants were tried jointly for murder. Two of the defendants were convicted and one was acquitted. The two defendants who were convicted sued out a writ of error to the Supreme Court. The Court held that the indictment was fatally defective, would not support a sentence for murder, and reversed the judgment as to the two defendants convicted. The case was remanded with directions to quash the indictment. Subsequently a new indictment was returned against all three defendants. The defendant who had been acquitted at the first trial filed a plea of former jeopardy. It was overruled and he was convicted upon a second trial. In reversing the conviction, the Supreme Court said. "[W]e are unable to resist the conclusion that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict is insufficient in that respect, is a bar to a second indictment for the same killing."[28] The Court further stated that "the prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial."[29] The rationale of the *Ball* decision was that a judgment of acquittal entered by a court having no jurisdiction of the offense or of the party was absolutely void and thus no bar to a subsequent trial of the defendant for the same offense before a court having jurisdiction of the offense and the party. The Court stated, however, that such was not the effect when the court had jurisdiction of the cause and of the party—the indictment being fatally defective. In such a case the judgment of the court is not void, "but only voidable by writ of error; and, until so avoided, cannot be collaterally impeached."[30] If a judgment of guilty were entered on the verdict and that judgment was not reversed, "it stands good, and warrants the punishment of the defendant accordingly, and he could not be discharged by a writ of *habeas corpus*."[31] If the judgment entered upon the verdict is one of acquittal, "the defendant, indeed, will not seek to have it reversed; and the Government cannot."[32] There is no question here but that the court had the requisite jurisdiction of the parties and of the subject matter. That being so, is not the judgment of the court voidable and not void? The *Ball* case held that a voidable judgment of acquittal is binding on the Government,[33] *i.e.*, that the Government cannot seek to have it reversed.

A similar question was disposed of recently in the case of *Umbriaco v. United States*.[34] In that case, verdicts of guilty were returned by the jury

27. 163 U.S. 662 (1896).
28. Id. at 669.
29. Ibid.
30. Id. at 670.
31. Ibid.
32. Ibid.
33. Id. at 671.
34. 258 F.2d 625 (9th Cir. 1958).

on two counts of the indictment. The trial court set aside the verdict under the first count and the Government attempted to appeal from the judgment. The court rather tersely stated that "an appeal from a judgment of the trial court acquitting a defendant because of the insufficiency of the evidence has never been permitted in federal courts. It seemed so elementary that we are surprised to find such a right asserted in this case."[35] Though *Umbriaco* raised no question of a usurpation of authority by the trial judge, plainly the Government felt he had erred at least in the exercise of a discretion he possessed. This is perhaps a distinguishing feature, but, nevertheless, the concept of finality despite error by the trial judge is to be gleaned.

No case in the federal courts has limited the application of the doctrine of double jeopardy based on the error of the trial judge or based on his motive in directing a verdict of acquittal. The whole spirit of the doctrine would seem to militate against such a limitation. It is generally recognized that pitted against the limited resources of the defendant are the comparatively unlimited resources of the prosecution, and that without such a safeguard as the fifth amendment protection against double jeopardy a defendant could be constantly subjected to harassment to his embarrassment both financial and personal.[36] The prosecution has had its day in court and, absent any waiver by the defendant[37] or some impelling necessity,[38] its inability to convict should end the defendant's jeopardy.

**International Law—Limitation of the "Act of State" Doctrine—Cuban Expropriation of American-Owned Property Held Violative of International Law.**—Plaintiff, a financial agent of the Republic of Cuba, asserted title to a sugar shipment by reason of Cuba's nationalization of the property of Compania Azucarera Vertientes-Camaguey (C.A.V.), a Cuban corporation whose stock was almost wholly owned by United States citizens.[1] Bills of lading had been delivered to defendant, Farr Whitlock, a brokerage firm, in New

35. Id. at 626.

36. 355 U.S. at 187-88.

37. The application of the doctrine of waiver is best illustrated in a criminal action wherein the defendant is convicted, appeals, and wins a reversal. The appellate court may order a new trial, the appeal by the defendant being a waiver of the defense of double jeopardy at a subsequent trial for the offense of which he was convicted at the first trial.

38. See note 14 supra.

1. In 1960 the Cuban Government decreed the nationalization of Cuban enterprises in which United States "physical and corporate persons" held a majority interest. See Executive Powers Res. No. 1 pursuant to Nationalization Law No. 851, Official Gazette of Cuba, July 7, 1960, in Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375, 382 nn.13-14 (S.D.N.Y. 1961). The sugar in issue was within the territory of Cuba at the time the nationalization measure purported to take effect. The Cuban resolution declared that the expropriation measures were "deemed a necessary defensive measure against the recent aggressive acts of the Congress and President of the United States reducing the participation of Cuban sugars in the American sugar market." Id. at 376.

York City pursuant to the terms of a contract to purchase the sugar from the Cuban government.[2] Defendant negotiated the bills of lading to its customers and received the purchase price. Defendant, however, upon being advised that C.A.V. claimed title and the right to the sale proceeds, delivered the proceeds to a receiver for the Cuban corporation appointed by the New York Supreme Court.[3] The complaint was directed against the receiver and Farr Whitlock, alleging conversion of the proceeds of the sale and the bills of lading. Denying plaintiff's motion for summary judgment, the district court held that the "act of state" doctrine did not prohibit judicial inquiry into the validity of the Cuban nationalization decree under international law. The court further held that the expropriation measure was ineffective to pass title in the sugar to plaintiff, on the ground that Cuba's seizure of American-owned property was discriminatory[4] and confiscatory[5] and, therefore, "a patent violation of inter-

2. The contract to purchase the sugar was entered into between defendant and plaintiff's assignor, a government owned Cuban corporation. In effect, the real party in interest was the Republic of Cuba.

3. A temporary receiver for the assets of C.A.V., located in New York, was appointed by the New York State Supreme Court for Kings County pursuant to N.Y. Civ. Prac. Act § 977-b. 193 F. Supp. at 376-77.

4. "The act classifies United States nationals separately from all other nationals, and provides no reasonable basis for such a classification. . . . The justification is simply reprisal against another government. Doubtless the measures which states may employ in their rivalries are of great variety but they do not include the taking of the property of the nationals of the rival government." Id. at 385. The World Court has stated that discrimination which is forbidden by international law is "discrimination based upon nationality and involving differential treatment . . . as between persons belonging to different national groups." The Oscar Chinn Case, P.C.I.J., ser. A/B, No. 63 at 87 (1934), 3 Hudson, World Court Reports 416, 438 (1938); accord, Norwegian Shipowners' Claims (Norway v. United States), 1 U.N. Rep. Int'l Arb. Awards 307 (Perm. Ct. Arb. 1922); see Domke, Foreign Nationalizations, 55 Am. J. Int'l L. 585 (1961).

5. In the past Cuba had been favored with the privilege of supplying most of this country's sugar quota, for the most part at prices higher than that of the world market. See H.R. Rep. No. 1746, 86th Cong., 2d Sess. 15-16 (1960). However, this privilege was withdrawn by the President of the United States. Proclamation No. 3355, 25 Fed. Reg. 6414 (1960). Under the Cuban Nationalization Law of July 6, 1960, compensation for the nationalized property was to be paid in bonds with a term of not less than 30 years. Interest of not less than 2% was provided, but to be paid exclusively from a fund which was dependent upon sales of sugar to the United States. Also, the bonds were to be amortized out of this same fund. The court reasoned that these contingencies "render[ed] the bonds unmarketable and valueless." 193 F. Supp. at 385-86. Furthermore, the court stated: "[if] the sugar quota for Cuba . . . [was] restored tomorrow, contributions to the compensation fund . . . would be nonexistent." Id. at 386. At present, there is some confusion with regard to those principles of international law relating to the right of a government to expropriate private property without payment of compensation. Some authorities doubt the existence of a right under international law to compensation for nationalized property. Williams, International Law and the Property of Aliens, Brit. Yb. Int'l L. 1 (1928); see Fachiri, Expropriation & International Law, Brit. Yb. Int'l L. 159 (1925). See also Baade, Indonesian Nationalization Measures Before Foreign Courts—A Reply, 54 Am. J. Int'l L. 801, 803-06 (1960). In contrast, the overwhelming weight of

national law."[6] *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375 (S.D. N.Y. 1961).

The major question for decision was whether the court was free to review the validity of the expropriation measure according to the standards of international law and then to refuse recognition thereof if it were found to be violative of those standards. Traditionally, the "act of state" doctrine has precluded the municipal courts of the United States from examining the validity of the acts of a foreign sovereign operating directly on persons or property within the territorial jurisdiction of the acting state.[7] The substance of this doctrine was first expressed in *Underhill v. Hernandez*,[8] by Chief Justice Fuller: "[T]he courts of one country will not sit in judgement on the acts of the government of another done within its own territory."[9] This judicial restraint imposed on our municipal courts was specifically applied to controversies in-

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authority declares that compensation is required, and partial compensation may be sufficient depending upon the economic, social and political needs of the nationalizing state. 1 Oppenheim, International Law § 155 (Lauterpacht ed. 1955); see 3 Hackworth, Digest of Int'l Law § 288 (1942). As one authority has pointed out, "The duty of a government to compensate in case of nationalization is almost universally recognized. . . . Even in the state practice of Communist countries, the obligation to pay compensation has not been denied. . . ." Domke, supra note 4, at 603-04 (1961).

6. 193 F. Supp. at 386.

7. See United States v. Belmont, 301 U.S. 324 (1937); Ricaud v. American Metal Co., 246 U.S. 304 (1918); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); Underhill v. Hernandez, 168 U.S. 250 (1897); Banco de Espana v. Federal Reserve Bank, 114 F.2d 438 (2d Cir. 1940). But see Sulyok v. Penzintezeti Kozpont Budapest, 279 App. Div. 528, 111 N.Y.S.2d 75 (1st Dep't), modified mem., 304 N.Y. 704, 107 N.E.2d 604 (1952), which refused to apply the "act of state" doctrine on the ground that the foreign confiscation violated the public policy of the forum; cf. Shapleigh v. Mier, 299 U.S. 468 (1937); Sabariego v. Maverick, 124 U.S. 261 (1888). See also M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933) which sustained the "act of state" doctrine although the Soviet Government had not been recognized diplomatically. On the other hand, the doctrine will not operate to give extraterritorial effect to foreign confiscatory decrees purporting to affect persons or property outside its territorial jurisdiction at the time of the decree. See Zwack v. Kraus Bros., 133 F. Supp. 929 (S.D.N.Y. 1955), aff'd in part, 237 F.2d 255 (2d Cir. 1956); Moscow Fire Ins. Co. v. Bank of New York, 280 N.Y. 286, 20 N.E.2d 758 (1939), aff'd sub nom. United States v. Moscow Fire Ins. Co., 309 U.S. 624 (1940); Vladikavkazsky Ry. v. New York Trust Co., 263 N.Y. 369, 189 N.E. 456 (1934); Plesch v. Banque Nationale de la Republique d'Haiti, 273 App. Div. 224, 77 N.Y.S.2d 43 (1st Dep't), aff'd per curiam, 298 N.Y. 573, 81 N.E.2d 106 (1948). But see United States v. Pink, 315 U.S. 203 (1942), where an international agreement was held to supersede this rule.

8. 168 U.S. 250 (1897). Underhill involved an American citizen suing a commander of revolutionary forces in Venezuela in a tort action. The tort was committed prior to the de jure recognition of the revolutionary faction by the United States. The suit was dismissed on the ground that the acts in question were considered to be those of the legitimate government of Venezuela. Ibid. See Re, Foreign Confiscations (1951); Zander, The Act of State Doctrine, 53 Am. J. Int'l L. 826 (1959); Comment, 58 Mich. L. Rev. 100 (1959).

9. 168 U.S. at 252.

volving foreign confiscations of private property in *Oetjen v. Central Leather Co.*[10] and *Ricaud v. American Metal Co.*[11]

*Oetjen* involved the confiscation of property of a Mexican citizen by the Mexican Government.[12] Notwithstanding the objection that the seizure had violated international law,[13] the Supreme Court held that the foreign sovereign's action was "not subject to reexamination and modification by the courts of this country."[14] *Ricaud*, on the other hand, involved the seizure of property owned by an American citizen, by the same Mexican Government.[15] Although the facts presented clearly involved a question of international law,[16] the issue was not expressly raised before the Court. The Court simply stated:

> The fact that the title to the property in controversy may have been in an American citizen . . . does not affect the rule of law that the act within its own boundaries of one sovereign State cannot become the subject of reexamination and modification in the courts of another.[17]

*Oetjen* and *Ricaud* have been distinguished by authorities[18] and the instant court[19] on the ground that those decisions dealt with the validity of intraterritorial seizures under *municipal law* only. On that basis, Judge Dimock, in the instant case, reasoned that the validity of the Cuban expropriation under

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10. 246 U.S. 297 (1918).

11. 246 U.S. 304 (1918).

12. Plaintiff's property was seized by a Mexican revolutionary force which was subsequently recognized by our Executive as the legitimate Government of Mexico. Such recognition operates retroactively so that all previous acts of the recognized sovereign are considered to be those of the legitimate government of the foreign state. 246 U.S. at 303.

13. Plaintiff contended that the seizure had violated the rules of law under Article 46 of the Hague Convention of 1907. The Court observed, however, that the Hague Convention did not apply to a civil war. Id. at 301. Nevertheless, the Court based its decision on the "act of state" doctrine. Id. at 302-03. See Re, Foreign Confiscations 56-57 (1951).

14. 246 U.S. at 303.

15. See note 12 supra.

16. State confiscation of private property of a foreign national clearly presents a question of the validity of the act under international law, according to the overwhelming weight of authority. See note 5 supra.

17. 246 U.S. at 310.

18. "[B]oth the Oetjen and Ricaud cases were decided as a matter of municipal law. In neither case did the court pass upon the validity of the seizure as a valid exercise of the power of a military commander to demand a military contribution. This international law question was not at all mentioned in the Ricaud case." Re, Foreign Confiscations 57 (1951). See also Zander, The Act of State Doctrine, 53 Am. J. Int'l L. 826, 843 (1959).

19. "[N]o court in this country has passed on the question . . . whether this court can examine the validity of the Cuban act under international law and refuse recognition to the act if it is in violation of international law." 193 F. Supp. at 380. See Bernstein v. Van Heyghen Frères Société Anonyme, 163 F.2d 246 (2d Cir.), cert. denied, 332 U.S. 772 (1947). "We have repeatedly declared, for over a period of at least thirty years, that a court of the forum will not undertake to pass upon the validity under the municipal law of another state of the acts of officials of that state, purporting to act as such. We have held that this was a necessary corollary of decisions of the Supreme Court, and if we have been mistaken, the Supreme Court must correct it." Id. at 249.

international law presented a question of first impression in the United States. Nevertheless, the rule of these decisions would seem to be sufficiently broad to preclude judicial review of foreign confiscations under municipal law or international law.

The real question to be answered, therefore, is whether the continued application of the doctrine in cases involving international law is justified. Originally, the doctrine seems to have been an outgrowth of the sovereign immunity doctrine.[20] However, sovereign immunity has no relevancy to a controversy in which a foreign sovereign or its agent is not directly involved in the dispute or in which the foreign sovereign voluntarily submits to the jurisdiction of the court.[21] *Oetjen* stated that the "act of state" restriction rests "upon the highest considerations of international comity and expediency."[22] It is extremely doubtful, however, that a court of the forum is under any international obligation to enforce foreign expropriation measures which are contrary to the principles of international law.[23]

The question also arises whether judicial abstention in this area is imposed by the constitutional doctrine of "separation of powers," on the theory that the validity of a foreign expropriation is a political question allied to the conduct of foreign affairs, and therefore, a matter falling exclusively within the executive responsibility.[24] It seems apparent, however, that the question of title to property in a particular case is more properly a justiciable issue for the court's determination, and that the fear of conflict with executive policy is at the most a collateral problem. The "act of state" doctrine is, more correctly, a self-imposed restraint developed by the courts themselves.[25]

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20. "[B]y virtue of the judicial abstention to review the act of the foreign government, the act does in fact enjoy an immunity. This is in fact an immunity ratione materiae that came about as an offshoot of the principle of sovereign immunity—ratione personae." Re, Foreign Confiscations 163 (1951).

21. See 2 Hackworth, Digest of Int'l Law §§ 169-76 (1941). See also Garcia-Mora, The Doctrine of Sovereign Immunity of Foreign States and Its Recent Modifications, 42 Va. L. Rev. 335 (1956).

22. 246 U.S. at 303-04.

23. Judge Lauterpacht of the International Court of Justice stated: "[N]either principle nor practice countenance a rule which, by reference to International Law, obliges—or permits—courts to endow with legal effect legislative and other acts of foreign States which are in violation of International Law." 1 Oppenheim, International Law § 115 at 270 (Lauterpacht ed. 1955).

24. "Professor Hyde describes the doctrine as 'the reluctance of the courts to assume that they are clothed by their sovereign with authority to exercise a jurisdiction which if exercised would be regarded by the foreign States concerned as an abuse of the judicial function. [1 Hyde, International Law 734 (2d rev. ed. 1945)]." Ass'n of the Bar of the City of New York, Comm. on Int'l Law, A Reconsideration of the Act of State Doctrine in United States Courts, p. 3 n.6 (May 1959). Admittedly, with regard to de jure recognition, the courts are conclusively bound by the political determination. It does not follow however, when the validity of these foreign acts is challenged under the recognized principles of international law, that the courts are precluded from examining those acts. See note 23 supra.

25. See Zander, The Act of State Doctrine, 53 Am. J. Int'l Law 826, 851-52 (1959).

The most satisfactory explanation for the doctrine was indicated in *Bernstein v. Van Heyghen Frères Société Anonyme*.[26] There the defendant claimed that he had derived his title from the Nazi government of Germany, to property confiscated from the Jews.[27] The court refused to review the validity of the seizure but Judge Learned Hand implied that the court would be free to examine a foreign expropriation measure if there appeared a "positive intent" of the Executive that judicial review would not embarrass the conduct of our foreign policy.[28] This dictum indicates that the ultimate justification for judicial restraint regarding foreign expropriations is the fear of prejudice to our foreign policy.[29]

The instant court assumed Judge Hand's suggestion to be the proper rationale for the "act of state" doctrine. The court indicated that the requisite "positive intent" necessary to relax traditional restraint was here evidenced by our Government's express denunciation of Cuba's nationalization measures as violative of international law.[30] In light of this statement of policy by the State Department, Judge Dimock concluded that judicial inquiry under the principles of international law would not prejudice our foreign policy.[31]

It is important to note the factual distinctions from the ordinary act of state decision, in order to evaluate properly the rule of the present case. Here the plaintiff, an agent of the Cuban Government was affirmatively invoking the "act of state" doctrine in an attempt to insulate and enforce the Cuban nationalization measure by means of our judicial process. Prior cases, on the other hand, involved attempts by the original owner to recover the expropriated property from some third party successor to the "interest" of the

26. 163 F.2d 246 (2d Cir.), cert. denied, 332 U.S. 772 (1947).

27. Plaintiff, sole owner of the Bernstein Line Corp., was forced to transfer all his shares to a Nazi trustee. Defendant purchased the vessel from the trustee. Subsequently the vessel was sunk and defendant was paid the insurance proceeds. Plaintiff sued the defendant in conversion. Id. at 251.

28. Ibid. Subsequently, the plaintiff obtained a statement from the State Department which explicitly relieved the court of any restraint upon the exercise of jurisdiction to review the acts of Nazi officials. On the basis of this statement, the court indicated that it would be free to examine the validity of the seizure of plaintiff's property. Bernstein v. N.V. Nederlandsche-Amerikaansche, 210 F.2d 375 (2d Cir. 1954) (per curiam), modifying 173 F.2d 71 (2d Cir. 1949).

29. In the absence of the requisite "positive intent," it may have been that the court considered judicial review of the Nazi confiscation to be prohibited by the constitutional doctrine of "separation of powers." See Bernstein v. Van Heyghen Frères Société Anonyme, 163 F.2d 246 (2d Cir. 1947). "So far as any property wrongfully seized remains in the control of the German Government, or has been used or destroyed, claims for it will go into the account for reparations; or be otherwise dealt with in the peace treaty. What those claims will be, how they will be collected and what restitution will be given the victims are all obviously matters of international cognizance and must be left wholly within the control of our own Executive." Id. at 251.

30. See Department of State Notes to the Castro Government, 43 Dep't State Bull. 603 (Sept. 29, 1960); 43 Dep't State Bull. 316 (Aug. 8, 1960); 43 Dep't State Bull. 171 (July 16, 1960).

31. 193 F. Supp. at 381.

expropriating state. The real significance of the present limitation on the "act of state" restriction is to be found in this latter area.

It would appear obvious that a literal interpretation of the *Bernstein* dictum, so as to require intervention by the Executive to advise the court on an *ad hoc* basis, would put an unreasonable and undesirable burden on the State Department.[32] Judicial inquiry, conditioned upon the express approval of the Executive, would require of the State Department, a possible premature statement of policy toward the nation involved. In any event, the resulting double standard might easily lead a foreign nation to interpret executive approval in a given case as a discriminatory personal attack.[33] Furthermore, judicial abstention in a particular case would be inconsistent with the application of international law in another. For it is obvious that the application of the "act of state" doctrine to cases involving foreign confiscations is not merely a neutral exercise of judicial abstention, but is in effect, an affirmative approval of a violation of the minimum standards of civilized conduct. In view of this, any piecemeal program of judicial review, conditioned upon the express approval of the Executive, would certainly threaten executive policy to a greater extent than might the abandonment of the doctrine altogether.

The present decision, therefore, is a more reasonable interpretation of Judge Hand's dictum and approaches the more liberal rule set out in the *Restatement of the Foreign Relations Law of the United States*,[34] which advocates that the "act of state" doctrine should not apply where the foreign act is violative of international law.[35] The Supreme Court has held that "international law is part of our law and must be ascertained and administered by the

32. See Ass'n of the Bar of the City of New York, Comm. on Int'l Law, A Reconsideration of the Act of State Doctrine in the United States Courts, p. 4 (May 1959).

33. Ibid.

34. See Restatement, Foreign Relations Law § 28d, comment e (Tent. Draft No. 4, 1960).

35. Ibid. The municipal courts of certain other countries have permitted, or demonstrated a willingness to permit judicial review of foreign nationalization measures under the standards of international law. The most outstanding of these cases is Anglo-Iranian Oil Co. v. Jaffrate (The Rose Mary), [1953] 1 Week. L.R. 246, 1953 Int'l L. Rep. 316 (Sup. Ct. Aden). The Rose Mary involved the expropriation of a British oil company and its properties by the Government of Iran. This court held that the "act of state" doctrine is not applicable when the acts complained of are contrary to international law. See Anglo Czechoslovak & Prague Credit Bank v. Janssen, 1943 U.L.R. 185 (Australia); Delville v. Servais, Annual, 1943-1945, No. 157 at 448 (Belgium); In re Fried, Krupp [1917] 2 Ch. 188 (England); Rosenberg v. Fiecher, Annuaire Suisse de Droit International 6, 1949, p. 139 Federal Tribunal (Switzerland); Domke, Indonesian Nationalization Measures Before Foreign Courts, 54 Am. J. Int'l L. 305 (1960) (discussion of Dutch court decision). See also Anglo-Iranian Oil Co. v. S.U.P.O.R. Co., Civil Court of Rome, Italy (1954), 1955 Int'l L. Rep. 23; Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha, Dist. Ct. Tokyo, appeal dismissed, High Court of Tokyo, 1953 Int'l L. Rep. 305 (Japan 1953). But see Anglo-Iranian Oil Co. v. S.U.P.O.R. Co., Court of Venice, Italy (1953), 1955 Int'l L. Rep. 19; In re Helbert Wagg & Co., [1956] 1 Ch. 323, 2 Week. L.R. 183 (England) which, in dictum, reaffirmed the "act of state" doctrine; Lauterpacht, re Helbert Wagg: A Further Comment, 5 Int'l & Comp. L.Q. 301 (1956).

courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."[36] Moreover, the avowed objective of our foreign policy is adherence to the rule of law.[37] Therefore, whatever might be said of the danger of applying the subjective criteria of the forum's public policy—the fear that judicial review of foreign expropriations, according to the minimum standards of international law, would prejudice our foreign policy—appears to be unwarranted and exaggerated.

**Labor Law—Agency Shop Lawful Form of Union Security Under Labor Management Relations Act.**—General Motors Corporation and United Auto Workers[1] signed a valid national collective bargaining agreement[2] which provided for maintenance of membership[3] and a union shop[4] except where such provision would be illegal under state law.[5] The union security contract covered employees in Indiana, whose right-to-work law outlawed the union shop.[6] General Motors refused to bargain on a supplementary pro-

36. The Paquette Habana, 175 U.S. 677, 700 (1900). See also 1 Oppenheim, International Law 41-42 (Lauterpacht ed. 1955).

37. Judicial inquiry, under international law "should not conflict with the policy of the Executive Department since this should also be, and has been stated to be, a primary objective of United States policy." Ass'n of the Bar of the City of New York, Comm. on Int'l Law, A Reconsideration of the Act of State Doctrine in the United States Courts, p. 4 (May 1959). See Dulles, The Role of Law in Peace, 40 Dep't State Bull. 255 (1959); Eisenhower, Freedom Under Law, 38 Dep't State Bull. 831 (1958); Stevenson, The American Tradition and Its Implications For International Law, 30 Fordham L. Rev. 427 (1962).

1. International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America, UAW-AFL-CIO.

2. This agreement covered General Motors Corporation employees at its numerous plants and facilities in various states throughout the country.

3. "Maintenance of membership [is a form of union security which] requires all existing members of the union to continue as members in good standing unless they take advantage of an 'escape clause' to renounce membership within a time fixed by the collective contract; it does not mean that all employees must be members of the union. New employees are not required to join the union, but, if they do join, they must retain their membership for the duration of the contract." CCH Lab. L. Rep. ¶ 4510 (2 Lab. Rel.) (1961).

4. "The union shop [is a form of union security which] does not require an applicant to be a member of the union before he is hired, but it does require him to join, and usually to continue his membership in, the union after he is hired." Ibid.

5. This exception in the contract was as follows: "(4b) Anything herein to the contrary notwithstanding, an employee shall not be required to become a member of, or continue membership in, the union, as a condition of employment, if employed in any state which prohibits, or otherwise makes unlawful, membership in a labor organization as a condition of employment." General Motors Corp., 130 N.L.R.B. 481, 483 n.2 (1961).

6. Section 14(b) of the Labor Management Relations Act, 61 Stat. 151 (1947), 29 U.S.C. § 164 (1958), which gives permission to the states to enact so-called "right-to-work" laws, provides: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employ-

posal[7] by the UAW calling for an agency shop clause[8] to cover employees in Indiana, where the right to work law had been construed as not prohibiting the agency shop.[9] The UAW then filed charges of unfair labor practice with the National Labor Relations Board.[10] A majority of the Board first held[11] that an agency shop was unlawful under the Taft-Hartley Act in a "right-to-work" state and that General Motors therefore was not obligated to bargain on the union's demand.[12] Subsequently the Board granted motions for reconsidera-

ment in any State or Territory in which such execution or application is prohibited by State or Territorial law." The Indiana Right-to-Work Law, under which the union shop is illegal, states: "No corporation or individual or association or labor organization shall solicit, enter into or extend any contract, agreement or understanding, written or oral, to exclude from employment any person by reason of membership or nonmembership in a labor organization, or to discharge or suspend from employment or lay off any person by reason of his refusal to join a labor organization. . . . Any such contract, agreement, or understanding, written or oral, entered into or extended after the effective date of this act, shall be null and void and of no force or effect." Ind. Ann. Stat. § 40—2703 (Supp. 1961).

7. Under the proposal, new employees hired thereafter would be required as a condition of continued employment after thirty days following the effective date of such clause or of their initial employments (whichever is later) to pay to the union a sum equal to the initiation fee charges and a monthly sum equal to the regular dues required of union members. General Motors Corp., 130 N.L.R.B. 481 (1961). Such provision was conceded to be valid under Indiana State Law, in the instant case. General Motors Corp., CCH Lab. L. Rep. (133 N.L.R.B. No. 21) ¶ 10416 (4 Lab. Rel.) (Sept. 29, 1961).

8. "The agency shop requires employees in a bargaining unit who do not join the union to pay the equivalent of union dues, on the theory that since nonmembers as well as members in the unit are getting the benefit of the collective bargaining, they should make some contribution. . . ." CCH Lab. L. Rep. ¶ 4510 (2 Lab. Rel.) (1961).

9. In Meade Elec. Co. v. Hagberg, 129 Ind. App. 631, 159 N.E.2d 403 (1959), the court stated that under the Indiana Right-to-Work Law there is no prohibition against a provision requiring the payment of fees or charges to a labor organization, and that it merely prohibits agreements and conduct which conditions employment on membership in a labor organization. Consequently an agency shop does not violate the Indiana right-to-work law. For analysis of this decision see Rose, The Agency Shop v. the Right to Work Law, 9 Lab. L.J. 579 (1958); cf. Jones, The Agency Shop, 10 Lab. L.J. 781 (1959). See also Schernerhorn v. Local 1625, Retail Clerks, 47 L.R.R.M. 2300 (1960), where the Florida Right-to-Work law was similarly construed as not outlawing the agency shop.

10. Labor Management Relations Act (Taft-Hartley Act) § 8(a)(5), 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(5) (1958) provides: "It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees. . . ."

11. The majority was composed of then Chairman Leedom and members Jenkins and Kimball. Members Rogers and Fanning dissented.

12. General Motors Corp., 130 N.L.R.B. 481 (1961). Union security is a compulsory subject of bargaining. NLRB v. Andrew Jergens Co., 175 F.2d 130 (9th Cir. 1949), enforcing 76 N.L.R.B. 363 (1948); Duro Fitting Co., 121 N.L.R.B. 377 (1958). However, since the Taft-Hartley Act imposed restrictions on union security, bargaining is not required on union security provisions not meeting the act's requirements. Furthermore, an employer is under a legal duty to reject such demands. Park & Tilford Import Corp. v. International Bhd. of Teamsters, 27 Cal. 2d 599, 165 P.2d 891 (1946).

tion,[13] and upon rehearing, reversed itself in a four-to-one decision, holding that an agency shop provision was a lawful form of union security under the Taft-Hartley Act of 1947.[14] Therefore, General Motors' failure to bargain with the union on the subject of an agency shop constituted an unfair labor practice under Section 8(a)(5) of the Taft-Hartley Act.[15] *General Motors Corp.*, CCH Lab. L. Rep. (133 N.L.R.B. No. 21) ¶ 10416 (4 Lab. Rel.) (Sept. 29, 1961).

The majority interpreted Section 8(a)(3) of the Taft-Hartley Act,[16] which specifically provides for a membership requirement in the union security contract, as permissive rather than exclusive.[17] It therefore concluded that when a state had enacted a right-to-work law making the union shop illegal, but not outlawing lesser forms of union security agreements such as the agency shop, such lesser forms of agreement were valid under federal law.[18] The Board's first decision in the instant case strictly interpreted section 8(a)(3) to provide that the only permissible form of union security was the union shop, on the ground that the right to bargain for any lesser form of union security (*e.g.*, agency shop) was contingent upon the existence of the right to bargain for a union shop.[19] Therefore, since the state legislature pursuant

13. Prior to the granting of motion, the Board's composition had been changed by the appointment of two new members—Chairman McCulloch and member Brown, replacing former members Jenkins and Kimball.

14. Section 8(a)(3) of the Labor Management Relations Act (Taft-Hartley Act) 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158 (1958) provides as follows: "Nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later. . . ."

15. See note 10 supra.

16. See note 14 supra.

17. General Motors Corp., CCH Lab. L. Rep. (133 N.L.R.B. No. 21) ¶ 10416 (4 Lab. Rel.) (Sept. 29, 1961).

18. That is to say, § 8(a)(3) defines the maximum limits of permissible union security which can be negotiated, thus authorizing lesser forms of union security, including the agency shop. Ibid.

19. The Board distinguished the situation in which an agency shop was permissible under § 8(a)(3) of the Labor Management Relations Act of 1947 (Taft-Hartley), in a state which did not have a right-to-work law outlawing the union shop, from the situation in the instant case where there was such a right-to-work law. In the former situation, "no legal impediment existed to preclude the parties from entering into the contracts requiring all employees to be union members. . . . Thus they were free to waive . . . the maximum requirement of union membership and to require in lieu thereof some lesser form of union security, such as the agency shop clause. The instant case is different in that . . . GM and UAW were not free under the [act] . . . to require of Indiana employees union membership as a condition of employment, and so, they were not free to require, as a condition of employment of such employees, any lesser form of union security, such as an agency shop. For one cannot waive a right he does not have." General Motors Corp., 130 N.L.R.B. 481, 487 (1961).

to section 14(b) of Taft-Hartley had made the union shop illegal,[20] a lesser form of union security was without authorization.[21]

Under the Wagner Act of 1935, [22] collective bargaining became, and has remained, the focal point of labor relations. Prior to that enactment federal law placed no restraints upon the extent to which provisions for compulsory union membership could be inserted in collective bargaining agreements.[23] Section 8(3) of the Wagner Act[24] made discrimination in employment, which would encourage or discourage union membership, illegal. However, the closed shop agreement was permitted. "Nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein. . . ."[25] Although the term "closed shop contract" appears throughout the legislative history of the proviso to section 8(3) it was not a well defined exception. Both Board and court decisions clearly established that the proviso contemplated other types of union security agreements such as union shop, maintenance of membership, preferential hiring,[26] and the agency shop.[27]

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20. See note 6 supra and accompanying text.

21. General Motors Corp., 130 N.L.R.B. 481 (1961).

22. National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935).

23. See Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd., 336 U.S. 301 (1949).

24. National Labor Relations Act (Wagner Act) § 8(3), 49 Stat. 452 (1935).

25. Ibid. States, however, were permitted, under Taft-Hartley Act § 14(b), 61 Stat. 151 (1947), to pursue more restrictive policies.

26. "Preferential hiring requires the employer to hire union members to the extent that a sufficient number of qualified workers are available." CCH Lab. L. Rep. ¶ 4510 (2 Lab. Rel.) (1961).

27. Public Serv. Co. of Colo., 89 N.L.R.B. 418 (1950), involving a maintenance of membership clause, including a "support money" provision requiring non-members to contribute fees for support of the union, made clear that an agency shop was a permissible form of union security under the Wagner Act. The agreement was executed after the enactment but before the effective date of the Taft-Hartley amendments, hence its validity was to be determined under the Wagner Act. Id. at 419-20. In holding that the provision was legal under the Wagner Act and a valid union security provision within the meaning of the § 8(3) proviso, the Board stated: "It does not appear to have been the intent of Congress to select only a particular type of union security agreement to be exempted from the operation of the Act. . . . [T]he Wagner Act was expressly designed to remedy 'inequality of bargaining power between employees . . . and employers.' To construe the term 'membership' in the Section 8(3) proviso as denoting the sole requirement a collective bargaining agent could obtain in a contract as a legitimate measure of security, would necessarily restrict, rather than aid employees and their representatives in collective bargaining. It is hardly likely, therefore, that Congress, while undertaking to bolster employee bargaining power, could have intended to insist that the bargaining agent be successful in obtaining in collective bargaining negotiations only the stronger forms of union security, i.e. membership guarantees, and that lesser concessions on the part of employers would not be accorded the protection of the proviso." Id. at 423-24. In an earlier case, National Elec. Prods. Corp., 3 N.L.R.B. 475 (1937), involving a contract which required employees to join the contracting union or in the alternative to have deducted from their

To eliminate the closed shop, the Taft-Hartley Amendments of 1947 left intact the introductory language of Section 8(3) of the Wagner Act, prohibiting discrimination in employment, but it modified the proviso to outlaw the closed shop. The modification, however, apparently sanctioned the union shop.[28] The object of the legislature in curtailing permissible union security arrangements was to remedy the most serious abuse of compulsory union membership. The amendment, in effect, emancipated the individual worker from the abuses of power by either organized labor or management, while permitting organized labor to eliminate the so-called "free riders," *i.e.*, those who enjoy the benefits of collective bargaining without paying their proportionate share of the cost of representation.[29] In explaining the proviso Senator Taft remarked that

> the rule adopted by the committee is substantially the rule now in effect in Canada . . . that there can be a closed shop or union shop, and the union does not have to admit an employee who applies for membership, but the employee must, nevertheless, pay dues, even though he does not join the union. If he pays the dues without joining the union, he has the right to be employed.[30]

In *Union Starch & Ref. Co.*,[31] the company and union entered into a collective bargaining contract containing a standard union shop provision.[32] Three employees who were not members of the union tendered to the union's representative the dues and initiation fees uniformly required of members, but refused to comply with additional requirements[33] which the union im-

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pay a sum equal to the dues of the union, the Board pointed out that the proviso to § 8(3) "speaks of an agreement with a labor organization requiring as a condition of employment 'membership therein.' The contract proviso . . . is not so limited. . . ." Id. at 486 n.11. The Board, however, found it unnecessary to pass on this question and resolved the case on other grounds.

28. See note 14 supra.

29. 1 Legislative Hist. of the Labor Management Relations Act of 1947, at 413, 639, 745-46; see, e.g., 1947 U.S. Code Cong. Serv. 1135. As stated by Senator Taft: "In other words, what we do, in effect, is to say that no one can get a free ride in such a shop. . . . The employee has to pay the union dues." 93 Cong. Rec. 3837 (1947).

30. 93 Cong. Rec. 5088 (1947). See also Joint Committee on Labor Management Relations, S. Rep. No. 986, 80th Cong., 2d Sess. 52 (1948). The rule referred to by Senator Taft was enunciated in Ford Motor Co. of Canada, 17 L.R.R.M. 2782 (1946).

31. 87 N.L.R.B. 779 (1949), enforced, 186 F.2d 1008 (7th Cir.), cert. denied, 342 U.S. 815 (1951).

32. "All present employees in the bargaining unit must become members of the Union within thirty (30) days after the execution of this agreement [April 2, 1948] and must maintain membership in the Union during the term of this agreement as a condition of employment. Any employee in the bargaining unit who fails to maintain membership in the Union because of non-payment of initiation fees or dues shall be summarily discharged by the Company upon receipt of written notice and demand by the Union. . . ." Id. at 780 n.6.

33. That they attend the next regular meeting of the union, at which applicants would be voted on, and that they take an oath of allegiance to the union.

posed as conditions of membership. The union then requested that the company discharge the employees pursuant to the contract. After full investigation the company complied with the union's request whereupon the discharged employees filed charges of unfair labor practices. The issue before the Board was "whether an employee who tenders to a union holding a valid union-shop contract an amount equal to the initiation fees and accrued dues thereby brings himself within the protection from discharge contained in the provisos of section 8(a)(3) and in section 8(b)(2) of the amended act."[34] The Board stated that "the provisos of section 8(a)(3) are specifically limited to protecting *nonmembers* of the contracting union, and cannot be converted into statements of the conditions which entitle an employee to membership rather than *those which entitle him, as a nonmember*, to keep his job."[35] The Board read proviso B of 8(a)(3) as extending protection to any employee who tenders periodic dues and initiation fees *without obligating him to join the union.* "If the union imposes any other qualifications and conditions for membership with which he is unwilling to comply, such an employee may not be entitled to membership, but he is entitled to keep his job."[36] The Board accordingly found that employer and union committed unfair labor practices by discharging employees for reasons other than non-payment of dues.[37] Therefore, the union shop contract

34. Union Starch & Ref. Co., 87 N.L.R.B. 779, 781 (1949). 61 Stat. 141 (1947), as amended, 29 U.S.C. § 158(b)(2) (1958) reads as follows: "It shall be an unfair labor practice for a labor organization . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section 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. . . ." The Board expressly disclaimed the contention by respondent company that the issue presented was: "whether one who does nothing more than tender a sum of money equivalent to the initiation fees and dues of a labor organization thereby acquires 'membership' in a labor organization, within the meaning of that term as it is used in the proviso of Section 8(a)(3) of the Act." Id. at 781-82 n.8.

35. Id. at 782 n.8. (Emphasis added.)

36. Id. at 784.

37. Discharge of employees for refusing to contribute to the union welfare fund was held to be lawful, under a security contract providing that non-union employees must either join the union or make contributions in an amount equivalent to union dues, to the union welfare fund, within six months after the contract date, in 1952 Administrative Decision NLRB General Counsel, No. 364. In American Seating Co., 98 N.L.R.B. 800 (1952), the contract provided for a union shop with an express exception as to its employees, who objected on religious grounds to joining the unions. In lieu thereof they would be required to pay in to the union's welfare fund an amount equal to the union dues they would have paid had they become members. The Board held that this provision did not exceed the union security requirements of the Taft-Hartley Act. The Board relied on its ruling in Public Serv. Co. of Colo., 89 N.L.R.B. 418 (1950), in which, as stated above, the agency shop provision did not violate the proviso in § 8(3) of the Wagner Act, and held that the agency shop provision was a valid form of union security under the amended act. The Board was cognizant of the legislative history of Taft-Hartley which illustrated that the provision

is not per se enforceable under federal law, but is in fact enforceable under federal law to the extent of an agency shop provision. The so-called "union shop" permissible under Taft-Hartley is no more than the agency shop.

Since the agency shop is the maximum form of union security agreement enforceable under federal law, and not the union shop agreement, the Indiana right-to-work law[38] as construed by its courts is a vain piece of legislation with respect to employers subject to the jurisdiction of federal law. However, it should be noted that the great majority of right-to-work states have interpreted their laws as prohibiting the agency shops as well as the union shops.[39]

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was intended to overcome the problem of "free riders." Id. at 802. Though not testing an agency shop provision, the Court, in Radio Officers' Union v. NLRB, 347 U.S. 17 (1954), stated that the legislative history of Taft-Hartley "clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concern about 'free riders,' i.e., employees who received the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason . . . . No other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned." Id. at 41-42. H.R. Rep. No. 245, 80th Cong., 1st Sess. 32 (1947) states "in brief a union may deny membership to an employee upon any ground it wishes, but the only ground on which it can have him discharged under a 'union security' clause is non-payment of initiation fees and dues."

38. Ind. Ann. Stat. § 40-2703 (Supp. 1961).

39. SYNOPTIC ANALYSIS OF RIGHT-TO-WORK LAWS*

| State | Constitutional amendment | Statute | Penal in nature | Union shop prohibited | Agency shop prohibited |
|---|---|---|---|---|---|
| Alabama | No | Yes | No | Yes | Yes |
| Arizona | Yes | No | No | Yes | Yes |
| Arkansas | Yes | No | Yes | Yes | Yes |
| Florida | Yes | No | No | Yes | No |
| Georgia | No | Yes | Yes | Yes | Yes |
| Indiana | No | Yes | Yes | Yes | No |
| Iowa | No | Yes | Yes | Yes | Yes |
| Kansas | Yes | No | No | Yes | Yes† |
| Louisiana†† | No | Yes | No | Yes | Yes |
| Mississippi | Yes | No | No | Yes | Yes |
| Nebraska | Yes | No | Yes | Yes | Yes |
| Nevada | No | Yes | Yes | Yes | Yes |
| N. Carolina | No | Yes | No | Yes | Yes |
| N. Dakota | No | Yes | No | Yes | No |
| S. Carolina | No | Yes | Yes | Yes | Yes |
| S. Dakota | Yes | No | Yes | Yes | Yes |
| Tennessee | No | Yes | Yes | Yes | Yes |
| Texas | No | Yes | No | Yes | Yes |
| Utah | No | Yes | Yes | Yes | Yes |
| Virginia | No | Yes | Yes | Yes | Yes |

* CCH Lab. L. Rep. ¶ 41025 (1 & 2 State Laws) (1961).
† Higgins v. Cardinal Mfg. Co., 188 Kan. 11, 360 P.2d 456 (1961).
†† Applies exclusively to agricultural workers.

**Labor Law—Taft-Hartley Act Does Not Pre-empt the Field of Legislation Regarding the Limitations and Requirements It Imposes Upon Employee Welfare Trusts.**—Petitioner, the Superintendent of Insurance of the State of New York, made an application, by an order to show cause, under Article XVI of the New York Insurance Law,[1] for a direction to take possession of and to liquidate the assets of respondent, United Construction Workers, United Mine Workers of America—S.H. Pomeroy Company Welfare Fund.[2] Respondent challenged the Superintendent's alleged authority, contending that Congress had pre-empted the field of legislation with respect to all matters embraced in the limitations and requirements imposed upon employee welfare trusts by Section 302 of the Taft-Hartley Act.[3] It also maintained that Article XVI of the New York Insurance Law is in direct conflict with section 302, and hence unconstitutional.[4] The New York Supreme Court granted petitioner's application[5] and its decision was unanimously affirmed by the appellate division.[6] The court of appeals affirmed, holding that "Congress did not intend to pre-empt this field . . . also . . . as to whether article XVI of the Insurance Law as applied here is repugnant to section 302 (subd. [c], par. [5]) of the Federal Labor-Management Relations Act . . . there is no such inconsistency." *In the Matter of Thacher*, 10 N.Y.2d 439, 443, —N.E.2d —,—,—N.Y.S.2d—,—(1962).

1. The petition was made pursuant to N.Y. Ins. Law §§ 511(j), 513, 526.

2. The fund was established in 1957 under a collective bargaining agreement in which the employer, S. H. Pomeroy Company, agreed to pay seven cents for each hour worked by the employees covered by the agreement. In order to comply with the requirements of § 302(c)(5) of the Labor Management Relations Act of 1947, 61 Stat. 157, 29 U.S.C. § 186(c)(5) (1958), a trust agreement, providing for the administering of the fund was also executed. In 1959 the company ceased its payments due to a work stoppage and since work has not resumed, no further payments have been made. Brief for Appellant, pp. 2-3, In the Matter of Thacher, 14 App. Div. 2d 736, 218 N.Y.S.2d 524 (1st Dep't 1961) (memorandum decision).

3. Labor-Management Relations Act of 1947 § 302(c)(5), 61 Stat. 157, amended by 73 Stat. 538 (1959), as amended, 29 U.S.C. § 186(c)(5) (Supp. II, 1959-1960). The effect of such a claim is to deny the states the right to enact any law on the question within the ambit of § 302. This is what may be termed, for clarity's sake, "total pre-emption."

4. The effect of this contention is to allow the states to enact laws relating to the subject matter of § 302 providing such laws are not in conflict with this section. This we shall call "partial pre-emption."

5. In the Matter of Thacher, 29 Misc. 2d 936, 216 N.Y.S.2d 299 (Sup. Ct. 1961). In substance the court ruled upon respondent's first claim declaring that there was no total pre-emption and, therefore, the state had the right to enact local laws. The second contention, however, was left unanswered for the court never approached the question of conflict and partial pre-emption. On the application of respondent, an order was issued staying execution of the supreme court's directive pending the determination of an appeal and permitting continued payments to be made from the fund by the appellant's trustees for certain premiums for insurance benefits. In the Matter of Thacher, 14 App. Div. 2d 674 (1st Dep't 1961) (memorandum decision).

6. In the Matter of Thacher, 14 App. Div. 2d 736, 218 N.Y.S.2d 524 (1st Dep't 1961) (memorandum decision).

It is axiomatic that where the federal constitution and state legislation conflict the latter must yield.[7] To the extent that Congress has occupied the field, the states are pre-empted from acting[8] as *any* law passed by the state would of necessity conflict with the federal statute.[9] On the other hand, if the federal provision merely sets forth policies and regulations governing a specific sphere of activity the states are precluded only from enacting legislation which is not in accord with such policies and regulations.[10] In the first instance there is actually total pre-emption while in the second the restriction is partial; in both cases, however, the state laws which yield must do so because they are unconstitutional.[11] Thus if the state provision is not repugnant to the federal act, it is a valid statute and "there is consequently no basis for holding that the State is without jurisdiction. . . ."[12]

7. U.S. Const. art. VI, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." This in substance is the basis of pre-emption. See International Union, UAW v. O'Brien, 339 U.S. 454 (1950); Plankinton Packing Co. v. Wisconsin Employment Relations Bd., 338 U.S. 953 (1950) (per curiam); La Crosse Tel. Corp. v. Wisconsin Employment Relations Bd., 336 U.S. 18 (1949); Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947); Hill v. Florida, 325 U.S. 538 (1945).

8. As the Supreme Court stated in Sinnot v. Davenport, 63 U.S. (22 How.) 227, 242-43 (1859): "The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. . . . [S]uch acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with or are contrary to the laws of Congress, made in pursuance of the Constitution . . . must yield to it [the Act of Congress]." See Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955); Garner v. Local 776, Teamsters Union, 346 U.S. 485 (1953); Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951). See also San Diego Bldg. Trades Council v. Garmon, 353 U.S. 26 (1957); Local 427, Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 20 (1957); Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957).

9. It should be noted, however, that since the doctrine of federal pre-emption stems from the Constitution, its application to labor legislation is limited to matters affecting interstate commerce. U.S. Const. art. 1, § 8. "The Congress shall have Power . . . [3] To regulate Commerce with foreign Nations, and among the several States . . . [18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . ."

10. See, e.g., International Union, UAW v. O'Brien, 339 U.S. 454 (1950); Plankington Packing Co. v. Wisconsin Employment Relations Bd., 338 U.S. 953 (1950) (per curiam); La Crosse Tel. Corp. v. Wisconsin Employment Relations Bd., 336 U.S. 18 (1949); Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947); Hill v. Florida, 325 U.S. 538 (1945); People v. Knapp, 4 Misc. 2d 449, 157 N.Y.S.2d 820 (Ct. Gen. Sess.), aff'd sub nom., Knapp v. Schweitzer, 2 App. Div. 2d 579, 157 N.Y.S.2d 158 (1st Dep't 1956), aff'd mem., 2 N.Y.2d 913, 141 N.E.2d 825, 161 N.Y.S.2d 437 (1957), aff'd, 357 U.S. 371 (1958); State v. Montgomery Ward & Co., 120 Utah 294, 233 P.2d 685, cert. denied, 342 U.S. 869 (1951).

11. See notes 8 and 9 supra. See also State v. Montgomery Ward & Co., 120 Utah 294, 303-20, 233 P.2d 685, 689-98 (dissenting opinion).

12. People v. Knapp, 4 Misc. 2d 449, 457, 157 N.Y.S.2d 820, 828 (Ct. Gen. Sess. 1956).

Section 302(a) and (b) of the Taft-Hartley Act[13] is a general prohibition against the payment to, or receipt by, an employee representative of any money or other thing of value where the payment is made by an employer. These subdivisions are penal in nature and fines and imprisonment may be imposed for their violation. Section 302(c)[14] delineates five exceptions to (a) and (b). The last of these sets forth express limitations and requirements relating to the establishment of employee welfare trusts, the purposes to which they must be devoted and by whom they must be administered. Subdivision (e) provides that the federal courts "shall have jurisdiction . . . to restrain violations of this section. . . ."[15] Although it might have been argued that this provision limited the task of administering union welfare funds solely to the federal courts, thus imputing to Congress the intent to pre-empt totally the field of welfare legislation, judicial interpretation has been to the contrary.

In *Moses v. Ammond*[16] a United States district court held that subdivision (e) does not bestow federal jurisdiction over *all* disputes relating to union welfare funds. In that action former members of a local union which had disaffiliated from the international sought termination of a welfare fund and distribution of its proceeds to themselves and others similarly situated. Since no violations of section 302(a) and (b) were involved, the court declined jurisdiction. It found that there was no total pre-emption and that such a construction would not be "consonant with the architecture of the law or with its purpose."[17] In 1956 the United States Supreme Court suggested that if Congress had intended to give exclusive jurisdiction over all disputes to the federal courts, it would have done so directly with a specific provision to that effect.[18] Absent such a provision, the Court held against total pre-emption and stated that section 302 was merely "a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative."[19] Accordingly, a New York court has ruled that the state may prosecute violations of its own statute dealing with the offense of bribery of labor representatives, a crime which also constitutes an infraction

13. "(a) It shall be unlawful for any employer . . . to pay, lend, or deliver or agree to pay, lend, or deliver, any money or other thing of value—(1) to any representative of any of his employees . . (2) to any labor organization . . . (3) to any employee or group or committee of employees . . . (4) to any officer or employee of a labor organization. . . . (b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section." Labor Management Relations Act of 1947, §§ 302(a)-(b), 61 Stat. 157, amended by 73 Stat. 537 (1959), as amended, 29 U.S.C. § 186(a)(b) (Supp. II, 1959-1960).

14. Labor Management Relations Act of 1947, § 302(c)(5), 61 Stat. 157, amended by 73 Stat. 538 (1959), as amended, 29 U.S.C. § 186(c)(5) (Supp. II, 1959-1960).

15. Labor Management Relations Act of 1947, § 302(e), 61 Stat. 158, 29 U.S.C. § 186 (e) (1958).

16. 162 F. Supp. 866 (S.D.N.Y. 1958).

17. Id. at 874.

18. United States v. Ryan, 350 U.S. 299 (1956).

19. Id. at 305.

of section 302.[20] In its decision the court noted that, " 'it should never be held that Congress intends to . . . suspend the exercise of the police powers of the States . . . unless its purpose to effect that result is clearly manifested.' "[21] Although the opinion was concerned with the penal portion of section 302, the position it took with respect to pre-emption is applicable to a proceeding involving the exceptions to this section. Finally, in 1959 the Supreme Court of California, after reviewing the previous decisions on the subject and pointing out the general confusion in the area, held that the federal court's jurisdiction under section 302 was definitely not exclusive and that "federal and state administration of employee welfare and pension plans may overlap."[22]

Thus it would appear that the theory of total pre-emption in the field of welfare fund legislation has been rejected by the courts with unanimity. The only remaining question regarding the validity of state legislation in that area is the issue of partial pre-emption.

In 1959 the Supreme Court, in *Arroyo v. United States*,[23] stated that Congress, in enacting Section 302 of the Taft-Hartley Act, intended to set forth a comprehensive federal labor policy. "[S]pecific standards were established to assure that welfare funds . . ."[24] would be set up and distributed only for the purposes which Congress had approved. Previously, in *State v. Montgomery Ward & Co.*,[25] the Supreme Court of Utah had anticipated this treatment of section 302 and had characterized Congress' words as "a sweeping prohibition . . . subject only to certain specific exceptions, [where] there is no room for the States to narrow or enlarge upon the exceptions without conflicting with the policy of Congress."[26] In this case the defendant employer was charged with the refusal to honor an assignment for "check off" by an employee.[27] It was held that the state statute authorizing such "check offs "was

20. See note 12 supra.

21. People v. Knapp, 4 Misc. 2d 449, 454, 157 N.Y.S.2d 820, 825 (Ct. Gen. Sess. 1956), citing Reid v. Colorado, 187 U.S. 137, 148 (1902); cf. International Union, UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266, 274 (1956), where the Court stated: "As a general matter we have held that a State may not, in furtherance of its public policy, enjoin conduct 'which has been made an 'unfair labor practice' under the federal statutes.' [the Court cites Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 475 (1955)] . . . this general rule does not take from the States power to prevent mass picketing, violence, and overt threats of violence. The dominant interest of the State in preventing violence and property damage cannot be questioned . . . nor should the fact a union commits a federal unfair labor practice while engaging in violent conduct prevent States from taking steps to stop the violence."

22. Cox v. Superior Court of San Bernardino County, 52 Cal. 2d 855, 863, 346 P.2d 15, 20 (1959).

23. 359 U.S. 419 (1959).

24. Id. at 426.

25. 120 Utah 294, 233 P.2d 685, cert. denied, 342 U.S. 869 (1951).

26. Id. at 302, 233 P.2d at 689.

27. Here an employee executed and delivered a written assignment of a portion of his wages to his employer. The employer refused to honor the assignment and a criminal complaint was filed against it charging the violation of Utah Laws 1937, ch. 57, §§ 1, 3 (1943),

repugnant to section 302(c) and must yield and be construed as inapplicable to employers subject to the federal labor act. Similarly, in *People v. Knapp*,[28] a New York court, also applying the logic of partial pre-emption, pointed out that it was only because "no conflict has been shown to exist . . . between the local statutes here involved and either the terms or the policy of the Federal legislation"[29] that the state had jurisdiction.

The test of federal pre-emption was set forth in *Rice v. Santa Fe Elevator Corp.* as, "whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act."[30] If it is, then the state law must be in absolute harmony even though "it [the federal act] is a more modest, less pervasive regulatory plan than that of the State."[31] The federal government's establishment of a national labor policy with regard to welfare funds has, therefore, effectively pre-empted the legislative field as to any state statute which conflicts with section 302. This is not to say, however, that states are precluded from enacting *any* laws relating to welfare funds simply because Congress has entered the field.[32] The first question posed must always be whether Congress has manifested an intent that the states be precluded from entering the legislative field altogether—a total pre-emption. If the answer to this query is negative then the problem arises as to whether the state statute has been applied in a manner which brings it into irreconcilable conflict with the federal act—a partial pre-emption.[33]

In the instant case the court of appeals reasoned that since there was neither an express provision in the federal act concerning liquidation or dissolution of welfare funds nor an explicit prohibition of state regulations of such funds, the state could take control of the fund in issue by virtue of its inherent police powers as manifested in Article XVI of the New York Insurance Law.[34] In support of this theory the court relied upon *Moses v. Ammond*[35] and Section 309 of the Welfare and Pension Plans Disclosure Act of 1958.[36] Both of these authorities, however, lead only to the conclusion that

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which provided as follows: "[-1] Whenever an employee . . . executes and delivers to his employer an instrument in writing whereby such employer is directed to deduct a sum . . . from his wages and to pay the same to a labor organization or union or any other organization of employees as assignee, it shall be the duty of such employer to make such deduction and to pay the same . . . until otherwise directed by the employee. . . . [-3] Any employer . . . who wilfully fails to comply with the duty here imposed shall be guilty of a misdemeanor."

28. 4 Misc. 2d 449, 157 N.Y.S.2d 820 (Ct. Gen. Sess. 1956).

29. Id. at 457, 157 N.Y.S.2d at 828.

30. 331 U.S. 218, 236 (1947).

31. Ibid.

32. State v. Montgomery Ward & Co., 120 Utah 294, 318, 233 P.2d 685, 697 (dissenting opinion), cert. denied, 342 U.S. 869 (1951).

33. Id. at 309, 233 P.2d at 692 (dissenting opinion).

34. In the Matter of Thacher, 10 N.Y.2d 439, 444, — N.E.2d —, —, — N.Y.S.2d —, — (1962).

35. 162 F. Supp. 866, 874 (S.D.N.Y. 1958).

36. 72 Stat. 1002 (1958), 29 U.S.C. §§ 309(a)-(b) (1958).

the field of welfare legislation has not been *totally* pre-empted by section 302. The *Moses* case denied "a broad bestowal of jurisdiction over *all* disputes relating to union welfare funds . . ."[37] while the Welfare and Pension Plans Disclosure Act, in the words of the court of appeals, itself, "permits a State such regulation *as does not conflict* with the federally imposed rules."[38] Thus the issue of partial pre-emption was for the most part left unanswered. The mere lack of a liquidation or dissolution provision, as such, in section 302, plus the "saving clause"[39] in section 309 of the 1959 act, does not mean that there is no conflict between the federal legislation and Article XVI of the Insurance Law.[40]

Section 302 limits payments from the principal or income of employee welfare trusts to specifically defined purposes, one of which was being carried out by respondent.[41] It also provides that these trusts only be administered by groups of employers and employees equally represented. Senator Ball, in introducing section 302, remarked that "unless we make sure that such funds . . . are actually used for the benefit to employees specified in the agreement, there is very grave danger that the funds will be used for . . . purposes not contemplated when they are established. . . ."[42] Once the funds are seized by the Superintendent of Insurance the limitation placed upon them by Congress will of necessity be violated, for what the Superintendent will do is purely speculative.[43] Even if he decided to act in accord with the regulations of section 302 there would still be a federal-state conflict, for, as stated in *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, "the power to decide a matter can hardly be made dependent on the way it is

37. In the Matter of Thacher, 10 N.Y.2d 439, 443, — N.E.2d —, —, — N.Y.S.2d —, — (1962). (Emphasis added.)

38. Id. at 444, — N.E.2d at —, — N.Y.S.2d at —.

39. Subsection b of § 309 adds a provision that the Disclosure Act does not exempt anyone from any liability or duty provided by any law "of any State affecting the operation or administration of employee welfare or pension benefit plans, or in any manner to authorize the operation or administration of any such plan contrary to any such law."

40. Attempting to prove the validity of article XVI, the court appears to be arguing in reverse. In support of the contention that due to the absence of a liquidation provision in § 302 there is no federal-state conflict, it cites § 309 of the Disclosure Act, which the court itself admits only holds valid such state legislation in which there is no conflict. See note 38 supra.

41. The assets of the trust were devoted solely to the payment of premiums for life, medical, surgical, and hospitalization insurance for eligible employees and their families and dependents. See Paramount Plastering, Inc. v. Local 2, Operative Plasterers & Cement Masons Int'l Ass'n, 195 F. Supp. 287, 298 (S.D. Cal. 1961), where the court held that Congress in the Taft-Hartley Act, including the 1959 amendments, adopted a more restrictive approach to labor-management relations. "This they expressed by proscribing certain practices . . . and permitting joint trust funds for certain purposes only." Although labor and management can legally associate for various purposes under state law, "they must accept the federal restriction of these purposes, if they seek to apply them to collective bargaining agreements, which come under the exclusive jurisdiction of federal law."

42. 93 Cong. Rec. 4678 (1947).

43. Article XVI of the Insurance Law provides for the liquidation of the fund but there are no express provisions which delineate the manner of the distribution of the assets.

decided."[44] Also the very fact that the Superintendent must oust the trustees and substitute his own administrative discretion in the dispensing of the fund would appear to be contrary to the congressional intent.

Section 309 of the Disclosure Act which permits the states to enact legislation regarding welfare funds, is simply the normal "saving clause" employed by Congress in numerous statutes where it does not intend to totally pre-empt the field. The fact, however, that Congress has left to the states "a large measure of regulatory power over these insurance funds"[45] does not mean that such regulations may in any way conflict with the federal statute. As the legislative history of section 302 reveals, "welfare plans and funds . . . administered jointly . . . resulting from collective bargaining agreements . . . might well be dealt a disastrous blow by arbitrary [state] legislation."[46] Also it should be noted that the presence of the "saving clause" in the Disclosure Act and the absence of it in Section 302 of the Taft-Hartley Act is persuasive, if anything, of the fact that the congressional intent with respect to the latter was more restrictive.[47]

Finally, the essence of the court's reasoning in the instant case is illustrated by its treatment of *Local 24, Teamsters Union v. Oliver*.[48] In that case the Supreme Court held that since the fixing of wages was within the scope of collective bargaining required by federal law, no state antitrust statute could be applied to prevent the carrying out of the collective bargaining agreement.[49] The present court distinguished this decision simply by pointing out that the State Insurance Deparment is not preventing the "carrying out" of a welfare fund agreement established pursuant to a collective bargaining contract, rather it is exercising its power of liquidation, a subject not mentioned in the federal act.[50] It should be noted, however, that the subject of antitrust or

44. 330 U.S. 767, 775 (1947).

45. In the Matter of Thacher, 10 N.Y.2d 439, 444, — N.E.2d —, —, — N.Y.S.2d —, — (1962).

46. 1 Legislative History of the Labor Management Relations Act, 1947, p. 485 (Senate Minority Report, No. 105, pt. 2, on S. 1126).

47. However, it might be argued that the overall purpose of § 302 is penal in nature and that Congress, as an afterthought, carved out certain exceptions so that all payments made by employers to employee representatives would not be unlawful. Certainly, this does not manifest an intent to totally pre-empt the field of welfare fund legislation.

48. 358 U.S. 283 (1959). This was an action by a union member-motor vehicle owner to restrain the union and common carriers from carrying out a collective bargaining agreement provision regulating the minimum rental and other terms of a lease under which the lessor-drivers operated their motor vehicles in the business of the lessee-common carriers.

49. Id. at 296. Compare Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949), where the Court upheld the application of a Missouri antitrust statute to a labor union which for the purpose of forcing plaintiff into a combination which had the concerted goal of preventing the sale of ice to non-union peddlers, picketed his cold storage warehouse. This is an area covered by federal law but there was no federal-state conflict since "the Missouri policy against restraints of trade . . . is in most respects the same as that which the Federal Government has followed for more than half a century." Id. at 502.

50. In the Matter of Thacher, 10 N.Y.2d 439, 445, — N.E.2d —, —, — N.Y.S.2d —, — (1962).

restraint of trade was not mentioned in the federal statutes[51] involved in the *Oliver* case. There, the Supreme Court, realizing that the enforcement of the Ohio law "would wholly defeat the full realization of the congressional purpose . . ."[52] resorted to the logic of partial pre-emption and refused to apply the conflicting state statute. The lack of semantic repugnancy, *i.e.*, antitrust-labor, "carry-out"-liquidate, did not prevent the Court from recognizing the basic antithesis between the two statutes involved.[53]

Thus in the present decision, albeit all the arguments advanced by the court may be valid, only one, namely, the omission of an explicit liquidation clause in section 302, treats the issue of partial pre-emption. The question of law decided, however, due to the number and size of welfare funds, is important. Hence a determination as to the validity of the application of Article XVI of the Insurance Law in the instant case should be based upon firm principles of policy and purpose. It is submitted that the negative judicial induction of the instant court is not sufficient to justify its decision in a case where article XVI is arguably within the area pre-empted.

**Negligence—Burden of Proving Negligence in Non-Trespass Blasting Cases Lightened.**—Plaintiff-homeowners brought negligence actions against defendant-builder, for damages to their residences caused by concussion resulting from defendant's blasting. Upon trial in the Westchester County Court there was introduced as evidence the testimony of an expert that excessive explosives had been used. Plaintiffs testified as to the noise and effects of the blasting. Defendant's officer testified that no records were kept of the time and place of blasting, or of the dynamite or material used. A verdict in favor of plaintiffs was set aside for failure to prove negligence and a new trial ordered. The appellate division agreed with the trial court that no negligence had been proved and dismissed the complaints.[1] Noting that the question of absolute liability for concussion damage was not properly before it, the court of appeals found that prima facie proof of negligence had been shown, reversed the appellate division's dismissal of the complaints, and ordered reinstatement of the jury verdict. *Schlansky v. Augustus V. Riegel, Inc.*, 9 N.Y.2d 493, 174 N.E.2d 730, 215 N.Y.S.2d 52 (1961).

51. Labor-Management Relations Act of 1947, §§ 7-8, 61 Stat. 140, 29 U.S.C. §§ 157-58 (1958) (Supp. II, 1959-1960).

52. Local 24, Teamsters Union v. Oliver, 358 U.S. 283, 295-96 (1959).

53. However, it might be argued that in the Oliver case the state statute declared unlawful a union agreement valid under federal law, while in the instant case the court did not hold the welfare fund agreement violated the state law but merely that there no longer was a fund to which the federal act could apply. This manifests a circuity of reasoning: If § 302 does not apply to a fund which is the subject of a liquidation proceeding then there is no federal-state conflict and the application of article XVI is justified. But this presupposes that state liquidation itself is permissible and that the purpose and policy of § 302 will not be defeated by it—the very fact which the court must prove.

1. Schlansky v. Augustus V. Riegel, Inc., 11 App. Div. 2d 787, 205 N.Y.S.2d 154 (2d Dep't 1960) (memorandum decision).

New York has long found, with almost all American jurisdictions,[2] absolute liability in trespass where injury is caused by debris from blasting[3] whether the injury is to property[4] or person.[5] Where the injury was caused by the concussion effect of the blasting without any physical contact, a minority of states has required proof of negligence.[6] These latter courts require a showing of negligence because of the early common-law distinction between trespass and case which considered the injury to be consequential. The vast majority of states, however, have found absolute liability in concussion cases, rejecting this distinction as a "marriage of procedural technicality with scientific ignorance. . . ."[7] Liability for concussion effects without trespass has also been premised upon the theory of nuisance.[8] In concussion cases New York has long followed the minority view. In the leading New York case of *Booth v. Rome, W. & O.T.R.R.*,[9] decided in 1893, plaintiff-homeowner brought a negligence action against defendant-railroad for damages for concussion-caused injury to her property incurred during defendant's construction of a roadbed in the city of Rochester. The trial court ruled that an owner, in excavating his land by blasting, did so at his peril and was liable for any damage caused to adjacent property regardless of negligence.[10] The court of appeals held that, since no negligence had been shown, plaintiff had no cause of action, reasoning that, although such an owner had a duty of care to avoid unnecessary harm to his

2. Prosser, Selected Topics on the Law of Torts 160 (1954) mentions the only case found to the contrary, Klepsch v. Donald, 4 Wash. 436, 30 Pac. 991 (1892), where a rock was thrown horizontally 940 to 1200 feet, killing plaintiff's husband.

3. Hay v. The Cohoes Co., 2 N.Y. 159 (1849). Defendant corporation, while blasting a canal on its own land, cast rocks damaging plaintiff's house. The court stated: "The use of land by the proprietor is not therefore an absolute right, but qualified and limited by the higher right of others to the lawful possession of their property. To this possession the law prohibits all direct injury, without regard to its extent or the motives of the aggressor." Id. at 161.

4. Sullivan v. Dunham, 161 N.Y. 290, 55 N.E. 923 (1900).

5. St. Peter v. Denison, 58 N.Y. 416 (1874). Defendant-blaster cast frozen earth upon the land of another and injured plaintiff. The court said: "It follows, then, that the defendant having no right to invade the premises, which, for the purposes of this case, were the possession of the plaintiff, it matters not whether and no [sic] he made his invasion without negligence." Id. at 423.

6. See Prosser, Selected Topics on the Law of Torts 161 n.175 (1954) for a list of states.

7. Id. at 161.

8. In Dixon v. New York Trap Rock Corp., 293 N.Y. 509, 58 N.E.2d 517 (1944), plaintiff's house was damaged by vibration from blasting conducted at defendant's neighboring rock quarry. The blasting was a customary operation. The court held that proof of negligence was not required where the blasting was not a temporary act and where it was not making an improvement to defendant's land. The court stated the fundamental principle: "'the safety of property generally is superior in right to a particular use of a single piece of property by its owner. . . .'" There is an exception to this rule in the case of a temporary act adapting land to a lawful use. In such a case proof of negligence is required. Id. at 514, 58 N.E.2d at 518.

9. 140 N.Y. 267, 35 N.E. 592 (1893).

10. Id. at 278, 35 N.E. at 595.

neighbor, yet he had the right to improve his land by any necessary and usual means.[11] The decision's rationale was rooted in the prevailing building conditions. The court gave as an example New York City, where, shortly before the turn of the century, construction activity had greatly increased, and, since the upper part of Manhattan Island is almost solid rock, excavation by blasting was a practical necessity. Relatively little of modern blasting technique was known in that day and to hold a blaster absolutely liable for concussion damage would have worked a hardship upon him and impeded the growth of the city. The court also indicated that one who had himself blasted to excavate his land should not, by the mere fact of being first in time in the area, be able to prevent his late-coming neighbor from excavating by blasting just as the complainant had himself done to improve his own land.[12] The court said that

> the test of the permissible use of one's own land is not whether the use or the act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy.[13]

The rule of *Booth* had until now been followed in New York without question, and the recurring problem which beset the plaintiff was the difficulty involved in establishing prima facie proof of negligence. In *Holland House Co. v. Baird*,[14] where the vault of plaintiff's building was allegedly damaged by concussions from defendant's nearby trench excavation, three witnesses, who had been in the vault, testified as to the sounds and shocks of blasting and described the damage. A civil engineer, who had not examined the blast site and knew nothing of the quality of the rock blasted, testified as to how blasting should be done under assumed circumstances. The court refused to accept the testimony of the engineer as sound proof of negligence because he did not know the facts of the case and, lacking evidence of the facts on which it was predicated, his answer to plaintiff's hypothetical question was not pertinent.[15] Contrary to *Holland House*, in *Viele v. Mack Paving & Constr. Co.*,[16] an expert

11. Ibid.

12. Ibid.

13. Id. at 277, 35 N.E. at 595 (1893). In Benner v. Atlantic Dredging Co., 134 N.Y. 156, 31 N.E. 328 (1892), decided the year before Booth, a government contractor blasting at Hell Gate in New York harbor damaged plaintiff's house by concussions. Proof of negligence was held necessary, the court stating, "one cannot confine the vibration of the earth or air within enclosed limits, and hence it must follow that if in any given case they are rightfully caused, their extension to their ultimate and natural limits cannot be unlawful, and the consequential injury, if any, must be remediless." Id. at 162, 31 N.E. at 330.

14. 169 N.Y. 136, 62 N.E. 149 (1901).

15. Proof was required as to the width and nature of the trench excavation, its distance from the wall of the vault, the quality of the soil in the excavation, the quality of the construction of the vault, and that the blasting was unnecessarily violent or that its violence was externally manifested on the street. Id. at 141-42, 62 N.E. at 151.

16. 144 App. Div. 694, 129 N.Y. Supp. 604 (2d Dep't 1911). The same result was

who had actually inspected the work from time to time testified as to how, in his opinion, the blasting could have been done without damage to the plaintiff's property. The expert, in the *Viele* case, also testified that he had suggested the proper method to defendant's foreman. The court held that even this did not establish a prima facie case and indicated that the plaintiff should have shown that the expert's suggested method would have avoided damage by reason of lessened vibration and concussion, that the method was practical, and that defendant did not adopt it. In the more recent case of *Shemin v. City of New York*,[17] plaintiff's expert witness was not present at the time of blasting and drew his conclusion of the use of excessive explosives from an examination of the damage to plaintiff's property. Again the court found no proof of negligence.[18]

Thus New York has required the establishment of a factual basis from which an inference of negligence might be drawn and upon which an expert's opinion might be based. *Kaninsky v. Purcell & Gilfeather, Inc.*,[19] in dictum, stated an exception to this rule: "[W]here the testimony of the results and surrounding circumstances of a blast is so strong that, under ordinary circumstances, such a result could not have occurred unless the blasting was negligently performed, a prima facie case of negligence is made out."[20] In *Brown v. Rockefeller Center, Inc.*,[21] a case in which neither the appellate division[22] nor the court of appeals wrote an opinion, plaintiff-customer of a beauty shop located one hundred feet from the blasting site was injured by a falling shelf immediately following an explosion. Plaintiff's expert witness testified that in his opinion excessive explosives were used. The court of appeals affirmed a verdict for plaintiff. With the possible exception of *Brown*, New York had consistently ruled that mere proof of damage buttressed by an expert's opinion that an excessive explosive charge had been used, absent any evidence of the method of blasting used and of the quality and type of the explosive charge and rock blasted, was insufficient to establish a prima facie case of negligence.

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reached in 150 App. Div. 839, 135 N.Y. Supp. 147 (2d Dep't 1912) after a new trial was granted.

17. 6 App. Div. 2d 668, 180 N.Y.S.2d 360 (1st Dep't 1958).

18. The court criticized the plaintiff for not showing that the quantity of dynamite in any one hole in a series of detonations was excessive under the circumstances; how many sticks of dynamite were used per hole; that the plaintiff's damage was related to those blasts in which more than six sticks of dynamite were used; or that the use of that quantity was excessive under the surrounding physical circumstances. Id. at 671-72, 180 N.Y.S.2d at 363.

19. 158 N.Y. Supp. 165 (App. T. 1916). In Interborough Rapid Transit Co. v. Williams, 168 N.Y. Supp. 688 (App. T. 1918), an excavator exploded several blasts, one of which knocked a hole in a subway wall, threw an 18 by 20 inch rock through the wall, and shook loose tile and plaster from the wall. Disregarding the element of trespass the court stated "that there was a question of fact which should have been presented to the jury, namely, whether the defendant exercised the degree of care measured by the danger to prevent or mitigate the injury." 168 N.Y. Supp. at 689.

20. 158 N.Y. Supp. at 166.

21. 289 N.Y. 729, 46 N.E.2d 348 (1942) (per curiam).

22. 264 App. Div. 750, 36 N.Y.S.2d 417 (1st Dep't 1942) (memorandum decision).

In the present case, Chief Judge Desmond, writing for the majority, found that a prima facie case of negligence had been established by a showing of injury to plaintiff's property, and the testimony of an expert, who had visited the scene, that excessive explosives had been used. The court also noted the fact that an officer of defendant had testified that no records were kept regarding the blasting. Coupling this testimony with the evidence of the damage and noise of the explosions it found "some basis for the finding of negligence."[23] Nevertheless, the court held that *Brown*, where there was no mention of defendant's failure to produce blasting records, was direct authority for the instant holding.

Judge Van Voorhis, concurring in the result,[24] criticized the majority's view that evidence of serious damage in itself furnished a basis for the expert's testimony that blasting was excessive. He found this at odds with the New York precedents. *Brown*, he reasoned, came within the rule which required a factual basis for an inference of negligence since there the damage resulted from a blast of such great force as to provide in itself the basis for an inference of negligence through the use of excessive explosives.[25] The concurring opinion reaffirmed the *Booth* rule and was critical of the majority's dictum which approved a rule of absolute liability for all blasting cases.[26] Judge Van Voorhis centered his concurrence solely on the fact that it was clear from the defendant's failure to keep records of the blasting that he sought to escape liability.[27]

It is significant that, in the eighteen years prior to the present case, *Brown v. Rockefeller Center, Inc.* has never been cited. It is valid to conclude, then, that in reality, if not technically so, the court of appeals here has modified the evidence requirement for establishing a prima facie cause of action in negligence in non-trespass cases involving damage resulting from blasting. Plaintiff's burden of proof has been considerably lightened. Indeed the rule now almost borders on the *res ipsa loquitur* doctrine. It is true that the bare fact that the injury occurred does not create an inference of negligence, and since negligence must be shown, a true *res ipsa loquitur* situation is not present. Now, however, proof of an injury joined with the opinion testimony of an expert witness that excessive explosives were used, is proof of negligence and the burden of going forward is shifted to the defendant. Perhaps of more significance is Chief Judge Desmond's comments on the New York precedents which, in the absence of proof of negligence, deny recovery for concussion damage in a non-trespass case:

> Were the question properly before us we would have to decide whether the present New York rule should be modified so as to conform to the more widely (indeed almost universally) approved doctrine that a blaster is absolutely liable for any damages he causes, with or without trespass. . . . But this record does not raise the

23. 9 N.Y.2d at 498, 174 N.E.2d at 732, 215 N.Y.S.2d at 55.
24. Id. at 499, 174 N.E.2d at 733, 215 N.Y.S.2d at 56.
25. Id. at 502, 174 N.E.2d at 735, 215 N.Y.S.2d at 58.
26. Id. at 500, 174 N.E.2d at 733, 215 N.Y.S.2d at 56.
27. Id. at 503, 174 N.E.2d at 735, 215 N.Y.S.2d at 59

question. Each of these suits was sued, tried and given by the court to the jury (without objection) on the theory that proof of negligence was necessary for recovery. Such became the law of the case. . . .[28]

One might infer from these remarks that a majority of the present court of appeals might be inclined to overrule *Booth* in favor of a rule of absolute liability. The court in recent years has followed a distinctly liberal trend in extending tort liability.[29] Will this open the often feared "floodgates" of litigation? Possibly so, but if in fact modern blasting methods can control the effects of blasting to a very high degree, then the instant decision may well cause blasters to adhere more closely to the duty of care owed[30] to neighboring property owners and the result might be less litigation simply because there are fewer instances of injury resulting from blasting operations.

**Taxation—Employer's Voluntary Payment to Employee's Widow Not Includable in Gross Income.**—Plaintiff, widow of a corporate officer who died in June, 1955, was, by resolution of the corporation's board of directors, granted an amount equal to one year's salary of the deceased. The payments, made over a three year period, were entered on the corporate books as "Administrative Expenses" under the caption "Payment to Widows of Former Employees" and were deducted by the corporation as ordinary business expenses for income tax purposes.[1] Plaintiff reported the payments as income and, after a deduction of $5,000 pursuant to Section 101(b) of the Internal Revenue Code of 1954,[2] paid the income tax due thereon. Thereafter plaintiff

28. Id. at 496-97, 174 N.E.2d at 731-32, 215 N.Y.S.2d at 53-54.

29. The triple-play combination of Berg to Becker to Bing has resulted in applying the doctrine of respondeat superior to hospitals just as to any other employer. Berg v. New York Soc'y for Relief of the Crippled, 1 N.Y.2d 499, 136 N.E.2d 523, 154 N.Y.S.2d 455 (1956); Becker v. City of New York, 2 N.Y.2d 226, 140 N.E.2d 262, 159 N.Y.S.2d 174 (1957); Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957). The Ferrara "cancerophobia" case was the first case permitting recovery against an original tortfeasor for purely mental suffering arising from information the plaintiff had received from a dermatologist to whom she had gone for treatment of her original injury. Ferrara v. Galluchio, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958). The so-called "fright" doctrine requiring, generally, actual impact between plaintiff and defendant was overruled last year. Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961), 30 Fordham L. Rev. 199.

30. "The defendant could not conduct the operation of blasting on its own premises, from which injury might be apprehended to the property of his neighbor, without the most cautious regard for his neighbor's rights." Booth v. Rome, W. & O.T.R.R., 140 N.Y. at 273, 35 N.E. at 593.

1. The plaintiff's husband at the time of his death had been in the employ of the corporation for over 40 years. 195 F. Supp. 786 (S.D.N.Y. 1961).

2. Section 101: "Certain death benefits . . . (b) Employees' death benefits. (1) General rule. Gross income does not include amounts received (whether in a single sum or otherwise) by the beneficiaries or the estate of an employee, if such amounts are paid by or on behalf of an employer and are paid by reason of the death of the employee. (2) Special

filed a claim for refund, contending that the payments were gifts and thus excludable from gross income. Cross motions for summary judgment were filed in the United States District Court for the Southern District of New York. If the payments were gifts under Section 102(a) of the Internal Revenue Code of 1954, they were completely excludable from gross income and not merely excludable up to $5,000 under section 101(b), but, since there was a material question of fact as to whether the payments were in fact gifts, the motions for summary judgment were denied. *Wilner v. United States*, 195 F. Supp. 786 (S.D.N.Y. 1961).

The Internal Revenue Code of 1939 excluded gifts from gross income[3] but included amounts received by an employee's survivor from an employer obligated by contract to make such payments upon the death of the employee.[4] The first $5,000 of such payments, however, were excluded from gross income.[5] All contractual payments in excess of $5,000 were includible in gross income[6] but no mention was made of an employer's payment made by reason of the death of the employee to a widow where there was no contract. Where these payments qualified as gifts they were not included in gross income.[7] Where, however, they were not held to be gifts, but were found to have been paid as compensation or under moral obligation, they were fully includable in gross income.[8] The Internal Revenue Service adopted the position that it would no longer litigate under the Internal Revenue Code of 1939 where voluntary payments were made to widows unless there was clear evidence that such payments were intended as other than gifts.[9]

The 1954 Code left unchanged the exclusion of gifts from gross income,[10] but the reference in section 22(b)(1) of the 1939 Code[11] to a contractual obligation was omitted. Rather the 1954 Code allowed a $5,000 exclusion from gross income for amounts received by a beneficiary from an employer by reason of the death of an employee.[12] Whether a voluntary payment to a widow might qualify as a gift under section 102(a) of the 1954 Code, or as

rules for paragraph (1). (A) $5,000 limitation. The aggregate amounts excludable under paragraph (1) with respect to the death of any employee shall not exceed $5,000."

3. Int. Rev. Code of 1939, § 22(b)(3), as amended, ch. 619, 56 Stat. 809 (1942).

4. Int. Rev. Code of 1939, § 22(b)(1), as amended, ch. 521, 65 Stat. 483 (1951).

5. Ibid.

6. Flarsheim v. United States, 62 F. Supp. 740 (E.D. Mo. 1945), aff'd, 156 F.2d 105 (8th Cir. 1946).

7. Rodner v. United States, 149 F. Supp. 233 (S.D.N.Y. 1957).

8. Simpson v. United States, 261 F.2d 497 (7th Cir. 1958), cert. denied, 359 U.S. 944 (1959). A corporation paid plaintiff-widow a sum equal to nine months salary of the deceased employee pursuant to an established plan. The court held the payment was not a gift; a legal obligation to pay the widow was not necessary to make it taxable so long as there was a moral obligation based on the corporation's established plan.

9. Rev. Rul. 58-613, 1958-2 Cum. Bull. 914. The reason given was the number of adverse court decisions.

10. Int. Rev. Code of 1954, § 102(a).

11. Int. Rev. Code of 1939, § 22(b)(1), as amended, ch. 521, 65 Stat. 483 (1951).

12. Int. Rev. Code of 1954, § 101(b)(1)-(2)(A).

taxable income in any amount over $5,000 under section 101(b), was first considered in *Rodner v. United States*.[13] There was, in *Rodner*, evidence that the payment was made out of respect for the deceased and in consideration of the length, character, and loyalty of his services. The corporation deducted its payment from gross income as an expense for business management, and not as wages or salaries.[14] Plaintiff reported the payment as income, paid the tax, and sued for a refund, claiming the payment a gift. The court held under the 1939 Code that, since the payment was not made to the employee or his estate, there was no presumption that it was compensation; that, since the widow had no legal or moral right to it, it was a gift, excludable from gross income. The court stated in dictum, however, that under the 1954 Code, which was enacted while the action had been pending, the general language exempting gifts was controlled by the more specific language of section 101 (b) and thus that gifts in the form of death benefits would be taxable as gross income to the extent that they exceeded $5,000.[15] In *Reed v. United States*,[16] however, the plaintiff widow of a corporate officer received from the corporation a sum of money pursuant to a resolution of the corporation's board of directors "as a material expression of sympathy and of kindness . . . and, motivated by a deep sense of appreciation and recognition of the past services of William M. Reed. . . ."[17] The corporation had made similar payments in like circumstances in varying amounts. The payment was held to qualify as a gift under Section 102 (a) of the Internal Revenue Code of 1954 and as such was not includible in gross income; section 101 (b) did not control. The district court decision of *Cowan v. United States*[18] reached the same conclusion on similar facts. The Internal

13. 149 F. Supp. 233 (S.D.N.Y. 1957).

14. From 1946 to 1953 the corporation made similar payments to widows of eight other deceased executives, only one of whom was a corporate officer as was plaintiff's spouse. Id. at 234-35.

15. Id. at 237. Bounds v. United States, 262 F.2d 876 (4th Cir. 1958), involving the 1939 Code followed. There the plaintiff-widow of a corporate officer received monies by resolution of the corporation's board of directors, "as recognition in part of the great contribution made by George C. Bounds to the success of the business of the Corporation, and, as additional compensation for services rendered. . . ." Id. at 879. On its books, the corporation recorded the payment as "compensation to officer's widow" and in its income tax return claimed it as a deduction for business expenses. The corporation had never before made any such payments to an estate or members of a deceased employee's family. The court found the payment voluntary in every sense, with no ensuing benefit to the corporation, made with apparent donative intent, and held it a gift excludable from gross income. Bounds indicated in dictum that under the 1954 Code such payments would be nontaxable only to the extent of the first $5,000. "[T]he law has now been amended, and the problem with which we are here concerned cannot arise in the future. The new law rejects the tests which have been found unsatisfactory in practice and unequivocally makes nontaxable payments to the employee's estate or family, made by reason of his death; but it imposes a $5,000.00 limitation." Id. at 878-79 n.2.

16. 177 F. Supp. 205 (W.D. Ky. 1959), aff'd mem., 277 F.2d 456 (6th Cir. 1960).

17. Id. at 206.

18. 191 F. Supp. 703 (N.D. Ga. 1960). Upon the death of plaintiff's husband, a cor-

Revenue Service, however, has indicated that it will not follow *Reed*.[19]

The present court first considered whether the payment to the widow of the deceased corporate officer, if a gift, would be controlled by section 101(b). An affirmative answer would have been dispositive of the entire case.[20] Judge Weinfeld pointed out, however, that section 102(a) excluded gifts from gross income without limitation and that gifts were neither mentioned nor given particular attention in section 101(b). The court further pointed out that it was not the intent of Congress to make payments, which were excludable from gross income as gifts, fully taxable after the first $5,000.[21] Rather the court found that Congress merely intended to make nongratuitous payments, not paid under a contract, eligible for the same $5,000 exemption (instead of being fully taxable as they were under the 1939 Code) as similar non-gift payments paid under contract. Thus, payments which qualify as gifts under section 102(a) would be fully excludable from gross income. The court stated that all the factors giving rise to payment[22] must be considered in relation to the ultimate issue, *i.e.*, the intent of the donor.

The Senate Committee on Finance on the Proposed Internal Revenue Code of 1954 stated that "the exclusion is . . . made available regardless of whether the employer has a contractual obligation to pay the death benefits."[23] The *Rodner* court found in this language an indication that the new provision "extends a boon instead of a burden to the recipients of gratuitous death benefits . . ."[24] and that the Senate Committee must have thought that gifts in the form of death benefits were fully taxable if they were not paid under a

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porate officer, the board of directors, which noted the bereavement of the plaintiff widow and the love and sympathy extended to her on the corporation's behalf, voted to pay her an amount equivalent to one year's salary of the deceased ($30,000), $5,000 as a death benefit, and $25,000 in recognition of the services of the deceased. The payment was held to be a gift completely excludable from gross income.

19. Rev. Rul. 60-326, 1960-2 Cum. Bull. 32.

20. If the court found that § 102(a) was controlled by § 101(b), the fact that the payment was a gift would have had no effect. 195 F. Supp. at 787-88.

21. The Government argued that in omitting the reference to the contractual obligation which was contained in § 22(b)(1) of the 1939 Code pertaining to death benefits, the 1954 Code manifests the congressional intent to treat all such payments as taxable after the first $5,000, whether they qualify as gifts or not. Id. at 788.

22. "[T]he absence of any obligation upon the corporation to make the payment; the voluntariness of the payments; the adequacy of the compensation paid to decedent for his services; the direct payment of the monies to the widow and not to his estate; . . . that no services were rendered by the widow . . . the identity in amount between the payment . . . by the Board of Directors without stockholders' approval; the deduction of the payment as a corporate business expense; and finally, that the resolution noted that for many years it had been the practice of the corporation to make payments to the widows of deceased officers and employees measured by the last year's compensation of the deceased." Id. at 790-91.

23. S. Rep. No. 1622, 83d Cong., 2d Sess., 14 (1954).

24. 149 F. Supp. at 237.

contract. Actually, committee reports[25] and hearings[26] in no way indicated a failure to realize that death benefit payments, if gifts, would be fully excludable from gross income.[27] Hence the *Rodner* dictum was founded upon a misinterpretation of the congressional intention and is an invalid basis for the Internal Revenue Service ruling[28] that it will not follow the *Reed* decision. The present case only makes more unreasonable the Internal Revenue Service position.

**Taxation—Federal Tax Lien—Problem of Circuity of Lien at Foreclosure.** —The plaintiff, a first mortgagee, commenced a foreclosure action pursuant to Section 1087 of the New York Civil Practice Act.[1] The defendants, besides the mortgagors, included a second mortgagee, several judgment creditors, and the United States Government. The Government's rights were embodied in a federal tax lien which had been filed subsequent to the recording of the first mortgage but prior to the accrual of various local real estate taxes. Plaintiff,

25. Note 23 supra; H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954).

26. Hearings Before the House Committee on Ways and Means on General Revenue Revision, 83d Cong., 1st Sess., 363-82 (1949).

27. Testifying before the Committee, Mr. Clifton Phelan of the Michigan Bell Telephone Co. advised that the same principles applied in all areas of Bell's direct payment plan, sickness, death, and on the job accident benefits, and the principles of using the direct payment method, rather than using a commercial insurance type payment plan, had to do with attracting good people to the company, having a low labor turnover, and providing a better and cheaper telephone service. Thus it is evident that the Committee and those testifying before it were discussing payments which would not qualify as gifts; payments which were known to be expected beforehand, and which would be used to attract good personnel. Hearings, supra note 26, at 370-71. "These payments have all of the characteristics of a death or insurance payment; however, under section 22(b) of the Internal Revenue Code, such payments are taxable to the recipient, unless the payment is made pursuant to a firm contract as stated above." Id. at 374. "These payments have all the characteristics of a death or insurance payment." Id. at 376.

28. Rev. Rul. 60-326, 1960-2 Cum. Bull. 32. It is to be noted that this is only one problem revolving around the center of confusion, i.e., the lack of a clear and workable definition or test of a "gift." This dilemma is omnipresent where there is some business connection between the giver and the receiver of the payment, whether it is in the form of a death benefit or not, be it money or something else. See Note, 36 N.Y.U.L. Rev. 693 (1961). The United States Supreme Court, in Commissioner v. Duberstein, 363 U.S. 278 (1960), refused to give a test or definition of a "gift"; instead the Court held that the mere lack of a contract did not mean that there was a gift. All the factors surrounding the payment must be considered and "primary weight in this area must be given to the conclusions of the trier of fact." Id. at 289. Compare United States v. Kasynski, 284 F.2d 143 (10th Cir. 1960), with Estate of Pierpont, 35 T.C. 65 (1960).

1. N.Y. Civ. Prac. Act § 1087 provides in part: "Where a judgment rendered in an action to foreclose a mortgage upon real property directs a sale of the real property, the officer making the sale must pay out of the proceeds, unless the judgment otherwise directs, all taxes, assessments and water rates which are liens upon the property sold. . . . The sums necessary to make those payments and redemptions are deemed expenses of the sale. . . ."

in his complaint, requested a judgment of sale for the sum of the first mortgage, amounts advanced for the payment of local taxes, and the expenses of the sale. The United States excepted, by way of an answer, and pleaded for the discharge of its lien prior to the payment of subsequently accrued local taxes. Plaintiff moved for summary judgment, subject only to the payment of local real estate taxes. The county court granted the motion.[2] On appeal, the appellate division reversed insofar as the judgment affected the tax lien of the United States.[3]

Remanded to the trial term, that court applied Sections 1082 and 1087 of the Civil Practice Act which direct the payment by the referee of local taxes and assessments from the proceeds of the sale as "expenses of the sale" itself,[4] and ordered the same distribution it had granted in its prior order. On appeal, once again, the appellate division modified the lower court's decree, holding that, while foreclosure proceedings were to be governed by *state procedure*, the procedural process was in conflict with federal law, and therefore, was pre-empted when it attempted to treat subsequently accrued local taxes in a more preferential manner than a federal tax lien. Plaintiff-appellant appealed to the court of appeals which, in turn, reversed the appellate division and reinstated the county court's order. The court held that a federal tax lien was not entitled to priority over a subsequent local tax lien since the vying liens were not "comparable charges" on the real estate, and because mortgagees have an absolute preference over a federal tax lien. *Buffalo Sav. Bank v. Victory*, 13 App. Div. 2d 207, 215 N.Y.S.2d 189 (4th Dep't 1961) (per curiam), *rev'd*, — N.Y.2d —, — N.E.2d —, — N.Y.S.2d — (1962).

The status and priority required to be given a federal tax lien in relation to private and local statutory lienors are matters which have evolved through a complicated and confusing legislative and judicial process.[5] Shortly after the Civil War, Congress enacted statutes creating a statutory lien for unpaid federal taxes.[6] Today, Section 6321 of the Internal Revenue Code serves

2. Buffalo Sav. Bank v. Victory, 17 Misc. 2d 564, 186 N.Y.S.2d 960 (Erie County Ct. 1959).

3. Buffalo Sav. Bank v. Victory, 11 App. Div. 2d 158, 202 N.Y.S.2d 70 (4th Dep't 1960) (per curiam).

4. N.Y. Civ. Prac. Act § 1082 provides in part: "In an action to foreclose a mortgage upon real property . . . it must direct the sale of the property mortgaged or of such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale and the cost of the action. . . ."

5. See in this connection for a critical study, Kennedy, The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien, 63 Yale L.J. 905 (1954); Wolson, Federal Tax Liens—A Study in Confusion and Confiscation, 43 Marq. L. Rev. 180 (1959). See also Cross, Federal Tax Claims: Nature and Effect of the Government's Weapons for Collection, 27 Fordham L. Rev. 1 (1958). For a historical approach, see Anderson, Federal Tax Liens—Their Nature and Priority, 41 Calif. L. Rev. 241 (1953); Plumb, Federal Tax Collection and Lien Problems (pts. 1 & 2), 13 Tax. L. Rev. 247, 459 (1958).

6. See 13 Stat. 470-71 (1865) and 14 Stat. 107 (1866). The lien attached to the property of the taxpayer after demand for the unpaid taxes had been made by the Collector of Internal Revenue. Congress also provided that the lien, for the purpose of priority, should

the same purpose.[7] This provision, while it does not mention priority status, establishes a lien upon the property of a delinquent taxpayer. This lien dates or arises from the time an assessment is made.[8] In effect, an automatic lien attaches to the property of the taxpayer after his failure to comply with the Commissioner's demand,[9] and the lien relates back to the time the assessment was made.[10] Since the Commissioner is not compelled to take any further steps to perfect the Government's lien, a "secret lien" is created—known only to the Internal Revenue Service.[11] To alleviate the harshness of this procedure, Congress enacted section 6323(a), which invalidates the tax lien as against mortgagees, pledgees, purchasers, or judgment creditors until such time as notice of the federal lien has been filed.[12] While this legislation has mitigated some of the more abusive aspects of the "secret lien,"[13] congressional action has halted without the adoption of a concise standard of priority. It has been replaced by an antithetical trend in judicial decisions, opposed to the extension of exemptions from federal preference.

Although the question of federal priority is one to be determined by the federal courts,[14] it was early recognized that federal claims were subordinated in priority to antecedent liens[15] under the maxim, "first in time, first in right."

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revert back to the date that the taxes had become due and payable to the Government. See Anderson, Federal Tax Liens—Their Nature and Priority, 41 Calif. L. Rev. 241 (1953). Later in the same century, an amendment was added changing the priority date of the tax lien to the "time when the assessment-list was received by the collector. . . ." See 20 Stat. 331 (1879).

7. Int. Rev. Code of 1954, § 6321 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 costs 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."

8. Congress has changed the time when the lien becomes effective. Int. Rev. Code of 1954, § 6322 provides: "Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time." Provisions similar to §§ 6321 and 6322 were formerly contained in ch. 852, §§ 3670 and 3671 of the Int. Rev. Code of 1939, 45 Stat. 875. For an explanation of assessment procedure, see Anderson, Federal Tax Liens—Their Nature and Priority, 41 Calif. L. Rev. 241, 242 (1953).

9. See note 7 supra.

10. See note 8 supra.

11. See Citizens Nat'l Trust & Sav. Bank v. United States, 135 F.2d 527 (9th Cir. 1943); United States v. Saslavsky, 160 F. Supp. 883 (S.D.N.Y. 1957). See also Felton, What the Supreme Court Says About the Federal Tax Lien, 37 Taxes 45 (1959).

12. 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. . . ."

13. See United States v. Snyder, 149 U.S. 210 (1893), where an unfiled tax lien was held superior to a subsequent purchaser for value without notice of the lien.

14. See United States v. Acri, 348 U.S. 211, 213 (1955); United States v. Security Trust & Sav. Bank, 340 U.S. 47, 49 (1950); Illinois v. Campbell, 329 U.S. 362, 371 (1946).

15. See Brent v. Bank of Washington, 35 U.S. (10 Pet.) 594 (1836); United States v.

These early cases, which interpreted the nature of the federal priority statute (now embodied in Section 3466 of the Revised Statutes of 1875,[16] providing that debts due to the United States by insolvent persons shall be first satisfied), held that this priority right did not cut off the rights of third parties with antecedent liens.[17]

In *Spokane County v. United States*,[18] however, the Supreme Court applied the "inchoate and general lien"[19] theory to section 3466 cases.[20] Under the "inchoate lien" test, federal priority is superimposed over an antecedent rival lien which has not become "specific and perfected."[21] Thereafter, while the Supreme Court paid lip service to the "first in time, first in right" doctrine (except where the doctrine applied to the federal lien, as in the instant case), no competing antecedent lien passed its cryptic test of "inchoateness."[22] Thus by judicial interpretation, federal priority under section 3466 has become absolute.[23]

For a number of years, the lower courts had held that the tax lien under

Hack, 33 U.S. (8 Pet.) 271 (1834); Conard v. Atlantic Ins. Co., 26 U.S. (1 Pet.) 386 (1828); United States v. Hooe, 7 U.S. (3 Cranch.) 73 (1805); accord, United States v. Guaranty Trust Co., 33 F.2d 533 (8th Cir. 1929). But cf. Thelusson v. Smith, 15 U.S. (2 Wheat.) 396 (1817).

16. Rev. Stat. § 3466 (1875), 31 U.S.C. 191 (1958) establishes a federal priority unlike the § 6321 tax lien. Section 3466 provides in part: "Whenever any person indebted to the United States is insolvent . . . the debts due to the United States shall be first satisfied."

17. See United States v. Hooe, 7 U.S. (3 Cranch.) 73 (1805). See also Cross, Federal Tax Claims: Nature and Effect of the Government's Weapons for Collection, 27 Fordham L. Rev. 1, 2-3 (1958).

18. 279 U.S. 80 (1929).

19. For a review of the Court's approach to this theory, see Cross, Federal Tax Claims: Nature and Effect of the Government's Weapons for Collection, 27 Fordham L. Rev. 1, 5 (1958). It should be noted that the courts have never applied the doctrine of "inchoateness" to the federal tax lien itself. See Ersa, Inc. v. Dudley, 234 F.2d 178 (3d Cir. 1956); United States v. Kings County Iron Works, Inc., 224 F.2d 232 (2d Cir. 1955).

20. In Spokane County v. United States, 279 U.S. 80 (1929), the Court held that federal priority under § 3466 was superior to the local tax lien. Accord, United States v. Waddill, Holland & Flinn, Inc., 323 U.S. 353 (1945); United States v. Texas, 314 U.S. 480 (1941).

21. See Illinois v. Campbell, 329 U.S. 362 (1946). A lien will be deemed inchoate under federal interpretation unless it is definite and precise as to the amount of the lien, the identity of the lienor, and the subject to which the lien attaches. See also United States v. Gilbert Associates, Inc., 345 U.S. 361 (1953); United States v. Knott, 298 U.S. 544 (1936).

22. See 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); United States v. Security Trust & Sav. Bank, 340 U.S. 47 (1950); United States v. Bond, 279 F.2d 837 (4th Cir.), cert. denied, 364 U.S. 895 (1960) (mortgagee's payment of mortgagor's defaulted local taxes); United States v. Hawkins, 228 F.2d 517 (9th Cir. 1955); United States v. White Bear Brewing Co., 227 F.2d 359 (7th Cir. 1955), rev'd per curiam, 350 U.S. 1010 (1956) (mechanic's lien); United States v. Colotta, 224 Miss. 33, 79 So. 2d 474, rev'd per curiam, 350 U.S. 808 (1955) (mechanic's lien unperfected).

23. See Kennedy, The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien, 63 Yale L.J. 905, 908-18 (1954).

section 6321 was not superior to antecedent rival liens and refused to invoke the "inchoate" doctrine.[24] In 1950, the Supreme Court, in reversing this trend, extended its "inchoate" test to cover the federal tax lien under section 6321.[25] In *United States v. Gilbert Associates*,[26] the Court reiterated its position but, since the taxpayer was insolvent as well as delinquent in the payment of his taxes, the Court merely established federal priority on the basis of section 3466, without asserting the section 6321 priority. The possibility, however, that the Supreme Court would never find an antecedent lien specific and perfect when in competition with a federal tax lien, something which developed with respect to section 3466, was negated in *United States v. City of New Britain*.[27] The *New Britain* Court found that certain local taxes had accrued and had become sufficiently "specific and perfected" before the federal tax lien arose.[28] But there the Court was confronted with a more intricate arrangement. While conceding that some state liens, filed *prior* to the attachment of the federal tax lien,[29] were sufficiently "choate" to take precedence over the federal lien, the Court held that *subsequently* accrued state liens, even though allotted a first priority over all other encumbrances by state law, were inferior to previously filed federal liens.[30]

Thus, the *New Britain* decision brings the instant case clearly into focus. The Court in *New Britain* by adhering to the "first in time, first in right" doctrine (since it was applicable to the federal tax lien in that situation),[31] arrived at a circular priority relationship.[32] The Court recognized that the federal tax lien was junior to the prior mortgage covered by section 6323(a), but rejected the state court's reasoning that the federal lien was also inferior to subsequent local taxes because under state law those taxes were superior to the first mortgage.[33]

24. Id. at 924 n.115. Kennedy refers to some thirty cases where the "incheateness" doctrine was never raised as to the federal tax lien.

25. United States v. Security Trust & Sav. Bank, 340 U.S. 47 (1950). The Court was apparently imposing the priority accorded § 3466 on to the tax lien of § 6321.

26. 345 U.S. 361 (1953).

27. 347 U.S. 81 (1954).

28. It has been noted in summary, that the "Supreme Court's election to rest its decision in Gilbert Associates on the 3466 priority [dealing with insolvent debtors of the United States] and not on a 3670 lien [which was the forerunner of section 6321] suggests that the less specific claim created by section 3466 is once again more efficacious than section 3670 . . . ," and after the New Britain decision that "standards of specificity and perfection are more easily met by a competing lien under section 3670 than under 3466." See Kennedy, The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien, 63 Yale L.J. 905, 929 (1954).

29. United States v. City of New Britain, 347 U.S. 81, 84-85 (1954).

30. Id. at 87-88.

31. See notes 15 and 22 supra and accompanying text. The "first in time, first in right" doctrine when applicable against the federal tax lien was nullified by the Supreme Court's reliance on the "inchoate lien" test until the New Britain decision. See also note 27 supra and accompanying text.

32. See United States v. City of New Britain, 347 U.S. 81, 87 (1954).

33. "There is nothing in the language of § 3672 to show that Congress intended antecedent federal tax liens to rank behind any but the specific categories of interests set out therein,

Thus by upholding federal priority over a subsequent state lien, the dilemmatic solution of circuity was achieved. The practical result of the Court's decision was that the first mortgage while inferior under state law to a local tax lien, but superior under federal law to a federal tax lien, was demoted, in effect, to a third priority behind both since state precedence was pre-empted by federal priority.[34]

The instant case presents only a slightly different ramification. Under New York foreclosure procedure, sections 1082 and 1087[35] permit local real estate and water taxes to be treated as "expenses of the sale" of foreclosure. Both the county court and the court of appeals addressing the issue of federal pre-emption over state procedure, with the resulting paradox of the circuity of lien doctrine, reasoned that the *New Britain* decision was distinguishable from the present case inasmuch as federal priority only affected distribution of *surplus proceeds*.[36] Those courts further argued that since *New Britain* had acknowledged that expenses of a foreclosure sale were to be paid before payment of a federal tax lien,[37] and since the Supreme Court had also recognized the necessity of following state foreclosure procedures,[38] Section 1087 of the Civil Practice Act was, therefore, a valid means of avoiding or circumventing the circuity enigma.

This was not the first time that the feasibility of using section 1087 to defeat a prior tax lien had been suggested.[39] In *Stadelman v. Hornell Woodworking*

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and the legislative history lends support to this impression." Id. at 88. See also United States v. Gilbert Associates, 345 U.S. 361, 364 (1953); United States v. Security Trust & Sav. Bank, 340 U.S. 47, 51 (1950). But cf. Brown v. General Laundry Serv., Inc., 139 Conn. 363, 94 A.2d 10 (1952).

34. E.g., Buffalo Sav. Bank v. Victory, 13 App. Div. 2d 207, 210, 215 N.Y.S.2d 189, 192 (4th Dep't 1961) (per curiam). See also Osborne, Mortgages § 221, at 596 (1951).

35. See notes 1 and 4 supra.

36. Buffalo Sav. Bank v. Victory, 26 Misc. 2d 443, 446, 206 N.Y.S.2d 518, 523 (Erie County Ct. 1960). See also United States v. City of New Britain, 347 U.S. 81, 88 (1954), where the Court said, "but as to any funds in excess of the amount necessary to pay the mortgage and judgment creditors, Congress intended to assert the federal lien." The county court in the instant case reasoned that "expenses of the sale" were not funds paid in excess of the amounts due on the mortgage or to the judgment creditors. 26 Misc. 2d at 446, 206 N.Y.S.2d at 522.

37. "[I]t appears that there is a meaningful difference between the Connecticut procedures involved in the New Britain case and the statutory procedural scheme of New York set forth in the Civil Practice Act. . . ." 26 Misc. 2d at 449, 206 N.Y.S.2d at 524. See in this connection, Rikoon v. Two Boro Dress, Inc., 9 Misc. 2d 591, 594, 171 N.Y.S.2d 19, 22 (Sup. Ct. 1957), modified mem., 8 App. Div. 2d 986, 190 N.Y.S.2d 790 (2d Dep't), modified on reargument mem., 9 App. Div. 2d 783, 193 N.Y.S.2d 302 (2d Dep't 1959), appeal denied, 7 N.Y.2d 711 (1960).

38. "[I]t was desirable to adopt as Federal law, State law governing divestiture of Federal tax liens. . . ." 26 Misc. 2d at 448, 206 N.Y.S.2d at 523.

39. To the effect that § 1087 was applicable even toward a federal tax lien, see Kronenberg v. Ellenville Nurseries & Greenhouses, Inc., 22 Misc. 2d 247, 196 N.Y.S.2d 106 (Sup. Ct. 1960); Rikoon v. Two Boro Dress, Inc., 9 Misc. 2d 591, 171 N.Y.S.2d 19 (Sup. Ct. 1957). Contra, Stadelman v. Hornell Woodworking Corp., 172 F. Supp. 156 (W.D.N.Y.

*Corp.*,[40] the same question was before a federal district court. That court, following a long line of federal cases,[41] decided that "New York State cannot impair the standing of federal liens without the consent of Congress."[42] A New York State court in *Dunkirk Trust Co. v. Dunkirk Laundry Co.*,[43] first holding the *New Britain* decision as controlling, reasoned that federal law superseded conflicting New York law when the "relative priority" of federal liens was involved. In *Rikoon v. Two Boro Dress, Inc.*,[44] a lower court, after acknowledging the *New Britain* rule, nonetheless found the procedural device embodied in section 1087 consistent with the latter case. *Rikoon's* recognition of such *state construction*, however, may have been a dictum since its decision was based on an alternate holding.[45] To date, two other departments of the appellate division have passed on the question. The second department, in two recent decisions, realigned itself with the appellate division in the immediate case.[46] The first department, though never squarely presented with the precise issue, has declined to accept the *Rikoon* rationale.[47]

From analogous cases, further doubt can be cast upon the validity of utilizing state procedure to accomplish indirectly what the Supreme Court has said cannot be done directly.[48] These courts, for example, have rejected the doctrine of "relation back"[49] as providing even a favored class under section 6323(a) with a priority over an intervening federal lien.[50] Even if "relation back" is prescribed by state law, the lien will not be deemed choate unless it can satisfy

1958); Dunkirk Trust Co. v. Dunkirk Laundry Co., 17 Misc. 2d 298, 182 N.Y.S.2d 381 (Chautauqua County Ct. 1959).

40. 172 F. Supp. 156 (W.D.N.Y. 1958).

41. See United States v. City of New Britain, 347 U.S. 81 (1954); United States v. Gilbert Associates, 345 U.S. 361 (1953); United States v. Security Trust & Sav. Bank, 340 U.S. 47 (1950); United States v. Lord, 155 F. Supp. 105 (D.N.H. 1957).

42. 172 F. Supp. at 158.

43. 17 Misc. 2d 298, 182 N.Y.S.2d 381 (Chautauqua County Ct. 1959).

44. 9 Misc. 2d 591, 171 N.Y.S.2d 19 (Sup. Ct. 1957).

45. Id. at 595-96, 171 N.Y.S.2d at 22. The court also relied on the doctrine of res judicata to bar the tax claim of the United States. The second department of the appellate division affirmed without opinion, thus leaving questionable, until recently, the authority of the lower court's decision as to the applicability of § 1087. See note 46 infra.

46. See Co-operative Loan & Sav. Soc'y v. McDermott, 14 App. Div. 2d 590, 218 N.Y.S.2d 268 (2d Dep't 1961); First Fed. Sav. & Loan Ass'n v. Lewis, 14 App. Div. 2d 150, 218 N.Y.S.2d 857 (2d Dep't 1961), where the court said the Rikoon case was affirmed solely on the basis of the operation of res judicata.

47. Cf. Metropolitan Life Ins. Co. v. United States, 9 App. Div. 2d 356, 194 N.Y.S.2d 168 (1st Dep't 1959).

48. See note 22 supra.

49. The term, as used here, is to be distinguished from the federal application of "reversion." See note 10 supra and accompanying text. The federal courts have rejected the subordination of federal liens to private and state liens, which under state law relate back in time of priority to some previous occurrence. See notes 50 and 52 infra and accompanying text.

50. See United States v. Bond, 279 F.2d 837 (4th Cir.), cert. denied, 364 U.S. 895 (1960), 30 Fordham L. Rev. 204 (1961).

the federal test of "specificity and perfection."[51] In *United States v. Christensen*,[52] the court stated that "payment of state taxes on mortgaged property by a prior mortgagee after federal tax liens are recorded does not give the mortgagee a lien for such local taxes superior to the appellant's prior tax liens."[53] Furthermore, it has been consistently held that a state's *characterization* of a lien cannot dominate the priorities when the federal government is involved.[54] If this were tolerated any attempt at a uniform application of federal taxes would be frustrated.[55]

It is a rule that federal priority is not to be determined until, under an exclusive state examination, the federal lien attaches to the property or to the property rights of the delinquent taxpayer.[56] The Supreme Court, however, in a decision relied on by the court of appeals to subordinate the federal lien to state procedure, rejected the argument that a federal lien attaching by recordation could be wiped out by foreclosure which, under state law, extinguished the property rights of the mortgagor.[57] That is to say, the Supreme Court favors following state foreclosure procedure as to the divestiture of federal tax liens[58] (at least where a favored class under section 6323(a) is the party foreclosing). Nevertheless, the Court maintains that once the federal tax lien attaches to the property of the taxpayer, it cannot be extinguished because of a subsequent eradication of the taxpayer's interest at foreclosure.

This admonition, limiting the exemption afforded a favored class under section 6323(a), appears to have been overlooked by the court of appeals in interpreting *United States v. Brosnan*.[59] The court, in the case at bar, relied heavily on an "absolute preference" it contended had been granted prior recorded mortgagees by federal law,[60] to justify its elevation of a subsequently accrued local lien to priority over the federal lien. While the *Brosnan* case stands for the proposition that a "favored" mortgagee may resort to state procedure providing for the extinguishment of a federal lien without naming the Government a party to the action, it never sanctioned a state test for federal priority. In fact, the *Brosnan* Court narrowed its ruling, stating: "A fortiori, the 'property' to which

51. See, e.g., United States v. Reese, 131 F.2d 466 (7th Cir. 1942); State v. Woodroof, 253 Ala. 620, 46 So. 2d 553 (1950); United States v. South Carolina, 227 S.C. 187, 87 S.E.2d 577 (1955).

52. 269 F.2d 624 (9th Cir. 1959).

53. Id. at 627.

54. United States v. Acri, 348 U.S. 211 (1955); United States v. Gilbert Associates, 345 U.S. 361 (1953); United States v. Waddill, Holland & Flinn, Inc., 323 U.S. 353 (1945).

55. United States v. Gilbert Associates, supra note 54; accord, United States v. Pelzer, 312 U.S. 399 (1941).

56. See Herrman v. Rogers, 358 U.S. 332 (1959) (per curiam); Rogers v. Calumet Nat'l Bank, 358 U.S. 331 (1959) (per curiam); United States v. Bess, 357 U.S. 861 (1957) (memorandum decision); Fidelity & Deposit Co. v. New York City Housing Authority, 241 F.2d 142, 144 (2d Cir. 1957); Aetna Cas. & Sur. Co. v. United States, 4 N.Y.2d 639, 152 N.E.2d 225, 176 N.Y.S.2d 961 (1958).

57. United States v. Brosnan, 363 U.S. 237 (1960).

58. See note 38 supra.

59. 363 U.S. 237 (1960).

60. This refers to Int. Rev. Code of 1954, § 6323(a).

the federal lien can attach is not diminished by the particular means of enforcement possessed by a competing lienor to whom the federal law concedes priority."[61] Thus even the case which the court of appeals used to support its state procedural dominance theory restricted the absoluteness concept conferred on mortgagee under section 6323(a) by the court.

To substantiate the preference rating granted subsequent local liens, the court of appeals asserted the difference in nature between local and federal liens. The court emphasized the point that local real estate liens attach to "*the property, itself, in its very nature as land . . .*" while the federal tax lien attaches to property "*merely because of an unconnected indebtedness of the owner of the land. . . .*"[62] In reality, the majority of the court was creating a "state inchoateness" doctrine, applicable against federal liens. The federal courts, however, have repeatedly considered federal liens to be perfected whether general or specific in nature,[63] and, the mere fact that the Government's lien was *general* when in competition with a subsequent local lien which was *specific* has been held immaterial to affect the priority relationship between the two.[64] A further argument against state superiority in this area, based on the restraint inherent in the supremacy clause of the Constitution, has been advanced:

> A state may provide that its lien for taxes or its lien used for the benefit of its private citizens shall be a "first lien" in all cases whatsoever. If at the time the rights of the United States attach, no state lien exists, but thereafter a state lien is imposed entitled to first priority under state law, this is only an attempt by the state to displace by a subsequent exercise of its taxing, legislative, or judicial power the priority or lien of the United States established by Congress under its constitutional authority to pay and collect taxes. Under the supremacy clause of the constitution, the attempt must fail.[65]

Since the weight of analogous cases and the preference accorded the Government's tax lien by the Supreme Court suggests that state procedure will not be allowed to function as a means of circumventing federal priority, it would seem

61. 363 U.S. at 241. See also Wesselman v. Engle Co., 309 N.Y. 27, 127 N.E.2d 736 (1955).

62. Buffalo Sav. Bank v. Victory, — N.Y.2d —, —, — N.E.2d —, —, — N.Y.S.2d —, — (1962). Judge Fuld, in his dissenting opinion, also points out that when "it has been determined, under state law, that the taxpayer has property or rights to property, 'state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States.' (United States v. Bess, 357 U.S. 51, 57). Moreover, when a Federal tax lien has attached to property of the taxpayer, as undoubtedly it has here, State law may not destroy it. (See Commissioner v. Stern, 357 U.S. 39)." — N.Y.2d at —, — N.E.2d at —, — N.Y.S.2d at —.

63. See United States v. Sampsell, 153 F.2d 731 (9th Cir. 1946); Metropolitan Life Ins. Co. v. United States, 107 F.2d 311 (6th Cir. 1939).

64. See United States v. City of Greenville, 118 F.2d 963, 965 (4th Cir. 1941). See also United States v. City of New Britain, 347 U.S. 81, 84 (1954).

65. Sarner, Correlation of Priority and Lien Rights in the Collection of Federal Taxes, 95 U. Pa. L. Rev. 739, 750 (1947). See also Michigan v. United States, 317 U.S. 338 (1943); United States v. City of Greenville, 118 F.2d 963 (4th Cir. 1941); Littlestown Nat'l Bank v. Penn Tile Works Co., 352 Pa. 238, 42 A.2d 606 (1945).

that the inevitable and unfortunate *modus operandi* in these cases should remain the doctrine of circuity. It has been submitted that the present operation of that doctrine[66] is unjust as to the mortgagee (who, in practice, is usually paid last), simply because the circuity arrangement occurred through no fault of his own.[67] Some lawyers have proposed, as a complete solution, that the federal government agree to subordinate its lien to local taxes under a "super-priority" doctrine.[68] This is, perhaps, the easiest and most concise solution.

While the doctrine of "circular priority" is neither a desirable result nor an adequate solution for this three-footed race for preference, the foreseeable but unpredictable conflict between state and federal dominance would run afoul of the constitutionally supported federal requirements of uniformity and supremacy.[69] Noting that "state procedure" dominance of tax law presents a danger to uniformity, a lower New York court[70] remarked, "There can be no quarrel with the proposition that the national government is not to be frustrated in the collection of revenue by the tax priority laws of half a hundred different States."[71] Essentially, this is the same opinion voiced by the appellate division in the instant case: while "it has also been held that while 'local procedure' should be followed in foreclosing a mortgage . . . , such 'procedure' cannot cut off a right expressly granted to the federal government by Congress. . . ."[72]

If the court of appeals is correct in assuming that a state statute can suspend the normal precedence of federal liens, then the original doctrine of the "first in time, first in right" will have been completely nullified. This means that under both the federal "inchoateness" test and by operation of "state procedure," the doctrine will be inapplicable. It is advanced that it is improper for a lesser sovereign with a junior charge to be preferred over a greater sovereign with a superior charge. Thus while the "inchoate" test, as announced by the Supreme Court, does not affect competing antecedent liens with the federal tax lien as stringently as it does when competing with federal priority under

66. Normally, as in the instant case, the court will direct payment from the proceeds of the sale, thusly: (1) set aside a fund in the amount of the first mortgage; then pay the junior federal tax lien from the residue, and if any surplus remains, such remainder is to be applied to the local taxes; (2) if the residue is insufficient to cover the local taxes, the balance is to be paid out of the fund set aside for the mortgagee; and, (3) pay the mortgagee. See 13 App. Div. 2d 207, 215 N.Y.S.2d 189.

67. Osborne explains the remedy to be applied to the "true circuity"—that is where through no one's fault the circuity relationship arises. Osborne, Mortgages § 209, at 538 (1951).

68. See 84 A.B.A. Rep. 661, 664 (1959).

69. See U.S. Const. art. 1, § 8 and art. 4, § 2. "Otherwise, a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time. . . ." United States v. City of New Britain, 347 U.S. 81, 86 (1954). See also Sarner, Correlation of Priority and Lien Rights in the Collection of Federal Taxes, 95 U. Pa. L. Rev. 739, 755-61 (1947).

70. Metropolitan Life Ins. Co. v. United States, 9 App. Div. 2d 356, 194 N.Y.S.2d 168 (1st Dep't 1959).

71. Id. at 359, 194 N.Y.S.2d at 172.

72. 13 App. Div. 2d 207, 209, 215 N.Y.S.2d 189, 191.

section 3466,[73] it does not seem compatible with the "rule" that a *subsequent* state lien can, by resort to *state procedure*, acquire "choateness" in the federal sense.

**Trusts—Children Adopted Subsequent to Creation of Trust May Not Share in Distribution of Trust.**—A trust fund created in 1950 designated the grantor's son as beneficiary and provided that after the son's death and during the life of his daughter the income was to be paid to the descendants of the grantor's son. The trust further provided that if descendants of the son be living at the death of the survivor of the son and granddaughter, the capital fund of the trust was to be distributed to such descendants.[1] The grantor's son died in 1959 survived by three natural children, including the daughter named in the trust, and two children who were adopted subsequent to the creation of the trust. An action was brought to determine the status of the adopted children with respect to the distribution of the trust. The New York Court of Appeals, in a four-to-three decision,[2] held in a per curiam opinion that the case was governed by Section 115 of the New York Domestic Relations Law[3] and that the adopted children could not share in the distribution of the trust. *In the Matter of Ricks*, 10 N.Y.2d 231, 176 N.E.2d 726, 219 N.Y.S.2d 30 (1961) (per curiam).

The supreme court at special term had held that the word "descendants" as used in the instrument included adopted as well as natural children.[4] The appellate division, without referring to the statute, modified the order of special term, holding that a trust limitation in favor of "issue" or "descendants" included only persons who have a blood relationship to the ancestor,[5] but that properly considered extraneous facts existing at the time the instrument was drawn will allow adopted children to be included within the ambit of the words "issue" or "descendants."[6] Since the court found no such facts existing here, it held the case to be governed by *In the Matter of Leash*.[7] The

73. See notes 29 and 30 supra and accompanying text.

1. The wording of the instrument in this regard was: "If descendants of the Grantor's son . . . shall be living at the death of the survivor of the Grantor's said son and granddaughter, then upon the death of such survivor the Trustee shall . . . distribute the capital fund of said Trust Estate to the descendants then living. . . ." 10 N.Y.2d 231, 233 (1961) (points of counsel).

2. Chief Judge Desmond and Judge Froessel joined in Judge Fuld's dissenting opinion.

3. "As respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the foster child is not deemed the child of the foster parent so as to defeat the rights of remaindermen." N.Y. Dom. Rel. Law § 115, changed to N.Y. Dom. Rel. Law § 117 by N.Y. Sess. Laws 1961, ch. 147, § 1.

4. 10 N.Y.2d 231, 232 (1961) (points of counsel).

5. In the Matter of Ricks, 12 App. Div. 2d 395, 212 N.Y.S.2d 548 (1st Dep't 1961).

6. Id. at 397, 212 N.Y.S.2d at 550.

7. 197 N.Y. 193, 90 N.E. 652 (1910).

per curiam opinion of the court of appeals accepted this reasoning,[8] adding only that the public policy of the state, with regard to adopted children, has been established by Section 115 of the New York Domestic Relations Law.

*In the Matter of Leask* was the first case decided under the statute. There, a testator provided for the payment of the income of a sum of money to a nephew " 'during his life, and upon his death leaving a child or children surviving him to pay over the principal of said sum to such child or children.' "[9] In the event of the nephew leaving no children, the trust was to revert and become part of the testator's residuary estate. After the testator's death, the nephew died, survived only by an adopted child, and the principal reverted to the testator's estate. The court held that the adopted child was precluded from taking the share reserved for the "children" of the nephew.[10]

The process of adoption of children and strangers to the blood, unknown to the common law,[11] has been governed exclusively by statute in the United States. The first New York laws authorizing adoption of children were passed in 1873,[12] and allowed the foster children to take no inheritance, as a matter of right, from the adopting parent. The history of New York legislation governing adoption clearly shows a progressively more liberal trend towards putting foster children on an equal plane with the natural children of their parents. In 1887 adopted children were given inheritance rights from the foster parent[13] and in 1938 they were given all the rights of fraternal relationship with the natural children of the foster parents, including the right of inheritance.[14] Indeed, the fourth paragraph of section 115, which was first passed in 1896[15] seems to be the final barrier to complete equality.

The courts have, in recent years, seemingly recognized the harshness of the *Leask* interpretation of the statute, and have succeeded in defining circumstances wherein the statute does not apply. In *In the Matter of Upjohn's Will*,[16] the court found in favor of the adopted children, in light of the fact that the testator knew of the adoption *prior* to the making of the will. The court said:

> Embodied in our adoption statute is the fundamental social concept that the relationship of parent and child, with all the personal and property rights incident to it, may be established, independently of blood ties, by operation of law, and that has been part of the public policy of this state since 1887 . . . .[17]

8. 10 N.Y.2d 231, 176 N.E.2d 726, 219 N.Y.S.2d 30 (1961).

9. 197 N.Y. at 195, 90 N.E. at 652.

10. Id. at 199, 90 N.E. at 654.

11. Atkinson, Wills § 14 (1937 ed.).

12. N.Y. Sess. Laws 1873, ch. 830, § 10. "A child, when adopted, shall take the name of the person adopting, and the two thenceforth shall sustain toward each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation, excepting the right of inheritance. . . ."

13. N.Y. Sess. Laws 1887, ch. 703, § 10. At this time the words "excepting the right of inheritance" were changed to "(including) the right of inheritance. . . ."

14. N.Y. Sess. Laws 1938, ch. 606, § 1 (now N.Y. Dom. Rel. Law § 117).

15. N.Y. Sess. Laws 1896, ch. 272, § 64.

16. 304 N.Y. 366, 107 N.E.2d 492 (1952).

17. Id. at 373, 107 N.E.2d at 494.

In *In the Matter of Day*,[18] the question was whether a child of whom the grantor had full knowledge, adopted eight years *after* the death of the grantor was to be treated in the same manner as a child adopted prior to the creation of the trust. Since the grantor intended to make no distinction between the first adopted child and the natural children, it would have violated that intention to draw a distinction between natural children and a subsequently adopted child. Again, in *In the Matter of Ward's Will*,[19] the adoption occurred *after* the death of the testator, and the adopted child was held to be within the limitation of "lawful issue" where it appeared from the testimony that the testatrix favored adoption generally—that she had approved and advocated adoption by her married but childless daughter, and that she desired to treat all of her children equally.

A thin line exists, then, between the cases cited and the case at bar, the main distinction being that no indication as to the grantor's intention appeared prior to the instrument's execution in the instant case while some manifestation of intention could be gleaned in *Upjohn*, *Day*, and *Ward*.

Yet the grantor in the instant case, who survived her son, sought to make known her intentions by submitting an affidavit to the lower court expressing her desire that the adopted children be included. The appellate division ruled that such affidavits were not admissible unless there was some ambiguity in the instrument itself. The court found none.[20] This is a peculiar ruling in light of the fact that the grantor was not faced with the question of adopted children at the time of the creation of the trust, yet used the term "descendants," which under New York law specifically includes adopted children,[21] and indeed testified that had the question arisen at that time, she would have instructed her attorney to use whatever language was necessary to include adopted children. Admittedly her testimony at the trial may not conclusively indicate her intention at the time of the creation of the trust, but it seems equally as strong as the evidence in *Upjohn*, *Day*, and *Ward*. Though these cases are distinguishable, there would seem to be no perversion of logic occasioned by an application of their reasoning to the instant case. Here, it would accomplish the express purposes of the grantor, while in the cited cases, because the testators were already dead, only their apparent intentions could be deduced.

Judge Fuld's dissent in the instant case argued that the only "passing" affected in this case upon the death of the grantee was to his descendants, and thus is not a " 'passing and limitation over . . . dependent . . . on the foster parent dying without heirs.' "[22] Insofar as the wording of the trust is concerned, this is correct, but should the grantee die without heirs, the trust fund would revert to the grantor's estate. If the two adopted children had been the only surviving "descendants" the problem could be more clearly seen. For even though

18. 10 App. Div. 2d 220, 198 N.Y.S.2d 760 (1st Dep't 1960).

19. 9 App. Div. 2d 950, 195 N.Y.S.2d 933 (2d Dep't 1959) (memorandum decision), aff'd mem., 9 N.Y.2d 722, 174 N.E.2d 326, 214 N.Y.S.2d 340 (1961).

20. In the Matter of Ricks, 12 App. Div. 2d 395, 398, 212 N.Y.S.2d 548, 552 (1st Dep't 1961).

21. N.Y. Decd. Est. Law § 83(14).

22. 10 N.Y.2d at 235, 176 N.E.2d at 727, 219 N.Y.S.2d at 32.

adopted children are "descendants" under New York law,[23] section 115 precludes them from taking *through* their adopting parent to the detriment of remaindermen—here, the natural children of the grantee, or, had there been none, the grantor's residuary legatees—unless a contrary intention is evidenced.

More significantly, Judge Fuld noted that the intention of the legislature in preserving paragraph four was to protect remaindermen "from fraud on their rights which would result if such rights could be defeated by the simple act of adoption."[24] The legislature was particularly concerned about the perpetration of fraud "through an adoption for the very purpose of cutting out a remainder."[25] In light of the grantor's affidavit it could hardly be claimed that any fraud was intended in the instant case.

In essence, the present section 117 obliges the court to presume against the adopted child, although, admittedly, a slight indication of the grantor's intention prior to the execution of the instrument will be enough to rebut the presumption. Apparently the lack of such manifestation of intention on the part of the grantor at the time of the creation of the trust was the key to the decision in the present case.

To prevent a recurrence of this unfortunate result, at least two avenues of approach are open. The courts could, in a situation such as this, where the question of adoption did not present itself when the trust was made, allow the grantor to submit an affidavit of intention when the issue does arise, thereby dispelling all doubts and ambiguities.[26] Or it might be in order for the legislature to amend the statute to permit the courts to presume in favor of the adopted child unless some *contrary* intention shall have been made known by the grantor, either in the instrument or extraneous to it. This would seem preferable, since it would give a uniform rule, applicable whether or not the settlor be living at the time of the construction proceedings. Efforts to amend the statute in this respect by the New York Joint Legislative Committee on Matrimonial and Family Laws have in the past been something less than spectacularly successful. In its 1959 Report the committee said:

It was suggested . . . that the law be amended to provide for complete severance

23. See note 21 supra.

24. In the Matter of Charles' Will, 200 Misc. 452, 462, 102 N.Y.S.2d 497, 506 (Surr. Ct.), aff'd mem., 279 App. Div. 741, 109 N.Y.S.2d 103 (1st Dep't 1951), aff'd mem., 304 N.Y. 776, 109 N.E.2d 76 (1952).

25. 10 N.Y.2d at 236, 176 N.E.2d at 728, 219 N.Y.S.2d at 33, citing In the Matter of Walter's Estate, 270 N.Y. 201, 206, 200 N.E. 786, 788 (1936).

26. But see In re Taintor's Estate, — Misc. 2d —, 222 N.Y.S.2d 882 (Surr. Ct. 1961), where, noting the decision in the instant case, the court held that a child adopted by a remainderman under a will, subsequent to the death of the testator, was not "lawful issue" under the present § 117, so as to defeat the rights of other remaindermen. The court said: "It would seem that any consideration of the problem by the search for an intention to benefit an adopted child does not give section 115 [now 117] real effect . . . . Many of the cases, while referring to the Domestic Relations Law, rest solely upon the intention of the testator and, in fact, the limitation as to defeating a remainder comes into play at a time when a decision of the case, based wholly on decedent's intention, has been reached without prior consideration of the statute." Id. at 885-86.

of ties between a foster child and his natural relatives and that the foster child have irrevocably for all purposes the rights and duties of a natural child. This suggestion of course immediately raised questions concerning the legal effect of property or other instruments wherein the foster parents refer to their "children" or under which remainders or other transfers are made to the "children" of the foster parents. It is said, of course, that the intent of any such instrument is to be ascertained by the court and such intent be effectuated. . . . This rule of interpretation at once throws into the area of speculation what a court might do. Drafters of instruments, testators, settlors, and the like are loath to create instruments, and consequent legal rights and duties, which are subject to future and unknown judicial interpretation. So far as humanly or legally possible draftsmen of legal papers seek certainty. The suggestion was made that the Domestic Relations Law be amended in Section 115 to provide that all such legal instruments effective *prior* to September 1, 1959, be interpreted under the present law, as in the *Upjohn* case, and those effective *after* September 1, 1959, be deemed to include foster children when the undefined term "children" is used unless the person making the instrument desires to restrict the meaning of the term to "children of the blood" and specifies that description in the instrument.[27]

The committee's recommendations were rejected by the legislature. In its 1960 Report the committee said: "It should be noted that no change in . . . construction is effected by the amendment to present Section 115 as renumbered in this bill."[28]

Such an amendment would, in keeping with the trend toward equality of adopted children with natural children of the foster parents, create a presumption in favor of the adopted children. The exact meaning of the words "children," "descendants," "lawful issue," and "heirs" would be made clear for draftsmen of instruments, eliminating the doubt and confusion that presently exists—and the unquestioned rights of grantors and testators to limit their bequests to children of the blood would be maintained.

27. N.Y. Leg. Doc. No. 44, pp. 27-28 (1959). The proposed change was to read: "As respects the passing and limitation over of real or personal property dependent under the provisions of any instrument effective on and after September first, nineteen hundred fifty-nine on the foster parent dying without heirs, the foster child . . . shall be deemed the child of the foster parent so as to defeat the rights of remaindermen . . . unless the instrument shall specify a child of the blood of the foster parent." Id. at 202-03.

28. N.Y. Leg. Doc. No. 27, p. 23 (1960).