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Case Notes

CASE NOTES

Antitrust—Acquisition of Leading Market Producer as Means of Market Entry In Lieu Of "Toehold" Acquisition Violates Section 7 of Clayton Act.—The Bendix Corporation, a diversified manufacturer whose products include automotive components, acquired Fram Corporation, a leading producer of various types of filters, including automotive filters. At that time the broad automotive filter market was relatively concentrated, with the top three companies accounting for 62.9% of industry sales and the top six companies accounting for almost 80% of industry sales. Fram ranked third in sales with 12.4% of the market, while Bendix accounted for only .35% of this market. In the narrower passenger car filter replacement market (or aftermarket) concentration was more pronounced; the top three firms accounted for 71.2% of this market. Fram ranked third with 17.2%, while Bendix represented an insignificant factor in this market. The Federal Trade Commission charged that the proposed acquisition would violate section 7 of the Clayton Act[1] and section 5 of the Federal Trade Commission Act.[2] The Commission focused on the narrower passenger car replacement market where it considered previous Bendix sales to be insignificant for purposes of analysis and thus classified Bendix as a potential, rather than an actual, competitor.[3] The Hearing Examiner concluded that since Bendix had no desire to enter the market through internal expansion, the merger with Fram did not destroy potential competition. The Commission reversed and ordered total divestiture, reasoning that since Bendix was a potential market entrant through a toehold acquisition, the merger violated section 7 regardless of whether Bendix had the desire or ability to gain entry into the market by means of internal expansion, because the merger might substantially lessen competition in the manufacture and sale of automotive filters. *Bendix Corp.*, No. 8739 (F.T.C., June 18, 1970).

Generally, a non-competing firm contemplating entry into a new market or line of commerce has three possible methods of entry: (1) the firm may enter by internal expansion, *i.e.*, the adaptation of its existing facilities to allow for production of the new product,[4] or (2) the firm may enter by merging with an

1. Clayton Act § 7, 15 U.S.C. § 18 (1964), provides in part: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

2. Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(1) (1964), provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

3. Bendix Corp., No. 8739, at 7-8 n.12, 11 (F.T.C., June 18, 1970).

4. See FTC v. Procter & Gamble Co., 386 U.S. 568, 573-75 (1967); United States v. Penn-Olin Chem. Co., 378 U.S. 158, 165-67 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651, 657-58 (1964).

already existing leading firm in the market,[5] or (3) the firm may enter by a toehold acquisition, *i.e.*, the acquisition of a small non-vital member of the industry when that member has the capability of being expanded into a substantial competitive force.[6] The latter two methods of entry into the market are examples of the conglomerate merger.[7] A "pure" conglomerate merger involves the combination of firms manufacturing totally unrelated product lines.[8] A "product extension" merger, on the other hand, is a consolidation of two firms whose products are so related that they can be distributed or sold in the same manner, through the same outlets, or to the same customers.[9]

Potential competition has been defined as that competition which may come into existence in the future.[10] Thus a firm likely and able[11] to enter a given market is a potential competitor of the firms already actually competing in the market.[12] Such potential competition often has an actual competitive effect on the market[13] because it creates a *threat of entry* into the market by the noncompeting firm.[14] This threat of entry provides a present actual effect on the

5. See cases cited note 4 supra.

6. Dep't of Justice Enforcement Policy, Merger Guidelines, Trade Reg. Rep. ¶ 4430, at 6687 (1968); McLaren, Antitrust and the Securities Industry, 11 B.C. Ind. & Com. L. Rev. 187, 191 (1970).

7. In addition to conglomerate mergers, there are two other types—horizontal and vertical. A horizontal merger involves two or more firms directly competing in the same product line and geographic market. Blair, The Conglomerate Merger in Economics and Law, 46 Geo. L.J. 672 (1958) [hereinafter cited as Blair]; Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1315 (1965) [hereinafter cited as Turner]; 42 St. John's L. Rev. 259 (1967). A vertical merger takes place when a firm merges with either a supplier or customer. Blair 672; Turner 1315; 42 St. John's L. Rev. at 259-60.

8. United States v. General Dynamics Corp., 258 F. Supp. 36, 56 (S.D.N.Y. 1966); Turner 1315.

9. Davidow, Conglomerate Concentration and Section Seven: The Limitations of the Anti-Merger Act, 68 Colum. L. Rev. 1231, 1232 (1968) [hereinafter cited as Davidow]; see FTC v. Procter & Gamble Co., 386 U.S. 568, 577-78 (1967).

10. Rahl, Applicability of the Clayton Act to Potential Competition, 12 ABA Antitrust Section 128, 131 (1958) [hereinafter cited as Rahl].

11. A firm is not a potential competitor unless it is both willing and able to enter the relevant market. See FTC v. Procter & Gamble Co., 386 U.S. 568, 580-81 (1967); Ekco Prods. Co. v. FTC, 347 F.2d 745, 746-52 (7th Cir. 1965).

12. See FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).

13. Professor Wilcox talks of the competitive effects of potential competition, stating: "Potential competition, either as a supplement to actual competition or as a substitute for it, may restrain producers from overcharging those to whom they sell or underpaying those from whom they buy." C. Wilcox, Competition and Monopoly in American Industry 7-8 (TNEC Monograph No. 21, 1940). Professor Weston states that "entry of new rivals is a continuing threat, likely to enforce behavior approaching the competitive norm." J. Weston, The Role of Mergers in the Growth of Large Firms 109 (1953). See also FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); Davidow 1241-52; Turner 1362-86.

14. FTC v. Procter & Gamble Co., 386 U.S. 568, 581 (1967); United States v. Penn-Olin Chem. Co., 378 U.S. 158, 173-74 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651, 659 (1964); Rahl 132-40.

market when it acts as a disciplining factor preventing present competitors from charging excessive prices and/or marketing inferior products.[15] Aside from this actual competitive effect caused by the threat of entry, the term "potential competition" has also been used to describe the competitive effects which may come to fruition *after* entry into the market by the potential competitor.[16] According to this analysis, potential competition will have a beneficial effect on the market because of the competitive effects that will be generated by the entering firm if it actually enters the market in a competitive form, *e.g.*, internal expansion.[17]

Both concepts of potential competition have been employed by various commentators[18] in analyzing the scope of the prohibition of section 7 of the Clayton Act against all mergers or acquisitions which may substantially lessen competition.[19] The writers concur that the destruction of the actual competitive effects created by potential competition when such destruction "may . . . substantially . . . lessen competition"[20] is violative of section 7.[21] However, much debate has focused on whether a violation of section 7 may be based on the rejection of a competitive method of entry into a market in favor of entry through merger with a leading firm. It has been argued that such a means of entry denies the market the competition which would have occurred had the entry taken place in a competitive manner,[22] *i.e.*, the merger results in the *loss of a new entrant.* Despite this discussion the courts have not widely adopted this loss of a new entrant concept.[23]

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15. See Rahl 135-36.

16. See, e.g., Davidow 1248-49; Rahl 132, 135-40; Turner 1379-86.

17. See generally Rahl 135-40; Turner 1379-86.

18. Rahl agrees that there are two aspects of potential competition. Rahl 132, 141-45. See also Davidow 1241-52; Turner 1362.

19. In the House Judiciary Report on the 1950 Celler-Kefauver Amendment, the Committee stated its intention to make section 7 applicable to "all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition . . . or tending to create a monopoly." H.R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949).

20. Clayton Act § 7, 15 U.S.C. § 18 (1964).

21. See, e.g., Davidow 1241; Rahl 135-40; Turner 1362.

22. Davidow 1248-49; Rahl 135-40; Turner 1379-86. Prof. Rahl has argued that, in an area as uncertain and ambiguous as potential competition, the only way to establish a section 7 violation is by proving a probable lessening of existing competition and not by pointing to the preclusion of future competition. Rahl 138. This analysis considers the latter to be a distortion of the purpose of section 7 which would transform the section into a program prescribing conduct for increasing competition by forcing a firm to choose the more competitive method of entry. Id. at 143. Prof. Turner has taken a different approach, concluding that this "loss of a new entrant" may properly be considered anticompetitive. Turner 1362, 1379-86.

23. Most prior Supreme Court cases discuss the "threat of entry" theory of potential competition but do not refer to the "loss of a new entrant" theory. See FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).

The loss of a new entrant theory is ambiguously referred to in Aluminum Co. of America v. FTC, 284 F. 401, 408 (3d Cir. 1922), cert. denied, 261 U.S. 616 (1923), petition to amend decree denied, 299 F. 361 (3d Cir. 1924), where the court stated that a particular trans-

By contrast, the aspect of potential competition dealing with the destruction of the threat of entry by merger or acquisition has been accepted both by the writers[24] and by case law[25] as being anticompetitive. These authorities have stated that, in certain circumstances,[26] when a potential competitor, who is willing and able to enter the relevant market by internal expansion, rejects this method and instead enters through merger with a market leader, its action is violative of the Clayton Act.[27] Such action violates section 7 because the competitive effects created by the threat of entry through internal expansion have been destroyed.[28]

In *United States v. El Paso Natural Gas Co.*,[29] the defendant, which accounted for over 50% of all California gas sales, acquired another company that had been trying to enter the California market. This merger violated section 7 because the mere threat of competitive entry by the acquired company had caused the defendant to improve service and lower prices.[30] Subsequently, in *United States v. Penn-Olin Chemical Co.*,[31] the Supreme Court declared that a joint

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action had an "effect upon actual competition as well as in destroying potential competition in a way later to make actual competition impossible . . . ." Id. Commenting on this case Rahl says that the potential competition was so close to actual competition, "that the court had no difficulty in treating it as the same thing as actual competition." Rahl 136. The theory is also referred to in United States v. Continental Can Co., 378 U.S. 441 (1964). "[T]he merger therefore carries with it the probability of foreclosing actual and potential competition between these two concerns." Id. at 463.

The only case to clearly discuss the theory is United States v. Wilson Sporting Goods Co., 288 F. Supp. 543 (N.D. Ill. 1968). The court reasoned that merger with a market leader "would eliminate all future competition which might develop . . . ." Id. at 564. The court concluded this line of thought by saying that a more procompetitive entry "is exactly what Section 7 is designed to preserve." Id. at 566.

Ekco Prods. Co. v. FTC, 347 F.2d 745 (7th Cir. 1965) summed up the state of the law in regard to the loss of a new entrant theory. "The finding that there will probably be a substantial lessening of competition in violation of Section 7 due to the prospect that a corporation would have entered a line of commerce as a competitor if it had not acquired a corporation in that line of commerce, is a relatively new concept in the field of antitrust law." Id. at 752.

24. See, e.g., Davidow 1242; Rahl 135-40; Turner 1362-79.

25. FTC v. Procter & Gamble Co., 386 U.S. 568, 581 (1967); United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Penn-Olin Chem. Co., 378 U.S. 158, 172-74 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651, 659 (1964); Ekco Prods. Co. v. FTC, 347 F.2d 745 (7th Cir. 1965); United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 562 (N.D. Ill. 1968).

26. The market concerned must be an oligopolistic market and the firm outside the market must be recognized as a likely entrant. Turner 1363.

27. FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Penn-Olin Chem. Co., 376 U.S. 158 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); Rahl 135-36; Turner 1362-63; see Davidow 1241-43.

28. See authorities cited notes 24 & 25 supra.

29. 376 U.S. 651 (1964).

30. Id. at 659.

31. 378 U.S. 158 (1964).

venture can be anticompetitive when it eliminates the potential competition of a company that may have remained at the edge of the market threatening to enter.[32] In *FTC v. Procter & Gamble Co.*,[33] the threat of entry was more clearly enunciated. Procter & Gamble, which had been threatening entry into the market through internal expansion, instead entered into a product extension merger with Clorox, the leading manufacturer in the heavily concentrated bleach industry. The Supreme Court upheld the Commission's finding that the acquisition of Clorox by Procter eliminated the latter as a potential competitor, thus destroying the competitive effects of the threat of entry by Procter and hence the acquisition violated section 7.[34]

In *Bendix*,[35] the Commission held that an anticompetitive destruction of potential competition could result not only when a potential competitor elects merger with a leading firm instead of entry by internal expansion but also when it chooses merger with a leading firm instead of a toehold acquisition.[36] Bendix had never seriously contemplated entering the relevant market through internal expansion.[37] However, the Commission stated:

> [M]ore important, we believe that the evidence of record unequivocally shows that Bendix possessed the incentives and capacity, and was likely, to make a toehold acquisition of a small firm in the passenger car filter aftermarket, and to attempt competitively significant expansion of that firm, if acquisition of a market leader like Fram were foreclosed to it by law.[38]

The Commission concluded that since Bendix was likely to enter the market through a toehold acquisition its merger with a leading firm in the industry was anticompetitive because it eliminated potential competition.[39] The Commission stated that the previous cases, which dealt only with internal expansion versus leading firm acquisition, were concerned more with the *effects* on potential

32. Id. at 173-74.

33. 386 U.S. 568 (1967).

34. The Court stated that "[p]rior to the merger, the Commission found, Procter was the most likely prospective entrant, and absent the merger would have remained on the periphery, restraining Clorox from exercising its market power." Id. at 575.

35. The Bendix and Procter fact patterns are quite similar. This is attested to by the fact that the complaint in Bendix is patterned after the Procter complaint. Bendix Corp., Trade Reg. Rep. ¶ 18,897, at 21,231 (FTC 1969).

36. Bendix Corp., No. 8739, at 18-19 (F.T.C., June 18, 1970).

37. "[I]t was decided that [Bendix] should try to expand its operations in this field. Consideration was given to whether this should be done by acquisition or by internal expansion. Eventually it was decided that it would not be feasible to expand by internal development, and that efforts should be made to acquire another company in the field." Bendix Corp., No. 8739, at 13 (F.T.C., June 18, 1970) (citations omitted).

38. Id. at 21.

39. The Commission stated that "[v]arious forms of merger entry other than through acquisition of a leading company—for example, a 'toehold' acquisition of a small company capable of expansion into a substantial competitive force—may be as economically desirable and beneficial to competition as internal expansion into a relevant market, and must be considered in assessing the potential competition of the acquiring firm which has been eliminated as a result of the challenged merger." Id. at 15.

competition caused by merger rather than with the *form* of potential competitive entry.[40] The Commission, in *Bendix,* deemphasized the difference between these two forms of entry—internal expansion and toehold acquisition—indicating that both are competitive forms of entry and that to discard a competitive form of entry in favor of the Fram merger violated section 7.[41]

Furthermore, even though *Bendix* discussed the threat of entry concept of potential competition,[42] the main thrust of *Bendix* concerned itself with the loss of a new entrant theory.[43] Bendix could have entered the market through either internal expansion, a toehold acquisition or merger with Fram, a market leader,[44] and the Commission concluded that "[i]f Bendix had taken either of the first two routes of entry, it would have become an actual competitor of Fram, and would have provided a beneficial new element in the market."[45] Bendix, however, chose merger with Fram, and as a result the competition that would have been created between Bendix and Fram was eliminated,[46] *i.e.,* the merger caused the loss of a new entrant. In effect, the Commission would require Bendix to choose that form of entry which would produce competition because a rejection of this method would be anticompetitive as it would preclude the competition which would have resulted from the competitive entry.[47] The Commission, in developing this line of thought, stated:

> We think it clear that Congress was concerned in Section 7 with the preservation of new and potential competition in any form: that new entry, if beneficial and procompetitive, is to be encouraged regardless of its form, and that a merger with a leading firm, especially in a concentrated industry, which eliminates the likelihood of such desirable entry through a toehold acquisition is embraced within the prohibitions of the statute.[48]

The significance of *Bendix* is twofold. First, *Bendix* extends existing case law by concluding that the toehold acquisition (as well as internal expansion) may come within the theory of potential competition. Second, the decision is clearly based on the anticompetitive effects resulting from the destruction of competition that would have occurred had entry taken place in a more competitive manner.

Prior to *Bendix* the pure conglomerate merger had never come under attack

40. The Commission relied on Brown Shoe Co. v. United States, 370 U.S. 294, 316-23 (1962), to establish the fact that the legislative intent behind section 7 was to prevent mergers having demonstrable anticompetitive effects. Bendix Corp., No. 8739, at 16 (F.T.C., June 18, 1970).

41. Id. The Department of Justice, in its recently issued guidelines, agreed with this reasoning and likewise equated internal expansion and the toehold acquisition as forms of potential competition. Dep't of Justice Enforcement Policy, Merger Guidelines, Trade Reg. Rep. ¶ 4430, at 6687 (1968). See also McLaren, supra note 6, at 191.

42. Bendix Corp., No. 8739, at 16, 28 (F.T.C., June 18, 1970).

43. Id. at 16, 27-28.

44. Id. at 27.

45. Id. at 27-28.

46. Id. at 8-9, 27-28.

47. Id. at 16, 18-19.

48. Id. at 16.

as being violative of section 7 under a potential competition theory[49] when the ability to expand internally into a market was not present, for that ability had been considered a prerequisite to the application of the theory of potential competition.[50] Under the *Bendix* rationale, however, a firm would not have to possess the ability to internally expand into the market in order for the potential competition theory to be applied. The theory would now be applied if the outside firm considered market entry by means of a toehold acquisition. Thus, the pure conglomerate merger might now be treated as causing an anticompetitive elimination of potential competition when leading firm acquisition is chosen instead of the toehold acquisition.[51]

An even greater threat to the pure conglomerate merger exists when the toehold acquisition concept is combined with the loss of a new entrant theory of potential competition.[52] Under this analysis a pure conglomerate merger with a market leader might be anticompetitive even if the alternative method of entry, the toehold acquisition, would not have created an *actual threat* on the market, *i.e.*, one would not have to prove the destruction of a threat but only the loss of a new entrant. Thus, if a firm considered the possibility of a toehold acquisi-

49. The potential competition argument has been used to prohibit the "product extension," rather than the "pure," conglomerate merger. Davidow stated that "the potential competition argument is most potent when leveled against a market or product extension merger rather than a purely conglomerate acquisition." Davidow 1241.

50. See FTC v. Procter & Gamble Co., 386 U.S. 568 (1967). Since the pure conglomerate merger involves unrelated products and markets, firms contemplating a pure conglomerate merger would seldom consider the alternative method of entry through internal expansion.

51. This concept can more easily be understood through the use of a simple illustration. X, a large, successful corporation which manufactures automobiles, desires to merge with Y, a leading firm in the manufacture of mousetraps. Merger with Z, a small producer of mousetraps but one which in conjunction with X's administrative efficiency, marketing techniques and sources of capital could become a substantial competitive force, is also possible. Prior to the Bendix decision, X's merger with either (assuming X does not have the ability to enter through internal expansion) would not be violative of the Clayton Act based on the theory of potential competition. The Bendix decision now casts doubt upon the legality of an X-Y merger because X could enter by means of a toehold acquisition by merging with Z.

52. Davidow discussed the concepts of toehold acquisition and the loss of a new entrant. Writing before Bendix, he stated: "There is a possible variation and expansion of the potential competition theory that has not yet been developed by case law. The new theory would be that when a large outside firm buys one of the top four companies in a concentrated market, an illegal elimination of potential competition can be demonstrated by showing that it could have effected entry by acquiring a firm considerably smaller and lower ranking than any one of the top four. The argument would be that if the facilities of the acquired and acquiring firm could be integrated, or other competitive advantages attained, then acquisition of one of the top four would tend to entrench oligopolistic concentration, while acquisition of a more minor firm might aid it in increasing its market share at the expense of the leading firms, thus decreasing market concentration. Development of this theory would make it possible to establish an illegal elimination of potential competition even though the acquiring firm can demonstrate that it lacks the facilities, know-how, distribution, or natural resources necessary for independent entry." Davidow 1248-49.

tion,[53] it could then be precluded from acquiring a market leader by means of a pure conglomerate merger. Such a prohibition has received some support,[54] even though the rationale of *Bendix* could be extended to an overbroad restriction on pure conglomerate mergers.

Because the Commission, however, might have found that section 7 had been violated on the basis that the merger destroyed the threat of entry, the thrust of the reasoning used to declare the merger violative of section 7 was a dangerous and unnecessary extension of the law on these facts. The combination of the toehold acquisition argument and the loss of a new entrant theory seems to be neither mandated by the somewhat ambiguous language of section 7 nor wise in the absence of evidence in each case of a possible lessening of actual competition.

Civil Rights—Revised Philadelphia Plan Held Not Violative of Title VII, Civil Rights Act of 1964.—The General State Authority of Pennsylvania solicited bids for a federally assisted construction project[1] subject to the requirements of the Revised Philadelphia Plan of the Department of Labor, which Plan required that minority group representation be taken into account in the recruiting and hiring practices of contractors on federally assisted construction projects.[2] A contractors association and seven individual contractors brought suit against the Secretary of Labor and the General State Authority of Pennsylvania in the United States District Court for the Eastern District of Pennsylvania, alleging that the Philadelphia Plan imposed racial quotas, required prefer-

53. The Commission in Bendix clearly concludes that Bendix was a potential entrant into the automotive filter aftermarket without discussing the problem of how probable the entry must be before a firm is seen as a potential entrant. Bendix Corp., No. 8739, at 20-26 (F.T.C., June 18, 1970). This problem is discussed in United States v. Penn-Olin Chem. Co., 217 F. Supp. 110, 128-29 (D. Del. 1963), vacated, 378 U.S. 158 (1964); see Turner 1372.

54. Assistant Attorney General McLaren has stated that "the [Antitrust] Division believes that the pace and scale of the merger trend as it existed in the Spring of 1969—with more and more giant firms merging with one another, or acquiring a leading firm in smaller industries—could have been ignored only at the risk of serious and perhaps irreversible damage to the competitive economy." McLaren, supra note 6, at 192.

1. The project involved a cost of approximately $4 million, of which more than $1 million represented a grant from the Department of Agriculture.

2. The Plan consists of two Department of Labor Orders, of June 27, 1969, and September 23, 1969. Both orders appear in 115 Cong. Rec. S17,213-18 (daily ed. Dec. 18, 1969), and in 2 CCH Employment Prac. Guide ¶¶ 16,175-76, at 7151-62 (1969). See generally The Philadelphia Plan: Equal Employment Opportunity in the Construction Trades, 6 Colum. J.L. & Soc. Prob. 187 (1970). The Plan was issued in implementation of the authority of the Secretary of Labor under Exec. Order No. 11,246 §§ 201-405, 3 C.F.R. 402 (1970), 42 U.S.C. § 2000e (Supp. V, 1970). The Executive Order elaborated on and defined the rights and duties of parties affected by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1964), as amended, 42 U.S.C. § 2000e(b) (Supp. V, 1970).

ential treatment for minority persons and so created reverse discrimination in violation of the Constitution of the United States, Title VII of the Civil Rights Act of 1964, and the laws of the Commonwealth of Pennsylvania. In a memorandum opinion and order, the district court granted the defendants' motion for summary judgment, holding that the Department of Labor's Revised Philadelphia Plan did not violate the provision of the Civil Rights Act making it an unlawful practice for an employer to discriminate against any individual with respect to his employment because of his race, color, religion, sex, or national origin. *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 311 F. Supp. 1002 (E.D. Pa. 1970).

Title VII of the Civil Rights Act of 1964,[3] dealing with equal employment opportunity through the elimination of racial discrimination,[4] was an attempt to utilize, in meeting the problem of discrimination in employment,[5] the full force of federal power under the commerce clause of the Constitution.[6] The Title defined unlawful employment practices for employers, employment agencies, and labor organizations,[7] and created the Equal Employment Opportunity Commission[8] for the purpose of dealing with complaints brought by aggrieved parties or by members of the Commission itself.[9] The Attorney General was granted power to bring a civil action in a case of general public importance.[10] In response to arguments that the Title would authorize the imposition of racial quotas upon employers and labor organizations in order to achieve a racial balance in the

3. 42 U.S.C. §§ 2000e to 2000e-15 (1964), as amended, 42 U.S.C. § 2000e(b) (Supp. V, 1970).

4. See H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963). See generally Berg, Equal Employment Opportunity Under the Civil Rights Act of 1964, 31 Brooklyn L. Rev. 62 (1965).

5. See generally Gould, The Emerging Law Against Racial Discrimination in Employment, 64 Nw. U.L. Rev. 359 (1969); Pollitt, Racial Discrimination in Employment: Proposals for Corrective Action, 13 Buffalo L. Rev. 59 (1963); Rabkin, Enforcement of Laws Against Discrimination in Employment, 14 Buffalo L. Rev. 100 (1964).

6. Truax v. Raich, 239 U.S. 33 (1915), held that statutorily-imposed discrimination in employment was violative of the equal protection clause of the fourteenth amendment. The Court struck down an Arizona statute providing that Arizona employers of more than 5 persons had to employ not less than 80 percent qualified electors or native-born citizens of the United States. The Court noted that "[i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure." Id. at 41.

Title VII reflects the modern approach to the problem of discrimination in employment, and defines an employer subject to the Act as a person engaged in an industry "affecting commerce." 42 U.S.C. § 2000e(b) (Supp. V, 1970). The Title appears then to be as broad as Congress' power over commerce. Senator Hubert H. Humphrey observed that "[t]he constitutional basis for title VII, is of course, the commerce clause." 110 Cong. Rec. 6548 (1964).

7. 42 U.S.C. § 2000e-2(a) to (c) (1964). Unlawful employment practices are those practices based on an individual's race, color, religion, sex, or national origin. Id.

8. Id. § 2000e-4.

9. Id. § 2000e-5.

10. Id. § 2000e-6.

work force,[11] a section was added to the Title prior to enactment which stated that no one would be required to remedy a racial imbalance by discrimination in favor of the disadvantaged group.[12]

The manner of application of the Title became clear when the United States Court of Appeals for the Fifth Circuit held that the doctrine that statutes in derogation of the common law must be strictly construed was inapplicable to provisions relating to equal employment opportunities.[13] It has also been held that the Title would be accorded a liberal construction "in order to carry out the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of racial discrimination."[14]

Executive Order 11,246 of 1965[15] required that federal contracts and federally assisted construction contracts contain specified language obligating the contractor and his subcontractors not to "discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin."[16] In addition, the Order went beyond Title VII by requiring the contractors to take "affirmative action" to insure that discrimination was not practiced.[17] Various sanctions were made available for noncompliance, including the cancellation, sus-

11. Senators Clark and Case, the floor managers of Title VII, inserted their defense into the Congressional Record: "There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual. While the presence or absence of other members of the same minority group in the work force may be a relevant factor in determining whether in a given case a decision to hire or to refuse to hire was based on race, color, etc., it is only one factor, and the question in each case would be whether that individual was discriminated against." 110 Cong. Rec. 7213 (1964).

For the legislative history of Title VII, see H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963); Vaas, Title VII: Legislative History, 7 B.C. Ind. & Com. L. Rev. 431 (1966).

12. 42 U.S.C. § 2000e-2(j) (1964) provides:

"Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number [or] percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

13. Georgia Power Co. v. Equal Employment Opportunity Comm'n, 412 F.2d 462, 466 n.6 (5th Cir. 1969).

14. United States v. Medical Soc'y, 298 F. Supp. 145, 151 (D.S.C. 1969).

15. Exec. Order No. 11,246 §§ 201-405, 3 C.F.R. 402 (1970), 42 U.S.C. § 2000e (Supp. V, 1970). See generally Note, Executive Order 11246: Anti-Discrimination Obligations in Government Contracts, 44 N.Y.U.L. Rev. 590 (1969).

16. Exec. Order No. 11,246 § 202, 3 C.F.R. 402 (1970), 42 U.S.C. § 2000e (Supp. V, 1970).

17. Id.

pension, or termination of contracts and the debarment of a contractor from future government contracts.[18] This Order became the basis for various Labor Department programs designed to remedy employment conditions in specific geographical areas.[19]

Both Title VII and the Executive Order were held constitutional in *Weiner v. Cuyahoga Community College District*,[20] where the lower court, in upholding one such Labor Department program (the Cleveland Plan), took the position that "[t]here has . . . come a time when firmness must be used against *all* who do not feel able or inclined to cooperate in the equal employment effort."[21] In *Weiner*, the plaintiff contractor had submitted the low bid for a redevelopment project which was subject to the requirements of the federal statute and accompanying order. The affirmative action plan involved was intended to assure that " '[t]here is a minority group representation in all trades on the job and in all phases of the work.' "[22] Plaintiff had conditioned its proposed minority representation with the words " 'Subject to availability and Referral to Reliance Mechanical Contractors, Inc., of Qualified Journeymen and Apprentices from Pipefitters Local No. 120,' "[23] referring to the union with which it had an exclusive hiring hall contract. When its bid was rejected because of this condition,[24] plaintiff brought an action charging that the federal officials were seeking an unlawful guarantee that the contractor would have members of minority groups on the job.[25] The lower court disagreed,[26] and the state supreme court affirmed, noting that "neither the invitation to bid nor the negotiations with respect to Affirmative Action Plans were directed at securing either an absolute guarantee of the actual results of such a plan or a result pertaining solely to Negroes."[27] The court added that an imposed quota of any particular minority would also violate the Civil Rights Act.[28]

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18. Id. § 209(a)(5), (6), 3 C.F.R. 406 (1970), 42 U.S.C. § 2000e (Supp. V, 1970).

19. In February, 1970, a national program for achieving equal employment opportunity in federally funded construction work in 19 major cities was announced by the Secretary of Labor, George P. Shultz. The cities affected were Atlanta, Boston, Buffalo, Cincinnati, Denver, Detroit, Houston, Indianapolis, Kansas City, Los Angeles, Miami, Milwaukee, Newark, New Orleans, New York, Pittsburgh, San Francisco, Seattle, and St. Louis. 2 CCH Employment Prac. Guide Rep., No. 35 (Feb. 16, 1970).

It is the intention of the Government to extend programs similar to the Philadelphia Plan to other areas whenever practicable. U.S. Dept. of Labor, News Release, June 27, 1969, at 2.

20. 15 Ohio Misc. 289, 238 N.E.2d 839 (C.P. 1968), aff'd, 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), cert. denied, 396 U.S. 1004 (1970).

21. 15 Ohio Misc. at 297, 238 N.E.2d at 844.

22. Id. at 293, 238 N.E.2d at 842.

23. Id. at 295, 238 N.E.2d at 843 (emphasis deleted).

24. Pipefitters Local No. 120 had some 1500 to 1600 white journeymen and 6 Negro apprentices. Id. at 289, 238 N.E.2d at 841.

25. See id. at 297-98, 238 N.E.2d at 844-45.

26. Id.

27. Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 39, 249 N.E.2d 907, 910 (1969), cert. denied, 396 U.S. 1004 (1970).

28. Id.

The court thus held valid a plan that required affirmative action programs in federal contract bids, but which did not include the specific goals or ranges later to be included in the Philadelphia Plan. A dissenting opinion[29] in *Weiner* concluded that the establishment of a quota would necessarily be part of any affirmative action plan intended to have the result of assuring that there is minority group representation in all trades and in all phases of the work.[30] The dissent reasoned that since the "result of assuring" minority group representation could not be distinguished from a "guarantee" of such representation, the Cleveland Plan thus violated the Civil Rights Act.[31]

The Philadelphia Plan was first issued in 1967 by the Department of Labor[32] and was similar to the later Cleveland Plan in that the individual contractor was to formulate his own affirmative action program prior to the submission of his bid, without reference to an already existing government standard. After award of the contract, the contractor had to negotiate further with the Government to establish a definite program of minority utilization. The Plan was suspended by the Labor Department after the Comptroller General[33] found that this post-award negotiation violated competitive bidding principles by imposing requirements on bidders which were not specifically set out in the solicitation for bids.[34]

The Revised Philadelphia Plan became effective on September 29, 1969, and required that with respect to construction contracts in the Philadelphia area[35] which were subject to Executive Order 11,246, and where the total cost of the project exceeded $500,000, each bidder must, in the affirmative action program submitted with his bid, set "specific goals of minority manpower utilization which

29. Id. at 41, 249 N.E.2d at 911.

30. Id.

31. Id.

32. Department of Labor Order of Nov. 30, 1967.

33. The Comptroller General stated that his General Accounting Office had an interest in the matter which "exists by virtue of the duty imposed upon our Office by the Congress to audit all expenditures of appropriated funds, which necessarily involves the determination of the legality of such expenditures, including the legality of contracts obligating the Government to payment of such funds." 49 Comp. Gen. 59, 60-61 (1969).

34. "[T]here would appear to be a technical defect in an invitation's requirement for submission of a program subject to Government approval prior to contract award which does not include or incorporate definite standards on which approval or disapproval will be based. We believe that the basic principles of competitive bidding require that bidders be assured that award will be made only on the basis of the low responsive bid submitted by a bidder meeting established criteria of responsibility, including any additional specific and definite requirements set forth in the invitation, and that award will not thereafter be dependent upon the low bidder's ability to successfully negotiate matters mentioned only vaguely before the bidding." 47 Comp. Gen. 666, 670 (1968). The Weiner court, however, upheld a Plan which could be challenged on this same basis, thus apparently disagreeing with the Comptroller General.

35. The Plan covered five counties in Pennsylvania: Bucks, Chester, Delaware, Montgomery, and Philadelphia. 115 Cong. Rec. S17,213 (daily ed. Dec. 18, 1969). It applied to six construction trades: iron workers, plumbers and pipefitters, steamfitters, sheet metal workers, electrical workers, and elevator construction workers, none of which had minority group membership of as much as two percent. Id. at S17,215.

meet the definite standard"[36] included in the invitation for bids. The Labor Department, after public hearings, established the ranges[37] within which the contractors' minority group[38] employment goals should be set. The contractor was required to make a good faith effort to broaden his recruitment base[39] in order to promote equal employment opportunity, but was prohibited from discriminating against any qualified applicant or employee while doing so.[40] Realizing that the validity of the Plan would depend on whether it "demands that the contractors hire on the basis of and with regard to race, color and national origin,"[41] the Department of Labor, in an explanatory paper accompanying the Plan, pointed out that "[a] racial quota . . . means that a specific number of minority workers must be hired and if an employer fails to hire that number, some consequence will automatically result from that failure."[42] The paper concluded that since the Plan set a goal, not a specific number, it did not impose a racial quota and did not make race the basis of the contractor's action.[43]

The Comptroller General again found fault with the Plan, arguing that whether the Plan was a quota system or a goal system was a matter of semantics, and that the actual result of the Plan was that "contractors commit themselves to making race or national origin a factor for consideration in obtaining their employees."[44]

The Justice Department answered the Comptroller General, arguing that the Plan merely required a good faith effort to meet the goals and that such an effort did not include any action which would violate any provision of Title VII.[45] In addition, the Plan specifically provided that the contractor could not discriminate

36. Id. at S17,214. The bidder could also fulfill his requirement by agreeing to participate in a multi-employer affirmative action program approved by the Office of Federal Contract Compliance (OFCC), established by the Secretary of Labor in implementation of his authority under the Executive Order 11,246. Id.

37. In the first year, employment ranges were to vary between four and nine percent; in the second year between nine and fifteen percent; in the third year between fourteen and twenty percent; and in the fourth and final year between nineteen and twenty-six percent. Id. at S17,216.

38. Minority groups include Negro, Oriental, American Indian, Spanish Surnamed American (Mexican, Puerto Rican, Cuban, or Spanish origin or ancestry). Id. at S17,217-18.

39. Id. at S17,216-17. The contractor's good faith depends on his efforts to broaden his recruitment base through at least all of the following activities: a) notifying community organizations listed with the OFCC of opportunities for employment on his project, as well as their response; b) maintaining a file on each minority worker referred to him, specifying what action was taken with regard to each worker; c) notifying the OFCC when a union with whom the contractor has a collective bargaining agreement has not referred back to the contractor a minority worker he sent to the union, or when a union referral process has impeded him in his efforts to meet his goal; and d) participating in and availing himself of training programs in the area, especially those funded by the Department of Labor. Id.

40. Id. at S17,214.

41. Contractors Ass'n v. Secretary of Labor, 311 F. Supp. 1002, 1009 (E.D. Pa. 1970).

42. U.S. Dep't of Labor, News Release, June 27, 1969.

43. Id.

44. 49 Comp. Gen. 59, 64-65 (1969).

45. 42 Op. Att'y Gen. No. 37, Sept. 22, 1969, at 6.

against any qualified applicant or employee in order to meet his commitment.[46] The Comptroller General yielded when Congress, after long debate, adopted the position of the Justice Department.[47]

In *Contractors*, the court had to determine whether, in actual practice, the requirements of the Philadelphia Plan compelled contractors to discriminate against nonminority group members in order to hire minority group applicants.[48] The plaintiffs maintained that they would be forced to give preferential treatment to minorities, in violation of the Civil Rights Act.[49] They argued that the ranges of the Plan were actually racial quotas, and that in order to meet the good faith effort requirement they had to make race a criterion of employment.[50] The contractors followed the reasoning of the dissent in *Weiner* that such a requirement was tantamount to a guarantee of minority employment.[51] The court took the opposite view, holding that the Plan did not require the contractors to hire a definite percentage of minority group employees, but merely required that the contractor make "every good faith effort to meet his commitment to attain certain *goals*."[52] The court stressed that the requirement of a good faith effort is important, for this defeats the allegation of the guarantee of minority employment.[53] No sanction may be imposed if a contractor has exhibited good faith, yet failed to meet his commitment.[54] The contractor, therefore, is not absolutely required to meet his goals, and he is not forced to discriminate in hiring.[55] The court thus adopted the view of the Labor Department[56] and the Attorney General[57] that quotas are not imposed and that the Plan does not refer to methods of dealing with individual applicants.[58]

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46. Id.

47. 115 Cong. Rec. 40,736-49 (1969). The Comptroller General thereafter abandoned his plan to withhold federal funds from those participating in the Plan.

48. 311 F. Supp. at 1008. The court first decided a challenge to the standing of the contractors association to maintain the action. The action was dismissed as it related to the association because of failure to establish that the association had a personal stake in the outcome; the harm complained of was possible discrimination against the individual members of the organization. The court cited Flast v. Cohen, 392 U.S. 83 (1968), to support this contention. The individual contractors could maintain the action since the failure to exert the good faith effort to meet their commitments would subject them to sanctions. 311 F. Supp. at 1007.

49. 311 F. Supp. at 1008; see 42 U.S.C. § 2000e-2(a) (1964).

50. 311 F. Supp. at 1008.

51. Id. at 1010; see Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 41, 249 N.E.2d 907, 911 (1969), cert. denied, 396 U.S. 1004 (1970).

52. 311 F. Supp. at 1010 (emphasis added).

53. Id.

54. Id.

55. See id.

56. The court, citing Udall v. Tallman, 380 U.S. 1 (1964), relied on the "principle that an interpretation given a Presidential order by the official charged with administering its provisions is entitled to great, if not controlling weight." 311 F. Supp. at 1009.

57. 42 Op. Att'y Gen. No. 37, Sept. 22, 1969.

58. 311 F. Supp. at 1010. Having found that the Plan itself was not inconsistent with the requirements of Title VII, the court went on to dispose of a challenge to the authority

The "equitable solution"[59] to the problem of minority group employment which the court envisioned may now have been substantiated. An inspection of Philadelphia projects covered by the Plan, made within six months of the *Contractors* decision, led the Department of Labor to conclude that the employment of minorities was running ahead of the first-year goals required by the Plan.[60] The initial success of the Plan has been due in part to the willingness of the Government to exercise its sanction power,[61] thus insuring that the good faith effort requirement did not become a loophole to avoid the purpose of the Plan. On the national level, the *Contractors* holding will give the Government a greater flexibility in seeking equal employment opportunities for minority groups. If the construction industry in a given area is unable on its own initiative to develop programs acceptable to the federal government, the Government can impose a "Philadelphia-type" plan with specific goals in the hiring of minority workers.[62]

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of the Executive Branch to design such a program. Plaintiffs charged that only the Congress could order social change, but the court determined that the Executive Branch could also do so, acting through executive orders. Id. at 1011-12. Such orders had been held to have the force of law in Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3d Cir. 1964). The authority of the President to require affirmative action under an executive order had earlier been held valid in Farkas v. Texas Instrument Inc., 375 F.2d 629 (5th Cir.), cert. denied, 389 U.S. 977 (1967).

The Executive Branch further had the authority to make the Plan applicable to a given limited area without violating equal protection guarantees, since, in Salsburg v. Maryland, 346 U.S. 545 (1954), these guarantees had been held to relate "to equality between persons as such rather than between areas." 311 F. Supp. at 1010.

Finally, the Executive Branch had the authority to direct the force of the Plan against the contractors, rather than against the unions, whom the contractors charged with responsibility for the discrimination, since the Government, unless forbidden by statute, has the unrestricted power to determine the terms, conditions, and parties with whom it will deal. Id. at 1011; see Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

(In the Department of Labor release accompanying the Plan, note 42 supra, the Government outlined what it hoped would be the effect of the Plan on the unions. If the contractor could not meet his obligation of affirmative action, he would not participate in federally financed construction, and there would be a potential loss of employment opportunity for union members. Thus it would be to the union's advantage to implement procedures and programs which would facilitate compliance by the contractors).

59. 311 F. Supp. at 1013.

60. The September 4, 1970 inspection indicated that minorities represented 30 percent of the iron workers, 25 percent of the steamfitters, 15.3 percent of the sheetmetal workers, 25 percent of the electricians, and 9.7 percent of the plumbers and pipefitters. The sixth craft covered by the Plan, the elevator construction craft, was not involved in federal contract work at the time of the inspection. 2 CCH Employment Prac. Guide, Rep. No. 51, at 2 (Sept. 24, 1970).

61. On July 1, 1970, six Philadelphia contractors were notified that administrative actions would be initiated unless they presented evidence of compliance with the Philadelphia Plan. Responses of five of the contractors were being reviewed when the sixth was notified that the Government was proposing to direct the termination of its subcontract to perform sheetmetal work on a project covered by the Plan. The notice also proposed action to debar the contractor from holding future Government contracts. Id. Rep. No. 50, at 5 (Sept. 10, 1970).

62. One such government-imposed program, the Washington Plan, became effective on

It is to the industry's advantage to devise its own formula of affirmative action, rather than have one imposed from the national level. The *Contractors* decision will help to open some of society's doors to all regardless of race. It will necessarily make the enforcement of civil rights more effective.

Courts—Family Court Jurisdiction over Intra-Family Violence Limited to Legally Recognized Marriages.—Each of the defendants in these three separate cases was convicted of assaulting the complainant with whom he had allegedly established an unceremonialized relationship not recognized in New York as a common-law marriage. Each appealed his conviction contending that section 812 of the Family Court Act[1] vested exclusive original jurisdiction in the family court in cases of intra-family violence. The appellate division affirmed the convictions without opinion.[2] The New York Court of Appeals affirmed, holding that the family court did not have jurisdiction in cases where the litigants were not legally married. The court reasoned that since the state of New York does not recognize common-law marriages, such jurisdiction would be inconsistent with the state's public policy.[3] *People v. Allen*, 27 N.Y.2d 108, 261 N.E.2d 637, 313 N.Y.S.2d 719 (1970).

In 1962, the New York State Legislature created a state-wide family court system[4] vesting it with exclusive original jurisdiction over acts constituting

June 1, 1970, and established goals ranging from 6 to 43 percent. The Plan applied to eleven construction trades in the Washington, D.C.-Northern Virginia-Southern Maryland area. Id. ¶ 16,180 (1970).

1. "The family court has exclusive original jurisdiction . . . over any proceeding concerning acts which would constitute disorderly conduct, harassment, menacing, reckless endangerment, an assault or an attempt [sic] assault between spouses or between parent and child or between members of the same family or household." N.Y. Family Ct. Act § 812 (McKinney Supp. 1970).

2. People v. Echols, 33 App. Div. 2d 1006, 309 N.Y.S.2d 108 (1st Dep't 1970) (mem.); People v. Christmas, 33 App. Div. 2d 892, 307 N.Y.S.2d 841 (2d Dep't 1969) (mem.); People v. Allen, 32 App. Div. 2d 1028, 303 N.Y.S.2d 837 (2d Dep't 1969) (mem.).

3. Defendant Allen had lived with the complainant for three years. His plea of guilty to assault in the third degree was in lieu of an indictment charging him with sodomy. Defendant Echols pleaded guilty to attempted assault in the second degree, the result of his breaking into the victim's apartment and stabbing her. The defendant and the victim, parents of two children, had lived together for eleven years. Defendant Christmas was found guilty by a jury of assault in the second degree. The evidence did not indicate that the defendant and the complainant had lived together with any degree of regularity. People v. Allen, 27 N.Y.2d 108, 261 N.E.2d 637, 313 N.Y.S.2d 719 (1970).

4. The New York Family Court system was created to replace the Domestic Relations Court of the City of New York (ch. 482, [1933] N.Y. Laws 156th Sess. 1038) and the Children's Court in the other counties in New York State (ch. 547, [1922] N.Y. Laws 145th Sess. 1259). See People v. Johnson, 20 N.Y.2d 220, 222, 229 N.E.2d 180, 181, 282 N.Y.S.2d 481, 483 (1967); Parnas, Judicial Response to Intra-Family Violence, 54 Minn. L. Rev. 585 (1970).

"disorderly conduct or an assault."[5] The purpose of the statute was to enable the family court to render practical help[6] through civil proceedings[7] rather than to secure criminal convictions.[8] The Legislature intended that the family court be more concerned with the social maladjustment of the litigants than with their legal "rights."[9] This court has been characterized "as a special agency for the care and protection of the young and the preservation of the family"[10] rather than a "special court."[11] Unlike other courts in the state of New York, the family court has available a reserve of trained family auxiliary services provided by social workers, psychologists, marriage counselors, and physicians as well as religious advisors.[12]

5. Family Ct. Act, ch. 686, § 812, [1962] N.Y. Laws 185th Sess. 3123 (codified as N.Y. Family Ct. Act § 812 (McKinney 1963)). The Legislature has subsequently amended section 812 to include "disorderly conduct, harassment, menacing, reckless endangerment, an assault or an attempt [sic] assault . . . ." N.Y. Family Ct. Act § 812 (McKinney Supp. 1970), amending § 812 (McKinney 1963). Section 812 has been held to exclude certain acts of intra-family violence from the family court's jurisdiction: People v. Nuernberger, 25 N.Y.2d 179, 250 N.E.2d 352, 303 N.Y.S.2d 74 (1969) (endangering the morals of a minor); Whiting v. Shepard, 35 App. Div. 2d 11, 312 N.Y.S.2d 414 (3d Dep't 1970) (murder); People v. Brennan, 33 App. Div. 2d 139, 306 N.Y.S.2d 384 (3d Dep't 1970) (murder); People ex rel. Doty v. Krueger, 58 Misc. 2d 428, 295 N.Y.S.2d 581 (Sup. Ct. 1968), aff'd mem., 32 App. Div. 2d 845, 302 N.Y.S.2d 605 (2d Dep't 1969), appeal dismissed, 26 N.Y.2d 881, 258 N.E.2d 215, 309 N.Y.S.2d 932 (1970) (sodomy and sexual abuse).

6. See People ex rel. Clifford v. Krueger, 59 Misc. 2d 87, 90, 297 N.Y.S.2d 990, 994 (Sup. Ct. 1969); People v. James, 55 Misc. 2d 953, 959-60, 287 N.Y.S.2d 188, 194-95 (Sup. Ct. 1968); Montalvo v. Montalvo, 55 Misc. 2d 699, 702, 286 N.Y.S.2d 605, 609 (Family Ct. 1968); Parrett v. Parrett, 46 Misc. 2d 573, 574, 260 N.Y.S.2d 382, 383 (Family Ct. 1965).

7. The family court was not awarded criminal jurisdiction because "criminal powers and procedures would be inconsistent with the proper development of the Family Court, during its formative period . . . ." Report of the Joint Legislative Committee on Court Reorganization, No. 2—The Family Court Act (reprinted in 2 [1962] McKinney's Sess. Laws 3428, 3430) [hereinafter cited as Report of the Joint Legislative Committee].

8. "In the past, wives and other members of the family who suffered from disorderly conduct, harassment, menacing, reckless endangerment, assaults, or attempted assaults by other members of the family or household were compelled to bring a 'criminal charge' to invoke the jurisdiction of a court. Their purpose, with few exceptions, was not to secure a criminal conviction and punishment, but practical help." N.Y. Family Ct. Act § 811 (McKinney Supp. 1970).

9. "Proceedings involving children and the family ought not be geared to the common adversary process but to processes which are preventative and conserving in character having the aims of maintaining family stability and of rescuing children from the usual disadvantages of condemned misbehavior." Paulsen, The New York Family Court Act, 12 Buffalo L. Rev. 420, 420-21 (1963).

10. Report of the Joint Legislative Committee 3430.

11. This characterization can be misleading since generally an "agency" lacks coercive powers, whereas the family court can compel a party to follow a prescribed course of conduct by making the alternative a jail sentence. N.Y. Family Ct. Act § 846 (McKinney Supp. 1970); see Lauer, The Family Court Act in Operation, 2 N.Y. Continuing Legal Education 67, 72 (Aug. 1964).

12. See generally Temporary Commission on Courts, Report to the Governor and Legis-

Lower New York courts prior to *People v. Allen*[13] had reached inconsistent results in determining whether the family court had jurisdiction in cases where the parties were not legally married to each other.[14] The statute vests jurisdiction in cases of assault[15] "between members of the same family or household."[16] *People v. Dugar*[17] reasoned that if the Legislature had intended to make the resources of the family court available only to legally married couples,[18] it would not have included the words "or household" in the statute.[19] After noting that households in which the parties were not legally married were very often sources of social disruption in the community at large,[20] the court commented that familial instability[21] might best be remedied by the "unique and flexible proce-

lature of the State of New York, 1956 N.Y. Legis. Doc. No. 18, at 52; Cobb, A State-Wide Family Court, 26 Conn. B.J. 279, 281 (1952).

13. 27 N.Y.2d 108, 261 N.E.2d 637, 313 N.Y.S.2d 719 (1970).

14. In People v. Haynes, 26 N.Y.2d 665, 256 N.E.2d 545, 308 N.Y.S.2d 391 (1970) (mem.), the court of appeals expressly reserved the question of whether family court jurisdiction existed where the parties were not legally married.

15. In the early years of the family court's existence, lower court decisions were in conflict with respect to the scope of the word "assault." Some courts limited family court jurisdiction to "simple" assaults, while others held that it also extended to felonious assaults. Compare People v. De Jesus, 21 App. Div. 2d 236, 250 N.Y.S.2d 317 (4th Dep't 1964), with People v. Klaff, 35 Misc. 2d 859, 231 N.Y.S.2d 875, aff'd on rehearing, 35 Misc. 2d 862, 231 N.Y.S.2d 875 (Dist. Ct. 1962). However, the court of appeals has since held that "[t]he statutory phrase, 'an assault between spouses', (§ 812) is broad enough to include any assault, felonious as well as petty." People v. Johnson, 20 N.Y.2d 220, 223, 229 N.E.2d 180, 182, 282 N.Y.S.2d 481, 484 (1967).

16. The Legislature refused to define the key words of section 812—"family" and "household"—and recommended instead that the courts rely "on the common law method of case by case adjudication" for their definition. N.Y. Family Ct. Act § 812, Committee Comments (McKinney 1963).

17. 37 Misc. 2d 652, 235 N.Y.S.2d 152 (Dist. Ct. 1962).

18. The question has arisen whether family court jurisdiction could be invoked in cases where the parties were divorced. In Koeppel v. Judges of the Family Ct., 44 Misc. 2d 799, 254 N.Y.S.2d 600 (Sup. Ct. 1964), the court found divorced parties to be members of the same family on the ground that the existence of issue from their marriage prohibited their divorce from completely severing their relationship. However, in People v. Williams, 24 N.Y.2d 274, 248 N.E.2d 8, 300 N.Y.S.2d 89 (1969), the court of appeals disapproved of the Koeppel decision holding that by divorce "the parties have procured the dissolution of the special matrimonial or family considerations that would otherwise make the Family Court the appropriate forum for the resolution of disputes." Id. at 283, 248 N.E.2d at 13, 300 N.Y.S.2d at 96.

19. 37 Misc. 2d at 653, 235 N.Y.S.2d at 153. "Family" has been interpreted to include in-laws. People ex rel. Clifford v. Krueger, 59 Misc. 2d 87, 297 N.Y.S.2d 990 (Sup. Ct. 1969) (brother-in-law); People v. Harkins, 49 Misc. 2d 673, 268 N.Y.S.2d 482 (Erie County Ct. 1966) (brother-in-law); People v. Keller, 37 Misc. 2d 122, 234 N.Y.S.2d 469 (Dist. Ct. 1962) (mother-in-law). In People v. Hasse, 57 Misc. 2d 59, 291 N.Y.S.2d 53 (Dist. Ct. 1968), the court found a stepmother and her adult stepchild, who was not living at home, to be members of the same family within the meaning of section 812.

20. 37 Misc. 2d at 653, 235 N.Y.S.2d at 153.

21. In the judicial years 1967-1969, the family court heard approximately 31,000 cases

dures and services available in the Family Court."[22] In addition, the court found that the relationship between the parties satisfied the connotative meaning of "household": "They apparently eat, sleep and generally subsist as a single domestic unit depending on this defendant for support as its head."[23]

People v. James[24] reiterated the *Dugar* argument adding that the words "or household" were found not only in section 812 of the Family Court Act but also in the state constitutional provision which authorized the creation of a state-wide family court system.[25] The *James* court also stressed the importance of the temporary orders of protection authorized by section 815(a) of the Family Court Act.[26] Since the purpose of such orders is the physical protection of the parties,[27] "such an order may be even more necessary against one who is not a spouse, or a member of the family, but merely a member of the 'household' . . . ."[28]

In *In re Best v. Macklin*,[29] on the other hand, the court turned to considerations of public morality. There the family court declined to exercise jurisdiction and returned the complaint to the criminal court from which it had been originally transferred, stating that "the rehabilitative processes of the Family Court do not enhance the declared public policy of the State of New York . . . ."[30] The court noted that if it accepted jurisdiction, the most it could do would be to effect a marital reconciliation which would not only make the court a party to

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of intra-family violence representing 15.5% of its total calendar. Administrative Bd. of the Judicial Conference of the State of New York, Report for the Judicial Year July 1, 1968, through June 30, 1969, 1970 N.Y. Legis. Doc. No. 90, at 289, 315 [hereinafter cited as Judicial Conference Report]. This percentage presumably would be greater except for the fact that the greater portion of intra-family violence is never reported. Parnas, supra note 4, at 593-94.

22. 37 Misc. 2d at 654, 235 N.Y.S.2d at 153.

23. Id., 235 N.Y.S.2d at 154. In the similar case of People v. Johnson, 48 Misc. 2d 536, 265 N.Y.S.2d 260 (Dist. Ct. 1965), the defendant was accused of assaulting the woman with whom he cohabited. The court cited Dugar for the principle that family court jurisdiction was not dependent on the existence of a valid marriage. Furthermore, the court said that the informality of the parties' relationship did not render the reconciliation procedures of the family court less appropriate. Id. at 537, 265 N.Y.S.2d at 261-62. See also Mason v. Gross, 158 N.Y.L.J., Dec. 15, 1967, at 20, col. 7 (Sup. Ct.).

24. 55 Misc. 2d 953, 287 N.Y.S.2d 188 (Sup. Ct. 1968).

25. Id. at 955, 287 N.Y.S.2d at 190. N.Y. Const. art. VI, § 13(b) provides: "The family court shall have jurisdiction over . . . crimes and offenses by or against minors or between spouses or between parent and child or between members of the same family or household."

26. N.Y. Family Ct. Act § 815(a)(v) (McKinney Supp. 1970) authorizes the family court to issue protection orders in accordance with section 842 which provides: "An order of protection . . . may set forth reasonable conditions of behavior to be observed for a period not in excess of one year by the petitioner or respondent or both, or, if before the court, any other member of the family or household." Id. § 842 (McKinney 1963).

27. See generally Downing v. Downing, 31 App. Div. 2d 913, 298 N.Y.S.2d 374 (1st Dep't 1969) (mem.); Smith v. Smith, 163 N.Y.L.J., April 13, 1970, at 17, col. 2 (Family Ct.); "S." v. "S.", 60 Misc. 2d 359, 303 N.Y.S.2d 166 (Family Ct. 1969).

28. 55 Misc. 2d at 960, 287 N.Y.S.2d at 195.

29. 46 Misc. 2d 622, 260 N.Y.S.2d 219 (Family Ct. 1965).

30. Id. at 623, 260 N.Y.S.2d at 221.

an immoral relationship but would also encourage that relationship to continue.[31] Furthermore, since the complainant's children were not those of the defendant, the court expressed a fear that a reconciliation would place the children in an unwholesome atmosphere.[32] While the court offered no explanation for the inclusion of the words "or household" in section 812, it did say that to include individuals involved in an informal relationship within the definition of "household" would be contrary to legislative intent.[33]

In *People v. Ostrander*,[34] where the defendant was convicted of assaulting the man with whom she cohabited, the court noted the role that the family court should play in enforcing morality. The criminal court refused to transfer the complaint to the family court reasoning that the utilization of the family court's reconciliation procedures would be incongruous in cases where the state had no interest in preserving the litigants' relationship.[35] The court also pointed out that the use of reconciliation procedures would make the court a party to the defendant's adultery.[36] However, the court factually distinguished *Ostrander* from other cases involving family court jurisdiction on two grounds: first, the defendant was legally married to a third party;[37] second, the parties were no longer living together at the time of the action.[38]

In adopting, in effect, the position taken in *Best* and *Ostrander*, the court of appeals in *Allen* relied primarily on the fact that the Legislature had refused to recognize the validity of common-law marriages.[39] The court reasoned that by

31. Id. In Dugar, the court had taken the opposite approach: "In some instances it may even be possible to arrange a legitimate marriage or at least furnish adequate counselling and protection." 37 Misc. 2d at 654, 235 N.Y.S.2d at 153.

32. "It is the public policy of this State not to place children in a situation which would impair their morals." 46 Misc. 2d at 623, 260 N.Y.S.2d at 221.

33. Id. See also Harrison v. Gross, 158 N.Y.L.J., Nov. 24, 1967, at 21, col. 1 (Sup. Ct.).

34. 58 Misc. 2d 383, 295 N.Y.S.2d 293 (Dutchess County Ct. 1968), aff'd mem., 32 App. Div. 2d 844, 302 N.Y.S.2d 998 (2d Dep't 1969).

35. Id. at 385-86, 295 N.Y.S.2d at 296.

36. Id. at 387, 295 N.Y.S.2d at 297-98.

37. "That the defendant is legally married to someone else . . . injects a new factor into the case which was not present in the prior New York lower court decisions." Id. at 385, 295 N.Y.S.2d at 295. It should be noted that in the Allen case the defendant Echols was also legally married to a third party. 27 N.Y.2d at 111, 261 N.E.2d at 639, 313 N.Y.S.2d at 721-22.

38. "None of the decisions supporting transfer cover the factual pattern that exists here, that is, where the household no longer exists by virtue of the separation of the parties." 58 Misc. 2d at 387, 295 N.Y.S.2d at 297. Similarly, in Allen, the evidence did not support defendant Christmas' contention that the parties were living together even at the time of the assault. 27 N.Y.2d at 111-12, 261 N.E.2d at 639, 313 N.Y.S.2d at 722.

39. 27 N.Y.2d at 112-13, 261 N.E.2d at 640, 313 N.Y.S.2d at 722-23. "Since the Legislature has chosen not to give legal recognition to these relationships, we should not, in construing section 812, contradict this policy." Id. at 113, 261 N.E.2d at 640, 313 N.Y.S.2d at 723. N.Y. Dom. Rel. Law § 11 (McKinney 1964), as amended, (McKinney Supp. 1970), requires the solemnization of marriages which take place within the state. However, New York will recognize the validity of common-law marriages if they are consummated in a state which accords legal recognition to such relationships. See People v. Haynes, 26 N.Y.2d

withholding recognition from common-law relationships the Legislature was indicating that such relationships were inimical to the welfare of the state.[40] The *Allen* court did not directly confront the arguments raised in those cases favoring family court jurisdiction. However, part of the reasoning in *Allen* obliquely rebuts the arguments made in *Dugar* and *James*. The court's reference to restraining orders and imprisonment[41] as proper remedies for the protection of the complainant in the absence of family court jurisdiction appears to be directed to the court in *James* which argued for extended family court jurisdiction to permit effective issuance of orders of protection.[42] The court's apprehension that the family court would be unduly burdened if, prior to each adjudication, it were required to conduct a pre-trial hearing to determine if there were a sufficient "unity of living arrangement"[43] appears to be directed to the court in *Dugar* which argued that a "household" was a single domestic unit depending on the defendant for support.[44] The *Allen* court's reference to "unity of living arrangement" as a standard for determining family court jurisdiction reflects its own prior holding in *People v. Williams*.[45] In that case, the court of appeals affirmed the criminal conviction of a defendant accused of assaulting his uncle with whom he did not reside. The court found that, since the assault stemmed from a dispute arising out of the landlord-tenant relationship between the defendant's parents and the uncle, there was no intimate family relationship sufficient to warrant

665, 256 N.E.2d 545, 308 N.Y.S.2d 391 (1970) (mem.); Shea v. Shea, 294 N.Y. 909, 63 N.E.2d 113 (1945) (mem.); Lieblein v. Charles Chips, Inc., 32 App. Div. 2d 1016, 301 N.Y.S.2d 743 (3d Dep't 1969) (mem.); Mortenson v. Mortenson, 225 N.Y.S.2d 323 (Sup. Ct. 1962); Skinner v. Skinner, 4 Misc. 2d 1013, 150 N.Y.S.2d 739 (Sup. Ct. 1956). The Allen court recognized this fact by limiting family court jurisdiction to "a solemnized marriage or a recognized common-law union." 27 N.Y.2d at 113, 261 N.E.2d at 641, 313 N.Y.S.2d at 723. The court's inclusion of "a recognized common-law union" is significant considering the fact that New York metropolitan areas include a large number of residents from states which recognize common-law unions. 1 U.S. Dep't of Commerce, Census of Population: 1960 (pt. 34, New York), at 438 (1961). See also Bureau of Fiscal Administration, New York City Dep't of Welfare, Monograph (1964); Horwitz, A Portrait of New York's Welfare Population—In One Month, 50,000 Persons Were Added to the City's Welfare Roles, N.Y. Times, Jan. 26, 1969, § 6 (Magazine), at 22; N.Y. Times, June 16, 1969, at 48, col. 1; id., June 1, 1969, at 70, col. 3.

40. 27 N.Y.2d at 112-13, 261 N.E.2d at 640, 313 N.Y.S.2d at 722-23. Judge Bergan, dissenting in part, cited the James decision saying that "the continued stable relationships together made them 'members' of the 'same' household within the meaning of the Constitution and the statute. The language obviously embraces others than lawfully married people." Id. at 114, 261 N.E.2d at 641, 313 N.Y.S.2d at 724. Thus he recommended with respect to defendants Allen and Echols, that the cases be remanded to determine the precise nature of the litigants' relationships. However, Judge Bergan agreed with the majority that the conviction of defendant Christmas should be affirmed since "the record [did] not indicate any relationship in the same household . . . ." Id.

41. Id. at 113, 261 N.E.2d at 641, 313 N.Y.S.2d at 723.

42. 55 Misc. 2d at 960, 287 N.Y.S.2d at 195; see text accompanying notes 26-28 supra.

43. 27 N.Y.2d at 113, 261 N.E.2d at 640, 313 N.Y.S.2d at 723.

44. 37 Misc. 2d at 654, 235 N.Y.S.2d at 154; see text accompanying note 23 supra.

45. 24 N.Y.2d 274, 248 N.E.2d 8, 300 N.Y.S.2d 89 (1969).

family court jurisdiction.[46] The *Williams* decision foreshadowed the holding in *Allen* insofar as it demanded "relationships characterized by a unity of living arrangement, and of social, economic, and, perhaps, *legal interdependence.*"[47]

While the majority in *Allen* based its decision on the Legislature's refusal to recognize common-law relationships, its failure to discuss the presence of the words "or household" in section 812 of the Family Court Act and the New York State Constitution debilitates the force of the decision. Rather than confront the statutory language, the *Allen* holding circumvented it. Furthermore, the Legislature indicated that it favored a "case by case adjudication" in defining the words "family" and "household."[48] The court's denial of family court jurisdiction to unmarried litigants appears to contradict this policy. The *Allen* decision compels a similarly situated complainant to choose between filing a criminal complaint or living in fear of another outburst of intra-family violence. If a female complainant[49] chooses the former, she must face the likelihood that the family's sole source[50] of support may be imprisoned or that he will receive a suspended sentence and be released without adequate counseling. If she chooses the latter, she must face the possibility of recurring acts of violence. Prior to *Allen* the family court offered a viable alternative.

Jurisdiction—Appearance Alone Does Not Render Nonresident Defendant Subject to In Personam Jurisdiction in an Unrelated Cause of Action—Dictum of *Everitt v. Everitt* Approved.—An action was commenced in Alaska to foreclose a mortgage,[1] and Einstoss, the defendant-mortgagor, who was otherwise not subject to in personam jurisdiction, entered an appearance.[2] Subse-

46. Id. at 281, 248 N.E.2d at 11, 300 N.Y.S.2d at 94.

47. Id. (emphasis added).

48. See note 16 supra.

49. The majority of complainants in cases of intra-family violence are wives. Parnas, supra note 4, at 594. In 1968-69, wives constituted 82% of all petitioners before the family court in cases of intra-family violence. Judicial Conference Report, supra note 21, at 316.

50. In 1968-69, non-relatives in the household constituted only 5% of the respondents, wives 3%, sons 3%. Judicial Conference Report, supra note 21, at 316.

1. Schlothan v. Einstoss, 17 Alas. 253 (D.C. Alas. 1957). In 1951, Einstoss had purchased property in Alaska for which he gave a full purchase money mortgage in the amount of $25,000. He defaulted in his mortgage payments, and, in 1954, the mortgagee instituted an in rem foreclosure proceeding against the property in the District Court for Alaska. Because it had filed a tax lien for approximately $60,000 against Einstoss in 1953, the Territory of Alaska was made a party defendant, and questions of priority were raised. Brief for Respondent at 4, In re Estate of Einstoss, 26 N.Y.2d 181, 257 N.E.2d 637, 309 N.Y.S.2d 184 (1970) [hereinafter cited as Brief for Respondent].

2. Brief for Appellant at 2, Appendix at A37, In re Estate of Einstoss, 26 N.Y.2d 181, 257 N.E.2d 637, 309 N.Y.S.2d 184 (1970) [hereinafter cited as Brief for Appellant]. Einstoss appeared in reliance upon the mortgagee's express representation that she would "satisfy any judgment solely out of the mortgaged property." 26 N.Y.2d at 185, 257 N.E.2d at 638, 309 N.Y.S.2d at 186; Brief for Appellant, Appendix at A56-57.

quently, Alaska, also a defendant in the action, filed a cross complaint against Einstoss for unpaid taxes[3] and served him personally in Seattle, Washington.[4] Einstoss died without answering,[5] and judgment was entered by default.[6] Decedent's New York administrator had not been made a party to the Alaskan action.[7] In a proceeding in New York to determine the validity of Alaska's claim against the decedent's estate,[8] the Surrogate denied effect to the Alaskan judgment.[9] The appellate division affirmed without opinion.[10] The court of appeals affirmed in a unanimous opinion, holding that an appearance, absent any further action, does not confer any jurisdiction upon a court beyond the general subject matter of the suit at bar.[11] *In re Estate of Einstoss*, 26 N.Y.2d 181, 257 N.E.2d 637, 309 N.Y.S.2d 184 (1970).

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3. 26 N.Y.2d at 185, 257 N.E.2d at 638, 309 N.Y.S.2d at 186.

4. Service was made pursuant to 28 U.S.C. § 1655 (1964) and Fed. R. Civ. P. 4(e).

"In an action in a district court to enforce any lien upon . . . property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear . . . .

"Such order shall be served on the absent defendant personally if practicable, wherever found . . . .

"If an absent defendant does not appear . . . the court may proceed as if [he] had been served with process within the State, but any adjudication shall . . . affect only the property which is the subject of the action." 28 U.S.C. § 1655 (1964).

5. Brief for Respondent 4. Einstoss died on May 17, 1954, the last day to answer, thus not in default at the time of his demise. Id. at 4-5.

6. Apparently unaware of Einstoss' prior death, the Territory procurred an entry of default in pleading on July 28, 1954. Judgment was entered thereupon in 1957, setting forth the priority of the Territory's tax lien over the purchase money mortgage. Id. at 5-6. See Schlothan v. Einstoss, 17 Alas. 253 (D.C. Alas. 1957). The mortgagee and the Territory litigated the matter of priority, and the Territory prevailed. Schlothan v. Alaska, 276 F.2d 806 (9th Cir.), cert. denied, 362 U.S. 990 (1960).

7. But the Alaskan court did appoint an ancillary administrator. Brief for Appellant, Appendix at A95-96.

8. The domicilliary administrator initiated this proceeding under Law of April 16, 1963, ch. 488, § 5, [1963] N.Y. Laws 186th Sess. 1923, amending Law of May 21, 1920, ch. 928, § 211, 4 [1920] N.Y. Laws 143d Sess. 626 (repealed 1966) (now N.Y. Surr. Ct. Proc. Act § 1809 (McKinney 1967)) which allows the administrator to ask the court to rule on the validity of a disputed claim.

9. In re Estate of Einstoss, 49 Misc. 2d 1023, 268 N.Y.S.2d 765 (Sur. Ct. 1966). The court determined "that the judgment has no binding effect as a claim against the assets of the decedent's estate, as it was rendered against the decedent after his death without being revived against his representatives in the manner required by rule 25 (subd. [a], par [1]) of the Federal Rules of Civil Procedure, as in effect in Alaska in 1954." Id. at 1025, 268 N.Y.S.2d at 767. The rule upon which the court relied read in part: "If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party." Fed. R. Civ. P. 25(a), 308 U.S. 691 (1937), as amended, 374 U.S. 882 (1963).

10. In re Estate of Einstoss, 27 App. Div. 2d 644, 277 N.Y.S.2d 623 (2d Dep't 1966) (mem.).

11. The court's holding was on alternative grounds. "The judgment upon which Alaska's

According to the Restatement of Judgments, "[t]he fundamental requirement as to the jurisdiction of a State over a person is that there should be such a relation between the State and the person that it is reasonable for the State to exercise control over him through its courts."[12] The state may acquire three different types of jurisdiction over the person: in personam,[13] in rem,[14] or quasi in rem.[15] Only where the state has in personam jurisdiction, however, may the successful plaintiff look to *all* of the defendant's assets, both within and without the state, for satisfaction of the judgment.[16] Under New York law, the requisite of an in personam jurisdictional predicate may be fulfilled in various ways: (1) the physical presence of the defendant in New York,[17] (2) the fictional presence of a corporation,[18] (3) the domicile of the defendant within the state,[19] (4) the performance of certain acts in the state,[20] (5) the

claim is grounded is not entitled to [full faith and credit] . . . not only because the New York administrator was never made a party to the proceeding but also because the Alaskan court never acquired in personam jurisdiction for the tax claim during Einstoss' lifetime." 26 N.Y.2d at 187, 257 N.E.2d at 639, 309 N.Y.S.2d at 188. The court pointed out that "the underlying claim upon which the Alaskan judgment was based—the decedent's liability for unpaid franchise taxes—is not, in itself, enforceable outside of Alaska." Id. at 186, 257 N.E.2d at 639, 309 N.Y.S.2d at 187. Also mentioned was the failure to comply with the Federal Rule regarding service of administrators. See note 9 supra.

12. Restatement of Judgments § 14, comment a at 77 (1942). In addition, the Restatement says: "A judgment . . . is valid if (a) the State in which it is rendered has jurisdiction to subject the parties and the subject matter to its control . . . and (b) a reasonable method of notification is employed and a reasonable opportunity to be heard is afforded to persons affected . . . and (c) it is rendered by a court with competency to render it . . . and (d) there is compliance with such requirements as are necessary for the valid exercise of power by the court . . . ." Id. § 4.

13. "Such a judgment may be rendered where the jurisdiction of the court which renders it is based on the court's power over the persons upon whom and in favor of whom the liabilities are imposed." Id. at 5.

14. "Such a judgment may be rendered where the jurisdiction of the court which renders it is based on the court's power over the thing, although it has no power over all the persons whose interests are affected." Id. at 6.

15. "A judgment quasi in rem, like a judgment in rem, affects interests in a thing; but unlike a judgment in rem it affects the interests of particular persons in the thing and not interests of all persons." Id. at 7.

16. "[A personal judgment] imposes upon the defendant an obligation to pay a sum of money to the plaintiff. This obligation can be enforced by the seizure by a public officer of any property of the defendant, then owned or thereafter acquired by him, which is subject to execution. Moreover such a judgment makes the defendant a debtor to the plaintiff for the amount of the judgment, and to recover this debt an action may be maintained by the plaintiff against the defendant, either in the same State or in another State." Id. at 6.

17. See generally N.Y. C.P.L.R. § 301 (McKinney 1963), § 308(1) (McKinney Supp. 1970).

18. See, e.g., Frummer v. Hilton Hotels Int'l, Inc., 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41, cert. denied, 389 U.S. 923 (1967). See also N.Y. Bus. Corp. Law § 304 (McKinney 1963).

19. N.Y. C.P.L.R. § 313 (McKinney 1963).

20. Id. § 302(a) (McKinney Supp. 1970).

consent of the defendant to the court's jurisdiction,[21] and (6) the use of the New York courts by the defendant as a plaintiff.[22] The defendant may provide the predicate for in personam jurisdiction himself by entering an appearance for purposes of contesting a claim, thus consenting to the court's jurisdiction.[23] However, not every action by the defendant will constitute an appearance;[24] nor will every appearance confer in personam jurisdiction on the court.[25] For example, if the defendant is served with a naked summons, he may serve a written demand for a complaint without subjecting himself to the court's jurisdiction.[26]

Once an action is commenced, a party may amend his pleadings once as a

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21. "[A]n appearance of the defendant is equivalent to personal service of the summons upon him . . . ." Id. R. 320(b). "[A]bsent adequate contacts or notice, appearance serves as a substitute for either or both; for unless [the defendant] presents jurisdictional objections to the court in the proper manner and at the proper time his appearance cures all defects except lack of subject matter jurisdiction." Homburger & Laufer, Appearance and Jurisdictional Motions in New York, 14 Buffalo L. Rev. 374, 375 (1965) (footnotes omitted).

In Reed v. Chilson, 142 N.Y. 152, 36 N.E. 884 (1894), the defendants had entered a general appearance in a Michigan action in the form of a general notice of retainer filed by an attorney of the court on behalf of the two defendants, one of whom was a resident of Michigan, the other of North Dakota. Id. at 154, 36 N.E. at 885. A unanimous court of appeals, giving effect to the foreign judgment, held that "[t]he service of the notice of retainer was a voluntary general appearance in the action, and equivalent to personal service," thus giving the court personal jurisdiction for all purposes. Id. at 155, 36 N.E. at 885. In so holding, the court rejected the contention that, since the defendants were compelled to appear upon pain of default, the appearance was not voluntary. Id.

22. N.Y. C.P.L.R. § 303 (McKinney 1963).

These six categories are the traditional ones. H. Peterfreund & J. McLaughlin, New York Practice 203 (2d ed. 1968). Whatever the jurisdictional predicate, "[a]n action is commenced . . . by service of a summons." N.Y. C.P.L.R. § 304 (McKinney 1963). Where his claim is for a sum certain, the plaintiff may elect to serve the defendant with a summons and "a notice stating . . . the sum of money for which judgment will be taken in case of default" in lieu of a complaint. Id. R. 305(b) (McKinney Supp. 1970).

23. See note 21 supra.

24. See N.Y. C.P.L.R. § 3012(b) (McKinney 1963). "The defendant is entitled to a copy of the complaint before he decides whether to appear or not. Indeed, he may very well base his decision, as to whether or not he wants to appear, on the cause of action pleaded in the complaint." Siegel, Practice Commentary to N.Y. C.P.L.R. § 3012, at 77 (McKinney Supp. 1970) (emphasis deleted).

25. In some instances, an appearance will confer no jurisdiction on the court, e.g., an appearance under N.Y. C.P.L.R. R. 320(b) (McKinney Supp. 1970), when coupled with an objection to jurisdiction under N.Y. C.P.L.R. R. 3211(a)(8) (McKinney 1970).

In other instances, an appearance will confer only limited jurisdiction on the court. N.Y. C.P.L.R. § 302(b) (McKinney 1963) provides that where jurisdiction is obtained under the long-arm statute (§ 302(a)), an appearance confers full personal jurisdiction only as to causes of action arising from acts enumerated in § 302(a); N.Y. C.P.L.R. R. 320(c) (McKinney Supp. 1970) provides for a limited appearance where service without the state is made pursuant to an attachment order under § 314(3).

26. See note 24 supra.

matter of right.[27] This procedure enables an enterprising plaintiff to entrap a defendant not otherwise subject to the court's in personam jurisdiction. Once the defendant appears in an action, having reached the decision to do so as a result of his understanding of the case obtained from a reading of the summons and complaint, he subjects himself to the personal jurisdiction of the court. The plaintiff can then exercise his statutory right to amend his complaint, and the defendant may suddenly find himself subjected to a suit in a forum which might not otherwise have had a sufficient basis to assert in personam jurisdiction over him had he not consented to such jurisdiction by his appearance. Given full knowledge of the plaintiff's intentions, the defendant very likely would not have consented to appear. The use of such entrapment in New York is dignified by age,[28] and, after more than half a century of prece-

27. N.Y. C.P.L.R. R. 3025(a) (McKinney 1963).

28. In Sharp v. Clapp, 15 App. Div. 445, 44 N.Y.S. 451 (1st Dep't 1897), the action had been commenced by service of a summons and notice of default. Defendants demanded a copy of the complaint, which was then served. The trial court granted the defendants' motion to strike the complaint on the ground that the summons sounded in contract and the complaint in conversion. The appellate division reversed, holding that the trial court had erred in setting aside the complaint. "[Once] the defendant has been brought into court by the service of [a] summons the plaintiff is at liberty to set up against him any cause of action which he may see fit." Id. at 446, 44 N.Y.S. at 452. The passage of half a century did nothing to soften this view of the courts. See, e.g., Johnstone v. Weibel, 131 App. Div. 166, 115 N.Y.S. 255 (2d Dep't 1909); Moreno v. Segal, 17 Misc. 2d 833, 187 N.Y.S.2d 567 (Sup. Ct. 1959); Mendoza v. Mendoza, 4 Misc. 2d 1060, 77 N.Y.S.2d 169 (Sup. Ct. 1947), aff'd mem., 273 App. Div. 877, 77 N.Y.S.2d 264 (1st Dep't), motion for leave to appeal dismissed mem., 297 N.Y. 950, 80 N.E.2d 347 (1948). Mendoza, decided 50 years after Sharp v. Clapp, held that, where a nonresident defendant appeared generally by moving to dismiss a complaint containing two causes of action, a complaint alleging a new cause of action could be served as a matter of right. "[T]he right of a plaintiff to amend the complaint as a matter of course . . . includes the right entirely to change the nature of the cause of action asserted. . . . An amended complaint served as a matter of right may also add additional causes of action." Id. at 1061, 77 N.Y.S.2d at 170.

Mendoza and its predecessors have been criticized for failing to acknowledge the constitutional issue presented. 3 J. Weinstein, H. Korn & A. Miller, New York Civil Practice ¶ 3025.10 (1970); Frumer, Jurisdiction and Limited Appearances in New York: Dilemma for the Nonresident Defendant, 18 Fordham L. Rev. 73, 88-96 (1949). See also Chapman v. Chapman, 284 App. Div. 504, 132 N.Y.S.2d 707 (3d Dep't 1954). The imposition of in personam jurisdiction on a defendant is subject to the constitutional protection of due process of law as guaranteed by the fourteenth amendment. "In the United States, the jurisdiction of a state court is controlled concurrently by state legislatures acting in accordance with state constitutions and by the United States Supreme Court as final interpreter of the federal constitution and laws." Developments in the Law—State-Court Jurisdiction, 73 Harv. L. Rev. 909, 912 (1960). Speaking in that latter capacity in International Shoe Co. v. Washington, 326 U.S. 310 (1945), the Supreme Court stated the minimum requirements: "[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Id. at 316 (emphasis deleted) (citations omitted). For subsequent elaborations of the "minimum contacts" test, see Hanson v. Denckla, 357 U.S. 235

dent, the lower New York courts were still attempting to deal fairly with this problem.

In *Finizio v. Finizio*,[29] plaintiff effected extraterritorial service of a summons and verified complaint containing two causes of action: one for separation, the other seeking to enjoin defendant from proceeding against plaintiff in a Nevada divorce action.[30] Since the Nevada court had already rendered a judgment of divorce, plaintiff amended her complaint by substituting an action for declaratory judgment in place of the demand for an injunction. Defendant appeared generally to answer the first cause of action, and specially, by motion, to dismiss the second on the ground that the court lacked jurisdiction over the person of the defendant as to this cause of action, no new service of process having been made.[31] Holding that it lacked jurisdiction as to the declaratory judgment action, the court said:

> To permit this second cause of action to stand would open the door to the bringing of . . . actions [which permit] plaintiffs the privilege of personal service without the state and then [allowing them to amend] their complaints to plead actions . . . which could not, in the first place, have been so served out of the state. Such a position is untenable, amounts to an evasion of the law and renders the law nugatory. *A defendant should not be enticed or tricked or even innocently be led into answering a complaint different from the sort of action which he will ultimately have to defend.*[32]

The court cited the due process clause of the fourteenth amendment as the basis for its holding.[33]

Finizio was followed by *Chapman v. Chapman*.[34] In approving the position taken by the Restatement of Judgments,[35] the court in *Chapman* said: "A nonresident defendant who desires to appear voluntarily in order to defend against a specific cause of action ought not to be compelled, as a condition of being permitted to make his defense, to submit to the jurisdiction of the court with respect to other causes of action."[36]

(1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957). See also McLaughlin, 1965 Supplementary Practice Commentary to N.Y. C.P.L.R. § 302 (McKinney Supp. 1970); 39 Fordham L. Rev. 325 (1970).

29. 124 N.Y.S.2d 121 (Sup. Ct. 1953).

30. Id. at 122-23.

31. Id. at 124. "The preamble of the original answer to the first complaint did not state that it was answering the complaint but stated specifically that it was 'answering the first cause of action of plaintiff's complaint.'" Id. at 124-25. "It is obvious that defendant did not intend to answer the second cause of action relating to injunction." Id. at 125.

32. Id. at 125 (emphasis added).

33. Id. at 125-26.

34. 284 App. Div. 504, 132 N.Y.S.2d 707 (3d Dep't 1954).

35. Id. at 514, 132 N.Y.S.2d at 717. See Restatement of Judgments § 5, comment g (1942).

36. 284 App. Div. at 514, 132 N.Y.S.2d at 717-18 (dictum). "The Restatement of Judgments states this not only as a matter of fairness but as a matter of constitutional right." Id. at 515, 132 N.Y.S.2d at 718. The judgment in question was denied validity on other grounds. On the subsequent trial of the action, it was shown that defendant had actually appeared generally. Chapman v. Chapman, 4 Misc. 2d 64, 158 N.Y.S.2d 674 (Sup.

In *Everitt v. Everitt*,[37] the court of appeals addressed itself to the problem of acquiring in personam jurisdiction over a defendant for a cause of action of which he was not apprised at the time of his appearance. While on her way to Delaware pursuant to a notice to take deposition served upon her by plaintiff's attorneys, defendant entered New York and there was served with a summons and default notice[38] in the amount of $46,900 in a contract action. Defendant, after entering a general appearance and demanding that a copy of the complaint be served upon her attorneys, returned to her residence in Mexico. The complaint, when served, contained, in addition to the original cause of action, a second cause of action also sounding in contract for $1,500 and a cause of action sounding in libel for $350,000. Special Term granted defendant's motion[39] to dismiss the additional causes of action for lack of personal jurisdiction.[40] The appellate division reversed.[41] The court of appeals affirmed the appellate division, holding that there was no denial of due process in dismissing defendant's motion, since her general appearance conferred personal jurisdiction on the court as to the additional causes of action.[42] The court said, with regard to the function of the default notice, that "the law has long been established in this State that such a notice is effectual only in case of default . . . and that 'if the defendant appears the notice at once is rendered of no importance. . . .' "[43] Therefore, "[b]y interposing a general appearance, defendant waived her objection to jurisdiction of her person and foreclosed her subsequent effort to move specially . . . ."[44] In a dictum of potentially far greater import than the actual holding,[45] the court said: "It may well be that if an action has been commenced against a nonresident by the service of a summons and *complaint*, the complaint cannot be amended by adding new causes of action after the defendant has left the State . . . ."[46] Thus a distinction was drawn between an action commenced by the service of a summons with a default notice, and one

Ct. 1956), aff'd, 5 App. Div. 2d 257, 168 N.Y.S.2d 872 (3d Dep't 1957). The court adhered to its earlier position, but found that defendant had waived the jurisdictional objection. For a laudatory analysis of the original opinion, see Lenhoff, Justice Halpern's Contribution to Conflict of Laws, 13 Buffalo L. Rev. 317, 319-21 (1964).

37. 4 N.Y.2d 13, 148 N.E.2d 891, 171 N.Y.S.2d 836 (1958), noted in 25 Brooklyn L. Rev. 137 (1959) and 44 Cornell L.Q. 240 (1959).

38. Where his claim is for a sum certain, plaintiff may serve defendant with a summons and, in lieu of a complaint, "a notice stating . . . the sum of money for which judgment will be taken in case of default." N.Y. C.P.L.R. R. 305(b) (McKinney Supp. 1970).

39. Defendant moved under § 237-a of the Civil Practice Act, Law of April 11, 1951, ch. 729, § 1, [1951] N.Y. Laws 174th Sess. 1705, amending Law of May 21, 1920, ch. 925, § 237, 4 [1920] N.Y. Laws 143d Sess. 97 (repealed 1962) (now N.Y. C.P.L.R. R. 3211(a)(8) (McKinney 1970)). 4 N.Y.2d at 15, 148 N.E.2d at 892-93, 171 N.Y.S.2d at 838.

40. 157 N.Y.S.2d 310 (Sup. Ct. 1956).

41. 3 App. Div. 2d 413, 161 N.Y.S.2d 172 (1st Dep't 1957).

42. 4 N.Y.2d at 15-17, 148 N.E.2d at 893-94, 171 N.Y.S.2d at 838-39 (passim).

43. Id. at 16, 148 N.E.2d at 893, 171 N.Y.S.2d at 838, citing Sharp v. Clapp, 15 App. Div. 445, 447, 44 N.Y.S. 451, 453 (1st Dep't 1897).

44. 4 N.Y.2d at 17, 148 N.E.2d at 894, 171 N.Y.S.2d at 839 (citations omitted).

45. The holding has been described as "very narrow." H. Peterfreund & J. McLaughlin, supra note 22, at 395.

46. 4 N.Y.2d at 16, 148 N.E.2d at 893, 171 N.Y.S.2d at 838 (emphasis added), citing

commenced by the service of a summons with a complaint. In the former instance, the defendant has only a limited knowledge as to what awaits him should he decide to enter the suit. In the latter, he stands fully apprised of the causes of action against which he must defend. Thus, a nonresident defendant, upon receipt of a summons and notice, was faced with a dilemma: should he default to the known quantity, or risk conferring jurisdiction over his person upon the court by an appearance, and thus subject himself to the possibility of yet greater claims?[47] It has been suggested[48] that the dictum in *Everitt* implied approval of the dictum in *Chapman* with the result that "the defendant who has elected to defend the causes of action alleged in the complaint will be bound by his general appearance *only with respect to those causes of action of which*, prior to his appearance, *he was fairly apprised by the complaint.*"[49]

The beginning of a trend toward the establishment of this view was first seen in *Meadow Brook National Bank v. Whitehead*,[50] where the supreme court, stating that it was following *Everitt*, said: "[W]hen a defendant defaults in appearance after service of summons and complaint, judgment cannot be entered against him for more than the amount specified in the complaint unless the complaint has been amended after notice to him and an opportunity to be heard . . . ."[51] However, with two statutory exceptions,[52] the law continued to assume "that if the defendant appears in the action it is his appearance which becomes the jurisdictional basis, superseding the original basis and supporting whatever claims the plaintiff may wish to plead, by amendment or otherwise."[53] In 1970, the court of appeals decided two cases that "strongly suggest that in

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Pennoyer v. Neff, 95 U.S. 714 (1878); Chapman v. Chapman, 284 App. Div. 504, 132 N.Y.S.2d 707 (3d Dep't 1954); Restatement of Judgments § 5, comment g (1942). The court further pointed out that "if defendant-appellant had defaulted in appearing in this action after the service of the summons with notice, judgment could not have been entered against her by default on any other cause of action or for more than the amount specified in the notice served with the summons . . . ." 4 N.Y.2d at 16, 148 N.E.2d at 893, 171 N.Y.S.2d at 838. The dissenters expressed their agreement with the dictum of the majority. Id. at 17-18, 148 N.E.2d at 894, 171 N.Y.S.2d at 839-40 (dissenting opinion).

47. This predicament is recognized in Peterfreund & Schneider, Civil Practice, 1958 Survey of N.Y. Law, 33 N.Y.U.L. Rev. 1263, 1271-72 (1958), where the suggestion is made that the defendant "be allowed to withdraw her appearance if she relied on the notice and now wishes to default on the claim stated therein." Id. at 1272. Additional commentary on the Everitt decision may be found in Grad, Conflict of Laws, 1958 Survey of N.Y. Law, 33 N.Y.U.L. Rev. 1067 (1958); Leflar, Conflict of Laws, 1960 Ann. Survey Am. L., 35 N.Y.U.L. Rev. 62, 73 (1960); McLaughlin, Civil Practice, 1962 Survey of N.Y. Law, 14 Syracuse L. Rev. 347, 371 (1962).

48. 44 Cornell L.Q. 240, 244 (1959).

49. Id. (emphasis added).

50. 31 Misc. 2d 344, 220 N.Y.S.2d 127 (Sup. Ct. 1961).

51. Id. at 345, 220 N.Y.S.2d at 128-29, citing, inter alia, Chapman v. Chapman, 284 App. Div. 504, 132 N.Y.S.2d 707 (3d Dep't 1954). Citing Everitt, the court in Meadow Brook did acknowledge that the rule might be different where there had been an appearance. 31 Misc. 2d at 345, 220 N.Y.S.2d at 129.

52. See note 25 supra.

53. Siegel, 1970 Supplementary Practice Commentary to N.Y. C.P.L.R. § 3012, at 79-80 (McKinney Supp. 1970).

the future the appearance may not have so broad a role."[54] *Patrician Plastic Corp. v. Bernadel Realty Corp.*[55] implied that the dictum of *Everitt* was about to emerge triumphant over the holding. "There may be special circumstances . . . such as in an action pending against a nonresident in which it is sought to add a new claim, when it *may be necessary to acquire personal jurisdiction anew over the defendent* . . . ."[56] That that triumph may soon be realized was indicated by *In re Estate of Einstoss.*[57]

It must be noted at the outset that while *Patrician* was a case involving solely New York law,[58] the holding in *Einstoss* was clouded by the fact that the issue arose out of a conflict of laws case, dealing with the law of Alaska as well as that of New York. Unfortunately, nowhere in his opinion does Chief Judge Fuld make this point explicitly clear. Under basic principles of conflicts law,[59] including the full faith and credit clause of the Constitution,[60] the courts of one state are required to give recognition and effect to judgments rendered by the courts of another state.[61] There are certain limited exceptions to this broad general rule.[62] Among these, two are of fundamental importance in instances such as the one presented by the facts of *Einstoss.* First, there are those judgments which are rendered by a court whose exercise of jurisdiction was

54. Id. at 80.

55. 25 N.Y.2d 599, 256 N.E.2d 180, 307 N.Y.S.2d 868 (1970).

56. Id. at 608, 256 N.E.2d at 184-85, 307 N.Y.S.2d at 875, citing Everitt (emphasis added).

57. 26 N.Y.2d 181, 257 N.E.2d 637, 309 N.Y.S.2d 184 (1970).

58. "[T]he defendant in question (Automatic Fire Alarm Company) [was] a domestic corporation . . . ." 25 N.Y.2d at 602, 256 N.E.2d at 181, 307 N.Y.S.2d at 870.

59. H. Goodrich, Conflict of Laws § 206 (4th ed. E. Scoles 1964) [hereinafter cited as Goodrich]; Restatement of Conflict of Laws § 430 (1934); Restatement (Second) of Conflict of Laws § 93 (proposed official draft 1967); G. Stumberg, Principles of Conflict of Laws 108 (3d ed. 1963) [hereinafter cited as Stumberg]. See generally Connolly v. Bell, 309 N.Y. 581, 132 N.E.2d 852 (1956); Johnston v. Compagnie Generale Transatlantique, 242 N.Y. 381, 152 N.E. 121 (1926); Dunstan v. Higgins, 138 N.Y. 70, 30 N.E. 729 (1893).

60. U.S. Const. art. IV, § 1.

61. As a practical matter, the full faith and credit clause has virtually preempted the field as far as judgments of sister states are concerned. Goodrich § 208; Stumberg 108. Congressional legislation under the full faith and credit clause is found in 28 U.S.C. §§ 1738-39 (1964). See Chicago & A.R.R. v. Wiggins Ferry Co., 119 U.S. 615 (1887); Hanley v. Donoghue, 116 U.S. 1 (1885); Hampton v. McConnell, 16 U.S. (3 Wheat.) 234 (1818); Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813). See also Ohio v. Chattanooga Boiler Co., 289 U.S. 439 (1933); Roche v. McDonald, 275 U.S. 449 (1928); Hartford Life Ins. Co. v. Barber, 245 U.S. 146 (1917); Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 (1915); Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912); Everett v. Everett, 215 U.S. 203 (1909); American Express Co. v. Mullins, 212 U.S. 311 (1909); Fauntleroy v. Lum, 210 U.S. 230 (1908); Insurance Co. v. Harris, 97 U.S. 331 (1878); Green v. Van Buskirk, 74 U.S. (7 Wall.) 139 (1869); McElmoyle v. Cohen, 38 U.S. (13 Pet.) 312 (1839).

62. See, e.g., Goodrich §§ 209-15; Restatement (Second) of Conflict of Laws §§ 103-21 (proposed official draft 1967); Stumberg 111-20. See also Atlas Credit Corp. v. Ezrine, 25 N.Y.2d 219, 250 N.E.2d 76, 303 N.Y.S.2d 382 (1969).

constitutionally ineffectual; they are not entitled to recognition, for to grant them any effect at all would be a violation of due process.[63] Second, there are those judgments wherein the court of the original forum violates a local rule regulating the competence of that court; they are not entitled to recognition, since they are invalid in the state where rendered.[64] Viewing *Einstoss* as an application of the first of these principles, the court of appeals must be seen as an American appellate court sitting in judgment on a principle of constitutional law. In that capacity, its opinion, although not binding, is highly influential in all American jurisdictions, subject to review only by the United States Supreme Court. Viewing *Einstoss* as an example of the second exception, its importance is diminished by the fact that the court of appeals was sitting as if it were an Alaskan tribunal to determine whether local (Alaskan) law has been complied with in rendering the judgment in question. Because of the vague tenor of the court's opinion on this crucial point it is impossible to determine which parts reflect the former perspective, and which the latter. However, because of the similarity of outlook to *Patrician*, decided only six weeks prior, it is possible to speculate that, regardless of the capacity in which it actually spoke in the present case, the court of appeals was really enunciating what it considered to be a basic principle of jurisdiction, both under the Constitution and, by implication, under the law of New York.

Rejecting the claimant's assertion of the doctrine of continuing jurisdiction,

63. "[A]s between the states of the United States, the full faith and credit clause of the Constitution and the legislation thereunder do not preclude an inquiry into the question of jurisdiction of the first court to render the judgment sought to be enforced in the second state. If there was no jurisdiction, the judgment is not entitled to [full] faith and credit." Goodrich § 209, at 395; accord, Restatement (Second) of Conflict of Laws § 104 (proposed official draft 1967); see National Exch. Bank v. Wiley, 195 U.S. 257 (1904); Grover & Baker Sewing Mach. Co. v. Radcliffe, 137 U.S. 287 (1890); Board of Pub. Works v. Columbia College, 84 U.S. (17 Wall.) 521 (1873). See generally Hanson v. Denckla, 357 U.S. 235 (1958); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Griffin v. Griffin, 327 U.S. 220 (1946); Spokane & Inland Empire R.R. v. Whitley, 237 U.S. 487 (1915); Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912); Brown v. Fletcher's Estate, 210 U.S. 82 (1908); Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888); Pennoyer v. Neff, 95 U.S. 714 (1878).

64. "What appears to be merely a regulation of procedure of the court rendering judgment may . . . be treated by the law of that state as a limitation on the competence of the court to act. Since a judgment rendered without complying with such a rule is invalid in the state of its rendition . . . it is not entitled to recognition in another state, so far as the full faith and credit clause is concerned." Goodrich § 209, at 396; Restatement of Conflict of Laws § 432, comment b (1934); Restatement (Second) of Conflict of Laws § 105 (proposed official draft 1967). See also Restatement of Judgments § 7, comments a, b & § 8 (1942). However, a mere error of law or fact in the proceedings prior to judgment will not support a denial of effect to the judgment. Goodrich § 215; Restatement of Conflict of Laws § 431 (1934); Restatement (Second) of Conflict of Laws § 106 (proposed official draft 1967). See generally American Express Co. v. Mullins, 212 U.S. 311 (1909); Simmons v. Saul, 138 U.S. 439 (1891); Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888); Hanley v. Donoghue, 116 U.S. 1 (1885); Maxwell v. Stewart, 88 U.S. (21 Wall.) 71 (1875); Christmas v. Russell, 72 U.S. (5 Wall.) 290 (1866).

which would have the effect of rendering Einstoss' appearance in the initial action a submission to the personal jurisdiction of the Alaskan court, the court of appeals held: "Although this is the general rule, the doctrine has its limits and, where a party appears but takes no further action in a case, a court's jurisdiction does not go beyond the general subject matter of the suit in which he appeared."[65] Thus the dictum of *Everitt* has emerged, slightly disguised, in the rationale of the *Einstoss* holding. As one commentator has stated: "The rule which emerges . . . appears to be that an amendment adding a new cause of action based upon a transaction different from that pleaded in the original complaint, requires an independent basis of jurisdiction."[66]

Assuming arguendo that the Alaskan court had obtained personal jurisdiction over Einstoss during his lifetime, would the claimant prevail? The court's opinion made it clear that he would not. "[I]f a party dies before a verdict or decision is rendered in an action, it abates as to him and must be dismissed unless it is revived by substituting his personal representative . . . ."[67] Prior to the enactment of the long-arm statute[68] in 1962, there was no way to substitute a foreign executor in an action unless there was an independent predicate

65. 26 N.Y.2d at 187, 257 N.E.2d at 640, 309 N.Y.S.2d at 188. The court considered the cross claim for taxes to be "unrelated" to the foreclosure proceedings. Id. "The mere fact that the Federal Rules permitted this claim to be asserted in a cross complaint does not alter the requirement that the court must obtain jurisdiction over the defendant anew before it may entertain a new and entirely unrelated claim against him." Id. at 188, 257 N.E.2d at 640-41, 309 N.Y.S.2d at 189.

66. McLaughlin, 1970 Supplementary Practice Commentary to N.Y. C.P.L.R. R. 320, at 244 (McKinney Supp. 1970).

67. 26 N.Y.2d at 189, 257 N.E.2d at 641, 309 N.Y.S.2d at 190, citing, inter alia, N.Y. C.P.L.R. § 1015(a) (McKinney 1963); id. R. 5016(d) (McKinney Supp. 1970).

The court of appeals, in McMaster v. Gould, 240 N.Y. 379, 148 N.E. 556 (1925), stated the general proposition: "[T]he constitutional requirement of due process of law precludes the Legislature from providing generally for continuing actions for judgments in personam against the foreign executors or administrators of deceased defendants." Id. at 388, 148 N.E. at 559 (emphasis deleted). The underlying rationale of McMaster was based on now outdated concepts of jurisdiction found in Pennoyer v. Neff, 95 U.S. 714 (1878). The Supreme Court has changed the test of due process since Pennoyer. See, e.g., International Shoe Co. v. Washington, 326 U.S. 310 (1945). The McMaster court regarded the foreign administrator as "the official of another sovereignty [who] exists only by virtue of the statute of another State and has no legal existence in this State." 240 N.Y. at 385, 148 N.E. at 558. See Helme v. Buckelew, 229 N.Y. 363, 128 N.E. 216 (1920). As to foreign executors, "there must be a domicile or possession which gives to the res to be administered a situs in New York." 240 N.Y. at 386, 148 N.E. at 558 (emphasis deleted). Distinguishing between the executor as an individual and as an official, the court said: "Regarding the foreign executor as a trustee rather than as an owner, even his presence in the State as an individual does not imply his presence as executor unless assets in the State or other trust duties to be performed here make his presence an incident of his fiduciary capacity and he must be present in the State as executor before judgments in personam can be entered against him." Id. at 387, 148 N.E. at 558-59 (emphasis deleted).

68. N.Y. C.P.L.R. § 302(a) (McKinney Supp. 1970).

over that executor. *Rosenfeld v. Hotel Corp. of America*,[69] following the "mainstream of current American jurisprudence,"[70] held that the statutory provisions[71] for the survival of a jurisdictional predicate after the death of the defendant were constitutional, at least in cases where the decedent had been subject to the court's jurisdiction under the long-arm statute.[72] The language of the opinion seemed to indicate that it was intended to be a bellwether of things to come. This assumption is now questionable in light of *Einstoss*, which appears to reaffirm the old rule of *McMaster v. Gould*,[73] holding the failure to substitute the representative to be jurisdictional:[74] "[I]t is still necessary that the *representative* be served with process and accorded 'all the procedural safeguards required by due process of law' before the court may enter a binding judgment against him."[75] Therefore, in *Einstoss*, absent an attempt to revive the action by substituting the administrator, the Alaskan court never had jurisdiction as to the estate at all.[76]

Of course the fact remains that, although the court of appeals found that the Alaskan court lacked jurisdiction as to either the decedent or the estate, *Einstoss* was a complicated litigation which dealt, albeit awkwardly, with a conflict of laws problem. Unfortunately, the determination of the conflicts issue is vague,[77] although the tenor of the opinion is strong. However, as one commentator, speaking of *Einstoss*, has pointed out, "whatever general observations were made about the impact of defendant's appearance in the foreign proceedings have analogy to and bearing upon the posture the Court of Appeals may strike when presented with the question of the impact of an appearance in an original New York action."[78] Accepting this view, it appears that the court of

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69. 20 N.Y.2d 25, 228 N.E.2d 374, 281 N.Y.S.2d 308 (1967).

70. Id. at 29, 228 N.E.2d at 376, 281 N.Y.S.2d at 311.

71. E.g., N.Y. C.P.L.R. § 302(a) (McKinney Supp. 1970), § 313 (McKinney 1963).

72. Id. § 302(a) (McKinney Supp. 1970). In non-long-arm cases, Einstoss seems to require the service of process on administrators in the same manner as a summons is served Id. § 308.

73. See note 67 supra. While agreeing with Rosenfeld in the narrow area of statutory interpretation, 26 N.Y.2d at 191, 257 N.E.2d at 642, 309 N.Y.S.2d at 191, Einstoss nevertheless indicated that what had been perceived as the Rosenfeld trend towards a relaxation of the strict requirements for substitution of executors and administrators was only an aberration, and no trend at all. For a criticism of this apparent reversal as being merely "legal mystique," see McLaughlin, 1970 Supplementary Practice Commentary to N.Y. C.P.L.R. § 1021, at 101 (McKinney Supp. 1970).

74. 26 N.Y.2d at 190, 257 N.E.2d at 642, 309 N.Y.S.2d at 191. "Since the substitution of an administrator is a jurisdictional act, the court must have some independent basis for the exercise of jurisdiction before it can order substitution." Id.

75. Id. at 191, 257 N.E.2d at 642, 309 N.Y.S.2d at 191 (emphasis added).

76. Id. at 191, 257 N.E.2d at 642, 309 N.Y.S.2d at 191-92.

77. See generally notes 59-64 supra and accompanying text.

78. Siegel, 1970 Supplementary Practice Commentary to N.Y. C.P.L.R. § 3012, at 80 (McKinney Supp. 1970).

appeals will frown upon any future attempts to lure nonresident defendants into the jurisdiction of a New York court by the substitution of causes of action in the complaint after the defendant has appeared in response to the service of either a summons and notice or a summons and complaint. In this area at least, the distinction between the two, so carefully drawn in *Everitt*,[79] may no longer be valid in New York. This development would be welcome, for it would terminate a practice which can only be described as, at best, overzealous. A nonresident should be able to feel completely free to enter the jurisdiction and defend an action. It is well established that, while in the state for that purpose, he is immune from service of process grounded solely in his "presence."[80] If this view, stated as dictum in *Everitt* and now approved in *Einstoss*, were to be adopted, he would also feel free to proceed without fear that the plaintiff might, by amendment, subject him to greater jeopardy than he had bargained for. The net result would be to encourage parties to appear in all actions, thereby helping to insure a more equitable resolution of controversies.

Remedies—Judicial Review of Expulsion from Religious Society Upheld on Tort Theory.—Plaintiff, a member of the First Baptist Church of South Orange, New Jersey, was expelled from the church as the result of a dispute over his right to be a member of the church's board of trustees. After the plaintiff filed a complaint in the New Jersey Superior Court against the pastor and members of the Board of Trustees, the congregation convened and rejected his reinstatement. Filing an amended complaint, the plaintiff alleged that the constitution of the church had not been followed in counting the votes and that the voting should have been in favor of reinstatement.[1] The superior court, chancery divi-

79. See notes 37-49 supra and accompanying text.

80. Even when the only purpose of his presence is to observe his attorney argue an appeal in his case, the defendant is immune. Chase Nat'l Bank v. Turner, 269 N.Y. 397, 199 N.E. 636 (1936). The privilege covers parties and witnesses who are voluntarily in the state without the compulsion of process. Kutner v. Hodnett, 59 Misc. 21, 109 N.Y.S. 1068 (Sup. Ct. 1908). In Chauvin v. Dayon, 14 App. Div. 2d 146, 217 N.Y.S.2d 795 (3d Dep't 1961), the court said: "The purpose of the privilege of immunity is to encourage nonresidents to come within the jurisdiction of this State to attend judicial proceedings where if they had remained outside of the State they would not be subject to the jurisdiction of our courts." Id. at 148, 217 N.Y.S.2d at 797. See generally Annot., 84 A.L.R.2d 421 (1962).

1. "According to plaintiff's amended complaint there were 31 votes against him and 25 in his favor. One vote against him was disqualified because the voter was delinquent in the payment of her dues. Plaintiff alleges that two other members who voted against him should also have been disqualified for the same reason. This would change the vote to 28 against reinstatement and 25 in favor. He further alleges that there were four members present who abstained. He contends that the votes of these four members should have been counted for him in accordance with the Constitution of the Church since that document requires that abstentions should be counted as affirmative votes. Thus, by plaintiff's count, he should have been reinstated by a vote of 29 to 28." Baugh v. Thomas, 56 N.J. 203, 206, 265 A.2d 675, 676 (1970).

sion, dismissed the complaint on the ground that it lacked jurisdiction,[2] and the appellate division affirmed.[3] The supreme court reversed and remanded holding that civil courts have jurisdiction to determine whether the established procedures for expulsion of a member have been properly followed by a religious organization. *Baugh v. Thomas*, 56 N.J. 203, 265 A.2d 675 (1970).

It has long been settled that the governing body of a religious society or church may adopt a constitution and a body of rules and regulations by which the expulsion or excommunication of its members is to be regulated.[4] For the most part, religious societies have remained unfettered in the government of their internal affairs and in the imposition upon their membership of rules and regulations for proper discipline, worship and doctrine.[5] Furthermore, all questions relating to the various practices of the church and of its members have been left in the hands of the church judicatories. Civil courts have been reluctant to interfere in the province of ecclesiastical jurisdiction,[6] and have frequently pointed out that their power to review decisions of ecclesiastical tribunals is restricted by the free exercise[7] and establishment[8] clauses of the first amendment of the United States Constitution.

The rule that civil courts will defer to the appropriate ecclesiastical tribunal on all questions relating to the faith and practices of a religious society was enunciated in 1871 by the United States Supreme Court in the leading case of *Watson v. Jones*.[9] In *Watson*, the Court held that it had no power to review a decision of the General Assembly of the Presbyterian Church.[10] Mr. Justice

2. See id. at 205, 265 A.2d at 676.

3. Id.

4. See, e.g., Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872); Knauss v. Seventh-Day Adventist Ass'n, 117 Colo. 540, 190 P.2d 590 (1948); Jones v. State, 28 Neb. 495, 44 N.W. 658 (1890); Hale v. Everett, 53 N.H. 9 (1868).

5. Comment, The Power of Courts Over the Internal Affairs of Religious Groups, 43 Calif. L. Rev. 322, 323 (1955).

6. This reluctance on the part of civil courts is not unique to the internal affairs of religious societies but applies to the internal affairs of all private voluntary associations. The late Professor Chafee of Harvard noted that three policies oppose judicial relief in this general area. The first is that courts are reluctant to become involved in the interpretation of the "dismal swamp" of obscure rules and doctrines; secondly, courts are afraid of picking up a "hot potato" and provoking wide resentment among members of a particular association; finally, courts have expressed the "living tree" doctrine—that the health of society will be promoted by allowing associations to freely grow. Chafee, The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993, 1020-29 (1930) [hereinafter cited as Chafee].

7. Hundley v. Collins, 131 Ala. 234, 32 So. 575 (1902); Clapp v. Krug, 232 Ky. 303, 22 S.W.2d 1025 (1929); Shannon v. Frost, 42 Ky. (3 B. Mon.) 253 (1842); Moustakis v. Hellenic Orthodox Soc'y, 261 Mass. 462, 159 N.E. 453 (1928); Waller v. Howell, 20 Misc. 236, 45 N.Y.S. 790 (Sup. Ct. 1897); Nance v. Busby, 91 Tenn. 303, 18 S.W. 874 (1892).

8. Hundley v. Collins, 131 Ala. 234, 32 So. 575 (1902); State ex rel. Soares v. Hebrew Cong. "Dispersed of Judah," 31 La. Ann. 205 (1879); Dees v. Moss Point Baptist Church, 17 So. 1 (Miss. 1895); Morris St. Baptist Church v. Dart, 67 S.C. 338, 45 S.E. 753 (1903); Minton v. Leavell, 297 S.W. 615 (Tex. Civ. App. 1927).

9. 80 U.S. (13 Wall.) 679 (1871).

10. "In this class of cases we think the rule of action which should govern the civil

Miller, writing for the majority, pointed out that upon joining a religious association members voluntarily subjected themselves to the ecclesiastical rules and regulations of that church, and were therefore precluded from appealing to the secular courts for a reversal of an ecclesiastical decree.[11] For the most part, Justice Miller's opinion was motivated by the principle of separation of church and state.[12] The Court was convinced that justice would not necessarily be promoted by submitting ecclesiastical decisions for review by the civil courts; rather, the most competent judges in ecclesiastical matters were provided by the religious organization itself.[13] Thus, the Court formulated a federal common law rule[14] "supported by the preponderant weight of authority in this country,"[15] which was to have a great impact upon state courts in subsequent years. Particularly in expulsion cases, *Watson* became the basis for the proposition followed by a number of jurisdictions that civil courts should never intervene to restore expelled members of a religious society, even when the expulsion was not in accordance with the rules and regulations of the society.[16]

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courts . . . is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." Id. at 727. This rule of noninterference was first set forth in Shannon v. Frost, 42 Ky. (3 B. Mon.) 253 (1842), where the Kentucky Court of Appeals said: "We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church. We must take the fact of expulsion as conclusive proof that the persons expelled are not now members of the repudiating church; for, whether right or wrong, the act of excommunication must, as to the fact of membership, be law to this Court." Id. at 258.

11. 80 U.S. (13 Wall.) at 729.

12. Id.; see Note, Judicial Intervention in Disputes Over the Use of Church Property, 75 Harv. L. Rev. 1142, 1155-57 (1962).

13. 80 U.S. (13 Wall.) at 729.

14. In Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952), the Supreme Court pointed out that Watson v. Jones set forth federal common law and was not a constitutional requirement. "Watson v. Jones, although it contains a reference to the relations of church and state under our system of laws, was decided without depending upon prohibition of state interference with the free exercise of religion. It was decided in 1871, before judicial recognition of the coercive power of the Fourteenth Amendment to protect the limitations of the First Amendment against state action." Id. at 115 (emphasis deleted & footnote omitted). The Kedroff Court, however, went on to praise Watson as radiating "a spirit of freedom for religious organizations, an independence from secular control or manipulation . . . ." Id. at 116. In doing this, the Court raised the rule established in Watson "to the dignity of a constitutional right" binding on the states. See The Supreme Court, 1952 Term, 67 Harv. L. Rev. 91, 110 (1953). In Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 447 (1969), the Court explained that before the Watson rule was converted into a constitutional requirement by Kedroff, it was first qualified by Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929). Gonzalez limited the Watson rule by allowing review of ecclesiastical matters before secular courts where the decisions of the church tribunals were marked by "fraud, collusion, or arbitrariness." Id. at 16.

15. 80 U.S. (13 Wall.) at 729.

16. Mount Olive Primitive Baptist Church v. Patrick, 252 Ala. 672, 42 So. 2d 617 (1949);

Despite this rule of non-interference in the expulsion proceedings of religious societies, judicial abstention has not remained absolute. One year after *Watson* was decided, the Supreme Court, in *Bouldin v. Alexander*,[17] reaffirmed the general rule of non-interference set out in *Watson*[18] but did not apply it to a situation where the persons purporting to be the ecclesiastical authority were actually usurpers—a small minority within the church society who were attempting to remove old trustees and expel a large number of the church's members.[19] Instead, the Court made a slight departure from the proposition it had set forth in *Watson* and explained that it would "inquire whether the resolution of expulsion was the act of the church, or of persons who were not the church and who consequently had no right to excommunicate others."[20] In so doing, it invalidated the actions of the minority as being in direct contravention of the rules of that society, and it restored possession of the church property to the lawful trustees.[21]

In reaching this determination, the Court opened the way for a gradual erosion of the *Watson* rule. State courts began to intervene to examine the justice and regularity of challenged expulsion proceedings rather than leave such an examination to ecclesiastical jurisdiction alone.[22] Following in the footsteps of *Bouldin*, some civil courts examined expulsions from religious societies to determine whether, in a church whose constitution required a majority vote of the membership, a majority was actually obtained or whether there was an unlawful attempt by a minority to expel a majority.[23] Other courts passed on the question of whether there actually was a power to expel existing within the religious organization or corporation[24] and whether the expelling agency was actually authorized to do so.[25] In light of this trend toward broadening judicial review in expulsion cases, courts in a number of jurisdictions have also examined expulsion proceedings to ascertain whether the expelling body had substantially complied

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Hundley v. Collins, 131 Ala. 234, 32 So. 575 (1902); Stewart v. Jarriel, 206 Ga. 855, 59 S.E.2d 368 (1950); Kauffman v. Plank, 214 Ill. App. 290 (1919); Ramsey v. Hicks, 174 Ind. 428, 91 N.E. 344 (1910); State ex rel. Hatfield v. Cummins, 171 Ind. 112, 85 N.E. 359 (1908); Jenkins v. New Shiloh Baptist Church, 189 Md. 512, 56 A.2d 788 (1948); Nance v. Busby, 91 Tenn. 303, 18 S.W. 874 (1892).

17. 82 U.S. (15 Wall.) 131 (1872).

18. 80 U.S. (13 Wall.) 679, 727 (1871); see note 10 supra.

19. 82 U.S. (15 Wall.) at 140.

20. Id.

21. See id.

22. See cases cited notes 23-27 infra.

23. Cooper v. Bell, 269 Ky. 63, 106 S.W.2d 124 (1937); Trustees of Oak Grove Missionary Baptist Church v. Ward, 261 Ky. 42, 86 S.W.2d 1051 (1935). But cf. Dees v. Moss Point Baptist Church, 17 So. 1 (Miss. 1895), where the plaintiff, who had founded and built the defendant church, was expelled by 9 out of 50 members of the church and denied relief by the state court on the ground that it had no jurisdiction over ecclesiastical matters.

24. Walker Memorial Baptist Church, Inc. v. Sanders, 285 N.Y. 462, 35 N.E.2d 42 (1941); People ex rel. Dilcher v. German United Evangelical St. Stephen's Church, 53 N.Y. 103 (1873); David v. Carter, 222 S.W.2d 900 (Tex. Civ. App. 1949).

25. Gray v. Christian Soc'y, 137 Mass. 329 (1884); see Hatfield v. DeLong, 156 Ind. 207, 59 N.E. 483 (1901) (improperly constituted appellate tribunal enjoined), overruled by Ramsey v. Hicks, 174 Ind. 428, 91 N.E. 344 (1910).

with all procedures demanded by the society's rules and regulations.[26] A few jurisdictions have taken an even bolder step by reviewing expulsion proceedings to determine whether the religious society had complied with various principles of natural justice.[27] Thus, members who were expelled without notice of specific charges or who were given no opportunity for a hearing have been ordered to be reinstated, even when the regulations of the society did not require such procedures to be followed.[28]

In most cases where a civil court has been willing to depart from the rule of non-interference in the internal affairs of religious associations and question the regularity of an expulsion, it has done so where it has been able to find some traditional common law theory on which to base its jurisdiction over such ecclesiastical matters and thereby classify the alleged wrong.[29] In *Bouldin v. Alexander*,[30] for example, the Supreme Court was able to reinstate the expelled majority only because a question of the legal ownership of church property was involved.[31] Thus, in cases involving religious societies, the deprivation of an interest in property has long been recognized as an invasion of one's civil rights sufficient to invoke the concern of the courts.[32] It has been held that such a property right is inherent in membership in a religious society,[33] and, therefore, all members

26. See, e.g., Taylor v. Jackson, 273 F. 345 (D.C. Cir. 1921); Knauss v. Seventh-Day Adventist Ass'n, 117 Colo. 540, 190 P.2d 590 (1948); Krecker v. Shirley, 163 Pa. 534, 30 A. 440, modified as to costs, 163 Pa. 560, 30 A. 447 (1894); David v. Carter, 222 S.W.2d 900 (Tex. Civ. App. 1949).

27. Moustakis v. Hellenic Orthodox Soc'y, 261 Mass. 462, 159 N.E. 453 (1928); Gray v. Christian Soc'y, 137 Mass. 329 (1884); Hughes v. North Clinton Baptist Church, 75 N.J.L. 167, 67 A. 66 (Sup. Ct. 1907); In re Koch, 257 N.Y. 318, 178 N.E. 545 (1931). These courts "apparently make no distinction between clubs formed for business, social or literary purposes, and those of a religious character, and apply the general tests applicable to expulsion from clubs to cases involving religious societies." 13 Cornell L.Q. 464, 467 (1928) (footnote omitted). These tests are taken from the English case of Dawkins v. Antrobus, 17 Ch. D. 615 (1881) (expulsion from the Traveller's Club) and are as follows: (1) the proceedings must be in accord with natural justice; (2) the expulsion must be in accordance with the society's regulations; (3) the expulsion must be made in good faith. See Chafee 1014.

28. See cases cited note 27 supra.

29. Developments in the Law—Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983, 998 (1963) [hereinafter cited as Private Associations].

30. 82 U.S. (15 Wall.) 131 (1872).

31. Id. at 139.

32. For other cases holding that courts have no jurisdiction to review expulsions unless there has been a deprivation of property rights see Hundley v. Collins, 131 Ala. 234, 32 So. 575 (1902); Stewart v. Jarriel, 206 Ga. 855, 59 S.E.2d 368 (1950); State ex rel. Hatfield v. Cummins, 171 Ind. 112, 85 N.E. 359 (1908); Sale v. First Regular Baptist Church, 62 Iowa 26, 17 N.W. 143 (1883); Trustees of Oak Grove Missionary Baptist Church v. Ward, 261 Ky. 42, 86 S.W.2d 1051 (1935); Rock Dell Norwegian Evangelical Lutheran Cong. v. Mommsen, 174 Minn. 207, 219 N.W. 88 (1928); Everett v. First Baptist Church, 6 N.J. Misc. 640, 142 A. 428 (Sup. Ct. 1928); Holcombe v. Leavitt, 69 Misc. 232, 124 N.Y.S. 982 (Sup. Ct. 1910). See also Comment, Constitutional Law—Freedom of Religion—Judicial Intervention in Disputes Within Independent Church Bodies, 54 Mich. L. Rev. 102 (1955).

33. Randolph v. First Baptist Church, 120 N.E.2d 485 (Ohio C.P. 1954); see Holcombe v. Leavitt, 69 Misc. 232, 124 N.Y.S. 982 (Sup. Ct. 1910) (a property interest was found in the opportunity to become trustee of the church). Contra, State ex rel. Hatfield v. Cummins, 171

have a right to share in the society's profits upon its dissolution.[34] In fact, however, the property doctrine has received a great deal of criticism because of its "almost fictional nature."[35] As one critic has explained, the "remote and conjectural possibility of sharing in a probably non-existent surplus is a very unsatisfactory basis for the jurisdiction of a court of equity."[36]

Another theory formulated by the civil courts was essentially a contract theory based on the idea that the consent given by a member to the rules and regulations of a religious society constitutes a contract between him and the whole of the society's members. Thus, some courts have treated the rules of the society as terms of a contract and have made this contract the sole basis of an expelled member's legal rights in the society.[37] This contract theory of justiciability has had a dual purpose. Some courts have used it to deny judicial review of a society's internal disputes[38] and have refused to interfere on behalf of expelled members on the theory that one who joins a religious society agrees in advance to be bound by its laws and voluntarily submits himself to its tribunals upon all questions of faith and individual conduct.[39] On the other hand, the contract theory has been used as a basis for allowing judicial review.[40] The courts which have done so have taken the view that where there is an improper expulsion, the expelled member has a cause of action for breach of contract against the organization for not following its own rules.[41] This theory has also met with criticism.[42] One argument against its validity is the fact that in many religious societies the membership is recruited from the children of adult members at the time of their birth or baptism, and thus there is no consensual agreement on their part to join the society.[43] In such cases it would seem totally improper to find the existence of

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Ind. 112, 85 N.E. 359 (1908) (church membership is purely an ecclesiastical and not property right).

34. Randolph v. First Baptist Church, 120 N.E.2d 485, 488 (Ohio C.P. 1954).

35. Private Associations 999.

36. Chafee 1000.

37. See cases cited notes 38 & 40 infra; Private Associations 1001.

38. Shannon v. Frost, 42 Ky. (3 B. Mon.) 253 (1842); Landis v. Campbell, 79 Mo. 433 (1883); Pounder v. Ash, 44 Neb. 672, 63 N.W. 48 (1895); People ex rel. Dilcher v. German United Evangelical St. Stephen's Church, 53 N.Y. 103 (1873); McGuire v. Trustees of St. Patrick's Cathedral, 54 Hun. 207, 7 N.Y.S. 345 (Sup. Ct. 1889); Furmanski v. Iwanowski, 265 Pa. 1, 108 A. 27 (1919).

39. See cases cited note 38 supra; 13 Cornell L.Q. 464, 465 (1928).

40. Thomas v. Lewis, 224 Ky. 307, 6 S.W.2d 255 (1928); Gartin v. Penick, 68 Ky. (5 Bush) 110 (1868); see Slaughter v. New St. John Missionary Baptist Church, 8 La. App. 430 (1928) (expulsion for failure to pay a required contribution concerned a civil right and civil contract and not ecclesiastical matters); Bear v. Heasley, 98 Mich. 279, 57 N.W. 270 (1893).

41. Chafee 1001; see Gartin v. Penick, 68 Ky. (5 Bush) 110 (1868), where the court said: "[T]he organic law of the church, like that of the State, being a contract between all the parties to it, and the members of the church being entitled, as citizens, to the protection of the paramount constitution of the State against all wrongful breaches of their contracts, the civil tribunals must have some rightful jurisdiction over the constitution of the church as a contract not less obligatory than any other contract between competent parties . . . ." Id. at 119.

42. See Chafee 1002; 13 Cornell L.Q. 464, 466 (1928).

43. 13 Cornell L.Q. 464, 466 (1928).

a contract. Other critics have attacked the "artificiality"[44] of the contract theory as it does not clearly set forth the identity of the parties to the contract,[45] nor does it explain both the "extreme deference paid by courts to the group's interpretation of the rules"[46] and "the fact that a member is held bound by rules of which he had no knowledge . . . ."[47]

In 1930, the late Professor Chafee suggested that a more realistic theory of justiciability would be that the wrong suffered by an expelled member of a church society is neither a deprivation of the right to property, nor breach of contract, but rather a tort consisting of the destruction of a member's personal relation to the religious society.[48] He criticized the idea that equity could only protect property rights[49] and called for the courts to recognize that membership in a religious society was chiefly an interest in personality.[50] Furthermore, such an interest should be entitled to equitable protection in the face of expulsion proceedings.[51] The use of this tort approach would allow courts to adjudicate the merits of an expulsion case with greater frankness and flexibility than would the contract theory. In addition, the tort approach would not be limited by the need for the existence of a property interest.[52] Although the relation of the member to the association would be shaped to some extent by his conjectural right to share in the society's profits, and by the terms of ecclesiastical laws existing at the time he joined the society, such factors would no longer be determinative in weighing the actual personal loss suffered as a result of expulsion.[53] In recent years courts have taken notice of this tort theory of jurisdiction and have recognized "the right of courts of equity to entertain jurisdiction because of the humiliation and hurt to personality, the injury to character, reputation, feelings and personal rights and human dignity."[54] Despite this recognition, however, no court prior to 1970 had

44. Chafee 1002.

45. Id. at 1003. Professor Chafee pointed out that new members do not think of themselves as forming a "vast network of executory transactions with the other members" such as a contract theory would demand, but rather they think of themselves as entering into "a present relation with the association." Id.

46. Private Associations 1001 (footnote omitted).

47. Id. at 1001-02 (footnote omitted).

48. Chafee 1007. This suggestion was first made with regard to expulsion from clubs and fraternal societies in 1916 by Roscoe Pound. Pound, Equitable Relief against Defamation and Injuries to Personality, 29 Harv. L. Rev. 640, 677-81 (1916).

49. Chafee 998; see Pound, Equitable Relief against Defamation and Injuries to Personality, 29 Harv. L. Rev. 640, 672 (1916). See also Berrien v. Pollitzer, 165 F.2d 21 (D.C. Cir. 1947).

50. An interest in personality has been defined by Dean Pound as a type of individual interest pertaining to one's physical and spiritual existence, which the law ought to secure. Pound, Interests of Personality, 28 Harv. L. Rev. 343, 349 (1915).

51. Chafee 998. "Excommunication from a church means loss of the opportunity to worship God in familiar surroundings with a cherished ritual, and inflicts upon the devout believer loneliness of spirit and perhaps the dread of eternal damnation. In comparison with such emotional deprivations, mere losses of property often appear trivial." Id. (footnote omitted).

52. Private Associations 1005.

53. Chafee 1007-08.

54. Randolph v. First Baptist Church, 120 N.E.2d 485, 489 (Ohio C.P. 1954). See generally Berrien v. Pollitzer, 165 F.2d 21 (D.C. Cir. 1947), involving the exclusion of a

been willing to base its jurisdiction over ecclesiastical decisions solely on the basis of such personality considerations.

Among those jurisdictions willing to review expulsions from religious societies, New Jersey has followed an uncertain path in selecting an appropriate theory of justiciability. In 1883, the New Jersey Supreme Court, in *Livingston v. Rector, &c., of Trinity Church*,[55] stated that the ecclesiastical judicatories of a religious society had exclusive jurisdiction over the administration of spiritual and temporal affairs where neither civil rights of individual members nor the property of the society were affected.[56] Thus, courts of equity would intercede in expulsion proceedings only where a property right[57] or a contract right[58] was involved. But in 1907, in the case of *Hughes v. North Clinton Baptist Church*,[59] the same court disregarded the rule set out in *Livingston* and proceeded instead on the authority of several cases involving expulsion from clubs and fraternal orders.[60] In *Hughes*, the plaintiff alleged that she was expelled from the defendant religious corporation "without cause, without charges and without opportunity for hearing,"[61] and the court held that if she had been so unlawfully excluded, she was entitled to be reinstated by the civil courts through a writ of mandamus.[62] Thus, the court did not base its holding on the existence of some property or civil right[63]—rather it interfered solely because of a violation of principles of natural justice.[64] Twenty-one years later, however, the New Jersey court, in

member of the National Woman's Party from the party's headquarters, in which the court gave relief on a personality theory stating that: "Equity jurisdiction is not limited to the protection of property and may be invoked for protection of personal rights." Id. at 22.

55. 45 N.J.L. 230 (Sup. Ct. 1883), overruled by Baugh v. Thomas, 56 N.J. 203, 265 A.2d 675 (1970).

56. Id. at 233. This rule was also followed by the New Jersey Supreme Court in Jennings v. Scarborough, 56 N.J.L. 401, 28 A. 559 (Sup. Ct. 1894) (expulsion of a rector by dissolving the pastoral relation between him and the parish), overruled by Baugh v. Thomas, 56 N.J. 203, 265 A.2d 675 (1970).

57. Livingston v. Rector, &c., of Trinity Church, 45 N.J.L. 230, 233 (Sup. Ct. 1883), overruled by Baugh v. Thomas, 56 N.J. 203, 265 A.2d 675 (1970).

58. Jennings v. Scarborough, 56 N.J.L. 401, 28 A. 559 (Sup. Ct. 1894) (selection of rector by the vestry and his acceptance of the position created a contract or civil right, enforceable by the civil courts), overruled by Baugh v. Thomas, 56 N.J. 203, 265 A.2d 675 (1970).

59. 75 N.J.L. 167, 67 A. 66 (Sup. Ct. 1907).

60. Zeliff v. Grand Lodge, Knights of Pythias, 53 N.J.L. 536, 22 A. 63 (Sup. Ct. 1891); State ex rel. Sibley v. Board of Management of Carteret Club, 40 N.J.L. 295 (Sup. Ct. 1878); see Annot., 20 A.L.R.2d 421, 485 (1951).

61. 75 N.J.L. at 168, 67 A. at 67.

62. Id.

63. It might even be suggested that the Hughes court was rejecting the property and contract theories of jurisdiction and was taking a step toward a personality theory years before such a step was proposed by Pound and Chafee.

64. Hughes v. North Clinton Baptist Church, 75 N.J.L. 167, 67 A. 66 (Sup. Ct. 1907); see Annot., 20 A.L.R.2d 421, 485 (1951). In Zeliff v. Grand Lodge, Knights of Pythias, 53 N.J.L. 536, 22 A. 63 (Sup. Ct. 1891), which was cited by the Hughes court and which involved expulsion from a fraternal order, the Supreme Court of New Jersey pointed out that civil courts will take jurisdiction of matters of discipline in voluntary associations, if it can be shown "either that the rules are contrary to natural justice, or that what has been done is contrary to the rules, or that there has been mala fides or malice in arriving at the decision, or refusal to give the member a hearing." Id. at 538, 22 A. at 64 (emphasis deleted).

Everett v. First Baptist Church,[65] returned to the rule of *Watson* and *Livingston* and denied a writ of mandamus on the ground that there was no civil or property right involved in an expulsion proceeding.[66] Subsequently, lower New Jersey courts, confused by the uncertainty of the law of that state, chose to follow the later *Everett* decision and not the *Hughes* case.[67] In fact, in one lower court decision, the Superior Court, Appellate Division, expressly rejected *Hughes* as an incorrect statement of law which was not to be followed.[68]

This inconsistency in New Jersey law has now been resolved by the state supreme court in *Baugh v. Thomas*.[69] In *Baugh*, the court rejected the proposition that, when there are neither property nor contract rights involved, civil courts lack jurisdiction to examine the regularity of expulsion proceedings, thereby expressly overruling *Everett* and upholding *Hughes*.[70] Although the *Baugh* court paid deference to *Watson*, pointing out that civil courts have no jurisdiction where questions of "spiritual matters or church doctrine"[71] are involved, it stated that it would look to see if the society had followed its established expulsion procedures.[72] In so doing, the court in *Baugh*, like the *Hughes* court, based its decision to review on the examination of a club and fraternal order expulsion case,[73] noting that "except in cases involving religious doctrines," it could see "no reason for treating religious organizations differently from other non-profit voluntary associations."[74] The *Baugh* court thus looked to *Higgins v. American Society of Clinical Pathologists*,[75] where a New Jersey court had based its jurisdiction solely on a tort theory. The plaintiff in *Higgins* had suffered "neither tangible economic loss nor any loss remediable under the tradi-

65. 6 N.J. Misc. 640, 142 A. 428 (Sup. Ct. 1928) (per curiam), overruled by Baugh v. Thomas, 56 N.J. 203, 265 A.2d 675 (1970).

66. Id. Here, as in Hughes v. North Clinton Baptist Church, the expelling church was incorporated. Thus, the New Jersey Supreme Court was not making a distinction between incorporated and unincorporated societies.

67. E.g., Cabinet v. Shapiro, 17 N.J. Super. 540, 86 A.2d 314 (Super. Ct. L. Div. 1952), overruled by Baugh v. Thomas, 56 N.J. 203, 265 A.2d 675 (1970), in which the Superior Court found that the principles involved were not purely ecclesiastical in nature but rather were civil and involved property rights. See Moorman v. Goodman, 59 N.J. Super. 181, 157 A.2d 519 (App. Div. 1960), overruled by Baugh v. Thomas, 56 N.J. 203, 265 A.2d 675 (1970).

68. Moorman v. Goodman, 59 N.J. Super. 181, 188, 157 A.2d 519, 523 (App. Div. 1960), overruled by Baugh v. Thomas, 56 N.J. 203, 265 A.2d 675 (1970). The appellate division held that the trial court properly refused to interfere with an expulsion of ten members of the First Baptist Church of Engelwood citing Watson v. Jones, Livingston v. Rector, &c., of Trinity Church, and Everett v. First Baptist Church. Both the trial court and the appellate division in Baugh v. Thomas, 56 N.J. 203, 265 A.2d 675 (1970), relied on Moorman in dismissing Baugh's complaint. Id. at 206, 265 A.2d at 676 (1970).

69. 56 N.J. 203, 265 A.2d 675 (1970).

70. Id. at 208, 265 A.2d at 677.

71. Id. at 207-08, 265 A.2d at 677.

72. Id. at 208, 265 A.2d at 677-78.

73. Higgins v. American Soc'y of Clinical Pathologists, 51 N.J. 191, 238 A.2d 665 (1968), where plaintiff-medical technologist was denied recertification by defendant non-profit corporation.

74. Baugh v. Thomas, 56 N.J. 203, 208, 265 A.2d 675, 677 (1970).

75. 51 N.J. 191, 238 A.2d 665 (1968).

tional contract and property theories,"[76] but rather a loss of an interest in personality.[77] Similarly, in *Baugh*, the court established its jurisdiction over the matter solely on a personality basis, stating that the "loss of the opportunity to worship in familiar surroundings" could constitute a serious emotional deprivation.[78] Granting jurisdiction on this theory, the court remanded the case to the trial court for review of the procedures followed by the expelling body to determine if there had been any departure from the church's rules and regulations.[79]

In conclusion, the New Jersey Supreme Court, in *Baugh v. Thomas*, has for the first time in a church expulsion case realized Professor Chafee's proposition that such cases be given a personality basis. Certainly there is no reason to limit equity to the protection of property or contract rights nor is there any reason to believe that personal rights are any "less important to the individual or less vital to society or less worthy of protection by the peculiar remedies equity can afford."[80] The tort approach here adopted offers a new flexibility in this type of case. Civil courts, unhampered by mechanical guidelines, will be able to weigh the actual competing interests of the parties and determine whether the humiliation, the emotional deprivation, and the hurt to personality resulting from an unjustified injury to a member's relational interest in a religious society will warrant judicial interference with the non-doctrinal internal affairs of that society. Thus, as a result of *Baugh v. Thomas*, other courts may now be invited "to explain their adjudications in a way meaningful for the eventual refinement of more precise rules in this area."[81]

Uniform Commercial Code—Commercial Paper—Negligent Certifying Bank Precluded from Asserting Alteration of Certified Check Against a Holder in Due Course.—The drawee bank certified two checks for the drawer, each of which at the time of certification was complete as to date, amount, payee's name, and drawer's name. Both checks were payable to plaintiff and signed by the drawer. After the certification, the drawer allegedly filled in blank spaces with words and figures to raise the amounts of the checks[1] and delivered them

76. Id. at 201, 238 A.2d at 670. See generally 7 Vill. L. Rev. 140 (1961).

77. "We conclude that the plaintiff's stake in her professional status is substantial enough to warrant at least limited judicial examination of the reason for her expulsion." 51 N.J. at 202, 238 A.2d at 670 (1968).

78. 56 N.J. at 208, 265 A.2d at 677. This idea of mental suffering as a proper element of damages is unique to the law of expulsion from religious societies, but not to the law of expulsion from clubs and fraternal associations. See Lahiff v. St. Joseph's Total Abstinence & Benev. Soc'y, 76 Conn. 648, 57 A. 692 (1904), where a wrongfully expelled member was allowed to recover damages on two grounds: (1) he was deprived of the use and enjoyment of the society's property and the privileges of membership, and (2) the wrongful expulsion caused the plaintiff mental suffering.

79. 56 N.J. at 209-10, 265 A.2d at 678 (1970).

80. Berrien v. Pollitzer, 165 F.2d 21, 22 (D.C. Cir. 1947), citing Kenyon v. City of Chicopee, 320 Mass. 528, 70 N.E.2d 241 (1946).

81. Private Associations 1005.

1. The checks were altered from $10 to $10,000 and from $8 to $28,600. As the certification stamps did not indicate the amounts for which the checks were certified, the alterations

to plaintiff for the purchase of real estate. On presentation for payment to the certifying bank, both checks were returned unpaid because of the alterations. In order to secure payment, plaintiff brought suit against Franklin National Bank, a successor in interest to the certifying bank, in the United States District Court for the Southern District of New York[2] alleging that the bank was negligent in certifying the checks because they were drawn in such a way that the amounts could easily be raised by filling in blank spaces. Plaintiff sought not only to recover the amount of the checks as raised, but also damages for dishonor of his own checks and impairment of his credit resulting therefrom. The court denied the defendant's motion for summary judgment,[3] holding that section 3-406[4] of the New York Uniform Commercial Code (New York UCC) precludes a certifying bank from asserting the alteration of a check against a holder in due course where the bank has negligently certified the check and this negligence has substantially contributed to the raising of the check. *Brower v. Franklin National Bank*, 311 F. Supp. 675 (S.D.N.Y. 1970).

In allocating losses resulting from check frauds, the legislatures and courts have generally been compelled to place the losses on innocent parties since under normal circumstances there is only a remote possibility of recovering from the defrauding individual.[5] In this regard, the particular defrauding technique

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were not thereby apparent. Brower v. Franklin Nat'l Bank, 311 F. Supp. 675, 677 (S.D.N.Y. 1970).

2. For purposes of jurisdiction, plaintiff asserted that there was diversity of citizenship and to support this assertion averred: " '[A]t all times hereinafter stated, plaintiff was a resident of the State of New Jersey and the defendant is a corporation organized and existing under and by virtue of the laws of the State of New York.' " Id. at 676. The claim to jurisdiction was based on 28 U.S.C. § 1332(a)(1) & (c) (1964) which provides:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

"(1) citizens of different States . . . .

. . . .

"(c) For the purposes of this section . . . a corporation shall be deemed a citizen of any State . . . where it has its principal place of business . . . ."

3. Defendant had answered that the complaint failed to state a claim upon which relief could be granted and also raised the defense of lack of diversity jurisdiction. With regard to the question of jurisdiction, the court pointed out that plaintiff's assertion of diversity was not proper "since a person may easily be a resident of New Jersey yet a citizen of New York and a corporation may be organized in New York but have its principal place of business in New Jersey." 311 F. Supp. at 676. The court assumed, however, that jurisdiction did exist since no evidence in support of this defense was offered and defendant did not argue the issue. Id. at 676-77.

4. N.Y. U.C.C. § 3-406 (McKinney 1964) provides: "Any person who by his negligence substantially contributes to a material alteration of the instrument or to the making of an unauthorized signature is precluded from asserting the alteration or lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business."

5. O'Malley, Common Check Frauds and the Uniform Commercial Code, 23 Rutgers L. Rev. 189, 191 (1969).

employed has generally dictated which party should bear the loss.[6] In the case of a material alteration,[7] *e.g.*, alteration of amount, the general common law rule was that all parties to the instrument, with the exception of those assenting to the alteration and subsequent endorsers, were discharged; it was immaterial that the instrument was in the hands of a holder in due course.[8] The adoption of this rule appears to stem from a belief on the part of the courts that public policy was best served by leaving the loss where it had fallen rather than shifting the loss by enforcing a contract against a party who never consciously agreed thereto.[9] Application of this general rule to checks raised after certification meant that a holder in due course could not shift the loss from himself to the certifying bank.[10]

However, in some situations where one of the parties by his careless conduct contributed to the alteration, the common law imposed liability on that person by estopping him from asserting the alteration as a defense.[11] When a drawer drew a check, complete in all respects including amount, but with "blank spaces"[12] that facilitated the raising of the check, it was generally clear that the

6. Id. The encouragement of practices calculated to prevent losses and their equitable distribution are the principal ends of loss allocation. Farnsworth, Insurance Against Check Forgery, 60 Colum. L. Rev. 284, 285 (1960). Frequently employed defrauding practices include forgery and alteration of the payee's name or the amount of the check. For a discussion of the allocation of losses with respect to these and other common defrauding techniques, see O'Malley, supra note 5.

7. A "material alteration" is one that "changes the contract of any party [to the instrument] in any respect . . . ." Uniform Commercial Code § 3-407(1) [hereinafter cited as U.C.C.].

8. J. Brady, The Law of Forged and Altered Checks § 93 (1925); see, e.g., Hunter v. Parsons, 22 Mich. 95 (1870); Gettysburg Nat'l Bank v. Chisolm, 169 Pa. 564, 32 A. 730 (1895).

"A holder in due course is a holder who takes the instrument

(a) for value; and

(b) in good faith; and

(c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person." U.C.C. § 3-302(1).

9. The reason for this rule is that due to the alteration, the identity of the original instrument has been destroyed. Bigelow, Alteration of Negotiable Instruments, 7 Harv. L. Rev. 1 (1893), citing Draper v. Wood, 112 Mass. 315 (1873); Wade v. Withington, 83 Mass. 561 (1861); Aldrich v. Smith, 37 Mich. 468 (1877).

10. "A bank which has certified a check cannot, according to the general rule, be held liable for an amount to which it is thereafter altered without its knowledge or consent . . . ." 7 Am. Jur. Banks § 567 (1937); see, e.g., Clews v. Bank of N.Y. Nat'l Banking Ass'n, 89 N.Y. 418 (1882); National Bank of Commerce v. National Mechanics' Banking Ass'n, 55 N.Y. 211 (1873); Annot., 22 A.L.R. 1157, 1162 (1923).

11. See Britton, Negligence in the Law of Bills and Notes, 24 Colum. L. Rev. 695 (1924); Comment, Allocation of Losses from Check Forgeries Under the Law of Negotiable Instruments and the Uniform Commercial Code, 62 Yale L.J. 417 (1953).

12. In this regard it is important to differentiate between an incomplete instrument containing obvious blanks, e.g., a check with no indication of amount, and an instrument complete in form but containing spaces making it easy to raise by the insertion of additional words and figures. See National Exch. Bank v. Lester, 194 N.Y. 461, 464-65, 87 N.E. 779,

drawee bank could debit his account for the amount of the raised check.[13] This view appears to have been based on the theory that the drawer owed a duty of care to the drawee because of the drawee's precarious position as overseer of the drawer's funds.[14] There was, however, a conflict of authority as to whether a holder in due course had a right to recover on a raised check from parties to the instrument prior to the alteration (including the drawer), since it was not clear whether such parties owed a duty of care to a holder in due course.[15] The majority[16] of jurisdictions denied recovery to a holder in due course holding that no such duty existed.[17] This was the position taken in the leading case of *Scholfield v. Earl of Londesborough*[18] where the House of Lords refused to allow an action by a holder in due course to recover from an acceptor[19] on a raised bill of exchange which had been drawn containing blank spaces.

The Uniform Negotiable Instruments Law (NIL) generally codified the

780 (1909). Also, assuming there is a duty of care owed by the party asserting the alteration, that duty has not necessarily been breached merely because the check has been raised; it must be shown that the instrument was prepared "in such an incomplete state as to facilitate or invite fraudulent alterations . . . ." Critten v. Chemical Nat'l Bank, 171 N.Y. 219, 224, 63 N.E. 969, 971 (1902). See also Annot., 22 A.L.R. 1139 (1923).

13. W. Britton, Bills and Notes § 282, at 665 (2d ed. 1961) [hereinafter cited as Britton]. In the leading case of Young v. Grote, 130 Eng. Rep. 764 (C.P. 1827), the court held that the drawer was estopped from asserting the alteration against the drawee bank where he had drawn a check leaving spaces and the bank in good faith paid the raised check. Accord, Timbel v. Garfield Nat'l Bank, 121 App. Div. 870, 106 N.Y.S. 497 (1st Dep't 1907).

14. Britton § 282, at 664-65.

15. "Where the instrument is so drawn as to permit the alteration of the sum payable by inserting words and figures, the courts in five states have allowed the holder in due course to recover, while in seven states . . . a contrary result has been reached." Id. at 665-66 (footnotes omitted). It should be noted that Britton does not distinguish between the holder's right to recover from the drawer and his right to recover from other parties prior to the alteration, e.g., endorsers. A party endorsing an instrument subsequent to an alteration would still be liable to a holder in due course. See note 8 supra and accompanying text.

16. A Louisiana court, expressing the minority view, held that "where one of two parties, neither of whom has acted dishonestly, must suffer, he shall suffer who by his own act occasioned the confidence, and consequent injury of the others." Isnard v. Torres, 10 La. Ann. 103, 104 (1855); accord, Yocum v. Smith, 63 Ill. 321 (1872); Hackett v. First Nat'l Bank, 114 Ky. 193, 70 S.W. 664 (1902); Scotland County Nat'l Bank v. O'Connel, 23 Mo. App. 165 (1886). In accordance with this principal, the court in Helwege v. Hibernia Nat'l Bank, 28 La. Ann. 520 (1876), held a certifying bank liable for the amount to which a certified check was raised on the theory that the bank was negligent in certifying the check because the alteration was facilitated by the form in which the check was drawn.

17. See, e.g., Fordyce v. Kosminski, 49 Ark. 40, 3 S.W. 892 (1887); Burrows v. Klunk, 70 Md. 451, 17 A. 378 (1889); Greenfield Sav. Bank v. Stowell, 123 Mass. 196 (1877). For a good discussion of the conflicting views, see National Exch. Bank v. Lester, 194 N.Y. 461, 87 N.E. 779 (1909).

18. [1896] A.C. 514, 541-42, 545-46, 548, 550, aff'g [1895] 1 Q.B. 536 (C.A. 1894). For a criticism of the Court of Appeal holding in the Scholfield case, see 8 Harv. L. Rev. 418 (1895).

19. Black's Law Dictionary 28 (4th rev. ed. 1968) defines "Acceptor" as one "who accepts a bill of exchange, (generally the drawee,) or who engages to be primarily responsible for its payment." (citation omitted).

common law rule regarding material alterations, although a certifying bank was liable to a holder in due course according to the tenor of the check at the time of certification.[20] The NIL, however, did not specifically deal with a party's right to enforce an instrument negligently drawn in such a way as to facilitate alteration,[21] and the cases were in conflict as to whether it had affected the common law rule of estoppel.[22] While a few courts suggested that the NIL, by not expressly incorporating the negligence doctrine, rejected it,[23] most considered the doctrine of estoppel by negligence as having been unaffected by the NIL.[24]

Under the Uniform Commercial Code (UCC) a certifying bank is an acceptor,[25] and, as such, its obligation is to "pay the instrument according to its tenor at the time of [its] engagement . . . ."[26] In the case of a material alteration, "[a] subsequent holder in due course may in all cases enforce the instrument according to its original tenor . . . ."[27] Also, UCC section 3-406, unlike the NIL, expressly prescribes the effect of negligence with regard to altered instruments: "Any person who by his negligence substantially contributes to a material alteration of the instrument . . . is precluded from asserting the alteration . . . against a holder in due course . . . ."[28]

Prior to *Brower*, two lower New York courts had considered the application of New York UCC section 3-406[29] in cases with factual situations essentially the same as that in *Brower*. In the first of these cases, *Sam Goody, Inc. v. Franklin*

20. "Under Section 124 [of the Negotiable Instruments Law], where a . . . check is altered after . . . certification . . . the certifying bank is not liable on the instrument for any amount as against a holder not in due course, and is liable to a holder in due course on the instrument only as it was at the time of . . . certification and prior to alteration." Britton § 140, at 400, citing Ozark Sav. Bank v. Bank of Bradleyville, 204 S.W. 570 (Mo. Ct. App. 1918). Section 124 of the Negotiable Instruments Law [hereinafter cited as N.I.L.] provides as follows:

"Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers.

"But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

21. Britton § 282, at 668.

22. 2 N.C.L. Rev. 96, 97 (1924); see text accompanying note 11 supra.

23. See, e.g., Commercial Bank v. Arden & Fraley, 177 Ky. 520, 197 S.W. 951 (1917); First Nat'l Bank v. Ketchum, 68 Okla. 104, 172 P. 81 (1918); Glasscock v. First Nat'l Bank, 114 Tex. 207, 266 S.W. 393 (1924).

24. See, e.g., National Exch. Bank v. Lester, 194 N.Y. 461, 87 N.E. 779 (1909). In this case, the court, after reviewing conflicting common law authorities, held that a holder in due course of an instrument altered by insertion of words and figures in blank spaces could not recover the raised amount from an accommodation endorser.

25. U.C.C. § 3-411(1) provides in part: "Certification of a check is acceptance."

26. Id. § 3-413(1).

27. Id. § 3-407(3). "As against any person other than a subsequent holder in due course "(a) alteration by the holder which is both fraudulent and material discharges any party whose contract is thereby changed unless that party assents or is precluded from asserting the defense . . . ." Id. § 3-407(2).

28. Id. § 3-406. This provision is identical to N.Y. U.C.C. § 3-406 (McKinney 1964), quoted in note 4 supra.

29. N.Y. U.C.C. § 3-406 (McKinney 1964).

National Bank,[30] the court held that the plaintiff as a holder in due course could not recover on the raised certified check as altered, but that under New York UCC section 3-413(1),[31] he could recover on the check only according to its tenor at the time of certification.[32] The court concluded that section 3-406 did not apply to this case,[33] and further that "the negligence of the bank, if any, [was] not a substantial or proximate cause of the loss . . . ."[34]

In *Wallach Sons, Inc. v. Bankers Trust Co.*,[35] the plaintiff met with a similar lack of success, recovering only the amount for which the check was certified. After reviewing the prior law, the court reasoned that "if banks are to be charged with the responsibility of studying checks prior to certification for the purpose of determining whether forgery after certification is possible, that duty, in view of past commercial practice and law should be effected by modification of the Uniform Commercial Code."[36] The court concluded that the Code had not so modified the prior law and that the bank was not liable on its certification for the amount to which the check had been altered.[37]

In *Brower*, the complaint purported to plead a tort claim based on negligence.[38] The court held, however, that the claim should be treated as a contract action based on the bank's certification, with the alleged negligence being important only insofar as it related to estoppel under New York UCC section 3-406.[39]

30. 57 Misc. 2d 193, 291 N.Y.S.2d 429 (Sup. Ct. 1968) (mem.). In Sam Goody, a check drawn for $16 and made payable to the plaintiff was presented to the defendant bank for certification. After certification, the amount was altered by filling in blank spaces with words and figures to read $1,600, and the check was then given to the plaintiff in payment for merchandise. Upon presentment to the bank for payment, the check was dishonored because of the alteration. Id. at 194, 291 N.Y.S.2d at 431.

31. N.Y. U.C.C. § 3-413(1) (McKinney 1964) provides: "The maker or acceptor engages that he will pay the instrument according to its tenor at the time of his engagement . . . ."

32. 57 Misc. 2d at 195-96, 291 N.Y.S.2d at 432.

33. Id. at 195, 291 N.Y.S.2d at 431. The court cited no authority supporting its conclusion that § 3-406 was not applicable.

34. Id. at 196, 291 N.Y.S.2d at 432.

35. 62 Misc. 2d 19, 307 N.Y.S.2d 297 (Civ. Ct. 1970). In Wallach a check certified by defendant bank for $29 was altered after certification by the insertion of words and figures to read $2,900 and negotiated to plaintiff in payment of merchandise valued at $2,900. Id. at 20, 307 N.Y.S.2d at 298.

36. Id. at 23, 307 N.Y.S.2d at 301.

37. In so holding the court quoted F. Whitney, The Law of Modern Commercial Practices § 353, at 512 (2d ed. 1965): " 'Under the rule that a bank is liable on the certification only to the tenor of the instrument at the time it certified it, it necessarily follows that the bank is not liable on a check altered after certification.' " 62 Misc. 2d at 23-24, 307 N.Y.S.2d at 301. The court's approach in grounding its holding on this quote appears questionable, because it is not clear that Whitney intended his statement to encompass cases where negligence was in issue; the section from which the court quoted is not directed to the subject of negligence, but rather to "Certification of Altered or Forged Checks." Whitney, supra, § 353.

38. 311 F. Supp. at 676.

39. Id. at 677. In this regard N.Y. U.C.C. § 3-406, Comment 5 (McKinney 1964) states: "This section does not make the negligent party liable in tort . . . . Instead it estops him from asserting it against the holder in due course . . . ." Although not agreeing with the plaintiff's theory, the Brower court held that "the form of pleading adopted by plaintiff would not justify dismissing his action." 311 F. Supp. at 678. This is in accordance with

After determining that the prior law would not estop the bank from asserting the alteration despite its alleged carelessness,[40] the court declared that "[t]he plain words of the Uniform Commercial Code § 3-406 seem clearly to change the old rule and to authorize this action. . . . The certifying bank would certainly seem to be included in the words 'any person'."[41] Noting the two prior New York cases, *Sam Goody* and *Wallach*, the court stated that it "[could not] accept their result and [felt] that the Court of Appeals of New York would not reach their result."[42]

The *Brower* court expressly left as issues of fact for the trial court:

(a) whether or not [the plaintiff] is "a holder in due course", and if he is such a holder, (b) whether defendant was or was not guilty of negligence when it certified these checks and if it was negligent (c) whether or not such negligence substantially contributed to the raising of the checks.[43]

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the rule followed in federal courts "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

40. 311 F. Supp. at 677-78. The Brower court relied on the Scholfield case as being a proper statement of the prior law. Id. See text accompanying notes 18 & 19 supra.

41. Id. at 678. In this regard it is noteworthy that the Code's definition of "person" includes an "organization." N.Y. U.C.C. § 1-201(30) (McKinney 1964). Furthermore, "organization" is defined as including "any . . . legal or commercial entity." Id. § 1-201(28).

The court in its construction of section 3-406 did not mention N.Y. U.C.C. § 1-103 (McKinney 1964) which provides that the principles of law and equity supplement the Code unless displaced by its particular provisions. In view of this section and the prior law, it is possible to construe the words "any person" used in section 3-406 as including only those persons owing a duty of care under prior law, namely drawers, and thus not including certifying banks. This construction is justified by arguing that since the term "by his negligence" refers to "any person" and since the section does not expressly mention imposing a duty of care, the common law is determinative of which parties are capable of negligence.

Although the Sam Goody and Wallach cases did not expressly employ this reasoning, they seem to have implicitly relied on it, since, otherwise, there appear to be no rational bases for the decisions. See text accompanying notes 30-37 supra.

The above construction, however, does not appear to be correct. If the drafters of the Code intended "any person" to be so limited, they certainly would have been more explicit. Also, the Code comments make it clear that this section "rejects decisions which have held that the maker of a note owes no duty of care to the holder . . . ." N.Y. U.C.C. § 3-406, Comment 2 (McKinney 1964). Under prior New York law, a maker owed no such duty. National Exch. Bank v. Lester, 194 N.Y. 461, 468-69, 87 N.E. 779, 781-82 (1909). Furthermore, the New York legislature, in enacting the Code, intended that, in situations where the alteration of an instrument is facilitated by the negligence of a prior party, the holder in due course "have an election either to enforce the instrument as originally written against any and all parties, or, alternatively, to enforce it against the negligent person as if the alteration had been ratified." 2 Report of the N.Y. Law Revision Comm'n, Study of the Uniform Commercial Code 1011 (1955).

42. 311 F. Supp. at 678. Since Brower involved a motion for summary judgement, the court did not make a determination of the facts; rather it found that the pleaded facts, if proven, would support a claim based on the certification and, under the court's construction of N.Y. U.C.C. § 3-406, would estop the bank from asserting the alteration. Id.

43. Id.

Presumably, if the plaintiff were able to prevail on all of the above issues, he would be able to recover on the checks as altered, since the bank would be precluded from asserting the alterations.[44] However, the court, in accordance with its rejection of the plaintiff's tort argument in favor of a contract theory,[45] indicated that the plaintiff would not be able to recover an amount greater than the checks as raised.[46]

The *Brower* decision does not place an unreasonable burden on certifying banks[47] and, as between the holder and the bank, the bank is certainly in the better position to avoid the loss. Presently many banks employ certification stamps which indicate that a check is certified "as originally drawn."[48] Since, in the absence of negligence, banks are not liable for the raised amount on checks altered after certification,[49] this practice is presumably aimed at protecting banks from losses resulting from alterations made prior to certification. It would appear desirable, however, for banks to employ stamps indicating the amount for which the check is certified.[50] If such a stamp were used, the inconsistent amounts on the face of the check would give notice to subsequent holders that the check had been raised after certification. The bank could therefore avoid liability in the *Brower*-type situation, as the holder, having notice of the alteration, could not claim to be a holder in due course.[51]

On facts such as those presented in *Brower*, there is good reason to construe UCC section 3-406 in such a way as to place the resulting loss on the certifying bank, since it is in the better position to frustrate the subsequent alteration. There is, however, justification for relieving the banks of this burden where the certification stamp clearly indicates the amount for which the check is certified. Because this minor adjustment in banking practice would be effective to protect subsequent innocent parties as well as the certifying bank itself, it is to be expected that the *Brower* decision will precipitate the use of stamps indicating the certified amount.

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44. Id. Even in the event that plaintiff could not prove negligence, so long as he could prove that he was a holder in due course, he would be entitled to recover the amount of the checks as they were at the time of certification. N.Y. U.C.C. § 3-407(3) (McKinney 1964). See also id. § 3-406, Comment 2.

45. See text accompanying notes 38 & 39 supra.

46. 311 F. Supp. at 678. See N.Y. U.C.C. § 3-406, Comment 5 (McKinney 1964).

47. In order for the holder to recover under the Brower holding it is still required that he prove himself to be a holder in due course, that the bank was negligent, and that this negligence substantially contributed to the alteration. See text accompanying note 43 supra. Also, it should be noted that banks are not required to certify checks. See N.Y. U.C.C. § 3-411(2) (McKinney 1964).

48. See R. Anderson, Uniform Commercial Code, Legal Forms 391 (1963), illustrating a typical certification stamp.

49. See note 27 supra and accompanying text. The liability of banks on checks altered prior to certification is presumably determined by recourse to N.Y. U.C.C. §§ 3-412, -413, -417, -418 (McKinney 1964).

50. Such a stamp might read: "Certified as originally drawn but in no event for more than (insert amount of check at time of presentment for certification)." In the event the check is found to have been raised prior to certification, the bank may still point to the language, "Certified as originally drawn." But, if the alteration occurred subsequent to the certification, the alteration would be apparent from the face of the check.

51. Compare note 4 supra with note 8 supra.