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Recent Cases

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RECENT CASES

Antitrust Law—Restraint of Trade—Supreme Court Suggests A New Reading of Section 3 of the Clayton Act

The petitioner utility company negotiated a contract with respondent coal company in which it agreed to purchase all of the coal it required as fuel at a new generating station for a twenty year period. These requirements were estimated to be 350,000 tons in 1958, increasing thereafter to a peak of 2,250,000 tons per year. Shortly before the first scheduled delivery, respondent advised petitioner that the contract was illegal under antitrust laws and would not be performed. Petitioner brought an action for declaratory judgment on the validity of the contract. Both the district court[1] and the Sixth Circuit (2-1),[2] agreed that the contract violated section 3 of the Clayton Act,[3] and was therefore unenforceable. On certiorari to the Supreme Court of the United States, *held,* reversed.[4] There was no substantial lessening of competition because only .77% of the total output of the coal producers in the relevant market area was encompassed by this contract.[5] *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961).

The Clayton Act was enacted by Congress in response to a bipartisan call for antitrust reform which stemmed from growing public alarm at the trend toward concentration.[6] It was intended to supplement and extend

1. Tampa Elec. Co. v. Nashville Coal Co., 168 F. Supp. 456 (M.D. Tenn. 1958).
2. Tampa Elec. Co. v. Nashville Coal Co., 276 F.2d 766 (6th Cir. 1960).
3. Section 3 of the Clayton Act reads, in pertinent part, as follows: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . for use, consumption, or resale within the United States . . . on the condition, agreement, or understanding that the lessee or purchaser therof shall not use or deal in the goods . . . of . . . competitors of the . . . seller, where the effect of such lease, sale, or contract for sale or such condition, agreemeut, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958).
4. Justices Black and Douglas dissented on the basis of the holding in the lower courts.
5. The respondent also contended that the contract violated sections 1 and 2 of the Sherman Act, but the Court found it unnecessary to discuss that act, stating that "if [the contract] does not fall within the broader proscription of § 3 of the Clayton Act it follows that it is uot forbidden by the [Sherman Act]." Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 335 (1961).
6. HANDLER, ANTITRUST IN PERSPECTIVE 29-30 (1957). An example of court attitudes which contributed to the concern and one which pointed to the need for legislation in the area of exclusive dealing is Whitwell v. Continental Tobacco Co., 125 Fed. 454 (8th Cir. 1903), where the court stated that "the right of each competitor to fix prices of the commodities which he offers for sale, and to *dictate the terms upon*

the Sherman Act of 1890 and other antitrust legislation.[7] Section 3 of this statute was aimed at limiting abuses of exclusive dealing arrangements,[8] including requirements contracts.[9] In the early decisions under this section, the Supreme Court struck down various exclusive agreements, stressing therein both the dominant market position of the seller and the market segment effectively foreclosed to that seller's competitors.[10] Defensive arguments as to the reasonableness and necessity of these arrangements for maintenance of customer good will or for protection against other manufacturers were largely unsuccessful.[11]

In recent years, section 3 cases have been more concerned with the market foreclosure than with the seller's dominance. Indeed, litigation has been overshadowed by the Supreme Court's decision in *Standard Oil Co. v. United States* (hereinafter cited as *Standard Stations*)[12] wherein market share foreclosure became the primary test for illegality.[13] Under attack were the defendant's requirements contracts with 16% of the retail outlets

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which he will dispose of them, is indispensable to the very existence of competition." *Id.* at 459. (Emphasis added.)

7. Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 355 (1922). S. REP. No. 698, 63d Cong., 2d Sess. 1 (1914), reads as follows: "[T]he bill [the Clayton Act], in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890 [The Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation . . . ." For a review of the chain of events in the legislative history of section 3, see Handler, *Recent Antitrust Developments,* 71 YALE L.J. 75, 85-87 (1961).

8. The two basic exclusive dealing arrangements are the tie-in and the requirements contract. See Note, *Exclusive Dealing Arrangements Under the Anti-Trust Laws,* 47 VA. L. REV. 675 (1961).

9. This arrangement is a contract or agreement whereby a buyer must purchase substantially all of his requirements of a particular product from one seller, if he is to be allowed to buy any at all. Standard Oil Co. v. United States, 337 U.S. 293 (1949).

10. See Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922) (requirements contract); United Shoe Mach. Corp. v. United States, 258 U.S. 451 (1922) (tie-in); International Business Machs. Corp. v. United States, 298 U.S. 131 (1936) (tie-in); Fashion Originator's Guild of America, Inc. v. FTC, 312 U.S. 457 (1941) (requirements contract); International Salt Co. v. United States, 332 U.S. 392 (1947) (tie-in). *But see* FTC v. Curtis Publishing Co., 260 U.S. 568 (1923). For individual treatment of these cases see Note, *supra* note 8.

11. In International Business Machs. Corp. v. United States, *supra* note 10, the Court rejected an argument that a tie-in of tabulating cards with a tabulating machine was necessary to insure proper results and customer satisfaction, and in Fashion Originator's Guild of America v. FTC, *supra* note 10, an argument that requirements contracts were necessary and reasonable to protect designers of expensive wearing apparrel from manufacturers who copied the designs and sold them more cheaply was also rejected.

12. 337 U.S. 293 (1949).

13. The Court recognized that the seller did not dominate the market, stating that "Standard's share of the retail market for gasoline, even including sales through company-owned stations, is hardly large enough to conclude as a matter of law that it occupies a dominant position . . . ." *Id.* at 302.

in a seven state area.[14] Standard's sales accounted for 23% of the total gasoline sold in the area,[15] 6.7% of which was sold through these outlets.[16] Writing for the majority, Justice Frankfurter framed the issue as whether the effect on competition could be shown "simply by proof that a substantial portion of commerce is affected or whether it must also be demonstrated that competitive activity has actually diminished or probably will diminish."[17] The Court rejected the latter alternative on the theory that such an inquiry would involve evaluation of economic data for which the Court was ill-suited.[18] Reviewing past decisions and legislative history, the Court held "that the qualifying clause of § 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected."[19] This is the rule of "quantitative substantiality"[20] which says, in effect, that when competitors are foreclosed from a substantial share of the market, substantial lessening of competition may be *inferred*.[21] The violation of section 3 in the *Standard Stations* case arose because the contracts foreclosed competitors from a substantial share of retail sales.[22]

14. *Id.* at 295. This was a total of 5,937 independent dealers.

15. *Id.* at 295.

16. *Ibid.* This amounted to $57.6 million worth of gasoline in 1947. Evidence disclosed that during the ten year period in which Standard employed these contracts, its proportionate sales of gasoline remained unchanged. *Id.* at 296.

17. *Id.* at 299.

18. *Id.* at 310.

19. *Id.* at 314. A strong critic of *Standard Stations,* Professor Milton Handler states that the decision rested on an improper reading of the legislative history of section 3. It rested on the mistaken idea that both branches of Congress intended an absolute prohibition of exclusives and only added the qualifying language of section 3 (*supra* note 3) as a mere gloss, without significant effect except in *de minimis* situations, when, in fact, it was the result of a compromise between opposing views in the House and Senate. See Handler, *Recent Antitrust Developments,* 71 YALE L.J. 75, 84-87 (1961).

20. See Kessler & Stern, *Competition, Contract, and Vertical Integration,* 69 YALE L.J. 1, 28 (1959) and accompanying note wherein reference is made to a collection of citations to writings on quautitative substantiality in HANDLER, ANTITRUST IN PERSPECTIVE 136-37, 143 (1957).

21. See Kessler & Stern, *supra* note 20, at 28. Professor Handler says, "The question which should have been formulated, and which the Court left unanswered, was whether the exclusive requirements contracts deprived existing or potential competitors of reasonable access to available market outlets." HANDLER, *op. cit. supra* note 20, at 34. He feels that the standard formulated by the Court compels illegality in all but insignificant situations. For his complete analysis of the case see HANDLER, *op. cit. supra* note 20, at 33-37, and see note 19 *supra.* Kessler and Stern, while critical of the test formulated in *Standard Stations,* advance the idea that the word "substantial" may have two meanings. The first is in the sense of "not insignificant," while the second would intend that there is a substantial, an insubstantial, and a zone in between. If the latter were the meaning used by the Court, then, even though limits were not defined, "substantial" in *Standard Stations* would mean only that market domination is not necessary for a section 3 violation. The courts in subsequent cases, however, have not made this distinction. For their analysis of the case see Kessler & Stern, *supra* note 20, at 24-37.

22. Notes 14-16 *supra.* Under the reasoning of Kessler and Stern, the Court did not base its decision against Standard Oil on the quantitive substantiality test, but

A decade of confusion and vacillation followed *Standard Stations*. While the courts applied the quantitative substantiality test,[23] the Federal Trade Commission rejected it, announcing in 1953 in *The Maico Co.*[24] that it had both the competence and the responsibility to appraise economic data on the effects of exclusive arrangements on market competition.[25] Therefore, the FTC would not hold section 3 violated merely upon a showing that competition was substantially foreclosed, but would base decisions only on the probable market effects.[26] This division of opinion led one commentator to observe in 1957 that section 3 liability might depend entirely on whether the proceeding was before the Commission or before a court.[27] To add to the uncertainty, the Supreme Court in *FTC v. Motion Pictures Advertising Service Co.*[28] implied that the Commission might impose stricter tests under section 5 of the Federal Trade Commission Act than under section 3 of the Clayton Act.[29] Then in 1960 the FTC reversed itself by expressly overruling the *Maico* doctrine and rejecting evidence in the form of economic data showing competitive or anti-competitive effects within the relevant market.[30] It stated that *Standard Stations* would be followed.[31]

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on the collective market foreclosure by major oil companies. Kessler & Stern, *supra* note 20, at 30.

23. See Anchor Serum Co. v. FTC, 217 F.2d 867 (7th Cir. 1954); Dictograph Prods., Inc. v. FTC, 217 F.2d 821 (2d Cir. 1954), *cert. denied*, 349 U.S. 940 (1955); Automatic Canteen Co. of America v. FTC, 194 F.2d 433 (7th Cir. 1952), *rev'd on other grounds*, 346 U.S. 61 (1953); Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. Light & Power Co., 184 F.2d 552 (4th Cir. 1950), *cert. denied*, 340 U.S. 906 (1950); United States v. Sun Oil Co., 176 F. Supp. 715 (E.D. Pa. 1959); Red Rock Cola Co. v. Red Rock Bottlers, Inc., 1952 Trade Cas. ¶ 67375 (5th Cir.); *cf.* Transamerica Corp. v. Board of Governors, 206 F.2d 163 (3d Cir. 1953), *cert. denied*, 346 U.S. 901 (1953). In United States v. J. I. Case Co., 101 F. Supp. 856 (D. Minn. 1951), the court held section 3 was not violated. The decision was based in part on the absence of a showing of actual or probable lessening of competition. "But authority of the case is weakened by the alternative holding that there was a failure of proof that the defendant actually entered into exclusive agreements as charged. Moreover, the amount of commerce involved amounted to less than ½ of 1 percent, which even under *Standard Stations* might be deemed insubstantial." HANDLER, ANTITRUST IN PERSPECTIVE 38 n.42 (1957).

24. 50 F.T.C. 485 (1953).

25. *Id.* at 487-88.

26. *Id.* at 488.

27. Handler, *op. cit. supra* note 23, at 39. In fact, the results have generally been the same. Harley-Davidson Motor Co., 50 F.T.C. 1047 (1954); Revlon Prods. Corp., 51 F.T.C. 260, *motion to re-open denied*, 51 F.T.C. 466 (1954); Beltone Hearing Aid Co., 52 F.T.C. 830 (1956); Outboard, Marine & Mfg. Co., 52 F.T.C. 1553 (1956).

28. 334 U.S. 392 (1953).

29. *Id.* at 394-95. Justice Frankfurter argued against using the quantitative substantiality doctrine in this Sherman Act case in a vigorous dissent which contained overtones of restricting the doctrine itself.

30. Mytinger & Casselberry, Inc., TRADE REG. REP. ¶ 29091, at 37529 (Sept. 28, 1960).

31. *Id.* at 37530. It would now appear that the FTC was right the first time, but in Rural Gas Serv., Inc., 3 TRADE REG. REP. ¶ 15515 (Oct. 24, 1961), the commission

In *Tampa Electric*, the Court implied that section 3 decisions based entirely on market share foreclosure were at an end. The Sixth Circuit had found that the agreement was exclusive, the line of commerce was coal (not boiler fuels), and that the relevant market area was peninsular Florida. Following *Standard Stations*, it held that the market share foreclosed was not "insubstantial,"[32] and that the agreement was illegal. The Supreme Court assumed, without deciding, that the contract was an exclusive dealing arrangement and that coal was the line of commerce, but it did not agree that peninsular Florida was the proper market area.[33] The Court found that "by far the bulk of the overwhelming tonnage marketed from the same producing area as serves Tampa is sold outside of Georgia and Florida . . . ."[34] It therefore held the relevant market area to be the area in which seven hundred coal producers, who were "eager"[35] to serve Florida, could effectively compete.[36] From the statistics presented, the Court found that the maximum estimated consumption by Tampa[37] was less than 1% of the total volume of coal marketed by these suppliers.[38] This the Court said, "is conservatively speaking, quite insubstantial."[39] From this determination of the market area, it would seem to follow that there was no violation of section 3 even under the strict *Standard Stations* doctrine. The Court, however, declined to rest its decision on that case, going on to say that neither dollar volume foreclosed nor market share foreclosed would be conclusive.[40] Instead, substantiality would be determined in a given case by weighing

> the probable effect of the contract on the relevant area of competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and *the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein* . . . .[41]

Thus, the Court states that the inquiry will go beyond *inference* from a showing of substantial market share foreclosure to an appraisal of market

appears to continue to follow *Standard Stations* when it dismissed a complaint on the ground that market foreclosure was too small for any inference of competitive injury.

32. 276 F.2d at 772.

33. 365 U.S. at 320, 330-32.

34. *Id.* at 331. The respondent had contended that the relevant market was Florida and Georgia "at most."

35. *Id.* at 331.

36. *Id.* at 331-32. For a criticism of the market area in the instant case, see *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 205-08 (1961). See also 39 TEXAS L. REV. 913 (1961).

37. 2,250,000 tons per year.

38. The Court took notice of the fact that 290,567,000 tons of bituminous coal were sold on the open market by producers within the relevant market in 1954. 365 U.S. at 332.

39. *Id.* at 333.

40. *Id.* at 333-34.

41. *Id.* at 329.

facts. The Court will delve beneath the surface to consider and weigh the potential short-run and long-run actual effects on competition. It would therefore appear that *Tampa Electric* has displaced the more mechanical quantitative substantiality test with a flexible standard in accord with the statute and its legislative history.[42]

The case, however, leaves grave doubts concerning its status as precedent for future litigation. As the precursor of a new interpretation of section 3, it has three major weaknesses. First, as was pointed out above, determination of the relevant market area could have been the controlling factor in the outcome of the case because even under the *Standard Stations* rationale, the market share as defined was not substantial. It could be argued, then, that language going beyond the quantitative substantiality test was superfluous to the decision.[43] Second, the litigation arose from an anticipatory breach of contract. Section 3 was interposed as a defense by a seller seeking to avoid his contractual obligation which distinguishes it from the normal antitrust suit brought by the government or by an injured consumer or competitor.[44] Such a "collateral" use of antitrust provisions has met with disfavor in the Supreme Court[45] and was strenuously attacked in this case by Judge Weick's dissent in the circuit court.[46] The Court left this important question unanswered, merely pointing out the problem by footnoting an earlier case in which it had disallowed a contract defense based on illegality under the Sherman Act.[47] Would it not have been better, where such a use of section 3 is involved, at least to invite the FTC into the case, thus affording the Court the advantage of the data and the experience of that agency?[48] Third, and particularly troublesome, is the fact that the

42. Notes 3, 19 *supra*. This does not mean that the expanded standard is more liberal. It has been suggested that the Court would now be free to find a section 3 violation where it found actual anticompetitive effects, though the market share was not substantial. See *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 205 (1961).

43. On the other hand it might be argued that the case is stronger because the Court was not content to follow *Standard Stations*, once the market area was determined.

44. It is interesting to note that when the contract was made, Nashville Coal Co. was owned by the late Justin Potter, who was at that time Tennessee's wealthiest man. Nashville Coal was probably the eleventh largest coal-mining and sales operation in the United States. Shortly thereafter, Potter's health failed, and he sold his coal company to Cyrus S. Eaton, one of the nation's richest men. Eaton merged Nashville Coal with West Kentucky Coal Co., then probably ninth largest in the U.S., in which he held working control. A recent magazine article indicates that Eaton owned stock in Tampa Electric Company, and yet, two years later, after large expenditures in reliance on the contract by both sides, Nashville Coal announced that the contract would not be performed. Caldwell & Graham, *The Strange Romance Between John L. Lewis and Cyrus Eaton*, Harpers, Dec. 1961, p. 25.

45. See Kelly v. Kosuga, 358 U.S. 516 (1959), and review of cases therein.

46. 276 F.2d at 766, 774-77.

47. 365 U.S. at 325.

48. This would be possible under FED. R. CIV. P. 24(b)(2). While a court could not compel intervention by the FTC, it is felt that the agency would desire to present arguments on important questions. The agency's declining to intervene could warrant an inference that no significant public interest was jeopardized.

Court justified its finding of legality, in part at least, on the ground that the buyer was a public utility. In answer to a contention that the twenty-year period of the contract was its principal vice, the Court said: "[B]ut at least in the case of public utilities the assurance of a steady and ample supply of fuel is necessary in the public interest."[49] The Court then added that this does not mean that public utilities are immune from Clayton Act violations,[50] but in judging substantiality, consideration of the parties' operations are relevant.[51] This makes it virtually impossible to discern a consistent underlying rationale from the case that is helpful in reading section 3. De-emphasis of quantitative substantiality in favor of a more qualitative test would be a progressive trend in section 3 litigation, but it is suggested that the facts of *Tampa Electric* did not offer a proper foundation for the pronouncement of such a change.

Civil Rights—Abatement and Revival—State Survival and Wrongful Death Statutes Adopted in Federal Civil Rights Act Suits

In a recent case in a federal district court in Arkansas plaintiff sought damages under the federal civil rights statutes.[1] She alleged that the

49. 365 U.S. at 344.
50. *Ibid.*
51. *Id.* at 335.

1. These decisions are, first and foremost, based on statutory construction. Thus, those portions of the statutes which are applicable are set out below.

REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958). "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

REV. STAT. § 1980 (1875), 42 U.S.C. § 1985(3) (1958). "(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

REV. STAT. § 1981 (1875), 42 U.S.C. § 1986 (1958). "Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence

police chief of Little Rock had caused her to be illegally arrested, beaten, and otherwise deprived of her civil rights.[2] When the defendant died prior to trial and plaintiff sought to substitute the administrator as defendant the administrator moved for dismissal, pointing to the absence of specific provision for survival of causes of action in the civil rights statutes as indicative of Congress' intent that there would be no survival. In a similar case brought under the civil rights statutes in a federal district court in Georgia, five police officers moved for dismissal after the injured party had died and his wife had filed suit individually and as administratrix. She alleged that her husband had died from brutal beatings inflicted by the defendants while he was illegally in their custody.[3] In each case the judge dismissed the complaint rejecting an interpretation that the statutes implied that the

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could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may he joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued."

REV. STAT. § 722 (1875), 42 U.S.C. § 1988 (1958). "The jurisdiction . . . conferred on the district courts by the provisions of this chapter . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal causes is held, so far as the same is not inconsistent with the constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

Note here that sections 1983 and 1985 concern active malfeasance while section 1986 refers to and provides for sanctions against passive nonfeasance. Note also that seetions 1983 and 1985(3) do not provide for survival of the cause of action or even mention it while section 1986 spccifically provides for survival of the cause of action to the widow or the estate.

2. Plaintiff alleged that she was, "without warning or provocation, forcibly seized and taken to jail, beaten, manhandled, and injured . . . . denied her constitutional right to equal protection under the laws, . . . denied her . . . right to see and talk with her attorney . . . illegally detained for an unreasonable length of time without charge . . . subjected to constant and protracted questioning . . . denied the opportunity to give and post bail immediately upon her request . . . all of which actions were . . . caused by the defendant . . . ." Pritchard v. Smith, 289 F.2d 153, 154 (8th Cir. 1961).

3. Plaintiff, the wife and administratrix of the deceased, alleged in substance: (1) that two police officers deprived the deceased of his rights to be secure in his person, to due process of law, and to equal protection of the law by illegally arresting him and while in their custody willfully and brutally beating him without cause, (2) that later all five police officers conspired to deprive the deceased of his rights secured by the constitution and with intent to discrininate against him, illegally removed him from jail and beat him so that he died a few days later. Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961).

cause of action would survive the death of a party. On appeal to the Fifth and Eighth Circuits, *held,* reversed and remanded for trial on the merits. The currently effective state survival and death statutes are adopted as federal law pursuant to section 1988 of the civil rights statutes in so far as this is necessary to make the federal civil rights statutes fully effective in the particular case. *Pritchard v. Smith,* 289 F.2d 153 (8th Cir. 1961). *Brazier v. Cherry,* 293 F.2d 401 (5th Cir. 1961).

The rules of the common law which applied to the instant situations, (1) that tort actions for personal wrongs abated on the death of either plaintiff or defendant, and (2) that no action could be founded on the death of a human being, were at one time universally followed, though they were severely criticised.[4] All of the states have abrogated these rules by statutes,[5] but Congress has never enacted a general wrongful death survival provision. Thus, where the action arises under federal law the question is necessarily whether Congress, in the particular statute which created the cause of action or through related statutes, has expressed or implied a federal right of survival or, absent this, has Congress expressly or by implication indicated that state laws were to be adopted when necessary to fill any gaps left in the federal law?[6] While the courts in the instant cases did not have the benefit of any precedent for the adoption of local law to implement the civil rights statutes,[7] such precedent does exist in related areas of the law such as survival of tort actions under admiralty and under the Federal Torts Claims Act.[8] Thus, as Judge Brown noted in *Brazier v.*

4. PROSSER, TORTS § 105 (2d ed. 1955).

5. *Ibid.*

6. See Brazier v. Cherry, 293 F.2d 401, 403-04, 406 (5th Cir. 1961); Pritchard v. Smith, 289 F.2d 153, 154-55 (8th Cir. 1961).

7. Apparently the question had not been litigated before.

8. See Hess v. United States, 361 U.S. 314 (1960). There an employee of a subcontractor for the government was killed through negligence of another government employee and the death occurred on the navigable waters of Oregon. An action was brought in admiralty against the United States under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1958) which makes the United States liable "for . . . personal injury or death caused by . . . any employee of the Government . . . under circumstances where the United States, if a private person, would be liable . . . in accordance with the law of the place where the act or omission occurred." The law of Oregon was applied to hold the government liable for the death of its employee. The court said, "Although admiralty law itself confers no right of action for wrongful death, *The Harrisburg,* 119 U.S. 199, yet 'where death . . . results from maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given.'" 361 U.S. at 318-19. And in The Tungus v. Skovgaard, 358 U.S. 588 (1959), a New Jersey resident went aboard a ship at the dock, slipped on spilled oil, and fell to his death. Suit was brought in admiralty to recover damages for his death. No federal survival or wrongful death provision was available since the deceased had not been a "seaman" so as to come under the survival provision of the Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958), and was not killed "on the high seas" so as to come under the Death On The

Cherry, there was no doubt that Congress could have adopted state law as federal law;[9] the question was: Had Congress done so in regard to causes of action arising under the civil rights statutes?

Judges Van Oosterhout and Brown, in writing the opinions for the courts of appeals, used similar lines of reasoning to find that Congress had adopted the currently effective local survival laws by enacting section 1988 of the civil rights statutes. Both judges noted (1) that federal law governed the cause of action and ruled out applicability of *Erie R.R. v. Tompkins*;[10] (2) that there was no survival at common law, and traced the legislative and judicial amelioration of the injustice arising from this harsh rule; (3) that section 1983, while creating the cause of action, did not expressly or impliedly treat the survival issue; and (4) that even in the absence of a specific provision "federal courts have determined . . . the issue of survival, on the basis of state law."[11] Section 1988 of the civil rights statutes provides:

> [B]ut in all cases where [the laws of the United States] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . . the common law, as modified and changed by the constitution and statutes of the State . . . shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

Both courts found that these words expressly authorized resort to state law[12] where there was a deficiency or gap in the civil rights statutes.[13] The

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High Seas Act, 41 Stat. 537 (1920), 46 U.S.C. § 761 (1958). In this case the court applied the New Jersey Wrongful Death Act as federal law to govern the action. And in Just v. Chambers, 312 U.S. 383 (1941), a suit in admiralty to recover damages for personal injuries aboard tort-feasor's boat on navigable waters within the boundaries of Florida, where the tort-feasor had died, the court applied the Florida survival statute in absence of any federal provision. *Accord*, Western Fuel Co. v. Garcia, 257 U.S. 233 (1921). For more thorough treatment of the developments in this area see generally Comments, *State Wrongful Death Acts and Maritime Torts*, 39 TEXAS L. REV. 643 (1961), *The Application of State Survival Statutes in Maritime Causes*, 60 COLUM. L. REV. 534 (1960).

9. Brazier v. Cherry, *supra* note 6, at 406: "Without a doubt Congress has the constitutional power to spell out a comprehensive right of survival for civil rights claims." "There is, first, nothing unusual about Congress adopting state law of the several states as federal law." *Id.* at 407. As an example of this Judge Brown cites the Outer Continental Shelf Lands Act, 67 Stat. 462 (1953), 43 U.S.C. § 1333(a)(2) (1958) which says in part: "To the extent that they are applicable and not inconsistent with this subchapter . . . the civil and criminal laws of each adjacent State . . . are declared to be the law of the United States for that portion of the surface soil and seabed of the outer Continental Shelf . . . which would be within the area of the State if its boundaries were extended seaward . . . ."

10. 304 U.S. 64 (1938). Since both cases involve questions under federal law and jurisdiction was not based on diversity of citizenship there was no *Erie* question involved.

11. Pritchard v. Smith, *supra* note 6, at 158.

12. Both judges pointed out that Congress as a matter of federal law adopts the whole common law as modified by the constitution and laws of the state and that from a federal standpoint there is no substantive-procedural type limitation in such

Eighth Circuit was unanimous in the view that the Arkansas survival statute should be regarded as part of the federal law; but the Fifth Circuit court was divided. The dissent insisted that Congress had limited the cause of action in section 1983 "'to the party injured' and *no one else,*" and since the "injured party" was dead there was no cause of action. It is significant that the phrase "and no one else" was not in the statute. As was noted by Judge Brown, implying such a phrase "defies history"[14] and while not necessarily illogical is neither compelled by logic nor commended by its just results. Having thus rejected the dissent Judge Brown went on to hold that both the survival and death statutes of Georgia became part of the federal statute because they were regarded as "needed in the particular case under scrutiny to make the civil rights statutes fully effective."[15]

Since in the *Pritchard* case the *"injured party"* was bringing the suit, Congress clearly intended that plaintiff have a cause of action under section

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adoptive legislation. They further pointed out that the terms of section 1988 were such that a limitation in the adoption to mere procedure would be "doctrinaire."

13. Both courts cited Cox v. Roth, 348 U.S. 207, 209-10 (1955), to show the tendency of the courts to find survival even if the strict terms of statutes, literally applied, would result in its denial. Judge Brown noted here "this rigor of the common law 'flies in the face of the express congressional purpose to provide for' protection of citizens against unconstitutional deprivations of their fundamental civil rights. The Court's awareness there that 'liberal application of the words of F.E.L.A. would result in denial of recovery against the personal representative of the tortfeasor' was not permitted to 'frustrate the congressional purpose.' Nor should it here." Brazier v. Cherry, *supra* note 6, at 406. In that case a *seaman* had been killed *on the high seas* so as to give his estate a cause of action under the Jones Act but the shipowner died prior to trial and admiralty did not provide specifically for survival in case of death of the tort-feasor. The Jones Act referred the rights of the seaman to the Federal Employers Liability Act, 45 U.S.C. §§ 51-60 (1958). This statute referring to rights of railroad employees against railroads had no need for a survival provision with reference to the tort-feasor's death and had none expressly. The court chose to construe the statute very liberally so as to find that Congress intended that the cause of action should survive the death of the tort-feasor.

14. Judge Brown in Brazier v. Cherry, *supra* note 6, at 404, quoting from SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943), says: "'Some rules of statutory construction come down to us from sources that were hostile toward the legislative process itself and thought it generally wise to restrict the operation of an act to its narrowest permissible compass. However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose . . . so as to carry out in particular cases the generally expressed legislative policy.'" And "it defies history to conclude that Congress purposely meant to assure to the living freedom from such unconstitutional deprivations, but that, with like precision, it meant to withdraw the protection of civil rights statutes against the peril of death . . . . Violent injury that would kill was not less prohibited than violence which would cripple."

15. "Thus § 1988 declares a simple, direct, abreviated test: what is needed in the particular case under scrutiny to make the civil rights statutes fully effective? The answer to that inquiry is then matched against (a) federal law and if it is found wanting the court must look to (b) state law currently in effect. To whatever extent (b) helps, it is automatically available, not because it is procedure rather than substance, but because Congress says so." Brazier v. Cherry, *supra* note 6, at 409.

1983. That Congress intended to allow this cause of action to be defeated arbitrarily by the defendant's death without any reference to the substantive merits seems unreasonable. It is difficult to visualize any situation more appropriate to the adoption of state law under section 1988 than survival. In the *Brazier* case, however, there were two logical, yet diametrically opposed viewpoints, the reasoning of either of which could have justified a decision in its favor. On one extreme the dissent favored a very strict statutory construction giving only that effect which the authors expressly manifested at the time of enactment.[16] Thus with ancient legislative intent, the statute, and the trial record as a frame of reference the appellate judge is to make his decision without considering the practical merits of such a decision in the present. The opinion of Judge Brown, on the other hand, seems to recognize the role which the judiciary has played in the past and will play in the future if our system of law is to continue to be dynamic and to meet the ever-changing needs and demands of our people. This view considers each and every relevant factor, giving each its proper weight before reaching a decision. It is submitted that a close analysis of these statutes, with a pragmatic viewing of their history and of modern congressional and Supreme Court policies,[17] could not lead to a more logical decision than that reached by these two courts.

Constitutional Law—Tenth Amendment—the Estate of A Veteran Dying Intestate Without Heirs May Constitutionally Escheat to the Federal Rather Than State Government

A veteran of the armed forces died intestate and without heirs in a Veterans' Administration hospital in Oregon. He left an estate consisting of approximately $1,000 in unexpended pension funds and $13,000 which he had inherited just before his death. This latter portion of the estate was claimed by Oregon under its escheat laws,[1] and by the United States under a federal statute which provides that if a veteran dies intestate without heirs while in a Veterans' Administration facility, his estate shall vest in the United States as trustee for such facility.[2] The probate court interpreted the

16. Brazier v. Cherry, *supra* note 6, at 410 (De Vane, J., dissenting). And see Judge Brown's words referring to the dissent in note 14 *supra*.

17. See these policies as set out in the opinions in the instant cases.

1. "Immediately upon the death of any person who dies intestate without heirs, leaving any real, personal or mixed property, interest or estate in this state, the same escheats to and vests in the state . . . ." ORE. REV. STAT. § 120.010 (1957).

2. The pertinent part of the statute is as follows: "Whenever any veteran (admitted

federal statute as requiring a contract between the veteran and the Government, and, since the deceased had been mentally incompetent when admitted to the hospital, there could not have been a valid contract. Therefore the statute was not applicable, and deceased's property escheated to the state. The Oregon Supreme Court affirmed this decision on the same reasoning, and added that the statute must require a contract so as not to violate the tenth amendment.[3] On appeal to the Supreme Court of the United States, *held*, reversed.[4] The statute does not require a contract, and being necessary and proper to the power to raise and maintain an army and navy, it does not violate the tenth amendment. *United States v. Oregon*, 366 U.S. 643 (1961).

With this case, the tenth amendment is once again interjected into the problematic area of federal-state relations.[5] The Articles of Confederation had provided that the states retained all powers not *expressly* delegated to the federal government,[6] but the word "expressly" was not included in the tenth amendment.[7] Perceiving the significance of this omission, attempts were made to have "expressly" inserted.[8] Although, obviously, these attempts failed, the matter was not settled and conflicting views came forth immediately.[9] One view saw the Constitution as granting only expressly

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as a veteran) shall die while a member or patient in any facility, or any hospital while being furnished care or treatment therein by the Veterans' Administration, and shall not leave surviving him any spouse, next of kin, or heirs entitled, under the laws of his domicile, to his personal property as to which he dies intestate, all such property, including money and choses in action, owned by him at the time of death and not disposed of by will or otherwise, shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund . . . ." 38 U.S.C. § 5220(a) (1958). The state of Oregon did not claim that portion of deceased's estate which consisted of unexpended pension funds, recognizing that that part of the estate vested in the United States under another statute, 38 U.S.C. § 3202(e) (1958). It might also be noted that the statute in question applies only to personal property.

3. *In re* Warpouske's Estate, 222 Ore. 40, 352 P.2d 539 (1960).

4. Mr. Justice Black wrote the majority opinion; Mr. Justice Douglas, joined by Mr. Justice Whittaker, dissented.

5. "The whole controversy over the proper activities of the national government rests upon the Tenth Amendment." Briggs, *State Rights*, 10 IOWA L. BULL. 297, 299 (1925).

6. "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." Articles of Confederation, art. II. For an exhaustive treatment of the Articles of Confederation, see JENSEN, THE ARTICLES OF CONFEDERATION (1948).

7. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

8. 1 ANNALS OF CONG. 767-68 (1789). This is discussed in 1 CROSSKEY, POLITICS AND THE CONSTITUTION 680-90 (1953).

9. One of the first such clashes occurred between Thomas Jefferson and Alexander Hamilton when the latter proposed his plan for a national bank. "Jefferson—speaking for all believers in states rights as against national rights . . . objected. He sent Washington a strong argument. The Constitution, he declared, expressly enumerated

enumerated powers with the tenth amendment operating as an independent limitation upon these powers. Opposing this interpretation were those who held the Constitution to give broadly implied powers upon which the tenth amendment did not act independently as a limitation.[10] The latter view was accepted and promulgated by Chief Justice John Marshall when the issue came before the Supreme Court.[11] In his classic rhetoric, Marshall emphasized the necessity of implied powers and pointed to the omission of "expressly" in the tenth amendment.[12] For Marshall, the tenth amendment was only declarative and did not limit a legislative enactment which could be related to a constitutional grant of power, even if the act entered a field previously dominated by state power.[13] This view, that federal and state powers were flexible and cooperative, prevailed on the Court until Marshall's death in 1835. Following further changes in the Court's per-

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all the powers belonging to the Federal government and reserves all other powers to the states; and it nowhere says that the Federal government may set up a bank. This seemed good logic. Washington was on the point of vetoing the bill. But Hamilton submitted a more convineing argument. He pointed ont that all the powers of the national government could not be set down in explicit detail. A vast body of powers had to be implied by general clauses, and one of these authorized Congress to 'make all laws which shall be necessary and proper' for carrying out other powers granted. Washington accepted this argument and signed Hamilton's measure." NEVINS & COMMAGER, A POCKET HISTORY OF THE UNITED STATES 138-39 (1960).

10. This latter approach was best represeuted by Alexander Hamilton, see note 9 *supra*, and has come to be known, properly enough, as the Hamiltonian view. Its counterpart was perhaps best represented by Thomas Jefferson, see note 9 *supra*, but has, over the years, come to be known as the Madisonian view. This is not altogether inappropriate. Madison, for example, wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." THE FEDERALIST No. 45, at 303 (Modern Library ed. 1940). However, it is interesting to note that in the first Congress, when it was proposed that "expressly" be inserted in the tenth amendment, Madison voted against the proposal. 1 ANNALS OF CONG. 767-68 (1789). For a discussion of the Madisonian and Hamiltonian views, see Casto, *The Doctrinal Development of the Tenth Amendment*, 51 W. VA. L.Q. 227 (1949).

11. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). In this case, Marshall "dealt with the old question of the implied powers of the government under the Constitution. Here he stood boldly forth in defense of the Hamiltonian theory that the Constitution by implication gives to the government powers which it did not expressly state." NEVINE & COMMAGER, *op. cit. supra* note 9, at 160.

12. "But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word 'expressly,' and declares only that the powers 'not delegated to the Uuited States, nor prohibited to the States, are reserved to the States or to the people;' thus leaving the question, whether the partieular power may become the subjeet of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument." McCulloch v. Maryland, *supra* note 11, at 406.

13. The principal cases which reveal Marshall's philosophy on the whole matter are Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); McCulloch v. Maryland, *supra* note 11.

sonnel,[14] new constitutional interpretations emerged.[15] Chief Justice Taney, who replaced Marshall, envisioned a competitive rather than cooperative concept[16] of the federal and state powers. He distinguished between them, making each independent of the other.[17] By doing this, the state power became supreme in its sphere and could not be touched even by expressly granted powers. This proposition was effectuated by making the tenth amendment both a symbol of state power and an independent limitation upon federal power.[18] The tenth amendment became such a shibboleth that the Court would finally say the federal government is one of enumerated powers.[19] Then, with the depression in the early 1930's came disrupting socioeconomic conditions which prompted legislation giving stronger powers to the federal government. But this early New Deal legislation was continually struck down by the Court, relying in part on the tenth amendment.[20] Following the 1936 election and the court-packing plan, a change became noticeable in the Court's attitude,[21] culminating, in

14. "Marshall died July 1835, and a few months later the Court was enlarged from seven justices to nine, a measure which enabled the appointing power of the day to water down the little that remained of his influence on the bench. Within twenty-two months the Court received a new Chief Justice and five new Associate Justices, and a new set of constitutional dogmas . . . ." CORWIN, COURT OVER CONSTITUTION 102 (1938).

15. "While the Federalist judges, led by Chief Justice Marshall, were still on the bench, Hamilton's theories held sway; but as the personnel of the courts changed, Madisonian principles came to the fore." Cowen, *What Is Left of the Tenth Amendment*, 39 N.C.L. REV. 154, 157 (1961). Some of the early cases first indicating the change were New York v. Miln, 36 U.S. (11 Pet.) 102 (1837); License Cases, 46 U.S. (5 How.) 504 (1847).

16. These phrases are Professor Corwin's. See UNITED STATES CONSTITUTION ANNOTATED at xiv (Corwin ed. 1953).

17. Taney explicitly stated his view thusly: "And the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres." Ableman v. Booth, 62 U.S. (21 How.) 506, 516 (1858).

18. "[F]or approximately a century, from the death of Marshall until 1937, the Tenth Amendment was frequently invoked to curtail powers expressly granted to Congress, notably the powers to regulate interstate commerce, to enforce the Fourteenth Amendment, and to levy and collect taxes." CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 232 (11th ed. 1954).

19. Hammer v. Dagenhart, 247 U.S. 251, 275 (1918); United States v. Harris, 106 U.S. 629, 635 (1882).

20. The Court declared unconstitutional the National Industrial Recovery Act, Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), and the Agricultural Adjustment Act, United States v. Butler, 297 U.S. 1 (1936). For a lively account of the Supreme Court and the Roosevelt administration during 1935-36, see SCHLESINGER, THE POLITICS OF UPHEAVAL 447-96 (1960).

21. The Court upheld the National Labor Relations Act, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), and the Social Security Act, Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937). In these two cases the dissent is predicated on the tenth amendment. In fact, in the *Helvering* case, the entire dissent is: "Mr. Justice McReynolds and Mr. Justice Butler are of opinion that the provisions of the act here challenged are repugnant to the Tenth

regard to the tenth amendment, in *United States v. Darby*[22] wherein the Court expressly returned to Marshall's position, saying: "The [tenth] amendment states but a truism that all is retained which has not been surrendered."[23] Thus, once again, the tenth amendment simply declares the relationship between the federal and state powers and does not have any inherent force to act independently as a limitation upon the federal government as long as the latter is legislating pursuant to the Constitution. *Darby* has been followed consistently and prevails today.[24] But, the idea that the tenth amendment "states but a truism" does not lead to the conclusion that state power, in its relation to federal, has been rendered impotent. The Court takes cognizance of essentially local activities[25] and considers this dominantly local character when interpreting legislation which forces the Court to draw lines between federal and state administration.[26] As Mr. Justice Frankfurter expressed it: "Federal legislation . . . cannot therefore be construed without regard to the implications of our dual system of government."[27] And the return to the principles of Marshall in construing

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Amendment." 301 U.S. at 646. These dissents indicate that the Court did not, between 1936 and 1937, undergo a sudden, complete reversal. Prior to this time there had been strong dissenting opinions in many of the cases with which we are concerned. *E.g.*, Justices Holmes, Brandeis, McKenna, and Clarke dissented in Hammer v. Dagenhart, *supra* note 19; Justices Brandeis, Cardozo, and Stone dissented in United States v. Butler, *supra* note 20, and in United States v. Constantine, 296 U.S. 287 (1935). Similarly, there were four dissenting Justices in the two important decisions after the change. See NLRB v. Jones & Laughlin Steel Corp., *supra* note 21; Steward Machine Co. v. Davis, *supra* note 21.

22. 312 U.S. 100 (1941).

23. *Id.* at 124. The quotation continues: "There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers." *Ibid.*

24. Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127 (1947); Case v. Bowles, 327 U.S. 92 (1946); Fernandez v. Wiener, 326 U.S. 340 (1945); Oklahoma *ex rel.* Phillips v. Atkinson, 313 U.S. 508 (1941).

25. "We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation." 10 East 40th St. Bldg., Inc. v. Callus, 325 U.S. 578, 582-83 (1945).

26. "Perhaps in no domain of public law are general propositions less helpful and indeed more mischievous than where boundaries must be drawn, under a federal enactment, between what it has taken over for administration by the central Government and what it has left to the States. . . . The real question is how the lines are to be drawn—what are the relevant considerations in placing the line here rather than there." A. B. Kirschbaum Co. v. Walling, 316 U.S. 517, 520, 523 (1942). In this same case, in discussing the phrase "'necessary' to the production of goods for commerce," it was said: "'Necessary' is colored by the context not only of the terms of this legislation but of its implications in the relation between state and national authority." *Id.* at 525.

27. Kirschbaum Co. v. Walling, *supra* note 26, at 520. It might be noted that Justice Frankfurter also wrote the majority opinion in 10 East 40th St. Bldg., Inc. v. Callus, *supra* note 25. And see his opinions in Mitchell v. H. B. Zachry Co., 362 U.S.

the tenth amendment does not destroy this duality.

In this case, the Supreme Court said the federal statute in question[28] was necessary and proper to the power to raise and maintain an army and thus did not violate the tenth amendment.[29] The majority opinion treats the constitutional issue in a single, brief paragraph, but it is vigorously taken up in Justice Douglas's dissenting opinion. The tone of the dissent is struck in its second sentence: "The succession of real and personal property is traditionally a state matter under our federal system."[30] Certain acts regarding veterans (*e.g.*, the establishment of hospitals, payment of pensions) are within the scope of the necessary and proper clause, but administration of veterans' estates is an inexplicable extension of this grant of power.[31] And the Court had recently warned against too great an expansion of the necessary and proper clause.[32] The dissent implies that the majority opinion failed to establish a sufficient relationship between the statute and the necessary and proper clause to justify the invasion of an area historically reserved to the states, and embedded in the tenth amendment.[33]

The decision in the instant case would seem to be in accord with the Court's prevailing view of governmental power and its relation to the tenth amendment.[34] And the result is an equitable one; the deceased probably would have preferred his estate to go to the Post Fund, rather than to the state in which the hospital happened to be located.[35] But this case is not to

310 (1960) (majority opinion); United States v. Kahriger, 345 U.S. 22 (1953) (dissenting opinion).

28. This comment is limited to the constitutional issue involved. As for the federal statute, the Supreme Court was construing it for the first time, and held that it did not require a contract between the veteran and the Government. Therefore, in the case of a veterau incompetent to enter a contract, as here, the statute operates automatically to vest his estate in the United States. The predecessor of the statute in question was passed in 1910, and expressly sounded in contract. Act of June 25, 1910, ch. 384, 36 Stat. 736. The statute was amended in 1941 and much of the contractual language was deleted. 38 U.S.C. §§ 5220-21 (1958). It is the conspicuous absence of express contractual terms in the 1941 act which leads the Court to conclude that the requirement of a contract has been eliminated. 366 U.S. at 646. For other cases applying the statute, see *In re* Skriziszouski's Estate, 382 Pa. 634, 116 A.2d 841 (1955); *In re* Gonsky's Estate, 79 N.D. 123, 55 N.W.2d 60 (1952); *In re* Bonner's Estate, 192 Misc. 753, 80 N.Y.S.2d 122 (Surr. Ct. 1948). If the veteran is mentally competent when he enters the hospital, his signing of the application form constitutes a contract, and there is no problem. See United States v. Security-First Nat'l Bank, 130 F. Supp. 521 (S.D. Cal. 1955); United States v. Mid City Nat'l Bank, 121 F. Supp. 402 (N.D. Ill. 1953); *In re* Turner's Estate, 171 Cal. App. 2d 591, 341 P.2d 376 (Dist. Ct. App. 1959); *In re* Witte's Estate, 174 Kan. 360, 255 P.2d 1039 (1953).

29. 366 U.S. at 648-49.

30. *Id.* at 649.

31. *Id.* at 651.

32. Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960).

33. 366 U.S. at 654.

34. See notes 28-24 *supra* and accompanying text.

35. The sentiment behind the act was perhaps best expressed by Representative Jennings during the House discussion of the bill: "And would it not be much better to

be so easily resolved. The devolution of property is admittedly an area reserved to the states;[36] and this statute obviously encroaches on it. But, at the same time, state power is not absolute in this area. For example, a state's inheritance laws must yield before a treaty.[37] Thus, since Congress has the authority to provide veterans with hospital facilities and other benefits, it can be argued that this carries with it the right to legislate on the whole matter. And if this statute is a means appropriate to that end, the tenth amendment will not stand in the way. This falls into line with the view expressed in *Darby* and followed since that time. This view, especially in modern times, is a sounder, more flexible interpretation, and makes the Constitution more adaptable to the public interest in a dynamic society. Unfortunately, the majority opinion does not develop this point; instead, the constitutional issue is dismissed in a single paragraph.[38] Recently there has been criticism of the Court's inclination toward assertive or declarative opinions, opinions which do not have a deliberated exposition of the rationale.[39] This, of course, is the Court's prerogative, but, because the devolution of property is of symbolic and historic siguificance, and traditionally has been reserved to the states, it is regrettable that the Court did not elucidate the constitutional problems involved in its decision.

Due Process of Law—A State May Deny An Applicant Admission to the Bar for Refusing To Answer Questions About His Advocacy of Subversive Organizations Or Objectives

In two recent decisions reviewed by the Supreme Court of the United States, applicants were denied admission to a state bar for refusing to answer questions concerning their possible Communist Party membership. In neither case was self-incrimination an issue and only in the California case was there even slight evidence that the applicant had ever participated in any subversive or questionable activity. The bar committee in both cases refused to certify the applicants on the narrow ground that their

let that money go into a fund that would inure to the benefit of other veterans than to . . . let it go into a fund under the escheat laws of that state." 87 CONG. REC. 5203-04 (1941).

36. See Mager v. Grima, 49 U.S. (8 How.) 490, 493 (1850).

37. Kolovrat v. Oregon, 366 U.S. 187 (1961). See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

38. 366 U.S. at 648-49.

39. Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957); Lewis, *Explanation, Please*, The New Republic, Dec. 4, 1961, p. 9.

refusal to answer questions had obstructed a full investigation into their good moral character, general fitness to practice law, and good citizenship. The applicants protested that they were privileged not to answer because the committees' questions violated their freedom of speech and association and that a denial of the right to practice law because of their refusal to answer these questions was arbitrary, unreasonable state action in violation of the due process clause of the fourteenth amendment. The supreme court of each state upheld its committee's decision.[1] In the Supreme Court of the United States, *held*, affirmed. Questions concerning possible membership in subversive organizations or advocacy of violent overthrow are relevant and material in an investigation to determine fitness to practice law, and it is not a violation of due process or freedom of speech and association to deny an applicant admission to the bar for refusing to answer such questions. *In re Anastaplo*, 366 U.S. 82 (1961). *Konigsberg v. State Bar*, 366 U.S. 36 (1961).

The constitutionally permissible scope of state inquiry into an individual's past activities or present beliefs and the use which a state may make of the results of the inquiry in affecting the individual's interests are, of course, questions of due process under the fourteenth amendment. In attempting to prevent "arbitrary" action by a state and yet recognizing that state action can and must at times impinge upon individual interests, it has become necessary for the Court to devise some test by which these two factors can be applied to concrete situations. The "clear and present danger" test was the first one adopted by the Court to determine when the need for protection of morals and orderly society justified governmental invasion of the need for individual freedom of expression.[2] Imminent danger created by the words used was the prerequisite to the constitutional prohibition of speech and assembly. Currently a "balancing test" is used by the Court which attempts to weigh the interests of the state against that of the individual without the requirement of imminent danger. Under this test, as the social value of the state action increases, *e.g.*, self-preservation from subversion,[3] greater incursions into the private affairs of the individual

1. 18 Ill. 2d 182, 163 N.E.2d 429 (1959). 52 Cal. 2d 769, 344 P.2d 777 (1959).

2. The "clear and present danger" test, as found in Bridges v. California, 314 U.S. 252 (1941), presents the issue of whether the words used are used under such circumstances and are of such nature as to create the substantial evils which Congress and the state have a right to prevent. It is necessary that the evil be substantial and the threat highly imminent. For other cases dealing with this test see Whitney v. California, 274 U.S. 357 (1927) and Dennis v. United States, 341 U.S. 494 (1951) (a probable rather than imminent danger is sufficient). In the case of Beauharnais v. Illinois, 343 U.S. 250 (1942) it was held that this test applied only to those freedoms protected by the first and fourteenth amendments; therefore writings, speech, or activity which are obscene or libelous will be immediately subject to censure.

3. See American Communications Ass'n v. Douds, 339 U.S. 382 (1950) (National Labor Relations Act provision imposing restrictions on and denial of benefits to any labor organization failing to file the prescribed anti-communist affidavit held valid); Barenblatt v. United States, 360 U.S. 109 (1959) (although recognizing that the first

appear reasonable and not arbitrary. In the area of state investigations into the fitness of an individual to have some license, hold a public job, or obtain some other limited benefit, two groups of cases appear. In one group, although the state's interest in the subject-matter of the questions asked is sufficient to justify examining an individual, the answer obtained may have such little probative value respecting his fitness that to deny him the benefit sought because of his answer is unreasonable and arbitrary. Thus admitted past membership in the Communist Party, use of aliases, and arrests were held insufficient to warrant a reasonable inference of present bad moral character which would deny bar admission to an applicant who had presented strong favorable evidence.[4] In the other cases, the question itself may be so unrelated to any legitimate state interest, regardless of the individual's answer, that it is arbitrary even to ask the question or to deny any benefit sought because of a refusal to answer or to penalize the individual for failure to cooperate. The names of NAACP members, for example, have been held to have "no relevant correlation"[5] to the right to engage in intrastate commerce[6] or to gain a city license,[7] and questions based on these asserted interests have been struck down. But, where the subject-matter of the investigation has been the extent of subversive activity generally[8] or in public education,[9] the names of associates have been con-

amendment protects an individual from compulsory disclosure, the Court limited the scope of its protection by holding that govenmental interest in the Communist Party outweighed the individual interest in privacy).

4. See Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). In its earlier *Konigsberg* decision, 353 U.S. 252 (1957), the Court held that the examining committee could not constitutionally infer from the petitioner's refusal to answer questions that he had failed to show that he had a good moral character or that he did not advocate violent overthrow of the government. The bar committee in the *Anastaplo* case did not infer from the petitioner's refusals that he had a bad moral character, but stated that he had obstructed a full investigation of his fituess and character which resulted in his failure to meet the burden of establishing them. See 31 MISS. L.J. 303 (1959).

5. Bates v. Little Rock, 361 U.S. 516 (1960).

6. See NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (contempt conviction for plaintiff's failure to produce a membership list of a local chapter under statute ascertaining qualifications to conduct intrastate business held invalid). See also 46 VA. L. REV. 730 (1950); 54 NW. U.L. REV. 390, 397 (1959).

7. See Bates v. Little Rock, 361 U.S. 516 (1960) (compulsory disclosure of NAACP chapter membership list under city occupational license tax ordinance held unconstitutional). See also Note, 27 GEO. WASH. L. REV. 653 (1959); Reference, 4 RACE REL. L. REP. 207, 224-36 (1959).

8. *Compare* Uphaus v. Wyman, 360 U.S. 72 (1959) (a contempt conviction for refusal to produce the list of persons attending a political discussion camp held valid) *and* Watkins v. United States, 354 U.S. 178 (1957) (contempt conviction for refusal to disclose to the House Committee on Un-American Activities whether certain persons had been members of the Communist Party was held invalid where a clear delegation of authority from Congress to ask such questions was absent), *with* Sweezy v. New Hampshire, 354 U.S. 234 (1957) (the use of contempt power to convict a person for refusing to identify the members of the Progressive Party held invalid because that organization was merely unpopular, not subversive). See 109 U. PA. L. REV. 67, 75-85 (1960).

9. See Adler v. Board of Educ., 342 U.S. 485 (1952); Beilau v. Board of Pub.

sidered relevant and unprivileged. Similarly, although mere membership in any religious organization is not a valid basis for exclusion from the legal profession, a state may validly question whether an applicant can in good faith take the required oath to support the state constitution. If he cannot do so because of religious scruples, a denial of bar admission has been held not to be unreasonable.[10] The Court has ruled that membership in the Communist Party is not unrelated to the use of limited powers for illegal purposes.[11] Therefore any question regarding membership therein would be substantially related to the fitness of those entrusted with the power of our legal system.[12] Likewise, a denial of bar admission based upon the answer received to such questions would be reasonable if it prevented a full investigation into the extent of an applicant's participation in that organization.

An adamant minority of the Court has consistently maintained that regardless of the relevance of a question, past expressions of one's political or social ideas and related associations may not be inquired into because such activity is protected, and silence about it privileged, under freedom of speech as stated in the first and incorporated into the fourteenth amendment. To these Justices, the possibility of future investigation will itself have a direct and substantial deterrent effect upon free communication equivalent to prior restraint.[13] So viewed, no balance of interests should

Educ., 357 U.S. 399 (1958) (state's interest in determining the qualifications of teachers in public schools including political beliefs outweighs the deterrent effect upon freedom of speech and association caused by compulsory disclosure). *But see* Slochower v. Board of Educ., 350 U.S. 551 (1956) (dismissal of professor for refusal to answer committee questions by invoking the fifth amendment held invalid).

10. See *In re* Summers, 325 U.S. 561 (1945) (applicant's religious scruples would not permit him to use firearms in time of war as required by the state constitution). *But cf.* Torcaso v. Watkins, 367 U.S. 488 (1961). The bar committee in the *Anastaplo* case asserted its right to inquire into the applicant's belief in a Supreme Being. He refused to answer saying that the subject was constitutionally protected. Subsequently the committee repudiated its right to ask this question and did not base its decision on his refusal to answer. 366 U.S. at 102-03.

11. See Braden v. United States, 365 U.S. 431 (1961).

12. The court-made rule in the *Konigsberg* case was based upon CAL. BUS. & PROF. CODE § 6064.1 which forbids certification to practice of anyone who advocates violent overthrow of the government. In the *Anastaplo* case the materiality of the question stemmed from its bearing upon the public interest in having lawyers who observe orderly processes of change. The court-made rule for exclusion therein was justified on the need for a full investigation of candidates, as found in *In re* Anastaplo, 3 Ill. 2d at 480, 121 N.E.2d at 831.

13. Prior restraint herein means official restraint of communication before actual publication. It, of course, does not mean that the Constitution protects every written or spoken word or activity, but it does prevent previous restraint upon publication. See Near v. Minnesota, 283 U.S. 697 (1931); Thomas v. Collins, 323 U.S. 516 (1945) (a statutory requirement that one register with a designated official before making a public speech for support of a lawful organization held invalid); Gitlow v. New York, 268 U.S. 652 (1925) (state statute punishing utterances advocating violent overthrow of the government held valid). See also Ernst & Katz, *Speech: Public and Private,* 53 COLUM. L. REV. 620 (1953).

be struck against freedom of speech and association short of the "clear and present danger" point.

The majority of the Court, in both instant cases, by predicating their decision upon the theory that first amendment freedoms are not "absolutes,"[14] proceed to validate the states' action herein on the ground that the exclusion imposed and the questions asked did not directly control the content of speech itself. The incidentally limiting effect upon freedom of association caused by these questions was found to be "outweighed" by the state's interest in having only lawyers "who are devoted to the law in its broadest sense, including not only its substantive provisions, but also its procedures for orderly change . . . ."[15] Since the hearings were privately conducted, subject to judicial review,[16] and the applicants had been warned about the consequences following a refusal to answer,[17] the majority of the Court thought that the state would have no opportunity to impose arbitrary restrictions on an applicant. The minority, however, thought the unequivocal command of the first amendment forbade the creation of tests under which speech or association might be subjected to compulsory disclosure. Mr. Justice Black thought that the speech involved in these cases—wholly related to conflicting ideas about governmental affairs and policies—clearly fell within the type of speech protected under any construction of the first amendment.[18] He therefore decried the use of the "balancing test" which under these facts would permit a state directly to abridge rather than minimally limit the unfettered exercise of these freedoms. Since the committees refused to certify these applicants even though there was little or no evidence presented adverse to them,[19] the states' adoption of their

14. The majority of the Court notes two ways in which constitutionally protected speech is narrower than unlimited license to speak. 366 U.S. at 50-51. One way exists where general regulatory statutes, not directly controlling the content of speech, incidentally limit its free exercise. Under such statutes the amount of deterrence has been justified by a subordinating governmental interest. This theory is applied by the majority in the instant cases. See, *e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949) (city ordinance prohibiting operation of sound truck on public streets held valid).

15. 366 U.S. at 52.

16. In California and other states, bar interrogations are conducted in private and an applicant denied admission to the bar has the right to review of his case, including review by the United States Supreme Court. But, as pointed out by the minority, there is little assurance of privacy if an applicant should take his case before any court.

17. The majority thought that it was of vital importance that the applicants be forewarned of the consequences of a refusal to answer these questions. Without such process the state would have an opportunity to impose discriminatory consequences upon an applicant. 366 U.S. at 44-49, 90-94.

18. The minority seems to think that any compulsory disclosure of speech or association will cause an unconstitutional infringement upon personal freedoms. See Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 880 (1960).

19. In the *Konigsberg* case there was some evidence arguably adverse to the petitioner. 366 U.S. at 59 n.8. In the *Anastaplo* case there was a complete lack of adverse evidence, but the question as to his possible Communist Party membership

procedural rules[20] here forced an applicant to prove affirmatively his good moral character and lack of forbidden advocacy—a practice which had earlier been held violative of due process and an unconstitutional deterrence of free speech.[21]

The two instant cases permit compulsory disclosure of speech and association which is both reasonable and necessary to uphold the integrity of the Bar as a "profession in whose hands so largely lies the safekeeping of this country's legal and political institutions."[22] A state could reasonably conclude that those who refuse to answer whether they are presently members of a political organization dedicated to the destruction of law and order should not be allowed into the profession.[23] As one can easily see, however, the precise nature of the right herein claimed is neither easily defined nor neatly fitted under the ubiquitous shield of due process or of the terms of the first amendment. Although the Court has recognized the existence of the rights to freedom of association and silence or anonymity in communication,[24] the more important factor—the scope of protection to be accorded them in various situations—is not clearly defined and depends upon the individual evaluations of the members of the Court. As recognized by the minority, "This [misapplication of the original balancing test][25] is,

was presented when the petitioner showed his belief in the "right of revolution" as presented in the *Declaration of Independence*. See 366 U.S. at 99 n.2, 113 n.10.

20. The burden of demonstrating fitness and good moral character is normally placed upon applicants for bar admission. All fifty states have required qualifications for bar admission including nonadvocacy of violent overthrow of the government and satisfactory moral character. See WEST PUBLISHING CO., RULES FOR ADMISSION TO THE BAR (35th ed. 1957); Jackson, *Character Requirements for Admission to the Bar*, 20 FORDHAM L. REV. 305 (1951). In the *Konigsberg* case the Court compared these rules with FED. R. CIV. P. 37(b), which provides that refusal to answer a relevant question after due warning may be considered as being answered in an unfavorable manner to the refusing party. 366 U.S. at 44-45.

21. The dissenting Justices think that the consequences of these decisions upon applicants for the bar will be more severe than a mere tax penalty as found in Speiser v. Randall, 357 U.S. 513 (1958), wherein a state procedural rule requiring veterans to bear the burden of proving affirmatively a lack of criminal advocacy of violent overthrow was held invalid. The majority distinguishes that case on the ground that in these cases there is no intent to penalize political beliefs. The minority, however, thinks that these rules and decisions will serve "to force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals . . . ." 366 U.S. at 115-16.

22. 366 U.S. at 52.

23. The license to practice law has generally been considered a privilege granted by the state and not a right guaranteed under the Constitution. Therefore a state does not have to grant such license or privilege to all who apply. See Braverman v. Bar Ass'n, 209 Md. 328, 121 A.2d 473 (1956) (disbarment of lawyer upheld when based upon conviction of conspiraey to violate the Smith Act, a crime involving moral turpitude).

24. See 36 IND. L.J. 306 (1961); 70 YALE L.J. 1084 (1961); 14 VAND. L. REV. 392 (1960).

25. Mr. Justice Black, speaking for the minority, thought that the "balancing test," as originally conceived, required not only consideration of governmental and individual interests generally, but consideration of the wisdom of those policies under the facts

of course, an ever-present danger of the 'balancing test' for the application of such a test is necessarily tied to the emphasis particular judges give to competing societal values."[26] The variable nature of this test, coupled with the duty of law applicants to answer truthfully questions asked by the examining committee,[27] leaves those who desire to practice law with little or no certainty as to what areas of his personal history will be beyond the investigator's grasp. Any present attempt to determine how the balance will be struck regarding the comparison of future govenmental interests with fundamental individual interests would, of course, be unnecessary and impractical.[28] It would seem important that some reasonable standard be set up by which the courts, applicants and examining committees could understand in advance what aspects of a person's political, religious, fraternal or other societal beliefs and organizational memberships will be substantially related to one's fitness for the legal profession or other positions of public trust.

Federal Courts—State Security for Expenses Statute Inapplicable in Federal Equity Action Under Securities Exchange Act

The plaintiffs, holders of 1.1% of the corporate stock of Borne Chemical Company, brought a stockholders' derivative action in a federal district court in Pennsylvania under section 10(b) of the Securities Exchange Act of 1934.[1] It was alleged that the defendants violated this federal act by the fraudulent sale of 10,000 shares of the company's capital stock. The defendants moved to require the plaintiffs to post security for expenses, including reasonable attorney's fees, as prescribed by the security for expenses statute of either Pennsylvania,[2] the state in which the court was

of each case. Since the majority of the Court in the *Anastaplo* case refused to pass upon the wisdom of the state's action therein and there was no evidence adverse to the petitioner, he believed that the test has been improperly applied. 366 U.S. at 111-12.

26. 366 U.S. at 74-75.

27. Cohen v. Wright, 22 Cal. 293 (1863). It is also constitutionally permissible for bar applicants to be required to take an oath to support the federal constitution under state law. See State Bar v. Langert, 43 Cal. 2d 636, 276 P.2d 596 (1954).

28. In these two cases the deciding vote was cast by Mr. Justice Stewart. As the personnel of the Court changes and new exigencies appear the balance may swing in either direction. See DOUGLAS, A LIVING BILL OF RIGHTS 23-58 (1961).

1. 48 Stat. 891, 15 U.S.C. § 78j(b) (1958). This section is implemented by § 29(b), 48 Stat. 903, as amended, 15 U.S.C. § 78cc (1958) and SEC Rule 10b-5, 17 C.F.R. § 240.106-5 (1949).

2. PA. STAT. ANN. tit. 12, § 1322 (Supp. 1960). This statute requires that in any derivative action by holders of less than 5% of the outstanding stock, the plaintiffs must

sitting, or New Jersey,[3] the state of incorporation and Borne's principal place of business.[4] The district court denied the motion. In the court of appeals, *held*, affirmed. In a stockholders' derivative action brought in a federal court for a violation of the Securities Exchange Act, the plaintiff is not required to post security for expenses even though both the state in which the court sits and the state of incorporation require security for expenses. *McClure v. Borne Chemical Co.*, 292 F.2d 824 (3d Cir.), *cert. denied*, 368 U.S. 939 (1961).

Although *Erie R.R. v. Tompkins*[5] held that a federal court exercising diversity jurisdiction must apply state substantive law, it is clear that *Erie* has no direct application to cases arising under federal laws; both the policy and the constitutional bases of *Erie* are confined to diversity jurisdiction.[6] Thus, even though the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*[7] ruled that *Erie* requires a federal district court to apply state security for expenses statutes in diversity cases, it does not necessarily follow that the same result would be reached in federal question cases. In such cases, if state law is to apply, it is because federal law is "interstitial" in its nature—that is, the federal law leaves gaps unregulated by congressional legislation or intent, and these gaps or interstices may be governed by state law.[8] When, for example, no provision has been made for certain matters such as statutes of limitations,[9] when a term of the act requires further definition,[10] and when matters more peculiarly of state interest

give security for the reasonable expenses, including attorney's fees, which may be incurred by the corporation or the other defendants.

3. N.J. STAT. ANN. § 14:3-15 (Supp. 1960). The New Jersey security for expenses statute is similar to the Pennsylvania statute except that New Jersey does not require the security if the value of the plaintiffs' shares is in excess of $50,000.

4. The defendants also argued that security for expenses is either required by general federal equity law, or should be implied from section 10(b) by analogy to other provisions of the Securities Acts. See note 25 *infra*.

5. 304 U.S. 64 (1938).

6. *Id., passim;* see, *e.g.*, Holmberg v. Armbrecht, 327 U.S. 392 (1946); Rothenberg v. H. Rothstein & Sons, 183 F.2d 524 (3d Cir. 1950); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 465 (1942) (Jackson, J., concurring). "Where, on the other hand, a federal matter is involved state law has no bearing except to the extent that federal law makes reference to and utilizes it." 2 MOORE, FEDERAL PRACTICE 456 (2d ed. 1948). *But cf.* Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013 (1953).

7. 337 U.S. 541 (1949).

8. HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435-36 (1953). See generally Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66 (1955); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules of Decision*, 105 U. PA. L. REV. 797 (1957); Note, *Rules of Decision in Nondiversity Cases*, 69 YALE L.J. 1428 (1960).

9. Cambell v. Haverhill, 155 U.S. 610 (1895) (suits at law). Compare Holmberg v. Armbrecht, 327 U.S. 392 (1946).

10. De Sylva v. Ballentine, 351 U.S. 570 (1956) ("children"); RFC v. Beaver County, 328 U.S. 204 (1946) ("real property"); Davies Warehouse Co. v. Bowles, 321

have not been pre-empted,[11] state law may round out a federal statute or a federally created right.[12] But where a federal statute is involved, before the state law may be applied the proper method of analysis (at least in actions at law) is to look first to the federal statute for an express or implied rule of law. If this is not found, the particular state law may be used only when it does not conflict with the policy of the federal statute[13] and is not surprising or capricious.[14] This analysis was skirted in *Fielding v. Allen*,[15] in which the Second Circuit passed on the question of whether a forum state's security for expenses statute would apply in a derivative suit arising under the Interstate Commerce Act.[16] Adjudging the corporation's right of action to be federally created, the court went on to find that the stockholders' right to maintain the derivative action for the corporation was also federally conferred and thus not subject to special requirements for cognate actions under state law.[17] The court based its decision on the federal court's historic equity jurisdiction which is said to be uniform and not sub-

U.S. 144 (1944) ("public utilities"). See also HART & WECHSLER, *op. cit. supra* note 8, at 456-57, for the more complex problem presented by tax statutes.

11. See, *e.g.*, Price v. Gurney, 324 U.S. 100 (1945); Board of County Comm'rs v. United States, 308 U.S. 343 (1939).

12. Note, 69 YALE L.J. 1428, 1446 (1960).

13. Circuit Judge Tuttle has stated the proper method of approach to be as follows: "To begin with first principles, this question is one arising under the statutes of the United States; those statutes being next to the Constitution the supreme law, it is in them that we should first look for the solution. We are free to construe those statutes by the principles generally accepted in the federal courts, without recourse to the law of any state; and in areas where Congress has legislated extensively so as to establish a general policy, that *policy* may furnish the answer to a particular question, even though the federal statutes do not expressly answer it, and though a state statute expressly enacts a contrary rule. . . . But, failing a complete solution in the federal statutes (and the penumbral area where Congress has so 'filled the field' that state law can have no application) we may then properly look to the foundation of legal interests and relationships created only by state law, to which the federal statutes must he related either because by their terms they postulate such interests and relationships, or because constitutional limitations of federal power require this." Fahs v. Martin, 224 F.2d 387, 392 (5th Cir. 1955). (Emphasis by court.) See, *e.g.*, Board of County Comm'rs v. United States, 308 U.S. 343, 351-52 (1939); Fischer v. Karl, 6 F.R.D. 268, 269 (E.D.N.Y. 1946) (state requirement of security for attorney's fees inapplicable to patent infringement suit); Hill, *supra* note 8, at 94; Mishkin, *supra* note 8, at 805; Note, 9 GEO. WASH. L. REV. 465 (1941); Note, 59 HARV. L. REV. 966 (1946); Note, 69 YALE L.J. 1428 (1960).

14. "This does not mean that a State would be entitled to use the word 'children' in a way entirely strange to those familiar with its ordinary usage, but at least to the extent that there are permissable variations in the ordinary concept of 'children' we deem state law controlling." De Sylva v. Ballentine, *supra* note 10, at 581. *Cf.* Davies Warehouse Co. v. Bowles, 321 U.S. 144, 152 (1944).

15. 181 F.2d 163 (2d Cir.), *cert. denied*, 340 U.S. 817 (1950).

16. Interstate Commerce Act § 5(4), as amended, 54 Stat. 907 (1940), 49 U.S.C. § 5(4) (1958).

17. 181 F.2d at 168. Even prior to *Fielding* a district court had summarily held that the New York security for expenses statute did not apply to a derivative suit brought under the Securities Exchange Act. Stella v. Kaiser, 81 F. Supp. 807 (S.D.N.Y. 1948).

ject to the peculiar requirements of local law.[18] It was conceded, however, that "the question is not free from doubt" in light of the strong language used in the *Cohen case;*[19] but the court felt that *Cohen* should be limited to diversity cases. Most of the courts and authors which have considered the result reached in *Fielding v. Allen* have accepted it without question.[20]

Chief Judge Biggs in the instant case, after a preliminary examination of security for expenses statutes,[21] concluded that such a statute unquestionably poses a serious obstacle to those shareholders who desire to maintain derivative suits.[22] The statute of Pennsylvania was summarily disposed of on the basis that the *Erie* doctrine and the *Cohen* case were not in point as

18. "The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation or restraint by State legislation, and is uniform throughout the different States of the Union." Payne v. Hook, 74 U.S. (7 Wall.) 425, 430 (1868). *Accord, e.g.,* Neves v. Scott, 54 U.S. (13 How.) 267, 272 (1851); Guffey v. Smith, 237 U.S. 101 (1915); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939); 2 MOORE, FEDERAL PRACTICE 456 (2d ed. 1948); Morse, *The Substantive Equity Historically Applied by the U.S. Courts,* 54 DICK. L. REV. 10 (1949); Note, 59 HARV. L. REV. 966, 972 (1946).

19. 181 F.2d at 168. The *Cohen* case said: "The very nature of the stockholder's derivative action makes it one in the regulation of which the legislature of a state has wide powers. Whatever theory one may hold as to the nature of the corporate entity, it remains a wholly artificial creation whose internal relations between management and stockholders are dependent upon state law and may be subject to most complete and penetrating regulation, either by public authority or by some form of stockholder action. . . . We conclude that the state has plenary power over this type of litigation." 337 U.S. at 549-50.

20. See Hoover v. Allen, 180 F. Supp. 263, 267 (S.D.N.Y. 1960) (cause of action based on Securities Exchange Act of 1934); Breswick & Co. v. Briggs, 136 F. Supp. 301, 302 (S.D.N.Y. 1955) (Investment Co. Act of 1940; defendant attacked soundness of *Fielding*); Fischman v. Raytheon Mfg. Co., 188 F.2d 783, 789 (2d Cir. 1951) (by implication) (Rule 10b-5); Dabney v. Alleghany Corp., 164 F. Supp. 28 (S.D.N.Y. 1958) (by implication) (§ 10b of Act of 1934); HENN, CORPORATIONS 592 (1961); 3 Loss, SECURITIES REGULATION 1839 n.512 (2d ed. 1961); 3 MOORE, FEDERAL PRACTICE 3506 n.47 (Supp. 1960); Note, 52 COLUM. L. REV. 267, 275 (1952); *cf.* Le Boeuf v. Austrian, 240 F.2d 546, 551 (4th Cir. 1957). *But see* Hill, *supra* note 8, at 94-95 suggesting other theories on which *Fielding* should have been decided.

21. 292 F.2d at 827-29. A minority of states have passed various forms of security for expenses statutes to prevent the abuse of stockholders' derivative suits. See, *e.g.,* CAL. CORP. CODE ANN. § 834; COLO. REV. STAT. ANN. § 31-30-21 (Supp. 1960); N.J. STAT. ANN. § 14:3-15 (Supp. 1960); N.Y. GEN. CORP. LAW § 61-b; N.D. CENT. CODE ANN. § 10-19-48 (1960); PA. STAT. ANN. tit. 12, § 1322 (Supp. 1960); WIS. STAT. ANN. § 180.405(4) (1957); MD. R.P. 328 § b. As to federal law, FED. R. CIV. P. 23(c) was designed to prevent such abuse by requiring court approval before a class action may be dismissed or compromised. Security for expenses, as a method of dealing with the abuse of derivative suits, has been greatly criticized. See, *e.g.,* BALLANTINE, CORPORATIONS § 157(a) (rev. ed. 1946); LATTIN, CORPORATIONS ch. 8, § 14 (1959); Hornstein, *The Death Knell of Stockholder's Derivative Suits in New York,* 32 CALIF. L. REV. 123 (1944); House, *Stockholder's Suits and the Coudert-Mitchell Laws,* 20 N.Y.U.L.Q. REV. 377 (1945). Also articles cited in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 550 n.5 (1949). *Contra,* Note, 52 COLUM. L. REV. 267 (1952). The general opinion seems to be that, "The cleansing effect of the threat of such [derivative] suits would seem to an impartial observer to far outweigh the possible abuse through strike suits." LATTIN, *op. cit. supra* at 388.

22. 292 F.2d at 829.

to nondiversity cases and that Pennsylvania's only significant contact with this litigation was as the forum state. Although the court noted that New Jersey, the state of incorporation and principal office of Borne, had a clear interest in the relationships of these stockholders and their corporation, it held the New Jersey statute also inapplicable relying on the reasoning of *Fielding v. Allen*[23] as to a uniform federal equity jurisprudence. In addition, the court insisted that state law is applicable only where that law will not cut across the federal interests receiving expression in the federal right sought to be enforced.[24] Thus the court concluded that where a unique and controversial state doctrine such as a security for expenses statute alters relationships that are the principal concern of a federal statute (the Securities Exchange Act), that doctrine will not be applied to limit rights arising under the federal statute.[25]

There can be no question but that the result reached in the *Fielding* and *Borne* cases is the correct one. Discerning the proper basis for holding the state statute inapplicable when the suit has been brought on the traditional equity side of the federal court is a more difficult problem. The analysis of the *Fielding* case was that when the form of relief exists within the federal court's historic equity jurisdiction (that which the High Court of Chancery in England possessed), the peculiar requirements of local law are not applicable.[26] There is certainly wide authority for this proposition.[27] But a strict adherence to this rule would seem to eliminate any possibility for state law filling the interstices of federal legislation, for once this rule is invoked, there is no need to analyze the relationship between the state statute and federal law. Although *Borne* adopted *Fielding v. Allen* and the

23. Note 15 *supra*. But note that in *Fielding* the state of incorporation did not require security. To the effect that the forum state has an equally valid interest in derivative suits see Note, 52 COLUM. L. REV. 267, 274-75, n.40 (1952).

24. 292 F.2d at 834. The court observed that there could have been no intent by Congress to absorb the state statutes into the act since the Seeurities Exchange Act of 1934 was passed more than a decade before the first state security for expenses statute. It was also noted that there is a comprehensive body of federal law with respect to the bringing of derivative suits.

25. *Id.* at 835. As to the defendants' contentions that "general federal equity law" requires the posting of security for expenses, the court indicated that it had found no case in which a federal court had required security for expenses, as opposed to costs, without express statutory authority. *Ibid.* The defendant also argued that since a private remedy has been implied into section 10(b), a security for expenses limitation should be implied along with the private remedy in view of the fact that some sections of the Securities Acts which explicitly grant private rights of action have security for expenses provisions. See, *e.g.*, Sccurities Act of 1933 § 11(e), as amended, 48 Stat. 907 (1934), 15 U.S.C. § 77k(e) (1958); Securities Exchange Act of 1934 § 9(e), 48 Stat. 890, 15 U.S.C. § 78i(e) (1958); Securities Exchange Act of 1934, 48 Stat. 897, as amended, 15 U.S.C. § 78r(a) (1958). But the court felt that the acts do not manifest a sufficiently elear or uniform policy in favor of security for expenses to allow the court to imply such a limitation from scction 10(b). 292 F.2d at 836-37.

26. See note 18 *supra* and accompanying text.

27. See authorities cited note 18 *supra*.

"historic federal equity" theory, it did not stop there.[28] The court in *Borne* proceeded with an analysis of the intentions of Congress and the question of whether the security for expenses statutes cut across the federal interests involved.[29] The result, of course, was the same. However, by the latter analysis, it would be possible for state law to apply in some instances. Where a federal statute is being interpreted, the approach seemingly should be the same in equity as it is at law—that is, state law may be applied only if the solution is not afforded by the federal statute and if the state law is not contrary to the general policy established by Congress and is not surprising or capricious.[30] It would also seem that the reasons usually given for applying uniform federal equity jurisdiction exclusive of state law are no longer persuasive when the interpretation of a federal statute is involved. For instance, it was argued that equity principles should be uniform throughout the federal system.[31] But it is now settled that it is not necessary for common law to be uniformly applied in the federal courts in actions at law; the law of the particular state may be used when it satisfies the necessary requirements and the federal statute does not require uniformity.[32] There would seem to be little basis for distinguishing between the two, especially when remedial rights are not involved. One reason for the outgrowth of the exclusiveness of federal equity can be found in the early history of federal courts. At that time many states had no separate courts of equity and often only rudimentary equitable doctrines.[33] This situation, of course, no longer exists. Perhaps the most convincing explanation of the birth of the doctrine lies in the Rules of Decision Act which up until 1948 stated:

> The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.[34]

In 1948, however, the act was amended, and "civil actions" was substituted

28. 292 F.2d at 833. "There is much to be said for the argument that a federal right, uniform in its nature throughout the nation, should be uniformly enforceable pursuant to federal standards." *Ibid.* However this finding of the need for uniformity was based on Congress' intention that the Securities Exchange Act be uniformly enforced. Query whether the court would have still insisted on uniformity if the federal statute involved had exhibited an absence of such a desire for uniformity on the part of Congress. Compare RFC v. Beaver County, 328 U.S. 204 (1946).

29. 292 F.2d at 833-35.

30. See notes 13-14 *supra* and accompanying text.

31. *Cf.* Note, 52 COLUM. L. REV. 267, 275 (1952).

32. See Note, 69 YALE L.J. 1428, 1447-48 (1960), which states: "[T]he actual administrative burden caused by the application of diverse state laws should be assessed in each case." *Id.* at 1448. See Hill, *supra* note 8, at 117; Note, 9 GEO. WASH. L. REV. 465, 473 (1941). See also note 28 *supra.*

33. See HART & WECHSLER, *op. cit. supra* note 8, at 650-51.

34. Rev. Stat. § 721 (1875).

for "trials at common law."[35] Thus there is no longer an expression of congressional intent to differentiate between actions at law and in equity.[36] It should be noted, however, that there were exceptions to the exclusiveness of historic federal equity jurisdiction,[37] this being especially true in questions involving the application of state "substantive" law.[38] These exceptions existed despite the strong language to the contrary in those cases which *Fielding* followed.[39] But even if these exceptions covered all cases in which the statutory construction test would apply state law, the latter test remains preferable, for it is important that the state law be found unsuitable for specific reasons in order to avoid misapplication of that precedent in later cases.[40] Although the statutory construction process was seemingly used in the *Borne* case as an alternative decision,[41] it could well mean a tendency to break away from the concept of exclusive federal equity jurisdiction.

35. Act of June 25, 1948, 28 U.S.C. § 1652 (1958).

36. See Fulton v. Loew's Inc., 114 F. Supp. 676, 683 (D. Kan. 1953) (dictum); 2 CROSSKEY, POLITICS AND THE CONSTITUTION 897-902 (1953); Hill, *supra* note 8, at 94-95, 111-14. "Yet it would appear that the general directive in the Rules of Decision Act, as historically construed, to apply state procedural law in appropriate instances in actions at law, is now also a directive to do so in proceedings in equity." *Id.* at 113. "Wholesale rejection of state law, when the federal act does not so require, seems inconsistent with the policy expressed in the Rules of Decision Act." Note, 69 YALE L.J. 1428, 1447 (1960).

37. See, *e.g.*, Levi v. Murrell, 63 F.2d 670 (9th Cir. 1933) (state statute of frauds applied); Hill, *supra* note 8, at 111-12. *Compare* Russell v. Todd, 309 U.S. 280 (1940), *with* Holmberg v. Armbrecht, 327 U.S. 392 (1946). See also Guaranty Trust Co. v. York, 326 U.S. 99, 103-04 (1945).

38. See Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1027-35 (1953). "Yet analysis of the pre-*Erie* cases shows that almost invariably the uniformity of decision in federal equity was understood to be a uniformity only in matters of practice and remedy." *Id.* at 1027-28. Professor Hill would classify the applicability of security for expenses statutes as a matter of practice. *Cf.* Hill, *supra* note 8, at 94.

39. See authorities cited note 18 *supra*.

40. "The need to articulate all the considerations which influence the choice of decisional rules becomes manifest when the process of decision is recognized for what it is: the judiciary is making the law, not finding it." Note, 69 YALE L.J. 1428, 1452 (1960).

41. It might even be argued that the statutory construction was the primary basis of the opinion. The court initially stated the issue to be resolved as, "Should this limitation be adhered to by a federal court when the corporate right that the plaintiff seeks to enforce derivatively arises under federal law?" 292 F.2d at 831. In response, the court stated: "The answer to this question lies in both an examination of the state security for expenses requirement and the federal right under Rule 10b-5." *Ibid.* Such an examination would not be necessary under the uniform federal equity doctrine.

Federal Rules of Civil Procedure—Intervention—A Member of An Association Is Denied Intervention As of Right in A Government Antitrust Suit Against the Association

The American Society of Composers, Authors and Publishers (hereinafter called ASCAP) is an unincorporated association made up of several thousand writers and publishers of musical compositions which grants licenses for the public performance of the compositions, collects and distributes the resulting revenue among its members. The Government brought an antitrust action against ASCAP in 1941 in which the Government alleged *inter alia* that there was a restraint of competition among ASCAP's members *inter sese* in that there was a domination of ASCAP's activities by its large publisher members. A consent decree was entered against ASCAP which decree was modified twice. Appellants, three small music publishing companies and members of ASCAP, contended that the latest modification did not go far enough in protecting their interests as against those of the large publishers. Appellants sought to intervene as of right under rule 24(a)(2) of the Federal Rules of Civil Procedure.[1] The United States District Court for the Southern District of New York denied appellants' motion to intervene. On appeal to the United States Supreme Court,[2] *held,* denial of intervention affirmed and appeal dismissed. In a government antitrust suit against dominant members of an association to prevent discrimination against the other members, the latter may not intervene as of right. *Sam Fox Publishing Co. v. United States,* 366 U.S. 683 (1961).

Rule 24(a)(2) provides that a party may intervene as of right in an action upon timely application[3] "when the representation of the applicant's interests by existing parties is or may be inadequate and the applicant is

1. "(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action . . . ."

2. The appellants appealed directly to the United States Supreme Court from a district court decision under the provisions of the Expediting Act, 62 Stat. 989 (1948), 15 U.S.C. § 29 (1958), which provides: "In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

3. The question of timeliness of the motion must be decided on the particnlar facts of each case. See, *e.g.,* Kozak v. Wells, 278 F.2d 104 (8th Cir. 1960) (where principal defendants had not drawn up issues, motion filed one year after complaint was filed was timely); Simms v. Andrews, 118 F.2d 803 (10th Cir. 1941) (decision as to motion's timeliness is in the discretion of the court); United States v. Wilhelm Reich Foundation, 17 F.R.D. 96 (D. Me. 1954), *aff'd,* 221 F.2d 957 (1st Cir.), *cert. denied,* 350 U.S. 842 (1955) (motion made two months after default judgment held untimely).

or may be bound by a judgment in the action . . . ."[4] Adequacy of representation is largely a factual question.[5] The more difficult question in determining whether there should be intervention of right is the interpretation of the word "bound." Some courts have held that a party will be considered "bound" if a judgment in the existing action would greatly prejudice his rights.[6] Others have held that for a party to be bound the judgment must be res judicata as to him.[7] This latter construction raises a problem with regard to intervention under rule 24(a)(2) in a representative action[8] since a person cannot be bound by a judgment unless his interests are adequately represented.[9]

The Court in the instant case first disposed of the question of appellants' right to intervene if their interests are considered aligned with the Government. The question of the adequacy of representation of appellants' interests was not decided by the Court because the appellants would not be bound by a judgment in the action. Since the Government is not bound by a judgment in an antitrust action to which it is a stranger, so also a private party is not bound by a judgment in a Government suit to which he, the private party, was a stranger. The Court admitted that a decree

4. FED. R. CIV. P. 24(a)(2).

5. Certain factors suggest to the court that representation of the applicant is or may be inadequate. For example, fraud or collusion, mishandling of the case, adverse interests of the representative and the applicant and unfriendly relations between the representative and the applicant. See, *e.g.*, Kozak v. Wells, *supra* note 3; Ford Motor Co. v. Bisanz Bros., 249 F.2d 22 (8th Cir. 1957); Farmland Irrigation Co. v. Dopplmaier, 220 F.2d 247 (9th Cir. 1955); Cuthill v. Ortman-Miller Mach. Co., 216 F.2d 336 (7th Cir. 1954); Pellegrino v. Nesbit, 203 F.2d 463 (9th Cir. 1953); Pyle-National Co. v. Amos, 172 F.2d 425 (7th Cir. 1949); Wolpe v. Poretsky, 144 F.2d 505 (D.C. Cir.), *cert. denied*, 323 U.S. 777 (1944); Union Nat'l Bank v. Superior Steel Corp., 9 F.R.D. 124 (W.D. Pa. 1949); Christon v. United States, 8 F.R.D. 327 (E.D. Pa. 1947); Jewell Ridge Coal Corp. v. Local 6167, UMW, 3 F.R.D. 251 (W.D. Va. 1943); United States v. C. M. Lane Lifeboat Co., 25 F. Supp. 410 (E.D.N.Y. 1938). See generally Note, *Intervention of Private Parties Under Federal Rule 24*, 52 COLUM. L. REV. 922 (1952).

6. See, *e.g.*, Kozak v. Wells, *supra* note 3; Ford Motor Co. v. Bisanz Bros., *supra* note 5; Textile Workers v. Allendale Co., 226 F.2d 765 (D.C. Cir. 1955); Clark v. Sandusky, 205 F.2d 915 (7th Cir. 1953).

7. Sutphen Estates, Inc. v. United States, 342 U.S. 19 (1951); Formulabs, Inc. v. Hartley Pen Co., 275 F.2d 52 (9th Cir. 1960); Cameron v. President and Fellows, 157 F.2d 993 (1st Cir. 1946); Kelley v. Pascal Systems, Inc., 183 F. Supp. 775 (E.D. Ky. 1960); Ar-Tik Systems, Inc. v. Dairy Queen, Inc., 22 F.R.D. 122 (E.D. Pa. 1958); United States v. Wilhelm Reich Foundation, *supra* note 3; United States v. General Elec. Co., 95 F. Supp. 165 (D.N.J. 1950); Innis, Speiden & Co. v. Food Mach. Corp., 2 F.R.D. 261 (D. Del. 1942); Owen v. Paramount Prods., Inc., 41 F. Supp. 557 (S.D. Cal. 1941); United States v. C. M. Lane Lifeboat Co., *supra* note 5. For a general discussion of the interpretations given the word "bound" as used in this rule, see Note, *Intervention and the Meaning of "Bound" Under Federal Rule 24(a)(2)*, 63 YALE L.J. 408 (1954).

8. For a discussion of this problem, see *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 897 (1958).

9. Hansberry v. Lee, 311 U.S. 32 (1940). See generally *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 858 (1952).

entered in this action would probably preclude or limit further relief for appellants but held that this is not the same as "bound" under rule 24(a)(2) since there must be a legal preclusion to satisfy this requirement of the rule.[10] The second problem the Court considered was whether the appellants were entitled to intervene if they were aligned with ASCAP. In determining this question, the Court equated the meaning of adequacy of representation under rule 24(a)(2) with adequacy of representation for the purposes of res judicata. In so doing, the Court stated that appellants could not be inadequately represented in a class action and at the same time be bound by a judgment rendered in such action.[11] Thus, the effect of the decision in the instant case seems to preclude intervention in a class action by a member of the class under rule 24(a)(2).

It could be argued that since this effect would result from a strict interpretation of "bound," the interpretation should be broadened so that parties that are not legally precluded, could seek intervention under this rule.[12] However, if intervention under rule 24(a)(2) was allowed in actions such as the one in the instant case, such intervention would interfere with the Government's prosecution of antitrust suits. For this reason a party seeking intervention in this type of action should do so under the provisions of rule 24(b)(2)[13] which makes the grant of intervention discretionary. In the present case, appellants failed to appeal from a denial of a motion to intervene under rule 24(b)(2)[14] and therefore the Court was not called upon to decide whether the decision below was an abuse of discretion. It seems that the best way to deal with the problem of intervention in an action such as the one in the instant case is to allow it only under rule 24(b)(2) where the court can exercise its discretion as to the propriety of such intervention.

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10. See note 7 *supra.*

11. "[A]ppellants . . . face this dilemma: the judgment in a class action will bind only those members of the class whose interests have been adequately represented by existing parties to the litigation . . . yet intervention as of right presupposes that an intervenor's interests are or may *not* be so represented." 366 U.S. at 691.

12. See note 6 *supra.*

13. "(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

14. It is not settled whether denial of intervention under rule 24(b) can be reversed for abuse of discretion. *Compare* Ford Motor Co. v. Bisanz Bros., *supra* note 5, *with* Brotherhood of R.R. Trainmen v. Baltimore & O.R.R., 331 U.S. 519 (1947), *and* Schockett v. Bromley, 198 F.2d 257 (10th Cir. 1952), *and* International Workers Order v. McGrath, 182 F.2d 368 (D.C. Cir. 1950).

Foreign Corporations—Promotional Activities May Subject Foreign Corporation to State Qualification Statute

Eli Lilly & Co., an Indiana corporation, sought to enjoin defendant, a New Jersey corporation, from selling plaintiff's products below fair trade prices.[1] Lilly had not qualified to do business under the New Jersey foreign corporation statute and had limited its activities in the state. The New Jersey Supreme Court affirmed dismissal of the action[2] holding that plaintiff's New Jersey operations subjected it to qualification as a prerequisite to suing in the state courts.[3] Plaintiff appealed claiming that this requirement violated the commerce clause of the Constitution. In the Supreme Court of the United States, *held*, affirmed.[4] The promotional activities of a foreign corporation, even though unaccompanied by solicitation of orders, may subject it to state qualification statutes if its intrastate activities are separable from its interstate activities. *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276 (1961).

A perennial problem is presented to courts in our American federal system by corporations whose activities are carried on outside the states of their incorporation. Clearly, the need for a national economy demands that these businesses remain unhampered by restrictive state laws and regulations; this is the basis for the commerce clause of the federal constitution. Just as clearly, however, a state must be able to control to some extent the activities of these foreign corporations within its borders. The conflicts between these two basic policies face the courts most frequently when they must determine the power of a state to tax multi-state business, to subject it to judicial jurisdiction, or to license it. So interrelated are these areas that they may be thought of as a spectrum, with progressively greater activity necessary to subject the corporation to local suits, to taxation and to qualification. The test most commonly applied by the courts in making this determination is the "doing business" test. Since the commerce clause prohibits unduly restrictive state regulation of interstate commerce, the usual qualification case has been resolved by labeling a corporation's activities either "interstate" and therefore immune from qualification require-

1. N.J. REV. STAT. § 56:4-2. (1940).

2. Eli Lilly & Co. v. Sav-On-Drugs, Inc., 31 N.J. 591, 158 A.2d 528 (1960).

3. "Every foreign corporation, except banking, insurance, ferry and railroad corporations, before transacting any business in this state, shall file in the office of the secretary of state a copy of its charter or certificate of incorporation . . . ." N.J. REV. STAT. § 14:15-3 (1940). "Until such corporation so transacting business in this state shall have obtained such certificate of the secretary of state, it shall not maintain any action in this state upon any contract made by it in this state." N.J. REV. STAT. § 14:15-4 (1940).

4. The Court divided 4-1-4.

ments, or "intrastate" and therefore subject to qualification requirements. There appears to be no sure guide for locating the line beyond which the corporation must not proceed without qualifying.[5] It has been said that an isolated act by a corporation is not "doing business" unless that act is part of the ordinary business of the corporation.[6] Nor will maintaining an office,[7] prosecuting or defending a suit,[8] soliciting orders through traveling salesmen[9] or through the mail[10] alone be enough to require the corporation to qualify. When, however, these acts, or others, are combined, it becomes increasingly likely that the courts will determine that the corporation's local business is sufficient to require it to qualify.

The Court's opinion, by Mr. Justice Black, reviewed briefly the long list of authorities for the principle that a corporation doing only interstate business in a foreign state cannot be required to register under qualification statutes.[11] After restating this principle,[12] the Court turned to the question of whether Lilly's dealings in New Jersey could be characterized as interstate or intrastate. The proof showed that Lilly: (1) maintained an office in New Jersey; (2) placed its name on the door and on the lobby directory; (3) listed the office in both the regular and classified sections of the telephone directory; (4) paid on a salary basis the secretary and eighteen detailmen who used the office; (5) used these detailmen to visit retail pharmacists, physicians and hospitals to promote its products; (6) permitted the detailmen to receive occasional orders for transmittal to New Jersey wholesalers; and (7) directed them to furnish to retailers advertising and promotional material and to advise the retailers on merchandising its products.[13] This set of facts, said the Court, argued so strongly that the business done was intrastate that to hold otherwise would be "to completely ignore reality."[14] Relying upon *Cheney Bros. v. Massachusetts*,[15] the Court said that the distinction between a systematic solicitation of orders in that case and the promotional work done here "goes only to the nature of the intrastate business Lilly is carrying on, not to the question of whether it is carrying on an intrastate business."[16] The Court distinguished *International Textbook Co. v. Pigg*[17] and similar cases upon which Lilly relied by saying that

5. Isaacs, *An Analysis of Doing Business*, 25 COLUM. L. REV. 1018 (1925).
6. Worcester Felt Pad Corp. v. Tucson Airport Authority, 233 F.2d 44 (9th Cir. 1956).
7. Alfred M. Best Co. v. Goldstein, 124 Conn. 597, 1 A.2d 140 (1938).
8. Compagnie du Port de Rio de Janeiro v. Mead Morrison Mfg. Co., 19 F.2d 163 (S.D. Maine 1927).
9. Robbins v. Taxing District, 120 U.S. 489 (1887).
10. Standard Fashion Co. v. Cummings, 187 Mich. 196, 153 N.W. 814 (1915).
11. 366 U.S. at 277-78.
12. *Id.* at 278.
13. *Id.* at 279-80.
14. *Ibid.*
15. 246 U.S. 147 (1918).
16. 366 U.S. at 282.
17. 217 U.S. 91 (1910).

Lilly sued upon a contract entirely separable from any particular interstate sale and that "the power of the state is consequently not limited by cases involving such contracts."[18] In his concurring opinion, Mr. Justice Harlan stated that Lilly's New Jersey operations are "local" because they result in increased purchases from wholesalers in the state, and not from out-of-state sources. He argued that promoting Lilly's products among those who can buy only from New Jersey wholesalers does not bear "the same close relationship to the necessities of keeping the channels of interstate commerce state-unburdened" as does the "drummer" situations; that a licensing requirement "does not deny Lilly a significant chance to reach New Jersey customers"; that Lilly's operations "concerned merely the doing of a local act after interstate commerce had completely terminated," and that "the only aspect of the present case that resembles the 'drummer' cases is the fact that Lilly's promotion of local sales ultimately serves to increase its interstate sales."[19]

Two years before the Court decided the *Lilly* case, it decided that closely similar activities were an inseparable part of interstate commerce.[20] As a result of the *Lilly* decision, many corporations apparently are faced with the prospect of re-evaluating their operations in foreign states to determine whether they must now qualify in those states to escape penalties of being an unlicensed foreigu corporation. This decision, as Mr. Justice Douglas pointed out in his lucid dissent, "blends . . . three distinct lines of decisions which until today have been considered separate. . . . I refer to our decisions concerning the power of a State (1) to tax an interstate enterprise, (2) to subject it to local suits, and (3) to license it."[21] Although the Court's decision was perhaps not entirely unforeseen,[22] it appears definitely to blur the lines between the three areas of "doing business." If Mr. Justice Douglas's interpretation is correct and the three lines of decisions are truly blended, it would seem that a state which could levy an allowable tax upon a foreigu corporation could also require it to qualify. The logical result of applying the tests used in one area to cases in the other two apparently would be that the "minimum contacts" doctrine applicable to questions of judicial jurisdiction could be applied to questions of qualification.[23] This

18. 366 U.S. at 283.

19. 366 U.S. at 288 (concurring opinion).

20. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).

21. 366 U.S. at 288, 289.

22. "[M]any decisions do not distinguish the concept 'doing business' . . . and sometimes indiscriminately cite cases involving, for example, 'doing business' for service of process purposes, in connection with questions involving 'doing business' for qualification purposes. It would appear that in view of the trend of the recent United States Supreme Court decisions away from the use of any symbolic concept, such as 'presence' *or* 'doing business', these instances will occur less often and more direct analysis will be required with respect to the particular problem involved." Keane & Collins, *Changing Concepts of What Constitutes "Doing Business" by Foreign Corporations,* 42 MARQ. L. REV. 151, 162 (1958).

23. International Shoe Co. v. Washington, 326 U.S. 310 (1945). Although the

of course would require virtually every corporation doing multi-state business to qualify in every state in which it carried on activities similar to Lilly's promotional work in New Jersey. Interestingly, the Court's decision to allow a state tax to stand after deciding that the taxpayer's activities were interstate[24] provoked such a storm of reaction that Congress attempted by statute[25] to negate the effect of the decision, and ordered a thorough study of the entire area of state taxation of income from interstate commerce.[26] Apparently there has been no similar reaction to the *Lilly* decision, which could indicate that the corporations most likely to be affected by it do not consider the problem to be of special significance. It would seem that the mechanical "doing business" test which the Court continues to apply in such cases is destined to compound rather than clarify the confusion which now exists. Already the Court has abandoned it in the area of judicial jurisdiction, adopting instead the "minimum contacts" test.[27] Such a test, which recognizes the conflict between the basic policies to be reconciled, offers a sound basis for reconciling them: Are the corporation's activities in the state such in quality or in quantity to demand the application of the policy in favor of state control rather than the policy of protecting an unhampered national economy?

Labor Law—Labor Unions—A Minority Union May Be Disestablished for Attempting To Exercise the Rights of An Exclusive Bargaining Agent

Petitioner labor union, at a time when there was no existing bargaining agent or other competing union, initiated an organizational campaign at a Bernhard-Altmann plant.[1] As a result of negotiations with the employer,

Court did not have before it any question involving the commerce clause, but was dealing with due process only, these words of Mr. Justice Black in McGee v. International Life Ins. Co., 355 U.S. 220 (1957), seem to be pertinent to this discussion: "[A] trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full content." *But cf.* Hanson v. Denckla, 357 U.S. 235 (1958).

24. Northwestern States Portland Cement Co. v. Minnesota, *supra* note 20.

25. State Taxation of Income From Interstate Commerce, 15 U.S.C. § 381 (Supp. II 1959). For a detailed discussion of the state taxation problem, see Hartman, *State Taxation of Corporate Income,* 13 VAND. L. REV. 21, 23-48 (1959).

26. *Id.* § 382.

27. International Shoe Co. v. Washington, *supra* note 23.

1. During the organizational campaign certain of the company's employees struck to protest a wage reduction. The campaign continued and the strike in no way affected the Board or the Court's decision even though some of the striking employees signed petitioner union's authorization cards.

a "memorandum of understanding" was signed designating petitioner the exclusive bargaining representative of all employees in an agreed upon unit and providing for wages and working conditions.[2] Both the union and the employer believed that a majority of the employees supported the union, but neither made any effort to substantiate this belief. In fact, consent by a majority of the employees had not been obtained.[3] After first approving the trial examiner's finding of no unfair labor practice, the NLRB, upon exceptions filed by the General Counsel, reversed its decision and held the employer guilty of violating sections 8(a)(1) and 8(a)(2) of the National Labor Relations Act,[4] by executing a contract with the union at a time it did not enjoy majority status and the union guilty of violating section 8(b)(1)(A) by restraining and coercing the employees in exercising their rights guaranteed by section 7 of the act. In addition the Board ordered the disestablishment of the union for all purposes until an election could be held and refused to allow it to continue as the representative of the minority members whom it did represent. The court of appeals affirmed. On certiorari to the Supreme Court of the United States, *held,* affirmed. Disestablishment for all purposes is a proper remedy when a minority union has attempted to achieve the status of exclusive bargaining agent even where the attempt resulted from good faith error. *International Ladies Garment Workers v. NLRB,* 366 U.S. 731 (1961).

The National Labor Relations Act envisages a system of collective

2. The memorandum of understanding in addition to making petitioner the exclusive bargaining agent of all production and shipping employees, called for an end to the strike, certain improved wages and conditions of employment, and signing of a formal contract within two weeks. The most important provision from the petitioner's point of view was a separability clause providing that should any provision of the agreement be held invalid, the remainder of the agreement was not to be affected.

3. It was not disputed as of the signing of the formal agreement that petitioner in fact represented a majority of employees in the designated unit. The Court, however, considered this irrelevant as the unfair labor practice was a *"fait accompli"* as of the signing of the memorandum of understanding.

4. Sections 8(a)(1) and (2) in their pertinent parts provide: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7; (2) to dominate or interfere with the formation of administration of any labor organization or contribute financial or other support to it . . . ." 61 Stat. 140 (1947), 29 U.S.C. §§ 158 (a)(1), (2) (1958).

Section 8(b)(1)(A) in its pertinent parts provides: "It shall be an unfair labor practice for a labor union or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7 . . . ." 61 Stat. 141 (1947), 29 U.S.C. § 158 (b)(1)(A) (1958).

Section 7 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(A)(3)." 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958).

bargaining based upon unions which have the support of a majority of the employees and which, therefore, may justly be given the status of exclusive agent. The position of a minority union is not expressly covered by the act in any detail, and uncertainty exists as to what these minority unions may and may not do. Generally, it is an unfair labor practice for a minority union to seek to be the exclusive bargaining agent;[5] to seek a union security agreement;[6] or to place an employer on a "We do not patronize" list.[7] It has been held, however, that absent an exclusive bargaining agent a minority union has the right to bargain and present grievances for its members only.[8] Such a situation exists where there is only a single minority union or where several unions are competing for recognition as the exclusive agent.[9] Even though a rival union has a majority card showing, a minority union may seek Board determination of conflicting representation claims.[10] Following an election in which no union has been certified[11] or in which an existing bargaining agent has been decertified,[12] a minority union may picket peacefully for organizational purposes.[13] After losing an election, however, a minority union may not exert the economic pressure of informational picketing to force an employer to bargain with it.[14] If an uncertified majority union has become a minority union because of the replacement of employees in the unit during a period of economic stress, it can not force

5. United Transp. Inc., 123 N.L.R.B. 668 (1959).

6. Max Factor & Co., 118 N.L.R.B. 808 (1957); Byran Mfg. Co., 119 N.L.R.B. 502 (1957); Morse Bros., 118 N.L.R.B. 1312 (1957); Lively Photos Inc., 123 N.L.R.B. 1054 (1959); Sierra Furniture Co., 123 N.L.R.B. 1198 (1959).

7. Layne Bryant, Inc., 121 N.L.R.B. 688 (1958); Jackson Tile Mfg. Co., 122 N.L.R.B. 764 (1958).

8. Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938). It is questionable if a right exists. Although the court used the expression "right," most probably it meant "privilege" as there is no statutory right.

9. Case No. K-493, Administrative Decisions of the NLRB General Counsel (1956), C.C.H. Lab. L. Rep. ¶ 3147.425.

10. William Penn Broadcasting Co., 93 N.L.R.B. 1104 (1951); The Wheland Co., 120 N.L.R.B. 814 (1958).

11. Case No. 1069, Administrative Decisions of the NLRB General Counsel (1954), C.C.H. Lab. L. Rep. ¶ 5150.85.

12. Linoleum & Plastic Workers v. NLRB, 269 F.2d 694 (4th Cir. 1959), *rev'd per curiam*, 362 U.S. 329 (1960). For a good discussion of a closely related subject, the one year certification rule and interplay of the "contract bar" rule, see Neary, *The Union's Loss of Majority Status and the Employer's Obligation To Bargain*, 36 TEXAS L. REV. 878 (1958).

13. NLRB v. Local 639, Drivers Union, 247 F.2d 71 (D.C. Cir. 1957), *aff'd*, 362 U.S. 274 (1960). To understand the Board's position on peaceful picketing see the annual reports of the NLRB for the years 1958 through 1960; Comment, 34 WASH. L. REV. 421 (1959). For an excellent discussion of section 8(b)(7) problems with an emphasis on status and recognitional picketing, see Merrifield, *Picketing Practices Under Section 8(b)(7), L.M.R.A.*, in LABOR MANAGEMENT RELATIONS AND LABOR LAW, INSTITUTE OF MANAGEMENT OF THE SCHOOL OF BUSINESS OF NORFOLK COLLEGE OF WILLIAM AND MARY 234 (1961). Both the problem solved and those raised by the recent decision are explored by this noted authority in the field.

14. Percello v. Retail Store Employees, 188 F. Supp. 192 (D. Md. 1960).

an employer to bargain with it as the exclusive agent,[15] but if the loss of majority status was the result of an employer unfair labor practice, the Board may nevertheless require the employer to treat the minority union as the exclusive bargaining agent.[16] Even where the majority of employees has chosen an exclusive bargaining agent, a minority union may peacefully picket for recognition as a minority representative.[17] Furthermore, under section 9(a) individual members and minority unions have the right to present grievances and have them adjusted, a right which has been interpreted to include all disputes which could be covered by a collective bargaining agreement so long as the exclusive bargaining agent is allowed to be present at the meeting and the result reached is not inconsistent with the terms of the collective bargaining contract.[18] Nor are minority unions precluded from entering into contracts of employment embodying matters not within the statutory scope of collective bargaining, provided the contract is not inconsistent with an existing bargaining agreement, does not itself constitute an unfair labor practice, or does not require less of an employer, nor more of the workers than does the agreement made by the majority union.[19]

The instant case presented no question of competing unions or of striking or picketing by a minority union. The vice of the agreement here was the mistaken requesting and granting of recognition as the exclusive bargaining agent when the union did not in fact have a majority support. The Supreme Court, as well as the majority of the Board and the court of appeals, could conceive of "no clearer abridgment of § 7 of the Act . . ." by both the employer and the union. In the Court's opinion, the good faith belief of both parties of the union's majority status was no defense to the unfair labor practice charges since nothing in the act required *scienter* as an element of the offense. To allow the defense would permit the negligence of unions and employers to frustrate free employee choice of a bargaining agent. Without discussion, the majority approved the Board's order denying the validity of the contract even as to the minority of the employees whom the union actually did represent. It was to this later, remedial point that Justices Black and Douglas directed their dissent. While tacitly acknowledging that the mistaken granting of recognition as exclusive agent might be an unfair labor practice for both employer and union which would justify disestablishment of the union as the representative of all employees, they could find no compelling reason for denying to the minority of the employees the advantages they had won in the contract or that they would receive by continued union representa-

15. GENERAL COUNSEL DECISION ¶ 10499 (1916).
16. NLRB v. Burke Mach. Tool Co., 133 F.2d 618 (6th Cir. 1943).
17. See note 14 *supra*.
18. Douds v. Local 1250, Retail Union, 173 F.2d 764 (2d Cir. 1949).
19. J. I. Case Co. v. NLRB, 134 F.2d 70 (7th Cir. 1943), *aff'd*, 321 U.S. 332 (1944).

tion of their minority interests. To them, the right of minority representation and bargaining had been recognized at the common law and they "found nothing in the history of the successive measures, starting with the Wagner Act, that . . . [would] deny a minority union the right to bargain for its members when a majority have not in fact chosen a bargaining representative." To do so here, thought the dissenting Justices, "smacks more of a penalty than of a remedial measure."[20]

The result in this case seems justified on the basis of leaving to the National Labor Relations Board the working out of a policy for minority unions and on the practical ground that in this fact situation, complete disestablishment of the union until an election could be held seems unlikely to work a particular hardship. As a precedent illuminating the shadowy area of minority union status, however, the case leaves much to be desired. Court development of a consistent comprehensive policy for the minority union seems both improper and impossible; responsibility lies with the Board. This case adds one more detail to the conduct denied to minority unions; a full rounded statement of what they may do is yet to be made.

Limitation of Actions–In A Malpractice Action the Statute of Limitations Does Not Begin To Run Until the Patient Knows or Has Reason To Know of His Injury

On April 26, 1955, the plaintiff was operated on by the defendant doctor and remained under his care until November 1955. After the operation plaintiff suffered back pains and in August 1958, an X-ray was taken. It disclosed that a wing nut from a retractor used in the operation had been left in her abdomen. On August 13, 1959, plaintiff filed a complaint in the superior court alleging malpractice. Defendant's motion for summary judgment was granted on the grounds that the two year statute of limitations for tort actions had run and barred the action.[1] On appeal to the Supreme Court of New Jersey, *held*, reversed. In a malpractice action where the alleged negligence is the failure to remove a foreign object, the statute of limitations does not begin to run until the patient knows or has reason to know of the foreign object. *Fernandi v. Strully*, 173 A.2d 277 (N.J. 1961).

20. International Ladies' Garment Workers v. NLRB, 366 U.S. 731, 744 (1961).

1. N.J. STAT. ANN. 2A, § 14-2 (1952). "Every action at law for an injury to the person caused by the wrongful act, negleet or default of any person within this state shall be commenced within 2 years after the cause of any action shall have accrued."

Statutes of limitations are designed to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[2] Only seventeen states have statutes of limitations specifically dealing with malpractice.[3] In most of the states, malpractice actions based on negligence are governed by general tort statutes of limitations[4] most of which require that the injured party bring his action within two years from the time it accrues. The question of when the cause of action "accrues" has appeared frequently[5] since the passage of the Limitations Act of 1623.[6] In malpractice actions where the doctor has left a foreign object in the patient, the majority of jurisdictions hold that the patient's cause of action arises when the incision is closed.[7] The *ratio decidendi* of these cases is that the negligent act and not the actual damage gives rise to the cause of action. The negligent act is said to cause a legal injury and all subsequent injuries are taken into consideration in the determination of damages.[8] To decide otherwise "would permit a patient, affected with some malady, to trace that malady to an original cause alleged to have occurred years and years ago."[9] A minority of jurisdictions have rejected this rule and have held that the cause of action does not necessarily accrue when the negligent act is committed. Some courts hold, as did the instant case, that the cause of action arises when the injured patient knows or

2. Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944).

3. Alabama, Arkansas, Colorado, Connecticut, Indiana, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New York, North Dakota, Ohio, and South Dakota.

4. It should be noted that statutes of limitations other than those for malpractice and tort actions may be applicable to an injury arising out of the patient-doctor relationship. If the operation is performed without the patient's consent, the statute of limitations for assault and battery may be applicable. Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1950). A few states (but not New Jersey) regard the injury as a breach of contract which gives rise to either a contract action or a tort action. Manning v. Serrano, 97 So. 2d 688 (Fla. 1957). See also RESTATEMENT, TORTS § 899, comment *b* (1939). If the patient has died as a result of the doctor's negligence, the statute of limitations for wrongful death will control. Naticchioni v. Felter, 54 Ohio App. 180, 6 N.E.2d 764 (1936). For additional comment on these statutes and on statutes of limitations generally, see *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950); LOUISELL & WILLIAMS, TRIAL OF MEDICAL MALPRACTICE CASES 377 (1960). This comment will be concerned only with tort and malpractice statutes of limitations since these are pleaded as a defense more frequently than the others.

5. Saunders v. Edwards, 1 Sid. 95, 82 Eng. Rep. 991 (K.B. 1662) (action for libel; issue: when did the cause of action arise).

6. Limitations Act, 1632, 21 Jac. 1, c. 16. This statute is generally considered to be the foundation of modern statutes of limitations.

7. Pickett v. Aglinsky, 110 F.2d 628 (4th Cir. 1940); Carter v. Harlan Hosp. Ass'n, 265 Ky. 452, 97 S.W.2d 9 (1936); Capucci v. Barone, 266 Mass. 578, 165 N.E. 653 (1919); Conklin v. Draper, 229 App. Div. 227, 241 N.Y.S. 529 (1930).

8. Silvertooth v. Shallenberger, 49 Ga. App. 133, 174 S.E. 365 (1934).

9. Albert v. Sherman, 167 Tenn. 133, 67 S.W.2d 140, 142 (1934).

should know of the foreign object.[10] Alabama and Connecticut have passed statutes[11] adopting this view. Other courts have not granted the patient this much protection and have said that the cause of action arises when the treatment is complete.[12] Some of these courts say that failing to remove the foreign object during subsequent treatment constitutes continuing negligence.[13] Another theory that has been employed is that the cause of action arises when the patient-doctor relationship is dissolved.[14] Both the majority and minority hold that if the patient is under a disability,[15] or the foreign object has been fraudulently concealed,[16] the statute of limitations will be tolled.

The decision by the supreme court in the instant case overruled several prior New Jersey decisions which had followed the majority rule.[17] Since the New Jersey Legislature had never specified when a cause of action arose within the meaning of the New Jersey statute of limitations,[18] the court recognized that its function was to delineate the statute "with due regard to the underlying statutory policy of repose, without, however, permitting unnecessary individual injustices."[19] The court decided that in foreign object malpractice actions the need for repose was outweighed by the need of allowing individual justice.

The court in the instant case has squarely faced and intelligently sought to decide the real issue presented by foreign object malpractice cases, that is, which of the two competing interests, the patient's right to justice or the doctor's right to protection against stale claims should be preferred. Since the issue is one of policy considerations, it can reasonably be pre-

10. California is the leading exponent of this discovery doctrine. Costa v. Regents of Univ., 116 Cal. App. 2d 445, 254 P.2d 85 (Dist. Ct. App. 1953). See also City of Miami v. Grooks, 70 So. 2d 306 (Fla. 1954); Perrin v. Rodriguez, 153 So. 555 (La. App. 1934); Hahn v. Claybrook, 130 Md. 179, 100 Atl. 83 (Md. App. 1917); Note, *Malpractice and the Statute of Limitations*, 32 IND. L.J. 528, 533 (1957) (discovery doctrine).

11. ALA. CODE ANN. tit. 7, § 25(1) (Supp. 1955). "All actions against physicians . . . for malpractice . . . must be commenced within two years next after the act or omission or failure giving rise to the cause of action, and not afterwards. Provided that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery . . . provided further that in no event may the action be commenced more than 6 years after such act." CONN. GEN. STAT. § 52-584 (1958) is substantially similar to Alabama's.

12. Thatcher v. De Tar, 351 Mo. 603, 173 S.W.2d 760 (1943).

13. Hotelling v. Walther, 169 Ore. 559, 130 P.2d 944 (1942).

14. Schmit v. Esser, 183 Minn. 354, 236 N.W. 622 (1931).

15. As, for example, mental incompetency, infancy, or absence from the jurisdiction. LOUISELL & WILLIAMS, TRIAL OF MEDICAL MALPRACTICE CASES 377 (1960).

16. Hudson v. Shoulders, 164 Tenn. 70, 45 S.W.2d 1072 (1932).

17. Weinstein v. Blanchard, 109 N.J.L. 332, 162 Atl. 601 (Ct. Err. & App. 1932); Tortorello v. Reinfeld, 6 N.J. 58, 77 A.2d 240 (1950).

18. See note 1 *supra*.

19. 173 A.2d at 285.

dicted that the courts will reach opposite decisions in the future as they have in the past. Some middle ground between the two policies should be adopted so as to give the patient the maximum rights possible while still allowing the doctor the maximum protection against stale claims. Rather than place this "tail chasing burden of interpretation" on the courts, it is submitted that the legislature should resolve the controversy by adopting statutes of limitations similar to Alabama's or Connecticut's.[20] Such a statute would extend the patient's cause of action, if the injury was unknown to him while protecting the doctor by ending liability completely six years after the operation.[21]

Taxation—Income Tax—Embezzled Funds Held Includable in Gross Income

Taxpayer was convicted for willfully attempting to evade income taxes by failing to report embezzled funds.[1] The court of appeals affirmed the conviction.[2] On certiorari to the Supreme Court of the United States, *held*, affirmed. *Commissioner v. Wilcox*[3] is overruled; a taxpayer must include embezzled funds in his gross income in the year in which they are misappropriated.[4] *James v. United States*, 366 U.S. 213 (1961).

The Internal Revenue Code of 1913 provided that "net income of a taxable person shall include gains, profits and income . . . from . . . the transaction of any lawful business . . . ."[5] Congress, in 1916, amended the gross income section of the Code to omit the word "lawful."[6] The courts have inferred from this omission that Congress meant to reach the gains of the unlawful business as well as those of the lawful and have consistently so

20. It should be noted that the supreme court limited the discovery doctrine to foreign objeet malpraetice cases.

21. See note 11 *supra.*

1. INT. REV. CODE OF 1939, ch. 1, § 145(b), 53 Stat. 63 (now INT. REV. CODE OF 1954, § 7201). Taxpayer, a union official, embezzled iu excess of $738,000 during the years 1951 through 1954 from his employer and from an insurance company. He pleaded guilty to the offense of conspiracy to embezzle in a New Jersey state court and was then charged with willfully attempting to evade federal income taxation because of his omission of these funds from his returns for these years.

2. United States v. James, 273 F.2d 5 (7th Cir. 1959).

3. 327 U.S. 404 (1946).

4. Since, however, the statute required the element of willfulness before a conviction could be maintained and "willfulness could not be proven iu a criminal prosecution . . . so long as the statute contained the gloss placed upon it by Wilcox at the time the alleged crime was committed," a majority of the Court dismissed this case. 366 U.S. at 221-22.

5. INT. REV. CODE OF 1913, ch. 16, § II(B), 38 Stat. 167.

6. INT. REV. CODE OF 1916, ch. 463, § 2(a), 39 Stat. 757.

held.[7] Gains from wrongful misappropriations, as opposed to gains from illegal businesses, however, have not received the same consistent treatment.[8] The Supreme Court in the *Wilcox* case held that *embezzled* funds were not to be included in the taxpayer's return for the year in which misappropriated because the embezzler lacked a "claim of right" to the money and was under a "definite, unconditional obligation to repay"[9] his gains. A later case, *Rutkin v. United States*,[10] however, included as gross income in the year received money acquired by *extortion*. The Court in *Rutkin* expressly stated that it was not overruling *Wilcox* but only limiting it to its facts. The cases were distinguished on the grounds that the victim of an embezzlement at no time gives his consent for the embezzler to have control of the money while the victim of an extortion knowingly consents to the entire transaction. In addition to consent of the victim, the *Rutkin* decision employed a second criterion of taxability: "an unlawful gain, as well as a lawful one constitutes taxable income when its recipient has such control over it that as a practical matter, he derives readily realizable economic value from it."[11]

The Court in the instant case re-examined the distinction previously made between *Wilcox* and *Rutkin* and found that both the embezzler and the extortionist acquired money by means of a criminal act and that both victims were equally entitled to restitution. The distinction between the embezzler's title to the money being void and the extortionist's title being voidable was dismissed as being irrelevant; "questions of federal income taxation are not determined by such 'attenuated subtleties.'"[12] In overruling *Wilcox*, the majority reiterated that the broad congressional policy was to "tax all gains except those specifically exempted." Stating that the

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7. United States v. Sullivan, 274 U.S. 259 (1927) (bootlegging); United States v. Chapman, 168 F.2d 997 (7th Cir. 1948) (black market profits); Barker v. Magruder, 95 F.2d 122 (D.C. Cir. 1939) (usurious loans); Estate of Joseph Karger, 23 P-H TAX CT. MEM. 637 (1954) (abortions); George L. Rickard, 15 B.T.A. 316 (1929) (transporting illegal movies in interstate commerce).

8. The following cases have held illegal gains to be taxable: Kurrle v. Helvering, 126 F.2d 723 (8th Cir. 1942) (embezzled funds); Humphreys v. Commissioner, 125 F.2d 340 (7th Cir. 1942) (ransom money); National City Bank v. Helvering, 98 F.2d 93 (2d Cir. 1938) (repudiating a dicta in Rau v. United States, 260 Fed. 131 (2d Cir. 1919) to the effect that money from embezzlement, burglary and robbery were not taxable). McKnight v. Commissioner, 127 F.2d 572 (5th Cir. 1942) held embezzled funds were not part of gross income.

9. 327 U.S. at 408. The Court classified the embezzler as a debtor of his victim and, like the debtor, under a definite obligation to repay.

10. 343 U.S. 130 (1952), 6 VAND. L. REV. 131 (1952).

11. 343 U.S. at 137. For a good history of the "claim of right doctrine" and its relationship to the *Wilcox* and *Rutkin* cases, see Keesling, *Illegal Transactions and the Income Tax*, 5 U.C.L.A.L. REV. 26 (1959); Note, *Taxation of Misappropriated Property: The Decline and Incomplete Fall of Wilcox*, 62 YALE L.J. 662 (1953); Note, *Taxing Unsettled Income: The "Claim of Right" Test*, 58 YALE L.J. 955 (1949).

12. 366 U.S. at 216-17.

Rutkin decision had "effectively vitiated"[13] the *Wilcox* rationale, the Court concluded that the exception in favor of the embezzler should no longer be maintained. A new rule was announced: "When a taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition, expressed or implied, of an obligation to repay and without restriction as to their disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent."[14] The Court justified this position by taking notice of the basic inequity which has heretofore existed between the honest taxpayer and the criminal embezzler. The honest taxpayer, who has mistakenly received money in one year, must include this income in his return for that year even though his right to the money is later ruled invalid. The Court could not find that Congress intended the embezzler to receive a more favorable tax treatment than the honest taxpayer.

This case contributes clarity and uniformity in this area of tax law by setting forth a test which will include in a taxpayer's gross income any wrongful gains he has received. The Court correctly decided that the sole issue was whether this gain was realized by the taxpayer sufficiently to be included in his return for the year of receipt. The fact that the victim of the embezzlement might be competing with a federal tax lien in attempting to recoup his loss was properly held not to be a relevant consideration. Congress rather than the Court should remedy this situation if it is felt to be unjust. The chief argument of the dissenting Justices—that federal prosecution for failing to pay taxes on the profits of criminal activity constitutes an encroachment into the field of state law enforcement[15]—seems an invalid criticism on at least two grounds. Even under the *Wilcox* rule embezzled moneys were not entirely free from taxation; the tax was simply delayed until the embezzler was no longer under a duty to repay his victim.[16] Federal encroachment would still exist, although like the tax, its effect would also be delayed. Secondly, and obviously, there are in these situations two separate crimes involved, one against state law and one under the federal tax statute. A failure of the state to prosecute the crime aganist

13. *Ibid.* See also Macias v. Commissioner, 255 F.2d 23 (7th Cir. 1958); United States v. Bruswitz, 219 F.2d 59 (2d Cir. 1955); Marienfeld v. United States, 214 F.2d 632 (8th Cir. 1954); 66 HARV. L. REV. 173 (1952).

14. 366 U.S. at 219. Chief Justice Warren cited North American Oil Consol. v. Burnett, 286 U.S. 417 (1932) for the last part of this test. This case introduced the claim of right doctrine as a method of annual tax accounting. Subsequent cases have applied the test to determine *when* a sum would be included in gross income. See, *e.g.*, Healy v. Commissioner, 345 U.S. 278 (1953); United States v. Lewis, 340 U.S. 590 (1951). *Wilcox*, however, used the doctrine to determine *whether* a sum would be included in gross income. It would seem that the claim of right doctrine has been restored to its original meaning by the majority opinion in the instant case.

15. 366 U.S. at 230 (Black, J., dissenting).

16. 327 U.S. at 409-10.

its law is no valid reason for the federal government allowing tax evasion to go unpunished. Although there is a possibility that tax evasion prosecutions might be used as a vehicle for unreasonable federal encroachment into local law enforcement, it seems more likely in most cases that the states would welcome federal cooperation in putting criminals behind bars. Ignoring, however, these considerations of the federal-state relationship, the decision in the instant case has long been anticipated. The distinction between *Rutkin* and *Wilcox* was too thin to stand up, and with this decision, the Court has returned to a logical symmetry in the taxing of criminal gains.

Workmen's Compensation—Compensation Granted For Heart Attack Induced By Mental and Emotional Stress

An employee of defendant airline company had been in a "severe and protracted state of emotional upset"[1] for four months prior to his death from a heart attack. In an action to recover workmen's compensation benefits for his death, the employee's wife alleged that the emotional condition arose because his employer's president held him responsible for damage to one of its planes and for the timely repair of the aircraft.[2] The plaintiff contended that the emotional stress constituted a compensable "accident"[3] and that the heart attack was a result of this emotional stress.[4] The workmen's compensation board awarded death benefits but was reversed by the appellate division[5] on the ground that in the absence of a showing of physical strain by the decedent there was no compensable injury. On appeal to the Court of Appeals of New York, *held,* reversed (4-to-3). Workmen's compensation benefits may be awarded for physical injuries resulting from a protracted state of mental or emotional stress. *Klimas v.*

1. The court quoted the finding of the appellate division concerning decedent's emotional condition and further emphasized the appellate division's finding that this condition "reached a climax" during the three days preceding decedent's death. Klimas v. Trans Caribbean Airways, Inc., 10 N.Y.2d 209, 176 N.E.2d 714, 715, 219 N.Y.S.2d 14,15 (1961).

2. The plane had been grounded by the Civil Aeronautics Authority because of corrosion on its wings, and the company's president had made numerous statements indicating that Klimas would lose his position if the aircraft was not in operating condition by the end of February.

3. Brief for Appellant, p. 9, Klimas v. Trans Caribbean Airways, Inc., 10 N.Y.2d 209, 176 N.E.2d 714, 219 N.Y.S.2d 14 (1961).

4. *Id.* at 2.

5. 12 App. Div. 2d 551, 207 N.Y.S.2d 72 (1960).

Trans Caribbean Airways, Inc., 10 N.Y.2d 209, 176 N.E.2d 714, 219 N.Y.S.2d 14 (1961).

The great majority of workmen's compensation statutes use the word "accident" in defining a compensable injury.[6] New York follows the general formula by defining injury as "only accidental injuries arising out of and in the course of employment . . . ."[7] Interpretation of the "accident" requirement has not been uniform.[8] One particularly difficult set of decisions, known as the generalized condition cases, involve injuries which are organic changes in the body not consisting of a definite "breakage" or collapse.[9] The courts have been reluctant to grant compensation for this type of injury because it is often difficult to establish employment causation.[10] They have, therefore, evolved some rather technical definitions for the term "accident." A minority of states have required the accidental injury to be caused by "unusual" exertion or exposure,[11] or, as expressed by the

6. The following states require that the injury be "by accident": Alabama, Alaska, Arizona, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, and Wisconsin. Arkansas, Connecticut, Illinois, Maryland, Mississippi, New York, and Oklahoma use the term "accidental injury." The accident requirement has been read into the laws by the courts of Michigan, West Virginia, and Wyoming. 1 LARSON, WORKMEN'S COMPENSATION § 37.10 (1952, Supp. 1960). For a collection of all of the United States workmen's compensation statutes see 1-4 SCHNEIDER, WORKMEN'S COMPENSATION STATUTES (perm. ed. 1939, Supps. 1948 and 1949) and 1 SCHNEIDER, WORKMEN'S COMPENSATION STATUTES UPKEEP SERVICE.

7. N.Y. WORKMEN'S COMP. LAW § 2 (7).

8. Professor Larson analyzes the wide variation among the states as being due to the "two-way" meanings given to both the unexpectedness and the definiteness elements of the accident concept. The problem has arisen because of the question of whether these elements are to be applied to the cause or the resulting injury. 1 LARSON, *op. cit. supra* note 6, § 37.20.

9. 1 LARSON, *op. cit. supra* note 6, § 38.30. "Since all compensation acts required that personal injury to be compensable must be employment-connected, the courts concluded that the further statutory qualification denoted some additional limitation and excluded certain employment-connected causes of disability, especially nontraumatic and occupational diseases." Risenfield, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 531, 543 (1954).

10. "The 'heart cases' where it is usually required to show some special effort as precipitating cause of the attack, stand in a class by themselves, but they do so because their generalized nature makes it difficult factually to attribute the attack to the work." Kayser v. Erie County Highway Dep't, 276 App. Div. 789, 92 N.Y.S.2d 612, 613 (1959). 1 LARSON, *op. cit. supra* note 6, § 38.80.

11. Hartford Acc. & Indem. Co. v. Industrial Comm'n, 66 Ariz. 259, 186 P.2d 959 (1947); Belber Trunk & Bag Co. v. Menesy, 47 Del. 595, 96 A.2d 341 (1953); Eastern Shore Pub. Serv. Co. v. Young, 218 Md. 338, 146 A.2d 884 (1958); Kemling v. Armour & Co., 222 Minn. 397, 24 N.W.2d 842 (1946); State *ex rel.* Hussman-Ligonier Co. v. Hughes, 348 Mo. 319, 153 S.W.2d (1941); Feagins v. Carver, 162 Neb. 116, 75 N.W.2d 379 (1956); Hensley v. Farmers Fed'n Co-op., 246 N.C. 274, 98 S.E.2d 289 (1957); Gartwright v. General Motors Corp., 153 N.E.2d 172 (Ohio App. 1958); Baur v. Mesta Mach. Co., 195 Pa. Super. 22, 168 A.2d 591 (1961); Sims v. South Carolina State Comm'n of Forestry, 235 S.C. 1, 109 S.E.2d 701 (1959); Cooper v. Venatieri, 73

New York court, to "be assignable to something catastrophic or extraordinary."[12] In 1950, however, after struggling for twenty-five years to distinguish between the "usual" and the "unusual" in the employment environment, the New York Court of Appeals adopted the following rule: "Whether a particular event was an industrial accident is to be determined not by any legal definition, but by the common-sense viewpoint of the average man."[13] Although interpretation of the "average man" test has varied,[14] it appears that the unusualness requirement has been abandoned in New York—at least where the claimant's injury involved a heart condition.[15] In addition to unusualness, some courts have demanded that the injury be assignable to a definite time and place.[16] Whether this means a definite time and place of the cause of the injury or of the effect of the injury is, however, a source of disagreement.[17] Clearly, if definiteness of cause is required, recovery for a heart attack resulting from stress and strain over a protracted period would be severely restricted.

Where the employee's generalized condition is alleged to have resulted from mental or emotional stress alone, another uncertainty of causation is introduced, and New York along with a minority of states has denied recovery.[18] These decisions may also come from an erroneous extension of the "impact" doctrine of tort law.[19] New York, however, has been in the

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S.D. 418, 43 N.W.2d 747 (1950); Kruse v. Department of Labor and Indus., 52 Wash. 2d 453, 326 P.2d 58 (1958).

12. Lerner v. Rump Bros., 241 N.Y. 153, 149 N.E. 334, 335 (1935).

13. Masse v. James H. Robinson Co., 301 N.Y. 34, 35, 92 N.E.2d 56, 57 (1950). In this case, the court held that a heart injury was compensable even though the employee had been engaged in his "daily work."

14. "Thousands of litigants have attempted their own interpretations of Chief Judge Loughran's famous statement in Masse v. James H. Robinson Co. . . . . For myself, I cannot imagine any average man considering this an accident. . . . [T]here still must be an 'industrial accident' in some real, objective sense. The Masse opinion itself recites that the employee 'whose work had long been physically hard, was subjected to unusual strain and exertion during his working hours in the week that ended April 15, 1947.' I do not think his claim would have been upheld on a showing that he had been worrying more than usual." 176 N.E.2d at 718, 219 N.Y.S.2d at 20 (dissenting opinion).

15. 1 LARSON, *op. cit. supra* note 6, § 38.64; Comment, 28 FORDHAM L. REV. 322, 330-31 (1959).

16. 1 LARSON, *op. cit. supra* note 6, § 37.20.

17. *Ibid.*

18. Lesnik v. National Carloading Corp., 285 App. Div. 649, 140 N.Y.S.2d 907 (1955), *aff'd*, 309 N.Y. 958, 132 N.E.2d 326 (1956); Lewter v. Abercrombie Enterprises, Inc., 240 N.C. 399, 82 S.E.2d 410 (1954) (cashier died of cerebral hemorrhage when excited by fire in theater); Toth v. Standard Oil Co., 160 Ohio St. 1, 113 N.E.2d 81 (1953) (employee suffered cerebral hemorrhage after questioning by police). *Contra, e.g.*, Firemen's Fund Indem. Co. v. Industrial Acc. Comm'n, 241 P.2d 299 (Cal. Dist. Ct. App.), *aff'd*, 39 Cal. 2d 831, 250 P.2d 148 (1952); Charon's Case, 321 Mass. 694, 75 N.E.2d 511 (1947); McClain v. Board of Educ., 30 N.J. 567, 154 A.2d 569 (1959).

19. "Surely if, in a negligence case, no causal relation can be found between an accident and damages caused by pure fright, no such relation can be discovered,

process of liberalizing its strict rules, granting recovery where the generalized condition was caused by a sudden emotional stress or where the physical exertion consisted only of working long hours over an extended period of time.[20] But in *Lesnik v. National Carloading Corp.*[21] an apparent outer limit was reached. There recovery was denied for a heart attack resulting from only emotional strain over an extended period of time.

In the instant case, the majority of the court cited the cases demonstrating the liberal trend[22] to show that New York had long since awarded benefits for injuries which had no physical "impact" as a cause.[23] The court distinguished the instant case from *Lesnik* on the basis of the extent to which the employees were coping with the very problems which caused the emotional stress at the time of their respective heart attacks,[24] and because of the weakness of the medical proof in *Lesnik* as compared to the "virtually conclusive nature" of the proof in the case at hand.[25] The majority further stated that the heart attack would have been considered an industrial accident by the "average man," and added, as a final makeweight, that its holding was supported by an ample number of decisions of other states.[26] The principal arguments of the dissenting opinion were: first, that the instant decision would make the application of workmen's compensation statutes limitless; second, that although the "average man" test dispensed with certain traditional requirements necessary for a compensable "accident," it nonetheless stopped somewhere short of allowing recovery when not supported by some observable, physical strain by the claimant;

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where the facts are the same, in a workmen's compensation case." Thompson v. City of Binghamton, 218 App. Div. 451, 218 N.Y.S. 355, 358 (1926) (dissenting opinion). "Grasping at the common law ruling that *nervous shock* without a flesh wound or external trauma was not a basis of liability, insurance carriers fought to infuse the same doctrine into compensation acts. Successful in a few states, they went down to defeat in England and in most American jurisdictions." HOROVITZ, WORKMEN'S COMPENSATION 75 (1944).

20. Anderson v. New York State Dep't of Labor, 275 App. Div. 1010, 91 N.Y.S.2d 710 (1949), *motion for leave to appeal denied*, 300 N.Y. 759, 90 N.E.2d 901 (1950); Furtardo v. American Export Airlines, Inc., 274 App. Div. 954, 83 N.Y.S.2d 745 (1948), *motion for leave to appeal denied*, 298 N.Y. 933, 83 N.E.2d 866 (1949); Pickerell v. Schumacher, 242 N.Y. 577, 152 N.E. 434 (1926); Krawczyk v. Jefferson Hotel, 278 App. Div. 731, 103 N.Y.S.2d 40 (1951); Church v. Westchester County, 253 App. Div. 859, 1 N.Y.S.2d 581 (1938); Thompson v. City of Binghampton, 218 App. Div. 451, 218 N.Y. Supp. 355 (1926).

21. 285 App. Div. 649, 140 N.Y.S.2d 907 (1955), *aff'd*, 309 N.Y. 958, 132 N.E.2d 326 (1956).

22. See cases cited note 20 *supra*.

23. 176 N.E.2d at 716-17, 219 N.Y.S.2d at 16-18.

24. "Lesnik may be distinguished on the ground that the attack occurred while the claimant was at rest—at the race track—while here 'even though the decedent was sitting by a swimming pool he was still in the midst of the very problem, the strain and tension of which the Board could [and did] find caused his attack.'" *Id.* at 717, 219 N.Y.S.2d at 18.

25. *Ibid.*

26. *Id.* at 717, 219 N.Y.S.2d at 18-19.

and third, that changes in well-established interpretations of the Workmen's Compensation Act should be left to the legislature.[27]

Analysis of the instant case indicates that it is only a slight extension of previous New York decisions, which based recovery on either sudden emotional stress or long hours of work over an extended period of time.[28] In *Lesnik*, however, the court had refused to award benefits on strikingly similar facts[29] to those in the case at hand. The distinction that Lesnik was resting when his heart attack occurred while Klimas was still worrying about his problems is not convincing.[30] In both cases, the heart attack was caused by employment conditions previous to the time of the attack and not by some event occurring simultaneous to the injury. If the cases may be distinguished at all, it is because of the strength of the medical proof that the anxiety and worry were a cause of the heart attack in the instant case as compared to the uncertain nature of the medical testimony in the *Lesnik* case.[31] If the controlling reason for awarding compensation benefits in the case at hand was that the trier of fact could reasonably have inferred that decedent's heart attack was caused by his work, it is a highly commendable decision. The basic reason for the workmen's compensation statutes is to provide benefits to the victims of work-connected injuries.[32] A few states, recognizing this reason, have frankly stated that proof of medical connection between the work and the injury is all that is necessary for benefits to be awarded.[33] Although the court of appeals refrained from making a definite statement that compensation will depend upon causation alone, the decision in the instant case strongly indicates that it is the culmination of a progressive movement toward allowing recovery for any heart attack when there is satisfactory proof of employment causation.

27. *Id.* at 718-19, 219 N.Y.S.2d at 19-20.

28. See cases cited note 20 *supra.*

29. The employee had undergone emotional stress due to anxiety over the decreasing revenues of his employer, but his heart attack occurred while he was attending a horse race.

30. 1 LARSON, *op. cit. supra* note 6, § 29.22.

31. 176 N.E.2d at 717, 219 N.Y.S.2d at 18.

32. 1 LARSON, *op. cit. supra* note 6, § 2.20.

33. Insurance Dep't v. Dinsmore, 233 Miss. 569, 102 So. 2d 691 (1958); Ciuba v. Irvington Varnish & Insulator Co., 27 N.J. 127, 141 A.2d 761 (1958).