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RECENT CASES

BANKRUPTCY—ACTS OF BANKRUPTCY—PETITION FOR DISSOLUTION UNDER STATE STATUTE

The insolvent corporation filed a certificate of dissolution pursuant to Section 105 of the New York Stock Corporation Law, which requires the directors of the petitioning corporation to wind up the business and distribute the assets.[1] Creditors of the insolvent corporation brought an involuntary bankruptcy proceeding alleging that the petition for dissolution was an act of bankruptcy under Section 3(a) (5) of the Bankruptcy Act, which provides that it is an act of bankruptcy if a person ". . . while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property. . . ."[2] The insolvent corporation opposed the adjudication on the grounds that the filing of a certificate of dissolution was not an "appointment" under Section 3(a) (5) and merely continued and expanded the fiduciary duties of the directors of the corporation. The Referee ordered the adjudication. On petition for review, *held,* Referee's report confirmed. The filing of a certificate of dissolution by an insolvent corporation is an act of bankruptcy because it results in the appointment of the directors as trustees to liquidate the corporation. In re *Bonnie Classics, Inc.,* 116 F. Supp. 646 (S.D.N.Y. 1953).

The 1903 amendment to the Bankruptcy Act provided that if the receivership proceedings were voluntary, the application for a receiver or trustee while insolvent constituted an act of bankruptcy.[3] On the other hand, if the receivership proceedings were involuntary, the receiver or trustee had to be put in charge of the debtor's property

1. "[S]uch corporation by its board of directors shall proceed to adjust and wind up its business and affairs with power to carry out its contracts and to sell the assets . . . and to apply the same in discharge of its liabilities and obligations and . . . to distribute the remainder of its assets among its stockholders." N.Y. STOCK CORP. LAW § 105.

2. 30 STAT. 546 (1898), as amended, 66 STAT. 421 (1952), 11 U.S.C.A. § 21(a) (5) (Supp. 1953).

3. 30 STAT. 546 (1898), as amended, 32 STAT. 797 (1903), 11 U.S.C.A. § 21(a) (4) (1927). It is pertinent to note that the action of the insolvent corporation in the instant case would clearly be an act of bankruptcy under the 1903 amendment since the mere application for a receiver while insolvent was sufficient. See, *e.g.,* Haubtman & Loeb Co. v. Dunbar Molasses Co., 13 F.2d 335 (5th Cir. 1926); *In re* Detroit Transp. Truck Co., 276 Fed. 757 (E.D. Mich. 1921); *In re* Rankin, 210 Fed. 529 (N.D. Ohio 1913), *aff'd sub nom.* Hill v. Western Electric Co., 214 Fed. 243 (6th Cir. 1914).

because of insolvency in order to constitute an act of bankruptcy.[4] The 1926 amendment eliminated the distinction between voluntary and involuntary receivership proceedings, and merely required that a receiver or trustee be "appointed" or "put in charge" while insolvent.[5] The Chandler Act of 1938 sought to abolish any distinction between "appointed" and "put in charge"[6] by providing that an act of bankruptcy is committed when the insolvent procures, suffers, or permits the appointment of a receiver or trustee to take charge of his property.[7]

The present Section 3(a)(5) provides that the appointment of either a "receiver" or a "trustee" to take charge of the insolvent's property is an act of bankruptcy.[8] The technical title of the officer or agent appointed to liquidate the insolvent debtor's estate has not been of significance to the courts.[9] However, to constitute an act of bankruptcy the receivership must be general in that the receiver or trustee appointed is to liquidate all the assets of the debtor, not merely a portion of the insolvent's estate.[10] An act of

4. 30 STAT. 546 (1898), as amended, 32 STAT. 797 (1903), 11 U.S.C.A. § 21(a)(4) (1927). This amendment was incorporated within § 3(a)(4) which also provided that it was an act of bankruptcy to make a general assignment for the benefit of creditors. Prior to the 1903 amendment the weight of authority was that the appointment of a receiver or trustee was not a general assignment for the benefit of creditors. *In re* Burrell, 123 Fed. 414 (2d Cir. 1903); Vaccaro v. Security Bank of Memphis, 103 Fed. 436 (6th Cir. 1900); *In re* Empire Metallic Bedstead Co., 98 Fed. 981 (2d Cir. 1899), 14 HARV. L. REV. 69 (1900); *In re* Gilbert, 112 Fed. 951 (D. Ore. 1902); *In re* Harper & Bros., 100 Fed. 266 (S.D.N.Y. 1900); *In re* Baker-Ricketson Co., 97 Fed. 489 (D. Mass. 1899). The 1903 amendment eliminated the appointment of a receiver or trustee as a method of avoiding bankruptcy. 1 COLLIER, BANKRUPTCY § 3.501 (14th ed. 1940); 1 LOVELAND, BANKRUPTCY § 153 (4th ed. 1912); 1 REMINGTON, BANKRUPTCY § 156 (5th ed. 1950).

5. 30 STAT. 546 (1898), as amended, 44 STAT. 662 (1926); Colin, *An Analysis of the 1926 Amendments to the Bankruptcy Act*, 26 COL. L. REV. 789, 792 (1926). For a criticism of the wording of this amendment, see McLaughlin, *Amendment of the Bankruptcy Act*, 40 HARV. L. REV. 341, 368 (1927).

6. 20 STAT. 546 (1898), as amended, 66 STAT. 421 (1952), 11 U.S.C.A. § 21(a)(5) (Supp. 1953).

7. Prior to the 1926 amendment it was held that "put in charge" was tantamount to the order of appointment by the court. *In re* Perry Aldrich Co., 165 Fed. 249, 253 (D. Mass. 1908). But in 1928 it was held that a court order of appointment of a receiver which required the receiver to give bond was not an "appointment" under the Bankruptcy Act when the receiver refused to give bond. *In re* Ago Const. Co., 26 F.2d 257 (M.D.N.C. 1928). For the reasons behind the amendments to the Act of 1898, see 1 COLLIER, BANKRUPTCY § 3.501 (14th ed. 1940); 1 REMINGTON, BANKRUPTCY § 156 (5th ed. 1950).

8. 20 STAT. 546 (1898), as amended, 66 STAT. 421 (1952), 11 U.S.C.A. § 21(a)(5) (Supp. 1953).

9. Haubtman & Loeb Co. v. Dunbar Molasses Co., 13 F.2d 335 (5th Cir. 1926). "An application for the appointment of judicial liquidators, under the Louisiana statute, is in legal effect the same as an application for the appointment of a receiver or trustee . . . because the powers and duties conferred are the same. . . ." *Id.* at 336. *Cf. In re* International Coal Mining Co., 143 Fed. 665, 667 (E.D. Pa.), *aff'd sub nom.* Cresson & Clearfield Coal & Coke Co. v. Stauffer, 148 Fed. 981 (3d Cir. 1906). See also NADLER, BANKRUPTCY § 461 (1948); 1 REMINGTON, BANKRUPTCY § 160 (5th ed. 1950).

10. See Elfast v. Lamb, 111 F.2d 434, 436 (2d Cir. 1940), 54 HARV. L. REV.

bankruptcy is committed by the appointment of a receiver or trustee, either temporary or permanent,[11] through court proceedings[12] or by agreement of the parties.[13]

Although the directors of a corporation bear a fiduciary relationship to the corporation and its stockholders,[14] they are not trustees in the strict sense.[15] But in the instant case the New York Stock Corporation Law refers to the directors as "trustees,"[16] the legal title to the corporate property vests in the directors upon dissolution[17] and the New York courts characterize the directors as "trustees."[18] Even if upon dissolution the directors continued in their previous fiduciary relationship, the filing of the certificate of dissolution created significant changes in their powers and duties. The directors, in addition to their fiduciary duties, were empowered to take charge of the corporate property, wind up the business, sell the corporate assets and extinguish the corporation's obligations.

The specific act of bankruptcy charged in the instant case was the act of the insolvent corporation in *procuring the appointment*

132; Standard Acc. Ins. Co. v. E. T. Sheftall & Co., 53 F.2d 40 (5th Cir. 1931); *In re* Turner, 51 F. Supp. 740, 743 (W.D. Ky. 1943); NADLER, BANKRUPTCY § 460 (1948). Section 105 of the New York Stock Corporation Law would seem to meet this requirement. "The purpose of the statute was to provide for a pro rata distribution of the corporation's property. . . ." Steinhardt Import Corporation v. Levy, 174 Misc. 184, 20 N.Y.S.2d 360, 361 (Sup. Ct. 1940).

11. *In re* Luxor Cab Mfg. Corp., 25 F.2d 644 (2d Cir. 1928); Blue Mountain Iron & Steel Co. v. Portner, 131 Fed. 57, 61 (4th Cir.), *cert. denied*, 195 U.S. 636 (1904); *In re* Hewitt Grocery Co., 33 F. Supp. 493, 495 (D. Conn. 1940); *In re* Kennedy Tailoring Co., 175 Fed. 871, 873 (E.D. Tenn. 1909).

12. Haubtman & Loeb Co. v. Dunbar Molasses Co., 13 F.2d 335 (5th Cir. 1926); Beatty v. Andersen Coal Mining Co., 150 Fed. 293 (1st Cir. 1906); *In re* Wenatchee Heights Orchard Co., 204 Fed. 674 (W.D. Wash. 1913); *In re* Electric Supply Co., 175 Fed. 612 (S.D. Ga. 1909); *In re* Pickens Mfg. Co., 158 Fed. 894 (N.D. Ga. 1908).

13. *In re* R. V. Smith Co., 38 F. Supp. 57 (W.D. Okla. 1941); *In re* C. H. Bennett Shoe Co., 140 Fed. 687 (D. Conn. 1905); *In re* Hercules Atkin Co., 133 Fed. 813 (E.D. Pa. 1904).

14. Kavanaugh v. Kavanaugh Knitting Co., 226 N.Y. 185, 123 N.E. 148, 151 (1919); Baker v. Cohn, 42 N.Y.S.2d 159, 166 (Sup. Ct. 1942), *aff'd*, 292 N.Y. 570, 54 N.E.2d 689 (1944).

15. Bosworth v. Allen, 168 N.Y. 157, 61 N.E. 163, 164, 55 L.R.A. 751, 85 Am. St. Rep. 667 (1901); Blaustein v. Pan American Petroleum & Transport Co., 263 App. Div. 97, 31 N.Y.S.2d 934, 959 (1st Dep't 1941), *aff'd*, 293 N.Y. 281, 56 N.E.2d 705 (1944); Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 649, 15 S.W. 448, 453, 24 Am. St. Rep. 625 (1891); 3 FLETCHER, CYCLOPEDIA CORPORATIONS § 838 (1947); 4 POMEROY, EQUITY JURISPRUDENCE § § 1089, 1090 (5th ed. 1941).

16. "The . . . directors, as trustees, . . . may continue to be sued in the corporate name." N.Y. STOCK CORP. LAW § 105(12).

17. Steinhardt Import Corp. v. Levy, 174 Misc. 184, 20 N.Y.S.2d 360, 361 (Sup. Ct. 1940). But legal title does not have to pass to the trustees under § 3(a)(5) of the Bankruptcy Act. *In re* R. V. Smith Co., 38 F. Supp. 57, 62 (W.D. Okla. 1941).

18. Central Union Trust Co. of N.Y. v. American Ry. Traffic Co., 198 App. Div. 303, 190 N.Y. Supp. 674, 676 (2d Dep't 1921), *aff'd*, 233 N.Y. 531, 135 N.E. 905 (1922); *In re* Friedman, 177 App. Div. 755, 164 N.Y. Supp. 892, 894 (1st Dep't 1917); Bank of New York v. Kennedy, 183 Misc. 819, 54 N.Y.S.2d 122, 125 (Sup. Ct. 1944); Marine Trust Co. of Buffalo v. Tralles, 147 Misc. 426, 263 N.Y. Supp. 750, 753 (Sup. Ct. 1933).

of a receiver or trustee to take charge of its assets.[19] The question was whether the filing of the certificate of dissolution was tantamount to the procuring of the appointment of a receiver or trustee.[20] The method of appointment of a receiver or trustee would seem to be immaterial if one is designated to take charge of and liquidate the insolvent's assets.[21] The court in the instant case stated, "The method adopted to effect the transfer is immaterial. It is the end result that counts. Any action . . . which effectively causes the transfer of his property to another for final liquidation purposes appoints . . ." a trustee to take charge under Section 3(a) (5).[22] The criterion promulgated in the instant case would seem to be too restrictive. Section 3(a) (5) does not specifically require that the appointment of a trustee be the result of action by the insolvent which would cause an effective transfer of the insolvent's property. The instant case holds that the filing of the certificate of dissolution caused an effective transfer of the insolvent corporation's assets to the directors as trustees and was therefore an "appointment" of the directors as trustees and an act of bankruptcy under Section 3(a) (5).[23]

As a result of the filing of the certificate of dissolution in the instant case, the directors of the corporation were appointed to take certain action with the corporate property.[24] The determinative question would then seem to be whether the purpose of the appointment was to place some one in charge of the insolvent's property to liquidate the insolvent's assets without considering the effectiveness of the transfer.[25] Applying either criterion, it would seem that the

19. 30 STAT. 546 (1898), as amended, 66 STAT. 421 (1952), 11 U.S.C.A. § 21(a) (5) (Supp. 1953); Sun-Lite Awning Corp. v. E. J. Conklin Aviation Corp., 176 F.2d 344, 347 (4th Cir. 1949).

20. "The trial court found that 'On August 29, 1939, the Parrot Speed Fastener Corporation was dissolved by filing a certificate of dissolution with the Secretary of State.'" Speed Products Co. v. Tinnerman Products, Ind., 179 F.2d 778, 782 (2d Cir. 1949). "Any stock corporation . . . may be dissolved at any time by the filing . . . of a certificate. . ." of dissolution. N.Y. STOCK CORP. LAW § 105. As a practical matter in determining whether an act of bankruptcy has been committed within the required four months period, the date of filing the certificate of dissolution would seem to be the most suitable.

21. *Cf. In re* C. H. Bennett Shoe Co., 140 Fed. 687 (D. Conn. 1905) (directors "put in charge" by written agreement); *In re* Hercules Atkin Co., Ltd., 133 Fed. 813, 815 (E.D. Pa. 1904) (trustee appointed by an election).

22. Instant case, 116 F. Supp. at 648.

23. *Ibid.*

24. Whether the appointment is made by statute, by the insolvent, or by court order is immaterial since § 3(a) (5) provides that the act of bankruptcy is committed if the insolvent has "procured, permitted, or suffered . . . the appointment of a receiver. . . ." See notes 12, 13 *supra*. Under the 1903 amendment it was held that "to procure" the filing of a petition for a state receiver is tantamount to "applying" for a receiver. *In re* Bucyrus Road Machinery Co., 10 F.2d 333, 334 (6th Cir. 1926).

25. Even under the 1926 amendment there was doubt whether there had to be an effective transfer to constitute an act of bankruptcy. In Walker v. Morgan & Bird Gravel Co., 20 F.2d 547, 548 (5th Cir.), *cert. denied,* 275 U.S.

insolvent corporation in the instant case, by filing the certificate of dissolution, procured, permitted, or suffered the appointment of a trustee under Section 3(a) (5) of the Bankruptcy Act.

CORPORATIONS—STOCKHOLDERS' DERIVATIVE SUITS—EQUITABLE STOCKHOLDER'S RIGHTS UNDER SECURITY STATUTE

Plaintiff stockholder instituted a derivative action to recover damages from certain corporate officers for fraud, mismanagement and waste. Defendants moved to require plaintiff to give security for expenses under a Pennsylvania statute[1] which authorized a corporation, in whose right a derivative action is brought by the holder of less than five percent of the outstanding shares of its stock, to require the plaintiff to give security for the reasonable expenses incurred by the corporation. Plaintiff was the beneficial owner of the requisite five percent of the stock, but his stock was not registered in the corporation's books. *Held,* plaintiff must either record his stock or put up the required security. A stockholder maintaining a derivative action, to avoid giving security for costs, must be the registered owner. *Murdock* v. *Follansbee Steel Corp.,* 114 F. Supp. 690 (W.D. Pa. 1953).

Although the term "stockholder" generally suggests one having legal title to shares of stock registered in his name on the corporate

562 (1927), the court held that if a court has jurisdiction, the appointment of a receiver is an act of bankruptcy even if the appointment was erroneous. In *In re* Sedalia Farmers' Co-Op. Packing & Produce Co., 268 Fed. 898, 902 (W.D. Mo. 1919), 34 HARV. L. REV. 784 (1921), the court said, "That that court may, therefore, have been without jurisdiction and that the appointment may have been improvidently made, is beside the question." See note 7 *supra.* One purpose of present § 3(a) (5) was to eliminate the conflict whether to "put in charge" was equivalent to an "appointment" by requiring only the appointment of trustee. 1 COLLIER, BANKRUPTCY 474-75 (14th ed. 1940).

"The Act of 1938 speaks merely of the 'appointment of a receiver or trustee to take charge of' the debtor's property. Thus it now seems that the mere 'appointment' is sufficient to constitute the act of bankruptcy." 1 *Id.* at 478.

1. "In any such suit instituted or maintained by holder or holders of less than five per centum of the outstanding shares of any class of such corporation's stock or voting trust certificates, the corporation in whose right such action is brought shall be entitled, at any stage of the proceedings, to require plaintiff or plaintiffs to give security for the reasonable expenses, including attorneys' fees, which may be incurred by it in connection with such suit, and by the other parties defendant in connection therewith, for which it may become liable pursuant to section three of this act, to which security the corporation shall have recourse in such amount as the court having jurisdiction shall determine upon the termination of such action. . . ." PA. STAT. ANN. tit. 12, § 1322 (1953). See Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 Sup. Ct. 1221, 93 L. Ed. 1528 (1949) (New Jersey law did not violate Constitution).

books,[2] the word may also denote simply the equitable owner of shares not yet registered, such as the beneficiary of a stock trust or the vendee under a contract to sell stock.[3] The rights of the legal owner and those of the beneficial owner may not always be identical in regard to corporate affairs, but in some instances they will be equal.[4] The court in the instant case decided that the intention of the security statute was not met unless plaintiff's stock appeared of record.[5] This precise requirement was not particularized in the statute, and no case has been found where the point has been ruled upon by any court.

In those situations where the statute and corporate charter are calculated to permit the corporation to maintain an efficient internal organization, it may be required that the stockholder be one of record. Thus, in most instances, only the record holder may vote in a corporate election,[6] object to a corporation merger,[7] participate in the distribution of assets upon liquidation[8] and receive stock dividends. The stockholder is required to appear of record in these instances in order to avoid the confusion which would otherwise exist if, for the transacting of such corporate business, it were necessary to determine the unrecorded ownership of stock. There must be order and certainty and a definite source of information. The court in the instant case interprets the security statute as just such a law.

The statute in question, however, requires security not for the purpose of determining stockholder identity, but rather to prevent the so-called "strike suit" which is often instituted for a nuisance purpose.[9] This security requirement is founded upon the realization

2. 18 C.J.S., *Corporations* § 475(b) (1939).

3. 13 FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5976 n.44 (1943).

4. "The word 'shareholder' in its ordinary and generally accepted meaning . . . is sufficiently broad to include the equitable as well as the legal owner. If the rulemakers had intended that a 'shareholder' be limited to one of record, they could have readily so provided." HFG Co. v. Pioneer Pub. Co., 162 F.2d 536, 540 (7th Cir. 1947).

5. See, Hornstein, *The Death Knell of Stockholders' Derivative Suits in New York*, 32 CALIF. L. REV. 123 (1944). The author is bitterly opposed to the security requirement law, and concludes that "[p]resumably an equitable owner . . . would be barred unless he put up bond." *Id.* at 124 n.6.

6. "The general and best rule is that the person in whose name stock stands on the books is entitled to vote it. . . ." Morrill v. Little Falls Mfg. Co., 53 Minn. 371, 55 N.W. 547, 550 (1893).

7. Salt Dome Oil Corp. v. Schenck, 28 Del. Ch. 433, 41 A.2d 583 (1945). This case is cited and quoted in the instant case as authority. But the court states: "We are not concerned here with . . . [a question relating] to the status of an equitable owner of the stock, in a court of equity, in pursuit of an equitable remedy." *Id.* at 586. This fully distinguishes it from the instant case.

8. 12 FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5506 (1932).

9. "For the so-called 'strike-suit' properly defined, is a suit brought not with an intent of diligent and effective prosecution, but with the motive of speedy, secret, private settlement for its nuisance value." House, *Stockholders' Suits and the Coudert-Mitchell Laws*, 20 N.Y.U.L.Q. REV. 387 (1945).

that a stockholder who owns five percent or more of a corporation's assets likely will not be inclined to burden his corporation irresponsibly with baseless law suits and legal expenses; but a shareholder who owns a smaller financial interest might well bring a suit against the best interests of the corporation.[10] The rigidity that is necessary to identify the stockholder for voting, dividend, merger and similar purposes is not needed where the equitable owner of stock is seeking to protect the corporation's interest. The security statute is therefore distinguishable from the rules generally requiring a registration of the owner's stock. It is apparent that the beneficial owner of five percent of the stock has as great a financial interest involved as a record owner of a like number of shares. Thus, an equitable holder is no more apt to bring a suit for nuisance purposes than is a registered shareholder.

In Pennsylvania, as in many other jurisdictions, the security statute imposes one of the two requirements for maintaining a derivative suit. The other is that the plaintiff be a stockholder at the time of the transaction of which he complains.[11] This requirement also is designed primarily to prevent nuisance suits.[12] It is significant that the weight of authority permits an equitable owner to maintain an action under statutes requiring him to be a stockholder at the time of the transaction;[13] the statutory term "stockholder" is construed to include an equitable owner.[14]

The equitable owner of stock has full and complete stockholder rights under these statutes and charter provisions which seek to limit strike suits. It is submitted that, as the security statute is primarily one to limit strike suits, the equitable owner should be able to avoid giving security upon proof of ownership of five percent of the corporation's stock.

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10. See Fuller v. American Machine & Foundry Co., 97 F. Supp. 742 (S.D.N.Y. 1951); Gordon v. Elliman, 280 App. Div. 655, 116 N.Y.S.2d 671 (1st Dep't 1952); Noel Associates, Inc. v. Merrill, 184 Misc. 75, 53 N.Y.S.2d 143 (Sup. Ct. 1944).

11. "In any suit brought to enforce a secondary right on the part of one or more shareholders against any officer, or director, or former officer or director of a corporation, domestic or foreign, because such corporation refuses to enforce rights which may properly be asserted by it, the plaintiff . . . must aver . . . that the plaintiff . . . was a stockholder at the time of the transaction of which he complains, or that his stock devolved upon him by operation of law from a person who was a stockholder at such time." PA. STAT. ANN. tit. 12, § 1321 (1953).

12. Rosenthal v. Burry Biscuit Corp., 30 Del. Ch. 299, 60 A.2d 106 (1948).

13. Hurt v. Cotton States Fertilizer Co., 145 F.2d 293 (5th Cir. 1944); Richardson v. Blue Grass Mining Co., 29 F. Supp. 658 (E.D. Ky. 1939).

14. See 46 MICH. L. REV. 431 (1948).

CRIMINAL LAW—EVIDENCE—IMMUNITY STATUTES

Subpoenaed by the Senate Crime Investigating Committee, defendant testified, without claiming his privilege against self-incrimination, concerning certain crimes he had committed in the State of Maryland. Rejecting defendant's contention that United States Criminal Code Section 3486[1] prohibited the use of the committee testimony against him, the Maryland Court of Appeals affirmed a conviction based upon the committee testimony.[2] On certiorari the State argued (1) that the defendant "waived the statutory 'privilege' by testifying 'voluntarily' . . . (2) the Section should be construed so as to apply to United States Courts only" and (3) "that Congress is without constitutional power to bar the use of congressional committee testimony in the state courts." *Held,* reversed. No language in the Act conditions immunity upon the claim of privilege; the Act clearly states the testimony shall not be used "in any court," and Congress has the power to bind the State courts under the necessary and proper clause of the First Amendment. *Adams v. Maryland,* 347 U.S. 179, 74 Sup. Ct. 442 (1954).

Congress in 1857 first enacted the immunity statute in question.[3] Its primary purpose was to grant committee witnesses immunity from prosecution in order to compel incriminating testimony despite the privilege against self-incrimination. It was held in *Counselman v. Hitchcock,*[4] however, that Congress had failed in its purpose, inasmuch as the statute did not confer complete immunity. That is, the statute prohibited only the use of the committee testimony against the witness in a subsequent criminal proceeding, rather than completely barring the prosecution of any offense disclosed by the testimony. Stirred by the *Counselman* decision, Congress enacted an Interstate Commerce Commission immunity statute, which provided that "no person shall be prosecuted . . . for or on account of any . . . [offense disclosed to] said Commission."[5] Interpreting the statute to apply to both state and federal prosecution, the Court in *Brown v. Walker*[6] held this statute did provide the complete immunity lacking in the *Counselman* case and all constitutional requirements against

1. "No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court. . . ." 18 U.S.C.A. § 3486 (1951).
2. Adams v. State, 97 A.2d 281 (Md. 1953).
3. 11 STAT. 156 (1857).
4. 142 U.S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110 (1892).
5. 27 STAT. 443 (1893), 49 U.S.C.A. § 46 (1951).
6. 161 U.S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819 (1896). *See* United States v. Monia, 317 U.S. 424, 427-28, 63 Sup. Ct. 409, 87 L. Ed. 376 (1943).

self-incrimination, therefore, had been met by this statute.[7] The proper method for a defendant to claim the immunity provided by a statute is by a special plea in bar;[8] but if the defendant does not claim the immunity, the evidence may be used to convict him, as the statute does not prohibit the defendant from waiving his immunity.[9]

In both the *Counselman* and *Brown* cases the witness had claimed his privilege against self-incrimination. The next question facing the courts was whether or not it was necessary for the witness to invoke his privilege against self-incrimination at the hearing before the immunity statute was applicable. The lower federal courts were in sharp conflict on this point. The courts holding it necessary to plead the privilege reasoned that Congress intended the immunity statute to be coterminous only with the Fifth Amendment.[10] The other courts relied on the plain words of the Act which did not require the assertion.[11] The majority state view requires the witness to claim his privilege before the statute is applicable.[12] The first clear cut decision by the Supreme Court was in *United States v. Monia*[13] wherein the Court in interpreting the Sherman Anti-trust

7. The court intimated, however, that even if the statute were not applicable to state prosecution, it still would have met all constitutional requirements. *See* Brown v. Walker, 161 U.S. 591, 608, 16 Sup. Ct. 644, 40 L. Ed. 819 (1896); United States v. Murdock, 284 U.S. 141, 149, 52 Sup. Ct. 63, 76 L. Ed. 210 (1931) (full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the Fifth Amendment).

8. Scribner v. State, 9 Okla. Crim. 465, 132 Pac. 933 (1913); State v. Sine, 91 W. Va. 608, 114 S.E. 150 (1922); see, Heike v. United States, 217 U.S. 423, 433, 30 Sup. Ct. 539, 54 L. Ed. 821 (1910).

9. Heike v. United States, 217 U.S. 423, 431, 30 Sup. Ct. 539, 54 L. Ed. 821 (1910) (statute does not provide immunity from prosecution, but only a shield against successful prosecution). See also Burrell v. Montana, 194 U.S. 572, 24 Sup. Ct. 787, 48 L. Ed. 1122 (1904).

10. See Johnson v. United States, 5 F.2d 471 (4th Cir. 1925); Sherwin v. United States, 297 Fed. 704 (5th Cir. 1924), *aff'd*, 268 U.S. 369 (1925); United States v. Lay Fish Co., 13 F.2d 136 (S.D.N.Y. 1926); see United States v. Lee, 290 Fed. 517 (N.D. Tex. 1923); United States v. Elkton, 222 Fed. 428 (S.D.N.Y. 1915); United States v. Skinner, 218 Fed. 870 (S.D.N.Y. 1914).

11. United States v. American Meat Institute, 47 F. Supp. 482 (N.D. Ill. 1942), *aff'd sub nom.* United States v. Monia, 317 U.S. 424 (1943); United States v. Goldman, 28 F.2d 424 (D. Conn. 1928); United States v. Moore, 15 F.2d 593 (D. Ore. 1926); United States v. Pardue, 294 Fed. 543 (S.D. Tex. 1923).

12. State v. Burnett, 184 N.C. 783, 115 S.E. 57 (1922); Scribner v. State, 9 Okla. Crim. 465, 132 Pac. 933 (1913); Commonwealth v. Richardson, 229 Pa. 609, 79 Atl. 222 (1911); State v. Davidson, 242 Wis. 406, 8 N.W.2d 275 (1943); State v. Grosnickle, 189 Wis. 17, 206 N.W. 895 (1926). *Contra:* State *ex rel.* Marshall v. Pettway, 121 Fla. 828, 164 So. 872 (1936); People v. Sharp, 107 N.Y. 427, 1 Am. St. Rep. 851 (1887); People v. Buffalo Gravel Corp., 195 N.Y. Supp. 940 (Sup. Ct. 1922); Nelson v. State, 41 Ohio App. 174, 180 N.E. 84 (1931). See Note, 3 WIS. L. REV. 485 (1926) for a discussion of the necessity of a witness claiming the privilege against self-incrimination before the immunity statute is applicable.

13. 317 U.S. 424, 63 Sup. Ct. 409, 87 L. Ed. 376 (1943). See Notes, 18 NOTRE DAME LAW. 348, 354 (1943), for good discussions of both the majority and minority opinions.

immunity statute[14] held it was not necessary to a claim the privilege in order to retain the benefit of the immunity statute. The Court noted that it was not until 1934 that Congress required in an immunity statute[15] that the witness plead his privilege before the statute was applicable, and that Congress had not so amended the statute before the Court.

In light of the instant case it seems clear that a witness before a congressional committee is given double protection; he can plead his privilege against self-incrimination and refuse to testify, or he can testify without claiming his privilege and be secure in the knowledge that the statute[16] prohibits the use of his testimony as evidence against him in both the state and federal courts. The instant case also clearly holds that Congress can regulate the use of evidence in a state court when that is necessary to carry out the purposes of a federal statute. Considering the strong dicta of *Brown v. Walker* and the holding of the instant case, it seems safe to predict that Congress can constitutionally enact a statute prohibiting prosecution in a state court of any offense which is disclosed by the testimony of a witness before a congressional committee.[17]

CRIMINAL PROCEDURE—GRAND JURY INDICTMENTS—FAILURE OF JURORS TO HEAR ALL THE EVIDENCE AS GROUNDS FOR SETTING ASIDE INDICTMENT.

Defendant, on arraignment, moved the court for permission to examine the record of attendance and the minutes of the grand jury for the purpose of demonstrating that the required number of jurors had not been present to hear the evidence presented against him. The motion to inspect the minutes was denied, consistent with a preestablished policy of the court, but the court itself examined the minutes and found the contention of the defendant true in a substantial degree. *Held,* indictment dismissed. *People v. Brinkman,* 126 N.Y.S.2d 495 (County Ct. 1953).

At common law the composition of a grand jury ranged from 12

14. 32 STAT. 904 (1903), 15 U.S.C.A. § 32 (1951), 49 U.S.C.A. § 47 (1951).
15. 48 STAT. 899 (1934), as amended, 63 STAT. 107 (1949), 15 U.S.C.A. § 78u(d) (1951); see 54 STAT. 853 (1940), 15 U.S.C.A. § 80b—9(d) (1951); 49 STAT. 831 (1935), as amended, 63 STAT. 107 (1949), 15 U.S.C.A. § 79r(e) (1951).
16. But see United States v. Bryan, 339 U.S. 323, 335, 70 Sup. Ct. 724, 94 L. Ed. 884 (1950) (immunity not granted even though the literal language of the act would cover the testimony, since to do so would be contrary to the purposes of the statute).
17. It is clear that a state immunity statute cannot prohibit federal prosecution of a crime disclosed by the testimony of the witness. Feldman v. United States, 322 U.S. 487, 64 Sup. Ct. 1082, 88 L. Ed. 1408 (1944).

to 23[1] persons and the concurrence of at least 12[2] was required to indict. Most states now fix, either by statute or constitutional provision, a maximum number,[3] a minimum number required to concur[4] and, in many cases, a quorum without which no business may be transacted.[5] It is generally held that the death, absence or excusal of one or more members does not invalidate the indictment so long as the prescribed minimum necessary for concurrence is present.[6]

Some states by statute,[7] and others by judicial decision,[8] provide that grand juries may act only upon legal evidence or upon evidence "produced, sworn and examined."[9] Most, if not all, states, however, require that grand jurors take an oath that they shall "inquire into" offenses within the county, and "true presentment make . . . to the best of . . . [their] knowledge."[10]

The instant case stands almost alone in its consideration of the amount of such evidence which must be heard by the individual grand jurors in order to concur in the indictment. The court held[11] that, implicit in the statutes providing a minimum number for concurrence[12] and the presentment of an indictment only on such evidence as would warrant a conviction,[13] there is the additional requirement that those concurring should have heard all or substantially all the evidence.[14]

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1. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 139 (1947); 23 AM. JUR., *Grand Jury* § 13 (1939).
2. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 139 (1947); 23 AM. JUR., *Grand Jury* § 16 (1939).
3. See, *e.g.*, GA. CODE § 59-202 (1937); ILL. ANN. STAT. c. 78, § 16 (1935); MICH. COMP. LAWS § 28.951 (1948); MISS. CODE ANN. § 1779 (1942). The following states have constitutional provisions: COLO. CONST. Art. II, § 23 (1876); KY. CONST. § 248 (1891); LA. CONST. Art VII, § 42 (1921); MO. CONST. Art. II, § 28 (1875); N. M. CONST. Art. II, § 14 (1912); OKLA. CONST. Art. II, § 18 (1907); TEXAS CONST. Art. V, § 13 (1876); WYO. CONST. Art. I, § 9 (1889).
4. ALA. CODE tit. 30, § 89 (1940); ARIZ CODE ANN. § 44-626 (1939); TENN. CODE ANN. § 11600 (Williams 1934); MICH. COMP. LAWS § 28.963 (1948); MISS. CODE ANN. § 2441 (1942).
5. N. Y. CODE CRIM. PROC. § 224; TEXAS CONST. Art. V, § 13 (1876).
6. Jones v. United States, 162 Fed. 417 (9th Cir. 1908) (failure to notify two jurors of meeting); *In re* Meckley, 50 F. Supp. 274 (M.D. Pa. 1943); People v. Simmons, 119 Cal. 1, 50 Pac. 844 (1897) (incompetency); People v. Hunter, 54 Cal. 65 (1879) (death); State v. Cooley, 72 Minn. 476, 75 N.W. 729 (1898); State v. Coulter, 104 Miss. 764, 61 So. 706 (1913) (absence of foreman); State v. Connors, 233 Mo. 348, 135 S.W. 444 (1911); State v. Garrison, 130 N.J.L. 350, 33 A.2d 113 (Sup. Ct. 1943).
7. ARIZ. CODE ANN. § 44-613 (1939); ARK. STAT. § 43-918 (1947) CAL. PENAL CODE § 919 (1949); MINN. STAT. ANN. § 628.59 (West 1947); N.M. STAT. ANN. § 42-522 (1941); N.Y. CODE CRIM. PROC. § 256.
8. *See* Noll v. Dailey, 72 W. Va. 520, 79 S.E. 688, 47 L.R.A. (N.S.) 1207, 1209 (1913).
9. See *e.g.*, IOWA CODE ANN. § 771.17 (1950); MINN. CODE ANN. § 629.59 (West 1947).
10. RESTATEMENT, CODE OF CRIMINAL PROCEDURE § 126 (1931).
11. Instant case, 126 N.Y.S.2d at 501.
12. N.Y. CODE CRIM. PROC. § 256.
13. N.Y. CODE CRIM. PROC. § 258. See RESTATEMENT, CODE OF CRIMINAL PROCEDURE § 140 (1931).
14. Instant case, 126 N.Y.S.2d at 504.

An important function of the grand jury is "to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony. . . ."[15] The citizen should be protected from the "disgrace of arrest and accusation and the anxiety and expense of trial under an indictment illegally found."[16] If absenteeism and rubber stamp methods are condoned by the courts or if evidence of those practices is inaccessible[17] to the defendant on motion to quash, then the usefulness of the grand jury is vitiated.

On the other hand, it is argued that an indictment is only an accusation[18] and that the harm done the defendant does not counterbalance the resulting inconvenience of a second grand jury investigation.[19] This position also finds support in a construction of the statutes. Since evidence before the grand jury is aimed at a prima facie establishment of guilt, the failure of jurors to hear all the evidence weakens the case against the accused. "If what the absentees hear is enough to satisfy them, there would seem to be no reason why they should not vote."[20] It would seem also that the provision for a maximum number, a lesser quorum and a minimum for concurrence presupposes the absence of some of the voting grand jurors.[21]

Even if the result in the instant case were considered desirable, there is the very difficult procedural problem of how to raise the question[22] and then how to prove it.[23] Most states adhere to the rule of secrecy[24] and it has been held that the regularity of grand jury proceedings is presumed when the indictment is signed by the requisite number of jurors;[25] nor may a grand juror testify that the indictment did not receive this number.[26] It is also the majority rule that courts may not inquire into the sufficiency of evidence before a grand jury.[27] New York, however, is in the minority and holds that the defendant has a *constitutional* right to have an indictment based on

15. Hale v. Henkel, 201 U.S. 43, 20 Sup. Ct .370, 50 L. Ed. 652 (1906).
16. Instant case, 126 N.Y.S.2d at 504. See ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 144-46 (1947).
17. See note 22 *supra*.
18. *Cf.*, Wortham v. State, 82 Ark. 321, 101 S.W. 757 (1907).
19. United States *ex rel.* McCann v. Thompson, 144 F.2d 604 (2d Cir. 1944).
20. *Id.* at 607.
21. *Ibid.*
22. Unless specifically provided by statute, the general rule is that minutes or notes of grand jury proceedings are not available to the defendant. Some do permit this in the discretion of the court. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 169 (1947).
23. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 167 (1947); Note, 27 N.Y.U.L.Q. REV. 319 (1947).
24. Nash v. State, 79 Ark. 120, 95 S.W. 147 (1906); Nash v. State, 73 Ark. 399, 84 S.W. 497 (1904).
25. Nash v. State, 79 Ark. 120, 95 S.W. 147 (1906); Gitchell v. People, 146 Ill. 175, 33 N.E. 757 (1893); State v. Baker, 20 Mo. 338 (1855).
26. AM. JUR., *Indictments and Informations* § 170 (1940). See Notes, 24 A.L.R. 1432 (1923), 31 A.L.R. 1479 (1924), 51 A.L.R. 573 (1927).
27. People v. Sexton, 187 N.Y. 495, 511, 80 N.E. 396, 401-02 (1907).

illegal or insufficient evidence quashed. Under these rulings, the result in the instant case seems justified and, in fact, inevitable. Although it would not be an unreasonable construction of their statutes for other states to follow the rule of the instant case, in view of the secrecy accorded grand jury proceedings in most states, such a construction seems unlikely.

DOMESTIC RELATIONS—TORTS—ACTION BY WIFE AGAINST HUSBAND FOR PERSONAL INJURIES

Plaintiff, a married woman, brought an action against defendant, her husband, for injuries resulting from defendant's alleged negligent operation of a motor vehicle in which plaintiff was riding. The trial court sustained a demurrer to the complaint. *Held,* reversed. A married woman may maintain a personal injury action against her husband for negligence. *Combs* v. *Combs,* 262 S.W.2d 821 (Ky. 1953).[1]

At common law one spouse could not maintain a tort action against the other.[2] The reasons given for the prohibition were the public policy against actions which tended to disturb domestic tranquility, and the legal identity of the parties which resulted in a futile circuity of action.[3] By the eighteenth century the harsh common-law rule had been tempered somewhat by the recognition of the wife's separate estate in equity.[4] Then, during the nineteenth century, the rights of married women were greatly expanded by the passage of the Married Women's Acts, which were intended to secure a separate legal estate to married women.[5] The great variety of wording and interpretation of these statutes has caused much confusion as to their effect.[6]

After the passage of these laws it was generally held that a married woman might bring action in her own name against third persons upon any cause of action whatever.[7] It was also generally held that in order to effectuate the manifest legislative purpose of securing her separate property a married woman might sue her husband in such actions as ejectment, replevin, conversion and detention of chattels, trespass to land, waste and unlawful detainer.[8] However,

1. The instant case is an extension of, and adopts the reasoning of Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953), which held that a woman's cause of action in tort was not extinguished by subsequent marriage to the defendant.
2. MADDEN, PERSONS AND DOMESTIC RELATIONS 220 (1931); 3 VERNIER, AMERICAN FAMILY LAWS 268 (1935).
3. See Brown v. Gosser, 262 S.W.2d 480, 482 (Ky. 1953); 41 C.J.S., *Husband and Wife* § 396 (1944).
4. See Note, 13 OHIO ST. L.J. 90 (1952).
5. MADDEN, PERSONS AND DOMESTIC RELATIONS 220-25 (1931).
6. See generally 27 AM. JUR., *Husband and Wife* §§ 589-637 (1940); 41 C.J.S., *Husband and Wife* § 396 (1944).
7. 41 C.J.S., *Husband and Wife* § 389 *et seq.* (1944).
8. Hamilton v. Hamilton, 255 Ala. 284, 51 So.2d 13 (1951) (conversion);

many jurisdictions, supported by a decision of the Supreme Court,[9] still refused to allow one spouse to sue the other spouse for a personal tort. This is the majority view today.[10] The usually advanced reasons for denying the action are the public policy against disturbing domestic tranquility, the possibility of raids on insurance companies, the possibility of trivial actions for minor annoyances, the rule that statutes in derogation of common law should be strictly construed and the notion that the divorce and criminal courts offer sufficient remedies to married women against their husbands.[11]

On the other hand, a substantial and growing minority of jurisdictions do permit married women to maintain personal tort actions against their husbands.[12] Moreover, some of those courts which subscribe to the majority view have allowed a wife to recover in certain situations, as where her cause of action arose before marriage,[13] or where the parties became separated before the cause of action arose.[14]

Hall v. Hall, 193 Tenn. 74, 241 S.W.2d 919 (1951) (unlawful detainer); 27 AM. JUR., *Husband and Wife* § 599 (1940); MADDEN, PERSONS AND DOMESTIC RELATIONS 222 (1931); *see* Brown v. Gosser, 262 S.W.2d 480, 484 (Ky. 1953).

9. Thompson v. Thompson, 218 U.S. 611, 31 Sup. Ct. 111, 54 L. Ed. 1180 (1910). See Note, 30 CHI KENT REV. 343 (1952). *But cf.* Steele v. Steele, 65 F. Supp. 329 (D.D.C. 1946), in which it was held that a woman might maintain an action against her former husband for an assault committed after an absolute divorce was granted but before the sixty day interim period had elapsed.

10. Paulus v. Bauder, 106 Cal. App.2d 589, 235 P.2d 432 (1951) (wife has no cause of action for injuries sustained after interlocutory decree but before final decree); Corren v. Corren, 47 So.2d 774 (Fla. 1950); Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952); Sink v. Sink, 172 Kan. 217, 239 P.2d 933 (1952); Callow v. Thomas, 322 Mass. 550, 78 N.E.2d 637 (1948) (no cause of action for a tort committed during a marriage later annuled); Wolfer v. Oehlers, 8 N.J. Super. 434, 73 A.2d 95 (L. 1950); Tanno v. Eby, 78 Ohio App. 21, 68 N.E.2d 813 (1946) (ante-nuptial cause of action for personal injuries extinguished by marriage to defendant); Raines v. Mercer, 165 Tenn. 415, 55 S.W.2d 263 (1932); Furey v. Furey, 193 Va. 727, 71 S.E.2d 191 (1952); McKinney v. McKinney, 59 Wyo. 204, 135 P.2d 940 (1943); *see* Addison v. Employers Mut. Liability Ins. Co., 64 So.2d 484 (La. App. 1953); American Auto. Ins. Co. v. Molling, 57 N.W.2d 847 (Minn. 1953). See Notes, 160 A.L.R. 1406 (1946), 89 A.L.R. 118 (1934).

In England there exists an unusual situation in which the wife may recover for an ante-nuptial tort of the husband. Curtis v. Wilcox, [1948] 2 K.B. 474 (C.A.). But the husband is not allowed to recover for an ante-nuptial tort committed upon him by his wife. Baylis v. Blackwell, [1952] 1 K.B. 154 (1951).

11. See Thompson v. Thompson, 218 U.S. 611, 31 Sup. Ct. 111, 54 L. Ed. 1180 (1910); McKinney v. McKinney, 59 Wyo. 204, 135 P.2d 940 (1943).

12. Bennett v. Bennett, 224 Ala. 335, 140 So. 378 (1932); Katzenberg v. Katzenberg, 183 Ark. 626, 37 S.W.2d 696 (1931); Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914) (assault and battery and false imprisonment); Brandt v. Keller, 413 Ill. 503, 109 N.E.2d 729 (1952); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938); Pardue v. Pardue, 167 S.C. 129, 166 S.E. 101 (1932); Wait v. Pierce, 191 Wis. 228, 209 N.W. 475, 48 A.L.R. 276 (1926); *see* Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941). A New York statute expressly allows the action. NEW YORK DOMESTIC RELATIONS LAW § 57.

13. Carver v. Ferguson, 254 P.2d 44 (Cal. App. 1953); Curtis v. Wilcox, [1948] 2 K.B. 474 (C.A.).

14. Lorang v. Hays, 69 Idaho 440, 209 P.2d 733 (1949) (false imprisonment); *cf.* Steele v. Steele, *supra* note 9.

Also in this group of cases are those in which a wife was allowed to recover from the husband's employer for a tort committed by the husband within the scope of his employment,[15] and where the wife was allowed to recover from a partnership[16] or voluntary association[17] of which the husband was a member, although she could not recover from him personally.

Many courts and text-writers have given persuasive reasons for the adoption of the minority view:[18] the majority rule is vestigial in character and embodies no tenable policy of morals or of social welfare; as this type of liability constitutes an additional risk which may be insured against, it would ultimately redound to the benefit of insurers; safeguards against trivial actions can be formulated; the precise wording of many statutes gives the wife a right to sue in all cases as if she were unmarried; the divorce and criminal courts do not afford a sufficient remedy for personal torts. In adopting this rationale, the instant case would seem to be in line with modern social policy and in accord with the policy of the Married Women's Acts.

FEDERAL JURISDICTION—SCOPE OF FEDERAL COMMON LAW—CHARACTERIZATION OF FOREIGN STATUTE FOR PURPOSE OF APPLYING FEDERAL CONSTITUTION

Pursuant to an Arkansas statute,[1] plaintiff, an Arkansas creditor of an imperfectly formed Arkansas corporation, brought suit in the federal court for the western district of Tennessee against two Tennessee incorporators to hold them liable as partners[2] for a corporate debt. The district court, having diversity jurisdiction, imposed liability on the theory that the full faith and credit clause of the Federal Constitution required the enforcement of the Arkansas statute since that statute was not penal in the international sense;[3]

15. Jones v. Kinney, 113 F. Supp. 923 (W.D. Mo. 1953); Tallios v. Tallios, 345 Ill. App. 342, 103 N.E.2d 507 (1952); Broom v. Morgan, [1952] 2 All E.R. 1007 (Q.B.).

16. Tobin v. Hoffman, 96 A.2d 597 (Md. 1953). *Contra*: Fagg v. Benton Motor Co., 193 Tenn. 562, 246 S.W.2d 978 (1952).

17. Damm v. Elyria Lodge, etc., 158 Ohio St. 107, 107 N.E.2d 337 (1952).

18. *See* Thompson v. Thompson, 218 U.S. 611, 619, 31 Sup. Ct. 111, 54 L. Ed. 1180 (1910) (dissenting opinion); McKinney v. McKinney, 59 Wyo. 204, 135 P.2d 940, 956 (1943) (dissenting opinion); also see Brown v. Gossner, 262 S.W.2d 480 (Ky. 1953); Notes, 30 CHI-KENT REV. 343 (1952), 13 OHIO ST. L.J. 90 (1952).

1. ARK. STAT. ANN. § 64-103 (1947).

2. Whitaker v. Mitchell Mfg. Co., 219 Ark. 779, 244 S.W.2d 965 (1952).

3. "The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it

the court of appeals affirmed.[4] Shortly thereafter the Tennessee Supreme Court, in a separate case involving the same defendants and issues, held that the Arkansas statute was penal and therefore the full faith and credit clause did not require its enforcement by Tennessee.[5] Thereupon a petition for rehearing was filed in the original case in the court of appeals. *Held,* petition granted and the case reversed. One of the three judges joined the previous dissenting judge to hold that the *Erie* doctrine[6] required the federal courts in Tennessee to apply that state's characterization of the Arkansas statute. *Doggrell* v. *Southern Box Co.,* 208 F.2d 310 (6th Cir. 1953).

It has often been said that state courts will follow the decisions of federal courts on questions of federal law and that federal courts will follow the decisions of the courts of the state in which they sit on questions of that state's law whether jurisdiction is based upon diversity of citizenship or on a federal question.[7] The instant case clearly presents a federal issue, as the full faith and credit clause of the Constitution protects the plaintiff's right to a cause of action in Tennessee if the Arkansas statute upon which it is based is not penal. Whether the characterization of that statute as penal or remedial is to be made in accordance with state law or in accordance with general law as determined by the federal courts is the narrow issue in the case. That the *Erie* doctrine does not require the federal courts to apply state law to federal issues or those incident thereto[8] is exemplified by numerous cases which involve either a right created by a federal statute or, as in the instant case, a right protected by the federal Constitution.[9] As an illustration, the federal

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cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act." Huntington v. Attrill, 146 U.S. 657, 673-74, 13 Sup. Ct. 224, 36 L. Ed. 1123 (1892).

4. Doggrell v. Great Southern Box Co., 206 F.2d 671 (6th Cir. 1953).

5. Paper Products Co. v. Doggrell, 261 S.W.2d 127 (Tenn. 1953), 7 VAND. L. REV. 281 (1954).

6. Stated without limitations, the doctrine is that, to secure uniformity of the results of litigation within a state, federal courts apply the substantive common law of the state.

7. See Note, 59 HARV. L. REV. 966, 974-76 (1946). Also see BUNN, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES 268-76 (5th ed. 1949) where the theme is that a court, whether state or federal, and regardless of the basis of jurisdiction, applies state law if the litigant asserts state-created rights and applies federal law if the litigant's rights are federal.

8. See Note, 140 A.L.R. 717, 718 (1942); 35 C.J.S., *Federal Courts* §§ 170, 186 (1943).

9. See, *e.g.,* Higginbotham v. Baton Rouge, 306 U.S. 535, 59 Sup. Ct. 705, 83 L. Ed. 968 (1939); Lyeth v. Hoey, 305 U.S. 188, 59 Sup. Ct. 155, 83 L. Ed. 119 (1938); George S. Colton Electric Web Co. v. United States, 116 F.2d 202 (1st Cir. 1940); Faulkner v. Commissioner, 112 F.2d 987 (1st Cir. 1940); Florida Power and Light Co. v. Miami, 98 F.2d 180 (5th Cir. 1938). But see Dysart v. United States, 95 F.2d 652 (8th Cir. 1938). For a comprehensive annotation concerning the duty imposed on the federal courts by the Erie doctrine to follow state law, see 140 A.L.R. 717 (1942).

courts, for the purpose of determining the existence of a contract, are ordinarily obliged to apply state law in an action on a contract. Nevertheless, in a case in which effect must be given the impairment of contract clause of the Federal Constitution, the federal courts determine by general law, as distinguished from the law of the forum, whether there is in fact a contract.[10] Since, in the instant case, the full faith and credit clause requires that, unless it be penal, the Arkansas statute be effectuated, the characterization of the statute, being essential to the determination of a constitutional question, raises a federal issue. The characterization, therefore, should be made in accordance with federal law rather than that of the forum.

The *Klaxon* case[11] is clearly distinguishable from the case under consideration and is not controlling. There the plaintiff's cause of action did not depend upon the foreign statute in question though his recovery would have been enhanced if effect had been given to it.[12] The Court in that case held, in effect, that since the plaintiff's cause of action was not dependent upon the foreign statute, the Federal Constitution did not require the forum to give effect to the statute even if it were not penal.[13] Where the cause of action is not dependent upon the full faith and credit clause, the characterization of a foreign statute is made for the purpose of applying the internal conflict of laws rule and is a local matter rather than a federal issue.[14] In the instant case, however, the plaintiff's cause of action is itself dependent upon the enforcement of the foreign statute; two of the three judges seemed to recognize that the full faith and credit clause required Tennessee to enforce the Arkansas statute if that statute were not penal in the international sense. The court, however, refused to recognize that the rights involved (here the plaintiff's constitutional right to have his cause of action given effect in Tennessee if the statute is not penal) may be so dependent upon federal authority (Constitution or statute) that federal law should determine the outcome.[15]

The policy of the *Erie* case was to discourage forum-shopping between the state courts and the federal courts within a given state.

10. Higginbotham v. Baton Rouge, 306 U.S. 535, 59 Sup. Ct. 705, 83 L. Ed. 968 (1939).

11. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 Sup. Ct. 1020, 85 L. Ed. 1477 (1941).

12. *Id.* at 498.

13. *Ibid.*

14. See Broderick v. Rosner, 294 U.S. 629, 55 Sup. Ct. 589, 79 L. Ed. 1100 (1935); Converse v. Hamilton, 224 U.S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749 (1912); Huntington v. Attrill, 146 U.S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123 (1892). These cases imply that if the cause of action is not within the scope of the full faith and credit clause, the characterization of the foreign statute is a matter of the local conflict of laws rule.

15. See BUNN, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES 268-76 (5th ed. 1949).

Since the question of characterization in the instant case is properly a federal issue, the *Erie* decision should not be controlling. Moreover, had the federal court of appeals declined to follow the Tennessee characterization, the result would not have been repugnant to the policy underlying the *Erie* case. The uniformity of decision therein contemplated would have ensued for the reason that state courts must follow federal determinations of federal issues.

LABOR LAW—UNFAIR LABOR PRACTICE—INTENT TO ENCOURAGE OR DISCOURAGE UNION MEMBERSHIP BY DISCRIMINATION

The National Labor Relations Board petitioned for enforcement of cease-and-desist and back pay orders in three cases which were combined in the United States Supreme Court. In each case, the Board found that a labor union had caused an employer to violate Section 8(a) (3) of the National Labor Relations Act by discriminating to encourage membership in a labor organization.[1] Involved were a refusal to hire,[2] discrimination in job assignments because of a reduction of seniority rights by the union[3] and retroactive wage payments only to members of a closed union.[4] *Held,* enforcement granted in each case. An intention to encourage or discourage union membership may be presumed by the Board from the nature of the discrimination. *Radio Officers' Union of Commercial Telegraphers Union, AFL* v. *NLRB,* 347 U.S. 17, 74 Sup. Ct. 323 (1954).

Subject to a proviso relating to union security contracts, Section 8(a) (3) of the National Labor Relations Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."[5] There are three prerequisites to a violation of the section. First, the employer must know or have reason to believe that the employee was engaging in a protected activity.[6] Second, there must be an intention to discriminate because of that activity.[7] Finally, the Board

1. See Walsh, *Section 8(b)(2) Discrimination,* 2 LABOR L.J. 495 (1951); Foley, *Union Unfair Labor Practices under the Taft-Hartley Act,* 33 VA. L. REV. 697 (1947); Note, *Some Unfair Labor Practices under the Taft-Hartley Act,* 5 WASH. & LEE L. REV. 13 (1948).
2. NLRB v. Radio Officers' Union of Commercial Telegraphers Unions, AFL, 196 F.2d 960 (2d Cir. 1952), *aff'd,* instant case.
3. NLRB v. Teamsters Union, 196 F.2d 1 (8th Cir. 1952), *rev'd,* instant case.
4. NLRB v. Gaynor News Co., 197 F.2d 719 (2d Cir. 1952), 53 COL. L. REV. 559 (1953), *aff'd,* instant case.
5. 49 STAT. 452 (1935), as amended, 65 STAT. 601 (1951), 29 U.S.C.A. § 158(a) (3) (Supp. 1953).
6. 17 NLRB ANN. REP. 136 (1952).
7. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 Sup. Ct. 615, 81

must find that the effect of the discrimination would be to tend to encourage or discourage union membership.[8] The burden of proof is always on the Board to establish a violation,[9] though the establishment of a prima facie case shifts the burden of going forward with the evidence to the employer, who has the burden of establishing an affirmative defense.[10] The Board must base its decision on the preponderance of the evidence.[11] Its findings of fact, if supported by substantial evidence[12] on the record considered as a whole, are conclusive in a reviewing court.[13]

The element of intention required for a violation of Section 8 (a) (3) does not necessarily involve an employer's attitude toward unions or unionization;[14] the requirement is satisfied if the natural and probable consequence of the employer's discrimination is the encouragement or discouragement of union membership. Nor must an intention to encourage or discourage union membership be the sole reason for the discrimination. It is enough if it is one of several reasons.[15] The Board, in determining the employer's intention, has considered the disparate treatment of union and nonunion employees and a failure to give a satisfactory explanation therefor, the proximity of an employee's union activity and the discrimination, a departure from the employer's usual procedures and his demonstrated attitude toward unions.[16]

L. Ed. 893 (1937); NLRB v. Harris-Woodson Co., 162 F.2d 97 (4th Cir. 1947); Wells, Inc. v. NLRB, 162 F.2d 457 (9th Cir. 1947); NLRB v. Walt Disney Productions, 146 F.2d 44 (9th Cir. 1944); MANOFF, LABOR RELATIONS LAW 82 (1950).

8. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 65 Sup. Ct. 982, 89 L. Ed. 1372 (1945); NLRB v. Illinois Tool Works, 153 F.2d 811 (7th Cir. 1946); NLRB v. Hudson Motor Car Co., 128 F.2d 528 (6th Cir. 1942). *Compare* the instant case, *with* NLRB v. Air Associates, Inc., 121 F.2d 586 (2d Cir. 1941). The instant case apparently overrules NLRB v. Del. E. Webb Const. Co., 196 F.2d 702 (8th Cir. 1952), and NLRB v. Reliable Newspaper Delivery, Inc., 187 F.2d 547 (3d Cir. 1951).

9. NLRB v. Reynolds International Pen Co., 162 F.2d 680 (7th Cir. 1947); Montgomery Ward & Co. v. NLRB, 107 F.2d 555 (7th Cir. 1939); Ward, *Proof of "Discrimination" under the National Labor Relations Act*, 7 GEO. WASH. L. REV. 797, 809-10 (1939).

10. Montgomery Ward & Co. v. NLRB, *supra* note 9.

11. 48 STAT. 926 (1934), as amended, 62 STAT. 991 (1948), 29 U.S.C.A. § 160(c) (Supp. 1953).

12. *See* NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 299, 59 Sup. Ct. 501, 83 L. Ed. 660 (1939).

13. See note 11 *supra*. See, *e.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474, 71 Sup. Ct. 456, 95 L. Ed. 456 (1951).

14. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 65 Sup. Ct. 982, 89 L. Ed. 1372 (1945).

15. See NLRB v. Industrial Cotton Mills, 208 F.2d 87 (4th Cir. 1953). Cusano v. NLRB, 190 F.2d 898 (3d Cir. 1951); Wells, Inc. v. NLRB, 162 F.2d 457 (9th Cir. 1947); NLRB v. Gluek Brewing Co., 144 F.2d 847 (8th Cir. 1944); 2 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING § 306 (1940).

16. Connecticut Chemical Research Corp., 98 N.L.R.B. 160 (1952); Miller (California Willis), 98 N.L.R.B. 325 (1952); Paramount Textile Machinery Co., 97 N.L.R.B. 691 (1951); Wood Mfg. Co., 95 N.L.R.B. 633 (1951); Nina Dye Works Co., 95 N.L.R.B. 824 (1951); 17 NLRB ANN. REP. 135 (1952).

After incantation of the maxim that a man is assumed to intend the foreseeable consequences of his conduct,[17] the Court held in the instant case that the Board may presume an employer's intention if his conduct, alone or in conjunction with the surrounding circumstances, leads the Board, in its expert judgment, to believe that encouragement or discouragement of union membership could reasonably have been foreseen. Thus, the test of the employer's intention becomes the Board's determination of the foreseeability of the effect of the discrimination. Certain types of discriminatory conduct, *e.g.*, disparate wage treatment,[18] discharge for union activity,[19] interference in jurisdictional disputes in favor of one union,[20] enforcement of nonsolicitation rules[21] and discrimination at the instance of a labor union without a valid union-security contract (as in the instant case), may be considered violations *per se*[22] of Section 8(a)(3) since it may be inferred that they inherently encourage or discourage union membership. In such a case, the Board may presume the intention merely from the act itself. In other cases, the presumption may be raised by a consideration of the act in the context of the circumstances surrounding it.

This presumption apparently may be rebutted by showing that under the circumstances encouragement or discouragement would not tend to result from the discrimination and therefore could not reasonably have been anticipated. The presumption, if conclusive, would make the employer's intention irrelevant,[23] and both the Board and the courts have recognized its relevance.[24] The Court did not go so far in the instant case, as Mr. Justice Frankfurter pointed out in a concurring opinion.[25]

The legal principle herein enunciated by the Court for determining an employer's intention in discrimination cases sheds light on a

17. Cramer v. United States, 325 U.S. 1, 31, 65 Sup. Ct. 918, 89 L. Ed. 1441 (1945); 2 WIGMORE, EVIDENCE § 300 (3d ed. 1940).
18. Instant case, 74 Sup. Ct. at 341.
19. NLRB v. Waterman S.S. Corp., 309 U.S. 206, 60 Sup. Ct. 493, 84 L. Ed. 704 (1940); Associated Press v. NLRB, 301 U.S. 103, 57 Sup. Ct. 650, 81 L. Ed. 953 (1937); NLRB v. Industrial Cotton Mills, 208 F.2d 87 (4th Cir. 1953); NLRB v. J. I. Case Co., Bettendorf Works, 198 F.2d 919 (8th Cir.), *cert. denied*, 345 U.S. 917 (1952).
20. NLRB v. Gluek Brewing Co., 144 F.2d 847 (8th Cir. 1944); NLRB v. Hudson Motor Car Co., 128 F.2d 528 (6th Cir. 1942).
21. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 65 Sup. Ct. 982, 89 L. Ed. 1372 (1945); NLRB v. Illinois Tool Works, 153 F.2d 811 (7th Cir. 1946).
22. FORKOSCH, A TREATISE ON LABOR LAW 750 (1953).
23. 9 WIGMORE, EVIDENCE § 2492 (3d ed. 1940).
24. NLRB v. Harris-Woodson Co., 162 F.2d 97 (4th Cir. 1947); NLRB v. Reynolds International Pen Co., 162 F.2d 680 (7th Cir. 1947); NLRB v. Draper Corp., 145 F.2d 199 (4th Cir. 1944); 18 NLRB ANN. REP. 38 (1953); 17 NLRB ANN. REP. 109 (1952). See MANOFF, LABOR RELATIONS LAW 82 (1950); Green, *Evidence of Unfair Labor Practices under the Taft-Hartley Act*, 26 N.C.L. REV. 253 (1948).
25. Instant case, 74 Sup. Ct. at 343-44.

heretofore shadowed concept. Hereafter, courts will not have to labor to find a ground for sustaining the Board's findings.[26] Though the result of the case will probably be to make it more difficult for an employer to defend successfully a discrimination charge on the ground of a lack of intent, that defense is still open. This would not have been true had the Board's contention that the employer's intention is irrevelant prevailed in the instant case.

26. NLRB v. Industrial Cotton Mills, 208 F.2d 87 (4th Cir. 1953); Cusano v. NLRB, 190 F.2d 898 (3d Cir. 1951); Allis-Chalmers Mfg. Co. v. NLRB, 162 F.2d 435 (7th Cir. 1947); NLRB v. Hudson Motor Car Co., 128 F.2d 528 (6th Cir. 1942).