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Recent Developments

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RECENT DEVELOPMENTS

Automobiles — Guest Statute — Owner as Guest in His Own Automobile

Owners, upon Defendant's request, permitted him to drive Owner's late model automobile so that Defendant could determine the quality of that model car. While operating the vehicle, Defendant's ordinarily negligent acts caused injury to the Owner and his car. Defendant, in the suit which followed, moved for dismissal on the ground that the Idaho guest statute¹ barred a claim based on ordinary negligence. *Held*: Absent other facts indicating a different relationship, the granting of a passenger's request to drive, as merely an act of hospitality, is not sufficient to change an owner's status from "host" to "guest." *Peterson v. Winn*, — Idaho —, 373 P.2d 925 (1962).

The common-law rule² requires an automobile driver to exercise the care of an ordinary, responsible man for the safety of his guests.³ Most states have abrogated this rule by the enactment of statutes relieving in varying degrees the owner or operator from liability for injury or death.⁴ Some statutes go to the extent of discharging the owner or operator from all liability except willful or wanton misconduct;⁵ others from liability for all except intentional or intoxicated acts;⁶ and still others from liability for injuries due to ordinary negligence.⁷ The insurance industry fostered the enactment of these statutes to prevent fraud and collusion, *i.e.*, friendly suits, between gratuitous guests in motor vehicles and their owners or operators.⁸ The feeling that the guest should not be permitted to repay his host's hospitality with the institution of a law suit is a secondary

¹ Idaho Code Ann. § 49-1401 (1947) provides:

No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator or caused by his intoxication or his reckless disregard of the rights of others.

² 2 Harper & James, Torts § 16.15 (1956).

³ Comment, 14 Sw. L.J. 72 (1960).

⁴ Morrison & Arnold, *Automobile Guest Laws Today*, 27 Ins. Counsel J. 223 (1960). The author lists 30 states with guest laws. *Id.* at 223-25.

⁵ Ala. Code tit. 36, § 95 (1959); Ark. Stat. §§ 75-913, -914 (1948); Ind. Ann. Stat. §§ 47-1021, -1022 (1952).

⁶ Colo. Rev. Stat. Ann. § 13-9-1 (1953); Iowa Code § 321.494 (1949); Utah Code Ann. §§ 41-9-1, -2 (1960).

⁷ Mich. Stat. Ann. § 9.2102 (1960); S.C. Code § 46-801 (1962).

⁸ *Naudzius v. Lahr*, 253 Mich. 216, 234 N.W. 581 (1931); *Cedziwoda v. Crane-Longley Funeral Chapel*, 155 Tex. 99, 283 S.W.2d 217 (1955).

reason.⁹ Guest statutes are generally held constitutional if they do not completely deny to an injured guest a claim against the owner or operator of the automobile.¹⁰

The question whether at the time of the injury there was a host-guest relationship between the driver of an automobile and one riding therein depends upon the provisions of the particular statute.¹¹ Because the usual guest statute contains no definition of a "guest," determination of the guest status is left to judicial interpretation on a case-by-case basis.¹² Whether one occupies the judicially defined guest status is usually a question of fact for the jury.¹³ In the majority of jurisdictions, a "guest" is one who is invited to enjoy the hospitality of the driver and who accepts without making any return or conferring any benefit upon the driver.¹⁴ When the driver receives a tangible benefit, monetary or otherwise, which is the motivating influence for furnishing the transportation, the rider is a "passenger."¹⁵ The party asserting he is not a guest has the burden of proof,¹⁶ which cannot be discharged by showing the intangible and vaguely defined benefits of hospitality, social relations, and companionship.¹⁷

The instant case squarely presented for determination the question whether an owner may be a "guest" while riding in his own automobile.¹⁸ Although less than a majority of the jurisdictions have considered this problem, definite lines of authority have developed.

⁹ "The situation that guest statutes are designed to prevent is well known, the proverbial ingratitude of the dog that bites the hand that feeds him." *Murray v. Lang*, 252 Iowa 260, 263, 106 N.W.2d 643, 646 (1960). See also *Crawford v. Foster*, 110 Cal. App. 81, 293 Pac. 841 (Dist. Ct. App. 1930).

¹⁰ *Naudzius v. Lahr*, 253 Mich. 216, 234 N.W. 581 (1931); *Elkins v. Foster*, 101 S.W.2d 294 (Tex. Civ. App. 1937).

¹¹ *Nemoitin v. Berger*, 111 Conn. 88, 149 Atl. 233 (1930).

¹² Comment, 14 Sw. L.J. 72 (1960); Comment, 3 Wyo. L.J. 225 (1949).

¹³ *Harper v. Harper*, 225 N.C. 260, 34 S.E.2d 185 (1945).

¹⁴ *Buffat v. Schnuckle*, 79 Idaho 314, 316 P.2d 887 (1957); *Naphtali v. Lafazan*, 8 App. Div. 2d 22, 186 N.Y.S.2d 1010 (1959); *Linn v. Nored*, 133 S.W.2d 234 (Tex. Civ. App. 1939) *error dism. judgm. cor.*; 60 C.J.S. *Motor Vehicles* § 399(5), at 1009 (1949).

¹⁵ *Ray v. Hanisch*, 147 Cal. App. 2d 742, 306 P.2d 30 (Dist. Ct. App. 1957); *Raub v. Rowe*, 119 S.W.2d 190 (Tex. Civ. App. 1938) *error dism. judgm. cor.*

¹⁶ *Martinez v. Southern Pac. Co.*, 45 Cal. 2d 244, 288 P.2d 868 (1955); *In re Wright's Estate*, 170 Kan. 660, 228 P.2d 911 (1951); *Webb v. Huffman*, 320 S.W.2d 893 (Tex. Civ. App. 1959) *error ref. n.r.e.*

¹⁷ *Murray v. Lang*, 252 Iowa 260, 106 N.W.2d 643 (1960). Sharing the expenses of the trip, *i.e.*, paying a share of the gasoline and oil used, fall within this category, and are not such compensation as will remove a person from the status of guest. *Morgan v. Tourangeau*, 259 Mich. 598, 244 N.W. 173 (1932); *Phelps v. Benson*, 252 Minn. 457, 90 N.W. 2d 533 (1958). See also 155 A.L.R. 576 (1945).

¹⁸ Suits seeking property damage from a person who borrowed the owner's car and then wrecked it while the owner was not present do not fall within the guest statute. This class of suits is excluded by wording such as in the Idaho Guest Statute, Idaho Code Ann. § 49-1401 (1947): "No person transported . . . shall have a cause . . ." (Emphasis added.)

One view, best exemplified by the case of *Phelps v. Benson*,¹⁹ holds that the owner may be a guest when riding in his own automobile. This construction is usually given by states which *liberally* construe statutes in derogation of the common law in order to effectuate the legislative intent.²⁰ These courts conclude that the guest statute is designed to thwart collusive litigation when the real party-defendant is an insurance company.²¹ At least one case holding that the owner may be a guest has applied a rebuttable presumption that an occupant riding in a car operated by another person is a guest and has the burden of proving otherwise.²²

The case of *Gledhill v. Connecticut Co.*²³ represents another considerable body of authority which holds that guest statutes, which derogate from the common law, should be *strictly* interpreted.²⁴ Under this view the statute is construed against the owner or operator to allow recovery by the injured occupant for ordinary negligence. The court in *Gledhill* relied upon the dictionary definition of the word "guest"²⁵ and upon the legislative policy of preventing actions by the recipients of a host's hospitality.²⁶ Those states which follow *Gledhill*²⁷ do not quarrel with the definition given the term "guest" by those states following *Phelps*,²⁸ since the former have

¹⁹ 252 Minn. 457, 90 N.W.2d 533 (1958). When two couples travel together in an automobile owned by one for the mutual pleasure of all, the mere fact of ownership does not prevent the owner from being a guest of the operator.

²⁰ See *Naudzius v. Lahr*, 253 Mich. 216, 234 N.W. 581 (1931); *Phelps v. Benson*, 252 Minn. 457, 90 N.W.2d 533 (1958).

²¹ *Scotvold v. Scotvold*, 68 S.D. 53, 298 N.W. 266 (1941).

²² *Murray v. Lang*, 252 Iowa 260, 106 N.W.2d 643 (1960). For other cases holding that the owner may be a guest, see *Sackett v. Haeckel*, 249 Minn. 290, 81 N.W.2d 833 (1957); *Christensen v. Hennepin Transp. Co.*, 215 Minn. 394, 10 N.W.2d 406 (1943); *Gorman v. Bratka*, 139 Neb. 718, 298 N.W. 691 (1941); *Willis v. Fitzgerald Bros. Brewing Co.*, 176 Misc. 197, 25 N.Y.S.2d 647 (App. Div. 1941); *Herzog v. Mittleman*, 155 Ore. 624, 65 P.2d 384 (1937); *Schweidler v. Caruso*, 269 Wis. 438, 69 N.W.2d 611 (1955). Although not within the typical guest statute, in cases in which the question is the liability of the guest for injury to a third person due primarily to the negligence of the driver, it is generally conceded that the owner may be considered as a guest. See, e.g., *Reiter v. Grober*, 173 Wis. 493, 181 N.W. 739 (1921). See also 18 A.L.R. 362 (1922).

²³ 121 Conn. 102, 183 Atl. 379 (1936). The Connecticut Guest Statute was repealed by omission in the 1949 statute revision.

²⁴ See *Prager v. Israel*, 15 Cal. 2d 89, 98 P.2d 729 (1940); *McCann v. Hoffman*, 9 Cal. 2d 279, 70 P.2d 909 (1937); *Smith v. Pope*, 53 Cal. App. 2d 43, 127 P.2d 292 (Dist. Ct. App. 1942); *Smith v. Clute*, 277 N.Y. 407, 14 N.E.2d 455 (1938).

²⁵ A guest is "a person to whom the hospitality of a home, club, etc., is extended." 121 Conn. at 105, 183 Atl. at 380.

²⁶ 121 Conn. at 107, 183 Atl. at 382.

²⁷ See *Richard v. Evans*, 273 Ala. 120, 135 So. 2d 384 (1961); *Ahlgren v. Ahlgren*, 313 P.2d 88 (Cal. Dist. Ct. App. 1957); *Collie v. Aust*, 342 P.2d 998 (Cal. Super. Ct. 1959); *Thomas v. Hughes*, 177 Kan. 347, 279 P.2d 286 (1955).

²⁸ *Phelps v. Benson*, 252 Minn. 457, 90 N.W.2d 533 (1958); *Murray v. Lang*, 252 Iowa 260, 106 N.W.2d 643 (1960).

now expanded the definition of that term.²⁹ However, the important distinction of strict and liberal construction of statutes in derogation of the common law remains.³⁰ Most of these courts recognize a presumption or inference that the owner of a vehicle, though riding in it, retains the right to direct and control the driver.³¹ The influence of the inference undoubtedly varies with the circumstances but is strongest when the operator is the wife or child³² of the owner-passenger; it is weakest when the facts show that the owner has loaned his car and is riding with the borrower.³³ Some courts take the view that the owner's retained right of control is inconsistent with his guest status.³⁴

A third, and more recent, line of cases holds that the owner may or may not be a guest, depending upon the facts and circumstances of each case.³⁵ The instant case falls within this group. These cases first consider the nature of the relationship between the parties at the outset of the journey, and when the status does not change, the host-guest relationship will be respected, regardless of the actual position of the parties in the automobile.³⁶ To determine who is the guest, the courts examine the relationship to find who is receiving the benefit. If the owner by permitting another to drive receives no other benefit, he is not relegated to the position of guest.³⁷

The tack which will be taken by those courts which have not been presented with the problem is difficult to predict. However, foreseeability is enhanced by determining whether the jurisdiction gives statutes in derogation of the common law a strict or liberal construction.³⁸ This approach is not without difficulty, since the guest statute must be construed to effect the purpose sought to be accomplished.³⁹ In jurisdictions where the policy of the legislature is to

²⁹ *Wilson v. Workman*, 192 F. Supp. 852 (D. Del. 1961); *Lorch v. Elgin*, 369 Pa. 314, 85 A.2d 841 (1952).

³⁰ The distinction was drawn in *Henline v. Wilson*, 174 N.E.2d 122, 125 (Ohio Ct. App. 1960), in which that court, in a strict construction jurisdiction, said: "Should we adopt a liberal construction we would probably find that the owner was a guest since he was really enjoying the hospitality of the driver."

³¹ *Grover v. Sharp & Fellows Contracting Co.*, 66 Cal. App. 2d 736, 153 P.2d 83 (Dist. Ct. App. 1944); *Beam v. Pittsburgh Rys.*, 366 Pa. 360, 77 A.2d 634 (1951).

³² *Cowart v. Lewis*, 151 Miss. 221, 117 So. 531 (1920).

³³ *Smith v. Spirek*, 196 Iowa 1328, 195 N.W. 736 (1923).

³⁴ *Ray v. Hanisch*, 147 Cal. App. 2d 742, 306 P.2d 30 (Dist. Ct. App. 1957).

³⁵ See *Helms v. Leonard*, 170 F. Supp. 143 (D. Va. 1959), *aff'd*, 269 F.2d 48 (4th Cir. 1959); *Naphtali v. Lafazan*, 8 App. Div. 2d 22, 186 N.Y.S.2d 1010 (1959).

³⁶ *Helms v. Leonard*, *supra* note 35. However, some cases have held that a person initially a guest remains a guest despite his subsequent conduct. See *Atkins v. Hemphill*, 33 Wash. 2d 735, 207 P.2d 195 (1949).

³⁷ *Naphtali v. Lafazan*, 8 App. Div. 2d 22, 186 N.Y.S.2d 1010 (1959).

³⁸ Note, 38 Texas L. Rev. 110 (1960).

³⁹ *Gregory v. Otts*, 329 S.W.2d 904 (Tex. Civ. App. 1959) *error ref. n.r.e.*

prevent collusive suits, if the owner is allowed to sue his driver, the possibility of collusion is equally as great as when the guest sues the host.⁴⁰ The general tort rule that a volunteer, *i.e.*, the guest who assumes the position of driver, will be liable for ordinary negligence in rendering aid to another if he does so negligently, no matter how good his intentions may be—the “officious intermeddler” doctrine⁴¹—can have no application in jurisdictions where the legislative policy is to prevent suits by a recipient of a host’s hospitality. The best approach, evidenced by the instant case, ignores technicalities based upon strict or liberal construction of the statute and the consequences of adopting one definition of guest as opposed to another⁴² and places the decision solely upon the facts of each case. Although, under this view, the result of a particular case cannot always be predicted, the court is free to dispense justice as required by the specific circumstances and to give effect to legislative policy. Under this rule the owner may be brought within the guest statute by a showing that the motivation for the trip was the conferring of a definite tangible benefit upon him.⁴³ Should the courts refuse to permit an owner to be a guest in a proper case, it is probable that either remedial legislation will be enacted⁴⁴ or that insurance companies will raise their rates to compensate for the new losses.⁴⁵

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⁴⁰ Note, 37 Neb. L. Rev. 467 (1958). However, since most modern automobile insurance policies extend coverage to whoever is driving, the question of ownership is immaterial insofar as liability of the insurance company is concerned. Note, 32 So. Cal. L. Rev. 93 (1959).

⁴¹ Gates v. Chesapeake & O.R.R., 185 Ky. 24, 213 S.W. 564 (1919); Dunham v. Village of Canisteo, 303 N.Y. 498, 104 N.E.2d 872 (1952). See also Prosser, Torts § 38 (2d ed. 1955).

⁴² In jurisdictions which use a dictionary definition of “guest,” *viz.*, a person to whom the hospitality of a home, club, etc. is extended, the owner could never be a guest in his own car since it would require that he be the recipient of his own hospitality. See Note, 4 U.C.L.A.L. Rev. 652 (1957).

⁴³ See Note, 9 Baylor L. Rev. 238 (1957).

⁴⁴ See, *e.g.*, Cal. Vehicle Code § 17158. See also Note, 37 Neb. L. Rev. 467 (1958).

⁴⁵ Texas courts have not been called upon to consider whether the owner may be a guest. The Texas statute, Tex. Rev. Civ. Stat. Ann. art. 6701(b) (1960), was passed in 1931 and was derived from the Connecticut statute, former Conn. Gen. Stat. Ann. § 1628 (1930), which was repealed in 1949 by omission from the 1949 revision of the General Statutes of Connecticut. The Texas statute provides, in substance, that a guest may recover only if his injury was caused by the host’s intentional act or by his heedlessness or reckless disregard of the rights of others. A Texas court has indicated that the Texas guest statute should be construed in the light of Connecticut decisions before the enactment of the Texas statute. Johnson v. Smither, 116 S.W.2d 812 (Tex. Civ. App. 1938) *error disp.* Therefore, if the *Gledhill* case (see note 23 *supra*) were followed, Texas might hold that the owner is not a guest. Further, reliance upon the dictionary definition of guest has precedent in Texas. McClain v. Carter, 278 S.W.2d 877 (Tex. Civ. App. 1955) *error ref. n.r.e.* But, unlike Connecticut, Texas is required by specific statutory authority to construe statutes in derogation of the common law liberally. Tex. Rev. Civ. Stat. Ann. art. 10, § 8 (1948). *But see* Farmers’ & Mechanics’ Nat’l Bank v. Hanks, 104 Tex. 320, 137 S.W. 1120 (1911); Silurian Oil Co. v. White, 252 S.W. 569 (Tex. Civ. App. 1923) *error ref.*,

Choice-of-Law — Multi-State Torts Under Federal Tort Claims Act — Application of Entire Substantive Law of State Where Act or Omission Occurred

A scheduled commercial airliner, bound from Oklahoma to New York, crashed in Missouri. Plaintiffs, legal representatives and survivors of the passengers and crew, sued the United States in the federal district court sitting in Oklahoma. The complaint alleged that an agent of the Civil Aeronautics Agency in Tulsa, Oklahoma, had violated provisions of the Civil Aeronautics Act and the corresponding regulations¹ and that such failure rendered the United States liable under the Federal Tort Claims Act² and the Oklahoma Wrongful Death Act.³ Prior to the institution of the suit, each of the plaintiffs had received or had been tendered a settlement of 15,000 dollars from the airline,⁴ the maximum recovery allowed under the Missouri Wrongful Death Act.⁵ The district court dismissed the suit, holding, *inter alia*,⁶ that if Oklahoma law were applicable under the Tort Claims Act, then the entire law of Oklahoma, including its choice-of-law rules, was applicable. Further recovery was thus denied since the Oklahoma choice-of-law rules would apply the law of Missouri, the place where the negligence had its operative effect.⁷ A majority⁸ of the court of appeals upheld the

where statutes were strictly construed. Therefore, a decision following the *Phelps* rule, holding that the owner is a guest, is not beyond possibility. It is submitted that the Texas courts should not adopt a hard and fast rule classifying the owner as guest or otherwise, but should, in accordance with the theory of the instant case, let each case turn upon its specific facts.

¹ Plaintiffs alleged that the crash was caused by a fire in one of the engines which, in turn, resulted from the failure of a defective and unairworthy cylinder which had been installed in the overhaul depot. Under the Civil Aeronautics Act, 72 Stat. 778, 49 U.S.C. § 1425 (1958), the administrator of the Federal Aviation Agency is responsible for the enforcement of rules and regulations controlling inspection, maintenance, overhaul, and repair of all equipment used in air transportation.

² Provisions of the Tort Claims Act are found in 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80 (1958). The pertinent provisions, §§ 1346 and 2674 are quoted in notes 16, 17 *infra*. Citations to relevant U.S.C. sections are hereafter referred to as sections of the "Tort Claims Act."

³ Okla. Stat. Ann. tit. 12, §§ 1051-54 (1961). Oklahoma has no limitation on recovery from a tortfeasor in a wrongful death action.

⁴ The United States filed a third party complaint against the airline, seeking reimbursement for any amount plaintiffs might recover from the government.

⁵ At the time of this suit, maximum recovery was determined by Mo. Ann. Stat. § 537.090 (1949), subsequently amended to allow a maximum recovery of \$25,000, Mo. Ann. Stat. § 537.090 (1962).

⁶ The district court alternatively ruled that the Oklahoma Wrongful Death Act could not be applied extra-territorially when a negligent act or omission occurred in Oklahoma and the injury in Missouri.

⁷ See *Gochenour v. St. Louis S.F. Ry.*, 205 Okla. 594, 239 P.2d 769, 771 (1959); *Miller v. Tennis*, 140 Okla. 185, 282 Pac. 345, 348 (1929).

⁸ 285 F.2d 521 (10th Cir. 1960).

decision.⁹ On certiorari,¹⁰ *held, affirmed*: The entire law, including choice-of-law rules, of the jurisdiction where a negligent act or omission occurs is to be applied in multi-state torts arising under the Federal Tort Claims Act. *Richards v. United States*, 369 U.S. 1 (1962).

As a general choice-of-law or conflict-of-laws rule, tort liability is governed by the law of the *place of injury*, when the act or omission and the injury occur in different jurisdictions.¹¹ The rule applies regardless of the forum.¹² However, only those foreign laws which are classified as "substantive" will be applied by the forum where the action is tried; the forum will use its own "procedural" rules.¹³ Although agreeing that the "place of the wrong" generally governs, some courts have held that such place is determined by where the wrongful act or omission occurred, rather than where the injury resulted.¹⁴

The Tort Claims Act was designed to remove sovereign immunity from the United States and, with certain exceptions, to render it liable for its torts.¹⁵ Section 1346(b) of the Tort Claims Act equates the liability of the federal government with that of a private person "in accordance with the law of the place where the act or omission occurred."¹⁶ According to section 2674, the liability of the United

⁹ *Id.* at 526. Chief Judge Murrah dissented, urging that only the internal law of Oklahoma was applicable and that it was error to apply the Oklahoma choice-of-law rules.

¹⁰ 366 U.S. 916 (1961).

¹¹ *Alabama G.S.R.R. v. Carroll*, 97 Ala. 126, 11 So. 803 (1892); *Cameron v. Vandegriff*, 53 Ark. 381, 13 S.W. 1092 (1890); Restatement, Conflict of Laws §§ 377-78 (1934). See also 77 A.L.R.2d 1266 (1961). To illustrate the general rule, suppose *D* standing in state *X* throws a rock which strikes and injures *P* who is standing in state *Y*. *P*'s substantive rights are determined by the law of the place of the injury, *viz.*, state *Y*.

¹² *Hunter v. Derby Foods, Inc.*, 110 F.2d 970 (2d Cir. 1940). The general rule has been applied to airline crashes similar to the one involved in the principal case; however, the United States was not a party. See *Riley v. Capital Airlines, Inc.*, 24 Misc. 2d 457, 199 N.Y.S.2d 515 (Sup. Ct. 1960); *Faron v. Eastern Airlines*, 193 Misc. 395, 84 N.Y.S.2d 568 (Sup. Ct. 1948).

¹³ Restatement, Conflict of Laws §§ 7, 584-85 (1934).

¹⁴ *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957); *Haumschild v. Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959). See also *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953). Several writers have critically reviewed the definition of the "place of the wrong" concept which underlies the general rule. See, e.g., Cook, *Tort Liability and Conflict of Laws*, 35 Colum. L. Rev. 202 (1935); Ehrenzweig, *The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement*, 36 Minn. L. Rev. 1 (1951); Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 Tul. L. Rev. 4, 165 (1944).

¹⁵ See *Feres v. United States*, 340 U.S. 135 (1950), for a detailed analysis of the purposes of the Tort Claims Act.

¹⁶ 28 U.S.C. § 1346(b) (1958) provides:

District courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States,

States shall be determined "in the same manner and to the same extent as that of a private individual under like circumstances."¹⁷ It has been determined that any interpretation of section 1346(b) must be made only in the light of the express wording of section 2674, since the sections must be read in *pari materia*.¹⁸

Literally interpreted, section 1346(b), when it speaks of the law of the jurisdiction in which the act or omission occurs, sets forth a basis for determining the rights of parties to a multi-state tort action contrary to the general choice-of-law rule, which applies the law of the place of injury.¹⁹ However, the legislative history of the choice-of-law provision of the Tort Claims Act does not conclusively substantiate a literal interpretation.²⁰ The language of section 1346(b), "where the act or omission occurred," is also found in the venue provision of the Tort Claims Act.²¹ Assistant Attorney-General Shea, while testifying at the time of its adoption, was asked where a claimant under the Tort Claims Act could bring his suit. He answered, "either where the claimant resides, or in the *locale of the injury or damage*."²² (Emphasis added.) If the words "act or omission" in the venue provision referred to the place where the claimant was injured or damaged, then the identical words found in section 1346(b) might have been given the same construction.²³ However, the majority of cases decided prior to the instant case had not so held.²⁴

Three distinct interpretations of the language in sections 1346(b) and 2674 developed in the courts of appeal faced with multi-state tort claims. One view applied the law of the jurisdiction where the negligent act or omission had its operative effect.²⁵ The other two

if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

¹⁷ 28 U.S.C. § 2674 (1958) provides: "The United States shall be liable, respecting . . . tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ."

¹⁸ *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957). See also *United States v. John Hancock Mut. Life Ins. Co.*, 364 U.S. 301, 308-09 (1960); Reviser's Notes following 28 U.S.C. § 2674 (1946); S. Rep. No. 1400, 79th Cong., 2d Sess. 32 (1946).

¹⁹ See authorities cited note 11 *supra*.

²⁰ *Hearings on H.R. 5373 and H.R. 6463 Before the House Committee on the Judiciary*, 77th Cong., 2d Sess. (1942); S. Rep. No. 1400, 79th Cong., 2d Sess. 32 (1946); 69 Cong. Rec. 2192-93, 3118 (1928); 86 Cong. Rec. 12024 (1940).

²¹ The venue provision of the act provides that suit may be brought "where the plaintiff resides or wherein the act or omission complained of occurred." 28 U.S.C. § 1402(b) (1958).

²² *Hearings, op. cit. supra* note 20, at 9, 29, 30.

²³ See *United States v. Union Trust Co.*, 221 F.2d 62, 80-81 (D.C. Cir.), *aff'd*, 350 U.S. 907 (1955).

²⁴ *Voytas v. United States*, 256 F.2d 786 (7th Cir. 1958); *United States v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir. 1955), *aff'd*, 350 U.S. 907 (1955); *Landon v. United States*, 197 F.2d 128 (2d Cir. 1952); *cf. United States v. Marshall*, 230 F.2d 183 (9th Cir. 1956).

²⁵ See *United States v. Marshall, supra* note 24.

views were commonly known as the "internal law"²⁶ and the "substantive law"²⁷ approaches and were similar in that both rationales applied the law of the jurisdiction where the negligent act or omission occurred in order to determine the rights of the litigants. However, the "internal law" rationale excluded application of any choice-of-law rules, while the "substantive law" interpretation applied the entire law, including any choice-of-law rules, of the state where the act or omission occurred.

Those courts applying the internal law of the jurisdiction where the negligent act had its operative effect relied upon the general choice-of-law rule and Shea's testimony to support their theory.²⁸ However, the decisions of a majority of appellate courts²⁹ have construed section 1346(b) to mean that Congress made a deliberate choice of words and intended to effectuate a basis contrary to the general choice-of-law rule for determining liability, thus giving rise to the "internal law" and "substantive law" theories. Both of the latter two theories were reasonable constructions of the explicit language found in section 1346(b), *i.e.*, "law of the place where the act or omission occurred." However, the "substantive law" interpretation generally³⁰ permitted the courts to give meaning to section 2674, *viz.*, that the liability of the United States should be determined "in the same manner and to the same extent as a private individual under like circumstances." Moreover, it had been determined that Congress did not intend to impose a distinct federal rule for determining the liability of the United States under the Tort Claims Act but meant to judge government liability by the same standards that are used to determine an individual's liability, namely, the local or state law.³¹

In the instant case, Chief Justice Warren, writing for the Court, distinguished the venue provision³² and section 1346(b). He stated that Shea's testimony "bears no relation to the choice-of-law problems, and . . . the considerations underlying the problem of venue are substantially different from those determining applicable law. . . . [Therefore,] we are not persuaded to allow an isolated piece of legislative history to detract from the Act the words Congress

²⁶ See, *e.g.*, *United States v. Union Trust Co.*, 211 F.2d 62 (D.C. Cir.), *aff'd*, 350 U.S. 907 (1955).

²⁷ See, *e.g.*, *Landon v. United States*, 197 F.2d 128 (2d Cir. 1952).

²⁸ *United States v. Marshall*, 230 F.2d 183 (9th Cir. 1956).

²⁹ *Voytas v. United States*, 256 F.2d 786 (7th Cir. 1958); *United States v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir.), *aff'd*, 350 U.S. 907 (1955); *Landon v. United States*, 197 F.2d 128 (2d Cir. 1952); *cf. United States v. Marshall*, *supra* note 28.

³⁰ See note 39 *infra*.

³¹ *Feres v. United States*, 340 U.S. 135, 141 (1950).

³² 28 U.S.C. § 1402(b) (1958).

expressly employed.”³³ Choosing not to accept the internal law of the place where the negligence had its operative effect as a suitable construction of “act or omission” in section 1346(b),³⁴ the Court passed to the choice between the “internal law” and “substantive law” interpretations. In so doing, the Court looked to the provisions of the entire Tort Claims Act “and to its object and policy.”³⁵ The Court refused to “assume that Congress intended to set the courts completely adrift from state law with regard to questions for which it . . . [had] not provided a specific and definite answer in an act such as the . . . [Tort Claims Act] which . . . is so intimately related to state law.”³⁶ Consequently, the “substantive law” approach was adopted.³⁷

The underlying purpose of the Tort Claims Act is evident; it is also clear that Congress did not intend to create an entirely distinct system of federal liability.³⁸ Thus, the “substantive law” approach better satisfies the purpose of the act, since under that theory federal courts can generally treat the United States as a private individual in like circumstances. The “internal law” rationale is inconsistent with this philosophy because it extends limitations upon *how much* state law will be applied without regard to the state’s particular policy or precedent. As a practical matter, the discarded “internal law” and “law of the place of injury” rationales did not provide the flexibility of application necessary in multi-state tort claims. The “substantive law” rationale is the more desirable since its application is in accord with the policy, as found in the choice-of-law rules, of the state where the act or omission occurs. If the plaintiffs had sued both the United States and the airline in the *Richards* case, the construction adopted would have determined the liability of the United States “in the same manner and to the same extent as

³³ 369 U.S. at 9-10 n.20.

³⁴ *Id.* at 10.

³⁵ *Id.* at 11.

³⁶ *Ibid.*

³⁷ It has been suggested that the Court has utilized the technique of *renvoi* in adopting the “substantive law” approach. See *In re Schneider’s Estate*, 198 Misc. 1017, 96 N.Y.S.2d 652 (Surr. Ct. 1950); *In re Zietz Estate*, 198 Misc. 77, 96 N.Y.S.2d 442 (Surr. Ct. 1950); *University of Chicago v. Dater*, 277 Mich. 658, 270 N.W. 175 (1936) for applications of this principle. However, the writer feels *renvoi* is not present in the *Richards* case since Missouri “internal law” determines liability without reference to the Missouri choice-of-law rule. Use of the latter rule would result in an endless stacking of conflicts rules before a decision is reached—seemingly the situation when the technique of *renvoi* would be present.

³⁸ The instant case represents a situation in which the Tort Claims Act creates a cause of action against the United States, and the issue of applicable law is controlled by the language expressed in the statute, as construed by the Court. See 369 U.S. at 7. This must be distinguished from a situation in which federal jurisdiction arises from diversity of citizenship. See *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487 (1941).

a private individual under like circumstances."³⁹ The decision does not create new problems of "forum shopping," because the federal district court of the forum state must apply the entire substantive law of the jurisdiction where the act or omission occurred, including the choice-of-law rules. The rule adopted by the Supreme Court will continue to allow states to determine liability according to established and familiar rules for torts committed entirely within a state, yet it also provides a flexible rule which will apply local policy as expressed in the state's choice-of-law rules in the handling of multi-state tort claims.

Donald Lucas

Constitutional Law — Eminent Domain — Taking of Land by a Nuisance

Plaintiff-homeowners sued the United States under the Tucker Act¹ and under the fifth amendment² for damages which arose from an alleged taking of their property by the United States Air Force. Following the acquisition of Plaintiffs' homes, an Air Force base nearby had been enlarged to accommodate jet aircraft, which subsequently had caused smoke, oily deposits, noise, and strong vibrations to be visited upon Homeowners' properties. Plaintiffs did not allege or prove that the aircraft flew directly over the property but contended only that the nuisance constituted a "taking" without compensation since it caused actual physical damage to their property as well as substantial interference with the normal incidents of use and enjoyment. *Held*: Noise, vibrations, and smoke which interfere with the use and enjoyment of property without a physical invasion of the property itself do not constitute a compensable taking under the fifth amendment. *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

³⁹ Jurisdiction over the airline would arise from diversity. The federal court sitting in Oklahoma would then apply Oklahoma substantive law under the "Erie doctrine," hence, also determining the airline's liability by Missouri law. See *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487 (1941). The "internal law" rationale would determine the liability of the United States by Oklahoma law and the airline's liability by Missouri law. However, the venue provision of the Tort Claims Act allows suit to be brought where all the plaintiffs reside or where the act or omission occurred. 28 U.S.C. § 1402(b) (1958). See also *Knecht v. United States*, 242 F.2d 929 (3d Cir. 1957); *Olson v. United States*, 175 F.2d 510 (8th Cir. 1949). Therefore, situations can arise when the liability of the United States and that of a private individual will not be determined in the same manner.

¹ 28 U.S.C. § 1346(a)(2) (1958). The Tucker Act provides that an action may be maintained against the United States for a claim "founded . . . upon the Constitution . . . or upon any express or implied contract with the United States."

² The U.S. Const. amend. V: ". . . nor shall private property be taken for public use, without just compensation."

Not every governmental interference which adversely affects a private economic interest amounts to a constitutional taking.³ Unlike many state constitutions which provide for payment when property has been taken or *damaged* as a result of the exercise of the power of eminent domain,⁴ the federal constitution provides for compensation only in the case of a *taking* of private property for public use.⁵ However, what constitutes a compensable taking cannot be defined precisely.⁶ It was early recognized that the term "property" consisted of both the corporeal interest itself and certain rights in and over the land.⁷ From this it was reasoned that a deprivation of those rights was equivalent to a use of the property itself and, hence, a "taking" in the constitutional sense.⁸ However, by limiting the words "taken" and "property" to their "obvious and popular meaning,"⁹ courts found a "taking" only in cases in which property was actually seized, rather than in those in which property was merely injured by non-dispossessory acts.¹⁰ As a result, throughout much of the nineteenth century mere damage, without a trespass, was not recognized under the fifth amendment.¹¹

In the latter half of the nineteenth century, "the obvious unfairness to property owners . . ."¹² began to influence the courts. In the leading case of *Pumpelly v. Green Bay Co.*,¹³ the Supreme Court said:

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, . . . [it should] be held that if the

³ *United States v. Dickinson*, 331 U.S. 745 (1947); *United States v. Willow River Power Co.*, 324 U.S. 499 (1945); *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922); *Harris v. United States*, 205 F.2d 765 (10th Cir. 1953); *Swetland v. Curtis Airports Corp.*, 55 F.2d 201 (6th Cir. 1932).

⁴ In 2 *Nichols*, *Eminent Domain* 324-25 (3d ed. 1950), there is a list of 25 state constitutions which provide, in substance, that private property shall not be publicly taken or *damaged* without compensation.

⁵ *Harris v. United States*, 205 F.2d 765, 767 (10th Cir. 1953). See also U.S. Const. amend. V, quoted note 2 *supra*; *United States v. Willow River Power Co.*, 324 U.S. 499 (1945); *Sharpe v. United States*, 191 U.S. 341 (1903); *Stephenson Brick Co. v. United States*, 110 F.2d 360 (5th Cir. 1940).

⁶ *Harris v. United States*, *supra* note 5.

⁷ 1 *Lewis*, *Eminent Domain* 52 (3d ed. 1909); *cf.* 3 *Bentham*, *Works* 182 (1943 ed.). *Nichols* states that the word "property" "has been used with reference to the corporeal object which is the subject of ownership, and it has been used to indicate the aggregate rights which an owner possesses in or with respect to such corporeal object." 2 *Nichols*, *op. cit. supra* note 4, at 2.

⁸ 1 *Lewis*, *op. cit. supra* note 7, at 56.

⁹ *Gibson v. United States*, 166 U.S. 269, 274 (1897). See also *Transportation Co. v. Chicago*, 99 U.S. 635 (1878); *Marchant v. Pennsylvania R.R.*, 153 U.S. 380 (1893).

¹⁰ *Gibson v. United States*, *supra* note 9.

¹¹ *Spies & McCoid*, *Recovery of Consequential Damages in Eminent Domain*, 48 Va. L. Rev. 437, 442 (1962). See also *Kratovil & Harrison*, *Eminent Domain—Policy and Concept*, 42 Calif. L. Rev. 596, 599 (1954).

¹² *Spies & McCoid*, *supra* note 11, at 442.

¹³ 80 U.S. (13 Wall.) 166 (1871).

government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.¹⁴

Though the case represented a departure from the strict interpretation of "taking,"¹⁵ the opinion still required physical invasion of the land.¹⁶ It was some time before courts awarded compensation for a "taking" which consisted only of consequential damages to property.¹⁷ In *Bedford v. United States*,¹⁸ the Court emphasized that the distinction between mere damages as a result of a taking and an actual taking itself had to be observed in applying the constitutional provision.¹⁹ Subsequent cases continued to elaborate upon this dichotomy.²⁰

The prevailing view today appears to be that any substantial interference which destroys or lessens the value of private property or the rights or enjoyment incidental to such property is, in fact and in law, a "taking" in the constitutional sense, even though title and possession of the owner remain undisturbed.²¹ The eminent domain provision of the constitution is thought to be addressed to every sort of interest a citizen possesses.²² As the Supreme Court stated in *United States v. Causby*,²³ ". . . it is the owner's loss, not the taker's gain, which is the measure of the value of the property taken."²⁴ However, this rule is modified by its corollary that consequential damages²⁵

¹⁴ *Id.* at 177.

¹⁵ See *United States v. Cress*, 243 U.S. 316 (1917), in which the Court held there were constitutional takings although the government had not directly appropriated the title, possession, or use of the properties. See also *United States v. Lynah*, 188 U.S. 445 (1903).

¹⁶ See Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 Yale L.J. 221, 235 (1931).

¹⁷ See *Sanguinetti v. United States*, 264 U.S. 146 (1924); *Bothwell v. United States*, 254 U.S. 231 (1920); *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914); *Manigault v. Springs*, 199 U.S. 473 (1905); *Bedford v. United States*, 192 U.S. 217 (1904); *Transportation Co. v. Chicago*, 99 U.S. 635 (1878). See also 1 Lewis, *op. cit. supra* note 7, at 445-46.

¹⁸ 192 U.S. 217 (1904).

¹⁹ *Id.* at 224.

²⁰ See *Griggs v. Allegheny County*, 369 U.S. 84 (1962), 16 Sw. L.J. 346 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958); *United States v. Causby*, 328 U.S. 256 (1946); *United States v. Willow River Power Co.*, 324 U.S. 499 (1945); *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914); *Harris v. United States*, 205 F.2d 765 (10th Cir. 1955).

²¹ 2 Nichols, *op. cit. supra* note 4, at 259.

²² *United States v. Dickinson*, 331 U.S. 745, 748 (1947). See also *Bartholomae Corp. v. United States*, 253 F.2d 716 (9th Cir. 1957).

²³ 328 U.S. 256 (1946).

²⁴ *Id.* at 261.

²⁵ Consequential damages are harmful effects to property not actually taken or entered

are *damnum absque injuria* and not compensable,²⁶ except in cases of severe interference equivalent to a deprivation of the use or enjoyment of property²⁷ which amounts to the imposition of a servitude.²⁸

Unlike the situation in *Causby* where there had been continuous invasions of the airspace above the landowner,²⁹ Homeowners in the instant case did not allege that the flights were made over their property but contended that the noise, vibration, and smoke alone were sufficient to amount to a taking under the Constitution.³⁰ Nevertheless, the trial court³¹ considered *Causby* a controlling precedent and held that since there was no trespass over the property, there was no taking which required compensation.³² The majority of the Tenth Circuit likewise rejected Homeowners' argument, noted the regular flights over the property in *Causby* and similar cases,³³ and held that absent such physical invasion, recovery had been uniformly denied.³⁴ The disturbance here was said to be merely a neighborhood inconvenience.³⁵ The weakness of this reasoning is that in *Causby*, even though the Court held that overhead flights were a necessary ingredient for recovery, the language employed³⁶ clearly indicated that it was not the overhead flights that constituted the taking but the noise and interference with the enjoyment and use of the land.³⁷ By relying upon that portion of *Causby* that required the overhead flights, the Tenth Circuit harked back to the old physical interpretation of "taking."³⁸ As a result the land owners' rights to recover continue to be unnecessarily restricted (1) because of the inadequacy of tort actions when the damage is the incidental result of a non-trespassory act, and (2) because it appears from

but injured as a natural result of an act lawfully done by another. 29 C.J.S. *Eminent Domain* § 111 (1941).

²⁶ 2 Nichols, *op. cit. supra* note 4, at 339.

²⁷ *Id.* at 343.

²⁸ Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922). See also United States v. Dickinson, 331 U.S. 745, 748 (1947); Yazel v. United States, 93 F. Supp. 1000 (Ct. Cl. 1950).

²⁹ United States v. Causby, 328 U.S. 256 (1946).

³⁰ See the court of appeals opinion, 306 F.2d at 584.

³¹ The lower court's opinion was not reported. See 306 F.2d at 582-83 for portions of that court's findings.

³² *Id.* at 582.

³³ *Id.* at 584; *cf.* Bartholomae Corp. v. United States, 253 F.2d 716 (9th Cir. 1957); Freeman v. United States, 167 F. Supp. 541 (W.D. Okla. 1958).

³⁴ 306 F.2d at 585.

³⁵ *Id.* at 586.

³⁶ The Court stated in United States v. Causby, 328 U.S. 256 (1946), that: "Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." *Id.* at 266.

³⁷ *Id.* at 269.

³⁸ See text accompanying notes 9, 10 *supra*.

Causby that flights above 500 feet are beyond the reach of the landowner and his objections about interference with his property rights,³⁹ since the space over one's property above that height is in the public domain.⁴⁰

The usefulness of air transportation warrants that its development be not limited by old concepts of property rights, yet fairness requires that those injured be reasonably compensated for operations that immediately and directly limit the exploitation of their properties.⁴¹ Chief Judge Murrah, in his dissent⁴² in the principal case, recognized the need for protecting the property owner and said that the test should be whether the interference is sufficiently direct and peculiar, and of sufficient magnitude to require, in the interest of justice, that the burden imposed be borne by the public rather than by the individual.⁴³ In rejecting that test and in failing to set forth clearly a test of their own, the majority of the Tenth Circuit left in doubt exactly when, if ever, interference with a protectable property right will constitute a compensable taking.⁴⁴ Previous cases in this area are confusing and of little help.⁴⁵ As a result, there is no clear indication of the theory underlying suits against the federal government for such "takings."⁴⁶

Now is the time for a re-evaluation of the principles and policies which have produced this result.⁴⁷ Since considerations of public policy should control,⁴⁸ Congressional legislation is needed.⁴⁹ However, until Congress furnishes the necessary relief, the courts should

³⁹ Cf. *Matson v. United States*, 171 F. Supp. 283, 286 (Ct. Cl. 1959).

⁴⁰ "Navigable airspace means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft." 72 Stat. 737, 49 U.S.C. § 1301(24) (Supp. IV, 1962). Civil Air Regulation § 60.17 provides: "Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes: 1000 feet over congested areas and 500 feet over other than congested areas." 14 C.F.R. § 60.17 (1956).

⁴¹ *Matson v. United States*, 171 F. Supp. 283 (Ct. Cl. 1959). Compare *Spies & McCoid*, *supra* note 11, at 451.

⁴² 306 F.2d at 586.

⁴³ *Id.* at 588.

⁴⁴ The majority stated: ". . . [T]hese disturbing conditions . . . do not effect an actual displacement of a landowner. . . . The damages are no more than a consequence of the operations of the Base . . ." 306 F.2d at 585. (Emphasis added.)

⁴⁵ See *United States v. Causby*, 328 U.S. 256 (1946); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1923); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922); *United States v. Cress*, 243 U.S. 316 (1917); *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871); *Swetland v. Curtiss Airports Corp.*, 55 F.2d 201 (6th Cir. 1932); *Freeman v. United States*, 167 F. Supp. 541 (W.D. Okla. 1958).

⁴⁶ See *United States v. Dickinson*, 331 U.S. 745, 748 (1947).

⁴⁷ See *Spies & McCoid*, *supra* note 11, at 449.

⁴⁸ *Cormack*, *supra* note 16, at 259.

⁴⁹ Cf. *Spies & McCoid*, *supra* note 11, at 456. See also *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945).

recognize that the rights of ownership include the right to reasonable use and enjoyment as well as the corporeal rights incident to property ownership and that when there is a violation of any of these rights, property is "taken."⁵⁰ Problems caused by technological advances cannot be solved by the application of rigid constitutional restraints formulated and enforced by courts,⁵¹ but only by the adaptation of the law to the economic and social needs of the times.⁵² The ever-increasing demands of modern transportation must be met for the good of society, yet there is no reason to place the brunt of the expense on those few unfortunate individuals who suffer direct property loss because of this expansion. The test enunciated by Chief Judge Murrah⁵³ would provide a logical and workable method of solving the problem. Under that rule, each case would, as it should, be weighed on its individual facts and compensation meted out as justice requires. As it stands, the principal case permits technicalities to override realities and should not be followed.

Fred Kolodey

Constitutional Law — Justiciable Controversy — Mr. Justice Frankfurter and Judicial Restraint

Connecticut's penal statutes prohibit the use of contraceptive devices and the giving of medical advice in the use of such devices.¹ Appellants, a married couple and a married woman, after medical determination that another pregnancy would be injurious to the

⁵⁰ Cormack, *supra* note 16, at 259.

⁵¹ See dissent in *United States v. Causby*, 328 U.S. 256, 274 (1946).

⁵² *Swetland v. Curtiss Airports Corp.*, 55 F.2d 201 (6th Cir. 1932).

⁵³ See text accompanying note 42 *supra*. In the recent case of *Thornburg v. Port of Portland*, ___ Ore ___, 376 P.2d 100 (1962), the Oregon Supreme Court recognized that Chief Judge Murrah's dissenting opinion was the better-reasoned analysis of the legal principles involved and added, "It is sterile formality to say that the government takes an easement in private property when it repeatedly sends aircraft directly over the land, . . . but does not take an easement when it sends aircraft a few feet to the right or left of the perpendicular boundaries [of such land]." *Id.* at 109.

¹ Conn. Gen. Stat. Rev. § 53-32 (1958):

Use of drugs or instruments to prevent conception. Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.

The Connecticut statute specifically outlaws only the *use* of contraceptive devices. The sale or distribution of such devices and the giving of information concerning their use are forbidden on the basis of the state's general accessory law, Conn. Gen. Stat. Rev. § 54-196 (1958): "*Accessories.* Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." See *State v. Nelson*, 126 Conn. 412, 11 A.2d 856 (1940).

health or life of the women,² sought a declaratory judgment that the statute deprived them of life and liberty without due process of law. Appellants' physician,³ alleging identical facts, contended that the statute prevented him from prescribing proper medical treatment⁴ and hence deprived him of liberty and property without due process of law. Appellee, the state's attorney, admitted that, in the course of his public duty, he intended to prosecute offenses against Connecticut law and that the use of and advice concerning contraceptives would constitute offenses.⁵ There was no evidence presented that the state had ever attempted to enforce the statute through criminal prosecution of spouses.⁶ *Held, dismissed*: A state penal statute, which has never been enforced and in all likelihood never will be enforced, presents no realistic threat of prosecution and thus no justiciable controversy in a declaratory judgment action challenging the statute as unconstitutional. *Poe v. Ullman*, 367 U.S. 497 (1961).

The jurisdiction of the Supreme Court can be invoked only under circumstances constituting a "case" or "controversy" within the

² Appellant Jane Doe, during a recent pregnancy, had developed a severe heart condition resulting in a cerebral hemorrhage. She was unconscious for two weeks and acutely ill for nine weeks during the pregnancy. After spontaneously delivering a still born fetus, Mrs. Doe was left with paralysis of the right leg and right arm, residual kidney damage, marked impairment of speech and serious emotional damage. The opinion of Mrs. Doe's physician was that another pregnancy would be exceedingly perilous to her life. Brief for Appellants, p. 5.

Appellant Pauline Poe had undergone three consecutive pregnancies terminating in the delivery of infants with multiple congenital abnormalities from which each died shortly after birth. Mrs. Poe suffered great emotional distress as a result of the successive tragedies, and her physician, who also treated Mrs. Doe, was of the opinion that another pregnancy would be extremely disturbing to her physical and mental health. Brief for Appellants, pp. 6-7.

Appellants were suing under fictitious names as approved by the Connecticut Supreme Court of Errors because of the special circumstances of the case.

³ The physician, Dr. C. Lee Buxton, was a specialist in obstetrics and gynecology. He was formerly a professor in these specialties at the Columbia-Presbyterian Medical Center in New York and at the time of the suit was Professor and Chairman of the Department of Obstetrics and Gynecology at Yale University School of Medicine and the Grace-New Haven Community Hospital. Brief for Appellants, p. 7.

⁴ Dr. Buxton's medical opinion was that the best and safest treatment for the two patients, Appellants Jane Doe and Pauline Poe, was the prescription by him and use by them of devices or instruments to prevent conception and future pregnancies. He contended that he was unable to administer such treatment and advice for the sole reason that Appellee, the state's attorney, claimed that the giving of such advice and treatment and the use of such instruments by the patients were prohibited by the Connecticut statutes, and that he would prosecute any violations of such statutes. Brief for Appellants, p. 7.

⁵ The admission was by demurrer to Appellants' complaint. Appellee's brief did not even discuss justiciability.

⁶ The Connecticut statute prohibiting the use of contraceptives has been in effect since 1879. Since that time there was but one recorded case dealing with a prosecution under the statute. In that case, *State v. Nelson*, 126 Conn. 412, 11 A.2d 856 (1940), the Supreme Court of Errors of Connecticut sustained the constitutionality of the statute as applied against two doctors and a nurse who had allegedly disseminated contraceptive information at a birth control clinic.

meaning of Article III of the Constitution.⁷ Thus the Court has no authority to pronounce an abstract opinion upon the constitutionality of a state statute.⁸ This is not, however, the sole limitation upon the Court's exercise of judicial power, particularly in cases involving constitutional issues. In addition, "the Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."⁹ Through the years these self-restraining rules have manifested the reluctance, even refusal, of the Court to undertake this most important and delicate function until it was compelled to do so, in the course of its constitutional duty, by litigants who actively asserted interests and rights in controversies which demanded immediate resolution.¹⁰

The Connecticut statute prohibiting the use of contraceptives was first enacted in 1879.¹¹ Since that time there had been no recorded

⁷ *Muskrat v. United States*, 219 U.S. 346 (1911). "The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter and includes only suits of a civil nature." *Id.* at 356, adopting Mr. Justice Field's definition in the case of *In re Pacific Ry. Comm.*, 32 Fed. 241, 255 (C.C.N.D. Cal. 1887).

⁸ *Muskrat v. United States*, *supra* note 7. The classical exposition of the Court's abhorrence of abstract opinions is found in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-41 (1937):

The Constitution limits the exercise of the judicial power to "cases" and "controversies". . . . A "controversy" in this sense must be one that is appropriate for judicial determination. . . . A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . The controversy must be definite and concrete, touching the legal relations. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

The fact that litigants utilize a statutory procedural device providing for relief of a "declaratory" nature (as provided, *e.g.*, by Conn. Gen. Stat. Rev. § 52-29 (1958)) does not preclude the Supreme Court's exercise of appellate jurisdiction "so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy, which is finally determined by the judgment below." *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249, 264 (1933). The *Haworth* case, *supra*, held that the entertainment of declaratory judgment proceedings, as authorized under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1958), and interpreted to apply only to "cases or controversies," was validly within the federal judicial power.

⁹ *Ashwander v. TVA*, 297 U.S. 288, 346 (1936). This oft-quoted statement appears in Mr. Justice Brandeis' concurring opinion, in which he summarized the rules utilized by the Supreme Court in avoidance of constitutional questions: constitutional issues affecting legislation will not be determined (1) in friendly, non-adversary proceedings, (2) in advance of the necessity of deciding them, (3) in broader terms than are required by the precise facts to which the ruling is to be applied, (4) if the record presents some other ground upon which the case may be disposed of, (5) at the instance of one who fails to show that he is injured by the statute's operation, or (6) who has availed himself of its benefits, or (7) if a construction of the statute is fairly possible by which the question may be avoided. *Id.* at 346-48.

¹⁰ See Mr. Justice Rutledge's opinion in *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-74 (1947).

¹¹ Conn. Acts, 1879, c. 78. At first, the prohibition against use of contraceptives was

prosecutions involving private medical advice by a doctor to his individual patients, or their private use of contraceptive devices.¹² The evident lack of enforcement of the statute, emphasized by the "inherently bizarre" nature of a prosecution of spouses for the use of contraceptives,¹³ demonstrated an absence of any realistic threat of prosecution of Appellants. Such an actual immediate threat of prosecution was posited by the Court as an indispensable element of the exigent adversity that was required to evoke its power to resolve constitutional issues.¹⁴ The admission of the state's attorney, by demurrer, that the statute would be enforced was considered by the Court to be merely a formal agreement between the parties that "collides with plausibility" and hence "too fragile a foundation for indulging in constitutional adjudication."¹⁵

The significance of the case rests upon the Court's avoidance of the exercise of its power of judicial review despite the fact that all the parties involved in the litigation, and the state courts below, readily admitted the existence of a valid, and keenly-disputed, justiciable controversy. Mr. Justice Frankfurter, who announced the judgment of the Court, for the two decades before his recent retirement had been the central figure and articulate spokesman of the cautious, self-denying approach to judicial review.¹⁶ A philosophy of intellectual humility and pragmatic skepticism, in the tradition of Justices Holmes and Brandeis, was instrumental in the molding of Mr. Justice Frankfurter's concept of the limited role of the judiciary in a democratic society.¹⁷ This Pyrrhonic distrust of judge-made

an integral part of an overall law against obscenity. Brief for Planned Parenthood Federation of America, Inc. as Amicus Curiae, p. 13. The statute was the result of the efforts of Anthony Comstock, the moralist zealot who inspired the foundation of the New York Society for the Suppression of Vice in 1873 and the Warch and Ward Society of Boston in 1876. See Mr. Justice Douglas' dissenting opinion, 367 U.S. at 520 n.10; Broun & Leech, Anthony Comstock (1927).

¹² See note 6 *supra*.

¹³ 367 U.S. at 502 n.3:

The assumption of prosecution of spouses for use of contraceptives is not only inherently bizarre, as was admitted by counsel, but is underscored in its implausibility by the disability of spouses, under Connecticut law, from being compelled to testify against one another.

¹⁴ 367 U.S. at 508:

The fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication. This Court cannot be umpire to debates concerning harmless, empty shadows. To find it necessary to pass on these statutes now, in order to protect appellants from the hazards of prosecution, would be to close our eyes to reality.

¹⁵ 367 U.S. at 501.

¹⁶ See Mendelson, Justices Black and Frankfurter: Conflict in the Court (1961).

¹⁷ Professor Frankfurter, writing in 1931, summarized the philosophical criteria of Mr. Justice Brandeis: "A philosophy of intellectual humility determines Mr. Justice Brandeis' conception of the Supreme Court's function: an instinct against the tyranny of dogma and

law¹⁸ found expression in the oft-repeated axiom of "judicial restraint"—the dogma that the law-making function rests with the legislatures and not the politically irresponsible courts.¹⁹ From such

scepticism regarding the perdurance of any man's wisdom, though he be judge." Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 Harv. L. Rev. 33, 87 (1931).

In 1938, a year before he was appointed to the Supreme Court, Professor Frankfurter delivered three lectures at Harvard designed to convey a sympathetic insight into the constitutional philosophy of Mr. Justice Holmes. These lectures also candidly portrayed Frankfurter's view of the function of the Supreme Court in modern society:

While the Supreme Court is thus in the exacting realm of government, it is itself freed from the terrible burdens of governing. The Court is the brake on other men's actions, the judge of other men's decisions. Responsibility for action rests with legislators. The range of the Court's authority is thus very limited, but its exercise may vitally affect the nation. No wonder John Marshall spoke of this power of the Court as "delicate".

No man who ever sat on the Court has been more keenly or more consistently sensitive than Mr. Justice Holmes to the dangers and difficulties inherent in the power of judges to review legislation. For it is subtle business to decide, not whether legislation is wise, but whether legislators were reasonable in believing it to be wise. In view of the complexities of modern society and the restricted scope of any man's experience, tolerance and humility in passing judgment on the worth of the experience and beliefs of others become crucial faculties in the disposition of cases. The successful exercise of such judicial power calls for rare intellectual disinterestedness and penetration, lest limitation in personal experience and imagination operate as limitations of the Constitution. These insights Mr. Justice Holmes applied in hundreds of cases and expressed in memorable language. . . . Frankfurter, *Mr. Justice Holmes and the Supreme Court* 60, 61 (2d ed. 1961).

See also Mendelson, *op. cit. supra* note 16, at 124-31.

¹⁸In Thomas, Felix Frankfurter: Scholar on the Bench 285-86 (1960), an admiring biographer has written of Mr. Justice Frankfurter:

One does not have to look far in Justice Frankfurter's writings to find at least tacit approval if not preference for the British approach. The most superficial examination of his judicial philosophy reveals self-professed Anglophilism. Its roots trace back to many important figures in English thought. For example, Jeremy Bentham's dislike for judge-made law and his insistence on the completeness of legislative statement of purpose through codes echo to some degree in Frankfurter's opinions. . . . It is perhaps in this area of bowing before congressional will and advocating self-restraint that Justice Frankfurter comes closest to the British legislative supremacy tradition.

¹⁹Mr. Justice Frankfurter's concurring opinion in *AFL v. American Sash & Door Co.*, 335 U.S. 538, 542, 555-57 (1949), is an expositive comment on the necessarily limited role of the judiciary in a democratic society. See also *United States v. Lovett*, 328 U.S. 303, 318 (1946) (Frankfurter, J., concurring).

Miss Thomas, in her biography of Mr. Justice Frankfurter, has this explanation of his view of the limited competence of the judiciary, Thomas, *op. cit. supra* note 18, at 277:

The basic point in his conception of judicial review is that a politically irresponsible branch of government is sitting in judgment on the competence of a co-ordinate politically responsible branch. Since "legislation is the most sensitive reflex of politics," and is "most responsive to public ends and public feelings," [Frankfurter, *The Public and Its Government* 10 (1930)] the Court in exercising judicial review calls to account not only the legislature but also the people. For someone who is a majoritarian, as Frankfurter is, this is a most awesome duty.

And further, *id.* at 282:

[Mr.] Justice Frankfurter's primary motivation for self-restraint is his theory of democratic government and the preponderant role that the politically responsible legislature plays therein. He feels that "judicial review is a deliberate check upon democracy through organs of government not subject

artfully-woven webs of sophistry arose Mr. Justice Frankfurter's insistence that the Court exercise its judicial power only when a case or controversy, in the strictest and most confined sense, and without regard to artificial admissions of the parties, was under consideration.²⁰ No other member of the Court invoked more rigorously the traditional limits of its jurisdiction or reasoned more eloquently that the Court "has no greater duty than the duty not to decide . . ."²¹

The Court in the principal case, in confining itself to the indispensability of adversity in constitutional litigation and emphasizing the lack of evidence of an actual "threat" of prosecution,²² brushed aside the more obscure but crucial issue: the mere existence of the state penal statute, which was of a self-enforcing nature, produced a substantial hardship upon the litigants.²³ Enforcement of the

to popular control." [Frankfurter, *John Marshall*, in *Government Under Law* (1956)]

²⁰ See Mendelson, *Mr. Justice Frankfurter and the Process of Judicial Review*, 103 U. Pa. L. Rev. 295, 315-18 (1954). Perhaps Mr. Justice Frankfurter's most widely quoted discussion of justiciability was his concurring opinion in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 149 (1951). See also, *Baker v. Carr*, 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting); *Adler v. Board of Educ.*, 342 U.S. 485, 497 (1952) (Frankfurter, J., dissenting); *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring).

²¹ In the 1931 tribute to Mr. Justice Brandeis, Professor Frankfurter wrote with typical esteem:

In his whole temperament, Mr. Justice Brandeis is poles apart from the attitude of the technically-minded lawyer. Yet no member of the Court invokes more rigorously the traditional limits of its jurisdiction. In view of our federalism and the Court's peculiar function, questions of jurisdiction in constitutional adjudication imply questions of political power. The history of the Court and the nature of its business admonish against needless or premature decisions. It has no greater duty than the duty not to decide or not to decide beyond its circumscribed authority. And so Mr. Justice Brandeis will decide only if the record presents a *case*—a live, concrete, present controversy between litigants. Frankfurter, *supra* note 17, at 79.

The description of Mr. Justice Brandeis' view of the judicial process is equally applicable to Mr. Justice Frankfurter. Cf. Davis, *Standing, Ripeness and Civil Liberties: A Critique of Adler v. Board of Education*, 38 A.B.A.J. 927 n.13 (1952): "Not only is Frankfurter the only Justice who almost always favors closing the judicial doors when the Court divides on such issues as standing and ripeness, but he is the only Justice who is often alone in taking that position."

²² Mr. Justice Frankfurter termed the fear of enforcement of the statute as merely "chimerical." 367 U.S. at 508. Any controversy between Appellants and the state prosecuting authorities was solely "debates concerning harmless, empty shadows." *Ibid.* The Court's opinion also implied that denial of relief to the Appellants would present slight actual hardship. *Id.* at 509.

²³ The contention of the married women was that they were unable to obtain proper medical advice because their physician was inhibited by the state penal statute and the threat of prosecution by the state's attorney. The Court asserted that the compliance with the statute was not "grounded in a realistic fear of enforcement." The statute's self-enforcing effect was evident in that even though the non-cooperating doctor's fear of enforcement may have been unjustified, he was nevertheless coerced into compliance and thus unwilling to prescribe contraceptives.

When a statute is self-enforcing, a showing of an immediate threat of prosecution should be unnecessary. For example, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the challenged statute was not to become effective for more than seventeen months after the case

statute by the state prosecuting authorities would undoubtedly have abridged the married couples' right to enjoy the privacy of their marital relations²⁴ and the doctor's right to advise his patients.²⁵ However, when such a statute is self-enforcing, its sheer existence should create a justiciable controversy.²⁶ Upon Appellants' showing that the statute barred them from engaging in the conduct in which they asserted a right to engage, the requisite antagonistic adversity should

was argued before the Court. There the statute was self-enforcing because its mere existence evoked reactions by parents that had a direct economic effect on the Society of Sisters. The Court found the injury to the Society "present and very real," *id.* at 536, and reached the merits of the constitutional issues. *Cf.* *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

A more objective inquiry by the Court in the principal case would seem to be, not whether there was an actual threat of enforcement, but whether the complainants were in fact injured in view of the self-enforcing nature of the statute.

²⁴ Mr. Justice Harlan's dissenting opinion cogently pictured state interference with the privacy of the home:

Precisely what is involved here is this: the State is asserting the right to enforce its moral judgment by intruding upon the most intimate details of the marital relation with the full power of the criminal law. Potentially, this could allow the deployment of all the incidental machinery of the criminal law, arrests, searches and seizures; inevitably, it must mean at the very least the lodging of criminal charges, a public trial, and testimony as to the corpus delicti. Nor could any imaginable elaboration of presumptions, testimonial privileges, or other safeguards, alleviate the necessity for testimony as to the mode and manner of the married couples' sexual relations, or at least the opportunity for the accused to make denial of the charges. In sum, the statute allows the State to inquire into, prove and punish married people for the private use of their marital intimacy. 367 U.S. at 548.

Physical invasion of the home is protected by the fourth amendment to the United States Constitution as applied to the states by the fourteenth amendment. See *Wolf v. Colorado*, 338 U.S. 25 (1949). It has been argued that the scope of the fourth and fourteenth amendments is broad enough to protect the privacy of the home against all unreasonable intrusions of whatever character. Mr. Justice Brandeis, dissenting in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), expressed the following view of the comprehensive constitutional right of privacy:

[The makers of the Constitution] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual whatever the means employed, must be deemed a violation of the Fourth Amendment.

Cf. *Boyd v. United States*, 116 U.S. 616, 630 (1886).

²⁵ In broad, sweeping terms Mr. Justice Douglas' dissenting opinion attacked the statute's interference with freedom of speech:

We witness in this case a sealing of the lips of a doctor because he desires to observe the law, obnoxious as the law may be. The State has no power to put any sanctions of any kind on him for any views or beliefs that he has or for any advice he renders. These are his professional domains into which the State may not intrude. . . . A society that tells its doctors under pain of criminal penalty what they may not tell their patients is not a free society. 367 U.S. at 514-15.

Cf. *Sweezy v. New Hampshire*, 354 U.S. 234 (1956) (teacher comes within freedom of speech guarantees of first amendment); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949) (public speaker); *Thomas v. Collins*, 323 U.S. 516 (1945) (public speaker).

²⁶ See note 23, *supra*.

have existed, thus making it incumbent upon the Court to consider the merits of the controverted constitutional issues.²⁷

William L. Morrow

Evidence—Criminal Tax Evasion—Proof of Willful Intent

Defendant was convicted of willful evasion of federal income taxes.¹ The government, over Defendant's objection, introduced the following facts as evidence of his willful intent: (1) Defendant's bank, acting under Defendant's orders, repeatedly refused to produce portions of its books and records concerning Defendant when requested to do so by a special agent of the Internal Revenue Service;² (2) the bank, again pursuant to Defendant's orders, refused to comply with a court order demanding the records.³ In the suit against the bank, Defendant intervened and did not authorize the bank to release the records until his petition for certiorari was refused by the Supreme Court.⁴ In the criminal trial the court instructed the jury as follows: "There is evidence in this case that attempts were made *to impede* the . . . investigations. . . . If you find that an attempt *to impede* the investigation was made by the Defendant, you may consider the fact as bearing on the intention of the Defendant. . . ."⁵

²⁷ There can be no quarrel with Mr. Justice Frankfurter's insistence upon judicial restraint so as to avoid needless constitutional decisions. However, the doctrine should be exercised with care lest it become, in the words of Mr. Justice Harlan, a "catch-all for an unarticulated discretion on the part of this Court to decline to adjudicate appeals involving Constitutional issues." 367 U.S. at 530. The avoidance of constitutional issues may at times be used as a manipulative device by a Court that prefers not to decide difficult questions of constitutionality, thus reducing judicial self-restraint to judicial self-abnegation. In such instances, deliberately self-imposed judicial impotence results in a mutilation of justice to litigants legitimately seeking judicial relief. Cf. Pritchett, *Libertarian Motivations on the Vinson Court*, 47 Am. Pol. Sci. Rev. 321, 336 (1953):

Frankfurter's major guides are negative in character—judicial self-restraint, deference to the legislature, the executive, and the states. But deciding Supreme Court cases is a positive job. There are responsibilities of judging which the Court cannot put off on a state court or a legislature. Frankfurter has on occasions come too close to abdicating this responsibility.

¹ Section 7203 of the Int. Rev. Code of 1954 provides: "Any person required by this chapter to pay any estimated tax, or required by law or regulations made under authority thereof to make a return or declaration . . . who willfully fails . . . to make such return or declaration . . . shall be guilty of a misdemeanor. . . ."

² Hecklering, *Tax Fraud Investigations: Cooperative or Adversary Proceedings?* 61 Taxes 807, 809 (1961), indicates the relevance of such action to the issue of willful evasion by the following statement: "As soon as a special agent of the Internal Revenue Service appears on the scene, it should become apparent that the government is considering whether criminal prosecution is warranted."

³ Section 7604 of the 1954 Code authorizes such an order.

⁴ In the Matter of Foster, 159 F. Supp. 444 (S.D.N.Y. 1958), *aff'd*, 265 F.2d 183 (2d Cir.), *cert. denied*, 360 U.S. 912 (1959).

⁵ Emphasis added by the court of appeals. 309 F.2d 8, 15 (4th Cir. 1962).

Held, reversed and remanded: Evidence of acts which impede investigation of criminal income tax evasion is not admissible to show the existence of a willful intent to defraud so long as the acts are committed in pursuance of a legally permissible course of conduct. *United States v. Foster*, 309 F.2d 8 (4th Cir. 1962).

The Internal Revenue Code⁶ classifies as a misdemeanor the willful failure to file a tax return as required by statute and by the regulations.⁷ Several courts have defined "willfulness" for the purpose of this provision as that state of mind in which the taxpayer is fully aware of the tax obligation that he seeks to conceal.⁸ The act of evasion must be done willfully and knowingly as distinguished from that done as a result of accident, mistake, neglect, or because of a bona fide belief that the income involved is not taxable.⁹ However, direct proof is not required;¹⁰ willfulness, as a question of fact, can be established by inferences drawn from combinations of acts and circumstances.¹¹ The specific problem of the instant case was whether evidence of legally permissible acts of resistance to investigation could be introduced as proof of a willful intent to defraud the government.

Since the fifth amendment privilege against self-incrimination is personal, neither bank records¹² nor corporate documents¹³ concerning a taxpayer fall within the scope of its protection. Moreover, personal tax records, insofar as they are required under the Internal Revenue Code, are not immune from inspection, since the constitutional privilege does not extend to books and records which the law requires one to keep.¹⁴

⁶ See note 1 *supra* for the text of § 7203 of the 1954 Code.

⁷ Section 7203 of the Int. Rev. Code of 1954 provides that the punishment for the offense shall be a fine of not more than \$10,000 or imprisonment for not more than one year, or both, along with the costs of prosecution.

⁸ See *Lloyd v. United States*, 226 F.2d 9 (5th Cir. 1955); *United States v. Norris*, 205 F.2d 828 (2d Cir. 1953); *United States v. Putek*, 55-1 U.S.T.C. 9243 (D.N.J. 1954). In addition to a mere attempt to defeat the tax, an essential element of the offense is the willful nature of the attempt.

⁹ *United States v. Hooper*, 216 F.2d 684, 686 (10th Cir. 1954).

¹⁰ See *United States v. Litman*, 246 F.2d 206 (3d Cir. 1957); *Hooper v. United States*, *supra* note 9; *Graves v. United States*, 191 F.2d 579 (10th Cir. 1953).

¹¹ *United States v. Norris*, 205 F.2d 828 (2d Cir. 1953); *Gaunt v. United States*, 184 F.2d 284 (1st Cir. 1950); *United States v. Commerford*, 64 F.2d 28 (2d Cir. 1933).

¹² Because the privilege is personal, one person cannot invoke it for the benefit of someone else. *Hale v. Henkel*, 201 U.S. 43 (1906).

¹³ *Wheeler v. United States*, 226 U.S. 478 (1913); *Wilson v. United States*, 221 U.S. 361 (1911).

¹⁴ *All v. Grand Cent. Aircraft Co.*, 347 U.S. 535 (1954); *Rogers v. United States*, 340 U.S. 367 (1951); *Shapiro v. United States*, 335 U.S. 1 (1947). Section 6001 of the 1954 Code provides: "Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe."

Courts have permitted juries to draw inferences prejudicial to the taxpayer because of non-production of "required records" in two different instances. First, there are cases in which the taxpayer fails to keep records,¹⁵ or else keeps them but through his negligence they are lost or destroyed.¹⁶ Second, there are cases in which the taxpayer has the records but effectively prevents the government from obtaining them.¹⁷ In *Beard v. United States*,¹⁸ the Eighth Circuit said that although willfulness could not be inferred from the taxpayer's refusal to produce, it was "natural and proper . . . [to infer] that the records disclose improper conduct. . . ."¹⁹ In *Landy v. United States*,²⁰ the Fifth Circuit limited the *Beard* decision to cases of *required records*, stating that *Beard* did not apply to a refusal to answer questions propounded by government agents. In only one case has the refusal to produce records upon request been allowed as evidence of a willful intent to defraud, and there the evidence was allowed only to rebut testimony of the taxpayer concerning his alleged good intentions to help the agents in their investigation.²¹

In the principal case the defendant was recalcitrant from the beginning. However, since the government agents finally obtained and introduced into evidence the contents of the records, the basis for an inference that the records contained prejudicial material was removed. The trial court, nevertheless, charged the jury that the defendant's attempt to impede the investigation could be considered as bearing on his intention.²² In finding this charge erroneous, the Fourth Circuit said that defendant's "refusal was in a statutory proceeding where the statute gave a clear right to a hearing. Outside this proceeding all he did was to delay decision to produce the bank records until he had conferred with his attorneys, certainly not an unreasonable insistence."²³

With respect to the demand of the revenue agent that he produce

¹⁵ See *Smith v. United States*, 236 F.2d 260 (8th Cir. 1956); *Hooper v. United States*, 216 F.2d 684 (10th Cir. 1954). In *Smith*, the court stated that the taxpayer's failure to keep records was a circumstance for jury consideration in determining his guilt or innocence.

¹⁶ *United States v. Litman*, 246 F.2d 206 (3d Cir. 1957); *Yoffe v. United States*, 153 F.2d 570 (1st Cir. 1946). In these cases, evidence of lost records supported an inference that the information they contained would be harmful to defendants charged with an attempt to evade taxes.

¹⁷ See *Olson v. United States*, 191 F.2d 985 (8th Cir. 1951).

¹⁸ 222 F.2d 84 (8th Cir. 1955).

¹⁹ *Id.* at 94.

²⁰ 283 F.2d 303 (5th Cir. 1960).

²¹ *Myres v. United States*, 174 F.2d 329 (8th Cir. 1949). In this case the court said that evidence of the taxpayer's refusal to give up his records was entitled to significance especially considering his professed desire to help the investigators. See also *United States v. Mousley*, 201 F. Supp. 510 (E.D. Pa. 1962).

²² 309 F.2d at 15.

²³ *Ibid.*

his records, no inference of guilt should be drawn from a taxpayer's participation in the hearing before the district court, since he is legally entitled to that proceeding. The freedom from having an inference of guilt or bad faith drawn from his participation in the hearing is analogous to that afforded in situations in which a person pleads a constitutional privilege. Thus, in *Slochower v. Board of Higher Educ.*,²⁴ the Supreme Court said, "[W]e must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. . . . The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury."²⁵ The court in the instant case correctly stated the same principle: "[A]s the impeding was entirely permissible, the jury should not be allowed to draw from it an inference of misdoing on the part of the accused."²⁶

Inherent in situations similar to the one presented in the instant case is the problem of the obligation of a taxpayer to respond to the inquiries of the Internal Revenue Service.²⁷ Two conflicting principles must be considered in determining the taxpayer's duty: (1) every person has an obligation to pay his legal share of taxes, but (2) every person has a right not to incriminate himself.²⁸ In criminal investigations the privilege against self-incrimination should control.²⁹ Therefore, at the outset of an income tax investigation the problem is whether or not its nature is civil or criminal. Assignment of a case to a special agent normally means that a criminal investigation is afoot, but a regular revenue agent can also initiate a criminal investigation. Moreover, in common practice an investigation that begins as a civil matter may become a criminal proceeding.

Under the specific facts in the instant case, the correct decision was reached. Although the question had not been previously decided, a contrary answer could have been implied from other opinions³⁰ to support the proposition that acts which impede governmental investigations are admissible as facts from which there can be drawn an inference of fraudulent intent. However, the result in the instant case should allay the fears of a taxpayer who refuses to produce his

²⁴ 350 U.S. 551 (1956).

²⁵ *Id.* at 556-57.

²⁶ 309 F.2d at 15.

²⁷ The court expressly declined to comment on this problem. 309 F.2d at 15.

²⁸ *Hecklering*, *supra* note 2.

²⁹ The limits of permissible resistance must always be kept in mind. Section 7210 of the Int. Rev. Code of 1954 places a possible penalty of a \$1000 fine and a year in prison for failure to obey a summons to produce testimony.

³⁰ *Beard v. United States*, 222 F.2d 84 (8th Cir. 1955); *Olsen v. United States*, 191 F.2d 985 (8th Cir. 1951); see text accompanying note 17 *supra*.

records until his procedural rights have been exhausted. On the other hand, now that a taxpayer's rights have been defined, he will likely be less eager to cooperate with government agents in both criminal and civil investigations. Investigators may find it increasingly necessary to employ court summons in order to examine books and records. The taxpayer knows that he may use his statutory rights to the fullest extent to resist a criminal investigation, or a civil investigation which subsequently becomes a criminal matter; and the evidence of his resistance in the earlier stages may not be introduced at his trial as proof of a willful intent to evade taxes.

Blair Rugh

Evidence — Privileged Communication — Corporation File Copy of Census Form

The Federal Trade Commission¹ ordered St. Regis Paper Company to produce its file copies of forms which it had submitted to the Census Bureau for the Census of Manufacturers. St. Regis refused to comply, alleging that the file copies were privileged communications under section 9 of the Census Act.² The file copy and the original, both government forms, were marked "confidential" and "not to be used for purposes of taxation, investigation, or regulation." The Trade Commission applied for a writ of mandamus to compel submission of the forms.³ The federal district court ordered St. Regis to produce the file copies,⁴ and the court of appeals affirmed.⁵ Because of a conflict in the circuits,⁶ the United States Supreme Court granted certiorari.⁷ *Held, affirmed*: File copies of reports which

¹ Pursuant to Federal Trade Commission Act § 6, 38 Stat. 721 (1914), 15 U.S.C. § 46 (1958).

² Census Act § 9, 13 U.S.C. § 9 (1958), provides:

INFORMATION AS CONFIDENTIAL; EXCEPTION: (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—(1) use the information furnished under the provisions of this title for any purposes other than the statistical purposes for which it is supplied; or (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

³ Such action is authorized by § 9 of the Federal Trade Commission Act, 38 Stat. 722 (1914), 15 U.S.C. § 49 (1958).

⁴ 181 F. Supp. 862 (S.D.N.Y. 1960).

⁵ 285 F.2d 607 (2d Cir. 1960).

⁶ In *FTC v. Dilger*, 276 F.2d 739 (7th Cir. 1960), the Seventh Circuit held, on similar facts, that the privilege extended to the file copy.

⁷ 365 U.S. 857 (1961).

are submitted to the Bureau of the Census are not privileged under section 9 of the Census Act and are subject to production on order of the Federal Trade Commission. *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1962). *Overruled*: 76 Stat. 922 (1962), amending Census Act § 9(a), 13 U.S.C. § 9(a) (1958).⁸

The concept of privileged communications is a creation of the law of evidence.⁹ In an effort to procure evidence for litigation, the common law regarded the act of giving testimony as a public duty,¹⁰ and for more than three centuries, it has been recognized as a fundamental maxim that the public has a right to every man's evidence.¹¹ A "privilege" is an exception to this obligation to give testimony.¹² The exception is granted "to protect interests and relationships which are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice."¹³ Privileges are usually in derogation of the common law (although some came from the common law)¹⁴ and generally owe their existence to statute.¹⁵ Because of the public policy against suppression of evidence, statutes which grant an immunity from disclosure are strictly construed.¹⁶ Professor Wigmore argues that the following are prerequisites to the existence of a valid privilege:¹⁷

- (1) The communications must originate in a *confidence* that they will not be disclosed;
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

⁸ See note 30 *infra*, for text of the amendment.

⁹ *Yazoo & M.V.R.R. v. Decker*, 150 Miss. 621, 116 So. 287 (1928).

¹⁰ *Blair v. United States*, 250 U.S. 273 (1919).

¹¹ 8 Wigmore, *Evidence* § 2192 (3d ed. 1940).

¹² *Id.* § 2285.

¹³ McCormick, *The Scope of Privilege in the Law of Evidence*, 16 *Texas L. Rev.* 447 (1938).

¹⁴ The privileges granted communications between attorney and client and between husband and wife are regarded by Wigmore as creations of the common law. 8 Wigmore, *op. cit. supra* note 11, §§ 2227, 2290, 2333.

¹⁵ *Thomas v. Morris*, 286 N.Y. 266, 36 N.E.2d 141 (1941).

¹⁶ *Southwest Metals Co. v. Gomez*, 4 F.2d 215 (9th Cir. 1925); *Weis v. Weis*, 147 Ohio St. 416, 72 N.E.2d 245 (1947); *Hyman v. Grant*, 102 Tex. 50, 112 S.W. 1042 (1908).

¹⁷ 8 Wigmore, *op. cit. supra* note 11, § 2285, at 531. Cases quoting or citing this statement with approval include: *Falsone v. United States*, 205 F.2d 734 (5th Cir. 1953); *United States v. Funk*, 84 F. Supp. 967 (E.D. Ky. 1949); *O'Toole v. Ohio German Fire Ins. Co.*, 159 Mich. 187, 123 N.W. 795 (1909); *Baskerville v. Baskerville*, 246 Minn. 496, 75 N.W.2d 762 (1954); *Marceau v. Orange Realty Co.*, 97 N.H. 497, 92 A.2d 656 (1952).

The census privilege met all four requirements.

The function of the census and the reason for its privilege were outlined in a Presidential Proclamation in 1929:¹⁸

The sole purpose of the Census is to secure general statistical information. . . . No person can be harmed in any way by furnishing the information required. The Census has nothing to do with taxation, . . . or with the enforcement of any national, state, or local law or ordinance. There need be no fear that any disclosure will be made regarding any individual person or his affairs.

The obvious policy was to encourage frankness in the responses of companies to census inquiries.¹⁹ In section 9 of the Census Act,²⁰ which creates the census privilege, Congress attempted to provide the state of trust which is so necessary to candid response.²¹ Until the *St. Regis* decision, it was generally assumed that copies of census report had a confidential status equal to that of the original reports filed with the Bureau of the Census.²² *FTC v. Dilger*,²³ a Seventh Circuit case decided prior to *St. Regis*, had so held, and other cases had indicated agreement with that result.²⁴

The *St. Regis* case presented the Supreme Court with two important, directly conflicting public interests: free access to evidence *versus* the confidentiality necessary to census administration. The Court decided in favor of the former. Justice Clark, writing for the majority, said, "Ours is the duty to avoid a construction which would suppress otherwise competent evidence."²⁵ The Court also based its decision upon an analogy drawn to income tax returns, which are privileged in the hands of the Internal Revenue Service

¹⁸ Presidential Proclamation of November 22, 1929, 46 Stat. 3011, 3012.

¹⁹ 36 Ops. Att'y Gen. 362 (1930).

²⁰ Census Act § 9, 13 U.S.C. § 9 (1958); see note 2 *supra* for the text of the statute.

²¹ In addition, § 214 of the Census Act, 13 U.S.C. § 214 (1958), provides criminal sanctions for unauthorized disclosure by an officer or employee of the Department of Commerce.

²² S. Rep. No. 2218, 87th Cong. 2d Sess. (1962), 87 U.S. Code Cong. & Ad. News 5122.

²³ 276 F.2d 739 (7th Cir. 1960).

²⁴ *FTC v. Orton*, 175 F. Supp. 77 (S.D.N.Y. 1959), resembled in many respects the *St. Regis* case. In both cases the FTC sought to compel production of information that the defendant company had supplied to the Census of Manufacturers. The Census forms on which the information was submitted were essentially the same. In the *Orton* case, however, the FTC attempted to compel the company to submit the forms which it had delivered into the physical possession of the Census Bureau. In *St. Regis*, the FTC sought the company's own file copies. In the *Orton* case the court held that the defendant company had no obligation to reacquire the information and deliver it up to the FTC. In *United States v. Bethlehem Steel Corp.*, 21 F.R.D. 568 (S.D.N.Y. 1958), defendants asked that the government be required to produce census records of other corporations. The Secretary of Commerce refused. The court held that the Secretary can disclose information only when the disclosure will not be detrimental to the reporting company. The government cannot waive the reporting company's privilege. The compulsory production of file copies was not decided because the defendants voluntarily produced their file copy.

²⁵ 368 U.S. at 218.

but not in the files of the reporting company.²⁶ Finally, the Court reasoned that since the FTC could obtain the identical information through its own power of requiring special reports, it should logically be able to compel the file copy and take advantage of the organization of the information afforded by the retained census form.

Although the Court's conclusion was grounded in persuasive precedent, the result of the *St. Regis* decision was undesirable. Withholding the census privilege from file copies was in accord with the prevailing view that statutes creating privileges are to be strictly construed.²⁷ However, the court underestimated the need for an extension of the privilege, since the prerequisites²⁸ for a privilege all exist in the instance of census file copies. The effect of the *St. Regis* decision upon the administration of the census was unfortunate. It prompted companies to destroy their file copies, caused a loss of faith in the Census Bureau, and led to a deterioration in surveys.²⁹ In October of 1962, at the urging of the Department of Commerce, Congress recognized the need for the privilege and passed legislation which overruled *St. Regis*. Public Law 87-813 amended section 9(a) of the Census Act to extend the census privilege to company file copies.³⁰ This extension of confidentiality to the file copy is not only desirable but vital. No amount of coercion can yield the candid submission of data that will now be obtained by the assurances that the information will be held in confidence. The file copy, often used later by the company as a reference for further statistical calculation, is an integral part of the census machinery, and as such is entitled to the protection of the census privilege.

Don C. Nix

²⁶ *Tollefsen v. Phillips*, 16 F.R.D. 348 (D. Mass. 1954); *Volk v. Paramount Pictures, Inc.*, 19 F.R.D. 103 (D. Minn. 1950); *Reeves v. Pennsylvania R.R.*, 80 F. Supp. 107 (D. Del. 1948); *The Sultana*, 77 F. Supp. 287 (W.D.N.Y. 1948).

²⁷ See text accompanying note 16 *supra*.

²⁸ See text accompanying note 17 *supra*.

²⁹ S. Rep. No. 2218, 87th Cong., 2d Sess. (1962), 87 U.S. Code Cong. & Ad. News 5122.

³⁰ 76 Stat. 922 (1962), amending Census Act § 9(a), 13 U.S.C. § 9(a) (1958). 13 U.S.C. § 9(a) (1958), provides:

No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this Title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

Procedure — Special Appearance — Texas Rule 120a

Rule 120a¹ of the Texas Rules of Civil Procedure, effective September 1, 1962, provides that a party may make a special appearance² before a Texas court to contest that court's jurisdiction over his person or property on the ground that either he or his property was not amenable to service of process. If the court determines that it has jurisdiction, the questioning party may then appear generally for any purpose, and his subsequent general appearance will not be considered a waiver of his contest over the jurisdiction.

Rule 120a does not inject a totally new concept into Texas procedure. Under the common law, as it existed in Texas prior to 1879, a special appearance was permitted.³ The abolition of special appearances in that year marked Texas' departure from the position taken by the overwhelming majority of the other common law states and countries.⁴ Under the rules existing after 1879, until rule 120a was

¹ Rule 120a, Tex. R. Civ. P., provides as follows:

(1) Notwithstanding the provisions of Rules 121, 122 and 123 [see notes 23, 24, 25 *infra*], a special appearance may be made by any party either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts of this State. A special appearance may be made as to an entire proceeding or as to any severable claim involved therein. Such special appearances shall be made by sworn motion filed prior to plea of privilege or any other plea, pleading, or motion; provided, however, that a plea of privilege and any other plea, pleading, or motion may be contained in the same instrument or filed subsequent thereto without waiver of such special appearance. The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes, shall not constitute a waiver of such special appearance. Every appearance, prior to judgment, not in compliance with this rule is a general appearance.

(2) Any motion to the jurisdiction provided for herein shall be heard and determined before a plea of privilege or any other plea or pleading may be heard. No determination of any issue of fact in connection with the objection to jurisdiction is a determination of the merits of the case or any aspect thereof.

(3) If the court sustains the objection to jurisdiction, an appropriate order shall be entered. If the objection to jurisdiction is overruled, the objecting party may thereafter appear generally for any purpose. Any such special appearance or such general appearance shall not be deemed a waiver of the objection to jurisdiction when the objecting party or subject matter is not amenable to process issued by the courts of this State.

² A "special appearance" is a "submission [to jurisdiction] for some specific purpose only, not for all the purposes of the suit." *Louisville & N.R.R. v. Industrial Bd.*, 282 Ill. 136, 118 N.E. 483, 485 (1917).

³ See *Atchison, T. & S.F. Ry. v. Stevens*, 109 Tex. 262, 206 S.W. 921 (1918); *Hagood v. Dial*, 43 Tex. 625 (1875); *Robinson v. Schmidt*, 48 Tex. 13, 19 (1877); *Richardson v. Wells*, 3 Tex. 223 (1848).

⁴ Texas' change has been attributed to Texas' "frontier spirit" and lack of patience with what were considered technicalities. See *Hearon, Non-Resident Defendants and the Special Appearance in Texas*, 32 Texas L. Rev. 78, 80 (1953). The only jurisdictions which do not permit special appearance are the Isle of Man, *Harris v. Taylor*, 2 K.B. 580 (1915), and

promulgated, if an action were filed in a Texas court against a non-resident over whom the court had no valid basis for in personam jurisdiction, the nonresident defendant was held to have submitted to the jurisdiction of the Texas court even if he appeared solely to question the validity of service.⁵ If the nonresident defendant chose not to appear, and a default judgment⁶ were entered against him, the judgment was void for want of proper service. However, the judgment's invalidity could only be shown in subsequent proceedings, which took two forms in Texas: direct attacks and collateral attacks. If the defendant directly attacked the judgment on appeal, the court might have ruled in his favor on lack of jurisdiction, but having come before the court on appeal, he would have then waived citation.⁷ Moreover, the judgment could not be collaterally attacked in Texas, if it were regular on its face,⁸ unless the court had no possible jurisdiction, *e.g.*, a case involving admiralty.⁹ Under both the old and new rules, however, the defendant can: (1) question jurisdiction in his home state by bringing an action for a declaratory judgment, assuming he can obtain in personam jurisdiction over the original plaintiff, or (2) raise lack of jurisdiction as a defense when the plaintiff sues on his judgment. Full faith and credit¹⁰ will not prevent the defense, since other states are not required to honor the judgment of a sister state court that is rendered without jurisdiction over the person.¹¹

In *York v. Texas*¹² the United States Supreme Court held that the old Texas rules of procedure constituted a mere inconvenience and not a deprivation of due process of law under the fourteenth amendment.¹³ When the Supreme Court held subsequently that even the

Mississippi, Miss. Code Ann. § 1881 (1956). However, Mississippi's statute has been interpreted to allow what is in effect a special appearance. See Note, *Special Appearance in Mississippi*, 19 Miss. L.J. 59 (1947).

⁵ *York v. Texas*, 137 U.S. 15 (1890).

⁶ A default judgment is rendered when the defendant fails to answer or plead within the time allowed or neglects to appear at the time of the trial. *Merrill v. Dunn*, 140 S.W.2d 320, 323 (Tex. Civ. App. 1940) *error dismissed, judgment corrected*.

⁷ Rule 123, Tex. R. Civ. P. (see note 25 *infra*); see *Industrial Fin. Serv. Co. v. Riley*, 295 S.W.2d 498 (Tex. Civ. App. 1956), *aff'd in part and reversed in part on other grounds*, 157 Tex. 306, 302 S.W.2d 652 (1957).

⁸ *Crawford v. McDonald*, 88 Tex. 626, 33 S.W. 325 (1895).

⁹ *Tammen v. Schaefer*, 101 S.W. 468 (Tex. Civ. App. 1907).

¹⁰ U.S. Const. art. 4, § 1.

¹¹ *Williams v. North Carolina*, 325 U.S. 226 (1945); *Thompson v. Whitman*, 85 U.S. 457 (1873).

¹² 137 U.S. 15 (1890).

¹³ The Court stated:

It is certainly more convenient that a defendant be permitted to object to the service . . . in the first instance. . . . But mere convenience is not substance of right. . . . Can it be held . . . that legislation simply forbidding the defendant to come into court and challenge the validity of service upon him

rendition of a void judgment was a deprivation of due process,¹⁴ some analysts concluded that the *York* case would be overruled should the question ever again reach the Court.¹⁵ Nevertheless, since Texas attorneys were still faced with the immediate problem of finding a substitute for the special appearance, they began to use a fictional amicus curiae to attack jurisdiction.¹⁶ That practice proved cumbersome since an amicus curiae could not appeal, because he did not have, in theory, any interest in the suit.¹⁷ Furthermore, the practice was severely limited in 1957 when the Texas Supreme Court held, in *Burger v. Burger*,¹⁸ that a non-resident defendant made a general appearance when he paid an alleged amicus curiae to appear for him.¹⁹ One other means of avoiding the harsh effects of the unavailability of special appearance was removal to a federal court where the validity of the service of process could be contested. However, removal was not always possible.²⁰

Rule 120a effects a change only in reference to parties who are not amenable to the jurisdiction of the court, *i.e.*, nonresidents. The older provisions, rules 121 through 123,²¹ which previously excluded a special appearance by anyone,²² now do so only with respect to Texas residents, who are always amenable to process issued by a Texas court. These rules provide that (1) an answer by the defendant dispenses with the necessity to serve a citation upon him,²³ (2) if the defendant's motion to quash citation is successful, the defendant is

in a personal action without surrendering himself to the jurisdiction of the court, but which does not attempt to restrain him from fully protecting his person, his property and his rights against any attempt to enforce a judgment rendered without due service of process, and therefore void, deprives him of liberty or property, within the prohibition of the Fourteenth Amendment? We think not. 137 U.S. at 21.

¹⁴ *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189 (1915).

¹⁵ See, *e.g.*, Blair, *Constructive General Appearance and Due Process*, 23 Ill. L. Rev. 119 (1928); *cf.* Hearon, *supra* note 4, at 78-101, for an excellent discussion in favor of a new rule allowing special appearance.

¹⁶ See Hearon, *supra* note 4, at 92; McDonald, *Texas Civil Practice* ¶ 9:05 (Supp. 1962).

¹⁷ See *Greathouse v. Ft. Worth & D.C. Ry.*, 65 S.W.2d 762 (Tex. Comm. App. 1933).

¹⁸ 156 Tex. 584, 298 S.W.2d 119 (1957), 11 Sw. L.J. 382 (1957).

¹⁹ See also *Nicklas v. Ajax Elec. Co.*, 337 S.W.2d 163 (Tex. Civ. App. 1960).

²⁰ Federal courts have jurisdiction limited to cases arising under the Constitution, laws or treaties of the United States, 28 U.S.C. § 1331 (1958), or actions involving diversity of citizenship where the matter in controversy exceeds \$10,000 exclusive of interest and costs, 28 U.S.C. § 1332 (1958). In a federal court jurisdiction may be questioned at any stage of the proceedings. Fed. R. Civ. P. 12(b). Federal courts sitting in Texas are not required to follow Texas practice concerning special appearance. *Mexican Cent. Ry. v. Pinkney*, 149 U.S. 194 (1893).

²¹ Tex. R. Civ. P.

²² See *York v. Texas*, 137 U.S. 15 (1890); *Atchison, T. & S.F. Ry. v. Stevens*, 109 Tex. 262, 206 S.W. 921 (1918).

²³ Tex. R. Civ. P. 121: "An answer shall constitute an appearance of the defendant so as to dispense with the necessity for the issuance or service of citation upon him."

still deemed to have entered his appearance,²⁴ and (3) if a judgment is reversed for want of service, the defendant shall be presumed to have entered his appearance.²⁵

The new rule should provide nonresidents with an important device for testing the extent of the jurisdiction of the Texas courts. Originally, state jurisdiction over nonresidents was limited to instances in which the nonresident defendant was served within the boundaries of the forum states.²⁶ Through an evolutionary process, a more liberal approach was adopted when the Supreme Court held that out-of-state service of process upon a nonresident was not a violation of due process if the defendant had sufficient "minimum contacts" within the state²⁷ and if the cause of action had grown out of those contacts.²⁸ Other recent cases²⁹ illustrate this discernible trend³⁰ toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. With that trend as a background, the Texas legislature enacted article 2031b,³¹ which allows service of process upon a nonresident person or corporation doing business within the state.³² Partially because the absence of a special appearance practice in Texas precluded the nonresident from litigating issues involving service of process, "doing business" under

²⁴ Tex. R. Civ. P. 122: "If the citation or service thereof is quashed on motion of the defendant, such defendant shall be deemed to have entered his appearance"

²⁵ Tex. R. Civ. P. 123: "Where the judgment is reversed on appeal or writ of error for want of service, or because of defective service of process, . . . the defendant shall be presumed to have entered his appearance"

²⁶ *Pennoyer v. Neff*, 95 U.S. 714 (1877).

²⁷ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

²⁸ The Court decided that if a non-resident had certain "minimum contacts" within the state then out-of-state service of process on the non-resident did not offend "traditional notions of fair play and substantial justice." 326 U.S. at 316. For a discussion of what constitutes "minimum contacts" see Comment, *Jurisdiction Over Foreign Corporations Under Art. 2031b*, 39 Texas L. Rev. 214, 219-20 (1960).

²⁹ In particular see *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), 12 Sw. L.J. 381 (1958). In this case the Supreme Court held that a Texas life insurance company was subject to California service of process by registered mail delivered in Texas in a suit arising from a policy issued to a resident of California. The company's only contact in California had been to solicit a renewal of the policy and accept premium payments thereon from a California resident. The application of this case has been limited by *Hanson v. Denckla*, 357 U.S. 235 (1958), in which the Court held that the *McGee* approach must be restricted to suits arising from contractual obligations.

³⁰ The trend, according to the Court, is based upon the increased nationalization of commerce and the fact that "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." 355 U.S. at 223; see 17 Sw. L.J. 180 (1963).

³¹ Tex. Rev. Civ. Stat. Ann. art. 2031b, §§ 3, 4 (Supp. 1962), provide that "doing business" in Texas "shall be deemed equivalent to an appointment" of the Secretary of State as agent to receive service of citation for an action arising from (1) a contract with a resident of Texas to be performed in part or wholly within the state or (2) commission of a tort in part or wholly in Texas.

³² The constitutionality of this statute has been questioned, in line with the arguments in *Pennoyer v. Neff*, 95 U.S. 714 (1877). See *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 288 F.2d 69 (5th Cir. 1961); 17 Sw. L.J. 180, 185 n.38 (1963).

article 2031b has yet to be defined authoritatively.³³ More litigation in this area should be forthcoming now that foreign corporations and other nonresidents have in rule 120a an effective method of questioning the validity of service of process by Texas courts.

Rule 120a requires that the special appearance be made by sworn motion filed prior to any other plea, pleading, or motion, although any other plea, pleading, or motion may be placed in the same instrument or filed subsequently without waiving the special appearance. No provision is made for either withdrawing an answer which is not a special appearance or for requesting an extension of time to plead specially. However, if for some reason the proper order of filing is not followed, it is possible that the courts will consider it within their discretion to allow a withdrawal so that the special appearance will not be waived. Such practice is currently followed in connection with the use of the plea of privilege.³⁴ On the other hand, the Texas courts have held that when a defendant requests an extension of time in order to plead, he invokes "an exercise of the court's powers and in so doing necessarily subject[s] himself to the court's jurisdiction."³⁵ Similarly, it can be argued that the request for a withdrawal of a plea which is not a special appearance is also an invocation of the court's powers. Thus, the defendant who desires to dispute his amenability to process, but who also wants an extension of time in which to prepare his other pleadings, would be well advised to file his special appearance prior to requesting the extension. In any event, the rule provides that any motion for special appearance shall be heard and determined before a plea of privilege or any other plea or pleading may be heard. Also, determination of any issue of fact in connection with the objection to jurisdiction will not be a determination of the merits of the case.

The rule provides that a party may use discovery processes before appearing specially.³⁶ McDonald, in *Texas Civil Practice*,³⁷ warns

³³ See Comment, *supra* note 28, at 214.

³⁴ "Plea of privilege" is the method of raising questions of proper venue in Texas courts. Tex. R. Civ. P. 86. Since any motion prior to a plea of privilege, other than special appearance, waives the right to raise the plea, decisions as to due order of pleading in plea of privilege cases may be considered analogous to due order of pleading under rule 120a. In allowing a withdrawal of a pleading in order to file a plea of privilege, one court stated: "The purpose of the statute prescribing a due order of pleading was not to deprive the defendant of any valuable right, but rather had as its purpose the preservation of an orderly disposition of the case." *Beir v. Sandgarten*, 99 S.W.2d 1004, 1006 (Tex. Civ. App. 1936).

³⁵ *Republic Oil & Gas Co. v. Owen*, 210 S.W. 319, 320 (Tex. Civ. App. 1919) *error ref.*

³⁶ Rule 120a § 1, sent. 4, quoted note 1 *supra*. See also Moore, *Federal Practice* § 12.13 (2d ed. 1962). Professor Moore doubts the validity of the federal rule (rule 12 (b), Fed. R. Civ. P.) which permits a defendant to question jurisdiction at any stage and suggests that once the defendant uses the court with respect to the merits of the case, he

against the defendant's use of discovery on the subject matter of the suit and suggests that to be safe, the defendant should apply discovery only to jurisdictional questions. It is difficult, however, to conceive of such a use. By allowing the defendant to use discovery prior to a special appearance, the rule would appear to permit discovery on the merits of the case, since no other use by the defendant is likely. Hence McDonald's caution seems to be without foundation.

One effect of a nonresident's unsuccessful attempt to question Texas jurisdiction by special appearance will be the application of the doctrine of res judicata to any further attempts to litigate that question. In *Baldwin v. Iowa State Traveling Men's Ass'n*,³⁸ the United States Supreme Court held that when a federal district court determined that it had jurisdiction over the person of the defendant upon the latter's special appearance, he was barred from raising that question again in a suit on the judgment in another federal court. The same principle has been applied when the second suit is on a state court judgment.³⁹ By considering the first resolution of the issue of personal jurisdiction to be res judicata on subsequent attacks, the Court recognized the principle that a court has jurisdiction to determine its own jurisdiction.⁴⁰ These decisions have been criticized as "placing the doctrine of res judicata on a plane higher than that accorded the constitutional requirement of full faith."⁴¹ However, assuming that *Baldwin* is followed in the future, the nonresident defendant who is unsuccessful in raising a question of jurisdiction under Texas' special appearance practice will be barred from collaterally attacking that adjudication. The Texas decision will be res judicata and entitled to full faith and credit.

The new special appearance rule is a desirable procedural change

should not be allowed thereafter to appear to question jurisdiction. However, the argument is academic, since the rule clearly provides otherwise.

³⁷ *Op. cit. supra* note 16, at § 9:05.

³⁸ 283 U.S. 522 (1931).

³⁹ See *Treines v. Sunshine Mining Co.*, 308 U.S. 66 (1939). However, in dictum, in *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 30 (1917), the Court implied that if a state court's determination that it had jurisdiction was "so gross as to be impossible in a rational administration of justice" such determination need not be given full faith and credit. See also, Survey Note, *Developments in the Law of Res Judicata*, 65 Harv. L. Rev. 818, 855 (1952).

⁴⁰ The principle, as a general rule, is equally applicable to questions involving jurisdiction over subject matter. See Restatement, Judgments § 10(1) (1942): "Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction." An example of an outweighing policy is found in *Kalb v. Feuerstein*, 308 U.S. 433 (1940).

⁴¹ Survey Note, *Res Judicata and Jurisdiction: The Bootstrap Doctrine*, 53 Harv. L. Rev. 652, 658 (1940).

which brings Texas in line with other common law states and countries. There has long been a need for an acceptable method of raising questions concerning the extension of state court jurisdiction over nonresident defendants who are served outside of the state. Rule 120a provides a welcome solution.

Howard V. Tygrett, Jr.

Vendor and Purchaser—Loss While Contract Executory— Right to Insurance Proceeds

Vendor and Purchaser entered into a real estate sales contract which gave both parties the right to specific performance. Purchaser took possession and began monthly payments. Each party separately contracted for fire insurance, Vendor specifically rejecting a clause which extended protection to Purchaser. One day before the scheduled closing date, the improvements on the land were destroyed by fire. Two months after the fire, Purchaser paid the balance of the contract price, and Vendor delivered the deed and assigned rights under his insurance contract to Purchaser. Purchaser sued both insurers, and each insurer filed a cross-claim against the other. Purchaser's claim was settled when each company contributed a pro rata share of the loss based on the face amount of each policy. This left the action between the two insurers.¹ *Held*: When a fire loss occurs while a real estate sales contract is executory and each party to the contract carries separate insurance, if the vendor is subsequently paid the full contract price by the purchaser, the loss is to be borne entirely by the purchaser's insurer. *Paramount Fire Ins. Co. v. Aetna Cas. & Sur. Co.*, —Tex.—, 353 S.W.2d 841 (1962).

The right to insurance proceeds when more than one party has an interest in the insured property is an issue that has not only split, but splintered, American jurisdictions. Different philosophies concerning the nature and purpose of the insurance contract, varying rules for determining who is to bear the risk of loss, and tortured efforts to prevent windfalls account for the diversity.² Modern history on the subject begins with *Paine v. Meller*,³ in which an English court ruled

¹ The trial court gave judgment for Vendor's insurer and ordered Purchaser's insurer to pay to Vendor's insurer the amount the latter had contributed toward the settlement. The court of civil appeals reversed and ordered the loss prorated between the two insurers in proportion to the face amounts of their respective policies. 347 S.W.2d 281 (Tex. Civ. App. 1961).

² Young, *Some "Windfall Coverages" in Property and Liability Insurance*, 60 Colum. L. Rev. 1063 (1960).

³ 6 Vesey 349, 31 Eng. Rep. 1088 (Ch. 1801).

that a purchaser holding the equitable interest had to bear the risk of loss. Later, the case of *Rayner v. Preston*⁴ established that (1) the vendor's insurance policy was personal to him and (2) even though the purchaser had to bear the loss by paying the full purchase price after the fire, he did not have any right to the proceeds under the vendor's policy. Subsequently, it was decided that the vendor also had no right to the insurance money, since only the purchaser bore the loss.⁵

Rayner v. Preston was understandably unpopular. Under that rule no one could win except the insurance company, and it was paid to bear the risk. Consequently, the celebrated dissent in *Rayner v. Preston*⁶ formed the germ for a now widely accepted, but diametrically opposed doctrine. In his dissent, Justice James argued that since the purchaser had equitable title, the vendor was a trustee for the benefit of the purchaser.⁷ Any benefits which the trustee received incident to legal ownership of the property were to be received for the benefit of the *cestui que trust* or the purchaser. In other words, the insurance company should pay the vendor who should turn the money over to the purchaser in lieu of the destroyed property. In 1922 Parliament, in effect, enacted into law the rule advocated by Justice James.⁸

A considerable number of American jurisdictions favor the dissent in *Rayner v. Preston*.⁹ Some, however, follow the older English rule.¹⁰ Others have developed home-grown hybrids.¹¹ Most American cases are decided on one of the following bases:

(1) The insurance policy is a personal indemnity contract. If the property is destroyed but the loss is covered by another so that the insured is reimbursed, the insured cannot recover from his insurer.¹²

⁴ 18 Ch. D. 1 (1881).

⁵ *Castellain v. Preston*, 11 Q.B.D. 380 (1883), reversing 8 Q.B.D. 613 (1882).

⁶ 18 Ch. D. 1, 12 (1881).

⁷ *Id.* at 13.

⁸ Law of Property Act, 1922, 12 & 13 Geo. 5, c. 16.

⁹ See Annot., 64 A.L.R.2d 1403, 1404 (1959): "The great majority of the cases have applied a theory of constructive trusteeship to the relation of vendor and purchaser . . ." Cases from the following 15 states are then cited: Alabama, California, Georgia, Iowa, Kentucky, Maryland, Missouri, Nebraska, New Jersey, New York, North Dakota, Ohio, Pennsylvania, South Dakota, and Washington. *Id.* at 1406.

¹⁰ *Id.* at 1404: "A few cases have held that the purchaser has no interest whatever in the proceeds of an insurance policy procured by the vendor at his own cost . . .," citing cases from California, Louisiana, New York, and Wisconsin.

¹¹ As one example of the special rules, in Minnesota a vendor who has a right to rescind a contract because of fraud by the purchaser is allowed to recover on the purchaser's policy for a loss that occurs while the purchaser is in possession. *Cetkowski v. Knutson*, 163 Minn. 492, 204 N.W. 528 (1925).

¹² *Smith v. Jim Dandy Mkts.*, 172 F.2d 616 (9th Cir. 1949); *Glen Falls Ins. Co. v. Sterling*, 219 Md. 217, 148 A.2d 453 (1959); *Tauriello v. Aetna Ins. Co.*, 14 N.J. Super. 530, 82 A.2d 226 (1951).

Nor may anyone else recover, *e.g.*, a purchaser who bears the risk of loss.¹³

(2) The insurance contract is absolute within its terms. If the property is destroyed, the insured may recover from his insurer. Other contract claims of the insured by which he may be reimbursed are of no concern to the insurer.¹⁴

(3) If the insured is a vendor and the risk of loss is on the purchaser, the vendor can recover subject to a constructive trust for the purchaser.¹⁵

(4) When the parties to a contract of sale make an agreement concerning insurance, the proceeds shall be applied in accordance with their intent.¹⁶ Such an agreement may be an assignment by one party of his claim¹⁷ or an agreement that the purchaser shall assume payment of premiums on the vendor's policy.¹⁸

Difficulties may arise with any one of these four approaches. The first, based on the nineteenth century English rule,¹⁹ may put the loss on a purchaser who is serenely ignorant of the personal indemnity concept of insurance. He may see no need of obtaining insurance since he knows the vendor has the property "covered." However, after a fire occurs, that purchaser will have to pay the full price for an ash heap. The insurance company will pay no one, because it is deemed by law to be subrogated to the vendor's claim against the

¹³ *Brownell v. Board of Educ.*, 239 N.Y. 369, 146 N.E. 630 (1925). The case contains a ringing re-affirmation of *Rayner v. Preston* but is not completely analogous. Risk of loss was not on the purchaser, as in the *Rayner* case, because the contract provided that the premises were to be delivered "in as good condition as they now are, natural wear excepted." 146 N.E. at 632.

¹⁴ *United States v. American Tobacco Co.*, 166 U.S. 468 (1897); *Edlin v. Security Ins. Co.*, 269 F.2d 159 (7th Cir. 1959); *First Nat'l Bank v. Boston Ins. Co.*, 17 Ill. 2d 147, 160 N.E.2d 802 (1959); *Foster v. Equitable Mut. Fire Ins. Co.*, 68 Mass. (2 Gray) 216 (1854); *Board of Trustees v. Cream City Mut. Ins. Co.*, 255 Minn. 347, 96 N.W.2d 690 (1959); *Kahn v. American Ins. Co.*, 137 Minn. 16, 162 N.W. 685 (1917); *Lampesis v. Travelers Ins. Co.*, 101 N.H. 323, 143 A.2d 104 (1958); *Foley v. Manufacturers' & Builders' Fire Ins. Co.*, 152 N.Y. 131, 46 N.E. 318 (1897); *Alexandra Restaurant, Inc. v. New Hampshire Ins. Co.*, 272 App. Div. 346, 71 N.Y.S. 2d 515 (Sup. Ct. 1947), *aff'd*, 297 N.Y. 858, 79 N.E.2d 268 (1948).

¹⁵ *Vogel v. Northern Assur. Co.*, 219 F.2d 409 (3d Cir. 1955); *Alabama Farm Bureau Mut. Ins. Serv. v. Nixon*, 268 Ala. 271, 105 So. 2d 643 (1958); *William Skinner & Sons v. Houghton*, 92 Md. 68, 48 Atl. 85 (1900); *Insurance Co. of No. America v. Alberstadt*, 383 Pa. 556, 119 A.2d 83 (1956); *Dubin Paper Co. v. Insurance Co. of No. America*, 361 Pa. 68, 63 A.2d 85 (1949).

¹⁶ *Raplee v. Piper*, 3 N.Y.2d 179, 143 N.E.2d 919 (1957).

¹⁷ *Milwaukee Mechanics Ins. Co. v. Maples*, 37 Ala. App. 74, 66 So. 2d 159 (1953); *Vierneisel v. Rhode Island Ins. Co.*, 77 Cal. App. 2d 229, 175 P.2d 63 (Dist. Ct. App. 1946); *Allyn v. Allyn*, 154 Mass. 570, 28 N.E. 779 (1891); *Kost v. Resolute Underwriters*, 211 S.W.2d 758 (Tex. Civ. App. 1948) *error disp.*

¹⁸ *Raplee v. Piper*, 3 N.Y.2d 179, 143 N.E.2d 919 (1957); *Persico v. Guernsey*, 220 N.Y. Supp. 689, *aff'd mem.*, 222 App. Div. 736, 225 N.Y.S. 890 (Sup. Ct. 1927); *Naquin v. Texas Sav. & Real Estate Inv. Ass'n*, 95 Tex. 313, 67 S.W. 85 (1902).

¹⁹ See text accompanying notes 4, 5 *supra*.

purchaser. This unhappy result contributes to the prevalence of the other three views.²⁰

In practical application, however, the others also present problems. Under the second approach, the vendor may be paid twice, once by his insurer, once by the purchaser.²¹ Or a purchaser who carries insurance may be allowed to recover although he has a right to rescind the sales contract.²²

Under the third approach, *i.e.*, the constructive trust doctrine, the purchaser may be able to make a handsome profit if both he and the vendor have policies, for some courts have allowed him to recover on his own policy and also receive as *cestui que trust* the proceeds of the vendor's policy. *In toto*, he recovers an amount more than the loss.²³

The fourth category of decisions, involving assignment of policy rights, has also resulted in one party's receiving a windfall.²⁴ Fewer problems develop under this approach, however, since the parties usually bargain for assignments and thereby tend to equalize advantages between themselves. Also, no difficulty is encountered in giving the proceeds to the purchaser if he has paid the insurance premiums.

In the instant case the court did not face the knotty issues which had resulted in windfalls or losses in the cases discussed above. Recovery was not sought by one who had already been made whole. Moreover, Purchaser could not have recovered more than his loss since by suing both insurers in the same suit, the loss could have been prorated. However, the court ruled that the full risk of loss was on Purchaser's insurer. The court reasoned, first, that Vendor had no

²⁰ See Annot., 64 A.L.R.2d 1403 (1959).

²¹ In *Edlin v. Security Ins. Co.*, 269 F.2d 159 (7th Cir. 1959), the court held that even though the vendor received the full purchase price after the loss, he was entitled to recover from his insurer. The purchaser, who intervened in the suit, was held not entitled to any part of the insurance proceeds. However, in *Board of Trustees v. Cream City Mut. Ins. Co.*, 255 Minn. 347, 96 N.W.2d 690 (1959), the court allowed the vendor to recover but pointedly refrained from expressing a view as to the purchaser's right to the insurance proceeds since the purchaser was not before the court. In similar situations the insured was allowed to recover although another repaired the damage. *Foley v. Manufacturers' & Builders' Fire Ins. Co.*, 152 N.Y. 131, 46 N.E. 318 (1897) (owner-contractor); *Alexandra Restaurant, Inc. v. New Hampshire Ins. Co.*, 272 App. Div. 346, 71 N.Y.S.2d 515. (Sup. Ct. 1947), *aff'd*, 297 N.Y. 858, 79 N.E.2d 268 (1948) (lessor-lessee).

²² *Lampesis v. Travelers Ins. Co.*, 101 N.H. 323, 143 A.2d 104 (1958).

²³ See *Vogel v. Northern Assur. Co.*, 219 F.2d 409 (3d Cir. 1955); *Dubin Paper Co. v. Insurance Co. of No. America*, 361 Pa. 68, 63 A.2d 85 (1949). Both of these cases, decided under Pennsylvania law, allowed a recovery in excess of loss. Subsequently, the Pennsylvania courts seem to have changed their position. In *Insurance Co. of No. America v. Alberstadt*, 383 Pa. 556, 119 A.2d 83 (1956), the court required that the loss be prorated between the two insurance companies so that the plaintiff could not recover in excess of the loss.

²⁴ See *Milwaukee Mechanics Ins. Co. v. Maples*, 37 Ala. App. 74, 66 So. 2d 159 (1953).

claim against his insurer.²⁵ Since he had the right of specific performance, vendor was paid the full purchase price after the fire and, therefore, suffered no loss. The court relied principally on a case in which lessor was denied recovery from his insurer because the damage had been repaired by the lessee.²⁶ The other cases cited by the court presented situations in which the plaintiffs were seeking windfalls.²⁷

The court then analyzed the doctrine of constructive trusteeship.²⁸ It acknowledged that the doctrine was widely accepted and could be useful, though questionable, in cases in which a purchaser would otherwise suffer an unforeseen loss. The court set the stage for future legal struggles by declaring that:

the rule [constructive trusteeship] should have no application when the vendees have secured their own insurance policy As it is not before us here, we leave open the question of whether, where the vendee has no insurance there can be recovery on the vendor's policy subject to a constructive trust for the vendee, who is often ignorant of his legal liability in such a situation²⁹

The court did not feel called upon to adopt a rule that "does violence to the idemnity concept of insurance"³⁰ for the benefit of a plaintiff cautious enough to buy his own insurance. Whether the presence of a less knowledgeable purchaser would require an opposite ruling will not be known until such a case arises.³¹

The considerable amount of concern expressed by both the majority and the dissent with respect to the constructive trusteeship doctrine was probably prompted more by deference to its popularity³² than by its relevance to the case. Initially, Purchaser sought recovery as an assignee of Vendor's rights under the latter's policy. As such, he did not seek or need the creation of a fictitious trust relationship.

²⁵ 353 S.W.2d at 844.

²⁶ *Ramsdell v. Insurance Co. of No. America*, 197 Wis. 136, 221 N.W. 654 (1928). The Wisconsin court indicated that it would have favored proration if other insurers of the same property had been before the court. "In equity and good conscience the insurance companies may yet prorate the loss, but we cannot see how it can be held that the [lessor] had any actual loss." *Id.* at 655.

²⁷ *Smith v. Jim Dandy Mkts.*, 172 F.2d 616 (9th Cir. 1949); *Tauriello v. Aetna Ins. Co.*, 14 N.J. Super. 530, 82 A.2d 266 (1951).

²⁸ 353 S.W.2d at 844.

²⁹ *Id.* at 845.

³⁰ *Ibid.*

³¹ It has been suggested that the constructive trusteeship doctrine coincides with the lay understanding that insurance runs with the property and that "as usual, the courts are sluggishly following business." Vance, *Insurance* § 131 (3d ed. 1951).

³² Annot., 64 A.L.R.2d 1403, 1406 (1959): "The rule quite generally followed is that the proceeds from the vendor's insurance policies, even though the purchaser did not contribute to their maintenance, constitute a trust fund for the benefit of the purchaser"

His assignor, Vendor, contracted for a policy which provided payment for a loss to the policyholder as his "*interest may appear at time of loss.*"³³ When the loss occurred, Vendor had an interest in the property equal to the unpaid balance of the purchase price. No clause in Vendor's insurance contract provided that the insurer would be relieved of liability if, *after the loss*, a purchaser should pay the policyholder an amount equal to the insurance claim. That construction seems to have been fabricated entirely by the court. Such an interpretation re-enunciates, with all its ancient rigor, the *Rayner v. Preston* rule,³⁴ long abandoned in England. Just as in those cases, the court here requires that (1) insurance be regarded as a personal indemnity contract and (2) that recovery be barred, even if a loss is suffered by the person insured, if the insured recovers from another.

Though subrogation is not mentioned, the ruling achieves the same effect. The court held that the purchaser's payment discharged the insurance company's liability to the vendor. That is the same as holding that when the insurance company pays the vendor, the company can reimburse itself by succeeding to the vendor's rights against the purchaser. However, except in the case of mortgagees, subrogation to the contract rights of an insured is not generally favored in this country.³⁵

Practical difficulties in applying the rule of the principal case are pointed out by the dissent.³⁶ A vendor and a purchaser might enter into a contract providing for payment of the purchase price over a period of years. According to the majority opinion, upon a loss, the vendor would have a claim against his insurer until and unless he "collects the full purchase price."³⁷ Thus, the installment contract would have to run its full course before the insurer's liability would be known.

The holding raises many other questions. It appears to embrace the old English doctrine, but it leaves the door open for future departures. The principal question in regard to future cases is whether an *uninsured* purchaser who bears the risk of loss will be able to recover on his vendor's policy. Moreover, the most disturbing question concerns the effect of the decision on the contractual relations between the parties. In holding that the vendor's insurer was not liable, the court denied the right of recovery by an insured who had

³³ 353 S.W.2d at 846. (Emphasis added.)

³⁴ *Rayner v. Preston*, 18 Ch. D. 1 (1881); *Castellain v. Preston*, 11 Q.B.D. 380 (1883), reversing 8 Q.B.D. 613 (1882); see notes 3-6 *supra* and accompanying text.

³⁵ Patterson, Insurance § 33 (2d ed. 1957).

³⁶ 353 S.W.2d at 846.

³⁷ *Ibid.*

a matured claim under the terms of his contract and also nullified his assignment of that claim.

Reba Graham Rasor

Venue — Corporations — Registered Office as Statutory Place of Residence

Plaintiff brought suit in Navarro County against two corporations, each of which filed a plea of privilege¹ alleging residence in Smith County. Plaintiff, in his controverting affidavit,² asserted that venue lay in Navarro County against one of the corporations, since its articles of incorporation designated that county as the address of its registered office.³ The corporation did not maintain an office in Navarro County and it conducted no business there. Its only office was in Smith County.⁴ *Held*: The designation by a corporation of the county in which its registered office and registered agent are located constitutes a statutory place of residence of the corporation for venue purposes. *Ward v. Fairway Operating Co.*, — Tex. —, 364 S.W.2d 194 (1963).

Venue, in modern thinking, can be defined as the place, usually a county or district, where a cause of action is to be tried.⁵ It must be distinguished from "jurisdiction" which is the power or authority of a court to decide a case.⁶ Although generalizations on the subject of venue are impractical, since it is largely a statutory matter, as a general rule venue in civil actions lies in the county in which the defendant resides at the commencement of the action.⁷ The primary

¹ A plea of privilege to be sued in the county of one's residence is authorized by Rule 86, Tex. R. Civ. P.

² A party who desires to controvert a plea of privilege does so by filing a verified controverting plea which sets forth "the grounds relied upon to confer venue of such cause on the court where the cause is pending." Rule 86, Tex. R. Civ. P.

³ The Texas Business Corporation Act requires that a corporation shall continuously maintain (1) a registered office and (2) a registered agent whose address must be identical to the registered office. Tex. Bus. Corp. Act Ann. art. 2.09 (1956). The post office address of the initial registered office must be set forth in the articles of incorporation. Tex. Bus. Corp. Act Ann. art. 3.02A(10) (1956).

⁴ The facts regarding the location of the corporation's business office are stated in the opinion of the court of civil appeals, 358 S.W.2d 143, 144 (1962).

⁵ *Sullivan v. Hall*, 86 Mich. 7, 48 N.W. 646 (1891). In *Hardenburgh v. Hardenburgh*, 115 Mont. 469, 146 P.2d 151 (1944), the court stated:

In olden times venue indicated the county from which the jury was to come.

This is the basis for the general rule. "Anciently a jury of one county could not try any matter arising in another county. A foreign county was almost as formidable a thing as a foreign country." . . . In present day legal phraseology "venue" means the proper county for the trial of a cause; that is, the county or counties fixed by statute for the trial. *Id.* at 152.

⁶ *Toumlin v. James Mfg. Co.*, 27 F. Supp. 512 (W.D.N.Y. 1939).

⁷ *Goodrich v. Superior Oil Co.*, 150 Tex. 159, 237 S.W.2d 969 (1951).

question is where does a corporation "reside" for venue purposes. The answer must be found in the individual state statutes.⁸

The Model Business Corporation Act,⁹ with certain specific exceptions,¹⁰ does not touch the matter of venue, nor does it specify where a corporation resides. The articles of incorporation (charter) required by the Model Act need not state the address of the corporation's principal office or the address of its place of business. Rather, the articles of incorporation must set forth the address of a registered office and the name of a registered agent whose business office address must be identical to the address of the registered office.¹¹ Thus, in patterning a corporate act after the Model Act, it was left up to the individual state legislature to provide conformity between its corporate venue statute and its corporation act.¹²

⁸ Similarly, to ascertain if there are any specific venue provisions applicable to the particular cause of action involved, the venue statute is the guide. However, venue provisions applicable to particular causes of action are outside the scope of this Note.

⁹ ABA-ALI Model Bus. Corp. Act (1953), hereafter referred to as the "Model Act." For an excellent discussion of the Model Act, its history, its need, states which have used it as a pattern and to what extent, states considering passage, etc., see Garrett, *Model Business Corporation Act*, 4 *Baylor L. Rev.* 412 (1952).

¹⁰ For involuntary dissolution of a corporation, the action shall be commenced in either of two counties, one of which is provided by the act to be the county in which the registered office is situated. Model Act § 89. The state adopting an act based on the Model Act will probably provide that the second county is the site of the state capital.

A proceeding to liquidate the assets and business of a corporation shall be brought in the county in which the registered office or the principal office is situated. Model Act § 90.

¹¹ Model Act § 48(j).

¹² The problem of providing conformity between the language of the venue statute and that of the corporation act has been treated by the states in various ways with varying degrees of effectiveness. A few examples are set forth below. In each case the corporation act requires the corporation: (1) to maintain a registered office and a registered agent and (2) to set forth in the articles of incorporation the address of the registered office and the name of the registered agent at such address. None require that the address of the corporation's principal office, place of business, domicile, or residence be set forth.

Illinois, whose corporation act was the model for the Model Act, has a venue statute which provides: "Except as otherwise provided in this Act, every action must be commenced (a) in the county of residence of any defendant . . ." Ill. Ann. Stat. ch. 110, § 5 (Smith-Hurd 1956). However, the statute provides that, for purposes of venue, "any private corporation . . . is a resident of any county in which it has its registered office or other office or is doing business." Ill. Ann. Stat. ch. 110, § 6(1) (Smith-Hurd 1956). The "Joint Committee Comment" following this section states: "The term 'principal office' used in . . . the former act is abandoned as being unduly restrictive and productive of uncertainty and the term 'registered office or other office' has been substituted."

The venue statute of Pennsylvania provides: "(a) Except as otherwise provided . . . a personal action against a corporation or similar entity may be brought in and only in (1) the county where its registered office or principal place of business is located; or (2) a county where it regularly conducts business." Pa. R. Civ. P. 2179 (1951).

Utah, whose Business Corporation Act became effective January 7, 1962, has a general venue provision which states that "the action must be tried . . . in the county in which any defendant resides . . ." The same section provides: "[I]f such defendant is a corporation, any county in which such corporation has its principal office or place of business shall be deemed the county in which such corporation resides. . . ." Utah Code Ann. § 78-13-7 (1953).

In Oklahoma "an action . . . against a corporation . . . may be brought in the county in which it is situated, or has its principal office or place of business, or in which any of

Prior to the passage of the Texas Business Corporation Act in 1955,¹³ the corporation statutes required that a corporation set forth in its charter "the place or places where its business is to be transacted."¹⁴ The venue statute, then, as now, provided that a corporation could be sued in the county in which it was domiciled or in the county in which its principal office was located.¹⁵ In *Hawk & Buck v. Cassidy*,¹⁶ a leading case on the matter of corporate venue,¹⁷ the issue was whether the charter of a corporation which designated a particular county as its place of business was sufficient to sustain venue in that county even though the corporation was not, in reality, using such county as its place of business.¹⁸ The court held that "a corporation may be sued in the county where its domicile is designated by its charter, and this regardless of whether it does business or maintains an office in such county."¹⁹ *Hawk & Buck* thus decided that a corporation's domicile or residence was the county designated in its charter as its "place of business."²⁰ By way of dictum the court indicated that its holding did not fix venue *exclusively* in the charter-designated county; the corporation might also be sued in the county where its principal office was, in fact, located.²¹

There are no general venue provisions in the Texas Business Corporation Act,²² and the lack of conformity between the act and the

the principal officers thereof may reside" Okla. Stat. Ann. tit. 12, § 134 (1960).

Oregon's general venue statute declares: "All other actions or suits shall be commenced and tried in the county in which the defendants, or one of them, reside or may be found at the commencement of the action or suit" Ore. Rev. Stat. § 14.080 (1959).

¹³ Tex. Bus. Corp. Act Ann. (1956).

¹⁴ An Act Concerning Private Corporations § 6, Texas Acts 1874, at 120, 122, 8 Gammel, Laws of Texas 122, 124 (1898) (Former art. 1304, Tex. Rev. Civ. Stat. (1925)).

¹⁵ The Texas venue statute states the general rule, subject to thirty-four exceptions or subdivisions, that no person shall be sued out of the county in which he has his "domicile." Tex. Rev. Civ. Stat. Ann. art. 1995 (1950). Subdivision 23, entitled "Corporations and Associations," reads, in part: "Suits against a private corporation . . . may be brought in the county in which its principal office is situated" The statute does not state where a corporation resides or is domiciled for venue purposes.

Domicile, as used in the Texas venue statute, means residence. *Pearson v. West*, 97 Tex. 238, 77 S.W. 945 (1904); *Brown v. Boulden*, 18 Tex. 432 (1857). "It is very generally held that a corporation . . . has a residence where it conducts its ordinary business." (Emphasis added.) *Texas & Pac. Ry. v. Mangum*, 68 Tex. 342, 346 (1887). For a complete discussion of "domicile" and "residence," see *Snyder v. Pitts*, 150 Tex. 407, 241 S.W.2d 136 (1951).

¹⁶ 164 S.W.2d 245 (Tex. Civ. App. 1942).

¹⁷ See *Higgins v. Hampshire Prods.*, 319 Mich. 674, 30 N.W.2d 390 (1948), in which the *Hawk & Buck* case is cited and followed. See also 175 A.L.R. 1083 (1948), where the *Higgins* case is reported, and the annotation at 1092.

¹⁸ 164 S.W.2d at 246.

¹⁹ *Id.* at 247.

²⁰ *Ibid.*

²¹ *Ibid.*

²² Tex. Bus. Corp. Act Ann. (1956). The Texas act is patterned after the Model Act. *Introduction*, 3A Vernon's Ann. Tex. Civ. Stat. ix (1956). There are certain important differences but none are pertinent to the question of venue. For a discussion of the Texas

Texas venue statute precipitated the problem in the principal case.²³ The venue statute allows suits against corporations to be maintained in the county in which the corporation has its (1) "domicile"²⁴ or (2) "principal office."²⁵ The corporation act requires that a corporation maintain (1) a "registered office" and (2) a "registered agent" at the registered office.²⁶ The articles of incorporation must set forth the post office address of the corporation's initial registered office and the name of the initial registered agent at such address.²⁷ The act does not require a corporation to designate the place or places of business, nor the location of its principal office.

Since the applicable corporate venue provisions were the same in the principal case as they were in *Hawk & Buck*,²⁸ the supreme court had to decide whether the reasoning and result in that case²⁹ would be applicable to the facts in the principal case, notwithstanding the change in charter requirements from "place of business"³⁰ to "registered office."³¹ The court resolved the problem by ruling that "the place of its designated registered office and agent shall constitute a statutory place of residence"³² of the corporation³³ and noted that its construction of the Texas corporation act "comports with the reasoning of cases illustrated by Hawk and Buck"³⁴

changes from the Model Act see Carrington, *Experience in Texas With the Model Business Corporation Act*, 5 Utah L. Rev. 292 (1957).

The Texas Act has some specific venue provisions. For involuntary dissolution of a domestic corporation or the revocation of a foreign corporation's certificate of authority, the suit "shall be commenced . . . in the district court of the county in which the registered office . . . is situated, or in any district court of Travis County." (Travis County is the county in which the state capital is located.) Tex. Bus. Corp. Act Ann. art. 7.03 (1956). "The district court for the county in which the registered office of a corporation is located may order liquidation of the assets and business of the corporation and may appoint a receiver to effect such liquidation" Tex. Bus. Corp. Act Ann. art. 7.06A (1956). See note 10 *supra* for similar provisions in the Model Act.

²³ See note 12 *supra* for examples of other states' handling of the conformity problem.

²⁴ Tex. Rev. Civ. Stat. Ann. art. 1995 (1950).

²⁵ Tex. Rev. Civ. Stat. Ann. art. 1995, § 23 (1950).

²⁶ Tex. Bus. Corp. Act Ann. art. 2.09 (1956).

²⁷ Tex. Bus. Corp. Act Ann. art. 3.02A(10) (1956). The address of the registered office can be changed inexpensively and with little difficulty by filing with the Secretary of State a statement of the change. Tex. Bus. Corp. Act Ann. art. 2.10 (1956).

²⁸ See note 15 *supra* and accompanying text.

²⁹ See notes 18-20 *supra* and accompanying text.

³⁰ An Act Concerning Private Corporations § 6, Texas Acts 1874, at 120, 122, 8 Gammel, Laws of Texas 122, 124 (1898) (Former art. 1304, Tex. Rev. Civ. Stat. (1925)).

³¹ Tex. Bus. Corp. Act Ann. art. 3.02A(10) (1956).

³² The court apparently uses "residence" to mean "domicile." Although the general venue provision speaks of "domicile," Tex. Rev. Civ. Stat. Ann. art. 1995 (1950), the court refers to "general venue in the county of residence." 364 S.W.2d at 195. This interchanging of "residence" and "domicile" is in accord with earlier Texas cases. See note 15 *supra*.

³³ 364 S.W.2d at 195.

³⁴ *Ibid.*

The holding in the principal case can be summarized as follows: (1) The county which a corporation has designated either in its original or amended articles of incorporation as the location of its registered office is, for venue purposes, the statutory residence of that corporation. (2) Subdivision 23 of the Texas venue statute,³⁵ which provides that suit may be brought against a corporation in the county in which its principal office is situated, is an exception to the general venue rule that suit be brought in the country in which the corporation has its domicile.³⁶

The question could arise as to whether the "statutory place of residence" is the only residence of a corporation for purposes of venue.³⁷ For such a result there would have to be an overruling, by implication, of prior cases which have considered other possible residences.³⁸ It is submitted that no overruling was implied by the court nor intended by the legislature.³⁹ The *Ward* case apparently equates "registered office" under the Texas Business Corporation Act with "place of business" under the prior corporation statutes, at least insofar as venue is concerned. As such, the *Ward* rule merely supplants the *Hawk & Buck* rule.

The result reached in the principal case is salutary. It provides an

³⁵ Tex. Rev. Civ. Stat. Ann. art. 1995 (1950).

³⁶ Accordingly, if a corporation designates X county as the location of its registered office (which, according to the rule announced in (1) above, establishes X county as its domicile for venue purposes) and if the principal office of the corporation is situated in Y county, a plaintiff can maintain venue against the corporation in either X county under the general rule or Y county under the exception.

³⁷ The problem as to possible additional residences is brought into sharp focus by considering subdivision 4 of the Texas venue statute. Tex. Rev. Civ. Stat. Ann. art. 1995 (1950). This subdivision provides, in part: "If two or more defendants *reside* in different counties, suit may be brought in any county where one of the defendants *resides*." (Emphasis added.) Thus, if a plaintiff attempts to apply subdivision 4 to bring several defendants into the county in which a corporation resides, it is imperative that the residence or residences of the corporation be known.

The *Ward* case also involved subdivision 4. The plaintiff attempted to prove that one of the corporations resided in Navarro County, and, therefore, under subdivision 4, venue would lie in that county as to the remaining defendants. The Supreme Court ruled on the residence of the Navarro County corporation and remanded the subdivision 4 question for further proceedings. 364 S.W.2d at 196.

³⁸ E.g., *Pittsburg Water Heater Co. v. Sullivan*, 115 Tex. 417, 282 S.W. 576 (1926); *Mercantile Bank & Trust Co. v. Schuhart*, 115 Tex. 114, 277 S.W. 621 (1925); *Texas & Pac. Ry. v. Mangum*, 68 Tex. 342, 4 S.W. 617 (1887).

³⁹ If the court had intended the "statutory place of residence" to be the only residence of the corporation, it would have been a simple matter to have said so. However, the court said that "the place of its designated registered office and agent shall constitute a statutory place of residence of the corporation . . ." 364 S.W.2d at 195. (Emphasis added.) The court also stated, "As so construed, the Texas Business Corporation Act constitutes a statutory pronouncement of where a corporation resides for venue purposes which meets the requirements of decisions illustrated by *Pittsburg Water Heater Company of Texas v. Sullivan* . . ." *Ibid.* It is thus the *corporation act* which provided the statutory residence. Since there was no change in the venue statute, it is reasonable to assume that prior constructions of the venue statute were still in force following passage of the Texas Business Corporation Act.

easily ascertainable county in which venue will always lie against a corporation. No undue burden is imposed upon a corporation, because it is free to designate any county as the location of its registered office, and it can easily change such location by complying with article 2.10 of the Texas Business Corporation Act. Of course, a corporation is now well advised to choose the site of its registered office with the idea of venue in mind.

Sam N. Vilches, Jr.

Workmen's Compensation — Longshoremen and Harbor Workers

Decedent was fatally injured while employed as a workman in the construction of an oil drilling barge. Although the barge had been launched, it was still under construction and had never been used in navigation. Claimant, Decedent's wife, recovered benefits under the Louisiana Workmen's Compensation Act.¹ Later, she obtained an award in a federal district court² under the Longshoremen's and Harbor Workers' Compensation Act;³ the award was disallowed by the court of appeals.⁴ On certiorari⁵ to the United States Supreme Court, *held, reversed*: Federal workmen's compensation is available to a harbor worker or longshoreman injured while working on the navigable waters of the United States, regardless of whether the particular injury is within the constitutional reach of a state workmen's compensation law. *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962).

In the past, injured longshoremen and harbor workers have been uncertain whether to apply for state or federal workmen's compen-

¹ La. Rev. Stat. §§ 23:1021-:1351 (1952).

² Although there is a maximum limit on the compensation award under Louisiana law, there is none under the federal law. In the instant case the federal award was credited with the payments made under the state award. This is consistent with the position taken when an employee obtains a recovery in two different states. In such a case the recovery is limited to the highest amount the workman should be entitled to receive under the act most favorable to him. See Goodrich, Conflict of Laws § 97 (3d ed. 1949); 1 Schneider, Workman's Compensation § 160 (3d ed. 1941). See also *Texas Employers' Ins. Ass'n v. Price*, 300 S.W. 667 (Tex. Civ. App.), *error dismissed per curiam*, 117 Tex. 173, 300 S.W. 672 (1927). The problems of subrogation between various insurance carriers are not within the scope of this Note.

³ 44 Stat. 1424 (1927), 33 U.S.C. §§ 901-50 (1958), as amended, 33 U.S.C. §§ 907(b)-41 (Supp. III, 1961).

⁴ 293 F.2d 52 (5th Cir. 1961).

⁵ 368 U.S. 946 (1962). "We granted certiorari because of the importance of the interpretation of § 3(a) in the administration of the act."

sation. In *Southern Pac. Co. v. Jensen*,⁶ decided in 1916, the United States Supreme Court held that United States admiralty jurisdiction applied to a case in which a longshoreman was killed while loading an ocean-going vessel, and that the worker was precluded from receiving state workmen's compensation.⁷ The Court reasoned that a state workmen's compensation statute could not operate in any area where it overlapped the United States admiralty jurisdiction.⁸ Because there was no federal workmen's compensation applicable to longshoremen at that time, the *Jensen* decision deprived these workers of the benefits of workmen's compensation. In an attempt to rectify this situation, Congress enacted legislation⁹ which allowed state compensation to longshoremen and harbor workers. However, the statute was declared unconstitutional in 1920, in *Knickerbocker Ice Co. v. Stewart*,¹⁰ as being a delegation of a non-delegable federal power to the states. In 1922 Congress attempted again to solve the problem left by *Jensen* by giving to claimants the rights and remedies under the workmen's compensation laws of any state.¹¹ This second statute met the same fate as the prior one, and for the same reason, in *Washington v. Dawson & Co.*¹² In 1927, in

⁶ 244 U.S. 205 (1916).

⁷ *Id.* at 216: "The matter was outside state cognizance and exclusively within federal maritime jurisdiction since to hold otherwise would impair the harmony and uniformity which the constitutional grant to the Federal government of the admiralty power was meant to assure."

⁸ The issues before the Court in the *Jensen* and *Calbeck* cases were completely different. The problem in *Jensen* concerned the limits of state jurisdiction in admiralty matters—a constitutional question. In *Calbeck*, the issue was the limit of federal jurisdiction—a question of statutory construction (in particular, the construction of § 3(a) of the Longshoremen's and Harbor Workers' Compensation Act).

⁹ Act of Oct. 6, 1917, 40 Stat. 395. This act purported to amend the Judicial Code §§ 24, 256 by adding to the saving clause: "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any State." (Emphasis added.)

¹⁰ 253 U.S. 149 (1920). The fundamental purpose of granting the admiralty power to Congress was to "preserve adequate harmony and appropriately uniform rules relating to maritime matters and bring them within the control of the Federal government." The Court said Congress could not transfer its legislative power to the states. Moreover, such a delegation of power to the various states would lend nonconformity rather than uniformity to the national law.

¹¹ Act of June 10, 1922, 42 Stat. 634, amended the saving clause of the Judicial Code §§ 24, 256 to read: "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States . . ."

¹² 264 U.S. 219 (1924). The concern was with a constitutional provision

which, for the purpose of securing harmony and uniformity, prescribes a set of rules, empowers Congress to legislate to that end, and prohibits material interference by the States. Obviously, if every State may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and sought to prevent. *Id.* at 226.

accordance with Justice McReynolds' suggestion in *Dawson*¹³ that the enactment of federal workmen's compensation legislation would be within its powers, Congress passed the Longshoremen's and Harbor Workers' Compensation Act.¹⁴

The Longshoremen's Act has several features which limit the scope of its application. It covers only those injuries incurred on the navigable waters of the United States.¹⁵ It does not cover (1) masters or members of a crew nor (2) officers or employees of the United States.¹⁶ Its most restrictive provision is that federal compensation is available only when compensation cannot be validly provided by a state statute.

Although the new act covered many persons not previously protected, the problem of determining whether to apply for state or federal compensation remained.¹⁷ If the claimant chose the wrong forum, his payments would be delayed, or possibly, if too much time was wasted, completely barred by the statute of limitations.¹⁸ The dilemma was partially abridged in a line of Supreme Court decisions¹⁹ in which state compensation was allowed for injuries sustained within the area covered by the federal admiralty laws. The reason given by the Court was that, although the employment was maritime in character, it was of purely local concern, and recovery under state law would not prejudice the uniformity of the national law.²⁰ However, the Court did not define the limits of this "maritime but local" theory. One example of the doctrine is found in the leading case of

¹³ *Id.* at 227-28:

Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several States. . . . The subject is national. Local interests must yield to the common welfare. The Constitution is supreme.

¹⁴ 44 Stat. 1424 (1927), 33 U.S.C. §§ 901-50 (1958), as amended, 33 U.S.C. §§ 907(b)-41 (Supp. III, 1961).

¹⁵ Dry docks are included in the coverage of the act as part of the navigable waters of the United States.

¹⁶ Masters and members of a crew are covered by the Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958), and officers and employees of the United States by the Federal Employer's Liability Act, 35 Stat. 65 (1908), as amended, 53 Stat. 1404 (1939), 45 U.S.C. § 51 (1958).

¹⁷ See 46 Harv. L. Rev. 593, 618 (1933); 29 Mich. L. Rev. 600, 603 (1931); 5 Tul. L. Rev. 123 (1930).

¹⁸ *Levinson v. Dupree*, 345 U.S. 648 (1953).

¹⁹ *Grant Smith-Porter Ship Co. v. Rhode*, 257 U.S. 469 (1922); *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921); *Industrial Comm'n v. Nordenholt Corp.*, 259 U.S. 263 (1922); *Millers' Indem. Underwriters v. Braud*, 270 U.S. 59 (1926).

²⁰ "[T]he cause was controlled by the principle, that as to certain local matters regulation of which would work no material prejudice to the general maritime law, the rules of the latter may be modified or supplemented by state statutes." *Miller's Indem. Underwriters v. Braud*, *supra* note 19, at 64.

Grant Smith-Porter Ship Co. v. Rhode,²¹ where state compensation was allowed because the employment (bridge building) was "local in nature" and because the parties had contracted with reference to the state law.

There was no significant change in the law from the ruling in *Jensen*,²² with the exception of the occasional inroads based on the "maritime but local" theory, until the case of *Davis v. Department of Labor & Indus.*²³ in 1942. In that case, Justice Black, writing for the majority, proposed that in those instances when it was difficult to determine whether a state or the federal act was applicable, recovery could be allowed under either. Referring to this vague area as a "twilight zone,"²⁴ the Court said its holding was designed to alleviate the problem inherent in the waterfront cases where a reasonable argument could be made for either federal or state jurisdiction.²⁵ However, because of its very nature it was impossible to set definite limits to the "twilight zone," and until the present, cases clearly within the United States admiralty jurisdiction were not considered within the "twilight zone."²⁶

In the instant case, Justice Brennan, speaking for the majority, first analyzed the situation that existed when the federal act was passed.²⁷ He concluded that the legislature had been faced with a two-fold problem: (1) There were many persons to whom no workmen's compensation was available as a result of the *Jensen* case,²⁸ and (2) the two previous attempts to give coverage to these people

²¹ 257 U.S. 469 (1922).

²² For examples of cases that came after the *Rhode* case, but which reiterated the principle announced in *Jensen*, see *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941); *Crowell v. Benson*, 285 U.S. 22 (1931).

²³ 317 U.S. 249 (1942).

²⁴ "There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements." *Id.* at 256. Other than this brief explanation, Justice Black did not further define the "twilight zone."

²⁵ See *Moore's Case*, 323 Mass. 162, 80 N.E.2d 478 (1948), *aff'd*, 335 U.S. 874 (1948), in which the Massachusetts Supreme Court stated that the *Davis* case should be regarded as a revolutionary decision deemed necessary to escape an intolerable situation and . . . designed to include . . . all waterfront cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way, even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other. *Id.* at 164.

Although ambiguous, in that it allows concurrent jurisdiction of two statutes which purport to be mutually exclusive, the "twilight zone" theory was only employed in cases in which the validity of the state award was challenged.

²⁶ See, e.g., *Avondale Marine Ways v. Henderson*, 346 U.S. 366 (1953).

²⁷ 370 U.S. at 117: "The Congress which enacted it [the Longshoremen's Act] would have preferred to leave to state compensation laws the matter of injuries sustained by employees on navigable waters within state boundaries."

²⁸ *Id.* at 118: "The *Jensen* decision deprived many thousands of employees of the benefits of workmen's compensation."

had been declared unconstitutional.²⁹ The Court placed more emphasis upon the problems which Congress had faced and upon what the Court construed the intention of Congress to have been in passing the act, than upon the language of the act itself. Thus, even though the act provides that federal compensation shall be payable only if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law,³⁰ and in the instant case, state compensation had already been received, the Court permitted recovery. The Court stated that Congress would have passed a more comprehensive act but for the unfavorable treatment given prior legislation. According to the Court, the "Longshoremen's Act was designed to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters,"³¹ and therefore, "in the application of the Act, the broadest ground it permits of should be taken."³² The Court allowed the compensation award on the theory that it was within Congress' desire to extend coverage to people excluded by the *Jensen* case.³³

A vigorous dissent³⁴ condemned the majority's line of reasoning, arguing that "the Court concludes that Congress did not mean what it said."³⁵ The dissent seriously doubted "whether statutory language as clear as that in . . . the statute could ever be ignored in the name of effectuating the supposed 'congressional desire.'"³⁶ The dissenting justices stated that they could not ignore the statutory requisite of the act,³⁷ *viz*, that federal compensation cannot be given unless workmen's compensation proceedings cannot validly be provided by state law.

²⁹ "This court struck down both statutes as unconstitutional delegations to the states of the legislative power of congress, and as tending to defeat the purpose of the Constitution to achieve harmony and uniformity to the maritime law." *Ibid*.

³⁰ It has been unequivocally recognized that recovery for those employed on new ship construction for disability or death through workmen's compensation may validly be provided by state law. *Grant Smith-Porter Ship Co. v. Rhode*, 257 U.S. 469 (1922).

³¹ 370 U.S. at 124.

³² *Id.* at 130.

³³ Because there was no federal workmen's compensation available to those excluded from state benefits by *Jensen*, those people found themselves with no workmen's compensation.

³⁴ 370 U.S. at 132. The dissenting opinion by Justice Stewart was adopted by Justice Harlan.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Longshoremen's and Harbor Workers' Act, 44 Stat. 1424 (1927), 33 U.S.C. §§ 901-50 (1958), as amended, 33 U.S.C. §§ 907(b)-41 (Supp. III, 1961). Section 3(a) provides that "compensation shall be payable . . . in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law"

Although the reasoning of the Court and the wording of the act are incompatible, the result reached is a desirable one for several reasons. It should promote the long sought condition of uniformity in the national law. In essence the Court's decision removes the requirement that federal compensation is available only in cases where state compensation cannot be given. Every longshoreman and harbor worker injured on the navigable waters of the United States should now be assured of a right to federal compensation.³⁸ More important, the injured employee is guaranteed a forum which will take jurisdiction and hear his claim.³⁹ Much of the confusion surrounding the choice of forums has been dissipated.

One question left unanswered by the Court is whether state jurisdiction is to be limited in those cases which are on the border line between state and federal authority.⁴⁰ Under the "twilight zone" theory, there is concurrent state and federal jurisdiction in that area where reasonable argument could be made either way.⁴¹ Because of this, state awards in a situation within the area of federal jurisdiction were not overruled. Since enlarged federal jurisdiction is now offered, there is no longer any need for a "twilight zone," and consequently, no need to allow state intervention on the fringe of federal jurisdiction.⁴²

In the instant case the Court was concerned only with the problem which plagued longshoremen and harbor workers when they had to choose the correct forum in which to apply for workmen's compensation. If the Court extends its reasoning to related cases, it can make clear forum problems that have bothered other groups of workers. There is doubt, for example, whether the remedy of a

³⁸ The increased uniformity exists because federal jurisdiction is assured in cases in which it might previously have been denied on the ground that state compensation could be validly given.

³⁹ Now that claims by longshoremen for federal compensation are secure on jurisdictional grounds, no longer need the claimant fear that his award will be delayed or barred by the statute of limitations because he chose the wrong forum.

⁴⁰ That is, whether, in those situations where state compensation is higher than federal compensation, the injured employee may apply for state compensation after he has received a federal award. It has been held that an award of state compensation is not a bar to a federal award, but the federal award will be credited by the amount of state compensation given. *Massachusetts Bonding & Ins. Co. v. Lawson*, 149 F.2d 853 (5th Cir. 1945). If this practice is allowed, an injured employee may apply for federal compensation secure in the knowledge that he will not be defeated on jurisdictional grounds. After he obtains the federal award he can later attempt to obtain higher compensation by applying to the state.

⁴¹ The injured workman in these cases does not face the problem of taking inconsistent judicial positions in the state and federal court. The Court's holding that the injury occurred on the navigable water of the United States is consistent with both state and federal jurisdiction.

⁴² It does not seem reasonable that the Court will use such reasoning to limit state jurisdiction since the consistent trend of the last forty years has been to enlarge the injured person's remedy.

railroad employee injured while loading or unloading freight cars from floats and barges is provided by the Longshoremen's Act⁴³ or the Federal Employer's Liability Act.⁴⁴ Another unsettled question concerns the determination whether a person is or is not a master or a member of a crew.⁴⁵ A third area of conflict arises in cases in which the limits of a dry dock must be determined.⁴⁶ The "twilight zone" theory has never been applied to any of these three areas; however, that fact should not bar the Court from applying the reasoning of the instant case.⁴⁷ In each of the three situations, the litigant's success hinges upon a fortunate selection of forums. This is the same problem which until now had plagued longshoremen and harbor workers who had to choose between a state or federal court. The *Calbeck* case should be a guide for seeking federal compensation under the Longshoremen's and Harbor Workers' Compensation Act in all three of the areas mentioned.

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⁴³ 44 Stat. 1424 (1927), 33 U.S.C. §§ 901-50 (1958), as amended, 33 U.S.C. §§ 907(b)-41 (Supp. III, 1961).

⁴⁴ 35 Stat. 65 (1908), as amended, 53 Stat. 1404 (1939), 45 U.S.C. § 51 (1958). The problem in these cases is whether the person is in maritime employment or in railroading activity. See, e.g., *Pennsylvania R.R. v. O'Rourke*, 344 U.S. 334 (1953). If the injury occurs on the navigable water (or dry dock) the instant case would be precedent for an award of compensation under the Longshoremen's Act regardless of the type of activity.

⁴⁵ See *Desper, Adm'rx v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952); *Norton v. Warner Co.*, 321 U.S. 565 (1944). The problem in these situations is whether the person's occupation is classified as longshoreman or harbor worker, or as a master or a member of a crew. Regardless of the classification, the instant case would be precedent for expanding the scope of the Longshoremen's Act to cover both groups. It is more difficult to extend the Court's reasoning into the area of master and crew, as they specifically were excluded from the statutes prior to the Longshoremen's Act. See note 16 *supra*. Also, when the Longshoremen's Act was passed, these workers lobbied against inclusion in order that they could save their remedies under the Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958).

⁴⁶ See *Avondale Marine Ways v. Henderson*, 346 U.S. 366 (1953); *Cope v. Vallette Dry Dock Co.*, 119 U.S. 625 (1887); *Travelers Ins. Co. v. Branham*, 136 F.2d 873 (4th Cir. 1943); *Continental Cas. Co. v. Lawson*, 64 F.2d 802 (5th Cir. 1933).

⁴⁷ The "maritime but local" theory has not been used in these areas because it is relevant only when the jurisdictional conflict is between a state and the federal act. The above named situations all concern conflicts between two federal acts.