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RECENT DECISIONS

BANKRUPTCY—GOVERNMENT CLAIMS—POWER OF A BANKRUPTCY COURT TO ALLOW AN AFFIRMATIVE JUDGMENT ON A COUNTERCLAIM AGAINST THE UNITED STATES.

Danning v. United States (9th Cir. 1958)

In this bankruptcy proceeding the United States filed a tax claim against the bankrupt, and the trustee in bankruptcy counterclaimed seeking affirmative relief against the United States. The referee held that a court of bankruptcy does not have jurisdiction to entertain such a counterclaim, and a petition for review was denied by the district court. The Court of Appeals for the Ninth Circuit affirmed, holding that a court of bankruptcy, although having jurisdiction to entertain counterclaims up to the amount of the Government's claim, has no jurisdiction to grant affirmative relief on such counterclaim. Danning v. United States, 259 F.2d 305 (9th Cir. 1958).1

It is well settled that without specific statutory consent2 no action may be brought against the United States,3 and no officer of the United States can waive the requirement of such consent.4 In bankruptcy proceedings, as in other actions, a counterclaim5 may be maintained up to the amount of a creditor's claim, even when that creditor is the United States.6 This is true whether the bankruptcy court has summary jurisdiction over such claim7 or whether the creditor must institute a plenary action in order to recover thereon.8 When affirmative relief is sought on a counterclaim, such relief will be granted against a creditor not possessing sovereign immunity if the bankruptcy court has summary jurisdiction.9

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1. Danning v. United States, 259 F.2d 305 (9th Cir. 1958).
2. Rev. Stat. § 1059 (1875), 28 U.S.C. § 1491 (1952): “The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:
   (1) Founded upon the Constitution; or
   (2) Founded upon any act of Congress; or
   (3) Founded upon any regulation of an executive department; or
   (4) Founded upon any express or implied contract with the United States; or
   (5) For "liquidated or unliquidated damages in cases not sounding in tort."
5. See Note 50 Colum. L. Rev. 505, 508 n. 30 (1950) distinguishing set-off, recoupment, and counter claim.

(430)
However, where the action is one in which a plenary suit would have to be brought to recover on the counterclaim, the courts are divided as to whether even a private creditor, by filing a claim in the bankruptcy court, waives that court's lack of jurisdiction over plenary proceedings, thereby allowing the court to grant affirmative relief on the counterclaim. Where the bankruptcy court would have jurisdiction to grant affirmative relief on a counterclaim against a private creditor, it has generally been held that affirmative relief on a counterclaim against the United States will not be awarded if the court has no statutory authority to entertain a direct suit against the Government. In *United States v. United States Fid. & Guar. Co.* the Supreme Court held that the awarding of an affirmative decree to a trustee in bankruptcy on a counterclaim against a federal tax claim, was invalid for lack of jurisdiction since the court which entered the decree had no statutory authority to entertain a direct action against the Government. The Court in that case reasoned that a set-off up to the amount of the Government's claim was a valid defense and, therefore, permissible, but any affirmative award would violate the Government's sovereign immunity, it being, in the nature of a direct action by the trustee. In *Re Greenstreet*, a bankruptcy proceeding, it was held that affirmative relief against the United States will not be granted where a counterclaim is for more than 10,000 dollars since the district courts' jurisdiction under the Tucker Act is limited to suits for less than 10,000 dollars. The opinion of the court there would seem to indicate that had the suit been within the statutory limit, affirmative relief might have been granted notwithstanding the fact that since the passage of the Tucker Act the courts have been in conflict as to whether or not that act extends the right of counterclaim to include affirmative relief. Some courts reason that the Tucker Act applies only to direct suits, and therefore, the United States has not waived its sovereignty as to counterclaims for affirmative relief, while other courts hold that since the Tucker Act gives authority...
for a direct suit it should also apply to counterclaims for affirmative relief.\footnote{17}

Although the court relied on extensive authority, it would appear that such authority is distinguishable from the instant case, since in the cases the court cited, the courts did not have jurisdiction to entertain a direct suit, and, therefore, could not allow a counterclaim for affirmative relief. In the instant case, if the statute\footnote{18} creating courts of bankruptcy is one which extends the jurisdiction of the district courts to include bankruptcy proceedings, rather than one which constitutes the district courts as separate courts of bankruptcy, the court would have jurisdiction up to the amount of 10,000 dollars as provided for in the Tucker Act, and possibly for more under the Federal Tort Claims Act. If the statute extends the jurisdiction and a direct suit would be allowed under the Tucker Act or the Federal Tort Claims Act, there seems to be no reason why a counterclaim for affirmative relief should not be allowed against the Government within the jurisdictional limits provided by those acts,\footnote{19} assuming, as the court did here, that a federal district court has jurisdiction to grant affirmative relief on a counterclaim against a private creditor. However, if the courts are established as separate courts of bankruptcy, they would have no jurisdiction over an original suit, because the Tucker Act and Federal Tort Claims Act would not apply,\footnote{20} and therefore, they could not entertain a claim for affirmative relief against the Government. Though the court did not discuss this problem,\footnote{21} in view of the fact that the present trend is to allow affirmative relief in cases under the Tucker Act and the Federal Tort Claims Act,\footnote{22} a better decision might have been to allow relief on the counterclaim and to construe the statute as enlarging the jurisdiction of the district courts.

\textit{John G. Hall}

\footnotetext{17}{United States v. Silverton, 200 F.2d 824 (1st Cir. 1952); United States v. Petasnick, 143 F. Supp. 206 (E.D. Wis. 1956) (counterclaims on the same contract); United States v. King, 119 F. Supp. 398 (Alaska 1954) (counterclaims for repairs under statutory lien in action for recovery of the chattel).}

\footnotetext{18}{30 Stat. § 45 (1898), 11 U.S.C. § 11 (1952).}

\footnotetext{19}{It may be argued that adjudications in bankruptcy are settled by a referee and not by a district court judge, but this would appear to be of little merit since the decision of the referee is subject to review by the district court.}

\footnotetext{20}{Both the Tucker Act and the Federal Tort Claims Act apply only to the district courts. See note 14, supra.}

\footnotetext{21}{The opinion of the court does not deal with this problem nor does it state whether the district court would have had jurisdiction over a direct suit rather than a counterclaim, although it does intimate that the counterclaim is a tax claim which could be brought under the Tucker Act. No figures are given and as the lower court has not yet written an opinion, it is impossible to determine whether the 10,000 dollar limit under the Tucker Act applies.}

\footnotetext{22}{See Note, 25 Geo. Wash. L. Rev. 315, 333 (1956-57).}
CONFLICT OF LAWS—FULL FAITH AND CREDIT—RECOVERY UNDER NEW YORK WORKMEN’S COMPENSATION ACT NOT A BAR TO SUIT AGAINST FELLOW-EMPLOYEE IN STATE OF ACCIDENT.

Ellis v. Garwood (Ohio 1958)

This was a tort action brought in Ohio to recover for the death of plaintiff's husband allegedly caused by the negligence of the defendant fellow-employee. Plaintiff's husband and defendant were on company business in an auto driven by defendant when the collision occurred which caused the death of the decedent. The accident occurred in Ohio. Defendant's answer alleged that plaintiff had recovered an award for her husband's death under the New York Workmen's Compensation Act. Defendant further contended that since the New York statute is exclusive in that it precludes further recovery by one who has received an award thereunder, this action against him as fellow-employee was barred. Plaintiff's demurrer to defendant's answer was overruled and the action was dismissed. The court of appeals reversed this judgment. The Ohio Court affirmed the decision of the court of appeals, holding that Ohio law does not bar the additional suit against the fellow-employee even though plaintiff recovered an award in another state which purports to give an exclusive remedy. Ellis v. Garwood, 152 N.E.2d 100 (Ohio 1958).

The United States Constitution commands that "full Faith and Credit shall be given in each state to the public Acts, Records and judicial proceedings of every other State". Pursuant to this clause Congress has decreed that state statutes shall be given such faith and credit in every court within the United States as they are given by law or usage in the courts of the state which renders them. Even though workmen's compensation acts are considered public acts within the meaning of the full faith and credit clause, decisions of the Supreme Court, since Bradford Electric Co. v. Clapper, have varied as to whether the state of employment, where that state has a workmen's compensation act purporting to provide an exclusive remedy, or the state of the place where the injury occurred, has the greater interest in protecting the injured employee, and should therefore apply its law. In the Bradford case, the Supreme Court refused to allow the employee to recover in the state where the injury occurred, holding that the exclusiveness of the statute of the state of employment prevented him from so doing. The Court reasoned that the state of the injury had only a casual interest in the enforcement of the employee's rights as compared with the interest of the state of employ-

1. N.Y. WORKMEN’S COMP. LAW § 29 (6).
ment. The Bradford case, however, was sharply limited by the subsequent decision in *Alaska Packers Assoc. v. Industrial Accident Comm'n*, where the Court found it proper for the state of employment to apply its own law rather than the law of the state where the injury occurred, on the ground that the state of employment had the greater interest in preventing the injured employee from becoming its charge. Conversely, the Court in *Pacific Employer's Co. v. Industrial Accident Comm'n* held that the state where the injury occurred is free to apply its own law to the exclusion of the conflicting law of the state of employment, reasoning that the situs of the injury being in the forum state was sufficient to give that state a substantial interest in granting recovery. Subsequently, however, the Court in *Industrial Comm'n v. McCartin* denied recovery of an additional award in the state of injury where the employee had already recovered under the workmen's compensation act of the state of employment, which statute purported to give an exclusive remedy. Finally, in *Carroll v. Lanza*, the Court decided that where the forum is also the state where the injury occurred, that state has an interest in the protection of the injured employee, and its courts need not recognize the exclusive remedy of the state of employment, even when payments are being made under the workmen's compensation act of that state. Mr. Justice Frankfurter, dissenting in that case, found it difficult to comprehend how the state of injury could have the interest in protecting the employee's rights that exists in the state of employment. He reasoned that under the "interest weighing" approach of the Bradford case, the exclusive statute of the state of employment should have barred recovery in the state of injury. More recently, a federal circuit court, citing the Lanza case, held that a federal district court sitting in Michigan in a diversity case could apply Michigan law to a suit by the injured party's administratrix instead of the New York Workmen's Compensation Act merely because the accident occurred in Michigan though deceased was employed and resided in New York.

The instant case is another in the progression of decisions away from the rule of the Bradford case that the forum does not have a sufficient interest in choosing its own law merely because the injury occurred there. Though the Court in the Lanza case allowed the forum to choose its own law where it was merely the situs of the injury, it was careful to point out that the interest which the forum has in choosing its own law, by virtue of being the situs of the injury, is in the problems following in the wake

7. Id. at 151.
9. Id. at 535.
13. Id. at 414-16.
of the accident, mentioning specifically the problems of medical care and possible dependents.\textsuperscript{16} Even if, however, the \textit{Lanza} decision can be taken to have held that the minimum interest requirement for a state to choose its own law is satisfied by a showing of a mere possibility of other legal problems arising within the state as a result of the injury, certainly that possibility does not exist in the instant case where the injured party is dead and was employed and resided in New York. Ohio's interest in granting relief can be characterized as, at most, a casual one. It should be doubted that the \textit{Lanza} case has limited the command of the full faith and credit clause in workmen's compensation situations announced in the \textit{Bradford} case to such an extent that a casual interest is now sufficient to allow the forum to ignore the exclusive workmen's compensation act of the state of employment. The court in the instant case, furthermore, did not deal with the additional problem presented by the decision of the Supreme Court in \textit{Magnolia Petroleum Co. v. Hunt},\textsuperscript{17} that if a compensation award is res judicata in one state, the claimant is precluded from recovery in a foreign state. The Supreme Court itself has frequently avoided applying this rule by finding that the award under the workmen's compensation act in the first state was not final.\textsuperscript{18} There appears to be no question here that the New York award is final, but the plaintiff is seeking recovery in Ohio against a different party. Though the New York courts would not permit action to be brought by the employee against the fellow employee in this situation, such action would not be barred by the operation of the principle of res judicata, but because the statute purports to be the exclusive remedy of the employee.\textsuperscript{19} That this court did not apply the \textit{Magnolia} doctrine is, therefore, not surprising; but that it did not even feel compelled to distinguish that decision, is probably indicative of the prevailing attitude toward the authority of the \textit{Magnolia} case, and may suggest its eventual discard. Though the trend away from the command of the full faith and credit clause in situations involving conflicting workmen's compensation act would seem proper in view of the fact that coverage under these acts varies widely,\textsuperscript{20} the instant case seems to have departed from the spirit of the \textit{Lanza} case by allowing Ohio to choose its own law where it has only a casual interest in the consequences arising from the injury occurring there.\textsuperscript{21}

\textit{Edward J. O'Malley}

\textsuperscript{16} Carroll v. Lanza, 349 U.S. 408, 413 (1955).
\textsuperscript{17} 320 U.S. 430 (1943).
\textsuperscript{19} Cunningham v. Mark Rafalsky, 281 App. Div. 609, 121 N.Y.S.2d 207 (1st Dep't 1953).
\textsuperscript{20} Compare Morrow v. Hume, 131 Ohio St. 319, 3 N.E.2d 39 (1936) with N.J. STAT. ANN. § 34:15-1 (1911).
\textsuperscript{21} In the recent case of \textit{Hagan v. John T. Cassale, Inc.}, 27 U.S.L. WEEK 2417, (N.Y. Sup. Ct. Feb. 24, 1959), the New York Supreme Court indicated that it would expect the New Jersey courts to apply the New York Workmen's Compensation Act where New York is the state of employment and New Jersey is only the situs of the injury.
CONSTITUTIONAL LAW—DEPORTATION—DUE PROCESS REQUIRES A
HEARING BEFORE HUNGARIAN REFUGEE-PAROLEE
MAY BE DEPORTED.

United States ex rel. Paktorovics v. Murff (2d Cir. 1958)

Appellant, a refugee who fled from Hungary at the time of the Hun-
garian revolution in 1956, executed a written application for himself and
family for parole into the United States pursuant to Section 212(d) (5)
of the Immigration and Nationality Act. After appellant's application
had been approved and he had established his residence in Baltimore, the
immigration officials learned that appellant had been a member of the
Communist Party subsequent to 1953, a fact which he acknowledged
but which did not appear on his application for parole. An exclusion
hearing was held, but the proceedings were limited to the question of
whether or not appellant had a valid immigration visa; and upon appel-
plant's admission that he had never been in possession of such a visa, the
Special Inquiry Officer found him to be inadmissible to the United States. An appeal from this determination was dismissed by the Board of Im-
migration Appeals, and a writ of habeas corpus was dismissed by the dis-
trict court. Upon appeal, the court of appeals reversed, holding that the
special circumstances involved in allowing the Hungarian refugees to
come to this country dictate that their parole may not be revoked without
a hearing at which the basis for the discretionary ruling of revocation
may be contested on the merits. United States ex rel. Paktorovics v. Murff, 260 F.2d 610 (2d Cir. 1958).

An alien seeking admission to the United States does not do so under
a claim of right, but only under a privilege granted him by acts of Con-
gress. In determining whether an alien, who has never been naturalized
or has never acquired any domicile or residence in the United States,
falls within the class to which the privilege has been extended, the de-
cision of an executive or administrative officer acting within powers ex-

1. Section 212(d) (5) provides: "The Attorney General may in his discretion
parole into the United States temporarily under such conditions as he may pre-
scribe for emergent reasons or for reasons deemed strictly in the public interest
any alien applying for admission to the United States, but such parole of such
alien shall not be regarded as an admission of the alien and when the purposes
of such parole shall, in the opinion of the Attorney General, have been served the
alien shall forthwith return or be returned to the custody from which he was
paroled and thereafter his case shall continue to be dealt with in the same manner
as that of any other applicant for admission to the United States." Immigration &

2. Aliens who are communists are excluded unless they can show that for at
least five years prior to the date of the application for a visa, they have been actively
§ 1182(a) (28) (1952).

3. Visas are required of all immigrants and non-immigrants, with exceptions for


5. Nishimura Ekiu v. United States, 142 U.S. 651 (1922); Chae Chan Ping v.
United States, 130 U.S. 581 (1889).
pressly conferred by Congress is held to be due process of law. It is well settled that the due process clause of the fifth amendment does not apply to entering aliens; therefore, it has been held that the Attorney General may, in some instances, deny an entering alien a hearing, and his finding on the alien’s exclusion is conclusive. However, once an alien has gained entry, the courts have accorded him the same protection guaranteed citizens by the fourth, fifth, sixth, and fourteenth amendments. Nevertheless, Congress does have the right to forcibly expel a resident alien for any reason deemed appropriate, except for his valid exercise of those rights protected by the Bill of Rights. However, before a resident alien can be expelled and deported, due process requires that he be given a hearing; whereas an entrant alien can be excluded and deported without a hearing. An arriving alien’s temporary harborage ashore, pending determination of his admissibility, is not, however, an entry, and does not affect the alien’s status, but is regarded as a stoppage at the border. Similarly, an alien who has been excluded but is being cared for by a society in New York until he can be deported is, in theory of law, at the boundary line, and has no foothold in the United States. And an alien paroled into the United States under an immigration bond is also not considered to be a resident alien. However, the Supreme Court has considered an alien seaman on a ship of American registry seeking readmission to be similar to an alien continuously residing and physically present within the United States. Prior to the instant case, courts have never considered parolees of any class to be resident aliens for


8. A hearing may be denied if the Attorney General’s finding of exclusion is based on confidential information the disclosure of which would be prejudicial to the public interest. Immigration & Nationality Act, 66 Stat. 199 (1952), 8 U.S.C. § 1225(c) (Supp. 1953).


10. United States v. Pink, 315 U.S. 203 (1942). It has been theorized that the position of the resident alien within the United States is factually closer to that of a naturalized citizen than to that of an alien seeking admission; therefore, the grant to the resident alien of constitutional protection should more nearly correspond to that given the citizen. See, e.g., Traux v. Raich, 239 U.S. 33 (1915); Wong Wing v. United States, 163 U.S. 228 (1896).


purposes of determining whether a hearing is required before a parole may be revoked.\textsuperscript{17} The court here has not held that Hungarian refugee parolees are entitled to a hearing whenever the Attorney General exercises one of his powers under the Immigration and Nationality Act.\textsuperscript{18} Nor has the court decided that all parolees are to be considered resident aliens,\textsuperscript{19} or that section 212(d)(5) of the Immigration and Nationality Act manifests congressional intent that all parolees be considered to be within the United States. On the contrary, section 212(d)(5) indicates that it was Congress’ intent that parolees be considered to be without the United States,\textsuperscript{20} and the court was not able to find language in the act which indicates that Hungarian refugee-parolees are to be distinguished from other parolees.\textsuperscript{21} Nevertheless, despite Congress’ intent that parolees not be given hearings before they are deported, the court has held that Hungarian refugee-parolees are different from other parolees and do have the constitutional right of a hearing before they can be deported for not having a visa. In making this determination, the court relied on three factors which combine to make the class of Hungarian refugee-parolees unique and which, in effect, operate to preclude Congress from deporting them for not having a visa without first according them a hearing. The refugees are physically present within the United States.\textsuperscript{22} Furthermore, the manner of invitation extended them to come en masse from Austria contributes to the unique status of these refugees; theirs’ is an express invitation rather than a privilege which merely provides an opportunity to enter the United States.\textsuperscript{23} Finally, they have accepted this invitation and despite their failure to have visas, they are the invitees of the Government. They did not have visas when

\textsuperscript{17} The Court has held that temporary parole into the United States does not entitle an alien to the benefit of the statute giving the Attorney General authority to withhold deportation of any alien “within the United States” if the alien would be subjected to physical persecution by deportation to the country from which he came. Leng May Ma v. Barber, 357 U.S. 185 (1958). However, even an alien who is in the United States illegally is sufficiently within the United States to take advantage of some of the provisions of the Immigration and Nationality Act; e.g., the provision allowing for voluntary departure. United States ex rel. Giacalone v. Miller, 86 F. Supp. 655 (S.D. N.Y. 1949).

\textsuperscript{18} As pointed out in the dissent, this would conflict with Leng May Ma v. Barber, 357 U.S. 185 (1958), which held that a Chinese parolee was not entitled to a hearing when he was attempting to invoke Section 243(h) of the Immigration & Nationality Act.

\textsuperscript{19} Some classes of parolees have already been found not to be resident aliens; Leng May Ma v. Barber, supra note 20; Kaplan v. Tod, 267 U.S. 228 (1925); United States ex rel. Lue Chow Yee v. Shaughnessy, 245 F.2d 874 (2d Cir. 1957).

\textsuperscript{20} See note 1 supra.

\textsuperscript{21} See note 1 supra.

\textsuperscript{22} Therefore, they are to be distinguished from entrant aliens who are on board ship or detained at Ellis Island. Cf., Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Yamataya v. Fisher, 189 U.S. 86 (1903); Roggenbuhl v. Lusby, 116 F.Supp. 315 (D. Mass. 1953).

\textsuperscript{23} At the request of the President, Congress passed a resolution specifically authorizing the Attorney General to bring these refugees to the United States. Presidential directive of December 1, 1956 referred to in his Message to the Congress on January 31, 1957, 103 CONG. REC. 1214. See also 72 Stat. 419 (approved July 25, 1958).
they left Austria, and the officials of the Government handling the matter knew at all times that they had no visas and were not expected to have them. It would appear to be inconceivable that, on the one hand, Congress would open the door and extend an invitation to these aliens to enter, and, on the other, close that door without first permitting them a hearing.24 The reasoning that an alien, paroled into the United States by the express will of the Government, is still to be considered without the United States would seem to be logomachy. An alien who has not entered the country clandestinely, and who has remained in the country for some time and has become subject to its jurisdiction and a part of its population, should at least be accorded a hearing before he is deported. In the instant case, the court has apparently put the Government on notice that in the future the practice of bringing aliens into the country and allowing them to establish a permanent home here, but reserving the right to deport them without a hearing, will be met with disfavor.

David H. Moskowitz

CONSTITUTIONAL LAW—Due Process—Amendment to National Housing Act Restricting Rentals Not Unconstitutional Though Applicable to Prior Contracts for Mortgage Insurance.

Federal Housing Administration v. Darlington, Inc. (U.S. 1958)

In 1949, Darlington was incorporated for the purpose of building and operating an apartment house, and entered into an agreement for mortgage insurance with the Federal Housing Administration (FHA) pursuant to the National Housing Act.1 Although a maximum duration period for rental was stipulated, no minimum period was expressed in the agreement. When Darlington was in operation, it found that in order to realize a profit it was necessary to rent a small percentage of its apartments for periods of less than thirty days.2 However, in 1954, the National Hous-

1. National Housing Act Amendments of 1942, ch. 319, § 608, 56 Stat. 303, 12 U.S.C. § 1743 (1946), amending 48 Stat. 1246 (1934). The purpose of the act, as stated in § 608(b)(2), is to provide housing for veterans of World War II and their immediate families. To achieve this, the FHA is authorized to insure mortgages, § 608(a), thereby stimulating the lending of private capital to those who desire to provide such rental housing for veterans.
2. The district court, in Darlington, Inc. v. Federal Housing Administration, 142 F. Supp. 341 (E.D.S.C. 1956), found that at no time were more than ten percent of the apartments used for transient rentals, and that there was no evidence that Darlington failed to give preference to veterans, nor that any person desiring permanent residency had been required to wait for an apartment.
VILLANOVA LAW REVIEW

ing Act was amended, declaring that the original purpose of the act was to stimulate housing "designed principally for residential use," and that subsequent use for transient or hotel purposes, i.e., for less than thirty day periods, would be prohibited. Darlington sought a decree in a district court declaring its right to lease for periods less than thirty days, and FHA affirmatively sought an injunction requiring Darlington to cease and desist from such practices. The lower court granted judgment for Darlington on the ground that a statute enacted for the sole benefit of private persons could not create a new obligation with respect to a past transaction. On appeal, the Supreme Court reversed, holding that the National Housing Act under which plaintiff's mortgage was insured implicitly denied to mortgagors acquiring mortgage insurance the right to rent to transients, and, even if such right was not denied, further regulation of the mortgagor by way of amendment was permissible because no vested right to rent to transients had attached. Three justices dissented, maintaining that the words, "principally for residential use," did not preclude some transient rentals, and further, that an imposition of additional conditions upon mortgagors on the basis of previously existing contracts for insurance operated to impair vested rights and was therefore unconstitutional.

Federal Housing Administration v. Darlington, Inc., 79 Sup. Ct. 141 (1958). The Constitution does not expressly prohibit Congress from impairing previously existing contracts. It has been held, however, that contracts are property, and that the rights and duties which are the subject of the agreement become vested property rights upon formation of the contract. Since vested rights are protected from congressional interference by the due process clause of the fifth amendment, unless an act of Congress is enacted pursuant to a constitutionally expressed power, it will be invalid if the only construction possible is that it retroactively divests rights previously vested. Until the instant case, whenever an

4. The majority opinion based this on such factors as the use of the terms "dwelling units" and "housing" in the National Housing Act and the regulations issued thereunder. Therefore, the majority stated that the term "principally for residential use" was used so as not to preclude some commercial rentals.
5. It was pointed out in the dissent that the FHA had approved some transient rental plans as submitted by other mortgagors, and that in granting plaintiff's application a maximum rental period was specified, but no minimum period was designated.
7. Lynch v. United States, 292 U.S. 571 (1933). Vested rights are ordinarily said to vest when the right to enjoyment, present or prospective, has become the right of some particular person as a present interest. Dunham Lumber Co. v. Gresz, 71 N.D. 491, 2 N.W.2d 175 (1942).
8. U.S. CONST. amend. V. When vested property rights are taken for public use, the private party is entitled to just compensation, as was pointed out in the Lynch case.
10. Lynch v. United States, 292 U.S. 571 (1933); Noble v. Union River Logging R.R., 147 U.S. 165 (1893). A statute is deemed retroactive when it "... takes away or impairs rights acquired under existing laws, or creates a new obligation,
act of Congress had been struck down because of its retroactive effect, it was struck down because vested rights had been directly taken or annulled, as in *Lynch v. United States*, where the Supreme Court held that beneficiaries of War Risk Insurance policies had a vested right to compensation which Congress had improperly divested by annulment of the policies. Under the fourteenth amendment, state statutes which have merely impaired the enjoyment of vested rights, rather than completely annulled them, have been found invalid as effecting a denial of due process. Although no cases involving acts of Congress have required a determination as to when vested contractual rights are merely impaired, it has been held by the Supreme Court, when dealing with the constitutional provision prohibiting states from impairing the obligation of contracts, that contractual rights are impaired when additional terms and burdens are imposed upon the parties.

As was pointed out in the dissenting opinion of Mr. Justice Harlan, it would seem that the term "principally for residential use" suggests that transient rentals were not wholly excluded at the time plaintiff entered into the agreement for insurance, and therefore, prior to the 1954 amendment, plaintiff could make some transient rentals. If such is the proper interpretation of the agreement, the imposition of additional burdens upon plaintiff substantially impairs rights previously vested under the contract for insurance. After defendant had granted plaintiff the right of mortgage insurance for a fixed term, in return for which plaintiff agreed to various regulations imposed by defendant to insure that economical rental housing would be provided for veterans, plaintiff made a substantial investment and began operations. Although the right to be insured, which enabled plaintiff to acquire the necessary capital to begin operations, is not completely annulled, the burden subsequently placed upon plaintiff greatly diminishes the value of that right to such an extent that the resulting loss of revenue will force the plaintiff into bankruptcy. The district

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12. Chicago City R.R. v. Chicago, 142 Fed. 844 (N.D. Ill. 1905). The court found that a right of dominion vesting in a streetcar company was impaired by the requirement to accept transfers issued to passengers by other companies.
13. "The impairment of a contract may consist in increasing its burdens as well as in diminishing its efficiency." *Columbia Railway, Gas & E. Co. v. South Carolina*, 261 U.S. 236 (1922). In a few cases, federal courts have stated that the due process clause prohibits Congress from impairing the obligation of contracts just as clearly as states are expressly prohibited under article one, section ten. In those cases, vested rights were also divested. See *Johnson v. United States*, 79 F. Supp. 208 (Ct. Cl. 1948).
15. The district court, in *Darlington, Inc. v. Federal Housing Administration*, 142 F. Supp. 341 (E.D. S.C. 1956), found that bankruptcy would be the logical result if plaintiff lost this source of revenue.
court found, moreover, that Congress did not enact the 1954 amendment under any constitutionally authorized power, but rather enacted it for the benefit of private hotel interests, which interests should not justify the taking of vested rights. Although the dissenting justices would apply the rule of the *Lynch* case to congressional enactments which impair vested rights indirectly, the majority opinion would seem to indicate that an act of Congress which merely impairs a vested right indirectly, rather than annuls such a right directly, will not be struck down, though not enacted pursuant to a constitutionally authorized power. It may be that once a contract has been entered into with the federal government, Congress may exercise broad power to subsequently regulate the activities of the private contracting party while the contract is in force, as long as rights vesting under the contract are not directly annulled.

*Charles C. Keeler*

**CONSTITUTIONAL LAW—FREEDOM OF SPEECH AND PRESS—TAXES UPON ADVERTISING MEDIA.**

*Baltimore v. A. S. Abell Co.* (Md. 1958)

Petitioners, owners of newspapers, radio and television stations, and billboards, and the purchasers of advertising therein, sought a decree declaring unconstitutional companion ordinances of the City of Baltimore which imposed a four per cent tax upon the purchasers of certain advertising,1 based on gross sales price, and a two per cent tax upon the sellers of such advertising,2 based on gross receipts therefrom. Both taxes applied to: space in newspapers and other printed matter published in Baltimore; time on any intrastate radio or television broadcast originating in Baltimore; space on billboards located in Baltimore; and space on vehicles or airborne devices. More than forty-one per cent of all advertising done in the area was not affected by the ordinances.3 The burden of the taxes fell extensively upon newspapers and the purchasers of space therein, who paid more than eighty-six per cent of both taxes for the first quarter of 1958. The remainder of the taxes fell most heavily upon the radio and television stations. The Circuit Court of Baltimore City found both ordinances unconstitutional as violative of the freedom of the press provisions of the Federal and State Constitutions.4 The Maryland Court of Appeals

1. BALTIMORE, MD., ORDINANCE No. 1097, § 1 (1957).
2. BALTIMORE, MD., ORDINANCE No. 1098, § 1 (1957). The taxes under these ordinances involve only impositions for the calendar year 1958, both ordinances having been repealed.
3. This included interstate radio and television, which was exempted, and direct mail and point of purchase advertising, constituting over thirty per cent of the total advertising in the area, which was excluded.
affirmed the decision of the lower court and held that ordinances which purport to levy taxes on advertising in general, but which have the effect of singling out broadcasting stations and newspapers, are a restraint upon speech and press and, therefore, unconstitutional, despite the fact that the enactors of the ordinances might have been actuated by the purest of motives. The court considered both ordinances together, as both effectively curtailed the necessary revenue of the broadcasting stations and newspapers.\(^5\) \textit{Baltimore v. A. S. Abell Co.}, 145 A.2d 111 (Md. 1958)\(^6\)

The law is well settled that newspapers,\(^7\) and radio and television stations\(^8\) are included within the constitutional protection of freedom of the press. An ordinance providing for a ban on a newspaper by a city,\(^9\) as well as a state statute providing for a permanent injunction against a newspaper,\(^10\) has been found to be unconstitutional as constituting previous restraints upon publication. Although no cases have held that advertising of itself is included within the free expression protection,\(^11\) the United States Supreme Court, in \textit{Grosjean v. American Press Co.},\(^12\) has held that a tax upon the receipts from advertising imposed solely upon newspapers is a previous restraint upon publication, and, therefore, unconstitutional. The Court there described the device of imposing a tax solely upon the press as being "single in kind." \(^{13}\) Prior to that case, state courts had upheld taxes levied solely upon newspapers.\(^{14}\) Cases subsequent to the \textit{Grosjean} case have upheld ordinary taxes imposed upon business in

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\(^{5}\) In determining that the tax upon the purchasers of advertising could be considered with the direct tax upon the newspapers and broadcasting stations, the court found that four dollars out of every one hundred dollars budgeted for advertising by the purchasers would be withheld in order to provide for the four per cent tax, thereby curtailing advertising expenditures, and resulting in a direct effect upon the media.


\(^{10}\) \textit{Near v. Minnesota}, 283 U.S. 697 (1930). In this case it was pointed out by the Court that the protection from previous restraint upon expression can be limited, but only in exceptional cases where it is necessary to protect the public safety or morals.

\(^{11}\) Although the purchasers of advertising space were given standing to sue in the instant case, the court pointed out that they did not exercise the right of free expression on their own behalf, but rather on behalf of the public, for whom the protection was intended, and that their standing to sue arose only after it could be shown that the newspapers and broadcasting stations were restrained through the curtailment of revenue.

\(^{12}\) 297 U.S. 233 (1935) (involving a two per cent tax imposed by Louisiana upon the advertising receipts of publications having a circulation exceeding twenty thousand copies per week).

\(^{13}\) 297 U.S. at 250.

\(^{14}\) See \textit{Preston v. Finley}, 72 Fed. 850 (C.C.W.D. Tex. 1896) (involving an occupation tax, prohibitive in effect, on the business of selling a particular newspaper); \textit{Norfolk v. Norfolk Landmark Pub. Co.}, 95 Va. 564, 28 S.E. 959 (1898) (a privilege tax on the business of publishing newspapers had been imposed).
general from which newspapers have sought to be exempted, and have dealt with the “single in kind” distinction made by the Supreme Court, by reasoning that such distinction was based on the motive behind the tax, i.e., to restrain. However, in a recent Supreme Court decision, the Court, by way of dictum, warned that a tax might be invalid if its effect was to restrain speech or press, even if such abridgment was not contemplated.

Prior to the instant case, state courts had distinguished the Grosjean case from situations such as the one involved here, on the ground that motive to restrain free expression is what was condemned by that case rather than merely the singular effect of the tax upon avenues of expression. Of course, where the intent to restrain free expression can be readily ascertained from the express purpose of the tax, and where the direct tendency of a tax is to curtail a protected activity, the tax is invalid. However, the purpose of the protection of freedom of speech and press is not so much to punish those who abridge the freedom of speech or press, as it is to protect the public interest in a free interchange of ideas. Therefore, where it is shown that the effect of a tax is clearly to single out a protected activity, as in the instant case, thereby effectively curtailing the dissemination of news and opinion, it is not necessary to inquire into the purpose of the legislature in imposing such a tax. Of course, a tax imposed upon business in general, for a legitimate governmental purpose, also curtails the amount of revenue of an included, pro-


16. Clearly, the motive for the tax was to restrain the larger publications which had voiced sentiments unfavorable to the late Huey Long, then quite powerful in the state government. This motive was compared by the Supreme Court in the Grosjean case to the motive for the noxious stamp taxes which antedated the first amendment and led to its adoption.

17. N.A.A.C.P. v. Alabama, 357 U.S. 449, 461 (1958). Wherein the Court cited the Grosjean case and stated that “statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the fourteenth amendment.” The Court also found that abridgment of speech or press may result from varied forms of governmental action, although such abridgment is not contemplated.

18. See note 15 supra.

19. In the Grosjean case, the Supreme Court found that a tax imposed solely upon the press curtailed the amount of revenue from advertising, thereby having a direct tendency to restrict circulation. Since the purpose for the tax was also to restrict circulation, the Court found the imposition unconstitutional.


21. In the instant case, the court found that while the taxes were in effect, newspaper linage in Baltimore decreased twelve per cent as compared with a national average decline of less than eight per cent. The court determined that since advertising accounts for approximately seventy-five per cent of the revenue of newspapers, the decline was due to a decrease in advertising revenue coupled with an increase in tax expenditures.
tected activity; however, the effect is relatively incidental when spread out in this manner.\(^2\) It would seem that no great burden is placed upon the police power by forbidding this power to single out free expression in order to force it to bear a disproportionate share of the cost of government, when measured against the benefit to the public of unfettered speech and press.

Charles C. Keeler

**CONTRACTS—ILLEGALITY—CONTINGENT FEE AGREEMENT TO PROCURE A GOVERNMENT CONTRACT.**

**Browne v. R. & R. Engineering Co.** (Del. 1958)

Plaintiff, an engineer experienced in bidding on government contracts, agreed with the defendant, who had never before prepared a government bid, to attempt to place the defendant’s name on the government bidding lists, to prepare certain drawings for which the plaintiff would be paid 1000 dollars, and to help the defendants prepare estimates to submit to the government. In return it was agreed that the plaintiff would be made a partner or be paid a certain percentage of the contract price, if a contract was obtained. Largely due to the plaintiff’s drawings and estimates, the bids were successful and resulted in a series of large contracts. When the plaintiff brought this action seeking five per cent of the total contract price as his fee, the district court held that an executive order was declarative of national public policy condemning such contracts as illegal, and the plaintiff would not be allowed to recover, notwithstanding the

\(^2\) An additional argument raised by the petitioners, but not relied upon by the court, was that there was a denial of equal protection. It was contended that the ordinances discriminated arbitrarily and unreasonably against a certain segment of the advertising media classification, particularly since no reasons were given for excluding point of purchase and direct mail advertising which constituted over thirty per cent of the total volume of advertising.

1. Exec. Order No. 9001, 6 Fed. Reg. 6787 (1941). Section Five of Title II provides that "every contract entered into pursuant to this order shall contain a warranty by the contractor in substantially the following terms:

‘The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.’"

By a literal reading of this executive order it has been held that hiring an agent solely for the purpose of having the contractor’s name placed on the government bidding list was an agreement “to solicit or secure a contract” and was unenforceable since the contractor had hired an agent in violation of the warranty agreement. Mitchell v. Flintkote Co., 185 F.2d 1008 (2d Cir. 1950), cert. denied, 341 U.S. 931 (1951).
fact that neither the plaintiff nor the defendants had known of such public policy or had been guilty of, or even contemplated, anything corrupt. *Browne v. R. & R. Engineering Co.*, 164 F. Supp. 315 (Del. 1958).\(^2\)

An agreement to procure a government contract by the terms of which undue influence is to be used on a government official is illegal and unenforceable.\(^3\) Even if corrupt means were in fact not used, courts will still not enforce such an agreement since it is violative of public policy.\(^4\) Furthermore, contracts which merely have a tendency to induce the use of undue pressures on government officials have been declared void.\(^5\) When consideration for services rendered in procuring a public contract is contingent on the awarding of the contract, such agreements were held to be illegal per se even before this executive order, since there is a tendency to bring undue influence on government officials.\(^6\) However, if the agent to procure the contract is employed on a continuing basis by the contractor, or if he is an established commission agent, the blanket condemnation of contingent fee agreements does not apply.\(^7\) Courts have reasoned that in the latter situation the temptation for the agent to exert improper influence is not as great as it is when an agent is hired to procure a specific contract for a contingent fee.\(^8\) Many states, however, do not hold commission contracts to be illegal on their face, but rather examine the circumstances of the agreement to determine whether corrupt practices were used or contemplated; and, if not, the agent can recover the agreed compensation.\(^9\) Prior to the promulgation of Executive Order Number 9001,\(^10\) authority could be found in federal cases for this less onerous test applied by some state courts.\(^11\) However, federal courts have uniformly interpreted this executive order as laying down a policy of prohibition on contingent fee commission arrangements\(^12\) and as not

RECENT DECISIONS

requiring a showing of actual or intended improper conduct to void the arrangement. Although established commercial agencies are exempt from the warranty requirement of this executive order pertaining to contingent fee arrangements, nevertheless, if an agent is suing for his commission, he has the burden of proving that he is a bona fide selling agency maintained by the contractor.

When confronted with a contingent fee arrangement as in the instant case, courts are in an understandable dilemma. On the one side is the desire to enforce an agreement from which the defendant has received all the benefit and by which the defendant will be unjustly enriched, if not enforced against him. Conversely, if the court allows recovery it is giving legal effect to the type of contract that almost uniformly has been found to have a tendency to bring improper pressure to bear on administrative officials. The provision in this executive order that, upon discovery that a contingent fee arrangement has been entered into in violation of the warranty by the contractor, the government may subtract from the contract price the amount of the contingent fee suggests that a prime consideration in including the warranty may have been a financial saving to the government. Under such an interpretation of the executive order, the plaintiff in the instant case would not be barred from recovery solely on the ground that the government may bring an action against the defendant for breach of warranty. However, this executive order has been interpreted as reaffirming the older decisions which invalidated commission agreements in procuring government contracts for public policy reasons. This rule was formulated at a time when the structure of the federal government was relatively uncomplicated, far from the complex organism that exists today. Under present conditions, when a company goes outside its regular sales organization for the selection of an agent to help secure a government contract, the contention is just as plausible that it does so because of its own unfamiliarity with the maze of the government procurement process, as it is that the company has done so


http://digitalcommons.law.villanova.edu/vlr/vol4/iss3/4
because the agent selected has some special access to government officials. If the federal courts were to relax their prohibition on contingent fee agreements per se, proof that the arrangement contemplated or resulted in undue influence would still invalidate the agreement.\textsuperscript{18} Then, in the absence of such a showing, an agent, even though hired specifically to secure one contract, could recover for honest professional services rendered just as a bona fide selling agent now may do.

\textit{John J. Guilfoyle, Jr.}

**EVIDENCE—RIGHT OF CONFRONTATION—ADMISSION OF CERTIFICATE OF BLOOD TEST RESULTS IN DRUNKEN DRIVING PROSECUTION AS EXCEPTION TO HEARSAY RULE.**

\textit{Kay v. United States} (4th Cir. 1958)

Defendant was convicted of drunken driving on a federal parkway under a Virginia statute\textsuperscript{1} made applicable by the Assimilative Crimes Act.\textsuperscript{2} The statute provided, \textit{inter alia}, that a certificate of the results of test to determine the alcoholic content of the blood of defendant, and to which he has consented, is admissible in court as evidence of the facts stated therein. On appeal defendant protested the introduction into evidence of a certificate of the results of his blood test to which he had consented. The court of appeals affirmed the conviction \textit{holding} that defendant was not deprived of the right of confrontation of witnesses in violation of the state or federal constitution, on the ground that such a certificate met the requirements of a permissible exception to the hearsay rule, \textit{viz.}, reasonable necessity, and assurance that the evidence has qualities of reliability and trustworthiness. \textit{Kay v. United States}, 255 F.2d 476 (4th Cir.), \textit{cert. denied}, 79 Sup. Ct. 42 (1958).\textsuperscript{3}

It is well settled that the right of confrontation does not preclude exceptions to the hearsay rule.\textsuperscript{4} But despite the fact that the provision

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\textsuperscript{18} This was the result in \textit{Glass v. Swimaster Corp.}, 74 N.D. 282, 21 N.W.2d 468 (1946).

\textsuperscript{1} \textit{Va. Code Ann.} 1950, §§ 18-75—18-75.3 (1956). But for the clause allowing the admission of the certificate as evidence, the statute involved in the instant case is identical to those sections of the 1952 Uniform Vehicle Code dealing with drunken driving (\textit{Uniform Vehicle Code}, Act V. § 54 (1952)) which establish presumptions of sobriety or intoxication from different levels of alcoholic content of the blood which have been constitutionally upheld as according due process. \textit{State v. Childress}, 78 Ariz. 1, 274 P.2d 333 (1954).


for the right of confrontation is worded similarly in all state constitutions or declarations of rights, it has met with a variety of constructions in different jurisdictions in relation to the permissibility of hearsay exceptions. Arkansas considers the right of confrontation as a substantive right for which nothing can be substituted because it imports the right of cross-examination. During the Prohibition Era, Texas, albeit other states allowed certificates of chemical analysis of liquor, held that such admission denies confrontation. Further, Texas has recently refused to admit a certificate identical to the one in the instant case despite a statute similar to the one involved here. Louisiana has similarly been reluctant to allow exceptions to the hearsay rule in criminal cases. On the other hand, Rhode Island has held that confrontation is not an absolute right applicable to all evidence, and that the test to be used by the court is whether the facts are essentially documentary notwithstanding that a criminal prosecution is involved. Originally, absolute necessity for the evidence was required before hearsay evidence would be admitted. As the use of documents as evidence developed, reasonable necessity became the requirement, with the result that exceptions today are made where the evidence sought to be admitted is merely more conveniently presented than non-hearsay evidence on the same point. Professor Wigmore points out that the elements of necessity and trustworthiness are not applied with equal force every time an exception is made, and one may be the real basis for the exception while the other is applied loosely or even may

5. See 5 WIGMORE, EVIDENCE § 1397 n.2 (3d ed. 1940, Supp. 1955) for each provision.
6. Smith v. State, 200 Ark. 1152, 143 S.W.2d 190 (1940). See also Veatch v. State, 221 Ark. 44, 251 S.W.2d 1015 (1952) (physician's report inadmissible unless the physician is present to allow defendant the right of cross-examination); Jones v. State, 204 Ark. 61, 161 S.W.2d 173 (1942) (notarized report of psychiatric board as to defendant's sanity not admissible unless defendant can call at state's expense any member of the board for cross-examination).
8. Torres v. State, 113 Tex. Crim. 1, 18 S.W.2d 179 (1929).
9. Estes v. State, 162 Tex. Crim. 126, 283 S.W.2d 52 (1955). The statute was not as specific as that involved in the instant case. It admitted as evidence records of heads of state departments, not specifying explicitly blood test records of the chief medical examiner.
10. See, e.g., State v. Green, 161 La. 620, 109 So. 143 (1926) (in manslaughter indictment, certificate of death of deceased held inadmissible because facts could be proved by oral testimony); State v. Joseph, 156 La. 862, 101 So. 21 (1924) (physician's report inadmissible where physician was not present to be cross-examined); State v. Davis, 149 La. 1009, 90 So. 835 (1922) (pedigree of bloodhounds inadmissible).
13. 5 id. § 1631.
be lacking in some instances. Where mere convenience is to substitute for the necessity requirement, the quality of trustworthiness thereby becomes the true basis for the validity of the exception.

In the instant case, by calling the certificate a record of a public official, trustworthiness might conceivably be imputed by the lack of motive to falsify inherent in the discharge of public duty. There are, however, many opportunities for mistake since the test involves more than a mere recordation of a manifested fact. For example, defendant’s claim that alcohol should not have been put on his arm as an antiseptic before drawing the blood is in agreement with eminent authority. Further, the blood test differs somewhat from the comparison of speedometers which is involved in a speeding violation prosecution. There the test is a simple matter with a result visible to any observer of ordinary intelligence.

It is noteworthy that when the certified results of a blood test are admitted into evidence, there is the possibility that the presumption of innocence in favor of the defendant may be destroyed since he is now required, in effect, to prove that he was not intoxicated. In *Kirby v. United States*, the Supreme Court, basing its holding on the right of confrontation, said that in proving an essential element of defendant’s crime, that goods found in his possession were stolen, the prosecution could not place in evidence a record of conviction of persons who had stolen the goods, for then the presumption of innocence would be of no consequence. For this same reason, the Court in *United States v. Elder* said that where facts constituting the offense itself are necessary to be proved, they must be proved by living witnesses who must confront the accused and subject themselves to cross-examination. The fact that this is a criminal prosecution where personal liberty is involved should indicate the necessity for caution in creating new exceptions to the hearsay rule. Special consideration should

14. 5 id. § 1423, at 206.
15. Vanadium Corp. v. Fidelity & Deposit Co., 159 F.2d 105 (2d Cir. 1947).
21. id. at 55-56 “... for, as to this vital fact which the government was bound to establish affirmatively, (defendant) was put upon the defensive almost from the outset of the trial by reason of what appeared to have been said in another criminal prosecution ... at which he was not entitled to be represented.”
be given to the effect of the exception on the presumption of innocence; rather than concluding that since certain flexible requirements for hearsay exceptions are met, the constitutional right of confrontation is not denied. Nevertheless, this case is not out of line with recently approved exceptions to the hearsay rule, and with further judicial approval might act as a signal to state legislatures that the last constitutional barrier to an effective prosecution of drunken driving violations has been hurdled.

Joseph J. Mahon, Jr.


Plaintiff, a citizen of Pennsylvania, brought a civil action for personal injuries in the District Court for the Eastern District of Pennsylvania against McCloskey & Co., a Delaware corporation having its principal place of business in Pennsylvania. Defendant moved for dismissal for want of federal jurisdiction on the ground that no diversity of citizenship existed, since under the 1958 amendment to Section 1332 of the Judicial Code, a corporation shall be deemed a citizen of any state of incorporation and of the state in which it has its principal place of business. The motion to dismiss was granted. Jaconski v. McCloskey & Co., 167 F. Supp. 537 (E.D. Pa. 1958).

Although it was clearly settled before the passage of the 1958 amendment that a corporation is deemed a citizen of the state of incorporation for diversity purposes, there is still much confusion in regard to the

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23. Certificates of speedometer tests, note 18 supra; certificates of liquor analysis, note 7 supra.
24. For even under the Uniform Vehicle Code and the presumptions it set up both the drawer of the specimen and the analyzer must be put on the stand, and chain of custody of the specimen must be shown. People v. Sansalone, 208 Misc. 491, 146 N.Y.S.2d 359 (County Ct. 1955); People v. Kovacik, 205 Misc. 275, 128 N.Y.S.2d 492 (N.Y.C. Ct. Spec. Sess. 1954). Under the common law prosecution is even more difficult, for expert testimony is necessary to prove the test used is reliable and that from the results of the test the defendant is intoxicated in the opinion of the expert witness. People v. Morse, 325 Mich. 270, 38 N.W.2d 322 (1949); Mora v. State, 159 Tex. Crim. 321, 263 S.W.2d 787 (1954).

1. 72 STAT. 415, as amended, 28 U.S.C. § 1332 (1958). The pertinent section reads: "(c) For purposes of this section ... a corporation shall be deemed a citizen of any state by which it has been incorporated and of the state where it has its principal place of business."
citizenship of corporations incorporated in more than one state. The weight of authority is to the effect that a corporation incorporated in the state where suit is brought will be considered a citizen of that state alone, even though incorporated elsewhere. Thus, a corporation incorporated in states A and B and sued in a federal court in state A by a citizen of state B could not successfully challenge the diversity jurisdiction by claiming to be a citizen of state B, for in this action it will be considered only as a citizen of state A; and conversely, if suit were brought in state B by a citizen of state B, the corporation could successfully challenge diversity jurisdiction, for in such a case it would be considered as a citizen of state B. A contrary view was followed by the Third Circuit in 

\[\text{Gavin v. Hudson & Manhattan R.R.}\]

where the plaintiff, a citizen of New Jersey, was permitted to sue defendant corporation, incorporated in both New York and New Jersey, in a federal court in New Jersey by simply alleging in his complaint that defendant was a citizen of New York. Since the instant case arose in the Third Circuit, the court had to determine the effect of the 1958 amendment to the Judicial Code upon the rule of the Gavin case. Plaintiff argued that the amendment making corporations citizens of the state wherein their principal place of business is located had no greater effect than to incorporate defendant in the state of its principal place of business, and therefore, the Gavin case was controlling in the case at bar. The court rejected this argument, and, limiting the holding in the Gavin case to instances of multiple incorporation, dismissed the present case for want of federal jurisdiction.

In order to obtain the result of the instant case, the court had to read section 1332(c), as merely constituting a corporation a citizen of the state where it has its principal place of business, and not as considering the corporation to have been incorporated in that state. Such a dis-


8. 185 F.2d 104 (3d Cir. 1950).

9. See note 1 supra.
tinction is material in relation to the congressional intent only in the Third Circuit where, under the Gavin case, a corporation incorporated in more than one state can be sued in a federal court in one of the states of incorporation by a citizen of that state. Thus, if the Gavin rule were applied in the present case, although plaintiff is a citizen of Pennsylvania and defendant's principal place of business is also in Pennsylvania, diversity jurisdiction could still be invoked, since defendant is incorporated in another state. The Gavin case, however, has been criticized by other circuit courts; in a recent Third Circuit decision, Delaware River Joint Toll Bridge Comm'n v. Stults, the Gavin case was not followed when a corporation incorporated in Pennsylvania and New Jersey tried to sue a citizen of New Jersey in a New Jersey district court. The court there held that, by affirming the decision in Jacobson v. New York, N.H. & H. R.R., the Supreme Court had endorsed the view that a multi-state corporation sued in one of the states of incorporation will be considered as a citizen of that state and no other. To avoid the holding of the Gavin case, the court in the present case strove to limit the Gavin case to instances of multiple incorporation, thereby making it inapplicable to the case at bar. It does not appear, however, that the court considered the question whether section 1132(c) has changed the present rule that a multi-state corporation sued in an incorporating state will be considered as a citizen of that state alone. The court construed this section, which makes a corporation a citizen of any state of incorporation, as merely a legislative endorsement of a long-established legal fiction. This view would appear to be the more acceptable as corporations were considered citizens of each state of incorporation even before the passage of this amendment. It is doubtful that section 1132(c), by making corporations citizens of "any" state of incorporation, impliedly rejects the present rule on multiple incorporation, when the wording of the section is not in-
consistent with the present rule on multiple incorporation and there is no other language in the amendment to indicate an intent to make such a change. On the other hand, it is arguable that by using the word "any" Congress intended to make a corporation a citizen of every state of incorporation, thus destroying diversity jurisdiction whenever an opposing litigant is a citizen of one of the states of incorporation. This view would result in a greater reduction in diversity cases in the district courts, but it involves a strained construction of the language of the statute, which finds no support in the legislative history of the amendment. Indeed, the rejection of a Senate proposal to make corporations citizens of every state in which they do business would seem to indicate that the intent of Congress was not to restrict diversity jurisdiction to any great extent.

It would appear that if Congress had intended to change the rule regarding diversity jurisdiction in cases of multiple incorporation, it would have done so in more specific terms. If, however, it is finally determined that Congress intended to reject the *Gavin* case by enacting section 1132(c), there would appear to be no obstacle to accepting plaintiff's argument that Congress, by providing that a corporation shall be deemed a citizen of the state where it has its principal place of business, merely intended to consider the corporation as having been incorporated in that state for diversity jurisdiction purposes.

Patrick M. Ryan

FEDERAL PROCEDURE—MANDAMUS—DISQUALIFICATION OF A JUDGE FOR BIAS.

*Green v. Murphy* (3d Cir. 1958)

The petitioner, defendant in a criminal action which was to be tried in the federal district court, filed an affidavit alleging that the trial judge was biased and prejudiced, and should be disqualified under the Federal Disqualification Statute. The specific contention was that because of a

18. Under this rule a corporation is considered as a citizen of each state of incorporation, and it is only when an action is brought by or against a corporation in a state of incorporation that the corporation will be considered only as a citizen of the state where suit is brought.


21. Although reduction in the number of diversity cases was a primary purpose of this legislation, Congress still wished to afford "... corporations doing business over a wide territory, the sort of protection which they need against local prejudice and the benefit of the salutary rules and practice of the federal courts." *Id.*, at 2613.

22. Of course, such a result would not help plaintiff here since the purpose of his argument was to gain the diversity jurisdiction advantages of the *Gavin* rule.

1. 62 Stat. 992, 28 U.S.C. § 144 (1948). "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding...."
long friendship with the petitioner, the trial judge would, in an endeavor to be just, lean toward the prosecution to a degree which would result in unfairness toward petitioner. The trial judge refused to step down, stating that the facts alleged in the affidavit were not legally sufficient. The circuit court sitting en banc, on petition for mandamus, without deciding if the facts stated were legally sufficient to compel disqualification, held, with two Judges concurring and one dissenting, that mandamus should not be granted since petitioner's proper remedy was by way of appeal after conviction. Green v. Murphy, 259 F.2d 591 (3d Cir. 1958).2

Mandamus is an original writ issued by a court compelling an inferior court or person to perform some duty which arises from the official or public status of that court or person.3 The writ of mandamus is extraordinary in that it will not issue where there is another plain, speedy, and adequate remedy at law;4 generally, appeal is available to the party.5 However, where there are circumstances which would make the appeal an inadequate remedy, such as when an irreparable injury would be sustained by a party forced to wait until appeal, the court may issue mandamus.6

By statute,7 federal appellate courts have the power to issue mandamus if the cause is within the court's appellate jurisdiction, which jurisdiction includes not only cases acquired on appeal, but those which are capable of being appealed.8 Since the federal statute which provides for disqualification of a judge for bias or prejudice does not expressly authorize the issuance of a writ of mandamus for removal, the circuit courts are divided in regard to what is the proper remedy available when the judge refuses to disqualify himself on the grounds that the facts recited in the affidavit are not legally sufficient to demonstrate bias or prejudice.9 Some circuit courts, partly relying on dictum in Berger v. United States,10 have held

2. Green v. Murphy, 259 F.2d 591 (3d Cir. 1958).
7. 62 Stat. 944 (1948), as amended 28 U.S.C. § 1651 (1949). "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate to their respective jurisdictions and agreeable to the usages and principles of law.
9. United States v. Onan, 190 F.2d 1 (8th Cir. 1951); Mitchell v. United States, 126 F.2d 550 (10th Cir.), cert. denied, 316 U.S. 702 (1942); Saunders v. Piggly Wiggly Corp., 1 F.2d 582 (W.D. Tenn. 1924).
10. 255 U.S. 22 (1921). The statement made by the Court in this case (that appeal would be inadequate in a disqualification for bias) was made in relation to the holding in the case that the judge may not pass upon the truth of the facts alleged in the affidavit filed. The point made by the Court was that if the judge could pass upon the truth of the facts stated, appeal would be inadequate because of the presumption that would support these facts upon appeal.
that where the judge is alleged to be prejudiced, a writ of mandamus may be issued requiring disqualification prior to final adjudication.\textsuperscript{11} These courts reason that appeal is not an adequate remedy because it would force the party to be tried by a partial judge, the very evil the statute was designed to prevent.\textsuperscript{12} Other circuit courts will issue mandamus only where there are extraordinary circumstances that cause extensive hardship, on the ground that unusual circumstances must be demonstrated before the court would be justified in circumventing the appellate process.\textsuperscript{13} However, courts following this view have yet to find circumstances warranting the issue of the writ. Finally, a minority take the position that appeal always affords an adequate remedy since the adequacy of a remedy is not determined by the hardship or inconvenience to the party in being required to wait, but by whether there is a remedy adequate to rectify the trial judge's error.\textsuperscript{14}

The majority, doubtful as to whether the case was even within its appellate jurisdiction, decided that there were no extraordinary circumstances present that would warrant the issuing of mandamus.\textsuperscript{15} The dissenting opinion, however, properly considers the proceeding as within the appellate jurisdiction of the court since the term "appellate" is not limited in its application to a cause on appeal but also applies to a proceeding which revises and corrects, but does not create, a cause already instituted in an inferior court.\textsuperscript{16} The extraordinary circumstances inherent in the nature of a disqualification proceeding, moreover, should be sufficient to satisfy any requirement for the issuance of mandamus.\textsuperscript{17} In addition to the extensive hardship caused a party forced to wait until after appeal for a new trial, there are few circumstances which are more damaging to the principle that justice must not only be done, but must appear to be done in order to engender public confidence in the judiciary, than a trial before a biased judge.\textsuperscript{18} Finally, the fact that a separate and elaborate system of certification and filing has been provided for disqualification proceedings would seem to indicate that Congress recognized the extraordinary nature of such proceedings and contemplated a system which would eliminate the usual necessity of appeal before a complainant's right

\textsuperscript{11} Gladstein v. McLaughlin, 230 F.2d 762 (9th Cir. 1955); Connelly v. United States Dist. Court, 191 F.2d 692 (9th Cir. 1951).

\textsuperscript{12} Foster v. Medina, 170 F.2d 632 (2d Cir. 1948), cert. denied, 335 U.S. 909 (1949); Eisler v. United States, 170 F.2d 273 (D.C. Cir. 1948); In re Lisman, 89 F.2d 898 (2d Cir. 1937); Minnesota & Ontario Paper Co. v. Molyneaux, 70 F.2d 545 (8th Cir. 1934).

\textsuperscript{13} Ibid.

\textsuperscript{14} People ex rel. Tinkoff v. Campbell, 212 F.2d 785 (7th Cir. 1954); Korer v. Hoffman, 212 F.2d 211 (7th Cir. 1954).

\textsuperscript{15} Green v. Murphy, 259 F.2d 591, 594 (3d Cir. 1958).

\textsuperscript{16} Ex parte Peru, 318 U.S. 578 (1943); Knox County v. Aspinwall, 65 U.S. (24 How.) 376 (1861); Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803).

\textsuperscript{17} See Connelly v. United States Dist. Court, 191 F.2d 692 (9th Cir. 1951).

\textsuperscript{18} See Offutt v. United States, 348 U.S. 11 (1954); Payne v. Lee, 222 Minn. 269, 24 N.W.2d 262 (1946).
can finally be determined. It would appear that as long as uncertainty remains concerning the nature of mandamus, the proper remedy for disqualification of an allegedly biased judge will be in doubt among the federal courts.

Peter G. Nyhart

PARTNERSHIP—Dissolution—Liquidation of Corporations as Assets of a Partnership.

Fortugno v. Hudson Manure Co. (N.J. 1958)

Plaintiff sought the dissolution of a family partnership consisting of seven children and a widow. Through the use of partnership funds, the organization had acquired several corporations for the purpose of carrying on various aspects of its business. The plaintiff-partner alleged that the corporations were assets of the partnership, and since he was an equal partner, dissolution of the partnership entitled him to an equal share of the corporations. He further alleged that according to the original partnership agreement the corporations should be liquidated and their assets distributed equally in cash. The trial court determined that the corporations were not assets of the partnership and ordered equal distribution of the stocks to the partners. On appeal, the superior court reversed, holding that the corporations were assets of the partnership, and since the result of a stock distribution would be to transform a full partner into a minority stockholder, the corporations should be liquidated to allow an equal cash distribution among the partners. Fortugno v. Hudson Manure Co., 144 A.2d 207 (N.J. 1958).

The question of whether an underlying agreement, existing prior to the formation of a corporation, may govern the management or disposition of that corporation without violating the rule that the corporation is to be managed by its board of directors has been answered differently by various jurisdictions. Based on considerations of public policy, and


1. The plaintiff alleged misconduct in the handling of partnership funds and affairs.

2. "That at the termination of this partnership, by reason of any cause, a full and accurate inventory shall be prepared, and the assets, liabilities and income, both gross and net shall be ascertained; that the debts of the partnership shall be discharged; and all the moneys and other assets of the partnership, then remaining, shall be divided in specie, between the parties, share and share alike." Fortugno v. Hudson Manure Co., 144 A.2d 207, 211 (N.J. 1958).


4. See, e.g., Deboy v. Harris, 207 Md. 212, 113 A.2d 903 (1955) (a joint-adventure agreement may survive a subsequent incorporation of that venture); Seaboard Airline R.R. v. Atlantic Coast Line R.R., 240 N.C. 49, 82 S.E.2d 771 (1954) (court will disregard the corporate agreement where it does not reflect true relationship); Boag v. Thompson, 208 App. Div. 132, 203 N.Y.S. 395 (2d Dep't 1924) (corporate agreement supersedes that of joint-venture).

the intention of the legislature, New Jersey, in Jackson v. Hooper, adopted the rule that a business organization cannot avail itself of the protective devices of a partnership through a prior partnership agreement, and, at the same time, those of a corporation. The court in that case maintained that any partnership agreement whereby corporations to be formed would be used as instrumentalities or agencies in the conduct of all of the partnership business, independent of statutory control, could not be enforced. If any remedy is available to the shareholders where a prior partnership agreement is breached, it must be in their capacity as shareholders for breach of a duty owed to them as shareholders. Many courts, however, have adopted the view that a partnership may form corporations for the purpose of conducting various phases of its business, and that these corporations may be subject to the terms of the prior partnership agreement, even though the corporations are used as instrumentalities of the partnership. Adopting the rationale of Wabash Ry. v.

7. 76 N.J. Eq. 592, 75 Atl. 568 (1910).
8. “The law never contemplated that persons engaged in business as partners may incorporate, with the intent to obtain the advantages and immunities of a corporate form, and then, Proteus-like, become at will a co-partnership or a corporation, as the exigencies or purposes of their joint enterprise may from time to time require. . . . They cannot be partners inter sese and a corporation to the rest of the world.” Jackson v. Hooper, 76 N.J. Eq. 592, 75 Atl. 568 (1910).
9. Id. at 571.
10. E.g., Seitz v. Michel, 148 Minn. 80, 181 N.W. 102 (1921); Sun River Stock & Land Co. v. Montana Trust & Sav. Bank, 81 Mont. 222, 262 Pac. 1039 (1928); Jackson v. Hooper, 76 N.J. Eq. 592, 75 Atl. 568 (1910); Manacher v. Central Coal Co., 284 App. Div. 380, 131 N.Y.S.2d 671 (1st Dep't 1954). This is true whether the prior agreement is a partnership or a joint-venture.

There is ample authority for the proposition that once a partnership or joint-venture is established, the law pertaining to both organizations is the same. See Nichols, Joint Ventures, 36 VA. L. Rev. 425, 442 (1950); Colowick, The Corporation as a Partner, 1955 Wash. U.L.Q. 76, 82.

11. It should be noted that those jurisdictions which follow the rule in Jackson v. Hooper have only dealt with situations where the partnership is non-existent in the sense that the entire function of the partnership is performed by the subsequently formed corporations. On the other hand, the jurisdictions which have applied the rationale of Wabash Ry. v. American Refrigerator Transit Co., 7 F.2d 335 (8th Cir. 1925), have done so where the partnership function was not absorbed by the corporations but continued to exist and operate side by side with the corporation. New York appears to be the only jurisdiction which expressly considers the question of whether the subsequent corporation is performing all or part of the partnership function as determinative.


13. See Elsbach v. Mulligan, 58 Cal. App. 2d 354, 136 P.2d 651 (1943); Donahue v. Davis, 68 So. 2d 163 (Fla. 1953). Under the screen of the corporate entity, the partnership, in truth, operates the corporation for the operative advantage of the partnership so as to constitute the corporation an instrumentality of the partnership.
American Refrigerator Transit Co., these courts look through the corporate form and interpret the prior existing agreement in order to give effect to the real intent of the members of the association, so long as the rights of creditors or other third parties do not intervene. The logic of this approach lies in the distinction between a closely-held corporation and one in which there are public investors. In the latter, there is a separation of ownership and management, and strict adherence to statutes governing the operation of corporate management is therefore required in order to minimize the possibility of a fraud being perpetrated upon the investor. The problem does not, however, arise in the closely-held corporation since ownership and management are usually the same. There being no other shareholders to protect in this situation, there would appear to be no policy reason preventing recognition of the original partnership agreement.

By the instant decision, New Jersey has aligned itself with numerous other states adopting the view that a corporation may operate subject to a prior agreement. The court here, however, has extended that doctrine to include the liquidation of the corporations to facilitate a cash distribution where such would be necessary to effectuate the purposes of the prior agreement. Without the proffered alternative of an opportunity for the defendants to buy the plaintiff out in cash, the decision would appear to be a harsh one, especially since the plaintiff was granted liquidation of the corporations on the ground that the partnership agreement

14. 7 F.2d 335 (8th Cir. 1925), cert. denied, 270 U.S. 643 (1926). "If corporations carry on part of their business through subsidiary companies, it makes little difference what such companies may be called; there is no particular divinity surrounding the term 'corporation.' The court will look through the form to get at the real intent of the association of individuals or corporations forming the organization ..., and will give effect to the real purpose of the organization to promote square dealings and effectuate justice."


16. Wabash Ry. v. American Refrigerator Transit Co., 7 F.2d 335 (8th Cir. 1925), cert. denied, 270 U.S. 643 (1926); Elsbach v. Mulligan, 58 Cal. App. 2d 354, 136 P.2d 651 (1943); Denny v. Guyston, 327 Mo. 1030, 40 S.W.2d 562 (1931). Where there are additional shareholders who are not members of the original agreement, or creditors who have relied on the responsibility of the corporations, to subject them to the terms of the original partnership agreement would be unjust.

17. See cases cited note 5 supra.

18. See note 16 supra.


20. See note 2 supra. The court's sympathy for the plaintiff is understandable, in view of the fact that his new position as a minority stock-holder would deprive him of the full voice in management and policy-making which he had as a full partner, and an equal opportunity to procure a comfortable position within the business structure. In addition, since this was a closely-held corporation, the plaintiff might have difficulty selling his stock.

21. The defendants had the alternative of buying out the plaintiff in cash only upon the suggestion of the plaintiff. Fortugno v. Hudson Manure Co., 144 A.2d 207 (N.J. 1958).
never contemplated their acquisition.\textsuperscript{22} Even assuming this to be true, the
unauthorized acts of acquiring the corporations seem to have been ratified
by the plaintiff's failure of timely objection and receipt of corporate
benefits.\textsuperscript{23} Not only would plaintiff appear to have ratified the acquisition
of the corporations, but it would seem that consent to the conversion of
partnership assets into corporate stock would contemplate the equal dis-
tribution of such stock upon the dissolution of the partnership even though
the original agreement provided for payment in specie.\textsuperscript{24} The fact that
the plaintiff was a minor at the time the partnership was originally formed,\textsuperscript{25}
and when the first corporation was acquired,\textsuperscript{26} should not affect the out-
come since he had already reached his majority when the original, oral
partnership agreement was replaced by a written agreement.\textsuperscript{27}

\textit{Jack E. Levin}

\textbf{RELEASE—FELA—WEIGHT OF EVIDENCE NECESSARY TO
PROVE FRAUD OR MISTAKE.}


Plaintiff, an employee of defendant railroad, signed for the sum of
710 dollars a release of any claim against the railroad for injuries he
received while riding on the back of a railroad truck. In this action
brought under the FELA, plaintiff contended that the release was invalid
because it was obtained by duress in that the defendant threatened the
plaintiff with the loss of his job if he refused to accept the settlement.
Plaintiff also claimed that the release was void on the ground of mutual
mistake of fact that plaintiff had no permanent injuries. The railroad
confessed liability because of the negligence of its truck driver, but chose
to defend upon the release. From a judgment of 5,000 dollars for plaintiff
the defendant appealed on the ground that the trial court erred in in-
structing the jury that plaintiff had the burden of proving the invalidity

\textsuperscript{22} Id. at 218.
\textsuperscript{23} See \textsc{Mec}hem, \textit{Elements of the Law of Partnership} \S 283 (2d ed. 1920).
\textsuperscript{24} Applying the reasoning of the court that the plaintiff should not be forced
to accept an equal distribution of stock since the partnership agreement did not
contemplate the acquisition of corporations, if the agreement had contemplated such
acquisition by the partnership, the plaintiff would have to be satisfied with a stock
distribution. Ratification of such acquisition should work the same result as a pro-
vision in the original agreement.
\textsuperscript{25} The partnership was originally formed in 1934. Although the record is not
clear what the plaintiff's age was at the time the partnership was first formed, the
fact that he graduated from college in 1939 would tend to indicate that he was a
minor in 1934.
\textsuperscript{26} Fortugno Realty Company was established in 1935.
\textsuperscript{27} The original oral partnership agreement of 1934 was reduced to writing in
1940.
of the release merely by a preponderance of the evidence, asserting that
the requirement should have been clear and convincing evidence. The
Supreme Court of Utah in affirming the judgment, held that the weight
of evidence for the avoidance of a release under the Federal Employer’s
Liability Act is the same as applied to issues of fact in civil matters gen-


eral, viz., the preponderance of the evidence. Maxfield v. Denver &

In regard to releases generally, federal courts have held that the
burden of persuasion is on the party alleging the fraud or mistake, and
that the burden must be met by clear and convincing evidence. The
rationale generally offered in support of this burden of proof is twofold:
First, the courts are reluctant to rescind or reform written contracts on
the basis of parol or extrinsic evidence; the courts state that the stability
of the commercial community demands special assurance of the enforce-
ment of contracts as written as against subsequent inconsistent claims.
Secondly, and more particularly in the case of releases, it is the policy of
the law to promote and sustain the compromise and settlement of dis-
puted claims, and to minimize litigation. In the case of releases arising
specifically from claims under the FELA there is a conflict in the federal
courts as to the weight of the burden of persuasion that one must satisfy
in alleging that the release is void because of mistake or fraud. Some
federal courts have adopted the rule applicable to releases generally and
require a showing of fraud or mistake by clear and convincing evidence.7
Other jurisdictions have asserted, as did the court in the instant case,
that the requisite burden of proof for avoiding a release is to demonstrate
fraud or mistake merely by a preponderance of the evidence.8 These latter
cases offer no reason for adopting the lesser standard of proof and seem
to rely on the dissenting opinion in Dice v. Akron C. & Y.R.R.,9 which
asserted, without supporting authority or rationale, that the lower re-
quirement of proof is the rule in actions arising under the FELA. The Su-
preme Court, however, has taken no majority position on this question.
A theory in support of the lower standard of proof was suggested in
Callen v. Pennsylvania R.R.10 where the dissent urged that releases under

3. The validity of a release under the FELA raises a federal question to be de-
   termined by federal rather than state law. South Buffalo Ry. v. Ahern, 344 U.S.
   367 (1952).
4. Lion Oil Ref. Co. v. Albritton, 21 F.2d 280 (8th Cir. 1927).
7. Chicago & N.W. Ry. v. Curl, 178 F.2d 832 (8th Cir. 1949); Callen v. Pennsyl-
   vania R.R., 162 F.2d 832 (3d Cir. 1947); Whitmarsh v. Pennsylvania R.R., 61 F.
8. Camerlin v. New York Cent. R.R., 199 F.2d 698 (1st Cir. 1952); Purvis v.
the FELA should be governed by the same rules which apply to releases by seamen under admirality law. Seamen are considered wards of the court, and one claiming a release as a defense is charged with the burden of proving that the release was freely made, absent duress, mistake, or fraud. The reasoning advanced in support of this rule is that seamen are regarded as necessitous persons, under strong economic pressures, who, because of their helplessness, are to be protected from hard bargains.

The Supreme Court in the Callen case expressly held that in cases arising under the FELA, the burden of persuasion is on the party who attacks a release as invalid because of mutual mistake or fraud. The Court thereby refused to accept the general analogy to admirality law as to the party required to bear the burden of persuasion, but did not reach the question of what the burden should be. As the same economic pressures often exist, coupled with the inherent duress arising from a fear of loss of employment from failure to compromise, it would appear that where the injured party is a non-maritime employee he would be better protected by the lower requirement of proof adopted in the instant case. The federal courts, moreover, in situations such as the one in the instant case, have recognized that economic inequality between the employer and employee, similar to that present here, may result in the absence of free bargaining.

That inequalities will arise where there is such a disparity in bargaining power is demonstrated by the fact that the plaintiff settled for 710 dollars, for injuries later evaluated by a jury to be worth 5,000 dollars. Finally, since the releases here are not standard commercial contracts between businessmen, if the rule of evidence announced by this court is adopted by the federal courts, it should not have the effect of disrupting commercial practice generally; and, as the relationship of the parties is one of employment, it is difficult to see how the rule of the instant case can serve to destroy the general community confidence in the enforceability of private settlements of disputes. It should be noted, however, that the Utah Supreme Court has merely stated what it believes the federal law to be on this particular question, and, as such, this determination does not have the weight of stare decisis in the federal courts.

William B. Colsey, III

14. Since there is no clear majority position on this question among the federal courts, and since the Supreme Court has not yet decided this problem, the Utah court considered itself free to predict how the Supreme Court would handle this problem in light of the past positions of the present majority of the Court.