



1-1-1948

Recent Decisions

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Recommended Citation

John Cauley, Robert D. Laundergan, John H. O'Hara & Robert R. Uhl, *Recent Decisions*, 23 Notre Dame L. Rev. 261 (1948).

Available at: <http://scholarship.law.nd.edu/ndlr/vol23/iss2/6>

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Sheil goes on to say, "Deny the Fatherhood of God as the one and only basis for our common brotherhood and you open wide the door to that racial insanity of the 'SUPER-MAN' and all of the hatred, brutality and violence that follow inevitably in its wake." Our answer to the problem of restrictive racial covenants will reveal whether we really love our neighbors, or merely tolerate their existence. America must recognize and, in recognizing, practice the fact that every man has a God-given right to exist on a plane equal to his dignity as a child of God.

In review, therefore, we find that the present law applying the doctrine of restrictive racial covenants is such that it is a violation of the rights of those persons so discriminated against. With the current hearing of restrictive covenant cases before the Supreme Court of the United States, a real opportunity for correction of this evil is presented. Let us in reaching the proper solution apply the law of God, upon which our democratic system finds its foundation, and show in practice the heeding of the exhortation of St. Paul who said, "He . . . it is who has made us fit ministers of the new covenant, not of the letter but of the spirit; for the letter kills, but the spirit gives life."¹⁷

James D. Sullivan

RECENT DECISIONS

WORKMEN'S COMPENSATION—CONFLICT OF LAWS.—*Spietz v. Industrial Commission et al.*, Wis., 28 N. W. (2d) 354 (1947)—This was an appeal to review a judgment setting aside an order of the Wisconsin Industrial Commission.

The facts are that Spietz and his employee were residents of Wisconsin; the employee worked in Montana where he was injured while working, and received temporary disability payments under Montana law. On returning to Wisconsin, where the benefits are greater, he applied for and received benefits under the Wisconsin compensation law. These were awarded with credit given for the awards received in Montana. The question raised is whether the Montana award is a bar to the Wisconsin award. Does it fall within the full faith and credit clause of the Federal Constitution so that the award in Montana will be considered *res adjudicata*?

To answer these questions the Wisconsin court turned to two recent cases decided by the United States Supreme Court with the same factual basis. In *Magnolia Petroleum Company v. Hunt* 320 U. S. 430, 64 S. Ct. 208, 88 L. Ed. 149 (1943), it was held that a final compensation award in one state is entitled to the protection of the full faith and credit clause. By a Texas statute an award of compensation was the final and exclusive remedy, and when the employee applied for Louisiana compensation, the United States Supreme Court held he was not entitled to it. The decision was based on the Texas Workman's Compensation Act, Art. 8306, Sec. 3. In a similar later case, *Industrial Commission of Wisconsin v. McCartin*, 330 U. S. 622, 67 S. Ct. 886, 91 L. Ed. 812 (1947), the United States

¹⁷ 2 Corinthians, chap. 3, verses 6-7.

Supreme Court held that an award under Illinois law would not bar an award for the same injury under Wisconsin's compensation act. The only feature which distinguishes the *McCartin* case from the *Magnolia* case seems to be an absence of a statute in Illinois such as would declare this award the final and exclusive remedy. Thus it would appear according to the decisions that an award of compensation is not entitled to full faith and credit unless the statute of the first state which awarded compensation specifically declared that an award is a bar to further action.

In the *Spietz* case, the Supreme Court of Wisconsin on this basis held the second award valid as (1) the Montana award was not final in that an award for permanent disability in Montana was still open for proceedings and (2) that the Montana compensation act, unlike that of Texas, did not declare such an award final.

In the cases previous to the *Magnolia* case on this problem the United States Supreme Court had held that for a compensation award to be entitled to full faith and credit, it must (1) state in the act that this award is to be the exclusive remedy and (2) the other state involved must not have more than a casual interest in the employee-employer relationship. In the *Magnolia* case the Supreme Court held in effect that only the first of these requirements need be met. In that case, Louisiana, the resident state of the employee, and the state where the contract of work was made, would appear to have a much greater interest in the outcome than Texas, where the injury occurred. In the *Magnolia* case the trend is toward allowing the awards full faith and credit.

One theory advanced in this reasoning is that when an employee is in a situation where he may elect to apply for one of two awards, his election to proceed under one will bar proceeding under another and that once the judgment is given it is *res adjudicata* and final. This overlooks the fact that the injured employee seldom knows he is entitled to compensation under two laws and may choose either. Neither does he know which state gives him the higher award. As pointed out in 44 COL. L. REV. 345 (1944) "election" in many cases is the advice of his employer.

It might be argued that the full faith and credit clause is observed when credit is given for the payments in the first state by the second award.

Another interesting question is whether a statute declaring a compensation award final is on principle entitled to recognition outside the jurisdiction. The Supreme Court of the United States in a five to four decision held in effect that it was. Justice Black in his dissent in the *Magnolia* case pointed out that the resident state has an interest in the employee's welfare even though the employee is injured elsewhere. Thus the barring of the award in the second state because the law of the first state declares its award to be the only one, is projecting the law of the first state beyond its jurisdiction. On principle it seems the *Magnolia* case extends the full faith and credit clause beyond the breaking point.

This decision by the Wisconsin court was carefully thought out in the light of the *Magnolia* and *McCartin* cases and followed strictly the principles laid down in these cases. The rule followed by the federal courts is, substantially, that an award by a second state will be barred when the compensation act of the first state declares its award to be final. It might be noted that the Restatement, Conflict of Laws (1934) Sec. 403, holds that an award by one state should not bar a second award.

John Cauley

WILLS—COMMON DISASTER—INTERPRETATION OF CLAUSES PROVIDING FOR DEATH IN A COMMON DISASTER. *Ross et al. v. Clore et al.*, —Ind. App.—, 74 N. E. (2d) 920 (1947). In the law of wills a common disaster occurs when the testator and beneficiary die under such circumstances that the chronological order of their deaths cannot be ascertained. The relative times of death being of great importance in the matter of survivorship, rules have been formulated to deal with death in a common disaster. Under the common law rule there was no presumption as to survivorship; it was a fact to be proved by the party asserting it. The civil law rule set up various presumptions as to survivorship between persons who perished in the same disaster, based upon age, sex, and physical strength of the individuals, and the assumption that the stronger would survive the weaker. These presumptions were extended only to parents and children. Where there are statutes concerning this, survivorship is presumed, as between persons who have perished in common disaster, from the probabilities resulting from strength, age and sex, according to specific rules. 17 C. J. 1179.

In order to prevent controversy, and to insure that the legal presumptions would not void their wishes, many testators began to include in their wills clauses designed to foresee and to provide for such a common disaster. Today, with our ever-increasing dangers to life in automobile, rail and air travel, such provisions are becoming more and more important.

In this recent case the court was called upon to interpret a common disaster clause. *Ross et al v. Clore et al.* The will of the testatrix, after reciting that her residuary estate, real and personal, was to go to her sister, Ella Snyder, then read, "In the event my sister Ella Snyder should die in an accident or otherwise at or about the same time I hereby direct my estate shall go to . . ." The sister died thirty-five days after the death of the testatrix from an illness which had existed at the time of the testatrix's death. There would probably be no question in the judge's mind as to the testatrix's intent but for the words, "or about the same time." It was his belief that these words did not have a sufficiently definite meaning by themselves or in the clause under consideration. In attempting to find the testatrix's intent from the will as a whole he came to the conclusion that by these words the testatrix meant the bequest to go to her sister only if the sister should live long enough and be in such a condition to "take or enjoy" the property.

Now, if indeed the testatrix had the intention ascertained by the court, is not this intention expressed in terms devoid of the definiteness necessary in order that any meaning and effect be ascribed to it? Enjoyment is a feeling personal to each individual and whether it may result from a given act cannot be objectively ascertained as to any one individual.

The New York courts have twice been called upon to construe a common disaster clause containing the phrase, "at or about the same time." In the more recent case the court merely decided that the husband who died eleven months after the death of his wife did not die "at or about the same time." *In re Rental's Will*, 60 N. Y. S. (2d) 646 (1945). The court in the other case had before it for construction a common disaster clause worded, "In the event that my said husband shall not have taken or exercised possession of the property given to him by my said will and testament. . . ." The husband survived only five and one-half months, during which time he distributed some of her property and paid some of her bills out of the estate. The court interpreted this clause to mean that "the testatrix sought to provide against a failure of survivorship and the death of her husband within a brief interval after her own, during which he would derive no benefit from her estate." *In re Redmond*, 100 N. Y. S. 347 (1906). It was held that the estate had vested in the husband prior to his death. Again the decision gave importance to the question of whether there was a benefit to

the husband, although here the substantiation of such an intention was very evident in the will, and the time of survivorship was much longer. Would it not be better, if the intention is manifest that in addition to making a provision for a common disaster it was also intended to provide for some other requirement such as being able to "take or enjoy" or "benefit from" the estate, that the intention be given effect by the following test, "Did the surviving beneficiary live long enough in such a condition as to be able to exercise the effective power of disposition over the estate?" It would seem that this power of disposition would generally be considered as being accompanied by the idea of enjoyment or a benefit received. Thus the judicially ascertained intent in the two cases would have been given the definiteness necessary for a proper operation.

In *Ross et al. v. Clore et al.*, the present case, the court, in its construction of the will, was guided by the cardinal rule that the intention of the testator, as determined from an examination of the whole will, attributing due weight to all its language, should be given effect. *In re Owen's Estate*, 65 N. Y. S. (2d) 221 (1945). If, however, the intention of the testator is obscure or ambiguous, resort must be had to those technical rules applicable to the construction of wills. *Caruthers v. Fisk Univ.*, 394 Ill. 151, 68 N. E. (2d) 296 (1946). For example, the application of the *ejusdem generis* rule to the phrase, "in an accident or otherwise at or about the same time," would seem to indicate that the death contemplated was to come from some common misfortune or disaster, perhaps even from a common fatal illness. *In re Astor's Estate*, 62 N. Y. S. (2d) 117 (1946). Then too, in the principal case, there is no mention made of the date of the will. This fact becomes important if the court is to put itself, as nearly as possible, in the circumstances of the testatrix in order to determine her intention. *Anderson v. Harris*, 320 Mass. 101, 67 N. E. (2d) 670 (1946). In the decisions herein discussed the courts have ignored the fact that the law so favors the vesting of estates and is so averse to the postponement thereof, that they will be held to vest at the earliest possible period, in the absence of clear manifestation of the intention of the testator to the contrary. *Geiger v. Geer et al.*, 395 Ill. 367, 69 N. E. (2d) 848 (1946). It seems quite evident in *Ross et al. v. Clore et al.* that the vesting of the estate is suspended until the death of the testatrix.

Thus in dealing with this particular method of expression in a common disaster clause, these two courts have established a dangerous precedent. They have permitted the vesting of estates to be suspended almost indefinitely, for they have limited the period of suspension only by the most general terms. If their test will admit the suspension of vesting for thirty-five days in one case, the same general test could easily permit six months or one year or even longer as a reasonable time in other cases.

Robert D. Londergan

UNITED STATES—TORT LIABILITY OF GOVERNMENT CORPORATIONS.—*National Housing Agency et al. v. Orton*,Tex. Civ. App., ..., 202 S. W. (2d) 243 (1946). Extension of government immunity from suit to government corporations is against public policy, and will not be implied. In the absence of Congressional consent, the functions of a government corporation must be of an essentially public character before immunity will be inferred. Accordingly, a provision in a statute allowing a government corporation to sue or be sued was held to apply to a suit in tort against another corporation derived from it.

This was an action for personal injuries brought by William T. Orton against the United States Housing Authority, the Federal Public Housing Authority, and the National Housing Agency. A verdict was obtained by the plaintiff in the trial court and the defendants appealed.

The plaintiff was employed as a nightwatchman in a men's dormitory operated by the FPHA in Orange, Texas, as a home for war plant workers. While engaged in his duties, he fell and received the injuries of which he complained. The dormitory in which the plaintiff was employed was built by the Farm Security Administration, but, before the injury occurred, it was transferred to the FPHA. Notice was served on the representative of all the appellants in Texas, while a non-resident notice was issued to the appellants' offices in Washington, D. C. Appellants filed a motion to quash and dismiss which was overruled. The jury having found the accident was due to the appellants' negligence in failing to repair a faulty stairway, the trial judge determined that FPHA and USHA were the same agency, operating under the supervision of the NHA, and allowed recovery against both. Appellants contended that USHA and FPHA were not the same agency and that FPHA, which had admitted control over the dormitory, was immune from suit.

The court held that USHA and FPHA had been merged by Executive Order 9070, 50 U. S. C. A. App. Sec. 601 note, and that the agency FPHA (USHA) was thereby created. Since The United States Housing Act of 1937, 42 U. S. C. A. Sec. 1405 (a) and (b), had conferred the power to sue and be sued on USHA, the court felt that this power was to be extended to FPHA (USHA), at least in exercising the duties of USHA. In considering the question of the public or governmental nature of the duties of FPHA (USHA), the court quoted Mr. Justice Holmes' opinion in *Sloan Shipyards Corp. v. U. S. Shipping Board*, 258 U. S. 549, 42 S. Ct. 386, 66 L. Ed. 762 (1931). There, in holding the Emergency Fleet Corporation liable for suit, he said, "An instrumentality of government he might be, and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts." The court did not attempt to decide what governmental functions should be considered immune, but did say that, excepting clear cases of immunity, the "consent to be sued should be extended to any function lawfully performed by the corporation."

The line between governmental and commercial functions has not been too clearly drawn. Some cases have held government-owned corporations immune from suit where they performed commercial functions for the public good. *Bal-liane v. Alaska N. R. Co.*, 259 F. 183 (C. C. A. 9th, 1919) (homesteading and hauling government coal); *Kansas City Bridge Co. v. Alabama State Bridge Corp.*, 59 F. (2d) 48 (C. C. A. 5th, 1932); rehearing denied 1932, 59 F. (2d) 1065; writ of certiorari denied 1932, 287 U. S. 644, 50 S. Ct. 90, 77 L. Ed. 557 road and bridge building). On the other hand, the court in the principal case had authority for its decision upholding the right to maintain a suit in tort where a general right to sue and be sued has been granted. It cited the leading case of *Kiefer & Kiefer v. Reconstruction Finance Corp.*, 306 U. S. 381, 59 S. Ct. 516, 83 L. Ed. 784 (1939). However, there are earlier cases where a Federal agency has been held not liable in tort, even though given the right to sue and be sued, on the theory that it was not authorized to commit torts. *Overholser v. National Home for Disabled Volunteer Soldiers*, 68 Ohio St. 236, 67 N. E. 487, 96 Am. St. Rep. 658 (1903); *Walker v. Home Owner's Loan Corp.*, 25 F. Supp. 589 (S. D. Calif. 1938). The *Kiefer* case, however, can be considered to have overruled them in respect to commercial functions of governmental corporations at least.

The appellants in the instant case also contended that the plaintiff should not have been able to maintain this suit because he had a right to compensation under the U. S. Employees' Compensation Act, 5 U. S. C. A. Chapter 15 (1916). This contention was overruled by the court as being a misstatement of the law. Where one has two remedies, he is free to pursue either, even if both are against the United States. *Dahn v. Davis*, 258 U. S. 421, 42 S. Ct. 320, 66 L. Ed. 696 (1922). If one remedy is pursued to completion, however, the other cannot be used.

The appellants' last major contention was that Amis, their representative in Texas, was not an agent of USHA and that FPFA and NHA were nonresidents and had not been served within the state. The court answered by stating that the right of FPFA (USHA) to make a general appearance could be inferred from its right to be sued, and that the filing of the motion to quash and dismiss had, under the court's rules of procedure, the effect of a general appearance. Rules 121, 122, 123, Texas Rules of Civil Procedure, 1939 Supp.

While this case was decided after the passage of the Tort Claims Act of 1946, 28 U. S. C. A. Secs. 921-946 inclusive, the action accrued before January 1, 1945, the effective date of the act. Under this law, all tort claims against suable government agencies must be tried by the federal district judge of the district where the action occurred, sitting without a jury. In such cases, the substantive law of the place where it is tried is followed, while the case is conducted according to the Federal Rules of Procedure.

The court also reiterated the established rule that costs can be adjudged against a government corporation not having immunity from suit. *Reconstruction Finance Corp. v. J. G. Menihan Corp.*, 312 U. S. 81, 61 S. Ct. 485, 85 L. Ed. 595 (1941).

The modern growth of government corporations and agencies, particularly during the war years, and the consequent increase in litigation, is resulting in a clearer definition of the law of governmental immunity from suit. The fundamental principles have been declared, but the diverse statutory origins of these corporations have made general application difficult. In each case, the court must weigh the intent of Congress as well as the rules of law in delivering a decision. Frequently, considerations of public policy will have a great influence on the courts. The trend in the law today is to put government corporations on an equal footing with the private corporations with which they compete. The law on this point, however, will probably never be settled as long as our ideas of the functions and duties of government continue to change. *John H. O'Hara*

INTERNATIONAL LAW—EFFECT OF WILL LEAVING PROPERTY IN CALIFORNIA TO GERMAN NATIONALS—*Clark v. Allen*,U. S., 67 Sup. Ct. 1431, 91 L. Ed. 1285 (1947). Alvina Wagner, a resident of California, died in 1942, and, under a will dated December 23, 1941, admitted to probate in a California court in 1942, bequeathed her real and personal property to four relatives who were nationals and residents of Germany. Six nieces and nephews, residents of California, petitioned for distribution of the estate, claiming that, under a California Statute (1941), Probate Code, Section 259, 259.1, and 259.2, the right of aliens abroad to take real or personal property in the United States by will or descent is conditioned upon the existence of a reciprocal right of Americans abroad, and in the absence of such reciprocal right the American heirs are entitled to the property. However, the Alien Property Custodian asserted that the property was vested in him, inasmuch as the California statute was void because it conflicted with the Constitution of the United States by invading the field of foreign affairs. The heirs then claimed that Article IV of the German-American Treaty of 1925, relied upon by the Alien Property Custodian, was abrogated or suspended by the war with Germany. A judgment was rendered in the district court for the Alien Property Custodian, Attorney General Tom Clark, who had instituted this action against the testator's executor and California heirs at law, but the circuit court of appeals reversed the decision. On appeal of the Alien Property Custodian the Supreme Court granted certiorari for a determination of his interest in the testator's property based upon the effectiveness of the treaty, during hostilities, and the state statute.

There are two questions involved here: (1) Did the outbreak of the war between the United States and Germany break, suspend or abrogate the Treaty of Friendship, Commerce and Consular Rights with Germany, signed on December 8, 1923 and proclaimed on October 14, 1925, 44 Stat. 2132, (2) Will a state statute prohibit an enemy alien from inheriting property when he has that right by treaty provision?

There is a diversity of opinion on the first question and little judicial precedent. Lenoir, *The Effect of War on Bilateral Treaties* (1946) 34 Geo. L. J. 129. In fact the Supreme Court has only dealt with two previous cases in this regard: *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 5 L. Ed. 662 (1823). *Karnuth v. United States*, 279 U. S. 231, 173 Sup. Ct. 677, 49 L. Ed. 274 (1929). Three schools of thought exist. One believes that war annuls all treaties. Another believes that war does not annul any treaties, that natural rights are preserved in war along with the legal system. Though the nations may be at war, the rights of individuals still continue. The Harvard Draft Convention on the Law of Treaties (1935) indicated this when the Reporter said, "There is no reason of public policy or national defense why any treaties should be regarded as *ipso facto* annulled or terminated by the outbreak of war between the parties." 29 Am. J. Int. L. (Supp) 1185-1186. Finally, there are the many writers who look into the "intent" of the parties drawing the treaties. Lenoir says, "The chief virtue of the 'intent of the parties' test seems to be that it provides a logical basis from which to argue for or against survival of a particular treaty provision upon the outbreak of war." 34 Geo. L. J. 129, 173.

In the outstanding American case, *Techt v. Hughes*, 229 N. Y. 222, 242, 128 N. E. 185, 191 (1920), Judge Cardozo formulated the principle that, during hostilities, if the treaty or its provisions were not annulled by the governments the compatible provisions were enforceable and the incompatible provisions were unenforceable. He stated: "International law today does not preserve treaties or annul them, regardless of the effects produced. It deals with such problems pragmatically, perserving or annulling as the necessities of war exact. It establishes standards, but it does not fetter itself with rules. When it attempts to do more, it finds that there is neither unanimity of opinion nor uniformity of practice . . ." Professor Hyde criticized this opinion by saying, "It may be observed that the 'principle' invoked fails to take cognizance of the fact that the contracting parties may have been, and probably were, quite unwilling to agree that the continuance of a privilege such as that of taking land by descent should be dependent upon the circumstance that the exercise of it was not impracticable after the outbreak of hostilities." 2 Hyde, *International Law* (2d ed. 1945), Section 550, note 7.

The treaty was considered in effect in the *Techt v. Hughes* case, as the government had not suspended or annulled it, and the provisions were compatible with the state of hostilities. So too in the instant case. Whether the treaty was abrogated by the fact that the German government had ceased to exist was held to be a political and not a judicial question. The United States did not suspend or annul the treaty by the Trading with the Enemy Act, 40 Stat. (1917), as amended by the First War Powers Act, 55 Stat. 839 (1941). Therefore, said Mr. Justice Douglas, the outbreak of war does not necessarily suspend or abrogate treaty provisions and "they prevail over any requirements of California law which conflict with them." Courts of a number of European states and this country support this view that war does not affect reciprocal inheritance treaty provisions. *Sutton v. Sutton*, 1 Russ. & M. 663, 39 Eng. Rep. 255 (Ch. 1830); *State ex rel Minor v. Reardon*, 120 Kan. 614, 245 Pac. 158 (1926); *Goos v. Brocks*, 117 Neb. 750, 223 N. W. 13 (1929).

Judge Cardozo has wisely stated that, ". . . while war is still flagrant, and the will of the political departments of the government unrevealed, the courts . . . play a humbler and more cautious part. It is not for them to denounce treaties

generally, *en bloc*. Their part it is, as one provision or another is involved in some actual controversy before them, to determine whether, alone, or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to time of peace." *Techt v. Hughes*, 229 N. Y. 222, 243. 128 N. E. 185, 192 (1920).

The instant case indicates a trend toward recognition of the individual's rights, even during warfare. For, if nations find themselves pitted against one another in warfare, there should be no sacrifice of the individual's rights, which cannot be taken away by anyone or any nation. War may find the rights abused, but the rights cannot be removed.

As to the second question the Court distinguishes between the disposition of inherited realty and personalty as provided for by the treaty.

The treaty in question provides that any person holding realty in the United States may leave it to a German heir. The heir is then allowed a three-year period, and longer if necessary, to sell the property and withdraw the proceeds. This will be done "without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn," according to Article IV of the treaty.

As to personalty Article IV contains this provision: "Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases." If Alvina Wagner is determined to be a German national the treaty would then govern, but she was assumed to be an American citizen and the Court found that the treaty made no provision for the personalty of an American citizen in this country to be left to German nationals. Even though the personalty could not be disposed of under the treaty it was argued that neither could it be disposed of under the California statute, which was claimed to be unconstitutional on the grounds of a state extension of power into the field of foreign affairs, a federal function. The Court held that state law determines the rights of succession to property and are effective so long as they do not conflict with a federal policy, such as a treaty. Here the treaty does not govern the rights of succession.

Mr. Justice Rutledge, concurring in part, dissented on the Court's assumption of Wagner's nationality and the expression of the constitutionality of the California statute. He stated, "The decision now made on that issue, by virtue of the Court's hypothesizing that she was an American citizen, will be rendered both moot and advisory in character if it is found, as it may well be in the District Court's further proceedings, that she was a German national. . . . It is more important that constitutional decisions be reserved until the issues calling for them are squarely and inescapably presented, factually as well as legally, than it is to expedite the termination of litigation of the procedural convenience of the parties."

Robert R. Uhl