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RECENT DECISIONS

LABOR LAW — UNION REPRESENTING SUPERVISORY EMPLOYEES IS A “LABOR ORGANIZATION REPRESENTING EMPLOYEES” WITHIN THE MEANING OF SECTION 301(A) OF THE LABOR MANAGEMENT RELATIONS ACT. — A collective bargaining agreement between the Isbrandtsen Co., Inc., and District 2, Marine Engineers Beneficial Association, AFL-CIO, contained an arbitration clause. The agreement resulted from negotiations between the employer and union, which represented the employer’s supervisory employees. On March 7, 1966, the union petitioned the Supreme Court of New York, Kings County, to compel arbitration of a dispute which arose out of the sale by the employer of certain vessels. On March 18, 1966, the employer petitioned the United States District Court for the Eastern District of New York for removal of the suit from the state court on the ground that the district court had original jurisdiction under section 301(a) of the Labor Management Relations Act of 1947.1 After removal, the union moved to remand to the state court asserting that the federal district court lacked jurisdiction. The union alleged that it was not a “labor organization representing employees” within the meaning of section 301(a) since all of the employees covered by the collective bargaining agreement in question were “supervisors” and section 2(3) of the act excludes supervisors from the statutory definition of “employee.”2 In denying the union’s motion to remand, the United States District Court for the Eastern District of New York held: the supervisor exclusion of section 2(3) of the National Labor Relations Act (NLRA) does not apply to section 301(a) of the Labor Management Relations Act (LMRA) to deprive the court of original jurisdiction in a contract dispute involving a union that is composed solely of supervisory personnel. Isbrandtsen Co. v. District 2, Marine Eng’rs Beneficial Ass’n, 256 F. Supp. 68 (E.D.N.Y. 1966).

In 1935, Congress enacted the National Labor Relations Act with the object of equalizing the bargaining power between employers and their employees. The act guaranteed employees the right to organize and bargain collectively through representatives of their own choosing. The act further sought to preserve this guarantee by preventing certain unfair practices on the employer’s part. By 1947, however, it was apparent that new legislation was needed to curb additional labor abuses, by both the employee and employer, which had arisen in the years following the enactment of the National Labor Relations Act. Congress responded with an act, which did not merely amend the National Labor Relations Act, but which attacked labor problems “in a comprehensive — not a

1 Section 301(a) of the Labor Management Relations Act of 1947 (Taft-Hartley Act), 61 Stat. 156, 29 U.S.C. § 185(a) (1964), provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. (Emphasis added.)

Thus, the Labor Management Relations Act of 1947 is composed of five titles, only one of which contains the amended National Labor Relations Act.

Because of this structure, an understanding of the degree to which the various titles of the LMRA are interrelated is essential to resolving the issue which arose in Isbrandtsen. Title I of the LMRA, entitled “Amendment of National Labor Relations Act,” contains the entire revised version of that act. This title deals primarily with unfair labor practices, union certification, and the jurisdiction of the National Labor Relations Board. Section 2(3) of the NLRA was amended to exclude supervisory employees from the statutory definition of “employee.” This amendment was an immediate response to the Supreme Court's decision in Packard Motor Car Co. v. NLRB, which upheld the Board’s ruling that an employer’s refusal to bargain with its supervisory employees constituted an unfair labor practice. Title III of the LMRA contains, among other subjects, provision for federal jurisdiction over labor organizations in breach of contract actions. Section 301(a) was motivated by a desire to promote more responsible labor relations by making the union, as well as the employer, answerable for breach of collective bargaining agreements in federal courts. Because of this grant of jurisdiction to the federal courts, the provision was placed in a title separate from Title I, which specifies the jurisdiction of the National Labor Relations Board. Title V of the LMRA contains a section defining terms used generally throughout the act, a savings provision, and a separability clause. Section 501(1) of this title defines “industry affecting commerce,” while section 501(3) provides that the terms “labor organization” and “employee” “shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.”

Thus, to find the statutory meaning of the phrase “labor organization representing employees in an industry affecting commerce” contained in section 301(a) of Title III, one must first turn to section 501(1) of Title V, which provides a definition of “industry affecting commerce.” For a definition of “labor organization” and “employee,” one must then turn to section 501(3). This section requires one to return to the amended NLRA in Title I where one discovers that a “labor organization” is one composed of “employees.”

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6 See note 1 supra.
   "The definition of employee does not include the employee’s representative, which is a labor organization. It is composed of employees and it is a labor organization within the statutory meaning. . . ."
8 See generally id. at 15-18.
(3) of this same title provides that the statutory definition of "employee" excludes supervisors. Therefore, the union's contention in Isbrandtsen that section 301(a), by its very language, excludes unions solely representing supervisory personnel appears to be a valid interpretation of that section.

This reading of section 301(a) was approved by the United States Court of Appeals for the Second Circuit in A. H. Bull S.S. Co. v. National Marine Eng'rs Beneficial Ass'n. In that case, the employer brought suit against the union for injunctive relief and damages under section 301(a) for alleged breach of a collective bargaining agreement. Two questions were presented to the Second Circuit: first, whether the dispute was a "labor dispute" within the meaning of the Norris-LaGuardia Act, which prohibits a federal court from enjoining a peaceful strike; and second, whether section 301(a) granted jurisdiction over a collective bargaining agreement between an employer and a union covering only supervisory personnel. Deciding the dispute was a "labor dispute" within the meaning of the Norris-LaGuardia Act, the Second Circuit went on to discuss the employer's suit for damages. On this issue, the court stated that "if they [the members of the union] are 'supervisors,' then MEBA is not a 'labor organization representing employees' for the purpose of this action."

Two other courts, in dictum, have interpreted section 301(a) in a like manner. In Retail Clerks, Local 330 v. Lake Hills Drug Co., the United States District Court for the Western District of Washington noted that only supervisory personnel were covered by the contract in question in Bull. The court stated that "it would have been completely contrary to the spirit if not the letter of the language of Section 301 for the court to have upheld jurisdiction under such circumstances."

In view of the favorable comments on Bull, a case that arose in the same circuit as Isbrandtsen, and that approved the interpretation of section 301(a) advanced by the union, it would seem that the district court in Isbrandtsen should have remanded the suit to the state court for lack of original jurisdiction. However, the court was of the opinion that Bull was not the last word on the question. The court felt that two Second Circuit cases decided subsequent to Bull had "cast doubt" on the validity and continued effect of that decision's application of the statutory definitions contained in Title I to section 301(a) of Title III.

In the first of these two cases, National Marine Eng'rs Beneficial Ass'n v. NLRB, the court enforced an NLRB cease and desist order against National

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12 250 F.2d 332 (2d Cir. 1957).
13 It should be noted that in Isbrandtsen, District 2, MEBA, not National MEBA, was the union involved.
16 Retail Clerks, Local 330, supra note 15.
17 Id. at 31,247.
18 Isbrandtsen Co. v. District 2, Marine Eng'rs Beneficial Ass'n, 256 F. Supp. 68, 73 (E.D.N.Y. 1966).
19 274 F.2d 167 (2d Cir. 1960).
MEBA, concluding that since the union admitted nonsupervisory personnel into membership, it was a "labor organization" that could be found guilty of an unfair labor practice under the NLRA. What appears to "cast doubt" on Bull's interpretation of section 301(a) is the court's statement that Bull "arose in a different context and under a different section... ; we are not willing to carry what was there said into the determination whether a union is a 'labor organization' under § 8(b)." This statement was clarified in the second case that Isbrandtsen cited as casting doubt on Bull. In United States v. National Marine Eng'rs Beneficial Ass'n, Judge Friendly observed:

In National Marine Engineers Beneficial Ass'n v. N.L.R.B. ... though we accepted the proposition that a union comprised wholly of supervisors would not be a "labor organization" within § 8(b) of the National Labor Relations Act ... we held that, on the facts there presented, the Board was justified in finding that non-supervisory employees participated in these two unions and hence in holding them within that section.

The question of whether the statutory definition of "employee" in Title I should apply to provisions outside of that title arose in this second MEBA case when National MEBA and other maritime unions composed of supervisors called a strike that halted approximately half of all American shipping. The district court granted the government an injunction under the national emergency provisions contained in section 208 of Title II of the LMRA. On the appeal from the injunction order, the union contended, somewhat similar to the argument made by the union in Isbrandtsen, that the reference to "employees" in the section 501(2) definition of "strike" is governed by section 2(3) of the amended NLRA. In rejecting this argument and affirming the injunction order, the Second Circuit expressed the view that nothing in the legislative history of the LMRA "conveys any thought that supervisory employees were to be excluded from any provisions outside Title I, the National Labor Relations Act as amended." The Second Circuit further observed that Bull had not really determined whether a union comprised of supervisors was subject to section 301(a), the decision in Bull having proceeded "on the basis that in any

20 Id. at 174.
21 Ibid.
22 294 F.2d 385 (2d Cir. 1961).
23 Id. at 390. Note that in Isbrandtsen there was some question as to whether some of the members of the union, not covered by the collective bargaining agreement, were supervisors. Because the court squarely faced the issue of whether a union comprised solely of supervisors constitutes a "labor organization representing employees" for the purposes of a 301(a) suit, it was not necessary to decide that question. Isbrandtsen Co. v. District 2, Marine Eng'rs Beneficial Ass'n, 256 F. Supp. 68, 71 n.3 (E.D.N.Y. 1966).
25 Ibid.
26 Section 208(a) of the Labor Management Relations Act of 1947 (Taft-Hartley Act), 61 Stat. 155, 29 U.S.C. § 178 (1964), allows federal courts to enjoin any "strike or lock-out" which may "imperil the national health or safety...." Section 501(2) of the Labor Management Relations Act of 1947 (Taft-Hartley Act), 61 Stat. 161, 29 U.S.C. § 142(2) (1964), defines the term "strike" to include "any strike or other concerted stoppage of work by employees...." (Emphasis added.)
28 Id. at 392.
event... an anti-strike injunction was prohibited by § 4 of the Norris-LaGuardia Act."

In other words, that language in Bull which some had understood as conclusive of the issue presented in Isbrandtsen was merely dictum, however strong that dictum may have been.

Whether the legislative history of the LMRA "supports the view that the supervisor exclusion of NLRA § 2(3) does not apply to LMRA § 301" depends largely upon the selectivity with which one inquires into it. There is an abundance of legislative history from which to choose. The most persuasive statements in support of the court's view in Isbrandtsen are its references to the bill introduced in 1946 by Congressman Francis Case to amend the NLRA. This bill was passed by both Houses of Congress but was vetoed by the President. The Case Bill contained the predecessors of sections 2(3) and 501(3). Most significantly, it also contained the predecessor of section 301(a), which provided in part that "all collective-bargaining contracts shall be mutually and equally binding and enforceable either at law or in equity against each of the parties thereto..." (Emphasis added.) As the court in Isbrandtsen was quick to point out, if the Case bill had become law, federal courts would have had jurisdiction in labor contract disputes "without reference to the status of the employees represented by one of said parties."

Changes were made in the Case bill, however, before section 301(a) emerged in its present form. The original House version of the section gave federal courts jurisdiction "if such contract affected commerce..." The Senate version, which was eventually adopted in the conference agreement, made the jurisdictional test whether the employer was in an industry affecting commerce or whether the labor organization represented employees in such an industry. In Isbrandtsen, the court read the latter change to "labor organization representing employees in an industry affecting commerce" to be "a more fluent and acceptable manner of expressing the notion that federal courts were to have jurisdiction only if the union involved represented men who performed

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29 Id. at 390.
31 Isbrandtsen Co. v. District 2, Marine Eng'rs Beneficial Ass'n, 256 F. Supp. 68, 74-75 (E.D.N.Y. 1966).
32 As two recent commentators have observed, "it must be remembered that there is such an abundance of legislative history [of the Taft-Hartley Act] that any conclusion reached could be said to be in accordance with the legislative intent." Sullivan and Tomlin, The Supreme Court and Section 301 of the Labor Management Relations Act, 42 Texas L. Rev. 214, 222 n.47 (1963). They further note that "in nearly every Supreme Court decision concerned with section 301, both the majority and minority opinion have relied on the legislative history to support their positions." Id. at 227-28. In support of this observation, see Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955).
33 92 Cong. Rec. 525 (1946).
34 Id. at 1070 (House of Representatives); Id. at 5739 ' (Senate).
35 Id. at 6674-6678.
36 Id. at 527.
37 Ibid.
38 Isbrandtsen Co. v. District 2, Marine Eng'rs Beneficial Ass'n, 256 F. Supp. 68, 75 (E.D.N.Y. 1966).
40 Id. at 66.
their labors in an industry affecting interstate commerce."\(^{41}\) Moreover, the court reasoned, section 301(a) specifies that "industry affecting commerce" is to be understood "as defined in this Act."\(^{42}\) If Congress intended that sections 2(3) and 501(3), the definition sections, were to be applicable automatically to section 301(a), the use of the phrase "as defined in this Act" to modify "industry affecting commerce," would be superfluous.\(^{43}\)

It may be argued, however, that the phrase "as defined in this Act" is superfluous. Section 501, which contains the definitions of terms used throughout the act, begins with the words, "When used in this Act—."\(^{44}\) Furthermore, except for the word "industry," the definition of "industry affecting commerce" in section 501(1) is not substantially different from the definition of "affecting commerce" in section 2(7) of Title I.\(^{45}\) Thus, the drafters of the LMRA could just as easily have taken care of the phrase "industry affecting commerce" by providing, as they did for the terms "labor organization" and "employee" in section 501(3), that reference should be made back to the definitions contained in Title I.

It is true that the conference agreement was intended to reflect an emphasis on the jurisdictional requirement that the industry involved, rather than the agreement, affect commerce. However, the Isbrandtsen court's reading the inclusion of the phrase "labor organization representing employees" as a more "fluent" manner in which to express that emphasis is arguably too all-inclusive. A better explanation for the inclusion of that phrase is that section 301(a) was to be "read in connection with the provisions of section 8 of Title I, also dealing with breach of contracts."\(^{46}\) The reason for this was that the original Senate version of section 8 also made it an unfair labor practice to breach a collective bargaining agreement.\(^{47}\) If these latter provisions had been adopted, the court hearing a 301(a) suit undoubtedly would feel compelled to use the same criteria the NLRB must use in determining whether it has jurisdiction over an unfair labor practice suit.\(^{48}\) In other words, the court clearly would be bound to use the statutory definitions of "labor organization" and "employee" contained in

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\(^{41}\) Isbrandtsen Co. v. District 2, Marine Eng'rs Beneficial Ass'n, 256 F. Supp. 68, 76 (E.D.N.Y. 1966).

\(^{42}\) See supra note 1.

\(^{43}\) Isbrandtsen Co. v. District 2, Marine Eng'rs Beneficial Ass'n, 256 F. Supp. 68, 76 (E.D.N.Y. 1966).


\(^{45}\) Section 501(1) of the Labor Management Relations Act of 1947 (Taft-Hartley Act), 61 Stat. 161, 29 U.S.C. § 142(1) (1964), provides: "The term 'industry affecting commerce' means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce." Section 2(7) of the Labor Management Relations Act of 1947 (Taft-Hartley Act), 61 Stat. 138, 29 U.S.C. § 152(7) (1964), provides: "The term 'affecting commerce' means in commerce or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or free flow of commerce."


\(^{47}\) Id. at 20, 23.

\(^{48}\) The conference agreement omitted this provision because it was determined that "the enforcement of [collective bargaining contracts] should be left to the usual processes of the law and not to the National Labor Relations Board." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 42 (1947). See note 8 supra.
Title I in determining if the union before it in a 301(a) suit was a "labor organization representing employees."

Moreover, other sections of Title III provide additional insight into the intended connectedness between Title I and Title III. In particular, section 303 authorizes a civil action for damages to anyone injured as a consequence of those unfair labor practices defined in section 8(b)(4). In hearing these suits, the court must interpret and apply the same provision that the NLRB considers in an unfair labor practice proceeding. This requirement qualifies the conclusion of the court in United States v. National Marine Eng'rs Beneficial Ass'n, heavily relied upon by the court in Isbrandtsen, that the supervisor exclusion of section 2(3) is applicable only to Title I.

The factor most responsible for the problem that arose in Isbrandtsen, and indeed in all cases where the question has arisen whether to apply the supervisor exclusion of Title I to provisions in other titles, is the lack of a provision in the LMRA clearly defining the status of supervisors. While section 14(a) of Title I provides that supervisors may become or remain members of labor organizations, it also stipulates that "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." (Emphasis added.) There is also language in the legislative history that "this amendment does not mean that employers cannot still bargain with such supervisors and include them, if they see fit, in collective-bargaining contracts." It is doubtful, however, that the proponents of the act ever envisioned a case where a contract dispute between an employer and a union representing supervisory personnel would come to the federal courts under section 301(a). The act's proponents were well aware that the only collective bargaining agreement between a major employer and a major union composed of supervisory personnel up to that time had been discontinued after a short period of time. They no doubt felt that employers, once freed from the requirement of bargaining with supervisors by the new act, would refrain from entering into such collective bargaining agreements. Thus, section 14(a) may be viewed as a harmless compromise to the opponents of supervisory exclusion.

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50 See Note, supra note 8, at 882.
51 United States v. National Marine Engr's Beneficial Ass'n, 294 F.2d 385, 392 (2d Cir. 1961). It must be noted that the conclusion of the court in United States v. National Marine Engr's Beneficial Ass'n was perhaps unnecessary for disposition of the matter in the case. There the court was interpreting the "emergency provisions" contained in Title II. If any title is truly a distinct entity from Title I because of the legislative history of LMRA, it is Title II. These Title II provisions were promulgated to replace the then expiring Smith-Connally Act but were not initially intended to be part of the LMRA. See Reilly, supra note 8, at 296.
54 See Sullivan and Tomlin, supra note 32, at 228.
56 No one saw this more clearly than those who were opposed to the amendment to the NLRA excluding supervisors:

We find seriously objectionable the complete exclusion from procedures and protections of the act of supervisors as a class. The beguiling statement of principle
That compromise, however, has led to the perplexing situation which arose in *Isbrandtsen*. Though the court's interpretation of the legislative history of the LMRA may be questioned, and though the result reached may contribute to a somewhat "piecemeal" interpretation of an act which was intended to be "comprehensive," it is submitted that the court reached a desirable result in retaining jurisdiction rather than remanding to the state court. The present need to bind supervisory unions to their contracts under section 301(a) is just as essential today as was the need to bind unions composed of statutory "employees" in 1947.\(^{67}\)

The marine industry, in particular, exemplifies this need. The situation there has been described by one writer as "chaotic."\(^{68}\) Three different unions represent the three main types of supervisory personnel, while several others represent the statutory employees.\(^{69}\) Moreover, where supervisory unions allow statutory employees membership, the union might be able to use section 301(a) as a war club. It could claim to be a "labor organization representing employees" when it wishes to enforce a contract under section 301(a), or it could claim to be a union of "supervisors" when it wishes to escape federal jurisdiction or enforcement of the contract under section 301(a).\(^{69}\) This does not comport with the Congressional desire to promote the mutual responsibility necessary for industrial peace by giving federal courts jurisdiction over unions in breach of contract disputes.\(^{61}\) Allowing federal jurisdiction in all disputes over collective bargaining agreements without having to inquire into the status of the members of the union represented, however, would comport with that Congressional desire.

Whether or not the legislative history of sections 2(3) and 301(a) support the result reached in *Isbrandtsen*, the district court's holding is consistent with the expansionist attitude the United States Supreme Court has taken in developing section 301(a) into the most important of federal laws governing collective bargaining agreements. Ever since the Supreme Court's landmark decision in *Textile Workers Union v. Lincoln Mills*\(^{62}\) that section 301(a) "authorizes federal courts to fashion a body of federal law for the enforcement of... collective bargaining agreements," many jurisdictional problems have arisen.\(^{63}\) These questions have been resolved by federal courts with little

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\(^{57}\) See text accompanying note 7 *supra*.


\(^{59}\) *Id.* at 806.

\(^{60}\) Mr. Justice Douglas recognized this problem when he stated: "It [MEBA] apparently claims to be a 'labor organization' when it is to its advantage to do so and protests against being so labeled when that position serves its end." *Marine Eng'rs Beneficial Ass'n v. Interlake S.S. Co.*, 370 U.S. 173, 188 (1962) (dissenting opinion).

\(^{61}\) See text accompanying note 7 *supra*.

\(^{62}\) 353 U.S. 448 (1957).

\(^{63}\) *Id.* at 451.

in the way of expressed legislative intent to guide them.\textsuperscript{65} The result reached in \textit{Isbrandtsen} logically can be encompassed within the mandate of \textit{Lincoln Mills}. Such a result tends to promote industrial peace by allowing federal courts to assume jurisdiction over unions in breach of contract disputes without inquiry into the status of the members represented.

\textbf{Robert R. Rossi}

\textbf{Trusts — The Doctrine of Worthier Title Is Abolished and an End Limitation to the Settlor’s Heirs or Next of Kin Creates a Beneficial Interest in Those Designated Classes.} — In 1923, Miss Anna Hatch created a spendthrift trust, directing the trustee to manage, invest, and control the property conveyed and to pay the annual income from the trust estate to the settlor for life. She further directed that, upon her death, the trustee was to convey the corpus of the trust to those she appointed by will and, if she failed to make such an appointment, the corpus was to go to “such of her next of kin . . . as by the law in force in the District of Columbia at the death of the . . . [settlor] shall be provided for in the distribution of an intestate’s personal property therein.”\textsuperscript{1} Outside of the reservation of the testamentary power of appointment, Miss Hatch retained no control over the corpus whatsoever, and the trust instrument expressly stated that she conveyed the property “irrevocably.” Feeling that the income from the trust was insufficient for her to live “in accordance with her refined but yet modest tastes,”\textsuperscript{2} Miss Hatch brought a suit in the United States District Court for the District of Columbia to compel the trustee to pay her an additional 5,000 dollars a year from the corpus of the trust. The district court, although finding the request to be a reasonable one, granted a summary judgment for the trustee because by the trust instrument the settlor had surrendered all control over the corpus, except for the testamentary power of appointment, and had expressly made the trust “irrevocable.” On appeal to the United States Court of Appeals for the District of Columbia, the appellant sought to establish a right to modify the trust arrangement by invoking a common law rule of ancient vintage, the doctrine of worthier title. According to the teaching of this doctrine, an inter vivos conveyance of an interest in land or an interest in things other than land with an end limitation to the conveyor’s “heirs” or “next of kin” raises a presumption that no beneficial interest is conveyed to the heirs or next of kin, a presumption overcome only if a contrary intent is found from additional language in the instrument of conveyance or other circumstances.\textsuperscript{3} As applied to this case, the doctrine would require that the trust instrument, seemingly creating a life estate in the settlor with a remainder in the settlor’s “next of kin,” would in fact create no beneficial interest in the next of kin but would leave a reversion in the settlor unless a contrary intention was shown. If the appellant thus had both the life estate and the reversionary interest in the trust estate, she would have been the sole bene-


\begin{enumerate}
\item \textit{Id.} at 561.
\item \textit{Restatement, Property} § 314(1) (1940).
\end{enumerate}
ficiary, as well as the settlor, and clearly could have revoked or modified under well established principles of trust law. The Court of Appeals met the appellant's argument head on and, affirming the lower court, held: the doctrine of worthier title forms no part of the law of trusts of the District of Columbia and any act or words of a settlor of a trust which would validly create a remainder interest in a third party may create a valid remainder interest in the settlor's "heirs" or "next of kin." Hatch v. Riggs Nat'l Bank, 361 F.2d 559 (D.C. Cir. 1966).

The doctrine of worthier title, so heavily relied upon by the appellant, dates back to feudal times where it developed as a rule of real property. As such, it was an admixture of the two factors which most typically characterized the legal system of that period: a curious fascination with technical and legalistic rules, and a staunch policy to protect the interests of the feudal lord. According to feudal law, certain incidents attached to the land which were imposed upon the heir in favor of the lord when he took by descent. In order to circumvent these incidents, it became the practice to transfer land to prospective heirs by will or as remaindersmen of an inter vivos conveyance. Thus, the heirs would take by purchase rather than descent, and the feudal incidents would not apply. Such a practice was inimical to feudal policy and the predictable answer was a new rule nullifying the attempts to deprive the lord of his traditional rights. The rule was the doctrine of worthier title. Historically, this rule has been broken down into two branches, the testamentary or wills branch and the inter vivos branch. The wills branch declared that a will, purporting to devise to an heir an estate of the same quantity and quality as the heir would take upon descent, was ineffective in making the heir a devisee and he took by descent. The inter vivos branch prohibited a grantor from limiting a remainder to his own heirs. Under this branch of the rule, it was held that the grantor retained a reversionary interest, and the heirs would take, if at all, by descent. Since the rationale of the doctrine was to prevent the frustration of feudal policy, it was

4 RESTATEMENT (SECOND), TRUSTS § 339 (1959); see 3 SCOTT, TRUSTS § 339 (2d ed. 1956).
5 The doctrine of worthier title should not be confused with the Rule in Shelley's Case, another feudal property rule which still survives to haunt unwary conveyancers. Shelley's Rule operates, in certain instances, upon an end limitation to the grantee's heirs, whereas the doctrine of worthier title is of concern when the end limitation is to the grantor's own heirs.
6 The chief incidents were relief, a payment to the lord required of the heir for the privilege of succeeding to the interest in the land; wardship, by which the lord was entitled to the profits of the land during their heir's minority; and marriage, which gave the lord the right to arrange a suitable marriage for the ward and reap any profit from the arrangement. 1 TIFFANY, REAL PROPERTY §§ 14-15 (3d ed. 1939).
7 The testamentary branch gave rise to the name of the doctrine as it was deemed that title acquired by descent was in some way "worthier" than title gained through purchase. Professor Warren has claimed that the appellation "worthier title" is a misleading misnomer when applied to the situation in which there is an inter vivos conveyance with a limitation to the grantor's heirs. Warren, A Remainder to Grantor's Heirs, 22 TEXAS L. REV. 22, 26-28 (1943). The testamentary branch of the doctrine is of little more than historical interest, and the Restatement takes the position that it is no longer a part of American common law. RESTATEMENT, PROPERTY § 314(2) (1940).
8 The English cases firmly establishing this common law rule were decided near the end of the sixteenth century. There were a few earlier cases declaring the rule, but the first leading case on the subject appears to be Fennick and Mitfords Case, 1 Leon. 182, 74 Eng. Rep. 168 (K.B. 1589). For an excellent discussion of the early English cases, see Morris, The Inter Vivos Branch of the Worthier Title Doctrine, 2 OKLA. L. REV. 133, 135-39 (1949).
applied as a rule of law. The doctrine applied only to real property and persisted in this form in England until abolished by statute in 1833.

In this country, the doctrine was accepted as a rule of law in those jurisdictions which showed an awareness of its existence. A major turning point for the doctrine in this country came with the celebrated case of Doctor v. Hughes, decided by the New York Court of Appeals in 1919. In that case, the trust deed conveying certain real property created a life estate in the grantor and provided that on the death of the grantor the property was to be conveyed to his "heirs at law." Upon a suit by creditors against a daughter of the grantor, it became necessary to determine whether she, as heir apparent, had any beneficial interest in the property in question. In an opinion by Judge Cardozo, the court recognized that under the doctrine of worthier title the grantor would retain a reversion, and the daughter would have no interest whatsoever. While refusing to apply the doctrine as a rule of law, the court declared that the rule persisted as a rule of construction and, as such, gave rise to a rebuttable presumption that the grantor did not intend to vest a beneficial interest in his "heirs." Although the change in the doctrine's force from a rule of law to one of construction was a somewhat surprising judicial technique, the decision, perhaps because of the eminence of the court and the jurist, revived and gave new impetus to the doctrine in this country. The utilization of the doctrine as a canon of construction has been widely followed and is accepted as the modern common law rule and applied to personal as well as real property.

9 In Godolphin v. Abingdon, 2 Atk. 57, 26 Eng. Rep. 432 (Ch. 1740), it was said that "a man cannot raise a fee simple to his own right heirs, by the name of heirs, as a purchase, by any form of conveyance whatsoever." Hargrave described the doctrine of worthier title as "a positive rule of our law." 1 HARGRAVE, TRACTS RELATIVE TO THE LAW OF ENGLAND 571 (1787).

10 The Inheritance Act, 3 & 4 Wm. 4, c. 106, § 4 (1833). The doctrine survived until this time although the feudal incidents had been abolished long before. The Tenures Abolition Act, 1660, 12 Car. 2, c. 24 (abolishing wardship and marriage); Fraudulent Devises Act, 1691, 3 & 4 W. & M., c. 14.

11 E.g., King v. Dunham, 31 Ga. 743 (1861); Harris v. McLaran, 30 Miss. 533 (1855); Robinson v. Blankenship, 116 Tenn. 394, 92 S.W. 854 (1906). For a relatively recent case applying the doctrine as a rule of law, see Wilson v. Pharris, 203 Ark. 614, 198 S.W.2d 274 (1941).

12 225 N.Y. 305, 122 N.E. 221 (1919).

13 "But at least the ancient rule survives to this extent, that to transform into a remainder what would ordinarily be a reversion, the intention to work the transformation must be clearly expressed." Id. at 312, 122 N.E. at 222.

14 There is no apparent logical reason why an ancient rule of law should be diluted into a modern rule of construction. The doctrine as a rule of construction has been justified on the grounds that it reflects the intention of the average conveyor and that it increases the alienability of property. RESTATEMENT, PROPERTY § 314, comment a (1940). But it has been suggested that Cardozo's decision may well have been intended as the first step in ridding the law of an unwanted rule of law. Verrall, The Doctrine of Worthier Title: A Questionable Rule of Construction, 6 U.C.L.A.L. Rev. 371, 373-74 (1959).

15 Before the New York court's decision, many courts had considered similar situations without giving any indication that they were even aware of the existence of the doctrine. See, e.g., Crawford v. Langmaid, 171 Mass. 309, 50 N.E. 606 (1898); Christ v. Kuehne, 172 Mo. 118, 72 S.W. 587 (1903). New York's intermediate appellate court made no mention of the doctrine when it considered the Doctor case. Doctor v. Hughes, 174 App. Div. 767, 161 N.Y. Supp. 634 (1916).

16 RESTATEMENT, PROPERTY § 314 (1940). The extension of the doctrine to include personal as well as real property has frequently been accomplished without any mention on the part of the courts that they were conscious of making such an extension. The New York court has conceded that it had "assumed" that transfers of personal property were embraced by the doctrine. Engel v. Guaranty Trust Co., 280 N.Y. 43, 47, 19 N.E.2d 673, 675 (1939).
The doctrine, as a rule of construction, has been difficult to apply, especially in the state which spawned it as such. Given that an end limitation to the grantor's "heirs" or "next of kin" raises a rebuttable presumption that the grantor or settlor intended to convey no beneficial interest to these designated classes, the paramount problem is the determination of what indicia of a contrary intent are sufficient to overcome the presumption. The New York court has attempted to set forth those factors which it considers to be significant in making this determination, but the application of these abstract guides to varying and complex trust instruments has left a line of cases which are confused and inconsistent. Generally, it may be said that the presumption that the grantor wished to retain a reversion has lost much of its force and that the evidence sufficient to rebut it need not be overwhelming. New York has taken limited legislative action to relieve the confusion which has resulted from its courts' attempts to apply the doctrine as a rule of construction. The legislatures of several other states have abolished the doctrine outright, either as a rule of law or a canon of construction.

The District of Columbia was one of the first jurisdictions in this country...17 The majority of the cases dealing with the doctrine as a rule of construction have arisen in New York. As the jurisdiction which proposed this version of the doctrine, it has been the most committed to it and consequently has been forced to adjudicate many cases in an attempt to clarify its holding in Doctor.

18 Basically, those factors which evidence an intention on the part of the settlor to give a remainder to his heirs or next of kin are a full and formal disposition of the principal of the trust property; no reservation of a power to grant or assign an interest in the property during the settlor's lifetime; a surrendering of all control over the trust property except the power to make testamentary disposition thereof; and no provision for the return of any part of the principal to the settlor during his lifetime. Richardson v. Richardson, 298 N.Y. 135, 144, 81 N.E.2d 54, 59 (1948).

19 For an excellent and thorough discussion of the New York cases, see Verrall, supra note 14, at 373-87. The New York court itself has spoken of the "almost ephemeral qualities which go to prove the necessary intent" that the settlor wished to convey a beneficial interest to the heirs or next of kin. In the Matter of Burchell, 299 N.Y. 351, 361, 87 N.E.2d 293, 297 (1949). In a dissenting opinion in the same case, Judge Fuld called upon the New York legislature for clarifying legislation. In the Matter of Burchell, supra at 362, 87 N.E.2d at 298-99 (dissenting opinion).

20 Id. at 360, 87 N.E.2d at 297.

21 N.Y. PERSONAL PROPERTY LAW § 23 and N.Y. REAL PROPERTY LAW § 118 (McKinney Supp. 1966), provide that for the purposes of revocation of a trust a gift or limitation, contained in a trust created on or after September first, nineteen hundred fifty-one, in favor of a class of persons described only as heirs or next of kin or distributees of the creator of the trust, or by other words of like import, does not constitute a beneficial interest in such persons. This legislation extends only to the situation in which revocation of the trust is sought. The effect of the doctrine must still be considered when the conveyor makes an inter vivos conveyance with an end limitation to his own heirs and a subsequent case arises involving creditors' rights, a dispute between the heirs and the grantor's devisees or an attempted conveyance by the grantor. For a critical evaluation of the amendments, see 26 N.Y.U. L. REV. 678 (1951); 26 ST. JOHN'S L. REV. 201 (1951).

22 The doctrine has been abolished in California, CAL. CIV. CODE § 1073 (Supp. 1966); Illinois, ILL. REV. STAT. ch. 30, §§ 188-89 (1957); Kansas (as to wills only), KAN. STAT. ANN. § 58-506 (1964); Minnesota, MINN. STAT. ANN. § 500.14(4) (1947); Nebraska, NEB. REV. STAT. § 76-114, 115 (1958) (adopting the UNIFORM PROPERTY ACT §§ 14-15); Texas, TEX. CIV. STAT. ANN. tit. 31, art. 1291a (Supp. 1966).

23 In Georgia, GA. CODE ANN. § 85-504 (1955), and North Carolina, N.C. GEN. STAT. § 41-33 (repealed 1951), the rule is avoided by establishing a constructional preference for construing a limitation to "A's heirs" to mean "A's children." In Pennsylvania, a statute which provides that a limitation to the heirs of a conveyer shall be construed to mean the heirs at the time the conveyance takes effect in enjoyment nullifies the effect of the doctrine. PA. STAT. ANN. tit. 20, §§ 180.14(4), 301.14(1) (1950).
to accept the doctrine of worthier title and apply it vigorously as a rule of law.\textsuperscript{23}
Now, with its decision in \textit{Hatch}, the District's highest court has become the first judicial tribunal to flatly abolish the doctrine.\textsuperscript{24}

In construing an instrument of the type which was involved in \textit{Hatch}, the court's primary duty is to give effect to the settlor's intention as long as so doing does not contravene public policy.\textsuperscript{25} Since it matters little to society whether the settlor, by an end limitation to his "next of kin," meant to create a remainder in them or to retain a reversion in himself, a meaningful evaluation of the court's decision must begin with the question of whether its result or one dictated by the doctrine of worthier title most closely effectuates the intention of a settlor who draws up a trust instrument of this kind.\textsuperscript{26} One of the primary reasons advanced for the retention of the doctrine as a rule of construction is that the rule in fact reflects the probable intention of the typical settlor.\textsuperscript{27}

Those who argue that the doctrine's rule of construction is justified on the basis that it represents the probable intention of the average conveyor believe that where a person purportedly creates a gift over to his own heirs and also gives himself an estate for life, he seldom intends to create an indestructible interest in those persons who would take his property by intestacy. Rather, it is believed that the conveyor intends the same as if he had given the remainder "to my estate."\textsuperscript{28} To an objection that the settlor has expressly declared that he is creating a remainder in his next of kin, it has been argued that end limitations such as these are frequently merely "tacked on" words, attractive to the legal mind's sense of symmetry, which are used with no thought of creating a beneficial interest.\textsuperscript{29} In addition, such end limitations may be no more than legal "magic words" by which the settlor's attorney, mindful of past judicial interpretation of such phrases, has indicated the settlor's intention to retain a reversionary interest in the trust estate.

Those who would agree with the court's interpretation that the trust instrument in \textit{Hatch} created a valid remainder interest in the settlor's next of kin point out that when a court interprets an end limitation as a reversion, it is proceeding against the express words of the settlor. While it is true the word "heirs" once referred to an indefinite line of succession and, as such, would seem to support the contention that the use of an end limitation of this type means no more than "to my estate," it is now well settled that a gift to "heirs" is a gift to the specific persons who qualify as such, not to heirs from generation

\textsuperscript{23} Miller v. Fleming, 7 Mackey 139 (D.C. 1889).
\textsuperscript{24} Many courts have indicated their aversion for the doctrine when it has been pressed upon them as dispositive of the facts before them. However, while construing the limitation to the "heirs" as creating a beneficial interest in that group, they have not been willing to go so far as to judicially abolish the doctrine. See, \textit{e.g.}, Peter v. Peter, 136 Md. 157, 110 Atl. 211 (1920); Norman v. Horton, 344 Mo. 290, 126 S.W.2d 187 (1939).
\textsuperscript{25} 1 Scott, \textit{Trusts} § 4 (2d ed. 1956).
\textsuperscript{26} In the fact situation involved in \textit{Hatch}, the final result may have been the same whether the doctrine was considered a rule of construction or whether the approach taken by the District of Columbia court was adopted. The four factors which the New York court has found to be significant in evidencing the settlor's intent to create a remainder, see \textit{supra} note 18, are all present in this case.
\textsuperscript{27} \textit{Restatement, Property} § 314, comment a (1940).
\textsuperscript{28} \textit{Ibid.}
\textsuperscript{29} Morris, \textit{supra} note 8, at 175.
Moreover, the settlor who uses such terms as "heirs" or "next of kin" is quite often cognizant of the individuals who will qualify for the remainder under the terms he has employed. Keeping this in mind, it is more believable that the settlor in fact intended to create a beneficial interest in those he knew to be his prospective heirs. If he wished to retain a reversion, the attorney drafting the trust instrument has much clearer terms at his disposal to indicate this intention than to use an end limitation of the type under consideration.

Proponents of the abolition of worthier title as a rule of construction have also claimed that the doctrine has bred expensive litigation and has occasionally caused excessive taxing of estates. Reflecting on New York's unhappy experience with the doctrine as a rule of construction, Professor Powell has declared that in New York no case involving a substantial sum can be fairly regarded as closed until it has been carried to the Court of Appeals. A similar situation is to be expected in other states. This means uncertainty in the law and wasteful expenditures of money by helpless clients.

The application of the doctrine may also have the unfortunate result of including the whole trust corpus in the decedent's estate for the purpose of the federal estate tax. In Hatch, the District of Columbia court addressed itself at the outset to this question of intent. In its analysis, the court, agreeing with those commentators who have proposed complete abolition of the doctrine, found that

30 3 WALSH, REAL PROPERTY 87 n.6 (1947). This evolution has been caused by the now universal use of intestacy statutes which specifically describe those persons who are to be considered the "heirs." See generally Casner, Construction of Gifts to "Heirs" and the Like, 53 HARV. L. REV. 207 (1939).

31 The court points out that, although it might be tempting to say that the settlor intended to create no beneficial interest in his heirs when he said "to myself for life, remainder to my heirs" when the question is a modest modification of the trust, the same result is far from appealing if the settlor dies without revoking the trust and leaves a will which makes no provisions for the heirs whom he assumed to be taken care of by the trust. Hatch v. Riggs Nat'l Bank, 361 F.2d 559, 563 (D.C. Cir. 1966). Before the widespread use of wills, in the days when the doctrine of worthier title was in full flower, the possibility of this situation was remote and the heirs-at-law would take the property as heirs of the conveyor's reversion.

32 3 POWELL, REAL PROPERTY ¶ 381, at 269 (1952). The New York legislature has also acted to remove this uncertainty but it has taken the approach opposite that of the District of Columbia court by declaring that, where the settlor wishes to revoke or modify, the designated heirs or next of kin have no beneficial interest. N.Y. PERSONAL PROPERTY LAw § 23 and N.Y. REAL PROPERTY LAw § 118 (McKinney Supp. 1966). The effect of such legislation is to return to the doctrine of worthier title as a rule of law, at least in the situation in which the settlor seeks to revoke the trust.

33 Trust arrangements are often used as an integral part of estate planning. The doctrine of worthier title may well cause tax problems if the settlor establishes a trust providing for the payment of the life income to himself or a third party and a gift of the corpus to his "heirs." If the doctrine is applied to this situation, it will likely be adjudged that the settlor has retained a reversion. Under the INST. REV. Code of 1954 § 2033, the value of this reversion will be included in the gross estate of the settlor for federal estate tax purposes. However, in a jurisdiction which has abolished the doctrine, the gift of the corpus to the "heirs" would likely be adjudged as creating a remainder in those persons who qualify as heirs under the relevant intestacy statute. In such a case the settlor would retain, at most, a defeasible reversion because the trust property would revert to his estate if there were a failure of heirs. The value of this defeasible reversion would be included in the settlor's estate but normally would be of little value. For a discussion of possible estate tax problems which may arise in this area, see generally Verrall, supra note 14, at 400-02.
it is questionable whether it [the doctrine] accords with the intent of the average settlor. . . . While the dominant intent of most such trusts may well be to benefit the life tenant during his life, a subsidiary but nevertheless significant purpose of many such trusts may be to satisfy a natural desire to benefit one’s heirs or next of kin. In the normal case an adult has a pretty good idea who his heirs will be at death, and probably means exactly what he says when he states in the trust instrument, “remainder to my heirs.”

But, aside from the consideration of the settlor’s intent, the alternative reason usually propounded in favor of the presumption of a reversion is that this tends to increase the alienability of the subject matter of the conveyance. The District of Columbia court, satisfied that the presumption of a reversion is not in accord with the average conveyor’s intent, turned its attention to this argument and suggested a method by which the settlor might modify the trust even though the remainder to the “heirs” is to be considered as creating a beneficial interest in the designated class.

The court recognized that it would be undesirable to make all trusts created under similar terms and circumstances as the one in dispute in *Hatch* irrevocable. Problems arise because “the living have no heirs” and because some of those declared to have a beneficial interest in the estate may be unborn or unascertained. Thus, no matter how desirable some form of modification might be, it would be impossible to obtain the consent of all the beneficiaries. To mitigate the harshness of such a result, the court held that

upon an adequate showing, by the party petitioning to revoke or modify the trust, that those who are, so to speak, the heirs as of the present time consent to the modification, and that there is a reasonable possibility that the modification that has been proposed adequately protects the interests of those other persons who might be heirs at the time the corpus is to be distributed, the District Court may appoint a guardian ad litem to represent the interests of those additional persons.

The circuit court’s holding that the trial court may, without express statutory authority, appoint a guardian ad litem to represent unborn interests is one which, while seldom litigated, has been questioned. The question was one of first impression in the District of Columbia. At least one major jurisdiction, however, has held that courts have no power to appoint such guardians unless the legislature has expressly authorized them to do so. Against the background of the

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35 RESTATEMENT, PROPERTY § 314, comment a (1940).
36 See 3 SCOTT, op. cit. supra note 4, § 340 at 2487-89. But any trust, no matter how “irrevocable” by its terms, is revocable with the consent of all the beneficiaries and the settlor. RESTATEMENT (SECOND), TRUSTS § 338 (1959). In some instances, the prospective heirs may be allowed to act on behalf of the unborn or unascertained beneficiaries on the theory that by protecting their own interests they thereby represent the similar interests of the unborn beneficiaries. On representation, see generally Comment, 5 HASTINOS L.J. 199, 205-18 (1954).
38 Ibid.
39 Moxley v. Title Ins. & Trust Co., 154 P.2d 417, 420 (Cal. App. 1945), aff’d, 27 Cal. 2d 457, 165 P.2d 15 (1946) (Traynor, J., dissenting). Shortly after this case was decided, California enacted legislation allowing the appointment of such guardians. CAL. CODE
Anglo-American legal tradition that every party is entitled to his “day in court,” it is apparently feared that to sanction this practice might deprive a person so represented of due process of law. The majority of courts which have considered the problem, however, are of the opinion that it is not inappropriate for courts of equity to act in this area without statutory foundation.40

It is submitted that the decision of the District of Columbia Circuit to take it upon itself, without the prodding of the legislature,41 to provide for the appointment of such guardians achieves a result which is most just for all parties actually or potentially interested in the litigation. The court pointed out that in a case in which the settlor may offer a quid pro quo to the heirs, the appointment of a guardian for the unborn beneficiaries may be particularly effective in achieving a result satisfactory for all parties concerned. For example, in a case such as Hatch, the settlor might surrender her testamentary power of appointment, which would secure the heirs’ remainder interest, in exchange for a modification of the trust agreement so as to allow her a larger annual income.42 To refuse to appoint a guardian ad litem could frustrate both the settlor’s desire to obtain a reasonable modification of the trust and the prospective heirs’ possibility of receiving the corpus.

The appointment of guardians for unborn or unascertained interests under the circumstances outlined by the court is clearly a desirable result when viewed in the light of the well established public policy towards increasing the alienability of property. Furthermore, if the guardian’s activities are properly supervised by the court, there would seem to be little possibility of a successful collateral attack by the heirs claiming that any settlements reached were not binding on them. The binding effect of litigation or settlements in which the guardian for the unborn interests was appointed pursuant to a statute is no longer questioned. That a collateral attack would succeed solely because the guardian was appointed under the court’s own authority is unlikely, especially since the courts traditionally have had the power to appoint similar guardians for infants.43

By proposing the appointment of a guardian ad litem, the court in Hatch solved the undesirable situation that may result from its holding that the “heirs” or “next of kin” have a beneficial interest in the trust estate as remaindermen. Thus, the court’s abolition of the doctrine is a commendable judicial response to a judicially created rule of construction which rests on bases of questionable validity. It is conceded that the doctrine as a rule of construction has only
given rise to uncertainty and confusion, and it is probable that it more often frustrates rather than effectuates the typical conveyor’s intent. By this decision, the United States Court of Appeals for the District of Columbia correctly refused to burden its jurisdiction with the remnant of an outdated rule. Its reasoning, if emulated, may signal the eventual death of this doctrine as a part of our common law.

Frank H. Smith

Federal Estate Tax — Judgments — State Court’s Determination of Taxpayer’s Property Rights Accepted as Authoritative by Federal Court in Applying Federal Tax Laws.—In 1930, Herman Bosch set up a revocable and amendable trust, the terms of which provided his wife, Margaret Bosch, with an income for her life. Mr. Bosch amended the trust in 1931 to give his wife a general power of appointment over the corpus. Mrs. Bosch purported to release a portion of her general power in 1951 in order to prevent the assets of the trust from being taxed as part of her estate. On Herman Bosch’s death in 1957, his executor claimed a marital deduction for the value of the trust. The Commissioner of Internal Revenue, however, asserted that the trust did not qualify for a marital deduction and assessed a federal tax deficiency of $70,222. The executor thereupon filed a petition in the Tax Court for a redetermination. While this action was pending, the executor, who was also the trustee for the estate, began a proceeding in the New York Supreme Court to settle his account as trustee. The key issue in that action was whether Mrs. Bosch’s release of her general power of appointment was valid. All three briefs filed in the New York Supreme Court advocated the invalidity of that release, and no argument in favor of the release was presented to that court. The New York court decided that since Mrs. Bosch possessed at the time of the release only a contingent power of appointment, she did not have the power to release it. At the conclusion of this proceeding, the Commissioner admitted that if the Tax Court were bound by the New York decision, section 2056(b)(5) of the Internal Revenue Code of 1954 would entitle Mrs. Bosch to a marital deduction. The Tax Court, while carefully stating that it did not consider

2. Separate briefs were filed in behalf of Mrs. Bosch, the trustee, and by a guardian ad litem in behalf of one of twenty-two minors who might possibly become beneficiaries if Mrs. Bosch died without exercising her power of appointment. Commissioner v. Estate of Bosch, 363 F.2d 1009, 1011 (2d Cir.), cert. granted, 87 Sup. Ct. 512 (1966).
3. Int. Rev. Code of 1954, § 2056(b)(5) provides:

   Life estate with power of appointment in surviving spouse.—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest . . . with power in the surviving spouse to appoint the entire interest . . . (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

   (A) the interest . . . thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

   (B) no part of the interest so passing shall, for purposes of paragraph (1)
itself bound by the state decree, decided that it would accept the New York decision as an "authoritative exposition of New York law and adjudication of the property rights involved." The Court of Appeals for the Second Circuit, Judge Friendly dissenting, affirmed and held: the New York judgment, rendered by a court which had jurisdiction over the parties and the subject matter, authoritatively settled the rights of the parties, not only for New York, but also for purposes of the application of the relevant provisions of federal tax law. Commissioner v. Estate of Bosch, 363 F.2d 1009 (2d Cir.), cert. granted, 87 Sup. Ct. 512 (1966).

The imposition of federal estate taxation is usually dependent upon a person having certain property rights. In the absence of any express federal criteria, the threshold question as to the nature and extent of these property rights is ordinarily determined in accordance with state law. The Supreme Court has stated: "State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed."

One would think that a corollary to such a rule would be that in a case such as Bosch, where the state court has already determined the taxpayer's property rights, the federal courts would be bound by that determination. For years, however, the federal courts have wrestled with the question of the effect to be given these state court decrees without arriving at any uniform conclusion. In most cases, the problem arises due to the manner in which these state determinations were made. Often, as in Bosch, the state proceeding may have been an amicable, one-sided family affair. It may have also reached a result questionable under the general law of the state. In such a case, the state judge must make his decision without benefit of an adverse presentation of both sides of the relevant issues.

Ordinarily when state law is being determined by a federal court, the doctrine set forth in Erie R.R. v. Tompkins is pertinent. However, as the Bosch majority pointed out, Erie is not relevant in a situation where a state court has already actually adjudicated the property rights of the party against whom federal tax liability is asserted.

Similarly the federal courts are not bound in this situation by the rule of Erie R.R. Co. v. Tompkins... The task here is not to discover the general New York law applicable to releases of powers of appointment.

(A), be considered as passing to any person other than the surviving spouse.


6 Morgan v. Commissioner, 309 U.S. 78, 80 (1940).


8 304 U.S. 64 (1938).
That may well be the subject of the required search in a case which concerns a taxpayer whose own special status under New York law has never been authoritatively determined by a New York tribunal. . . . It [Erie] does not refer, and was never intended to refer, to the question of whether or not a federal court is to accept a state determination of the rights under state law of a party to a federal action.9

Much of the confusion in this area can be attributed to the only two Supreme Court cases directly on point. *Freuler v. Helvering*10 and *Blair v. Commissioner*11 are authority for the general principle that a state court’s determination of property rights is binding and conclusive upon a federal court determining the federal tax consequences flowing from these property rights unless the state decree was obtained through collusion.12 In *Freuler* the Commissioner charged, to no avail, that the state decision was “collusive in the sense that all the parties joined in a submission of the issues and sought a decision which would adversely affect the Government’s right to additional income tax.”13 Such a definition of collusion would aid the solution of many of the cases and would rule against the conclusive effect of the state decree in *Bosch*. Unfortunately, however, the Court never expressly accepted this definition of collusion advanced by the Commissioner. In *Blair*, although an appeal had been taken in the Illinois courts,14 the parties involved appeared less adversary than in *Freuler*. The Court, however, chose to dismiss the charge that the state proceedings were collusive simply by citing *Freuler*, thus leaving unanswered an issue they had proposed to resolve.15

The aftermath of these two cases has been that, while applying the same general principle, the federal courts of appeals have pursued separate and conflicting paths due to their differing interpretations of the word collusion.16 The polar meanings that have been ascribed to this word are best exemplified by the conflicting views of the Third and Fifth Circuits.

The Fifth Circuit, beginning in *Saulsbury v. United States*,17 has consistently equated nonadversary with collusive.18 Although they decided in *Saulsbury* that the state court had not actually determined any property rights under the trust involved, the court was clear that no matter what the state court held, their decision was not binding. The court stated:

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10 291 U.S. 35 (1934).
14 For a discussion of the so-called “magic effect of appeal,” see Colowick, *supra* note 5, at 225. See also Braverman and Gerson, *supra* note 5, at 558; Sacks, *supra* note 5, at 292-93.
15 The Court stated that they took up the case because of the existing conflict in the circuits. Blair v. Commissioner, 300 U.S. 5, 8 (1937).
17 199 F.2d 578 (5th Cir. 1952), *cert. denied*, 345 U.S. 906 (1953).
18 E.g., United States v. Farish, 360 F.2d 595 (5th Cir. 1966) (per curiam); Estate of Stallworth v. Commissioner, 260 F.2d 760 (5th Cir. 1958).
By the word *collusion*, we do not mean to imply fraudulent or improper conduct, but simply that all interested parties agreed to the order and that it was apparently to their advantage from a tax standpoint to do so. We mean that there was *no genuine issue of law* or fact as to the right of the beneficiary to receive this income, and *no bona fide controversy* between the trustee and the beneficiary *as to property rights* under the trust instrument.19 (Emphasis added in part.)

The Third Circuit takes a much broader view of collusion. In the leading case of *Gallagher v. Smith*,20 they required a showing of actual fraud in order to render the state court decree collusive. Noting that it is "quite common and highly commendable for all the members of a family group interested in a decedent’s will to take a common view as to their rights under it,"21 the Third Circuit considered nonadversity to be only some evidence of actual fraud. The court stated:

>[W]e think that the fact that the parties all favored the same result in the state court is relevant only so far as it is evidence of collusion and should not in and of itself vitiate in the federal court such conclusive effect as the state law gives to the judgment with respect to the property rights determined by it.22

In defining collusion, most of the other circuits have adopted an approach similar to the nonadversary test of the Fifth Circuit.23 Some courts have considered such additional factors as the status of the state court, the precedent value of their decisions,24 and the correctness of the state court’s adjudication under state law.25 However, a consideration of factors of this type would seem to be the mistaken use of *Erie* against which the *Bosch* majority warned.26 The question of collusion should deal only with the manner in which the state proceedings were carried out. *Erie* is irrelevant to this type of inquiry.

It is difficult to place the decision in *Bosch* squarely in line with any of these conflicting precedents. In his dissent, Judge Friendly accused the majority

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19 Saulsbury v. United States, 199 F.2d 578, 580 (5th Cir. 1952), cert. denied, 345 U.S. 906 (1953).
23 *E.g.*, Estate of Pierpont v. Commissioner, 336 F.2d 277 (4th Cir. 1964), cert. denied, 380 U.S. 908 (1965); *In re Sweet’s Estate* v. Commissioner, 234 F.2d 401 (10th Cir.), cert. denied, 352 U.S. 878 (1956); Newman v. Commissioner, 222 F.2d 131 (9th Cir. 1955). *But see*, Flitcroft v. Commissioner, 328 F.2d 449 (9th Cir. 1964); Eisenmenger v. Commissioner, 145 F.2d 103 (8th Cir. 1945). Until *Bosch*, most of the decisions in the Tax Court adhered to the nonadversary rule. See, e.g., Estate of Howard E. Stevens, 36 T.C. 184 (1961); Estate of Charles Elson, 28 T.C. 442 (1957).
of aligning the Second Circuit with the Third. Indeed, the majority, after admitting that a majority of the courts follow the nonadversary test, quoted the following passage from the Third Circuit's decision in *Gallagher*:

So far as those parties are concerned the law of the state is what the state court has declared and applied in their case. If the state court's judgment has binding final effect under the state law the rights of the parties can only be what the court has held them to be. It is for this reason that the federal court should not in a case of this kind make an independent examination and application of state law.  

But, it is important to note that the majority also relied heavily on the Tax Court's decision in *Bosch*. In accepting the state court decision as authoritative, that court considered such additional factors as the prior notice of the state proceeding given to the Commissioner, the statewide jurisdiction of the New York Supreme Court, and the possible offsetting tax consequences to Mrs. Bosch. These factors are not relevant to the Third Circuit rationale, but the majority repeated them verbatim and considered them in making their decision.

An able Tax Court judge quite explicitly undertook to balance several relevant factors . . . before deciding to accept the New York judgment as authoritative of the rights of parties. *We, too, have considered all of the circumstances and feel that the decision below was correct.*  

The majority also agreed wholeheartedly with the Tax Court that, although they were not "bound" by the New York decree, they would consider it authoritative in this case. Hence, it seems that by combining *Gallagher* and the decision of the Tax Court, the *Bosch* majority adopted only a "watered down" version of the Third Circuit approach. In so doing, they have left the Second Circuit free to decide these cases on an *ad hoc* basis. Without this interpretation of the majority's decision, it would be hard to agree with the manner in which they distinguished *Second Nat'l Bank v. United States*. In this case, another panel of the Second Circuit recently decided that they were not bound to follow a property determination made by a Connecticut Probate Court since that court is not a court of record, has many judges that are not lawyers, and has no precedent value within the state. The majority in *Bosch* apparently agreed

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27 With our own court uncommitted, I regret my brothers' vote to align ourselves with the rather mechanical view of the Third Circuit rather than the more realistic one of the Fourth and Fifth, thereby needlessly handicapping the Commissioner in the fair and equal enforcement of the federal revenue laws. Commissioner v. Estate of Bosch, *supra* note 26, at 1016 (dissenting opinion).


30 *Id.* at 1014.

31 The *issue is*, then, strictly speaking, *not* whether the federal court is "bound by" the decision of the state tribunal, but whether or not a state tribunal has *authoritatively determined* the rights under state law of a party to the federal action. (*Emphasis added.*) *Id.* at 1013.

32 351 F.2d 489 (2d Cir. 1965).
that the decrees of such a court should not be binding. Nevertheless, absent an appeal, Connecticut probate courts do finally adjudicate the property rights of those parties before them. Thus, a court strictly adhering to the principles in *Gallagher* would have no occasion to decline to follow the probate decree simply because of the nature or status of that court.

Judge Friendly's dissent, which clearly shows a strong inclination toward the nonadversary test of the Fifth Circuit, also presents an interpretation problem. Judge Friendly declared:

I would hold that when it is evident that state court litigation has been brought primarily to have an effect on federal taxes, the judgment of an inferior state court adjudicating property rights is entitled to little weight, and that *when the state court has not had the benefit of a fair presentation of both sides of the controversy, it is entitled to none.* (Emphasis added.)

The interpretation problem arises in succeeding remarks in which Judge Friendly made a thorough examination of New York law pertaining to the release of a contingent power of appointment. He presented a convincing argument that the New York Supreme Court erred in declaring such a power unreleasable. His inquiry into the general New York law may well have been intended to serve as an illustration of the injustice that may result if these ex parte judgments are considered conclusive. However, Judge Friendly's language suggests that he might have made such an examination of state law even if the invalidity of Mrs. Bosch's release had been declared in an adversary proceeding.

Any attempt to choose the best of these irreconcilable approaches must begin with a study of the policy considerations behind each. The Third Circuit plainly follows a policy of giving state court decisions their due and avoiding the theoretical injustice that might result to the taxpayer if state decrees were not considered binding. It has stated:

if in the absence of fraud such a (state) judgment does determine the rights of the parties in the property they must thereafter live with it so far as their enjoyment of the property is concerned. It is certainly logical, therefore, that such taxation as is based solely upon the ownership of the property should follow such a judgment.

As has been noted above, the *Bosch* majority, although evidencing some of the same reverence for state court decrees, actually followed the case by case

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33 Commissioner v. Estate of Bosch, 363 F.2d 1009, 1014 (2d Cir.), cert. granted, 87 Sup. Ct. 512 (1966). The majority stated that the decree in *Second National Bank* was not authoritative in Connecticut. This is confusing since "authoritative" in *Bosch* meant "settling the rights of the parties."


36 Id. at 1016-18.

approach of the Tax Court. Quite possibly they felt that any general rule, even the Third Circuit's, cannot always be trusted to provide an equitable result in the varying circumstances of each case. Perhaps, it may simply be that the majority felt the New York Supreme Court was correct in declaring Mrs. Bosch's release invalid in this case. At any rate, this approach of "balancing all the relevant factors" certainly leaves both the taxpayer and the Commissioner with unanswered questions. Must the Commissioner always go into the state court whenever he is informed of a case in that court with possible federal tax consequences? For a decision to be considered authoritative in a federal court, must the taxpayer always bring suit in a state court that has jurisdiction and precedent value for the whole state?

No such ambiguities plague the Fifth Circuit where basic fairness and justice to the Commissioner carry the day, all previous considerations of the Third Circuit notwithstanding. Judge Friendly made a strong statement in favor of the Fifth Circuit's reasoning. "The latter [Gallagher rule] would permit citizens, unwilling to accept the tax consequences of actions taken by them or their decedents, to evade federal taxes by taking advantage of an unwitting lower state tribunal." It is submitted that this realistic view should take precedence over the theoretical niceties of the Third Circuit rule. To consider only the fact that a taxpayer has had his property rights determined by a state court without giving controlling weight to how this determination was made would be to ignore completely the ease with which "nominally" adverse parties may obtain a desired decree in today's crowded courts. As a prominent member of the Tax Division of the Department of Justice has written:

The collection of revenue should be protected from obstruction by state court judgments procured in cases involving spurious or trumped-up issues between parties who have no fundamental difference of opinion. Proper administration of the tax structure requires that no taxpayer be allowed an advantage not available to others similarly situated. . . .

The Fifth Circuit avoids this unfairness by holding the state decree collusive and not binding whenever the Commissioner can show that the parties in the state court did not have a real adverse interest in the property rights involved. Thus, a state court that has not had the benefit of hearing both sides of the issues never has the final say.

38 Actually, one suspects that quite often the question of whether the federal court feels bound to follow the state court decision may depend mainly upon whether or not the federal court agrees with the state court's view of local law or whether it feels the state court's local law views will lead to a suitable result in the federal tax matter. Lowndes and Kramer, supra note 5, at 57.

39 The majority said that they believed that it would take legislation to hold the Commissioner "bound" whenever he has prior notice. This would not necessarily mean that notice could not remain one of the factors to be considered. Commissioner v. Estate of Bosch, 363 F.2d 1009, 1012-13 (2d Cir.), cert. granted, 87 Sup. Ct. 512 (1966).

40 Such a requirement would be consistent with the Second National Bank case. However, it would also seem to be somewhat of an incorporation of the Erie principles which the majority had already termed irrelevant.


42 Cardozo, Federal Taxes and the Radiating Potencies of State Court Decrees, 51 Yale L.J. 783, 796 (1942).
That such a test is not merely a formula for preventing state courts from deciding any matters relevant to federal taxation, was illustrated recently by the Fifth Circuit in *United States v. Estate of Farish.*\(^\text{43}\) In *Farish,* the Commissioner cited the *Saulsbury* nonadversary rule and argued that a state declaratory judgment did not bind the district court. The district court, expressly adhering to the nonadversary test, carefully reviewed the state proceedings to ascertain their true nature. They found that the taxpayer had staunchly contested the vesting of certain property rights in her husband’s estate with the trustee and a guardian *ad litem.* Careful attention was given to all the government’s objections to the state proceedings, and they were found either irrelevant or unsupported by the evidence.\(^\text{44}\) The Fifth Circuit, affirming per curiam, expressly approved the district court’s approach.\(^\text{45}\)

*Farish* illustrates that the nonadversary test does not manifest a disrespect for state courts. Rather, it prevents them from being used unscrupulously by parties whose sole intent is to evade federal tax liability. Actually this Fifth Circuit test does not differ greatly from that proposed by the Commissioner in *Freuler.*\(^\text{46}\) Perhaps the Supreme Court meant to adopt such a test in *Freuler.* *Bosch* now gives the Court an opportunity to clarify their position. Hopefully they will make the Fifth Circuit’s nonadversary test uniform in all the circuits.

Hugh C. Griffin

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**CONTRACT LAW — SALE AND LEASEBACK ARRANGEMENT RESCINDED WHEN REVENUE RULING FRUSTRATED ACHIEVEMENT OF TAX BENEFITS UPON WHICH CONTRACT WAS BASED.** — Ward Mayer and other stockholders of Timber Structures, Inc., contracted to sell the business to the West Los Angeles Institute for Cancer Research, a tax-exempt corporation. The contracting parties set up a complex sale and leaseback arrangement whereby both would profit by taking advantage of the tax laws.\(^\text{1}\) After a $10,000 down payment, the con-

\(^\text{43}\) 360 F.2d 595 (5th Cir. 1966), *affirming per curiam,* 233 F. Supp. 220 (S.D. Tex. 1964).

\(^\text{44}\) Although there was ambiguous language in *Saulsbury* indicating that the burden of proof might be on the taxpayer, the district court put it squarely on the Commissioner. They quoted from *Mary Kent Miller,* 32 P-H Tax Ct. Mem. 1225, 1230 (1963): "Since the law presumes that court proceedings are regular and valid, we think in a situation like this, where 'collusion' is asserted by (the government), it is incumbent upon (it) to produce at least some evidence to that effect." *Estate of Farish v. United States,* 233 F. Supp. 220, 228 (S.D. Tex. 1964), *aff’d per curiam,* 360 F.2d 595 (5th Cir. 1966).

\(^\text{45}\) United States v. Farish, 360 F.2d 595, 596. In any circuit accepting the nonadversary test, it is obvious, as shown by *Farish,* that the brunt of the work will be handled by the Tax Court or the district court. The main question will always be one of fact: did the preponderance of the evidence show the state proceedings to have been nonadversary? Under *Fed. R. Civ. P. 52(a),* the court of appeals could only reverse this lower court determination if it found it clearly erroneous.

For a full discussion of other problems that may arise in any court adopting the nonadversary test, it is obvious, as shown by *Farish,* that the brunt of the work will be handled by the Tax Court or the district court. The main question will always be one of fact: did the preponderance of the evidence show the state proceedings to have been nonadversary? Under *Fed. R. Civ. P. 52(a),* the court of appeals could only reverse this lower court determination if it found it clearly erroneous.


\(^\text{1}\) For extensive discussion of sale and leaseback arrangements and their tax consequences, see Commissioner v. *Brown,* 380 U.S. 563 (1965); *Union Bank v. United States,* 285 F.2d 126 (Gt. Cl. 1961); *Royal Farms Dairy Co. v. Commissioner,* 40 T.C. 172 (1963); *Anderson Dairy, Inc. v. Commissioner,* 39 T.C. 1027 (1963); *Lanning,* *Tax Erosion and the "Bootstrap
tracting parties agreed that the Institute would liquidate the company and form a new operating company. The Institute would then lease all the plant, machinery, and equipment of the old corporation to the new company for five years. The new operating company would pay eighty percent of the operating profits to the Institute as rent, and the Institute in turn would pay ninety percent of the rentals to the selling stockholders as part of the purchase price. It was contemplated that the operating company would deduct the rental payments as a business expense, and that the Institute, because of its tax-exempt status, would pay no tax on the rental receipts. The Mayers, stockholders of Timber Structures, believed that they would pay tax on the amounts they received from the Institute at capital gain rates. Thus, the Institute, without paying any money except the $10,000 down payment, would reap ten percent of the rental payments without any other risks, and eventually would own the property outright. Subsequently, a ruling of the Internal Revenue Service was applied to the sale. Under this ruling, the operating company’s rental payments would be taxable to the Institute as unexempt income, and payments to the selling stockholders would not be entitled to capital gain treatment. Mayer sued for rescission of the contract contending that the revenue ruling completely frustrated the purpose of the transaction. The United States District Court for the District of Oregon granted rescission of the sale and leaseback arrangement on this basis. The United States Court of Appeals for the Ninth Circuit affirmed and held: the purpose of the sale and leaseback arrangement was frustrated by the revenue ruling which rejected the tax premises upon which the transaction was based. West Los Angeles Institute for Cancer Research v. Mayer, 366 F.2d 220 (9th Cir. 1966), cert. denied, 87 Sup. Ct. 718 (1967).

Pacta sunt servanda (agreements shall be kept) is a basic policy in our law. Contracts should be enforced so that men who make their arrangements in advance can rely with certainty on their contracts. Such a policy promotes commerce and security of transactions. It is not unusual for two parties to contract, and then for one party to see his expectations being frustrated or his anticipated profits from the contract turned into losses. These are the risks of the business world. There are exceptional cases, however, where a supervening event occurs which completely destroys the value of the bargain. In these situations, a blind adherence to the pacta sunt servanda policy might lead to an injustice. Thus, courts can refuse to enforce a contract on the grounds that to do so would be unjust or against public policy. One of the theoretical bases for relieving parties of their duties under a contract is the doctrine of frustration.


2 In 1950, Congress passed legislation in an attempt to deal with the tax advantages of sales to charitable foundations with leaseback arrangements. This legislation now is contained primarily in INT. REV. CODE OF 1954, § 514. It taxes as unrelated business income to the exempt organization rentals received on leases over five years. Thus, by limiting leases to five years, sale and leaseback plans do not fall within section 514 of the Code. See Commissioner v. Brown, 380 U.S. 563, 565-66 (1965); 19 J. TAXATION 302 (1963).

Frustration occurs when performance has become of little value to the promisee. Although frustration is sometimes used synonymously with impossibility of performance, the two doctrines are conceptually distinct. Impossibility of performance occurs when a promisor's own performance has become impossible or extremely difficult.

Frustration of purpose is a doctrine of contract law of long but unsure standing. The one consistent feature of the doctrine is the inconsistency with which the courts have applied it. The doctrine originated in the English coronation cases. In the leading case of Henry v. Krell, a man hired an apartment in order to view the coronation processions. When the processions were not held due to the king's illness, the court held the lessee was released from his duty to pay for the apartment. Although there was nothing about the purpose of the transaction in the contract, the court found that the lessee rented the apartment of these processions could not reasonably have been foreseen or provided for, and that the nonhappening excused the lessee from the contract. This was the first and leading case granting relief on the basis of frustration. Several months later, however, the same court, in a similar situation, held the lessee liable for the rent.

The leading American case dealing with the doctrine is Lloyd v. Murphy. In that case, the lessee had rented a piece of property in order to sell new automobiles on the site. The site could not be used for any other purpose without the express consent of the lessor. Shortly thereafter, because of the war, the federal government restricted the sale of new automobiles. The lessor waived the restriction in the contract and gave the lessee permission to use the land for other purposes. Despite the waiver, the lessee contended he was no longer obligated under the lease because the purpose for which he entered the lease had been frustrated by the governmental restriction. Justice Traynor, speaking for the California Supreme Court, held that the lessee was not excused from the lease. Traynor failed to find that the lease was made totally valueless by the governmental regulation. He also found that the lessee failed to prove that the pos-

4 The doctrine has been discussed extensively by legal periodicals. See, e.g., Anderson, Frustration of Contract — A Rejected Doctrine, 3 De Paul L. Rev. 1 (1953); Conlen, The Doctrine of Frustration as Applied to Contracts, 70 U. Pa. L. Rev. 87 (1922); Patterson, Constructive Conditions in Contracts, 42 Colum. L. Rev. 903 (1942); Rothschild, The Doctrine of Frustration or Implied Condition in the Law of Contracts, 6 Temp. L. Q. 337 (1932); Smit, Frustration of Contract: A Comparative Attempt at Consolidation, 58 Colum. L. Rev. 287 (1958); Comment, Contracts — Frustration of Purpose, 59 Mich. L. Rev. 58 (1960); Comment, Impossibility and the Doctrine of Frustration of the Commercial Object, 34 Yale L. J. 91 (1924).
5 Smit, supra note 4, at 309. Smit finds:

The conflict of authorities, apparently not reconcilable under any encompassing rationale, has stimulated the view that in every frustration case the court weighs competing policies, determined by the facts of the individual case, instead of applying a general doctrine covering all frustration cases. It offers little, if any, assistance to commendable efforts to bring some certainty and predictability in this area of the law.

7 [1903] 2 K.B. 740. There was some confusion by the court between frustration of purpose and impossibility of performance. One judge held that the case came within the doctrine of Taylor v. Caldwell, 3 B & S 826, 122 Eng. Rep. 309 (K.B. 1863), which was decided on the basis of impossibility.
sibility of war and its consequences on the sale of automobiles were not foreseeable. Justice Traynor stated that the basic issue in frustration cases is

whether the equities of the case, considered in the light of sound public policy, require placing the risk of a disruption or complete destruction of the contract equilibrium on defendant or plaintiff under the circumstances of a given case ... and the answer depends on whether an unanticipated circumstance, the risk of which should not be fairly thrown on the promisor, has made performance vitally different from what was reasonably to be expected.¹⁰

*Lloyd v. Murphy* illustrates two characteristics common to many frustration cases. About half of American frustration cases involve lease arrangements, and one of the most frequent causes of frustration is unexpected governmental action in the form of a statute or executive order that radically changes the basis of the contract.¹¹ As can be gleaned from the decision in *Lloyd v. Murphy*, apparently the doctrine of frustration has won very little acceptance by American courts. One commentator has classified it as a rejected doctrine.¹² Although adopted by the *Restatement of Contracts*¹³ and included under the term “impracticability” in the progressive *Uniform Commercial Code*,¹⁴ it is almost without support in case law.

However, in those few cases that have applied the doctrine, several requisites are generally required. These requirements may be broken down into the following: the value of the expected counterperformance must have been

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¹⁰ *Id.* at 53-54, 153 P.2d at 50.
¹² A careful search has uncovered no instance in which an American court of last resort, in litigation involving a contract, has expressly followed the doctrine of frustration in making its decision. The body of American case law from which citations are made in support of the doctrine will be found on analysis to consist of a few decisions of lower appellate courts, of numerous items of obiter dictum, and of cases in which the opinion makes no mention of the doctrine. The other side of the picture is that many decisions have been rendered by courts of last resort in the last twenty years in which the doctrine was mentioned or discussed but not followed. These statements will come as something new to many readers, since legal literature gives the impression that the doctrine of frustration is an established part of American law. Anderson, *supra* note 4, at 1. But see *Smit*, *supra* note 4, at 307.
¹³ *Restatement, Contracts* § 288 (1932), states:

Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrate, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears.

It appears that there was no discussion on this section before any annual meeting of the American Law Institute. Apparently the provision was drafted by Reporter Samuel Williston and inserted in a catch-all draft passed just minutes before the final adoption of the *Restatement*. Anderson, *supra* note 4, at 8.

¹⁴ *Uniform Commercial Code* § 2-615. Comment 1 to this section states that a seller will be excused “from timely delivery of goods contracted for, where his performance has become *commercially impracticable* because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting.” (Emphasis added.) Comment 3 states that the test of “commercial impracticability (as contrasted with ‘impossibility,’ ‘frustration of performance’ or ‘frustration of the venture’) has been adopted in order to call attention to the commercial character of the criterion chosen by this Article.” For a good discussion of the Code provisions concerning commercial impracticability, see *The Uniform Commercial Code and Contract Law: Some Selected Problems*, 105 U. PA. L. REV. 836, 880-906 (1957).
rendered practically worthless; the frustrating event must not have been foreseeable and assumed; the purpose of the frustrated party in making the contract must have been known to both parties when the contract was made; and the contract must be executory. When applying the doctrine of frustration, courts have used various rationales. Among the rationales most frequently employed are failure of consideration, basic assumption, implied conditions, and gap-filling. However, whatever rationales are used by the courts in frustration cases, it appears that they are mere attempts to frame their decisions in some legally accepted language. As one commentator has stated:

In the final analysis, the entire problem of fixing the limits within which parties, who have not expressly stated them, shall be excused from performance, is not solely one of theoretical concept, nor of logical deduction, but more so, perhaps, than we care to articulate, one of public policy.

Mayer differs from other frustration cases by its peculiar fact situation. As exemplified by Lloyd v. Murphy, many frustration and impossibility cases involve executive orders. Mayer, however, raises for the first time the important


16 Justice Traynor stated: "Performance remains possible but the expected value of performance to the party seeking to be excused has been destroyed by a fortuitous event, which supervenes to cause an actual but not literal failure of consideration . . . ." Lloyd v. Murphy, 25 Cal. 2d 48, 53, 153 P.2d 47, 50 (1944).

17 Alfred Marks Realty Co. v. Hotel Hermitage Co., 170 App. Div. 484, 156 N.Y. Supp. 179 (1915). The basic assumption test is recognized by both Restatement, Contracts § 288 (1932) and Uniform Commercial Code § 2-615.

18 E.g., Patch v. Solar Corp., 149 F.2d 558, 560 (7th Cir.), cert. denied, 326 U.S. 741 (1945), where the court said: "Whether you call it impossibility of performance or frustration, the result is the same. In either event the court will imply a condition excusing both parties from performance . . . ."; 119 Fifth Ave., Inc. v. Taiyo Trading Co., 190 Misc. 123, 125, 73 N.Y.S.2d 774, 776 (Sup. Ct. 1947), aff'd, 275 App. Div. 695, 87 N.Y.S.2d 430 (1949), where the Court said:

The doctrine is based upon the theory of an implied term which the law imputes to the parties in order to regulate a situation which, in the eyes of the law, the parties themselves would have regulated by agreement if the necessity had occurred to them.

Dorsey v. Oregon Motor Stages, 183 Or. 494, 194 P.2d 967, 971 (1948), where the Oregon Supreme Court stated that the English doctrine of "commercial frustration" and the American doctrine of "supervening impossibility of performance" read into the contract, "in the absence of repellent circumstances, an implied condition that the promisor shall be absolved from performance" if a supervening event for which neither party is responsible frustrates the purpose intended to be gained by the promisor. See also Patterson, supra note 4.

19 West Los Angeles Institute for Cancer Research v. Mayer, 366 F.2d 220, 225 (9th Cir. 1966), cert. denied, 87 Sup. Ct. 718 (1957), follows the gap-filling rationale. In its decision in Mayer, the Ninth Circuit cites as authority Smit, supra note 4, at 314. Smit argues that a frustration problem may arise even where the subsequent events were foreseen.

Unforeseeability ordinarily establishes that a promisor cannot reasonably be presumed to have assumed the risk of occurrence of the unforeseen circumstances. However, the applicability of the gap filling doctrine ultimately hinges on whether or not proper interpretation of the contract shows that the risk of the subsequent events, whether or not foreseen, was assumed by the promisor. If it appears from the nature of the contract as well as from the surrounding circumstances that, although they were reasonably foreseeable, the promisor did not assume the risk of the subsequent events, the contract shows a gap subject to supplementation in accordance with rules of objective law.

20 Rothschild, supra note 4, at 338.

question of whether a tax ruling should be held to have the same effect as a statute or executive order in frustration and impossibility cases. The Ninth Circuit has answered in the affirmative.

Although *Mayer* was framed in terms of frustration, the case is not really an appropriate one for applying the doctrine. Only two of the four conditions generally required were clearly met. The district court found that the purpose of the frustrated party was known by both parties when the contract was made, and that since only part of the payments had been made, the contract was still executory. However, there is reason to question whether the most important conditions of frustration existed in *Mayer*. The consideration promised to Mayer did not become wholly valueless by the supervening tax ruling, and there is some evidence that the possibility of an adverse tax ruling was not unforeseeable.

Since the operating company could still continue to deduct the full eighty percent rental payments for tax purposes, the transaction was not rendered totally valueless. The real problems were that the Institute was being taxed on the rentals, and the Mayers were not being accorded capital gain treatment. There was, however, a default provision in the contract. The arrangement, secured by chattel and real property mortgages on the sold properties, would be in default if specified minimum payments were not met. Even if they could have invoked the default clause, the Mayers would not have wanted to as it did not provide for an immediate return of the properties. Moreover, the Institute offered to pay the Mayers the remainder of the purchase price after the court action had begun. Nevertheless, the Ninth Circuit held this concession would not satisfy the contractual purpose of the Mayers.

In addition to the question whether the contract was rendered valueless, there is sufficient reason to question whether an adverse tax ruling was not foreseeable. The parties actually discussed failure of the tax advantages in their negotiations preceding the contract, and the Institute’s representative orally promised to return the properties if the tax benefits became ineffective. In finding that the parties did not foresee the possibility of the tax ruling, the district court gave a very restricted meaning to the word “foreseeable.” To be sure, the district court’s interpretation of foreseeability does not conform to the view of foreseeability taken by Justice Traynor in *Lloyd v. Murphy*. Traynor had argued that the party who claimed frustration of the contract entered into on August 4, 1941, had failed to prove that a war was not foreseeable.

Despite the arguments that the contract still remained valuable to both parties and that the parties contracted with reference to the possibility of an adverse tax ruling, the district court and the Ninth Circuit nonetheless allowed the contract to be rescinded and the properties returned on the basis of frustration. The Ninth Circuit found that the revenue ruling made it impossible for the operating company to make the contemplated payments to the Institute.

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23 Ibid.
24 Ibid.
25 Ibid.
27 Id. at 55-56, 153 P.2d at 51.
The court held the tax consequences which were denied by the ruling were "the keystone of the plan, without which it was wholly unfeasible and would never have been seriously considered" by the Mayers. The Institute's offer to pay the remainder of the purchase price after the court action had begun, likewise was held not to satisfy the contract. "The consideration bargained for by the sellers was not merely $2,500,000 but $2,500,000 recognized by the IRS as proceeds from the sale of a capital asset and entitled to capital gain treatment." The Ninth Circuit noted that the Supreme Court's decision in *Commissioner v. Brown* had no bearing on the case. *Brown* involved a sale and leaseback arrangement similar to the one in *Mayer*. The Supreme Court in *Brown* declared the sellers were entitled to capital gain treatment. *Brown*, however, which was decided in 1965, still lay in the future when the parties entered into their contract in 1951, the tax benefits of which were frustrated by the 1954 revenue ruling.

The Ninth Circuit's statement that the "now more widely accepted view" is that "foreseeability of the frustrating event is not alone enough to bar rescission if it appears that the parties did not intend the promisor to assume the risk of its occurrence" is open to dispute. This statement is in direct conflict with Justice Traynor's language in *Lloyd v. Murphy*. In support of its position the Ninth Circuit cited scant authority—Once the court had accepted this view as law, by admitting testimony surrounding the making of the contract, it was a simple matter to conclude that the Mayers did not assume the risk of an adverse ruling.

The admission of testimony surrounding the formation of the contract brought into question the parol evidence rule. One of the chief criticisms of the doctrine of frustration is that it violates the parol evidence rule. This rule provides that oral agreements prior to, or contemporaneous with, an integrated written contract cannot be admitted to vary or add to the terms of the contract. The rule is intended to secure finality and certainty in contractual rights and duties under a written contract. It was early recognized in frustration cases that the parol evidence rule was no bar to admitting oral evidence for the purpose of ascertaining the intent of the parties to a written contract. In admitting

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29 Id. at 224.
32 The courts have required a promisor seeking to excuse himself from performance of his obligations to prove that the risk of the frustrating event was not reasonably foreseeable and that the value of counterperformance is totally or nearly totally destroyed, for frustration is no defense if it was foreseeable or controllable by the promisor, or if counterperformance remains valuable. 25 Cal. 2d 48, 54, 153 P.2d 47, 50 (1944).
34 Id. at 225-26.
36 SIMPSON, *op. cit. supra* note 15, at § 98.
parol evidence in frustration cases, courts are not actually varying or adding to the contract. Rather they are trying to effectuate the intent of the parties.

In *Mayer*, the purpose of the frustrated party was not expressed in the contract. A supervening event, unprovided for in the contract, entirely changed the complexion of the agreement. Thus, in order to make a fair ruling, it was necessary for the court to obtain all the facts possible surrounding the making of the contract. The Institute strenuously objected to the admission of the oral agreement between Mayer and the Institute's representatives. The evidence revealed that Mayer was concerned that the contemplated tax advantages might fail, and he thus desired a provision in the contract providing for return of the properties should such an event occur. However, he was persuaded by his lawyers and the Institute's representatives that such a provision might taint the bona fides of the plan and result in an adverse tax ruling. Mayer thereupon demanded and received an oral promise from the Institute's representative that if the tax advantages failed, the properties would be returned and the contract cancelled. In this case, the admission of oral evidence of the circumstances surrounding the transaction was correct. The statute dealing with parol evidence in Oregon (the jurisdiction in which *Mayer* arose) specifically provides that parol evidence is admissible to show the situation of the parties to an instrument and the circumstances under which it was made, even where the instrument is unambiguous.

The key to the court's decision in *Mayer* may well lie in the intricacies and subtleties of tax law. Although tax rulings are appealable, and although it might be argued that a ruling is not totally frustrating, a party should not have to resort to a lawsuit. Also, it was the very delicate nature of the tax world that prompted the parties not to insert an exculpatory or saving clause into the written contract. Failure to include reference to the tax consequences did not necessarily mean that the parties were guilty of fraud. The United States Supreme Court has stated, "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted."  

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39 Ibid.
40 After stating that no evidence of the terms of the agreement other than the contents of the writing may be received, Ore. Rev. Stat. § 41.740 (1963) proceeds: "However this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in ORS 42.220 . . . ." Ore. Rev. Stat. § 42.220 (1965) provides:

In construing an instrument, the circumstances under which it was made, including the situation of the subject and of the parties, may be shown so that the judge is placed in the position of those whose language he is interpreting.

The Oregon Supreme Court in Card v. Stirweis, 232 Or. 123, 374 P.2d 472 (1962), interpreted Ore. Rev. Stat. § 42.220 (1965) as allowing parol evidence admissible to show the situation of the parties to an instrument and the circumstances under which it was made.

41 Gregory v. Helvering, 293 U.S. 465, 469 (1935). In Stone v. Stone, 319 Mich. 194, 29 N.W.2d 271 (1947), a case analogous to *Mayer*, the parties were not denied relief because of their attempt to minimize taxes. A father had transferred part of the family business to his two minor children under a mistaken belief that income accruing to the children could be separately returned. However, when his plan failed as a result of a subsequent Supreme Court decision, he was granted relief on the basis of mutual mistake. In *Stone*, there was no sale, but rather a gift.
The result in *Mayer*, if interpreted correctly and in light of the peculiar facts of the case, is not bad law. In view of the difficulty in obtaining tax advisory opinions in advance, and of the complexity of the tax world, a safety valve is needed where a contract is founded upon presumed tax advantages. *Mayer* has found such a safety valve in the doctrine of frustration of purpose. By applying the doctrine of frustration, the Ninth Circuit actually succeeded in giving effect to the oral promise to return the property. Although it may be argued that the decision in *Mayer* is a distortion and liberal extension of the frustration doctrine, there is nothing unusual in liberally interpreting a legal doctrine to do justice.

*Charles Weiss*

**CONFLICT OF LAWS — TORTS — WHAT THE COURT CONSIDERS TO BE THE BETTER RULE OF LAW IS A SIGNIFICANT FACTOR IN CHOOSING WHICH STATE LAW TO APPLY.** — On the evening of June 26, 1964, Mr. and Mrs. Albert Clark left their home in Lancaster, New Hampshire, for an automobile trip to Littleton, New Hampshire, intending to return home later that same evening. The trip took the Clarks into Vermont where they were involved in an automobile accident. Mrs. Clark brought a suit for damages against her husband in a Superior Court of New Hampshire alleging that her injuries resulted from her husband’s negligence in operating the automobile. Vermont, the state in which the accident occurred, has a guest statute under which a host is liable to his automobile guest only if the injuries were caused by the operator’s “gross or wilful negligence.”1 In New Hampshire, however, which has no such statute, a guest may recover if his injuries resulted from his host’s lack of ordinary care.2 The plaintiff moved for a pre-trial order that the substantive law of New Hampshire should govern. The question as to which state law was to apply was transferred without a ruling to the Supreme Court of New Hampshire. That court, on the pre-trial order, held: where there were no counter-vailing policy considerations which would require the application of Vermont law, the court should apply the better rule of law. The court concluded that New Hampshire law was preferable to that of Vermont and should, therefore, govern. *Clark v. Clark*, 222 A.2d 205 (N.H. 1966).

The real significance of *Clark* lies not in its holding, but in its language. The significance of this language can be seen from an examination of the torts-conflict of law development over the last forty years. Until recent times, the general rule of law that was almost universally applied in any tort-conflicts situation was that the substantive law of the place of injury rather than that

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1 VT. STAT. ANN. tit. 23, § 1491 (1959) provides:

The owner or operator of a motor vehicle shall not be liable in damages for injuries received by any occupant of the same occasioned by reason of the operation of such vehicle unless such owner or operator has received or contracted to receive pay for the carriage of such occupant, or unless such injuries are caused by the gross or wilful negligence of the operator.

of the forum state was to be applied. Thus, in tort litigation, the situs state's laws concerning various rights, duties, privileges, and immunities that are substantive in nature were applied by courts in the forum state. However, the forum continued to apply its own procedural laws. The difference between substance and procedure has never been clear, and thus the application of the substantive-procedural dichotomy has not always been easy. This rule concerning the application of the situs state's substantive laws was adopted in the Restatement of Conflict of Laws, section 378: "The law of the place of wrong determines whether a person has sustained a legal injury."

The Restatement choice of law rule has had significant impact in automobile accident litigation. This is especially true in view of the adoption of automobile guest statutes in many jurisdictions. Thus, in situations similar to that present in Clark, a plaintiff suing in a jurisdiction which has no guest statute cannot recover on a showing of ordinary negligence if the situs state has such a statute. Moreover, under this rule, the forum state would have to recognize a defense granted by the situs even if the forum allowed no such defense. One such defense, important in automobile accident litigation, is immunity from suit. Personal injury actions are frequently affected by the fact that at least one of the parties involved is a member of the same family. At common law there could be no tort action between husband and wife. Although this immunity doctrine has been the subject of much criticism and has been rejected in a number of jurisdictions, the continued vitality of the doctrine has had important ramifications in the conflict of law area. If, for some reason, the situs state granted certain immunity from suit and the forum state did not, courts in the forum state would have to recognize the situs' immunity and deny recovery. Thus, a husband-defendant who would be immune from suit in the situs state could not be sued in any other state.

The Restatement choice of law rule has certain advantages. Foremost

3 For a concise history of this rule, see Ehrenzweig, Conflict of Laws, 541-48 (1962). For a thorough treatment of the application of this rule in torts, see generally 2 Beale, Conflict of Laws 1286-1305 (1935).

4 In Howard v. Howard, 200 N.C. 574, 576, 158 S.E. 101, 102 (1931), the court stated:

The actionable quality of the defendant's conduct in inflicting injury upon the plaintiff must be determined by the law of the place where the injury was done; that is, the measure of the defendant's duty and his liability for negligence must be determined by the law of New Jersey [the situs state]. . . . If an act does not give rise to a cause of action where it is committed the general rule is that the party who commits the act will not be liable elsewhere . . . .

5 Prosser, Torts 880 (3d ed. 1964).

6 Id. at 884-85.

7 In Dawson v. Dawson, 224 Ala. 13, 15, 138 So. 414, 415 (1931), the court stated:

The question is, Can the wife maintain an action in tort committed in Mississippi against her husband in the courts of Alabama for which she could not recover under the laws of Mississippi notwithstanding she could do so in Alabama, the parties being citizens of Alabama, when the injury occurred or the tort was committed in the state of Mississippi?

It is well settled by the decisions of this court that, where an accident occurs in another state, the courts of this state will look to the substantive law of that state to determine whether the defendant under that law has breached any legal duty to the plaintiff.

8 The converse was not always true. In situations where the situs state did not grant immunity, but the forum state did, the courts applied the forum law and thus granted immunity. The reasons given were "public policy." Kircher v. Kircher, 288 Mich. 669, 286 N.W. 120 (1939); Kyle v. Kyle, 210 Minn. 204, 297 N.W. 744 (1941); Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936); Poling v. Poling, 116 W.Va. 187, 179 S.E. 604 (1935).
among these is its ease of application. Courts simply have to look to the laws of the situs state and apply them. This, no doubt, accounts for the rule's long heritage. Until recent years, it was applied in automobile cases as a well-accepted rule of law. Courts generally stated that the rule was "well settled" or "not seriously in dispute" and applied it mechanically, without advancing any policy reasons in its support.

Although Connecticut, Illinois, and North Carolina have applied the law of the situs state rule in recent automobile litigation, the Restatement rule does not represent the progressive trend of today's conflicts law. The Restatement choice of law rule has become "almost completely discredited as an unvarying guide" in present-day tort litigation. One of the main causes for such judicial disfavor with the old rule is that courts, in applying this rule, are forced to give effect to the public policy of another state even if such policy is in contradiction to that of their own state. This situation became most critical in automobile litigation because of the increasing number of accidents occurring outside the state in which the suit is brought. Thus, courts had a strong motive for changing or deviating from the Restatement. A number of theories were devised to circumvent the rule.

One of the earliest attempts to avoid application of this outmoded rule came in 1928 in Levy v. Daniels' U-Drive Auto Renting Co. In that case the defendant, a Connecticut corporation, rented one of its automobiles to a Mr. Sack. The plaintiff, a guest in the rented car driven by Sack, was injured as a result of his host's negligence. The accident occurred in Massachusetts and suit was filed in Connecticut. Connecticut had a statute rendering any person who rented any vehicle strictly liable for any damage caused by the operation of the rented vehicle; Massachusetts had no such statute. Thus, the liability of the defendant corporation could be predicated only on its negligence in renting the car. Since negligence could not be shown, a rigid application of the Restatement rule would have meant that the Connecticut court would have had to apply the law of the place of the accident, or Massachusetts law, which would have negated any liability. However, the Supreme Court of Connecticut, in holding the defendant liable, reasoned that the Connecticut statute was imposed upon the contract by law, and the contract remained the same in every state. It thus predicated the defendant's liability on a contractual rather than a tort basis.

This reasoning was not followed by courts until almost thirty years later.

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11 Hyatt v. Cox, 57 Ill. App. 2d 295, 205 N.E.2d 260 (1965). This case, however, has been modified by Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966). Hyatt held that the substantive law of the situs state applies and followed Opp v. Fryor, 294 Ill. 538, 128 N.E. 590 (1920), in this respect. Wartell held that the forum state's immunity statute applied rather than that of the situs state. However, Wartell made no attempt to overrule Opp or Hyatt.
14 108 Conn. 333, 143 Atl. 163 (1928).
15 The statute provided: "Any person renting or leasing to another any motor vehicle owned by him shall be liable for any damage to any person or property caused by the operation of such motor vehicle while so rented or leased." Public Acts of Conn. 1925, ch. 195, § 21.
16 108 Conn. 333, 337-38, 143 Atl. 163, 164-65 (1928).
In 1955, the Supreme Court of California handed down the landmark opinion of *Emery v. Emery*. In that case, the Emery family, domiciled in the state of California, were involved in an automobile accident in Idaho caused by the negligence of their unemancipated minor son. One of the Emery children, who was injured in the accident, brought suit in California against her brother as tortfeasor and her father as owner of the vehicle. A preliminary question before the court was whether the immunities granted by California law or those granted by Idaho law should be applied. An application of the *Restatement* rule would have meant that the California court had to recognize the immunities granted by Idaho law. However, the court held that the suit involved family relations more than mere tort relations and hence California law should govern. The court stated:

We think that disabilities to sue and immunities from suit because of a family relationship are more properly determined by reference to the law of the state of the family domicile. That state has the primary responsibility for establishing and regulating the incidents of the family relationship and it is the only state in which the parties can, by participation in the legislative processes, effect a change in those incidents. Moreover, it is undesirable that the rights, duties, disabilities, and immunities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries during temporary absences from their home. Since all of the parties to the present case are apparently domiciliaries of California, we must look to the law of this state to determine whether any disabilities or immunities exist.

This statement represented a significant change in the law. *Emery* was the first opinion to refuse to apply the immunities granted by the situs state on the basis that the suit involved family relations more than tort relations. This is quite significant in view of the number of automobile accident cases that involve members of the same family as adverse parties. Thus, *Emery* was a major inroad upon the *Restatement* rule.

Four years later, the Supreme Court of Wisconsin handed down another landmark decision, *Haumschild v. Continental Cas. Co.* The facts in *Haumschild* represented the familiar conflicts of law pattern. The parties were domiciled in Wisconsin and were involved in an automobile accident in California. Under Wisconsin law, the wife could sue her husband for his negligence in causing the accident; under California law, the husband was immune from such a suit. The Wisconsin court, in refusing to apply the law of the situs, stated:

We are convinced that, from both the standpoint of public policy and logic, the proper solution of the conflict of laws problem, in cases similar to the instant action, is to hold that the law of the domicile is the one that ought to be applied in determining any issue of incapacity to sue based upon family relationship.

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18 Id. at 428, 299 P.2d at 223.
19 7 Wis. 2d 130, 95 N.W.2d 814 (1959).
20 95 N.W.2d at 818.
The court stated that immunity was derived from the common law idea of the unity of husband and wife, and held that there was no longer any reason for granting such immunity to the husband.21

The absurdity of the Restatement rule was clearly pointed out in Kilberg v. Northeast Airlines, Inc.22 In that case, plaintiff's decedent bought an airplane ticket in New York City for a flight to Boston. The plane crashed in Massachusetts killing a number of passengers, including plaintiff's decedent. The plaintiff filed suit in New York against the defendant airline for the wrongful death of his decedent. This case involved a direct conflict between the New York State Constitution and a Massachusetts statute. The New York Constitution provides that there shall be no statutory limit on the amount of recovery in a wrongful death action.23 The Massachusetts statute limited the amount recoverable on such an action to a maximum of $15,000.24 Thus, an application of the Restatement rule would have limited the amount of recovery to $15,000 in spite of the New York Constitution. The New York Court of Appeals, however, refused to follow the limitations imposed by the Massachusetts statute and instead applied the New York law. The court stated: "Modern conditions make it unjust and anomalous to subject the traveling citizen of this State to the varying laws of other States through and over which they [sic] move... The place of injury becomes entirely fortuitous."25

Two years after Kilberg, the New York Court of Appeals decided Babcock v. Jackson,26 which involved a defendant-host and a plaintiff-guest, both residents of New York. The accident occurred while the parties were driving in Ontario, Canada. New York had no guest statute. Ontario had a very harsh

21 Id. at 817. Haumschild expressly overruled Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931), which applied the immunities granted by the situs state. Id. at 818.
23 N.Y. CONST. art. I, § 16.
   If the proprietor of a common carrier of passengers... by reason of his or its negligence... causes the death of a passenger, he or it shall be liable in damages in the sum of not less than two thousand nor more than fifteen thousand dollars, to be assessed with reference to the degree of culpability of the defendant or of his or its servants or agents... .
   This statute has subsequently been amended to raise the minimum and maximum amounts recoverable to $5,000 and $50,000 respectively for accidents occurring after January 1, 1966. Mass. Gen. Laws Ann. ch. 229, § 2 (Supp. 1965).
25 Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 39, 172 N.E.2d 526, 527, 211 N.Y.S.2d 133, 135 (1961). The holding in Kilberg was challenged as violating the "full faith and credit" clause of art. IV, § 1 of the United States Constitution in Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962), cert. denied, 372 U.S. 912 (1963). That case involved another decedent in the same airplane crash as in Kilberg. The defendant Airlines argued that the New York court was not necessarily required to give any faith or credit to the Massachusetts law. However, the defendant argued further that once the New York Court gives some faith and credit to the Massachusetts law (in this case the right to maintain an action in New York under the Massachusetts Wrongful Death Statute) then it must give full credit to the limitations imposed by that same law. This argument was expressly rejected by the United States Court of Appeals for the Second Circuit, sitting en banc, in Pearson. The court in Pearson held that the holding in Kilberg did not violate the federal constitution. 309 F.2d at 557. For a treatment of a choice of law which did violate the full faith and credit clause, see First Nat'l Bank v. United Air Lines, Inc., 342 U.S. 396 (1952); Hughes v. Fetter, 341 U.S. 609 (1951). For a thorough treatment of this subject, see generally Currie, The Constitution and the Choice of Law: Governmental Interests and the Judicial Function, 26 U. Chi. L. Rev. 9 (1958).
guest statute, which completely precluded recovery by any injured guest. The court, in refusing to apply the Ontario guest statute, reasoned that Ontario had no conceivable interest in denying a remedy to a New York guest against his New York host merely because the accident occurred in Ontario. The court stated:

Although the rightness or wrongness of defendant’s conduct may depend upon the law of the particular jurisdiction through which the automobile passes, the rights and liabilities of the parties which stem from their guest-host relationship should remain constant and not vary and shift as the automobile proceeds from place to place.

When the American Law Institute met recently to draft a new Restatement of Conflict of Laws, decisions such as Babcock, Kilberg, Haumschild, and Emery caused the ALI to revise its choice of law rule. Thus, the Restatement (Second), Conflict of Laws, section 379, Tentative Draft No. 9 provides:

(1) The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort.

(2) Important contacts that the forum will consider in determining the state of most significant relationship include:
   (a) the place where the injury occurred,
   (b) the place where the conduct occurred,
   (c) the domicil, nationality, place of incorporation and place of business of the parties, and
   (d) the place where the relationship, if any, between the parties is centered.

(3) In determining the relative importance of the contacts, the forum will consider the issues, the character of the tort, and the relevant purposes of the tort rules of the interested states.

The significant change which has taken place in choice of law over the past twelve years can thus be readily seen. Moreover, courts have not confined this expansion to the new idea embodied

27. Ont. Rev. Stat. ch. 172, § 105(2) (1960) provides: [T]he owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in . . . the motor vehicle.


in the tentative draft of the *Restatement (Second)*. In 1965, the Supreme Court of Wisconsin, in *Wilcox v. Wilcox*, adopted the position of the new *Restatement* draft and went a step beyond it. The court, after stating that the order of the various factors in the *Restatement* would not be determinative of the weight given to those factors, made the following interesting statement: "[T]he law of the forum should presumptively apply unless it becomes clear that non-forum contacts are of the greater significance." The tentative draft of the *Restatement (Second)* makes no mention of presumptions. Under *Wilcox*, Wisconsin courts will henceforth presumptively apply the forum law, whereas under the *Restatement (Second)* they would have had to first inquire into which state had the most significant relationship to the events and the parties involved.

In *Clark*, however, the Supreme Court of New Hampshire made no mention of any presumption as to which law would be applied. The court did, however, list five factors important in determining the proper choice of law. These factors were predictability of results; maintenance of reasonable orderliness and good relationship among the states in our federal system; simplification of the judicial task; the advancement of the forum's own governmental interests; and finally, the court's preference for what it regards as the sounder rule of law. In arriving at its decision, the court focused primarily on the last factor, namely its preference for what it considered to be the sounder rule of law. The court stated:

> We prefer to apply the better rule of law in conflicts cases . . . . If the law of some other state is outmoded, an unrepealed remnant of a bygone age, "a drag on the coattails of civilization," . . . we will try to see our way clear to apply our own law instead. If it is our own law that is obsolete or senseless (and it could be) we will try to apply the other state's law.

This language is much broader than that used by the court in *Wilcox*. The court in *Clark* made it clear that it would apply the better rule of law whether the law be that of the forum state or that of the situs.

If the court's language in *Clark* were followed in future cases, many problems could arise in attempting to determine which is the "better" rule of law. There is a great diversity in the laws of the several states in numerous areas. For example, there is no unanimity of opinion among the states as to the procedural effects of *res ipsa loquitur*. Some states say that certain facts and circumstances allow a presumption of negligence, whereas others allow only an inference of negligence. Another problem is the division among the various states as to who has the burden of proof for the defense of contributory negligence. Some states place the burden on the plaintiff to show freedom from

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30 26 Wis. 2d 617, 133 N.W.2d 408 (1965).
31 133 N.W.2d at 416.
34 For a breakdown of the states' holdings in regard to the procedural effects of *res ipsa loquitur*, see Prosser, *op. cit. supra* note 5, at 232-39.
contributory negligence, whereas other states place the burden of proof on the
defendant who asserts this defense. Moreover, as has been shown above, there
is often a conflict among the states as to various immunities and limitations on
the amount of recovery. Who is to say which is the better rule of law? Courts
in the past have usually applied the forum law in regard to the doctrines of
res ipsa loquitur and contributory negligence. Under the language of Clark,
however, the procedural laws of the forum need not be applied if the court
does not think that they are the better rules of law. The court in Clark made
this express point when it stated: "If it is our own law that is obsolete or sense-
less (and it could be) we will try to apply the other state's law."

A problem will also arise in the federal courts. In Klaxon Co. v. Stentor
Elec. Mfg. Co., the United States Supreme Court held that under the Erie
doctrine a federal court in a diversity action must apply the conflict of laws
doctrine of the state in which the federal court is located. Thus, in a state which
follows the language of Clark, a federal court when faced with a choice of law
problem must decide which is the better rule of law. In the absence of any
guides from the state supreme court, the federal court will have to decide on
its own what it considers the better rule of law.

The court's statement in Clark will also create serious problems concerning
the predictability of results. It will be very difficult for a lawyer to advise his
client on the feasibility of litigation since he will have to guess what the court
will think the better rule of law to be. As has been noted above, this will not
always be an easy task. The court in Clark recognized that problems would
arise in the future when it stated:

This case is a comparatively easy one, and in cases like it the result will
hereafter be reasonably easy for lawyers and trial judges to calculate.
Admittedly there will be harder cases, more difficult to decide, cases that
will not yield sure answers in terms of proper choice-influencing considera-
tions as readily as this case does. That will not be a new phenomenon
in conflict of laws. Nor will it be as bad as choice based on mechanical
rules which do not take the relevant considerations into account. In course
of time perhaps we will develop "principles of preference" based upon the
relevant considerations, to guide us more exactly.

It is submitted that the precise holding in Clark was clearly just. Guest

35 See, id. at 426.
36 United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964), petition for cert. dis-
misssed, United Air Lines, Inc. v. United States, 379 U.S. 951; Citrola v. Eastern Air Lines,
Inc., 264 F.2d 815 (2d Cir. 1959); Lobel v. American Airlines, Inc., 192 F.2d 217 (2d Cir.
1951), cert. denied, 342 U.S. 945 (1952); Blumenthal v. United States, 189 F. Supp. 439
(E.D. Pa. 1960); Chase v. Albert, 147 Conn. 680, 166 A.2d 148 (1960); Hutchins v. Rock
Creek Ginger Ale Co., 194 A.2d 305 (D.C. App. 1963); Leventhal v. American Airlines, Inc.,
347 Mass. 766, 196 N.E.2d 924 (1964); Stevens v. Missouri Pacific R. Co., 355 S.W.2d 122
(Mo. 1962); Riley v. Capital Airlines, Inc., 42 Misc. 2d 194, 247 N.Y.S.2d 427 (Sup. Ct.
37 Alexander v. Kramer Bros. Freight Lines, Inc., 273 F.2d 373 (2d Cir. 1959); Sampson
v. Channell, 110 F.2d 754 (1st Cir.), cert. denied, 310 U.S. 650 (1940); Waite v. Krug
39 313 U.S. 487 (1941).
statutes have been outmoded for a considerable length of time. Many writers have criticized them. However, the language of the court will lead to questionable results. It will take a long time to build up the body of precedent which is required for judicial stability. Until that time, there will be little predictability in the law. The Wisconsin court's statement in Wilcox that the court will presumptively apply the law of the forum has the virtue of giving the courts a more definite standard to follow. Under this doctrine, lawyers are apprised that the forum law will be applied unless the other state's contacts "are of the greater significance." Such a statement, if made in Clark, would have achieved the same result and would have had the added virtue of insuring more stability and certainty. These are no small virtues. Although the court's decision in Clark may have meant greater justice in the instant case, it is to be hoped that immediate justice was not purchased at the price of future instability and uncertainty in the law.

William T. Coleman

Criminal Law—Habeas Corpus—Right to Treatment of a Person Involuntarily Committed to a Mental Hospital After Being Acquitted of an Offense by Reason of Insanity Is Cognizable in Habeas Corpus.—Charles Rouse was involuntarily committed to Saint Elizabeths Hospital? by the Municipal Court, now the Court of General Sessions, of the District of Columbia. He had been found not guilty, by reason of insanity, of carrying a dangerous weapon, a misdemeanor for which the maximum imprisonment is one year. After four years of confinement, Rouse brought habeas corpus in the United States District Court for the District of Columbia attacking his incarceration. Rouse contended, among other things, that he was receiving no psychiatric treatment. The district court refused to consider the alleged lack of treatment and denied habeas corpus relief. The United States Court of Appeals for the District of Columbia, Danaher, J. dissenting, remanded and held: law and justice require that we remand for a hearing, and findings on whether appellant is receiving adequate treatment, and if not, the details and circumstances underlying the reason why he is not, the latter information being essential to determine whether there is "an overwhelmingly compelling reason" for the failure to provide adequate treatment. Rouse v. Cameron, No. 19863, D.C. Cir., Oct. 10, 1966.


42 Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408, 416 (1965).
In a companion case, decided on the same day as Rouse, the petitioner was attacking his involuntary confinement in Saint Elizabeths Hospital as a "sexual psychopath." He appealed from a denial of his habeas corpus petition on the grounds that the district court erred, among other things, in failing to find that the absence of psychiatric treatment in the hospital required relief. In granting sexual psychopaths a right to relief upon a showing that they are not receiving reasonably suitable and adequate treatment, the United States Court of Appeals for the District of Columbia held: the district court must inquire into petitioner's allegations of lack of treatment in accordance with the standards and procedures set forth in Rouse v. Cameron. Millard v. Cameron, No. 19584, D.C. Cir., Oct. 10, 1966.

Judge David Bazelon, author of the controversial Durham Rule, has again broken new ground in the medico-legal field by his finding in Rouse that persons involuntarily committed to mental hospitals after being acquitted of an offense by reason of insanity have a right to treatment that is cognizable in habeas corpus. After discussing several theories under which the right to treatment could be supported on constitutional grounds, Judge Bazelon went on to base the right on the 1964 Hospitalization of the Mentally Ill Act. Having developed the right to treatment with relative ease, the remaining part of the opinion was devoted to providing the proper means and standards for implementing the right.

There is some question as to whether the 1964 Hospitalization of the Mentally Ill Act was ever intended to apply to persons committed by order of a court in a criminal proceeding, because the statutory definition of mental illness seems to exclude such persons. Nevertheless, the right to treatment is plain. Even the dissenting judge recognized this in saying, "No member of this court has ever suggested that a person committed because of mental illness should not receive 'treatment.'" It would seem that Judge Bazelon for the majority was content to base the right to treatment on the questionable application of the 1964 Hospitalization of the Mentally Ill Act because it allowed him to avoid the serious constitutional questions presented by a denial of the right to treatment. It is submitted, however, that the United States Court of Appeals for

3 D.C. CODE §§ 22-3503-09 (1961) contain provisions for the involuntary commitment to Saint Elizabeths Hospital of all persons, who though not insane, fall within the statutory definition of "sexual psychopath."

4 Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954). Here the famous M'Naghten and irresistible impulse tests of criminal responsibility were rejected in the District of Columbia in favor of the so-called Durham Rule that an accused is not criminally responsible if his unlawful act was the product of mental disease or defect.

5 D.C. CODE § 21-562 (Supp. V, 1966) provides:
A person hospitalized in a public hospital for a mental illness shall, during his hospitalization, be entitled to medical and psychiatric care and treatment. The administrator of each public hospital shall keep records detailing all medical and psychiatric care and treatment received by a person hospitalized for a mental illness and the records shall be made available, upon that person's written authorization, to his attorney or personal physician.


7 Id. at 28. (dissenting opinion). It is important to note that Judge Danaher's dissent was confined almost entirely to his contention that the court was deciding a case which was not before it, viz., that Rouse had contended on his pleadings and at trial that he was not insane and needed no treatment, not that he was being deprived of treatment. Id. at 20.

8 Id. at 6. (majority opinion).
the District of Columbia recognizes that the right to treatment is constitutionally compelled, and that they would be willing to place it on strong constitutional grounds if necessary.

The purpose of involuntary hospitalization after acquittal by reason of insanity is treatment rather than punishment.9 "It has two purposes: (1) to protect the public and the subject; (2) to afford a place and a procedure to rehabilitate and restore the subject ...."10 "Sickness of the individual and his need of treatment or care is the only justification for using 'likelihood of dangerousness' as a basis for deprivation of liberty."21 As was said of the District of Columbia statute, "[T]his mandatory commitment provision rests upon a supposition, namely, the necessity for treatment of the mental condition which led to the acquittal by reason of insanity. And this necessity for treatment presupposes in turn that treatment will be accorded."12 Since the only justification for involuntary hospitalization of one not guilty of a crime by reason of insanity is therapeutic, the conclusion is inescapable that one so incarcerated who receives no treatment is being deprived of his liberty without due process of law.13

"Our present policy of indefinitely involuntarily institutionalizing our mentally ill in mental prisons rather than in mental hospitals"14 violates every standard of due process of law. Clearly it is not "fair and just and proper,"15 nor does it comport with "traditional notions of fair play and substantial justice."16 As one commentator has noted:

Denial of liberty and property without adequate treatment to restore these rights to individuals is shocking to a sense of justice and fair play, and persistent denial is violative of due process, because "confine in a mental hospital is as full and effective deprivation of personal liberty as is confinement in jail."17

Judge Bazelon termed this practice of involuntary confinement without treatment as "shocking."18 In fact, it is submitted that this practice so shocks the conscience as to be violative of due process under a logical extension of the

10 Ragsdale v. Overholser, supra note 9, at 947. See note 9 supra.
11 Goldstein and Katz, supra note 9, at 237.
13 Bassion, supra note 9, at 310. "To hold a patient solely for potential dangerousness would snap the thin line between detention for therapy and detention for retribution." Goldstein and Katz, supra note 9, at 238.
15 Ibid. The fair and just and proper test of due process was given by Frankfurter in his dissent in Solesbee v. Balkcom, 339 U.S. 9, 16 (1950), where he said, "Due process is that which comports with the deepest notions of what is fair and right and just."
17 Bassion, supra note 9, at 310, citing Barry v. Hall, 98 F.2d 222, 225 (D.C. Cir. 1938).
rationale in *Rochin v. California*. It has been suggested that in addition to violating due process, such conduct may violate other constitutional guarantees such as the equal protection clause or that it may constitute a cruel and unusual punishment.

The right to treatment also has been recognized by statute in several other jurisdictions. Even in the absence of statutes, it has been contended that the state, as *parens patriae*, has a duty to provide such treatment. Thus, it becomes manifestly evident that persons involuntarily incarcerated after being acquitted of a crime by reason of insanity have a right to adequate care and treatment. Although few people, at least in the abstract, would dispute that those involuntarily confined after being adjudged not guilty by reason of insanity have a right to adequate treatment, disagreement arises when it comes to implementing this right with a positive judicial remedy.

The majority in *Rouse* found that the provisions in the 1964 Hospitalization of the Mentally Ill Act requiring hospitals to keep records detailing psychiatric care and treatment and to make such records available to the patient's attorney indicated a congressional intent to implement the right to treatment by affording a judicial remedy for its violation. If, however, the right were placed on a constitutional ground, as has been shown it could well be, the decision to implement it would be entirely judicial. The recognition of a constitutional right to treatment would seem necessarily to imply its implementation. Many courts, though, when faced with the prospect of greatly increased mental health appropriations necessary to provide adequate treatment and the possibility that regardless of appropriations there might well be a national lack of medical personnel, might shy away from the recognition of any such right or of the remedy needed to enforce it. The right to treatment, which seems so obvious in the abstract, has been ignored for a very long time, probably for these reasons.

Indeed, it has been suggested that implementation of the right to treatment through habeas corpus would result in the release of many persons dangerous to themselves and society. This in turn is expected to arouse such a public

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19 342 U.S. 165 (1952), where conduct in combating crime that shocks the conscience was found to violate due process of law.
20 Sas v. Maryland, 334 F.2d 506, 509 (4th Cir. 1964).
21 Ibid.
23 Bassiouni, supra note 9, at 302-305.
25 While there are many statistics showing the inadequacy of our mental health programs, one commentator noted that a recent survey disclosed:
26 See generally Birnbaum, supra note 14.
27 Id. at 503.
outcry that legislatures will be forced to increase appropriations and thus pro-
vide adequate care and treatment so that such persons can be constitutionally
detained until safe to release. 28

The right to treatment has two elements. The first is the initial decision
of the court that it will implement the individual’s right to adequate treatment
by ordering him released if such treatment is not provided. As seen above,
however, recognizing the individual’s right to adequate treatment will force
the legislative implementation of the right by providing treatment of all involun-
tarily committed mental defectives, with all the financial and personnel prob-
lems this will entail. In the past, many a court has shunned such policy decisions
where the potential cost was so high, stating that such problems are exclusively
within the legislative domain. The Rouse majority, however, forthrightly faced
the problem. In effect, Rouse holds that the public must pay the cost of indi-
vidual rights and that mental prisons must be eliminated.

Once we accept the fact that there is a statutory or constitutional right to
adequate treatment, the remedy of habeas corpus would seem to follow imme-
diately. A person incarcerated solely because of his need of treatment, who
has a right to treatment but is being deprived of it, is “in custody in violation
of the Constitution or laws” 29 of the United States and is entitled to relief in
habeas corpus. The court is required to “dispose of the matter as law and
justice require.” 30

Habeas corpus has been previously granted in a small number of cases that
came close to establishing a limited right to treatment. In In re Maddox, 31 a
petitioner, who had been adjudged a criminal sexual psychopath under the
Michigan Criminal Sexual Psychopath Act, but who had never been tried or
convicted of any crime, was being incarcerated in a state prison rather than in
a mental hospital. Since he was not receiving treatment in an appropriate state
institution within the meaning of the act, his incarceration in a penal institution
was deemed unconstitutional in that he had never been convicted of a crime. 32
In Commonwealth v. Page, 33 the court sustained a petitioner’s exceptions to a
commitment proceeding under a sex offender statute because the remedial aspect
of confinement as a sexually dangerous person must have a foundation in fact. 34
In this case, the defendant had been indefinitely committed to a prison treat-
ment center which had not in fact been established. The court, in finding the
commitment invalid, stated that it is not sufficient that the legislature announces
a remedial purpose if the consequences to such a person are penal. 35 “[A] con-

28 Ibid.
29 28 U.S.C. § 2241 (c) (3) (1964), dealing with power to grant writ of habeas corpus.
30 28 U.S.C. § 2243 (1964), dealing with hearing and decision on the writ of habeas
32 It is interesting to note that if one accepts the statement that a mental hospital with-
out adequate treatment facilities is a mental prison, (see text accompanying note 14 supra)
its patients, who were committed after a not guilty by reason of insanity verdict, are being
held in a penal institution without having been convicted of a crime.
34 The court stated that habeas corpus was the usual way to question such commitment
but that exception during the commitment proceedings was also proper. 339 Mass. 313, 159
35 Ibid.
finement in a prison which is undifferentiated from the incarceration of convicted criminals is not remedial so as to escape constitutional requirements of due process.”

The District of Columbia Circuit itself had once before granted habeas corpus in a case in which there was an apparent lack of treatment. In *Miller v. Overholser*, the petitioner alleged that his incarceration as a sexual psychopath in a place maintained for the confinement of violent, criminal, hopelessly insane, instead of in a place designed and operated for mentally ill who are not insane, was not authorized by the sexual psychopath act. The court agreed, and went on to consider the availability of habeas corpus as a remedy. Although recognizing that “except in circumstances so extreme as to transgress constitutional prohibitions, the courts will not interfere with discipline or treatment in a place of legal confinement,” it noted that “the writ [of habeas corpus] is available to test the validity not only of the fact of confinement but also of the place of confinement.”

The situation in *Rouse* fits both reasons enunciated in *Miller*. First, as noted above, there may well be a constitutional right to treatment, the denial of which would make the confinement invalid. Secondly, finding a right to treatment would make incarceration in a place where there is no treatment, incarceration in a place of invalid confinement, for which habeas corpus is a remedy. It is apparent that Judge Bazelon was correct in directing the inquiry into adequacy of treatment during a habeas corpus hearing. In so doing, he is to be commended in his forthright implementation of a right often discussed but never remedied.

Recognizing that the present state of knowledge and therapy regarding mental disease has not reached finality of judgment, Judge Bazelon refused to let lack of finality relieve the court of its duty to render an informed decision. While realizing that the “shortage of psychiatric personnel is a most serious problem today,” he refused to justify our continuing failure to provide suitable and adequate treatment because of the lack of staff and facilities. He also was aware that the shortage cannot be remedied immediately, but refused to approve indefinite delay because “the rights here asserted are... present rights... and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled.”

The majority opinion appears to leave the actual development of standards for measuring the adequacy of treatment to the district court. It is clear, however, that treatment, to be adequate, need not be proven that it will cure or improve the patient, but only that there is a “bona fide effort to do so.” It

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36 *Ibid.* Note that the statute involved in this case was one that provided for commitment for an indefinite period without benefit of a jury trial.
37 206 F.2d 415 (D.C. Cir. 1953).
38 *Id.* at 419. See Kemmerer v. Benson, 165 F.2d 702 (6th Cir. 1948); Platek v. Adenholt, 73 F.2d 173 (5th Cir. 1934); Annot., 24 A.L.R.2d 350, 374-77.
41 *Id.* at 12.
42 *Id.* at 11.
44 *Id.* at 8.
is also clear that if the district court finds that the patient is not receiving adequate treatment so that his incarceration violates the Constitution and laws of the United States, it still may allow the hospital a reasonable opportunity to initiate treatment depending on the length of time the patient has lacked treatment, the length of time he has been in custody, the nature of his mental condition, and the danger his release would present. The court may grant unconditional or conditional release if it appears the opportunity for treatment has been exhausted or that treatment is otherwise inappropriate. Judge Bazelon, however, refused to detail the possible range of circumstances where release would be appropriate.

Thus, we see that the right to treatment is recognized and the district court required to look into its adequacy with the power to release the patient if the hospital does not ultimately develop a program that does in fact treat. The judges in the District Court of the District of Columbia are now burdened with the job of determining when a patient is getting adequate treatment. Given the flux which characterizes the field of psychiatry, and the fact that most judges have little medical knowledge and so must depend on experts, this will be a difficult task.

It is suggested that if the lower courts in the District of Columbia closely adhere to Judge Bazelon's bona fide effort to treat test while making every effort to avoid administrative decisions on medical practices, they will stay within their habeas corpus powers and avoid becoming arbitrators of medical disputes. Rouse's failure to guard against the danger of undue judicial interference in the administrative-medical decision area is perhaps its greatest shortcoming.

The right of the involuntarily institutionalized to adequate psychiatric treatment is undeniable. It is to be hoped that the right will soon be placed on a sound constitutional basis by the Supreme Court. In the meantime, a cautious implementation of the right through discretionary use of habeas corpus in the District of Columbia can do much to pave the way for its ultimate nationwide enforcement.

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45 Id. at 13.
46 Ibid.
47 Ibid.