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DECISIONS: CORPORATION LAW / INSURANCE

DECISIONS

CORPORATION LAW—SECRETARY-TREASURER MAY INSTITUTE SUIT FOR CORPORATION OVER BAD FAITH OBJECTION OF PRESIDENT WHERE BY CUSTOM HE HAD CHARGE OF ALL LITIGATION.—In a somewhat unusual decision, the Appellate Division, First Department, has held that the secretary-treasurer of a closely held corporation had authority to institute an action in the name of the corporation, without the consent of the board of directors and despite the president's objection.[1]

The plaintiff, a close corporation engaged in the manufacture and sale of semi-precious rings, was owned in equal shares by its president and secretary-treasurer, who together with their wives constituted the board of directors. Throughout the existence of the corporation, the secretary-treasurer, with the presumptive authority of the president, had instituted all legal actions. This practice became an established custom.

The secretary-treasurer caused a summons and complaint to be served upon defendant Beckerman, son-in-law of the corporation's president, and an employee of the corporation. The complaint alleged that during the period of his employment, Beckerman had competed with his corporate employer by converting sample models of jewelry to his own use. The commencement of this action was without the authorization of the board of directors, and over the objections of the president, father-in-law of the defendant.

The Supreme Court at Special Term denied defendant's motion to set aside the service on the ground that the corporation had not authorized commencement of the action.[2] The Appellate Division affirmed this order by a four to one vote, holding that the well-established practice by which the secretary-treasurer acted for the corporation in commencing actions and verifying pleadings implied an authority in that officer to institute the instant action.[3]

The defendant relied upon the case of *Sterling Industries* v. *Ball Bearing Pen Corporation*,[4] in which the president of a corporation had no authority to commence an action in behalf of the corporation after a majority of the board of directors had failed to give the approval sought by him. The Appellate Division distinguished the instant case in two respects. First, in the *Sterling* case the president had no implied authority to bring the action, especially after being rebuffed in his efforts to obtain express authority from the board of directors, while in the present case the directors did not act on the question. Secondly, the *Sterling* case did not pass upon the question of the emergency situation, vital and critical to the corporation, which the facts in the instant case created. The court also pointed out that the defendant in the instant action, in contrast to the situation in the *Sterling* case, was not an officer of the corporation, and had no interest in its internal management.[5]

The General Corporation Law provides that "the business of a corporation shall be managed by its board of directors . . ."[6] The Stock Corporation Law states that "the directors . . . may appoint or elect . . . [officers] who shall respectively have such powers . . . subject to the control of the directors, as may be prescribed by them or in the by-laws."[7] Usually, articles of incorporation and by-laws make no reference to

[1] Rothman and Schneider, Inc. v. Beckerman, 1 A. D. 2d 154, 148 N. Y. S. 2d 396 (1st Dep't 1956).

[2] 142 N. Y. S. 2d 668 (Sup. Ct. N. Y. Co. 1955).

[3] See note 1, *supra*, at 156, 148 N. Y. S. 2d 396, 398.

[4] 298 N. Y. 483, 84 N. E. 2d 790 (1949).

[5] See note 1, *supra*, at 157, 148 N. Y. S. 2d 396, 399.

[6] N. Y. GEN. CORP. L. § 27.

[7] N. Y. STOCK CORP. L. § 60.

the power of the president or other offcers to institute legal proceedings,[8] and the decision as to whether a corporation should seek to enforce a cause of action for damages "is . . . ordinarily a matter of internal management and is left to the discretion of the directors, in the absence of instruction by vote of the stockholders."[9] Some authorities maintain that the power to prosecute litigation for a corporation inheres in the office of the president,[10] but the weight of opinion appears to be that such *inherent* power applies only with respect to presidents of banking corporations.[11] The power may, however, be *implied* under certain circumstances, as where litigation appears to be necessary to preserve the corporate interests, and where there are indications of bad faith on the part of the directors in failing or refusing to authorize legal proceedings.[12]

Several years ago, it was held that an action for conversion of corporate property should not be dismissed solely on the ground of lack of authority from the two-man board of directors, of whom one was the defendant and the other the corporation's president.[13] In a recent case, the New York Supreme Court sustained the right of a president to bring an action in the name of a corporation for an accounting against its sales agent, who was also treasurer, secretary and fifty-per-cent stockholder, after the board of directors failed to act as a result of the deadlock caused by the split ownership.[14] In the instant case, the Supreme Court at Special Term had remarked that "it is . . . apparent that the dissenting directors are interested parties and should not be allowed to vote on the question . . . [of instituting the action] if it had come before the board."[15] The situation in these cases differs from that in *Sterling Industries,* where the Court of Appeals had found that in forming the corporation, there was an understanding among the promoters that the interest of the directors in other corporations would not be disqualifying.[16]

The present decision is unique in that neither the secretary nor the treasurer of a corporation, as distinguished from the president, have previously been considered to have any implied authority to bring an action in the corporate name.[17] There seems to be no valid reason, however, why the doctrine of implied authority should be limited to the office of the president. The decision in the present case appears to broaden the doctrine of implied authority to include the secretary-treasurer as well as the president, where prior custom clearly spells out the power, and is supported by the apparent bad faith of the president who is able to block action by the board of directors.

[8] 10 A. L. R. 2d 703, 704 N. (1950).
[9] Koral v. Savory, 276 N. Y. 215, 217, 11 N. E. 2d 883, 884 (1937).
[10] 13 AM. JUR. *Corporations* § 928 (1938).
[11] See note 8, *supra.*
[12] See note 8, *supra,* at 707.
[13] Warwick Sportswear Co. v. Simon, 13 N. Y. S. 2d 321 (Sup. Ct. App. T. 1st Dep't 1939).
[14] Aircheck, Inc. v. Felder, 133 N. Y. S. 2d 790 (Sup. Ct. N. Y. Co. 1954).
[15] See note 2, *supra,* at 669.
[16] See note 4, *supra,* at 491, 84 N. E. 2d 790, 793.
[17] 30 N. Y. U. L. Q. REV. 1553 (1955); 13 AM. JUR. *Corporations* §§ 908, 912 (1938).

INSURANCE—WHERE SELLER LEAVES LICENSE PLATE ON AUTO AFTER ABSOLUTE SALE, HIS PERSONAL LIABILITY THROUGH ESTOPPEL FOR VENDEE'S NEGLIGENCE HELD NOT TO CREATE OR MAINTAIN LIABILITY IN HIS LIABILITY INSURANCE COMPANY.—The Appellate Division, Fourth Department, in reversing the Supreme Court at Trial Term, has recently held by a divided court, that although liability for injuries resulting from an auto accident may be imposed upon the seller of the car who has parted with title and possession but failed to remove his license plates (in contravention to Section 61 of the Vehicle and Traffic Law),[1] an insurer who has previously contracted to indemnify the seller for "all accidents arising out of the ownership, maintenance or use of the car", is under no obligation to indemnify either the insured seller or the buyer.[2]

An auto owner sold his car to a buyer, but failed to remove the license plate which had been issued to him at the time he registered the car. While the buyer was still driving the car with the seller's license plate, he was involved in an accident. An injured party sought to hold liable both the buyer and also the seller, on the basis of the above-mentioned rule. The seller, in turn, notified the insurance company which had written a policy covering his "ownership, maintenance, or use" that should he be held liable to the injured party, he would expect the company to pay the judgment, under the terms of the policy.

The insurance company brought an action for a declaratory judgment as to the rights among the seller, the buyer and of itself. Special Term held that the insurer was obliged to indemnify both the insured seller and the buyer.[3] The Appellate Division reversed, holding that once the automobile was sold and its ownership, maintenance and use by the insured terminated, the policy was inoperative and the insurance company was not liable either to the seller or to the buyer.

The seller of a car who leaves his license plates attached, after legal or equitable title has passed to the purchaser, is estopped as to injured third parties to deny ownership of the vehicle.[4] This raises the problem of whether the seller's insurance company can be held liable to indemnify such a seller under a policy to indemnify the insured for liability arising out of the ownership, maintenance or use of the car.

It appears that legal or equitable title in the holder of a policy clearly imposes liability on the insurance company.[5] Either legal or equitable title constitutes an insurable interest, which generally is necessary to obtain a policy of insurance.[6] However, in liability insurance, the loss insured against is that which arises out of the use of the property, and the general rule is that the third party's right to recover does not depend on the insured's legal or equitable title, but rather on whether the insured can be charged at law or in equity with an obligation for which he is liable.[7] In the instant case, the liability of the seller was imposed by estoppel.

In the New York case of *Abrams* v. *Maryland Casualty Co.*,[8] the insured seller sold a truck to his employee, who previously had been driving it in the employer's business. The case turned on interpretation of the words "insurable interest", and the

[1] N. Y. VEH. & TR. L. § 61.

[2] Phoenix v. Guthiel, 1 App. Div. 2d 99, 147 N. Y. S. 2d 341 (4th Dep't 1956).

[3] Phoenix v. Guthiel, 206 Misc. 3, 132 N. Y. S. 2d 478 (Sup. Ct. Monroe Co. 1954).

[4] Switzer v. Aldrich, 307 N. Y. 56, 120 N. E. 2d 159 (1949).

[5] Pauli v. St. Paul Mercury & Indemnity Co., 167 Misc. 417, 4 N. Y. S. 2d 41 (Sup. Ct. Erie Co. 1938).

[6] Commonwealth v. Arrigo, 160 Md. 595, 154 Atl. 136 (1931).

[7] 6 BLASHFIELD, ENCYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE, § 3873 (Kansas City 1936).

[8] Abrams v. Maryland Casualty Co., 300 N. Y. 80, 89 N. E. 2d 235 (1949).

court held that the insurable interest meant not only legal title to the truck, but any interest the employer might have in the truck, including the continued use of the truck in the employer's business by the new owner, and the employer's possible liability under the respondeat superior rule. Upon that interpretation, the seller's insurance company was held liable for damages recovered in a judgment against the insured for accidents occurring after the truck was sold. In that policy (as in the policy in the instant case) the insurer agreed to indemnify for losses arising out of the ownership, maintenance, or use of the vehicle. However, in the present case the insured had no such continuing business interest in the car after he sold it to the purchaser—in fact he had no interest of any type in the car.

The Appellate Division held that the only way the insurance company could be held liable to indemnify the seller would be by a construction of the automobile insurance policy to mean that an ownership by estoppel after the insured object had been sold was within the contemplation of the parties who wrote the contract. The court said that the words "maintenance or use" meant a maintenance or use arising out of ownership and that the ownership meant was ownership in fact and not ownership at law imposed as a consequence of the omission of the legal duty, namely, the duty to remove one's license plates when he sells his car.

As to the purchaser of the automobile, the rule in New York is that a policy of insurance is personal to the insured and does not pass ipso facto upon transfer of the object of insurance.[9] Most policies do provide for a transfer of the policy to the new owner of the insured object, if notice of the transfer is given to the company, and its consent is obtained therefor. However, where no notice is given, the courts generally have held that no valid assignment has taken place.[10]

Since there was no such notice in the case at bar, the buyer urged that the insurance company's liability to indemnify him be predicated upon the "omnibus clause" of the policy which is written to conform to section 59 of the New York Vehicle & Traffic Law. That section provides generally that any use of the vehicle with the consent, express or implied, of the owner renders the owner vicariously liable to injured third parties, regardless of whose business the driver is on. The owner's insurance company, through the omnibus clause, is rendered liable for injuries arising out of such use.[11]

Therefore, the problem facing the Court was whether section 59 and the omnibus clause were to be extended to mean that an absolute vendee is operating the car with the consent or permission of the absolute vendor merely because the vendor is estopped to deny ownership as to injured parties.

Wherever the problem has arisen, the insurance company which writes a policy for a conditional vendor who sells his car but retains title for security purposes, has been held not liable for the negligence of the conditional vendee who has equitable title and control of the car.[12] In this case, the omnibus clause cannot be applied, because the seller has contracted away the power to give permission to the conditional vendee or to anyone else to use the car.

If not even a conditional vendor may give permission to the conditional vendee to use the car even though the former retains a security title, it follows a fortiori that one who has parted with legal *and* equitable title, though estopped to deny own-

[9] Beck-Brown Realty Co. v. Liberty Bell Ins. Co., 137 Misc. 263, 241 N. Y. Supp. 727 (Sup. Ct. Kings Co. 1930).

[10] Employer's Liability Assur. Corp. v. Sweatt, 95 N. H. 31, 57 A. 2d 157 (1948); Merchants Mutual Casualty Co. v. Pinard, 87 N. H. 473, 183 Atl. 36 (1936).

[11] 2 AM. JUR. AUTOS, §§ 532-535 (1936).

[12] 4 C. J. S. AUTOS, § 829(b)bb (1946).

ership because of a statutory violation, may not give permission to the true owner. Therefore, the absolute vendor's insurance company cannot be held liable for the absolute vendee's tort on the basis that he is operating the car with the permission of the owner.

INSURANCE—WHERE INSURED ORALLY PROMISED TO NAME WIFE AS BENEFICIARY IN RETURN FOR WIFE'S PAYMENT OF PREMIUMS, AND THEN SECRETLY CHANGED BENEFICIARY TO SISTER, STATUTE OF FRAUDS HELD NO DEFENSE TO SISTER IN ACTION BY WIFE.—In an action for a declaratory judgment that plaintiff was a lawful beneficiary of an insurance policy on the life of her deceased husband, plaintiff offered proof that he had named her as beneficiary under an oral agreement whereby she promised to pay the premiums, although prior to his death he secretly changed the beneficiary, naming his sister. The Court of Appeals, reversing the Appellate Division, First Department, held that the statute of frauds could not be applied to bar the plaintiff wife's prior right.[1]

The plaintiff and decedent were married in 1927, and lived together until the husband's death in 1953. During their married life, the husband was unemployed and depended for his support largely on the wife's earnings. As a result of this adverse economic situation, they were unable to put aside any savings for sickness and death expenses. After some seventeen years of married life, they decided that the husband would take out an insurance policy on his life and name his wife as beneficiary if she, the plaintiff, would pay the premiums. The insurance policy naming the plaintiff as beneficiary was issued, and he delivered it to her in 1944. Thereafter she paid the whole or a substantial part of the annual premiums from her earnings. When the husband died in 1953, she made arrangements for his funeral and burial in reliance on the avails of the policy. Without the knowledge or consent of the plaintiff, however, the plaintiff's husband had withdrawn and taken from the possession of the plaintiff the life insurance policy and had caused the beneficiary to be changed from the plaintiff to his sister, the defendant.

The wife brought an action for a declaratory judgment, praying that she be declared the legal owner of the policy, that the proceeds be paid to her, and that the defendant sister-in-law be declared a trustee for and on behalf of the plaintiff.

The defendant contended that the action could not be maintained in the light of subdivision 9 of Section 31 of the Personal Property Law, which renders unenforceable any contract to assign or any assignment of a life insurance policy, or a promise to name a beneficiary of any such policy, unless the agreement or some note or memorandum thereof is in writing. The defendant moved for summary judgment, in support of which she showed by affidavit that in 1950 the deceased had executed a request to the insurance company for a change of beneficiary in which he made the defendant his beneficiary.

The Supreme Court at Special Term denied the defendant's motion for summary judgment on the ground that issues of fact were presented "which cannot be summarily disposed of by affidavits but rather should await complete determination by trial." The Appellate Division, reversing, dismissed the complaint, agreeing with defendant that the action was barred by the statute.[2] The issues thus presented to the Court of Appeals were whether the action was barred by the affirmative defense of

[1] Katzman v. Aetna Life Ins. Co., 309 N. Y. 197, 128 N. E. 2d 307 (1955).

[2] Katzman v. Aetna Life Ins. Co., 285 App. Div. 446, 137 N. Y. S. 2d 583 (1st Dep't 1955).

the Statute of Frauds and, if not, whether the defendant's motion for summary judgment should be granted on the ground that only such issues of fact were presented which could summarily be disposed of by affidavits.

The Court of Appeals held that Section 31, subdivision 9, of the Personal Property Law was not authority for dismissing the complaint, inasmuch as the plaintiff's cause of action was not based on an oral promise to give property in the future, but rather, was brought to prevent the consummation of a scheme between the insured and his sister to undo, surreptitiously, an executed transaction which he, in fact, had done openly just as he had agreed to do.

Prior to the enactment of Section 31, it was well settled in New York that an insurance policy was orally assignable.[3] In those cases almost all the assignments made were gifts. However, due to the fact that delivery of an insurance policy can be ambiguous and equivocal, because a policy must fall into the possession of another at the time of the insured's death,[4] and that such a situation was an invitation to fraud, as evidenced by the large number of actions brought based on oral assignments,[5] the legislature enacted said subdivision 9 of Section 31 to correct this situation.[6] In the case at bar, the court held that the delivery had not been equivocal, but deliberate and intentional, carrying out the terms of an entirely natural and probable transaction to protect the wife, if she survived, from the burden of expense incident to last illness and death of the husband. Here an effective inter vivos gift was made,[7] and such a transaction was not impaired by the Statute of Frauds.[8]

In *Siegel* v. *Tankleff*,[9] it was held that a gift of a policy completed by delivery prior to the enactment of Section 31, subdivision 9, of the Personal Property Law, was valid. This case was advanced by the defendant as indicating that delivery after the effective date of the statute would not suffice. The Court of Appeals, however, held that such a construction could not very well be reconciled with long established decisional law respecting inter vivos gifts when delivery is accompanied by intent.[10] In *Bernstein* v. *Prudential Life Insurance Company*,[11] the date of delivery had been held to be of little importance so long as it appeared that it in fact occurred.

The Appellate Division, in deciding the present case, had relied on the decision in *Fischer* v. *New York Savings Bank*.[12] There the deceased designated Fischer, a creditor, as beneficiary in a policy on his life. Thereafter the decedent named his wife beneficiary, and her claim to the proceeds was upheld. The Court of Appeals held that that case was distinguishable on its facts; in the *Fischer* case there was no delivery

[3] Jackson v. Twenty-Third Street Railway Co., 88 N. Y. 520 (1882); Marcus v. St. Louis Mut. Life Ins. Co., 68 N. Y. 625 (1877); Matter of Van Alstyne, 207 N. Y. 298, 100 N. E. 802 (1913); McGlynn v. Curry, 82 App. Div. 431, 81 N. Y. Supp. 855 (1st Dep't 1903).

[4] See note 1, *supra*.

[5] Mitchell v. Mitchell, 265 App. Div. 27, 37 N. Y. S. 2d 612 (1st Dep't 1942).

[6] Brief for the New York State Ass'n of Life Underwriters as Amicus Curiae, p. 15; Superintendent of Insurance's Memorandum to Governor concerning Assembly Int. No. 473, Pr. 468, p. 1.

[7] See note 1, *supra*.

[8] Bernstein v. Prudential Ins. Co., 204 Misc. 775, 124 N. Y. S. 2d 624 (Sup. Ct. N. Y. Co., 1953); John Hancock Mut. Life Ins. Co. v. Sandrisser, 95 N. Y. S. 2d 399 (Sup. Ct. Kings Co., 1950).

[9] 95 N. Y. S. 2d 178 (Sup. Ct. Queens Co., 1949).

[10] See note 1, *supra*.

[11] 204 Misc. 775, 124 N. Y. S. 2d 624 (Sup. Ct. N. Y. Co., 1953).

[12] 281 App. Div. 747, 118 N. Y. S. 2d 742 (1st Dep't 1953).

of the policy, no payment of premiums, and no confidential relationship such as springs from the marriage relation to support and give credence to the alleged oral agreement.

INSURANCE—CONTRACTS—INSURER MAY CALCULATE INTEREST ON POLICY LOAN ON DAILY BASIS FOR PURPOSE OF VOIDING POLICY FOR EXCESSIVE INDEBTEDNESS.—In an action brought by the beneficiary to recover on a life insurance policy, the Appellate Division, Fourth Department, has held that the company could properly calculate the interest on an insurance loan on a daily basis and thereby cancel the policy for excessive indebtedness. This procedure was sanctioned despite a provision in the contract that such interest was "payable semi-annually."[1]

The policy provided that interest on policy or premium loans should be payable semi-annually, "on the first day of March and the first day of September of each year" and that if the "interest shall not be paid when due, it shall be added to and become part of the principal of said loan." The policy further provided that a default would be deemed to have occurred and the policy null and void if "at any time the total indebtedness against said policy shall equal or exceed the cash value of such policy."

The insured had obtained a loan secured by the policy in 1947, and subsequently failed to make payments on it. On September 1, 1952, when the unpaid accrued interest was added to the indebtedness, as provided in the policy, the cash value of the policy exceeded the total indebtedness. On September 2, 1952, however, by the addition of one day's interest, the indebtedness exceeded the cash value of the policy. The insurance company duly mailed a notice to that effect to the insured, who failed to make any payments within the prescribed notice period before the cancellation was to take effect. The insured died prior to the next semi-annual payment date.

The insurance company set this out as a defense to the beneficiary's action to collect under the policy. The trial court granted summary judgment to the insurance company, and the beneficiary appealed, contending that this worked a forfeiture and was premature, as it was improper for the insurance company to add any interest to the total indebtedness prior to the following March 1. The Appellate Division affirmed the summary judgment for the insurance company.

The court cited the case of *Guerin* v. *New York Life Insurance Co.*,[2] where the insured, in discharging a policy-secured loan, unsuccessfully challenged the propriety of the insurance company's act of adding to the total indebtedness interest accrued since the last date when interest became due under the terms of the policy, and the case of *Baker* v. *Equitable Life Assurance Society*,[3] where the insurance company was allowed to charge against the surrender value of the policy the interest on loans to the date of premium default, even though that date was prior to the date when the annual interest would otherwise have become due.

Both of these latter cases were decided in favor of the insurance companies and the decisions were predicated upon the fact that if such charges were not allowed, then situations might arise where the lenders would have no security for the unpaid interest. The same reasoning would seem to be applicable to such circumstances as presented by the principal case.

It is interesting to note that on similar facts the Supreme Court of Arkansas

[1] Chambers v. Massachusetts Mutual Life Ins. Co., 1 App. Div. 2d 105, 147 N. Y. S. 2d 326 (4th Dep't 1956).

[2] 271 App. Div. 110, 62 N. Y. S. 2d 805 (1st Dep't 1942).

[3] 288 N. Y. 87, 41 N. E. 2d 471 (1946).

ruled against the insurance company in 1934.[4] The Pennsylvania Superior Court arrived at the same conclusion in 1934,[5] reaffirmed it in 1943,[6] and in 1945 the Supreme Court of Pennsylvania rendered a similar decision.[7]

The court believed that the only alternative open to the insurance company if it were not allowed to continue this practice, would be to pass the delinquent's burden on to all policy-holders, either by increasing premiums, by raising loan interest rates or by decreasing cash surrender value. The Appellate Division has placed the burden where, economically, it seems to belong.

PRACTICE—NEW JERSEY INVESTIGATION OF MUNICIPAL CORRUPTION HELD NOT AN "ACTION, SUIT, OR SPECIAL PROCEEDING" UNDER STATUTE AUTHORIZING NEW YORK COURTS TO COMPEL TESTIMONY AT REQUEST OF SISTER STATE.—The Court of Appeals of New York[1] has held, with two judges dissenting, that an investigation conducted by the Superior Court of New Jersey, pursuant to an enabling statute,[2] into the affairs of the City of Jersey City, is not an "action, suit, or special proceeding" within the meaning of the New York Statute,[3] which authorizes the New York courts to compel testimony and the production of records in aid of such proceedings outside the state.

A petition was filed by freeholders of the City of Jersey City requesting an investigation into the financial affairs of that municipality, including alleged corruption in the awarding of a garbage removal contract to the Hudson City Contracting Company, Inc., a firm owned by the appellant, a resident of the State of New York.

Pursuant to that contract, Hudson City had removed garbage from January 1, 1953 through February 15, 1953, when the Superior Court of New Jersey adjudged the contract null and void.[4] The New Jersey Court, pursuant to the statute authorizing such petitions[5] for investigation, appointed a commission to take testimony concerning the alleged municipal corruption. The comissioner, thereafter, applied to the New York Supreme Court for a subpoena duces tecum, directing the appellant to appear and to bring with him all his books, records and other data "pertaining to the submission of bids . . . for garbage contract removal. . . ." The subpoena was issued and personally served upon the appellant in New York. He failed to appear on the date specified, but moved in the Supreme Court at Special Term for an order vacating and quashing the subpoena. The motion was denied. On appeal, the Appellate Division affirmed[6] the denial unanimously, and the Court of Appeals denied leave to appeal. The

4 New York Life Ins. Co. v. Shivley, 188 Ark. 1044, 69 S. W. 2d 392 (1934).
5 Roesser v. National Life Ins. Co., 115 Pa. Super: 409, 175 Atl. 887 (1934).
6 Senin v. Metropolitan Life Ins. Co., 153 Pa. Super. 658, 34 A. 2d 910 (1943).
7 Walsh v. Aetna Life Ins. Co., 352 Pa. 429, 43 A. 2d 102 (1945).

1 Matter of Klein, 309 N. Y. 474, 131 N. E. 2d 888 (1956).
2 N. J. REV. STAT. 40:4-1 *et seq.*
3 N. Y. CIV. PRAC. ACT § 310: "In what cases depositions may be taken. A party to an action, suit or special proceeding, civil or criminal, pending in a court without the state, either in the United States or in a foreign country, may obtain, by the special proceeding prescribed in this article, the testimony of a witness, and, in connection therewith, the production of books and papers, within the state, to be used in the action, suit, or special proceeding."
4 Scatuorchio v. Jersey City Incinerator Authority, 14 N. J. 72, 100 A. 2d 69 (1953).
5 See note 2, *supra.*
6 Matter of Klein, 284 App. Div. 900, 135 N. Y. S. 2d 240 (1st Dep't 1954).

Court of Appeals also dismissed an appeal taken as of right, on the grounds that the order did not finally determine the special proceeding.[7]

Following the denial at Special Term, the commissioner sought and obtained an order requiring the appellant to show cause why he should not appear to testify and be directed to bring his books and records with him. Compliance with that order was stayed pending the aforementioned appeal. After the question of the vacating of the subpoena was resolved in the commissioner's favor, an order was made at Special Term directing the owner to appear for examination and to bring with him the above-mentioned books and records. From that order, the owner appealed to the Appellate Division, which unanimously affirmed the order of Special Term. From that affirmance the appellant appealed.

The commissioner sought to have the subpoena duces tecum issue under the provisions of the New York Statute,[8] which provides for the issuance of such subpoenas in the case of an action, suit, or special proceeding in a sister state or foreign nation. The issue presented was whether or not the investigation undertaken by the Superior Court of New Jersey was such "an action, suit, or special proceeding."

In *Matter of Isaacs,* a subpoena duces tecum issued for the examination of a resident of New York in reference to litigation then pending in New Jersey. It was not shown in the application that issue had been joined in the New Jersey controversy. The Appellate Division set aside the subpoena and held that under our rules, "issue must be joined before a subpoena can be directed in a case like the present, and the evidence sought must be relevant to such issue. That condition was now shown to exist in the present case."[9]

The New York statute provides that "the word 'action', when applied to judicial proceedings, signifies an ordinary prosecution in a court of justice, by a party against another party for the enforcement of a right, the punishment of a public offense."[10] A special proceeding is defined as "Every other prosecution by a party for either" of the aforesaid purposes.[11]

The New Jersey statute[12] makes no provision for a determination of issues nor does it provide for any final judgment or order. The statute is permissive in its tone stating only that "the judge may, in his discretion, appoint experts to prosecute such investigations." The comparable New York statute, on the other hand, states that if the Justice is satisfied that municipal corruption exists, ". . . he *shall forthwith grant* an order restraining such unlawful or corrupt expenditures or such other improper use of such monies" (emphasis supplied).[13] The emphasized portion of New York law is mandatory, not permissive; the permissive character of the New Jersey statute was determinative in the reasoning of the court.

This decision conforms to the results of earlier cases, in not permitting a subpoena duces tecum to issue to a resident of New York state, on request of a commissioner of a sister state, in the case of non-judicial hearings. It goes further, however, by stating that in order for a subpoena duces tecum to issue in New York on the request of such a commissioner of a sister state or foreign nation, there must be, in the matter pending in that state or nation, a trial and determination of issues, and a final order or judgment of rights, duties, or liabilities.

[7] Matter of Klein, 307 N. Y. 909, 123 N. E. 2d 596 (1954).
[8] See note 3, *supra.*
[9] 149 App. Div. 157, 132 N. Y. Supp. 1023 (1st Dep't 1911).
[10] N. Y. CIV. PRAC. ACT § 4.
[11] N. Y. CIV. PRAC. ACT § 5.
[12] N. J. REV. STAT. 40:6-2.
[13] N. Y. GEN. MUN. L. § 4.

PROCEDURE—APPELLATE DIVISION HELD TO HAVE POWER TO INCREASE VERDICT AS ALTERNATIVE TO ORDER GRANTING NEW TRIAL FOR INSUFFICIENCY OF VERDICT.—In affirming a decision of the Appellate Division, First Department,[1] the Court of Appeals recently upheld the power of the Appellate Division to increase a verdict conditionally in lieu of affirming an order of the trial court which had ordered a new trial after setting aside a verdict as inadequate.[2]

After trial of a negligence action, the jury awarded damages to plaintiff in the amount of $1,000. The trial court then granted plaintiff's motion to set aside the verdict as inadequate, and ordered a new trial. The defendant appealed to the Appellate Division, where the order was affirmed *unless* the defendant stipulated to increase the verdict to $2,500, an amount which the court felt was the maximum that could be allowed without being excessive as a matter of law. The defendant so stipulated and the Appellate Division entered a verdict accordingly. On appeal to the Court of Appeals, the plaintiff took the position that the Appellate Division did not have the power to render such a verdict, as it constituted an unwarranted interference with the trial court's discretion, and that such a verdict deprived her of a jury trial.

The authority of an appellate court to take this form of action is found in § 584 of the Civil Practice Act[3] which authorizes the appellate courts to make "final judgments upon the right of any or all of the parties." In 1917, prior to the passage of the Civil Practice Act, the Court of Appeals in the case of *Herrman* v. *United States Trust Co.*[4] construed § 1317 of the Code of Civil Procedure (the forerunner to § 584 of the Civil Practice Act) to allow the Appellate Division to reduce the amount of a verdict rendered by the jury, which verdict had been set aside by the trial court as excessive in ordering a new trial. The Appellate Division's modification of the trial court's order was contingent upon the defendant's stipulation to accept a lesser verdict in lieu of a new trial. In the *Herrman* case, the Court of Appeals held that § 1317 of the Code of Civil Procedure gave the appellate courts the power to render any verdict on appeal which the trial court could or should have rendered.

In a case[5] subsequent to the enactment of the Civil Practice Act, the Court of Appeals, by affirming a decision of the Appellate Division,[6] construed the words "final judgment upon the right of any or all of the parties", as used in § 584 of the Civil Practice Act, to the same effect as had been given that phrase by the court in the *Herrman* case.

The plaintiff's further contention, that the Appellate Division's decision in the instant case deprived her of her right to a trial by jury as provided for in the New

[1] O'Connor v. Papertsian, 284 App. Div. 245, 130 N. Y. S. 2d 817 (1st Dep't 1954).

[2] 309 N. Y. 465, 131 N. E. 2d 561 (1956).

[3] "(1) Upon an appeal from a judgment or an order, any appellate court to which the appeal is taken, which is authorized to review such judgment or order, may reverse or affirm, in whole or in part, or may modify the judgment or order appealed from, and each interlocutory judgment or intermediate or other order which it is authorized to review, and as to any or all of the parties. It shall thereupon render judgment of affirmance, judgment of reversal and final judgments upon the right of any or all of the parties, or judgment or modification thereon, according to law, except where it may be necessary or proper to grant a new trial or hearing, where it may grant a new trial or hearing."

[4] 221 N. Y. 143, 116 N. E. 865 (1917).

[5] United Paperboard Co. v. Iroquois Paper and Pulp Co., 249 N. Y. 588, 164 N. E. 594 (1928).

[6] 217 App. Div. 253, 217 N. Y. Supp. 762 (4th Dep't 1926).

York State Constitution,[7] was also dismissed by the Court of Appeals as being without merit. The court cited in support of its holding the case of *Middleton* v. *Whitridge*,[8] wherein it had been held that "the defendants had their case tried by the jury once and that they have no constitutional right to two jury trials." In the instant case, the Appellate Division in no way reversed the jury's findings but merely agreed with the trial court that the verdict was inadequate and therefore set a maximum limitation, as a matter of law, on the verdict to be awarded, which the defendant stipulated to pay in lieu of a new trial.

By so ruling, the court has by express holding extended § 584 to permit the Appellate Division not only to reduce a verdict upon plaintiff's stipulation to accept a lesser verdict, but also to permit the increase of a verdict upon defendant's stipulation to pay such amount in lieu of a new trial. In both instances it is the respondent, over whose objection the jury verdict was set aside by the trial court and the appeal taken, who agrees by stipulation to accept the appellate court's verdict in lieu of a new trial.

PROCEDURE—STATE EMPLOYEES' RETIREMENT SYSTEM HELD A MERE STAKEHOLDER OF MONEY FRAUDULENTLY TRANSFERRED TO IT BY EMPLOYEE DEBTOR, AND THEREFORE HAS NO SOVEREIGN IMMUNITY FROM SUIT BY CREDITOR IN SUPREME COURT.—The New York Court of Appeals has ruled that when a member of the New York State Employees' Retirement System fraudulently transfers funds to the System for his account to avoid making support payments to his wife under a separation agreement, the husband, in an action brought by the wife, is the real party in interest, and the doctrine of sovereign immunity will not be applied to bar the wife's recovery of the funds from the System.[1]

After executing a separation agreement in which he agreed to pay his wife $100.00 a month, the husband made two payments and defaulted on the balance. Plaintiff thereafter sued to recover installments as they become due, and discovered that the husband, an employee of the State of New York and a member of the Retirement System, had recently received $2,627.22 from the sale of securities and had deposited the sum with the Retirement System "to be credited to his account." The plaintiff, naming her husband and the Retirement System as defendants, sought a judgment, setting aside the transfer as fraudulent and void as to her[2] so that she could recover the amount of her judgments from the fund. The Supreme Court at Special Term dismissed the complaint as to the Retirement System on the ground that the System exercised a governmental function of the state and therefore was immune from suit in the Supreme Court. The Appellate Division affirmed,[3] but the Court of Appeals reversed, on the ground that the real controversy was between plaintiff and her husband, and that the System was only a stakeholder and therefore not insulated by the doctrine of sovereign immunity.

[7] N. Y. CONST. art. 1 § 2.
[8] 213 N. Y. 499, 507, 108 N. E. 192, 199 (1915).

[1] Glassman v. Glassman and New York State Employees' Retirement System, 309 N. Y. 436 (1956).
[2] N. Y. DEBTOR AND CREDITOR L. § 273: "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration."
[3] 284 App. Div. 1066, 149 N. Y. S. 2d 225 (2d Dep't 1956).

The court agreed that the Retirement System is the kind of state instrumentality that is clothed with the sovereign immunity of the state, but the court felt that under § 273 of the Debtor and Creditor Law the transfer of funds by the husband was fraudulent as to his creditor wife. Therefore the court held as it had in a previous case, that the creditor may levy upon property which she is "entitled to treat as belonging to the debtor, albeit the title is ostensibly lodged elsewhere."[4]

Immunity of the sovereign from suit is an ancient principle still in force today, although the sovereign may by express statutory provision waive the immunity.[5] New York has waived its immunity to the extent that it has consented to be sued in the Court of Claims.[6] The Supreme Court does not have jurisdiction over actions against the state itself. The state's immunity from suit is equally applicable to its agencies and officers.[7] An action may not be prosecuted against a state officer or agency where the real party in interest is the state itself,[8] and, where the state acts through an instrumentality, an action against such agency is deemed an "action against the state" as respects immunity of the state from actions on tort claims.[9]

An action against a public official in his personal capacity can, of course, be brought in any court of original jurisdiction where an action can be maintained against the public official as a private person, but if the action is brought against a public agent in his official status, the claim is in fact against the state and can be maintained only in accordance with the consent of the state, that is, in the Court of Claims.[10] Suits against state officers to recover, or direct the disposition of property in the possession of the state are generally regarded as suits against the state.[11]

New York State Employees' Retirement System exercises a governmental function, and a complaint against it in the Supreme Court in an earlier case was dismissed on the ground that the court neither had jurisdiction over the person of the defendant nor over the subject matter of the suit.[12] It has been held that in an action by low bidders against the state and city officers for rescission of a bid and for return of the bid check on the ground of error in the computation of the bid, the fact that officers were sued in their official capacity and not as individuals almost conclusively established that the state was the real defendant.[13]

The precise point decided in the instant case had not, apparently, been considered before in New York. In holding that the Retirement System was here a mere stakeholder, the court emphasized that it was the defendant husband's act that was actually the basis of the action. The state had no direct interest in the outcome of the case, therefore, it was not a "suit against the state."

4 Hearn 45th St. Corp. v. Jano, 283 N. Y. 139, 27 N. E. 2d 814 (1940).

5 Goodwill Industries of El Paso v. United States, 218 F. 2d 270 (5th Cir. 1954).

6 N. Y. Ct. Cl. Act §§ 8, 9, 12.

7 Matter of Woitasek, 179 Misc. 947, 40 N. Y. S. 2d 514 (Sup. Ct. N. Y. Co. 1943).

8 Matter of Hicka, 180 Misc. 173, 40 N. Y. S. 2d 267 (Sup. Ct. N. Y. Co. 1943).

9 Beldon v. Mortgage Commission, 173 Misc. 731, 19 N. Y. S. 2d 112 (Sup. Ct. N. Y. Co. 1940).

10 Breen v. Mortgage Commission, 285 N. Y. 425, 35 N. E. 2d 25 (1941), citing Adler, Inc. v. Noyes, 285 N. Y. 34, 32 N. E. 2d 781 (1941).

11 Louisiana v. Jumel, 107 U. S. 711, 2 S. Ct. 128, 27 L. Ed. 448 (1882). See also Christian v. Atlantic & N. C. R. Co., 133 U. S. 233, 10 S. Ct. 260, 33 L. Ed. 589 (1890).

12 Sunlit Gardens v. Moore, 183 Misc. 343, 48 N. Y. S. 2d 376 (Sup. Ct. Kings Co. 1944).

13 Psaty v. Duryea, 306 N. Y. 413, 118 N. E. 2d 584 (1954).

TORTS—UNITED STATES NOT LIABLE FOR INJURY CAUSED BY CRASH OF GOVERNMENT-OWNED PLANE ON LOAN TO CIVIL AIR PATROL OPERATED BY CIVILIAN CAP MEMBER.—The United States Court of Appeals for the Tenth Circuit recently held that the United States is not liable under the Federal Tort Claims Act[1] for the death of a passenger in the crash of a Civil Air Patrol aircraft piloted by a Civil Air Patrol member who holds a pilot's license.[2]

Claimants' father was riding as a passenger in a CAP aircraft during an official CAP indoctrination flight. The aircraft was on loan from the United States Air Force and was under the control of a licensed civilian pilot who was a member of the CAP. The plane stalled at an altitude of 200 feet and crashed, killing the pilot and claimants' father.

The claimants asserted a right to bring an action against the United States under the Federal Tort Claims Act. In their allegations they relied mainly upon legislation[3] enacted subsequent to the issuance of the original charter of the Civil Air Patrol[4] which established it as a volunteer civilian auxiliary of the Air Force, and authorized the Secretary of the Air Force to accept and utilize its services in fulfillment of the objectives set out in its charter.

The District Court of Oklahoma granted a motion by the Government to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted. On appeal, two questions were raised, namely (1) whether or not the Civil Air Patrol is a "federal agency"[5] and (2) whether or not the pilot of the aircraft was an "employee of the government"[6] within the purview of the statute.

In dealing with the first question, the court cited the primary purpose of the Civil Air Patrol to be to encourage private citizens to contribute voluntarily their efforts and services in furtherance of the public welfare. It may not engage in any business for pecuniary profit or gain. It is not a wholly owned government corporation,[7] nor is it a mixed government corporation.[8] Rather, the control Congress exercises over it is that exercised over any private corporation granted a federal charter, requiring an annual submission to Congress of a report of its proceedings and activities for the preceding calendar year. The court held that the foregoing facts clearly excluded the Civil Air Patrol from the status of a corporation "primarily acting as an instrumentality of the United States" or "a part of the executive department of the United States" or "an independent establishment of the United States" within the meaning of the statute, and that it "was chartered as an independent, non-government entity."

[1] 63 STAT. 101 (1949), 28 U. S. C. § 1346(b) (1952).

[2] Pearl v. United States, 230 F. 2d 243 (10th Cir. 1956).

[3] 68 STAT. 485 (1954), 5 U. S. C. § 626L(1-6) (Supp. 1 1955).

[4] 60 STAT. 36 (1946), 36 U. S. C. §§ 201-208 (1952).

[5] 63 STAT. 106 (1949), 28 U. S. C. § 2671 (1952): "As used in this chapter and sections 1346(b) and 2401(b) of this title, the term . . . 'federal agency' includes executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States, but does not include any contractor with the United States."

[6] 63 STAT. 106 (1949), 28 U. S. C. § 2671 (1952): "As used in this chapter and sections 1346(b) and 2401(b) of this title, the term . . . 'employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States."

[7] A corporation whose financial transactions and operations are kept under annual scrutiny by Congress.

[8] A corporation whose financial transactions are required to be audited by the General Accounting Office.

As to the remaining question, namely whether the fact that the aircraft was government-owned rendered the United States liable, the court held that this did not in and of itself make the pilot an employee of the government in the absence of any more positive evidence.

The court distinguished on the facts the case of *Alexander* v. *Civil Air Patrol*,[9] where it was held that an officer of the United States Air Force, assigned to a local wing of the Civil Air Patrol as a liaison officer, in which capacity he was flying an aircraft which had been assigned to the Civil Air Patrol, was acting "in the line of duty and within the scope of his employment as an officer of the United States Air Force." There, the court had dismissed the action against the Civil Air Patrol when it was established that the plane was owned, operated and controlled by the Air Force, unlike the aircraft in the instant case.

The court considered that reliance by the claimants upon the legislation enacted in 1954[10] was without merit. Its purpose was not to establish the Civil Air Patrol as a "volunteer civilian auxiliary of the Air Force" to the extent of making all its members employees of the government, but rather (as set forth in the Report of the Senate Committee on the Armed Services[11] which accompanied the bill) to remedy a misinterpretation of Public Law 557. That legislation stated that the Air Force could grant all surplus aircraft material and equipment to the Civil Air Patrol. The Federal Property and Administrative Services Act of 1949[12] defined surplus property to mean "property excess to the needs of all Federal agencies." The interpretation of the two laws, read together, was that the Civil Air Patrol, in acquiring surplus Air Force property, came last in line after all the other federal agencies. Section 1 of the 1954 act[13] remedied the situation by permitting the Civil Air Patrol to acquire excess equipment of the Air Force without regard to the Federal Property and Administrative Services Act of 1949.

It is to be noted that no claim was made under Section 5 of the Act of 1954[14] that the pilot was detailed by the Secretary of the Air Force to assist in the training program of the Civil Air Patrol or under Section 6 of the Act of 1954[15] (that the mission was one specifically assigned by the Air Force in time of war or national emergency). Therefore, this case was held to be subject to decisions pertaining to the negligent operation of vehicles or property belonging to the United States while in the custody of others than its employees. These cases[16] have held that merely because the negligent party is, for example, a member of the National Guard, liability is not automatically imputed to the United States. Something more in the way of connecting the negligent party with the United States must be brought forth by the injured person.

[9] 134 F. Supp. 691 (1955).

[10] See note 4, *supra.*

[11] Sen. Rep. 1278, 83rd Cong. 2d Sess. (1954).

[12] 63 STAT. 378 (1949), 40 U. S. C. § 471 (1952).

[13] 68 STAT. 485 (1954), 5 U. S. C. § 626L(1) (Supp. 1 1955).

[14] 68 STAT. 485 (1954), 5 U. S. C. § 626L(5) (Supp. 1 1955).

[15] 68 STAT. 485 (1954), 5 U. S. C. § 626L(6) (Supp. 1 1955). See note 1, *supra.*

[16] Williams v. United States, 189 F. 2d 607 (10th Cir. 1951) and cases cited; King v. United States, 178 F. 2d 320 (5th Cir. 1951), *cert. den.* 339 U. S. 964, 70 S. Ct. 998, 94 L. Ed. 1373 (1951), United States v. Holly, 192 F. 2d 221 (10th Cir. 1951), O'Toole v. United States, 206 F. 2d 912 (3rd Cir. 1953).