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Notes

NOTES

CONSTITUTIONAL LAW—NEW JERSEY SUNDAY CLOSING LAW HELD CONSTITUTIONAL—REVIEW OF OTHER JURISDICTIONS.—On April 4, 1960, the Supreme Court of New Jersey, two Justices dissenting, held the New Jersey Sunday Closing Law of 1959[1] constitutional and valid. The plaintiff in the instant case, *Two Guys from Harrison, Inc.*,[2] a chain of highway stores selling general merchandise, was appealing from a prior decision of the New Jersey Superior Court[3] declaring the Law constitutional.

Chief Justice Weintraub spoke for himself and two others (Burling, J. filed a concurring opinion) in delivering the majority opinion of the Court. The Chief Justice reviewed the history of the Sunday Closing Laws, beginning with the command at Mt. Sinai:

"Ye shall keep the Sabbath therefore; for it is holy unto you: everyone that defilith it shall surely be put to death: for whosoever doeth any work therein, that soul shall be cut off from among his people. Six days may work be done; but in the seventh is the Sabbath of rest, holy to the Lord; whosoever doeth any work in the Sabbath day, he shall surely be put to death."[4]

The majority opinion continued by tracing the legislative history of the New Jersey Sunday Closing Law. In substance, the history of the law was relatively quiescent until the year 1951. In that year, the New Jersey Legislature repealed the existing Sunday law[5] and supplanted it with a new law[6] which contained no penalty clause. The New Jersey Supreme Court promptly held[7] that the removal of the penalty clause changed the character of the statute from a penal statute to an expression of public policy only. This, however, did not change the basic public policy of the state against exposure and sale of goods on Sunday, but left to the various municipalities the enforcement of Sunday laws by their own ordinances. The power to enact such ordinances was present by virtue of the New Jersey Home Rule Act,[8] which enabled the Municipalities to enact ordinances for the preservation of public health, safety, and welfare of their citizens.

This proved to be slightly less than successful. Efforts to adopt different policies failed because of the restraining effect of the policy established by the state law,[9] and because of the problem created by the fact that each municipality could not protect itself from the activities of its neighbors. Pressure developed for a statewide solution to the problem. The legislature responded by passing a new law in 1958[10] which prohibited the sale of certain merchandise throughout the state on Sunday and imposed penalties for violations. There remained one problem—certain resort areas of the south Jersey coast wanted no part of Sunday closing at all. To placate these counties

[1] L. 1959, C. 119 N.J.S.A. 2A: 171-5.8 et seq. ". . . unlawful . . . to sell . . . clothing or wearing apparel, building materials, furniture, home or office furnishings, or household, business, or office appliances."

[2] Two Guys from Harrison v. Furman, 32 N.J. 199, 160 A.2d 265 (1960).

[3] Two Guys from Harrison v. Furman, 58 N.J. Super. 313, 156 A.2d 57 (1959).

[4] Exodus 31: 14, 15.

[5] N.J.R.S. 2A: 207-1.

[6] 2A: 171-1 N.J.S.A. "No worldly employment or business, except works of necessity and charity, shall be performed . . . on Sunday."

[7] State v. Fair Lawn Service Center, 20 N.J. 468, 120 A.2d 233 (1956).

[8] N.J.S.A. R.S. 40-48-2.

[9] Auto-Rite Supply Co. v. Woodbridge Twp., 25 N.J. 188, 135 A.2d 515 (1957); Hertz Washmobile System v. So. Orange, 25 N.J. 207, 135 A.2d 524 (1957).

[10] L. 1958, C. 138; N.J.S.A. 2A: 171-5.1.

of Cape May, Ocean and Atlantic, a section was included in the law exempting these three counties therefrom, solely on the basis of population.[11] That statute was soon put to the test, and was declared unconstitutional in the case of *Sarner v. Union Township*[12] on the ground that the exclusion of the three counties was unreasonable and arbitrary. No appeal was prosecuted. The legislature promptly enacted the present law, which is the subject of the instant litigation.[13] This statute, almost identical in scope to the ill-fated 1958 law, eliminated the three-county exemption and provided instead for referendums to be held in each county at the next regular election.[14] In 15 counties of the state, petitions were filed in accordance with the provisions of the new law[15] and the question was put to the voters at the general election held November 3, 1959. In 12 of the 15 counties, the voters approved the application of the statute to their counties. In the face of this apparent display of public opinion, the plaintiff herein brought suit to declare the new law invalid.

Thus brought up to date, the Court in the instant case proceeded to deal with the plaintiff's contentions. *Two Guys* alleged that the statute was beyond the police power of the state; that it contravened the ban against the union of church and state in the United States and New Jersey Constitutions; and finally, that if the act could survive critical inquiry as to power to legislate, nonetheless the classification of what might and might not be sold denied equal protection of the law as guaranteed by the Fourteenth Amendment and the State Constitution. The first issue decided by the Court was whether the basic 1951 revision[16] violated the edict of the First Amendment as made applicable by the Due Process clause of the Fourteenth Amendment of the Federal Constitution that a state:

". . . shall make no law respecting an establishment of religion",

or of Article I, par. 4 of the New Jersey Constitution, that,

"There shall be no establishment of one religious sect in preference to another."

After a discussion of the intent of the legislature, the Court concluded that the 1951 Law was more than a valid exercise of the police power of the state providing for the public health and welfare by providing a day of rest from labor, because the 1951 Law banned all forms of recreation, including walking for pleasure[17] except upon approval by local referendum. However, the opinion continued, there was no need to pass on the validity of the 1951 Law, since the effect of the 1959 Law was to repeal by implication the earlier Law, for if under the 1951 Law any type of activity was prohibited for religious reasons, there could be no reasonable basis for the differentiation in the 1959 Law between the sale of the five items it proscribes and all other items which it leaves untouched. Thus the Court declared,

"We accordingly conclude that Chapter 119 repealed and superseded the inconsistent policy contained in N.J.S. 2A: 171-1, 2 and 6 to 12, N.J.S.A."[18]

The opinion then went on to discuss the 1959 Law on its own merits. It concluded

[11] N.J.S.A. 2A: 171-5.5. "The provisions of this act shall be inapplicable to counties bordering on the Atlantic Ocean having a population of less than 225,000."

[12] Sarner v. Union Twp., 55 N.J. Super. 523, 151 A.2d 208 (1959).

[13] See note 1, supra.

[14] N.J.S.A. 2A: 171-5.12.

[15] N.J.S.A. 2A: 171-5.13 to 5.15.

[16] Supra note 6.

[17] N.J.S.A. 2A: 171-6.

[18] Supra note 2 at 160 A.2d 279.

that the Law was devoid of any religious orientation, for as Justice Weintraub declared,

"We know of no religious order which limits its edict against Sunday activity to the sale of the five categories of items prohibited by Chapter 119."[19]

The plaintiff also alleged that the statute sought to protect the urban merchant against his highway adversary, and plaintiff tried to invoke the principle that the state police power may not be used to restrain competition merely for the private advantage of a particular group. The Court dismissed this allegation by simply declaring that it had no way of knowing that such was the purpose, and that this contention of plaintiff's was in the realm of pure conjecture. Finally, the majority opinion concluded,

"We accordingly conclude that the presumption that Chapter 119 is constitutional was not overcome and hence the trial court properly denied plaintiff's motion for summary judgment . . . ."[20]

But the Court also remanded the case for further proceedings in order to give the plaintiff the opportunity of proving that the 1959 Law uses an unreasonable and capricious classification by singling out five commodities as the object of the Sunday ban.

Justice Burling, in his concurring opinion, agreed with the majority reasoning, but further declared that one of the intents of the legislature was to free the highways from traffic caused by commercial activity to an extent sufficient to allow their unobstructed use by persons seeking relaxation. The dissenting opinion, filed by Justice Francis on behalf of himself and Justice Schettino, disagreed with the basic premise of the majority that the 1959 Law, by implication, repealed the 1951 Law. In a lengthy, well-written opinion, the dissent took the view that the 1959 Law merely implemented the older law by providing for penalties in cases of sales of five commodities. This basic purpose was still to preserve Sunday as the day of rest, for if the 1959 Law must stand alone, it is unconstitutional and void, because of its arbitrary and discriminatory selection of five commodities.

"It is entirely inconsistent with our fundamental freedoms to single out the particular five classes of goods for Sunday prohibition and to select those who sell them for discipline and restraint, while at the same time releasing the overwhelming majority of other citizens to do as they please in the field of business on Sunday."[21]

The dissent concluded that the basic Sunday Closing Law, the 1951 statute 2A: 171-1 N.J.S.A., was the only valid law now existing, and if the legislature feels that is too harsh, no obstacle exists to prevent the drafting of a new law.

Sunday legislation is more than 15 centuries old. It originated in Rome in 321 A.D. when Constantine the Great passed an edict commanding all Judges and citizens to rest on the venerable day of the sun.[22] These laws were enacted in England as a by-product of the church-state union. The American colonists brought with them the tradition of a state established religion, and perhaps largely for sectarian reasons the authority of colonial government was exerted to support the Christian Sabbath.[23] As the years passed, these laws were held to be a valid exercise of the state's police power; based not on religious grounds, but for the purpose of protecting employees by preventing them from laboring or having to labor on Sunday.[24] With the growth of

[19] Id. at 279.
[20] Id. at 283.
[21] Id. at 293.
[22] State v. Malone, 238 Mo. App. 939, 192 S.W.2d 68 (1946).
[23] Supra note 2, 160 A.2d 268.
[24] City of Harlan v. Scott, 290 Ky. 585, 162 S.W.2d 8 (1942).

commerce and industry however, came new problems. For instance, in Massachusetts, in 1858, the legislature, apparently yielding to various pressure groups, commenced the practice of writing in various exceptions to the general prohibition against secular activities on Sunday, resulting in some 70-odd amendments, and leading to the statement in one Court opinion that:

"The result of all this is that the Sunday Law as it now exists on the books, is an almost unbelievable hodgepodge."[25]

Though these statutes exempting certain classes of merchandise or specific commodities were once widely upheld,[26] later decisions have evidenced an increasing trend toward holding them unconstitutional, as being both discriminatory and unreasonable.[27] They have recently come under increased attack for three reasons:

1. The advent of the highway merchant located out of the urban area proper, and approachable mainly by automobile, has heightened competition between the urban merchant and his roadside competitor.[28]

2. The strengthening and enlarging of existing Sunday laws, especially the penal aspects thereof.[29]

3. The increased prosecution of violators under these laws.[30]

They have always been assailed on religious grounds by Orthodox Jews[31] and other Christian and Moslem sects who believe that Saturday is the Sabbath. These Jewish merchants claim that the Sunday laws force them to operate at a disadvantage by compelling them to remain closed two days per week instead of one, as do their competitors.[32] At any rate, the following is a brief summary of Sunday Law decisions, with emphasis on recent cases in the northeastern United States, since many of the Western states do not have Sunday closing statutes.

New York

The New York view was laid down by the Court of Appeals in the much-cited 1950 decision of *People v. Friedman*.[33] There, the defendant had been convicted of having publicly sold uncooked meats on Sunday in violation of a section of the New York Penal Law.[34] The Court declared as its policy that,

". . . a plea that a statute imposes inconvenience or hardship upon a litigant should be addressed to the legislature; we may not usurp its functions by legislating judicially."[35]

The Court recognized that the Sunday Law was religious in origin, but had been maintained by the legislature for public health and safety purposes. The Court went

[25] Crown Kosher Super Market v. Gallagher, 176 F. Supp. 466, 472 (U.S.D.C.D. Mass. 1959).

[26] State ex rel. Hoffman v. Justus, 91 Minn. 447, 98 N.W. 325 (1904); Motor Car Dealer's Ass'n. v. Haines, 128 Wash. 267, 222 P. 611 (1924).

[27] Mt. Vernon v. Julian, 369 Ill. 447, 17 N.E.2d 52 (1938); Broadbent v. Gibson, 105 Utah 53, 140 P.2d 939 (1943).

[28] Supra note 2.

[29] Supra notes 1, 10.

[30] Crown Kosher Super Market v. Gallagher, 176 F. Supp. 466 (U.S.D.C.D. Mass. 1959).

[31] Com. v. Starr, 144 Mass. 359, 11 N.E. 533 (1887); Cohen v. Webb, 175 Ky. 1, 192 S.W. 828 (1917).

[32] Supra note 30.

[33] People v. Friedman, 302 N.Y. 75, 96 N.E.2d 184 (1950).

[34] N.Y. Penal Law § 2147.

[35] Supra note 33 at 79, 96 N.E.2d at 186.

on to hold that Sec. 2147 N.Y.P.L. did not violate the First Amendment of the United States Constitution, because it does not set up a church, make attendance upon religious worship compulsory, impose restrictions upon expression of religious belief, work a restriction upon the exercise of religion according to the dictates of one's conscience, provide compulsory support, by taxation or otherwise, of religious institutions, nor in any way enforce or prohibit religion. The last words of the Court were,

"The defendant's remedy lies with the legislature."[36]

Certiorari was denied by the United States Supreme Court on the ground that there was no substantial Federal question involved.[37]

In May, 1959, the question was again before the Court of Appeals, and it was held that sales of gravestones and monuments fell within the ban of Sec. 2147 even though these items were not specifically referred to in the statute.[38]

"The simple fact is that the legislature, by enacting Sec. 2147, has announced that all sales, except those specifically excepted in the statute itself, are forbidden . . . ."[39]

Frozen meats are "uncooked fresh meats" within the meaning of Sec. 2147. In *People v. Kless*[40] the plaintiff contended that since frozen meats were not specifically mentioned within 2147, they were exempt from the law. The City Court of Buffalo, per Kuszynski, J., disagreed, and declared,

"Freezing is a process which keeps meats in a fresh state for indefinite periods; hence frozen meats *are* uncooked fresh meats and within the prohibitions of Sec. 2147."[41]

There have been a confusing series of cases involving self-service laundries in the metropolitan area within the last year or two. In a 1958 decision, the Nassau County Court reversed the District Court and held that it was no violation of Sunday Laws for the owner of a self-service laundry to allow customers to enter his premises and wait on themselves.[42] But this decision was apparently overruled a year later when the District Court held that Welt *was* violating the Law whether he was on the premises or not.[43] On June 11, 1959, the Appellate Division with two Justices dissenting[44] held that a self-service laundry *was* within the purview of Sec. 2146.[45] A year before, the same Court had reached an opposite conclusion in *People v. Gwyer*.[46] On June 18, 1959, however, the same body decided that a patron who used a self-service laundry was not guilty of violating Sec. 2143 N.Y.P.L.[47] The Court justified its finding by quoting from the Bible;

"(A)nd the man shall wash his clothes and shall be clean . . . and his clothes being washed he shall be clean. Leviticus, Ch. 13, pars. 6,34."[48]

[36] Id. at 79, 96 N.E.2d at 187.
[37] 341 U.S. 907, 71 S. Ct. 623, 95 L. Ed. 1345 (1950).
[38] People v. Kupprat, 6 N.Y.2d 88, 188 N.Y.S.2d 483 (1959).
[39] Id. at 89, 188 N.Y.S.2d at 485.
[40] People v. Kless, 17 Misc. 2d 17, 190 N.Y.S.2d 82 (Buffalo City Ct., Erie Cty. 1959).
[41] Id., 190 N.Y.S.2d at 83.
[42] People v. Welt, 14 Misc. 2d 275, 178 N.Y.S.2d 313 (Nassau County Ct. 1958).
[43] People v. Welt, 19 Misc. 2d 462, 191 N.Y.S.2d 403 (Nassau County Dist. Ct. 1959).
[44] People v. Kaplan, 8 A.D.2d 163, 188 N.Y.S.2d 673 (1st Dept. 1959).
[45] N.Y. Penal Law § 2146 "All trades, manufactures, agricultural or mechanical employments . . . are prohibited, except . . . works of necessity."
[46] People v. Gwyer, 7 A.D.2d 711, 179 N.Y.S.2d 987 (1st Dept. 1958).
[47] People v. Aliprantis, 8 A.D.2d 276, 187 N.Y.S.2d 477 (1st Dept. 1959).
[48] Id., 187 N.Y.S.2d at 480.

The most recent case in this field, as of the time of writing, was resolved on a question of evidence. In *People's Laundromat v. Beckmann*[49] the Supreme Court of Nassau County because of insufficiency of evidence, refused to grant an injunction compelling the police to cease and desist from blocking the plaintiff's store. It appeared that the plaintiff merely introduced into evidence a photograph of a policeman standing in front of the laundromat. This, the Court ruled, was insufficient to prove the plaintiff's case, and the action was dismissed.

CONNECTICUT

There has been limited litigation in this State concerning Sunday Closing Laws. The Connecticut statute,[50] reproduced in the footnotes, is fairly typical of the general class of Sunday Closing Laws in force throughout the United States which do not enumerate certain classes of merchandise to be exempted therefrom. The constitutionality of the Statute was last upheld by the state's highest Court in 1958.[51] The Connecticut Law contains a religious exemption provision[52] also found in similar language in the laws of other states.[53]

MASSACHUSETTS

Perhaps the most important in the recent series of Sunday Law decisions was handed down by a 3-Judge Federal District Court in 1959, which declared the Massachusetts Law[54] unconstitutional.[55] In the *Crown* case, the state's Sunday Closing Law was challenged by a Springfield Kosher Supermarket. It was and is the only market of its type for a 26-mile radius, and its customers come from long distances to shop there. The market was owned and operated by Orthodox Jews, who duly observed the Sabbath from sundown Friday night to sundown Saturday night. Many of its customers were also Orthodox. For many years the Crown market had been closed down from sundown on Friday, but had been open for business from 8 A.M. to 6 P.M. on Sundays, in violation of a special provision of the Massachusetts Law allowing limited sales of kosher meat on Sunday.[56] The market alleged that it made more than one-third of its week's gross sales on Sunday. Circuit Judge Magruder, speaking for the majority of two, McCarthy, J., dissenting, attacked the Massachusetts Law as

[49] People's Laundromat v. Beckmann, 20 Misc. 2d 867, 190 N.Y.S.2d 131 (Sup. Ct. Nassau Co. 1959).

[50] Conn. G.S. 53:300 (Rev. 1958) "Any person who does, or requires an employee to do, any secular business or labor . . . unless required by necessity or mercy . . . or sells or exposes for sale any goods, wares, or merchandise . . . shall be fined not more than $50 . . . ."

[51] State v. Shuster, 145 Conn. 554, 145 A.2d 196 (1958).

[52] Conn. G.S. 53:303 (Rev. 1958): "No person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath, and actually refrains from secular business and labor on that day . . . and who has filed written notice of such belief with the prosecuting attorney . . . shall be liable to prosecution for performing secular business and labor on Sunday, provided he shall not disturb any other person who is attending public worship."

[53] Michigan, Mich. Stat. Ann. Sec. 18:855; Rhode Island, Gen. Laws Sec. 11:40-4; Texas, Vernon's Texas Stat., Art. 284; Ohio, Page's Ohio Gen. Code Sec. 13045; Minnesota, Minn. Stat., Sec. 614.30, inter alia.

[54] Mass. Gen. Laws Ann., Ch. 136.

[55] Supra note 30.

[56] Mass. Gen. Laws Ann., Ch. 136-6.

being so riddled with exceptions as to render it void as violative of due process. The United States Supreme Court has agreed to review this decision in its coming session.[57]

PENNSYLVANIA

In 1959, the basic existing Sunday Statute,[58] enacted in 1939, was further strengthened by a new provision relating to the selling of personal property on Sunday, and providing for a penalty of $100 for the first offense and $200 for any subsequent offense during the same year.[59] *Two Guys from Harrison,* the same firm which contested the New Jersey law, sought a declaratory judgment and also sought to enjoin the District Attorney from enforcing the new law.[60] After determination that the Federal Court had proper jurisdiction, the case came before the District Court again, and it upheld the 1959 Law, but refused to pass on the constitutionality of the 1939 Law, leaving that question up to the state courts.[61] District Judge Welch filed a separate opinion, concurring in part, and dissenting in part. He agreed with the majority in that it was not for the courts to strike down the basic Sunday Law, which he maintained represented the desire of the people to hold themselves above crass materialism for at least one day. He disagreed with them, however, in that he did not believe that the 1959 amendment was based on considerations of public health, welfare or security, but was in reality, an act to regulate commerce and deal with competition among businessmen.

Of note is the fact that the Pennsylvania Court had already passed on the validity of the 1939 Law in *Com. v. Bauder,*[62] decided in 1959. It had upheld the law as not being unreasonable or discriminatory. The question again came before the state's highest Court in 1960.[63] The Court, basing its reasoning on *People v. Friedman*[64] and *Two Guys v. McGinley,*[65] refused to grant an injunction restraining the Chief of Police of Montgomery County from enforcing the 1959 Amendment. Despite these decisions, on April 20, 1960, a Quarter-Sessions Judge of Philadelphia County declared the Pennsylvania Sunday Closing Law unconstitutional, and dismissed the convictions of a manager and one employee of a Philadelphia bargain store, who had been arrested for selling on Sunday.[66] Judge Raymond Pace Alexander reasoned that since the Law classified articles of merchandise arbitrarily, it violated due process since public health and welfare were not involved. If, on the other hand, it was a religious law, it would again fail, for the United States Constitution forbids laws based on religious grounds as set forth in the First Amendment. Thus it follows that the Law is void, for the basis of the Sunday Law is religious, and the Judge declared that neither Christianity nor any other religion could be part of the law of the Commonwealth. At the time of this writing, an appeal by the Commonwealth is pending.

[57] 362 U.S. 960, 80 S. Ct. 876, 4 L. Ed. 2d 875 (1960).

[58] Purdon's Penna. Stat. Ann., § 4699.4.

[59] Purdon's Penna. Stat. Ann., § 4699.10.

[60] Two Guys from Harrison-Allentown v. McGinley, 266 F.2d 427 (3rd Cir. 1959).

[61] Two Guys from Harrison-Allentown v. McGinley, 179 F. Supp. 944 (U.S.D.C.E.D. Pa. 1959).

[62] 14 D. & C. 2d 571, aff. 145 A.2d 915 (1959).

[63] Rubin v. Bailey, 398 Pa. 271, 157 A.2d 882 (1960).

[64] Supra note 36.

[65] Supra note 61.

[66] Com. v. Cavallero and Levenston (not yet reported), Quarter-Sessions Court of Philadelphia County, Philadelphia, Pa.

MARYLAND

In a decision handed down in May, 1959[67] the Maryland Court of Appeals upheld the Maryland Sunday Closing Law. The Court affirmed the convictions of several businessmen who had been charged with selling merchandise on Sunday in violation of the state Sunday Law.[68] The Court relied on two prior Maryland decisions and the New York case of *People v. Friedman*.[69]

NEW JERSEY

The situation in New Jersey has already been dealt with *supra,* but one additional decision[70] is worthy of comment. The New Jersey Law also contains an exemption provision,[71] similar to other states.[72] In the *Carr* case, the defendant had been convicted of violating a local ordinance of the Town of West Orange identical in form and substance to the basic New Jersey Sunday Law of 1951 dealt with at length in the principal case. Defendant's store had not been open for business, but its employees had been taking inventory on Sunday. The conviction was affirmed, the Court holding that the exemption provision does not apply to a Corporation, but only refers to the individual working on his own premises.

NEW HAMPSHIRE

There has been no recent litigation involving Sunday Closing laws in this New England state, possibly due in part to an interesting local option amendment[73] to the basic Sunday Law.[74]

KANSAS

In April 1959, the Kansas Supreme Court dismissed an action to have a Kansas City ordinance declared unconstitutional.[75] The ordinance prohibited the holding of public auctions on Sunday. Plaintiff, an auctioneer, had charged that the ordinance was violative of due process in denying him his livelihood. The Court quoted at length from an earlier Missouri case[76] to the effect that

"Sunday is a day of dual character. It is the Christian's day of worship; it is also the day of rest of men everywhere, irrespective of whether they have or have not a creed or a religious belief . . . they ar civil, not religious, regulations, and are based upon a sound public policy which recognizes that rest one day in seven is for the general good of mankind."[77]

[67] McGowan v. State, 220 Md. 117, 151 A.2d 156 (1959).

[68] Ann. Code Md. Art. 27, § 492.

[69] Judefind v. State, 78 Md. 510, 28 A. 405 (1894); Levering v. Bd. of Pk. Comm., 134 Md. 48, 106 A. 176 (1919); see note 36, supra.

[70] Town of West Orange v. Carr's Dept. Store, 53 N.J. Super. 237, 147 A.2d 97 (1959).

[71] N.J.S.A. 2A:171-4.

[72] Supra note 53.

[73] N.H.R.S.A. § 578.5: "Nothing in this chapter shall prevent the selectmen of any town . . . from adopting by-laws and ordinances permitting and regulating retail business, plays, games, sports, and exhibitions . . . provided such by-laws . . . are approved by a majority vote of the legal voters present and voting at the next legal election. But no such by-laws . . . shall permit public dancing, horse racing, or prize fights at any time on the Lord's Day . . . ."

[74] N.H.R.S.A. § 578.3.

[75] ABC Liq. Inc. v. Kansas City, 322 S.W.2d 876 (Kan. 1959).

[76] State v. Chicago, B. & Q. R. Co., 239 Mo. 196, 143 S.W. 785 (1912).

[77] Id. at 209, 143 S.W. at 786.

MICHIGAN

Late in 1959, the Michigan Supreme Court, in a 5-3 decision, upheld the validity of an ordinance of the city of Flint prohibiting the conducting or engaging in the business of selling, renting, or leasing furniture on Sunday.[78] The Court stated that the regulation of certain trades was within the power of the legislature, and since the Law applied with equal vigor to all furniture dealers, it was not discriminatory. Justice Voelker dissented sharply, citing among his objections, the numerical weight of authority found in the cases collected in 57 ALR2d 975.

ILLINOIS

On January 21, 1960, the Illinois Supreme Court, Davis, J. dissenting, held that a Sunday ordinance which prohibited *all* business except "emergency needs" was arbitrary, and hence could not be sustained, since it prohibited all types of business, including harmless activity.[79] Among the plaintiffs were the operators of a motel, a restaurant, and a gasoline service station. The Court cited an earlier Illinois decision[80] as being controlling, in that occupations having no tendency to affect or endanger the public in connection with health, safety, morals or general welfare, and entirely innocent in character, are not within the state's police power.

SUMMARY AND CONCLUSION

The Sunday Closing Laws, religious in their origins, have been turned into battlefields of economic warfare; yet their essentially religious overtone has remained. Authorities agree that one day's respite in seven is the desired objective,[81] but which day? With the authorities in hopeless and total disagreement, it is hoped that the United States Supreme Court will clarify the issue when it reviews the cases which it has agreed to examine in the coming session.[82] P. D. P.

CONFLICT OF LAWS—TRANSFER OF ACTION IN FEDERAL COURTS—FORUM NON CONVENIENS.—In a recent decision,[1] the United States Supreme Court held that under a federal statute providing for the transfer of an action on the grounds of convenience of witnesses to any other district in which the action "might have been brought", the defendant could not as a matter of right obtain transfer by voluntary submission to a district in which the action could not originally have been brought by the plaintiff. In effect, the Court held that venue is jurisdictional and that no privilege exists which would allow a defendant to waive the provisions of the statute.

In two actions joined for purposes of review by the Supreme Court, defendants had moved under 28 U.S.C. § 1404(a)[2] to transfer pending actions to districts which would better suit the convenience of witnesses. Plaintiffs objected in each instance on the ground that at the time of the commencement of the action the defendants were not subject to suit in the proposed transferee districts. They urged that the statute,

78 People's Appliance & Furniture v. Flint, 358 Mich. 34, 99 N.W.2d 522 (1959).
79 Pacesetter Homes v. Vill. of So. Holland, 18 Ill. 2d 247, 163 N.E.2d 464 (1960).
80 Supra note 27.
81 Supra note 77.
82 Supra note 57.

1 Hoffman v. Blaski, Behimer v. Sullivan, 363 U.S. 335, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960).
2 62 Stat. 937, 28 U.S.C. § 1404 (1948).

providing for transfer to a district where the action "might have been brought", neither contemplated nor authorized a transfer based solely on a voluntary submission to the transferee district by the defendants against plaintiffs' protests.

The Supreme Court granted certiorari[3] due to the conflicting decisions of the Circuit Courts on this question.

In the *instant* case, plaintiffs, residents of Illinois, had brought an action for patent infringement against a corporate defendant, incorporated in Texas, and against an individual co-defendant who was also a resident of that state. Plaintiffs had properly sought venue in Texas pursuant to 28 U.S.C. § 1400(b)[4] and had effected service upon defendants there. It was conceded that at the time the action was brought the defendants did not maintain a regular place of business in Illinois and would not have been subject to an action in that state. However, defendants moved to transfer the action to Illinois, under § 1404(a) on the grounds that this would better suit the convenience of witnesses necessary for trial and that there was other litigation pending in Illinois wherein plaintiffs were charging infringement of the same patent and much of this pre-trial information would be relevant to the action against defendants; in fact, defendants sought to consent to consolidation with the Illinois matter. Their motion was granted by the District Court, Northern District of Texas. In affirming this decision, the Court of Appeals, 5th Cir.,[5] found neither a violation of the statute nor an abuse of discretion. That Court stated that the "purposes for which § 1404(a) was enacted would be unduly circumscribed if a transfer could not be made 'in the interest of justice' to a district where they [the defendants] seek the transfer."[6]

The transfer having been effected to the Illinois Federal District Court, the plaintiffs then petitioned the Illinois court to remand the case to Texas, and after various proceedings, their petition for mandamus to compel such re-transfer was granted by the United States Court of Appeals, 7th Cir.[7] This court held that the plain meaning of § 1404(a) limited the possible transferee districts to those in which the plaintiff could have brought the action originally, and that defendant could not later—by submission —obtain a transfer to any district other than one within that limit, and that to hold otherwise would be to unduly expand upon the statute. The court stated in its ruling ". . . It is hardly open to doubt but that it (Congress, in enacting 1404(a)) referred to a district where the plaintiff . . . had a right to bring the case."[8]

The second case, *Behimer v. Sullivan,* involved a stockholders' derivative action brought in Illinois on behalf of minority stockholders of Utah Oil Refining Corporation, a Utah corporation. Plaintiffs, suing on their own behalf and for others similarly affected, were residents of Illinois and New York, respectively. The defendants, Standard Oil Company and Standard Oil Foundation, Inc., were both Indiana corporations but were licensed to do business in Illinois and thus subject to the action pursuant to

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[3] 359 U.S. 904, 79 S. Ct. 583, 3 L. Ed. 2d 570 (1959); 361 U.S. 809, 80 S. Ct. 50, 4 L. Ed. 2d 58 (1959).

[4] 62 Stat. 936, 28 U.S.C. § 1400(b) (1948). "Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

[5] Ex Parte Blaski, 245 F.2d 737 (5th Cir. 1957).

[6] Id. at 738.

[7] 260 F.2d 317 (7th Cir. 1958).

[8] Id. at 320.

28 U.S.C. § 1391(c).[9] The action was based on an alleged illegal acquisition by defendants of the assets of the Utah corporation, and defendants moved to transfer the action to Utah on the grounds that most of the minority stockholders resided there, the books of the Utah corporation were there as well, and the substantive law of Utah would govern at the trial. They, too, sought to submit to the jurisdiction of the Utah court by waiver of objection to venue, as they had not maintained a regular place of business and could not originally have been properly served in Utah. The District Court in Illinois granted defendants' motion,[10] but on mandamus proceedings the Court of Appeals, 7th Cir., following its prior ruling in the *Blaski* case, reversed the District Court.[11] This ruling of the Illinois Court of Appeals was affirmed by the Supreme Court in the instant case.

It is basic to our jurisdictional concept of the administration of law that a plaintiff may only bring his plea before a court having jurisdiction both of the subject-matter and of the defendant. It is also basic that a defendant cannot confer jurisdiction, but that the court must have authorization to adjudicate concerning the subject-matter in a given case.

Article III of the Constitution, in addition to enumerating the cases and controversies within the judicial power of the United States, and creating the Supreme Court with certain areas of original jurisdiction and appellate review, provides that the judicial power be vested "in such inferior Courts as the Congress may from time to time ordain and establish." Accordingly, the creation of the federal courts and their jurisdiction is derived solely from Congressional enactment, subject to the constitutional statement of federal judicial power. It is well settled that the Constitution "simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it."[12] Accordingly, jurisdiction must be strictly exercised within the provisions of the act conferring it.[13]

Basically, a Congressional authorization for the federal district courts to entertain suits based on violations of certain federal laws or on diversity of citizenship gives jurisdiction to all districts of that subject-matter or class of cases. The dual citizenship enjoyed by all citizens of this country raises an inherent conflict as to the district in which the trial should proceed. The authorizing statutes meet this problem by specifying where the suit may be brought, subject, of course, to proper service of that court's process. The general authority for service is set forth in the Federal Rules of Civil Procedure;[14] otherwise extra-territorial effect is only provided in specific instances.

The heart of the question is whether these statutory requirements as to venue pertain to the designation of jurisdiction or are merely enacted as a protection to the defendant against his having to go many miles from his residence or place of business to defend a suit. If the latter view is correct, the defendant should logically be free to

[9] 62 Stat. 935, 28 U.S.C. § 1391 (1948): "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

[10] Behimer v. Sulivan, 261 F.2d 467, 468 (C.A. 7th Cir. 1958).

[11] Behimer v. Sullivan, supra note 10.

[12] Kline v. Burke Construction Co., 260 U.S. 226, 43 S. Ct. 79, 67 L. Ed. 226 (1922).

[13] 54 Am. Jur. 662, 665.

[14] Fed. R. Civ. P. 4.

"All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state."

choose a forum other than that in which plaintiff could have brought the case, and the transfers sought in the instant matters, based on convenience of witnesses, etc., would have been properly granted. This, however, would compel a construction of § 1404(a) as permitting the defendant to transfer the action to any district in which he chose to waive the protection of venue requirements; but continuing the demand that the plaintiff satisfy these venue requirements.

This interpretation had been given by numerous district courts as well as by some of the circuit courts. At least seven district courts had granted transfers to other districts where originally venue did not exist, on the ground that the defendant's consent made such district one in which the action "might have been brought."[15] On the other hand, three districts had held to the contrary, maintaining that defendant's consent was not relevant in ascertaining whether a transferee district was proper,[16] and two districts granted motions on the basis of the presence of a number of defendants in the transferee district.[17] Moreover, two districts went so far as to grant plaintiff's motion to transfer to a district where originally venue would not lie, even without defendant's consent;[18] and another held that § 1404(a) ". . . contemplates statutory venue and not consent venue."[19]

In the circuit courts, the First Circuit had upheld a transfer on the defendant's motion to a district in which venue existed but where process could not be served upon defendant;[20] the Second Circuit had held one way on a plaintiff's motion and the other on a motion by a defendant.[21] The Third Circuit had held that a district court had power to transfer an action on defendant's motion to a district in which plaintiff did not have a legal right to bring it. This court, in a 3-2 decision, held that the phrase "might have been brought" meant "could now be brought."[22] The Fifth Circuit, which granted the *Blaski* transfer, had itself held both ways.[23] The Ninth Circuit had held that on plaintiff's motion a district court did not have power to transfer an action to a district in which plaintiff did not have a legal right to bring it originally.[24]

Accordingly, in the instant case the Supreme Court attempted to clarify the meaning of § 1404(a) and to state the import of Federal venue requirements.

[15] Hill v. Upper Mississippi Towing Corp., 141 F. Supp. 692 (D.C. Minn. 1956); McGee v. Southern Pacific Co., 151 F. Supp. 338 (D.C.S.D.N.Y. 1957); Welch v. Esso Shipping Co., 112 F. Supp. 611 (D.C.S.D.N.Y. 1953); Mire v. Esso Shipping Co., 112 F. Supp. 612 (D.C.S.D.N.Y. 1953); Cain v. Bowater's Newfoundland Pulp & Paper Mills, Ltd., 127 F. Supp 949 (D.C.E.D. Pa. 1954); Anthony v. R.K.O. Radio Pictures, Inc., 103 F. Supp. 56 (D.C.S.D.N.Y. 1951); Blaski v. Howell (D.C.N.D. Ill. Mar. 14, 1958).

[16] General Electric Co. v. Central Transit Warehouse Co., 127 F. Supp. 817 (D.C. W.D. Mo. 1955); Tivoli Realty, Inc. v. Paramount Pictures, Inc., 89 F. Supp. 278 (D.C. Del. 1950); Felchin v. American Smelting & Refining Co., 136 F. Supp. 577 (D.C.S.D. Calif. 1955).

[17] Ferguson v. Ford Motor Co., 89 F. Supp. 45 (D.C.S.D.N.Y. 1950); Glasfloss Corp. v. Owens-Corning Fiberglass Corp., 90 F. Supp. 967 (D.C.S.D.N.Y. 1950).

[18] McCarley v. Foster-Milburn Co., 89 F. Supp. 643 (D.C.W.D.N.Y. 1950); Troy v. Poorvu, 132 F. Supp. 864 (D.C. Mass. 1955).

[19] Johnson v. Harris, 112 F. Supp. 338, 341 (D.C.E.D. Tenn. 1953).

[20] Re Josephson, 218 F.2d 174 (1st Cir. 1954).

[21] Compare Foster-Milburn Company v. Knight, 181 F.2d 949 (1950) with Anthony v. Kaufman, 193 F.2d 85 (2d Cir. 1951) and Torres v. Walsh, 221 F.2d 319 (2d Cir. 1955).

[22] Paramount Pictures, Inc. v. Rodney, 186 F.2d 111, 114 (3d Cir. 1951).

[23] Compare Blackmar v. Guerre, 190 F.2d 427 (5th Cir. 1951) with Ex Parte Blaski, 245 F.2d 737 (5th Cir. 1957).

[24] Shapiro v. Bonanza Hotel Co., 185 F.2d 777 (9th Cir. 1950).

While "venue, like jurisdiction over the person, may be waived",[25] and is waived unless timely objection is made,[26] a waiver does not test the power of the court to take dominion over the matter. The Supreme Court rejected defendants' contentions that they could assert such waiver privilege as a positive right and held that the "power of a District court under § 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but rather, upon whether the transferee district was one in which the action 'might have been brought by the plaintiff.'"[27] The Court stated:

". . . [W]e do not see how the conduct of a defendant, after suit has been instituted, can add to the forum where 'it might have been brought.' In the normal meaning of words this language of sec. 1404(a) directs the attention of the judge who is considering a transfer to the situation which existed when suit was instituted."[28]

The Court thus refused any broad interpretation of § 1404(a) as sought by defendants, and interpreted the statute as restricting the transfer within the venue requirements set forth by Congress.

The Supreme Court found the language of § 1404(a) unambiguous, direct and clear, and held that defendants' conception of its meaning would do violence to the plain words of that section.[29] The Court pointed out that the effect of allowing defendants to assert their waiver privilege as a positive right, over the objections of the plaintiffs, would allow defendants to have the action transferred on the grounds of convenience to a district to which plaintiff, on the same grounds, would be unable to obtain transfer. Further, the Court found nothing in the section, or in its legislative history, which suggested "such a unilateral objective" and went on to say they "should not, under the guise of interpretation ascribe to Congress any such discriminatory purpose."[30]

With respect to the legislative history of § 1404(a), the reviser's notes, accompanying the code, show that this section was drawn in accordance with the doctrine of *forum non conveniens,* and was meant to alleviate the harshness of dismissals granted under that doctrine, and to provide instead for transfer to an alternative district which was found more convenient and in the interests of justice.[31]

The doctrine of *forum non conveniens* arises from a basic concept of the broad and inherent power of all courts to control their own process; to prevent abuse or unnecessary hardship and to do substantial justice; and where two or more courts in different forums can exercise jurisdiction over a cause of action, if it is brought in an inconvenient forum the court of that forum has the power to dismiss the suit.[32]

In *Gulf Oil Corp. v. Gilbert,*[33] a tort action involving loss by fire occurring in another state, and in *Rogers v. Guaranty Trust Co.,*[34] a stockholders' derivative action, the Supreme Court affirmed dismissals of actions by federal district courts under the

[25] Commercial Casualty Ins. Co. v. Consolidated Stone Co., 278 U.S. 177, 49 S. Ct. 98, 73 L. Ed. 252 (1929).

[26] Camp v. Green, 250 U.S. 308, 39 S. Ct. 478, 63 L. Ed. 997 (1919); Panama R.R. Co. v. Johnson, 264 U.S. 275, 44 S. Ct. 391, 68 L. Ed. 748 (1924).

[27] Supra note 1 at 343, 80 S. Ct. at 1089-90, 4 L. Ed. 2d at 1262.

[28] Supra 1 at 343, 80 S. Ct. at 1090, 4 L. Ed. 2d at 1261.

[29] Supra note 1 at 344, 80 S. Ct. at 1090, 4 L. Ed. 2d at 1262.

[30] Supra note 1 at 344, 80 S. Ct. at 1090, 4 L. Ed. 2d at 1262.

[31] H.R. Rep. No. 308, 80th Cong., 1st Sess. A 132 (1947); H.R. Rep. No. 2646, 79th Cong., 2d Sess. A 127 (1946).

[32] Ia. L. Rev. 44:630 Apr. 1959.

[33] 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947).

[34] 288 U.S. 123, 53 S. Ct. 295, 77 L. Ed. 652 (1933).

doctrine of *forum non conveniens*. In the *Rogers* case, where the federal court had concurrent jurisdiction with the state court, this doctrine was applied to relegate the matter to the state courts. In this case the Court stated:

". . . While the district court had jurisdiction to adjudge the rights of the parties, it does not follow that it was bound to exert that power. *Canada Malting Co. v. Paterson Co.*, 285 U.S. 413, 422, and authorities cited. It was free in the exercise of a sound discretion to decline to pass upon the merits of the controversy and to relegate plaintiff to an appropriate forum. (citing cases) . . . But it safely may be said that jurisdiction will be declined whenever considerations of convenience, efficiency and justice point to the courts of the State of the domicile as appropriate tribunals for the determination of the particular case (citing cases) . . . ."[35]

The doctrine of *forum non conveniens* naturally presupposes the existence of at least two alternative forums. The effect of the Supreme Court decision with respect to the remedial provisions of § 1404(a) is that this presumption was not extended any further by that statute.

While the majority chose to find the meaning of § 1404(a) plain, the dissent, written by Mr. Justice Frankfurter and in which Justices Harlan and Brennan joined, pointed to the various interpretations by the circuit courts as evidence of the ambiguity of the language employed. The dissent noted that more than one-half of the district courts and every court of appeals but one, which had considered the problem, had interpreted the section to allow for transfer by way of voluntary submission to a venue other than that provided in the statute conferring jurisdiction.[36] While this may have merit with regard to the language used, the Court apparently felt constrained to a strict interpretation of the Legislature's intent, and mere ambiguity was not found sufficient to warrant the implication sought by defendants.

Mr. Justice Frankfurter could see no exploitation of the right of transfer by voluntary submission to the transferee district inasmuch as the transfer was dependent upon satisfying the requirements of convenience and the interests of justice. Basically, he states, this is not a question of the power of a defendant to confer jurisdiction, admittedly beyond the power of litigants, but is concerned with the locality of the lawsuit and "the rules regulating which are defined mainly by the convenience of the litigants."[37] However, this argument loses much of its force in view of the practical effects of allowing the defendant to use this power of waiver as "a sword instead of a shield", in taking advantage of increased bargaining power to force unreasonable submission to jurisdiction[38] and other misuse in dilatory tactics and forum shopping. Also to be considered is the additional burden placed on the discretionary powers of the courts.

In effect the problem is one of administration, and concerns the issue of whether the courts should enlarge upon their discretionary powers to provide for the place of trial as best fits the convenience of witnesses in each case or hold the parties rigidly to the requirements set forth in the statutes authorizing jurisdiction. It is apparent that the Supreme Court felt that if Congress' intention was to enlarge upon those discretionary powers, such a radical departure from precedent warrants a clear designation from Congress, and the Court refused to accomplish that end by a broad interpretation of this section. M. B.

[35] Id. at 130-131, 53 S. Ct. at 298, 77 L. Ed. at 656-57.

[36] Supra note 1 at 358, 80 S. Ct. at 1097, 4 L. Ed. 2d at 1270.

[37] Supra note 1 at 359, 80 S. Ct. at 1097, 4 L. Ed. 2d at 1271.

[38] 45 Cornell L.Q. 364 (1960).

CONFLICT OF LAWS—DAMAGES—TORT LIABILITY OF UNITED STATES UNDER FEDERAL TORT CLAIMS ACT IN REFERENCE TO AIRCRAFT ACCIDENTS.—The purpose of this note is to examine a recent decision[1] from three standpoints. First, the case involves an unusual problem concerning damages. Second, it invokes a consideration of significant underlying theories of conflict of laws and third, it emphasizes in striking fashion some of the intricate problems arising in connection with the tort liability of the United States under the Federal Tort Claims Act.[2]

The facts of the case are as follows: A wrongful death action was instituted against the United States[3] by the executors of the decedent, Helen E. Hoskinson, who lost her life when an Eastern Air Lines plane in which she was a passenger collided with a Bolivian military type plane over Washington, D.C. Both planes were preparing to land at a public airport owned by the United States. The airport control tower located in Virginia was manned by U.S. personnel and the negligence of a Government control tower operator was established as a contributing cause of the accident.

A companion action brought against the airline was consolidated with the action against the United States for trial in a Connecticut district court; the action against the airline to be tried by a jury, and the action against the United States to be heard by the court.[4] At this point, pursuant to a stipulation executed and filed by the parties, the trial of the consolidated actions was postponed to await the outcome of a pending "test" action[5] brought by the personal representatives of other passengers killed in the same accident. The "test" action is often referred to as the *Union Trust* or the *Miller* cases.[6] It was the first case decided under Section 1346(b) of the Federal Tort Claims Act,[7] involving the negligence of the United States in one state and the injury of the plaintiff in another state. For the purpose of simplicity, the "test" action will be referred to herein as the *Union Trust* case, and the principal case will be referred to as the *Hoskinson* case.

The controlling issue in the *Union Trust* case was whether Section 1346(b) provided for a different choice of law than the general conflict of laws rule for torts involving negligence in one state and injury in another. Section 1346(b) provides as follows:

"Subject to the provisions of Chapter 171 of this Title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances *where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*"[8] (Italics added.)

[1] Cook, Parker and the First National Bank & Trust Co. of New Canaan, Executors v. United States of America, 274 F.2d 689 (2d Cir. 1960).

[2] 28 U.S.C., §1346(b).

[3] U.S. District Court for Connecticut (1959).

[4] 28 U.S.C., §2402.

[5] Union Trust Co. v. United States, 221 F.2d 62 (D.C. Cir., 1955) Three appeals were taken from this decision: United States v. Union Trust Co., aff'd, 350 U.S. 907 (1955); Union Trust Co. v. Eastern Airlines, rev'd., 350 U.S. 907, Modified 350 U.S. 962 (1955); Union Trust Co. v. United States, cert. denied, 350 U.S. 911 (1955); also referred to as the "Miller Test Cases."

[6] Supra note 5, Union Trust Co. v. United States, 221 F.2d at 80. (In an unconventional opinion, Judge Miller writing for the Court dissented therein on the question of the choice-of-law applicable.)

[7] Union Trust Co. v. United States, 113 F. Supp. 80, (D.D.C., 1953).

[8] Supra note 2.

According to the general rule,[9] the law of the place of injury governs. If the general rule were followed, then the law of the District of Columbia would be applicable.

A divided court held[10] that Section 1346(b) provided in explicit terms for the Government's liability to be determined under the law of the place where the negligent employee's "act or omission occurred" and since the "act or omission occurred" in Virginia, Section 1346(b) requires that the Virginia wrongful death statute be applied in the *Union Trust* case. The significance of this determination lies in the marked difference between the District of Columbia death statute and the Virginia death statute. The District of Columbia statute[11] permits unlimited recovery, but only for the pecuniary loss sustained by the decedent's statutory beneficiary. On the other hand, the Virginia statute[12] limits recovery for any one death to $15,000, but permits recovery for not only pecuniary loss but also for loss of society of the decedent (consortium) and for mental anguish occasioned by the decedent's death (solatium).[13]

The extraordinary result of the test case concluded that Eastern Airlines was held liable under the District of Columbia death statute because the negligence of the airline's pilot occurred over Washington, D.C., where the collision took place, and the United States was held liable pursuant to the Virginia death statute because the negligence of the Government's employee occurred in that state. Since the issue of the law applicable, and consequently, the liability of the defendants were merged in the stipulation, this left only the question of damages to be determined in the *Hoskinson* case. In the action against the airline, the plaintiff obtained and collected a judgment for $37,820 for pecuniary loss, and furnished the airline with a *release expressly reserving its rights* against the United States. In the action against the United States under the Federal Tort Claims Act,[14] the executors were awarded damages of $15,000, the maximum permitted by the Virginia wrongful death statute.[15]

Generally, the plaintiff may bring an action against joint tort-feasors, either severally or jointly, pursue each to judgment and elect to enforce both.[16] A partial satisfaction of one judgment will not prevent obtaining or enforcing another, although any recovery must be credited pro tanto against a subsequent amount collected.[17]

The idea of granting compensation for injury is to place the plaintiff in the same position he would have been had the injury not occurred.[18] The award of money should be no more and no less than that required to accomplish this. By the same token, the defendants are entitled to be protected so that they should not be required to pay more than they are adjudged to owe for their wrong.[19] A judicial balancing between the policies of just compensation and just responsibility must be struck by seeing to it that the plaintiff is fully satisfied, but not unjustly enriched.[20] It is

9 Restatement, Conflicts of Law, §337, (1934): "the place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."
10 Supra note 1.
11 Ibid.
12 Va. Code, §8-633, (1950).
13 Mathew v. Hicks, 197 Va. 112, 87 S.E.2d 629, (1955).
14 Supra note 2.
15 Supra note 12.
16 Prosser, Law of Torts, §46 (2d Ed. 1955).
17 Ibid.
18 Sutherland on Damages, §12 (4th Ed. 1916); McCormick on Damages, §1 (1935).
19 Prosser, supra note 16.
20 Ibid.

generally agreed that the injured party is entitled to but one satisfaction,[21] but the troublesome problem is to determine when satisfaction has been received. Plaintiff's counsel in the *Hoskinson* case invoked consideration of this problem when he moved to open the judgment against the United States,[22] urging that since Virginia law permitted recovery for solatium and consortium as well as pecuniary loss, there should be an apportionment of the $15,000 recovery among the three elements of damage, i.e., pecuniary loss, solatium and consortium. The district court denied the plaintiff's motion. The plaintiff appealed,[23] contending that it was error for the court to refuse to apportion the recovery when the result of such refusal was to deny compensation for two elements of damage recoverable under Virginia law. A divided United States Court of Appeals affirmed the district court,[24] holding that the Virginia law did not suggest that these elements must be considered when the recovery exceeds the statutory limit of $15,000, and that since the plaintiff had recovered $37,820 from Eastern Airlines, this foreclosed any recovery against the United States.[25] In dicta, the court intimated that another ground for denying recovery to the plaintiff existed.[26] Under Virginia law, a release, though it contains a reservation of rights against other parties, automatically acts as an absolute release with respect to other joint-tort-feasors.[27] Consequently, the court questioned the efficacy of the reservation of rights against the United States contained in the release given to the airline.

In a strenuous dissent,[28] Judge Magruder first attacked the rule established in the *Union Trust* case[29] on the question of the choice of law applicable. Then in support of the appellant's position, he urged that even if we were to proceed on the assumption that the rule established by the *Union Trust* case on the question of liability was the law applicable, payment of the judgment by the airline could only extinguish the liability of the United States *for identical items of damage recoverable under both statutes, and therefore,* payment by the airline could only extinguish the liability of the United States for pecuniary loss, but not for consortium and solatium. Judge Magruder admitted that there was no provision that would require a district court in a federal tort claims suit to apportion the amount recoverable; but conversely, there was no provision which prevents such a disposition. Moreover, it would be consistent with the liberal construction given to the statute by the Virginia court,[30] for the district court to have apportioned the recovery. In addition, it should be noted that inasmuch as the Federal Tort Claims Act was designed to remove the sovereign immunity of the United States from suit,[31] it seems reasonable that the Act should receive a liberal interpretation in order to effectuate its benevolent purpose.[32]

RELEASE: AND THE CONFLICT OF LAWS

Now that we have examined the *Hoskinson* case with respect to its factual setting, there are two areas of inquiry that require further investigation. First, the

[21] Ibid.
[22] Supra note 1.
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Shortt v. Hudson Supply & Equipment Co., 191 Va. 306, 60 S.E.2d 900 (1950).
[28] Supra note 1.
[29] Supra note 5.
[30] Supra note 13, at 115, 87 S.E.2d at 633.
[31] Wright, Tort Liability of Governmental Units, 40 Minn. L. Rev 751 (1956).
[32] Pinella v. United States, 216 F.2d 622 (2d Cir. 1954); O'Toole v. United States, 206 F.2d 912 (3d Cir. 1953).

question of *release,* and second, the question of *liability*. While the question of *release* was not a determining factor in the outcome of the *Hoskinson* case, the court did suggest an area of inquiry by indicating that the release was a possible alternate basis for the decision.

A release by definition, is a surrender of a cause of action and can be given gratuitously or for an inadequate consideration; a satisfaction, on the other hand, is acceptance of full compensation for an injury. Consequently, when a court speaks of a release of joint-tort-feasors of the injured party, the situation might very well be that there has been no satisfaction or only a partial one. Much confusion concerning the law of release of joint-tort-feasors existed at early common law.[33] This stems from the fact that the early common law courts spoke of releases and satisfactions as being, in effect, the same thing.[34] As a result, under the common law in this country, the release of one tort-feasor extinguished any cause of action against a joint-tort-feasor.[35] There was much criticism of this rule, and consequently, it was modified by the use of covenants not to sue,[36] which generally are held not to discharge the covenantor's claim against other joint-tort-feasors. Apparently, only *Washington*[37] and *Virginia*[38] have still retained the strict common law rule, and preclude the device of a covenant not to sue. In a leading Virginia case,[39] the plaintiff furnished a release expressly reserving his rights against other tort-feasors. The court held that the release extinguished the cause of action despite the reservation of rights contained therein. As a result of Virginia's adherence to the common law rule and the *dicta* contained in the *Hoskinson* case, a problem was suggested. Some conflicts-of-law theorists refer to this problem as the "incidental question."[40] It arises in cases where a release has been executed in one state and the tort to which it refers has occurred in another. The problem is whether the law governing the effect of the release should be determined by the law governing the tort or by the independent choice-of-laws rule of the forum. In a number of jurisdictions the courts have held that the law of the situs of the tort is applicable to determine the effect of the release.[41] Other courts have approached the problem as two separate transactions, and have applied contract rules to determine the effect to be given the release.[42] It is no wonder that a leading writer in this field finds the cases in great confusion on this point.[43]

Two recent New York decisions highlight the disagreement that exists with respect to this problem. The first decision, *Debono v. Bittner,*[44] involved an auto accident that occurred in Virginia. The plaintiff executed a general release to a third party,

[33] Supra note 16.
[34] Ibid.
[35] Ibid.
[36] Ibid.
[37] Gertzendaner v. United Pacific Ins. Co., 52 Wash. 2d 61, 322 P.2d 1089 (1958).
[38] Supra note 27.
[39] Supra note 13.
[40] Cavers, The Conditional Sellers Remedies and the Choice-of-Law Process, 35 N.Y.U.L.Rev. 1131-33 (1960).
[41] Lindsay v. Chicago B & Q R.R., 226 F.23 (7th Cir., 1955); Western Newspaper Union v. Woodward, 133 F.Supp.17 (W.D.Mo., 1955); Goldstein v. Gilbert, 125 W.Va. 250, 23 S.E.2d 606 (1942).
[42] The Adour, 21 F.2d 858, (D. Md., 1927); Leach v. Mason Valley Mines Co., 40 Nev. 143, 161 Pac. 513 (1916).
[43] Ehrenzweig, Releases of Concurrent Tort-Feasors in the Conflict of Laws: Law and Reason Versus the Restatement, 46 Va. L. Rev. 712, 714 (1960).
[44] 13 Misc. 2d 333, 178 N.Y.S.2d 419 (Sup. Ct., 1958).

which release contained the customary reservation of rights against parties other than the person released. Subsequently, the plaintiff sued one of the other parties for personal injuries arising from the same accident. The Supreme Court of New York granted defendant's motion to dismiss, holding that since the defense of release is a matter of substance going to the right of the plaintiff to maintain a court action, the law of Virginia should apply and under that law releases were absolute, despite the reservation of rights contained therein.

In *Kaufman v. American Youth Hostels,*[45] the Appellate Division held that the effect to be given a release executed in New York by New York parties was to be determined by New York law, even though the tort was committed in Oregon. The underlying rationale was that New York was the state that had the most significant contacts with the matter in dispute.

If it is decided that the better view is to treat the release as an independent contract, then the question arises as to what is the choice-of-law rule applicable to contracts. *The Restatement*[46] urges that the law of the place of contracting determines the validity and effect of a promise. However, this has never been the general rule.[47] In fact, *the Restatement* itself, rejected this rule by adopting the law of the place of performance in connection with questions concerning performance.[48] When both these rules were found unsatisfactory, some courts turned to the intention of the parties as an alternative.[49] Recently, the New York courts have turned to the "center of gravity" theory[50] as a solution. This theory merely states a conclusion and offers little help in the way of guidance except, perhaps, as a refutation of prior concepts. Professor Ehrenzweig proposes that we must begin anew to solve this problem and advances what he calls the "basic rule of validation" as a solution.[51] The underlying rationale of this rule is that the parties entering into a contract upon equal terms want their agreement to be binding and the rule of conflict-of-laws should assist them whenever it can.

The fact that Virginia Law is virtually isolated on the question of release;[52] that none of the parties had any significant connection with Virginia; and that the question of the effect of a release in the conflict-of-laws is an open one in most jurisdictions,[53] are all reasons why the court's intimation that it would deny effect to the express intention of the parties by applying the law of the clearly fortuitous place of negligence, appears arbitrary and unreasonable.

THE UNION TRUST CASE REVISITED—IMPLICATIONS IN THE AFTERMATH

Now we come to the question of the liability aspect of the *Hoskinson* case. Inasmuch as the outcome of this case was controlled by the *Union Trust* case, interpretation of section 1346(b), it is important to examine the statute from the standpoint of its legislative background and subsequent judicial interpretation in order to determine whether the statute was intended to provide for a choice-of-law different from the general rule.[54]

[45] 6. A.D.2d 223, 177 N.Y.S.2d 587 (1958) Motion for leave to appeal granted, 6 A.D.2d 1016, 178 N.Y.S.2d 623 (2d Dep't., 1958).

[46] Supra note 9 at § 332.

[47] Nussbaum, Principles of Private International Law 164 (1943).

[48] See supra note 8 at §358.

[49] 2 Beale, Conflict of Laws, 1171-74 (1935).

[50] Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954).

[51] Ehrenzweig, Contracts in Conflicts of Laws, 59 Col. L. Rev. 973, 987 (1959).

[52] Supra note 27.

[53] Supra note 43.

[54] Supra note 8.

The Federal Tort Claims Act was designed to remove the sovereign immunity of the United States from suit[55] and with certain exceptions[56] render the United States liable in tort *as a private person would be under like circumstances.*[57] Although much has been written about the Act and its judicial interpretation,[58] at least one area remains unsettled, i.e., the proper point of reference to determine the tort liability of the United States for "foreign" torts under the statute. If a literal interpretation of Section 1346(b) is adopted, then that Section changes the generally accepted conflict-of-laws rule concerning "foreign" torts.[59] According to the general rule, the place of wrong is the place where the injury occurred. This is the rule applied *by American courts* when they deal with "foreign" torts.[60] This view is ordinarily referred to by the conflict-of-laws theoreticians as the "vested rights" approach.[61] Its underlying rationale is that the substantive rights of the parties become vested when and where the tort occurs and, therefore, are to be determined with reference to the substantive law of the place of wrong. The goal of the "vested rights" concept is to secure uniformity of results by preventing the outcome of a case from being determined by a party's choice of the forum.[62] This practice is referred to as "forum-shopping" because the plaintiff brings his action in a jurisdiction which has reached results favorable to his position. Actually, the general rule is circuitous since the existence of a tort cannot be ascertained without reference to a specific law, the applicability of which, as in the case at hand, is the very issue to be determined. Recently, there has been a noticeable tendency to depart from the general rule in order to take into account the interests of the state having significant contacts with the parties to the transaction.[63] These cases seem to indicate that a departure is justified and desirable.

A literal reading of Section 1346(b) indicates that Congress intended to provide for a choice-of-law rule in that Section. However, an investigation of the circumstances surrounding the enactment of this provision tends to contradict this view. The Federal Tort Claims Act was originally enacted as Title IV of the Legislative Reorganization Act of 1946.[64] This Act thoroughly reorganized legislative procedure and effected a revision of the congressional committee structure. Normally, when sweeping legislation is enacted it is highly improbable that Congress would be too concerned with precise language,[65] or for that matter, the complex legal problem involved in multi-state torts. Consequently, it is no surprise that at least two authorities have suggested that the wording of this provision was accidental,[66] and not intended to effectuate any change

[55] Supra note 31.

[56] 28 U.S.C., §2680 (1952).

[57] Supra note 2.

[58] E.g., 10 Vand. L. Rev. 846 (1957); 23 Geo. Wash. L. Rev. 228 (1954); 61 Har. L. Rev. 1076 (1948).

[59] Supra note 8.

[60] Cameron v. Vandergriff, 53 Ark. 381, 12 S.W. 1093 (1890); Otey v. Midland Valley R.R., 108 Kan. 755, 197 Pac. 203 (1921); Young v. Masci, 289 U.S. 253 (1933) (dictum).

[61] Cheatham, American Theories of Conflict of Laws: Their Role and Utility, 58 Har. L. Rev. 361, 379-34 (1945).

[62] Cook, The Logical and Legal Basis of the Conflict of Laws 340-41 (1929).

[63] E.g., Grant v. McAuliffe, 41 Cal.2d 859, 264 P.2d 944 (1953); Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957); Haumschild v. Continental Casualty Co., 95 N.W.2d 814 (1959).

[64] Ch. 753, 60 Stat. 842 (1946) (Codified in various sections of 28 U.S.C).

[65] 9 Vand. L. Rev. 83, 84-85 (1955).

[66] Goodrich, Yielding Place to New: Rest Versus Motion in the Conflict of Laws,

in the choice-of-law rules. Further support for the viewpoint that no change was intended can be found in the Senate Report on the Act which states that liability "will be the same as that of a private person under like circumstances."[67] In addition, testimony before the House Judiciary Committee regarding the then pending venue provision of the Federal Tort Claims Act upholds this view. When asked where a claimant brings suit, Assistant Attorney-General Shea speaking for the Department of Justice answered, "either where the claimant resides or in the locale of the injury or damage."[68] This reply has a dual significance. Mr. Shea was referring to the venue provision of the Federal Tort Claims Act which is now Section 1402(b). This Section provides that suit brought under the Act may be instituted "where the plaintiff resides or *where the act or omission complained of occurred.*" Note that these are the same words which appear in Section 1346(b).[69] In addition, Section 1402(b) refers directly to Section 1346(b) since the former Section sets forth the proper venue for a suit authorized by the latter Section. Considering the legislative history surrounding the enactment of the various provisions of the Federal Tort Claims Act, it would seem to be a tenable position that the insertion of "act or omission" was not intended to change the accepted conflict-of-laws rule. In fact, there is no indication that the drafters of the Act even considered the problem of multi-state torts when they chose the language of the Section.

Consequently, it is no wonder that a dispute has developed among the federal circuit courts as to the proper interpretation of this Section when the negligent act and injury take place in different states.[70] The courts have reached three different conclusions as to the correct interpretation of the section. While the District of Columbia Circuit Court in the *Union Trust* case held that the United States was liable according to the place of the negligent act, thereby adopting a literal interpretation of Section 1346(b), the Ninth Circuit in *United States v. Marshall*[71] interpretated the same section as referring to the *law of the place of injury*. Thus, the first interpretation advanced in the *Union Trust* case, determines liability with reference to the place where the defendant stood, i.e., the place where the negligence occurred, and the second interpretation found in the *Marshall* case determines liability with reference to the place where the plaintiff stood, i.e., the place where the injury took place. It should be observed that the second interpretation was initially advanced in Judge Miller's *dissent* in the *Union Trust* case and was subsequently adopted by Judge Magruder in *his dissent* in the *Hoskinson* case.[72]

Assuming, however, that the proper interpretation of Section 1346(b) is that the law of the place of negligence applies, then the federal courts are confronted with another problem. Which law should they apply—the *internal law* or the *entire law* of the place where the "act or omission" occurred? The court in the *Union Trust* case did not consider this problem and merely applied the *internal* law of Virginia. The application of the *entire* law was an interpretation advocated in the *Hess case*.[73] There the court said that the law of the state is not limited to its tort law, but includes the state's

50 Col. L. Rev. 881, 884-95 (1950); Leflar, Choice of Law; Torts: Current Trends, 6 Vand. L. Rev. 447, 448 (1953).

[67] S. Rep. No. 1400, 79th Cong. 2d Sess. 32 (1946).

[68] Hearings on H.R. 5373 and H.R. 6463, 77th Cong. 2d Sess. 9 (1942).

[69] Supra note 9.

[70] Supra note 5; contra United States v. Marshall, 230 F.2d 183 (9th Cir., 1956).

[71] 230 F.2d 183 (9th Cir. 1956).

[72] Supra note 1.

[73] Hess v. United States, 259 F.2d 285, 291 (9th Cir. 1958).

conflict-of-laws rules. Furthemore, the court noted that the interpretation advanced in the *Union Trust* case, if followed, does violence to another Section of 1346(b),[74] since the United States is not held liable in the same manner and to the same extent as a "private person under (like) circumstances."[75] Judge Magruder highlighted this inconsistency in his dissent when he noted that the Virginia courts would not have applied Virginia law, because the Virginia conflict-of-laws rule determines liability according to the law of the place of injury.[76] Consequently, Virginia probably would have applied the District of Columbia death statute if confronted with the factual situation presented in the *Hoskinson* case.[77] It is apparent, therefore, that the third interpretation advanced in the *Hess* case is evidently the most logicial approach. It follows the plain wording of the statute and, in addition, it does not do violence to any other provision contained therein. It is important to note that this third interpretation was followed by a Second Circuit decision, *Landon v. United States*.[78]

It is evident that either Section 1346(b) should be amended in order to clarify its meaning, or the United States Supreme Court must make a choice from among the three interpretations. A solution is necessary for two reasons; (1) to promote uniformity in federal tort law, and (2) to prevent "forum-shopping." Although jurisdiction, under the Federal Tort Claims Act is vested exclusively in the federal district courts, there is room for "forum-shopping" if the various circuit courts apply different interpretations to Section 1346(b).[79]

This writer suggests that the third interpretation of Section 1346(b) referring to the *entire* law of the place where the "act or omission" occurred is the most desirable one from two standpoints. First, by referring to the *entire* law of the place of negligence, the result generally would be the same as that obtained under the general rule,[80] in that the place of injury would generally control, except that the wording of the statute remains unchanged, thus precluding the need for corrective legislation. Secondly, the third interpretation is more flexible since it allows a forum to take advantage of any new developments in the choice-of-law rules, designed to prevent inequitable results in a particular situation.[81] Moreover, this flexibility is achieved without resulting in any inconsistency between the various provisions of Section 1346(b).

In conclusion, it should be noted that had the *entire* law of Virginia been applied in the *Union Trust* case the unusual problem in damages that confronted the court in the *Hoskinson* case would never have arisen. S.G.

ADMIRALTY LAW—SEAMEN—LIABILITY OF SHIPOWNER UNDER DOCTRINE OF "UNSEAWORTHINESS."—Maritime law is not corpus juris—it is a very limited body of customs and ordinances of the sea.[1] The rights, duties and liabilities of seamen serving on a vessel in navigable waters are ordinarily governed by the rules of maritime law.

74 Supra note 2.
75 Ibid.
76 Supra note 1.
77 Atlantic Coast Line v. Withers, 192 Va. 493, 65 S.E.2d 654 (1951); Baise v. Warren, 158 Va. 505, 164 S.E. 655 (1932).
78 197 F.2d 128 (2d Cir. 1952).
79 Words and Phrases, "Forum-Shopping," (Permanent Ed. 1958).
80 Supra note 8.
81 Supra note 62.

1 Jensen v. Southern Pacific Co., 244 U.S. 205, S. Ct. 524, 61 L. Ed. 1086 (1917).

A cause of action arising out of a maritime tort is vested in the admiralty side of the federal courts.[2]

American Courts of Admiralty, adjudicating the rights of seamen under maritime law, while regarding them as wards of admiralty, have been in the constant habit of extending towards them a peculiar, protecting favor and guardianship.

The origin of the right of a seaman to recover for injuries incurred on board ship is not certain. At their inception the American courts of admiralty regarded certain ancient codes as establishing the limits of a shipowner's liability to a seaman injured in the service of his vessel.[3]

One of the earliest codes cited is the Rules of Oleron,[4] which were promulgated in the twelfth century by Eleanor Dutches of Guienne. Article 6 of The Rules of Oleron provided: "sailors injured by their own misconduct could only be cured at their own expense, but if by the master's order and command any of the ship's company be in the service of the ship and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the cost and charges of the said ship." Under article 18 of the Laws of Wisbuy:[5] "a mariner being ashore in the master's or the ship's service, if he should happen to be wounded, he shall be maintained and cured at the charge of the ship . . . for his own recklessness the ship is discharged." Similar provisions are to be found in article 39 of the Laws of the Hanse Towns[6] and in the Marine Ordinances of Louis XIV.[7]

In none of these early codes is there a distinction made between injuries received accidentally at the seaman's own hands or by negligence, nor does it appear that the seaman was to be indemnified beyond his wages and the expense of his maintenance and cure.[8] All of these codes released the shipowner from all liability where the injury or illness was caused by the seaman's gross and willful misconduct.

In the latter half of the nineteenth century, there was a departure from these earlier codes in allowing an indemnity beyond the expense of maintenance and cure in cases arising from unseaworthiness. This departure was first seen in England in The Merchant Shipping Act of 1876,[9] which provided that:

"(I)n every contract of service, expressed or implied between an owner of a ship and the master or any seaman thereof, there is an obligation implied that all reasonable means shall be used to insure the seaworthiness of the ship before and during the voyage."

Prior to 1876 English and American law recognized unseaworthiness as a condition upon a contract of employment, which upon the employer's default operated to exonerate the seaman from forfeiture of wages if he quit the ship.[10] The concept of unseaworthiness found its way into maritime tort law through the rules covering marine insurance and the carriage of goods by sea.[11]

[2] U.S. Const. art. III, § 1.

[3] Harden v. Gordon, Fed. Cas. No. 6047, 2 Mason 541 (CCD Me. 1823). See also, Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 58 S. Ct. 651, 82 L. Ed. 993 (1938).

[4] Reprinted in 30 Fed. Cas. at 1174, 1175 (1897).

[5] Id. at 1191, 1192.

[6] Id. at 1200.

[7] Id. at 1209.

[8] Gilmore and Black, The Law of Admiralty, 254 (1957).

[9] The Merchant Shipping Act of 1876, 39 & 40 Vict. Chap. 80 section 5.

[10] See The Arizona v. Anelich, 298 U.S. 110, 121, 122 note 2, 56 Superior Court 707, 710, 711, 80 L. Ed. 1075, 1079 (1936); 1 Parson, Maritime Law, 455 (1868).

[11] See The Silva, 171 U.S. 462, 19 S. Ct. 7, 43 L. Ed. 241 (1898); The Southwark,

Although there are statements to the contrary,[12] American Admiralty Courts have held before the *Osceola* case in 1903,[13] and as early as 1883 that a shipowner was under a duty to furnish his seamen with a safe place to work,[14] including safe appliances and equipment.[15] That duty was not an absolute one, but rather one of exercising due care.[16] In *The City of Alexandria* case Judge Addison Brown, after an extensive review of the ancient admiralty precedents, held that the shipowner was liable only for such negligence as rendered the ship or her appliances unseaworthy.[17]

1900 TO 1920

In 1903 the Supreme Court in the *Osceola* case,[18] adopted the rule found in the *City of Alexandria case*.[19] The tenor of the *Osceola* case is that American law on the liability of the shipowner to seamen was to be the same as the law of England as found in The Merchant Shipping Act of 1876.[20] The court held that the owner's duty toward the seamen required only the use of all reasonable means to insure the seaworthiness of the ship.[21]

Judge Harlan, in commenting on the *Osceola* case, stated that:

"While the seamen's rights were thus cut down by removing the basis for a negligence action where unseaworthiness did not exist, there is no indication that it was intended at the same time to enlarge their rights permitting an action to be maintained without regard to negligence where unseaworthiness did exist."[22]

After the *Osceola* case there were a number of decisions exonerating the shipowner from responsibility for the negligence of their masters because that negligence had not rendered the vessel unseaworthy.[23] Congress attempted to broaden the recovery for injured seamen and while construing the *Osceola* case as merely an application of the fellow-servant rule enacted the La Follette Act of 1915.[24] In *Chelentis v. Luckenbach S.S. Co.*, the Supreme Court emasculated the La Follette Act, holding that it did not alter maritime law, but merely allowed sailors to have recourse to common law remedies where appropriate.[25] The high court stated that the rights of the seamen must

191 U.S. 1, 24 S. Ct. 1, 48 L. Ed. 65 (1903); 1 Parsons on Maritime Insurance 367-400 (1868).

12 The Arizona v. Anelich, 298 U.S. 110, 56 S. Ct. 707, 80 L. Ed. 1075 (1936).

13 The Osceola, 189 U.S. 158, 23 S. Ct. 483, 47 L. Ed. 760 (1903).

14 The City of Alexandria, 17 Fed. 390 (S.D. N.Y. 1883).

15 The Noddleburn, 28 Fed. 855 (D.C. Ore. 1886).

16 The Neptuno, 30 Fed. 925 (S.D. N.Y. 1887); The France, 59 F. 474 (2d Cir. 1894); The Concord, 58 Fed. 913 (S.D. N.Y. 1893); The Flowergate, 31 Fed. 762 (E.D. N.Y. 1887).

17 Op. cit. supra note 14, The City of Alexandria.

18 Op. cit. supra note 13, The Osceola.

19 Op. cit. supra note 14, The City of Alexandria.

20 Supra note 9.

21 Op. cit. supra note 14, The City of Alexandria.

22 Dixon v. United States, 219 F.2d 10 (2d Cir. 1955).

23 See Tropical Fruits S.S. Co. v. Towle, 222 F. 867 (5th Cir. 1915); John A. Roebling's Sons Co. v. Erickson, 261 F. 986 (2d Cir. 1919).

24 Act of March 4, 1915, C. 153, 38 Stat. 1185: "That in any suit to recover damages for an injury sustained on board a vessel or in its service, seamen having command shall not be held to be fellow servants with those under their authority."

25 Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 38 S. Ct. 501, 62 L. Ed. 1171 (1918).

be measured according to the rules of maritime law, and thus can not be measured by the rules of common law.[26]

The Supreme Court held that causes of action arising from maritime torts committed on navigable waters within the jurisdiction of the federal courts are governed exclusively by maritime law.[27] The jurisdiction of admiralty over maritime torts does not depend solely upon the wrong having been committed on board a vessel, but is dependent upon two tests. Is must be shown that the wrong was committed upon the high seas or other navigable waters, and secondly the character or maritime nature of the tort.[28]

Under maritime law, no recovery was permitted for injuries resulting in the death of a seaman or generally for injures resulting from the negligence of a fellow servant or master.[29] Contributory negligence was not a bar to an action arising from a maritime tort, but it was a ground for mitigation of damages.[30]

In 1920 Congress enacted the Jones Act,[31] which brought into maritime law new rules of liability. It was enacted for the benefit and protection of seamen, who are peculiarly the wards of admiralty.[32] Its purpose was to enlarge that protection not to narrow it.[33] It obliterated all distinctions between the kinds of negligence for which a shipowner is liable as well as limitations imposed by the fellow-servant doctrine, by extending to seamen remedies made available to railroad workers under The Federal Employer's Liability Act.[34] It gave the seaman injured in the course of his employment, an election to sue for damages at law, with a trial by jury in which all statutes of The United States modifying or extending the common law right or remedy in cases of personal injury to railway employees would be applied. In case of death of a seaman as a result of the injury, it similarly gave a right of action to his personal representatives.[35]

A seaman now had a choice of actions after the passage of the Jones Act. He could sue on this new federal statutory remedy for injuries caused by the shipowner's negligence or by relying on his traditional right, he might sue for injuries caused by unseaworthiness of the vessel. A seamen's right to recover under the Jones Act is an alternative to his right to recover for unseaworthiness of the vessel.[36] Where injury or death is not the result in whole or in part of negligence of the employer or his agents,

[26] Ibid.

[27] Robbins Dry Dock & Repair v. Dahl, 226 U.S. 449, 45 S. Ct. 157, 69 L. Ed. 372 (1925).

[28] Atlantic Transport v. Imbrovek, 234 U.S. 52, 34 S. Ct. 733, 58 L. Ed. 1208 (1913).

[29] Lindgren v. United States, 281 U.S. 38, 50 S. Ct. 207, 74 L. Ed. 686 (1930).

[30] Olson v. Flavel, 34 F. 477 (D.C. Ore. 1888); The Frank & Willie, 45 F. 494 (S.D. N.Y. 1891); The Julia Fowler, 49 F. 277 (S.D. N.Y. 1892); John A. Roebling's Sons Co. v. Erickson, 261 F. 986, 987 (C.C.A. 2d 1919); Panama R. Co. v. Johnson, 264 U.S. 375, 44 S. Ct. 391, 68 L. Ed. 748 (1924).

[31] The Merchant Marine Act of June 5, 1920 (Jones Act), 41 Stat. 1007, 46 U.S.C. § 688 (1959).

[32] Arizona v. Anelich, op. cit. supra note 12.

[33] Ibid.

[34] Federal Employer's Liability Act, Act of April 22, 1908, C. 149, 35 Stat. 65, 45 U.S.C. § 51 et seq (1958).

[35] Arizona v. Anelich, op. cit. supra note 12.

[36] Mc Gee v. United States, 165 F.2d 287 (2d Cir. 1947).

the Jones Act does not change the rights of remedies of the parties under admiralty law and a seaman takes the same risk of his calling as he did prior to its enactment.[37]

RIGHTS OF RECOVERY AFTER 1920

Under the rule of the *Osceola* case, even though a seaman could show negligence, he could not recover unless he could prove negligence by showing that the owner had breached his duty in not furnishing and maintaining equipment free from known defects or those which ought to have been known by him.[38] In 1922 the Supreme Court stated in the *Carlisle Packing Co. v. Sandanger* case that a shipowner could be held liable without any showing of negligence, for unseaworthy conditions existing when the vessel left her home pier.[39] The owner's duty to a seaman of providing a seaworthy vessel was regarded by the Court as absolute and similar to that duty established by the implied warranty in cargo cases.[40] The decision in the *Sandanger* case was derived from an established line of cargo cases which held that shipowners were absolutely liable to shippers for the unseaworthiness of vessels at the outset of the voyage.[41] In so ruling the court gave expression to a policy long discernable in American admiralty decisions, of implying the warranty, not merely because of the customary expectations of the parties to an agreement, but in order to increase protection to life and property against all hazards of the sea.

Mr. Justice Frankfurter in commenting on the reasoning behind the decision in the *Sandanger* case said:

"the reasons which justified the implications on grounds of policy as to cargo, justified it as to employed seamen; and there is no countervailing extensive increase in the nature of the duty to give the court serious pause in extending to protection of life, a policy designed in a significant part for the protection of property. . . . Under the strict rules of shipboard organization and conduct, the safety of the seamen was in a very real sense subject to the same hazards."[42]

In 1893 The Harbor Act relaxed the exacting obligations of the owner's warranty of seaworthiness of his ship.[43] In 1936 The Carriage of Goods By Sea Act cut down the shipowners duty to cargo owners to one of the usual due care to furnish a seaworthy vessel.[44] This relaxation of the owner's duty has not been extended by statute or by decision to the obligation of the owner to the seamen.[45]

The rule of the *Sandanger* case has become firmly established in American admiralty law and has enjoyed liberal construction and expansion in a number of directions.[46]

[37] Lake v. Standard Fruit S.S. Co., 185 F.2d 354 (2d Cir. 1950); Repsholdt v. United States, 205 F.2d 852 (7th Cir. 1953).

[38] Glorigard v. France & Canada S.S. Corp., 263 F. 545 (2d Cir. 1920).

[39] Carlisle Packing Co. v. Sandanger, 259 U.S. 255, 42 S. Ct. 475, 66 L. Ed. 927 (1922).

[40] See The Silvia, 171 U.S. 462, 19 S. Ct. 7, 43 L. Ed. 241 (1898); The Southwark, 191 U.S. 1, 24 S. Ct. 1, 48 L. Ed. 65 (1903).

[41] Op. cit. supra note 22, Dixon v. United States.

[42] See dissent Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 34 S. Ct. 926, 4 L. Ed. 2d 941 (1960).

[43] Act of Feb. 13, 1893 (Harter Act) C. 105, 27 Stat. 445, 46 U.S.C. § 190 (1959).

[44] The Carriage of Goods By Sea of 1936, 49 Stat. 1207, 46 U.S.C. § 1300 (1959).

[45] Mahnich v. Southern S.S. Co., 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561 (1944).

[46] See The Ralph, 299 F. 52 (9th Cir. 1924); Keen v. Overseas Tankship Corp., 194 F.2d 515 (2d Cir. 1952); Hawn v. Pope & Talbot Inc., 198 F.2d 800 (3rd Cir. 1952), aff'd, 346 U.S. 406, 74 S. Ct. 202 98 L. Ed. 143 (1953)—unsatisfactory

In the two decades following the *Sandanger* case, in addition to the extension of the doctrine of unseaworthiness to longshoremen,[47] repairmen and other harbor workers,[48] who are doing work formerly done by seamen, it has been held that not only defects in the ship's structure, machinery, appliances, furnishings, equipment, appurtenances, and gear render the ship unseaworthy but also that a ship not manned by a competent crew renders the ship unseaworthy.[49]

A vessel to be seaworthy must not only be strong staunch and reasonably fit for a voyage, but she must also be properly equipped and for that purpose there is a duty upon the owner to provide a competent master,[50] a crew adequate in number and competent for their duty,[51] and equal in disposition and seamanship to the ordinary men in the calling.[52]

In *Boudoin v. Lykes Bros. S.S. Co.* the Supreme Court in holding that a vessel becomes unseaworthy when the standard of disposition and seamanship of any member of her crew is not maintained stated that a seaman with a savage and vicious nature imperils the ship just as does a vessel bursting at the seams.[53]

Mahnich v. Southern S.S. Co. is a landmark case in the history of seaworthiness for it deemed that the operating negligence of a ship's officer could make the vessel unseaworthy.[54] In this case a seaman was injured by a fall from a staging which gave way when a defective rope parted. The ship's mate had supplied the defective rope when sound rope was available aboard ship. As to the staging which was rendered unseaworthy by the defective rope and the mate's negligence, the court found the fact that there was sound rope aboard which might have been used to rig a safe staging, did not afford an excuse to the owner for the failure to provide a safe one. The court held that regardless of the amount of care the owner exercises in providing a seaworthy vessel, he is not absolved from liability if, in fact, an unseaworthy condition exists and proximately causes an injury to a seaman. The shipowner was held to have an absolute and non-delegable duty to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection but reasonable fitness or reasonable suitability for the ship's intended service.[55]

In the *Seas Shipping* case[56] the right of a seaman to recover for injuries resulting

working conditions held to be within the seaworthiness doctrine although the vessel itself and her appliances were seaworthy; Alaska Steamship Co. v. Petterson, 374 U.S. 396, 74 S. Ct. 601, 98 L.Ed. 798 (1954), where recovery was allowed under the unseaworthiness doctrine for defective appliances temporarily brought on board by an independent contractor for use by him in the performance of his duty.

[47] Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946); Pope & Talbot Inc. v. Hawn, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953).

[48] Pope & Talbot Inc. v. Hawn, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953).

[49] Peninsula & Occidental S.S. Co. v. NLRB, 98 F.2d 411 (C.C.A. 5th 1938) certiorari denied, 305 U.S. 653, 95 S. Ct. 248, 83 L. Ed. 423.

[50] The Ralph, 299 F.2d 52 (9th Cir. 1924).

[51] In Re Pacific Mail S.S. Co., 130 F. 76 (9th Cir. 1904).

[52] Boudoin v. Lykes Bros. S.S. Inc., 348 U.S. 336, 75 S. Ct. 382, 99 L. Ed. 296 (1955); Keen v. Overseas Tankship Corp., 194 F.2d 515 (2d Cir. 1952).

[53] Boudoin v. Lykes Bros. S.S. Co., op. cit. supra note 52.

[54] Mahnick v. Southern S.S. Co., 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561 (1944).

[55] Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336, 75 S. Ct. 382, 99 L. Ed. 354 (1955).

[56] Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946); for an excellent treatment of this see 6 New York Law Forum 176 (1960).

from unseaworthiness was extended to a longshoreman who was injured aboard ship while doing work which was formerly done by seamen. In permitting recovery the court said of unseaworthiness:

"It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. . . . It is a form of absolute duty owing to all within the range of its humanitarian policy."

After the *Seas Shipping* case extended to longshoremen the warranty of seaworthiness, previously accorded to members of the crews of ships, a doctrine of "relinquishment of control" was developed and applied by some courts.[57] The rule stated that when an owner surrenders control of any part of his ship to a stevedore in charge of loading or unloading, his duty of seaworthiness as to the part surrendered extends only up to the time the stevedore assumes control. If thereafter the agents of the stevedore, while he is in control, create an unsafe condition where none existed before, a shipowner is not liable for resulting accidents. This doctrine was completely rejected by the Supreme Court in the *Petterson* case,[58] when it held that an owner's absolute duty to provide a seaworthy vessel, together with its appurtenant appliances and equipment was not affected by turning over a part of the vessel to another. The shipowner was held liable for defects in equipment brought aboard by a stevedore and used under the stevedore's direction.

Absolute Liability

In 1950 the U.S. Court of Appeals for the third circuit, in the *Cookingham* case held that the temporary presence of a substance on a ship's deck or stairway causing injury to a seaman does not constitute unseaworthiness.[59] The court reasoned:

"To extend the doctrine of unseaworthiness to cover such a case as this would be to make the shipowner an insurer against every fortuitous or negligent act on shipboard which results in temporarily rendering an appliance less than safe even though he may have no knowledge of or control over its happening, and without giving him a reasonable opportunity, such as is afforded by the safe place to work doctrine of the law of negligence, to correct the condition before he becomes liable for it."

Subsequent decisions of the Supreme Court held that the lack of knowledge of an unsafe condition or of an opportunity to correct it would not relieve the shipowner of liability for unseaworthiness, thus weakening the rule enunciated in the *Cookingham* decision.[60] In *Mitchell v. Trawler Racer*,[61] the Supreme Court rejected the holding of the *Cookingham* case. A seaman on his way ashore at the end of a voyage, stepped on the ship's rail in order to reach a ladder attached to the pier. The rail was covered with slime and fish gurry apparently remaining there from earlier unloading operations. The seaman was injured when his foot slipped off the rail as he grasped for the ladder. The Supreme Court in a six-to-three decision reversed the lower court's holding that with

[57] Lauro v. United States, 162 F.2d 32 (2d Cir. 1947); Grasso v. Lorentzen, 149 F.2d 32 (2d Cir. 1947); Gallagher v. United States Lines Co., 206 F.2d 177 (2d Cir. 1953); Lopez v. American-Hawaiian S.S. Co., 201 F.2d 418 (3rd Cir. 1953).

[58] Alaska Steamship Co. Inc. v. Petterson, 347 U.S. 396, 78 S. Ct. 601, 98 L. Ed. 499 (1953).

[59] Cookingham v. United States, 184 F.2d 213 (3rd Cir. 1950).

[60] Alaska Steamship Co. Inc. v. Petterson, op. cit. supra note 58; Boudoin v. Lykes Bros. S.S. Co., op. cit. supra note 55.

[61] Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960).

respect to an unseaworthy condition which arises only during the progress of the voyage, the shipowner's obligation "is merely to see that reasonable care is used under the circumstances . . . incident to the correction of the newly arisen defect."[62]

Mr. Justice Stewart wrote the opinion of the majority in the *Mitchell v. Trawler Racer* case and gave a brief history of the origin and development of the doctrine of seaworthiness. The majority opinion after examining the *Sandanger* case and citing decisions of the Supreme Court, which in the last two decades followed the *Sandanger* case, stated that they have all undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care. The majority opinion continued: "There is no suggestion in any of the decisions that the duty is less onerous with respect to an unseaworthy condition arising after the vessel leaves her home port, or that the duty is any less with respect to an unseaworthy condition which may be only temporary." Referring to the *Petterson* case,[63] the court said: "That decision is thus specific authority for the proposition that the shipowner's actual or constructive knowledge of the seaworthy condition is not essential to his liability. That decision also effectively disposes of the suggestion that liability for a temporary unseaworthy condition is different from the liability that attaches when the condition is permanent."

Referring to the *Sandanger* case,[64] Mr. Justice Frankfurter in his dissenting opinion said that no explanation accompanied the dogmatic pronouncement on an issue not presented. He states: that in the Sandanger case it was deemed sufficient to rely on unelaborated citations of two cargo cases, which were concerned not with the rights of seamen but with the shipowner's liability for cargo damage. Speaking of the development of the doctrine of unseaworthiness, he said: "When it appears that a challenged doctrine has been uncritically accepted as a matter of course by the inertia of repetition . . . the court owes it to the demands of reason, on which judicial law-making power ultimately rests for its authority to examine its foundations and validity in order appropiately to assess claims for its extension."

In none of the cases cited by the majority, was the court called upon even remotely to consider whether the absolute warranty of seaworthiness extends to conditions arising after the commencement of the voyage.[65] Mr. Justice Frankfurter continued: "The Court offers no reason of history or policy why vessel owners, unlike all other employers, should, in circumstances where the only benefit to be gained is the insurance itself, be regarded by law as the insurers of their employees. If there were a sufficient reason for the judicial imposition of such a duty, it would be arbitrary in the extreme to limit it to cases where by chance the injury occurs through the momentary inadequacy of a prudently run vessel. All accidental injury should fall within such a humanitarian policy provided only that it occurs in the service of the ship. It was such a policy which from the earliest times has justified the imposition of the duty to provide maintenance and cure; but nothing in the nature of modern maritime undertakings justifies extending to compensation a form of relief which for more than five centuries has been found sufficient."

Mr. Justice Harlan in his dissenting opinion writes: "The Court is not fashioning a rule designed to protect life, for there appears no real basis for expectation that this decision will promote the taking of greater precautions at sea. The shipowner is held liable, without being told that there was something left undone which should have been

[62] 265 F.2d 426 (1 Cir. 1959).
[63] Op. cit. supra note 58, Alaska Steamship Co. Inc. v. Petterson.
[64] Carlisle Packing Co. v. Sandanger, op. cit. supra note 39.
[65] See dissent, Mitchell v. Trawler Racer, Inc., op. cit. supra note 61.

done, for he is not asked to show, that the vessel ought to have been outfitted differently, that is, in a fashion which would have prevented the dangerous condition from arising at all. Nor is the respondent permitted to show that such condition was not due to its fault."

CONCLUSION

In light of a policy inherent in admiralty law, the doctrine of seaworthiness as developed by the Supreme Court, places on a shipowner an absolute and continuing duty,[66] resulting in liability without fault. This calls for the imposition of liability against the shipowner for transitory acts which makes the vessel just as unseaworthy to the injured person as it would if the defective condition existed at the commencement of the voyage. Lack of knowledge or opportunity of the shipowner to correct a defective condition does not affect the shipowner's liability in light of *Petterson*[67] and *Boudoin*.[68]

The rights of seamen to recover for injuries in the service of their ship have increased to such an extent that a shipowner has an absolute duty to furnish them at all times with a seaworthy ship while his duty to the paying passenger is one of due care. This right of the seamen has increased and developed as a result of a policy inherent in maritime law which is sensitive to the rights of the seamen and sedulous for their protection. Seamen are the wards of admiralty and the policy of the maritime law has always been to see that they are accorded proper protection by the vessels on which they serve.[69] W. T. J.

[66] Mahnich v. Southern S.S. Co., 321 U.S. 96, 64 S. Ct. 455, 96 L. Ed. 561 (1944); Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946).

[67] Alaska Steamship Co. v. Petterson, op. cit. supra note 58.

[68] Boudoin v. Lykes Bros. S.S. Co., op. cit. supra note 55.

[69] The State of Maryland, 85 F.2d 944 (4th Cir. 1936).