

NOTES

DEATH TAXES AND CONFLICTING CLASSIFICATIONS OF INTERESTS IN LAND*

THE FOURTEENTH Amendment has been held to deny the domiciliary state of a decedent the right to include in his taxable estate real property situated in another state.¹ Difficulties in applying this constitutional limitation arise if the law of the state of situs of the property and that of the state of domicile of the owner differ as to whether the property should be classified as real property. For example, land subject to a sale contract, or owned by a partnership or trust, or ordered sold by will, is treated, for some purposes, as intangible personalty, under the doctrine of equitable conversion.² There has been disagreement in the cases, however, on the issue of whether this doctrine will be employed for tax purposes so as to confer the power to tax upon the state of the owner's domicile, rather than upon the state where the land is situated.³ If, in any particular case, the two states involved come to different conclusions upon this issue, the same property may be taxed twice, or not at all.⁴ Since either result is undesirable, and since double taxation may even be unconstitutional in the view of recent cases,⁵ at least one

*Carrie S. Fair, 35 B. T. A., Nov. 10, 1936.

1. Frick v. Pennsylvania, 268 U. S. 473 (1925).

2. Stone, *Equitable Conversion by Contract* (1913) 13 COL. L. REV. 369; Note (1926) 42 A. L. R. 426.

3. Land subject to sale contract: compare *In re Boshart's Estate*, 107 Misc. 697, 177 N. Y. Supp. 567 (Surr. Ct. 1919), *aff'd*, 188 App. Div. 783, 177 N. Y. Supp. 574 (4th Dep't, 1919) with *In re Paul's Estate*, 303 Pa. 330, 154 Atl. 503 (1931), *cert. denied*, 284 U. S. 630 (1931), (1931) 41 YALE L. J. 140. See Comment (1936) 46 YALE L. J. 272, 273. Land held by partnership, see (1916) 30 HARV. L. REV. 90. Land held by trust: *Dana v. Treasurer*, 227 Mass. 562, 116 N. E. 941 (1917); Fead and Green, *Massachusetts Trusts and Succession Taxes* (1929) 27 MICH. L. REV. 869. Land ordered sold by will, see (1926) 25 MICH. L. REV. 84; (1926) 39 HARV. L. REV. 781. For a collection of cases on the whole field, see note (1926) 42 A. L. R. 426.

4. State *ex rel.* Hilton v. Probate Court of Ramsey County, 145 Minn. 155, 176 N. W. 493 (1920).

5. It was held in *Frick v. Pennsylvania*, 268 U. S. 473 (1925) that a state may not collect an inheritance tax upon property that is not within the taxing jurisdiction. More recent cases [*Farmer's Loan and Trust Co. v. Minnesota*, 280 U. S. 294 (1930) and *First National Bank of Boston v. Maine*, 284 U. S. 312 (1932)] indicate that possibly the transfer at death of any given property can take place at only one point, and hence that property can have only one taxable situs. Therefore, the Supreme Court may well hold it unconstitutional for two states, both using their own law, to give property two separate taxable situs. To prevent this, the Supreme Court could itself determine the situs of the particular property interest, thus binding the obedience of both states. However, in view of the variety of possible problems of this type, a seemingly preferable method would be for the Supreme Court to leave the individual decisions to the state courts, but to require that one of the two states follow the law of the other. In the latter case it would be more expedient to make the law of the

court⁶ sitting in the state of domicile has classified the decedent's interest for purposes of taxation by applying the conflict of laws rule that the law of the situs of land should determine whether an interest in the land is real or personal.⁷

An exactly similar problem does not confront the federal taxing authorities, for the Constitution has not thus far been interpreted to prohibit the federal government from taxing foreign real property belonging to an American decedent.⁸ But since the federal estate tax specifically exempts from taxation any "real property situated outside the United States,"⁹ a comparable problem of determining what property interests are real may arise, especially if the foreign interest is unfamiliar, or the foreign law differs in matters of classification. But the federal problem differs from that of the states; in the state cases the fundamental issue is the constitutional one of whether or not the property being taxed has a taxable situs within the taxing jurisdiction. The distinction between real and personal interests in land is used as a step in the court's decision on the taxable situs issue, a question of judicial policy under the Fourteenth Amendment. But under the federal statute, assuming that the Supreme Court will not hold it unconstitutional to tax foreign realty, the problem of taxable situs becomes unimportant, and the scope of the term real property is a problem in statutory construction, as to whether Congress meant the phrase real property to be read in

state where the land is situated control, in accordance with the conventional conflicts rule, see *infra* note 7. It may even be that the due process clause requires the use of conflicts principles in the resolution of such interstate differences. See Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws* (1926) 39 HARV. L. REV. 533.

6. *Bates v. Decree of Judge of Probate*, 131 Me. 176, 160 Atl. 22 (1932). This was also considered in *Land Title and Trust Co. v. South Carolina Tax Commission*, 131 S. C. 192, 206, 126 S. E. 189, 193 (1925), (1925) 34 YALE L. J. 803.

7. *Clarke v. Clarke*, 178 U. S. 186 (1900); *Freke v. Lord Carbery*, [1873] L. R. 16 Eq. 461; *In re Berchtold*, [1923] 1 Ch. 192; *Re Burke*, [1928] 1 D. L. R. 318 (Saskatchewan); RESTATEMENT, CONFLICT OF LAWS (1934) §§ 208, 209; DICEY, CONFLICT OF LAWS (5th ed. 1932) rule 150 (a); WESTLAKE, PRIVATE INTERNATIONAL LAW (7th ed. 1925) chap. VIII.

8. The Supreme Court stated in *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 202, 204 (1905), a property tax case, that in order to justify taxation there must be some degree of protection given to property by the taxing state as a *quid pro quo*. Foreign realty seemingly receives little such protection, hence there have been doubts whether such realty might constitutionally be included in the taxable estate [31 Op. Atty. Gen. (1918) 287]. However, in the more recent case of *Burnet v. Brooks*, 288 U. S. 378 (1933), the Court states, at page 400, that the federal power to collect an inheritance tax is subject only to the jurisdictional limitations recognized in international relations. At present, in the international sphere, where jurisdiction is based upon the domicile or citizenship of the decedent, the right to tax the total estate, regardless of the nature or location of the property, is generally recognized, and many countries now do include foreign realty within the taxable estate. See GUGGENHEIM, *L'IMPOSITION DES SUCCESSIONS EN DROIT INTERNATIONAL ET LE PROBLÈME DE LA DOUBLE IMPOSITION* (Genève, 1928) 41, 51-67.

9. 48 STAT. 754, 26 U. S. C. § 411 (1934).

an American sense, or intended interests in land to be classified as real or personal, for purposes of the statute, in accordance with the accepted conflicts rule, by the law of the situs of the land.

Recently a federal estate tax was levied upon Cuban property interests described as *hipotecas*, and owned by an American decedent. Since the *hipoteca* is considered by the law of Cuba to be an "immovable," a term generically akin to the Anglo-American "real property," the executrix of the decedent's estate claimed that the *hipotecas* fell within the tax exemption extended by statute to real property situated abroad.¹⁰ The Board of Tax Appeals, rejecting this contention, held that Congress when it referred to "real property" intended the term to be used as it is understood in American law, and that the *hipotecas*, being like mortgages, were personalty under American law and therefore taxable. One member dissented.¹¹

While the conclusion of the majority that Congress intended the scope of the statutory exemption to be determined by American law is tenable,¹² such intent is always difficult to establish satisfactorily¹³ and the adoption of American law as the criterion of what is real property leads to several con-

10. In the Revenue Act of 1916, section 202 provided for the inclusion in the gross taxable estate of "all property, real or personal, tangible or intangible, wherever situated." But despite the seeming generality of the provision, partly on the basis of an argument based upon other provisions of the Act, and partly through fear that a contrary interpretation would be unconstitutional, both the Treasury Department and the Attorney General construed this provision as exempting foreign real estate. 31 Op. Atty. Gen. (1918) 287; 20 Treas. Dec. 435, T. D. 2735 (1918). The subsequent statutes, including that of 1926 under which this case arose, repeated the provision, but the Act of 1934 contained an amendment specifically exempting foreign real property. The Board assumed that the 1934 Act merely stated the intent of the 1926 Act, and based its reasoning upon the wording of the 1934 Act.

11. *Carrie S. Fair*, 35 B. T. A., Nov. 10, 1936, on appeal to C. C. A. 3rd. Cf. *Matter of Vivanti*, 63 Misc. 618, 118 N. Y. Supp. 680 (Surr. Ct. 1909). English cases on similar tax problems: *Toronto General Trusts Co. v. The King*, [1919] A. C. 679; *Lawson v. Commissioners of Inland Revenue*, [1896] 2 I. R. 418; *Chatfield v. Berchtoldt*, [1872] L. R. 7 Ch. 192; *Forbes v. Steven*, [1870] L. R. 10 Eq. 178; *Re Stokes*, [1890] 62 L. T. 176. See generally DICEY, *CONFLICT OF LAWS* (1st ed. 1896) Appendix, note 17, p. 781 (Not in later editions).

12. However, if it should be unconstitutional to tax foreign realty, see *supra* note 8, the Board's interpretation of the statute may result in an unconstitutional tax on property outside the taxing jurisdiction. The Board reasoned that since a *hipoteca* represents a debt, its situs is, by the doctrine of *mobilia sequuntur personam*, at the domicile of the creditor and therefore within the taxing jurisdiction. But this assumes that *hipotecas* are *mobilia*, whereas according to conflicts principles that is a preliminary question which should be decided according to the law of the situs. Lorenzen, *The Theory of Qualifications and the Conflict of Laws* (1920) 20 COL. L. REV. 247, 264; Beckett, *The Question of Classification (Qualification) in Private International Law* (1934) 15 BRIT. Y. B. OF INT. LAW 46.

13. The Board relied on *Retailer's Credit Association of Alameda County*, 33 B. T. A. 1166 (1936) to the effect that the taxpayer must come strictly within an exemption. But see *Eidman v. Martinez*, 184 U. S. 578, 583 (1902) that words of exception must be liberally construed.

fusing and perhaps unfortunate consequences. Since Cuba has already exercised its unquestioned power to tax the *hipotecas* involved,¹⁴ a double tax will necessarily fall upon the estate of the American decedent if the instant case is upheld on appeal.¹⁵ Furthermore, under the view of the statute adopted by the majority, courts may, in the future, be faced with the complex problem of classifying strange foreign interests in land according to distinctions between realty and personalty historically developed in Anglo-American law. Moreover, the idea of real property has no uniform content throughout the United States and the resolution of such local diversity presents a supplementary problem to courts endeavoring to apply "American law" to foreign created interests.¹⁶ Because of these difficulties and the absence of any clear expression of congressional intent to employ the words real property in a technical American sense,¹⁷ it is arguable that the statute should be read to require the classification of particular interests, in accordance with the conflicts rule, by the law of the situs of the land.¹⁸ If this construction of the statute had been followed in the instant case, however, a further difficulty would have been presented, in that Cuban law does not contain the phrase "real property." However, the Cuban word immovable seems equivalent functionally to the American classification real property, although not identical with it in content,¹⁹ and the disparity in nomenclature should not be enough to prevent the application of Cuban law.²⁰ However, as a practical matter,

14. See *Carrie S. Fair*, 35 B. T. A., Nov. 10, 1936, at page 4.

15. That this is to some extent contrary to the intent of the exemption, see Report of Finance Committee, covering amendment to Section 302 (a) of the Revenue Act of 1926, adopted as Section 404 of the Revenue Act of 1934. SEN. REP. No. 558, 73d Cong., 2d Sess. (1934) 46.

16. If this is viewed as a problem of statutory interpretation, the federal courts are not bound by state law. *Reynolds v. N. Y. Trust Co.*, 188 Fed. 611 (C. C. A. 1st, 1911); *Skaggs v. Kansas City Terminal Ry. Co.*, 233 Fed. 827 (W. D. Mo. 1916).

17. When, in the interpretation of a term in a federal statute, there arises a difference between general common law principles and local state law, in order to preserve uniformity within the United States, the common law controls unless the statute expressly, or by necessary implication, depends upon local law. *Burnet v. Harmel*, 287 U. S. 103 (1932); *Burk-Waggoner Oil Ass'n v. Hopkins*, 269 U. S. 110 (1925); *Weiss v. Wiener*, 279 U. S. 333 (1929). But *cf.* *Crooks v. Harrelson*, 282 U. S. 55 (1930). There would seem no need to extend this presumption to cases of foreign law, since uniformity is better served by the use of the conflicts rule to prevent double taxation.

18. Since most of the countries of the world do not use the term real property, it seems plausible that Congress, in exempting foreign realty, anticipated the use of common conflicts rules, and "intended" the words "real property" as a shorthand notation for the analogous classification used by the law of the situs.

19. Even in American law the classification immovable may be more realistic for tax purposes, *cf.* *Craver's Estate*, 319 Pa. 282, 179 Atl. 606 (Superior Ct. 1935) (99 year lease renewable forever held immovable and not taxable at the domicile, although intangible personalty).

20. For a careful analysis of the applicability of the conflicts rule, see WENGLER, *BEITRÄGE ZUM PROBLEM DER INTERNATIONALEN DOPPELBESTEUERUNG* (1935) pp. 73 *et seq.* But Wengler believes that where the law of the situs possesses no comparable term

the conflicts rule is unlikely to be adopted in the near future in the international sphere because courts are reluctant to apply foreign law in the determination of revenue matters, and because there is an unwillingness to avoid international double taxation through unilateral self limitation.²¹ But since the problem of double taxation is being approached through the use of bilateral treaties,²² the conflicts rule may, in the future, become of great service, as between treaty nations, in avoiding the difficulties arising from differences in internal law.

DEFECTIVE GOODS AS A DEFENSE AGAINST A COMMERCIAL FACTOR OR BROKER*

MANY DEVICES have been developed by sellers, or by their financing agencies, to make the buyer's obligation to pay independent of any defenses arising out of the contract of sale.¹ The trade acceptance in the hands of a discounting bank is a case in point. The commercial letter of credit functions to the same end,² provided only that the accompanying documents are in order. It has been uncertain, however, in those branches of trade where financing is done by the seller's factor or broker,³ how far this separation of the payment obligation from questions of quantity and quality would be allowed to go.⁴ A recent case in the English Court of Appeal clarifies the point somewhat. A firm of brokers, pursuant to a *del credere* agency contract, paid the seller the full purchase price of certain goods within three days of the delivery to them of the shipping documents, and drew their own

or where there is such a term, but the classification of the particular interest involved is uncertain, then the law of the forum should be applied.

21. The tendency has been to expand federal taxation. *Cook v. Tait*, 265 U. S. 47 (1924); *Guaranty Trust Co. of New York, Executor*, 21 B. T. A. 330 (1930); *Guaranty Trust Co. v. Commissioner*, 79 F. (2d) 245 (C. C. A. 2nd, 1935). The same has been true of foreign countries. *In re Consuelo, Dowager Duchess of Manchester*, [1912] 1 Ch. 540; GUGGENHEIM, *op. cit. supra* note 8, p. 51-68.

22. McCaffery, *The Franco-American Convention Relative to Double Taxation* (1936) 36 COL. L. REV. 382. The European countries are well in advance in the use of such treaties, GUGGENHEIM, *op. cit. supra* note 8, p. 69 n. 1.

*Churchill and Sim v. Goddard, 154 L. T. R. 586 (C. A. 1936).

1. See Comment (1924) 34 YALE L. J. 775.

2. *O'Meara v. Nat. Park Bank*, 239 N. Y. 386, 146 N. E. 636 (1925); FINKELSTEIN, LEGAL ASPECTS OF COMMERCIAL LETTERS OF CREDIT (1930) 224.

3. In the letter of credit transaction the issuing bank is brought into the transaction by the buyer. FINKELSTEIN, *op. cit. supra* note 2, at 146.

4. There are, of course, many variations of the use of a commercial agent as a financing medium, *e. g.*, *Rytenberg v. Schefer*, 131 Fed. 313 (S. D. N. Y. 1904); *Ommen v. Talcott*, 188 Fed. 401 (C. C. A. 2d, 1911); *Boise v. Talcott*, 264 Fed. 61 (C. C. A. 2d, 1920); *Irving Trust Co. v. Commercial Factors' Corp.*, 68 F. (2d) 864 (C. C. A. 2d, 1934); *Irving Trust Co. v. Lindner & Bro., Inc.*, 264 N. Y. 165, 190 N. E. 332 (1934); see Steffen and Danziger, *The Rebirth of the Commercial Factor* (1936) 36 COL. L. REV. 745.

drafts on the purchaser, which were duly accepted. Despite the defectiveness of the goods as determined upon a subsequent arbitration, the brokers recovered against the buyer as acceptor of the drafts, the court holding that the action had been brought by the plaintiffs not as agents or trustees of the seller, but as holders of the accepted drafts, which, viewed in their commercial setting, constituted an independent contract between plaintiffs and defendant, its consideration, according to the court, being the transfer of the shipping documents and not full performance of the underlying contract of sale.⁵

There is little question of the power of a factor to contract in his own name and to sue the buyer on the contract, whether the name of the seller be disclosed or undisclosed;⁶ but his action is said to be subject to the superior cause of action of his principal,⁷ and the buyer in any such case is entitled to defend on any ground available against the seller.⁸ Since the broker,⁹ on the other hand, does not ordinarily appear as promisee in the contract of sale, he generally has no action for the purchase price at all:¹⁰ the rule that such an agent may acquire a standing in court through the acquisition of some sort of "special interest"¹¹ is not as certain as its frequent statement would seem to imply.¹² Where the broker does succeed in maintaining a suit against the buyer, moreover, defenses good against the

5. *Churchill and Sim v. Goddard*, 154 L. T. R. 586 (C. A. 1936), *rev'g* 51 T. L. R. 453 (K. B. 1935), (1935) 80 L. J. 56, (1935) 180 L. T. 7.

6. *Stockbarger v. Sain*, 69 Ill. App. 436 (1896); *William R. Smith & Son v. Bloom*, 159 Iowa 592, 141 N. W. 32 (1913); *Keown & Co. v. Vogel*, 25 Mo. App. 35 (1887); *Davis v. Harness*, 38 Ohio St. 397 (1882); *Progress Blue Ribbon Farms v. Chicago Horse Sales Co.*, 153 Wis. 249, 140 N. W. 1132 (1913); *cf. Plummer Mercantile Co. v. Henderson*, 37 Colo. 93, 86 Pac. 108 (1906); *Ermeling v. Gibson Canning Co.*, 105 Ill. App. 196 (1902); *Owen v. Harriott*, 47 Ind. App. 359, 94 N. E. 591 (1910).

7. See *Beardsley v. Schmidt*, 120 Wis. 405, 409, 98 N. W. 235, 236 (1904); *MECHEM, AGENCY* (2d ed. 1914) §2037. But the principal may not defeat the agent's suit to the extent of any lien the agent may have. *Drinkwater v. Goodwin*, 1 Cowp. 251 (K. B. 1775).

8. *MECHEM, op. cit. supra* note 7, §2045; *RESTATEMENT, AGENCY* (1933) §368; *BOWSTEAD, AGENCY* (8th ed. 1932) 439; *cf. Grice v. Kenrick*, L. R. 5 Q. B. 340 (1870).

9. The distinction between broker and factor is discussed in *Graham & Co. v. Duckwall, Fitch & Co.*, 8 Bush 12 (Ky. 1871); *J. M. Robinson, Norton & Co. v. Corsicana Cotton Factory*, 124 Ky. 435, 102 S. W. 869 (1907).

10. *White & Elder v. Chouteau*, 10 Barb. 202 (N. Y. Sup. Ct. 1850); *Fairlie v. Fenton*, L. R. 5 Ex. 169 (1870); *Sharman v. Brandt*, L. R. 6 Q. B. 720 (1871); *Jordeson & Co. v. London Hardwood Co.*, 110 L. T. R. 666 (K. B. 1913); *Flatau, Dick & Co. v. Keeping*, 36 Com. Cas. 243 (C. A. 1931). But *cf. Barton Thompson & Co. v. Vigers Bros.*, 19 Com. Cas. 175, 110 L. T. R. 667, note *a* (K. B. 1906).

11. *White & Elder v. Chouteau*, 10 Barb. 202 (N. Y. Sup. Ct. 1850); *Atkyns & Batten v. Amber*, 2 Esp. 493 (C. P. 1796); *BOWSTEAD, op. cit. supra* note 8, at 431.

12. *MECHEM, op. cit. supra* note 7, §§2033-2036; *RESTATEMENT, AGENCY* (1933) §372.

seller may be proved against him,¹³ as in the case of an action by the factor.¹⁴ These holdings are consistent with the traditional description of the commercial factor or broker as assignee of the seller's claim against the buyer for the purchase price, subject to all the defenses valid against the seller-assignor.

An agent of the type employed in the English case, however, seems to resemble the issuer of a letter of credit more than he does the ordinary broker. By the practice involved both in the English case and in the letter of credit transaction the seller contracts for payment by a third party—the agent in the one case, the issuing bank in the other—who undertakes to pay in cash against shipping documents,¹⁵ or at some other specified point in the transaction, apart from the terms of the sales contract. The obligation of the bank issuing a letter of credit to accept and pay the seller's drafts upon receipt of the specified documents is not defeated by reason of defects in the goods;¹⁶ nor can the buyer refuse the bank reimbursement because the goods do not comply with contract specifications.¹⁷ In several cases prior to the present case, on the other hand, in which similar *del credere* brokers, who had paid the sellers, but had not obtained acceptances from the buyers, sought to maintain a claim against the buyers for the price of the goods or the return of the shipping documents, the English courts denied the relief requested, on the ground that the plaintiffs, not being parties to the principal contract of sale, had no standing in court against the buyers.¹⁸ It remains to be seen whether the buyer who knows of a defect in the goods

13. *Leo v. McCormack*, 186 N. Y. 330, 78 N. E. 1096 (1905).

14. In many cases it is difficult to distinguish the financing agent from one who is himself a purchaser, *e. g.*, *In re Taft*, 133 Fed. 511 (C. C. A. 6th, 1904); *B. F. Sturtevant Co. v. Cumberland Dugan & Co.*, 106 Md. 587, 68 Atl. 351 (1907); *Commercial Credit Co. v. Girard Nat. Bank*, 246 Pa. 88, 92 Atl. 44 (1914); *Ex parte White*, 24 L. T. R. 45 (C. A. 1871). Where the agency could be considered a "veil" for a sale to the agent, the "agent" would seem to become a principal seller clearly subject to the defense of defectiveness of the goods.

15. FINKELSTEIN, *op. cit. supra* note 2, at 223.

16. *O'Meara Co. v. Nat. Park Bank*, 239 N. Y. 386, 146 N. E. 636 (1925); *Continental Nat. Bank v. Nat. City Bank of N. Y.*, 69 F. (2d) 312 (C. C. A. 9th, 1934).

17. *First Wis. Nat. Bank v. Forsyth & Co.*, 189 Wis. 9, 206 N. W. 843 (1926); FINKELSTEIN, *op. cit. supra* note 2, at 171-172; *cf. Pan-American Bank & Trust Co. v. Nat. City Bank*, 6 F. (2d) 762 (C. C. A. 2d, 1925), *cert. denied*, 269 U. S. 554 (1925); *Farmers' Bank v. Stapleton*, 118 Kan. 755, 236 Pac. 828 (1925); *Tocco v. Bank of Italy*, 249 Mass. 267, 143 N. E. 905 (1924); *Camp v. Corn Exchange Nat. Bank*, 285 Pa. 337, 132 Atl. 189 (1926).

18. *Jordeson & Co. v. London Hardwood Co.*, 110 L. T. R. 666 (K. B. 1913); *Flatau, Dick & Co. v. Keeping*, 36 Com. Cas. 243 (C. A. 1931) (Scrutton, J.). But *cf. Barton Thompson & Co. v. Vigers Bros.*, 19 Com. Cas. 175, 110 L. T. R. 667, note a (K. B. 1906). All these cases, like the principal case, seem to have arisen in the Anglo-Baltic lumber trade. The argument does not seem to have been made that the brokers might sue as third party beneficiaries of the contract of sale, under which the buyers obligated themselves to pay by accepting, upon receipt of shipping documents, drafts drawn either by the sellers or by their authorized agents.

can now refuse to accept a draft proffered with proper documents by a factor who claims, under the instant case, to be an independent financial agent entitled to be paid, by the usage contemplated in the sales contract, without reference to defenses good against the seller. For it was the "independent"¹⁹ contract between brokers and buyer, consummated with the acceptance by the buyer of the bill of exchange drawn against him by the brokers, which led the court, in the instant case, to the same result generally attained in the letter of credit cases—that questions concerning quality of the merchandise must be separately settled between seller and buyer after the financing medium has been made whole.

Under the English decision, then, the agent, upon the buyer's acceptance of his bill, apparently becomes more than a mere assignee of the seller with respect to the claim for the purchase price. His position is evidently regarded as being more analogous to that of the bank which has discounted the seller's draft upon the buyer, taking the attached bill of lading as collateral security.²⁰ If the buyer refuses to accept, the bank may charge the item back to the seller's account.²¹ Having accepted, however, the buyer may not subsequently refuse payment to the bank because of dissatisfaction with the goods.²² While the agent who draws his own drafts on the buyer, as in the English case, does not occupy the position of the discounting bank as a holder in due course, he is performing the same banking function in the matter of pay-

19. *Churchill and Sim v. Goddard*, 154 L. T. R. 586, 588 (C. A. 1936).

20. *Lewis Leonhardt & Co. v. W. H. Small & Co.*, 117 Tenn. 153, 96 S. W. 1051 (1906); ZOLLMANN, *BANKS AND BANKING* (1936) § 5495. The bank is generally made the payee of the bill. Although the House of Lords has held that the payee of a bill of exchange cannot be a holder in due course [*Jones, Ltd. v. Waring & Gillow, Ltd.*, [1926] A. C. 670, (1927) 40 HARV. L. REV. 494; for the American cases see BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* (5th ed. 1932) 487-502], the question seems never to have been decided in an action by payee against acceptor [see Comment (1927) 36 YALE L. J. 1005].

21. *American Trust & Savings Bank v. Gueder & Paeschke Mfg. Co.*, 150 Ill. 336, 37 N. E. 227 (1894); *Noble v. Doughten*, 72 Kan. 336, 83 Pac. 1048 (1905); cf. *Shapiro Bros. Factors' Corp. v. Cherokee Silk Corp.*, 114 N. J. L. 356, 176 Atl. 893 (1935).

22. *Flournoy v. First Nat. Bank of Jeffersonville*, 78 Ga. 222, 2 S. E. 547 (1887); *Arpin v. Owens*, 140 Mass. 144, 3 N. E. 25 (1885). Even complete failure of consideration between drawer and drawee is not a defense against the payee bank which has discounted. *Goetz v. Bank of Kansas City*, 119 U. S. 551 (1886); cf. *Hoffman & Co. v. Bank of Milwaukee*, 12 Wall. 181 (U. S. 1870). Nor, if the drafts are paid, may the purchaser garnishee the bank in an action against the seller. *Fourth Nat. Bank of Cincinnati v. Mayer*, 89 Ga. 108, 14 S. E. 891 (1892); *Vickers v. Machinery Warehouse and Sales Co.*, 111 Wash. 576, 191 Pac. 869 (1920); ZOLLMAN, *op. cit. supra* note 20, § 5497. *Contra*: *J. C. Haas & Co. v. Citizens' Bank*, 144 Ala. 562, 39 So. 129 (1905); *Searles Bros. v. Smith Grain Co.*, 80 Miss. 688, 32 So. 287 (1902); *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251 (1900); *Landa v. Lattin Bros.*, 19 Tex. Civ. App. 246, 46 S. W. 48 (1898). The rule of the cases *contra* has been held no longer tenable with respect to interstate transactions because of the FEDERAL BILL OF LADING ACT, 39 STAT. 538 (1916), 49 U. S. C. §§ 81-124 (1934). *First Nat. Bank of Ripley v. Tchula Commercial Co.*, 132 Miss. 58, 95 So. 742 (1923).

ment,²³ and the independence of that activity should not be obscured by the fact that he may also be engaged in the business of making sales contracts. This being true, the result is that English law—this time with respect to the factor or broker—has taken one more step looking toward greater liquidity of money obligations.²⁴

SUBROGATION OF INSURER UNDER WORKMEN'S COMPENSATION LAWS*

IN THE few states¹ where Workmen's Compensation statutes define neither the rights of reimbursement of an insurer who has paid a statutory award to an employee injured in the course of his employment by the negligence of a third person, nor the manner in which these rights may be enforced,² the courts tend to hold, analogizing Workmen's Compensation insurance to life and accident insurance, that neither the employer nor the insurer is subrogated to the injured workman's claim against the tortfeasor.³ Since the amount payable by the insurer is a fixed sum based primarily on the average earnings of the employee⁴ and not an actual measure of his loss, the element of indemnity, which seems to decide the availability of subrogation in this field,⁵ is not apparent.⁶ Counter argument has been made, however,

23. This has been recognized, however, as not subjecting the financial agent to the banking laws. *In re* Worth Lighting and Fixture Co., Inc., 292 Fed. 769 (S. D. N. Y. 1923).

24. See BERLE & PEDERSON, *LIQUID CLAIMS AND NATIONAL WEALTH* (1934) c. 10.

*Globe Indemnity Co. v. Atlantic Lighterage Corp., 271 N. Y. 234, 2 N. E. (2d) 640 (1936).

1. The statutes of New Hampshire, Ohio, and West Virginia contain no provisions. N. H. PUB. LAWS (1926) c. 178; OHIO GEN. CODE ANN. (Page, 1926) §1465-37; OFFICIAL CODE OF W. VA. (1931) c. 23.

2. See ASSOCIATION OF CASUALTY AND SURETY EXECUTIVES, *DIGEST OF WORKMEN'S COMPENSATION LAWS IN THE UNITED STATES AND TERRITORIES* (12th ed. 1931) §32; 2 SCHNEIDER, *WORKMEN'S COMPENSATION LAW* (2d ed. 1932) §466; (1933) 17 MINN. L. REV. 828; (1934) 88 A. L. R. 665.

3. Aetna Life Ins. Co. v. Otis Elevator Co., 204 S. W. 376 (Tex. Civ. App. 1918) [statute amended in 1917 to cover the situation. TEX. ANN. REV. CIV. STAT. (Vernon, 1925) art. 8307, §6a]; Merrill v. Marietta Torpedo Co., 79 W. Va. 669, 92 S. E. 112 (1917); (1929) 29 COL. L. REV. 1167.

4. 2 SCHNEIDER, *WORKMEN'S COMPENSATION LAW* (2d ed. 1932) c. IX.

5. St. Louis, Iron Mt. & So. R. R. v. Commercial Union Ins. Co., 139 U. S. 223 (1890); VANCE, *INSURANCE* (2d ed. 1930) 679.

6. See City of Austin v. Johnson, 204 S. W. 1181, 1183 (Tex. Civ. App. 1918); Fox v. Dallas Hotel, 111 Tex. 461, 472, 240 S. W. 517, 520 (1922); Mercer v. Ott, 78 W. Va. 629, 638, 89 S. E. 952, 955 (1916); Merrill v. Marietta Torpedo Co., 79 W. Va. 669, 679, 92 S. E. 112, 116 (1917); cf. Interstate Tel. & Tel. Co. v. Pub. Service Elec. Co., 86 N. J. L. 26, 90 Atl. 1062 (Sup. Ct. 1914); 1 CAMPBELL, *WORKMEN'S COMPENSATION* (1935) §30; (1929) 29 COL. L. REV. 1167; (1925) 38 HARV. L. REV. 971. It is true, however, that by the terms of his contract the insurer indemnifies the employer for any award the latter has to pay, but the insurer in suing the tortfeasor is seeking to be subrogated ultimately not to any right of action of the employer, but to that of the employee. This situation is to be contrasted with the one presented when the employer is subrogated by statute to the employee's cause of action. See note 21 *infra*.

that the insurer, by compensating the employee for a limited portion of his loss of capacity to work, is indemnifying him up to that amount in a manner analogous to that of one who indemnifies an insured, under a fire insurance policy, for a part of the ascertainable loss.⁷ Attempts at distinctions on the point, however, are inconclusive, for Workmen's Compensation so resembles life and accident insurance on the one hand and indemnity insurance on the other that it is impossible to classify it unqualifiedly with either type. The matter should be analyzed independently in terms of the judicial policy of subrogation, which is rooted in the equity desire to prevent unjust enrichment. And since a disabled employee's total actual loss is usually incapable of definite evaluation, it is impossible to say with any conviction that the employee who recovers in full both from his employer and from a third party tortfeasor is being unjustly enriched.⁸

Ordinarily this problem does not arise, however, for the insurer's rights of subrogation are explicitly defined in the statutes.⁹ Occasional difficulties, nevertheless, still persist, like the determination of the measure of recovery and the procedural problem of the proper party to bring action. In states in which the election by the employee to receive compensation not only bars any further action by him but deprives him of all interest in the amount recovered,¹⁰ the insurer may recover only the amount of compensation he has paid,¹¹ although New York had a contrary rule before its statute was amended.¹² Likewise the majority of courts have held that the employee,

7. See Hardman, *Common Law Right of Subrogation Under Workmen's Compensation Acts* (1920) 26 W. VA. L. Q. 183.

8. See *Suttles v. Railway Mail Ass'n*, 156 App. Div. 435, 437, 141 N. Y. Supp. 1024, 1026 (1913); *Aetna Life Ins. Co. v. J. B. Parker & Co.*, 96 Tex. 287, 292, 72 S. W. 621, 622 (1902); *Gatzweiler v. Milwaukee Elec. Ry. & Light Co.*, 136 Wis. 34, 38, 116 N. W. 633, 634 (1908); see VANCE, *INSURANCE* (2d ed. 1930) 672, 679. Quite apart from the principle of subrogation, however, there is some authority for the view that the insurer should be allowed to recover despite the absence of statutory provisions, because his injury is the direct and foreseeable consequence of the tortfeasor's negligence. *Staples v. Central Surety Corp.*, 62 F. (2d) 650 (C. C. A. 10th, 1932); see *Travelers' Ins. Co. v. Great Lakes Eng. Co.*, 184 Fed. 426, 431 (C. C. A. 6th, 1911); cf. *Dayton Light Co. v. Westinghouse Elec. Co.*, 287 Fed. 439 (C. C. A. 6th, 1923); VANCE, *INSURANCE* (2d ed. 1930) 680, n. 74. *Contra*: *Interstate Tel. & Tel. Co. v. Public Service Elec. Co.*, 86 N. J. L. 26, 90 Atl. 1062 (1914); see *Connecticut Mut. Life Ins. Co. v. New York, N. H. & H. R. R.*, 25 Conn. 265, 274, 65 Am. Dec. 571, 576 (1856).

9. See note 2, *supra*.

10. For example, see ARIZ. REV. CODE ANN. (Struckmeyer, 1928) §1435; COLO. COMP. LAWS (1921) §4461; N. M. STAT. ANN. (Courtright, 1929) §156-124; OKLA. STAT. (Harlow, 1931) §13368. All of these statutes subrogate the employer as well as the insurer, but for the purposes of this note the right of only the insurer will be considered.

11. *Ridley v. United Sash and Door Co.*, 98 Okla. 80, 224 Pac. 351 (1924); *American Mut. Liab. Ins. Co. v. Otis Elevator Co.*, 160 Tenn. 248, 23 S. W. (2d) 245 (1930); *Corrigan v. Stormont*, 160 Va. 727, 170 S. E. 16 (1933).

12. *Travelers' Insurance Co. v. Brass Goods Mfg. Co.*, 239 N. Y. 273, 146 N. E. 377 (1925); see *Phoenix Indemnity Co. v. Staten Island Ry.*, 251 N. Y. 127, 136, 167 N. E. 194, 197 (1929). Statute amended in 1935 stipulating that any damages in

being without any interest, is not a proper party plaintiff and therefore that the insurer must bring the action in his own name.¹³ In most states, however, the statutory transfer to the insurer of the employee's cause of action, while complete, does not cut off the interest of the employee absolutely, for the employee is allowed any excess the insurer recovers above the amount of compensation paid.¹⁴ Some courts under such statutes allow the insurer to sue in his own name on the ground that the insurer has succeeded to the employee's complete cause of action.¹⁵ Usually, however, actions are brought either in the name of the employee¹⁶ or by joining him as plaintiff,¹⁷ and although the former practice is objectionable as requiring litigation in the name of parties other than the real party in interest, it is justified practically by the fact that the employee's interest in the recovery of damages above the amount of compensation might be prejudiced by any mention of the insurer.

A few statutes, making no reference to the insurer, provide only for subrogation of the employer to the employee's cause of action, and require him to hold any recovery above the amount of compensation in trust for the employee.¹⁸ Under such circumstances the insurer should be permitted to assert the injured workman's cause of action, since the insurer, by promising to indemnify the employer fully for any compensation he has to pay, is entitled, in the absence of statute, to be subrogated *pro tanto* to the rights of the employer, who in turn is subrogated by statute to the rights of the

excess of the amount of compensation be paid to the employer. N. Y. WORKMEN'S COMPENSATION LAW § 29.

13. *Moseley v. Lily Ice Cream Co.*, 38 Ariz. 417, 300 Pac. 958 (1931); *Lang v. Brooklyn City R. Co.*, 247 N. Y. 551, 161 N. E. 178 (1928); *Bellanger v. Econ. Engin. Co. and Lib. Mut. Ins. Co.*, 245 App. Div., 889, 282 N. Y. Supp. 325 (3d Dep't 1935); *Eagle-Picher Lead Co. v. Kirby*, 109 Okla. 96, 235 Pac. 176 (1925); *cf. Okmulgee Supply Co. v. Rotman*, 144 Okla. 293, 291 Pac. 1 (1930).

14. For example, see LAWS OF DEL. (1917) 3193 11. § 131; FLA. COMP. GEN. LAWS ANN. (Skillman, Supp. 1936) § 5966(38); MASS. GEN. LAWS (1932) c. 152, § 15; N. Y. WORKMEN'S COMPENSATION LAW § 29; N. C. CODE ANN. (Michie, 1935) § 8081(r); N. D. COMP. LAWS ANN. (Supp. 1925) § 396a 20; ACTS OF S. C. (1936) art. 610, § 11; TEX. ANN. REV. CIV. STAT. (Vernon, 1925) art. 8307 § 6a.

15. *The Kokusai Kisen Kabuskiki Kaisha*, 44 F. (2d) 659 (S. D. Tex. 1930). Some statutes expressly permit him to do so. See, for example, ACTS OF S. C. (1936) art. 610 § 11; S. D. COMP. LAWS (1929) § 9446.

16. *Berry v. Irwin*, 224 Ky. 565, 6 S. W. (2d) 705 (1928); *Chaves v. Weeks*, 242 Mass. 156, 136 N. E. 73 (1922); *Becker v. Eastern Mass. St. Ry.*, 279 Mass. 435, 181 N. E. 757 (1932).

17. *Prigden v. Atlantic Coast Line R. R.*, 203 N. C. 62, 164 S. E. 325 (1932). Especially if the courts hold that the statute does not deprive the employee of a right of action against the third person for damages in excess of the compensation received. *Scott v. Mo. Pac. Ry. Co.*, 333 Mo. 374, 62 S. W. (2d) 834 (1933). If the employee is not joined as party plaintiff an objection may be raised that there is a split in the cause of action. See note 25 *infra*.

18. For example, see the LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT 44 STAT. 1440 (1927), 33 U. S. C. A. § 933 (Supp. 1936); IDAHO CODE ANN. (1932) § 43-1004; MICH. COMP. LAWS (1929) § 8454; PA. STAT. ANN. (Purdon, 1930) tit. 77, § 671.

employee.²⁰ The accident insurance analogy is therefore not applicable to statutes of this type, but at least one court has by virtue of that analogy refused to subrogate the insurer.²⁰

But even if the subrogation issue is decided in the insurer's favor, and the majority of courts so decide,²¹ a special procedural difficulty is created by statutes of the type last discussed, where the insurer is subrogated only to so much of the cause of action against the tortfeasor as is covered by its contract indemnifying the employer. The remainder of the cause of action belongs to the employer who by the express terms of many statutes is the only party who can recover any excess over the amount of compensation paid. Thus when an insurer under the Federal Longshoremen's and Harbor Workers' Compensation Act²² brought an action for damages in its own name against the tortfeasor, alleging to be subrogated to all the rights of the employer, the court, in dismissing the complaint, stated that the employer must either bring the suit or be made a party to it in order to avoid subjecting the tortfeasor to two suits on the same operative facts.²³ Although the rule against thus splitting a cause of action has been invoked before to prevent a suit in the name of an insurer who had paid only a portion of the total award,²⁴ it has not been employed heretofore to bar an insurer who has paid the whole award but who by statute is unable to recover the excess from the tortfeasor.²⁵ The rule is most frequently applied in situations in which an employee is killed by the negligence of a third person, and the

19. See *Aetna Life Ins. Co. v. Moses*, 287 U. S. 530, 541 (1931); 2 SCHNEIDER, WORKMEN'S COMPENSATION LAW (2d ed. 1932) § 458.

20. See *Marshall-Jackson Co. v. Jeffery*, 167 Wis. 63, 69, 166 N. W. 647, 650 (1918); (1932) 26 ILL. L. REV. 831, 833.

21. *Aetna Life Ins. Co. v. Moses*, 287 U. S. 530 (1931); *Workmen's Comp. Exch. v. Chicago, M., St. P. & P. R.*, 45 F. (2d) 885 (D. Idaho 1930); *Lincoln Park Coal Co. v. Wabash Ry.*, 338 Ill. 82, 170 N. E. 8 (1930), (1932) 26 ILL. L. REV. 831; see *City of Red Wing v. Eichinger*, 163 Minn. 54, 56, 203 N. W. 622, 623 (1925); cf. *Donahue v. Thorndike and Hix, Inc.*, 119 Me. 20, 109 Atl. 187 (1920) (term "employer" as used in the Act includes the insurer).

22. 44 STAT. 1440 (1927), 33 U. S. C. § 933 (1934).

23. *Globe Indemnity Co. v. Atlantic Lighterage Corp.*, 271 N. Y. 234, 2 N. E. (2d) 640 (1936). *Contra: Travelers' Ins. Co. v. Lee and Simmons*, 241 App. Div. 835, 271 N. Y. Supp. 239 (2d Dep't 1934) (overruled by principal case).

24. *Maryland Casualty Co. of Baltimore v. Cincinnati, C., C. & St. L. Ry.*, 74 Ind. App. 272, 124 N. E. 774 (1919); see *Powell & Powell v. Wake Water Co.*, 171 N. C. 290, 296, 88 S. E. 426, 430 (1916); CLARK, CODE PLEADING (1928) § 24.

25. By the terms of many Acts the election by the employee to receive compensation does not deprive him of the right to sue the tortfeasor for damages in excess of the amount of compensation, and since the insurer is given the right to sue for the amount of compensation, in order to prevent double suits it is provided that the party who first sues must notify the other, who may then join in the action. See, for example, CONN. GEN. STAT. (1930) § 5231; LA. GEN. STAT. ANN. (Dart, 1932) § 4397; *Fidelity Union Casualty Co. v. Carpenter*, 12 La. App. 321, 125 So. 504 (1929). For a discussion of the common law rules against splitting a cause of action, see (1936) 10 ST. JOHN'S L. REV. 344. For a dictum to the effect that the Workmen's Compensation Acts supersede the rule against splitting a cause of action, see *Kandelin v. Lee Moor Contracting Co.*, 37 N. M. 479, 488, 24 P. (2d) 731, 736 (1933).

class of dependents who are entitled to and who have elected to receive compensation under the Act, thereby transferring their cause of action to the insurer, is more restricted than the class permitted to share in the recovery under the death statute. In order to prevent a splitting of the cause of action, the majority of courts hold that, since the dependents who did not receive compensation are not deprived of their right to recover under the death statute, the insurer cannot sue in its own name but must prosecute its claim through an action brought by the executor or representative of the deceased.²⁶ Some courts likewise permit only one suit but hold that acceptance of compensation prohibits any action under the death statute, regardless of the dissimilarity between the beneficiaries under the two statutes.²⁷ In the instant case the only way the court could obviate the possibility of a split in the cause of action would be to allow subrogation of the insurer to all the rights of the employer, permitting recovery of full damages and directing that any excess above the amount of compensation be held in trust for the employee. This procedure, however, would constitute a considerable deviation from orthodox doctrine.²⁸ Furthermore, it would not preclude a second suit against the tortfeasor by the employer who, not being a party to the first suit, would not be bound by the judgment. It is, therefore, particularly desirable that the omission of the insurer's name in the terms of the statute be cured by legislative rather than judicial action.

APPELLATE REVIEW OF INCONSISTENT FINDINGS AND JUDGMENTS*

IN SEPARATE actions brought by two plaintiffs in different trial courts for damages caused by the breaking of an aqueduct maintained by the City of Los Angeles, the two courts, sitting without juries, made opposite findings of fact with respect to the defendant's negligence on substantially the same evidence and entered judgments accordingly. Both judgments were affirmed by different intermediate courts of review. The Supreme Court of California, considering the cases together on further appeal, adopted the opinion of the intermediate appellate court which affirmed the judgment for the plaintiff, and reversed the other. In this "anomalous" situation, the court held, it was not bound by the findings of fact of the respective trial courts, but could

26. *Liberty Mutual Ins. Co. v. American Incin. Co.*, 51 F. (2d) 739 (S. D. N. Y. 1931); *Streeter v. Graham and Norton Co.*, 144 Misc. Rep. 516, 259 N. Y. Supp. 14 (Sup. Ct. 1932); cf. *Doleman v. Levine*, 295 U. S. 221 (1935), (1936) 10 *SR. JOHN'S L. REV.* 344.

27. *Moore v. Christensen S. S. Co.*, 53 F. (2d) 299 (C. C. A. 5th, 1931); see *Georgia Casualty Co. v. Haygood*, 210 Ala. 56, 61, 97 So. 87, 91 (1923). Accord: *Travelers' Ins. Co. v. Louis Padula Co.*, 224 N. Y. 397, 121 N. E. 348 (1918). *Contra*: *Brown v. Southern Ry.*, 202 N. C. 256, 162 S. E. 613 (1932).

28. Subrogation extends only to the amount the insurer is compelled to pay. *Hall & Long v. Railroad Companies*, 13 Wall. 367 (U. S. 1871).

**Southern Pacific Co. v. Los Angeles*, 5 Cal. (2d) 545, 55 P. (2d) 847 (1936); *Inyo Chemical Co. v. Los Angeles*, 5 Cal. (2d) 525, 55 P. (2d) 850 (1936).

determine the "legal issue" of whether "legal responsibility" should be imposed.¹

Inconsistent findings of fact made by court or jury in support of a single judgment may be resolved on appeal, if the discrepancy is not too serious, by calling one finding harmless error;² or certain of the findings may be discounted and the judgment affirmed by resorting to the traditional presumption in favor of the judgment of a court of general jurisdiction.³ When the findings are wholly irreconcilable, the appellate court may remand for a new trial.⁴ Jury findings in equity, being only advisory, may, when they conflict with those of the chancellor, simply be ignored.⁵ Reconciliation of the findings of fact in support of a single judgment is most difficult in the review of inconsistent verdicts against the master and in favor of the servant in joint actions for damages allegedly due to the negligence of the latter;⁶ particularly is this so in the usual case where the master alone appeals and the plaintiff pursues the servant no further, so that the appellate court cannot remand for a new trial against both defendants. Certain courts, finding some evidence of negligence against the master, affirm;⁷ others, holding that the master cannot be liable without the servant, reverse.⁸ Judgments on verdicts against the master, without mention of the servant, have several times been sustained on the ground that the plaintiff alone is aggrieved, and not the defendant, when the jury can agree on the liability of only one of two joint tortfeasors.⁹

Similar inconsistencies in separate actions by different plaintiffs involving substantially the same subject matter, as in the California case, present a different problem.¹⁰ Since the reviewing court theoretically has no power

1. *Ibid.*, (1936) 24 CALIF. L. REV. 733.

2. *Epstein v. Gradowitz*, 76 Cal. App. 29, 243 Pac. 877 (1925); *Register Life Ins. Co. v. Kenniston*, 99 Mont. 191, 43 P. (2d) 251 (1935).

3. *Grignon's Lessee v. Astor*, 2 How. 319 (U. S. 1844); *Hotaling v. Hotaling*, 193 Cal. 368, 224 Pac. 455 (1924). The New York courts, however, interpret the findings in the light more favorable to the appellant. *Elterman v. Hyman*, 192 N. Y. 113, 84 N. E. 937 (1908).

4. *Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service*, 217 Cal. 131, 17 P. (2d) 712 (1932); *Lanning v. Trenton & Mercer County Traction Corp.*, 3 N. J. Misc. 1006, 130 Atl. 444. (Sup. Ct. 1925).

5. *Simon Newman Co. v. Woods*, 85 Cal. App. 360, 259 Pac. 460 (1927).

6. See Comment (1932) 45 HARV. L. REV. 1230.

7. *Strickfaden v. Green Creek Highway Dist.*, 42 Idaho 738, 248 Pac. 456 (1926); *Curtis v. Puget Sound Bridge & Dredging Co.*, 133 Wash. 323, 233 Pac. 936 (1925). And *cf.* *Stuart v. Standard Oil Co. of Ind.*, 211 Mo. App. 345, 244 S. W. 970 (1922) (only master, not servant, held liable for nonfeasance, as distinct from misfeasance). No independent negligence on the part of the master by reason of his choice of servants entered into these cases.

8. *Larson v. Hines*, 220 Ill. App. 594 (1921); *Ind. Nitroglycerine & Torpedo Co. v. Lippencott Glass Co.*, 165 Ind. 361, 75 N. E. 649 (1905); *Sparks v. Atlantic Coast Line R. R.*, 104 S. C. 266, 88 S. E. 739 (1916).

9. *Ill. C. R. R. v. Murphy's Adm'r*, 123 Ky. 787, 97 S. W. 729 (1906); see *Dunbaden v. Castles Ice Cream Co.* 103 N. J. L. 427, 429, 135 Atl. 886, 887 (1927).

10. See *Vaniewsky v. Demarest Bros. Co.*, 106 N. J. L. 34, 37, 148 Atl. 17, 18 (Sup. Ct. 1929), *aff'd*, 107 N. J. L. 389, 154 Atl. 623 (1931); Comment (1932) 45 HARV. L. REV. 1230, 1233. For discussions of the *Dorrance* cases, in which it was

to substitute its own judgment on conflicting evidence for that of the finder of facts below, it would seem conceptually correct for both judgments to be affirmed on separate appeals on the ground that there is sufficient evidence to support either conclusion.¹¹ Here too, however, several devices have been employed to reconcile the two judgments. Where at least one of the actions has resulted in a dismissal, nonsuit or directed verdict, the task is facilitated. The appellate court can simply affirm the order or judgment in that action and reverse the judgment for the opposing party, however entered, in the other proceeding, on the ground that the legal liability or non-liability of the defendant under the facts involved in both actions has been correctly decided as a matter of law in the former case.¹² If one of the actions has resulted in a dismissal, nonsuit or directed verdict which has been affirmed on appeal before the other action comes before the same or another appellate court, a reversal of the judgment for the opposing party in the second action can be based squarely on the doctrine of *stare decisis*.¹³

Where, as in the present case, both judgments have originally been entered on jury verdicts or on independent findings by courts sitting alone, it suggested that conflicting decisions by the courts of New Jersey and Pennsylvania on the question of Dorrance's domicile violated constitutional immunities, see Chafee, *The Federal Interpleader Act of 1936: II* (1936) 45 YALE L. J. 1161, 1169-1176; (1934) 34 COL. L. REV. 1151, 1374.

11. *Fidelity & Deposit Co. of Md. v. Lehigh Valley R. R.*, 275 Fed. 922 (C. C. A. 3d, 1921); *Akers v. Fulkerson*, 153 Ky. 228, 154 S. W. 1101 (1913); *Canadian & American Mortgage & Trust Co. v. Edinburgh-American Land Mortgage Co.*, 16 Tex. Civ. App. 520, 42 S. W. 864 (1897); *Board of Education v. Wright-Osborn Co.*, 49 Utah 453, 164 Pac. 1033 (1917). In *Barbee v. Farmers' Bank of Polo*, 240 Mo. 297, 144 S. W. 839 (1912), however, the reviewing court refused to be bound by the findings of a trial judge conflicting with those made by another judge on the same evidence in a former case which had previously been affirmed by the same reviewing court.

Although verdicts or findings may be upheld in a civil suit which are contrary to those made on the same issues in a criminal action [*Quatray v. Wicker*, 16 La. App. 515, 134 So. 313 (1931); *Sorbello v. Mangino*, 108 N. J. Eq. 292, 155 Atl. 6 (Ch. 1931). *Contra*: *Eagle, Star & British Dominions Ins. Co. v. Heller*, 149 Va. 82, 140 S. E. 314 (1927), (1928) 6 N. C. L. REV. 333], the situation is not the same as that involving two civil actions, because of the different rules of evidence and burden of proof involved [see Note (1924) 31 A. L. R. 264]. But in two criminal actions an accessory before or after the fact may be found guilty even though another jury has previously determined the innocence of the alleged principal, for the second jury may have reached a different conclusion regarding the innocence of the principal. *Commonwealth v. Long*, 246 Ky. 809, 56 S. W. (2d) 524 (1933); see Comment (1931) 25 ILL. L. REV. 845.

12. *Rosenthal v. N. Y., S. & W. R. R.*, 112 App. Div. 431, 98 N. Y. Supp. 476 (1st Dep't 1906); *cf. Liberty Ins. Co. v. Central Vt. R. R.*, 19 App. Div. 509, 46 N. Y. Supp. 576 (3d Dep't 1897).

13. *Mercier v. Yazoo & M. V. R. R.*, 140 La. 644, 73 So. 710 (1916); *Scott v. King*, 51 App. Div. 619, 64 N. Y. Supp. 626 (3d Dep't 1900); *Cawley v. La Crosse City Ry.*, 106 Wis. 239, 82 N. W. 197 (1900). But see *Backman v. Rodgers*, 153 App. Div. 299, 302, 138 N. Y. Supp. 29, 32 (2d Dep't 1912); *cf. F. B. Vandegrift & Co. v. United States*, 173 Fed. 609 (C. C. A. 3d, 1909). The doctrine of *res judicata* is, of course, limited to actions between the same parties or their privies. 2 FREEMAN, JUDGMENTS (5th ed. 1925) §§ 630, 371.

may be more difficult to discover an element which can be labeled a question of law on the basis of which to resolve the inconsistency.¹⁴ The conflict in this case, however, might have been resolved without reference to the law-fact distinction. The Supreme Court of California has the power by statute to review findings of fact made by a trial court sitting without a jury.¹⁵ Although that statute has been held inapplicable to findings based on conflicting evidence,¹⁶ it might well have been utilized under the peculiar circumstances of the present case, where the court held that the evidence in neither of the trials below was in substantial conflict.¹⁷ Alternatively, the court might have remanded both cases for retrial in a consolidated action. Many of the statutes governing consolidation embody the strict common law requisites that the actions must be pending in the same court at the same time between the same parties and must be based upon causes of action which might have been joined.¹⁸ But others, like the California act, allow consolidation whenever, in the discretion of the court, it would not prejudice a substantial right.¹⁹ And, although the cases were originally tried in different counties, consolidation of such actions has been permitted in New York under a statute similar to that in California.²⁰

14. For a discussion of the hazy distinction between questions of fact and of law see ARNOLD & JAMES, *CASES ON TRIALS, JUDGMENTS AND APPEALS* (1936) 132, 133; THAYER, *EVIDENCE* (1898) 202; (1924) 2 *TEX. L. REV.* 361. In the instant case, even if the facts were substantially undisputed, as the court stated, the possibility of different inferences to be drawn therefrom would seem to make the question one of fact rather than of law. *Wilbur v. Wilbur*, 197 Cal. 1, 239 Pac. 332 (1925).

15. CAL. CODE CIV. PROC. (Deering, 1933) §956a.

16. *Tupman v. Haberkern*, 208 Cal. 256, 280 Pac. 970 (1929); see Comment (1932) 20 *CALIF. L. REV.* 171.

17. The note on this case in (1936) 24 *CALIF. L. REV.* 733 assumes that the court was acting under its statutory power, but the court in its opinion makes no mention of the statute, and the court's language, while vague, implies that it was reviewing an error of law and not of fact.

18. *MONT. REV. CODES ANN.* (Anderson & McFarland, 1935) §9820; *NEV. COMP. LAWS* (Hillyer, 1929) §9025; *N. D. COMP. LAWS ANN* (1913) §7965; *ORE. CODE ANN.* (1930) §7-104; *UTAH REV. STAT. ANN.* (1933) §104-54-12.

19. CAL. CODE CIV. PROC. (Deering, 1933) §1048; *N. Y. CIV. PRAC. ACT.* §96; cf. *ARK. DIG. STAT.* (Crawford & Moses, 1921) §1081; *N. M. STAT. ANN.* (Court-right, 1929) §105-828; see *Realty Construction & Mortgage Co. v. Superior Court*, 165 Cal. 543, 547, 132 Pac. 1048, 1049 (1913).

20. *N. Y. CIV. PRAC. ACT* §96; *Lee v. Schmeltzer*, 229 App. Div. 206, 242 N. Y. Supp. 34 (1st Dep't 1930). Consolidation in the proper sense, whereby several actions are combined into one in which a single judgment is rendered, is generally governed by statute (see notes 18, 19, *supra*). There are also two alternative devices, sometimes improperly termed consolidation: the procedure in equity whereby several suits are ordered to be tried together, each, however, retaining its separate character and requiring entry of a separate judgment [*Metropolitan Cas. Ins. Co. of N. Y. v. Lehigh Valley R. R.*, 94 N. J. L. 236, 109 Atl. 743 (1920)]; and so-called "quasi-consolidation," whereby all but one of the actions are stayed pending the trial of one, the judgment in which is conclusive as to the others. See generally *Lumiansky v. Tessier*, 213 Mass. 182, 188, 99 N. E. 1051, 1053 (1912); *Azinger v. Pa. R. R.*, 262 Pa. 242, 245, 105 Atl. 87, 88 (1918).

THE SCOPE OF THE ATTORNEY-CLIENT PRIVILEGE*

THE COMMON-LAW privilege of non-disclosure accorded communications between an attorney and his client,¹ is now generally embodied in statutes² which have repeatedly been qualified by narrow constructions³ and restrictive rules of interpretation. Thus the client must intend the communication to be confidential,⁴ and the protection of the privilege is withdrawn if the intention of confidence is terminated either expressly by waiver,⁵ or impliedly by what is vaguely referred to as "waiver by implication"⁶ or "exceptions of necessity."⁷ Furthermore protection is consistently refused by the courts regardless of the intention of the client if the communication sought to be privileged was incidental to a fraud or crime about to be perpetrated.⁸ A recent case suggests a further limitation on the scope of the privilege rule.⁹ A client-witness, after suit was brought against him by his daughter, injured while a passenger in a vehicle operated by him, conferred with the attorney for his insurance company. Subsequently, the insurer disclaimed liability, and a judgment was obtained against the client-witness. When an execution was issued and returned unsatisfied, the plaintiff daughter brought the present

*Shafer v. Utica Mutual Insurance Co., 248 App. Div. 279, 289 N. Y. Supp. 577 (4th Dep't 1936).

1. See 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2290.

2. The statutes have been collected in 5 WIGMORE, EVIDENCE § 2292, n. 1; see also WIGMORE, EVIDENCE (Supp. 1934) § 2292, n. 1.

3. Much litigation has developed, for example, in determining whether the professional relation exists [5 WIGMORE, EVIDENCE §§ 2296, 2300-2304; WIGMORE, EVIDENCE (Supp. 1934) § 2303; (1925) 25 COL. L. REV. 845], and whether the word "communication" in the statute includes only the utterances of the client. 5 WIGMORE, EVIDENCE § 2306; WIGMORE, EVIDENCE (Supp. 1934) § 2306.

4. 5 WIGMORE, EVIDENCE §§ 2311, 2314; WIGMORE, EVIDENCE (Supp. 1934) §§ 2311, 2314. See Comment (1926) 40 HARV. L. REV. 114 (testamentary dispositions).

5. See Blackburn v. Crawfords, 3 Wall. 175, 194 (U. S. 1865).

6. See 5 WIGMORE, EVIDENCE § 2327; WIGMORE, EVIDENCE (Supp. 1934) § 2327, n. 3; Spalding, *The Uncertain State of the Law as to Waiver of Professional Privilege as to Confidential Communications* (1935) 20 MASS. L. Q. 16. Cf. Emory, *Waiver of Patient's Privileges* (1931) 6 WASH. L. REV. 71; Comment (1932) 20 CALIF. L. REV. 302; (1936) 31 ILL. L. REV. 134.

7. 5 JONES, COMMENTARIES ON EVIDENCE (2d ed. 1926) § 2164.

8. 5 WIGMORE, EVIDENCE § 2298; WIGMORE, EVIDENCE (Supp. 1934) § 2298; 5 JONES, *op. cit. supra* note 7, § 2161; see also Nadler v. Warner Co., 321 Pa. 139, 184 Atl. 3 (1936). Although the reason for this principle is said to be that such subjects are not within the professional character of a lawyer [Standard Fire Insurance Co. v. Smithhart, 183 Ky. 679, 211 S.W. 441, 5 A.L.R. 977 (1919)] the basis of the exception is probably the preponderance of the public interest in disclosure over the public interest in preserving the privacy of the relationship. See Annesley v. Earl of Anglesea, 17 How. St. Tr. 1140, 1243 (1743); McMaster's Trial, 9 Amer. St. Tr. 861, 871 (1872). Compare the status of the medical privilege in criminal proceedings. Note (1925) 45 A. L. R. 1357; Legis. (1933) 81 U. OF PA. L. REV. 755, 762.

9. Shafer v. Utica Mutual Insurance Co., 248 App. Div. 279, 289 N. Y. Supp. 577 (4th Dep't 1936).

action against the insurer. The defendant alleged a conspiracy to defraud¹⁰ and sought to prove it by questioning the client-witness as to statements made by him in conference with the defendant's attorney. The appellate division of the Supreme Court, reversing the trial court, found that, although the rule of privilege prevents the client as well as the attorney from being questioned,¹¹ it cannot be invoked by a witness to shield himself "from a disclosure which is a legitimate subject of inquiry."¹² Since witnesses have found protection in the rule of privilege in comparable instances,¹³ it is unlikely that the relationship involved in the present case, that of insured and attorney for insurer, alone prompted the decision. It is probable that the particular facts of the case combined to make the doctrine inapplicable, but it is difficult to determine the significance of the vague qualification employed.¹⁴

The thought of the court may have been that it was "legitimate" to require evidence from a witness over his objection of privilege when the subject of inquiry is the disclosure of a communication relating to an intended fraud or crime. If this was so, the court was restating a familiar rule in over-general terms.¹⁵ If, on the other hand, the court simply wished to indicate that testimony could be elicited, despite the objection of privilege, whenever the court regarded disclosure as reasonable, it was in effect conceding that the scope of the attorney-client privilege is controlled by judicial discretion, and influenced by factual considerations like the difficulty of finding other evidence to prove the matter in issue,¹⁶ or the suspected presence of fraud

10. Affidavits, prepared by the defendant company, denying the plaintiff's negligence were signed soon after the accident by the plaintiff and both her parents. The daughter and her mother later claimed the affidavits were signed under a threat of loss of the father's driving license.

11. Although Section 353 of the New York Civil Practice Act does not specifically include a privilege to the client, the courts have implied such a protection. *Bolt & Co., Inc. v. Gilmore*, 120 Misc. 116, 198 N. Y. Supp. 616 (Sup. Ct. 1923).

12. See *Shafer v. Utica Mutual Insurance Co.*, 248 App. Div. 279, 289, 289 N. Y. Supp. 577, 587 (4th Dep't 1936); *cf. Dixie Mfg. Co. v. Ricks*, 153 Ga. 364, 112 S. E. 370 (1922); *Neugass v. Terminal Cab Corp.*, 139 Misc. 699, 249 N. Y. Supp. 631 (Sup. Ct. 1931). It is well established that a communication to an attorney representing two parties is not privileged in a controversy between them. 5 WIGMORE, EVIDENCE §2312. The court, in the instant case, might have found the client-witness and the insurer opposing parties. But *cf. Neugass v. Terminal Cab Corp.*, *supra*.

13. See *Neugass v. Terminal Cab Corp.*, 139 Misc. 699, 249 N. Y. Supp. 631 (Sup. Ct. 1931). Where an attorney acts for two parties having a common interest, the communications by each are privileged from disclosure at the instance of a third person. 5 WIGMORE, EVIDENCE §2312. A third person, not one of the two original parties, seeks disclosure in the instant case, and the defendant no longer has a common interest with the client-witness.

14. This limitation was used on but one other occasion. See *Chellis v. Chapman*, 7 N. Y. Supp. 78, 82 (Sup. Ct. 1889), *aff'd on other grounds*, 125 N. Y. 214, 26 N. E. 308 (1891) (defendant in breach of promise suit compelled to disclose whether he delivered to his counsel letters received from plaintiff).

15. See note 8, *supra*.

16. The fact that the conversation at the conference, admittedly the crucial factor in the disclaimer, could not be proved without the defendant's testimony was persuasive

or illegality with reference to the subject concealed. The formulation of a broad rule of that sort, however, was not necessary to the decision of the principal case, since limitations already well established might have been invoked to require the testimony. For example, it might, with some justification, have been held that no confidence could have been intended by the client-witness since any information given by him with reference to the accident must have been imparted to the defendant in view of the duties of the attorney to his client, the insurer. Likewise, it could have been said that the attorney had been consulted in aid of a fraud intended by the client-witness, or that the conversation in question was between an attorney and a witness, not a client, and therefore that the privilege statute was not available.¹⁷

Since the adoption of "a legitimate subject of inquiry" as a criterion converts a privilege, hitherto qualified only by loose exceptions, wholly into a matter of discretion, it would seem politic to order that discretion by requiring that the privilege be invoked only when the injury which would inure to the attorney-client relation by reason of the disclosure of the communication is greater than the ultimate benefit secured to the public by such a disclosure.¹⁸ This test, with its emphasis on public policy, seems desirable, particularly in instances where the use of the privilege would prevent an interrogation of legal advisers concerned with the bribery of public officials.¹⁹ The proof of conspiracy which would ordinarily avoid the privilege in cases of that character is often difficult.²⁰ The public interest is likewise a consideration of importance in inquiries by Congressional committees²¹ and administrative agencies,²² balked by the defense of professional confidence. If courts, however, are reluctant to acknowledge the discretionary nature of the rule of privilege,²³ legislatures may respond to recent attacks on an

for disclosure in the principal case. *Shafer v. Utica Mutual Insurance Co.*, 248 App. Div. 279, 289, 289 N. Y. Supp. 577, 587 (4th Dep't 1936).

17. *Bergmann v. Manes*, 141 App. Div. 102, 125 N. Y. Supp. 973 (2d Dep't 1910).

18. A similar principle was advanced by Dean Wigmore as one of four conditions necessary to the establishment of any privilege against disclosure between persons in a given relation. 5 WIGMORE, EVIDENCE §2285; see *Re United States v. Mammoth Oil Co.* [1925] 2 D. L. R. (Ont.) 66, 74; *Ex parte McDonough*, 170 Cal. 230, 244, 149 Pac. 566, 571 (1915) (dissent). See *Wright v. Mayer*, 6 Ves. 280, 281 (Ch. 1801).

19. See *Address of Hon. Samuel Seabury* (1932) 18 A. B. A. J. 371, 372.

20. See WIGMORE, EVIDENCE (Supp. 1934) §2299.

21. See (1936) 45 YALE L. J. 1503, 1504, n. 7.

22. See, e. g., *Hearing Before the Securities and Exchange Commission*, In the Matter of Cuba Cane Sugar Corp. and Cuba Cane Products Co., Inc., 1152, 1162 (Oct. 2, 1935); but cf. *McMann v. Engel*, N. Y. Times, Jan. 20, 1937, p. 29, col. 1 (no broker-customer privilege is warranted in S. E. C. investigation).

23. See, e. g., *Ex Parte McDonough*, 170 Cal. 230, 149 Pac. 566 (1915), (1915) 29 HARV. L. REV. 109; *Brooklyn Savings Bank v. Park Slope Realty Corp.*, 146 Misc. 4, 260 N. Y. Supp. 508 (Sup. Ct. 1932).

absolute rule²⁴ by granting trial judges the discretionary power thought to be desirable.²⁵ The conservatism of trial courts can probably be relied upon to limit avoidance of the privilege in private cases,²⁶ but where public interest in disclosure is clear, the presence of discretionary judicial power can insure subjection of the privilege to the more pressing need.²⁷

RECOVERY BY EMPLOYEE AS BENEFICIARY OF CONTRACT EMBODYING
MINIMUM WAGE ORDINANCE DESPITE RELEASE OF CLAIM*

AN EMPLOYEE of a construction company on a municipal dam project beyond the city limits brought an action against his employer to recover the difference between the wages he had received and those which he claimed should have been paid him under an ordinance of the city requiring minimum wages, varying with certain types of employment, which had been expressly incorporated into the contract between the municipality and the construction company. Holding that the plaintiff could maintain an action as donee beneficiary under the contract even though there was no express provision for such a remedy either in the contract or in the ordinance, the Supreme Court of Washington affirmed a judgment for the plaintiff. No mention was made in the opinion of the fact that the plaintiff had accepted the lower amount without protest and had receipted payment in full.¹

Although actions by individual residents against contractors for breach of undertakings to furnish municipalities with certain types of public service are frequently denied on the basis of a presumed intention to benefit the citizens of the municipality collectively rather than individually,² this prin-

24. See Whipple, *The Duty of Disclosure* (1922) 56 AM. L. REV. 801; Radin, *The Privilege of Confidential Communication Between Lawyer and Client* (1928) 16 CALIF. L. REV. 487; cf. *Address of Hon. Samuel Seabury* (1932) 18 A. B. A. J. 371, 372. But see 5 WIGMORE, EVIDENCE § 2291; *Brooklyn Savings Bank v. Park Slope Realty Corp.*, 146 Misc. 4, 260 N. Y. Supp. 508 (Sup. Ct. 1932).

25. Compare N. C. CODE ANN. (Michie, 1935) § 1798 (medical privilege).

26. Courts are often concerned over the possible loss of prestige and practice to the attorney or physician. See *Metropolitan Life Insur. Co. v. Boddie*, 194 N. C. 199, 202, 139 S. E. 228, 230 (1927), citing N. C. CODE ANN. (Michie, 1935) § 1798.

27. See *State v. Martin*, 182 N. C. 846, 850, 109 S. E. 74, 76 (1921). For reasons of public policy, the physician-patient privilege has been avoided in many jurisdictions in criminal cases, insanity proceedings, suits for personal injuries, and cases arising under the Workmen's Compensation Acts, while waiver of the privilege in insurance contracts has also been upheld. See Comment (1933) 81 U. OF PA. L. REV. 755; (1932) 20 CALIF. L. REV. 302.

**Stover v. Winston Bros. Co.*, 185 Wash. 416, 55 P. (2d) 821 (1936).

1. *Ibid.*, appeal dismissed for want of substantial federal question, 57 Sup. Ct. 44 (1936).

2. *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U. S. 220 (1912); *H. R. Moch, Inc. v. Rensselaer Water Co.*, 247 N. Y. 160, 159 N. E. 896 (1928); 2 WILLISTON, CONTRACTS (rev. ed. 1936) § 373; RESTATEMENT, CONTRACTS (1932) § 145, illustration 2; *Corbin, Liability of Water Companies for Losses by Fire* (1910)

ciple of construction has not been applied to minimum wage provisions in municipal construction contracts. Since the employees of the contractor are clearly the class for whose benefit provisions of this type are inserted in municipal contracts, the right of a particular member of the class to maintain an action on the contract in his own behalf as donee beneficiary of the contract is undisputed under the more liberal view.³ Third party beneficiary doctrines have been similarly applied in actions against the employer based upon collective labor agreements⁴ and the President's recent Reemployment Agreement.⁵

19 YALE L. J. 425. But *cf.* *Mugge v. Tampa Water Works Co.*, 52 Fla. 371, 42 So. 81 (1906); *Pond v. New Rochelle Water Co.*, 183 N. Y. 330, 76 N. E. 211 (1906); *Rigney v. N. Y. C. & H. R. R. R.*, 161 App. Div. 187, 146 N. Y. Supp. 395 (3d Dep't 1914), *aff'd*, 217 N. Y. 31, 111 N. E. 226 (1916).

3. *Hearn v. Ralph Sollitt & Sons Constr. Co.*, 93 S.W. (2d) 551 (Tex. 1936); 2 WILLISTON, *op. cit. supra* note 2, §§ 356, 357, 368, 378; RESTATEMENT, CONTRACTS (1932) §§ 135, 138, 139; Corbin, *Contracts for the Benefit of Third Persons* (1918) 27 YALE L. J. 1008; Corbin, *Contracts for the Benefit of Third Persons in the Federal Courts* (1930) 39 *id.* 601; Comments (1935) 15 B. U. L. REV. 133, (1936) 6 BROOKLYN L. REV. 64. Where there is a state statute prescribing minimum wages for workers on public contracts, an employee can bring an action directly upon the employer's breach of statutory duty. *City of Glendale v. Coquat*, 52 P. (2d) 1178 (Ariz. 1935); *Rhodes v. New Orleans G. N. Ry.*, 129 Miss. 78, 91 So. 281 (1922); see Comment (1933) 42 YALE L. J. 762, 769; *cf.* *Goebel v. Elliott*, 178 Wash. 444, 35 P. (2d) 44 (1934) (action on city ordinance where contract of employment made and performed within city limits).

4. *Dierschow v. West Suburban Dairies, Inc.*, 276 Ill. App. 355 (1934), (1935) 2 U. OF CHI. L. REV. 335; *Yazoo & M. V. R. R. v. Sideboard*, 161 Miss. 4, 133 So. 669 (1931), (1931) 16 MINN. L. REV. 100; *Gulla v. Barton*, 164 App. Div. 293, 149 N. Y. Supp. 952 (3d Dep't 1914); see Christenson, *Legally Enforceable Interests in American Labor Union Working Agreements* (1933) 9 ILL. L. J. 69; Duguit, *Collective Acts as Distinguished from Contracts* (1918) 27 YALE L. J. 753; Fuchs, *Collective Labor Agreements in American Law* (1925) 10 ST. LOUIS L. REV. 1; Rice, *Collective Labor Agreements in American Law* (1931) 44 HARV. L. REV. 572; Comments (1932) 41 YALE L. J. 1221, (1936) 15 ORE. L. REV. 229.

5. N. R. A. Release No. 502, Aug. 27, 1933; *Beaton v. Avondale, Colo. Dist. Ct.*, 2d Dist., Oct. 26, 1933, (1933) 82 U. OF PA. L. REV. 283; *Fryns v. Fair Lawn Fur Dressing Co.*, 114 N. J. Eq. 462, 168 Atl. 862 (Ch. 1933); *Canton v. The Palms*, 152 Misc. 347, 273 N. Y. Supp. 239 (Buffalo City Ct. 1934); Wis. State Fed. of Labor v. Simplex Shoe Mfg. Co., Circ. Ct. Wis., Oct. 13, 1933, (1933) 1 U. S. L. WEEK 137, (1933) 32 MICH. L. REV. 270; Comments (1934) 14 B. U. L. REV. 789, (1933) 33 COL. L. REV. 1394. With respect to the N. R. A. Codes which followed see Billig, *The Worker's Day in Court: Employee's Right to Code Wages* (1934) 3 GEO. WASH. L. REV. 1; Padwe, *Right of Third Party Beneficiaries under the N. I. R. A.* (1934) 9 ST. JOHN'S L. REV. 166. Direct recovery is similarly permitted in favor of laborers and materialmen against the surety on a contractor's bond, unless the bond cannot be interpreted to include protection for these classes. 2 WILLISTON, *op. cit. supra* note 2, § 372; Corbin, *Third Parties as Beneficiaries of Contractors' Surety Bonds* (1928) 38 YALE L. J. 1; Corbin, *The Law of Third Party Beneficiaries in Pennsylvania* (1928) 77 U. OF PA. L. REV. 1, 19; Campbell, *Protection of Laborers and Materialmen under Construction Bonds* (1935) 3 U. OF CHI. L. REV. 1.

Granted the position of an individual employee as a third party beneficiary under the contract between municipality and employer, the effect of his accepting wages less than the contractual minimum and receipting payment in full depends on several circumstances. Since accord and satisfaction rest upon knowledge of the existence of the claim which is being renounced,⁶ the giving of such a receipt by the employee in ignorance of the employer's duty to pay a greater wage would seem to present no bar to a subsequent action for the wage differential. A similar result would follow if the contract of employment specified no wage whatever and there were no dispute as to the amount due the employee at the minimum rate; for the acceptance of a lesser amount in satisfaction of a greater liquidated obligation is without consideration.⁷ Receipt of a sum certain, however, in settlement of an unliquidated claim, with full knowledge on the part of the employee of his possible right to a greater amount, would seem to constitute a valid defense to a subsequent action by the employee on the same claim.⁸ In the Washington case there was no evidence of the employee's ignorance of the minimum wage provision at the time of payment and receipt, and there was apparently some confusion at the time of suit as to the amount due the employee at the minimum rate, by reason of a dispute as to the type of work done. Nor was the city ordinance available of its own force to avoid the effect of the employee's renunciation on grounds of public policy: The implied contract of employment was performed and apparently made, and the release executed, outside the territorial jurisdiction of the city; and, although the construction contract between the city and the employer was made expressly with reference to the ordinance, the employment and release agreements between employer and employee were not.⁹

There are holdings, however, based upon a public policy divorced from specific legislation, to the effect that a contract made by *A* with *C* which requires a wilful breach of a former contract between *A* and *B* is unenforceable by *A* against *C*.¹⁰ The defendant's agreements with its employees would seem clearly to have entailed a breach of its contract with the city within the scope of this rule, particularly in view of the fact that the construction contract was awarded the defendant upon a competitive bid based expressly upon the minimum wage specified in the invitation, so that the payment of the lesser wage resulted in an unjust enrichment of the con-

6. 1 WILLISTON, *op. cit. supra* note 2, §§ 128, 129; RESTATEMENT, CONTRACTS (1932) § 417 *et seq.*

7. Pederson v. Portland, 144 Ore. 437, 24 P. (2d) 1031 (1933); 1 WILLISTON, *op. cit. supra* note 2, § 130.

8. See note 6, *supra*.

9. The effect of the employee's renunciation could have been avoided on grounds of public policy, had the minimum wage provision been incorporated in a state statute. City of Glendale v. Coquat, 52 P. (2d) 1178 (Ariz. 1935), 102 A. L. R. 842 (1936); Larsen v. Rice, 100 Wash. 642, 171 Pac. 1037 (1918).

10. Roberts v. Criss, 266 Fed. 296 (C. C. A. 2d, 1920); Reiner v. North American Newspaper Alliance, 259 N. Y. 250, 181 N. E. 561 (1932), (1932) 18 CORN. L. Q. 84, (1932) 46 HARV. L. REV. 158; RESTATEMENT, CONTRACTS (1932) § 576, comment a; see Carpenter, *Interference with Contract Relations* (1928) 41 HARV. L. REV. 728.

tractor in fraud of the city.¹¹ And, although the city could have recovered the wage differential on behalf of the employees in an action for breach of the contract in its own right, direct recovery by the employees would avoid the circuitry.¹²

MANUFACTURERS' LIABILITY IN TORT*

A RETAIL purchaser of underwear claimed in an action against the manufacturer that he had contracted dermatitis as the result of the defendant's negligent failure to remove a certain chemical introduced in the process of manufacture. Since the several launderings of the particular pieces had removed most of any chemical originally present, the plaintiff's only evidence was of the circumstances of the injury and of an excess of the chemical in other pieces of the same brand. Finding that the presence of the chemical caused the plaintiff's illness, that the condition of the underwear could not have been detected by reasonable examination, and that nothing had happened between the manufacture of the garment and its being worn which might have changed its condition, the Judicial Committee of the Privy Council reversed the High Court of Australia¹ and entered judgment for the plaintiff.² "A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer," the Committee held, "to take that reasonable care."³

11. *Horbach v. Coyle*, 2 F. (2d) 702 (C. C. A. 8th, 1924); 3 WILLISTON, CONTRACTS (1st ed. 1920) §1628; RESTATEMENT, CONTRACTS (1932) §577.

12. The employee's failure to protest when accepting the lesser wage should present no bar to an action for the differential; for an employee would hardly be willing to risk discharge by protesting, even though he may know of the greater wage to which he is entitled. *Hearn v. Ralph Sollitt & Sons Constr. Co.*, 93 S.W. (2d) 551 (Tex. 1936); see 3 WILLISTON, *op. cit. supra* note 11, §1626.

**Grant v. Australian Knitting Mills*, [1936] A. C. 85 (P. C.).

1. *Australian Knitting Mills v. Grant*, 50 C. L. R. (Aust.) 387 (1933) (one justice dissenting), reversing the Supreme Court of South Australia. Judgment on an implied warranty against the retailer as codefendant was reversed on the first appeal, but this judgment in turn was reversed on the second.

2. *Grant v. Australian Knitting Mills*, [1936] A. C. 85 (P. C.), (1936) 6 *CAMB. L. J.* 118, (1936) 48 *JURID. REV.* 78, (1936) 81 *L. J.* 92, (1936) 52 *L. Q. REV.* 12, (1936) 52 *SCOT. L. REV.* 46, (1936) 3 *U. OF CHI. L. REV.* 673; see also Pilcher and Beale, *Grant v. Australian Knitting Mills—Liabilities of Manufacturers and Retailers* (1935) 9 *AUST. L. J.* 288; Underhay, *Manufacturers' Liability: Recent Developments of Donoghue v. Stevenson* (1936) 14 *CAN. B. REV.* 283.

3. *Grant v. Australian Knitting Mills*, [1936] A. C. 85, 102 (P. C.), quoting from *Donoghue v. Stevenson*, [1932] A. C. 562, 599.

Born of some dicta in *Winterbottom v. Wright*⁴ a century ago, the principle developed both in England and in America that the duty of manufacturers to use due care in their production is limited to those persons in privity of contract with them.⁵ To this rule, however, an exception was early acknowledged with respect to products regarded as "inherently" or "imminently dangerous."⁶ The process of extending this exception from articles dangerous though flawless to articles dangerous if defective culminated in this country twenty years ago in *MacPherson v. Buick Motor Company*,⁷ where Judge Cardozo recognized as within its scope any article "reasonably certain to place life and limb in peril when negligently made."⁸ Although there is apparently no article which, if defectively produced, could not reasonably be held to come within the scope either of this rule or of that of the Privy Council, the latter would seem in a sense to go slightly further. The New York court in the *MacPherson* case took pains to demonstrate that recovery in that state had not been limited to "instruments of destruction" and that an automobile with a latently defective wheel was reasonably certain to be dangerous; the Privy Council concluded without much ado, from the fact of the injury itself, that woolen undergarments containing free sulphites were potentially so dangerous to the consumer⁹ as to support the inference

4. 10 M. & W. 109 (Ex. 1842). *Winterbottom v. Wright* decided only that breach of contract is insufficient in itself to give a stranger to the contract an action for consequential damages. See *Donoghue v. Stevenson*, [1932] A. C. 562, 589, 594.

5. See (1933) 46 HARV. L. REV. 530. This limitation has generally been explained as an expression of public policy. See *Earl v. Lubbock*, [1905] 1 K. B. 253, 259; *Mullen v. Barr & Co.*, [1929] Sess. Cas. 461, 476, 479; Comment (1927) 40 HARV. L. REV. 886, 890; cf. *Burkett v. Studebaker Bros. Mfg. Co.*, 126 Tenn. 467, 474, 150 S. W. 421, 423 (1912) (to limit litigation). It has also been suggested that injury to anyone but the immediate vendee of the manufacturer is not foreseeable. But see BOHLEN, *STUDIES IN THE LAW OF TORTS* (1926) 124.

6. *Thomas v. Winchester*, 6 N. Y. 397 (1852) (poison).

7. 217 N. Y. 382, 111 N. E. 1050 (1916), (1916) 25 YALE L. J. 679; see Comment (1916) 29 HARV. L. REV. 866.

8. *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 389, 111 N. E. 1050, 1053 (1916); see Bohlen, *Liability of Manufacturers to Persons other than their Immediate Vendees* (1929) 45 L. Q. REV. 343, 359; cf. *Ultramares Corp. v. Touche, Niven & Co.*, 255 N. Y. 170, 180, 174 N. E. 441, 445 (1931); CARDOZO, *THE GROWTH OF THE LAW* (1924) 77.

9. The instant case is apparently the first in either England or America to allow recovery for a defect in clothing. *Contra*: *Kerwin v. Chippewa Shoe Mfg. Co.*, 163 Wis. 428, 157 N. W. 1101 (1916); *Cook v. Garside & Sons*, 145 Misc. 577, 259 N. Y. Supp. 947 (Sup. Ct. 1932). *Donoghue v. Stevenson*, [1932] A. C. 562, the famous snail in the bottle case in which the doctrine of privity had "had its brains knocked out" [see (1936) 52 L. Q. REV. 12, 13], might have been limited to goods distributed in sealed packages. See *Farr v. Butters Bros. & Co.*, [1932] 2 K. B. 606, 614. The Privy Council, however, recognized that a sealed package is only one means of proving that the defect has been caused by the manufacturer. *Grant v. Australian Knitting Mills*, [1936] A. C. 85, 106 (P. C.).

of a duty of care in their manufacture. The British rule may, therefore, lend itself less readily to a process of distinction in future cases.¹⁰

The general duty of the manufacturer in Great Britain may, of course, be limited with respect to the classes of persons to whom the duty is owed, the types of manufacturer—whether final or sub-processor or both—who owe the duty, and the sorts of injury which the duty comprehends. The duty of the manufacturer under the American cases has been extended beyond vendees¹¹ to users who were not vendees at all,¹² and, even further, to persons in some way connected with vendees¹³ and to others in mere physical proximity to them.¹⁴ There has been a corresponding tendency in this country toward imposing the duty on all processors along the line of manufacture: The sub-processor has been held to the same duty of due care in the manufacture of his particular part of the finished product as the final processor,¹⁵ and the latter, in addition to being held liable for negligence in his own stage of the manufacturing process,¹⁶ has also been held to a duty of adequate inspection of the product coming to him from the sub-processor.¹⁷ Again, the type of

10. See Pollock, *The Snail in the Bottle, and Thereafter* (1933) 49 L. Q. REV. 22, 24. The *MacPherson* case has been distinguished in the lower New York courts. *Jaroniec v. Hasselbarth*, 223 App. Div. 182, 185, 228 N. Y. Supp. 302, 305 (3d Dep't 1928) (mattress); *Cohen v. Brockway Motor Truck Corp.*, 240 App. Div. 18, 19, 263 N. Y. Supp. 545, 546 (1st Dep't 1934) (truck door); *Creedon v. Automatic Voting Machine Corp.*, 243 App. Div. 339, 341, 276 N. Y. Supp. 609, 611 (4th Dep't 1935) (voting machine); see *Johnson v. Cadillac Motor Co.*, 261 Fed. 878, 886 (C. C. A. 2d, 1919). The requirement of privity of contract has been held since the instant case to apply to persons injured as the result of a defect in a house. *Otto v. Bolton & Norris*, [1936] 2 K. B. 46, 55, noted disapprovingly, (1936) 52 L. Q. REV. 313. *Sioux Falls Serum Co.*, 44 S. D. 421, 184 N. W. 252 (1921).

11. *Heckel v. Ford Motor Co.*, 101 N. J. L. 385, 128 Atl. 242 (1925); *Murphy v.*

12. *O'Brien v. American Bridge Co.*, 110 Minn. 364, 125 N. W. 1012 (1910); *Crist v. Art Metal Works*, 230 App. Div. 114, 243 N. Y. Supp. 496 (1st Dep't 1930).

13. *Barabe v. Duhrkop Oven Co.*, 231 Mass. 466, 121 N. E. 415 (1919) (landlord of purchaser); *Clark v. Standard Sanitary Mfg. Co.*, 8 N. J. Misc. 284, 149 Atl. 828 (Sup. Ct. 1930) (tenant of purchaser); *Crane Co. v. Sears*, 163 Okla. 603, 35 P. (2d) 916 (1934) (employee of tenant of purchaser).

14. *Kalinowski v. Truck Equipment Co.*, 237 App. Div. 472, 261 N. Y. Supp. 657 (4th Dep't 1933) (pedestrian); *Flies v. Fox Bros. Buick Co.*, 196 Wis. 196, 218 N. W. 855 (1928) (same).

15. *Smith v. Peerless Glass Co.*, 259 N. Y. 292, 181 N. E. 576 (1932); RESTATEMENT, TORTS (1934) § 395, comment *f*; see *Martin v. Studebaker Corp.*, 102 N. J. L. 612, 615, 133 Atl. 384, 386 (1926). *Contra*: *Tipton v. Barnard & Leas Mfg. Co.*, 302 Mo. 162, 257 S. W. 791 (1924).

16. *Quackenbush v. Ford Motor Co.*, 167 App. Div. 433, 153 N. Y. Supp. 131 (3d Dep't 1915); *Reed & Barton Corp. v. Maas*, 73 F. (2d) 359 (C. C. A. 1st, 1934).

17. *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916); *Marsh Wood Products Co. v. Babcock & Wilcox Co.*, 207 Wis. 209, 240 N. W. 392 (1932). At the same time, where the manufacturer, either processor or subprocessor, has been clearly responsible for the defect, his negligence is not insulated by an intermediate agent's opportunity or duty to inspect, or, often, by the agent's knowledge of the defect. Opportunity: *Krahn v. J. L. Owens Co.*, 125 Minn. 33, 145 N. W. 626 (1914). Duty:

injury for which recovery may be had has been extended in the United States to include injury to property, under various criteria of foreseeability,¹⁸ as well as to persons. There is little authority in England on which to base an estimate of the extent to which the general duty of care recognized by the Privy Council is likely to be limited by these several considerations. But any limitation of the class of persons to whom the duty is owed short of the degree to which the American cases have gone in this regard would seem inconsistent with the general extension of the manufacturer's duty in the principal case.¹⁹ A similar inconsistency would be created by a restriction of the duty to the final processor, unless he were held either strictly liable for his failure to discover defects in the product coming to him from the sub-processor or vicariously liable for negligent manufacture by the latter.²⁰ With respect to the type of injury suffered, there should be no difficulty in England, within the *Polemis* doctrine,²¹ in allowing recovery for property as well as personal damage.²²

To whatever extent the general duty imposed by the Privy Council may be limited by these considerations, however, the rule of the British case, together with the liberal application, in actions by remote vendees against manufacturers, of the doctrine of *res ipsa loquitur*, approaches a rule of absolute liability for defects. *Res ipsa loquitur* has been used not only to shift to the defendant—upon proof by the plaintiff of the injury, the defect, and the causal connection—the burden of introducing evidence of the general use of a careful process of manufacture;²³ it has been used also to require proof by the defendant of due care in the manufacture of the particular article which is alleged to have caused the injury,²⁴ and sometimes, as in the instant

Rosebrock v. General Elec. Co., 236 N. Y. 227, 140 N. E. 571 (1923). But see MacPherson v. Buick Motor Co., *supra*, at 390, 111 N. E. at 1053. Knowledge: Bryson v. Hines, 268 Fed. 290 (C. C. A. 4th, 1920); Farley v. Edward E. Tower & Co., 271 Mass. 230, 171 N. E. 639 (1930). *Contra*: Stultz v. Benson Lumber Co., 59 P. (2d) 100 (Cal. 1936).

18. See (1934) 32 MICH. L. REV. 1007; (1930) 14 MINN. L. REV. 306, 307.

19. *Cf.* Brown v. Cotterill, 51 T. L. R. 21 (K. B. 1934); Howard v. Furness-Houlder Argentine Lines, 55 Ll. L. L. Rep. 121 (K. B. 1936). But *cf.* Grant v. Australian Knitting Mills, [1936] A. C. 85, 103 (P. C.).

20. But *cf.* Otto v. Bolton & Norris, [1936] 2 K. B. 46, 57; Evans v. Triplex Safety Glass Co., [1936] 1 All E. R. 283, 286 (K. B.).

21. *In re Polemis*, [1921] 3 K. B. 560, 572, 577.

22. *Cf.* Anglo-Celtic Shipping Co. v. Elliott, 42 T. L. R. 297 (K. B. 1926); see Donoghue v. Stevenson, [1932] A. C. 562, 599.

23. Reed & Barton Corp. v. Maas, 73 F. (2d) 359, 362 (C. C. A. 1st, 1934) *semble*; Coakley v. Prentiss-Wabers Stove Co., 182 Wis. 94, 98, 195 N. W. 388, 389 (1923) *semble*.

24. Krahn v. J. L. Owens Co., 125 Minn. 33, 145 N. W. 626 (1914).. Negligence will be more readily inferred where the defect is due to the non-performance of an essential part of the manufacturing process than where a casual defect has not been discovered. See Comment (1927) 40 HARV. L. REV. 886, 888, n. 9; compare Armstrong Packing Co. v. Clem, 151 S. W. 576 (Tex. Civ. App. 1912), with Hasbrouck v. Armour & Co., 139 Wis. 357, 121 N. W. 157 (1909).

case, largely to excuse failure of the plaintiff to prove the defect itself.²⁵ Furthermore, although the plaintiff is said to bear the burden of refuting the possibility that the defect was caused after the product left the defendant's hands,²⁶ the proof with which courts have been satisfied on this issue, again as in the instant case, may make this obstacle more theoretical than real.²⁷ No great change in practical result would, therefore, seem to be involved in the adoption—within certain limitations of parties plaintiff, parties defendant and types of injury—of an express rule of absolute manufacturers' liability.²⁸ Such a rule would have much to commend it.²⁹ The manufacturer, more particularly the final processor, is in a better position than anyone else to prevent the loss by using due care, to shift it to an insurer, to distribute it among consumers by raising his price, and, if he prefers, to avoid it entirely by leaving the business.³⁰ Moreover, the general reliance on his name would facilitate the choice of a defendant in a field where the causes of the accident are often so complex as to obscure the source of the particular defect.

THE NEW HAMPSHIRE AUTOMOBILE COMPENSATION BILL*

LEGISLATION designed to facilitate the equitable distribution of the economic loss resulting from automobile accidents has been directed primarily toward assuring payment of judgments through some form of financial responsibility or compulsory insurance plan. Little legislative attention has been directed toward improving the system by which claims are recognized in the first place. The theory of negligence with its many defences as administered by judge and jury under orthodox rules of evidence and procedure has proved peculiarly costly and difficult of application in these cases. And the courts have become so hopelessly clogged with such litigation that the injured party frequently finds it more desirable to agree to an unfavorable settlement than to await trial.¹

25. Cf. *Oliver v. Saddler & Co.*, [1929] A. C. 534.

26. See (1936) 48 JURID. REV. 78, 79. Mere prolonged use of an article has defeated recovery. *Lynch v. International Harvester Co.*, 60 F. (2d) 223 (C. C. A. 10th, 1932); *Blacker v. Lake & Elliott*, 106 L. T. R. 533 (K. B. 1912).

27. Cf. *Jump v. Ensign-Bickford Co.*, 117 Conn. 110, 167 Atl. 90 (1933); *Australian Knitting Mills v. Grant*, 50 C. L. R. (Aust.) 387, 440 (1933).

28. Some courts have reached practically the same end by enforcing an implied warranty running with the goods. *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N. W. 382 (1920); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P. (2d) 409 (1932). *Contra*: *Chysky v. Drake Bros. Co.*, 235 N. Y. 468, 139 N. E. 576 (1923).

29. Cf. *Andrews, Relation of Workmen's Compensation to Accident Prevention* (1926) 123 ANNALS 205; (1937) 46 YALE L. J. 713.

30. See *Douglas, Vicarious Liability and Administration of Risk* (1929) 38 YALE L. J. 584, 588; *Feezer, Social Justice in the Field of Torts* (1927) 11 MINN. L. REV. 313, 324; *Comment* (1937) 37 COL. L. REV. 77, 79.

**In re* Opinion of the Justices, 87 N. H. 492, 179 Atl. 344 (1935).

1. See generally FRENCH, *THE AUTOMOBILE COMPENSATION PLAN* (1933) 10-43; GREGORY, *LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS* (1936); Report by

A bill recently introduced into the New Hampshire Senate attempted a more comprehensive solution of the automobile accident problem.² A commission was proposed, consisting of two department heads and a chairman appointed by the governor, to hear motor accident cases, make findings, and render awards, to the extent of \$3,000 to a single complainant, for personal injury, death or property damage in excess of \$50.³ Although the commission was to grant a hearing *de novo* to holders of unsatisfied non-default judgments in the regular state courts, upon complaint made within a specified time,⁴ its original jurisdiction was apparently to be limited to resident car owners who should have furnished security for their own liability as defined in a previous statute.⁵ No complaint could be filed with the commission during the pendency of an action at law; nor could an action at law be maintained after the filing of a complaint.⁶ The defendant could deny the jurisdiction of the commission upon proper proof of insurance or ownership of property out of which a judgment might be satisfied;⁷ and the right to jury trial was to be waived by application for motor registration or an operator's license, by the filing of a complaint, or, in the case of a non-resident, by the use of the public highways.⁸ Hearings were to be conducted by one or more members of the commission or an appointed referee,⁹ and counsel could be employed by either party, the fee of counsel for the complainant being fixed by the commission.¹⁰ Although the commission was empowered to make whatever rules, presumably of evidence and procedure, it felt were necessary to carry out the plan, existing doctrines of negligence and its defences were not altered.¹¹ The right to appeal was limited to review by the Supreme Court on questions of law;¹² the findings of fact of the

the Committee to Study Compensation for Automobile Accidents to the Columbia University Council for Research in the Social Sciences, 1932, 17-131; Symposium, *Financial Protection for the Motor Accident Victim* (1936) 3 LAW & CONTEMP. PROB. 465-578; Balantine, *A Study of Compensation for Automobile Accidents* (1930) 16 A. B. A. J. 97, 98; Déak, *Liability and Compensation for Automobile Accidents* (1937) 21 MINN. L. REV. 123; Ives, *Compulsory Liability Insurance* (1924) 10 A. B. A. J. 697, 698; Lewis, *Accident Litigation* (1924) 72 U. OF PA. L. REV. 400; Marx, *Compulsory Compensation Insurance* (1925) 25 COL. L. REV. 164.

2. Senate Bill No. 37 (N. H. 1935).

3. *Id.*, §§ 1-3, 13.

4. Complaint was to be filed within thirty days of the issuance of the judgment. *Id.*, §§ 18, 19.

5. The act required the complainant to give the commission immediate notice of the accident and claim and to file his complaint within six months. *Id.*, §§ 4-6. The commission was to serve the defendant by mail, the regular nonresident motorist statute being used for nonresidents. *Id.*, § 7.

6. *Id.*, § 29.

7. If the plaintiff objected to the denial, the issue was to be settled at a preliminary hearing with the burden of proof on the defendant. *Id.*, §§ 11, 12.

8. *Id.*, § 17.

9. *Id.*, §§ 3(II), 9, 10.

10. *Id.*, § 8.

11. *Id.*, §§ 3(VI), 16.

12. The commission might also transfer any question of law to the court on its own motion. *Id.*, § 15.

commission were to be final, and its orders when certified to the Superior Court were there to be entered as judgments upon which ordinary execution might issue.¹³ When an award remained unsatisfied for thirty days, it was to be paid from a special state fund raised by charging one dollar in addition to the regular fee for an operator's license and five dollars additional for registration of every car not adequately insured.¹⁴ Payment was to be made in two installments, half immediately and the other half, or as much of it as remained in the fund, at the end of the year.¹⁵ The state was then to be subrogated to the judgment rights of the complainant, with a lien on all real estate and motor vehicles of the defendant, and the debtor's right to drive was to be suspended.¹⁶ The Supreme Court of New Hampshire held in an advisory opinion that, notwithstanding the reservation of judicial review, this plan involved a delegation of judicial power to the executive branch of the government which violated the provision with respect to separation of powers in the state constitution, because the primary duty of the commission was not to administer a legislative policy or to perform a regulatory function, but to adjudicate private litigation.¹⁷

The proposal, however, contains more serious infirmities than those raised on the score of constitutionality. Leaving the jurisdiction of the regular courts in automobile cases unimpaired, the bill was so phrased that, aside from the provision for complaint by a judgment creditor, only an insured car owner was apparently to be entitled to initiate a proceeding before the commission, and even his complaint was to be subject to dismissal except by an uninsured and financially irresponsible defendant. There would have been little incentive, with the maximum award limited to \$3,000 and payable from a fund of doubtful financial stability, for a party sustaining serious injury to forego a jury trial; and in a case under such a scheme where the plaintiff would benefit by proceeding before the commission, the defendant would be more than likely for that very reason to deny its jurisdiction, if he could prove financial responsibility. The proposed bill, therefore, could hardly have afforded more than some guaranty of payment;¹⁸ and even in that respect it would probably have been less effective, in view of the limited awards and the precarious character of the fund out of which they were to be paid, than a compulsory insurance law of the type in effect in Massachusetts.¹⁹ Finally, no solution would seem to go to the root

13. *Id.*, §§ 14, 21, 22.

14. *Id.*, §§ 24, 25.

15. *Id.*, § 26.

16. *Id.*, §§ 23, 27, 28.

17. *In re* Opinion of the Justices, 87 N. H. 492, 179 Atl. 344 (1935).

18. Suspension of the defendant's license (see note 16, *supra*), moreover, hardly seems an effective sanction for enforcing payment; and in the case of a person dependent on driving as a livelihood it would also operate as a great hardship. Many financial responsibility laws are open to the same criticism. See Report, *supra* note 1, at 100.

19. MASS. GEN. LAWS (1932) c. 90, § 34(a)-(j); see Report, *supra* note 1, at 111-131; Symposium, *supra* note 1, at 537-578.

of the automobile accident problem which did not discard the perspective of negligence or fault.²⁰

Automobile accident compensation plans divorced both from the courts and from the legal concept of negligence have been widely discussed.²¹ Their proponents generally suggest, in essence, a specially qualified board to hear motor accident controversies and award compensation, regardless of fault,²² for specified injuries and loss of time; payments would vary, within defined limits, according to the complainant's weekly wage.²³ Since the right to a court trial and the rules of negligence would be abolished and judicial review limited to questions of law, a scheme of this type would, it is contended, relieve court congestion, afford a hearing free from technical rules of evidence and procedure, and consequently decrease in great measure the expense and time required to obtain a judgment under the existing system. At the same time compensation awards, instead of being influenced, like jury verdicts, by the defendant's ability to pay, would bear a more satisfactory and consistent relation to the loss sustained. Complementing this scheme of rendering awards, a system of compulsory compensation insurance would guarantee their full and prompt payment.²⁴ Increasing the insurance rate for each individual in proportion to the number or amount of the awards rendered against him would tend to discourage carelessness as well as incentives to collusion;²⁵ and the cost of automobile accidents would be equably distributed among the entire motoring community at a price which should not be prohibitive.²⁶

20. See note 11, *supra*. Such an approach has yet to be made. See Symposium, *supra* note 1, at 584. See generally FRENCH, *op. cit. supra* note 1, c. 2; Report, *supra* note 1, at 217; Symposium, *supra*, at 579-597; Carman, *Is a Motor Vehicle Accident Compensation Act Advisable?* (1919) 4 MINN. L. REV. 1. But see Ives, *loc. cit. supra* note 1; Sherman, Comments on Report to Columbia University (Pamphlet submitted to Committee of Nine on Financial Responsibility for Automobile Accidents, 1932); Symposium, *supra*, at 598.

21. See note 20, *supra*. A model compensation plan has been prepared by the Committee to Study Compensation for Automobile Accidents. Report, *supra* note 1, at 137-143; see Symposium, *supra* note 1, at 579-582.

22. The owner's liability would be limited under the Columbia plan, however, to injuries "caused by" the operation of his motor vehicle, in order to allow the courts some flexibility in excluding certain types of accidents. In an accident involving two or more automobiles each owner would compensate the occupants of his own car and the owner of the other, but not himself. See Report, *supra* note 1, at 138-140.

23. An arbitrary wage would be assumed in the absence of actual earnings. See Report, *supra* note 1, at 140; Symposium, *supra* note 1, at 594. But see *id.* at 603.

24. See Report, *supra* note 1, at 143. Compulsory insurance now exists in Massachusetts, Austria, Czechoslovakia, Denmark, Finland, Great Britain, Norway, Sweden, and Switzerland. See Déak, *supra* note 1, at 136. The Massachusetts act has been upheld. *In re* Opinion of the Justices, 251 Mass. 569, 147 N. E. 681 (1925); see (1930) 44 HARV. L. REV. 123; *cf.* Packard v. Banton, 264 U. S. 140, 68 L. Ed. 596 (1924) (New York compulsory liability insurance statute for certain public carriers).

25. See Symposium, *supra* note 1, at 592. But see *id.* at 551.

26. See Report, *supra* note 1, at 156, 288; Symposium, *supra* note 1, at 590. But see *id.* at 607.

A compensation plan of this sort, creating a definite legislative policy properly administrable by a special board whose rulings would be subject to judicial review on questions of law, would seem, on the close analogy of workmen's compensation statutes,²⁷ to violate neither the doctrine of separation of powers nor any other constitutional guarantee.²⁸ Motorists have frequently been regarded as a distinct class subject to special control within the equal protection clause of the Fourteenth Amendment.²⁹ Similarly, the due process clause should not prevent the legislative extinction of the common law cause of action for negligence in automobile cases in favor of a statutory system of automobile accident liability without fault;³⁰ and due process of law insures simply a fair hearing, not necessarily a court trial.³¹ At the same time the right to jury trial which is guaranteed in the several state constitutions may be denied, with the abolition of a particular cause of action, on the ground that there is nothing left for the jury to try.³²

27. Workmen's compensation acts have almost uniformly been held constitutional. *Mountain Timber Co. v. Washington*, 243 U. S. 219 (1917); see Note, L. R. A. 1916A 409.

28. See Report, *supra* note 1, at 162; Sherman, *supra* note 20, at 45. The federal constitution does not forbid a state to confer judicial functions on non-judicial bodies. See *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 225 (1908). But the state constitutions generally require that the three essential powers of government be kept as independent of each other as possible. N. H. CONST. I, art. XXXVII; COLUMBIA UNIVERSITY, INDEX DIGEST OF STATE CONSTITUTIONS (1915) 526-529. Although most workmen's compensation acts are administered by special boards, the New Hampshire act is administered by the state courts. N. H. PUB. LAWS (1926) c. 178.

29. *In re* Opinion of the Justices, 251 Mass. 569, 147 N. E. 681 (1925); cf. N. Y. C. R. R. v. White, 243 U. S. 188, 208 (1917) (workmen's compensation). The exclusion of non-resident complainants, as provided in the New Hampshire bill (§4), might raise another constitutional issue. But, based on residence rather than citizenship, such a provision would seem not to violate the privileges or immunities clause. Cf. *Douglas v. N. Y., N. H. & H. R. R.*, 279 U. S. 377 (1929); see Comment (1936) 45 YALE L. J. 1235, 1243, nn. 134, 140.

30. Cf. N. Y. C. R. R. v. White, 243 U. S. 188 (1917).

31. *Reetz v. Michigan*, 188 U. S. 505 (1903).

32. Such denial would seem to violate neither the Fourteenth Amendment [see N. Y. C. R. R. v. White, 243 U. S. 188, 208 (1917)], nor the Seventh [see *Mountain Timber Co. v. Washington*, 243 U. S. 219, 235 (1917)], nor the usual state constitution [see N. H. CONST. I, art. XX; INDEX DIGEST, *op. cit. supra* note 28, at 800-804; cf. N. Y. CONST. art. I, §2]. If the cause of action were not abolished, however, a provision such as that in the New Hampshire bill (see note 8, *supra*), to the effect that mere use of the state highways by a nonresident should constitute a waiver of jury trial, might be held violative of the doctrine of unconstitutional conditions. See, on this doctrine, Hale, *Unconstitutional Conditions and Constitutional Rights* (1935) 35 COL. L. REV. 321; authorities cited in Comment (1936) 45 YALE L. J. 1100, 1111, n. 59.

STATUTORY DOUBLE LIABILITY OF SHAREHOLDERS IN BANK HOLDING
COMPANIES*

GROUP banking systems controlled by holding companies unauthorized to carry on the business of banking,¹ are a comparatively recent development in this country.² Although statutes allowing one corporation to purchase the stock of another generally are sufficiently broad to permit the formation of bank holding companies,³ in several states the provisions for stock ownership have been limited to corporations organized for similar purposes,⁴ thus making it doubtful whether group banking systems could exist.⁵ In some states, indeed, the purchase of bank stock by non-banking corporations has been expressly hedged by restrictions,⁶ or even conditioned on the submission of the holding company to strict governmental supervision.⁷ Although these restrictions may have been adopted largely because of a legislative distrust of

*Barbour v. Thomas (C. C. A. 6th, Nov. 11, 1936).

1. Bank holding companies have been incorporated under the general corporation laws of the states. See CARTINHOOR, *BRANCH, GROUP AND CHAIN BANKING* (1931) 203; *Legis.* (1935) 48 HARV. L. REV. 659, 667. But *cf.* Wis. Stat. (1935) § 221.56.

2. *Hearings before Committee on Banking and Currency on H. R. 141*, 71st Cong., 2d Sess. (1930) 70. But although large holding companies originated in 1926, smaller closed corporations holding bank stock have existed for thirty years. CARTINHOOR, *op. cit. supra* note 1, at 96.

3. See *Legis.* (1935) 48 HARV. L. REV. 659, 666; MICH. OPS. ATT'Y GEN., 605, 607 (1929) (authorizing the formation of the Detroit Bankers Company). Arizona, Iowa, Nebraska, and South Dakota have no statutory provisions, but the courts have occasionally permitted stock ownership between corporations without the benefit of statutes. *White v. G. W. Marquardt & Son*, 105 Iowa 145, 74 N. W. 930 (1898); 6 FLETCHER, *CYCLOPEDIA CORPORATIONS*, (Perm. ed. 1931) § 2825.

4. See *e.g.* KAN. REV. STAT. ANN. (1923) § 17-603; KY. STAT. (Carroll, 1936) § 883b-2; VT. PUB. LAWS (1933) § 5818.

5. See MICH. OPS. ATT'Y GEN. 605, 607 (1929). Nor is it generally possible for a banking corporation to assume the functions of a holding company. CARTINHOOR, *op. cit. supra* note 1, at 196. Bank holding companies may, however, be formed in foreign states where the corporation laws are more liberal. [POOR, *BANK, GOVERNMENT AND MUN. VOLUME* (1934) 1311]. But states may impose restrictions on such foreign corporations [see note 7, *infra*], or may require them to license as doing business within the state. *Bankers Holding Co. v. Maybury*, 161 Wash. 681, 297 Pac. 740 (1931); see 17 FLETCHER, *op. cit. supra* note 3, § 8490.

6. See *e.g.* MICH. COMP. LAWS (Mason, Supp. 1933) § 10135-10, as amended Mich. Pub. Acts 1935, § 194; MISS. LAWS (1934) c. 146, § 72; WASH. REV. STAT. (Remington, Supp. 1936) § 3243-1; W. VA. (Official Code, 1931) c. 31 § 8-38; *cf.* KY. STAT. (Carroll, 1936) § 581 (forbidding any "person" to own more than one half the stock of any bank); VT. PUB. LAWS (1933) § 5819 (forbidding the incorporation of holding companies).

7. See *e.g.* N. Y. BANKING LAW § 39; ORE. CODE ANN. (1930) § 25-502. Several states have set up certain requirements such as adequate capitalization of the holding company, as a condition precedent to the right to vote or receive dividends from the stock. KAN. REV. STAT. ANN. (Supp. 1933) § 9-125b; N. J. COMP. STAT. (Supp. 1930) tit. 47, § 3a(3), (4), (14); WIS. STAT. (1931) § 221.56, as amended Wis. Laws 1935, c. 393 (also imposing a secondary liability on holding company stock holders). See also 49 STAT. 710 (1935), 12 U. S. C. § 61 (Supp. 1936).

centralized private control over banking,⁸ it is not unlikely that the desire to forestall evasion of the statutory double liability assessments upon bank stockholders⁹ was of some persuasive force, since the prospect of holding companies being without assets ample enough to meet the assessments was not unreal, and, at that time, there was no certainty that the statutes imposing liability would be declared applicable judicially to stockholders of large holding companies.¹⁰ Such a declaration was forthcoming for the first time in a recent case. There the stockholders of several Detroit banks exchanged their stock for that of the Detroit Bankers Company, a Michigan holding corporation. To protect the creditors of the various banks, a provision was inserted in the charter of the holding company and in each share of its stock,¹¹ whereby the stockholders agreed to assume whatever statutory liability should attach to that company as a result of the insolvency of any of the unit banks. After the bank holidays of 1933, the subsidiary banks failed to re-open, and since the holding company was without assets, the receiver of the national bank involved sought to recover the double assessment directly from the holding company's shareholders. These shareholders in turn sued to enjoin the assessment, disclaiming any title to the stock, and contending that the contractual provisions assuming liability were unenforceable on several grounds.¹² The receiver denied the allegations of the complaint and filed a cross bill seeking a judgment against the plaintiffs for the amount of the assessments. The Federal District Court denied the injunction and awarded judgment to the receiver on his counterclaim apparently both because the plaintiffs, as the beneficial owners of the stock, were within the scope of the federal statute imposing double liability on shareholders of insolvent national banks,¹³ and because the contracts were enforceable by the receiver as a third party beneficiary. This decision was affirmed by the Circuit Court of Appeals for the

8. See *Hearings before Committee on Banking & Currency on H. R. 191*, 71st Cong., 2d Sess. (1930) 1069; 75 CONG. REC. 9899 (1932).

9. Statutes imposing double liability on bank stockholders have been passed in almost all of the states. See 2 MICHIE, BANKS AND BANKING (Perm. ed. 1931) §22; 3 ZOLLMAN, BANKS AND BANKING (Perm. ed. 1936) §1611. Possibly because of the administrative difficulties inherent in enforcing statutory assessments, there is a present tendency to substitute deposit insurance for the older form of super-added liability. 49 STAT. 684, 12 U. S. C. 264 (Supp. 1935) (permanently establishing the Federal Deposit Insurance Corporation); Legis (1936) 36 COL. L. REV. 808; 48 STAT. 189 (1933), 12 U. S. C. 64 a (1934) (repealing REV. STAT. §5151 (1875), 12 U. S. C. §63 (1934) which imposed double liability on stockholders of insolvent national banks).

10. See *Hearings before Committee on Banking & Currency on H. R. 141*, 71st Cong., 2d Sess. (1930) 34, 888, 1139; CARTINEOUR, *op. cit. supra* note 1, at 245; 3 ZOLLMAN, *op. cit. supra* note 9, at §1770.

11. The stockholders of the banks also signed an agreement and power of attorney authorizing a committee to form a holding company, the shareholders of which should be subject to super-added liability.

12. The plaintiffs relied on the Statute of Frauds, a vague theory of *res judicata*, and the peculiar causation of the insolvency, which it was contended was not within the contemplation of the parties.

13. REV. STAT. §5151 (1875), 12 U. S. C. §63 (1934).

Sixth Circuit solely on the ground that double liability attached to beneficial ownership of the stock.¹⁴

Although bank stockholders have used several devices to avoid statutory assessments; they have thus far met with small success. The courts have held that double liability statutes may either be enforced against the record holder of bank stock who is estopped from denying a liability upon which creditors of the bank are presumed to have relied,¹⁵ or enforced against the "beneficial owner," a term which has been given a broad application. Thus, if a stockholder attempts to evade his statutory obligations by recording the stock in the name of an agent,¹⁶ or a corporation,¹⁷ or a trust,¹⁸ and yet retains all the advantages of ownership, the courts have invariably fastened liability on him. The principal case is consistent with that sequence of decisions. The instant court, while sustaining the direct assessment upon the holding company stockholders, refrained from recourse to the overworked

14. *Barbour v. Thomas* (C. C. A. 6th, Nov. 11, 1936) *aff'g*, 7 F. Supp. 271 (E. D. Mich. 1933), Comment (1935) 33 MICH. L. REV. 273; (1935) 2 U. OF CHI. L. REV. 484. Moreover, it was contended that the assessment itself was invalid because the insolvency of the bank allegedly resulted after the bank holidays from unwarranted governmental interference and from the mismanagement of the Comptroller after the bank had closed. These contentions were properly dismissed by both the lower court and the Circuit Court of Appeals, since the legality of the bank holidays has frequently been upheld [*Schnader v. U. S. Fidelity & Guaranty Co.*, 314 Pa. 140, 170 Atl. 686 (1934)], and the validity of an assessment is not conditioned upon the causation of the insolvency. *Chase v. Hall*, 30 F. (2d) 195 (C. C. A. 9th, 1929); *Crawford v. Gamble*, 57 F. (2d) 15 (C. C. A. 6th, 1932).

15. *Lantry v. Wallace*, 182 U. S. 536 (1901); *Rawlings v. Meredith*, 80 F. (2d) 254 (C. C. A. 5th, 1935). But the record holder will not be held liable if the stock was acquired without his knowledge or consent unless he has accepted benefits conferred by the stock. *Keyser v. Hitz*, 133 U. S. 138 (1890); *Goess v. Brown*, 12 F. Supp. 517 (E. D. N. Y. 1935); 2 MICHIE, *op. cit. supra* note 9, at 121.

16. *National Bank v. Case*, 99 U. S. 628 (1878); *Pauly v. State Loan & Trust Co.*, 165 U. S. 606 (1897); *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162 (1906); see *Houghton v. Hubbell*, 91 Fed. 453, 455 (C. C. A. 1st, 1899) (both agent and principal liable).

17. *Corker v. Soper*, 53 F. (2d) 190 (C. C. A. 5th, 1931) *cert. denied*, *Corker v. Howard*, 285 U. S. 540 (1932), (1931) 45 HARV. L. REV. 580; *Durrance v. Collier*, 81 F. (2d) 4 (C. C. A. 5th, 1936); *Metropolitan Holding Company v. Snyder*, 79 F. (2d) 263 (C. C. A. 8th, 1935), (1935) 20 MINN. L. REV. 312; *Harris Inv. Co. v. Hood*, 123 Fla. 598, 167 So. 25 (1936); see 3 ZOLLMAN, *op. cit. supra* note 9, at § 1770.

18. *English v. Gamble*, 26 F. (2d) 28 (C. C. A. 8th, 1928); *Fors v. Farrell*, 271 Mich. 358, 260 N. W. 886 (1935); (1935) 20 MINN. L. REV. 217; *Maddison v. Bryon*, 31 N. M. 404, 247 Pac. 275 (1926). The creation of a trust for the single purpose of evading the statute is not, however, a prerequisite to the validity of an assessment against the beneficiaries. *Laurent v. Anderson*, 70 F. (2d) 819 (C. C. A. 6th, 1934) *aff'g*, *Keyes v. Am. Life & Accid. Ins. Co.*, 1 F. Supp. 512 (E. D. Ky. 1932); *O'Keefe v. Pearson*, 73 F. (2d) 673 (C. C. A. 1st, 1933). The determining factors seem to be whether the trust contains assets other than bank stock and whether these assets are sufficient to meet the assessment. *Cf. Taylor v. Davis*, 110 U. S. 330 (1883); *Heidin v. Cremin*, 66 F. (2d) 943 (C. C. A. 8th, 1933).

and misleading terminology associated with "piercing the corporate veil."¹⁹ Although the court might have reasoned in terms of the existence or non-existence of the corporate entity of the holding company as has been done in analogous cases involving small corporations,²⁰ in actions involving evasion of statutory duty by the use of the corporate form, inquiry is not to be directed into such channels, but rather is to be confined to an examination of whether there has been any infringement of the terms of the statute.²¹ This was apparently the policy of the principal court, and the conclusion that the holding company stockholders were beneficial owners of the bank stock and for that reason within the ambit of the Act seems unassailable.²² Yet a similar holding in every action involving a direct assessment against holding company stockholders is not a necessary consequence of the decision, which may be limited to its controlling facts. It is difficult, however, to isolate the factual elements which compelled the conclusion of the principal court. Probably of decisive importance was the fact that the holding company was without assets sufficient to satisfy the assessment.²³ Furthermore, the stock of the holding

19. For observations on the clouded conceptualism involved, see *Berkey v. Third Ave. Ry.* 244 N. Y. 84, 94, 155 N. E. 58, 61 (1926); *Farmers Loan & Trust Co. v. Pierson*, 130 Misc. 110, 119, 222 N. Y. Supp. 532, 543 (Sup. Ct. 1927); LATTY, *SUBSIDIARIES AND AFFILIATED CORPORATIONS* (1936) §3. Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations* (1929) 39 YALE L. J. 193, 195.

20. See *Metropolitan Holding Company v. Snyder*, 79 F. (2d) 263, 266 (C. C. A. 8th, 1935); *Harris Inv. Co. v. Hood*, 123 Fla. 598, 613, 167 So. 25, 31 (1936). *Contra*: *Durrance v. Collier*, 81 F. (2d) 4 (C. C. A. 5th, 1936). In the leading case of *Corker v. Soper*, 53 F. (2d) 190 (C. C. A. 5th, 1931) the court expressly refused to disregard the corporate entity of the corporation holding the bank stock but allowed recovery against its controlling stockholder on the theory that the corporation was merely the agent of the defendant who was thus a beneficial owner within the statutory provisions. Compare (1932) 10 N. C. L. REV. 288, with (1935) 2 U. OF CHI. L. REV. 484.

21. *United States v. Elgin, Joliet & Eastern Ry.* 56 Sup. Ct. 841 (1936); Comment (1936) 46 YALE L. J. 299; LATTY, *op. cit. supra* note 19, at 54. In these cases questions of control, assets, and corporate ritual are of importance only as they reveal a violation of the statute. Thus the "control" of a subsidiary coal company by its parent becomes important when the issue is whether the parent is "operating" a coal mine. *United States v. Lehigh Valley R. R. Co.*, 220 U. S. 257 (1911). Yet courts in these cases customarily talk about the disregard of the corporate-fiction. *United States v. Del. L. & W. R. R.* 238 U. S. 516 (1915); *United States v. Reading Co.*, 253 U. S. 26 (1920).

Likewise in tort or contract cases emphasis should be placed not on the metaphysics of the corporate entity but rather on provable factors such as the observance of corporate ritual, the actual control reserved or exercised by the "parent," the adequacy of the subsidiary's capitalization, and the question of who was the actual promisor on the contract or the real actor in the tort. See Douglas, *supra* note 19.

22. See notes 16, 17, 18, *supra*.

23. Insolvency of the transferee corporation or trust has been emphasized in every case involving evasion of double liability statutes. See cases cited *supra* notes 16, 17 and 18. Statutes recently enacted in several states likewise reveal the necessity of assets sufficient to meet statutory assessments. See note 7, *supra*. Under these statutes liability would probably be enforced against the holding company rather than its stockholders. See 3 ZOLLMAN, *loc. cit. supra* note 10.

company represented only bank stock, the dividends of which were paid over to the holding company stockholders intact, the court regarding the holding company merely as a medium for the protection of its stockholders' interests as beneficial owners of the bank stock.²⁴ It is also significant that the holding company stockholders had represented themselves as assuming the double liability peculiar to bank stock,²⁵ and the reliance of the depositors and banking authorities upon this "holding out" is almost sufficient of itself to estop the plaintiffs from denying direct responsibility.²⁶ It is impossible to ascertain the precise effect accorded any one of these factors, but owing to the persistence with which the courts have enforced double liability statutes, it is reasonable to suppose that the same result will be reached in all cases in which the holding company itself is unable to satisfy the double assessment.²⁷

Resort to this more general analysis was not necessary in the instant case, however, for an independent basis of decision was afforded by the contractual provisions under which the holding company stockholders assumed liability for the double assessment.²⁸ The contracts, incorporated in the articles of association and printed on each share of the holding company stock, were sufficiently ambiguous, however, to make the selection of a proper theory of recovery embarrassing. Yet it is a plausible interpretation that, although the promise to pay assessments was addressed to the holding company, the performance was to run to the bank, and therefore that the bank's receiver might sue directly as a third party beneficiary.²⁹ It is equally plausible, however, that both the promise and the performance were to be directed at the holding

24. The fact that one receives all the benefits conferred by the stock has been of controlling importance. See *Fors v. Farrell*, 271 Mich. 358, 369, 260 N. W. 886, 891 (1935); *Broderick v. Alexander*, 268 N. Y. 306, 309, 197 N. E. 291, 292 (1935).

25. Permission for the formation of the Detroit Bankers Company was expressly conditioned on the acceptance by the stockholders of the contractual provisions inserted in the shares. Cf. MICH. OPS. ATT'Y GEN. 605, 608 (1929). Furthermore, the names of the holding company stockholders were listed with the banking authorities.

26. *Ross v. Penn. R. R.*, 106 N. J. L. 536, 148 Atl. 741 (1930). *Quaid v. Rathowsky*, 183 App. Div. 428, 170 N. Y. Supp. 812 (1st Dep't 1918), *aff'd*, 224 N. Y. 624, 121 N. E. 887 (1918). Cf. cases cited *supra* note 15; *Lyons v. Westwater*, 181 Fed. 681 (C. C. A. 3d, 1910); *Fed. Res. Bank v. Crothers*, 289 Fed. 777 (C. C. A. 4th, 1923).

27. See *Laurent v. Anderson*, 70 F. (2d) 819, 823 (C. C. A. 6th, 1934).

28. The agreements provided that: "The holder of each share of common stock of this corporation shall be individually and severally liable . . . , for any statutory liability imposed upon this corporation by reason of its ownership of shares of capital stock of any bank or trust company," and further that "the stockholders . . . severally agree that such liability may be enforced in the same manner and to the same extent as statutory liability may now or hereafter be enforceable against stockholders of banks or trust companies . . ."

29. *Smith v. Thompson*, 250 Mich. 302, 230 N. W. 156 (1930); RESTATEMENT, CONTRACTS (1932) §§ 133, 136; see *Pa. Cement Co. v. Bradley Contracting Co.*, 7 F. (2d) 822, 825 (C. C. A. 2nd, 1935). Color is given this view by the provision in the contracts that the liability was to be enforced "in the same manner and to the same extent as statutory liability."

company.³⁰ In that event the bank's receiver would be unable to recover in accordance with orthodox third party beneficiary doctrine.³¹ Yet a relaxation of the technicalities of that doctrine seems perfectly proper in cases similar to the principal one in which the conceded intent of the undertaking was to insure the protection of the unit banks and their depositors.³² Indeed so obviously was the function of the promise one of secondary liability, extending credit to the limited class of persons within the contemplated protection of double liability statutes, it would be more realistic to read the contract as a surety contract and predicate recovery on that theory.³³ Since the promise under any construction was nominally addressed to the holding company, the Statute of Frauds is no obstacle.³⁴ But even if these theories of recovery had failed, the bank receiver might still have prosecuted suit directly against the stockholders, but in the name of the holding company's receiver who had shown no inclination to collect the assets.³⁵

30. The phrase, "in the same manner" may mean "in a comparable" rather than "in an identical" manner.

31. *Utah-Idaho Live Stock Loan Co. v. Blackfoot City Bank*, 290 Fed. 553 (E. D. Idaho, 1921) *Grand Prairie Gravel Co. v. Trinity Portland Cement Co.*, 295 Fed. 140 (C. C. A. 5th, 1923); *Morris v. Hummel*, 75 F. (2d) 681 (C. C. A. 7th, 1935).

32. An intent to benefit is a well recognized justification for the application of the third party beneficiary doctrine. *Cf. In re Wolf Mfg. Industries*, 56 F. (2d) 64 (C. C. A. 7th, 1933); *Tweeddale v. Tweeddale*, 116 Wis. 517, 93 N. W. 440 (1903): Such an intent may be evidenced by a promise to pay directly to the third party but the intent itself would seem to be the operative fact. See *Ulman v. Nat. Surety Co.*, 3 F. Supp. 348, 349 (E. D. Mont. 1933); *Concrete Steel Co. v. Ill. Surety Co.*, 163 Wis. 41, 46, 157 N. W. 543, 544 (1916).

33. See *North v. Joseph W. North & Son*, 93 N. J. L. 438, 442, 103 Atl. 244, 246 (1919); Comment (1935) 24 CALIF. L. REV. 193, 195; *cf. Union Oil Co. of Calif. v. Pac. Surety Co.*, 182 Cal. 69, 187 Pac. 14 (1920). The situation can be distinguished from that involving an indemnity against loss in which direct recovery by creditors has been denied. *Cushman v. Carbondale Fuel Co.*, 122 Iowa 656, 98 N. W. 508 (1904).

34. *Clay Lumber Co. v. Hurts Branch Coal Co.*, 174 Mich. 613, 140 N. W. 912 (1913); see Corbin, *Contracts of Indemnity and Statute of Frauds* (1928) 41 HARV. L. REV. 689, 693.

35. The permission of the state court would first have to be secured by a petition. *Cf. Ohio Valley v. Mack*, 163 Fed. 155 (C. C. A. 6th, 1906); *In re Bailey*, 151 Fed. 953 (E. D. Pa. 1907); *Googins v. Skillings*, 118 Me. 299, 108 Atl. 50 (1919); 5 REMINGTON, BANKRUPTCY (3d ed. 1923) §2223.