

NOTES

FULL FAITH AND CREDIT—WORKMEN'S COMPENSATION AWARD*

IN determining the credit which one state must extend to a workmen's compensation award of another state, a conflict of conceptual principles must be resolved by deciding which shall have the greater weight: the doctrine of *res judicata* under the full faith and credit clause, or the privilege of each state to determine, according to its own standards, the compensation which will be given its injured workers. In *Magnolia Petroleum Co. v. Hunt*,¹ the Supreme Court considered more important the principle that an award, as a judgment, shall be entitled to the same credit in all states as in the state where rendered. The Court reasoned that since one actionable injury can give rise to only one "cause of action," the singleness of which is unaffected by a change in legal theory, a second proceeding under the Louisiana Compensation Act was barred where compensation for the same injury had been received under the Texas statute.

In the recent case of *Loudenslager v. Gorum*,² however, the Supreme Court of Missouri held that the *Magnolia* ruling did not preclude a recovery under the Missouri Compensation Act where compensation for the same injury had been denied under the Arkansas statute. The apparent contradiction between the two decisions calls for an examination of the issues involved.³

The most important reason for this conflict in conceptual analysis is the failure of the courts to recognize the difficulties involved in defining a "cause of action" independent of the purpose for which it is used and the context to which it is applied.⁴ This failure has been evident in cases involving the

* *Loudenslager v. Gorum*, 195 S. W. (2d) 498 (Mo. 1946).

1. 320 U. S. 430 (1943) (*Hunt*, a resident of Louisiana, employed in that state by the *Magnolia Petroleum Company*, was injured in Texas while in course of employment). See generally *Cheatham, Res Judicata and the Full Faith and Credit Clause: Magnolia Petroleum Co. v. Hunt* (1944) 44 COL. L. REV. 330; *Wolkin, Workmen's Compensation Award—Commonplace or Anomaly in Full Faith and Credit Pattern?* (1944) 92 U. OF PA. L. REV. 401.

2. 195 S. W. (2d) 498 (Mo. 1946).

3. Where compensation has been previously granted, the *Magnolia* ruling has been uniformly followed. *Butler v. Lee Bros. Trucking Contractors*, 206 Ark. 884, 178 S. W. (2d) 58 (1944); *Overcash v. Yellow Transit Co.*, 352 Mo. 993, 180 S. W. (2d) 678 (1944). Literal adherence to this rule is evident in a recent decision denying the greater compensation available under the Wisconsin act because of a previous recovery under the Illinois statute, although the settlement order before the Illinois commission specifically stated that claimant's rights under the Wisconsin act were not forfeited by the settlement. *McCartin v. Industrial Commission*, 248 Wis. 570, 22 N. W. (2d) 522 (1946), *cert. granted*, 15 U. S. L. WEEK 3135 (U. S. 1946).

4. The Supreme Court has stated that the phrase, "cause of action," is not "susceptible of any single definition that will be independent of the context or of the relation to be governed." *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, 68 (1933). For con-

Federal Employers' Liability⁵ and state workmen's compensation acts, which are mutually exclusive in their application.⁶ Reasoning that a single injury gives rise to one "cause of action," the Supreme Court has barred a recovery under the Federal Act where the plaintiff, for the same injury, previously had a favorable award under the state act.⁷ But where the plaintiff proceeds under the mistaken supposition that his employment is intrastate⁸ and is denied compensation under the state act, the Court has not held this judgment a bar to his recovery under the Federal Act.⁹ If claimant, having suffered one actionable injury, has only one "cause of action," the denial of compensation, viewed as an adjudication of this "cause of action," would operate as an effective bar to recovery in a subsequent suit for the same injury, though under a different statute. To avoid this result and yet maintain the singleness of the "cause of action," the courts refer to the fact that since there was no possible choice of two inconsistent remedies, plaintiff is not barred because of the "unsuccessful pursuit of an inapplicable remedy."¹⁰

flirting interpretations of the effect of this decision see Arnold, *The Code "Cause of Action" Clarified by United States Supreme Court* (1933) 19 A. B. A. J. 215 and Gavitt, *A "Pragmatic Definition" of The "Cause of Action"?* (1933) 82 U. OF PA. L. REV. 129.

5. 35 STAT. 65 (1908), 53 STAT. 1404 (1939), 45 U. S. C. §§ 51-60 (1940).

6. In the Second Employers' Liability Cases, 223 U. S. 1, 53-5 (1912), the Court held that the Federal Act, which regulates the liability of interstate carriers by railroad for injuries to their employees engaged in such commerce, supersedes the laws of the states, in so far as it covers the same field. Thus where the injury occurred in interstate commerce the Federal Act is exclusive in its operation. On the other hand, if the injury occurred outside of interstate commerce, the Federal Act is without application, and the state law is controlling. *Wabash R. R. v. Hayes*, 234 U. S. 86, 89-90 (1914). And in *N. Y. Central R. R. v. Winfield*, 244 U. S. 147 (1917), the Court held that the Federal Act prevented the application of any state act to a railroad employee injured while engaging in interstate commerce, though the Federal Act offered no remedy because of the absence of negligence.

7. *Chicago, R. I. & P. Ry. v. Schendel*, 270 U. S. 611 (1926).

8. For a discussion of the Supreme Court's role in deciding the nature of the commerce involved, see FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928) 206-8.

9. *Troxell v. Delaware, L. & W. R. R.*, 227 U. S. 434 (1913). See *Hogan v. New York Cent. & H. R. R.*, 223 F. 890 (C. C. A. 2nd, 1915) (bringing and subsequent discontinuance of a suit under state act is not a bar to a later suit under Federal Act); *Waters v. Guile*, 234 F. 532 (C. C. A. 6th, 1916) (filing of a claim under the state act, not prosecuted to recovery, is not an effective election as against a remedy under the Federal Act). In permitting a recovery under the state act after a federal court had rejected the claim because the employee was not engaged in interstate commerce, the Michigan court said: "There is a difference between an election of remedy and a mistake of remedy, and the law has not gone so far as to deprive parties of meritorious claims merely because of attempts to collect them by inappropriate actions upon which recovery could not be had." *Hansen v. Pere Marquette Ry.*, 267 Mich. 224, 227, 255 N. W. 192, 193-4 (1934).

10. *Waters v. Guile*, 234 F. 532, 536 (C. C. A. 6th, 1916). The Court in this case assumes that had the plaintiff the option of proceeding under either act, his action would have amounted to an election which would bar his suit under the Federal Act. "But election presupposes a choice of remedies, and where there is but one remedy available there can be no choice of remedies. . . ." *ibid.* See RESTATEMENT, JUDGMENTS (1942) § 65(b).

In the somewhat analogous situation, involving the applicability of two state compensation acts to the same injury, the Supreme Court established the doctrine that recovery may be had under the laws of the state of injury¹¹ or the state of the employment relationship,¹² the field of workmen's compensation being one to which the usual conflict of laws rule does not apply.¹³ Since questions of policy vital to the interests of each state are materially involved, the Court found that each state was constitutionally empowered to apply its internal law and need not subordinate its domestic policy to the laws of another.¹⁴ The same reasoning which urged the establishment of this doctrine, affording a choice of remedies to the injured employee, would seem to apply with equal validity to the practice of a majority of the states which allowed a second recovery, but limited the total recovery to the highest compensation available under the act most favorable to the claimant.¹⁵

11. Any implication in *Bradford Electric Light Co. v. Clapper*, 286 U. S. 145 (1932) that the state of injury could not apply its own act, even where its public policy so dictated, was rejected by *Pacific Employers Ins. Co. v. Industrial Accident Comm.*, 306 U. S. 493 (1939).

12. *Alaska Packers Association v. Industrial Accident Comm. of California*, 294 U. S. 532 (1935). For a discussion of the factors required before the local act may be applied to extraterritorial accidents see (1943) 57 HARV. L. REV. 242.

13. The earlier cases involving workmen's compensation acts treated them as a statutory substitution for the common law of torts. Under this theory recovery could be had only under the laws of the state in which the wrong occurred, the state of injury. A second approach treated the obligation to pay compensation as the outgrowth of a contract, and under this theory recovery could be had in the state where the contract of employment was made. A third view, and the one adopted by the Supreme Court, regarded the compensation acts as a statutory regulation of the employer-employee relationship, the purpose of which was to shift the burden of industrial accidents from the individual to the industry. See GOODRICH, *CONFLICT OF LAWS* (2d ed. 1938) § 97; 2 BEALE, *THE CONFLICT OF LAWS* (1935) §§ 398.1-401.3.

14. In denying that the full faith and credit clause required the state of California to invoke the statute of Alaska rather than its own, the Court stated: "It has often been recognized by this Court that there are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce even the judgment of another state, in contravention of its own statutes or policy." *Alaska Packers Association v. Industrial Accident Comm. of California*, 294 U. S. 532, 546 (1935). And in the *Pacific Employers* case the Court held that the full faith and credit clause did not "override the constitutional authority of another state to legislate for the bodily safety and economic protection of employees injured within it." *Pacific Employers Insur. Co. v. Industrial Accident Comm.*, 306 U. S. 493, 503 (1939).

15. *Migues' Case*, 281 Mass. 373, 183 N. E. 847 (1933); *Miller v. National Chair Co.*, 127 N. J. L. 414, 22 A. (2d) 804 (1941), *aff'd*, 129 N. J. L. 98, 28 A. (2d) 125 (1942); *Gilbert v. Des Lauriers Column Mould Co.*, 180 App. Div. 59, 167 N. Y. Supp. 274 (3d Dep't 1917); *Price v. Horton Motor Lines*, 201 S. C. 484, 23 S. E. (2d) 744 (1942); *Salvation Army v. Industrial Comm.*, 219 Wis. 343, 263 N. W. 349 (1935). The Ohio statute clearly provides for such recovery. OHIO GEN. CODE ANN. (Page, 1938) § 1465-8. Others indicate that this result should be reached. See FLA. STAT. ANN. (1943) § 440.09(1); GA. CODE ANN. (1938) TIT. 114, § 411; MD. ANN. CODE (Flack, 1939) Art. 101, § 80(3); N. C. CODE ANN. (Michie & Sublett, 1939) § 8081(rr); S. C. CODE (1942) § 7035-39; VA. CODE ANN. (1942) § 1887 (37)(b). See also GOODRICH, *op. cit. supra* note 13, at 243; 2 BEALE, *op. cit. supra* note 13,

This was in no sense a double recovery, but was merely an attempt to insure that the injured employee would receive the maximum compensation possible.

In the *Magnolia* case, the first instance in which the constitutionality of this practice was presented to the Supreme Court, it was held that since there was only one "cause of action," and that cause having become res judicata in one state,¹⁶ the full faith and credit clause requires that it be recognized as such in every other state.¹⁷ Though the injured employee was free to pursue a remedy under either of the applicable acts, the Court declared that his choice of one precluded his seeking the other. A change in legal theory does not constitute a change in the "cause of action" to avoid a plea of res judicata in a claim based on the same injury, under a different statute. A consistent application of this reasoning to cases involving mutually exclusive statutes would necessitate a denial of compensation to a claimant who, having pursued his one possible remedy under a mistaken legal theory, seeks recovery under the correct statute. In just this situation, the Supreme Court in *Troxell v. Delaware, L. & W. R. R.*¹⁸ had previously allowed recovery on the ground that the "cause of action" under the state law was based on a different theory than that under the Federal law.¹⁹ The Court in the *Magnolia* case finally rejected this notion, but attempted to sustain the results of the *Troxell* decision by allowing a recovery for the claimant who "has been denied a remedy by one state because it does not afford a remedy for the particular wrong alleged. . . ." ²⁰

This ambiguous exception in the reasoning of the Court has been interpreted to mean that a denial of compensation in one state is not a bar to

§ 403.1; 1 SCHNEIDER, WORKMEN'S COMPENSATION TEXT (3d ed. 1941) § 160; DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION (1936) 819; RESTATEMENT, CONFLICT OF LAWS (1934) § 403. For a discussion of this point see AMERICAN LAW INSTITUTE PROCEEDINGS (1932) Vol. 10, pp. 76-8. *Contra*: Hughey v. Ware, 34 N. M. 29, 276 P. 27 (1929); Tidwell v. Chattanooga Boiler & Tank Co., 163 Tenn. 420, 43 S. W. (2d) 221 (1931); De Gray v. Miller Bros. Const. Co., 106 Vt. 259, 173 Atl. 556 (1934).

16. For the purpose of internal state administration, a final compensation award is res judicata in a subsequent proceeding in the forum of the award with respect to the same injury. See Note (1939) 122 A. L. R. 550; 1 SCHNEIDER, *op. cit. supra* note 15, § 100.

17. For a general discussion of the applicability of the full faith and credit clause to administrative determinations see Abel, *Administrative Determinations and Full Faith and Credit* (1937) 22 IOWA L. REV. 461.

18. 227 U. S. 434 (1913). Claimant, as widow of the deceased, brought suit under the Pennsylvania statute, and was denied recovery in this action because of the fellow-servant rule. In a second action, as administratrix of the estate of the deceased, claimant sued for recovery under the Federal Employers' Liability Act, which allows recovery for the negligence of fellow-servants.

19. A second basis for the Court's decision was the lack of identity of parties, one of the requisites to the operation of a judgment as res judicata. This theory has apparently been overruled by a later decision which held that when the parties and interests involved are the same, though differently named, res judicata applies. *Chicago, R. I. & P. Ry. v. Schendel*, 270 U. S. 611, 618 (1926). See Moschzisker, *Res Judicata* (1929) 38 YALE L. J. 299, 310.

20. 320 U. S. 430, 444 (1943).

recovery in a second state.²¹ In the *Loudenslager* case, where the claimant, widow of the deceased, was denied compensation in Arkansas on the ground that the deceased was an independent contractor and not an employee, the Missouri Court claimed that this situation was analogous to that in the *Troxell* case. It was argued that since the terms "employer" and "employee" depend for their definitions on the different statutes concerned, a determination of the status of the deceased under the Arkansas Act²² could not prevent Missouri from reaching a different conclusion under its own act.²³

Though the Supreme Court in the *Magnolia* case deviated from its one "cause of action" premise to cover a particular group of cases, the Missouri court's interpretation, which would completely contradict this premise, would seem invalid. According to the rule set down by the Supreme Court, an award granting compensation is as conclusive of the rights of the parties in all other states as in the state in which it was rendered. Within the forum of the award, a denial of compensation is no less conclusive as a determination of the rights involved than an award granting compensation.²⁴ Most states provide that where compensation has been granted, modifications may be made by the commission in the event of changed conditions.²⁵ But

21. "If the claim under the Texas Act had been denied because of statutory defenses accorded the employer, I do not suppose that the requirements of full faith and credit would bar the subsequent claim under a Louisiana statute which did not recognize such defenses." Mr. Justice Douglas, dissenting in *Magnolia v. Hunt*, 320 U. S. 430, 447-8 (1943). For an interpretation that the *Magnolia* decision bars recovery in a second suit only where there has been a previous judgment favorable to the plaintiff, see *Travelers Ins. Co. v. Cardillo*, 141 F. (2d) 362, 363 (App. D. C. 1944).

22. ARK. STAT. ANN. (Pope, Supp. 1944) 1360 *et seq.*

23. The Missouri statute includes as a statutory employee, an independent contractor who is "injured or killed on or about the premises of the employer while doing work which is in the usual course of his business." MO. REV. STAT. ANN. (1939) § 3698(a). The Missouri court has denied compensation to independent contractors injured on public highways. *Doyle v. Erard*, 227 Mo. App. 384, 54 S. W. (2d) 1006 (1932); *Rutherford v. Tobin Quarriers*, 336 Mo. 1171, 82 S. W. (2d) 918 (1935). In the *Loudenslager* case, the decision of the Missouri court is that the deceased, killed on a highway, was an employee within the act, but not an independent contractor employed on or about the premises. *Loudenslager v. Gorum*, 195 S. W. (2d) 498, 501 (Mo. 1946). For the definitions of "employer" and "employee" in the statutes concerned see ARK. STAT. ANN. (Pope, Supp. 1944) 1360-1 and MO. REV. STAT. ANN. (1939) §§ 3692, 3695(a).

24. *Concho Washed Sand Co. v. Worthing*, 166 Okla. 105, 26 P. (2d) 415 (1933) (unappealed order of Industrial Comm. denying compensation, is final and conclusive); *State v. Industrial Accident Board*, 94 Mont. 386, 23 P. (2d) 253 (1933); *Boyich v. J. A. Utley Co.*, 306 Mich. 625, 11 N. W. (2d) 267 (1943); *Ocean Accident and Guarantee Corp. v. Pruitt*, 58 S. W. (2d) 41 (Tex. Comm. App. 1933). The doctrine of *res judicata* is equally applicable to judgments for the plaintiff and for the defendant. See *RESTATEMENT, JUDGMENTS* (1942) §§ 61-3.

25. It has long been recognized that the successful administration of workmen's compensation is incompatible with a strict adherence to the doctrine of *res judicata*. Since in most cases it is difficult to predict accurately the extent of claimant's injury at the time compensation is awarded, nearly all the states provide some modification provision in the event of changed conditions. Under these statutes, an award of compensation is only res

an award denying compensation, unappealed to the courts, is regarded as a final determination which cannot be altered.²³ If full faith and credit must be extended to one award, consistent reasoning would require that it be extended to the other.

The dominant theme of the Supreme Court's decisions in the *Alaska Packers*²⁷ and the *Pacific Employers* cases²⁸ is the right of each state, in matters of vital public interest, to enforce its own statute to the disregard of the laws of another state. Under the reasoning of those cases, Missouri's interest in preventing the pauperization of its citizens would seem sufficient to justify the enforcement of its own act. But under the ruling in the *Magnolia* case a state may be forbidden to extend its compensation act to cover its own citizens who, but for a previous denial under a different statute, would be entitled to compensation. An indiscriminate extension of the privilege of a state, on the basis of legitimate interest, to ignore the previous adjudications of other states would have a disruptive effect on our federal system.²⁹ But the nature of workmen's compensation, as protective legisla-

judicata as to the condition of the claimant at the time of the award, but is not a bar to subsequent modifications. See JONES, DIGEST OF WORKMEN'S COMPENSATION LAWS (12th ed. 1931) § 26; Note (1931) 41 YALE L. J. 148.

26. A condition precedent to the altering of an award is the existence of previous compensation. Where the award is one denying compensation, the commission or board has no jurisdiction to reopen the case, and if such award is unappealed to the courts, it is a conclusive and final adjudication of the rights of the parties involved. See *Rhindress v. Atlantic Steel Co.*, 71 Ga. App. 898, 32 S. E. (2d) 554 (1944); *Mishler v. Kelso Grain Co.*, 133 Kan. 38, 298 P. 655 (1931); *Olentine v. Calloway*, 147 Okla. 137, 295 P. 608 (1931). A similar ruling existed in Texas. *Cooper v. United States Fidelity and Guaranty Co.*, 33 S. W. (2d) 189 (Tex. Comm. App. 1930). But an amendment was added to the statute permitting review of orders denying compensation within 12 months after they are issued. TEX. CIV. STAT. ANN. (Vernon, 1925) Art. 8306, § 12(d).

27. *Alaska Packers Association v. Industrial Accident Comm. of California*, 294 U. S. 532 (1935).

28. *Pacific Employers Ins. Co. v. Industrial Accident Comm.*, 306 U. S. 493 (1939).

29. In the second *Williams* case, the Supreme Court was willing to countenance the probable disruptive effect of its decision in holding that a Nevada divorce decree was not a valid defense to a prosecution for bigamy in North Carolina, where a North Carolina jury found that no bona fide domicile had been acquired in Nevada. *Williams v. North Carolina*, 325 U. S. 226 (1945). A comparison of the situation in divorce proceedings with that in workmen's compensation reveals important differences in procedure and in the degree of reconcilability of conflicting policies. However, Mr. Justice Jackson found the two problems sufficiently analogous to compel his concurrence in the *Magnolia* case, decided by a Court split 5-4. Mr. Justice Jackson, who dissented in the first *Williams* case, regarded himself bound by the majority decision in that case, *Williams v. North Carolina*, 317 U. S. 287 (1942), the effect of which decision Mr. Justice Jackson apparently interpreted to be broader than was revealed in the second *Williams* case. In the *Magnolia* case, Mr. Justice Jackson was unable to see how Louisiana could "be constitutionally free to apply its own workmen's compensation law to its citizens despite a previous adjudication in another state if North Carolina was not free to apply its own matrimonial policy to its own citizens after judgment on the subject in Nevada." *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 446 (1943). Since under the second *Williams* case North Carolina may reexamine the question of domicile previously decided by a Nevada Court, a possibility which Mr. Justice Jackson appar-

tion for injured workers, enforced in most states by administrative commissions empowered to consider only their own statutes, would seem to call for special treatment.³⁰ The anomalous position of workmen's compensation in the conflict of laws is a result of these special considerations, which suggest that no differentiation should be made between the credit which is extended to a statute and to an award arising under it.³¹

The difficulties created by the *Magnolia* decision serve to emphasize the need to reconsider the doctrines adopted in that case. Since the amount recoverable under any workmen's compensation act is at best only a partial indemnification for the loss, both economic and physical, suffered by the injured employee,³² that policy which permits the employee to recover the maximum amount available³³ under the applicable acts would seem socially desirable. In refusing to allow a second suit, the Supreme Court has lessened the possibilities of maximum recovery, and in a sense punishes the injured employee for a mistake which he is often unable to avoid. At the time of his injury, the employee quite likely is unaware of the existence of two different remedies. Ignorant of the claims procedure, concerned primarily with the immediate care of his family, the claimant will sometimes rely on his employer's advice,³⁴ and may easily be induced to sign a claim under the less favorable act.³⁵ The employee may at times be maneuvered into an unfavorable position by a procedural device which enables the employer to initiate proceedings.³⁶ Even the knowledge that a greater recovery is possi-

ently thought was precluded by the first *Williams* case, it appears that the reasons which compelled his concurrence in the *Magnolia* decision are no longer valid.

30. For a discussion of the special factors in workmen's compensation see Cheatham, *supra* note 1, at 343.

31. "If a state statute, by providing that the bringing of a proceeding for an award shall bar any other claim, could not have precluded a claim in another state, it is difficult to appreciate why an award itself should have greater effect, where the tribunals of the state making it could not have considered the other claim." Freund, *Chief Justice Stone and the Conflict of Laws* (1946) 59 HARV. L. REV. 1210, 1229.

32. While it is true that the position of the injured worker under a compensation act is much better than under the common law, it is also a fact that "in many cases the benefits obtainable have been too low for subsistence, and the injured worker has at times become dependent upon private charity or public relief." UNITED STATES BUREAU OF LABOR STATISTICS, BULLETIN No. 672 (1940) 71.

33. The amounts available under the various statutes differ considerably. *Id.* at 202-12.

34. See *Overcash v. Yellow Transit Co.*, 352 Mo. 993, 180 S. W. (2d) 678 (1944). Claimant, widow of the deceased employee, asked the employer's lawyers to recommend counsel to represent her. Claim was filed in Kansas, but after learning from another lawyer the possibilities of a far greater recovery in Missouri, claimant attempted to withdraw suit in Kansas and to recover under the Missouri statute. The Kansas commission refused, and claimant was awarded compensation under that statute, which precluded recovery in Missouri.

35. See *Magnolia v. Hunt*, 320 U. S. 430 (1943). Claimant was told that he could not collect compensation unless he signed the forms presented to him, and in order to collect he signed the forms. See Mr. Justice Black dissenting, *id.* at 450.

36. See *Chicago, R. I. & P. Ry. v. Schendel*, 270 U. S. 611 (1926). The surviving widow

ble may prove of no avail once a claim has been filed, for some statutes will not allow a withdrawal.³⁷ Under the present doctrine these factors may preclude the injured employee from obtaining the greatest award, and in so doing they constitute a partial frustration of the purpose of workmen's compensation.

The effect of the *Magnolia* decision might be limited by legislation, both state³⁸ and federal,³⁹ but the more feasible suggestion is a reconsideration of the doctrines established in that case. If the desirable results of the *Loudenslager* case are to be sustained,⁴⁰ the Supreme Court must modify its "one cause of action" premise. In procedural questions of amendment it has been reasonably held that a change in legal theory does not constitute a change in the "cause of action."⁴¹ But an extension of this doctrine to the problem of the conflict of laws in workmen's compensation has created an undesirable situation. The more logical policy might here hold that for the purpose of res judicata a change in legal theory effects a change in the "cause of action."

instituted suit under the Federal Act, and soon after the employer railway company started proceedings before the Iowa Industrial Commission. Under the Iowa statute either employer or employee may file a petition for arbitration. IOWA CODE (1946) § 86.14. See also *Landreth v. Wabash R. R.*, 153 F. (2d) 98 (C. C. A. 7th, 1946) (defendant filed for adjustment of claim with the Illinois Industrial Commission).

37. See *Loudenslager v. Gorum*, 195 S. W. (2d) 498 (Mo. 1946) (After a claim had been filed with the Arkansas commission and hearings had begun, claimant filed a dismissal of the claim. Defendant filed objections to the dismissal, which the commission treated as a motion to dismiss and issued an order denying it); *Overcash v. Yellow Transit Co.*, 352 Mo. 993, 180 S. W. (2d) 678 (1944).

38. One possible solution is that the states specifically allow recovery under their laws even where there has been a previous recovery under another statute. This course was left open by the Court's decision which held that there was "no occasion to consider what effect would be required to be given to the Texas award if the Texas courts held that an award of compensation in another state would not bar an award in Texas. . . ." *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 443 (1943). A more feasible proposal is that legislation be enacted by the states, permitting a claimant to stay the proceedings before an award has been granted, and providing for the revocation of such award upon the application of claimant within a reasonable period after it is rendered. See *Wolkin*, *supra* note 1, at 411.

39. Congressional legislation could also solve the problem by excepting workmen's compensation awards from the application of the full faith and credit clause. "The mandatory force of the full faith and credit clause as defined by this Court may be, in some degree not yet fully defined, expanded or contracted by Congress." Mr. Justice Stone dissenting in *Yarborough v. Yarborough*, 290 U. S. 202, 215 n. 2. However, the constitutionality of such legislation may be questioned. See *Freund*, *supra* note 31, at 1230.

40. Petition for certiorari has been filed, 15 U. S. L. WEEK 3128 (U. S. 1946).

41. See *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, 68 (1933), in effect overruling *Union Pacific Ry. v. Wylter*, 158 U. S. 285 (1895).

TAXABILITY OF PROCEEDS ON SALE OF A RIGHT TO INCOME FOR LIFE*

IF the owner of a right to income for life—either as the owner of a legal life estate or as the beneficiary of a trust—surrenders or sells the interest in return for a lump sum payment by a purchaser, the transaction may be treated in either of two ways for federal income tax purposes. It may be regarded as the receipt in advance of the future income payments, in which case the consideration received would be taxable as ordinary income.¹ Or it may be treated as the sale of a capital asset so that the capital gain and loss provisions² of the Internal Revenue Code would apply. The latter alternative was recently adopted in a decision³ which subordinated the statutory concept of a capital asset by emphasizing the legal concept of the interest as “property.”

The taxpayer was the beneficiary of a testamentary trust and had surrendered her interest to the remainderman pursuant to a state probate court decree.⁴ She computed the present value of her right to future income payments based upon her life expectancy, subtracted the \$55,000 consideration paid by the remainderman, and reported the difference⁵ as a capital loss⁶ on her income tax return. The Tax Court upheld the Commissioner's contention that this was not a capital transaction and that the full \$55,000 was taxable as ordinary income,⁷ but the Circuit Court of Appeals for the Second Circuit, Judge Frank dissenting, reversed the determination.⁸

Faced with a choice between two lines of authority stemming from tax decisions of the Supreme Court, the majority of the court considered that *Blair v. Commissioner*,⁹ which involved the separate and distinct problem of allocating the tax on future payments of trust income after an assignment of the beneficiary's interest, controlled the result.¹⁰ The dissent would have

* *McAllister v. Commissioner*, 157 F. (2d) 235 (C. C. A. 2d, 1946).

1. INT. REV. CODE § 22a (1939).

2. INT. REV. CODE § 117 (1939).

3. *McAllister v. Commissioner*, 157 F. (2d) 235 (C. C. A. 2d, 1946).

4. Though the trust contained spendthrift provisions, its termination was successfully accomplished. *New Jersey Equity*, Docket No. 129/370 (Ch., July 19, 1940). *McAllister v. Commissioner*, 5 T. C. 714, 720-1 (1945). The state court's determination that the beneficiary may alienate his interest is binding on a federal court. *Blair v. Commissioner*, 300 U. S. 5, 9-10 (1937).

5. The basis for the comparison was derived by the use of the expectancy tables set forth in I. T. 2076, III-2 CUM. BULL. 18 (1924). The value of the life interest was computed on the age of the beneficiary as of the time of transfer. 5 T. C. 714, 721 (1945).

6. INT. REV. CODE § 117 (b) (1939).

7. 5 T. C. 714 (1945).

8. 157 F. (2d) 235 (C. C. A. 2d, 1946).

9. 300 U. S. 5 (1937).

10. This view of the *Blair* case has been adopted in situations similar to the instant case. *Allen v. First National Bank and Trust Co.*, 152 F. (2d) 592 (C. C. A. 5th, 1946); *Bell's*

followed *Hort v. Commissioner*,¹¹ which involved the more analogous question of whether the surrender of a lease was a capital transaction.

In the *Blair* case the income beneficiary of a testamentary trust made a gift for life of a share in the future income. The Supreme Court applied the conventional test¹² of whether income alone or the property producing the income had been assigned, *i.e.*, whether the "fruit" or the "tree"¹³ had been given away, and decided that the beneficiary-donor had parted with "property" and was therefore not taxable on the future income payments when received by the donee. The majority in the principal case, finding no distinction between the interest given away in the *Blair* case and that surrendered here, concluded that the interest being "property," must also be a capital asset, the statutory definition of which is given in terms of "property."¹⁴ This conclusion is subject to criticism on three grounds.

First, subsequent cases have cast doubt upon the validity of the *Blair* decision itself. It was once thought in assignment of income cases that retention of some control over the flow of income was decisive in determining the taxable person.¹⁵ But where a bondholder made an irrevocable gift of accumulated interest in the form of a bond coupon,¹⁶ and where an insurance agent made an assignment of earned, unpaid commissions,¹⁷ both were held taxable on the payments when made, though neither retained any control over the flow of the income. Similarly taxed was a beneficiary of a life estate after an assignment of a portion of the trust income for the period of a year.¹⁸ In the exercise of the power to direct the flow of the income, the court found such satisfaction¹⁹ accruing to the donors and assignor as to render them

Estate v. Commissioner, 137 F. (2d) 454 (C. C. A. 8th, 1943); *Randall v. Randall*, 60 F. Supp. 308 (S. D. Fla. 1944). *Cf.* *Quigley v. Commissioner*, 143 F. (2d) 27 (C. C. A. 7th, 1944).

11. 313 U. S. 28 (1941).

12. See Buck, *Income Tax Evasion and Avoidance: The Deflection of Income* (1936) 23 VA. L. REV. 107, 123; Note (1941) 50 YALE L. J. 512, 513.

13. See *Lucas v. Earl*, 281 U. S. 111, 115 (1930).

14. "§ 117. CAPITAL GAINS AND LOSSES—(a) DEFINITIONS. As used in this chapter—(1) CAPITAL ASSETS. The term 'capital assets' means property held by the taxpayer (whether or not connected with trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (l)." INT. REV. CODE (1939).

15. See Pavenstedt, *The Broadened Scope of Section 22 (a): The Evolution of the Clifford Doctrine* (1941) 51 YALE L. J. 213, 240.

16. *Helvering v. Horst*, 311 U. S. 112 (1940), (1941) 41 COL. L. REV. 340.

17. *Helvering v. Eubank*, 311 U. S. 122 (1940).

18. *Harrison v. Schaffner*, 312 U. S. 579 (1941). See Notes (1941) 50 YALE L. J. 512, (1941) 54 HARV. L. REV. 1405.

19. "Such a use of his economic gain, the right to receive income, to procure a satisfaction which can be attained only by the expenditure of money or property, would seem to be the enjoyment of income whether the satisfaction is the purchase of goods . . . , the payment of his debt . . . , or such non-material satisfactions as may result from the payment of

taxable, although they had given up all future control. By this analysis it would seem that the life beneficiary in the *Blair* case should have been taxable as well. In relation to its own problem of the allocation of the future tax on income payments, the *Blair* case stands alone, limited to its own facts.²⁰

Second, whatever the present validity of the *Blair* decision is, the conclusion that the interest involved is "property" for one purpose is not conclusive that it is also a capital asset. The courts have generally refused to regard as capital transactions various transfers of "property," especially those by which the transferors have procured advance payments of income. This was emphatically demonstrated by the Supreme Court's decision in *Hort v. Commissioner*,²¹ where the sum received by a lessor for the cancellation of a lease was held taxable as ordinary income despite the fact that the lease for other purposes may be called "property."²² Similarly, the consideration received by a stockholder for the sale of his rights to a dividend declared but not yet payable,²³ the payments made in return for a covenant not to engage in a competing business,²⁴ the income received by the lessor from an oil lease whether by way of initial bonus or royalties on the oil subsequently produced,²⁵ and payments made to a retiring partner representing a share in the

a campaign or community chest contribution, or a gift to his favorite son. Even though he never receives the money, he derives money's worth from the disposition of coupons which he has used as money or money's worth in the procuring of a satisfaction which is procurable only by the expenditure of money or money's worth." *Helvering v. Horst*, 311 U. S. 112, 117 (1940).

20. The Supreme Court refused to apply the *Blair* rule in the *Horst*, *Eubank* and *Schaffner* cases. See notes 16, 17, and 18 *supra*. The rule was further limited in *Huber v. Helvering*, 117 F. (2d) 782 (App. D. C. 1941) where the beneficiary-assignor of all the trust income for a period of a year was held taxable on the payments received by the assignee. Groner, C. J., concurring, thought the *Blair* case overruled by the *Eubank* and *Horst* cases. Vinson, J., now Chief Justice of the Supreme Court, writing for the majority, though considering the *Blair* doctrine "a nebulous concept" felt it necessary to distinguish it. *Id.* at 784-5. See also Pavenstedt, *supra* note 15, at 242-5.

21. 313 U. S. 28 (1941).

22. "The consideration received for cancellation of the lease was not a return of capital. We assume that the lease was 'property,' whatever that signifies abstractly. Presumably the bond in *Helvering v. Horst*, 311 U. S. 112, and the lease in *Helvering v. Bruun*, 309 U. S. 461, were also 'property,' but the interest coupon in *Horst* and the building in *Bruun* nevertheless were held to constitute items of gross income. Simply because the lease was 'property' the amount received for its cancellation was not a return of capital, quite apart from the fact that 'property' and 'capital' are not necessarily synonymous in the Revenue Act of 1932 or in common usage. Where, as in this case, the disputed amount was essentially a substitute for rental payments which § 22 (a) expressly characterizes as gross income, it must be regarded as ordinary income, and it is immaterial that for some purposes the contract creating the right to such payments may be treated as 'property' or 'capital.'" *Id.* at 31.

23. *Rhodes' Estate v. Commissioner*, 131 F. (2d) 50 (C. C. A. 6th, 1942).

24. *Beals' Estate v. Commissioner*, 82 F. (2d) 268 (C. C. A. 2d, 1936); *Salvage v. Commissioner*, 76 F. (2d) 112 (C. C. A. 2d, 1935); *Cox v. Helvering*, 71 F. (2d) 987 (App. D. C. 1934).

25. *Burnet v. Harmel*, 287 U. S. 103 (1932).

future earnings as distinguished from a division of the partnership assets²⁵ are taxable as ordinary income.²⁷ Regarded as essentially only the lump sum payment of future income, the consideration received for the transfer of a life interest would seem to require similar treatment.

That the interest transferred is essentially only the right to future income was not an acceptable premise to the majority in the instant case because the beneficiary of a trust has other rights.²⁸ He may sue to enforce the trust, enjoin a breach of the trust, and obtain redress in case of a breach.²⁹ However, a recognition that the beneficiary has these additional rights should not obscure the reality that they are collateral to and for the protection of the one essential right to the income payments.³⁰ In the case of a legal life estate the beneficiary's ownership of legal title might be similarly regarded.³¹

Third, a life interest, whether of a trust beneficiary or a legal life estate, does not seem to fit the capital asset provisions of the Internal Revenue

26. *Levinson v. Commissioner*, 154 F. (2d) 60 (C. C. A. 2d, 1946); *McClellan v. Commissioner*, 117 F. (2d) 988 (C. C. A. 2d, 1941); *Helvering v. Smith*, 90 F. (2d) 590 (C. C. A. 2d, 1937).

27. Compare *Swastika Oil & Gas Co. v. Commissioner*, 123 F. (2d) 382 (C. C. A. 6th, 1941); *Ansorge v. Commissioner*, 147 F. (2d) 459 (C. C. A. 2d, 1945).

28. "Petitioner's right to income for life from the trust estate was a right in the estate itself. Had she held a fee interest, the assignment would unquestionably have been regarded as the transfer of a capital asset; we see no reason why a different result should follow the transfer of the lesser, but still substantial, life interest. As the Court pointed out in the *Blair* case, the life tenant was entitled to enforce the trust, to enjoin a breach of trust, and to obtain redress in case of breach." *McAllister v. Commissioner*, 157 F. (2d) 235, 236 (C. C. A. 2d, 1946).

29. *Blair v. Commissioner*, 300 U. S. 5 (1937).

30. "The right of a beneficiary of an income-producing trust is primarily the right to receive the trust income. All his rights against the trustee and third persons who interfere with the trust *res* are incidental; their purpose is to protect the primary right to receive the income." MAGILL, *TAXABLE INCOME* (Rev. ed. 1945) 303. See Note (1941) 50 *YALE L. J.* 512, 516. Cf. *Irwin v. Gavit*, 268 U. S. 161 (1925); *Lowery v. Commissioner*, 70 F. (2d) 713 (C. C. A. 2d, 1934); *Codman v. Miles*, 28 F. (2d) 823 (C. C. A. 4th, 1928), *cert. denied*, 278 U. S. 654 (1929). Several states have enacted statutes which declare that the whole estate or interest in real property held in trust is vested in the trustee and that the beneficiary takes no interest or estate in the corpus. The statutes are collected and discussed in 1 *BOGERT, TRUSTS AND TRUSTEES* (1935) § 184. The exact nature of the beneficiary's interest is a subject of dispute with courts and commentators. *Id.* § 183. The conflicting views are discussed and the authorities are cited in 1 *TIFFANY, REAL PROPERTY* (3d ed. 1939) § 243. See also Scott, *The Nature of the Rights of the Cestui Que Trust* (1917) 17 *COL. L. REV.* 269; Stone, *The Nature of the Rights of the Cestui Que Trust* (1917) 17 *COL. L. REV.* 467.

31. The Tax Court, however, has refused to extend this analysis to the transfer of a legal life estate. *Harman v. Commissioner*, 4 T.C. 335 (1944). Opper, J., who wrote the Tax Court majority opinion in the *McAllister* case, dissented with two others in the *Harman* case. See also *Estate of Camden*, 47 B. T. A. 926 (1942), *aff'd sub nom. Commissioner v. Camden*, 139 F. (2d) 697 (C. C. A. 6th, 1943) where the consideration received by the wife for the conveyance of real estate for life to her husband with reversion to herself, was held taxable as a receipt from the sale of a capital asset rather than rental from a lease. The Tax Court distinguished the sale of an income beneficiary's interest in a trust as "only the right to receive income." 47 B. T. A. 926, 931 (1942).

Code, the purpose of which was to encourage the conversion of capital investments by removing the excessive tax burdens which resulted from treating any gains from such transactions as ordinary income.³² The revenue laws provide no adequate basis on which to compute the gain or loss on the transfer of such a life interest. There is no cost which can be used as a basis. The usual basis for bequests and legacies, value at the time of the testator's death,³³ urged by the Tax Court dissent in the *McAllister* case,³⁴ fails to take into account the normal reduction in value of the life interest as the beneficiary or owner grows older.³⁵ It is virtually certain that the interest will fall in value as the life-span of the beneficiary or owner grows shorter. The omission in the statute of a satisfactory basis provision would seem to indicate a Congressional intent to exclude the sale or exchange of a life interest from the scope of the capital asset section.

It is unfortunate that the *Blair* case, which has been severely limited by the Supreme Court even in its own sphere of particular application, has been extended by the principal case to the distinct problem of defining a capital asset. To have followed the more analogous cases involving transfers of the right to future income would have prevented the application of the capital gain and loss provisions to an inappropriate type of interest.

STATE COURT EVASION OF UNITED STATES SUPREME COURT MANDATES*

STATE court independence has been frequently asserted by an evasion of United States Supreme Court mandates.¹ A recent instance of the apparent disregard of such a mandate is found in a Nebraska case, *Hawk v. Olson*.² There petitioner, sentenced to life imprisonment after a murder conviction, sought a writ of habeas corpus on grounds of perjured testimony, deprivation of opportunity to consult counsel and prepare a defense, and subsequent

32. H. R. REP. NO. 350, 67th Cong., 1st Sess. (1921) 10; SEN. REP. NO. 275, 67th Cong., 1st Sess. (1921) 12. See Kent, *The Case for Taxing Capital Gains* (1940) 7 LAW & CONTEMP. PROB. 194, 197. The tax was scaled to approximate a yearly tax on the annual increments of value added to the asset realized as a whole by the sale or exchange.

33. INT. REV. CODE § 113 (a) (5) (1939).

34. 5 T.C. 714, 724-5 (1945).

35. The beneficiary-legatee is not allowed deductions for exhaustion of his interest. INT. REV. CODE § 24 (d) (1939).

* *Hawk v. Olson*, 146 Neb. 875, 22 N. W. (2d) 136 (1946).

1. See generally Comment, *Final Disposition of State Court Decisions Reversed and Remanded by the Supreme Court, October Term, 1931, to October Term, 1940* (1942) 55 HARV. L. REV. 1357; Warren, *Federal and State Court Interference* (1930) 43 HARV. L. REV. 345.

2. 146 Neb. 875, 22 N. W. (2d) 136 (1946).

curtailment of the right to appeal. During six years of persistent attempts in five different courts to obtain a hearing on these allegations, ten former applications had been denied, all for technical or jurisdictional reasons, without affording him a chance to prove the merits of his claims.³ The Nebraska Court rejected his eleventh request, stating that habeas corpus was a collateral attack available only against a judgment void on its face, and that the application stated mere conclusions rather than facts.⁴ The United States Supreme Court, although accepting the Nebraska decisions that sufficiency of evidence could not be raised by habeas corpus, and that Hawk's petition did not establish any interference with his right to appeal, reversed and remanded,⁵ declaring that the allegations included facts showing a deprivation of the effective assistance of counsel, in violation of the due process clause of the 14th Amendment, sufficient to entitle the petitioner to a hearing.

Nevertheless, Hawk's motion for compliance with the resulting mandate was denied by the Nebraska Court.⁶ In the explanatory opinion the majority stated that the Supreme Court must not have recognized the real basis of the previous Nebraska decision, namely, that the applicant had mistaken his remedy, and that under state procedure the issue of denial of counsel was not justiciable in a habeas corpus proceeding. The Court further asserted that although the Supreme Court might declare the petitioner's right to some remedy under the 14th Amendment, it could not dictate within the state the choice of one particular remedy.

The legal pattern of such attack on an appellate order⁷ was set by the

3. Application denied on grounds that trial court had proper jurisdiction and that habeas corpus was available only against a judgment void on its face. *Hawk v. O'Grady*, 137 Neb. 639, 290 N. W. 911 (1940), *cert. denied*, 311 U. S. 645 (1940); application to Dist. Ct. of Lancaster County, Neb., denied (1941) [see 130 F. (2d) 910 (C. C. A. 8th, 1942)]; 3rd successive application to U. S. Dist. Ct., D. Neb., containing present allegations, denied for lack of federal jurisdiction until the newly alleged matter had been presented to state courts, *Hawk v. Olson*, 130 F. (2d) 910 (C. C. A. 8th, 1942), *cert. denied*, 317 U. S. 697 (1943); application directly to the Nebraska Supreme Court denied without opinion (1943) [see 321 U. S. 114, 115 (1944)]; original to U. S. Supreme Court denied without prejudice to application to a district court, *Ex parte Hawk*, 318 U. S. 746 (1943); applications to both U. S. Dist. Ct., D. Neb., and senior circuit judge, 8th circuit, denied (1943) [see 321 U. S. 114, 115 (1944)]; and original to U. S. Supreme Court denied for failure to exhaust state remedies, *Ex parte Hawk*, 321 U. S. 114 (1944).

4. *Hawk v. Olson*, 145 Neb. 306, 16 N. W. (2d) 181 (1944), *cert. granted*, 324 U. S. 893 (1945).

5. *Hawk v. Olson*, 326 U. S. 271 (1945).

6. *Hawk v. Olson*, 146 Neb. 875, 22 N. W. (2d) 136 (1946).

7. The constitutionality of the appellate jurisdiction of the Supreme Court over the state courts was first settled in 1816. *Martin v. Hunter's Lessee*, 1 Wheat. 304 (U. S. 1816). See *Cohens v. Virginia*, 6 Wheat. 264, 413-23 (U. S. 1821). Since then there have been few direct challenges to the superior power of the Supreme Court. In the matter of *Booth*, 11 Wis. 498 (1859); and *Worcester v. Georgia* and *Butler v. Georgia*, 6 Pet. 515, 597 (U. S. 1832) later disobeyed by the Georgia Supreme Court [no reported decision exists; case is referred to in the Matter of *Booth*, *supra* at 529 and in *Padelford v. Savannah*, 14 Ga. 438, 481 (1854)]. See also *Padelford v. Savannah*, *supra* at 455-512. For an account of the con-

early case of *Davis v. Packard*.⁸ There, with approval by affirmance, the United States Supreme Court permitted the effect of its own opinion and mandate to the dernier court of New York to be avoided, the latter court having declared that under state law the appellate court's jurisdiction did not permit a reversal of the trial court for a factual error not appearing on the face of the record. The Supreme Court affirmance was hinged on the New York court's recognition that a coram vobis writ was still available.

Variations on this method of avoidance, similarly founded on the autonomy of state courts within the realm of state law, were subsequently authorized by the Supreme Court.⁹ Among the devices used were a revised construction of a state statute,¹⁰ the discovery of a hitherto unconsidered alternative ground for judgment under state law,¹¹ and the development of a "factual" approach.¹²

Two further rationales as grounds for evasion, at present untested by the Supreme Court, were recently advanced by this same Nebraska Court in *Johnson v. Radio Station WOW*.¹³ In reviewing the original state decision,¹⁴

flict and antagonism surrounding these early decisions, see Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act (1913)* 47 AM. L. REV. 1, 161.

8. 8 Pet. 312 (U. S. 1834).

9. For two evasions similarly based on state jurisdictional rules, not reviewed by the U. S. Supreme Court, see *Murphy v. The Factors' and Traders' Ins. Co.*, 36 La. An. 953 (1884); and *Louisiana ex rel. The Southern Bank v. Pillsbury*, 35 La. An. 408 (1883); but cf. *Kanouse v. Martin*, 3 Duer 664 (N. Y. 1854). See generally Comment (1942) 55 HARV. L. REV. 1357.

10. *Georgia Power Co. v. Decatur*, 179 Ga. 471, 176 S. E. 494 (1934), *rev'd sub. nom. Georgia Ry. & Electric Co. v. Decatur*, 295 U. S. 165 (1935); statute reconstructed, but judgment given for same party, 181 Ga. 187, 182 S. E. 32 (1935), *aff'd*, 297 U. S. 620 (1936), 49 HARV. L. REV. 838; *Schuykill Trust Co. v. Pennsylvania*, 302 U. S. 506 (1933); *Lindsay v. Washington*, 194 Wash. 129, 77 P. (2d) 596 (1938), *cert. denied*, 305 U. S. 637 (1938).

11. *Atchison, Topeka & Santa Fe Ry. v. Scarlett*, 300 U. S. 471 (1937), alternative ground considered, 12 Cal. (2d) 549, 86 P. (2d) 85 (1939), *cert. denied*, 306 U. S. 657 (1939); *Coombes v. Getz*, 285 U. S. 434 (1932), reversal avoided, 217 Cal. 320, 18 P. (2d) 939 (1933); *Hartford Life Ins. Co. v. Barber*, 245 U. S. 146 (1917), reversal avoided, *Barber v. Hartford Life Ins. Co.*, 279 Mo. 316, 214 S. W. 207 (1919), *aff'd*, 255 U. S. 129 (1921). But cf. *Lone Star Gas Co. v. Texas*, 304 U. S. 224 (1938), reversal avoided, 129 S. W. (2d) 1164 (1939), *rev'd*, 137 Tex. 279, 153 S. W. (2d) 681 (1941). A variation is afforded by the reexamining of a covered point of state law: *State ex rel. Anderson v. Brand*, 214 Ind. 347, 5 N. E. (2d) 531, 913 (1937), on rehearing, 214 Ind. 352, 7 N. E. (2d) 777 (1937), *rev'd*, 303 U. S. 95 (1938), evaded, 214 Ind. 356, 13 N. E. (2d) 955 (1938). Compare *Hartford Acc. & Indemnity Co. v. Delta & Pine Land Co.*, 169 Miss. 196, 150 So. 205 (1933), *rev'd*, 292 U. S. 143 (1934), evaded, 189 Miss. 496, 195 So. 667 (1940).

12. *Missouri ex rel. Gaines v. Canada*, 342 Mo. 121, 113 S. W. (2d) 783 (1938), holding that state college need not admit negroes to its law school, *rev'd* on grounds that state must provide equal educational facilities, 305 U. S. 337 (1938), returned by state supreme court to lower court to decide whether entry could be denied on grounds that under a new appropriation and statute the all-negro college provided the equal legal educational facilities, 344 Mo. 1238, 131 S. W. (2d) 217 (1939).

13. 146 Neb. 429, 19 N. W. (2d) 853 (1945), (1946) 34 GEO. L. J. 109, (1945) 59 HARV. L. REV. 132, (1946) 14 GEO. WASH. L. REV. 379.

14. *Johnson v. Radio Station WOW*, 144 Neb. 406, 13 N. W. (2d) 556 (1944), motion

the Supreme Court¹⁵ had conceded the absolute jurisdiction of the state over the issue of fraud in the lease of a radio station, but, in the interest of effectuating the overriding policies of the Federal Communications Act, had ordered certain changes to be made in the timing of the retransfer decree.¹⁶ The Nebraska Court, however, relying on Mr. Justice Frankfurter's concession of state jurisdiction, held the situation to be within the principle of *Davis v. Packard* and refused to comply.¹⁷ It was further asserted that a Supreme Court mandate impinging on that jurisdiction violated Section 265 of the Judicial Code¹⁸ and might be treated as advisory.

Neither of the new rationales thus advanced seems tenable. It is true that the Judicial Code's long-standing prohibition of federal injunctions against state courts has been sometimes construed to include orders not directly restraining the court but necessarily having that effect.¹⁹ But it has never been applied to successive decisions or orders in the identical action. To do so would invalidate the entire theory and practice of appellate jurisdiction.²⁰ Second, extension of the *Davis v. Packard* doctrine through reli-

for rehearing denied, 144 Neb. 432, 14 N. W. (2d) 666 (1944). In the supplemental opinion, the court admitted that the power to license and to transfer a license was within the exclusive jurisdiction of the FCC, and stated that their former mandate was to be construed accordingly only as directing the parties to do all things necessary to secure a return of the license.

15. *Radio Station WOW v. Johnson*, 326 U. S. 120 (1945), Mr. Justice Roberts and Mr. Justice Jackson dissenting.

16. The opinion indicated that state jurisdiction over the issue of fraud would be amply respected if qualified by a required postponement of the retransfer of the physical properties until the FCC was enabled to act on the new license applications; *id.* at 132.

17. 146 Neb. 429, 19 N. W. (2d) 853 (1945).

18. The present statute reads, "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." 36 STAT. 1162 (1911), 28 U. S. C. § 379 (1940).

19. The following three cases were cited by the Nebraska Court: *Stenger v. Stenger Broadcasting Corp.*, 28 F. Supp. 407 (M. D. Pa. 1939); *Reisler v. Forsyth*, 21 F. Supp. 610 (D. N. J. 1937) (fed. ct. denied bill attempting to enjoin Beach Commission from expending municipal funds, where the commission had obtained a mandamus in a state court directing the mayor to credit them with such funds); and *Amusement Syndicate Co. v. El Paso Land Improvement Co.*, 251 Fed. 345 (W. D. Tex. 1918) (bill for injunction in fed. ct. denied to cestui where suit by the trustee for the same purpose was pending in a state court with competent jurisdiction).

In general the statute is held applicable whenever the defendant in the federal court would be liable for contempt on an attempt to take advantage of a state judgment. *Hill v. Martin*, 296 U. S. 393 (1935); *Harrison v. Triplex Gold Mines*, 33 F. (2d) 667 (C. C. A. 1st, 1929); *Western Union Tel. Co. of Ill. v. Louisville and N. R. R.*, 218 Fed. 628, 134 C. C. A. 386 (C. C. A. 7th, 1914) and cases cited therein; *Dillon v. Kansas City S. B. Ry.*, 43 Fed. 109 (C. C. W. D. Mo. 1890); *Domestic and Foreign Missionary Society v. Hinman*, 13 Fed. 161 (C. C. D. Neb. 1881); *First Nat. Bank of Youngstown v. Hughes*, 6 Fed. 737 (C. C. N. D. Ohio 1881).

20. See (1946) 59 HARV. L. REV. 132 and cases cited *supra* note 19 for meaning of "order indirectly restraining." Prior to 1941 the prohibition of Section 265 had been considerably emasculated by both statutory and judicially implied exceptions even with respect to separate suits. The Act had been held not to apply where the federal court obtains control over

ance on conceded jurisdiction²¹ appears to overlook completely the Supreme Court resolution of intertwining state and federal questions.²² Thus to interpret that doctrine as meaning that the state court may determine the dividing line conflicts directly with the supremacy clause and its natural corollary that the Supreme Court must be final arbiter of the extent of its own power.²³

The evasion in the *Hawk* case, in contrast, falls more directly into the

the res, where a state court judgment is "unconscionable," where the constitutionality of a state statute is being tested while a suit in a state court is threatened, where prosecution of a suit in a state court is part of a violation of a federal statute, and where considered necessary to protect federal jurisdiction. For discussion and illustrative cases, see Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts* (1933) 42 YALE L. J. 1169; Comment (1933) 42 YALE L. J. 456; Comment (1940) 13 So. CALIF. L. REV. 331. In 1941, however, a federal court was denied the power of injunction to protect its own decree and to prevent relitigation of identical issues in a state court. The majority opinion reaffirmed the res exception, but apparently denied or left in serious doubt the validity of all others. *Toucey v. New York Life Ins. Co.*, 314 U. S. 118 (1941), discussed with approval (1942) 27 CORN. L. Q. 270, criticized in (1942) 26 MINN. L. REV. 558, (1942) 16 TULANE L. REV. 468, and (1942) 90 U. OF PA. L. REV. 857.

The Nebraska reasoning appears to be based on the dogma that when a court transcends its authority, its order is void. *Lewis v. Peck*, 154 Fed. 273 (C. C. A. 7th, 1907). But contrast applicability of two other oft-stated dicta: that the Section limits only power, not jurisdiction, *Jamerson v. Alliance Ins. Co.*, 87 F. (2d) 253, 256 (C. C. A. 7th, 1937); *Smith v. Apple*, 264 U. S. 274, 278-9 (1924); and that the Section does not apply when the jurisdiction of the federal court was properly acquired for purposes other than that of staying proceedings in a state court. *Garner v. Second Nat. Bank*, 67 Fed. 833, 836 (C. C. A. 1st, 1895); *Perry v. Sharpe*, 8 Fed. 15, 24 (C. C. S. D. Ohio 1881).

Actually all three dicta are equally out of context. Section 265 forbids injunctions issuing from the United States Supreme Court to an inferior state court since no appellate relation between them exists. *In re Slaughter-house Cases*, 10 Wall. 273, 298 (U. S. 1869). It is there clearly implied that where appellate jurisdiction exists Section 265 does not apply.

21. The Nebraska stand also draws some strength from certain logical inconsistencies in Mr. Justice Frankfurter's majority opinion. State jurisdiction to order retransfer of the federally licensed facilities is there expressly conceded, even if, should the FCC not consent to the license transfer, there might result a permanent split in license and facilities, thus preventing effective operation. *Radio Station WOW v. Johnson*, 326 U. S. 120, 132 (1945). In strict logic, this statement of state jurisdiction cannot lie with the further holding that the state court's decree trespasses on federal grounds because of the possibility of causing a temporary separation.

The inconsistency described, however, is almost purely academic, because of the extreme unlikelihood of a "permanent split." If the FCC should overlook the finding of fraud and retransfer order, its action would still be subject to eventual Supreme Court review. 48 STAT. 1093 (1934), 47 U. S. C. § 402 a (1940) in conjunction with 38 STAT. 220 (1913), 28 U. S. C. § 47 (1940). See *FCC v. Columbia Broadcasting System of Cal.*, 311 U. S. 132 (1940); Comment (1942) 56 HARV. L. REV. 121; Comment (1942) 10 U. OF CHI. L. REV. 88.

22. Even with concessions and possible inconsistencies, see note 21 *supra*, a federal question as the basis of the retiming mandate is furnished by the policy of the Federal Communications Act to protect the public interest. *Radio Station WOW v. Johnson*, 326 U. S. 120, 132 (1945); 48 STAT. 1082 (1934), 47 U. S. C. § 303 (1940).

23. See Warren, *loc. cit. supra* note 1. Analogous is the power of the federal courts to determine removability, a power held paramount to the "bootstrap doctrine" and res judicata in a state court; *Kloeb v. Armour & Co.*, 311 U. S. 199 (1940), (1941) 25 MINN. L. REV. 531.

Davis v. Packard principle,²⁴ but only if the assumption be made that Hawk will in fact be granted a hearing on application for a writ of coram nobis or on a statutory motion for a new trial, the only remaining possible remedies. Until such an attempt is made, actual disobedience is not yet real. It is, however, significant that in its first denial of this application the court stated that a writ of coram nobis was the correct procedure for the introduction of new evidence,²⁵ while its opinion after reversal contained no finding that coram nobis would be allowed for a showing of denial of counsel; nor did it include what course the applicant should properly have pursued. Instead, the later opinion justified its result by pointing to the unused remedies which had been available to petitioner after original conviction and cited the legal principle that a constitutional right may be forfeited by the failure to make timely assertion of that right.²⁶ If from these statements it may be deduced that the court now deems the forfeited remedies the only ones allowable, and so intends to deny a possible future request for a hearing, there is substantial conflict with and disobedience of the Supreme Court mandate,²⁷ which was

24. After the decision of the principal case, Hawk again applied to a federal district court for a writ of habeas corpus. *Hawk v. Olson*, 66 F. Supp. 195 (D. Neb. 1946). The court declared that it had first granted the application on the grounds that any remaining state remedies were apparently illusory. Then, before the trial, and because of the intervening Supreme Court decision of *Woods v. Neirstheimer*, 66 Sup. Ct. 996 (U. S. 1946), it here reversed itself for lack of jurisdiction until the state courts should finally declare their position on remaining possible remedies.

Relative to the Nebraska evasion, the court stated: ". . . the quoted conclusion(s) (from the principal case) . . . are the final—more accurately the latest—deliverances upon the matter (habeas corpus) by Nebraska's highest court. And this court will not presume to disregard or question them or to deny the Nebraska court's right upon a ground of Nebraska practice to deny compliance with the mandate of the United States Supreme Court. Nor, it may be assumed, will the Supreme Court of the United States." *Hawk v. Olson*, *supra* at 198.

25. *Hawk v. Olson*, 145 Neb. 306, 310, 16 N. W. (2d) 181, 183 (1944).

26. *Hawk v. Olson*, 146 Neb. 875, 881, 22 N. W. (2d) 136, 140 (1946).

27. For similar deduction see *Hawk v. Olson*, 66 F. Supp. 195, 200 (D. Neb. 1946). Past Nebraska decisions on coram nobis and the statutory limitation on a motion for new trial also tend to indicate that those remedies are not practically available to Hawk, and therefore imply effective disobedience of the Supreme Court mandate. Writ of error coram nobis has been generally held improper except for the introduction of new evidence not known to the applicant at the time of the trial. *State v. Boyd*, 117 Neb. 320, 220 N. W. 281, 58 A. L. R. 1283 (1928); *Carlsen v. State*, 129 Neb. 84, 261 N. W. 339 (1935); *Newcomb v. State*, 129 Neb. 69, 261 N. W. 348 (1935); for discussion, see *Hawk v. Olson*, *supra* at 199-201.

The Nebraska statute on motion for new trial reads in part: ". . . and provided, further, that such motion must be filed within three years after the date of such verdict, and such motion and the procedure herein provided shall be the exclusive method and procedure for reviewing criminal cases after the expiration of the term at which such verdict is rendered." NEB. REV. STAT. (1943) § 29-2103.

Equally significant is the unusual silence of Nebraska's Attorney General on the proper course open to the applicant and the adequacy of remaining remedies; silence in the face of an order to show cause with particular attention to these points. *Hawk v. Olson*, 66 F. Supp. 195, 196, 199 (D. Neb. 1946).

patently issued with full knowledge of the loss of some rights by petitioner.

As the extent of disobedience in the *Hawk* case is thus not yet definitely ascertainable, and as the validity of the grounds of disobedience in the *Johnson* case will not now be tested in the Supreme Court,²⁸ these two Nebraska opinions have significance and effect only in the contribution of their iota of discredit to the country's judicial system. The layman expects that an adjudication of a party's rights by the United States Supreme Court is determinative; and loss of respect follows naturally if its mandates are evaded²⁹ or if litigation is again prolonged.³⁰

In the past, little has been done to prevent this type of discredit by taking action against state courts after evasion has occurred. At times a reappeal by the aggrieved party has forced the Supreme Court into action in affirmance of its former decree.³¹ Yet, with theoretical methods of enforcement possibly available, including mandamus,³² and even prosecution of the diso-

28. The Nebraska discussion was somewhat academic, because in effect, neither mandate was followed. The parties to the old lease immediately adopted a new one more generous to the lessor, and apparently uncontested by the lessor's policy holder. Communication to YALE LAW JOURNAL from Attorney for the defendant Radio Station WOW, Inc. See also (1945) 59 HARV. L. REV. 132, 134.

29. To prevent such time-wasting and to preclude overcrowding of its docket by confining itself to important federal issues, the Supreme Court has long refused to review state judgments resting on an adequate state ground, even though there be error in the decision of a federal question. *Murdock v. Memphis*, 20 Wall. 590 (U. S. 1874); *Arkansas So. R. R. v. German Nat. Bk.*, 207 U. S. 270 (1907); and cases collected in Note (1903) 63 L. R. A. 33, 42. This practice thus blocks off an area of evasion by removing the necessity for its exercise, precludes delay in litigation, and satisfies the parties by rendering a final judgment on the crucial issue. The loss of respect stems from the restricted scope of the practice; the Supreme Court appears to laymen as a final arbiter in most cases, but in the few as an adjudicator whose power can be avoided through legal trickery. See Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 CORN L. Q. 499, 503; Taft, *The Jurisdiction of the Supreme Court under the Act of February 13, 1925* (1925) 35 YALE L. J. 1, 2; *Hearings before Committee on the Judiciary on S. 2060 and S. 2061*, 68th Cong., 1st Sess. (1924) 21; (1940) 49 YALE L. J. 1463; Comment (1941) 40 MICH. L. REV. 84.

But where an implicitly possible non-federal ground has been left unconsidered by the state court, the Supreme Court of necessity has reviewed the federal question. *Internat. Steel and Iron Co. v. Nat. Surety Co.*, 297 U. S. 657 (1936). With the Supreme Court unable or unwilling to adjudicate undetermined state laws, a legitimate method of evasion is thus left open to the state court, and prolonged litigation is likely to result; *Grayson v. Harris*, 90 Okla. 147, 216 Pac. 446 (1923) (judgment for defendant, a possible state ground left unconsidered), *rev'd* on federal ground, 267 U. S. 352 (1925), *rev'd* again for defendant on the state ground *supra*, 129 Okla. 281, 264 Pac. 623 (1928), *rev'd* on a new federal ground, 279 U. S. 300 (1929), *rev'd* and remanded for a new trial, 146 Okla. 291, 294 Pac. 187 (1930), judgment in part for plaintiff *aff'd*, 173 Okla. 163, 47 P. (2d) 879 (1935).

30. "Justice delayed is justice denied." Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins* (1946) 55 YALE L. J. 267, 294; see *Hearings before Committee on the Judiciary on S. Res. 552*, 64th Cong., 1st Sess. (1915) 15.

31. *Stanley v. Schwalby*, 162 U. S. 255 (1896); *Williams v. Bruffy*, 102 U. S. 248 (1880); *Tyler v. Magwire*, 17 Wall. 253 (U. S. 1872); *Chaires v. United States*, 3 How. 611 (U. S. 1845).

32. Both case law and statutes are inconclusive on the existence of the power or jurisdic-

bedient state judges,³³ no remedy more severe than a directly issued award of final execution³⁴ or a mandate ordering a specific judgment³⁵ has yet been invoked.

To preclude evasion in the first instance the two most sweeping solutions presently available would be a direct award of execution whenever feasible,³⁶ or enforced waiver of alternative grounds for the state judgment not brought in issue in the earlier litigation.³⁷ The latter method might be further modified by Supreme Court recognition of its own ability to adjudicate undetermined state law.³⁸ Although none of these possible remedies would seem to

tion of the United States Supreme Court to issue a writ of mandamus to a state court. It has been held an inappropriate remedy where writ of error is available and adequate. *In re Blake*, 175 U. S. 114, 118 (1899). Compare dicta affirming the power, *Ohio Oil Co. v. Thompson*, 120 F. (2d) 831, 835 (C. C. A. 8th, 1941); *In re Dowd*, 133 Fed. 747, 751 (C. C. D. Colo. 1904); *In re Green*, 141 U. S. 325, 327 (1891); *Holmes v. Jennison*, Appendix II, 14 Pet. 614, 632 (U. S. 1840) with dicta denying it, *Graham v. Norton*, 15 Wall. 427, 428 (U. S. 1872); *Martin v. Hunter's Lessee*, 1 Wheat. 304, 366 (U. S. 1816) (concurring opinion). See discussion in (1946) 14 GEO. WASH. L. REV. 379, 380-1; and Comment, *Jurisdiction of the Supreme Court to Issue Mandamus to a State Court* (1942) 20 TEX. L. REV. 358, 361-5. However, in the latest Supreme Court decision bearing on the question, the Court denied a writ of mandamus against the judges of the Supreme Court of Texas on grounds other than lack of power to issue the writ, and after issuing an order to show cause as to why mandamus should not be granted, *Ex parte Texas*, 315 U. S. 8 (1942).

33. See *Holmes v. Jennison*, Appendix II, 14 Pet. 614, 632 (U. S. 1840); and JUD. CODE § 268, REV. STAT. § 725 (1875), 28 U. S. C. § 385 (1940). No other instance where the power has been discussed, even as to lower federal courts, has been found, and it is difficult to conceive of an occasion so drastic as to require its use. Cf. in a state court, *In re Mahon*, 71 Cal. 586, 12 Pac. 868 (1887).

34. *Tyler v. Magwire*, 17 Wall. 253 (U. S. 1872); *Williams v. Bruffy*, 102 U. S. 248 (1880) both cited *supra* note 31. The original provisions of the Judiciary Act of 1789, Sec. 25, permitted an award of execution only on second appeal, 1 STAT. 85 (1789); but, as presently amended, permit a direct award of execution at any time in the discretion of the court, whether review is obtained by appeal or certiorari. JUD. CODE § 237, 43 STAT. 937 (1925), 28 U. S. C. § 344 (1940).

35. *Stanley v. Schwalby*, 162 U. S. 255 (1896) cited *supra* note 31.

36. See note 34 *supra*.

37. Analogous to the waiver of a constitutional right by failure to make timely assertion thereof. *Yakus v. United States*, 321 U. S. 414, 444 (1944) and cases cited therein; and to the familiar waiver of a federal question for purposes of appeal unless adequately presented in the state court. *White River Lumber Co. v. Arkansas ex rel. Applegate*, 279 U. S. 692, 700 (1929); *Cleveland and Pittsburgh R. R. v. Cleveland*, 235 U. S. 50, 53 (1914).

38. This modification would meet the problem of cases cited *supra* note 29. The scope of permissible review has been uniformly restricted to the federal questions which gave rise to Supreme Court appellate jurisdiction. Section 25 of the Judiciary Act of 1789 clearly required this interpretation by a provision reading, "But no other error shall be assigned or regarded as a ground of reversal . . . than such as . . . immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute." 1 STAT. 86-7 (1789). The rewritten statute of 1867 omitted this provision, but the identical rule was implied. *Murdock v. Memphis*, 20 Wall. 590 (U. S. 1874), construing 14 STAT. 386 (1867). The proposed modification would then involve either a rejection of the implied absorption of the provision into the later act or a reinterpretation of the meaning of the provision which would restrict its limitations to state

conflict with the Constitution,³⁹ nor with the present Judicial Code,⁴⁰ they would entail an important change from present practices, perhaps disproportionate to the magnitude of the ill. An additional objection lies in the possibility of decisions inconsonant with the normal policies and substantive law of a state.⁴¹

A less thorough remedy not open to the above objections could be achieved by an overruling of *Davis v. Packard* with respect to jurisdictional and procedural issues alone.⁴² Although occasional decisions deviating from normal state procedure might thereby result, verdicts under substantive law of the state would be consistent.⁴³ Such a limitation would considerably narrow

questions explicitly decided by the state court. But see on Supreme Court power to review local law, *Stanley v. Schwalby*, 162 U. S. 255, 279 (1896). Compare the recent voluntary Supreme Court practice of delaying decision on a case originating in the lower federal courts until the state courts have passed on applicable state questions. See *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478 (1940), 53 HARV. L. REV. 1394, (1943) 56 HARV. L. REV. 1162, (1944) 53 YALE L. J. 788. For criticism, see Clark, *supra* note 30, at 293-5.

39. "In all the other Cases before mentioned," (including by construction cases from the state courts, *Martin v. Hunter's Lessee*, 1 Wheat. 304 (U. S. 1816), cited *supra* note 7) "the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations, as the Congress shall make." U. S. CONST. Art III, § 2.

40. With reference to the appellate jurisdiction over state courts the Code provides: "The appeal shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the appeal." JUD. CODE § 237, 43 STAT. 937 (1925), 28 U. S. C. § 344 (1940). With respect to cases reviewed on writ of certiorari, ". . . for review and determination, with the same power and authority, and with like effect as if brought up by appeal. . . ." *Ibid.* The discretionary power to award execution would seem to include the lesser power to preclude the introduction of new issues of state law. See also note 38 *supra*.

41. See Comment (1942) 55 HARV. L. REV. 1357, 1364-5.

42. By such a rule, state courts would be permitted to consider issues of state substantive law, expressly or impliedly left open by the mandate, but would not be permitted to use procedural technicalities or previously unconsidered jurisdictional objections to prolong litigation or to achieve a result opposite to that of the mandate. In effect, this principle has been occasionally, if inconsistently, followed. ". . . our (Supreme Court) jurisdiction cannot be now ousted, after we have acted upon the case and passed upon its merits, by any suggestion that that court (the state court of appeals) never took jurisdiction to look into the record of the inferior court and determine the character of its judgment." *Williams v. Bruffy*, 102 U. S. 248, 254-5 (1880).

43. Thus, with respect to the problem of the principal case, the Nebraska Court would be privileged in the future to set an exclusive remedy other than habeas corpus for persons in Hawk's position, and the Supreme Court would, as before, have no jurisdiction to review the denial of an application made on grounds of incorrect remedy. But in the particular case itself, having not originally clearly invoked such state ground, and having thus permitted the question to be adjudicated by the Supreme Court, the Nebraska court would have no other course open than to follow the mandate and grant an immediate hearing. The substantive state law is unchanged except perhaps as modified by the Federal Constitution; the state loses no real control over its own procedure; yet unnecessary litigation and the possibility of a second Supreme Court review are eliminated.

the field for state technical evasion without prolonging litigation, and the unlikely event of state non-evasive defiance could then justifiably be met by one of the aforementioned modes of enforcement.

NEUTRALIZATION OF A TURNCOAT WITNESS' TESTIMONY*

THE rule against impeaching one's own witness¹ by introduction of a prior extra-judicial statement, if rigidly applied, leaves a party at the mercy of a witness who has changed his story on the stand or revealed hitherto hidden adverse testimony. To escape this result most jurisdictions by statute or judicial decision have modified the rule without openly repudiating it.² The previous contradictory statement by the witness, however, still is admissible only for the purpose of counteracting or "neutralizing" the damaging testimony.³ Whether the testimony in chief has in fact been neutralized is generally deemed a question for the jury,⁴ under express instructions from

* *United States v. Michener*, 152 F. (2d) 880 (C. C. A. 3d, 1945).

1. For the history and scope of the rule, see 3 WIGMORE, EVIDENCE (3d ed. 1940) § 896 (hereinafter cited as 3 WIGMORE); Ladd, *Impeachment of One's Own Witness—New Developments* (1936) 4 U. OF CHI. L. REV. 69-76. And see note 23 *infra*.

2. "The rule in its original and strict form against impeaching one's own witness is discredited everywhere. . . ." *Young v. United States*, 97 F. (2d) 200, 205 (C. C. A. 5th, 1938). Since, by one stratagem or another, most jurisdictions have enabled parties to impeach their own witnesses by use of prior inconsistent statements, the rule survives mainly in limitations and conditions which must be distinguished or fulfilled.

According to the prevailing view, impeachment by proof of a prior inconsistent statement will not be permitted unless the adverse testimony at the trial works both "surprise" and "damage" on the party calling the witness. *United States v. Maggio*, 126 F. (2d) 155, 158-9 (C. C. A. 3d, 1942); *Young v. United States*, 97 F. (2d) 200, 205-6 (C. C. A. 5th, 1938). See 3 WIGMORE § 904. As to what constitutes "surprise" and "damage" the courts are at variance. See, e.g., *United States v. Graham*, 102 F. (2d) 436, 442 (C. C. A. 2d, 1939); *Shaffman v. United States*, 289 Fed. 370, 374 (C. C. A. 3d, 1923); *Crago v. State*, 28 Wyo. 215, 229, 202 Pac. 1099, 1104 (1922); cf. *Kuhn v. United States*, 24 F. (2d) 910, 913 (C. C. A. 9th, 1928); *Weygant v. Bartle*, 88 Ore. 310, 318, 171 Pac. 587, 590 (1918). See also 3 WIGMORE § 905; cases are collected *ibid.*, n. 4 and in Note (1931) 74 A. L. R. 1042. For state statutes see Ladd, *supra* note 1, at 88-91; Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure: 2* (1937) 47 YALE L. J. 194, 203; Schatz, *Impeachment of One's Own Witness: Present New York Law and Proposed Changes* (1942) 27 CORN. L. Q. 377, 381-9.

3. This is the orthodox view. *Ellis v. United States*, 138 F. (2d) 612, 616 (C. C. A. 8th, 1943); *New York Life Ins. Co. v. Bacalis*, 94 F. (2d) 200, 202 (C. C. A. 5th, 1938). See 3 WIGMORE §§ 1017-9. Cases collected *id.* at § 1018, n. 3 and Note (1941) 133 A. L. R. 1454, 1455-61. But see note 24 *infra*.

4. *Schneider v. United States*, 57 F. (2d) 454, 457 (C. C. A. 3d, 1932); *State v. D'Adame*, 84 N. J. L. 386, 397, 86 Atl. 414, 418 (1913). The jury accordingly may make a *pro tanto* determination of the testimony in chief which has been discredited. See *Chicago, St. P., Minn., and O. Ry. v. Kulp*, 102 F. (2d) 352, 358 (C. C. A. 8th, 1939).

the judge⁵ that the extra-judicial statement may be considered only for the purpose of evaluating the witness' credibility by indicating his capability of telling two different stories.⁶

In the recent case of *United States v. Michener*⁷ the Circuit Court of Appeals for the Third Circuit rejected a variation of the neutralization doctrine which would have made the determination of whether the testimony had been neutralized a question for the court rather than for the jury. In a prosecution under the false claims statute,⁸ two witnesses for the government gave testimony damaging to its own case.⁹ The government was then permitted without objection to impeach by offering proof of inconsistent statements the witnesses had made before trial.¹⁰ In both instances, after the prosecutor had introduced the impeaching testimony but before defendant had been given opportunity to cross-examine, the trial judge on his own motion withdrew the witnesses and told the jury their testimony had been neutralized and was to be "for nothing held."¹¹ The circuit court, on appeal, called this procedure reversible error, and held that the question of neutralization was essentially one of credibility and must go to the jury.¹²

The district court's conception of the neutralization doctrine had not seemingly appeared in other reported cases aside from a lone dictum in *United States v. Young*.¹³ In that case the court said that, in instances of this type, the "best practice" is to allow the impeaching party to remove his

5. *State v. D'Adame*, 84 N. J. L. 386, 397, 86 Atl. 414, 418 (1913). Compare *Young v. United States*, 97 F. (2d) 200, 207 (C. C. A. 5th, 1938) with *State v. Kysilka*, 85 N. J. L. 712, 714-5, 90 Atl. 309, 310-1 (1914) and *State v. Jolly*, 112 Mont. 352, 356, 116 P. (2d) 686, 688 (1941).

6. An early American statement of the doctrine was by Shaw, C. J. in *Commonwealth v. Starkweather*, 10 Cush. 59, 60 (Mass. 1852). What is sought to be elicited, according to Wigmore, is the "undefined capacity to err;" it is the "repugnancy of the two" statements that is significant. 3 WIGMORE §§ 685-6. It would seem, however, that if the prior statement is of such weight as to eradicate completely the testimony in chief, its effect has gone beyond the demonstration of a mere "capacity to err." See *Pulitzer v. Chapman*, 337 Mo. 298, 319, 85 S. W. (2d) 400, 411 (1935); cf. *Zimberg v. United States*, 142 F. (2d) 132, 136 (C. C. A. 1st, 1944); *Stewart v. Baltimore & O. R. R.*, 137 F. (2d) 527, 529 (C. C. A. 2d, 1943).

7. 152 F. (2d) 880 (C. C. A. 3d, 1945).

8. 40 STAT. 1015 (1918), 18 U. S. C. § 80 (1940).

9. See Brief for the United States, p. 30, *United States v. Michener*, 152 F. (2d) 880 (C. C. A. 3d, 1945) (hereinafter cited as Brief for United States); Brief for Appellant, pp. 56-9, *United States v. Michener*, 152 F. (2d) 880 (C. C. A. 3d, 1945) (hereinafter cited as Brief for Appellant).

10. One witness was impeached on the basis of a prior oral, and the other by use of a prior written, statement. *Id.* at 58-9; Brief for United States, p. 30.

11. Brief for Appellant, pp. 57, 59.

12. *United States v. Michener*, 152 F. (2d) 880, 885 (C. C. A. 3d, 1945). "Pieces of evidence do not, like the action of chemical elements, so 'neutralize' each other." *Ibid.* Compare *Schneider v. United States*, 57 F. (2d) 454, 457 (C. C. A. 3d, 1932).

13. 97 F. (2d) 200 (C. C. A. 5th, 1938). This case was reversed and remanded for failure of the judge to instruct the jury as to the limiting use to which they may put the impeaching evidence.

witness and to strike the testimony from the record.¹⁴ *Kuhn v. United States*¹⁵ was cited as authority for this dictum, but the *Kuhn* case involved a different situation at the trial; there, the prosecutor, after having introduced evidence to impeach his own witness, later moved to sustain defendant's objection to the testimony. The court granted the motion, admonished the jury not to consider the evidence, and withdrew the witness.¹⁶ Accordingly, in terms of controlling precedent, the circuit court in the instant case would appear correct in rejecting the interpretation promulgated by the trial court.¹⁷

The procedure of the district court would similarly seem improper from the viewpoint of expeditious trial practice. To keep from the jury the issue of whether or not the impeaching evidence had in fact neutralized the testimony in chief,¹⁸ to deny the defendant the opportunity to cross-examine,¹⁹ and to prevent the witness' explaining the inconsistency²⁰ deprives the trier of fact of possibly relevant evidence. On the other hand, for the defendant to recall the witness as his own and thus reopen the issues of the allegedly neutralized testimony, entails needless duplication and abets further confusion of the jury.

14. *Id.* at 205. This dictum was apparently accepted without qualification in Note (1938) 117 A. L. R. 326, 329.

15. 24 F. (2d) 910 (C. C. A. 9th, 1928).

16. *Id.* at 913.

17. In *Levine v. United States*, 79 F. (2d) 364 (C. C. A. 9th, 1935) the court expressly refused to decide the point, but upheld the withdrawal of a "neutralized" government witness, on the ground that defendant had not properly asserted his right to cross-examine. There may be tendency to confuse the procedure of the district court in the principal case with the rule that where there is no evidence supporting a cause of action or a prosecution other than extra-judicial statements, the trial court may dismiss the action or direct a verdict for defendant. *MacLachlan v. Perry*, 68 F. (2d) 769, 772 (App. D. C. 1934); *cf. Bernhard v. Chicago, B. & Q. R. R.*, 132 Neb. 346, 352, 272 N. W. 209, 212 (1937), *cert. denied*, 302 U. S. 685 (1937); *Largin v. State*, 37 Tex. Cr. App. 574, 575, 40 S. W. 280 (1897).

18. *United States v. Michener*, 152 F. (2d) 880, 884-5 (C. C. A. 3d, 1945). See notes 4 and 6 *supra*.

19. *United States v. Michener*, 152 F. (2d) 880, 884 (C. C. A. 3d, 1945). The fact that a party may make a witness his own is no basis for denial of the right of cross-examination. *Resurrection Gold Mining Co. v. Fortune Gold Mining Co.*, 129 Fed. 668, 676 (C. C. A. 8th, 1904).

20. *United States v. Michener*, 152 F. (2d) 880, 884 (C. C. A. 3d, 1945). This is an opportunity which a witness ordinarily will not be denied. *Southern Transportation Co. v. Ashford*, 48 F. (2d) 191, 192 (C. C. A. 5th, 1931); *Meadors v. Commonwealth*, 281 Ky. 622, 626, 136 S. W. (2d) 1066, 1068 (1940); *Quartz v. Pittsburgh*, 340 Pa. 277, 279, 16 A. (2d) 400, 401 (1940). See 3 WIGMORE § 737 n. 1. Yet it might well be asked whether the extent to which such an opportunity will be granted should not be discretionary with the court. At the trial in the principal case, after witness Miller had been confronted with a contradictory written statement, he endeavored, according to appellant himself, "for pages, thereafter . . . to explain that he had not fully understood the contents of the statement, that it had been signed in a moment of great nervous tension, and that his present testimony was correct." Brief for Appellant, p. 59. It would seem that the witness here had adequate opportunity to explain, and that appellant could not be heard to complain. See *Di Carlo v.*

It would appear therefore that reversal by the appellate court was justifiable in order to rectify a procedure unfair to the defendant. Yet the decision on appeal is not without its unfortunate consequences: the litigants have been subjected to a costly and time-consuming appeal; the jury will, on new trial, be exposed to a mass of conflicting testimony, part of which they will be instructed to consider only in the light of the credibility of the witness and not as substantive evidence. It seems unlikely that such an instruction is effectually heeded.²¹ Once the witness is on the stand it would seem preferable to let extra-judicial statements come in for whatever they may be worth so long as the declarant is present, and to rely on impeachment and cross-examination to provide the jury with data to test the weight of the witness' testimony.²² The net result of the principal case serves but to point up the difficulty of giving lip service to outmoded rules of evidence and at the same time attempting to dispense substantial justice; neither trial nor appellate court has successfully bridged the gap.

The original basis for the rule against impeaching one's own witness—that a party "vouched" for all those who testified in his favor—is an anachronism today,²³ and the objection to giving substantive effect to a witness' extra-judicial statements on grounds of hearsay would seem to have little validity when the declarant is on the stand and available for cross-examination.²⁴ The evils flowing from perpetuation of the rule, on the other

United States, 6 F. (2d) 364, 368 (C. C. A. 2d, 1925), *cert. denied*, 268 U. S. 706 (1925) ("The latitude to be allowed in the examination of a [recalcitrant] witness is wholly within the discretion of the trial judge."); *Brusletten v. Relyea*, 207 Minn. 375, 376-7, 291 N. W. 608, 609 (1940).

21. *Medlin v. County Board of Education*, 167 N. C. 239, 241, 83 S. E. 483, 484 (1914). But see *Wright v. Beckett*, 1 M. & Rob. 414, 419, 174 Eng. Rep. 143, 144-5 (C. P. 1833).

22. See note 24 *infra*.

23. The basis for the rule goes back to the time when witnesses were compurgators or "oath-helpers." See *Crago v. State*, 28 Wyo. 215, 220-4, 202 Pac. 1099, 1100-3 (1922); 3 WIGMORE § 896; Ladd, *supra* note 1, at 69-76. The other rationalizations for the rule—that a party is bound by his witness' statements and that he guarantees his general credibility—grew out of the ancient conception of "vouching" and appear equally without justification today. 3 WIGMORE §§ 897-8; Ladd, *supra* note 1, at 76-88. But see *Hernandez v. State*, 22 So. (2d) 781, 783 (Fla. 1945) ("Mr. Farrior put him on and he vouches for him.") The real reluctance of the courts to abandon the rule completely seems to stem from a vague feeling that a party ought not to have the means at his disposal to coerce his witness, but this has been described as "speculative," "of trifling practical weight," and protecting only "the disreputable and shifty witness." 3 WIGMORE § 899; see Ladd, *supra* note 1, at 84-5. See also the horrors paraded in *Sturgis v. State*, 2 Okla. Cr. 362, 391-2, 102 Pac. 57, 68-9 (1909).

24. To meet the qualifications of the hearsay rule, the statement must be made under oath and subject to cross-examination. See 5 WIGMORE § 1362. For this reason a witness' extra-judicial assertion is considered inadmissible as substantive evidence. *Hernandez v. State*, 22 So. (2d) 781 (Fla. 1945). Yet since it may come in for purposes of impeachment, it is questionable whether it should be classified as pure hearsay. See 3 WIGMORE § 1018; *State v. D'Adame*, 84 N. J. 386, 396, 86 Atl. 414, 418 (1913). There would seem no valid reason for refusing to give it substantive effect, since the witness whose prior contradiction is being introduced is under oath and available for cross-examination by counsel, confronta-

hand, would seem to vitiate completely any vestige of its utility: excluding relevant evidence,²⁵ obscuring the merits, confounding the jury,²³ unduly curbing the discretion of the judge,²⁷ delaying the trial,²³ and inordinately

tion by the party opponent, and scrutiny by the jury. See *Di Carlo v. United States*, 6 F. (2d) 364, 368 (C. C. A. 2d, 1925), *cert. denied*, 268 U. S. 706 (1925); *State v. Jolly*, 112 Mont. 352, 355, 116 P. (2d) 686, 688 (1941); 3 WIGMORE § 1018; Ladd, *supra* note 1, at 86-8; MOD. CODE OF EVID. (1942) Rule 106(1).

A few courts have allowed prior statements to be used as substantive evidence but the implications of their decisions have unfortunately not been expanded. In the federal courts the leading case is *Di Carlo v. United States*, 6 F. (2d) 364 (C. C. A. 2d, 1925), *cert. denied*, 268 U. S. 706 (1925), wherein Judge Learned Hand said, at 368: "If, from all that the jury see of a witness, they conclude that what he says now is not the truth, but what he said before, they are nonetheless deciding from what they see and hear of that person and in court." The federal courts in recent cases, however, have so limited the decision of the *Di Carlo* case, though not always without reluctance, as to leave little of its vitality: see e.g., *United States v. Block*, 88 F. (2d) 618, 620 (C. C. A. 2d, 1937), *cert. denied*, 301 U. S. 690 (1937); *United States v. Graham*, 102 F. (2d) 436, 442 (C. C. A. 2d, 1939), *cert. denied*, 307 U. S. 643 (1939); *Ellis v. United States*, 138 F. (2d) 612, 616-21 (C. C. A. 8th, 1943). But see *Chicago, St. P., Minn., & O. Ry. v. Kulp*, 102 F. (2d) 352, 358 (C. C. A. 8th, 1939); *United States v. Biener*, 52 F. Supp. 54, 56 (E. D. Pa. 1943).

Nor have efforts by state courts to depart from the doctrine been eminently successful. The Supreme Court of Missouri in *Pulitzer v. Chapman*, 337 Mo. 298, 320, 85 S. W. (2d) 400, 411 (1935) allowed the introduction of a prior inconsistent sworn deposition as substantive evidence, and this was extended in *O'Malley v. City of St. Louis*, 343 Mo. 14, 21, 119 S. W. (2d) 785, 787 (1938) to a previous written contradictory statement by party plaintiff on the precedent of the *Pulitzer* case. In subsequent decisions, however, inferior Missouri courts have refused to broaden the *Pulitzer* and *O'Malley* decisions. See *Woolfe v. Connecticut Mutual Life Ins. Co.*, 112 S. W. (2d) 865, 874 (Mo. App. 1938); *Short v. White*, 133 S. W. (2d) 1039, 1042 (Mo. App. 1939); *Kennard v. McCrory*, 136 S. W. (2d) 710, 715 (Mo. App. 1940); *Zamora v. Woodmen of the World Life Ins. Soc.*, 157 S. W. (2d) 601, 606 (Mo. App. 1942). And see Hertzman, *Prior Inconsistent Statements As Substantive Evidence* (1941) 12 Mo. BAR J. 83.

25. "There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court." *Di Carlo v. United States*, 6 F. (2d) 364, 368 (C. C. A. 2d, 1925), *cert. denied*, 268 U. S. 706 (1925). Where a party is apprised that a witness may change his story, he may hesitate to call the witness at all, lest the court find no bona fide "surprise" and deny admission to the prior statement in toto. See, e.g., *Chalmette Petroleum Corp. v. Chalmette Oil Distributing Co.*, 143 F. (2d) 826 (C. C. A. 5th, 1944), where neither party would risk calling the witness; the court suggested that, in such a case, the judge should call him and allow both parties to cross-examine and impeach. See also Ladd, *supra* note 1, at 86; Fuller, *Impeachment of Own Witness* [1945] WIS. L. REV. 434, 438.

26. It is doubtful whether the jury can be expected to comprehend the legalistic distinction between impeaching testimony and substantive evidence. *Medlin v. County Board of Education*, 167 N. C. 239, 241, 83 S. E. 483, 484 (1914). See *Pulitzer v. Chapman*, 337 Mo. 298, 319, 85 S. W. (2d) 400, 411 (1935). The distinction is in substance no different from that in which a witness contradicts his direct testimony on cross-examination. The situation becomes more confused when the witness admits part of the prior statement and denies the rest. See *Perry v. F. Byrd*, 280 Mich. 580, 582, 274 N. W. 335, 336 (1937) and cases cited note 6 *supra*.

27. The trial court subjects itself to reversal when it determines what constitutes "surprise," "hostility," "lapse of memory," "prejudice," etc. preliminary to an attempt by the

emphasizing the importance of courtroom tactics and stratagems of clever counsel.²⁹ To promote a just and expeditious disposition of a case on the merits is the *raison d'être* for a rule of evidence; when it ceases to serve that function, it should be abolished.³⁰

party to impeach his witness (see cases cited note 2 *supra*) or undertakes to instruct the jury as to the limited effect of impeaching testimony (see note 5 *supra*). The better view makes such determinations entirely discretionary with the judge. *London Guarantee & Accident Co. v. Woelfle*, 83 F. (2d) 325, 334 (C. C. A. 8th, 1936). Compare the early opinion of Lord Abbott quoted in *Clarke v. Saffrey, Ry. & Mood*, 127, 171 Eng. Rep. R. 966, 967 (1824). Abolishing all vestiges of the rule, on the other hand, would not expose the trial court to such needless reversals. See MOD. CODE OF EVID. (1942) Rules 106, 303.

28. It would seem desirable to eliminate the time-consuming practices concomitant with preservation of the rule: argument by counsel whether the party was "surprised" or "entrapped," whether the testimony was "damaging," whether the witness was "hostile," and whether a proper foundation for impeachment had been laid.

29. Much would seem to depend on the ingenuity of counsel in making a sufficient showing of surprise or entrapment. See note 2 *supra*. And see *State v. Baltimore & O. R. Co.*, 117 Md. 280, 284, 83 Atl. 166, 167 (1912); see also the foreword by Morgan, MOD. CODE OF EVID. (1942) 10-1.

30. Opinion is virtually unanimous among commentators advocating complete abandonment of the rule. See 3 WIGMORE §§ 905, 1018; BENTHAM, A TREATISE ON JUDICIAL EVIDENCE (1825) 103-4; Callahan and Ferguson, *supra* note 2, at 201-4; Ladd, *supra* note 1, at 94-6; MOD. CODE OF EVID. (1942) Rule 106 (1); Moidel, *Impeaching One's own Witness* (1940) 24 J. AM. JUD. SOC. 85, 87; MORGAN and others, THE LAW OF EVIDENCE (1927) xvi n. 1; Morgan, *The Jury and the Exclusionary Rules of Evidence* (1937) 4 U. OF CHI. L. REV. 247, 257; Schatz, *Impeachment of One's Own Witness: Present New York Law and Proposed Changes* (1942) 27 CORN. L. Q. 389-94.