

Corporations Bearer Shares in the United States Civil Law Contrast Connecticut and Montana Statutes Authorizing Issuance

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NOTES

Corporations: Bearer Shares in the United States: Civil Law Contrast: Connecticut and Montana Statutes Authorizing Issuance.—In 1961 the Connecticut Legislature amended the Connecticut Stock Corporation Act to authorize the issuance of share certificates in bearer form.¹ Connecticut is only the second American jurisdiction expressly to authorize the issuance of bearer shares.²

Although bearer shares are common in Europe, South America, and many other civil law countries, corporation laws in the United States generally provide for only registered equity shares. The Uniform Stock Transfer Act, the Rules of the New York Stock Exchange,³ and the corporation statutes of most jurisdictions clearly do not contemplate bearer shares. Consequently, the interjection of bearer shares into the American corporation structure raises many problems as to (1) the voting, dividend, and liquidation rights, and possible liabilities of shareholders, (2) the transferability of such shares, and (3) the traditional right of the corporation to rely on record ownership in determining its shareholders for various corporate purposes. The anonymity of bearer shares also creates difficulties in the assessment and collection of income, capital gains, inheritance, and share transfer taxes. Securities regulations,⁴ antitrust and alien property laws, and other statutes and regulations are more difficult to enforce when bearer shares are issued. Management control *via* proxy machinery is harder to maintain.⁵

American corporation law is already familiar with many of the problems which accompany bearer shares since the traditional bearer bond creates somewhat similar difficulties.⁶ The analogy to bearer shares is even more complete in those states which expressly authorize the grant of voting and other shareholder rights to bondholders.⁷ The problems created by voting debt securities

¹ Conn. Pub. Act 327, § 51 (1961), amending Conn. Stock Corp. Law (enacted 1959, effective Jan. 1, 1961), Conn. Gen. Stat. Ann. § 33-345 (1962).

² The only other statute expressly authorizing the issuance of bearer shares is the Montana corporation statute. Mont. Rev. Codes Ann. §§ 15-608 to 15-613 (1947). See text accompanying notes 24-25, *infra*.

³ See 2 Christy, *Transfer of Stock* A:295-96 (3d ed. 1962).

⁴ For example, "insider trading" in violation of the Securities and Exchange Act of 1934, section 16b, 48 Stat. 896 (1934), 15 U.S.C. § 78p(b) (1959), or violation of SEC Rule X-10-b-5 would be difficult to detect. Violations of section 7 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 18 (1959) might also be less susceptible of discovery.

⁵ See Berle & Means, *The Modern Corporation and Private Property* 87-88 (1933). Cf. Schmid, "Corporate Control in Switzerland," 6 *Am. J. Comp. L.* 27, 29 (1957).

⁶ Bearer bonds are transferable by delivery and negotiable under the Uniform Negotiable Instruments Act when they meet the formal requirements of a negotiable instrument set forth in that act. See Uniform Negotiable Instruments Act §§ 1-4. Under the functional definition of "security" in the Uniform Commercial Code, bearer bonds are negotiable instruments. See Uniform Commercial Code §§ 8-102, 8-105. Another statute which imparts negotiability to bearer bonds whether or not they meet the formal requirements of the Uniform Negotiable Instruments Law is N.Y. Pers. Prop. Law §§ 260-62.

See Steffen & Russell, "Registered Bonds and Negotiability," 47 *Harv. L. Rev.* 741 (1934), wherein the authors state: "Many members of the unregistered bond family . . . have, in a series of decisions and with the aid of some legislation, been accorded full negotiability." See also Comment, 40 *Yale L.J.* 261 (1930). For a history of the negotiability of corporate bonds, see Beutel's *Brannan, Negotiable Instruments Law* 256-59 (7th ed. 1948) and Steffen & Russell, "The Negotiability of Corporate Bonds," 41 *Yale L.J.* 799 (1932).

⁷ The corporation laws of eleven states presently allow a corporation to issue debt securities with voting rights if authorized by the articles of incorporation. See Cal. Corp. Code

are similar to, but in many respects different from, those created by the bearer share.⁸

Equity Shares in the United States: Civil Law Contrast

The bearer share is the typical equity security in most European and many South American countries.⁹ Authority to issue bearer shares is usually limited

§ 306; Del. Code Ann. tit. 8, § 221 (1953); Kan. Gen. Stat. Ann. § 17-3311 (1949); La. Rev. Stat. §§ 12:32(H), 12:38(F) (1950); Md. Ann. Code art. 23, § 18(8) (1957); Mich. Stat. Ann. § 21.36 (1937); Minn. Stat. Ann. §§ 301.26(12), 301.35(2), 301.35(3) (1947); Neb. Rev. Stat. § 21-166 (1954); Okla. Stat. Ann. tit. 18, §§ 1.67, 1.71(c) (1953); Pa. Stat. Ann. tit. 15, § 2852-317 (1958); Va. Code Ann. § 13.1-32 (Supp. 1962). See also N.Y. Bus. Corp. Law § 518(b) (effective Sept. 1, 1963). The present N.Y. Stock Corp. Law § 97 provides that a reorganization plan or agreement may stipulate that bondholders may have voting rights. The provision for voting rights may be inserted in the certificate of reorganization. See N.Y. Stock Corp. Law § 96.

Some of these statutes allow a corporation to give voting rights to the holders of "other obligations" or "creditors" of the corporation as well as to the holders of debt securities. See Cal. Corp. Code § 306; La. Rev. Stat. § 12:32(H) (1950); Md. Ann. Code art. 23, § 18(8) (1957); Minn. Stat. Ann. § 301.26 (1947); Okla. Stat. Ann. tit. 18, § 1.67 (1953). For definition of "bonds," see N.Y. Bus. Corp. Law § 102(a)(1) ("Bonds" includes secured and unsecured bonds, debentures, and notes.).

Some statutes also give certain debt security holders other rights of shareholders if appropriate provision is made in the articles of incorporation or by-laws of the corporation as the statute may require. See Cal. Corp. Code § 306; Del. Code Ann. tit. 8, § 221 (1953); Kan. Gen. Stat. Ann. § 17-3311 (1949); La. Rev. Stat. § 12:38(F) (1950); Md. Ann. Code art. 23, § 18(8) (1957); Mich. Stat. Ann. § 21.36 (1937); Minn. Stat. Ann. §§ 301.35(2), 301.35(3) (1947); Neb. Rev. Stat. § 21.166 (1954); Okla. Stat. Ann. tit. 18, § 1.71(c) (1953); Pa. Stat. Ann. tit. 15, § 2852-317 (1958).

See Tracy, "The Problem of Granting Voting Rights to Bondholders," 2 U. Chi. L. Rev. 208 (1935). Professor Tracy regards the grant of voting rights to debt security holders chiefly as a means of protecting such holders upon default by the corporation. The accomplishment of this end can be assured by conditioning the existence of voting rights upon a default by the corporation. Certain creditors, however, may insist upon representation on the issuing corporation's board of directors regardless of default.

Of course, if the issuing corporation attached conditions precedent to the vesting of voting rights in the debt security holders, there would be no problem until the conditions were met. For example, if a corporation provided in its articles that certain debt securities would have voting rights of the corporation failed to meet interest or principal payments, the security holder's voting rights would be inchoate until such default. The corporation could further obviate the problems of notice by requiring that upon the occurrence of any conditions precedent to the vesting of voting rights in debt security holders, the bearer bond or debenture holders must register their holdings in order to exercise their voting rights. See Tracy, *supra* note 7, at 216 n.22.

Quaere as to management's fiduciary duties and shareholders' pre-emptive rights with respect to the issuance of debt securities with voting rights from the time of issuance. Cf. Henn, *Corporations and Other Business Enterprises* § 176 (1961).

⁸ One of the common problems of bearer shares and bearer debt securities is that of notice. For example, many modern trust indentures confer voting rights on indenture security holders with respect to the indenture and the trustee's administration. Presumably notice to bearer holders is given by publication of any meetings. See Henn, *supra* note 7, at p. 221. Corporations presently notify bearer bondholders by publication of the corporation's exercise of redemption rights. See Henn, *supra* note 7, at p. 230. Notice to bearer shareholders of meetings, etc., could also be given by publication. See also note 37, *infra*, and accompanying text.

⁹ An exception is Italy where bearer shares cannot presently be issued. The Mussolini government required the registration of all shares. Post-war Italian governments have retained the requirement of compulsory registration, "presumably for the aid which they give to enforcement of taxes, exchange control, and other legislation." 2 *American Enterprise in the European Common Market* 131 (Stein & Nicholson, eds., Michigan Legal Studies 1960) [hereinafter cited as 2 *American Enterprise*].

In England, § 83 of the Companies Act of 1948, 11 & 12 Geo. 6, c. 38, provides that a company may, if authorized in its articles, issue "share warrants" payable to bearer in respect of any fully paid share. These negotiable warrants entitle the holder to demand and receive

to public stock companies.¹⁰ Shares in bearer form are usually issued only when fully paid¹¹ and are freely negotiated by delivery.¹² Although many advantages flow from the anonymity and mobility of bearer shares, American corporation laws have almost unanimously failed to utilize this device. Professor Schlesinger suggests that this widespread neglect is attributable to "a number of historical, political, social, and economic factors."¹³

In the United States, twenty-five states and the District of Columbia unequivocally prohibit the issuance of bearer shares by requiring that the share certificate state upon its face the name of the person to whom issued.¹⁴

registered shares upon the surrender of the warrant. Private companies may not issue share warrants and their issuance by public companies has been limited since the Exchange Control Act of 1947, 10 & 11 Geo. 6, c. 14. Section 10 of that act forbids the issuance of bearer securities without the consent of the treasury which is rarely given. All bearer securities issued prior to the act and held in the United Kingdom, or on behalf of a resident of the United Kingdom, must be deposited in an authorized depository to which all dividends are paid. This system enables the treasury to maintain strict controls over "share warrants." Gower, *Modern Company Law* 359-61 (2d ed. 1957); 2 *Inst. on Private Investment Abroad* 97 (Southwestern Legal Foundation 1960). See notes 68-73 *infra*, and accompanying text.

¹⁰ Limited liability companies and English private companies cannot issue bearer securities. Examples of European public stock companies are:

1. public company (England)
2. société anonyme (S.A.) (France, Belgium, Luxembourg)
3. Aktiengesellschaft (A.G.) (Germany)

The bearer shares issued by these companies are denominated respectively:

1. share warrants
2. action au porteur
3. Inhaberaktie

¹¹ 2 *American Enterprise*, *supra* note 9, at 130. See note 25 *infra* and accompanying text.

¹² 2 *American Enterprise*, *supra* note 9, at 129-30; Schlesinger, *Comparative Law* 432 (2d ed. 1959).

¹³ Schlesinger, *supra* note 12, at 442-43. Professor Schlesinger notes in analyzing the presence of bearer shares in continental Europe and their relative absence in the United States:

- (1) The creation of a firm statutory basis for bearer shares by the adoption of such securities in the continental Codes of Commerce of the 19th century along with the traditional institutions of the law merchant.
- (2) The absence of any legal tradition or business practice favoring bearer shares in the common law countries.
- (3) The freedom of the common law countries from invading armies or political upheaval, therefore less of a demand for this mobile form of wealth.
- (4) The corporate management group which has more influence in the formulation of corporate charters and laws in the United States would be opposed to bearer securities because of the increased difficulty in proxy solicitation.
- (5) The traditionally dominant role of the European banks as custodians of bearer shares exerts a pressure for their retention whereas transfer agents in the United States seek to preserve the registered security system.

See also Eder, "Company Law in Latin America" (pts. 1-2), 27 *Notre Dame Law* 1, 223, 230-32 (1952).

¹⁴ Ala. Code tit. 10, § 21(39) (Supp. 1959); Alaska Comp. Laws Ann. § 36-2A-29 (Supp. 1958); Ark. Stat. Ann. § 64-218 (1957); Cal. Corp. Code § 2401 Ann.; Colo. Rev. Stat. Ann. § 31-30-8(3) (Supp. 1960); D.C. Code Ann. § 29-908g(d) (Supp. 1961); Hawaii Rev. Laws § 172-41 (1955); Idaho Code Ann. § 30-119 (1948); Ill. Ann. Stat. ch. 32 § 157.21 (Smith-Hurd, Supp. 1961); Ind. Ann. Stat. § 25-205(f) (1960); Iowa Code Ann. § 496 A. 22 (1962); Kan. Gen. Stat. Ann. § 17-3215 (1949); Ky. Rev. Stat. § 271.165(2) (1956); La. Rev. Stat. § 12:14 (Supp. 1960); Minn. Stat. Ann. §§ 301.02(8), 301.18(5) (1947); N.C. Gen. Stat. § 55-57 (1960); N.D. Rev. Code § 10-1920 (Supp. 1957); Ohio Rev. Code Ann. § 1701.25 (Page Supp. 1961); Ore. Rev. Stat. § 57.121(3) (1961); Pa. Stat. Ann. tit. 15, § 2852-607 (1958); Tex. Bus. Corp. Act. art. 2.19 (1956); Utah Code Ann. § 16-10-21 (1962); Va. Code Ann. § 13.1-20 (Supp. 1960); Wash. Rev. Code Ann. § 23.01.140 (1961); Wis. Stat. Ann. § 180.18 (1957); Wyo. Laws 1961 ch. 85, § 20. See also N.Y. Bus. Corp. Law § 508(c) (2) (effective Sept. 1, 1963). Cf. N.Y. Stock Corp. Law § 65.

Twenty-one additional states have statutes relating to the form of share certificates which do not expressly require that they state the name of the shareholder.¹⁵ In most of these states, however, other sections of the corporation law indicate that only registered shares were contemplated.¹⁶ The majority of the states in this group presently have the Uniform Stock Transfer Act which hypothesizes the existence of registered shares only.¹⁷ Massachusetts, New Hampshire, New Mexico, and Rhode Island are presently under the Uniform Commercial Code which defines "security" in article 8 to include bearer shares.¹⁸ New York and Georgia have provisions supplementing their Uniform Stock Transfer Acts to provide for the transfer of bearer shares.¹⁹ Neither the Uniform Commercial Code nor the provisions of the New York Personal Property Law and its Georgia counterpart, however, are thought to authorize the issuance of bearer shares. They only govern the negotiability or transferability of bearer shares which may have been issued by a corporation authorized by law to do so.²⁰

¹⁵ Del. Code Ann. tit. 8, § 158 (1953); Fla. Stat. Ann. § 608.41 (1956); Ga. Code Ann. § 22-1834 (Supp. 1961); Me. Rev. Stat. Ann. ch. 53, § 50 (1954); Md. Ann. Code art. 23, § 23 (1957); Mass. Ann. Laws ch. 156, § 33 (1957); Mich. Stat. Ann. § 21.25 (Supp. 1961); Mo. Ann. Stat. § 351.295 (1952); Neb. Rev. Stat. § 21-101(3) (1954); Nev. Rev. Stat. § 78.235 (1957); N.H. Rev. Stat. Ann. § 294:51 (1955); N.J. Rev. Stat. § 14:8-11 (1937); N.M. Stat. Ann. § 51-3-1 (1953); N.Y. Stock Corp. Law § 65 (Cf. N.Y. Bus. Corp. Law § 65); Okla. Stat. Ann. tit. 18, § 1.113 (1953); R.I. Gen. Laws Ann. §§ 7-3-14, 7-3-15 (1957); S.C. Code § 12-241 (1952); S.D. Code § 11.0320 (Supp. 1960); Tenn. Code Ann. § 48-301 (1955); Vt. Stat. Ann. tit. 11, § 262 (1958); W. Va. Code Ann. § 3049 (1961).

¹⁶ See Del. Code Ann. tit. 8, §§ 183, 219 (1953); Fla. Stat. Ann. § 608.39 (1956); Ga. Code Ann. §§ 22-1858, 22-1862, 22-1863 (Supp. 1961); Me. Rev. Stat. Ann. ch. 53, § 34 (1954); Md. Ann. Code art. 23, §§ 40, 43(2), 50 (1957); Mass. Ann. Laws ch. 155, § 22 (1959); Mich. Stat. Ann. § 21.35 (Supp. 1961); Mo. Ann. Stat. § 351.215 (1952); Neb. Rev. Stat. § 21-101(3) (1954); Nev. Rev. Stat. § 78.105 (1957); N.H. Rev. Stat. Ann. § 294:85a (Supp. 1961); N.J. Rev. Stat. § 14:5-1 (1937); N.M. Stat. Ann. § 51-2-27 (1953); N.Y. Stock Corp. Law §§ 47, 62; Okla. Stat. Ann. tit. 18, §§ 1.2(20), 1.16(b)(4), 1.58, 1.59 (1953); R.I. Gen. Laws Ann. § 7-3-17 (1957); S.D. Code § 11.0802 (1939); Tenn. Code Ann. § 48-308 (1955); W. Va. Code Ann. § 3050 (1961).

All of these statutes are oriented around the registered share without consideration of the special characteristics of bearer shares.

¹⁷ Del. Code Ann. tit. 8, §§ 181-202 (1953); Fla. Stat. Ann. § 614.01 to -.24 (1956); Me. Rev. Stat. Ann. ch. 53, §§ 51-72 (1954); Mich. Stat. Ann. §§ 19.331 to -.355 (1958); Mo. Ann. Stat. §§ 403.010 to -.240 (1952); Neb. Rev. Stat. §§ 21-201 to -.224 (1954); Nev. Rev. Stat. §§ 79.010 to -.240 (1957); N.J. Rev. Stat. §§ 14:8-23 to -.46 (1937); Okla. Stat. Ann. tit. 18 §§ 1.85 to -.97, 1.103 to -.109 (1953); S.C. Code §§ 12-301 to -.324 (1952); S.D. Code §§ 11.0501 to -.0524 (1939); Tenn. Code Ann. §§ 48-1001 to -.1024 (1955); Vt. Stat. Ann. tit. 11, §§ 301-22 (1958); W. Va. Code Ann. §§ 3053-74 (1961).

¹⁸ Uniform Commercial Code § 8-102(1)(a)(i). Quere as to the effect of the Code requirement that a "security" be of a "type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment." (§ 8-102(1)(a)(ii)). See also §§ 8-304(1), 8-310.

New Jersey (effective Jan. 1, 1963), and Oklahoma (effective Dec. 31, 1962) have also enacted the Code.

¹⁹ N.Y. Pers. Prop. Law §§ 186 to 186-c; Ga. Code Ann. §§ 22-1902, 22-1920, 22-1921 (Supp. 1961).

²⁰ The comment to § 8-101 of the Uniform Commercial Code states: "The Article [article 8] is neither a Blue Sky Law nor a corporation code. It may be likened rather to a negotiable instruments law dealing with securities." See Schlesinger, *supra* note 12, at 442 n.4: Bearer shares are expressly mentioned in Secs. 186-186-c of the New York Personal Property Law; but these provisions deal only with the transfer of bearer shares issued elsewhere, and do not authorize the issuance of such shares by New York corporations. The background of the legislative enactment of §§ 186 to 186-c of the N.Y. Pers. Prop. Law supports Professor Schlesinger's interpretation. These sections embodied one of the Hofstadter Acts which were adopted to overcome the rule of *Manhattan Co. v. Morgan*, 242

Arizona and Mississippi do not have provisions in their corporation laws defining the form of share certificates, but both have adopted the Uniform Stock Transfer Act which presumes the existence of registered shares²¹ and both states have provisions in their respective corporation statutes indicating that only registered shares are contemplated.²²

Montana and Connecticut are the only states whose corporation laws expressly authorize the issuance of bearer shares by domestic corporations.²³

Montana and Connecticut Bearer Share Statutes

Bearer shares by nature require special treatment from that traditionally accorded registered shares in the United States. Special provisions are necessary relative to transferability, giving notice, exercise of voting rights, and paying dividends and other distributions. The Montana and Connecticut statutes solve these problems in entirely different ways.

Montana. The Montana bearer share provisions, effective since 1897, authorize mining corporations to issue this type of security upon approval by shareholders holding three-fourths of the capital stock.²⁴ Shares must also be fully paid and nonassessable to be issued in bearer form.²⁵ Section 15-608 of

N.Y. 38, 150 N.E. 594 (1926). The Manhattan case held that negotiability was determined by the formal requisites of the New York Negotiable Instr. Law. The bearer certificate in the Manhattan case was not an equity security but embodied an obligation promissory in nature. Judge Cardozo stated in a dictum at 47-48, 150 N.E. 597:

We assume, though there is no occasion to determine, that negotiable instruments of the first class—i.e., those representing interests in property—are not within the purview of the statute, [Negotiable Instr. Act] however broad its title.

Sections 186 to 186-c of the N.Y. Pers. Prop. Law go beyond the facts of the Manhattan case which involved a promissory obligation, because equity securities are unquestionably outside the Negotiable Instr. Law and therefore presumably still governed by the law merchant (N.Y. Negotiable Instr. Law § 7) which recognizes the negotiability of bearer shares. The enactment of §§ 186 to 186-c, however, resolves any doubt as to the negotiability of bearer shares by codifying the law merchant. Sections 260-62 of the N.Y. Pers. Prop. Law are the provisions of the Hofstadter Acts more directly related to the facts of the Manhattan case.

²¹ Ariz. Rev. Stat. Ann. §§ 10-231 to -254 (1956); Miss. Code Ann. §§ 5359-01 to -26 (1957).

²² Ariz. Rev. Stat. Ann. § 10-175A (Supp. 1961); Miss. Code Ann. § 5332 (1957).

²³ Conn. Gen. Stat. Ann. § 33-345(c) (1962); Mont. Rev. Codes Ann. §§ 15-608 to -613 (1947).

²⁴ Mont. Rev. Codes Ann. §§ 15-608 to -613 (1947). The reasons for Montana's limitation of bearer shares to mining corporations are not clear. Perhaps one reason is the legislative recognition of the attractiveness of such shares to potential investors (especially European capitalists) and the desire to increase the capital investment in Montana's most important economic pursuit. See note 45 *infra*. Surprisingly, however, there is no literature or reported cases on the Montana bearer share statute and no available evidence as to how widely bearer shares are actually issued by Montana mining corporations. See note 28 *infra*.

An interesting contrast is found in the French treatment of mining companies. Although French stock companies may generally issue bearer shares, the charter of a mining stock company must conform to the model charter published by the Ministry of Public Works (Ministère des Travaux Publics) which requires that all shares be in registered form. Mining companies in France are largely subject to government control. The issuance of shares in registered form facilitates government supervision. See Church, *Business Associations under French Law* § 435 (1960).

²⁵ The requirement that shares be issued in registered form until fully paid is standard in almost all countries authorizing bearer shares. See 2 *American Enterprise*, *supra* note 9, at 131, citing:

(1) Belgium: C. Com. I, IX, art. 46.

(2) France: Act of July 24, 1867, art. 3, amended by Decree of Dec. 7, 1954.

(3) Germany: AktG § 10(2).

the Montana Revised Codes further provides that subject to the provisions of the by-laws of the issuing corporation and to the corporation law of the State, the bearer is entitled "to the ownership of the same upon delivery and without transfer by indorsement or on the books of such corporation." Thus full negotiability is given bearer shares outside the scope of the Montana Negotiable Instruments Law.²⁶ This section also permits the corporation to rely upon the bearer's ownership for all purposes "except that of holding office."²⁷

The remaining sections of the Montana corporation law relating to bearer shares are quite analogous to European laws dealing with such securities. Section 15-609 provides for a "foreign registry" deposit system by which bearer shares may be voted by proxy. The statute authorizes issuing corporations to establish a registry in other states and foreign countries where holders of bearer certificates reside.²⁸ Shareholders are allowed to deposit their certificates for voting purposes. No provision is made for the establishment of a registry in Montana, evidently on the assumption that domestic shareholders may present their shares for voting purposes. Upon deposit of his shares the foreign shareholder may, in a writing signed by the agent of the registry, appoint some person as proxy to vote the shares at the next meeting.²⁹ Prior to the shareholder meeting, the agent must certify to the corporation the number of shares deposited, their date of issue and serial numbers, and by whom and when the certificates were deposited. Ordinarily a European corporation's articles of

(4) Luxembourg: Company Law, art. 43.

(5) Netherlands: W.K. art. 38c.

See also Crawford, "The Brazilian Business Corporation," 11 Tul. L. Rev. 59, 72 (1936); Eder, *supra* note 13, at 223, 231; 2 Inst. on Private Investment Abroad 433 (Southwestern Legal Foundation 1960) (Mexico). The latter indicates that a few Latin American countries permit the issuance of a bearer share when 50% of its subscription has been paid. The possibility that the company may issue watered shares still exists despite the statutory requirement that the shares be fully paid and nonassessable.

²⁶ Mont. Rev. Codes Ann. §§ 55-101 to -1706 (1961).

²⁷ Most statutes permit a corporation to rely to a large extent on record ownership. N.Y. Stock Corp. Law § 47 (notice and voting), § 62 (dividends and other distributions). See Henn, *supra* note 7, at 267; Note 45 Cornell L.Q. 111 (1959). Quære, as to whether a corporation would be permitted to rely on the ownership of the possessor of a bearer share in circumstances where it is on notice, actual or constructive, that the bearer is not the true owner. See Uniform Commercial Code § 8-403 (issuer's limited duty of inquiry).

European bearer shares are also transferred by delivery alone.

²⁸ This statute may provide a clue as to why Montana authorized bearer shares in 1897. The provision for the establishment of registries in foreign countries, as well as other states, suggests that one of the reasons for the statute was to encourage foreign investment. European capital played an important investment role in the pre-World War I period. The use of registered shares tends to discourage investment from continental Europe. See 2 American Enterprise, *supra* note 9, at 131; Moreau, French Corporations 14 (No. 1 Practical Studies in Foreign Law, 1956). In 1897 when the bearer share statutes were passed Montana's copper mining industry was just being born. Marcus Daly first exploited Montana's copper resources in 1880. The Anaconda Company was incorporated in Montana as the Anaconda Copper Mining Company in 1895. See Poor's Industrial Survey 1832 (1960). There was certainly a great potential for capital investment in 1897 which the newly organized mining companies may have encouraged.

²⁹ The deposit system may also be an effective device for management control over proxy machinery. Control problems are inherent in the issuance of bearer shares because management loses contact with the shareholder. See Schmid, *supra* note 5 at 27, 29 (1957). If the corporation's depository agent were to encourage the depository shareholder to give a proxy favorable to management, a very high degree of control could be retained over the proxy machinery of bearer shares. Moreover, experience has demonstrated that European bearer shareholder disinterestedness works in favor of the depositor banks which exercise the proxies obtained. See Schlesinger, *supra* note 12, at 440.

incorporation or by-laws provide for the deposit of bearer shares either at the office of the corporation or at a specified bank at least five days before the shareholder meeting.³⁰ The depositing shareholders are given a receipt which will entitle them to participate at the annual meeting. The shares may also be voted by proxy.³¹

Montana also provides for the voting of bearer shares by "actual production of such bearer certificates at the time of voting"; such presentation is "so far as the corporation is concerned . . . conclusive evidence of the bearer's right to vote or represent the shares . . ."³²

The Montana statute also contains a provision relating to the notification of bearer shareholders of shareholder meetings;³³ all notice to bearer shareholders is deemed waived except where Montana law otherwise requires notice by newspaper publication. Montana, however, requires notice by publication only when the meeting proposes (1) to amend the articles of incorporation,³⁴ (2) to extend corporate existence,³⁵ or (3) to authorize the sale of corporate property.³⁶ The Montana statute waives notice to the bearer shareholder except in these extraordinary circumstances, whereas most European stock companies authorizing bearer shares are required to publish notice of all shareholder meetings.³⁷

Section 15-612 provides for the payment of dividends to holders of bearer certificates. Dividends are payable either upon production of the share certificates or upon the presentation of dividend coupons which may be attached to the share certificate. The coupons are detachable and separately negotiable. The use of detachable coupons to distribute dividends is analogous to the interest coupon of certain debt securities.³⁸ In Europe coupons are commonly

³⁰ Church, *supra* note 24, at p. 417; Moreau, *supra* note 28, at 38.

In addition to the noted method of deposit for voting purposes, France has a semi-voluntary central depository system which facilitates the exercise of voting rights, payment of dividends, and subscription for new issues. The system operates on a clearing house basis. The shareholder may deposit his bearer certificates with a bank or brokerage institution affiliated with the Sicovam corporation (*société interprofessionnelle pour la compensation des valeurs mobilières*). The affiliate will credit the depositor's account with the number of shares deposited and will notify Sicovam which will credit the affiliate's account. Share transfers are accomplished by a simple debit and credit on the accounts of the transferor and transferee respectively. Dividends are paid to Sicovam and then distributed through the clearing system. When the depositor withdraws his shares they are not necessarily the same ones which he deposited. If the shareholder does not want his shares to participate in this clearing process he must expressly so state upon depositing his shares. See Church, *supra* at 291-94. Compare §§ 8-313, 8-320 of the Uniform Commercial Code as enacted in New York.

³¹ Church, *supra* note 24, at p. 417; Moreau, *supra* note 28, at 38; 2 *American Enterprise*, *supra* note 9, at 128.

³² Mont. Rev. Codes Ann. § 15-611 (1947). The by-laws of French corporations usually require that shares be deposited a certain number of days before the meeting. The deposit receipt serves as an admission card to the shareholders' meeting. Church, *supra* note 24, at p. 416; Moreau, *supra* note 28, at 38.

³³ Mont. Rev. Codes Ann. § 15-610 (1947).

³⁴ Mont. Rev. Codes Ann. §§ 15-201 to -204 (1947).

³⁵ Mont. Rev. Codes Ann. §§ 15-215 to -218 (1947).

³⁶ Mont. Rev. Codes Ann. §§ 15-901 to -904 (1947).

³⁷ See, e.g., Church, *supra* note 24, at §§ 343, 344.

³⁸ See Henn, *supra* note 7, at § 155. The form of dividend coupons would differ in certain respects from the interest coupon. Interest coupons usually state on their face the fixed amount due for each interest payment and the date due. Payment of dividends is dependent on the existence of legally available funds, and dividends are declared at the discretion of

used to distribute dividends to bearer share holders. The coupons of European bearer shares are often not even attached to the share certificate.³⁹ The separateness of the coupons demonstrates their individually negotiable character. The European bearer stock certificate is usually accompanied upon issue by a "talon" which entitles the holder to a new set of coupons when the first are exhausted.⁴⁰ Presentation of the European bearer certificate or cancelled dividend coupons is usually required for the exercise of pre-emptive rights or receipt of liquidation payments,⁴¹ and presumably the by-laws of a Montana mining corporation could so provide.⁴²

At the shareholder's request and upon the surrender and cancellation of the certificate, the bearer shareholder may "convert" his bearer shares into registered shares and registered shareholders may "convert" their shares into bearer form under Montana law.⁴³ European share certificates in one form may also be exchanged for the other.⁴⁴

The Montana corporation statute contains quite complete provisions for the authorization of bearer shares. Montana bearer shareholders may vote (in person or by proxy), receive dividends, "convert" their holdings into registered shares, and transfer their interests by mere delivery of the share certificates. The Montana provisions are generally analogous to European laws dealing with this type of security.

The one serious limitation on the authorization of bearer shares in Montana is their restriction to mining corporations.⁴⁵ The Connecticut statute is not restricted as to the nature of the issuing corporation.

Connecticut. Section 33-345 of the Connecticut Stock Corporation Act presently authorizes the issuance of share certificates in bearer form.⁴⁶ The Connecticut statute, however, deals with bearer shares in a manner quite different from Montana.

Although bearer share certificates are authorized by section 33-345, section 33-310(d) of the Connecticut Stock Corporation Act states that shareholders of record "shall be the only shareholders entitled to receive the notice of or to vote at the meeting, or receive the distribution. . . ."⁴⁷ An argument can therefore be made that bearer shares with voting and dividend rights are not au-

the board of directors: therefore, the dividend coupon would probably state only the serial number of the share certificate to which it was attached originally and the dividend number.

³⁹ See 2 American Enterprise, supra note 9, at 130; Schlesinger, supra note 12, at 431.

⁴⁰ Schlesinger, supra note 12, at 431.

⁴¹ Church, supra note 24, at p. 288; Schlesinger, supra note 12, at 431. The company laws of Germany and France give indefeasible pre-emptive rights to all shares. 2 American Enterprise, supra note 9, at 133.

⁴² See Mont. Rev. Codes Ann. § 15-614 (1947):

The corporation may do all acts and adopt all by-laws and resolutions necessary or proper to carry into effect the powers herein granted, and to provide for details in the exercise thereof, subject, however, to the provisions of this act.

⁴³ Mont. Rev. Codes Ann. § 15-613 (1947). The Montana statute uses the word "convert," but "exchange" would be technically more correct since "convert" usually connotes conversion into a different type, class, or series of security. The change from bearer to registered is only a change in form.

⁴⁴ Church, supra note 24, at § 242.

⁴⁵ The state motto of Montana, "the Treasure State," is "Oro y plata" (gold and silver), which suggests that perhaps the limitation to mining corporations is not such a serious one in Montana whose present mineral production is about \$175,000,000 per annum.

⁴⁶ Conn. Gen. Stat. Ann. § 33-345 (1962).

⁴⁷ Conn. Gen. Stat. Ann. § 33-310(d) (1962). This subsection was added by the same Public Act which amended § 33-345 to authorize the issuance of bearer shares. Conn. Pub. Act 327 §§ 23, 51 (1961).

thorized in Connecticut. Section 33-310, however, relates to the closing of share transfer books and the fixing of a record date by the board of directors and should be construed as applying only to registered shares. Indeed, the closing of share transfer books and the fixing of a record date have no logical relation to bearer shares. The Montana corporation law contains two sections relating to the closing of share transfer books and the fixing of record dates which are worded similarly to section 33-310.⁴⁸ Neither of these sections, however, supersedes the express authorization of bearer shares and the provisions for receipt of dividends and the exercise of voting rights by bearer shareholders.⁴⁹ Although the Connecticut statute does not contain special provisions relating to the voting and dividend rights of bearer shareholders, section 33-310(d) logically should not be construed as applying to bearer shares.⁵⁰ Presumably the exercise of voting and dividend rights by Connecticut bearer shareholders would be governed by appropriate provisions in the articles of incorporation or the by-laws.⁵¹

Section 33-327 of the Connecticut Stock Corporation Act provides for notice of meetings to shareholders *of record*.⁵² No provision for notice to bearer shareholders is found as in the Montana statute which provides that all notice to such shareholders is deemed waived except where in a few special circumstances notice by publication is required by Montana law.⁵³ Provision for notice to voting bearer shareholders would presumably be set forth in the articles of incorporation or the by-laws of the issuing Connecticut corporation. The articles and by-laws would also state the conditions for the exchange of authorized bearer shares for registered securities and vice versa.⁵⁴

Article 8 of the Uniform Commercial Code, repealing the Uniform Stock Transfer Act, would govern the negotiability and transfer of Connecticut bearer shares, at least in Connecticut.⁵⁵ Special statutory provisions are therefore unnecessary.⁵⁶

⁴⁸ Section 15-504 of the Mont. Rev. Codes Ann., which provides for the fixing of a record date for determining the voting rights of shareholders, states: "[O]nly such stockholders, as shall be stockholders of record on the date so fixed of stock entitled to vote . . . shall be entitled to such notice of and to vote."

⁴⁹ Section 15-621 relating to the fixing of a record date for the distribution of dividends and other corporate purposes reads: "[O]nly such stockholders, as shall be stockholders of record on the date so fixed shall be entitled to receive payment of such dividend. . . ."

⁴⁹ Mont. Rev. Codes Ann. §§ 15-608 to -614 (1947).

⁵⁰ Professor Manning, the Chairman of the Connecticut Commission on Revision of the Corporation Laws, in noting the 1961 amendment to § 33-345(c) which authorized the issuance of bearer shares stated:

It is perhaps interesting to note that the amended subsection (c) recognizes that nothing in the Corporation Act prevents the issue of bearer shares. This form of share issuance is common in Europe though relatively unknown in the United States. Manning, "The 1961 Amendments to the Connecticut Corporation Acts," 35 Conn. B.J. 460, 467 (1961). Bearer shares without voting or dividend rights would not be similar to European bearer shares. Consequently, the analogy to European bearer securities would not be accurate if § 33-310(d) were construed to deprive Connecticut bearer shareholders of all voting and dividend rights.

⁵¹ See Conn. Gen. Stat. Ann. §§ 33-290, 33-306 (Supp. 1961). See also Conn. Gen. Stat. Ann. § 33-311A(h) (1962).

⁵² Conn. Gen. Stat. Ann. § 33-327 (1962).

⁵³ Mont. Rev. Codes Ann. § 15-610 (1947). See notes 33-37 *supra*, and accompanying text.

⁵⁴ Conn. Gen. Stat. Ann. §§ 33-290, 33-306 (1962). Cf. Mont. Rev. Codes Ann. §§ 15-613 (1947), note 43 *supra* and accompanying text.

⁵⁵ Conn. Gen. Stat. Ann. §§ 42a-8-101 to -406 (1962).

⁵⁶ Cf. Mont. Rev. Codes Ann. § 15-608 (1947); N.Y. Pers. Prop. Law §§ 186-186c; Ga. Code Ann. §§ 22-1902, 22-1920, 22-1921 (Supp. 1961).

The solution of the technical problems created by the issuance of bearer shares in Connecticut is left to the articles of incorporation and by-laws of the issuing corporation. The larger problem of government regulation, taxation, and management control remain.

Problems Created by Bearer Shares

The issuance of bearer shares renders the retention of management control more difficult. Bearer shares, because of their negotiability, would not be issued by a close corporation desiring to remain closely held. In larger publicly held corporations which potentially might issue bearer shares, control usually rests in the management.⁵⁷ Control of the proxy machinery is the means by which management perpetuates itself.⁵⁸ Maintaining proxy machinery over bearer shares is difficult because usually the only means of communication between the corporation and the unknown present holder of the shares is by publication. Although management's use of the proxy has been subjected to federal regulation in the past generation,⁵⁹ it remains an important control device which management will seek to preserve. There are several ways, however, by which management can reconcile control and the issuance of bearer shares. The obvious and simplest way is to authorize bearer shares only of a class without voting rights. The Montana statutory provision deeming notice to bearer shareholders waived in most circumstances may also be effective in diluting the vote of bearer shareholders.⁶⁰ Another possible approach is the establishment of a registry system with its own proxy machinery.⁶¹ Some of these devices may decrease the investment value of bearer shares—at least where the investor is interested in obtaining a proportionate interest in control.

Securities regulation by the government is more difficult when bearer shares are issued. The rules formulated by the SEC under section 14(a), the proxy regulation section of the Securities Exchange Act of 1934, are oriented toward registered shares.⁶² The regulations require that management use the line of

⁵⁷ Berle & Means, *The Modern Corporation and Private Property* 86-88 (1933). The authors state at pp. 87-88: "Where ownership is sufficiently sub-divided, the management can thus become a self-perpetuating body even though its share in the ownership is negligible."

⁵⁸ The existence of proxy machinery is often described as the major reason for the separation of ownership and control in large, publicly held American corporations. See 2 Loss, *Securities Regulation* 857-58 (2d ed. 1961):

The widespread distribution of corporate securities, with the concomitant separation of ownership and management, puts the entire concept of the stockholders' meeting at the mercy of the proxy instrument.

See also Berle & Means, *supra* note 57, at 139:

The proxy machinery has thus become one of the principal instruments not by which a stockholder exercises power over the management of the enterprise, but by which his power is separated from him.

⁵⁹ See § 14(a) of the Securities Exchange Act of 1934, 48 Stat. 895, 15 U.S.C. § 78, which makes it unlawful for any person to solicit proxies of any securities listed on a national exchange without compliance with the rules and regulations of the SEC. The SEC has promulgated Reg. V-14 to implement this subsection.

⁶⁰ See Mont. Rev. Codes Ann. § 15-610 (1947).

⁶¹ Cf. Mont. Rev. Codes Ann. § 15-609 (1947). See notes 28-31 *supra* and accompanying text.

⁶² Professor Loss comments: "In Europe, aside from England, the prevalence of bearer shares makes anything like the American proxy regulation difficult." 2 Loss, *supra* note 58, at 664. See May, "Financial Regulation Abroad: The Contrasts with American Techniques," 47 *J. Pol. Econ.* 457, 482-84 (1939).

communication between the corporation and the shareholders fairly. If bearer shares are issued widely, the regulations will have to be supplemented by provisions regulating management's use of other media of communication than the shareholder lists in soliciting proxies from bearer shareholders. The question of federal regulation of bearer shares under section 14(a) or 16(b) (insider trading provision) may be purely academic since these sections apply only to listed securities and the New York Stock Exchange, for example, does not list bearer shares.⁶³

Administration of the alien property laws would be virtually impossible in the bearer share situation. For example, the Trading With the Enemy Act of 1917, as amended, requires American corporations to transmit to the alien property custodian "a full list, duly sworn to, of every officer, director, or stockholder known to be, or whom the representative of such corporation . . . has reasonable cause to believe to be an enemy. . . ."⁶⁴ The enforcement of many other laws is also rendered more difficult by the issuance of bearer shares.⁶⁵

Income, capital gains, inheritance, and share transfer taxes are more difficult to enforce and collect because of the anonymity of negotiable bearer shares.⁶⁶ Indeed, one of the major reasons for the popularity of bearer shares in civil law countries is their tax evasion possibilities. One of the reasons suggested for the passage of the Connecticut statute is the inheritance tax avoidance possibilities inherent in bearer shares.

The widespread issuance of bearer shares might produce a legislative reaction to aid the enforcement of tax and other laws.⁶⁷ England, for example, has severely limited the issuance of both the bearer "share warrant" and the bearer debenture. Prior to the Exchange Control Act, 1947, the issuance of both bearer debentures and share warrants was discouraged by the imposition of much

⁶³ The N.Y. Stock Exchange requires that "[T]he text of the face of all certificates . . . indicate ownership." N.Y.S.E. Company Manual § A12(1). The section of the Company Manual relating to the form of the assignment required on each certificate states:

Stock certificates shall carry the following form of assignment: "NOTICE: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular."

N.Y.S.E. Company Manual § A12(1).

⁶⁴ 40 Stat. 416 (1917), 50 U.S.C. § 7a (Appendix 1958).

⁶⁵ For example, laws dealing with:

- (1) Ownership of shares by aliens;
- (2) cross ownership situations;
- (3) shareholder liabilities (e.g., N.Y. Stock Corp. Law § 71); and
- (4) antitrust (e.g. § 7 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 18 (1958)).

⁶⁶ Section 6042 of the Int. Rev. Code of 1954, 26 U.S.C. § 6042 (1958) requires corporations to submit certain information returns:

Every corporation shall when required by the Secretary or his delegate—

- (1) Make a return of its payments of dividends, stating the name and address of, the number of shares owned by, and the amount of dividends paid to, each shareholder.

- (3) Furnish to the Secretary or his delegate a statement of its accumulated earnings and profits . . . if divided or distributed.

These returns are of great value in enforcing the federal tax laws, but would be worthless if the reporting corporation issued bearer shares. The corporation would not know the names of the bearer shareholders. See Schlesinger, *supra* note 12, at 440. The withholding of dividends and interest payable to share and debt security holders under the new tax law would also create various practical problems where bearer shares are issued.

⁶⁷ The Internal Revenue Service presently estimates that \$25 billion of income goes unreported each year. The Service would certainly encourage legislation to prevent any increase in unreported income.

higher stamp duties than on registered securities.⁶⁸ Presently the stamp duty payable upon the issuance of bearer debentures is greatly in excess of that imposed on registered debentures.⁶⁹ The Exchange Control Act, 1947,⁷⁰ requires that the consent of the treasury be obtained before either share warrants *or* bearer debentures are issued.⁷¹ The Act also requires the deposit of bearer debentures and share warrants "at all times in the custody of an authorized depository . . ."⁷² The issuance of bearer shares on a large scale in the United States might provoke Congress to take steps to eliminate the advantage of anonymity of bearer debt securities as well as bearer shares.

CONCLUSION

American corporate law has developed with the registered share. This traditional orientation has contributed to a vesting of control of the publicly held corporation in management. Management perpetuates its position by use of proxy machinery. Although bearer shares have the advantage of (1) anonymity of ownership and (2) potential attraction of foreign investment accustomed to this type of security, management is not likely to appreciate the increased difficulty of proxy control.⁷³ The absence of a direct line of communication between the corporation and the shareholder may also be disadvantageous to the latter, who may become disenfranchised or experience delay in receiving dividends by missing published notice. The consequences of loss or theft are also more serious to the shareholder than in the case of registered shares. Most important of all, the American investor is accustomed to registered shares.

Any tax advantage which a potential investor visualizes in the anonymity of bearer shares may be short-lived. Presently the tax laws do not discriminate against or discourage the issuance of bearer debt securities which have traditionally been issued by American corporations.⁷⁴ The introduction of the novel

⁶⁸ See Stamp Act, 1891, 54 & 55 Vict., c. 39, § 107; Finance Act, 1899, 62 & 63 Vict., c. 9, §§ 4, 8. See also Steffen & Russell, "Registered Bonds and Negotiability," 47 Harv. L. Rev. 741, 742 (1934); 1 Palmer, Company Precedents 762 (17th ed. 1956).

⁶⁹ Palmer, Company Law, 392-93 (20th ed. 1959).

⁷⁰ 10 & 11 Geo. 6, c. 14, § 10.

⁷¹ Charlesworth, Company Law 138-40, 252-53 (7th ed. 1960). The author comments at pp. 139-40: "Share warrants are not very common. This is because they cannot be issued without Treasury consent and because they must be deposited with an authorized depository, and also because of the heavy stamp duty." See also Hornby, An Introduction to Company Law 113 (1957); Palmer, *supra* note 69, at 386-87.

⁷² Palmer, *supra* note 69, at p. 315. The author notes:

An authorised depository can only part with bearer securities

(a) for the purposes of transferring them from one authorised depository to another;

(b) for the purpose of obtaining the payment of capital moneys and

(c) for the purpose of collecting coupons.

⁷³ Professor Gower in noting the relative unpopularity of the share warrant in England states:

In the first place, the company is unable to get into touch with its shareholders except through newspaper advertisement and, if the share warrants confer voting rights, this makes it much more difficult for the management to maintain control through the proxy voting machinery.

Gower, Modern Company Law 360 (2d ed. 1957).

⁷⁴ Int. Rev. Code of 1954, § 4311 imposes a tax of 11¢ per each \$100 face value on the issuance of "certificates of indebtedness." Int. Rev. Code of 1954, § 4331 levies a tax of 5¢ on each \$100 face value on a sale or transfer of "certificates of indebtedness." "Certificate of indebtedness" is defined broadly in § 4381 to include "bonds, debentures, or certificates of indebtedness, and all instruments, however termed, issued by a corporation with interest coupons or in registered form known generally as corporate securities." The same tax rates apply to both bearer ("coupon") and registered debt securities.

bearer share on a wide scale, however, might provoke legislation aimed at curbing the tax evasion possibilities of all bearer securities.⁷⁵

The United States, like England, her sister common law country, is not fertile ground for the issuance of bearer shares. The cautious and limited use of this device, however, may provide an excellent means of attracting foreign investors accustomed to bearer shares.⁷⁶

Gerald M. Amero

Domestic Relations: Breach of Contract to Marry: New York Civil Practice Act Article 2-A: Recovery of Antenuptial Gifts.—In 1935, New York adopted Article 2-A of the Civil Practice Act, better known as the "heart balm" statute.¹ Enacted for the purpose of preventing "unjust enrichment" and "the perpetration of frauds,"² it abolished all causes of action "to recover sums of money as damages for . . . breach of contract to marry,"³ and provided that "no contract to marry . . . shall operate to give rise . . . to any cause or right of action for the breach thereof."⁴ (Emphasis added.) The first cases decided after the enactment of Article 2-A presumed that the new statute was not intended to regulate actions for the return of antenuptial gifts, but was directed solely at the damage remedy for injured feelings and loss of prospective status, which is involved in an action for breach of contract to marry.⁵ Accordingly these cases were decided in accordance with the traditional New York law of unjust enrichment which permitted recovery of gifts made in contemplation of marriage when the engagement was cancelled by mutual consent or breached unjustifiably by the donee; gifts given unconditionally, however, were not recoverable.

But memorandum affirmances by the Court of Appeals in *Andie v. Kaplan*,⁶ followed by *Josephson v. Dry Dock Savings Institution*,⁷ determined that an

South Carolina, evidently the only state which imposes an issue tax on debt securities, applies the same rates to securities whether "with interest coupons or in registered form." S.C. Code § 65-682 (1952).

⁷⁵ See note 67 *supra*.

⁷⁶ Quære, as to whether increased foreign investment is sound economically. One of the principal reasons for the passage of the Exchange Control Act, 1947, was to prevent currency from being taken out of England. See Charlesworth, *supra* note 71, at 139 n.57.

¹ N.Y. Civ. Prac. Act §§ 61a-61h. The statute may be found in N.Y. Civ. Rights Law §§ 80-84, effective Sept. 1, 1963. N.Y. Sess. Laws 1962, ch. 310, § 65.

² N.Y. Civ. Prac. Act § 61a.

³ N.Y. Civ. Prac. Act § 61b (N.Y. Civ. Rights Law § 80). Actions for alienation of affections, criminal conversation, and seduction were also abolished because they were subject to abuse and often served as a source of blackmail for unscrupulous plaintiffs.

⁴ N.Y. Civ. Prac. Act § 61d (N.Y. Civ. Rights Law § 80).

⁵ *Hutchinson v. Kernitzky*, 23 N.Y.S.2d 650 (2d Dep't 1940); *Zawadski v. Vandetti*, 256 App. Div. 932, 9 N.Y.S.2d 219 (4th Dep't 1938). Even so, the dissent in *Zawadski* argued that recovery should not be allowed in an action based upon breach of promise to marry, since N.Y. Civ. Prac. Act § 61h (N.Y. Civ. Rights Law § 84) provides that Article 2-A should be construed liberally in order to effectuate its purposes. Cf. explanation for New York position in *Bullen v. Neuweiler*, 73 Pa. D. & C. 207 (C.P. 1949).

But cf. *A.B. v. C.D.*, 36 F. Supp. 85 (E.D. Pa. 1940), *aff'd*, 123 F.2d 1017 (1941), a federal case in effect construing the "heart balm" statutes of New York and Pennsylvania as prohibiting recovery of antenuptial gifts.

⁶ 263 App. Div. 884, 32 N.Y.S.2d 429 (2d Dep't), *aff'd mem.*, 288 N.Y. 685, 43 N.E.2d 82 (1942).

⁷ 266 App. Div. 992, 45 N.Y.S.2d 120 (1st Dep't 1943), *aff'd mem.*, 292 N.Y. 666, 56 N.E.2d 96 (1944).

action for restitution or replevin of an engagement ring or other money or property after breach of the promise to marry is included within the ban of the "heart balm" act. Prior to 1947, three cases had followed these precedents,⁸ but two others distinguished the *Andie* case on the ground that (1) mutual rescission was involved instead of breach,⁹ and (2) there had been a subsequent agreement to return gifts which was separately enforceable because distinct from the contract to marry.¹⁰ In 1947, following an exhaustive study of this situation, the New York Law Revision Commission proposed an amendment to the "heart balm" act which would have permitted the recovery of antenuptial gifts "in a proper case." The proposed section read: "§ 61-j. This article shall not be deemed to prevent a court in a proper case from granting restitution for property or money transferred in contemplation of the performance of an agreement to marry which is not performed."¹¹ Although the bill was passed by both houses, the governor vetoed it without explanation.¹²

The Commission's study pointed out that the interpretation which bars an action for restitution of property transferred in contemplation of marriage makes the statute an instrument for the unjust enrichment of the defendant.¹³ The conflicting lower court decisions since then may be attributed to judicial attempts to prevent such results.

This note will survey New York cases decided in the fifteen years since the Commission's study and will contrast the New York position with that of other states having comparable "heart balm" statutes.

New York Decisions Since 1947

Since 1947, several courts have followed the Court of Appeals decisions by disallowing recovery of an engagement ring or money because the action was based on breach of promise of marriage.¹⁴ In a number of cases, however, the courts have resorted to various factual distinctions and legal theories in order to avoid the *Andie* construction of the "heart balm" statute and thus to be free to accomplish justice under the traditional restitutionary rules. As a result of this judicial inventiveness, the law concerning return of antenuptial gifts now stands in a state of confusion; neither party to an action can be certain when and in what court recovery will be granted or denied. Nevertheless, some attempt to catalogue the post-1947 cases may be helpful.

Isolated cases have in effect disregarded the Court of Appeals ruling. One court, while acknowledging that the action to recover an engagement ring is

⁸ *Morris v. Baird*, 269 App. Div. 948, 57 N.Y.S.2d 890 (2d Dep't 1945); *Hecht v. Yarnis*, 268 App. Div. 771, 50 N.Y.S.2d 170 (1st Dep't 1944); *Alberelli v. Manning*, 185 Misc. 280, 56 N.Y.S.2d 493 (1st Dep't 1945).

⁹ *Unger v. Hirsch*, 39 N.Y.S.2d 965 (N.Y. City Ct. 1943).

¹⁰ *Spitz v. Maxwell*, 59 N.Y.S.2d 593 (Sup. Ct. N.Y. County 1945).

¹¹ 1947 Law Revision Comm'n Rep. 227 (1947 Leg. Doc. No. 65 (J)); Sen. Int. No. 116, Pr. No. 116, Ass. Int. No. 120, Pr. No. 120.

¹² 1947 Public Papers of Thomas E. Dewey 286 (March 25, 1947). One explanation of the veto lies in the governor's unwillingness to allow inroads on a statute which declares a fundamental public policy of the state. Interview with Director of Research, Law Revision Commission, March 27, 1962.

¹³ 1947 Law Revision Comm'n Rep. 245.

¹⁴ *Grunberg v. Grunberg*, 199 Misc. 249, 99 N.Y.S.2d 771 (Sup. Ct. Kings County 1950) (over \$6,000); *Reinhardt v. Schuster*, 192 Misc. 919, 81 N.Y.S.2d 570 (Sup. Ct. 1st Dep't 1948) (ring); *Nichols v. Gesselian*, 191 Misc. 641, 78 N.Y.S.2d 2 (Sup. Ct. 1st Dep't 1948) (money given to purchase furniture); *Bressler v. Bressler*, 133 N.Y.S.2d 38 (N.Y. Mun. Ct. 1954) (\$1,089).

not generally allowable under Article 2-A of the Civil Practice Act, criticized the result of such rulings¹⁵ and permitted the jury determination for the plaintiff to stand on procedural grounds.¹⁶ In another case the plaintiff, who had transferred over \$2,000 to defendant in reliance on his promise of marriage, sued for money had and received. The court simply refused to apply the Court of Appeals construction of the "heart balm" statute and reasoned that

the action in effect is to recover moneys, wrongfully gained and held by the defendant, and while a portion of the moneys sought to be recovered may grow out of a breach of promise to marry, *it is not for damages for such breach*. It is not within the spirit of the statute to justify a defendant from withholding moneys if the proof on trial shows that the plaintiff is entitled thereto.¹⁷ (Emphasis added.)

Departures from the *Andie* decision have also caused considerable uncertainty regarding the right of a third party to recover antenuptial expenditures. In one case, the father of the bride sought to recover expenditures made in preparation for the marriage and in reliance upon the groom's promise to marry; but recovery was held to be barred by Article 2-A, apparently on the ground that "but for" the breach of promise to marry there would be no action.¹⁸ Yet the parents of a groom were allowed restitution for gifts made to his fiancée in contemplation of the marriage,¹⁹ even though this action similarly arose out of a breach of promise to marry.

Since 1947, the courts have applied another technique to avoid the *Andie* case. Where a person has been induced to change a bank account into a joint account before marriage, recovery of the money contributed has been allowed upon the theory that no allegations concerning the marriage contract are necessary in order to recover money rightfully belonging to the plaintiff.²⁰ Yet in

¹⁵ *Grishen v. Domagalski*, 191 Misc. 365, 80 N.Y.S.2d 484 (N.Y. City Court 1948).

Grave doubt exists as to whether the Legislature contemplated a prohibition against an action to recover engagement rings and other valuables actually exchanged in consideration of the mutual promise of marriage. It does not seem just or logical that engaged couples who pool their resources for the purpose of buying or furnishing a home or to meet the expenses of the marriage, should have no recourse in the event a mutual termination of the engagement results in a refusal to redivide the money or property so involved.

191 Misc. at 366, 80 N.Y.S.2d at 485.

In reply to the last sentence, see the cases cited in notes 9 supra and 20 infra where recovery was allowed upon finding mutual rescission, and where there had been a pooling of resources.

The court went on to distinguish the *Andie* case, supra note 6:

[P]laintiff sought to recover from a paramour with whom he had been living in illicit relations, moneys and property which he said she had received from him upon her promise to ultimately marry him. That such a case was the test suit establishing a precedent against the restoration of the status quo of decent people, who for reasons of incompatibility wish to terminate a marriage contract, is indeed unfortunate.

191 Misc. at 367, 80 N.Y.S.2d at 485.

¹⁶ A motion to dismiss the complaint, which alleged mutual rescission, had been denied. Since this denial had not been appealed, the trial court felt that the finding of a valid cause of action on the motion to dismiss was the law of the case and controlled despite the Court of Appeals construction of Article 2-A.

¹⁷ *Kaufman v. Rosenbach*, 208 Misc. 265, 267, 143 N.Y.S.2d 722, 724 (Saratoga County Ct. 1955) (following *Zawadski*, supra note 5).

¹⁸ *Costas v. Marmarellis*, 200 Misc. 912, 111 N.Y.S.2d 909 (Sup. Ct. 2d Dep't 1951).

¹⁹ *Easley v. Neal*, 202 Misc. 554, 110 N.Y.S.2d 191 (Sup. Ct. Cattaraugus County 1952).

²⁰ *Farone v. Bianchi*, 10 App. Div. 2d 790, 198 N.Y.S.2d 521 (3d Dep't 1960); *Splendore v. Guglielmo*, 205 Misc. 941, 129 N.Y.S.2d 374 (Sup. Ct. N.Y. County 1954) (this decision

other cases plaintiffs, who were induced to transfer an undivided half-interest in realty in expectation of marriage, were not granted reconveyance because the actions arose out of the breach of promise to marry.²¹

The courts have continued to apply the rationalization found in the pre-1947 cases that a subsequent agreement to return each other's gifts is separately enforceable, since the allegation of breach of contract to marry is not essential to the cause of action.²² In one case, however, plaintiff had redelivered the ring to defendant to encourage her to reconsider the rejection of his proposal, on the understanding that she would return it if her decision remained unfavorable. The court declared that her refusal to return the ring was a breach of a contract to enter a contract of marriage, and thus recovery was barred by Article 2-A,²³ although it seems that an opposite result could have been reached on the ground that the redelivery of the ring involved a separate agreement.

Thus, one cannot readily generalize that actions for return of antenuptial gifts in New York are prohibited. Under the broad dictum of the *Andie* case, none of the above actions should have been allowed, since all arose out of a breach of contract to marry. Yet in a substantial number of cases the lower courts have narrowly construed the holding of the Court of Appeals, with the result that recovery *may* be allowed (1) when the breach of contract to marry is not considered a necessary allegation, (2) when there has been a mutual rescission instead of a breach, or (3) when a subsequent agreement to return gifts can be found. In the light of the legislative disapproval of the *Andie* decision, as demonstrated by the proposed amendment in 1947, and the obvious effort of some courts to evade what they consider a harsh rule, the Court of Appeals might be encouraged to reverse its memorandum decisions if a similar case arises. Likewise renewed legislative effort may now meet with success.

Recovery of Antenuptial Gifts in States Other than New York

Fifteen other states have statutes, substantially similar to New York's, outlawing actions for breach of contract to marry.²⁴ To date, the states of California,²⁵

is humorous in its treatment of the disillusionments of young love); *Warneck v. Kielly*, 68 N.Y.S.2d 157 (Sup. Ct. Westchester County 1946).

²¹ *Mastersanti v. Mascioli*, 13 App. Div. 2d 865, 214 N.Y.S.2d 932 (3d Dep't 1961); *Hallstrom v. Erkas*, 124 N.Y.S.2d 169 (Sup. Ct. Queens County 1953); *Brandes v. Agnew*, 275 App. Div. 843, 88 N.Y.S.2d 553 (2d Dep't 1949).

²² *Levy v. Gersten*, 196 Misc. 255, 94 N.Y.S.2d 484 (N.Y. City Ct. 1949) (ring and other gifts); see also *Bates v. Engelman*, 201 Misc. 288, 115 N.Y.S.2d 426 (N.Y. City Ct. 1951).

²³ *Nosonowitz v. Kahn*, 201 Misc. 863, 106 N.Y.S.2d 836 (N.Y. Mun. Ct. 1951).

²⁴ Ala. Code tit. 7, § 114 (1958); Cal. Civ. Code § 43.5; Colo. Rev. Stat. Ann. § 41-3-1 (1953); Fla. Stat. Ann. §§ 771.01 -08 (Supp. 1961); Ind. Ann. Stat. §§ 2-508 to 2-510 (Burns 1946); Me. Rev. Stat. Ann. ch. 112, § 91 (Supp. 1961); Md. Ann. Code art. 75C, § 2 (1957); Mass. Ann. Laws ch. 207, § 47A (1955); Mich. Stat. Ann. § 25.191 (1957); Nev. Rev. Stat. § 41:380 (1961); N.H. Rev. Stat. Ann. § 508:11 (1955); N.J. Rev. Stat. § 2A:23-1 (1952); Pa. Stat. Ann. tit. 48 §§ 171-73 (Purdon Supp. 1961); Wisc. Stat. Ann. §§ 248.01 -02 (Supp. 1962); Wyo. Stat. §§ 1-727 to 1-731 (1957).

²⁵ *Stienback v. Halsey*, 115 Cal. App. 2d 213, 251 P.2d 1008 (Dist. Ct. App. 1953) (donee breached; donor recovers ring and other gifts); *Mack v. White*, 97 Cal. App. 2d 497, 218 P.2d 76 (Dist. Ct. App. 1950) (donee breached; donor recovers proceeds of sale of property); *Simonian v. Donoian*, 96 Cal. App. 2d 259, 215 P.2d 119 (Dist. Ct. App. 1950) (donor breached; no recovery); *Norman v. Burks*, 93 Cal. App. 2d 687, 209 P.2d 815 (Dist. Ct. App. 1949) (donee breached; donor recovers \$18,000 ring, \$40,000 home, \$76,000 accessories); *Priebe v. Sinclair*, 90 Cal. App. 2d 79, 202 P.2d 577 (Dist. Ct. App. 1949) (donee breached; donor recovers ring but other items were absolute gifts and not recoverable).

Massachusetts,²⁶ New Hampshire,²⁷ New Jersey,²⁸ and Pennsylvania²⁹ have determined that their respective prohibitions against actions for breach of contract to marry do not preclude actions for the recovery of antenuptial gifts. The decision in *Gikas v. Nicholis*³⁰ is typical of the reasoning employed:

It was not the intention of the New Hampshire Legislature in outlawing breach of promise suits to permit the unjust enrichment of persons to whom property had been transferred while the parties enjoyed a confidential relationship. To so construe the statute would be to permit the unjust enrichment which the statute is designed to prevent.³¹

Thibault v. Labumiere,³² a leading Massachusetts case, contained a dictum, reminiscent of the *Andie* case, indicating that any right of action based on breach of contract of marriage was abolished by the statute. However, when directly faced with the problem, the court in *De Cicco v. Barker*³³ allowed restitution for antenuptial gifts, saying the action was

not to recover damages either directly or indirectly for breach of the contract to marry but to obtain on established equitable principles restitution of property held on a condition which the defendant was unwilling to fulfil.³⁴

The California statute was enacted with a companion provision affirmatively permitting a donor to recover antenuptial gifts when the marriage contract is breached by the donee or abandoned by mutual consent.³⁵ Louisiana has no "heart balm" statute, but does have provisions for the return of gifts made in consideration of marriage.³⁶

Thus states other than New York, with or without "heart balm" legislation, have continued to follow the traditional English rule regarding antenuptial

²⁶ *De Cicco v. Barker*, 339 Mass. 457, 159 N.E.2d 534 (1959) (donee breached; donor recovers ring but other items were absolute gifts and not recoverable).

²⁷ *Gikas v. Nicholis*, 96 N.H. 177, 71 A.2d 785 (1950) (donee breached; donor recovered ring but other items were absolute gifts and not recoverable).

²⁸ *Morris v. MacNab*, 25 N.J. 271, 135 A.2d 657 (1957) (he breached and lost his gifts to her, but she recovered \$6,500 she had given him; opinion contains analysis of cases); *Mate v. Abrahams*, 62 A.2d 754 (N.J. Essex County Ct. 1948) (where donor breached, he is not entitled to recovery of ring); *Albanese v. Indelicato*, 25 N.J. Misc. 144, 51 A.2d 110 (2d Dist. 1947) (no matter who breached, the donor should recover the ring, but not other items with no symbolic meaning); *Glazer v. Klughaupt*, 116 N.J.L. 507, 185 Atl. 8 (1936) (recovery on contract of hire); *Beberman v. Segal*, 6 N.J. Super. 472, 69 A.2d 587 (1949) (recovery of ring not barred by "heart balm" statute).

²⁹ *Pavlicic v. Vogtsberger*, 390 Pa. 502, 136 A.2d 127 (1957) ("[A] breach of any contract which is not the actual contract for marriage itself, no matter how closely associated with the proposed marriage, is actionable." 390 Pa. at 511, 136 A.2d at 132) (The case involved a 75-year-old man mulcted by the 26-year-old divorcee and is amusingly treated.); *Preshner v. Goodman*, 83 Pa. D. & C. 387 (C.P. 1953) (donor breached but forcibly took ring back; donee could recover value of the ring); *Weber v. Bittner*, 75 Pa. D. & C. 54 (C.P. 1950) (donee breached; donee entitled to reconveyance of property); *Bullen v. Neuweiler*, 73 Pa. D. & C. 207 (C.P. 1949) (statute held not to bar action for restitution of antenuptial gifts).

³⁰ *Supra* note 27.

³¹ 96 N.H. at 179, 71 A.2d at 786.

³² 318 Mass. 72, 60 N.E.2d 349 (1945).

³³ *Supra* note 26.

³⁴ *De Cicco v. Barker*, *supra* note 26, at 459, 535.

³⁵ Cal. Civ. Code Ann. § 1590 (Deering 1960).

³⁶ La. Civ. Code Ann. arts. 1740, 1897 (1945). *Daigle v. Fournet*, 141 So. 2d 406 (La. App. 1962) (donor recovered ring, although given at Christmas); *Ricketts v. Duple*, 177 So. 838 (La. App. 1938) (donor recovered ring and cedar chest); *Wardlaw v. Conrad*, 18 La. App. 387, 137 So. 603 (1931) (donor recovered ring); *Decuers v. Bourdet*, 10 La. App. 361, 120 So. 880 (1929) (donor breached, but was allowed to recover under statute).

gifts: Where a gift is made to win the lady's affections, or otherwise given absolutely, *e.g.*, perfume or clothing, the donor is considered to have made a completed gift and may not recover. But when a gift is given in contemplation or consideration of marriage, the donor may recover when the contract was mutually rescinded or when the donee unjustifiably breached, but not if the donor unjustifiably breached.³⁷

CONCLUSION

New York has taken an unpopular and unjustifiable³⁸ view regarding restitution of antenuptial gifts. Not only is the New York interpretation unique among the states, but dissatisfaction with this position is demonstrated by the unanimous condemnation of the commentators.³⁹ The repeated attempts of the New York courts to justify a departure from the rule have led to inconsistent decisions and uncertainty as to the outcome of an action for the return of antenuptial gifts.

Instead of waiting for a case to come to the Court of Appeals, perhaps it would be more realistic for the legislature to reconsider the amendment proposed by the Law Revision Commission to correct the situation. The fifteen years since the Commission's study have emphasized the need to eliminate the contradictory decisions in the lower courts, and to prevent the use of the statute as a shield for fraud, a result which it was designed to prevent.

Joanne M. Smith

³⁷ *Jeffreys v. Lack* [1922] 153 L.T. Jo. 139; *Cohen v. Sellar* [1926] 1 K.B. 536; *Jacobs v. Davis* [1917] 2 K.B. 532; Restatement, Restitution § 58 (1937). See also Note, 29 Cornell L.Q. 401 (1944); Annots., 24 A.L.R.2d 579 (1952), 92 A.L.R. 604 (1934); 38 C.J.S. Gifts § 61 (1943).

³⁸ Defendant in the *Andie* case, *supra* note 6, attempted to justify the result as follows: [A]n unscrupulous plaintiff today [could] allege, untruthfully, that large sums of money or gifts had been tendered the defendant in contemplation of marriage. Then the mere service of a summons upon the defendant and a threat to embarrass her by publicity, would be sufficient to enforce the payment of monies, unjustifiably. [i.e. blackmail or an unfavorable settlement]

Quoted in 1947 Law Revision Comm'n Rep. 244. The Report went on to answer the argument:

The respondent's argument lacks persuasiveness because an action to recover gifts made in contemplation of marriage would not ordinarily involve scandalous matter, and would probably be no more damaging to reputation than many other actions which are permitted. The argument demands, moreover, that innocent parties should be deprived of their remedy merely because in a few cases the plaintiff may make exorbitant demands and bolster them by perjured testimony.

³⁹ Feinsinger, "Legislative Attack on 'Heart Balm,'" 33 Mich. L. Rev. 979 (1935), at 1000:

Recovery in actions for breach of promise has frequently included elements for which an independent action would be recognized on ordinary principles of . . . quasi-contract. The statute should not prevent recovery for such elements, even though the establishment of the cause of action might require evidence of a promise to marry and its breach.

Among note writers indicating dissatisfaction with the New York interpretation are: Notes, 10 Ala. L. Rev. 435 (1958); 13 Brooklyn L. Rev. 174 (1947); 21 Brooklyn L. Rev. 252 (1955); 7 Buffalo L. Rev. 316 (1958); 52 Colum. L. Rev. 242, 248-49 (1952); 43 Marq. L. Rev. 341, 349-53 (1960); 22 N.Y.U.L. Rev. 771 (1947); 25 Notre Dame Law. 684 (1950); 11 Syracuse L. Rev. 124 (1959); 3 Wyo. L.J. 147 (1949).

Federal Courts: Jurisdiction Over Municipalities: State Statute Limiting Tort Actions Against Municipalities to State Courts: *Markham v. City of Newport News*, 292 F.2d 711 (4th Cir. 1961).—Plaintiff commenced an action in a federal district court against the city of Newport News, Virginia, alleging that she sustained personal injuries when her vehicle fell into a sewer manhole which the city had negligently left unguarded. Although the amount in controversy exceeded ten thousand dollars and diverse citizenship¹ existed between the parties, the district court dismissed the complaint.² It held that under the doctrine of *Erie R.R. v. Tompkins*³ a specific Virginia statute divested the court of diversity jurisdiction. The statute provides that no tort action against a city or other political subdivision of the state shall be instituted "except in a court of the Commonwealth established pursuant to the Constitution of Virginia . . ."⁴ The court of appeals, however, reversed.⁵ It reasoned that since the statutory requisites for asserting diversity jurisdiction were present, and since a substantive right enforceable in the state courts was pleaded, the Virginia statute could not destroy the jurisdiction of a federal court whose power and authority flow from the United States Constitution.⁶ Moreover, the court held that the *Erie* doctrine "does not extend to matters of jurisdiction."⁷

Thus the principal case raises the perplexing question whether or not a state can limit federal jurisdiction over controversies in tort in which a municipality or other subdivision of a state is a party. The object of this note is: first, to examine the general rule defining the scope of diversity jurisdiction and the rule's application to municipalities; secondly, to examine policy considerations which have justified deviations from the general rule; thirdly, to explore the possibility that the power to preclude the assertion of federal jurisdiction over tort actions against municipalities may be a logical concomitant of a state's power to restrict actions against itself solely to state courts.

Stated most broadly, the general rule is that a state cannot deprive federal courts of jurisdiction.⁸ More specifically, applying this rule to diversity jurisdiction, whenever a personal⁹ or property¹⁰ right can be enforced generally¹¹ in

¹ A municipality is a "citizen" for diversity purposes. *Cowles v. Mercer County*, 74 U.S. 118 (1868).

² *Markham v. City of Newport News*, 184 F. Supp. 659 (E.D. Va. 1960).

³ 304 U.S. 64 (1938).

⁴ Va. Code Ann. § 8-42.1 (Supp. 1960).

⁵ *Markham v. City of Newport News*, 292 F.2d 711 (4th Cir. 1961).

⁶ U.S. Const. art. 3, § 2.

⁷ *Markham v. City of Newport News*, supra note 5, at 718. The court reasoned that under the *Erie* policy a federal court should reach the same result as a state court; therefore it would be anomalous if a state court could give greater relief than could a federal court. A more cogent argument, however, is that *Erie* by its own terms precludes states from destroying federal jurisdiction. "Except in matters governed by the Federal Constitution or by its Acts of Congress, the law to be applied in any case is the law of the State." *Erie R.R. v. Tompkins*, supra note 3, at 78. See also 2 Moore, *Federal Practice* ¶ 2.09, at 437 n.29 (2d ed. 1961). Obviously the Constitution and 28 U.S.C. § 1332 (1958) are the sources of federal diversity jurisdiction and are within the exception. See supra note 6.

⁸ 1 Ohlinger, *Federal Practice* article III, § 2(8) (1949).

⁹ *Railway Co. v. Whitton*, 80 U.S. 270 (1871) (wrongful death action).

¹⁰ *Smyth v. Ames*, 169 U.S. 466 (1898); *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894) (actions to enjoin enforcement of railroad rates).

¹¹ A state may designate that only a particular state citizen (e.g., the Attorney General) could assert a certain substantive right (e.g., a quo warranto proceeding or injunction) against another state citizen (e.g., domestic fraternal societies), and thus limit federal

a state court, it can, if the statutory jurisdictional requirements set by Congress are met, also be enforced in a federal court without regard to jurisdictional limitations imposed by state legislatures¹² or judiciaries.¹³ The rule applies to contract actions, whether or not the remedy sought is damages¹⁴ or injunction,¹⁵ to tort actions,¹⁶ and also to newly created state statutory actions.¹⁷ Although a state in which a federal court sits may not normally destroy federal diversity jurisdiction by providing that particular causes of action can be brought *only* in state courts, under the *Erie* doctrine a state can abolish a particular cause of action or its remedy¹⁸ and thereby preclude the exercise of diversity jurisdiction. In other words, when no cause of action or remedy exists under state law, a federal court with diversity jurisdiction would determine that no case or controversy exists and dismiss the complaint for failure to state a cause of action; but, it would not dismiss for lack of jurisdiction.¹⁹

diversity jurisdiction by precluding out-of-state citizens from asserting this right. McGarry v. Lentz, 13 F.2d 51 (6th Cir. 1926); Wright v. The Praetorians, 63 F. Supp. 839 (N.D. Tex. 1943). See also Klein v. Brodbeck, 15 F. Supp. 473 (E.D. Pa. 1934), in which a federal district court held that it had no jurisdiction to entertain an action of escheat.

¹² Railway Co. v. Whitton, supra note 9, at 285 (statute had provided that wrongful death actions "shall be brought . . . in some court established by the [state] constitution and laws . . ."). See also Waltz v. Chesapeake & O. Ry., 65 F. Supp. 913 (N.D. Ill. 1946) (suit in federal court based upon the Federal Employer's Liability Act, i.e. a federal question, held not barred by state statute prohibiting actions based upon out-of-state wrongful death statute).

Restrictive state statutes have not only posed jurisdictional problems for federal courts, but they have also presented "full faith and credit" and conflicts questions for state courts. These questions have generally been resolved by opening other forums despite the restrictive statutory provisions. In Atchison, T. & S.F. Ry. v. Sowers, 213 U.S. 55 (1909), a wrongful death action based on a state statute which attempted to limit such actions to its own courts was construed not to prohibit other forums from entertaining actions based on the statute. Accord, Tennessee Coal Co. v. George, 233 U.S. 354 (1914). Kenney v. Supreme Lodge, 252 U.S. 411 (1920), held that an action on a sister state's judgment for wrongful death was maintainable despite a statute of the forum state which provided that no action for an out-of-state wrongful death could be brought in the state. Hughes v. Fetter, 341 U.S. 609 (1951), went one step further and held that the full faith and credit clause prohibits a state from closing its doors to an "original" action based on another state's wrongful death statute.

¹³ Hyde v. Stone, 61 U.S. 170 (1857).

¹⁴ Louisiana Highway Comm'n v. Farnsworth, 74 F.2d 910 (5th Cir. 1935).

¹⁵ The Maccabees v. City of No. Chicago, 125 F.2d 330 (7th Cir. 1942). See also Skagit County v. Northern Pac. Ry., 61 F.2d 638 (9th Cir. 1932).

¹⁶ Grady County, Georgia v. Dickerson, 257 F.2d 369 (5th Cir. 1958).

¹⁷ See Aurora Shipping Co. v. Boyce, 191 Fed. 960, 963 (9th Cir. 1911), rejecting the argument that since a state has power to create a new right, it should also have power to impose a condition that such right be enforced only in state courts. See also Rubel-Jones Agency v. Jones, 165 F. Supp. 652 (W.D. Mo. 1958), rejecting the argument that a federal court could not accept that part of a statute creating a substantive right and at the same time reject the statute's limitation of suits thereunder to state courts.

¹⁸ Woods v. Interstate Realty Co., 337 U.S. 535 (1949) (state law precluding unqualified foreign corporations from maintaining action in state courts held binding on federal courts); Angel v. Bullington, 330 U.S. 183 (1947) (state's abrogation of right to bring action for deficiency judgment held binding on federal courts).

Of course, the absolute limitation imposed by states must be constitutional. For example, Hughes v. Fetter, 341 U.S. 609 (1951), held that the full faith and credit clause of the United States Constitution precluded Illinois from prohibiting the maintenance of actions based on sister state wrongful death statutes. Thus the case of Davidson v. Gardner, 172 F.2d 188 (7th Cir. 1949), was reduced to a dead letter. It had held that since a federal court under the *Erie* rule must follow Illinois law, it could not entertain an out-of-state wrongful death action while sitting in a diversity case in Illinois.

See also discussion of jurisdiction of workmen's compensation boards, notes 34, 35 infra.

¹⁹ Of course, after a dismissal on the merits, no further action could be brought. After

Diversity Jurisdiction over Municipalities

The power of a state to create municipalities is exclusive and practically unlimited. Moreover, a municipal corporation can function only by virtue of power expressly or impliedly granted by its creator-state.²⁰ Thus, a city has no inherent power to issue bonds²¹ or to enter into contracts.²² Once such power is constitutionally²³ bestowed, however, a municipality may sue or be sued on its financial or contractual obligations to the same extent as an individual.²⁴ Under the aforementioned general rule, therefore, once a state recognizes the liability of a municipality on its contracts, it creates substantive rights in obligees over which federal courts sitting in a diversity case have jurisdiction. This jurisdiction cannot be restricted by state statute.²⁵ Stated differently, although a state has power to control municipal contractual liability in the first instance, it cannot deprive federal courts of jurisdiction.

The *Markham* case²⁶ logically extends this rule to *tort* actions against a municipality. Its holding that a state statute cannot restrict tort actions solely to state courts is analytically compelling in light of the settled state of the law regarding contract actions against a municipality. The question arises, however, whether or not any policy consideration is present which may support a restriction of federal diversity jurisdiction over tort actions against municipalities.

Policy Exceptions to Diversity Jurisdiction

Federal courts occasionally have drifted from a strict application of the general rule that a state cannot deprive federal courts of jurisdiction when certain policy considerations have existed. An examination of these considerations against the apparent policy behind the Virginia statute in the *Markham* case follows.

A desire to limit the size of damage awards in order to prevent depletion of municipal treasuries probably impelled passage of the Virginia statute.²⁷ Lower judgments, or perhaps even a favorable verdict, might be expected when

a dismissal for want of jurisdiction, however, another action could be brought. Restatement, Judgments §§ 49, 50 (1942).

Moreover, under Fed. R. Civ. P. 41(a), the second voluntary dismissal before answer is res judicata. If a court, however, had no jurisdiction, its voluntary dismissal does not count. *New Edgewood Properties, Inc. v. Sachsman*, 22 Misc. 2d 36, 194 N.Y.S.2d 186 (N.Y. County 1959).

²⁰ *Claiborne County v. Brooks*, 111 U.S. 400, 406-07 (1884). 1 *McQuillin, Municipal Corporations* § 3.02, at 509 (3d ed. 1949); 18 *id.* § 53.01 at 132 (1950).

²¹ 15 *McQuillin*, supra note 20, § 43.19, at 495 (1950).

²² 5 *id.* § 19.39, at 581 (1949).

²³ *Norton v. Shelby County*, 118 U.S. 425 (1886) (action on municipal bonds held not maintainable where the issuing body was invalidly constituted and lacked power to contract).

²⁴ See note 22, supra.

²⁵ *Chicot County v. Sherwood*, 148 U.S. 529 (1893); *Lincoln County v. Luning*, 133 U.S. 529 (1890); *Cowles v. Mercer County*, 74 U.S. 118 (1868). The rule for which the above cases are cited applies even though no state statute declares counties to be bodies corporate and politic because, at any rate, it is not "within the power of the state to create political bodies capable of contracting debts with citizens of other states, and yet privileged against being compelled to pay those obligations by suit in the national courts." *McPike v. Lincoln County*, cited in 68 U.S.L. Rev. 512, 516 (1934) [not officially reported].

²⁶ *Markham v. City of Newport News*, 292 F.2d 711 (4th Cir. 1961).

²⁷ But see Note, 36 *Tul. L. Rev.* 351, 354 (1962) where the author suggests that prevention of "procedural inconveniences of being forced to defend suits outside its locale" was the motive behind the statute.

an action against a municipality is brought in a local county court with a jury composed of municipal taxpayers.²⁸ Higher judgments, on the other hand, would be more likely in an action brought in a United States district court which embraces the county,²⁹ since a wider choice of jurors is guaranteed. Prevention of local prejudice against out-of-state plaintiffs, however, was precisely the reason for institution of diversity jurisdiction. Therefore, assuming this policy is still valid,³⁰ the Virginia statute was properly disregarded.

In order to avoid diversity problems, the Virginia legislature might have created a separate court before which all municipal tort actions would be tried without a jury. The case of *Zeidner v. Wulforst*³¹ provides support for the proposition that a special court would not infringe the policy behind diversity jurisdiction since judges are less likely to be prejudiced against out-of-state citizens. There, a tort action brought in a federal district court against the New York Thruway Authority, a municipal corporation, was dismissed for want of jurisdiction on the ground that a state statute provides that claims against the Authority can be brought only in the New York Court of Claims.³² Although *Zeidner* failed to distinguish *Markham* sufficiently, its decision is nevertheless compatible with *Markham* since the Court of Claims is a special tribunal with limited jurisdiction and sits without a jury.³³

A separate tribunal such as the New York Court of Claims also introduces compelling policy goals such as utilization of expertise and production of judicial efficiency. These characteristics are the bases of workmen's compensation statutes. Significantly, the boards or commissions created by some state statutes have exclusive original jurisdiction over actions arising from injuries suffered in the course of employment.³⁴ The exclusive remedy of such statutes

²⁸ State court venue in an action against a municipality generally would be the county which embraces the municipality. See 68 U.S.L. Rev. 281 (1934) for an exhaustive list of cases.

²⁹ Federal judicial districts encompass a number of state counties. Federal court venue in an action against a municipality generally would be the district which embraces the situs of the municipality. See, e.g., *Goldstein v. City of New Orleans*, 38 Fed. 626 (E.D. La. 1889). The reason is that actions against municipalities, absent a state statute to the contrary, are considered inherently local. See, e.g., *O'Toole v. United States*, 106 F. Supp. 804 (D.C. Del. 1952), rev'd on other grounds, 206 F.2d 912 (3d Cir. 1953) (not deciding the rule for which the lower court case is cited).

³⁰ E.g., *Burford v. Sun Oil Co.*, 319 U.S. 315, 336 (1943) (dissenting opinion). Justice Frankfurter suggests there is no longer a need for diversity jurisdiction. See also McCormick, Chadbourne & Wright, *Federal Courts and Procedure* 208 (4th ed. 1962).

³¹ 197 F. Supp. 23 (E.D.N.Y. 1961).

³² N.Y. Pub. Auth. Law § 361(b). Note the pertinent statement of the dissent in *Easley v. New York State Thruway Authority*, 1 N.Y.2d 374, 382, 135 N.E.2d 572, 577, 153 N.Y.S.2d 28, 34 (1956):

"If the Court of Claims can be vested with jurisdiction over causes of action sounding in tort against the [Thruway] Authority for the reason that it performs a governmental function, so, also, could it be authorized exclusively to hear and determine similar causes of action against cities, counties, towns . . . which also perform governmental functions of the State"

The court held that the statute vesting sole jurisdiction in the Court of Claims for actions against the Authority was valid.

³³ N.Y. Ct. Cl. Act § 12 (16 Bliss 1947). The court in *Zeidner v. Wulforst*, supra note 31, at 26, in attempting to distinguish *Markham* emphasized that the Court of Claims is a separate tribunal with special, as opposed to general, jurisdiction, but might have stressed more pointedly that the Court of Claims sits without a jury.

³⁴ See, e.g., 3 La. Rev. Stat. Ann. §§ 1021, 1032 (1950); N.Y. Workmen's Comp. Act § 29(6).

has been held to restrict federal diversity jurisdiction.³⁵ No judicial or administrative system capable of expert and efficient disposal of tort actions, however, was created by the Virginia statute. Thus, the statute cannot be supported on this basis.

Another state policy which has prevailed and hence limited the application of diversity jurisdiction is the protection of state citizens, who are creditors of an out-of-state decedent, against removal of the decedent-debtor's assets from the state. This policy is manifested by the common law rule that foreign executors and administrators cannot sue in their representative capacity in state courts.³⁶ The federal courts have consistently asserted their inability to determine actions brought by these representatives despite the presence of diversity jurisdictional requisites and a substantive cause of action.³⁷ Obviously, the Virginia statute in *Markham* does not derive support from this policy.

Although a federal court could exercise diversity jurisdiction in a particular situation, it may nevertheless decline jurisdiction if a sensitive area of state policy is involved. In such cases, judicial discretion would regard federal interference as undesirable. A typical example would be the federal policy of non-intervention in state regulation of oil conservation.³⁸ On the other hand, the economy of a state does not rise or fall with a municipality's tort liability which involves a comparatively insensitive area of state policy.³⁹

Sovereign Immunity and Federal Jurisdiction

A state, by exercising its sovereignty, may be able to limit federal jurisdiction over tort actions against municipalities. Although a municipality is generally sub-

³⁵ *Hall v. Continental Drilling Co.*, 245 F.2d 717 (5th Cir. 1957); *Shultz v. Lion Oil Co.*, 106 F. Supp. 119 (W.D. Ark. 1952). Moreover, federal courts would also be bound by the "exclusive" remedy of workmen's compensation statutes in an action brought under the Federal Safety Appliance Act, 45 U.S.C. §§ 1-16 (1954), which gives the states power to fashion any appropriate remedy. *Tipton v. Atchison, T. & S. F. Ry.*, 298 U.S. 141 (1936); *Geraghty v. Lehigh Valley R.R.*, 83 F.2d 738 (2d Cir. 1936). A distinction should be noted between an original action before a board and an appeal from a board's determination. In the latter circumstance, if the amount in controversy exceeds \$10,000, an action normally may be brought in a federal court. See *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348 (1961), in which an appeal was taken from the Texas board's award to a United States district court. On further appeal to the United States Supreme Court, the amount in controversy was held to be the amount claimed on appeal, not the amount awarded by the board.

The argument could be made that since workmen's compensation boards are not courts, no state judicial remedy is available and thus the aforementioned general rule, notes 8-17 supra and accompanying text, does not apply. Nevertheless, a legal right enforceable in a state action by a workmen's compensation board cannot be originally enforced in a federal court, which is certainly contrary to the spirit of the general rule, if not the letter.

³⁶ *Vaughn v. Northup*, 40 U.S. 1 (1841).

³⁷ *Vaughn v. Northup*, supra note 36; *Kerr v. Moon*, 22 U.S. (9 Wheat.) 565 (1827). Cf. *Moore v. Mitchell*, 281 U.S. 18, 24 (1930); *Turner v. Alton Banking & Trust Co.*, 166 F.2d 305 (8th Cir. 1948); *Cooper v. American Airlines*, 149 F.2d 355 (2d Cir. 1945). Moreover, even where a state statute abrogates the common law rule but provides that foreign personal representatives must join a resident representative in order to bring suit in state courts, thus precluding the possibility of a diversity action against state citizens, federal courts have no diversity jurisdiction. *Holt v. Middlebrook*, 214 F.2d 187, 191 (4th Cir. 1954).

³⁸ *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). See also *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941); *Gilchrist v. Interborough Co.*, 279 U.S. 159 (1929). For additional cases on the principle of equitable abstention, see *McCormick, Chadbourn & Wright*, supra note 30, at 431.

³⁹ Another subject deemed sensitive by the federal courts is marital status. Even if the requisites of diversity jurisdiction are present, federal courts will decline jurisdiction over divorce or support cases. *Popovici v. Agler*, 280 U.S. 379 (1930); *Albanese v. Richter*, 161 F.2d 688 (3rd Cir. 1947).

ject to *contractual* liability to the same extent as an individual,⁴⁰ it is immune from *tort* liability in the performance of "governmental," as opposed to "proprietary," functions.⁴¹ This *limited* immunity is derived from the *absolute* immunity inherent in a sovereign state⁴² on the theory that a municipality acts in its "governmental" capacity when it acts as a representative of the state.⁴³ Moreover, characterization of a particular activity as "governmental" is binding on the federal courts.⁴⁴ Thus, if a municipality is immune from suit in state courts, it will also be immune from suit in federal courts.⁴⁵ This is simply another example of the *Erie* rule's mandate of looking to state law in matters of substance.

Proceeding further, the principle is well established that even though a cause of action against a state exists by virtue of state law, a state has the power to absolutely prevent the jurisdiction of federal courts from attaching.⁴⁶ Thus a state can waive its sovereign immunity from suit, but limit its waiver to suits brought in state courts.⁴⁷ Nevertheless the court of appeals in

⁴⁰ 5 McQuillin, *supra* note 20, § 19.39.

⁴¹ See generally 17 McQuillin, *supra* note 20, § 49.02; Annot., 60 A.L.R.2d 1198 (1958). The first case to recognize municipal tort immunity, *Russel v. Men of Devon*, 100 Eng. Rep. 359 (1788), did not expressly mention sovereign immunity as the basis for its decision. The case of *City of New York v. Bailey*, 2 Denio 433 (Ct. Err. N.Y. 1845), was the first case to cite sovereign immunity as the basis for distinguishing between the "governmental" and "proprietary" acts of a municipality. The rule generally persists. See, e.g., *Bolster v. City of Lawrence*, 225 Mass. 387, 114 N.E. 722 (1917); *Nissen v. Redelack*, 246 Minn. 83, 74 N.W.2d 300 (1955). South Carolina treats all functions and acts of a municipality as "governmental." *Irvine v. Town of Greenwood*, 89 S.C. 511, 72 S.E. 228 (1911). Moreover, a state may statutorily expand municipal immunity by declaring "proprietary" activities "governmental." *City of Corsicana v. Wren*, 159 Tex. 202, 317 S.W.2d 516 (1958); *Kirksey v. City of Ft. Smith*, 227 Ark. 630, 300 S.W.2d 257 (1957); *Imperial Prod. Corp. v. City of Sweetwater*, 210 F.2d 917 (5th Cir. 1954).

On the other hand, a state can also strip a municipality of its common law immunity. *Bernadine v. City of New York*, 294 N.Y. 361, 62 N.E.2d 604 (1945); *Irvine v. Town of Greenwood*, 89 S.C. 511, 72 S.E. 228 (1911). But a statute merely implying that a municipality is subject to liability will be strictly construed. *Bradshaw v. City of Seattle*, 43 Wash.2d 766, 264 P.2d 265 (1953). See generally Annot., 89 A.L.R. 394 (1934), and 38 Am. Jur., *Municipal Corporations* § 585 (1941), for power of legislature to impose liability on its municipalities.

⁴² See *Monaco v. Mississippi*, 292 U.S. 313 (1934), and *Hans v. Louisiana*, 134 U.S. 1 (1890), for enunciation of the sovereign immunity doctrine as applied to a state. See *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824) for a concise statement of the federal government's immunity.

⁴³ 18 McQuillin, *supra* note 20, § 53.24, at 198.

⁴⁴ *Detroit v. Osborne*, 135 U.S. 492 (1890). The Supreme Court in this pre-*Erie* case held that the question of municipal liability was one of "local," as opposed to "general," law binding on the federal courts.

Moreover, a federal court would be bound to observe the "local" law establishing conditions precedent to a suit against a municipality. *May v. County of Buchanan*, 29 Fed. 469 (N.D. Iowa 1886). Under *Erie*, the same conclusion would generally follow. *Cooper v. Westchester County*, 39 F. Supp. 58 (S.D.N.Y. 1941).

⁴⁵ See note 8 *supra*, for the practical consequences of dismissal for failure to state a cause of action.

⁴⁶ *Kenecott Copper Corp. v. Tax Comm'n*, 327 U.S. 573 (1946); *Ford Motor Co. v. Indiana Treas. Dep't*, 323 U.S. 459 (1945); *Great No. Ins. Co. v. Read*, 322 U.S. 47 (1944); *Chandler v. Dix*, 194 U.S. 590 (1904); *Smith v. Reeves*, 178 U.S. 436 (1900). Cf. *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932) (federal government's mere consent to suit does not authorize suit in a state court). Aside from *Matthews v. Rodgers*, *supra*, all of the above cases involved attempts by taxpayers to recover taxes paid under protest. Thus, they might be distinguished as cases merely involving federal deference to state supremacy in the area of state finance. See *Great No. Ins. Co. v. Read*, *supra* at 54.

⁴⁷ Cases cited note 46 *supra*.

Markham distinguished⁴⁸ states from municipalities by reasoning that the source of state power to avoid federal jurisdiction was the Eleventh Amendment, which does not apply to municipalities.⁴⁹

This distinction is tenuous. The Eleventh Amendment, which provides that a state cannot be sued by citizens of *another* state,⁵⁰ does not expressly authorize or empower a state to destroy federal jurisdiction over actions against itself. Rather, it is merely a constitutional declaration that states are imbued with sovereign immunity. The sovereignty of a state, however, is the significant characteristic behind the power to limit such suits against itself solely to state courts,⁵¹ not the Eleventh Amendment. This conclusion is buttressed by the case of *Smith v. Reeves*.⁵² There, a state citizen sued *his own* state in a federal court, a situation in which the Eleventh Amendment was not applicable. The United States Supreme Court held that the state had consented to be sued only in state courts. The traditional immunity of the sovereign from suit was the basis of the decision. Moreover, the traditional immunity of a state from suit by a *foreign state*⁵³ is also a manifestation that sovereignty extends far beyond the Eleventh Amendment.

When a municipality acts in a "governmental" capacity, it acts vicariously as a sovereign.⁵⁴ A state, therefore, theoretically has the same power to remove tort actions against a municipality which performs "governmental" functions from the domain of federal jurisdiction⁵⁵ as it has to provide that all actions against itself shall be brought only in state courts.⁵⁶ The Eleventh Amendment distinction drawn by *Markham* is not pertinent to the argument that a municipality sometimes functions as a sovereign. Of course the degree to which a municipality does not function and is not considered as a sovereign weakens the above argument, but does not make it implausible.

⁴⁸ *Markham v. City of Newport News*, 292 F.2d 711, 716 (4th Cir. 1961).

⁴⁹ *Chicot County v. Sherwood*, 148 U.S. 529 (1893); *Lincoln County v. Luning*, 133 U.S. 529 (1890); *Cowles v. Mercer County*, 74 U.S. 118 (1868).

⁵⁰ U.S. Const. amend. XI. See also *Matter of Ayers*, 123 U.S. 443 (1887); *Louisiana v. Jumel*, 107 U.S. 711 (1882).

⁵¹ See *Hans v. Louisiana*, 134 U.S. 1, 11-21 (1890): "The suability of a State without its consent was a thing unknown to the law. This has been so often laid down . . . that it is hardly necessary to be formally asserted." The court implied that the Eleventh Amendment was necessary only to set the law on a straight path after the aberration of *Chisholm v. Georgia*, 1 U.S. (2 Dall.) 419 (1793).

⁵² 178 U.S. 436 (1900). A fortiori, if a state has not consented to be sued at all, one of its citizens could not maintain an action against it in a federal court. *Hans v. Louisiana*, supra note 51.

⁵³ *Monaco v. Mississippi*, 292 U.S. 313 (1934).

⁵⁴ 18 *McQuillin*, supra note 20, § 53.24, at 198.

⁵⁵ Most tort actions in a federal court against a municipality probably would be based upon diversity jurisdiction. See note 1 supra. A state, however, is not a "citizen" for diversity purposes, *State Highway Comm'n v. Utah Co.*, 278 U.S. 194 (1929), and could be subject only to federal question jurisdiction. Therefore, since the power of a state is the basis of the author's contention that tort actions against municipalities could possibly be limited to state courts, federal question as well as diversity actions should logically be so restricted.

The case of *Workman v. New York City*, 179 U.S. 552 (1900), however, provides authority that federal question tort actions (e.g., in admiralty) against a municipality could not be limited by local common law defining "governmental" functions. Although the question whether a state could limit any tort action against a municipality to state courts was not before the court, *Workman* would necessarily be overruled if the author's contention prevailed.

⁵⁶ See note 46 supra and accompanying text.

CONCLUSION

Federal jurisdiction, as indicated above, is not completely inviolable.⁵⁷ Although, theoretically, only the bare power of the sovereign State of Virginia could justify the attempted restriction of federal jurisdiction over tort actions against municipalities, the reasoning in *Markham* that no restriction is possible seems short-sighted.

Specifically, in regard to diversity jurisdiction, only the policy of protecting an out-of-state plaintiff from local prejudice provides real support for the Court of Appeals decision. Moreover, the general rule (*i.e.*, once a legal right can be enforced generally in a state court and the requisites of diversity jurisdiction are present, the maintenance of an action in the federal courts cannot be prevented by the state statute) stands or falls on this policy assumption. Even assuming that the policy behind diversity jurisdiction is still valid, however, the characteristics inherent in a special tribunal similar to the New York Court of Claims might perhaps override it.

Richard A. Nicoletti

Torts: Libel and Slander: Absolute Privilege for Federal Employees: *Poss v. Lieberman*, 299 F.2d 358 (2d Cir. 1962); *Carr v. Watkins*, 227 Md. 578, 177 A.2d 841 (1962).—Two courts recently considered whether a government employee acting within the scope of his duties should be able to assert the defense of absolute privilege in a defamation action. In *Poss v. Lieberman*,¹ a claims representative of the Health, Education and Welfare Department allegedly made a defamatory statement in a confidential report to his supervisor. The court held the claims representative could successfully assert the defense of absolute privilege, because the alleged defamatory matter was included in a confidential intra-agency report. In so holding, however, the court rejected the district court's broad interpretation² of *Barr v. Matteo*.³ In *Carr v. Wat-*

⁵⁷ Aside from instances where jurisdictional requisites for diversity actions are present yet federal courts cannot or will not exercise jurisdiction, states could regulate the amount of damages recoverable in a particular action to no more than \$10,000. They thus could effectively limit diversity jurisdiction, and thereby restrict certain actions solely to state courts. For example, in the past some states' wrongful death statutes limited damages to \$10,000, and this limitation was held binding as the maximum amount recoverable. See, e.g., *Perkins v. Wilcox*, 294 Mo. 700, 242 S.W. 974 (1922); *Chick Transit Corp. v. Edenton*, 170 Va. 361, 196 S.E. 648 (1938). See also *Atchison, T. & S. F. Ry. v. Nichols*, 264 U.S. 348, 352 (1924), where in an action removed from a state to a federal court, the court implied that the state statutory limit on damages is binding on the federal courts.

In addition, most states limit the liability of innkeepers to far less than \$10,000. E.g., 2 Hawaii Rev. Laws § 193-13 (1955) (limitation of liability to \$50 for articles not left in hotel safe); N.Y. Gen. Bus. Law § 200 (limitation of liability to \$500 for articles left in hotel safe). See *Minneapolis Fire and Marine Ins. Co. v. Matson Nav. Co.*, 352 P.2d 335 (Sup. Ct. Hawaii 1960) where a mink coat was lost or stolen and liability was held to be no more than \$50.

These statutes and cases suggest that the Virginia legislature could have limited recovery in a tort action against a municipality to \$10,000 and thus could have achieved its goal of avoiding federal jurisdiction. The result in *Markham* could have been evaded.

¹ 299 F.2d 358 (2d Cir. 1962).

² 187 F. Supp. 841 (E.D.N.Y. 1960). The court thought the language in *Barr* required it to find that every federal employee acting within the scope of his duties was covered by an absolute privilege.

³ 360 U.S. 564 (1959).

kins,⁴ a naval ordinance laboratory guard allegedly made defamatory statements concerning the plaintiff knowing they would come to the attention of plaintiff's employer. The statements concerned Carr's (plaintiff's) reason for leaving his previous employment at the ordinance laboratory, and resulted in the plaintiff's discharge. The Supreme Court of Maryland, on appeal from an order sustaining the defendant guard's demurrer, held that the federal guard was cloaked in absolute privilege and the only question to be submitted to the jury upon remand was whether the guard was acting within the scope of his duties.⁵ The court thought the language of *Barr v. Matteo* demanded this result. Both cases illustrate the difficulties courts have had in interpreting the *Barr* case.

In *Barr*, the Supreme Court held that the director of the Office of Rent Stabilization could assert the defense of absolute privilege in a libel action. The alleged libelous statements were made in a press release. In a dictum the majority indicated that any federal employee could claim absolute privilege for any defamatory statements made within the scope of his duties.⁶

The Doctrine of Absolute Privilege

A liberal interpretation of *Barr* would result in a finding that *any* federal employee would not be liable for libelous statements, slanderous statements, or like conduct if acting within the scope of his duties.

Absolute privilege is available at common law to certain classes of defendants as one of the defenses that may be asserted in an action for libel, slander, or a related tort. Once it is shown that the defendant falls within the protected class, the privilege operates as a complete defense. *Barr* thus seems to find a defendant will not be liable to a person injured by his statements, regardless of motive, if he was a federal employee acting within the scope of his duties when the alleged defamatory statement was made. The absolute privilege doctrine must be distinguished from the doctrine of qualified privilege. If a defendant is entitled to rely on only a qualified privilege as a defense to a defamation action, he must show, in addition to the elements of absolute privilege, that the statements were not made maliciously and he had a reasonable belief in their truth.⁷

The extension of absolute privilege to employees of the executive branch of the federal government has been evolutionary. Judicial officers performing judicial functions⁸ as well as legislators exercising legislative functions have long been able to assert an absolute privilege.⁹ The absolute privilege was first extended to executive officers in *Spalding v. Vilas*,¹⁰ where the Postmaster General was accused of distributing a circular containing defamatory matter. After this extension of the presidential privilege to cabinet officers,

⁴ 227 Md. 578, 177 A.2d 841 (1962).

⁵ The question came up to the Supreme Court of Maryland on a demurrer to the complaint. The court, interestingly enough, held that two state police officers were only protected by a qualified privilege.

⁶ See note 33 *infra* and accompanying text.

⁷ Prosser, Torts § 95 (2d ed. 1955); Comment, 10 Stan. L. Rev. 589 (1958); Note, 20 Md. L. Rev. 368 (1960).

⁸ See, e.g., 1 Harper & James, Torts § 5.22 (1956); Prosser, *supra* note 7 at § 95; Comment, 20 U. Chi. L. Rev. 677 (1953); Note, 44 Minn. L. Rev. 547 (1960).

⁹ *Ibid.*

¹⁰ 161 U.S. 483 (1896).

the doctrine was further extended by the lower federal courts. *De Arnaud v. Ainsworth*¹¹ applied the doctrine to an executive officer lower than cabinet rank. The defendant was a department head directly responsible to the Secretary of War. The court imputed the privilege enjoyed by the Secretary of War to the defendant, saying:

[A]s the defendant . . . was the duly appointed official to . . . report to the Secretary for the action of the President, the same reason applies for the privilege of the report that would apply if the investigation and report had been made by the Secretary in person.¹²

In the years following *De Arnaud*, a special assistant to the Attorney General,¹³ various officials in the Comptroller General's office,¹⁴ a prison warden and members of the parole board,¹⁵ a District of Columbia commissioner,¹⁶ a chairman of the Tariff Commission,¹⁷ a consul,¹⁸ a high ranking Internal Revenue agent,¹⁹ a government psychiatrist,²⁰ immigration officials,²¹ the Commissioner of Indian Affairs,²² and a member of a local draft board,²³ were all held to be protected by an absolute privilege. In one case, *Colpoys v. Gates*,²⁴ the court refused to apply the absolute privilege doctrine to a United States marshal. The marshal had made allegedly defamatory statements to the press concerning the plaintiff. Whether the court thought an absolute privilege should be denied because the marshal was not within the scope of his duties or because the office of federal marshal is not entitled to an absolute privilege is not clear.

The federal cases decided prior to *Barr* thus established two requirements for absolute privilege: (1) the office must be one which should have the benefit of an absolute privilege,²⁵ and (2) the occasion must be privileged, *i.e.*, the officer must be acting within the scope of his duties.²⁶ Though some of the cases had language indicating a relaxation of the first requirement so as to protect all federal employees, the actual holdings were based on narrower grounds. The courts found an absolute privilege when the employee uttering the alleged defamatory statement was a cabinet officer,²⁷ or preparing a confidential intra-agency report,²⁸ or exercising a quasi-judicial function,²⁹ or

¹¹ 24 App. D.C. 167 (D.C. Cir. 1904).

¹² *Id.* at 177.

¹³ *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd mem.*, 275 U.S. 503 (1927).

¹⁴ *Cooper v. O'Connor*, 99 F.2d 135 (D.C. Cir. 1938).

¹⁵ *Lang v. Wood*, 92 F.2d 211 (D.C. Cir. 1937).

¹⁶ *Brown v. Rudolph*, 25 F.2d 540 (D.C. Cir. 1928).

¹⁷ *Smith v. O'Brien*, 88 F.2d 769 (D.C. Cir. 1937).

¹⁸ *United States ex rel. Parravicino v. Brunswick*, 69 F.2d 383 (D.C. Cir. 1934).

¹⁹ *Harwood v. McMurtry*, 22 F. Supp. 572 (W.D. Ky. 1938).

²⁰ *Taylor v. Glotfelty*, 201 F.2d 51 (6th Cir. 1952).

²¹ *Papagianakis v. The Samos*, 186 F.2d 257 (4th Cir. 1950).

²² *Farr v. Valentine*, 38 App. D.C. 413 (D.C. Cir. 1912).

²³ *Gibson v. Reynolds*, 172 F.2d 95 (8th Cir. 1949).

²⁴ 118 F.2d 16 (D.C. Cir. 1941).

²⁵ *Note*, 21 U. Pitt. L. Rev. 41, 49 (1959).

²⁶ *Ibid.*

²⁷ *Glass v. Ickes*, 117 F.2d 273 (D.C. Cir. 1940); *Standard Nut Margarine Co. v. Mellon*, 72 F.2d 557 (D.C. Cir.), *cert. denied*, 293 U.S. 605 (1934); *Mellon v. Brewer*, 18 F.2d 168 (D.C. Cir. 1927).

²⁸ *United States ex rel. Parravicino v. Brunswick*, 69 F.2d 383 (D.C. Cir. 1934); *Farr v. Valentine*, 38 App. D.C. 413 (D.C. Cir. 1912); *Harwood v. McMurtry*, 22 F. Supp. 572 (W.D. Ky. 1938).

²⁹ *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd mem.*, 275 U.S. 503 (1927); *Papa-*

directly responsible to a cabinet officer.³⁰ Courts have generally recognized an absolute privilege in all these situations.³¹ The common thread of the decisions previous to *Barr* was duties that could be classified as discretionary as opposed to ministerial, exercised by the federal employee.³²

Barr v. Matteo involved a libel suit against the head of the Office of Rent Stabilization. The district court and the court of appeals held the defendant was not entitled to an absolute privilege and the question of malice should go to the jury. The Supreme Court of the United States reversed, however, and held the defendant was entitled to an absolute privilege. While the holding that this particular officer was entitled to an absolute privilege was not in itself surprising, the broad language used by Justice Harlan was novel. The opinion has been generally interpreted as abandoning, in dictum, the first requirement for an absolute privilege, *i.e.*, the office be privileged, and thus extending the doctrine to any federal employee acting within the scope of his duties.³³ The majority stated that it proposed a balancing test where "the interest of the public in obtaining fearless executive performance and the interest of the individual in having redress for defamation"³⁴ are weighed. The dissenters, however, thought other language in the principal opinion indicated rather a complete subservience of the individual's right to freedom from defamation.³⁵ Five opinions were written in *Barr v. Matteo*. A concurring opinion by Justice Black argued that the public interest in having complete information on the functioning of the government demanded that a federal employee have complete freedom to give press releases.³⁶

Separate dissenting opinions were written by Justices Brennan, Stewart, and Warren. Justice Brennan argued that a qualified privilege is enough protection for any federal employee,³⁷ while Justice Stewart, though agreeing with the broad principles set forth by the principal opinion, thought the defendant was not acting within the scope of his duties.³⁸ Chief Justice Warren dissented primarily on the ground that the majority's test reversed the usual burden of proof rule in privilege cases.³⁹ The usual rule is that privilege is an affirmative defense which the defendant must plead and prove.⁴⁰ When one combines the *Barr* dictum, *i.e.*, that the sole test for absolute privilege is to be whether the occasion

gianakis v. The Samos, 186 F.2d 257 (4th Cir. 1950); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949); Phelps v. Dawson, 97 F.2d 339 (8th Cir. 1938); Lang v. Wood, 92 F.2d 211 (D.C. Cir. 1937); Smith v. O'Brien, 88 F.2d 769 (D.C. Cir. 1937).

³⁰ Cooper v. O'Connor, 99 F.2d 135 (D.C. Cir. 1938); De Arnaud v. Ainsworth, 24 App. D.C. 167 (D.C. Cir. 1904).

³¹ *Barr v. Matteo*, 360 U.S. 564, 585 (1959) (dissenting opinion by Warren, Ch. J.); Handler & Klein, "The Defense of Privilege in Defamation Suits Against Government Executive Officials," 74 Harv. L. Rev. 44 (1960); Comment, 55 Nw. U.L. Rev. 228 (1960); Note, 58 Mich. L. Rev. 295 (1959).

³² See generally James, "Tort Liability of Governmental Units and Their Officers," 22 U. Chi. L. Rev. 610 (1955); Comment, 10 Stan. L. Rev. 589 (1958).

³³ *Barr v. Matteo*, supra note 31; Comment, 55 Nw. U.L. Rev. 228 (1960); Notes, 44 Minn. L. Rev. 547 (1960); 73 Harv. L. Rev. 237 (1959); 34 St. Johns L. Rev. 168 (1959).

³⁴ *Barr v. Matteo*, supra note 31, at 578.

³⁵ *Id.* at 585 (dissenting opinion by Warren, Ch. J.).

³⁶ *Id.* at 577 (concurring opinion of Black, J.).

³⁷ *Id.* at 586 (dissenting opinion of Brennan, J.).

³⁸ *Id.* at 589 (dissenting opinion of Brennan, J.).

³⁹ *Id.* at 579 (dissenting opinion of Warren, Ch. J.).

⁴⁰ Comment, 15 Ohio St. L.J. 330 (1954); Notes, 44 Minn. L. Rev. 547 (1960); 21 U. Pitt. L. Rev. 41 (1959).

is privileged, with the presumption that a federal employee is acting within the scope of his duties, it becomes apparent that the plaintiff must bear the burden of showing the defendant was acting outside the scope of his duties.⁴¹ Furthermore, the burden of proof may become an almost insurmountable barrier to the plaintiff's right to recover when the duties of the employee are not specifically set forth.⁴² For this reason, and because of the decision's unnecessarily broad language the *Barr* case has been criticized by the commentators.⁴³ The criticism, however, may not be deserved. To denote the person to whom absolute privilege applies, the opinion used the words "executive official." This suggests that the doctrine is to apply only to officers who are reasonably high in the government hierarchy and exercise some degree of discretion in their duties. Also, the case may be limited to its facts.⁴⁴

The lower federal courts have limited the scope of the *Barr* dictum. In *Preble v. Johnson*,⁴⁵ where alleged defamatory statements were made by the head of a maintenance control program to a naval air station, the court found the defendant could assert the defense of absolute privilege. It declined, however, to base its decision on the broad dictum in *Barr*; holding instead that official reports in response to inquiries are absolutely privileged. In *Craig v. Cox*,⁴⁶ the plaintiff claimed that *Barr* required an extension of the doctrine to the defendants if they were acting within the scope of their duties. The court refused to grant an absolute privilege to police officers at Washington National Airport. In *Gaines v. Wren*⁴⁷ the court said:

Where statements are made by a government official in connection with his official duties and in reply to an inquiry, and where the reply thereto is not *malicious* . . . such statements . . . are absolutely privileged.⁴⁸ (Emphasis added.)

The Second Circuit in *Poss v. Lieberman*,⁴⁹ held there was an absolute privilege since the alleged defamatory matter was in a confidential internal report, but expressed displeasure with the lower court's following the broad dictum of *Barr*:

While the language of the recent cases indicates an unlimited reach to the privilege, it may be possible that a case involving such an administrative employee at a minor grade might lead to a reexamination of the language.⁵⁰

Two cases other than *Carr v. Watkins* seemingly have interpreted *Barr* as requiring the inclusion of all federal officers within the absolute privilege doctrine.⁵¹

⁴¹ Notes, 44 Minn. L. Rev. 547 (1960); 21 U. Pitt. L. Rev. 41 (1959).

⁴² Notes, 21 U. Pitt. L. Rev. 41, 48 (1959); 34 St. Johns L. Rev. 168 (1959).

⁴³ Handler & Klein, *supra* note 31; Comment, 10 Stan. L. Rev. 589 (1958); Notes, 73 Harv. L. Rev. 237 (1959); 58 Mich. L. Rev. 295 (1959); 34 St. Johns L. Rev. 168 (1959); 38 Texas L. Rev. 120 (1959); 21 U. Pitt. L. Rev. 41 (1959); cf. 3 Davis, Administrative Law Treatise § 26.01 (Supp. 1960, at p. 19); Comment, 55 Nw. U.L. Rev. 228 (1960); Note, 44 Minn. L. Rev. 547 (1960).

⁴⁴ See Handler & Klein, *supra* note 31, at 48.

⁴⁵ 275 F.2d 275 (10th Cir. 1960).

⁴⁶ 171 A.2d 259 (Mun. Ct. of App. D.C. 1961).

⁴⁷ 185 F. Supp. 774 (N.D. Ga. 1960).

⁴⁸ *Id.* at 777.

⁴⁹ 299 F.2d 358 (2d Cir. 1962).

⁵⁰ *Id.* at 360-61.

⁵¹ *Sauber v. Gliedman*, 283 F.2d 941 (7th Cir. 1960). The court seemed to base its

The status of the doctrine of absolute privilege is unclear, but the better authority has not interpreted *Barr* as requiring the extension of absolute privilege to all federal employees. The doctrine presently now is a somewhat liberalized version of the twofold requirement which existed prior to *Barr*.

Policy Bases for Absolute Privilege

The courts and commentators give many justifications for the granting of absolute privilege to government officials. The rationale most often given for the doctrine of absolute privilege is that the public interest demands the shielding of "responsible government officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities."⁵² This rationale is really a composite of three justifications in one. If an official is forced to litigate actions arising out of the performance of his duties, he will not have sufficient time to devote to the responsibilities of his office; qualified persons will be deterred from entering public service because of possible liability for their actions; and persons already in government service may be deterred from making objective decisions if one alternative presents a threat of liability.⁵³ These reasons concern factors that affect the smooth functioning of the government. Other justifications for absolute privilege have been: The complexity of modern government requires much delegation to lesser officials; there have not been too many abuses where an absolute privilege was granted; and there are alternate ways to deter irresponsible officials.⁵⁴ Whether these reasons are sufficient to justify an absolute privilege is beyond the scope of this note,⁵⁵ and the subsequent discussion will be limited to their application to the *Poss* and *Carr* cases.

In view of the policy behind the doctrine of absolute privilege, the *Poss* case was decided correctly. Obviously the effective functioning of the government requires that at least internal reports to superiors be privileged. Thus, the court was correct in holding the defendant was entitled to an absolute privilege because the alleged defamatory matter was in an intra-agency report. Many of the policy reasons underlying the doctrine of absolute privilege would be negated if a qualified privilege was all that was allowed in this situation. It would appear that the fullest latitude should be allowed to an official making a report to his superior. This will encourage candor and is unlikely to involve any harm to the complainant since there will be no widespread publication. Absolute privilege would allow many summary judgments

decision on an assistant to the Attorney General having the privilege of the Attorney General, although it did use broad language suggesting that any federal official was entitled to an absolute privilege. See also *Porter v. Eyster*, 294 F.2d 613 (4th Cir. 1961). The force of this decision is somewhat lessened by the fact that it was a diversity case involving West Virginia law. In *Brownfield v. Landon*, 307 F.2d 389 (D.C. Cir. 1962) statements made by an Air Force Inspector General were held to be absolutely privileged. Though the court cited *Barr* with approval, the affidavits below seemed to present a broader issue than scope of duties.

⁵² *Barr v. Matteo*, 360 U.S. 564, 565 (1959).

⁵³ See Comment, 10 *Stan. L. Rev.* 589 (1958); Note, 44 *Minn. L. Rev.* 547 (1960); Note, 21 *U. Pitt. L. Rev.* 41 (1959).

⁵⁴ *Barr v. Matteo*, supra note 52, at 576; Handler & Klein, supra note 31; Note, 44 *Minn. L. Rev.* 547 (1960).

⁵⁵ See concerning this question, the dissenting opinion Warren, Ch. J., in *Barr v. Matteo*, supra note 49; Handler & Klein, supra note 31; Note, 44 *Minn. L. Rev.* 547 (1960).

in this field while qualified privilege would, in almost every situation, require a trial on the question of the official's motive. Such a trial would involve waste of governmental time in a situation where the complainant will suffer very little harm.

It is also submitted that the subsequent discussion concerning *Carr* will demonstrate the *Poss* court was correct in indicating the absolute privilege should not be extended to every federal employee.⁵⁶

In *Carr v. Watkins*, the federal employee was a security guard at an ordnance laboratory. The court held that the language in *Barr* compelled them to find he was covered by an absolute privilege.⁵⁷ If one looks behind the language of *Barr* and examines the case in the light of the policy underlying the doctrine,⁵⁸ it becomes apparent the decision is not sound.

In *Carr*, the absence of the guard from his job in order to defend a law suit could not be said to impair the workings of the government.⁵⁹ Furthermore, it is unlikely that there is a great shortage of people seeking guard jobs or that these people would be deterred from taking the job because of possible liability arising from their duties. After all, vacancies in guard positions with private concerns and vacancies in police departments are apparently filled despite the equal likelihood that liability could result from the performance of the duties. Also, a guard is an employee exercising little discretion; therefore, the failure to grant an absolute privilege would not be a threat to objectively made governmental decisions. With respect to the arguments that there are other ways of preventing irresponsible action, and that there have not heretofore been widespread abuses of the absolute privilege, it must be noted that the same pressures which tend to deter judicial officers and higher executive officials are not present when absolute privilege is extended to a guard.⁶⁰ In this same regard, it is also interesting to note that in the earlier

⁵⁶ *Supra* note 52.

⁵⁷ Two ancillary problems with regard to the federal employee involved in *Carr* were presented. The first was whether federal or state law should govern the scope of the privilege. The court held that in view of *Howard v. Lyons*, 360 U.S. 593 (1959), federal law applies to a federal officer. Secondly, the problem was whether the defense of absolute privilege is available as a defense to a cause of action based on invasion of the right of privacy. Although there is no direct authority on the point, the court was correct in holding that it was. In *Barr v. Matteo* the court spoke of "kindred torts" and the doctrine has been applied by the lower federal courts to many analogous torts. See, e.g., *Morton Int'l Corp. v. FDIC*, 305 F.2d 692 (1st Cir. 1962) (action for business destruction); *Michaels v. Chappell*, 279 F.2d 600 (9th Cir. 1960) (abuse of process); *O'Campo v. Hardisty*, 262 F.2d 621 (9th Cir. 1958) (conspiracy to ruin business and reputation); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949) (false arrest); *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd mem.*, 275 U.S. 503 (1927) (malicious prosecution).

⁵⁸ "Absolute immunity, requiring the surrender of personal rights for the good of the whole, should be granted only in cases of necessity." Comment, 20 U. Chi. L. Rev. 677, 679 (1953).

⁵⁹ One commentator in criticizing *Barr* said. "[T]he present rule is unnecessarily broad in failing to distinguish between officials exercising substantial discretion or having unique skills and officials whose temporary absence from work would not be particularly detrimental." Note, 73 Harv. L. Rev. 237, 239 (1959).

In *Morton Int'l Corp. v. FDIC*, *supra* note 57, the court refused to grant an absolute privilege. Although it is not explicitly stated in the opinion, the court seemed to be relying on the fact that in a declaratory judgment proceeding there was no threat to the official and thus no deterrent to objective action.

⁶⁰ For a discussion of this problem see *Handler & Klein*, *supra* note 31, at 54-55, where the following safeguards present in judicial proceedings are discussed:

1. The aggrieved party will have an opportunity for appellate review.

cases involving federal police officers or the like, the courts have refused to grant an absolute privilege.⁶¹ Perhaps Professor Davis puts his finger on a reason why the doctrine had not, previous to *Carr*, been applied to police officers when he says:

The problem of immunity of . . . [police] officers is a highly practical one for abuses by police officers are so wide-spread that estimates have been made that from one million to three and a half million illegal arrests are made annually.⁶²

CONCLUSION

Carr, in following the dictum in *Barr* without taking into account later Federal cases, misinterpreted federal law. A twofold test seems to be required; both the office and the occasion must be absolutely privileged before the employee is held to be protected by an absolute privilege. It must be noted, however, that the trend until now has been to liberalize the first requirement. Even so, it would seem the court in granting an absolute privilege to a guard subverts the rights of the injured plaintiff to those of the government employee, while ignoring the reasons for granting an absolute privilege. If the justifications for the doctrine are not present an employee is sufficiently protected by a qualified privilege. The burden of showing that his actions were reasonable and not motivated by malice is not too great especially in light of the dictum in *Barr*, which seems to put the burden of showing the federal employee was acting outside the scope of his duties on the plaintiff.⁶³ After the *Carr* decision, Dean Prosser may believe that he was hasty in saying, "Clearly a janitor is not to escape all liability for defamation merely because he is employed by the state and has duties to perform."⁶⁴ The guard in *Carr* was not too many levels above Dean Prosser's janitor on the administrative totem pole.

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2. The litigant in a judicial proceeding will, during that proceeding, have adequate opportunity to vindicate himself.

3. The fact that procedures are available for disqualification of the judge.

4. The character, history, and traditions of the bench and bar.

The deterrents to arbitrary action by a high executive official are:

1. Adverse publicity and consequent failure to be reelected or reappointed.

2. In certain administrative functions, judicial review may be available.

See Jennings, "Tort Liability of Administrative Officers," 21 Minn. L. Rev. 263, 275 (1937); Note, 44 Minn. L. Rev. 547, 552 (1960).

⁶¹ *Colpoys v. Gates*, 118 F.2d 16 (D.C. Cir. 1941); *Craig v. Cox*, 171 A.2d 259 (Mun. Ct. of App. D.C. 1961).

⁶² Davis, *Administrative Law* § 26.03, at 474 (1959).

⁶³ See notes 39-41, *supra* and accompanying text.

⁶⁴ Prosser, *Torts* § 95, at 612 (2d ed. 1955).