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Notes and Comments

NOTES AND COMMENTS

TAXATION: A CRITIQUE OF *DOBSON* v. *COMMISSIONER*: FINALITY OF TAX COURT'S DETERMINATIONS OF TAX ACCOUNTING QUESTIONS

The Supreme Court recently wrote a new chapter on the finality to be accorded to determinations of the Tax Court in *Dobson v. Commissioner, 320 U. S. 489, 64 Sup. Ct. 239 (1943)*, petition for rehearing denied, *321 U.S.231, 64 Sup. Ct. 495 (1944)*. Reiterating the often-stated,[1] though reluctantly followed[2] rule that absolute finality must be accorded to the Tax Court's findings of fact, the Court extended this rule of finality to the Tax Court's determinations of tax accounting practice. The extent to which the Court thereby relinquished its supervision of tax accounting methods was unprecedented and appeared out of line with a Supreme Court decision of only eight months' priority.[2a] But how much of the *Dobson* decision is still law has suddenly become highly debatable, for the Supreme Court within five months handed down two other decisions[2b] which have cast considerable doubt on the meaning of the *Dobson* decision.

The dispute in the *Dobson* case involved 200 shares of corporate stock purchased by the taxpayer and later sold in 1930 and 1931 at substantial losses. In those years taxpayer took deductions for these losses in his federal income tax returns, but since his tax returns, exclusive of these deductions, would have shown deficits, the deductions did not offset any taxable income, and thus effected no tax benefit. Years later, taxpayer, learning that he had been induced to purchase the stock by fraud, brought suit for recission, tendering the proceeds of the prior sales, and by settlement in 1939 recovered less than his total losses. Taxpayer never reported as income any part of the recovery. Adjustment of his tax liability for 1930 and 1931, the years of the deductions in issue, was barred by the statute of limitations in 1939.

The issue defined by the above facts is: Where a deduction does not result in tax benefit in the year taken, should a recovery in a subsequent

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[1] *E.g.*, see Helvering v. Rankin, 295 U. S. 123, 55 Sup. Ct. 732 (1935); Elmhurst Cemetery v. Comm'r, 300 U. S. 37, 57 Sup. Ct. 324 (1936); Helvering v. Lazarus & Co., 308 U. S. 252, 60 Sup. Ct. 209 (1939); Wilmington Co. v. Helvering, 316 U. S. 164, 62 Sup. Ct. 984 (1941).

[2] See GRISWOLD, CASES AND MATERIALS ON FEDERAL TAXATION (1940) 134. To avoid the rule, courts will often say there is no substantial evidence to support the ultimate finding. See, *e.g.*, Denniston v. Comm'r, 106 F. (2d) 925 (C. C. A. 3d, 1939). Or, as recoguized by the court in the principal case, courts will argue that the question involved is one of law, not of fact, 320 U. S. at 501, 64 Sup. Ct. at 246.

[2a] Virginian Hotel Corp. v. Helvering, 319 U. S. 523, 63 Sup. Ct. 1260 (1943). See text *infra* at p. 518 *et seq.*

[2b] Security Flour Mills Co. v. Comm'r, 321 U. S. 281, 64 Sup. Ct. 596 (1944); and Douglas v. Comm'r, 12 U. S. L. WEEK 4385 (May 15, 1944). See text *infra* at p. 522 *et seq.*

year be included in gross income in the year of recovery?[3] The Board of Tax Appeals (now the Tax Court), applying the tax benefit rule, treated the deduction as if it had never been taken and decided the main issue in the negative.[4] On appeal the circuit court reversed on the ground that, in the absence of statute or Treasury regulations, the application of the tax benefit rule was improper as a matter of law.[5] The Supreme Court held: (1) the circuit court erred in treating as a question of law what was only a question of proper tax accounting practise; and (2) in matters of tax accounting, as in all other matters of fact, the determinations of the Tax Court are final and unreviewable in the absence of statute or regulations prescribing a fixed method of accounting.

I

The holding in the *Dobson* case is thus twofold. The first part of the holding involves an important and novel question; namely, whether the so-called tax benefit rule, described in the margin,[6] is, in the absence of statute, a matter of law involving equitable considerations, or merely a matter of tax accounting. The question is, at least, arguable.[7] The Supreme Court,

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[3]Other than the issue to be discussed in this comment, the first *Dobson* decision and the later decision on the petition for rehearing resolved the following three issues, not involved in the facts given *supra*:

(1) Should a recovery be included in taxable income in so far as it represents prior losses, the deductions for which effected tax benefits in the year of the deduction? *Held,* yes.

(2) If the answer to question (1) is yes, should the recovery described in (1) be taxable as ordinary income or as capital gain? *Held,* ordinary income.

(3) What significance is to be attached to taxpayer's failure to avail himself of certain allowable personal exemptions and credits for dependents because other deductions offset all his taxable income for that year? *Held,* none, where the Tax Court so rules.

[4]Estate of Collins, 46 B. T. A. 765 (1942).

[5]Harwick v. Comm'r, 133 F. (2d) 732 (C. C. A. 8th, 1943).

[6]The tax benefit rule provides that where deductions for losses did not effect a reduction of tax liability, amounts subsequently recovered on the loss constitute a non-taxable recoupment of loss, rather than taxable income. G. C. M. 20854, 1939-1 (Part 1) CUM. BULL. 102; Plumb, *The Tax Benefit Rule Today* (1943) 57 HARV. L. REV. 129; Estate of Collins, 46 B. T. A. 765 (1942). This rule imposes a limitation on the general rule that where deductions are taken for losses, such deductions are deemed to constitute a recoupment for tax purposes; and a subsequent recovery must be included in gross income for the taxable year in which received, since the prior deduction has already given the taxpayer all the recoupment to which he is entitled. U. S. Treas. Reg. 94, Art. 23 (k)-1; Plumb, *op. cit. supra* at 130-131. The general rule is based on the theory that the portion of income which is not taxed as a result of the deduction for loss represents, in effect, the monetary return which would otherwise be necessary to effect a recoupment. Estate of Collins, *supra,* at 769. The rationale of the tax benefit rule is this: Where the taxpayer had no income in the year of the deduction, the deduction did not in fact accomplish the recoupment which under the general rule is deemed to be effected by a portion of his income going tax-free. Only by a subsequent recovery of the loss can the taxpayer truly receive a recoupment; and until the income tax equivalent of a full recoupment is effected, a recovery of loss is not income. G. C. M. 20854, 1939-1 (Part 1) CUM. BULL. 102.

[7]Application of the tax benefit rule seems to be more than a mere method of

by virtue of its affirmance of the Tax Court's determination on the ground that such a determination was in the nature of a finding of fact, and by virtue of its express statement that it was "not adopting any rule of tax benefits,"[8] seemed to take the position that a question of the applicability of the tax benefit rule is, in the absence of statute, a matter of tax accounting practice. The effect of this holding was to sanction the extension of the tax benefit rule, which is already applied in many other situations,[9] to recoveries of stock losses.

It is primarily the purpose of this comment to examine the second part of the *Dobson* holding, that is, the rule of finality laid down by the Supreme Court, with respect to its desirability, its consistency with some prior Supreme Court decisions, and the likelihood of its survival.

The desirability of placing on the shoulders of the Tax Court, which "is

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accounting in the nature of a finding of fact. It has been called a principle of equity. Harwick v. Comm'r, 133 F. (2d) 732, 735 (C. C. A. 8th, 1943); *cf.* Plumb, *op. cit. supra* note 6, at 129; see also Stone, C. J., dissenting in Virginian Hotel Corp. v. Helvering, 319 U. S. 523, 529, 63 Sup. Ct. 1260, 1263 (1943), indicating that he believed failure to Comm'r, 320 U. S. 489, 502, 64 Sup. Ct. 239, 247 (1943). Indeed, the application of the tax benefit rule resembles "mixed questions of law and fact," which, when resolved by the Tax Court, are always reviewable. Marsch v. Comm'r, 110 F. (2d) 423 (C. C. A. 7th, 1940); Bynum v. Comm'r, 113 F. (2d) 1 (C. C. A. 5th, 1941). *But cf.* Dobson v. Comm'r, 320 U. S. 489, —, 64 Sup. Ct. 239, 247 (1943). Indeed, the application of the tax benefit rule in computing income approximates the application of a criterion in determining value, which is also reviewable. Powers v. Comm'r, 312 U. S. 259, 61 Sup. Ct. 509 (1940); Helvering v. Maytag, 125 F. (2d) 55 (C. C. A. 8th, 1942); Meadow Land & Improvement Co. v. Comm'r, 124 F. (2d) 297 (C. C. A. 3d, 1942).

[8]320 U. S. at 506, 64 Sup. Ct. at 249.

[9]It is not the object of this comment to discuss the development of the rule and its present application; that task has been amply handled elsewhere. See Plumb, *op. cit. supra* note 6. Suffice it to say that the rule is now applied by statute [INT. REV. CODE § 22(b)(12), *added by* Revenue Act of 1942 § 116] and regulations [U. S. Treas. Reg. 111, § 29.22(b)(12)-1] to recoveries of bad debts, prior taxes and delinquency amounts, and also by statute to recoveries of war losses [INT. REV. CODE § 127(c)(2), *added by* Revenue Act of 1942 § 157(b)]; by a long line of Board opinions it is applied to the rebate or cancellation of interest and expenses [Chenango Textile Corp., 1 T. C. 147 (1942) (N. A.); Barnhart-Morrow Consolidated, 47 B. T. A. 590 (1942); Amsco Wire Products Corp., 44 B. T. A. 717 (1941) (N. A.); see also cases cited in 1 MONTGOMERY, FEDERAL TAXES ON CORPORATIONS (1943) 556; and Plumb, *op. cit. supra* note 6, at 140; and see cases collected in 1 Prentice-Hall 1944 Fed. Tax Serv. ¶¶ 7359, 7372] and to the recoupment of losses generally [Edward E. Marshall, 10 B. T. A. 1140 (1928)].

There is considerable question whether the rule may be applied to allow a second deduction to be taken where the prior deduction resulted in no tax benefit. [See Fidelity & Deposit Co. v. Magruder, 50 F. Supp. 817 (D. Md. 1943) (appeal pending), allowing duplicate deductions for bad debts. *Contra:* Bank of Newberry, 1 T. C. 374 (1942) (acq.).] The rule has been held inapplicable to deductions for depreciation [Virginian Hotel Corp. v. Helvering, 319 U. S. 523, 63 Sup. Ct. 1260 (1943) (5-4 decision)] and depletion [Douglas v. Comm'r, 12 U. S. L. WEEK 4385 (May 15, 1944), *aff'g* 134 F. (2d) 762 (C. C. A 8th, 1943) (affirmance by virtue of an equally divided Supreme Court; see note 38 *infra*)], and deductions for ordinary business expenses incurred in the performance of a contract [Burnet v. Sanford & Brooks Co., 282 U. S. 359, 51 Sup. Ct. 150 (1931)]. It is also said not to apply to deductions for the issuance of corporate bonds at a discount [See G. C. M. 22163, 1940-2 CUM. BULL. 76, 80].

relatively better staffed for its task than is the judiciary,"[10] the ultimate responsibility to determine proper tax accounting methods can hardly be questioned. But for the Court to indicate that questions of tax accounting are not reviewable, where there is no controlling statute, because they are in the nature of questions of fact seems open to doubt; for whether a particular tax accounting method is legitimate frequently involves reviewable questions of law, not mere questions of fact. In a fairly similar case where the Board of Tax Appeals had ruled that certain sums received by a taxpayer constituted a recoupment of sums previously spent, the circuit court reversed the Board on the ground that such a finding was not in the class of an unreviewable determination of disputed testimony or a finding as to the weight of evidence, but rather an indulgence in a fictional theory of computation.[11] Similarly, it would appear, a finding that a certain recovery does not constitute income, which rests not on pure fact, but on an equitable theory,[12] like the tax benefit rule, should be subject to review. In view of its refusal to review the merits of the *Dobson* case, the Supreme Court must be taken to have laid down a broad rule that thenceforth matters of tax accounting, though possibly involving some questions of law, were, in the absence of statute or regulations, to be left as exclusively to the jurisdiction of the Tax Court as matters of fact had theretofore been.

This was not the first time the Supreme Court had indicated a willingness to relinquish its supervision of tax accounting. As early as 1930, it held that the determination of whether losses should be deducted in the year sustained calls for "a practical, not a legal test";[13] and much discretion in prescribing proper practice should be allowed the administrative board charged with the duty of enforcing the revenue acts.

Nevertheless, that the present members of the Supreme Court *unanimously* accepted as conclusive the Tax Court's determination that the tax benefit rule should be applied to deductions for stock losses is surprising in view of this same Court's utter disregard of the Tax Court's determination of the applicability of the tax benefit rule to deductions for depreciation in the earlier *Virginian Hotel Corporation* case,[14] decided by a 5-4 Court last term.

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[10]Jackson, J., in Dobson v. Comm'r, 320 U. S. at 498, 64 Sup. Ct. at 245.

[11]Tunnel R.R. of St. Louis *et al.* v. Comm'r, 61 F. (2d) 166, 173 (C. C. A. 8th, 1932), *rev'g* 17 B. T. A. 1135 (1929), *cert. den.*, 288 U. S. 604, 53 Sup. Ct. 396 (1932).

[12]See note 7 *supra.*

[13]Lucas v. American Code Co., 280 U. S. 445, 449, 50 Sup. Ct. 202, 203 (1930).

[14]Virginian Hotel Corp. v. Helvering, 319 U. S. 523, 63 Sup. Ct. 1260 (1943). For several years taxpayer reported depreciation of certain assets on a straight line basis at rates of 15% and 10%, taking the appropriate deductions therefor. Because no taxable income was earned during these years, the deductions effected no tax benefit. The Commissioner, determining that the rates of depreciation were too high, readjusted them to 8% and 5%, but refused to readjust the property basis so as to compensate for the excessive, eroneous deductions, and assessed a deficiency computed on the depreciation basis as adjusted by amounts equal to the excessive deductions. *Held,* four judges dissenting, depreciation basis must be adjusted downward by amount of prior excessive deductions, irrespective of whether any tax benefit was effected.

Although the *Virginian Hotel* case deals with the effect of deductions on the adjustment of the depreciation basis, whereas the *Dobson* case deals with adjustment of

The *Virginian* case dealt with the effect to be given to excessive deductions for depreciation in determining the proper adjustment of the property basis, where such deductions effected no tax benefits. The Court gave no consideration to the Tax Court's ruling, concerning itself only with the interpretation to be given to section 113(b)(1)(B) of the Internal Revenue Code, which prescribes the method of making adjustments for depreciation.

II

The *Virginian Hotel* and the *Dobson* cases present analogous problems. Although this was recognized and urged upon the Court in the briefs filed by both the taxpayer and the government in the *Dobson* case,[15] the *Dobson* decision not only does not attempt to distinguish the two cases, but does not even refer to the *Virginian* decision. It may be that the Court felt that the two cases were not comparable, in that the latter case deals with the determination of the proper basis for depreciation, while the former is concerned with whether certain recoveries constitute income or a mere return of capital. But the solution of both problems can only be reached by ascertaining the property basis, which is required to be adjusted to the extent of deductions for various items. Both cases turn upon the same question: In computing adjustment of the property basis, what significance is to be attached to deductions—in the one case for depreciation, in the other for stock losses—which effect no tax benefits? Further, certain elements in the two cases appear to be very similar: Investment in a depreciable asset corresponds to investment in stock in that both are assets; the loss of capital resulting from the depreciation of an asset is basically the same as the capital loss resulting from stock losses; in both situations the loss is accompanied by a downward adjustment of the value of the investment for income tax purposes;[16] in both situations the loss is compensated for in the same way, by the allowance of a deduction;[17] and in both situations the deduction is regarded as a recoupment of loss for tax purposes.[18]

Despite all these similarities, the Supreme Court differed in its approach to the two cases. The entire Court in the *Virginian Hotel* case, contrary to their later unanimous ruling in the *Dobson* case, accorded no finality to the Tax Court in deciding upon the applicability of the tax benefit rule,

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the cost basis, the two bases are proclaimed by statute to be computed and adjusted in the same way. [See INT. REV. CODE §§ 23(n), 114(a), 113(a), 113(b)(1)(B).] While the incidents of the adjustment of the cost basis differ from those of the adjustment of the depreciation basis—the latter affects the value of the property for purposes of computing the yearly depreciation, and the former affects the value of the property only for purposes of sale or other disposition—a holding as to the one is equally applicable to the other. MONTGOMERY, *op. cit. supra* note 9, at 273.

[15]See Brief for Respondent in Opposition, 8-9, and Petitioners' Reply Memorandum, 2, Dobson v. Comm'r, 320 U. S. 489, 64 Sup. Ct. 239 (1943).

[16]INT. REV. CODE § 113(b)(1)(A) (stock losses); INT. REV. CODE § 113(b)(1)(B) (depreciation).

[17]INT. REV. CODE § 23(e), *limited by* § 23(g) *to the extent provided in* § 117(b) and (d)(2) (stock losses); INT. REV. CODE § 23(l) (depreciation).

[18]Estate of Collins, 46 B. T. A. 765, 769 (1942) (stock losses); United States v. Ludey, 274 U. S. 295, 303, 47 Sup. Ct. 608, 611 (1927) (depreciation).

and instead reviewed the question on the merits, deeming it to be a question of statutory interpretation to be decided ultimately by the judiciary, rather than a mere question of tax accounting to be determined conclusively by the Tax Court.

This apparent inconsistency in the holdings would be readily explainable, if the relevant statute in the *Virginian Hotel* case prescribed a definite rule on the applicability of the tax benefit principle, while the statute in the *Dobson* case did not; for it seems undisputed that where a definite method of accounting is prescribed in the statute, its application becomes a question of law subject to revew by the judiciary, rather than an ordinary tax accounting question in the nature of an unreviewable question of fact. Not even the *Dobson* decision can be cited as according finality to the Tax Court where the statute contains a fixed rule.

But the *Dobson* decision did not attempt to explain its apparent inconsistency with the *Virginian* decision along these lines. This is understandable, since both cases involve the *same* section of the Code, 113(b)(1), providing that "Proper adjustment . . . of the property shall in all cases be made—" for various deductions enumerated in paragraph (A) (involved in the *Dobson* case), such as "expenditures, receipts, losses, or other items, properly chargeable to capital account," and in paragraph (B) (involved in the *Virginian* case), such as depreciation "to the extent allowed (but not less than the amount allowable). . . ." Paragraph (B) obviously does not lay down an express rule regarding the applicability of the tax benefit rule any more than does paragraph (A).

If a fixed rule is to be found in paragaph (B) which would explain the seeming inconsistency between the *Virginian Hotel* and *Dobson* decisions, it can only be found by an interpretation which reads in such a fixed rule. All the members of the Court in the *Virginian* case did read a fixed rule into paragraph (B), the majority claiming that the statute definitely precluded, and the minority claiming that the statute affirmatively prescribed, application of the tax benefit rule.

It remains to be considered whether there is justification for so interpreting paragraph (B); for, if there is, the *Virginian* and *Dobson* decisions are reconcilable because of the presence of a fixed rule in the former case, and the absence of such a rule in the latter. In reaching their conclusion in the *Virginian* case, the justices completely ignored the "proper adjustment" phrase of section 113(b)(1), upon which the *Dobson* decision seems partly to have been based,[19] and focused their attention exclusively on language

[19]Two sentences in the *Dobson* decision give rise to a doubt as to whether the holding was based on the words "proper adjustment," in section 113(b)(1), or on the words "properly chargeable," found only in paragraph (A) and thus applicable only to the *Dobson* case:

> What, in the circumstances of this case, was a *proper adjustment* of the basis was thus purely an accounting problem. . . . Evidently the Tax Court thought that the previous deductions were not altogether *"properly chargeable* to capital account" and that to treat them as an entire recoupment of the value of Taxpayer's stock would not have been a *"proper adjustment."* (320 U. S. at 504, 64 Sup. Ct. at 248. Italics added.)

Logic, however, compels the conclusion that the power given to the Tax Court to

in paragraph (B), requiring that the property be adjusted for deductions "to the extent *allowed* (but not less than the amount *allowable*)."[20] The Court was not concerned with the effect of "allowable" deductions on the adjustment of the property basis, but only with the effect of deductions "allowed" in excess of what was legally allowable; for as to "allowable" deductions for depreciation, it is universally agreed that, because of certain policy considerations,[21] yearly adjustment must be made, regardless of whether such deductions effect a tax benefit.[22]

The majority, predicating their opinion on this accepted treatment of the word "allowable" as used in the statute, gave paragraph (B) a very literal[23] interpretation, saying, in effect, that they could see no difference between Congress' use of the words "allowable" and "allowed"; therefore, the statute must be interpreted as precluding application of the tax benefit rule to "allowed" deductions. On this questionable[24] theory, the majority fashioned a decision which technically is reconcilable with the *Dobson* decision.

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determine whether the tax benefit rule should be applied is based solely on the words "proper adjustment." The words "properly chargeable" refer only to the kinds of deductions for which adjustment must be made [see examples of "properly chargeable" items in U. S. Treas. Reg. 111, § 29.113(b)(1)-1 (1943)]; whereas "proper adjustment" refers to the method of adjustment. Application of the tax benefit rule obviously involves a method of adjustment, not a type of deduction.

[20]Italics added. Why paragraph (B), though formerly requiring adjustment only to the extent of depreciation "allowable," was amended in 1932 to require adjustment to the full extent "allowed," if that be greater, is not pertinent here. For full explanation of the reason behind the amendment, see Virginian Hotel Corp. v. Helvering, 319 U. S. 523, 526, 63 Sup. Ct. 1260, 1262, and n. 7; SEN. REP. No. 665, 72d Cong., 1st Sess. (1932) 29; H. R. REP. No. 708, 72d Cong., 1st Sess. (1932) 22; see also Note (1940) 40 COL. L. REV. 540.

[21]The policy is against allowing taxpayers to gain unwarranted advantage by accumulating depreciation for use in a year in which it will bring the most tax benefit. This policy is recognized as outweighing considerations in favor of the tax benefit rule by both the majority and dissenting opinions in the *Virginian Hotel* case. 319 U. S. at 525 and 529, 63 Sup. Ct. at 1262 and 1263.

[22]See Hardwick Realty Co. v. Comm'r, 29 F. (2d) 498 (C. C. A. 2d, 1928), *cert. dismissed on mot.*, 279 U. S. 876, 49 Sup. Ct. 344 (1928); American Nat'l Realty Co., 47 B. T. A. 653 (1942), *aff'd*, 136 F. (2d) 486 (C. C. A. 5th, 1943); *cf.* United States v. Ludey, 274 U. S. 295, 47 Sup. Ct. 608 (1927).

[23]See MONTGOMERY, *loc. cit. supra* note 14.

[24]The majority seemed to reach their decision in the belief that the policy consideration, discussed in note 21 *supra*, which prevents the application of the tax benefit rule to the making of adjustments for deductions "allowable" also militates against the application of the rule to excessive deductions "allowed." But, as Chief Justice Stone stated in his dissent [319 U. S. at 529, 63 Sup. Ct. at 1263], the objective of the policy would appear to be fully satisfied by requiring adjustment to be made only to the extent of depreciation "allowable."

The majority decision aroused much criticism, and Congress was petitioned by the American Bar Association to adopt corrective legislation in the form of the tax benefit rule. MONTGOMERY, *loc. cit. supra* note 14; Plumb, *op. cit. supra* note 6, at 148, n. 80. The Committee on Federal Taxation of the American Institute of Accountants advocated similar legislation [(1942) 73 J. ACCOUNTANCY 486, 490], as did the United States Chamber of Commerce [*Hearings before House Committee on Ways and Means on Revenue Revision of 1943*, 78th Cong., 1st Sess. (unrev. printing 1943) 631-632]. But Congress, on Feb. 25, 1944, passed the Revenue Act of 1943 without adopting any of the legislation suggested.

Even this highly technical argument, which appears to be the sole basis for the majority's contention that the statute lays down a fixed rule as to "allowed" deductions, is not available to the minority in support of its contention that the statute should be interpreted as affirmatively prescribing the application of the tax benefit principle as a fixed statutory rule. For while the similarity between the words "allowed" and "allowable" lends support to the majority's position, it militates against the minority's position. The basis of the minority's opinion is not that the statute clearly indicates the proper rule, but that it would be "inequitable"[25] not to interpret it as applying the tax benefit rule. While this result is more desirable than that reached by the majority, it does not seem consistent with the rule of the *Dobson* case. Surely the applicability of the tax benefit rule was no less a question of tax accounting in the *Virginian Hotel* case than in the *Dobson* case. And the statute was no more explicit on this question in the one case than in the other. What greater justification, then, was there for the exercise of judicial review and indulgence in statutory interpretation in the *Virginian* case than in the *Dobson* case?

If courts are allowed to construe statutes as prescribing fixed rules of accounting where such rules are not expressed or clearly implied, the bar to judicial review, set up by the *Dobson* decision for application in cases where the pertinent statute does not contain a fixed rule, will be easily avoided by the obvious device of reading into such statutes a fixed rule, just as the minority and majority have done in the *Virginian* case. In this light the position taken by all nine justices in the *Virginian* case appears inconsistent, at least in spirit, with their later position in the *Dobson* case.

III

In view of this inconsistency and in view of the unprecedented extent to which the Supreme Court in the *Dobson* case denied its own right to even question rulings of the Tax Court in tax accounting problems, it seemed reasonable to assume that the highest Court eventually would break away from its *Dobson* decision. But the rapidity with which this break came was stunning. Although the *Dobson* doctrine was applied by the Court in the next case to come before it involving a tax accounting question,[26] barely two months after its enunciation the doctrine seems to have been disregarded in *Security Flour Mills Co. v. Commissioner*.[27] There the taxpayer, vendor

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[25]319 U. S. at 529, 63 Sup. Ct. at 1263.

[26]Dixie Pine Products Co. v. Comm'r, 320 U. S. 517, 64 Sup. Ct. 364 (1944). The question was whether a processing tax incurred in a certain year, payment of which was contested and liability for which was contingent upon the outcome of the contest, was properly deductible in the year incurred, by a taxpayer accounting on the accrual basis. *Held*, no.

For present state of law on deductions taken for taxes later ruled unconstitutional, see Revenue Act of 1942 § 157, *adding* INT. REV. CODE § 127; U. S. Treas. Reg. 111, § 29.128-1 (1943). This new statute did not apply to the years involved in the *Dixie Pine* case.

[27]321 U. S. 281, 64 Sup. Ct. 596 (1944).

of a product subject to a processing tax, added the amount of the tax to the sale price. The tax was contested by taxpayer, never paid, and a year later held unconstitutional. In subsequent years taxpayer made refunds to its customers to the extent the sale price had been increased in prior years by the unconstitutional tax. Taxpayer, whose accounting was on an accrual basis, sought to account for the deductible refunds by taking a deduction in the year the excess amounts were originally collected and included in income, rather than in the year the refunds were actually made. It should be recognized that this case is distinguishable on its facts from the *Dobson* case in that it does not involve the tax benefit rule; but it must be remembered that the *Dobson* decision is expressly stated not to be a tax benefit decision.[28] The Tax Court upheld taxpayer's method of accounting in the *Security* case. The Supreme Court, in refusing to accept the method of tax accounting adopted by the Tax Court, purported to distinguish the *Dobson* decision on the ground that the question in the *Security* case was not whether the Tax Court had made a determination of fact, but whether, as a matter of law, the Tax Court had misconstrued the extent of power conferred by the statute in issue.

Mr. Justice Jackson and Mr. Justice Douglas dissented in a one-sentence memorandum, being "of opinion that the case is governed by Dobson v. Commissioner,"[29] but giving no supporting reasons. Presumably they had in mind the following, written by Justice Jackson himself, in the *Dobson* decision:

> Whatever latitude exists in resolving questions such as those of proper accounting, treating a series of transactions as one for tax purposes, or treating apparently separate ones as single in their tax consequences, exists in the Tax Court and not in the regular courts. . . .[30]

Against this setting, examine the words of Mr. Justice Roberts in the *Security* decision:

> In short, the petitioner's position is that the Commissioner and the Board of Tax Appeals are authorized and required to make exceptions to the general rule of accounting by annual periods wherever, upon analysis of any transaction, it is found that it would be unjust or unfair not to isolate the transaction and treat it on the basis of the long term result. We think the position is not maintainable. . . .[31] We are of opinion that the purpose of the language which Congress used was not to substitute, whenever in the discretion of an administrative officer or tribunal such a course would seem proper, a . . . [different] method of accounting. . . .[32]

Mr. Justice Roberts did purport to distinguish the *Dobson* case. But one

[28]See text at note 8 *supra*.
[29]321 U. S. at 287, 64 Sup. Ct. at 599.
[30]320 U. S. at 501-502, 64 Sup. Ct. at 247.
[31]321 U. S. at 285, 64 Sup. Ct. at 598.
[32]*Id.* at 287, 64 Sup. Ct. at 599.

might voice reasonable doubts as to whether the above quoted pronouncements are distinguishable.

If the *Security Flour Mills* case left any doubts as to how closely the Supreme Court would adhere to the *Dobson* decision, these doubts were recently put to rest by the Supreme Court's decision in *Douglas v. Commissioner*.[33] Decided less than five months after the *Dobson* case, the *Douglas* case seems to represent, far more clearly than the *Security Flour Mills* case, a major break by the Court with its *Dobson* decision.

Involved in the *Douglas* case was a legislatively authorized Treasury regulation,[34] requiring that an amount equal to deductions allowed in a prior year for depletion must be added to taxable income in a later year, upon the occurrence of a certain contingency in that later year. One of the issues in the case was whether the tax benefit rule could be injected into the above regulation, so as to excuse the addition to income in the later year of an amount representing a deduction which did not offset taxable income in the prior year. As in the *Dobson* and *Virginian Hotel* cases, *supra,* the relevant statute or regulation contained no provision as to the permissibility of applying the tax benefit rule. The Board of Tax Appeals decided to apply the tax benefit rule,[35] and it is most significant that it did so on the authority of its own prior decision in the *Dobson* case. The Circuit Court of Appeals for the Eighth Circuit, the same court that had passed upon and reversed the Board's ruling in the *Dobson* case,[36] again reversed the Board, on the same grounds, in the *Douglas* case;[37] it too relied exclusively on its own previous ruling in the *Dobson* case. The Supreme Court, by virtue of an equally divided court,[38] affirmed the circuit court. It was expressly recognized that the *Douglas* case involved "an issue similar

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[33]12 U. S. L. WEEK 4385 (May 15, 1944). *D,* one of the owners of an iron mine, leased it to an operating company, said company to pay minimum royalties annually in advance of extraction of the ore, which royalties were to be applied to ore mined later. The royalties were reported as income in the years received, and appropriate deductions for depletion were taken in the same years. *D* received no tax benefit from the deduction in 1933. When the lease terminated years later, none of the ore had been extracted. In the year of termination, the Commissioner, pursuant to the applicable Regulations, *infra* note 34, included in the gross income of *D* a sum equal to the aggregate amount of *all* deductions taken, including the 1933 tax-benefit-less deduction. Taxpayer protested, and suit was brought.

[34]U. S. Treas. Reg. 94, Art. 23(m)—10(b) and (c), relating to I. R. C. § 23(m). As applied to the facts of the *Douglas* case, *supra* note 33, the regulation provides that where the owner of a mine has leased it to another, with the requirement that the lessee shall pay annual royalties in advance of extraction of the ore, the owner is allowed to take deductions for depletion to offset the royalty payments; but if the lease terminates before the ore which has been paid for in advance has been extracted, the lessor must report as income for the year of termination an amount equal to prior deductions taken on account of ore paid for but not removed.

[35]Estate of Chas. H. Robinson, 46 B. T. A. 943 (1942).

[36]Harwick v. Comm'r, 133 F. (2d) 732 (C. C. A. 8th, 1943), *rev'g* Estate of Collins, 46 B. T. A. 765 (1942). (The *Dobson* case bore different titles in the courts below.)

[37]Douglas v. Comm'r, 134 F. (2d) 762 (C. C. A. 8th, 1943).

[38]Only eight justices participated in the consideration and decision of the case, Mr. Justice Jackson being the non-participant.

to that involved in *Dobson v. Commisioner*."[39] Nevertheless, of the six justices to consider the question,[40] four reached a result which appears to be thoroughly antagonistic to the result of the *Dobson* decision, in that they rejected the Board's application of the tax benefit rule, rather than according to it the finality which the *Dobson* decision would seem to require.

Despite their recognition of the similarity of the *Douglas* and *Dobson* cases, the justices voting for affirmance unfortunately did not explain or justify the strikingly opposed holdings in these two cases. The present state of the law is therefore uncertain. The Court has not yet said that the *Dobson* case has been overturned. But in view of its inconsistency with the earlier *Virginian Hotel* decision, and the Court's apparent disregard of it in the later *Security Flour Mills* and *Douglas* cases, it is now doubtful to what extent the profession can safely rely on the *Dobson* case.

Alvin D. Lurie

[39]12 U. S. L. WEEK at 4385.

[40]Although four justices voted to uphold the circuit court on the tax benefit point, and four voted to reverse, two of the latter group based their decision on other grounds which made it unnecessary to consider the tax benefit point; this fact, together with the non-participation of Mr. Justice Jackson in the decision left only six justices who had to decide the problem.

STUDENT NOTES

Arbitration: Contracts: Recent developments in the law of arbitration in New York.—What has been the affect of the war on arbitration contracts? One might expect the answer to be characterized by the role that arbitration has played in the settling of disputes arising out of government war contracts. Such, however, is not the case; not because arbitration is unable to meet the task, but rather owing to the government's strict prohibition against such clauses in its war contracts.[1]

The war has not been without its contributions, however, to the development of the arbitration law of New York. Price ceilings, priority regulations, and similar governmental orders have brought more than one arbitration case before the New York courts. In the main, these decisions can be classified into three groups: (1) where the contract containing the arbitration clause was made before the order, (2) where the contract was made afterwards, and (3) where the order did not apply to the subject matter of the contract as such, but rather to the acquisition of an excess inventory of that subject matter.

The first group is exemplified by the leading case of *Matter of Kramer & Uchitelle, Inc.*[2] Here the contract contained an arbitration clause as well as a sale price which was above a subsequently established O.P.A. ceiling. The court in a 5-2 decision held that by act of government there was a complete frustration of performance excusing the seller and rendering the arbitration provision inoperative.

Within the second class is *Matter of Kahn & Feldman.*[3] In this case a written contract for the sale of raw silk was dated July 25, 1941, but was not actually executed by the parties until July 28th. On July 26th the Office of Production Management prohibited such deliveries unless authorized by the Director of Priorities. A motion to permanently enjoin the other party from proceeding to arbitration was granted, the court holding that the contract was invalid at its inception and the arbitration provision unenforceable.

The following set of facts exemplifies the third group: A buyer claimed that to take goods would force him to have an excess inventory in violation of a priority regulation. In granting the plaintiff's motion to proceed to arbitration, the court said that since the defendant could assign the contract or make an application to the Director of Priorities to enable himself to accept deliveries, the arbitration provision should be enforced.[4]

Exclusive of the so-called war decisions, recent years have been marked

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[1]C. C. H. WAR LAW SERVICE, Government Contracts, Vol. II, p. 24, 742, § 25, 255. Comment (1940) 50 YALE L. J. 458.

[2]288 N. Y. 467, 43 N. E. (2d) 493, 141 A. L. R. 1497 (1942). *Accord:* Sanders v. Lowenstein, 289 N. Y. 702, 45 N. E. (2d) 457 (1942).

[3]290 N. Y. 781, 50 N. E. (2d) 107 (1943).

[4]Federated Textiles, Inc. v. Glamour Girl, Inc., 265 App. Div. 252, 38 N. Y. S. (2d) 493 (1st Dep't 1942). Where the Chief Price Attorney interpreted the regulation as not applicable to the contract in question, a motion to proceed to arbitration was granted. Matter of Frankle, 180 Misc. 88, 40 N. Y. S. (2d) 566 (1943).

by the general expansion, interpretation, and application of the arbitration principles both under statutes and common law. The arbitration statutes incorporated in 1937 in Article 84 of the Civil Practice Act have undergone but two changes within recent years. Both of these were additions to section 1448: one validates labor arbitration,[5] which is beyond the scope of this survey; and the other allows arbitration agreements upon questions which arise "out of valuations, appraisals or other controversies which may be collateral, incidental, precedent or subsequent to any issue between the parties."[6] This clarifies the law and overcomes the effect of the *Fletcher* case,[7] wherein the court refused to appoint an arbitrator for the purpose of evaluating stock, holding that the question of appraisals and evaluations did not involve "a controversy" and that the arbitration statute applied only in cases concerning "questions of ultimate liability." As this amendment was not effective when the recent case of *Stern v. Stern*[8] was decided (which followed the *Fletcher* case), it would seem that now the amount of support due a wife under a separation agreement can be made the subject of arbitration.[9]

Arbitration, having originated at common law, still retains many of the common law principles, despite the enactment of statutes. The courts have held that the purpose of these statutes was not to abrogate the common law, but merely to provide a more effective remedy; in other words, the statutory remedy is cumulative rather than exclusive.[10] Consequently, submission to arbitration may be made as at common law notwithstanding statutory provisions.[11] Under the federal statute,[12] too, which so closely resembles New York's,[13] it would seem that recourse can be had to common-law arbitration should the parties so desire.

Typical of recent decisions in accord with this principle is *Matter of Friedheim v. International Paper Co.*[14] A controversy having arisen, under

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[5]Paragraph added, L. 1940, c. 851.

[6]Paragraph added, L. 1941, c. 288.

[7]Matter of Fletcher, 237 N. Y. 440, 143 N. E. 248 (1924).

[8]285 N. Y. 239, 33 N. E. (2d) 689, 133 A. L. R. 1332 (1941).

[9]Generally, matters involving property rights and pecuniary claims arising in matrimonial matters may be arbitrated in New York. Note (1939) 17 N. Y. U. L. Q. Rev. 626. The custody, support, and rights of visitation of children are not properly the subject of arbitration. Waltman v. Waltman, N. Y. L. J. Jan. 15, 1940, p. 221 (Sup. Ct.).

[10]6 Williston, Contracts (rev. ed., Williston & Thompson, 1936) § 1919. Rosenbaum v. Drucker, 346 Pa. 434, 31 A. (2d) 117 (1943).

[11]New York Lumber & Wood-Working Co. v. Schneider, 119 N. Y. 475, 24 N. E. 4 (1890); Hinkle v. Zimmerman, 184 N. Y. 114, 76 N. E. 1080 (1906); Hano v. Isaac Blanchard Co., 199 N. Y. Supp. 227 (1922). For other authorities see 6 Williston, *op. cit. supra* note 10, at § 1919.

[12]43 Stat. 883 (1925), 9 U. S. C. (1940). Whether the parties subjected themselves to the Federal Arbitration Act or New York's is a question of intention. Matter of Marchant v. Mead-Morrison Mfg. Co., 252 N. Y. 284, 169 N. E. 389 (1929); French v. Petrinovic, 46 N. Y. S. (2d) 846 (City Court of New York 1944).

[13]Cohen and Dayton, *The New Federal Arbitration Law* (1926) 12 Va. L. Rev. 265; Poor, *Arbitration Under the Federal Statutes* (1936) 36 Yale L. J. 667.

[14]265 App. Div. 601, 40 N. Y. S. (2d) 144 (1st Dep't 1943).

the usual arbitration clause, it was submitted to arbitrators who made an award. On motion to the supreme court this award was vacated because of alleged error in the findings by the arbitrator. The appellate division, in reversing, sustained the well-established common law rule that an award may not be impeached because of error of the arbitrators as to the law or facts in the absence of fraud, corruption, or other misconduct.[15] Likewise, an award which failed to comply with the statutory requirements because of lack of an acknowledgement was still enforced as a common law award.[16]

The question of the existence of a contract of arbitration has been frequently litigated. The arbitration agreement must, of course, be founded upon a valid, existing contract.[17] In New York the issue of the "making of the contract" or the "failure to comply therewith" has been held to be a subject for the court to determine and not the arbitrators.[18] Thus, when a seller attempted to impose arbitration by stamping a provision therefor on invoices sent after the goods had been delivered, and arbitration had not been previously discussed between the contracting parties, it was held not to constitute an arbitration agreement.[19] Should the validity of the arbitration provision turn upon the question of the authority of the person signing the contract, that becomes an issue of fact concerning the existence of the contract and is for the court to determine.[20] Another instance is furnished by *Matter of Lipman v. Haueser Shellac Co.*,[21] where the seller alleged cancellation by agreement. The contract called for the settlement by arbitration of "all controversies in connection with and/or arising out of this contract." On motion of the buyer's assignee[22] the court compelled the seller to

[15]Matter of Wilkins, 169 N. Y. 494, 62 N. E. 575 (1902); Matter of Pine St. Realty Co., Inc., 233 App. Div. 404, 253 N. Y. Supp. 174 (1st Dep't 1931); Matter of Shirley Silk Co., 257 App. Div. 375, 13 N. Y. S. (2d) 309 (1st Dep't 1939); Delma Engineering Corp. v. J. A. Johnson, — App. Div. —, 45 N. Y. S. (2d) 913 (1st Dep't 1944).

[16]Matter of Widder Bros., Inc., N. Y. L. J., Nov. 13, 1941, p. 1477 (Sup. Ct.). Where there's a clear intention to have a statutory arbitration, but a failure to meet the statutory requirements, the entire proceeding may be a nullity. Electric Steel Elev. Co. v. Kam Malting Co., 112 App. Div. 686, 98 N. Y. Supp. 604 (4th Dep't 1906).

[17]Metro Plan, Inc. v. Miscione, 257 App. Div. 652, 15 N. Y. S. (2d) 35 (1st Dep't 1939); Application of Gruen, 173 Misc. 756, 18 N. Y. S. (2d) 990 (1940), *aff'd*, 259 App. Div. 712, 18 N. Y. S. (2d) 1023 (1st Dep't 1940) (issue of duress); Matter of Frankle, 180 Misc. 88, 40 N. Y. S. (2d) 566 (1943); 6 WILLISTON, *op. cit. supra* note 10, at § 1920.

[18]See C. P. A. § 1450. Matter of Kahn, 284 N. Y. 515, 32 N. E. (2d) 534 (1940); Matter of Aqua Mfg. Co., Inc., 179 Misc. 949, 40 N. Y. S. (2d) 564 (1943), *aff'd*, 266 App. Div. 714, 41 N. Y. S. (2d) 935 (3d Dep't 1943).

[19]Tannenbaum Textile Co., Inc. v. Schlanger, 287 N. Y. 400, 40 N. E. (2d) 225 (1942), *noted* (1942) 27 CORNELL L. Q. 558.

[20]N. Y. Mfg. Corp. v. International Looms, Inc., N. Y. L. J., July 23, 1943, p. 161 (Sup. Ct.). There is no implied authority for a wife to bind her husband to an arbitration agreement. Barrett Nephews & Co. v. Gerst, N. Y. L. J., Jan. 15, 1942, p. 214 (Sup. Ct.).

[21]289 N. Y. 76, 43 N. E. (2d) 817 (1942).

[22]An assignee may avail himself of an arbitration clause. Lipmann v. Haeuser Shellac Co., 289 N. Y. 76, 43 N. E. (2d) 817 (1942); Sanders v. Lowenstein, 289 N. Y. 702, 45 N. E. (2d) 457 (1942).

proceed to arbitration, holding that all acts of the parties subsequent to the making of the contract which raised issues of fact or law were for the arbitrators.

Also presented in this type of case is the problem of the severability of the arbitration agreement from the main contract. American courts, generally speaking, do not conceive of the arbitration provision as a separate entity creating independent rights and duties except in two cases: where the substantive contract failed to comply with the Statute of Frauds, and where there is an attempted rescission of the main contract by one party.[23] In all other instances the arbitration agreement is either terminated or treated as never having come into existence.[24]

Recent cases have allowed the subject matters of arbitration agreements to range from tort claims[25] to specific performance actions.[26] Frequently, these agreements will contain a condition precedent to arbitration, and such clauses are rigidly enforced.[27]

Jurisdictional difficulties of the arbitration committees would appear overcome, as the leading case of *Gilbert v. Bernstine*[28] has been consistently followed. Here there was an agreement to arbitrate "at London pursuant to the arbitration Law of Great Britain." When differences arose, a notice of the arbitration proceeding in London was served; when defendant failed to appear, an award was made there against him. The plaintiff subsequently sued for the amount of the award in New York and the Court of Appeals held that a good cause of action was stated. Again in the recent case of *Mulcahy v. Whitehill*[29] a contract was made with a Massachusetts resident providing for the settlement of disputes in New York, in accordance with the rules of the American Arbitration Association, upon demand of either party. A notice was served by mail on the Massachusetts defendant, and when he failed to appear an award was made against him. The Supreme Court of New York having confirmed the award,[30] suit was instituted in

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[23] 6 WILLISTON, *op. cit. supra* note 10, at § 1920; Comment (1943) 43 COL. L. REV. 508.

[24] 6 WILLISTON, *op. cit. supra* note 10, *at* § 1920; Comment (1943) 43 COL. L. REV. 508.

[25] Matter of Rosenberg, N. Y. L. J., Mar. 6, 1943, p. 906 (Sup. Ct.) (Tort claims); Application of Tully, 24 N. Y. S. (2d) 638 (1940), *aff'd*, 260 App. Div. 937, 24 N. Y. S. (2d) 727 (2d Dep't 1940) (attorney's fees); Parry v. Bache, 125 F. (2d) 493 (C. C. A. 5th, 1942) (stock subscription agreements under the U. S. Arbitration Act).

[26] Matter of Freydberg Bros., Inc. v. Corey, N. Y. L. J., Oct. 30, 1941, p. 1289 (Sup. Ct.), *aff'd*, 263 App. Div. 805, 32 N. Y. S. (2d) 129 (1st Dep't 1941).

[27] Filling claims before preceding to arbitration: Matter of Caudwell Wingate Co., Inc., N. Y. L. J., Dec. 20, 1940, p. 2134 (Sup. Ct.), *aff'd*, 262 App. Div. 829, 28 N. Y. S. (2d) 763 (1st Dep't 1941), *appeal denied*, 262 App. Div. 994, 30 N. Y. S. (2d) 806 (1st Dep't 1941).

[28] 255 N. Y. 348, 174 N. E. 706, 73 A. L. R. 1453 (1931).

[29] 48 F. Supp. 917 (D. Mass. 1943).

[30] For one year after the award an application may be made to the court having jurisdiction, upon notice to adversary, for an order confirming the award. C. P. A. § 1461. Once confirmed, it has the same effect as a judgment. *Ibid.*

the Massachusetts District Court to enforce the award, which after confirmation had the effect of a judgment. In allowing recovery, the court said that his unqualified submission of disputes to arbitration necessarily implied a submission to the rules of procedure of the American Arbitration Association and to the law of New York covering such arbitration. This case is but one of the latest in a long series which would seem to settle the question of the enforcibility of such awards.[31]

The varied web of the procedural aspects of arbitration is too closely knit to be examined at any length herein. Of considerable importance, however, is the waiving of the arbitration provision, which may occur in one of many ways. Probably the most common is by failure to set forth the arbitration clause in an answer to a civil suit.[32] An action begun by a warrant of attachment[33] constitutes a waiver by that party of the arbitration provision, and similarly, the question of the validity of the contract may be waived by proceedings before the arbitrator and the parties may be estopped from asserting lack of authority.[34] The weight to be given to evidence is for the arbitrators to determine; and a court is precluded from opening the record and passing upon the judgment,[35] though exclusion of evidence may be the basis for a court review.[36] As mentioned before, under the statutes the final award must be confirmed by the court and an acknowledgement by the arbitrators is a prerequisite to such confirmation,[37] although, where this is lacking due to inadvertance, it may be corrected.[38] Before being approved by the court, the award has the same status as a verdict of a jury,[39] and once approved, may be enforced as any other judgment.

Occasionally the question has arisen as to who may act as an arbitrator. In *MacFadden v. Binvenga*[40] it was said that a supreme court justice may

[31]Coudenhove-Kalergi v. Dieterle, 36 N. Y. S. (2d) 313 (1942) (German award); RESTATEMENT, CONFLICT OF LAWS § 77 (1) (d); BEALE, CONFLICT OF LAWS (1935) § 81.1.

[32]Matter of Haupt v. Rose, 265 N. Y. 108, 191 N. E. 853 (1934); Nagy v. Arcas Brass & Iron Co., Inc., 242 N. Y. 97, 150 N. E. 614 (1926); Short v. National Sport Fashions, Inc., 264 App. Div. 284, 35 N. Y. S. (2d) 169 (1st Dep't 1942); Matter of Dandy Dress, Inc., 179 Misc. 36, 37 N. Y. S. (2d) 449 (1st Dep't 1942).

[33]McKinney v. McKinney, N. Y. L. J., Sept. 9, 1943, p. 485 (Sup. Ct.).

[34]Matter of Fine, 263 App. Div. 797, 32 N. Y. S. (2d) 113 (1st Dep't 1941), *aff'd*, 287 N. Y. 843, 41 N. E. (2d) 170 (1942).

[35]Matter of John Kelly, Ltd., N. Y. L. J., Sept. 1, 1943, p. 433 (Sup. Ct.).

[36]Matter of Ashbes, N. Y. L. J., Sept. 3, 1943, p. 451 (Sup. Ct.).

[37]"To entitle the award to be enforced . . . it must be in writing: and . . . subscribed by the arbitrators making it; acknowledged or proved, and certified in like manner as a deed to be recorded . . ." C. P. A. § 1460. Sanford Laundry, Inc. v. Simon, 285 N. Y. 488, 35 N. E. (2d) 182 (1941).

[38]Matter of Verly Building Corp., 264 Div. 885, 35 N. Y. S. (2d) 891 (2d Dep't 1942).

[39]Matter of Fine, 263 App. Div. 797, 32 N. Y. S. (2d) 113 (1st Dep't 1941), *aff'd*, 287 N. Y. 843, 41 N. E. (2d) 170 (1942).

[40]290 N. Y. 568, 48 N. E. (2d) 166 (1943). It was here pointed out that Article 6, Section 19 of the New York Constitution provides that a judge of the Court of Appeals and a justice of the supreme court shall not practice as attorney or counselor in any court of record nor act as referee in any action or proceeding.

not act as an arbitrator in a matter pending before him. Should the arbitrator be disqualified,[41] the entire award, order, and judgment entered thereon will be vacated and set aside. The arbitrators have authority to determine who shall pay the fees of arbitration, unless it is otherwise expressly provided in the submission or contract.[42]

This survey of recent decisions would seem to indicate that the courts are fostering a gradual expansion of arbitration principles subject to a vigilant guidance.

Donald P. Yust

Conflict of laws: Taxation: Power of state of owner's domicile to tax property which is taxed elsewhere under the "unit rule."—Northwest Airlines is a Minnesota corporation with its principal place of business at St. Paul. It operates its planes over seven states, and makes regularly scheduled landings in five. It owns or leases hangars and office space at each stopping-place. Its principal service and repair station is located at St. Paul, but it also has maintenance bases in four states besides Minnesota. St. Paul is registered with the Civil Aeronautics Authority as the home port of all of Northwest's planes. During 1939, only 16% of the total mileage covered by Northwest's planes was flown in Minnesota, but each of the planes was in the state at some time during the year.

Northwest computed its Minnesota personal property tax for 1939 on the basis of the number of planes within the state on May 1, the statutory tax assessment day. The state authorities assessed a deficiency tax against Northwest, claiming the right to tax all planes owned by the airline at their full value.[1] The Supreme Court of Minnesota, with three judges dissenting, upheld the trial court's judgment in favor of the state.[2] The U. S.

[41]This may be brought about in one of many ways: passing judgment on his own claim [*In re* Miller, 260 App. Div. 444, 23 N. Y. S. (2d) 120 (1st Dep't 1940)]; failure to disclose interest [Shirley Silk Co., Inc. v. American Silk Mills, Inc., 260 App. Div. 572, 23 N. Y. S. (2d) 254 (1st Dep't 1940)]; partiality [Goldens Bridge Colony, Inc. v. Cooper, 265 App. Div. 857, 37 N. Y. S. (2d) 665 (2d Dep't 1942)].

[42]C. P. A. § 1457; Bernstein v. Perlmutter, 37 N. Y. S. (2d) 95 (1942).

[1]The state based its claim on MINN. STAT. (1941) § 272.01, which declares that "all real and personal property in this state, and all personal property of persons residing therein, including the property of corporations . . . is taxable. . . ." The language used in the majority opinion indicates that the Court considered Northwest's planes to be "property in this state," and therefore taxable under this statute even without the provision for taxation of "all personal property of persons residing therein." Several other states have statutes purporting to tax all property within the state. See CAL. REV. & TAX. CODE (Deering, 1939) § 201; GA. CODE ANN. (1937) § 92-101; ILL. ANN. STAT. (Smith-Hurd, 1940) c. 120, § 499; MICH. STAT. ANN. (Henderson, 1935) § 7.1; MO. REV. STAT. (1939) § 10,936; N. J. STAT. ANN. (1940) § 54:4-1; TEX. CIV. STAT. (Vernon, 1939) art. 7145.7503, 5061. OHIO GEN. CODE ANN. (Page, 1938) § 5328 specifically taxes "aircraft belonging to persons residing in this state and not used in business wholly in another state."

[2]State v. Northwest Air Lines, 213 Minn. 395, 7 N. W. (2d) 691 (1942), noted (1943) 56 HARV. L. REV. 1011, 38 ILL. L. REV. 210, 29 VA. L. REV. 958.

Supreme Court granted certiorari,[3] and, after argument, affirmed the judgment of the state courts. *Northwest Airlines, Inc. v. Minnesota,* — *U. S.* —, *64 Sup. Ct. 950, 12 U. S. L. Week 4370 (U. S. 1944).* Mr. Justice Black and Mr. Justice Jackson wrote concurring opinions. Mr. Chief Justice Stone wrote a dissent in which Justices Roberts, Reed and Rutledge joined.

Traditionally, property both movable and immovable is taxable by the political subdivision wherein it has its "situs,"[4] and with respect to corporeal wealth, as in the present case, the situs is real. The property actually occupies space at a point which can be located. This rule is not without its reason, since the jurisdiction where property is used and located ordinarily furnishes protection and other benefits for which it is entitled to compensation.[5] But "situs" is a legal term, and the situs of even tangible property is frequently difficult to determine, since a movable is seldom stationary in character and may easily be removed from one jurisdiction to another. This difficulty early gave rise to the doctrine *mobilia sequuntur personam,* which, simply state, is a presumption that the situs of all personalty for tax purposes is the domicile of its owner.[6] This presumption may be rebutted by proof that the property has acquired a permanent location in a jurisdiction other than that of the owner's domicile.[7] Where a permanent location has been acquired, the place of situs is given sole jurisdiction to tax, and the place of the owner's domicile is excluded.[8]

Neither the concept of situs nor the doctrine *mobilia sequuntur personam* is adequate when applied to property composed of a number of shifting units some of which can be found at any time in each jurisdiction where the owner carries on business, but none of which is permanently located in any jurisdiction. In *Pullman's Palace Car Co. v. Pennsylvania,*[9] the Court held that property of this kind (in this case, railroad cars) could be assessed by each jurisdiction in which the units were regularly present on the basis of the average number of units within the jurisdiction during the tax year. This rule was a practical compromise, since it allowed each state visited by the itinerant property to levy a tax in return for the protection and other benefits which the property received there, and at the same time it protected property employed in interstate commerce from the burdens of double taxation. However, it was a rule based upon a fiction, since it attributed situs to an average (which is only a mathematical concept incapable of

[3]319 U. S. 734, 63 Sup. Ct. 1157 (1943).

[4]McCulloch v. Maryland, 4 Wheat, 316, 429 (U. S. 1819); BEALE, THE CONFLICT OF LAWS (1935) § 118C.8.

[5]Beale, *Jurisdiction to Tax* (1919) 32 HARV. L. REV. 587. *Cf.* HARDING, DOUBLE TAXATION OF PROPERTY AND INCOME (1933) 22-27.

[6]STORY, CONFLICT OF LAWS (8th ed. 1883) 533-541.

[7]As expounded by Story, the presumption is conclusive and irrebuttable. Story's view has not been followed, however, by either courts or commentators in this country. The prevailing view seems to be that situs is governed primarily by the physical location of the chattel, and the doctrine *mobilia sequuntur* is invoked only when necessary to the attainment of a just result. See In re Fidelity Assur. Ass'n, 42 F. Supp. 973, 984 (S. D. W. Va. 1941); Beale, *The Situs of Things* (1919) 28 YALE L. J. 525.

[8]Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 26 Sup. Ct. 36 (1905).

[9]141 U. S. 18, 11 Sup. Ct. 876 (1891).

having any location) in spite of the fact that situs could be attributed to none of the units of property from which the average was calculated.[10]

The "unit rule" of taxation set forth in *Pullman's Palace Car Co. v. Pennsylvania*[11] has been applied to buses[12] and trucks[13] moving interstate, but never to steamships.[14] It has been held that vessels are not taxable at ports of call[15] but only at the home port[16] or at the domicile of the owner.[17]

Under the doctrine *mobilia sequuntur personam* the state of the owner's domicile is allowed to tax at its full value property composed of shifting units all of which are frequently outside the state, where their absences are in the nature of mere random excursions such that a taxable average is never present in another jurisdiction.[18] Likewise, the state of the owner's domicile is permitted to tax at its full value property composed of units none of which have ever been in the taxing state, where they have not acquired a taxable situs elsewhere.[19] The presumption that the situs of personalty is identical with the domicile of its owner holds good in the absence of proof that the property has acquired a situs in another jurisdiction. But the Supreme Court had never decided whether the fictional situs attributed to the average number of a quantity of shifting units in states other than the state of the owner's domicile was so far equivalent to actual situs that the state of domicile could tax only the proportion of the property which was not taxable under the unit rule in the other states. That question was presented by the principal case, and the Court answered it by allowing the state of the owner's domicile to tax the property at its full value.

In reaching this result the Court relied heavily on the doctrine *mobilia sequuntur personam*. It is true that the majority opinion emphasized the fact that Minnesota was not only the domicile of the corporation but also

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[10]The fictitious nature of the assumption is illustrated by the fact that statutes purporting to tax "all property within the state" have been held ineffective to subject an average of shifting units to taxation. The jurisdiction may tax only if it has a statute specifically making such property taxable, and providing a method of valuation and assessment. Queen City Brewing Co. v. District of Columbia, 134 F. (2d) 44 (App. D. C. 1943); Tamble v. Pullman Co., 173 Fed. 200 (C. C. M. D. Tenn. 1909); State v. Union Tank Car Co., 151 Miss. 797, 119 So. 310 (1928); Lewis & Holmes Motor Freight Corp. v. Atlanta, 195 Ga. 810, 25 S. E. (2d) 699 (1943). *Contra:* Union Tank Car Co. v. McKnight, 84 F. (2d) 421 (C. C. A. 7th, 1936); People v. Wilson Car Lines, Inc., 369 Ill. 294, 16 N. E. (2d) 752 (1938).

[11]141 U. S. 18, 11 Sup. Ct. 876 (1891).

[12]State Tax Commission v. Central Greyhound Lines, 252 Ky. 300, 67 S. W. (2d) 35 (1934).

[13]Lewis & Holmes Motor Freight Corp. v. Atlanta, 195 Ga. 810, 25 S. E. (2d) 699 (1943).

[14]Powell, *Taxation of Things in Transit* (1921) 7 VA. L. REV. 245, 251.

[15]Hays v. Pacific Mail Steamship Co., 17 How. 596 (U. S. 1855); St. Louis v. Wiggins Ferry Co., 11 Wall. 423 (U. S. 1871).

[16]Hays v. Pacific Mail Steamship Co., 17 How. 596 (U. S. 1855).

[17]Ayer & Lord Tie Co. v. Kentucky, 202 U. S. 409, 26 Sup. Ct. 679 (1906); Callender Navigation Co. v. Pomeroy, 61 Ore. 343, 122 Pac. 758 (1912).

[18]New York Central & H. R. R.R. v. Miller, 202 U. S. 584, 26 Sup. Ct. 714 (1905).

[19]Southern Pacific Co. v. Kentucky, 222 U. S. 63, 32 Sup. Ct. 13 (1911); State v. Second Judicial Dist. Court, 56 Nev. 38, 43 P. (2d) 173 (1935).

the home base of its fleet of planes. However, the Court had previously declared in *Johnson Oil Refining Co. v. Oklahoma*[20] that a state not the domicile of the owner could not tax a fleet of tank cars at their full value although the taxing state was the base of operations for the entire fleet. Since the majority did not overrule the *Johnson* case, it seems safe to assume that the decisive factor which rendered the planes taxable at their full value in the principal case was the fact that the taxing state was the place of the corporation's domicile.

The principal case appears to undermine the authority of *Pullman's Palace Car Co. v. Pennsylvania*,[21] since it repudiates by implication the doctrine of fictional situs upon which the unit theory depends. The Court indicates that the right of the state of the owner's domicile to tax could be cut off only by the acquisition by the property of an "actual" situs outside the state—that is, by its continuous absence from the state during the tax year. However, the Court's holding on this point is obscured by its reliance on *New York Central R.R. v. Miller*.[22] In that case, the state of the owner's domicile was permitted to tax property composed of a number of shifting units at its full value; but there, no conflict existed between the fictional situs theory and the doctrine *mobilia sequuntur personam*, since the court was free to assume that the excursions of the units from the state of the owner's domicile were so random and irregular that it was impossible to estimate the average number present in other states. That being true, the unit rule could not be employed to attribute a fictional situs to an average number of cars outside the state of the owner's domicile. It is difficult for the Court to make a similar assumption in the principal case, since, as Mr. Chief Justice Stone points out in his dissent, six of the seven states over which Northwest operates its planes had assessed and collected taxes in accordance with the unit theory.

Mr. Justice Jackson reached the same result as the majority, but by a path of somewhat less resistance. He took the view that airplanes resemble ships more than railroad rolling stock, and, just as ships are exempt from taxation at ports of call,[23] so airplanes should be taxable only at their home port. But in proposing that planes be taxed solely at their base of operations, Mr. Justice Jackson departed from his ship analogy. Although at one time ships were taxable at the home port,[24] this rule proved impracticable, and subsequent decisions transferred the taxing power to the jurisdiction of the owner's domicile.[25] While in this case the owner's domicile and the base of operations were the same, a situation in which this would not be true can easily be imagined.[26]

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[20]290 U. S. 158, 54 Sup. Ct. 152 (1933).
[21]141 U. S. 18, 11 Sup. Ct. 876 (1891).
[22]202 U. S. 584, 26 Sup. Ct. 714 (1905).
[23]Hays v. Pacific Mail Steamship Co., 17 How. 596 (U. S. 1855); St. Louis v. Wiggins Ferry Co., 11 Wall. 423 (U. S. 1871).
[24]Hays v. Pacific Mail Steamship Co., 17 How. 596 (U. S. 1855).
[25]St. Louis v. Wiggins Ferry Co., 11 Wall. 423 (U. S. 1871); Ayer & Lord Tie Co. v. Kentucky, 202 U. S. 409, 26 Sup. Ct. 679 (1906).
[26]See Johnson Oil Refining Co. v. Oklahoma, 290 U. S. 158, 54 Sup. Ct. 152 (1933).

The decision of the majority, whatever the theory upon which it is based, has the effect of subjecting property to multiple taxation. This is in conformity with several recent decisions of the Court concerning the taxation of intangibles;[27] but hitherto this tendency had been less apparent in cases dealing with the taxation of tangible property.[28] Although it has long been recognized that property employed in interstate commerce is not completely exempt from state taxation,[29] the Court has held that multiple taxation of such property by the states constitutes an unpermitted burden on interstate commerce.[30] If the decision in the principal case represents a reversal of the Court's former attitude on this question, Congressional action may be necessary to lighten a tax burden which is perhaps greater than the interstate carriers should be required to bear.

Robert W. Gribben

Evidence: Lie-detectors: Discussion and Proposals.—The late Dean Wigmore remarked in 1923, "If there ever is devised a psychological test for the evaluation of witnesses, the law will run to meet it."[1] Although deception-detectors are now available, the few cases involving them which have reached appellate courts show no such eagerness on the part of those tribunals.

In 1923, the Court of Appeals of the District of Columbia in *Frye v. United States*[2] refused to admit testimony as to results of Marston's systolic blood pressure test,[3] reasoning that it had not yet received "such scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made."[4]

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[27]State Tax Commission of Utah v. Aldrich, 316 U. S. 174, 62 Sup. Ct. 1008 (1942), noted (1942) 28 CORNELL L. Q. 74; Curry v. McCanless, 307 U. S. 357, 59 Sup. Ct. 900 (1939); Graves v. Elliott, 307 U. S. 383, 59 Sup. Ct. 913 (1939).

[28]See Sancho v. Humacao Shipping Corp., 108 F. (2d) 157 (C. C. A. 1st, 1939).

[29]Nashville, C. & St. L. Ry. v. Browning, 310 U. S. 362, 60 Sup. Ct. 968 (1940); Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149, 20 Sup. Ct. 631 (1900); American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 19 Sup. Ct. 599 (1899); Marye v. Baltimore & Ohio R.R., 127 U. S. 117, 8 Sup. Ct. 1037 (1888).

[30]Fisher's Blend Station v. Tax Commission, 297 U. S. 650, 56 Sup. Ct. 608 (1936); Union Tank Line Co. v. Wright, 249 U. S. 275, 39 Sup. Ct. 276 (1919); Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118 (1887).

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[1]2 WIGMORE, EVIDENCE (2d ed. 1923) § 875.

[2]293 Fed. 1013 (App. D. C. 1923), 34 A. L. R. 145 (1925). Notes (1924) 24 COL. L. REV. 429, 37 HARV. L. REV. 1138, 33 YALE L. J. 771.

[3]The term "lie detector" is applied to any machine for the recording of the involuntary physiological responses connected with conscious deception: change in pulse rate, respiration rate, galvanic reflex, blood-pressure, and others. Earlier instruments recorded only one or two of these reactions. Recently, however, the polygraph, which records all of these responses, has been accepted almost universally as the most reliable. Trovillo, *A History of Lie Detection* (1939) 29 J. CRIM. L. 848, 879, n. 95; see note 50 *infra*. *But see* MacNitt, *In Defense of Electrodermal Response and Cardiac Amplitude as Measures of Deception* (1942) 33 J. CRIM. L. 266.

[4]293 Fed. 1013, 1014 (App. D. C. 1923).

Ten years later, the Wisconsin court in *State v. Bohner*[5] rejected the results of Keeler's polygraph test, on the ground that it was still in the experimental stage, citing the *Frye* case as authority.[6]

The New York Court of Appeals decision in *People v. Forte*[7] in 1938, has been thought by many to overrule the county court decision in *People v. Kenny*,[8] handed down in the same year, and is usually cited as authority for the rule that the results of lie-detector tests are inadmissible in New York. Careful analysis of the two cases reveals that no such rule was laid down.

In *People v. Kenny*, the Queens County Court allowed an expert, Father Summers of Fordham University, to testify concerning the results of a pathometer[9] test made on the defendant. It is important to note that, to lay a predicate, the defense offered in evidence the uncontroverted testimony of Summers as to the great accuracy of the machine,[10] and that the prosecuting attorney conceded the practical utility and scientific value of the technique. His only objection was that the apparatus had not yet received general scientific recognition,[11] and his only authorities for this objection were the *Frye*[12] and *Bohner*[13] cases, one fifteen, the other five years before, neither dealing with the apparatus in question. On the basis of the testimony offered, the trial judge decided that results of the pathometer test were admissible in evidence.

In *People v. Forte*,[14] the Kings County Court denied a motion by defendant's attorney (after defendant's conviction) to allow defendant to be removed to another county and subjected to Summers' test. The court refused to admit testimony concerning the pathometer's reliability and status in the field of criminal investigation. It decided that the apparatus had not yet received general scientific recognition, relying solely on (1) a statement of opinion made by Wigmore in 1937,[15] and (2) a statement of opinion by a psychology professor at Columbia University that the blood pressure test

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[5]210 Wis. 651, 246 N. W. 314, 86 A. L. R. 611 (1933). Notes (1933) 13 B. U. L. REV. 321, 8 WIS. L. REV. 283, 24 J. CRIM. L. 440.

[6]210 Wis. 651, 657, 246 N. W. 314, 317 (1933).

[7]279 N. Y. 204, 18 N. E. (2d) 31 (1938), 119 A. L. R. 1198 (1939). Notes (1939) 24 CORNELL L. Q. 434, 37 MICH. L. REV. 1141, 25 VA. L. REV. 492, 27 ILL. B. J. 308.

[8]167 Misc. 51, 3 N. Y. S. (2d) 348 (Co. Ct. 1938). Notes (1938) 16 CHI-KENT L. REV. 269, 29 J. CRIM. L. 287, 86 U. OF PA. L. REV. 903.

[9]The pathometer measures the changes in the electrical conductivity of the skin in response to emotional stimuli. For a complete description, see Forkosch, *The Lie Detector and the Courts* (1939) 16 N. Y. U. L. Q. REV. 202, 208; Summers, *Science Can Get the Confession* (1939) 8 FORDHAM L. REV. 334.

[10]167 Misc. 51, 52, 3 N. Y. S. (2d) 348, 349 (Co. Ct. 1938). Summers testified that the pathometer was practically 100% accurate, basing his estimate upon over 6000 tests. See note 33 *infra*.

[11]*Id.* at 53, 3 N. Y. S. (2d) 348, 350.

[12]293 Fed. 1013 (App. D. C. 1923).

[13]210 Wis. 651, 246 N. W. 314 (1933).

[14]167 Misc. 868, 4 N. Y. S. (2d) 913 (Co. Ct. 1938).

[15]WIGMORE, SCIENCE OF JUDICIAL PROOF (3d ed. 1937) §§ 311-313. Wigmore, however, had approved the use of the lie-detector conditionally in 1935. WIGMORE, CODE OF EVIDENCE (2d ed. 1935) § 967.

(not the galvanometer test) was still in an experimental stage,[16] and (3) an A.L.R. annotation stating that the *Frye* and *Bohner* cases were the only cases in which attempts have been made to introduce results of physiological deception tests.[17]

The *Kenny* decision was never appealed. The *Forte* decision was affirmed by the Court of Appeals.[18] From this affirmance the fallacious conclusion is drawn that the Court of Appeals thereby overruled the *Kenny* decision. The opinion of the court evinces no such intention:

> We cannot take judicial notice that this instrument is or is not effective for the purpose of determining the truth. . . . The record is devoid of evidence tending to show a general scientific recognition that the pathometer possesses efficacy. Evidence relating to handwriting, fingerprinting and ballistics is recognized by experts as possessing such value that reasonable certainty can follow from tests. Until such a fact, if it be a fact, is demonstrated by qualified experts in respect to the 'lie-detector,' we cannot hold as a matter of law that error was committed in refusing to allow defendant to experiment with it.[19]

The *Kenny* case and the *Forte* case are not opposed in principle. The Court of Appeals in the *Forte* case based its refusal to admit the results of the lie-detector test upon a lack of testimony proving its efficacy; the court in the *Kenny* case admitted the results of the test only after such testimony had been supplied.[20]

Even if the holdings were directly in conflict, the decision of the Court of Appeals is of doubtful force, since it is based upon the premise that no evidence was offered "tending to show a general scientific recognition that the pathometer possessed efficacy,"[21] and that therefore the court had been asked to take judicial notice. However, both the record[22] and the report of the lower court[23] show that testimony to this effect was offered and rejected by the lower court. Therefore, in New York the admissibility of the results of a lie-detector test should still be considered a matter for the trial judge's discretion.

In 1942, the Michigan court in *People v. Becker*[24] refused to take judicial notice of the lie-detector's general scientific recognition, holding that results of lie-detector tests were properly excluded in the absence of testimony indicating such recognition, relying upon[25] the *Frye* (1923) and *Bohner*

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[16]Note (1924) 24 COL. L. REV. 428, 430.
[17]Note (1933) 86 A. L. R. 616.
[18]279 N. Y. 204, 18 N. E. (2d) 31 (1938).
[19]279 N. Y. 204, 206, 18 N. E. (2d) 31, 32 (1938).
[20]See Notes (1939) 24 CORNELL L. Q. 434, (1941) 48 W. VA. L. Q. 45, (1939) 8 FORDHAM L. REV. 354, (1942) 139 A. L. R. 1174.
[21]The court's refusal to take judicial notice on the facts it assumed seems sound. 20 AM. JUR. § 97.
[22]Record on Appeal, 273-277, 279 N. Y. 204, 18 N. E. (2d) 31 (1938).
[23]167 Misc. 868, 873, 4 N. Y. S. (2d) 913, 917 (Co. Ct. 1938).
[24]300 Mich. 652, 2 N. W. (2d) 503, 139 A. L. R. (1942).
[25]*Id.* at 565, 2 N. W. (2d) 503, 505 (indirectly by citing as their sole authority 20 AM. JUR. § 762, 633, which in turn relies upon the Frye and Bohner cases).

(1933) cases for the proposition that the blood pressure test had not yet, in 1942, gained sufficient scientific standing to justify its admission.

Le Fevre v. State,[26] a Wisconsin decision, is the latest case to be reported. Writers have assumed that the results of lie-detector tests would be admissible if the parties, before the test was given, signed a stipulation providing that either party might use the results on the trial.[27] In the *Le Fevre* case, the court, sustaining the district attorney's objection, excluded the findings and conclusions of the lie-detector expert in spite of such a stipulation between the district attorney and the defendant. From the reported opinion, the appellate court's approval of the lower court ruling without any attempt to justify its stand, seems unwarranted. The record, however, discloses that the defendant offered only the *report* of the lie-detector examiner whereas the hearsay rule requires the examiner himself to testify.[28]

Excluding cases in which confessions, although partly induced by a lie-detector test, have been admitted,[29] these six cases seem to contain the only reported instances of attempts to offer the results of lie-detector tests in evidence.[30]

Utilization of the Lie-Detector.—Although the reliability of witnesses is not computable, it certainly does not approximate the reliability evidenced by the record of lie-detectors in thousands of tests. The two leading authorities in the field, Keeler and Inbau,[31] estimate that lie-detector findings are approximately 85% accurate.[32] Other experts make even more optimistic reports.[33] Considering that in many instances there is no opportunity to verify the results, and that this estimate excludes those cases where the examiner considered the results too uncertain to make a definite diagnosis,

[26]242 Wis. 416, 8 N. W. (2d) 288 (1943). Note [1943] WIS. L. REV. 430.

[27]Inbau, *Scientific Evidence in Criminal Cases* (1935) 2 LAW AND CONTEMP. PROB. 495, 502; INBAU, LIE DETECTION AND CRIMINAL INTERROGATION (1942) 66; Jordan, *Admissibility of Deception Tests* (1938) 29 J. CRIM. L. 287, 291.

[28]For a complete discussion of this case, see Note [1943] WIS. L. REV. 430.

[29]State v. Delhart, 242 Wis. 562, 8 N. W. (2d) 360 (1943). Note [1943] WIS. L. REV. 430; Commonwealth v. Jones, 341 Pa. 541, 19 A. (2d) 389 (1941), 139 A. L. R. 1174 (1942); Commonwealth v. Hipple, 333 Pa. 33, 3 A. (2d) 353 (1939).

[30]In State v. Hudson, 289 S. W. 920 (Mo. 1926), the court refused to admit testimony concerning the examination of the defendant under scopolamin, commonly referred to as "truth-serum." Note (1927) 12 ST. LOUIS L. REV. 215. For a discussion of various theories of deception detection, see Trovillo, *A History of Lie Detection* (1939) 29 J. CRIM. L. 848, 30 J. CRIM. L. 104.

[31]In 1942, Inbau estimated a 10% margin of error. This estimate excluded those cases in which extraneous information was used in conjunction with the lie-detector to get confessions. INBAU, LIE DETECTION AND CRIMINAL INTERROGATION (1942) 54.

[32]Summers, *Science Can Get the Confession* (1939) 8 FORDHAM L. REV. 334, 338; Inbau, *The Lie Detector* (1935) 40 SCIENTIFIC MONTHLY 81, 83; Keeler, *Method of Detection Deception* (1930) 1 AM. J. POL. SCI. 42. See also Trovillo, *Deception Test Criteria* (1943) 33 J. CRIM. L. 338, 341 (85% of records indicating guilt are subsequently verified as correct; only .05% prove erroneous).

[33]Marston estimated 94.2% accuracy in 1921 [Marston, *Psychological Possibilities in the Deception Test* (1921) 11 J. CRIM. L. 551, 568] and over 97% accuracy in 1935 [N. Y. L. J., Oct. 5, 1935, p. 1134]. Summers claimed 99% success [Summers, *Science Can Get the Confession* (1939) 8 FORDHAM L. REV. 334, 340], but this estimate has since been discredited as being too optimistic.

the percentage of actual error must be well below ten percent. This excellent record would seem to justify the assertion that using the results of lie-detector tests to verify the testimony of important witnesses would be an inestimable advance in the efficiency of the legal process.[34]

Lawyers, judges and legal writers, however, are sitting back, complacently waiting for the lie-detector to be proven infallible[35] or for psychologists and physiologists to "accept" it.[36] Because the few authorities in the field have failed to enlist the interest of physiologists and psychologists generally,[37] the latter are neither inclined nor qualified to stamp any lie-detector with their approval.[38]

Although the law is hanging back, the lie-detector is being used to advantage in other fields. As early as 1938, an estimated one hundred police departments,[39] including five state police organizations, employed the lie-detector in the investigation of crimes.[40] Their enthusiastic reports are convincing proof of the machine's reliability.[41] For instance, the Wichita Police Department's reports, after four thousand examinations made over a period of three years, that in those tests where deception was indicated, 55.1% of the subjects later confessed, and that 41.2% of the remaining 44.9% had been successfully prosecuted in court.[42]

Detective agencies, too, find the lie-detector invaluable. An official of a large detective agency recently estimated that the lie-detector made possible the successful solution of ninety-nine percent of its cases where solution was otherwise impossible.[43]

The lie-detector has also been used in business. Many large department and chain stores have adopted the practice of regularly examining employees with the lie-detector;[44] one of the world's largest reports that in six years

[34]BARNES AND TEETER, NEW HORIZONS IN CRIMINOLOGY (1943) 287. *But see* Peller, *Scientific Aids in Proof* (1939) 13 ST. JOHN'S L. REV. 328, 336: "Science has offered little aid in either the uncovering or uprooting of bias and the motive to lie. The only tools available for this task are the common-law tests of credibility (physical appearance and mannerisms: blushing, squinting of eyes, twitching, squirming, throat pulsations, verbosity, avoiding eyes of examiner) and . . . cross-examination."

[35]See text at note 62 *infra*.

[36]See McCormick, *Deception Tests and the Law of Evidence* (1927) 15 CAL. L. REV. 484, 496, n. 46-48, showing the answers of 38 leading psychologists to the question of whether the results of lie-detector tests should be used in evidence. "Not more than seven replies could be considered as showing lack of faith in the machine" (*id.* at 498).

[37]INBAU, LIE DETECTION AND CRIMINAL INTERROGATION (1942) 64.

[38]*Ibid.*; Jordan, *Admissibility of Deception Tests in New York* (1938) 29 J. CRIM. L. 287, 290.

[39]Trovillo, *A History of Lie Detection* (1939) 29 J. CRIM. L. 848, 879, n. 95; MARSTON, THE LIE-DETECTOR TEST (1938) "Introduction"; Note (1939) 8 FORDHAM L. REV. 122, n. 13.

[40]Marston, *op. cit. supra* note 39, at 20.

[41]See, *e.g.*, the reports of: Toledo Police Department [54 AM. CITY 15 (1939)]; San Antonio Police Department [3 TEX. B. J. 482 (1940)]; Michigan State Police [15 ROCKY MT. L. REV. 162 (1943)].

[42]161 SCIENTIFIC AMERICAN 8 (1939).

[43]McEvoy, *The Lie Detector Goes Into Business* (Feb. 1941) 38 READER'S DIGEST 69, 71.

[44]*Id.* at 69.

it has thereby accounted for over ninety percent of its losses.[45] Lloyd's of London is so impressed with the record shown by the lie-detector that insurance premiums are substantially reduced to banks wherever lie-detector tests are given regularly.[46] In Chicago, premiums on bonds covering bank employees are reduced ten percent if the bank agrees to test its employees every five years.[47] In the thirty Chicago banks employing the polygraph since 1931, defalcations have vanished.[48]

Although the lie-detector is yet to be sanctioned by an appellate court, trial judges the country over, convinced of its merits, have admitted the results of lie-detector tests in evidence in unappealed and therefore unreported cases.[49]

Objections to the admission of the lie-detector in evidence.—The many objections which have been raised to the admission of the results of lie-detector tests are roughly classifiable in three groups: (1) unfounded objections resulting from either a misunderstanding of the machine or of its proposed place in the trial; (2) objections, sound and unsound, which although directed at the lie-detector, apply equally to all expert testimony

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[45] *Id.* at 71.

[46] *Id.* at 69.

[47] Marston, *op. cit. supra* note 39, at 21.

[48] McEvoy, *supra* note 43, at 70.

The lie-detector has been put to many novel uses also. For instance, the Secretary of the National Council of Bar Examiners reported its use in one mid-western state in testing candidates for admission to the bar, and recommended its universal adoption for such purpose in doubtful cases. N. Y. Times, Jan. 27, 1939, p. 7, col. 1.

[49] 1924—Municipal Criminal Court of Indianapolis [Marston, *op. cit. supra* note 39, at 20]; 1935—Circuit Court of Columbia Co., Wis., in State v. Loviello and Gregano [Inbau, *Deception of Detection Technique Admitted in Evidence* (1935) 26 J. CRIM. L. 262]; 1935—Circuit Court of Cook Co., Ill., in Reuter v. Hillberg [Marston, *op. cit. supra* note 39, at 20]; 1936—Circuit Court of Fond du Lac Co., Wis., in State v. Rowe [Note (1936) 26 J. CRIM. L. 758]; 1938—Magistrate's Court of Chicago [N. Y. Times, Feb. 3, 1938, p. 25, col. 2]; 1941—Circuit Court of Forest Co., Wis., in State v. Conn [Note (1943) WIS. L. REV. 430, 435].

1943—King's Co. Ct. of N. Y. in People v. Goldman [Judge Leibowitz set aside verdict of guilty in rape case after convicted man submitted to a lie-detector test permitted by the judge because of discrepancies in the testimony on the trial. N. Y. Times, Dec. 3, 1943, p. 58, col. 4; Dec. 8, 1943, p. 25, col. 7; Dec. 30, 1943, p. 10, col. 8. A new trial was subsequently ordered. N. Y. Times, Dec. 20, 1943, p. 10, col. 8. The use of the lie-detector in the Goldman case became an issue in the subsequent trial of the complainant for perjury. In the later trial, Judge Taylor refused the defendant permission to take a lie-detector test. N. Y. Times, Feb. 20, 1944, p. 27, col. 1; Feb. 26, 1944, p. 28, col. 2].

1944—Magistrate's Court of N. Y. C. [Magistrate Masterson released defendant charged with possession of policy slips after Dr. Kubis of Fordham had testified to the reliability of the lie-detector, and to the absence of indications of deception on the part of the defendant when so tested. N. Y. Times, Feb. 27, 1944, § 4, p. 38, col. 7].

Results of lie-detector tests have also been admitted in Ohio, California, Michigan and Washington in unappealed and therefore unreported cases [Marston, *op. cit. supra* note 39, at 20; Venters, *Use of Lie Detectors,* N. Y. L. J., Oct. 5, 1935, p. 1134]. In Chicago, some judges use the lie-detector in determining cases tried without a jury and in hearings for application for parole [Johnston, *The Magic Lie Detector,* SAT. EVE. POST, April 29, 1944, p. 102].

based upon scientific investigation; (3) valid objections arising from the unusual nature of the lie-detector.

(1) Those objections which are based upon misunderstanding or misinformation can be disposed of by a description of the technique and its proposed use in the trial. The lie-detector[50] is a machine which records those involuntary bodily changes, not visibly discernible, which accompany the emotions involved in conscious deception and the apprehension of detection. Contrary to some writers,[51] the fear of being prosecuted for a *crime* is not the sole cause of a suppression reaction; any real motive, whether pecuniary or personal, for concealing the answer from the operator is believed sufficient.[52] Hence, the lie-detector would be effective in civil, as well as in criminal, cases.

Some critics fear that conscious faking or emotional reactions other than fear of deception, such as extreme excitement or fear of the test, would often cause a wrong diagnosis. Conscious faking is effectively foiled by the recording of *involuntary* physical reactions; change in blood pressure, pulse rate, and electrodermal response. The following description by Keeler shows how irrelevant factors are discounted by the examination procedure:

> In order that the effect of existing environment, the present emotional state, and the physical condition of the subject may be determined, a polygraph recording is made for some minutes during which no questions are asked. Whatever the existing physiological and emotion conditions might be, the resulting polygraph curves indicate the "norm" for the period of the test. After this "norm" has been established, two or three irrelevant questions are asked, then questions pertaining to the crime, intermingled with irrelevant questions. Each question must be worded briefly and call for a "yes" or "no" answer. The examiner's mode of asking questions must be uniform as to rate, volume, and inflection of speech all through the test.[53]

Another reason offered for barring the lie-detector is that a few individuals, because of physical[54] or mental peculiarities,[55] fail to experience a recordable suppression reaction.[56] In most instances, however, this incapacity is readily apparent, as when it results from imbecility, insanity, intoxication, or extreme obesity. The great value of the lie-detector should

[50]For the rest of this discussion, the term "lie-detector" will refer only to the polygraph, which combines the advantages of the several types of lie-detector machines and which is most generally accepted as superior. See note 3 *supra*. For a short description of the polygraph, see Keeler, *Debunking the Lie Detector* (1934) 25 J. CRIM. L. 153, 156; for a more technical description, see Hensley, *The Lie Detector in Action* (1940) 3 TEX. B. J. 482.

[51]Comment (1924) 33 YALE L. J. 771, 773.

[52]Inbau, *Methods of Detecting Deception* (1934) 24 J. CRIM. L. 1140, 1147.

[53]Keeler, *supra* note 50, at 158.

[54]*E.g.*, intoxication, extreme obesity, a recent subjection to the third degree, a bad cough.

[55]Any mental peculiarity which prevents the subject from realizing he is not telling the truth.

[56]Trovillo, *What the Lie Detector Can't Do* (1941) 32 J. CRIM. L. 121 (illustrations of cases where the lie-detector is ineffective).

not be lost to the courts because in a small percentage of cases no record definite enough to warrant a diagnosis is obtainable. In such cases the lie-detector's report would neither impeach nor strengthen the subject's credibility.

It is not proposed that lie-detector tests be made in the court room before the jury,[57] but rather that the record of the tests and the conclusions of the expert examiner based upon it be offered in evidence as showing the credibility of a witness.[58] Such a use, hardly leading to the "abolition of the jury" as has been charged,[59] makes unimportant the question of who shall decide what questions are to be asked by the examiner.[60]

As for the objection that the lie-detector, and not the testimony of the expert, would become the issue,[61] once the lie-detector has been accepted by the courts, the jury's only task would be to weigh the expert's testimony according to conventional standards.

(2) Some objections to admitting results of lie-detector tests are equally applicable to other expert testimony which is admitted in evidence. It is urged, for instance, that because the tests are not infallible, they should be barred.[62] Infallibility is not, and should not be, a prerequisite to the admissibility of evidence.[63] The proponents of the lie-detector make no pretence to one hundred percent accuracy because its accuracy depends upon an interpretation by the examiner who has human limitations.[64] But then, many scientific matters which are admissible in evidence are subject to the same limitation, the X-ray, diagnosis by physicians and psychiatrists, micro-analysis, ballistics, and handwriting analysis, to mention a few. No testimony can be considered absolutely reliable and to weigh it is the proper function of the jury.

Two substantial dangers, it must be admitted, do attend the admission of the results of lie-detector tests: (1) The jury (and the judge) may fail to evaluate them properly;[65] (2) incompetent and unethical examiners may

[57]The court room is no better place for lie-detector tests than a crowded police station. McCormick, *supra* note 36, at 501.

[58]"It must be borne in mind that the use of 'lie detectors' is not to establish any independent fact in issue; its primary, indeed, its sole purpose is to demonstrate that the defendant is worthy of belief. It is a device which tends to sustain or to discredit the defendant's credibility." People v. Forte, 167 Misc. 868, 869, 4 N. Y. S. (2d) 913, 914 (Co. Ct. 1938).

[59]Forkosch, *The Lie Detector and the Courts* (1939) 16 N. Y. U. L. Q. Rev. 202, 221.

[60]People v. Forte, 167 Misc. 868, 872, 4 N. Y. S. (2d) 913, 917 (Co. Ct. 1938); Forkosch, *supra* note 59, at 227.

[61]State v. Bohner, 210 Wis. 651, 658, 246 N. W. 314, 317 (1933).

[62]Peller, *Scientific Aids in Proof* (1939) 13 St. John's L. Rev. 328, 333, 340; 43 Time 60 (Jan. 10, 1944). See McCormick, *supra* note 36, at 500, for a refutation of this argument.

[63]"All that should be required as a condition is the preliminary testimony of a scientist that the proposed test is an accepted one in his profession and that it has a *reasonable* [italics added] measure of precision in its indications." 2 Wigmore, Evidence (2d ed. 1923) § 990.

[64]Trovillo, *supra* note 3, at 878; Inbau, *Methods of Detection Deception* (1934) 24 J. Crim. L. 1140, 1147; Note (1927) 8 Fordham L. Rev. 120, 122.

[65]Inbau, *supra* note 37, at 62; Forkosch, *supra* note 59, at 230.

give unsound or perjured testimony.[66] The first danger is inherent in our jury system and is no greater in the case of a lie-detector expert than any other expert. The second danger exists with testimony of all kinds. But as Professor Morgan of Harvard has said:

> Given a litigant willing to commit or suborn perjury and counsel ready to encourage or wink at it, no exclusionary rule will deter them. . . . . No rational procedure will sanction an exclusionary rule supported only by its supposed efficacy to hinder or prevent false testimony. . . .[67]
>
> Neither *fear of perjury* nor *distrust of the capacities of the judicial tribunal* has any pertinence to a consideration of the wisdom or propriety of creating or retaining privileges against disclosure of relevant data.[68]

(3) Certain real difficulties caused by the peculiar nature of the lie-detector attend its use by the courts, but as the New York Court of Appeals said concerning the admissibility of fingerprint evidence, "the fact that it presents to the court novel questions [does not] preclude its admission upon common-law principles."[69]

Still these difficulties merit serious attention. First, a party might produce only those tests which were favorable to himself, and his opponent would not be able to examine him under the lie-detector, nor to cross-examine him should he refuse to take the stand.[70] Second, it would be difficult for the opposing counsel to expose an incompetent or dishonest "expert" and to cross-examine him concerning the tests,[71] because the lie-detector is not adequately standardized as to instrument, manner of conducting tests, qualifications of examiners, and interpretation of the records.[72]

A Proposed Procedure to Regulate the Admission of the Results of Lie-Detector Tests.—These difficulties could be largely surmounted by the adoption of a suitable statute or proper court rules.[73]

The state should adopt a standard machine (preferably the polygraph which is almost universally accepted)[74] and a standard method of giving the tests and of interpreting the records.[75] What is more important, the

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[66]Inbau, *supra* note 27, at 502; Inbau, *Deception of Detection Technique Admitted in Evidence* (1935) 26 J. CRIM. L. 262, 270; Keeler, *supra* note 50, at 158.

[67]Morgan's *Foreword* to the AMERICAN LAW INSTITUTE'S MODEL CODE OF EVIDENCE (1942) 6.

[68]*Id.* at 7. Italics added.

[69]People v. Roach, 215 N. Y. 592, 604, 109 N. E. 618, 623 (1915).

[70]State v. Bohner, 210 Wis. 651, 659, 246 N. W. 314, 318 (1933).

[71]*Ibid;* Inbau, *op. cit. supra* note 37, at 64.

[72]Inbau, *op. cit. supra* note 37, at 63.

[73]The need for regulation is well recognized. Marston writes, "I have received letters from jurists and from Bar Associations all over the country inquiring about the lie-detector and how it can be made available for local use." MARSTON, THE LIE-DETECTOR TEST (1938) 76. The need for regulation is pointed out by Justice Fitzgerald in People v. Forte, 167 Misc. 868, 872, 4 N. Y. S. (2d) 913, 917 (Co. Ct. 1938), and by the late Dean Wigmore in WIGMORE, CODE OF EVIDENCE (2d ed. 1935) § 967.

[74]See note 3 *supra.*

[75]For a description of the generally approved method, see Trovillo, *Deception Test*

state should license lie-detector experts as it now does certified public accountants, physicians and lawyers.[76] The qualifications for lie-detector experts, as well as the other standards, should be determined with the advice of the most experienced authorities in the field.[77]

The trial judge should be given discretionary authority to appoint a licensed expert, whenever a lie-detector test is requested by one of the parties or seems desirable to the judge. Before appointing a lie-detector expert, he should first give the parties opportunity to propose experts and to object to any expert under consideration. If the parties agreed upon the choice of an expert, he should be appointed.

A witness's refusal to take a lie-detector test after one is ordered by the court should be subject to mention to the jury and punishable as contempt of court.[78] Either party should have the right to employ a licensed expert other than the one appointed by the court.

Immediately following a test, the expert should be required to file with the court a report of the test, including the record and his conclusions. This report should be open to inspection by the interested parties for a reasonable time before the expert is called to the stand, and any disputes or questions caused by the report should be settled by the judge at a special hearing for that purpose. This would give counsel ample opportunity both to prepare a cross-examination and to discover any prejudicial or incompetent matter contained in the report, before it is offered to the jury.

The testimony of the expert examiner should be admissible as bearing upon the credibility of the witness examined. Either counsel, and perhaps the judge, should be allowed to question the expert concerning his experience and other qualifications, the method used during the examination, and his conclusions.

The compensation to be paid an expert called by the court, should be fixed by the court at a reasonable sum. This sum should be paid by the

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Criteria (1942) 33 J. CRIM. L. 338, 339; Keeler, *Debunking the Lie Detector* (1934) 25 J. CRIM. L. 153, 158.

[76]Keeler, *supra* note 75, at 159.

[77]In 1941 there were less than 100 trained experts in the United States. McEvoy, *The Lie Detector Goes into Business* (Feb. 1941) 38 READER'S DIGEST 69, 71.

The following qualifications are recommended by authorities: (1) long experience in criminal, business, social, and professional matters, (2) honesty, (3) an 8 months' training. See 15 ROCKY MT. L. REV. 162, 164.

[78]Such a provision, it may be objected, would be violative of the witness's privilege against self-incrimination. This objection is well refuted by Dean Hardman of the University of West Virginia School of Law: "Such an objection, . . . seems untenable, for despite some dissent it is now generally held that the privilege applies only to compelled testimony as distinguished from nontestimonial evidence, and it would seem that the recordations of the lie detector do not constitute a testimonial utterance within the meaning of the privilege inasmuch as the evidentiary value of the data sought to be used in the court lies in the physical reaction of the person subjected to the test rather than in the words used by him. That this is so is indicated by the fact, among others, that the recordations are the same whether the person taking the test answers questions or remains silent." Hardman, *Lie Detectors, Investigation, Courts* (1941) 48 W. VA. L. REV. 37, 39. See also Note (1924) 37 HARV. L. REV. 1138; Inbau, *Methods of Detecting Deception,* 24 J. CRIM. L. 1140, 1151.

state in criminal cases and assessed as costs in civil cases. Experts not appointed by the court should be paid by the party calling them.[79]

Charlotte L. Smallwood

Evidence: New York Parol Evidence Rule: Procedural or Substantive Law.—In *Zell v. American Seating Company, 138 F. (2d) 641 (C. C. A. 2d., 1943),*[1] the action was for commissions alleged to have been earned in obtaining war contracts. The defendant claimed that the contract was embodied wholly in a written memorial. The plaintiff claimed that the contract was composed of a written memorial and an accompanying oral agreement. The plaintiff has been paid the stipulated monthly compensation called for in the written contract and now sues for a three per cent commission on the contract or purchase price of the war contracts obtained for the defendant. The relevant part of the written contract provided: ". . . the Company may, if it desires, pay you something in the ~~matter~~ nature of a bonus."[2] The alleged oral agreement provided that, in addition to the stipulated monthly compensation, the plaintiff should receive a commission of the three to eight per cent of the contract or purchase price of any war contracts obtained. The exact percentage between the two figures was left to be determined at a later date. All of the negotiations of the parties took place in Grand Rapids, Michigan. The principal case also raises an interesting problem of Federal Procedure. However, that problem is not within the scope of this note.

Mr. Justice Frank, writing for the Second Circuit Court of Appeals, in the *Zell* case says in reference to the parol evidence rule: "The substantive character of the rule, although perhaps shadowy, still exists in New

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[79]These suggestions are merely tentative, being modelled for the most part upon Chapter Five ("Expert and Opinion Evidence") of the American Law Institute's MODEL CODE OF EVIDENCE and the Uniform Expert Testimony Act. The procedure suggested would, it is believed, satisfy the requirements for regulation upon which Wigmore conditioned his approval of the use of the lie-detector in court. WIGMORE, CODE OF EVIDENCE (2d ed. 1935) § 967.

[1]The District Court for the Southern District of New York [50 F. Supp. 543 (1943)] granted the defendants' motion for summary judgment, holding that to allow the plaintiff to prove his alleged collateral agreement would violate the parol evidence rule. Upon appeal, to the Circuit Court (Second Circuit) the decision of the lower court was reversed. The Supreme Court of the United States granted *certiorari* February 28, 1944, and on May 8, 1944 the Court reversed the Circuit Court of Appeals and reestablished the holding of the District Court by the following opinion: *"Per Curium:* In this case two members of the Court think that the judgment of the Circuit Court of Appeals should be affirmed. Seven are of the opinion that the judgment should be reversed and the judgment of the district court affirmed—four because proof of the contract alleged in respondent's affidavits on the motion for summary judgment is precluded by the applicable state parol evidence rule, and three because the contract is contrary to public policy and void, . . ." [12 U. S. L. WEEK 3371 (U. S. 1944)].

[2]138 F. (2d) 641, 642 (C. C. A. 2d, 1943).

York."[3] This cryptic statement by Mr. Justice Frank is rather startling in the light of the views expressed by the leading text-writers in the fields of evidence and contracts. James Bradley Thayer, the great pioneer in the rationalization of the rules of evidence, tells us that the parol evidence rule is a rule of substantive law defining contracts, deeds, wills, judgments, or the like.[4] Wigmore, at the outset of his discussion of the subject, emphatically states that the rule is "in no sense a rule of Evidence but a rule of Substantive Law."[5] *Williston on Contracts*[6] sets forth the same theory as that laid down by Thayer and Wigmore.

Professor McCormick seems to be the only author who suggests the view that the parol evidence rule may be procedural in some of its aspects. He points out in his article, "The Parol Evidence Rule as a Procedural Device for Control of the Jury,"[7] that, in the determination of whether parol evidence should be admitted, the division of power between the judge and jury is procedural. He says:

> The anesthetic qualities of the language—technique about "contradicting," "admissibility" and "completeness" which the court have inherited, and the preoccupation of the great text writers, Thayer, Wigmore, and Williston, with the substantive aspect of the parol evidence doctrine, have contributed to the almost complete absence in the reported appellate opinions of any real discussion of the practical administrative problem of division of power between judge and jury.[8]

Mr. Justice Frank's cryptic statement as to the rule may have been based upon the same ideas which are set forth in Professor McCormick's article, or upon the decisions of certain cases in New York, or, perhaps, upon both.

A rule of thumb definition of what is procedure, might be stated as follows: If the decision is one which is made as one of the formal steps of a trial or hearing, as a part of the operation of the court machine, it may be said to be procedural rather than substantive.

In New York the patrol evidence rule has been comprehensively stated by Mr. Justice Pound in *Newburger v. American Surety Co.*[9] as follows:

> Parol evidence may not be received to vary the clear and unambiguous terms of a solemn written agreement between the parties although matters may be proved which tend to show fraud, mistake, illegality, want of consideration, lack of capacity of any other matter affecting the validity of the writing or to establish the existence of a separate oral agreement as to any matter on which the document is silent, and which

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[3] *Id.* at 643.
[4] THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898) 408-9.
[5] 9 WIGMORE, EVIDENCE (3d ed. 1940) § 2400.
[6] 3 WILLISTON, CONTRACTS (Rev. ed., Williston & Thompson, 1936) §631.
[7] McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury* (1932) 41 YALE L. J. 365.
[8] *Id.* at 380.
[9] 242 N. Y. 134 151 N. E. 155 (1926).

> is not inconsistent with its terms, where from the circumstances of the case the court infers that the parties may not intend the document to be a complete and final statement of the whole of the transaction between them, or to establish a condition precedent to the attaching of an obligation under the contract.[10]

This statement of the rule certainly does not fall within the above stated rule of thumb definition as to procedure. This fact is further substantiated by numerous New York Court of Appeals decisions which have both impliedly and expressly held that the rule is one of substantive law.[11]

However, an agreement, based upon *Brady v. Nally*,[12] might be offered to show that the rule may have procedural aspects. In the *Brady* case the contract provided for payment upon completion of the work. Evidence was admitted, without objection and without motion to strike it out, to show an oral agreement to pay on other terms. The court said, "the parties have the right to make a rule of evidence for their own case and they are presumed to have done so when testimony, otherwise incompetent, is received without objection and without any effort to have it stricken from the minutes or disregarded by the trial court."[13] The decision of the Court of Appeals was, in effect, that if the admission of parol evidence is not objected to in some manner in the trial court, it cannot be objected to in the appellate court. Although substantive as well as procedural rules of law may be waived, the right to waive the rule might be classified as procedural.

Mr. Justice Vann, who wrote the decision in the *Brady* case, in dealing with the same question in *Loomis v. N. Y. C. and H. R. R.R. Co.*,[14] said:

> No effect can be given to such evidence even when received without objection, provided the court is asked in due form to instruct the jury that it is merged in the written agreement if they found there was one.[15]

The latest case to infer that the parol evidence rule might be viewed as procedural, in some aspect, is *Higgs v. DeMaziroff*.[16] The action was upon three promissory notes. The defendant's affirmative defense was that the notes were delivered subject to an oral condition that they were not to be paid or enforced until paintings for which they were given were sold, and then only out of the proceeds of the sale. Although the plaintiff did not expressly move to strike out the oral evidence as violating the parol evidence

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[10] *Id.* at 142, 151 N. E. at 157.

[11] Wilson v. Deen, 74 N. Y. 531 (1878); Eighmie v. Taylor, 98 N. Y. 288 (1885); Lese v. Lamprech, 196 N. Y. 32, 89 N. E. 581 (1909); Ruppert v. Singhie, 243 N. Y. 156, 153 N. E. 33 (1926); Mitchill v. Lath, 247 N. Y. 377, 160 N. E. 646, 68 A. L. R. 239 (1928).

[12] 151 N. Y. 258, 45 N. E. 547 (1897).

[13] *Id.* at 264-5, 45 N. E. at 549.

[14] 203 N. Y. 359, 96 N. E. 748 (1911).

[15] *Id.* at 367, 96 N. E. at 751.

[16] 263 N. Y. 473, 189 N. E. 555, 92 A. L. R. 807 (1934).

rule, the plaintiff did move to dismiss defendant's affirmative defense. The trial court denied this motion. However, on appeal, the Court of Appeals held that the plaintiff's motion amounted to a motion to strike out the parol evidence and should have been granted. This decision is in accord with the earlier decisions of the court in the *Brady* and *Loomis* cases.

As previously indicated, the parol evidence rule may be procedural in still another aspect. When one party to an action introduces in evidence a written agreement and the other party offers an oral agreement, two questions arise. These questions are stated by Professor McCormick as follows:

> (1) Was this writing intended by the parties to displace this asserted oral agreement?
>
> (2) Who decides whether the document was intended to supersede the alleged oral contract?[17]

McCormick points out that there are two plausible answers to the second question. Namely, the power lies either in the judge, or in the judge and jury. He examines four available expedients in administering the parol evidence rule.

> First, the crude, older method of choice by the trial judge between the rule against "varying, altering, or adding to, a writing," and the formulas for "incomplete writings" and "collateral contracts," with the real motives for the choice left almost inarticulate, ... * * *
>
> Second, we may advocate the plan of resolving the whole matter into one of the application of the standard express intent, with no special treatment for written transaction except this, that the trial judge shall determine as a preliminary fact-question whether a given alleged oral agreement was intended by the parties to be abandoned when the writing was signed. * * *
>
> Third, ... Let the trial judge use the same machinery for control of the jury which he always has available. If, in his opinion, reasonable minds could reach but one conclusion from the evidence, he is empowered to withdraw that question from the jury.
>
> Fourth, ... Let the trial judge, after hearing the testimony as to the alleged oral agreement, including the evidence of substantiating circumstances, compare it with the terms of the writing, and if he considers that it is one which parties situated as these were would "naturally and normally" have recited in the writing itself, had they made it and intended it to stand, then he will reject the evidence thus tentatively heard. On the other hand, if . . . he concludes that the alleged oral pact is "such an agreement as might normally be made as a separate agreement by parties situated as were the parties to the written contract," then he will allow the evidence to go to the jury. . . . . He will still, if he admits the evidence and the proof is conflicting, submit to the jury

[17]McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, (1932) 41 YALE L. J. 365, 375.

the issues: was the oral agreement made as claimed, and, if so, was it intended to be displaced by the written terms?[18]

Professor McCormick sharply criticizes the first expedient, which is the one used by the courts at present, and urges the adoption of the fourth method.

The focal point, to which attention must be directed, is not whether the authority should be given to the judge or to the judge and jury, but, that regardless of which has the final decision, the formal steps taken by the trial court in applying this part of the parol evidence rule are procedural. If this procedural aspect of the rule is recognized, Professor McCormick's views on the apportionment of the duties between the bench and the jury box may very well be adopted.

Wigmore expressly gives the authority to determine the intention of the parties to the trial judge,[19] but he does not cite any case in point and apparently treats it as an incidental feature of the parol evidence rule. As for a formula to be used, he says: "In deciding upon this intent, the chief and most satisfactory index for the judge is found in the circumstance whether or not the *particular element of the alleged extrinsic negotiation is dealt with at all in the writing.*"[20] Williston implies that the "court"[21] passes upon the question of intention of the parties, and then goes on to give his formula for determining admissibility.[22]

Professor McCormick seems to be the only writer who propounds the theory that the administrative problem of division of power between judge and jury, in relation to the parol evidence rule, is a procedural aspect of the rule.

Even though most of the decisions of the New York courts flatly state that the parol evidence rule is substantive, the decisions in *Brady v. Nally*, *Loomis v. N. Y. C. & H. R. R.R. Co.*, and *Higgs v. DeMaziroff* certainly intimate that the rule may be procedural in at least one aspect, and Professor McCormick sheds light on still another possible procedural aspect of the rule. These considerations undoubtedly underlie Mr. Justice Frank's statement that "the substantive character of the rule, although perhaps shadowy, still exists in New York."[23]

When the parties to an action enter into a contract in New York and the suit on the contract is brought in New York, and the question of

[18] *Id.* at 377-9.

[19] 9 WIGMORE, EVIDENCE (3d ed. 1940) § 2430. In note 3 the author states: "Sometimes, but erroneously, the question of intent is left for the jury."

[20] 9 WIGMORE, EVIDENCE (3d ed. 1940) § 2430.

[21] 3 WILLISTON, CONTRACTS (Rev. ed., Williston & Thompson, 1936) § 633.

[22] *Id.* § 638. "The test of admissibility is much affected by the inherent possibility of parties who contract under the circumstances in question, simultaneously making the agreement in writing which is before the court and also the alleged parol agreement. The point is not merely whether the court is convinced that the parties before it did in fact do this, but whether the parties so situated generally would or might do so."

[23] 138 F. (2d) 641, (C. C. A. 2d, 1943).

whether or not the parol evidence rule is to be applied arises, it does not make any difference whether the courts call the rule substantive or procedural. However, when the contract is made in a foreign state and a suit is instituted in New York or in a federal court sitting in New York, a conflict of laws problem arises and it is of great importance whether the rule is held to be substantive or procedural. For this reason, it is hoped that the New York court, in future decisions, will more clearly identify the substantive and procedural aspects of the rule.

Alvah W. Burlingame III

Labor Law: Discharge of "wildcat" strikers: Discrimination.—Increasing dissatisfaction over the frequency of "wildcat" strikes in industry prevails. The present national crisis makes them a matter of grave concern. What is the status of the "wildcat" strikers? That was the problem before the court in *Western Cartridge Co. v. National Labor Relations Board, 139 F. (2d) 855 (C. C. A. 7th, 1944).*

The employees on the day shift in the cupping department of the company's plant were disgruntled because of the dilatory tactics of the company in negotiating certain grievances as to working conditions and an increase in wages. On July 3, 1942, the day shift quit work. The superintendent told the employees that the company would not set a definite date to hear their grievances until they returned to work. When the men refused, they were given suspension slips, which notified them to appear before the discipline board on July 6. The superintendent rejected similar demands made by the employees of the second and third shifts, who also quit work and were given suspension slips. On July 7, the discipline board discharged the eighteen men of the first shift who had gone on strike and hired others to fill their places. However, different treatment was accorded the employees of the other two shifts, for their jobs were kept open for them until their return.

The Circuit Court of Appeals found, in a proceeding by the company to set aside the order of the National Labor Relations Board, that although substantial evidence supported the finding of the Board that the company had been guilty of unfair labor practices in the light of the persistent hostility to the organization of its employees in violation of section 8 (1) of the National Labor Relations Act, yet its unfair labor practices were not the cause of the strike.

The court held that since the employees were not negotiating as members of the union nor under any claim of bargaining rights, the strike was a "wildcat" strike.[2] Moreover, the company was engaged in the manufacture of munitions of war and the strike was a violation of their solemn pledge not to strike for the duration of the war. Nor had these employees resorted to the ample machinery set up by the government for the settlement of labor

[1]139 F. (2d) 855, 857.
[2]*Id.* at 859.

disputes. Without violating section 8 (3) of the Act,[3] the company had the right to discharge the striking employees or to refuse to take them back into its employ if the company did not discriminate against them so as *"to encourage or discourage membership in any labor organization."*[4] The order of the Board under section 8 (3) of the Act was refused enforcement because there was no evidence to sustain the Board's finding of discrimination in refusing to rehire the striking employees.

In interpreting the National Labor Relations Act, the courts have held that the Act "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them."[5] Indeed, the Act provides that the employee is entitled to the protection of the Act only where he is engaged in concerted activities to achieve his right to self-organization, and the advantages attendant upon it. Employees who engage in a "wildcat" strike are subject to discharge because it is an illegal act. A "wildcat" strike is a concerted activity dissociated from the activity of any labor organization.[6]

Employees who take part in a "wildcat" strike are in no better position than employees who engage in a "sit-down" strike. The Supreme Court of the United States, in *National Labor Relations Board v. Fansteel Metallurgical Corp.*,[7] recognized that the seizure and forcible retention of an employer's factory by employees in a "sit-down" strike, even though caused by the employer's unfair labor practices, was a good ground for the discharge of the employees. The Act contemplated only a lawful strike.

An illegal strike may result from a breach of contract by the employees as well as from their tortious conduct. In *National Labor Relations Board v. Sands Manufacturing Co.*,[8] and in *National Labor Relations Board v. Columbian Enameling & Stamping Co.*,[9] the contracts which the respective unions had with the employers contained a no-strike provision. In both cases, the unions sanctioned a strike in violation of their agreements. The United States Supreme Court held that an effective discharge of the employees for the repudiation of their agreement was not prohibited by the Act, any more than was a discharge for a tort committed against the employer.

"The statute does not interfere with the normal right of the employer to select or discharge his employees,"[10] nor does the statute provide that "the relationship held in *statu quo* under Title 29, Section 152 (3), shall continue in absence of wrongful conduct on the part of the employer and rightful conduct on the part of the employees."[11] Otherwise the right of the em-

[3]C. 372, § 8 (3), 49 STAT. 452 (1935), 29 U. S. C. § 158 (3) (1940).
[4]139 F. (2d) 855, 858.
[5]National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 45-46, 57 Sup. Ct. 615, 628 (1937).
[6]In the Matter of Weirton Coal Co. and United Mine Workers of America, Local 6295, 34 Decis. and Orders of N.L.R.B. 1255, 1271.
[7]306 U. S. 240, 59 Sup. Ct. 490 (1939).
[8]306 U. S. 332, 59 Sup. Ct. 508 (1939).
[9]306 U. S. 292, 59 Sup. Ct. 501 (1939).
[10]See note 5 *supra*.
[11]See note 7 *supra*.

ployer to select and discharge his employees in the absence of intimidation or coercion would be cut off. Section 8 (3)[12] of the Act imposes only one limitation upon the employer's right to hire, fire, promote, transfer or demote his employees. The factor motivating the employer's action must not be the union membership, activity or relationship of the worker. Discharge for no reason at all is lawful if the purported absence of cause is not anti-unionism disguised as a whim.

Whether discrimination exists or not is a question of fact, the determination of which must be supported by substantial evidence.[13] The Fourth Circuit Court of Appeals has held that an employee, who was discharged because he refused to work while an illegal strike was going on, could not complain of discrimination by the employer where others were discharged for the illegal strike, even though members of the same union were rehired.[14] The court was unable to find in the record of the *Western Cartridge Co.* case any substantial evidence to support a finding of the Board that the company's actions against its striking employees were taken to discourage membership in a labor organization, either in the matter of their hire or tenure. Even though the exclusive right of the Board to draw inferences could be drawn. The employees of the day shift belonged to the same union as the employees of the other two shifts, but as to them no charge of discrimination was made.[15]

The avowed purpose of the National Labor Relations Act was to prevent the industrial strife occasioned by labor disputes as a burden upon and to interstate commerce. This purpose was to be achieved by encouraging collective bargaining and protecting the workers in their freedom of association and self-organization.[16] By declaring a "wildcat" strike illegal, the court, in the *Western Cartridge Co.* case, outlawed it as an anti-social device of self-help, not within the protection of the Act.[17]

John Francis Sullivan

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[12]C. 372, § 8 (3), 49 STAT. 452 (1935), 29 U. S. C. § 158 (3) (1940).

[13]Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 61 Sup. Ct. 845 (1941).

[14]*Ibid.*

[15]139 F. (2d) 855, 859.

[16]C. 372, § 1, 49 STAT. 449 (1935) 29 U. S. C. § 151 (1940).

[17]"While high officials of the United Automobile Workers, C.I.O., looked on, the Ford Motor Company today discharged 10 men for participating in a Rouge Plant disturbance in which a plant protection man was beaten and a labor relations office damaged." Mr. R. J. Thomas, president of the union, denounced the action of the "wildcat" strikers as contrary to the policy of the union. N. Y. Times, Mar. 10, 1944, p. 17, N. Y. Herald Tribune, Mar. 10, 1944, p. 1.