RECENT CASES

Administrative Law—Authority to Determine Coverage of Walsh-Healey Act—Secretary of Labor, under Walsh-Healey Act relating to hours and wages of persons employed on government contracts,[1] issued a subpœna [2] ordering defendant, holder of a contract to furnish shoes for the government, to produce payroll records of plants which, although not named in the contract, manufactured parts used in constructing the shoes.[3] Federal district court refused Secretary's petition to enforce the subpœna;[4] reversed by the circuit court of appeals.[5] *Held* (two justices dissenting),[6] affirmed; Secretary of Labor, not the courts, has authority in first instance to determine whether separate plants of government contractor are within coverage of the Act. *Endicott-Johnson Corp. v. Perkins,* 317 U. S. 501 (1943).

The constitutionality of statutes conferring upon federal courts jurisdiction to enforce administrative subpœnas [7] and compel testimony was established in *Interstate Commerce Commission v. Brimson,*[8] and subsequent decisions [9] have reiterated the holding on the theory that appropriate

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1. 49 STAT. 2036 (1936), 41 U. S. C. A. §§ 35-45 (Supp. 1942). The Act provides that in any contract with the United States for manufacture of materials in amount exceeding $10,000 persons employed are to be paid not less than the minimum wages as determined by the Secretary of Labor, and shall not be permitted to work in excess of 40 hours in any one week.

2. Secretary of Labor is empowered to administer the provisions of the Act, to make investigations and inquiries, to hold hearings, and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath.

3. The contracts with the defendant were entered into, pursuant to conditions of the Act, between Oct. 26, 1936, and June 8, 1938. Thereafter, in 1939, the Secretary issued rulings which provided that materials or supplies manufactured in integrated establishments and used in fulfilling the contract, should conform to the provisions of the Walsh-Healey Act.

4. 37 F. Supp. 604 (N. D. N. Y. 1941) and 40 F. Supp. 254 (N. D. N. Y. 1941). Federal district court based its decision upon the ground that the plant in question not being within the coverage of the Act, the Secretary was unauthorized to obtain the plant's books.

5. 128 F. (2d) 208 (C. C. A. 2d, 1942).

6. Justices Murphy and Roberts.

7. The Walsh-Healey Act in part provides: ". . . In case of contumacy, failure, or refusal of any person to obey such an order, any district court of the United States . . . shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof. . . ." 41 U. S. C. A. § 39 (Supp. 1942).

8. 154 U. S. 447 (1894). Although the question was decided by the federal court in *In re* Pacific Railway Commission, 32 Fed. 241 (N. D. Calif. 1887) "it was seven years later before this question of the power of an administrative body to compel testimony through the courts was brought before the Supreme Court. . . ." Lilienthal, *The Power of Governmental Agencies to Compel Testimony* (1925) 39 HARV. L. REV. 694, 703.

9. Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 (1938); General Tobacco and Grocery Co. v. Fleming, 125 F. (2d) 596 (C. C. A. 6th, 1942). "It is unreasonable to assume that Congress intended that one who, when called upon to produce his books and records, denies that he is engaged in transactions within the purview of the Act should be refused a hearing upon that issue before his privacy is invaded in derogation of his individual immunity from unreasonable search of his papers and effects." *Id.* at 599. *Contra:* Katzenback v. Tomadelli Corp., 102 N. J. Eq. 186, 140 Atl. 26 (1928) (What amounted to an order to obey an administrative subpœna was granted without a hearing over defendant's denial of statutory jurisdiction and demand for a hearing).

defenses may be made to the administrator's application for enforcement by the court. The power to punish for contempt, however, has not been bestowed directly upon federal [10] administrative agencies by legislative action. Heretofore, only after the court had determined the validity of the subpœna would it issue an order, disobedience of which constituted contempt.[11] Although indicative of the present trend to broaden the powers of administrative agencies,[12] the decision in the instant case seems inconsistent with the traditionally accepted view that federal administrative agencies are in themselves powerless to compel obedience to subpœnas.[13] By abolishing the discretionary power of the court and forcing it to comply with the wishes of the Secretary in enforcement proceedings,[14] the present decision would in effect place the sanction of punishment for contempt in the hands of the Secretary of Labor, thus permitting her to do indirectly what she could not validly accomplish by direct action. That such power would be constitutional if granted by legislation is debatable;[15] that in many situations it would expedite administrative action which otherwise would be seriously hampered is conceded. However, such authority hardly can be inferred from the statute as it now stands, and it is doubtful that Congress intended to attain this result by the more circuitous method of automatic judicial action.[16]

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10. The rule in respect to state agencies is not well settled; some states holding that the agency can enforce its subpœnas, and others adhering to the federal view.

11. General Tobacco and Grocery Co. v. Fleming, 125 F. (2d) 596 (C. C. A. 6th, 1942). "In the exercise of the judicial power to review questions of law, as conferred by an Act of Congress, the seal of a United States Court should not become a mere rubber stamp for the approval of arbitrary action by an administrative agency." *Id.* at 599.

12. For an analysis and illustrations of the increasing use of administrative justice see Feller, *Administrative Justice* (1938) 27 SURVEY GRAPHIC 494.

13. ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES: REPORT OF THE COMMITTEE ON ADMINISTRATIVE PROCEDURE, APPOINTED BY THE ATTORNEY-GENERAL, Appendix K (1941).

14. *Cf.* SEC v. Tung Corporation of America, 32 F. Supp. 371 (N. D. Ill. 1940) reported in 54 HARV. L. REV. 129 (1940) (SEC, suspecting defendant corporation was dealing in unregistered securities, subpœnaed defendant to produce certain documents. SEC petitioned court upon defendant's refusal to appear. Held, defendant is entitled to a hearing at which SEC must demonstrate to the court a basis for enforcement of the subpœna). A possible distinction between the holdings of this case and the instant case is found in a difference in wording of the two statutes involved. The Securities Act provided that in case of refusal to obey a subpœna a district court *may* issue an order to appear. The Walsh-Healey Act uses the phrase, *shall have jurisdiction* to issue an order. If this evidences an intent of Congress to make the action of the court in the latter statute compulsory as compared with the discretion allowed in the Securities Act, it fails from faulty draftsmanship.

15. In a discussion of the Interstate Commerce Commission the suggestion is made, which would be equally applicable to the Department of Labor, "Thus if a federal statute or amendment were now enacted conferring upon our noble Interstate Commerce Commission, under certain limited circumstances, authority to punish for contempt, the ponderables would likely outweigh the imponderables." Albertsworth, *Administrative Contempt Powers: A Problem in Technique* (1939) 25 A. B. A. J. 954, 956.

16. As is pointed out in the vigorous dissenting opinion, ". . . Congress evidently intended to keep the instant subpœna power within limits, and clearly must have meant for the courts to perform more than a routine ministerial function in passing upon such applications. If this were not the case, it would have been much simpler to lodge the power of enforcement directly with the Secretary, or else to make disregard of his subpœnas a misdemeanor." Instant case at 512.

Conflict of Laws—Effect to Be Given Foreign Decrees of Divorce Where Service on Absentee Defendant is by Publication—Defendants obtained divorce decrees in Nevada from North Carolina spouses who were served by publication. Defendants then married and returned to North Carolina where they were indicted for bigamous cohabitation.[1] On the court's charge that the Nevada decrees were invalid since they did not conform to North Carolina requirements for recognition of foreign divorces,[2] defendants were convicted. The North Carolina Supreme Court affirmed the conviction.[3] *Held* (two justices dissenting) reversed. Nevada's jurisdiction being admitted, its decrees are entitled to full faith and credit in North Carolina. *Williams v. State of North Carolina,* 63 Sup. Ct. 207 (1942).

Under the Constitution, full faith and credit must be given in one state to the judgments of a sister state.[4] However, an exception was traditionally said to exist where such recognition would grossly offend the local public policy. This exception, announced more in *dicta* than in decisions,[5] is today regarded by the more liberal view as without merit, since public policy varies only slightly, in fact, between states. It nevertheless was embodied in the much discussed case of *Haddock v. Haddock,*[6] decided on the facts of the instant case by a split court,[7] which the instant case overrules.[8] As state divorce laws at variance with one another can easily

1. *See* NORTH CAROLINA CODE (1939) § 4342: "If any person, being married, shall contract a marriage with any other person outside of this state, which marriage would be punishable as bigamous if contracted within this state, and shall thereafter cohabit with such person in this state, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend . . . to any person who at the time of such marriage shall have been lawfully divorced from the bond of the first marriage." Thus the validity of the Nevada divorces was placed squarely in issue in the North Carolina trial.

2. Pridgen v. Pridgen, 203 N. C. 533, 166 S. E. 591 (1932), laid down the rule that a foreign divorce, based on substituted service and where the defendant made no appearance, would not be recognized in North Carolina.

3. State v. Williams, 220 N. C. 460, 17 S. E. (2d) 769 (1942).

4. U. S. CONST. Art. IV, § 1. This section provides, in addition, that "Congress may by General Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." This power was exercised. The Act of May 26, 1790, REV. STAT. § 905 (1875), 28 U. S. C. A. § 687 (1934) provides that judgments "shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from which they are taken." These provisions have been interpreted to mean that "not some, but full" faith and credit must be given such judgments. Davis v. Davis, 305 U. S. 32, 40 (1938).

5. Cases where the foreign judgment in question was penal, or where it purported to govern the disposition of realty in the forum, furnish good examples. *See* Bradford Electric Co. v. Clapper, 286 U. S. 145, 160 (1931); Hood v. McGehee, 237 U. S. 611, 615 (1914); Mr. Justice Holmes, concurring in Fall v. Eastin, 215 U. S. 1, 14 (1909); Huntington v. Attrill, 146 U. S. 657, 666 (1892). But in Fauntleroy v. Lum, 210 U. S. 230 (1908), the Supreme Court squarely held that a foreign judgment would not be denied full faith and credit on the single ground of local policy; and in Broderick v. Rosner, 294 U. S. 629, 642 (1934) Mr. Justice Brandeis states: ". . . the room left for the play of conflicting policies is a narrow one."

6. 201 U. S. 562 (1906). The *Haddock* case, both because of the important social implications involved in the problem, and because of the widely divergent views of the members of the court that decided it (see note 7 *infra*) has evoked wide comment among the writers. *See* Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417; Strahorn, *The Supreme Court Revisits Haddock* (1938) 33 ILL. L. REV. 412; Holt, *Any More Light on Haddock v. Haddock?* (1941) 39 MICH. L. REV. 689.

7. The Supreme Court split 5 to 4 in the *Haddock* case, Justices Brewer, Brown, Harlan, and Holmes dissenting. Both Mr. Justice Brown and Mr. Justice Holmes wrote opinions. The Holmes opinion, stressing the social undesirability of the result reached by the majority, is especially forceful, and is repeatedly cited by the majority opinion in the instant case.

8. Instant case at 216.

cause grave consequences,[9] it seems clear that uniformity in the matter of recognition of foreign decrees is essential. Therefore, the newer view, sustained by this decision, is far preferable to the older one; and all such decrees rendered by a court having competent jurisdiction must now be sustained in every other state regardless of the local laws concerning requirements for divorce and recognition of foreign decrees. In regard to the instant case it must be stressed that the Nevada decrees are not rendered immune from all attack. If the jury had found that the defendants had secured their divorces in fraud on the Nevada court, such decrees would not be entitled to full faith and credit,[10] since Nevada would have acted without jurisdiction. And the majority opinion unambiguously asserts that it is not passing on the question of Nevada's jurisdiction.[11] The risks arising when the defaulting spouse obtains a foreign divorce are considerable even under the instant decision: an indictment for bigamy, a cloud on title to his property on his death intestate,[12] and the bastardization of the children under his second marriage[13] represent some of the possible consequences. But since a decision allowing the forum to refuse full faith and credit on the ground of public policy would transform these possibilities into absolute reality,[14] being based, in addition, on the fiction that

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9. "Under the circumstances of this case (if the *Haddock* case were followed), a man would have two wives, a wife two husbands. The reality of a sentence to prison proves that that is no mere play on words. Each would be a bigamist for living in one state with the only one with whom the other state will permit him lawfully to live. Children of the second marriage would be bastards in one state but legitimate in the other." Instant case at 214.

10. Bell v. Bell, 181 U. S. 175 (1900).

11. Although the trial judge had instructed the jury that if it found the defendants had procured the Nevada divorces through fraud on the Nevada court, the defendants were guilty of bigamy (since Nevada would not then have had jurisdiction over either party to the suit), the verdict returned against defendants was a general one, not specifying the grounds of the conviction; and under the rule of Stromberg v. California, 283 U. S. 359, 368 (1930), if one of the admitted grounds for conviction is invalid because unconstitutional, the conviction cannot be sustained. And Mr. Justice Douglas, speaking for the majority, states at 210: "If the case had been tried and submitted on that issue only (the issue of fraud), we would have quite a different problem, as *Bell v. Bell* indicates. We have no occasion to meet that issue now and we intimate no opinion on it. . . . Rather we must treat the present case . . . as if petitioners had . . . long ago acquired a permanent abode there" (in Nevada, so that there could be no question of fraud).

It is to be noted that this carefully worked out distinction was not drawn by Mr. Justice Jackson in his dissenting opinion, which rests essentially on the assumption that the defendants were convicted on the ground of fraud alone.

12. The majority opinion states, at 210: "But we do not agree with the theory of the *Haddock* case that, so far as the marital status of the parties is concerned, a decree . . . need not be given full faith and credit." A footnote then explains: "Thus we have here no question as to extraterritorial effect of a divorce decree insofar as it affects property in another state." This qualifying language would not appear to contemplate disturbing the rule, laid down in Fall v. Eastin, 215 U. S. 1 (1909) and followed in Olmsted v. Olmsted, 216 U. S. 386 (1909), that a judgment governing the disposition of foreign realty need not be accorded full faith and credit.

13. Since the decree may still be held on remand, invalid as a fraud under the *Bell* case.

14. If the rule of the *Haddock* case were followed, no showing of fraud would be necessary; the forum could deny recognition of the foreign divorce, on policy grounds, wherever it did not conform to the forum's law on the subject. This would have the practical effect of virtually insuring the bastardization of the children of the second marriage, since in almost every case the foreign law will be different, the foreign divorce having been secured for the precise purpose of evading the requirements of the local law on the subject.

"domicile" follows the domicile of the innocent rather than the culpable spouse,[15] it must be concluded that the majority opinion reaches the better result.

Income Tax—Taxability to Grantor of Income of Trust for the Benefit of the Grantor's Minor Children—Taxpayer created separate trusts for his minor children, giving trustees authority to devote so much of the net income of the trust property as "to them shall seem advisable" to the "education, support and maintenance" of the beneficiary. Except for a relatively small amount the income was retained by the trustees and added to the principal. The lower court [1] ruled that only the income actually distributed was taxable to the grantor.[2] *Held,* since all of the income could in the discretion of the trustees [3] be distributed in discharge of the grantor's legal obligation to support his minor children, the entire income was taxable to grantor under § 167 (a) (2) of the Internal Revenue Code.[4] *Helvering v. Stuart,* 63 Sup. Ct. 140 (1942).

Section 167 of the Revenue Act of 1934 was intended by Congress to combat the ever-increasing avoidance of the higher bracket surtax rates through the device of creating trusts, the income of which remained in substance at the disposal of the grantor (creator) of the trust.[5] This was merely a specific application to trusts of a general income tax doctrine that money expended by *A* in payment of a legal obligation of *B* was taxable income to *B*.[6] Since a parent is legally obligated to support his minor children, under this section the income of a trust created for the benefit of grantor's minor children has been held to be income of the grantor, but prior to the instant case, only to the extent that it was used for such sup-

15. *See* Mr. Justice Holmes, dissenting in the *Haddock* case, at 630: "(This theory) is a pure fiction, and fiction is always a poor ground for changing substantial rights." Moreover, there is neither practical nor legal justification for making jurisdiction depend on the culpability or innocence of a party; it will force a purely legal question, that of jurisdiction, to depend on the finding of a fact extraneous to the suit altogether. For excellent analyses of this phase of the problem, *see* Bingham, *The American Law Institute v. The Supreme Court—In the Matter of Haddock v. Haddock* (1936) 21 CORN. L. Q. 393, 426; Goodrich, *Matrimonial Domicile* (1917) 27 YALE L. J. 49.

1. Stuart v. Commissioner, 124 F. (2d) 772 (C. C. A. 7th, 1941).

2. This decision followed the rule laid down by the Treasury Department in GCM. No. 18972, 1937—2 CUM. BULL. 231, after acquiescing in the decision of E. E. Black, 36 B. T. A. 346 (1937).

3. Trustees were grantor, his wife, and his brother. Since the wife and brother were not beneficiaries, they had no substantial interest in the distribution of the trust income, adverse to that of the grantor. Hall v. Welch, 37 F. Supp. 788, 792 (D. Mass. 1941) (interest of trustees, as such, is not adverse to grantor's interest); Morton v. Commissioner, 109 F. (2d) 47 (C. C. A. 7th, 1940) (commercial trustees' interest held to be neither substantial nor adverse).

4. Revenue Act of 1934, § 167 (a) ". . . where any part of the income of a trust . . . (2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; . . . then such part of the income of the trust shall be included in computing the net income of the grantor."

5. Helvering v. Stuart, 63 Sup. Ct. 140, 147 (1942) (citing SEN. REP. No. 665, 72d Cong., 1st Sess. (1932) 34-35). See also U. S. Treas. Reg. 86, Revenue Act of 1934, Art. 167-1 (b).

6. Old Colony Trust Company v. Commissioner, 279 U. S. 716 (1929) (payment by petitioner's employer of tax due on petitioner's income for the previous year was to be included in petitioner's gross income for the year in which it was paid); Douglas v. Willcuts, 296 U. S. 1 (1935) (doctrine applied to income of an alimony trust); Commissioner v. Grosvenor, 85 F. (2d) 2 (C. C. A. 2d, 1936) (trust for the benefit of grantor's minor daughters).

port.[7] The decision of the instant case extends the grantor's tax liability to the whole of the income of the trust, regardless of the amount used for such support.[8] The court reached the conclusion that under the wording of the statute it was not the actual payment of trust income to grantor, but the possibility of such payment that was to be treated as income to the grantor.[9] This would seem to be a proper treatment of trusts which permit payments directly to the grantor of any part, or all, of the trust income. However, where the trust income is income to the grantor, not because of the possibility of payment to him, but only because of the possibility that trustees can satisfy some legal obligation of the grantor out of trust income, it seems clear that if the trust income exceeds the amount of the obligation, there is no logic in treating the excess as income of the grantor. In the opinion of the lower court the propriety of such a limitation was recognized,[10] but the Supreme Court ignored this issue. Since the extent of a parent's liability to support minor children is a matter of state law, the proper amount of trust income to be treated as income of the grantor may be determined by reference to the statutes and court decisions of the state in which the parent resides.[11] And since the basis for taxing the grantor is that the trust income represents gross income to him to the extent of his ability to shift the payment of this legal obligation to the trustee, limiting tax liability to the maximum amount of the obligation would seem in accord with the legislative intent.

Judgment—Validity of Judgment Lien Against Land Conveyed to Terre-tenant After Expiration of the Lien Against Judgment Debtor—Land subject to a judgment lien was conveyed to terre-tenant. The lien was not revived against the judgment debtor or the terre-tenant within five years of the entry of the judgment. *Held,* the lien continued against the land conveyed to terre-tenant five years from the date

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7. Commissioner v. Grosvenor, 85 F. (2d) 2 (C. C. A. 2d, 1936) (grantor taxed on amounts paid directly to the beneficiaries, which in the absence of proof to the contrary are assumed to have been spent for their support); Frank E. Wolcott, 42 B. T. A. 1151, 1157 (1940) (trustees had the same discretion and grantor was taxed on the amount spent); Percy M. Chandler, 41 B. T. A. 165, 178 (1940) (holding none of the trust income taxable to grantor where trustees had discretion as to the amount to be spent in support of beneficiaries, but none was so used); Martin F. Tiernan, 37 B. T. A. 1048, 1054 (1940); E. E. Black, 36 B. T. A. 346 (1937).

8. This extension of the rule was forecast by a decision of the Board of Tax Appeals in 1939. J. S. Pyeatt, 39 B. T. A. 774, 780 (1939) (where grantor had reserved the privilege of drawing a limited portion of the trust income to reimburse him for the expense of supporting the infant beneficiary, grantor was held taxable on the maximum amount which he could receive, rather than on the small amounts actually paid him by trustees).

9. Revenue Act of 1934, § 167 (a) ". . . where any part of the income . . . (2) may . . . be distributed to the grantor; . . . then such part . . . shall be included in computing the net income of the grantor."

10. ". . . such obligation is, of course, limited to a reasonable allowance consistent with the taxpayer's station in life and the minor's welfare." Stuart v. Commissioner, 124 F. (2d) 772, 780 (C. C. A. 7th, 1941).

11. Yarborough v. Yarborough, 290 U. S. 202 (1933). In the state of Illinois, for example, where grantor resides, it has been held that the factors to be considered in determining the proper amount to be paid by a father to foster parents for the support and maintenance of his minor children, were the fathers income and station in life. Charbonneau v. Norton, 263 Ill. App. 341 (1932).

on which terre-tenant recorded his deed.[1] *Simmons v. Simmons,* 150 Pa. Super. 393, 28 A. (2d) 445, and *Ellinger v. Krach,* 150 Pa. Super. 384, 28 A. (2d) 453.

The majority followed a rule of property [2] developed from a series of decisions [3] interpreting the Act of April 16, 1849.[4] The rule is stated: "It [the lien] was to continue five years from the date the terre-tenant's deed was recorded, under the act of 1849." [5] But as applied to the facts of the instant cases this interpretation does not conform with the terms of the statute. It disregards entirely the opening phrase, "In all cases when a judgment has been, or shall be regularly revived between the original parties. . . ." [6] In previous cases before the appellate courts, the requirement of revival between the original parties was never questioned as the statute was literally complied with in each case by issuance of a writ of *sci. fa.,*[7] by amicable agreement between the original parties,[8] or by the death of the judgment debtor.[9] The rule formulated from them was in part dictum, therefore, for its application extended beyond their decisions. The dissenting judges in the instant cases follow the statute, construing it strictly, and find that it has no application to the instant facts. And this has been the holding in two of three recent common pleas cases,[10] in which a lien was attempted to be revived against a terre-tenant after the creditor had slept on his rights against the original debtor for the statutory period. Whether the judicial rule was formulated inadvertently without due consideration of the instant situation, or was a form of intentional judicial

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1. In *Simmons v. Simmons,* the judgment debtor died more than five years after the judgment, but before the action was brought. In *Ellinger v. Krach,* the judgment debtor had not died at the time of the action. This difference between the facts of the cases is not controlling on their decisions.

2. It is so called by Chief Justice Kephart in Farmers National Bank and Trust Co. of Reading, to use v. Barrett *et al.,* 321 Pa. 273 (1936). See I LADNER, CONVEYANCING IN PENNSYLVANIA (2d ed. 1941) 447, rule II, cited in Simmons v. Simmons, at 28 A. (2d) 451.

3. Uhler v. Moses, 200 Pa. 498 (1901); Kefover *et al.* v. Hustead *et al.,* 294 Pa. 474 (1928); Farmers National Bank and Trust Co. of Reading, to use v. Barrett *et al.,* 321 Pa. 273 (1936); First National Bank and Trust Co. v. Miller *et al.,* 322 Pa. 473 (1936); Everett Hardwood Lumber Co. v. Calhoun, 121 Pa. Super. 451 (1936).

4. "In all cases when a judgment has been or shall be regularly revived between the original parties, the period of five years, during which the lien of the judgment continues, shall only commence to run in favor of the terre-tenant from the time that he or she has placed their deed on record: Provided, That this act shall not apply to any cases which have been finally adjudicated, or when the terre-tenant is in actual possession of the land bound by such judgment, by himself or tenant. P. L. 663, § 8, PA. STAT. ANN. (Purdon, 1931) tit. 12, § 872.

5. Uhler v. Moses, 200 Pa. 498 (1901).

6. P. L. 663, § 8, PA. STAT. ANN. (Purdon, 1931) tit. 12, § 872.

7. First National Bank and Trust Co. v. Miller *et al.,* 322 Pa. 473 (1936); Uhler v. Moses, 200 Pa. 498 (1901).

8. Farmers National Bank and Trust Co. of Reading, to use v. Barrett *et al.,* 321 Pa. 273 (1936); Everett Hardwood Lumber Co. v. Calhoun, 121 Pa. Super. 451 (1936); First National Bank of Ashley v. Tomichek *et al.,* 140 Pa. Super. 101 (1940).

9. Kefover *et al.* v. Husfead *et al.,* 294 Pa. 474 (1928).

10. Italo-French Produce Co. v. Dellapa, and Zeno, terre-tenant, 1 Pa. D. & C. 216 (1921); Lewis v. Puchy *et al.,* 44 Pa. D. & C. 482 (1942). *Contra:* Klein *et al.* v. Anderson *et ux.,* 39 Pa. D. & C. 139 (1940) (lien held invalid on procedural grounds).

legislation to extend the scope of the statute,[11] it should not overrule the unrepealed [12] statute, its meaning being clear, and the purpose of which was not to provide the creditor with an additional remedy, but rather to preserve his existing legal remedy against unrecorded conveyances of land by the judgment debtor.[13] The result reached by the majority in the instant decisions is incongruous. The negligent creditor who has let the statutory period pass without revival of the lien against the debtor is now given a further remedy because of the fortunate circumstance that the debtor's land was conveyed and the deed recorded in the interim.

Parties: Interpretation of Uniform Contribution Among Joint Tort-feasors Act—Plaintiff brought suit against defendant for damages sustained in an automobile accident. Defendant obtained leave of the court to serve summons on three other parties as third-party defendants,[1] who pleaded the general issue. The original plaintiff failed to amend his pleadings to include the new parties.[2] The evidence as to the facts of the accident was conflicting. Verdict was directed in favor of the third-party defendants on the basis of testimony of plaintiff. Defendant's request for charge that proximate cause be considered as related to the third-party defendants was refused. Verdict and judgment for plaintiff against original defendant. *Held* (one judge dissenting), affirmed; the question of third-party defendant's acts as a proximate cause of the accident was properly withheld from the jury because the testimony of the plaintiff was sufficient to exonerate them.[3] *Brotman v. McNamara,* 29 A. (2d) 264 (Md. 1942).

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11. Klein *et al.* v. Anderson *et ux.,* 39 Pa. D. & C. 139 (1940), affording an excellent review of this line of cases, at p. 147: "The lien of the *original judgment* continues as a lien against the land of a terre-tenant for five years from the recording of the deed. The Act of 1849 has to include original judgments as well as revivals, in order to establish a uniform rule of property. . . . When we eliminate the *error* (italics mine) that the Act of 1849 applies only to revivals, it is then that the acts of assembly, and the decisions of the Supreme Court make a consistent whole, in accord with right reason, justice, and equity." Judge Wilson submits that the limiting clause in the Act of 1849 was an "error", and must be judicially amended to make a workable rule of property. With this we cannot agree. The language and intent of the Act of 1849 are clear, see *infra* note 13, and should not be distorted to conform to a subsequent judicial interpretation.

12. Uhler v. Moses, 200 Pa. 498 (1901), held that the Act of June 1, 1887, P. L. 289, § 1, PA. STAT. ANN. (Purdon, 1931) tit. 12, § 868, amending the Act of March 26, 1827, P. L. 129, § 1, PA. STAT. ANN. (Purdon, 1931) tit. 12, § 868, did not repeal the Act of April 16, 1849.

13. The Act of March 26, 1827, P. L. 129, § 1, PA. STAT. ANN. (Purdon, 1931) tit. 12, § 868, provided that no judgment should continue a lien for more than five years from its entry or revival, unless revived within that period, by agreement of the parties and terre-tenants, or by a writ of *sci. fa.* This led to the practice of conveyance to a terre-tenant, who would fail to record his deed or enter into possession, making it impossible for the judgment creditor to revive the lien as to him. Armstrong's App., 5 W. & S. 352 (1843). To correct this, the Act of 1849 was passed providing that the period of five years shall begin to run in favor of the terre-tenant only after his deed is recorded, provided the judgment be regularly revived between the original parties.

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1. Maryland, Chapter 344 of the Acts of 1941.

2. The court in the instant case evades the question of the effect of this failure. It seems clear, however, that it would not militate against the rights of the defendant against the third-party defendants.

3. The testimony of the third-party defendants, which incriminated each other and both of which contradicted the plaintiff, was considered insufficient to take that issue to the jury.

The Uniform Contribution among Joint Tort-feasors Act, which was embodied in the Maryland statute, was drafted because of dissatisfaction with the common law negligence rules. At common law contribution among joint tort-feasors was not allowed.[4] The joint liability theory is to make each participant in a tort satisfy the judgment in proportion to his negligence, the plaintiff being denied recovery *pro tanto* his contributory negligence.[5] The effective application of this theory requires that all interdependent claims arising out of one transaction be adjudicated in one proceeding, since the apportionment of liability in one suit is not binding in a later action involving the third party.[6] The court in the instant case was of the opinion that the defendant had full opportunity to present his claim against the third-party defendants, as well as his defense against the plaintiff. The argument was that the third-party defendants were cleared of any negligence by the plaintiff's evidence, the evidence implicating the third-party defendants not being sufficient to take the issue of their negligence to the jury. The sufficiency of this evidence is the sole point of divergence between the majority and dissenting opinions. The court, by admitting the evidence of the plaintiff as to the lack of negligence of the third-party defendants, even though the plaintiff did not amend to include them, was entirely consonant with the theory of the act: to adjudicate all claims arising out of the same transaction in one proceeding. There were, in effect, two lawsuits in the same proceeding: plaintiff v. defendant and defendant (third-party plaintiff) v. third-party defendants,[7] with the plaintiff a witness in the latter suit. Since the original defendant, having a right to do so, failed to introduce any evidence implicating the third-party defendants, it may be assumed that he had none. Therefore, it appears that the defendant's claim against the third-party defendants has been properly heard, and the purposes of the act fulfilled.

Torts—Charities—Liability of Charitable Corporation for Negligence of Servant—Plaintiff, a special nurse, seeks recovery from hospital for injury caused by negligence of defendant's employee.[1] Defendant

4. Merryweather v. Nixan, 8 T. R. 186 (K. B. 1799).

5. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS (1936). But in the instant case, by omission of § 2 (4) of the Uniform Act, which provides for pro rata distribution among the joint tort-feasors, the Maryland act seems to provide only for equal distribution of loss among the joint tort-feasors. But by the inclusion of § 7 of the Uniform Act as § 27 of the Maryland act, the third-party defendant may counterclaim against the original plaintiff, which implies that the original plaintiff is thus denied recovery *pro tanto* his contributory negligence.

6. GREGORY, *op. cit. supra* note 5, at 80. *Cf.* Neenan v. Woodside Astoria Trans. Co., 261 N. Y. 159, 184 N. E. 744 (1933); Michel v. McKenna, 199 Wis. 608, 227 N. W. 396 (1929).

7. GREGORY, *op. cit. supra* note 5, at 31; Anderson v. MacKenzie (1934) 1 W. W. R. 192 and 303 (B. C. Sup. Ct.). In *Mara v. Hartley* the Ontario court, whose remedy and procedure on this subject is very similar to the Uniform Act, said, "The Legislature could not have intended the right to contribution between wrongdoers to depend upon the election of the plaintiff as to whom he will sue." 39 O. W. N. 519, 521 (1931). *See* Scharine v. Huebsch, 203 Wis. 261, 267, 234 N. W. 358, 360 (1931).

1. The plaintiff in this case was a special nurse; she was assigned to the case by the Georgetown Hospital and paid by the patient whom she attended. Having suffered injuries as a result of the negligent conduct of a student nurse, she now sues the defendant as operator of the hospital on respondeat superior principles. She comes under the legal heading of a stranger to the charity, as contrasted with a beneficiary. One whom a charity is designed to help bears the legal relationship of beneficiary to the charity. All others, employees, visitors, third parties, etc., come under the legal term of strangers to the charity.

appeals from an adverse judgment in the Federal District Court. *Held,* judgment affirmed. *President and Directors of Georgetown College v. Hughes,* 130 F. (2nd) 810 (App. D. C. 1942).

The general rule that charitable corporations are not liable in tort actions,[2] is a principle of immunity which came to the United States as an application of a repudiated English decision;[3] and many authorities are opposed to it.[4] In its course of development it has been subjected to various types of modifications, one of the most important of which is based on the relation of the person injured to the charity.[5] Some states have broken away from the doctrine of complete immunity and impose liability if the person harmed is a stranger [6] to the charity,[7] the principle adopted by three of the judges [8] in the instant case.[9] Other jurisdictions have extended the liability still further to protect paying beneficiaries as well as strangers.[10] And finally, several states have granted recovery without distinction be-

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2. Arkansas Valley Co-op. Rural Electric Co. v. Elkins, 200 Ark. 883, 141 S. W. (2d) 538 (1940); Maretick v. South Chicago Community Hospital, 297 Ill. App. 488, 17 N. E. (2d) 1012 (1938); Ratliffe v. Wesley Hospital and Nurses Training School, 135 Kan. 306, 10 P. (2d) 859 (1932); Emery v. Jewish Hospital Ass'n, 193 Ky. 400, 236 S. W. 577 (1921); Loeffler v. Trustees of Sheppard and Enoch Pratt Hospital, 130 Md. 265, 100 Atl. 301 (1917); Zoulalian v. New England Sanitorium and Benevolent Ass'n, 230 Mass. 102, 119 N. E. 686 (1918); Eads v. Young Women's Christian Ass'n, 325 Mo. 577, 29 S. W. (2d) 701 (1930); Gable v. Sisters of St. Francis, 227 Pa. 254, 75 Atl. 1087 (1910); Waldman v. Young Men's Christian Ass'n, 227 Wis. 43, 277 N. W. 632 (1938).

3. The first American case dealing specifically with the tort liability of charitable corporations is believed to be McDonald v. Massachusetts General Hospital, 120 Mass. 432 (1876). In holding such a corporation immune, the court in this case followed a rule laid down in an English case, Holliday v. St. Leonard, 11 C. B. (N. S.) 192 (1861), apparently not knowing that it had already been reversed by Foreman v. Mayor of Canterbury, L. R. 6 Q. B. 214 (1871).

4. HARPER, THE LAW OF TORTS (1933) §294, says: "The modern view holds charitable corporations liable quite as though they were operating for profit, and the problem of tort liability is no different than in the case of any other corporation. . . ." Also, PROSSER, TORTS (1941) 1079, and Feezer, *Tort Liability of Charities* (1928) 77 U. OF PA. L. REV. 191.

5. Another type of exception rests on who is responsible for the injury, imposing liability for the negligence of managing officials but not for that of minor employees, Old Folks' and Orphan Children's Home v. Roberts, 83 Ind. App. 546, 149 N. E. 188 (1925). Still another type depends on where the injury occurs, holding liability for injury on the public streets, Daniels v. Rahway Hospital, 10 N. J. Misc. 585, 160 Atl. 644 (1932), but not for harm within the institution, Boeckel v. Orange Memorial Hospital, 108 N. J. L. 453, 158 Atl. 832 (1932).

6. For an explanation of the distinction between stranger and beneficiary, see note 1 *supra.*

7. Cohen v. General Hospital Soc. of Connecticut, 113 Conn. 188, 154 Atl. 435 (1931); St. Vincent's Hospital v. Stine, 195 Ind. 350, 144 N. E. 537 (1924); Andrews v. Young Men's Christian Ass'n, 226 Iowa 374, 284 N. W. 186 (1939); Bruce v. Central Methodist Episcopal Church, 147 Mich. 230, 110 N. W. 951 (1907); Marble v. Nicholas Senn Hospital Ass'n, 102 Neb. 343, 167 N. W. 208 (1918); Daniels v. Rahway Hospital, 10 N. J. Misc. 585, 160 Atl. 644 (1932); Cowans v. North Carolina Baptist Hospitals, Inc., 197 N. C. 41, 147 S. E. 672 (1929); Pflugfelder v. Convent of Good Shepherd, 55 Ohio App. 158, 9 N. E. (2d) 4 (1936); Weston's Adm'x v. Hospital of St. Vincent of Paul, 131 Va. 587, 107 S. E. 785 (1921); Heckman v. Sisters of Charity of House of Providence, 5 Wash. (2d) 699, 106 P. (2d) 593 (1940).

8. Chief Justice Groner, Justice Stephens, and Justice Vinson.

9. Circuit Court decisions which have held there was no liability to beneficiaries include: Higgins v. Pratt Institute, 45 F. (2d) 698 (C. C. A. 2d, 1930); Ettinger v. Trustees of Randolph-Macon College, 31 F. (2d) 869 (C. C. A. 4th, 1929); Badenheimer v. Confederate Memorial Ass'n, 68 F. (2d) 507 (C. C. A. 4th, 1934).

10. Silva v. Providence Hospital, 14 Cal. (2d) 762, 97 P. (2d) 798 (1939); Morton v. Savannah Hospital, 148 Ga. 438, 96 S. E. 887 (1918).

tween strangers and beneficiaries,[11] the theory followed by the remaining three judges in the instant decision.[12] Those favoring immunity have argued that liability would waste the corporate fund and would violate the purpose of gifts to charity.[13] However, the risk is an insurable one, and charitable corporations have continued to thrive in those states which impose liability. Furthermore, it is improbable that the matter of tort liability has ever deterred contributions to charity. Immunity has also been justified on the theory of an implied waiver by the beneficiary; yet if the beneficiary were asked to sign such a waiver, seldom would he agree.[14] In opposition to immunity, one can rationalize that since individuals and partnerships are held liable for torts committed while bestowing charitable services, the corporate charity, which is certainly better able to bear the burden of liability than is an individual, should be held to the same standard. In business or other activity the form of organization makes no difference in the liability; it should be immaterial here also. The fact that three of the judges could have imposed liability on the stranger theory, as did their colleagues, but refused to do so and instead went further to extend protection without regard to this stranger-beneficiary distinction, seems to indicate the direction in which the law is moving.

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11. Borwege v. City of Owatonna, 190 Minn. 394, 251 N. W. 915 (1933); Welch v. Frisbie Memorial Hospital, 90 N. H. 337, 9 A. (2d) 761 (1939). *See* Dillon v. Rockaway Beach Hospital and Dispensary, 284 N. Y. 176, 179, 30 N. E. (2d) 373, 374 (1940).

12. Justices Rutledge, Miller, and Edgeworth.

13. If one follows the belief that liability tends to destroy the corporate fund and is contrary to the donor's purpose, there can be no justification for the intermediate doctrine imposing liability for the benefit of strangers and denying it when non-paying beneficiaries are involved. Certainly a liability suit by a stranger is just as much a burden on the charity as is that by a non-paying beneficiary.

14. For a criticism of this implied waiver theory, see Feezer, *Tort Liability of Charities* (1928) 77 U. OF PA. L. REV. 191, 202.