Case Notes

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Case Notes


In July of 1961 Orvner Biggs, an employee of the Norfolk Dredging Co., was injured while working aboard his employer’s barge on the Elizabeth River. He immediately received compensation payments under the Virginia Workmen’s Compensation Act, but when the payments were stopped, Biggs obtained an award from the Virginia Industrial Commission ordering their reinstatement. Samuel Clowers, an employee of a bridge building contractor, suffered a crushed foot while debarking onto a bridge piling from his employer’s commuter vessel. After receiving compensation under the Virginia statute, he obtained an award for benefits under the Longshoremen’s and Harbor Workers’ Compensation Act. Both Biggs and Clowers then brought suit against their respective employers, alleging that they were hurt while working as seamen and therefore entitled to recover under the Jones Act or on the warranty of seaworthiness under general maritime law. The District Court granted summary judgment for the defendant employer in each case. Because the Longshoremen’s Act and the Virginia Compensation Act have exclusive remedy provisions, the court determined that an award under these acts constituted a bar to further actions against an employer, based on the remedies available to seamen. Consolidated on appeal for the determination of that single issue, the Court of Appeals vacated both judgments and remanded the actions to the trial court, holding

2 This suit was brought against the defendant on a joint venture theory. The action was not properly maintained and, if pressed, motion to quash would probably have been sustained. Clowers v. Tidewater-Raymond-Kiewit, 237 F. Supp. 1015-16 & n. 1.
3 Supra note 1.
6 Under general maritime law an injured seaman, once he proves an injury caused by an unseaworthy condition existing on the vessel, may recover without proof of negligence on the part of the vessel’s owner. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960); Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944); The Osceola, 189 U.S. 158 (1903).
8 Longshoremen’s Act, supra note 4, § 905; Virginia Workmen’s Compensation Act, supra note 1, § 65-7.
9 Biggs v. Norfolk Dredging Co., supra note 7, at 596-97. “Whether the circumstances of this case are such that we deem it res judicata, estoppel, accord and satisfaction, or waiver is not of great importance. We hold the plaintiff is barred from now seeking relief as a seaman in an action under the Jones Act.” In reaching this result the court relied heavily on Hagens v. United Fruit Co., 185 F.2d 842 (2d Cir. 1943).
that the appellants were entitled to seamen's remedies, notwithstanding the awards of compensation, if they could show themselves to be members of that class.\textsuperscript{10}

Permitting the claimants to seek further remedies against their employers is directly contrary to the provisions of the Longshoremen's Act.\textsuperscript{11} That federal statute expressly includes within its scope all those engaged in maritime employment,\textsuperscript{12} except the master and crew members of a ship,\textsuperscript{13} and makes recovery under its provisions the exclusive remedy of the injured against his employer.\textsuperscript{14} The court has permitted the appellants to pursue recovery on the warranty of seaworthiness or the Jones Act and has based its decision of the principle of avoiding a harsh and incongruous result.\textsuperscript{15}

Traditionally, seamen have been protected as wards of admiralty. A seaman injured in the service of his ship was entitled to wages, maintenance, and cure at least until the end of the voyage, without reference to the question of negligence, and to indemnity when his injuries resulted from the unseaworthiness of the ship.\textsuperscript{16} In 1920 Congress passed the Jones Act, by which "seamen" were given the right to sue for damages at law for personal injuries, "and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railroad employees shall apply."\textsuperscript{17}

The scope of the term "seaman," as used by Congress, became an issue in International Stevedoring Co. v. Haverty.\textsuperscript{18} The Supreme Court held that a longshoreman, injured while loading a ship, could maintain an action against his employer as a seaman under the Jones Act. The Court reasoned that since the plaintiff's work was a maritime service formerly rendered by the ship's crew, the remedy available to him should not vary with the accident of his being employed by a stevedoring contractor rather than by the shipowner.\textsuperscript{19}

When Congress passed the Longshoremen's Act in 1926, the word "seaman" took on a new ambiguity. This legislation was deemed to have superseded the Jones Act in regard to longshoremen and harbor workers,\textsuperscript{20} as construed in the Haverty case,\textsuperscript{21} by providing compulsory compensation for that group and by making it the exclusive remedy against the employer.\textsuperscript{22} Therefore "seamen" as used in the Jones Act meant

\begin{itemize}
  \item Biggs v. Norfolk Dredging Co., 360 F.2d 360, 365 (4th Cir. 1966).
  \item \textit{Supra} note 4, § 905.
  \item \textit{Supra} note 4, § 903 (a). Compensation is payable under this act when the death or disability accrues on the navigable waters of the United States or any dry dock, if recovery through workmen's compensation proceedings is not provided for by state law.
  \item Also excluded from coverage of the act are persons hired by the master to load, unload, or repair a small vessel under eighteen tons net, government employees, and persons whose injury resulted solely from intoxication or from the wilful intention of the employee to injure himself or another. \textit{Supra} note 4, § 903 (a)-(b).
  \item \textit{Supra} note 4, § 905.
  \item Biggs v. Norfolk Dredging Co., \textit{supra} note 10, at 365.
  \item See note 6 \textit{supra}.
  \item \textit{Supra} note 5. This legislation made the Federal Employers' Liability Act applicable to seamen.
  \item 272 U.S. 50 (1926).
  \item \textit{Id.} at 52.
  \item Panama Agencies v. Franco, 111 F.2d 263, 265 (5th Cir. 1940).
  \item \textit{Supra} note 18.
  \item \textit{Supra} note 4, §§ 903, 905.
\end{itemize}
only the master and crew members of a ship.23 They alone are entitled to maintain a Jones Act suit.24

The Longshoremen's Act, however, overruled the Haverty decision only with respect to its permitting a Jones Act suit by a longshoreman.25 The holding in that case, that a longshoreman is a seaman by reason of the duties of his employ, is still good law.26 The reason for this is that the Longshoremen's Act expressly provides an injured employee with the right of election to sue a third party rather than take compensation from his employer, when such third party was responsible for the injury.27 The Supreme Court preserved for longshoremen the maritime remedy of libeling the vessel in rem on the warranty of seaworthiness, by continuing to regard them as seamen, in this kind of third party suit.28 In Seas Shipping Co. v. Sieracki, the majority stated that those engaged in the traditional work of seamen are entitled to the protections traditionally afforded seamen, and a shipowner cannot escape liability to those who do the vessel's work by bringing an intermediary contracting employer between himself and those workers.29

Congress had attempted to achieve a balance in the law protecting maritime workers. The injured crew member could sue his employer for negligence under the Jones Act and could libel the ship for unseaworthiness, but was excluded from compensation benefits. The injured harbor worker30 was covered by the federal compensation statute, with the right of election to sue a third party shipowner on the warranty of seaworthiness, but the exclusive remedy clause denied him Jones Act rights against his employer.31

In the principal case the court has held that if the claimants can show themselves to be seamen, they are entitled to maintain an action for unseaworthiness, despite

24 Briner v. Brooklyn E. Dist. Terminal, 46 F. Supp. 502 (E.D.N.Y. 1942). In an action brought under the Jones Act, summary judgment will be granted for the employer if it appears that the employer has provided compensation under the Longshoremen's Act and the employee is not a member of the crew or the master of the vessel.
25 Swanson v. Marra Bros., 328 U.S. 1, 7 (1945). Although the Court held several times after the passage of the Longshoremen's Act that an injured stevedore could recover against his employer under the Jones Act, citing International Stevedoring Co. v. Haverty, supra note 18, these were cases in which the injury occurred prior to the date on which the Longshoremen's Act became effective. E.g., Urvac v. Jarka Co., 282 U.S. 234, 238 (1931); Northern Coal & Dock Co. v. Strand, 278 U.S. 142, 145-46 (1928); Burynski v. Luckenbach S.S. Co., 277 U.S. 226, 228 (1928).
26 This doctrine was repeated several times. E.g., South Chicago Coal & Dry Dock Co. v. Basset, supra note 23, at 260; Puget Sound Co. v. Tax Commission, 302 U.S. 90, 92 (1937) (dictum). It was finally reaffirmed in unmistakable terms in Seas Shipping Co. v. Sieracki, 328 U.S. 85, 100-03 (1946), where a stevedore, employee of an independent contractor, recovered from the shipowner on the warranty of seaworthiness after an injury resulting from a latent defect in the ship's equipment.
27 Supra note 4, § 935.
29 Id. at 95.
30 "'Most (perhaps all) types of harbor workers are 'seamen' entitled to recover for unseaworthiness.'" GILMORE & BLACK, ADMIRALTY 252 (1957). See also Pope & Talbot v. Hawn, 364 U.S. 406 (1953).
31 Consequently, he could not sue under the Jones Act at all because it applies only in actions brought by employees against their employers. See Cosmopolitan Shipping Co. v. McLister, 337 U.S. 783 (1949) (dictum); GILMORE & BLACK, ADMIRALTY 251 (1957).
the fact that the shipowner is their employer. Also if they can show themselves to be
members of the crew, they can maintain a Jones Act suit, despite the fact that they
have received awards of compensation. The basis for this holding, which nullifies
the employer's exclusive liability under the compensation statute, is that the duties
of the defendant as employer and as shipowner are distinct and he should not be
permitted to avoid the latter. The Longshoremen's Act permits an injured harbor
worker to libel an unseaworthy ship belonging to a third party and the result would
be incongruous if that right were denied when the shipowner is also the employer.

This exclusive liability was first negated in Ryan Stevedoring Co. v. Pan Atlantic
S.S. Co. There a shipowner sought indemnity from the employer of a injured long-
shoreman who had recovered against the ship, because the employer stevedoring
company had caused the unseaworthy condition. The defendant maintained that
allowing the shipowner to recover damages in excess of what the employer could
have been compelled to pay as compensation would strip him of the exclusive liabil-
ity granted by the Longshoremen's Act. Speaking for the majority, Justice Burton
stated that the "exclusive liability" provision did not protect the employer because
the shipowner's claim was not "on account of" the injury but was based on a con-
tractual right to indemnity and thus not within the reach of the statutory provi-

In reaching its decision, the court in the principal case relied primarily on Reed
v. The Yaka. In that case the petitioner, an injured stevedore who had received
compensation under the Longshoremen's Act, libeled the ship for unseaworthiness
when his employer was bareboat charterer of the vessel and owner pro hac vice.
There was no third party liability as had existed in Ryan, and the employer was the
party against whom an alternative remedy was being sought. The Supreme Court
declared that the technical difference of ownership of the vessel should not prevent
an injured employee from recovering on the warranty of seaworthiness, although
this conclusion violated the literal meaning of the exclusive remedy clause of the
Longshoremen's Act. The majority reasoned that "only blind adherence to the
superficial meaning of a statute" could prompt disregard for the fact that the re-

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83 Id. at 365.
85 This is the language of the exclusive liability provision of the Longshoremen's Act, supra
note 4, § 905.
86 Ryan Stevedoring Co. v. Pan Atlantic S.S. Co., supra note 34, at 128-32. Even in the absence
of an express indemnity agreement, the contractor was obliged to reimburse the shipowner
for damages, because of the contractor's breach of its agreement to stow the cargo properly
and safely. Supra at 132-34; Accord, Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315
(1964); GILMORE & BLACK, ADMIRALTY 367 (1957).
88 The vessel was delivered to the charterer, who took complete possession, command, and
control of its navigation.
89 Supra note 37, at 412-13. It was determined that the bareboat charterer had assumed the
warranty of seaworthiness and therefore he, and not the owner, must stand responsible for it
when the ship is libeled.
90 Supra note 34.
91 Supra note 4, § 905.
92 Reed v. The Yaka, supra note 37, at 415.
spondent was not only an employer of longshoremen, but also a bareboat charterer of a vessel for which he must be charged with the traditional and absolute duty of providing a seaworthy ship. It would be a harsh and incongruous result to permit a variance in the remedies available to longshoremen, injured under precisely the same circumstances, because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service. 43

Applying that conclusion to the principal case, the court found no inconsistency in the claimants seeking compensation on the ground that they are not crew members and suing on the warranty of seaworthiness on the ground that they are seamen. Reed v. The Yaka 44 peremptorily dictates that an employee, injured aboard his employer's vessel, should be put in the same position as one injured aboard the vessel of a third party. 45 The exclusive remedy clause of the compensation statute is merely rendered inapposite when the employer is the ship's owner and the employee is a seaman or one executing a seaman's duties. 46

But the Biggs decision goes beyond this and holds that the claimants are entitled to maintain an action under the Jones Act if they can show themselves to be crew members of a ship. 47 This conclusion, based on the principle of avoiding a harsh and incongruous result, raises a question unanswered by the court. Since the Jones Act is a remedy available only against the employer of the claimant, 48 where is the harsh and incongruous result in giving effect to the exclusive remedy clause and denying the right to a remedy that could not have been used against a third party in any event? This presents a further question as to the binding power of an administrative finding. Since the groups covered by the Longshoremen's Act and the Jones Act are mutually exclusive, 49 did an award of compensation constitute a finding that the injured parties were not members of a crew and thereby excluded from Jones Act remedies? The court avoids this by relying entirely on Yaka. 50 There are also two distinctions which the court finds unimportant. The Yaka case was an action brought only on the warranty of seaworthiness and the Supreme Court did not consider the Jones Act in its opinion and, secondly, although the petitioner in that case had received compensation, it was not under an award. 51

It would seem, therefore, that an issue is raised regarding the binding power of an administrative finding 52 and, by ignoring that finding, the court has permitted the claimants to pursue an alternative remedy by contradicting an allegation which is at the basis of the original awards.

43 Ibid.
44 Supra note 37.
46 Ibid.
47 Id. at 364.
48 See note 31 supra.
49 Seas Shipping Co. v. Sieracki, supra note 28.
51 Id. at 364. Compare Lawrence v. Norfolk Dredging Co., 319 F.2d 805 (4th Cir. 1963).
52 See South Chicago Coal & Dry Dock Co. v. Basset, supra note 23, where the Supreme Court held that the finding of the deputy commissioner that the claimant was not a crew member, was binding in a subsequent suit by the employer to restrain the award, since it was supported by the evidence.

In 1963, the Piggly Wiggly stores were selling milk, in South Carolina, at 39 cents a half gallon, although the prevailing price was then 53 cents a half gallon. Milk was being supplied to the stores on a discount or rebate basis1 by the Paradise Ice Cream Co., a milk processing plant, that had been purchased by the same concerns2 which controlled the Piggly Wiggly stores. On November 12, 1964, the South Carolina Council of Milk Producers, Inc., an association of raw milk producers, filed an antitrust suit, in the United States District Court, against Piggly Wiggly Wholesale, Inc., the Paradise Ice Cream Co. and the other parties involved in this retail grocery store business. The complaint alleged that defendants had combined and conspired in restraint of trade and commerce in grocery items, including milk and dairy products in an effort to monopolize trade and commerce in these commodities contrary to sections 1 and 2 of the Sherman Act,3 and that as a proximate result plaintiffs suffered injury in their business. The Council sought injunctive relief and damages of $500,000 under the appropriate sections of the Clayton Act,4 the Sherman Act,5 and the Robinson-Patman Act.6

Defendants, hereinafter collectively referred to as Piggly Wiggly, moved for summary judgment. Accordingly, the district court dismissed the suit on the grounds, inter alia,7 that the Council had failed to state a cause of action upon which relief could be granted, in that it failed to show or allege any "direct relationship" (i.e., either competition or privity of contract) between Piggly Wiggly, processors-distributors of whole milk, and the Council, producers-suppliers of raw milk.8

1 Originally milk was invoiced to the stores at 48 cents and discounted 10 cents. When the South Carolina Milk Commission instructed Paradise to sell its milk for not less than 48 cents, it apparently complied. Nevertheless, Piggly Wiggly continued to sell milk below actual cost, at 44 1/2 cents, and received rebates from Paradise for losses incurred.

2 The parties concerned were: (a) Commodore Points Terminal Corporation, a Florida manufacturer of store fixtures, and owner of the Piggly Wiggly Corporation; (b) the Piggly Wiggly Corporation, franchiser and controller of the trade name, Piggly Wiggly; (c) Piggly Wiggly Wholesale, Inc., a South Carolina buyer and seller of groceries and a Piggly Wiggly franchiser; (d) the Greenbax Stamp Co., owned by Piggly Wiggly Wholesale; (e) Joseph T. Newton, Jr., alleged owner, officer, director and/or stockholder of above corporations; and (f) individual Piggly Wiggly Stores.

3 26 Stat. 210 (1890), 15 U.S.C. §§ 1-2 (1964). Section 1: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . ." Section 2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . ."


7 South Carolina Council of Milk Producers, Inc. v. Newton, 241 F. Supp. 259 (E.D.S.C. 1965). The district court found that the problem of a non-profit making party plaintiff, the Council was by charter non-profit making and hence not considered a business under section 4, remediable by appropriate amendments joining individual profit making farmer members in the suit.

8 Id. at 262.
any showing of this direct relationship, the district court reasoned that the Council had no standing to sue under the judicially limited terms of section 4 of the Clayton Act.9

On appeal, the Court of Appeals, Fourth Circuit, reversed and remanded the case for trial, holding that the absence of allegations of directness was not necessarily fatal to the Council's claim:

... if a plaintiff can show himself [as the circuit court felt the Council had] within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby, then he has the standing to sue.... The sector is sometimes designated as the 'target area' of the defendant's illegal practices.10

The broad wording of section 4 of the Clayton Act11 has been judicially limited12 because of the extraordinary treble damage remedy which it provides.13 The problem arises when courts have to determine where the line of limitation is to be drawn as to possible plaintiffs. In the early case of Loeb v. Eastman Kodak Co.,14 the court held that a shareholder-creditor, employee could not recover for personal losses suffered when the photographic supply house for which he worked was allegedly driven into bankruptcy by the illegal practices of a competitor. The reasoning of the court was that "the injury complained of was directed at the corporation and not the individual stockholder ... [thus] any injury which he, as a stockholder, received was indirect, remote and consequential."15 Loeb produced the judicial basis for excluding claims for personal losses suffered by creditors,16 shareholders,17 officers,18 and employees19 of injured corporations from court consideration. In a somewhat similar

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9 Supra note 4. The section reads: "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor ... and shall recover threefold the damages by him sustained . . . ."

10 South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 418 (4th Cir. 1966); see, Conference of Studio Unions v. Loew's Inc., 193 F.2d 51 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1951); Karseal Corp. v. Richfield Oil Corp. 221 F.2d 358 (9th Cir. 1955).

11 Supra note 4.


14 183 Fed. 704 (3d Cir. 1910).

15 Id. at 709.

16 See, e.g., Gerli v. Silk Ass'n of America, supra note 12.

17 See supra note 12.


situation, recovery has been denied to the landlord of a defendant's competitor.\textsuperscript{20} The rental being partially based on a percentage of the lessee's receipts.\textsuperscript{21} It has also been held that a patent licensor, not receiving expected royalties from his licensee due to the anti-trust violations of the defendant, could not recover.\textsuperscript{22} The basic principle delineated by these cases is that derivative causes of action may not be maintained under section 4 of the Clayton Act. Nevertheless, this line of judicial reasoning is not to be construed as a general bar to claims for damages by stockholders, employees or creditors of an injured corporation, because the anti-trust violations "may result in injuries to a stockholder [and conceivably an employee or creditor] which are not the injuries of the corporation and for which he may sue in his own right."\textsuperscript{23}

Two schools of thought arose from the initial Loeb doctrine which excluded derivative section 4 claims. In each case considered, the important question of whether the injury to plaintiff was direct, or whether it was derived from the injury received directly by another, had to be asked, and the answer determined if a claimant's suit would survive the Loeb directness test or not.

One school of judicial thought has reasoned that 'directness' depends upon the existence of either a direct competitive relationship, or privity of contract between the plaintiff and the defendant.\textsuperscript{24} Narrowing the scope to one similar to that found in Newton in which a supplier is suing a competitor of the supplier's customer for injuries arising from an alleged anti-trust violation, the Massachusetts' District Court, in Snow Crest Beverages, Inc. v. Recipe Foods, Inc.,\textsuperscript{25} held:

\begin{quote}
The Clayton Act does not give a private cause of action to a corporation which is not in competition with defendant but whose losses result only from an interruption or diminution of profitable relationship with a second corporation directly affected by alleged violations of anti-trust laws, and this is so even though there is to a substantial extent common ownership of stock of the two corporations, and even though the first corporation sells virtually all of its product to the second corporation.\textsuperscript{26}
\end{quote}

Snow Crest is apparently contrary to Newton. Snow Crest's supplier provided 90 percent of the ingredients used by Snow Crest in making syrup.\textsuperscript{27} In Newton, the Council supplied its processor with raw milk. In both cases, the suppliers complained of injuries resulting from the business practices of the competitors of the respective concerns which were supplied by the plaintiffs involved. And yet, the court in Snow Crest

\begin{footnotes}
\item[21] But see, Congress Bldg. Corp. v. Loew's Inc., 246 F.2d 587 (7th Cir. 1957).
\item[23] 36 A.L.R. 2d 1355; see United Copper Sec. Co. v. Amalgamated Copper Co., 282 F. 574 (2d Cir. 1916); Peter v. Western Newspaper Union, 200 F.2d 867 (5th Cir. 1953); Fanchon & Marco, Inc. v. Paramount Pictures, Inc., 202 F.2d 731 (2d Cir. 1953).
\item[25] Supra note 12.
\item[26] Id. at 909.
\item[27] Snow Crest Beverages Inc. v. Recipe Foods, Inc., supra note 12.
\end{footnotes}
Crest would not entertain the supplier's suit, while in Newton, the supplier's suit was allowed. The reason for the difference is the narrowing of focus in Snow Crest to exclude for lack of privity or competitive relationship between the adverse parties the same type of suit that was allowed in Newton.

In Volasco Products Co. v. Lloyd A. Fry Roofing Co., the circuit court found that "it is well established in the law that a supplier is too remote and too far removed from the direct injury to recover damages resulting from violations of anti-trust laws directed at the supplier's customers." Volasco and Snow Crest are discussed by the court in Newton. An attempt is made to distinguish them from the instant case on the grounds that the product involved was an ingredient of the final product, while the raw milk which the Council supplied is "essentially the equivalent commodity," to the final processed milk.

More importantly, the court in Newton denies the privity-competition basis of the 'directness' line of reasonings and implicitly supports a broader second school of thought:

... if either of the cited cases [Snow Crest and Volasco] be read as declaring that a supplier who is not in privity or competition with one guilty of anti-trust misconduct, but whose business is proximately affected by such misconduct, can never have a claim for anti-trust damages against the wrongdoer, we could not follow the decision that far.

The second school of judicial reasoning is typified by the decisions in Conference of Studio Unions v. Loew's, Inc., and Karseal Corporation v. Richfield Oil Corporation. These and other cases espouse the idea that it is not necessary for plaintiff to establish either a competitive or privity relationship between himself and the alleged violator, but that he must show that an alleged anti-trust violation "... has been committed which harms him ... [and] that he is within the area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." The broader concept of an 'area of the economy' or 'target area' of the defendant's illegal practices allows for suits which would be excluded by the appli-
cation of a competitive or privity standard. Thus it was held, in Newton, that "even without allegations of directness of injury the present complaint made out a cause of action under the anti-trust statutes."37

Is it the more satisfactory solution for courts, in seeking to eliminate derivative anti-trust suits for treble damages, to dismiss summarily suits by those who are not competitors or in privity with the wrongdoers, or to allow plaintiffs the opportunity to present evidence at trial in an attempt to show that they were proximately and not remotely or consequentially injured by defendants' misconduct? The better of the two approaches appears to be the latter, especially in light of the Supreme Court's recognition of the policy embodied in congressional legislation giving recourse to private enforcement of the anti-trust laws, under section 4 of the Clayton Act. Since Congress has determined that certain anti-trust activities are injurious to the public, the Court, "in the face of such a policy... should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."38

While "directness" of injury might well be assumed, when a competitive or privity relationship exists, non-existence of such relationships does not, semantically or otherwise, preclude a direct injury. It has been well said that to satisfy the judicially fabricated "directness" test, a plaintiff "must show that his loss was not a consequence of injury to someone else, i.e., that he had direct relations with the wrongdoer, or, [emphasis added] that he was within the 'target area' of the violation."39 Thereby, even though failing to allege direct relations with the wrongdoer, as the Council had, in Newton, a plaintiff might still be afforded the opportunity to evidence his allegation that his business was proximately injured by the violation.

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37 South Carolina Council of Milk Producers, Inc. v. Newton, supra note 10, at 418.

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CLARENCE X. BOLLENBACK FILED A CLAIM with the Continental Casualty Company under a health and accident insurance policy on which he had paid premiums regularly. After the company refused to pay the claim on the grounds that the policy had lapsed in 1959 due to non-payment of premiums, Bollenback brought an action for restitution to recover all premiums paid. A judge, sitting without a jury, found that defendant repudiated the contract by non-payment of plaintiff's claim and ruled
that plaintiff recover the amount of all premiums paid. On appeal, the Supreme Court of Oregon remanded the case to the trial court with directions to modify the judgment declaring that plaintiff received the actual value of "protection" under the policy prior to 1959 so that he could recover only those premiums paid by him after that date.

An irreconcilable conflict between two principal lines of authority exists concerning the measure of damages for the wrongful cancellation, repudiation or termination of an insurance contract by the insurer where the assured elects to put an end to the contract. One rule is to the effect that if the insured elects to rescind the contract rather than have it enforced he may recover the amount of premiums paid or premiums with interest. The other rule, where the assured is still capable of securing other insurance of like nature and kind, permits recovery of the difference between the cost of carrying the cancelled insurance and the cost of the new insurance for a like term. As a variation of the latter rule it has been held that where the assured is no longer insurable, his measure of damages is the present value of his policy.

Recovery under each rule is, in fact, based on a different theory. The purpose of rescission and restitution is to place both parties as near as possible to their positions prior to the formation of the contract. The purpose of a suit for damages is to place the injured party as near as possible to the position he would be in had the contract been completed. Some courts have confused a suit for restitution upon rescission with a suit for damages. Generally, all premiums are awarded as the measure of recovery where suit is based on the theory of rescission and restitution, but in Ken-

2 Id. at 765, 414 P.2d at 812.
4 Id. at 762, 414 P.2d at 809.
10 5 CORBIN, CONTRACTS §996, at 15 (1964).
tucky Home Mut. Life Ins. Co. v. Rogers13 plaintiff was awarded all premiums in a suit for "damages." In another case tried on the theory of damages the measure of recovery was all premiums less the value of the coverage received.14 Where the insured was not able to obtain new insurance it was held that the measure of recovery was the amount of premiums paid plus interest rather than the value of the policy.15 However, it has been held that where the insured prays for recovery of premiums, it is immaterial whether he is no longer insurable.16 This confusion contributes to the fact that the courts are badly divided on the correct measure of damages where the injured party, in fact, elects to rescind his contract and bring an action for restitution.17

The majority view in the United States where restitution is sought after rescission of a wrongfully cancelled insurance contract, is probably that all premiums may be recovered.18 There are cases which so hold without discussing the deduction of "protection" benefits.19 Other cases reach this conclusion after rejecting the contention that such deduction should be made.20 It has been stated that all premiums may be recovered where wrongful cancellation involves a combination life and accident and health policy.21 However, another line of cases holds that the benefit of "protection" received should be deducted from the total amount of premiums paid to arrive at the correct amount recoverable.22 Where there was a wrongful cancellation of the accident and health provision of a combination life and accident and health policy, all premiums were not recoverable on the ground that the life provision remained unimpaired.23

In Bollenback, the court relied heavily on Watson v. Massachusetts Mut. Life Ins. Co.24 where the insured's assignee brought an action for restitution of all premiums after rescinding a wrongfully cancelled life insurance policy. There it was said that the benefits, if any, received by the insured must be deducted in an executory contract.25 "The purpose of the contract, in so far as plaintiff was concerned, was to

13 Id.
18 Annot., supra note 3, at 111.
21 Supra note 16.
22 Mutual Reserve Fund Life Ass'n. v. Ferrenbach, 144 Fed. 342 (8th Cir. 1906); Capital City Benefit Soc'y v. Travers, 4 F.2d 290 (D.C. Cir. 1925).
24 140 F.2d 673 (D.C. Cir. 1943), cert. denied, 322 U.S. 746 (1943).
25 Id. at 677.
obtain protection in the form of defendant's promise to pay claims in case of his disability. Thus, plaintiff received the benefit of the "protection" he had bargained for prior to the time of cancellation. "Because insurance protection cannot be returned to defendant, the theory of recovery [restitution] necessarily means the return to plaintiff of all premiums less the value of any benefits plaintiff has actually received under the contract." Since plaintiff did not claim that the amount of premiums paid was in excess of the cost of carrying the risk of his policy, the defendant was permitted to retain all premiums paid prior to the date of cancellation of the policy.

The number of recent cases on the measure of recovery for wrongful cancellation of an insurance policy is slight. In Sabbagh v. Professional & Business Men's Life Ins. Co. where plaintiff brought an action for restitution to recover the first premium paid on four life insurance policies alleging fraud in the inducement, the court allowed deduction for cost of carrying the insurance. Deduction for "protection" was also permitted in Schwer v. Benefit Ass'n of Ry. Employees, but in that case an accident and health policy was viewed as a monthly term policy which had to be renewed each month. The Schwer court said in dictum, however, that on a continuous policy, plaintiff could recover all premiums paid plus interest. Recovery of all premiums was permitted in Kentucky Home Mut. Life Ins. Co. v. Rogers. Thus, it cannot be said that the few recent cases show a trend in favor of the Bollenback decision.

The early case of American Life Ins. Co. v. McAden rejected the deduction for insurance "protection" argument stating that "...although the company carried the risk...the company has paid nothing and the plaintiffs have received nothing." The reasoning of McAden has been relied on by subsequent cases which reach a similar result. In another case it was said that "the rights of the parties under the contract had attached, but the plaintiff had never received any actual benefit from it." It seems clear that in these cases the theory of placing both parties in statu quo is accomplished by simply restoring the parties to their respective financial positions at the time the contract was formed.

The rejection of insurance "protection" as an actual benefit has been severely criticized as an assumption resting on "a misconception of the theory and business of life insurance." In the case of Lovell v. St. Louis Mut. Life Ins. Co., the Supreme

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* supra note 1, at 754, 414 P.2d at 806.
* Id. at 765, 414 P.2d at 812.
* Ibid.
* 153 Ohio St. 312, 91 N.E.2d 523 (1950).
* Id. at 323, 91 N.E.2d at 529.
* supra note 12.
* 109 Pa. 399, 1 Atl. 256 (1885).
* Id. at 405, 1 Atl. at 258.
* See, e.g., Gaskill v. Pittsburgh Life & Trust Co., supra note 7.
* Mutual Reserve Fund Life Ass'n v. Ferrenbach, supra note 22, at 345.
* 111 U.S. 264 (1884).
Court of the United States considered "protection" as an actual benefit and did not permit recovery of premiums paid prior to wrongful cancellation. This case is relied on by Watson and other cases which reach the same result. The Lovell case, however, was distinguished in Black v. Supreme Council American Legion of Honor. Lovell involved a mutual mistake by the insured and the insurer's agent with respect to the surrender of a life insurance policy. This line of cases would permit recovery of all premiums on a "total failure of consideration" or where no risk has attached.

The Watson court said that an insurance contract is not a fixed obligation to pay money at a future date. Yet it has been stated that the sole obligation of an insurer is to pay money at the death of the policy holder under a life insurance contract. Thus, the consideration bargained for by the insured would appear to be a significant factor in determining the measure of recovery. Here again the courts are confusing an action for restitution upon rescission with an action for damages. It has been pointed out that an action for restitution is not based on the contract. The contract has been rescinded.

Professor Corbin has stated: "Because of the aleatory character of such [insurance] contracts, it is certain that there is no agreed equivalency between the sum promised by the insurer and the premiums to be paid by the insured." Both Corbin and Williston seem to prefer that line of cases which deduct "protection" benefits received by the insured.

Although Bollenback notes the failure of the courts to distinguish between an action for restitution upon rescission and one for damages, it is believed that the court in that case also failed to distinguish the two forms of action. It seems correct to say that the insured has bargained for "protection" and therefore, has received a benefit: that which he bargained for. However while an action for damages is based on the contract, an action for restitution is not. The equitable result requires recovery of all premiums as the insurer, even though carrying a risk, has actually paid nothing, while the insured has paid premiums and actually gained nothing. The insurer should not be permitted to benefit by his own wrongful cancellation of the contract.

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9 Capital City Benefit Soc'y v. Travers, supra note 22.
10 Supra note 36.
17 5 CORBIN, CONTRACTS § 1118, at 635 (1964).
18 Id. at § 1118.
19 5 WILLISTON, CONTRACTS § 1460 A, at 4085 (1977):
... an assured has been in many cases permitted, though, it seems unjustly, to recover on repudiation of a life insurance policy the full amount of the premiums paid, in spite of the period of protection that the insured has enjoyed.

PLAINTIFF, EMPLOYED AS A STEVEDORE for International Terminal Operating Co., was in the process of unloading the S.S. Madaket, owned by the defendant Waterman Steamship Corporation. To facilitate unloading operations Terminal received permission from Waterman to temporarily remove a one ton steel ladder attached to the superstructure of the ship. The stevedores hastily agreed on a plan by which it would be lowered through a hatch of the Madaket and laid on the floor of the hold. In attaching this ladder to a hoist plaintiff’s co-workers placed proper equipment aside, and used a "S" hook unsuitable for the use to which it was put. When the bottom of the ladder reached the floor of the hold it became disengaged from the hook and in falling injured the plaintiff, Skibinski. He brought this suit against Waterman alleging that the S.S. Madaket was unseaworthy, Waterman in turn brings in co-defendant Terminal. The District Court for the Southern District of New York gave judgment for the plaintiff, and the Second Circuit affirmed stating that improper use of this equipment by the stevedores gave rise to a condition of unseaworthiness on the S.S. Madaket.

The doctrine of the warranty of seaworthiness was until recently limited only to seamen. Courts have looked with favor upon suits by seamen because of the loneliness, perils and hardships endured while at sea. In 1926 the Supreme Court decided that longshoremen were "seamen" for purposes of recovery under the Jones Act. This remedy for negligence was short lived however, when in 1927 the Longshoremen's and Harbor Workers' Compensation Act was passed by Congress. This Act was upheld by the Supreme Court in 1932 and for nineteen years it was the longshoreman's exclusive remedy. During these years the Supreme Court decided that in relation to seamen, the shipowners duty to furnish a seaworthy ship was absolute, thus making clear that his liability was independent of negligence.

Recently the trend of the courts toward longshoremen was reversed in Sea Shipping Co. v. Sieracki in which remedies afforded by the Longshoreman Act were exclusive only against the employer, leaving the injured stevedore free to bring suit against the owner whether or not he was negligent, for reasons of unseaworthi-

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2 Skibinski v. Waterman S.S. Corp., 360 F.2d 539 (2d Cir. 1966).
3 Seas Shipping Co. v. Sierachi, 328 U.S. 85 (1946).
9 Mahnic v. Southern S.S. Co., 321 U.S. 96 (1944). The reason for this is that seamen were subject to the rigorous discipline of the sea.
10 Supra note 3.
ness of the vessel. Today it is generally accepted that a shipowner is liable for a condition of unseaworthiness even if this condition was brought about by the negligence of the stevedoring employees.

A shipowner is not an insurer. His duty is not to provide an accident-free ship, but only to provide a vessel and appurtenances reasonably fit for their intended use. Thus, the difficulty arises in determining whether or not a condition of unseaworthiness existed, which in turn gave rise to the injury.

The Skibinski court relied on Grillea v. United States as authority to support its finding that a condition of unseaworthiness had been created. Here a stevedore had placed the wrong hatch over the hold of a ship and on the following day another stevedore fell through this hatch and was injured. Judge Learned Hand held that the act of negligence had stopped and when it did a condition of unseaworthiness was created. In deciding this case Judge Hand stressed the time element, inferring that if seaworthy equipment is made unseaworthy at the moment of injury no liability should rest on the shipowner. Skibinski puts to use part of Judge Hand's reasoning in Grillea, by inferring that the negligent act of the stevedores had stopped, and the "S" hook became part of the Madaket's equipment. Judge Hand's reasoning in Grillea, in respect to the time element, was doubted when the Supreme Court in Mitchell v. Trawler Racer, Inc. held the shipowner liable even if the condition was merely temporary. The majority uses this case in support of its argument that the Madaket was temporarily unseaworthy.

In Mitchell, however, the moment in time in which a ship becomes even temporarily unseaworthy was not decided. Justice Stewart stated:

What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness.

Morales v. City of Galveston affirmed by the Supreme Court after Mitchell inferred that the duration of the defect should be considered as one of the elements in deter-


5 232 F.2d 919 (2d Cir. 1956).

6 Skibinski v. Waterman S.S. Corp., supra note 2, at 542. "[T]he use of this apparatus took a substantial amount of time, so that the apparatus became part of the Mandaket's equipment."

7 See Skibinski v. Waterman S.S. Corp., supra note 1, at 293-4 where it was stated that in less than ten minutes from the time that the stevedores received orders to lower the ladder the accident occurred. Thus it can be concluded from the district court's review of the facts that the "S" hook was in use for no more than ten minutes. Is this a substantial amount of time, as Judge Hays concludes?


9 Id. at 550.

mining whether or not the ship is unseaworthy, thus leaving the question as to what time the ship becomes unseaworthy open for the lower federal courts to interpret. The answer to this question alone does not determine seaworthiness, but it is an important factor to be considered.

If mere negligence by a fellow stevedore was the sole cause of the injury the shipowner is not held liable, however, if there is an unsafe condition of the workplace, which may have been caused solely by the negligence of the co-worker the warranty of seaworthiness will have been held to be breached. Recent decisions under circumstances very similar to these of Skibinski have been rendered in favor of the shipowner. For example, in Billeci v. United States where plaintiff's co-workers omitted placing a safety device in a winch, which subsequently broke injuring the plaintiff. The court distinguished the Grillea decision by pointing out that there the negligent act had terminated and created a condition.

The Court draws support from Reid v. Quebec Paper Sales & Transp. Co. and Strika v. Netherlands Ministry of Traffic. In Reid the condition lasted only a few seconds while a portable ladder was negligently left unattended. In Strika longshoremen used two securing devices instead of one in hoisting a pontoon. As in Skibinski the equipment was proper, but was improperly used. In both Reid and Strika the negligence of the stevedores had terminated resulting in an unseaworthy condition.

Unseaworthiness has been denied under similar facts. In Spinelli v. Isthmian S.S. Co. a hoist broke injuring the plaintiff. The court absolved the shipowner saying that there was no defective equipment. In Puddu v. Royal Neth. S.S. Co. the beam buckled on the ship, also due to the negligence of the plaintiff's fellow longshoremen. Judge Hays' opinion (concurring in the result) states, citing the reasoning in Grillea:

In the present case the defect arose 'as a momentary step or phase in the progress of work on board' and "should be considered as an incident in a continuous course of operation" and not an unfitness of the ship. Judge Hays distinguishes these cases when he says that they "were thought to involve transitory situations which had not yet ripened into unseaworthiness."

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* 298 F.2d 703 (9th Cir. 1962).
* Id. at 706. There was no discussion of when the negligent act would become a condition.
* Supra note 21.
* Supra note 21.
* Supra note 20.
* Supra note 20.
* Id. at 757.
* Skibinski v. Waterman S.S. Corp., supra note 2, at 542.
no attempt to define when in point of time a "transitory situation" ripens into unseaworthiness. Whether it ripens or not may be dependent on whether a ladder, such as in Skibinski, is in one instance lowered negligently by a stevedore causing injury to his co-worker, or whether ten minutes before lowering the ladder an "S" hook is negligently inserted by a stevedore as the connecting device between the ladder and the hoist. Only in the latter case will the shipowner be liable since in the former case the negligent act had not yet terminated and in the latter instance it had. If this is the main distinction in instances such as these, then it is difficult to see why the Billeci decision was rendered for the shipowner and in Skibinski the exact opposite conclusion was reached. The court could have rendered a decision for the shipowner in Skibinski by saying that the condition did not exist, implying that the negligence of the stevedores in the process of lowering the ladder by means of an "S" hook had not terminated. It might have been just as possible for the Billeci court to render judgment for the plaintiff, finding that the negligent act of the stevedores in omitting to place the necessary safety device in the winch created a condition of unseaworthiness.

The distinction underlying the reasoning in Skibinski, which is based upon whether the negligent act of the stevedores had terminated or not, is uncertain. In the future, under similar circumstances such as in Skibinski and Billeci, who can foresee whether the court will discover a condition of unseaworthiness or merely negligence? In the dissent Judge Friendly points out, very aptly:

It is time to scuttle a doctrine which requires judges to make distasteful hair-splitting distinctions unrelated to any intelligible concepts of right and wrong; granted that liability for unseaworthiness does not rest on fault, it ought to rest on something more casuistry.

The Supreme Court should deal with the problem of a momentarily unsafe condition created solely by the negligence of the stevedores, to avoid these "hairsplitting decisions".

Skibinski v. Waterman S.S. Corp., supra note 2, at 544.
Ibid.


McHasco Electric, Inc. (contractor) entered into three construction contracts with three municipalities in Minnesota. Each contract required that all creditors' claims be paid as a condition to receiving final payment and provided for the mu-
unicipalities to retain a proportion of the funds for use in paying labor and material claims, should the contractor default. Appellant, Fidelity and Casualty Company of New York (surety) furnished the performance bonds required by Minnesota statute.\footnote{1} Subsequently the contractor made an assignment, effective in the event of default, to the surety of all contract proceeds. During performance, McHasco obtained two loans from respondent, First National Bank of St. Paul, and in consideration thereof made an assignment to the bank of all accounts receivable on the contracts. Of these loans, 85 per cent were used in payment of labor and material claims. Upon completion of the work, the contractor defaulted in payment of the labor and materialmen, and the surety, under compulsion of the bonds, satisfied the outstanding claims. Consequently both the surety and the bank sought the retained funds in the hands of the municipalities. The trial court ruled in favor of the bank. On appeal, the Supreme Court of Minnesota reversed, holding that the claim of the surety to withheld funds was superior to that of the bank.\footnote{2}

The priority of claims to a fund withheld by an owner as between a surety and an assignee bank has been an issue of repeated litigation. The majority of courts agree that the surety's claim is founded upon the equitable doctrine of subrogation.\footnote{8} The question then becomes: to whose rights is the surety subrogated? It has been held that the surety gains the rights of the contractor.\footnote{4} This leaves the surety with nothing; for by the act of assignment the contractor has divested itself of all rights to the fund, and consequently there remain no rights to which the surety may succeed through subrogation.

Many courts have ruled that the surety, having performed the contractor's obligations to the labor and materialmen, should be subrogated to the rights which these creditors had possessed—their rights as creditors of the contractor and their rights to the fund in the owner's hands. This right has generally been recognized where the surety has acted under compulsion of the bond and not as a volunteer,\footnote{6} or where it

\footnote{1} Minn. Stat. Ann., \S 574.26 (1945) provides:
No contract with the state, or with any municipal corporation . . . for the doing of any public work, shall be valid for any purpose, unless the contractor shall give bond to the state or other body contracted with, for the use of the obligee and all persons doing work or furnishing skill, tools, machinery, or materials . . . conditioned for the payment, as they become due, of all just claims for such work, tools, machinery, skill, materials . . . for the completion of the contract in accordance with its terms, for saving the obligee harmless from all costs and charges that may accrue on account of the doing of the work specified . . . .

\footnote{2} Minn. —, 141 N.W.2d 491 (1966).

\footnote{8} 83 C.J.S. Subrogation \S 1 (1953):
Subrogation is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt . . . .

\footnote{4} Fidelity & Deposit Co. v. Union State Bank, 21 F.2d 102 (D. Minn. 1927); Hipwill v. National Sur. Co., 130 Iowa 656, 105 N.W. 318 (1905); Fidelity & Deposit Co. v. City of Auburn, 150 Wash. 114, 272 Pac. 34 (1928).


\footnote{Central State Bank v. U.S. Fidelity & Guar. Co., 9 F.2d 326 (5th Cir. 1925); Exchange State
has taken an assignment upon payment of the claims. It has been held, however, that upon payment of the labor and material claims, the "lien" was satisfied and there remained no rights for the surety to acquire. Likewise, where the labor and materialmen had no right to the fund, or there was no special fund for their protection, the surety’s claim was useless. The surety, by performing under its bond, has not only performed the contractor’s duty to its creditors, but has also performed the contractor’s duty to the owner. Thus, many courts have ruled that, upon payment, the surety is subrogated to the rights of the owner. This gives the surety a preference; for the contractor or its assignee cannot compel payment of this fund without rendering performance. However, in some cases, the surety has lost this preference where it was found to be a volunteer, or where the assignee bank made payments to the labor and materialmen either directly, or indirectly by agreement with the contractor. On the other hand, in many cases the tracing of the loans into the hands of the creditors was held to be immaterial.

The “Minnesota rule,” following the leading United States Supreme Court cases of Prairie State Bank v. United States and Henningsen v. United States Fidelity &


7 Riverview State Bank v. Wentz, 34 F.2d 419 (8th Cir. 1929); Federal & Deposit Co. v. Claiborne Parish School Bd., 11 F.2d 404 (W.D. La. 1926), aff’d, 40 F.2d 577 (5th Cir. 1930); Aetna Trust Co. v. Nackenhorst, 188 Ind. 621, 122 N.E. 421 (1919).


10 Adamson v. Paonessa, supra note 9; First National Bank v. Monroe County, 131 Miss. 828, 95 So. 726 (1923); Guthrie Investments, Inc. v. Bennett, 63 Wash.2d 697, 388 P.2d 955 (1964).


13 Fidelity & Deposit Co. v. City, 95 Kan. 559, 144 Pac. 852 (1914).


15 Farmers Bank v. Hayes, 58 F.2d 54 (6th Cir. 1932); Md. Cas. Co. v. Bd. of Water Comm’rs, supra note 11; Union Indem. Co. v. City of New Smyrna, 100 Fla. 980, 130 So. 453 (1930); First Nat’l Bank v. Pessa, supra note 11; State v Schlesinger, 114 Ohio St. 929, 151 N.E. 177 (1926).


17 supra note 11.
Guaranty Company,\textsuperscript{18} has been that the equity of the surety, through subrogation, is superior to that of one loaning money to the contractor. This holds even though the advanced money goes into performance of the contract, unless the money is loaned under a contract obligating the lender to make advances.\textsuperscript{19} The respondent bank in \textit{McHasco} argued that the Minnesota rule was changed by the subsequent case, \textit{Farmers State Bank v. Burns},\textsuperscript{20} so as not to require an obligation on the part of the assignee bank to advance funds to the contractor. In that case the contractor had contracts with the cities of Madelia and Owatonna. The surety, which suffered a loss only on the Madelia contract, claimed funds withheld by Owatonna. The court, in holding for the bank, took notice that there was no provision in either contract which required payment of all claims as a condition of final payment. The court found that the execution of the performance bond was merely compliance with an "independent covenant" and a subsequent breach of that independent undertaking \textit{i.e.} nonpayment of labor and material claims, gave rise to a cause of action but did not afford the city any ground for avoiding the contract. From this, the court reasoned that the city had no right to use the retained fund for payment of labor and material claims; and if the city had no right to use the funds in that manner, the surety had no right to the funds either.

In \textit{McHasco}, Justice Rogosheske distinguished the \textit{Burns} case on the grounds that it lacked a provision for satisfaction of all creditors' claims as a condition precedent to final payment, a condition clearly present in \textit{McHasco} and held that \textit{National Surety Company v. Berggren}\textsuperscript{21} was controlling. In \textit{Berggren}, there were similar claims of priority advanced by the surety and the assignee bank under similar facts. The court held for the surety, stating that the bank could not have priority without being legally bound to advance funds to the contractor. The majority in \textit{McHasco} found that the surety rendered the performance necessary to compel final payment by satisfying the contractor's obligations to both the municipalities and the labor and materialmen. By the surety's performance, it was subrogated to the rights of all parties to whom it performed. Since the municipalities had the right to use the funds to pay unsatisfied claims, the surety gained the municipalities' right. The labor and materialmen also had a right to the fund because it was created partly for their protection. The surety gained this right. The court recognized that the surety was benefited to the extent that the bank's loans were used to pay the creditors' claims, and concluded that the bank and the surety had an equitable interest in the fund. In examining the nature of each interest, the court found that the bank relied on the contractor's rights who, by default, forfeited the right to final payment; while the surety acted under compulsion of the bond, and was thus subrogated to the \textit{prior} rights of the owner and the contractor's creditors.

As the recent United States Supreme Court case of \textit{Pearlman v. Reliance Insurance Co.},\textsuperscript{22} reaffirmed \textit{Prairie State}\textsuperscript{23} and \textit{Henningsen},\textsuperscript{24} so \textit{McHasco} reaffirms the old-

\textsuperscript{18} Ibid.
\textsuperscript{20} 126 Minn. 188, 148 N.W. 55 (1942).
\textsuperscript{21} \textit{Supra} note 16.
\textsuperscript{22} \textit{Supra} note 5.
\textsuperscript{23} Prairie State Bank v. United States, \textit{supra} note 11.
\textsuperscript{24} Henningsen v. U.S. Fidelity & Guar. Co., \textit{supra} note 11.
er cases which make up the Minnesota rule. Judge Whitaker of the Court of Claims observed in *United Pacific Insurance Company v. United States* that due to the confusion concerning the status of *Prairie State* and *Henningsen* the Supreme Court granted certiorari in order to settle the question. In *Pearlman*, the Supreme Court reviewed and analyzed its prior decisions and concluded that there had been no repudiation of "the equitable principles so deeply imbedded in our commercial practices, our economy, and our law as spelled out in the *Prairie Bank* and *Henningsen cases.*" The Court went on to hold:

the Government had a right to use the retained fund to pay laborers and materialmen; that the laborers and materialmen had a right to be paid out of the fund; that the contractor, had he completed his job and paid his laborers and materialmen, would have become entitled to the fund, and the surety, having paid the laborers and materialmen, is entitled to the benefit of all these rights to the extent necessary to reimburse it.

*National Surety Corporation v. United States,* involved a contest between surety companies on a defaulting contractor's bond and an assignee bank under the 1940 Assignment of Claims Act. The court, in referring to the *Henningsen* case, held that while the United States was under no legal obligation to protect labor and materialmen, it was under an equitable obligation to do so, and the surety became subrogated to the right of the United States to apply withheld funds to the payment of these creditors' claims which right was superior to the bank's right. In *Newark Insurance Company v. United States,* the surety, upon learning that certain creditors of the contractor were not being paid, requested the Government to hold back further payments until an investigation could be made. Subsequent to this, however, the Government made final payments on the contract to an assignee bank. The surety, which incurred a loss on its bond, sued the Government for the final payment. The court, in denying the Government's motion for summary judgement, stated that if it appeared that the Government, after being informed of the surety's equitable interest in the money, paid it to a party other than the surety without good reason, the surety would be entitled to recover.

*McHasco* and the other recent cases just mentioned are part of a current trend to reinforce the surety's position in the commercial world. But where does this leave the assignee bank? The court in *McHasco* enunciated what appears to be the current disposition toward the assignee bank—the bank is in a better position than the surety to protect itself from loss. According to the court, all the bank need do is refuse to advance funds without the surety's consent. This puts a bank which is under no obligation to advance funds in an advantageous bargaining position. If the con-

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[See cases cited supra note 16.](#)

[162 Ct. Cl. 361, 319 F.2d 893, 895 (1963).](#)

[144 Ct. Cl. 655, 169 F. Supp. 955 (1959).](#)

[Supra note 5.](#)


[First Nat'l Bank v. McHasco Elec. Co., supra note 2, at 494.](#)
contractor, while performing, needs working capital in order to complete performance, it must get the advance from somewhere or it is faced with default, forcing the surety to absorb the loss. Thus, if the situation just described is presented to the surety, the surety is faced with the alternatives of consenting to at least a partial assignment or being faced with absorption of the loss on the contract. On the other hand, the situation might present itself where the surety will not consent to an assignment. This is where the “Minnesota rule” falls short. Under the rule, if the bank does make advances without the requisite legal obligation or the surety’s consent, it runs the risk of the contractor defaulting and the surety receiving priority to any withheld funds. This is inequitable; for both the surety and the bank by their respective expenditures have contributed to the fund. The equities are balanced only when the surety and the bank are allowed to participate in the fund to the extent that their contributions held it intact. For example, if the bank advanced $50,000 for the payment of the labor and materialmen and the surety absorbed a $50,000 loss upon the contractor’s default, both should be allowed to participate in the fund equally. In practice though, it is much more likely that the surety will consent to a partial assignment to the bank, and to the extent that this situation prevails, the “Minnesota rule” is workable in the commercial world.


LINUS PAULING, internationally famous scientist and winner of the Nobel Prize in Chemistry and the Nobel Peace Prize, has been active in the last decade in efforts to promote an international nuclear test ban treaty. In 1960, the St. Louis Globe-Democrat published an editorial which criticized Pauling’s activities. The editorial stated that Pauling had been cited for contempt of Congress when in truth he had never been cited for such contempt. Pauling brought a libel action against the St. Louis Globe-Democrat Publishing Company, publisher of the newspaper. The United States District Court for the Eastern District of Missouri dismissed the action and Pauling appealed. The Court of Appeals of the Eight Circuit, affirming, held: Where a private citizen, not acting as a public official, has by his activities projected himself into the arena of public policy, public controversy, and “pressing public concern” the principle of New York Times v. Sullivan is applicable.

The Supreme Court’s decision in New York Times v. Sullivan marked the initial
application of the first amendment's protection of speech and the press to defama-
tory libel. The Court therein held that a public official may recover damages for a
defamatory falsehood relating to his official conduct only if he proves that the state-
ment was made with actual malice—that is with knowledge that the statement was
false or with reckless disregard of whether it was false or not. The New York Times
decision, the Court pointed out, was prompted by "a profound national commit-
tment to the principle that debate on public issues should be uninhibited, robust
and wide open."

In Rosenblatt v. Baer the Supreme Court again took up the issues of the New York
Times case. The Court, limiting itself to the points argued, held that the question
whether the plaintiff was a "public official" within the New York Times rule was not
to be answered under state law standards. The Court, expanding on its commit-
tment to the principle of free debate on public issues in the New York Times case,
stated that a strong interest exists, first, in debate on public issues and, second, in
debate about those persons who are in a position to significantly influence the resolu-
tion of those issues, which must be protected.

In reaching its conclusion the court in the present case recognized that the New York
Times case dealt only with public officials, and overcame the argument that the
rule of the case should be limited to public officials by showing first, that the Supreme
Court favored expansion of the New York Times rule, and second that the Su-
preme Court specifically denied in Rosenblatt that it was tying the New York Times
rule to the rule of official privilege.

The court then, drawing a comparison between public officials and private citi-

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* Id. at 268.
* Id. at 293-94.
* Id. at 270.
* Id. at 84-85.
* Id. at 85.

significant footnotes, one from the New York Times case and one from the Rosenblatt case,
in support of its position. In Times the Supreme Court had said:

We have no occasion here to determine how far down into the ranks of government em-
ployees the "public official" designation would extend for purposes of the rule or other-
wise to specify categories of persons who would or would not be included.


In Rosenblatt the Supreme Court had said:

We are treating here only the element of public position, since that is all that has been
argued and briefed. We intimate no view whatever whether there are other basis for
applying the New York Times standards—for example that in a particular case, the inter-
est in reputation are relatively insubstantial, because the subject of discussion has thrust
himself into the vortex of the discussion of a question of pressing public concern.


Id. at 196. Again the court turned to a footnote to support its position. The court cited
footnote 10 of the Rosenblatt case:

We reject any suggestion that our reference in New York Times, 376 U.S. at 282, 283,
n.23 . . . to Barr v. Matteo 360 U.S. 564 mean that we have tied the New York Times rule
to the rule of official privilege. The interests protected by the New York Times rule are
interests in discussion, not retaliation.

zens who project themselves into the public arena, stated that lobbyists, heads of pressure groups and public figures like Dr. Pauling13 may possess at least as great a capacity for influencing public policy as a minor public official who is clearly subject to the New York Times rule.14 The court realized that criticism of these private citizens is at least as important to the public interest as criticism of public officials15 and concluded that if the New York Times rule is to effectively promote debate on public issues, it must also be applicable to private citizens who seek to influence public policy.16

The New York Times case, as it involved a major departure from the pre-existing law has initiated substantial litigation, the majority of which favors expansion of its holding.17 The question whether the rule can be extended to private citizens has arisen in a number of cases.

In the only other federal court of appeals decision on this point, the Second Circuit in Pauling v. News Syndicate Corp.,18 another defamation suit brought by Dr. Pauling, said in dicta that the New York Times rule should be extended to participants in any public debate on issues which are of "grave public concern."19 However, the district courts are in conflict. The district courts in Eastern Kentucky20 and Connecticut21 on one hand have extended the rule to private citizens, while the district courts of Southern New York22 and the District of Columbia23 have declined to extend the rule beyond public officials.

The state courts are also split on the application of the New York Times rule. The New York courts have decided a substantial number of cases which involved the extension of the rule. While they have generally held for extension, the courts have differed as to when and to whom the rule should be extended.

Thus in a case brought by a law partner of a candidate for mayor24 and in a case brought by Dr. Pauling,25 the New York courts held the New York Times rule to be applicable. However, the New York courts have declined to extend the rule to a

13 Dr. Pauling became concerned about the destructive effects of possible nuclear wars in 1946. It was his dominating interest for the last twenty years and during that period he has given over 750 lectures concerning atomic weapons and the need to prevent a nuclear war. He has travelled throughout the world giving lectures and pressing his views on heads of states, ambassadors and other public officials. His efforts have gained him such prominence in this field that he was awarded the Nobel Peace Prize.


16 *Id.* at 196-97.

17 *Id.* at 196, and the cases cited therein.


19 *Id.* at 671.


Russian Count; to a famous pugilist; to a noted baseball player; and to a radio and television performer.

In other state court actions the Colorado and Alaska Supreme Courts have extended the rule to private citizens, while the Texas and New Hampshire courts have declined to extend the rule. The Texas case is of especial interest because it arose out of the same report as did the Colorado and Eastern Kentucky cases, supra, and reached a conclusion contrary to these cases. The Supreme Court will have the last say as it has granted a petition for certiorari on the case.

In all of the cases cited, the courts make an honest effort to determine the scope of the Supreme Court's ruling in the New York Times case. The division is understandable however when it is considered that the majority of the cases were decided before the Rosenblatt case.

In the New York Times case, the Court in support of its position cited Barr v. Matteo reasoning that since under the Barr case public officials are protected against suits by private citizens for defamatory statements made by the public officials in their official capacity, then private citizens should be protected against suits by public officials acting in their official capacity. While the Court by a footnote attempted to show that the rationale of the New York Times case was intended to apply to others than public officials, the meaning of the footnote is questionable and before Rosenblatt was decided only the Walker v. Courier Journal and Louisville Times court relied on the footnote to support their application of the New York Times rule to a private citizen. The majority of the courts, however, relied on the Barr v. Matteo analogy as the basis for their refusal to extend the New York Times case beyond the public official concept. It was not until the Rosenblatt case that the Supreme Court specifically denied that its reference to Barr v. Matteo in the New...
York Times case was intended to show that the New York Times rule was limited to public officials.43  
The courts in Walker v. Associated Press,44 Pauling v. National Review, Inc.,45 Pearson v. Fairbanks Publishing Co.46 and the present case are the only courts to consider whether the New York Times rule should be extended to others than public officials since Rosenblatt was handed down and in every case Rosenblatt was cited and the New York Times rule was extended to private citizens.

"The thrust of the New York Times rule," the Supreme Court said in the Rosenblatt case,47 "is that when interests in public discussion are particularly strong, . . . the Constitution limits the protection afforded by the law of defamation." The amount of litigation and conflict on the issue of the present case alone points to the need of more definite standards by which the courts can effectively protect "interests in public discussions".

Justice Black in his concurrences in New York Times and Rosenblatt has given that standard when he said "an unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the first amendment".48 The Supreme Court has said that the purpose of the first amendment is to protect freedom of expression on public questions.49 Libel laws, however, hamper this freedom50 and if the Supreme Court is to be consistent it must recognize Justice Black's standard and hold libel laws inapplicable at a minimum to discussions of public affairs.

The court in the present case, while bound by the actual malice limitation of the New York Times case,51 closely approached Justice Black's standard in its interpretation of the applicability of the New York Times rule and on this point is consistent with the first amendment's protection of free speech.

44 Supra note 30.
45 Supra note 25.
46 Supra note 31.
47 Rosenblatt v. Baer, supra note 8, at 86.
49 The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The Constitutional safeguard, we have said "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." New York Times v. Sullivan, supra note 3, at 269. See also cases cited therein.
50 Errors of fact particularly in regard to a man's mental states and processes, are inevitable. Information and discussion will be discouraged and the public interest in public knowledge of important facts will be poorly defended if error subjects its author to a libel suit .... Whatever is added to the field of libel is taken from the field of free debate. Sweeney v. Patterson, 128 F.2d 457 (D.C. Cir. 1942). Quoted with approval in New York Times v. Sullivan, supra note 5, at 272.
51 The Supreme Court gave no indication in the Rosenblatt case that it was altering its position on the issue of actual malice. The Supreme Court will have an opportunity to review its stand on the malice issue because the Texas Court in Associated Press v. Walker, supra note 32, found that there was actual malice in the reporting. See Justice Black's dissent in Rosenblatt v. Baer, supra note 8, at 87 for an interesting argument as to the effect of the actual malice requirement.
IN 1923 ANNA P. HATCH CREATED an irrevocable spendthrift trust, income to herself for life and on her death the corpus to whomever she appointed by will, or on the failure to appoint, to her next of kin. In 1963 the settlor, life beneficiary, sought to obtain a modification order whereby she would receive an additional $5000 per year from the corpus. The United States District Court for the District of Columbia denied relief and granted a summary judgment for defendant trustees. The Court of Appeals affirmed.

Counsel for Hatch relied on the doctrine of worthier title to claim that the heirs had no interest and Anna Hatch could therefore revoke, amend, or modify as she saw fit. The Court of Appeals pointed out that the doctrine of worthier title is no longer held to be either a rule of law or one of construction in the District of Columbia. On the contrary, "any act or words of the settlor which would validly create a remainder interest in a named third party may create a valid remainder interest in the settlor's heirs." Thus the court reached the conclusion that Anna Hatch could not unilaterally terminate the trust on the theory set forth, but the court went on to give a detailed explanation of how she could attain her end in a way that might be acceptable to the courts of the District of Columbia. Since all trusts are revocable, regardless of declarations to the contrary, if the settlor and all beneficiaries agree to the revocation, the only thing preventing a modification or revocation in the instant case was the impossibility of obtaining the permission of the yet to be determined next of kin.

The court suggested that this difficulty could be overcome if the settlor could show that those who would be her next of kin, if they were determined at the time the action was brought, agreed to the termination and, if she were to show that the interests of unborn beneficiaries were adequately protected. If such a showing was made, the court could then appoint a guardian ad litem to represent the unborn contingent remaindermen. The court further suggested that the settlor's position would be strengthened if she were to offer a quid pro quo to the prospective heirs for their consent to a termination. The heirs could trade their qualified interest for an absolute interest.

Looked upon separately, the suggested procedures are not without precedent. In

1 Hatch v. Riggs Nat'l Bank, 361 F.2d 559 (D.C. Cir. 1966).
2 Id. at 561.
3 Ibid.
4 Id. at 566.
5 Id. at 564.
6 Id. at 564-65 (dictum).
8 Hatch v. Riggs Nat'l Bank, supra note 1, at 565.
9 Ibid.
10 Ibid.
a large number of states representation of unborn and unascertained heirs is provided for by statute.11 The Illinois statute permits a court to appoint a guardian ad litem for any infant or insane defendant in a cause in equity "whether a trust is involved or not," or for any person not in being whom it appears might become entitled to any future interest, legal or equitable.12 "The representative shall have the power to bind the party he represents as though such party were a party to the suit."13 Where there is no legislative fiat, however, there is some doubt as to whether a court of equity has this power inherently.14 By the better view it does.15 The problem of how to revoke or modify a trust where there is a gift over to a class is less difficult. Here the doctrine of virtual representation16 is applicable and courts are generally not so reluctant to state that the interests of unborn and unascertained heirs are adequately represented by the already born members of the same class.17

The court in the instant case, however, went beyond the generally accepted theories and justifications for the use of a guardian ad litem. Anna Hatch was seeking modification based on the worthier title doctrine. In effect she was saying that she had the power to modify because she never gave anything—the remainder to her heirs was actually a reversion in herself. She merely wanted more money than she had originally provided for herself.18 If an action is brought based on the theory suggested by the court, it will be interesting to see if that theory will be accepted despite the lack of necessity of adjudicating the rights of parties. No rights are brought into issue here. The validity of the trust is not questioned. The action is merely one of convenience to the settlor/life beneficiary. Query whether such is ground for the appointment of a guardian ad litem?

Where the court is under no duty to adjudicate conflicting claims of parties to the trust, can it still appoint a guardian ad litem who will have the power to waive the rights of the unborn contingent remaindermen? In the instant case these rights are not merely contingent on the determination of the next of kin, but also they are subject to defeasance in the event that the settlor decides to exercise her testamentary power of appointment. It would seem that where such a situation exists it would be more valuable to the unborn heirs were they to have an absolute interest which could not be defeated. This is where the court's suggestion of a quid pro quo becomes relevant.19 As the court suggests, the unborn contingent remainder-

12 ILL. REV. STAT. c. 22, § 6 (1964).
13 Ibid.
16 RESTATEMENT, PROPERTY § 182 (1936); 1 AMERICAN LAW OF PROPERTY § 4.85 (1952).
18 Hatch v. Riggs Nat'l Bank, supra note 1, at 561.
19 Ibid. at 566.
men, acting through a guardian ad litem, could agree to an increase in the annual income of the life beneficiary in return for the life beneficiary's agreement to transfer assets in trust for the benefit of the heirs, without a retention of the power to appoint by will.\footnote{Ibid.} As a result of such an agreement the heirs could have an absolute interest in addition to or in place of their presently qualified interest. As said by the court: "The pattern of such a modification is clearly available where the remaindermen of a trust are recognizable as a class even though the members of the class are not now individually ascertainable."\footnote{Id. at 566.}

That statement by the court is clearly sound where the validity of the trust is challenged. In \textit{Mabry v. Scott},\footnote{Mabry v. Scott, supra note 15.} which the Court of Appeals cites as authority for the proposition that the power to appoint a guardian ad litem is an inherent one of every court, the settlor alleged fraud, undue influence, and failure of consideration, and sought to have the trust set aside on those grounds. The complaint was later amended to allege mistake of fact on the part of the settlor,\footnote{Id. at 246, 124 P.2d at 662.} but in any event, a case was presented which the court had a duty to adjudicate. The validity of the trust was challenged. The California District Court of Appeal felt constrained to act. But in so doing the court required that a condition be met for a court to act in such a case: there must be an allegation of mistake, or inferentially, some allegation of fraud, duress, or undue influence such as to warrant the exercise of the powers of a court of equity in relieving the settlor from covenants and conditions which otherwise would not have been made.\footnote{Id. at 247, 124 P.2d at 663.}

So too in Tennessee, courts require that there be an adversary proceeding. In the case of \textit{Rodgers v. Unborn Child or Children of Rodgers},\footnote{Rodgers v. Unborn Child or Children of Rodgers, 204 Tenn. 96, 315 S.W.2d 521 (1958).} the life tenant of property in which children born to her were named as remaindermen, sought to have the fee vested in her because of the unlikelihood that she would have any children (she was 46 years old and unmarried), or, in the alternative, to have the property sold and the value of the remainder interest set aside out of the proceeds. The Supreme Court of Tennessee refused to grant the life tenant's request on the grounds that the case was not an adversary proceeding such as to require the court to adjudicate the rights of parties.\footnote{Id. at 99, 315 S.W.2d at 526.} The court did not deny its power, even in the absence of statute, to act for the benefit of persons under a disability, whether \textit{in esse} or \textit{in posse}, and irrespective of whether the estate in question is vested or contingent. But a neces-

\cite{Ibid.}
\cite{Id. at 566.}
\cite{Mabry v. Scott, supra note 15.}
\cite{Id. at 246, 124 P.2d at 662.}
\cite{Id. at 247, 124 P.2d at 663. The court in speaking of the doctrine of virtual representation said: The reason behind the exception [to the rule of indispensable parties] is a simple one of human relationships, implicit in the principle that human laws, and all other temporal things, are for the living; not for the dead or for those not yet in being, if to hold otherwise would result in injustice to living persons. Because parties are not in being, and therefore cannot be brought before the tribunal, is not sufficient reason for a court to stand by, helpless and impotent, when rights of living persons, in ordinary common sense ought to be adjudicated.}
\cite{Rodgers v. Unborn Child or Children of Rodgers, 204 Tenn. 96, 315 S.W.2d 521 (1958).}
\cite{Id. at 99, 315 S.W.2d at 526.}
sary condition for the exercise of this power was that there be a cause of action stated for which relief could be granted.\(^\text{27}\)

Thus, if the life tenant in the Rodgers case were to have framed an issue in her complaint which would have required adjudication, the Supreme Court of Tennessee would have felt constrained to act. But in viewing the action as ex parte, and basically as one of convenience to the life tenant, the court could not vest the fee in the life tenant because the decree would not have been binding on any persons not parties to the suit.\(^\text{28}\) The afterborn remaindermen would have an action against the life tenant’s purchaser. Under the rule in Rodgers, Anna Hatch’s action would be viewed as an ex parte one despite the naming of trustees as defendants since there was no true controversy which demanded that the court act. Despite a decree by the court allowing Hatch to terminate the trust, contingent remaindermen might have a cause of action against the trustees for diminishing the value of their interest.

In New York this problem of how to terminate an irrevocable trust is solved by statute.\(^\text{29}\) Revocation of a trust is possible upon the consent of all persons beneficially interested, and a gift or limitation to heirs of the settlors does not create a beneficial interest in such persons.\(^\text{30}\) In the case of In re Peabody\(^\text{31}\) the terms of the trust were, to settlor for life then to such beneficiaries as she by will might appoint, and in default of appointment to her surviving issue,\(^\text{32}\) and if none, to various alternative takers. The settlor was pregnant and wished to amend the trust. The trustees were unwilling to permit this as a result of settlor’s condition. The New York Court of Appeals held that a child en ventre sa mere is not a person beneficially interested in the trust, and such child’s consent was not necessary under the statute.\(^\text{33}\) Under New York law therefore, Anna Hatch would have no difficulty in obtaining a court’s permission to modify as she wished. She would merely be required to make a declaration to the trustees that she wished to modify. No other parties are beneficially interested under the statute, and no one else’s consent is required.

The key question then is would a decree of the District Court for the District of Columbia permitting the termination of the Anna Hatch trust, in the absence of a real controversy, be binding on contingent remaindermen who were represented by

\(^{\text{27}}\) Ibid.
\(^{\text{28}}\) Id. at 97, 315 S.W.2d at 524.
\(^{\text{29}}\) N.Y. PERS. PROP. LAW \S\ 23:
Upon the written consent of all persons beneficially interested in a trust in personal property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof.

For the purposes of this section, a gift or limitation, contained in a trust created on or after September first 1951, in favor of a class of persons described only as heirs or next of kin or distributees of the creator of the trust, or by other words of like import, does not create a beneficial interest in such persons.

\(^{\text{30}}\) Ibid.
\(^{\text{32}}\) In re Decker, 13 Misc. 2d 121, 177 N.Y.S.2d 598 (App. Div. 1958). The corpus was to go to testamentary appointees, in the failure of appointment to settlor’s next of kin. The trust was created prior to Sept. 1, 1951, and therefore the settlor could not revoke. N.Y. PERS. PROP. LAW \S\ 23. But the court said that if the trust had been created after that date the settlor would have been the only person interested and could have revoked at will.

\(^{\text{33}}\) In re Peabody, supra note 31, at 544, 158 N.E.2d at 845, 186 N.Y.S.2d at 270.
a guardian ad litem, but who were not parties of necessity to a real controversy? Under the Tennessee and California cases, and by the weight of authority, the answer would seem to be no.

The Court of Appeals for the District of Columbia has suggested a method by which a settlor can revoke an irrevocable trust. The method is simple and promotes the free alienability of property. It seems equitable to allow a settlor/life beneficiary to reach the corpus in a case where the trust was originally created primarily for her own benefit. As a result of legislative action such a result could be achieved in New York. But in the absence of statute, most courts would hold that the trust could not be terminated. It would at least be necessary for the party seeking the termination to present a prima facie case challenging the validity of the trust. Then the court would be compelled to appoint a guardian ad litem and/or rely on the doctrine of virtual representation to protect the interests of unborn and unascertained contingent remaindermen. And since challenging the trust would place in issue the rights of contingent remaindermen, they would be bound by the decision.

The Court of Appeals' approach to the problem is frank and straightforward, though novel. Doctrines of mistake are so indefinite that it is usually not difficult to present a prima facie case. The solution suggested in the instant case obviates the necessity of circuitous pleading and deals with the true problem. However, until the suggested plan is actually approved by a court, and until that decision is challenged unsuccessfully by a contingent remainderman whose interest in the trust was diminished, trustees and guardians ad litem will not rest easy.

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34 § Scott, Trusts § 340 (2d ed. 1956); Simes & Smith, Future Interests § 1805 (2d ed. 1956).
36 Although the question was not considered by the court, serious tax problems could result if the court's method of termination were adopted. If the corpus of an irrevocable trust is tax free to the income beneficiary because it cannot be reached, why should it not be taxable if it can be reached with relative ease?