Marquette Law Review

Volume 46
Issue 2 *Fall 1962*

Article 3

Third Party Actions and Products Liability

Suel O. Arnold

THIRD PARTY ACTIONS AND PRODUCTS LIABILITY

SUEL O. ARNOLD*

I. HISTORY OF WIS. STAT. §102.29 (1961)

Because questions with increasing frequency arise with respect to third-party actions under Wis. Stat. §102.29 (1961), and because of the scarcity of literature on the subject, I have been requested to prepare a short history of §102.29 of the statutes, with particular emphasis upon the problems which may confront the trial lawyer.

Chapter 50 of the Laws of 1911, created §2394-1 to §2394-31 of the statutes. This act of the Legislature marked a milestone in the personal injury field and with a similar act of New York, was one of the first Workmen's Compensation Acts enacted in the United States.

The original act provided that the making of a claim by an injured workman, constituted an assignment to the employer of the injured employee's claim against the third-party whose negligence caused the employee's injuries. The employer was given the right to bring the action in his own name against the third-party tortfeasor for the damages caused by such third-party.

By Chapter 599 of the Laws of 1913, the Legislature amended §2394-25 by adding Subsec. (2) to provide that the making of a claim by the employee against a third-party for damages by reason of an accident covered by the Compensation Act, operated as a waiver of any claim by the injured employee against the employer for Workmen's Compensation. Chapter 624 of the laws of 1917, created Subsec. (3) of §2394-25 of the statutes, to provide that the employee might apply for and receive Workmen's Compensation and also maintain an action against a physician or surgeon for malpractice. The statute, as amended, contained the provisions still found in the statutes, that the measure of damages, if any were recovered in the action, "shall be the amount found by the jury, less the compensation paid to the employee, . . . due to such malpractice."

Chapter 680 of the laws of 1919, amended §2394-25, to provide for the sharing, by the employer, of the proceeds of recovery against the third-party liable for the injuries to the employee. In case the employer recovered, the cost of collection was first deducted, and out of the remainder, the employee was entitled to receive one-third. Any amount remaining after the employer and his Workmen's Compensation carrier had been reimbursed for payments made under the Workmen's Compensation Act, was payable to the injured employee. As amended, the

* Attorney, Milwaukee, Wisconsin; Arnold, Murray & O'Neil.

statute provided that, in the event the employed failed or refused, within ninety days after notice, to institute an action against the tort-feasor, the employee might bring the action in his own name. Settlements of the third-party claims and distribution of the proceeds were required to have the approval of a court or the Industrial Commission.

One of the very significant provisions in the 1919 Amendment, was contained in Subsec. (2) of §2394-25 of the statutes, which deprived the injured employee of Workmen's Compensation benefits in the event he brought suit against the third-party for damages, or settled his claim against the third-party.

It is important to remember that Subsec. (2) of §102.29 of the statutes, as amended by Chapter 132 of the laws of 1931, preserves to an employer or compensation insurer, the same right possessed by an employee to bring suit against a third-party whose negligence caused injuries to the employee. The employer and compensation insurer therefore, have the right to maintain an action where the employee fails or refuses to bring it. When the employer brought the action, one-third of the amount recovered after the deduction of expenses of collection, belonged to the employee, and the distribution of the proceeds of the judgment secured by the employer required the approval of a court or the Industrial Commission.

Chatper 475 of the laws of 1947, which created Subsec. (5) of §102.29 of the statutes, made appropriate provision for notice to the Industrial Commission and approval of settlements, where the same insurance carrier insured both the employer and the third-party.

One of the questions in connection with §102.29 which occasionally arises involves the right of the employer or compensation insurer to refuse to approve a settlement with a third-party which the injured employee has negotiated. In *Bergren v. Staples*,[1] Liberty Mutual Insurance Company refused to approve of a settlement negotiated by an injured employee of Marsch Construction Company, an insured of the Liberty Mutual Insurance Company. Under authority of §102.29(1) of the statutes, the trial court entered judgment against the third-party tort-feasor and refused to allow to the insurance carrier a jury trial. Liberty Mutual Insurance Company contended that it was entitled to a trial by jury under §5, Article I, of the Wisconsin Constitution. The court held that the remedy provided by §102.29 of the statutes, was a statutory remedy and that since the Legislature had created the remedy, it was competent for the Legislature to specify the conditions upon which the remedy might be pursued. The court justified the action of the trial court, upon the further ground that §102.29(1) of the statute, was a part of the contract of employment between the employer and the employee.

[1] 263 Wis. 477, 57 N.W. 2d 714 (1953).

Disputes sometimes arise between an employer and an employee in the prosecution of an action against a tortfeasor whose negligence has caused the employee's injury. Subsec. (1) of §102.29 of the statutes, as amended by Chapter 107 of the laws of 1949, provides in part, that the employer and employee shall each have an equal voice in the prosecution of the claim and, "any disputes arising shall be passed upon by the court before whom the case is pending." If no action is pending in a court, the Industrial Commission passes upon the dispute. The statute, as amended, also provides that where both the employee and employer participate in the action and are each represented by counsel, the attorney's fees allowed as a part of the cost of collection shall be divided between the attorneys, as directed by the court or by the Industrial Commission.

It must be constantly borne in mind, that the remedy afforded by §102.29 of the statutes, is entirely statutory and that the provisions of the statute must be strictly complied with. In *Huck v. Chicago, S. P., M. & O. R. Co.*,[2] the court held that the proceeds of a settlement of the employee's case must be divided in accordance with the statutory formula for division of proceeds and that the statute did not give the trial court power to vary the formula without the consent of the parties.

Special problems may arise where the third-party action under §102.29 of the statutes, is a wrongful death action. I suggest that before counsel proceed in such cases, they consult *Murray v. Dewar*,[3] and Chapter 649 of the laws of 1961, which amended Subsec. (2) of §331.04 of the statutes and which refers specifically to §102.29 of the statutes.

II. Orders of the Industrial Commission as Res Judicata

The law respecting res judicata in Wisconsin, is definitely in a state of flux. The assumption that the rule of res judicata applies only in the case of identity of parties has vanished with the decision in *McCourt v. Algiers*.[4] The decision is founded upon the New York case of *Good Health Dairy Products Corp. of Rochester v. Emery*.[5] The rule is analyzed in the case of *Davis v. McKinnon & Mooney*.[6]

Here again, we are confronted with a dearth of authority involving the question of res judicata as applied to orders of the Industrial Commission. In *Lange Canning Co. v. Industrial Comm.*,[7] an employee obtained an award against the employer, Lange Canning Company, upon application to the Industrial Commission which, on the 11th day of December, 1919, made findings of fact and entered a temporary award in the amount of $95.15. On June 23, 1922, thte Industrial Commission

[2] 14 Wis. 2d 445, 111 N.W. 2d 434 (1961).
[3] 6 Wis. 2d 411, 94 N.W. 2d 635 (1959).
[4] 4 Wis. 2d 607, 91 N.W. 2d 194 (1958).
[5] 275 N.Y. 14, 9 N.E. 2d 758, 112 A.L.R. 401 (1937).
[6] 266 F. 2d 870 (6th Cir. 1959).
[7] 183 Wis. 583, 197 N.W. 722 (1924).

made a further award of $1,099.01, against the Lange Canning Company and based the award upon the same facts found in the earlier award of December 11, 1919. Lange Canning Company brought an action in the Circuit Court for Dane County to set aside the second award. The trial court set the award aside and the industrial Commission appealed to the supreme court. Upon appeal, the judgment was reversed. The court, in reply to the contention that the findings and award dated December 11, 1919, constituted a bar to the second award because of res judicata said:

> It is true that the award here under review is based on the same findings of fact, so far as the relation of the parties is concerned, that constituted the basis of the temporary award. But it has never been held, so far as we are advised, that findings of fact constitute *res adjudicata.* Neither are we prepared to say that the doctrine of *res adjudicata* is applicable to administrative findings or orders. But we have considered the question upon the theory upon which it was argued and have arrived at the conclusion that the statute expressly authorizes an action to review either the interlocutory or final award, and that the voluntary payment of one does not affect the right to review the other, even though both be based on the same findings of fact. It follows that the award here under review was erroneous, and should be vacated and set aside.[8]

Verhelst Construction Co. v. Galles,[9] was an action by an employer under the Workmen's Compensation Act and his insurer, against a third-party under §102.29 of the statutes, to recover the amount of the payment of an award by the Industrial Commission, upon the death of an employee. The third-party, of course, was not a party to the proceeding before the Industrial Commission. The Court held that the award of the Industrial Commission was not res judicata as to a defendant in an action brought under §102.29 of the statutes and said:

> Defendant also claims that he is denied a jury trial upon the question of liability under the act for payment by the employer into the state treasury. That point is passed upon in *Travelers Ins. Co. v. McCord,* 128 Misc. 626, 220 N.Y. Supp. 170, and it is there held that the defendant may contest the facts upon which the award rests under the act. The defendant not being a party to the proceeding before the Industrial Commission, the award is not *res judicata* as to him. The award offered in evidence makes a *prima facie* case, according to the New York case, but the defendant may offer evidence tending to show non-existence of any fact essential to a lawful award under the act or that the award was excessive, and in such a situation the burden would rest upon the plaintiff to prove existence of all essential facts and the correctness of the award as to amount. The answer does

[8] *Id.* at 588.
[9] 204 Wis. 96, 235 N.W. 556 (1931).

> not assert non-existence of any such facts or excessiveness of the award, and no evidence was offered tending to show either. The defendant might have had a jury trial upon the facts essential to uphold the award had he raised an issue as to their existence.[10]

In *Hinrichs v. Industrial Comm.*,[11] the Industrial Commission entered a temporary award covering a period of 76 weeks from the time of the injury to June 8, 1933. The order expressly reserved jurisdiction in the Commission, to pass upon liability for compensation benefits following June 5, 1933. Neither the employer nor its insurer commenced any action to vacate the award and payments were made according to the award up to the time of the order which was subsequently entered by the Industrial Commission fixing compensation for a permanent disability on a different wage basis. The employee contended that the temporary award was res judicata as to the basis of computation. The court, upon the authority of *Lange Canning Co. v. Industrial Comm.*,[12] held that the temporary award was not res judicata. The court said:

> The appellant seeks to have the temporary award of the Industrial Commission given the same force and effect as an interlocutory judgment of a court, and to apply the same rule of *res judicata* to such an award as he deems to be applicable to such a judgment. The Industrial Commission is not a court. Its determinations are not judgments of a court. A temporary award of the commission is not an interlocutory judgment of a court. If an interlocutory award of a court is *res judicata* as to the issues involved in it, it does not follow that a temporary award of the commission is *res judicata* as to the issues therein involved.[13]

The court commented that in the *Lange* case, the court was not prepared to say that the doctrine of res judicata was applicable to administrative findings or orders. In *Hinrichs v. Industrial Comm., supra,* the court said:

> We are now prepared to say, and we now do say, without saying further, that the doctrine of res judicata does not apply to temporary awards of the Industrial Commission.[14]

Hinrichs v. Industrial Comm. is reported in 122 A.L.R. 548. Following the report of the case, there is an annotation on the subject of res judicata as regards decisions or awards under a Workmen's Compensation Act. The annotation is a treatise on the subject which consists of 70 pages. In the annotation, the author cites cases covering all applications of the rule, both with respect to its effect in proceedings before an administrative board and in actions in the courts. Comment on a few of the cases will be helpful.

[10] *Id.* at 101.
[11] 225 Wis. 195, 273 N.W. 545 (1937).
[12] *Supra* note 7.
[13] *Supra* note 11, at 197.
[14] *Supra* note 11, at 198.

In *Katzenmeier v. Doeren*,[15] the court held that a judgment in favor of a defendant in a Workmen's Compensation proceeding, could not be pleaded in bar to an action predicated on the alleged negligence of the defendant which was not a material issue in the Workmen's Compensation proceeding. The court further held, that the judgment could not be pleaded as an estoppel, because none of the findings on which it was rendered determined the questions of defendant's negligence or the plaintiff's contributory negligence. In *Karny v. Northwestern M. & I. Co.*,[16] the court held, that a decision of the Industrial Commission that an injured employee was not an employee under the Compensation Act, was binding upon him if he failed to take an appeal. This case, together with the *Verhelst* case, were authorities before the decision in *Hinrichs* that, to some extent at least, the orders of the Industrial Commission constitute res judicata.

There are a number of situations which do not appear to be squarely covered by Wisconsin decisions. For example: Suppose the Industrial Commission dismisses an application for compensation because the alleged employee is not an employee. May the employee recover in a tort action brought later against the employer, or will the decision of the Industrial Commission, if not appealed from, be res judicata? Suppose further, that the employee later makes an application for compensation from a different person as an alleged employer. Could the second defendant successfully defend upon the ground of res judicata?

How about a case where the Industrial Commission finds that the act does not apply to the proceeding? May the employer, in a common law action, defend upon the ground that the claim was a Workmen's Compensation claim? In *Hines v. Continental Baking Co.*,[17] the court answered the question in the negative.

In *Prince v. Saginaw Logging Co.*,[18] the court held that a finding by the Industrial Commission that the claimant was not in the course of employment at the time of his injury was res judicata as to the employer in a subsequent action by the employee to recover damages for the negligence of the employer.

Finally, suppose that an employee was injured by an explosion of a defective gas line on premises of the employer. The employee, at the time, was under the impression that he was to report for work on that particular day, but actually, he was not supposed to report for work until the following day. Suppose further, that the injured employee made application for Workmen's Compensation, but that his application was denied by the Industrial Commission, because the relationship of employer and employee did not exist at the time. Would the order of

[15] 150 Minn. 521, 185 N.W. 938 (1921).
[16] 160 Wis. 316, 151 N.W. 786 (1915).
[17] 334 S.W. 2d 140, 84 A.L.R. 2d 1027 (Mo. Ct. App. 1960).
[18] 197 Wash. 4, 84 P. 2d 397 (1938).

the Industrial Commission denying compensation be res judicata in a subsequent action brought by the employee against the employer for damages for negligence? These questions, and many others, are raised and considered in the annotation in 84 A.L.R. (2d) 1036.

While not strictly in the realm of *res judicata,* because many employees work in a number of states for the same employer, questions constantly arise as to the propriety of a multiplicity of claims for Workmen's Compensation presented to administrative bodies in different states. In *Industrial Commission of Wisconsin v. McCartin,*[19] Kopp worked as a bricklayer for McCartin. Both were residents of Illinois. Pursuant to a contract made in Illinois, Kopp worked for McCartin on a building job in Wisconsin. Kopp drove back and forth between his home in Illinois and his work in Wisconsin. While employed in Wisconsin, Kopp suffered an injury to his left eye, and, on June 7, 1943, he filed an application for adjustment of claim with the Industrial Commission of Wisconsin. McCartin and his carrier, objected to the jurisdiction of the Wisconsin Commission to hear the claim. On July 20, 1943, Kopp filed an application for adjustment of claim with the Industrial Commission of Illinois. Payment was made by the compensation insurer under the Illinois Workmen's Compensation Act, pursuant to an understanding that payments made to Kopp would be credited toward compensation awarded under the Wisconsin Act. The Court held that there was nothing to prevent both the States of Illinois and Wisconsin from paying Workmen's Compensation to Kopp. The Court distinguished the case of *Magnolia Petroleum Co. v. Hunt.*[20] In that case, the Texas Commission awarded Workmen's Compensation under the Texas law. There was no reservation such as in the McCartin case. The Supreme Court held that the State of Louisiana had no jurisdiction to enter an award of compensation.

III. Expanding Jurisdiction Over Non-Residents

The Legislature of the State of Wisconsin has taken notice that the old doctrine of *Pennoyer v. Neff,*[21] a case decided in 1877, has shrunk to a point where it has ceased to have any substantial interest other than historical. In order to keep pace with the progress in other jurisdictions, the Legislature, by Chapter 226 of the laws of 1959, effective July 1, 1960, amended Chapter 262 of the Wisconsin Statutes, to provide expanded jurisdiction over non-residents. Section 262.05 of the statutes, provides that a court of this state having jurisdiciton of the subject matter, has jurisdiction over a person served in an action in accordance with the provisions of §262.06, in the following cases: where such person is engaged in substantial and not isolated activities within

[19] 330 U.S. 622 (1947).
[20] 320 U.S. 430, 150 A.L.R. 413 (1943).
[21] 95 U.S. 714 (1878).

the state and whether such activities are wholly interstate, intrastate or otherwise. This provision is substantially a statement of the law as it existed before the amendment with respect to corporations. Jurisdiction, likewise, attaches in any action claiming injury to personal property within or without the state, arising out of an act or omission within this state by the defendant.

The Legislature has expressly provided for a redress of local injury through a foreign act. Subsec. (4) of §262.05, provides that in any action claiming injury to person or property within this state, arising out of an act or omission outside this state by the defendant, the court shall have jurisdiction provided that, in addition, at the time of the injury, either solicitation or service activities were carried on within the state by or on behalf of the defendant, or products, materials, or things processed, serviced or manufactured by the defendant, were used or consumed within this state in the ordinary course of trade. The jurisdiction, thus created, applies both to natural persons and corporations.

Subsec. (5) of §262.05 of the statutes, provides for greatly expanded jurisdiction over non-residents with respect to services, goods or contracts.

The first rupture in the jurisdictional wall which formerly restricted jurisdiction over the person when service was had outside the state, resulted from *International Shoe Co. v. Washington.*[22] In that case, the Court held that due process required only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it, such that the maintenance of the suit did not offend "traditional notions of fair play and substantial justice."

In *McGee v. International Life Ins. Co.,*[23] the United States Supreme Court held service to be good on the life insurance company, under the following facts: In 1944, Lowell Franklin, a resident of California, purchased a life insurance policy from the Empire Mutual Insurance Company, an Arizona corporation. In 1948, the respondent International Life Insurance Company, agreed with Empire Mutual, to assume its insurance obligations. Respondent then mailed a reinsurance certificate to Franklin in California, offering to insure him in accordance with the terms of the policy he held with Empire Mutual. He accepted this offer and from that time until his death in 1950, paid premiums by mail from his California home to respondent's Texas office. Neither Empire Mutual nor the respondent ever had any office or agent in California and so far as the records show, respondent had never solicited or done any insurance business in California, apart from the policy involved.

---

[22] 326 U.S. 310 (1945).
[23] 335 U.S. 211 (1948).

The Court, upon the authority of *International Shoe Company v. Washington,*[24] held that the service was good. The Court said:

> Looking back over this long history of litigation a trend is clearly discernable toward expanding the permissible scope of state jurisdiction over foreign corporations and other non-residents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more states and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend itself in a state where he engages in economic activity.[25]

In the later case of *Hanson v. Denckla,*[26] the Court said it was a mistake to assume that the requirements for personal jurisdiction over non-residents which had evolved from the rigid rule of *Pennoyer v. Neff,*[27] to the flexible standard of *International Shoe Co. v. Washington,*[28] presaged the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are still more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so, unless he has the "minimal contacts" with that state that are a prequisite to its exercise of power over him.

In reliance upon the *International Shoe and McGee* cases, the Supreme Court of Wisconsin has recognized the expanding jurisdiction over non-residents as evidenced by the decision in *Lau v. Chicago & N.W.R. Co.,*[29] where the court paraphrased the statement with respect to minimum contacts in the *International Shoe Company* case. The decision in the *Lau* case was foreshadowed in *Huck v. Chicago, St. P., M. & O. R. Co.,*[30] *Dettman v. Nelson Tester Co.,*[31] and *Bond v. Harrel.*[32]

Against the evolutional background of decisions and legislative enactments, we shall now explore the extent to which Wisconsin courts may obtain jurisdiction over non-residents. This can best be accomplished by a study of cases such as *Gray v. American Radiator & Standard Sanitary Corp.*[33] In that case the Titan Valve Company moved to

[24] *Supra* note 22.
[25] *Supra* note 22, at 222-223.
[26] 357 U.S. 235 (1958).
[27] *Supra* note 21.
[28] *Supra* note 22.
[29] 14 Wis. 2d 329, 111 N.W. 2d 158 (1961).
[30] 4 Wis. 2d 132, 90 N.W. 2d 154 (1958).
[31] 7 Wis. 2d 6, 95 N.W. 2d 804 (1959).
[32] 13 Wis. 2d 369, 108 N.W. 2d 552 (1961).
[33] 22 Ill. 2d 432, 176 N.E. 2d 761 (1961).

quash the service made by the plaintiff, upon the ground that it did no business in Illinois; i.e., that there were not the minimal contacts which were a requisite under the decision in the *International Shoe* case. It appeared that the Titan Valve Company manufactured a valve in Ohio, which subsequently was incorporated into a hot water heater in Pennsylvania, and which, in the course of commerce, was sold to an Illinois consumer. The Illinois purchaser brought suit against Titan to recover damages for injuries sustained in Illinois because of the explosion of the water heater. The court cited and followed the earlier case of *Nelson v. Miller*.[34] In that case, the commission of a single tort within the State of Illinois was held sufficient to sustain jurisdiction under the Illinois Statutes. The defendant in that case was a resident of Wisconsin and was engaged in the business of selling appliances. It was alleged that in the process of delivering a stove in Illinois, an employee of the defendant negligently caused injury to the plaintiff. In holding that the defendant was not denied due process by being required to defend in Illinois, the court said:

> The defendant sent his employee into Illinois in the advancement of his own interests. While he was here, the employee and the defendant enjoyed the benefit and protection of the laws of Illinois, including the right to resort to our courts. In the course of his stay here the employee performed acts that gave rise to an injury. The law of Illinois will govern the substantive rights and duties stemming from the accident. Witnesses, other than the defendant's employee, are likely to be found here, not in Wisconsin. In such circumstances, it is not unreasonable to require the defendant to make his defense here.[35]

The *Gray* case has been followed in *Beck v. Spindler*,[36] and has been cited with approval in *Greene v. Robertshaw-Fulton Controls Co.*,[37] (an opinion which is a treatise on the subject, by Chief Judge Steckler), and in *Hoagland v. Springer*.[38]

In *Hellriegel v. Sears, Roebuck & Co.*,[39] Judge Campbell dismissed an action against Newark Stove Company, an Ohio corporation, and Power Products Corporation, a Wisconsin corporation, in an action for damages brought in Illinois on account of an alleged defective lawnmower manufactured outside the State of Illinois. Judge Campbell, however, in *McMahon v. Boeing Airplane Company*,[40] cited the Hellriegel case and stated that the *Gray* case had established the law in Illinois, and that because of *Erie R. Co. v. Tompkins*,[41] he was obliged to follow the *Gray* case.

---

[34] 11 Ill. 2d 378, 143 N.E. 2d 673 (1957).
[35] *Id.* at 143 N.E. 2d 680.
[36] 257 Minn. 25, 99 N.W. 2d 669 (1959).
[37] 204 F. Supp. 117, (S.D. Ind. 1962).
[38] 75 N.J. Super. 560, 183 A. 2d 678 (1962).

The District Court of the United States for the Eastern District of Wisconsin, has consistently followed the Wisconsin Supreme Court in interpreting the statutes with reference to personal jurisdiction. *Krisor v. Watts,*[42] *Kappus v. Western Hills Oil, Inc.,*[43] and *American Type Founders Co. v. Mueller Color Plate Co.*[44]

The subject of the interpretation of Chapter 262, as amended, is brilliantly treated by G. W. Foster, Jr., in the Supplement to the October, 1959, Wisconsin Bar Bulletin. It is apparent, both from the present economy and transportation and from the decisions of the courts, both state and federal, that the legal horizon with respect to the maintenance of suits against non-residents, has broadened and that hereafter, where the injury occurs in Wisconsin because of a defect in an instrumentality sold in commerce outside Wisconsin, the courts in Wisconsin will acquire personal jurisdiction. The evolution is consistent with the prediction made by the court in *Smyth v. Twin State Imp. Co.,*[45] where the court said:

> Extension of the jurisdiction of courts may be expected to continue in the wake of scientific and economic development. Facility of travel has largely effaced state lines.[46]

---

[39] 157 F. Supp. 718 (N.D., E.D. Ill. 1957).
[40] 199 F. Supp. 908 (N.D.E.D. Ill. 1961).
[41] 304 U.S. 64 (1938).
[42] 61 F. Supp. 845 (E.D. Wis. 1945).
[43] 24 F.R.D. 123 (1959).
[44] 171 F. Supp. 249 (E.D. Wis. 1959).
[45] 116 Vt. 569, 80 A. 2d 664 (1951).
[46] *Id.* at 80 A. 2d 668.