Alyeska Pipeline Service Co. v. Wilderness Society: The Demise of the Private Attorney General Theory As a Basis for Awarding Attorneys' Fees in Public Interest Litigation

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ALYESKA PIPELINE SERVICE CO. v. WILDERNESS SOCIETY: THE DEMISE OF THE PRIVATE ATTORNEY GENERAL THEORY AS A BASIS FOR AWARDING ATTORNEYS' FEES IN PUBLIC INTEREST LITIGATION

Recently, in *Alyeska Pipeline Service Co. v. Wilderness Society*[1] the United States Supreme Court by a 5-2 vote[2] rejected the allowance of attorneys' fees to various environmentalist groups which had challenged the construction of the trans-Alaska oil pipeline.[3] In so doing, the Court repudiated the *private attorney general theory* as a basis for awarding attorneys' fees in public interest litigation.[4]

The decision in *Alyeska* was consistent with the general American

1. 421 U.S. 240 (1975).
2. Justices Douglas and Powell did not participate.
3. In December, 1969 the Department of the Interior revealed that a right of way for an oil pipeline across Alaska would be granted. The plaintiffs, various environmentalists groups, filed an action to prevent construction of the pipeline, Wilderness Society v. Hickel, 325 F. Supp. 422 (D.D.C. 1970). The cause of action was based on the failure to comply with the Mineral Lands Leasing Act, 30 U.S.C. § 185 (1970) (MLLA), and the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1970) (NEPA). The court granted a preliminary injunction. Meanwhile, Alyeska Pipeline Service Co., a corporation composed of major oil companies, was allowed to intervene in the suit. Eventually, the court dissolved the injunction.

On appeal, the court of appeals reversed on the ground that the proposed pipeline would violate the width provisions of the MLLA. Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973). The court expressly declined to rule on the NEPA issues since the MLLA was felt to be dispositive. Subsequently, Congress enacted legislation so that no further action under either of these Acts was required for construction of the pipeline. Mineral Lands Leasing Act, 30 U.S.C. § 185 (Supp. IV, 1974); Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1652(d) (Supp. IV, 1974). With the litigation effectively terminated by congressional action, plaintiffs sought attorneys' fees.

4. Legislation has subsequently been introduced in Congress to offset the effects of this decision. Student Lawyer, Nov. 1975, at 10. The private attorney general theory as used in this context is to be distinguished from a doctrine of the same name which pertains to the question of standing. *See Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

rule.[5] As early as 1796, in *Arcambel v. Wiseman*[6] the Supreme Court had concluded that the American practice did not permit the award of attorneys' fees to the successful litigant as a matter of course.[7] Subsequent cases have adhered to the decision.[8]

Various justifications have been given for this rule. Among those most frequently cited are that it provides free access for all to the courts, since one is not threatened with the additional burden of paying the fees of his opponent's counsel; that fees would be too difficult to ascertain; and that the rule prevents the possibility of abuse in the awarding of fees.[9]

On the other hand, this rule deters those who cannot afford to pay attorneys' fees from litigating their meritorious claims.[10] The harshness of this has been mitigated to some extent by statutes and enforceable contracts which provide for the recovery of fees.[11] Furthermore, other exceptions to the American rule have been created by the judiciary through the exercise of its equitable powers when the inter-

5. There has been much criticism of the American rule with many calling for its abolishment. *See* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society,* 54 CALIF. L. REV. 792 (1966); Goodhart, *Costs,* 38 YALE L.J. 849 (1929) [hereinafter cited as Goodhart]; King & Plater, *The Right to Counsel Fees in Public Interest Environmental Litigation,* 41 TENN. L. REV. 27 (1973) [hereinafter cited as King & Plater]; Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?,* 49 IOWA L. REV. 75 (1963); Nussbaum, *Attorney's Fees in Public Interest Litigation,* 48 N.Y.U.L. REV. 301 (1973) [hereinafter cited as Nussbaum]; Stoebuck, *Counsel Fees Included in Costs: A Logical Development,* 38 U. COLO. L. REV. 202 (1966); Note, *Awarding Attorney and Expert Witness Fees in Environmental Litigation,* 58 CORNELL L. REV. 1222 (1973).

6. 3 U.S. (3 Dall.) 234 (1796).

7. *Id.* When one considers the origins of our legal system the disallowance of attorneys' fees seems anomalous, as England has allowed their recovery for some time. Beginning with the passage of the Statute of Gloucester, 6 Edw. I, c. 1 (1278), successful plaintiffs were permitted to recover their fees. Later, another statute allowed a dependent to recover fees, 4 Jac. I, c. 3 (1607). Finally, with the passage of the Supreme Court of Judicature Act of 1873, 36 & 37 Vict., c. 66 and the Supreme Court of Judicature Act of 1875, 38 & 39 Vict., c. 77, the awarding of fees was left to the discretion of the court. Among the various reasons cited for the divergence of the American and English rules are that lawyers were characters of disrepute in America, that the American rule favored the poor man and was, therefore, more democratic, and that the difference was simply the result of a historical accident. Goodhart, *supra* note 5, at 873-78.

8. *See, e.g.,* F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116 (1974); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967); Stewart v. Sonneborn, 98 U.S. 187 (1879); Oelrichs v. Spain, 82 U.S. (15 Wall.) 211 (1872); Day v. Woodworth, 54 U.S. (13 How.) 534 (1852).

9. King & Plater, *supra* note 5, at 34-35. *See also* Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964); Oelrichs v. Spain, 82 U.S. (15 Wall.) 211 (1872).

10. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

11. *See* cases cited note 8 *supra.* Among the statutes allowing for recovery of fees are: Clayton Act, 15 U.S.C. § 15 (1970); Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78r(a) (1970); Truth in Lending Act, 15 U.S.C. § 1640(2) (1970); Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) (1970); Communications Act of 1934, 47 U.S.C. § 206 (1970).

ests of justice have so required, such powers originating from the authority of the chancellor to do equity in a particular situation.[12]

Two of these equitable exceptions were developed by the Supreme Court and remain viable. A third, the private attorney general rationale, originated with the lower federal courts and was rejected by the Supreme Court in *Alyeska*. What induced them to take the initiative and fashion this doctrine without the approval of the High Court? It is submitted that the answer to this lies in an examination of the two settled exceptions.

The first of these, the *bad faith or obdurate behavior exception*, dictates that where one party maintains an unfounded action or defense against another in bad faith, vexatiously or wantonly, the court may award attorneys' fees against him as a penalty for his conduct.[13] Although this theory is flexible enough to be applied whenever a litigant is guilty of some misconduct in his use of the judicial machinery, that is the extent of its purview.[14]

Unlike the first exception, the second has seen considerable expansion since it was first announced, and the Supreme Court has been primarily responsible for this. Originally, the so-called *common fund doctrine* was invoked when an individual protected or created a monetary fund or a property right in which others had a legal interest.

The earliest and purest application of this principle can be seen in *Trustees v. Greenough*.[15] Plaintiff, a bondholder in a trust fund, was suing the trustees on behalf of himself and others similarly situated for waste in the disposition of certain lands held by the fund. Having prevailed on the merits, he sought to recover attorneys' fees and costs. The Court approved an award of attorneys' fees, reasoning that one who is jointly interested with others in a common fund and who in good faith maintains the necessary litigation to save it from waste and destruction is entitled in equity to reimbursement of his costs, either out

12. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166 (1939).
13. Hall v. Cole, 412 U.S. 1, 5 (1973) (where the Court concluded that the underlying rationale of this exception is punitive, and the essential element in triggering the award of fees is the existence of bad faith on the part of the unsuccessful litigant); Vaughan v. Atkinson, 369 U.S. 527, 530-31 (1962); Universal Oil Prod. Co. v. Root Ref. Co., 328 U.S. 575 (1946); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-28 (1923); Fairley v. Patterson, 493 F.2d 598, 604-07 (5th Cir. 1974); Guardian Trust Co. v. Kansas City S. Ry., 28 F.2d 233 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1930); 6 J. Moore, Federal Practice ¶ 54.77[2], at 1709 (2d ed. 1975).
14. *See* authorities cited note 13 *supra*; King & Plater, *supra* note 5, at 43.
15. 105 U.S. 527 (1881).

of the fund itself or by proportional contribution from those who receive the benefit of the litigation.[16]

In the later case of *Sprague v. Ticonic National Bank*,[17] the common fund doctrine was expanded to apply in the situation where the plaintiff sues only on his own behalf for the protection of a monetary fund but benefits others by his litigation. There the plaintiff sued the receiver of the Ticonic National Bank to impress a lien upon the proceeds of certain bonds in the amount of her trust deposit. Following the successful prosecution of her claim, the plaintiff sought counsel fees from the proceeds on the ground that she had indirectly benefitted the other investors in the trust. The court found that although the plaintiff had not claimed to be the representative of a class, she had, by prevailing in her action, established the claims of others to the same fund under the doctrine of stare decisis.[18] Thus, she was entitled to reimbursement for her litigation expenses out of the fund from which the other beneficiaries would eventually recover.

Recent years have seen a further extension of the common fund doctrine, as is evidenced by *Mills v. Electric Auto-Lite Co.*[19] In that case the minority shareholders of a corporation brought suit to prevent a merger between their corporation and another, claiming that the proxies held by management authorizing it were obtained by misleading proxy statement in violation of section 14(a) of the Securities Exchange Act of 1934.[20] After ruling for plaintiffs, the Court awarded them attorneys' fees, although the statute made no provision for them.[21] In so doing, the Court recognized that the benefit conferred upon a class need not be pecuniary in nature, but need only be "substantial".[22] The benefit in *Mills* was nonmonetary; however, it extended to all shareholders in the form of "corporate therapeutics"

16. *Id.* at 532-33. The underlying rationale of this doctrine is unjust enrichment. *Id.* at 532; *see* note 21 *infra.*

17. 307 U.S. 161 (1939).

18. *Id.* at 166-67.

19. 396 U.S. 375 (1970).

20. 15 U.S.C. § 78n(a) (1970).

21. While the general American rule is that attorneys' fees are not ordinarily recoverable as costs, both the courts and Congress have developed exceptions to this rule for situations in which overriding considerations indicate the need for such a recovery. A primary judge-created exception has been to award expenses where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself. . . . To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense.

396 U.S. at 391-92 (citation & footnote omitted).

22. *Id.* at 392-95.

through the enforcement of the proxy statutes.[23] Thus, the plaintiffs were entitled to recover the costs of the litigation from the corporation.

The common fund doctrine received perhaps its broadest application in *Hall v. Cole*.[24] The plaintiff had circulated various petitions among his fellow union members, charging the union leadership with undemocratic action and shortsighted policies. He was subsequently expelled from the organization and brought suit, claiming that this action violated section 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959[25] which protects the right of free speech. The plaintiff was successful and was granted fees from the union fund. The Court relied on the fact that the plaintiff had vindicated not only his own right of free speech, but the rights of all members through the enforcement of an important congressional policy, thereby rendering a substantial service to the membership as a whole.[26]

Two observations about the acknowledged equitable exceptions are noteworthy. First, their very existence speaks to the power of the courts to devise new remedies whenever necessary.[27] Secondly, the evolution of the common fund doctrine demonstrates a liberalizing attitude of the Supreme Court regarding the circumstances appropriate for the awarding of fees.

Initially, the latter doctrine required that a pecuniary benefit be conferred directly upon a known group of beneficiaries. As it has since developed, no monetary benefit need be created for the doctrine to apply, provided that there is a "substantial" benefit and that it devolves upon some ascertainable class. The most recent Supreme Court cases have found that the furtherance of congressional policies embodied in federal statutes meets the "substantial benefit" test. As will be seen presently, this characterization of the common fund doctrine differed from the private attorney general rationale in only one material respect—the latter doctrine required only that the benefit be shared by a large number of persons and not that those benefited by the litiga-

23. *Id.* at 396. For an in-depth look at *Mills* see *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 211-18 (1970); Note, *Mills v. Electric Auto-Lite Company: Proxy Violations—The Causation Question and the Award of Attorney's Fees*, 65 NW. U.L. REV. 854 (1970); Comment, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316 (1971); Recent Cases, *Causation—Attorneys' Fees and Section 14(a) of the Securities Exchange Act of 1934*, 36 MO. L. REV. 133 (1971).

24. 412 U.S. 1 (1973).

25. 29 U.S.C. § 412(a)(2) (1970).

26. 412 U.S. at 7-9.

27. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 272-78 (1975) (Marshall, J., dissenting).

tion be an ascertainable class. There is no question that this difference makes the application of the common fund doctrine improbable in public interest litigation.[28] Whether this difference should have been considered sufficient to justify striking down the private attorney general rationale while retaining the common fund exception is immaterial in view of the holding in *Alyeska.*

In any event, in 1968, several years before the most liberal applications of the common fund doctrine in *Mills* and *Hall,* a Supreme Court case arose which did not involve any of the equitable exceptions, but which heavily influenced the birth of the private attorney general theory. In *Newman v. Piggie Park Enterprises, Inc.*[29] the plaintiff instituted a class action based on section 204(a) of the Civil Rights Act of 1964[30] to enjoin racial discrimination in the defendant's eating establishments. After winning on the merits, the plaintiff was awarded fees in accordance with the Act which provided that the prevailing party was entitled to a reasonable attorney's fee in the court's discretion.[31] But in explaining its decision, the Court went beyond the language of the statute:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. *When a plaintiff brings an action* under that Title, he cannot recover damages. If he obtains an injunction, *he does so not for himself alone but also as a 'private attorney general, vindicating a policy that Congress considered of the highest priority.* If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.[32]

This dictum, plus the existence of the two acknowledged equitable exceptions, apparently suggested to many lower federal courts that an award of attorneys' fees was appropriate, even in the absence of a statutory grant, where the party suing served an important congressional

28. Given the number of people benefitted by public interest litigation and the fact that they do not all belong to some common association, there would be no way to impose fees on a common treasury in order to spread the costs of litigation proportionately among them. The appeals court in *Alyeska* concluded that to apply the common fund exception in this case would be to "stretch it totally outside its basic rationale . . . ." Wilderness Society v. Morton, 495 F.2d 1026, 1029 (D.C. Cir. 1974).

29. 390 U.S. 400 (1968) (per curiam). This decision was reaffirmed in Northcross v. Board of Education, 412 U.S. 427 (1973) (per curiam).

30. 42 U.S.C. § 2000a-3(a) (1970).

31. *Id.* § 2000a-3(b).

32. 390 U.S. at 401-02 (emphasis added) (footnotes omitted).

policy impacting a great many persons.[33] And in a period of increased access to the courts through the Supreme Court's liberalization of standing requirements, the principal obstacle to such public interest litigation was the cost involved.[34] With the adoption of the private attorney general rationale, this obstacle could be overcome.

During the seven-year interval between *Piggie Park* and *Alyeska*, many lower federal courts endorsed the private attorney general rationale,[35] while at least one refused to countenance it.[36] Meanwhile, the Supreme Court scrupulously avoided the question, twice expressly refusing to rule on the validity of the doctrine.[37] However, in *Alyeska* the issue was placed squarely before it.

The factual setting in *Alyeska* was such that the Court could have disposed of the case without ruling on the validity of the private attorney general theory by merely finding it inapplicable. The swift, negative congressional reaction to the pipeline construction delay engendered by this suit suggests that at least Congress believed no important goal was being furthered.[38] However, this was not the approach taken. Instead, the decision was firmly grounded on the belief that the private attorney general doctrine has no place in American jurisprudence.

Surprisingly, the Court devoted little attention to the line of its earlier decisions developing and enlarging the common fund equitable exception,[39] and failed to even consider the broad language of *Piggie Park*. Rather, congressional intent was considered determinative and

33. *See* Souza v. Travisono, 512 F.2d 1137 (1st Cir. 1975); Taylor v. Perini, 503 F.2d 899, 905 (6th Cir. 1974); Fowler v. Schwarzwalder, 498 F.2d 143, 144-46 (8th Cir. 1974); Cornist v. Richland Parish School Bd., 495 F.2d 189, 192 (5th Cir. 1974); Hoitt v. Vitek, 495 F.2d 219, 220-21 (1st Cir. 1974); Brandenburger v. Thompson, 494 F.2d 885, 888-89 (9th Cir. 1974); Fairley v. Patterson, 493 F.2d 598, 605-06 (5th Cir. 1974); National Resources Defense Council, Inc. v. Environmental Protection Agency, 484 F.2d 1331, 1332-34 (1st Cir. 1973); Cooper v. Allen, 467 F.2d 836, 841 (5th Cir. 1972); Knight v. Auciello, 453 F.2d 852, 853 (1st Cir. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143, 147-48 (5th Cir. 1971); Sims v. Amos, 340 F. Supp. 691, 694-95 (M.D. Ala.), *aff'd mem.*, 409 U.S. 942 (1972); La Raza Unida v. Volpe, 57 F.R.D. 94, 98-102 (N.D. Cal. 1972).

34. King & Plater, *supra* note 5, at 27-31; Nussbaum, *supra* note 5, at 301-03.

35. Cases cited note 33 *supra*.

36. Bradley v. School Board, 472 F.2d 318, 327-31 (4th Cir. 1972), *vacated on other grounds*, 416 U.S. 696 (1974).

37. *See* F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 130 (1974); Hall v. Cole, 412 U.S. 1, 5-6 n.7 (1973).

38. Once the suit was brought to the attention of Congress, exempting legislation was quickly passed so that no further action was required before construction of the pipeline could begin. See note 3 *supra*. Therefore, it is arguable that the plaintiffs were not vindicating, but rather frustrating, a congressional policy of high priority. *Contra*, 421 U.S. at 285-86 (Marshall, J., dissenting).

39. *See* text accompanying notes 15-26 *supra*.

the lengthy series of enactments purporting to govern the costs allowable in federal litigation was examined for some evidence of this.

The earliest of these statutes had provided that the attorneys' fees allowable "in the circuit and district courts . . . [were to] be the same in each state respectively as [were] used or allowed in the supreme courts of the same."[40] But owing to the greatly diverse standards employed by the states, this plan gave rise to a curious patchwork of rules governing the awarding of fees in the federal courts, both confusing and inequitable in its operation.[41] In order to remedy this situation, an act was passed in 1853 which was to regulate attorneys' fees and all other costs to be allowed in federal litigation.[42] This act set out in great detail the amount of attorneys' fees that could be taxed against the losing party and no amount above this was to be allowed.[43] The substance of this act with some modification has been carried forward in subsequent codifications and remains in effect to date.[44]

The Court in *Alyeska* concluded that, because of this act and because some statutes make provision for attorneys' fees[45] while others do not, Congress enjoys hegemony over fee shifting.[46] While acknowledging the two equitable exceptions, discussed earlier,[47] the Court was unimpressed by them and felt that their existence did not warrant the creation of a third.[48] Hence, it was beyond the power of the lower federal courts to award fees under the private attorney general rationale in the absence of congressional authorization.

The majority's exclusive reliance on statutory construction as the basis for its decision is open to criticism. Although the general rule does not permit recovery of fees by the successful litigant, heretofore exceptions of both legislative and judicial creation have been recognized.[49] And while Congress can, expressly or impliedly, restrict the fees available under a particular statute, implied restrictions on the ju-

40. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93.
41. 421 U.S. at 251 & n.24.
42. Act of Feb. 26, 1853, ch. 80, 10 Stat. 161.
43. However, this was not intended to prevent an attorney from exacting a reasonable fee from his client, but only to prevent the imposition of a fee on the opposing party in an amount above that allowed by the statute. The Baltimore, 75 U.S. (8 Wall.) 377, 392 (1869).
44. 28 U.S.C. §§ 1920, 1923 (1970).
45. *See* note 11 *supra*.
46. 421 U.S. at 260-62.
47. See text accompanying notes 12-26 *supra*.
48. *See* 41 U.S. at 257-59 & 269-71.
49. 421 U.S. at 275 (Marshall, J., dissenting); *see* note 11 *supra* and text accompanying notes 11-26 *supra*.

dicial power to do equity are disfavored.[50] The "fee statute" had never before been regarded by the Court as a legislative embodiment of the American rule or a plenary restraint on the awarding of fees.[51] Moreover, the language purporting to make exclusive the nominal fees obtainable under the statute was deleted in the 1948 revision of the Judicial Code and has not reappeared in any of the subsequent versions.[52] Thus, the "fee statute" in its present form provides little, if any, evidence of a congressional intent to foreclose the discretionary awarding of fees by the federal courts.[53] Finally, neither the existence of this statute, nor the fact that some statutes provide for fees while others do not, had prevented the Court from adopting the two equitable exceptions noted.[54] These considerations prompted Justice Marshall, dissenting, to conclude "that the [majority] is willing to tolerate the 'equitable' exceptions to its analysis not because they can be squared with it, but because they are by now too well established to be casually dispensed with."[55]

According to *Alyeska,* attorneys' fees are not to be awarded unless a statute or enforceable contract provides for them or a party is able to bring himself within one of the two acknowledged equitable exceptions. Furthermore, the power of the federal courts to give birth to other judge-created exceptions, equitable or otherwise, was expressly disapproved. Now "it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine."[56]

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50. 421 U.S. at 278 & 281 (Marshall, J., dissenting).
51. *Id.* at 278; *see* text accompanying notes 12-26 *supra.*
52. 421 U.S. at 280-81 (Marshall, J., dissenting); 421 U.S. at 255-56 n.29 (majority opinion).
53. 421 U.S. at 280-81 (Marshall, J., dissenting).
54. *Id.* at 281-82 (Marshall, J., dissenting); *see* text accompanying notes 12-26 *supra.*
55. 421 U.S. at 278.
56. *Id.* at 262 (citation omitted). The full impact of this decision, especially in the civil rights area, is yet to be seen. Much civil rights litigation falls within the boundaries of title II which provides for attorneys' fees. Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) (1970). However, suits not so qualifying depend upon the equitable exceptions to obtain fees. Since proving bad faith is difficult, if not impossible, and the common fund doctrine is limited to an ascertainable class, it is possible that many meritorious civil rights claims will go unlitigated. Most of the cases awarding fees under the private attorney general rationale arose in the civil rights context. *See* cases cited note 33 *supra.*