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HARVARD LAW REVIEW

LAWYERS AND INVOLUNTARY CLIENTS: ATTORNEY FEES FROM FUNDS

John P. Dawson *

Although American courts generally do not allow winning litigants to recover their expenses for attorneys, one escape route has been found when their success creates or preserves a "fund" which benefits third parties not participating in the litigation. In this Article, Professor Dawson traces the development of the "common fund" mechanism, from its origins as a method of preventing unjust enrichment of strangers through the expenditures of active litigants, to applications permitting attorneys themselves to recover compensation from third parties in addition to that received under contracts with clients. He concludes that the solicitude courts exhibit toward lawyers in honoring claims so divorced from the restitution of benefits obtained through another's loss can be explained only by special judicial favor for fellow members of the guild.

THE refusal of American courts to include attorney fees in the costs awarded to winning litigants has been much criticized. Its main purpose supposedly is to ensure ready access to the courts by reducing penalties for failure, but for the litigant who prevails its effect is a partial denial of justice. For it means that in any case where legal services are needed and used, he must pay a substantial part of the cost of proving that his claim or defense was just. It is no wonder that avenues of escape have been searched for and found. The escape route that will be examined here permits charging attorney fees to funds that have been created, increased, or protected by successful litigation.

Funds can appear in many different forms, and in some instances may be subdivided into several minifunds. This fund concept is employed to realize the broadly defined purpose of recapturing unjust enrichment. As is true elsewhere this purpose, or aspiration, is controlled and contained by the environment in which it operates. Strict limits have been fixed in the past by the procedural and doctrinal setting, but when attention is concentrated on the fund, as an independent entity, its appeal, even spell, may well be increased. This spell, however, is also due to

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the uncertain and conflicting policies behind the rule that the fund idea circumvents.

I. POLICIES PROMOTED BY THE GRANT OR DENIAL OF COUNSEL FEES

The standard American rule excluding counsel fees from recoverable costs is a departure from the practice followed in England and other European countries on which reports have been made. No adequate historical explanation for the departure has ever been advanced, and in any event, the reasons commonly given — the spirit of individualism in frontier societies, the conception in earlier times of lawsuits as sporting contests, and the widespread hostility toward lawyers — are not persuasive now.¹ Even if distrust of lawyers does survive, it provides no reason for denying indemnity to their clients.

The conflict and confusion of purposes that are still at work are illustrated by the divergent reasons now given for changing the rule. On the one hand it is urged that an uncertain but potential liability for an opponent's counsel fee will make a litigant "stop and think" before commencing an action or asserting a defense and that this would be a good thing, for it would deter litigation and reduce court congestion. On the other hand it is argued with passion that because of the rule many meritorious litigants, especially the poor, are denied access to the courts by their inability to pay the expenses of litigation and it follows that their opponents should pay them.² The object of the latter pro-

¹ These and related themes are discussed in the well-known article of Arthur Goodhart, *Costs*, 38 YALE L.J. 849 (1929), and in Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963); Stoebe, *Counsel Fees Included in Costs: A Logical Development*, 38 COLO. L. REV. 202 (1966); Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216 (1967).

² See Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966). Another author has argued for a precisely opposite conclusion — that it is the English rule, charging winners' fees to losers, that brings disadvantage to the poor, i.e., to persons whose resources are so limited that they "cannot take the risk of being ruined" by a suit whose costs would exceed their capital. Goodhart, *Current Judicial Reform in England*, 27 N.Y.U. L. REV. 395, 406 (1952). But it seems rather that if their claims or defenses proved to be meritorious the poor would not be harmed but helped, since their recovery would then be increased. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUDIES 399, 439 (1973). The economic analysis of the latter author discloses the complexity of the variables that defeat any estimates framed in general terms. He points out that by increasing both the rewards for success and the penalties for failure the English practice may deter litigation and induce more settlements, *id.* at 428, but that this will depend most of all on the readiness or reluctance of those immediately concerned to take on the risks of litigation. *Id.* at 438-39.

posal quite evidently is to encourage litigation, or at any rate some types thereof.

The dilemma posed by these arguments is obvious. If the shifting to losers of the counsel fee expenses of winners became the general rule and if the rule were to be administered impartially, the assurance that litigants will be relieved of these expenses if they win would carry with it the certainty that their own expense in counsel fees will be doubled if they lose. The rule denying winners any allowance for counsel fees rests on an unverifiable guess that more potential litigants (suitors or defendants) will be deterred by the risk of doubled costs if they lose than will be encouraged by the prospect of indemnity if they win. Such an assumption is strengthened by the extensive use in chancy litigation of the contingent fee, which casts the risks of failure on lawyers, but situations occur in which lawyers cannot be induced to take the risks.

One response to this dilemma is to discriminate in the awarding of attorney's fees—to allow recovery of fees only by particular kinds of winners or against particular kinds of losers. In this regard, legislatures can be selective in ways that courts, purporting to render evenhanded justice, would find it harder to justify. Scattered through state statutes are provisions in great variety giving counsel fees to particular types of successful litigants, but federal legislation on the subject has special interest.³ Particularly in civil rights cases, the discretion conferred on the courts

³ Such provisions of federal legislation are of two main types. The first type openly discriminates—counsel fees are awarded only to successful plaintiffs and the awards are mandatory. The most important instance is the plaintiff who sues for an antitrust violation and recovers treble damages, 15 U.S.C. § 15 (1970). Also singled out for special favor are litigants suing creditors who fail to make the finance charge disclosures required by the Truth in Lending Act, 15 U.S.C. § 1640(a)(2) (1970), common carriers and certain other federally regulated utilities that commit certain specified misdeeds or defaults, 7 U.S.C. §§ 210(f), 499g (1970); 45 U.S.C. § 153(p) (1970); 46 U.S.C. § 1227 (1970); 47 U.S.C. § 206 (1970); 49 U.S.C. §§ 16(2), 908(b), (e) (1970), and employers who pay less than the federally legislated minimum wage, 29 U.S.C. § 216(b) (1970). *See also* 15 U.S.C. § 72 (1970) (conspiracies to dump imported commodities); 38 U.S.C. § 1822(b) (1970) (intentional overcharging in federally financed sales to veterans).

The statutes of the second type do not, on their face, discriminate, but call for the award of counsel fees to the "prevailing party," subject to court discretion. Provisions of this type have long appeared in the patent, 35 U.S.C. § 285 (1970), and copyright, 17 U.S.C. § 116 (1970), legislation. They are also included in the civil remedies provided for violations of the federal securities laws, 15 U.S.C. §§ 77k(e), 77www(a), 78i(e), 78r(a) (1970), and in the civil remedies used to reinforce controls over internal union management, 29 U.S.C. §§ 431(c), 501(b) (1970). More important nowadays is the federal civil rights legislation, which relies heavily on private litigation to prevent or to penalize discrimination in public accommodations, employment, and the sale or leasing of housing. *See* 42 U.S.C. §§ 2000(a)-(3)(b), 2000(e)-5(k), 3612(c) (1970).

can enable a sympathetic judiciary to discriminate against losing defendants and in favor of losing plaintiffs and thus resolve the dilemma that has inhibited more basic change elsewhere.⁴

For the argument that is to follow it is important to note that these legislative provisions all have a specific and limited objective — to reimburse winning clients for liabilities incurred to their lawyers. The statutes do not give or purport to give to the lawyers themselves any independent right to an extra fee that they can enforce against the losing party.⁵ This is equally true of the doctrine manufactured by federal courts allowing awards of attorney fees against litigants who have engaged in fraudulent, groundless, or vexatious conduct in causing or conducting federal court litigation. This doctrine represents another sharp reaction against the rule denying counsel fees to winners. It has been applied freely by the federal courts, in a very wide range of civil litigation,⁶ but its object, like that of the special legislation mentioned, is to save winning clients harmless from the costs they incurred in winning, not to give lawyers rewards of their own — most specially, not extra rewards.

It thus appears that the exclusion of attorney fees from recoverable costs expresses no solidly supported judgment of policy, and rests on a highly debatable calculus of probabilities. In particular, it seems clear that no policy is undermined by allowing recovery where the claim for reimbursement can be deflected

⁴ The use of attorney fees to promote the purposes of federal civil rights legislation has been much discussed. See, e.g., Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U. L. REV. 301 (1973); Note, *Awarding of Attorneys' Fees in School Desegregation Cases: Demise of the Bad-Faith Standard*, 39 BROOKLYN L. REV. 371 (1972); Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HASTINGS L.J. 733 (1973).

⁵ This is clear enough in the statutory language and was strongly affirmed in *First Iowa Hydro Elec. Co-op v. Iowa-Illinois Gas & Elec. Co.*, 245 F.2d 630 (8th Cir.), cert. denied, 355 U.S. 871 (1957). Here the attorneys for a plaintiff in an antitrust damage action claimed an interest in the litigation by virtue of their contract for a contingent fee and appealed on that ground, unsuccessfully, from dismissal of the action.

Some slight doubt is raised as to civil rights cases by the dicta in *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970). There the question was whether an award of attorney fees was precluded if there was no evidence that the successful plaintiffs were obligated to pay an attorney fee. The court in *Bell v. Alamatt Motel*, 243 F. Supp. 472 (N.D. Miss. 1965) (alternate holding), had held that in that case no fee should be awarded, but the Fifth Circuit in the *Miller* case disagreed. Judge Brown added that the court itself would "assure" that the fee, when fixed, would go to the lawyer, not the client. *Id.* at 539. Further discussion appears in Note, *Awards of Attorney's Fees to Legal Aid Offices*, 87 HARV. L. REV. 411; 421-22 (1973).

⁶ See 6 J. MOORE, *FEDERAL PRACTICE* ¶ 54.77[2], at 1709-11 & n.17 (2d ed. 1974); Annot., 8 L. Ed. 2d 894, 912-13 (1963).

toward a stranger — where a litigant, suing on a cause of action of his own, has succeeded and it then appears that his success has ensured gains of nonparty strangers. He will be denied recovery from his opponent of his out-of-pocket loss in counsel fees, even though it was his opponent's resistance that caused this loss, mainly because of the deterrent effect on litigation generally if all of its real costs were regularly shifted to losers. But such reasoning is entirely irrelevant to a claim against a complete outsider, to recapture some part of the windfall to him. If the outsider were to object that the successful litigant is a self-serving intermeddler in his affairs (as he undoubtedly is), that is answered by the fact that at times our attitude toward such intermeddlers is distinctly favorable. In the case supposed a claim to recover unjust enrichment could be framed as a claim of the enterprising litigant to enforce contribution to costs that he had necessarily incurred in bringing gains to himself and necessarily, without any element of altruism, to others. Where interests are intertwined and united to this degree, the aspiration of preventing enrichment of one through another's loss awaits only a favorable opportunity to reassert itself.⁷

II. ORIGINS OF THE COMMON FUND

The "common fund" as a source of counsel fees has been created, almost single-handedly, by the United States Supreme Court. The landmark decisions of that Court will be sketched in this section, up to the point where this contrivance, with impetus and fuel supplied from the same source, took off from the launching pad and headed off toward destinations that are as yet unknown.

The first landmark case, *Trustees v. Greenough*,⁸ nearly a century ago presented the claim for restitution in a way that was as appealing as one could well imagine. The state of Florida had conveyed to trustees more than ten million acres of state-owned land to provide security for a bond issue of the Florida Railroad Co. The trustees had collusively sold hundreds of thousands of acres at nominal prices and had failed to provide reserves for payment of interest and principal on the bonds. Vose, a large holder of the Railroad Company's bonds, sued to set aside the transfer as fraudulent and for the appointment of a receiver. After eleven years of litigation at his own expense he had recaptured the looted assets and secured large payments to the bondholders, which they had accepted.

Vose, the client, then presented a claim for reimbursement of

⁷ Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. REV. 1409, 1418 (1974).

⁸ 105 U.S. 527 (1881).

his lawyers' fees. The residue of the restored trust estate was still being administered by a receiver under the trial court's direction in the interest of the bondholders, so there was a fund under the court's "control" that could be tapped. As the Supreme Court pointed out, if the trustees themselves had rightfully incurred these expenses in retrieving the assets for the trust, the expenses would have been chargeable to the trust estate, which by familiar rules must "bear the expenses of its own administration";⁹ Vose had merely performed the trustees' duty. The Court concluded that to deny Vose contribution to the costs he had incurred¹⁰

would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; . . . [t]hey ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution.

The Court in *Greenough*, however, drew a sharp distinction between lawyer and client. While Vose, the active litigant, was held to be entitled to a "charge" for the reasonable value of his lawyers' services, which the lower court would fix with a wide discretion, it had no discretion to award an allowance to Vose himself for his own time and expenses. He was a creditor who sued to promote his own interest and it would present too great a temptation to litigants to "intermeddle" in the management of funds "if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid."¹¹ The *Greenough* case has been followed in this as in other ways. The recovery allowed is for services by lawyers. I know of no case that uses the *Greenough* doctrine to reimburse the litigants themselves for their own time, travel, or personal expenses, however necessary their efforts may have been to litigation that conferred gains on others.¹²

The second landmark case, *Central Railroad & Banking Co. v. Pettus*,¹³ moved beyond *Greenough* in that the claim on the

⁹ *Id.* at 532.

¹⁰ *Id.*

¹¹ *Id.* at 538.

¹² The only other case discovered in which this issue was even discussed was the taxpayer's action in *Horner v. Chamber of Commerce*, 236 N.C. 96, 72 S.E.2d 21 (1952), where the taxpayer was awarded contribution to his attorney fees but the court in dictum said that he was not entitled to an allowance for his own time and effort since he should not "capitalize on the suit." 236 N.C. at 101, 72 S.E.2d at 24-25.

¹³ 113 U.S. 116 (1885).

"fund" was asserted in that case not by a client, but directly by attorneys. The original action,¹⁴ a creditors' bill brought in an Alabama state court to reach the assets of the debtor, a railroad, had been framed as a class action. After the action succeeded, the lawyers sought to recover for the services they had provided to inactive class members. In response to the objection that petitioning attorneys had already received the agreed fee for their services from their clients and should recover no more, the Supreme Court deemed it enough to say that the attorneys had throughout intended to charge fees of all other creditors who took advantage of the decree and that otherwise they would have charged their own clients more. As to the absence of any agreements between the attorneys and the passive members of the class, the Court said merely that these members knew the action was a class action brought in part for their protection and, as in the *Greenough* case, "every ground of justice" called for payment by those who "accepted the fruits" of the labors of others.¹⁵ To secure their right to an extra fee, the lawyers were given a lien on the railroad assets that had been salvaged by the decree and made available to satisfy the creditors' claims. In the event of nonpayment of the extra fee the lien was to be enforced by sale of these salvaged assets.¹⁶

The Court seemed to be cheerfully unaware that it had leaped across a gulf. The *Greenough* case three years before had approved the claim of a *client* for contribution to the litigation costs that he had incurred but under the usual rule could not recover from his losing opponents. The *Pettus* case totally transformed this into an independent right of the *lawyer*, reinforced by lien, to an extra reward so that he might share the wealth of strangers. The lawyer was suddenly thought of as producer of this wealth,

¹⁴ *Montgomery & W.P.R.R. v. Branch, Sons & Co.*, 59 Ala. 139 (1877).

¹⁵ 113 U.S. at 127.

¹⁶ The lien given by the decree of the Federal Circuit Court for the Middle District of Alabama, and approved by the Supreme Court, was on the roadbed, depots, trestles, and bridges owned by the original debtor, the Montgomery and West Point Railroad. These fixed assets had been transferred successively to the Western Railroad and then to two Georgia corporations which at the time of the decree, and apparently also at the time of its approval by the Supreme Court, were still operating the railroad. *See id.* at 117. There was the further difficulty that the original creditors' bill was still pending before the Alabama state court and the only issue removed to the federal court (through diversity of citizenship) was the lawyers' petition for an additional fee. It seems quite plain that the federal court, foreclosing the lien, would have no means to determine priorities as between the lawyers and the creditors of the railroad and that there would not be much left for trains to run on if these fixed assets were sold. It seems safe to infer that the Supreme Court considered the lawyers' lien to come first and to be enforceable even if the "fund" were dissipated so as to leave nothing for the nonclient creditors that the lawyers' services had supposedly benefited.

though he did nothing more than perform his contract with his own client, and furthermore had been paid by his client in full the sum he had agreed to accept. The only explanation for this surprising result must be that the Court was bemused by the thought that the lawyers were the single-handed and primary benefactors.¹⁷ For then and ever since if anyone other than a lawyer had presented such a farfetched claim, no court would be bemused by the appeal to unjust enrichment. Under the usual formula of enrichment through another's loss, it would be difficult indeed for the claimants in the *Pettus* case to contend that they had suffered any loss at all, since they had been paid by their clients the full contract price for their services.¹⁸ Prior to that case, state courts had held that even attorneys had no claim against strangers, nonclients, for the profit from the lawyer's services.¹⁹ This view continued to reappear for some time thereafter in state court decisions.²⁰ As will be seen shortly it is always held in reserve and is promptly reasserted when there is no "fund" available to trigger the *Greenough-Pettus* machinery.

In the *Pettus* case, in order to justify giving the lawyer-claimants a lien on the assets that had been salvaged by the creditors' bill, the Court cited two Alabama decisions which allowed lawyers "charging" liens on judgments that their services

¹⁷ The only clue on this point in Justice Harlan's opinion for the Court is his statement that the recovery ensured to the nonclient creditors "was due to the skill and vigilance of the [petitioning attorneys], so far as the result of litigation may, in any case, be referred to the labors of counsel." *Id.* at 126.

¹⁸ See Dawson, *supra* note 7, at 1444-57 (discussing gains to strangers through performance of the producer's own contract; in those situations, claims of enrichment, uniformly rejected, were made somewhat more plausible by the likelihood that the producer would suffer a loss through the default of his own contract partner).

¹⁹ *Chicago, St. Charles & M.R.R. v. Larned*, 26 Ill. 218 (1861); *Jones v. Woods*, 76 Pa. 408 (1874); *Hand v. Savannah & Charleston R.R.*, 21 S.C. 162 (1883).

In *Grimball v. Cruse*, 70 Ala. 534 (1881), the court in dicta conceded that with creditors' bills, where a fund is brought within court control, lawyers' fees should be deducted from the shares of inactive creditors who benefit. But the case itself was a proceeding to construe a will in which attorneys for two distributees established a construction that ensured inheritance by other distributees similarly situated. An allowance to the lawyers, payable out of the shares of the inactive distributees, was denied with the comment:

To travel beyond the parties making the contract, in search of an implied promise to pay for such incidental benefit, would introduce a new and dangerous principle in implied contracts, the extent of which it is difficult to conjecture.

Id. at 544.

²⁰ *In re Estate of Officer*, 122 Iowa 553, 98 N.W. 314 (1904); *Forman v. Sewerage & Water Bd.*, 119 La. 49, 43 So. 908 (1907); *Succession of Kernan*, 105 La. 592, 30 So. 239 (1901); *McGraw v. Canton*, 74 Md. 554, 22 A. 132 (1891); *Rives v. Patty*, 74 Miss. 381, 20 So. 862 (1896); *Mayfield v. McKnight*, 56 S.W. 42 (Tenn. Ct. Ch. App. 1899).

helped to procure.²¹ The "charging" lien, a security device manufactured by American courts in aid of lawyers, is widely recognized in American law but as normally applied, and as previously applied in Alabama, it merely reinforced claims of lawyers against their own clients.²² Being persuaded that *Greenough* controlled, the *Pettus* court could, without hesitation, apply this device rooted in contract against third parties with no contractual obligation. And so the machinery was perfected and depersonalized. The lawyers' claim was not against strangers to the contract with their own client, indeed it was not against people at all. It was a charge on a "fund," which could be seized and sold if it did not pay. This line of thought, of course, conceals the Hobson's choice confronting the owners of the fund: the only way they could escape paying the lawyers was to abandon their own shares in the fund.

Even if lawyers were to be given liens on strangers' shares in funds, there was no inevitable logic to dictate that they should recover an extra fee, in addition to that due from their own clients.²³ It is possible to think of the "fund" as a form of security, available as an ultimate recourse to cover any deficit in the payment due the lawyer from his client. This view has been adopted in one case.²⁴ The lawyer's claim would then be derivative and would simply reinforce the purpose of the *Greenough* result, which was to compel contribution to the litigation costs of the client. For it could be argued that it was the merit of the

²¹ *Ex parte* Lehmann, Durr & Co., 59 Ala. 631 (1877); *Warfield v. Campbell*, 38 Ala. 527 (1863).

²² *Ex parte* Lehmann, Durr & Co., 59 Ala. 631 (1877); *Warfield v. Campbell*, 38 Ala. 527 (1863); 2 E. THORNTON, A TREATISE ON ATTORNEYS AT LAW §§ 578-98 (1914); *Wentworth, Attorneys' Lien — A Survey and a Proposal*, 35 CONN. B.J. 191 (1961). But in the absence of statute, liens on physical assets (land or goods) recovered for the client are usually not awarded. *See* Annot., 93 A.L.R. 667 (1934).

²³ In the *Pettus* case, of course, there would have been no contest if they had not demanded more, since the fees due from the clients to the lawyer-petitioners had already been fully paid.

²⁴ In *Maurer v. International Re-insurance Corp.*, 33 Del. Ch. 456, 95 A.2d 827 (1953), some insurance companies that had re-insured their risks with International established that they and other re-insurers were entitled to share in a trust fund set up to secure "policyholders." Maurer, attorney for the active litigants, sought a charge on the trust fund for his services. The Supreme Court of Delaware conceded that under the *Pettus* case payment of a "common fund" could be ordered directly to an attorney, but asserted that this was only for convenience, and that any claim belonged to the client, for contribution to the client's costs in order to relieve him of the "burden of the costs of litigation" and should be asserted in the client's name; otherwise the lawyer would be paid twice and unjustly enriched. *Id.* at 463, 95 A.2d at 831.

It should be noted that persons other than lawyers have uniformly failed in efforts to make up deficits in the returns due from their contract partners by recouping value they have added to assets owned by third parties. *Dawson, supra* note 7, at 1458.

client's claim, which the lawyer was under a duty to demonstrate, that produced the benefit to others. Indeed the conception of the client as producer of the benefit is firmly rooted in the *Greenough* case and has by no means disappeared. Though claims against "funds" are asserted overwhelmingly by lawyers on their own behalf, clients do occasionally sue. It is agreed everywhere that if a *Greenough*-type fund can be found, the client can assert in his own name a claim for contribution to his costs against the fund that his litigation has "created, increased, or protected."²⁵

The net result is that either client or lawyer can secure a charge on a *Greenough*-type fund for legal services rendered in successful litigation. In the rare case where the client sues it is taken for granted, and *Greenough* itself implied, that the claim

²⁵ The following list of 28 successful claims of clients for contribution, if not complete, is nearly so: *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *Cole v. Hall*, 462 F.2d 777 (2d Cir. 1972); *Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981 (3d Cir. 1970), *cert. denied*, 401 U.S. 911 (1971); *Gibbs v. Blackwelder*, 346 F.2d 943 (4th Cir. 1965); *Gilson v. Chock Full O'Nuts Corp.*, 326 F.2d 246 (2d Cir. 1964); *Walsh v. National Savings & Trust Co.*, 247 F.2d 781 (D.C. Cir. 1957); *Carbon Steel Co. v. Slayback*, 31 F.2d 702 (4th Cir. 1929); *Bright v. Philadelphia-Baltimore-Washington Stock Exch.*, 327 F. Supp. 495 (E.D. Pa. 1971); *Brown v. T.W. Phillips Gas & Oil Co.*, 105 F. Supp. 479 (W.D. Pa. 1952); *Washington Fire & Marine Ins. Co. v. Hammett*, 237 Ark. 954, 377 S.W.2d 811 (1964); *Farmers' & Merchants' Nat'l Bank v. Peterson*, 5 Cal. 2d 601, 55 P.2d 867 (1936); *In re Estate of Lundell*, 107 Cal. App. 2d 463, 237 P.2d 62 (1951); *Pensioners Protective Ass'n v. Davis*, 122 Colo. 535, 150 P.2d 974 (1944); *Phillips v. Liberty Mut. Ins. Co.*, 253 A.2d 502 (Del. 1969); *Lovrien v. Fitzgerald*, 245 Iowa 1325, 66 N.W.2d 458 (1954); *Farmers Bank & Trust Co. v. Stanley*, 190 Ky. 762, 228 S.W. 691 (1921); *Louisville Presbyterian Theological Seminary v. Botto*, 117 Ky. 962, 80 S.W. 177 (1904); *Helm v. Smith-Fee Co.*, 79 Minn. 297, 81 N.W. 542 (1900); *Swedish-American Nat'l Bank v. Davis*, 71 Minn. 508, 74 N.W. 286 (1898); *White v. University Land Co.*, 49 Mo. App. 450 (1892); *Allen v. Omaha*, 136 Neb. 620, 286 N.W. 916 (1939); *Peterson v. John J. Reilly, Inc.*, 105 N.H. 340, 200 A.2d 21 (1964); *Klaciak v. Kovacs*, 111 N.J. Super. 307, 268 A.2d 305 (1970); *Horner v. Chamber of Commerce*, 236 N.C. 96, 72 S.E.2d 21 (1952); *Kinney v. Uglow*, 163 Ore. 539, 98 P.2d 1006 (1940); *In re Estate of Engebretson*, 68 S.D. 255, 1 N.W.2d 351 (1941); *State ex rel. Bonner v. Andrews*, 131 Tenn. 554, 175 S.W. 563 (1915); *Tennessee United Paint Store, Inc. v. D.H. Overmyer Warehouse Co.*, 62 Tenn. App. 721, 467 S.W.2d 806 (1971), *cert. denied*, 467 S.W.2d 806 (Tenn. 1971). Stockholders' derivative suits have peculiar features and must be dealt with separately.

The solution in *In re Continental Vending Mach. Corp.*, 318 F. Supp. 421 (E.D.N.Y. 1970), seems to be unique—the lawyer, not the client, presented the claim, but the fee awarded the lawyer out of the "fund" was ordered paid directly to his client as reimbursement for the fee already paid by the client. *Id.* at 433.

It may be in some of these cases that the client's name was used as a matter of form, the real object being to secure an additional fee for his lawyer. This seems to be true of *Carbon Steel Co. v. Slayback*, *supra*, and *Smith v. Kroeger*, 138 Ohio St. 508, 37 N.E.2d 45 (1941). It clearly was the object in the analogous case of *Hopkins v. Cohen*, 390 U.S. 530 (1968), which did not involve a "fund."

The only case I have found in which both client and lawyer joined in the application for a fee for the lawyer is *In re Estate of Merica*, 99 Neb. 229, 155 N.W.

for legal services is a first charge on the fund and must be satisfied before any distribution occurs.²⁶ The same priority is assumed for the lawyer's own claim when asserted independently, and where the issue of priority rises to the surface this is made explicit.²⁷ The lawyer's claim is independent in the sense that he can assert it, though foreclosure of his lien may destroy the fund²⁸ or so deplete it that there is nothing left to pay his own client.²⁹ He can assert his claim though he has agreed with his client to serve the client gratuitously.³⁰ It has even been held that where the client's petition for contribution to his own outlay in attorney fees was brought first and denied, the denial did not operate as *res judicata* to bar the lawyer's separate claim for a fee, chargeable to the fund.³¹

This priority accorded to the claims of both client and lawyer, however, does not explain the triumphant progress of the "common fund" that originated in *Greenough* and *Pettus*. Its primary attraction clearly lies in the device it provides for awarding extra fees to lawyers. It is tempting to explain the progress of this idea through accidents of litigation — two cases decided only three years apart by a court with a nationwide audience, the first case (*Greenough*) extremely appealing on its facts and in the limited purpose it set forth (contribution to litigation costs, not reimbursable otherwise, incurred by a litigant whose success brought gains to others); the second case (*Pettus*) then slipping past under the protective fog of the first. But accident, if it played a part, does not explain the enthusiasm with which the message of *Pettus* was received. It is constantly restated with fervor which is at times reinforced by the Bible. Strangers who resist paying lawyers for services that have brought them benefits inspire judicial indignation, which is not expended on behalf of intermeddlers of other professions: "It is repugnant to fundamental principles

887 (1915), but the object here seems to have been, again, to secure not contribution for the client but an extra fee for the lawyer.

²⁶ *Carbon Steel Co. v. Slayback*, 31 F.2d 702 (4th Cir. 1929); *Farmers' Bank & Trust Co. v. Stanley*, 190 Ky. 762, 228 S.W. 691 (1929); *Peterson v. John J. Reilly, Inc.*, 105 N.H. 340, 200 A.2d 21 (1964).

²⁷ *Winslow v. Harold G. Ferguson Corp.*, 25 Cal. 2d 274, 153 P.2d 714 (1944) (priority prevailing over not only the claims of other creditors but also the lien of the federal government for income taxes); see *United States v. Hubbell*, 323 F.2d 197 (5th Cir. 1963); *Columbia Cas. Co. v. Consolidated Shipping Co.*, 276 F. Supp. 600 (E.D. La. 1967).

²⁸ This was at least a possibility in the *Pettus* case if the lien given the lawyers was foreclosed by sale. See note 16 *supra*.

²⁹ See *Campbell v. Provident Sav. & Loan Soc'y*, 61 S.W. 1090 (Tenn. Ct. Ch. App. 1900).

³⁰ See *Washington Gas Light Co. v. Baker*, 195 F.2d 29, 33-34 (D.C. Cir. 1951).

³¹ *Wallace v. Fiske*, 80 F.2d 897, 909-12 (8th Cir. 1936).

of equity . . . that they should reap where they have not sown."³² It seems that these two decisions tapped some deeper streams of emotion. The case law that has grown out of *Greenough* and *Pettus* expresses a conviction, widely held among judges and lawyers, at least, that lawyers have a right that is denied to all the rest of the population,³³ to share the wealth of strangers that their services have produced.

It is clear that such claims of lawyers against strangers cannot be explained as a product of express contract. In the client's remedy for contribution, as authorized by the *Greenough* case, there is at least a remote connection with express contract in that the client's contractual liability to his lawyer sets a ceiling on the litigation costs that are to be shared. But the lawyer's remedy, introduced by the *Pettus* case, must be conceived as a form of wholly extra-contractual restitution. It does not aim, of course, to recapture all the gain that the strangers realize. That there be a gain is a requirement but, as we shall see, it need not be measured by economic tests and can take peculiar shapes that would not fit in any other type of restitution. The fee fixed in the contract of the lawyer with his own client is usually not mentioned but in any event clearly should not control.³⁴ His recovery is presumably measured by the market value of the services rendered, but the market for services by lawyers in risky litigation is dominated and pervaded by contingent fees. In the absence of a governing contract, fixing fees is a function of judges, not juries, and judicial valuation of lawyers' services employs a medley of shifting and unrelated variables.³⁵ One of the variables that is

³² Petition of Crum, 196 S.C. 528, 533, 14 S.E.2d 21, 24 (1941).

³³ See Dawson, *supra* note 7, at 1458.

³⁴ Holding that it does not control: Little Rock Road Mach. Co. v. Light, 240 Ark. 1012, 403 S.W.2d 726 (1966); G.M. Dykes Iron Works, Inc. v. Dehenffe, 131 So. 2d 760 (Fla. Ct. App. 1961); Webster County Soil Conserv. Dist. v. Shelton, 437 S.W.2d 934 (Ky. 1969); *In re Interstate Trust & Banking Co.*, 235 La. 825, 106 So. 2d. 276 (1958); *cf. In re Faling's Estate*, 113 Ore. 6, 228 P. 821 (1924).

The only significant group of cases that carries over the contingent fee arrangements with clients to claims against nonclients are the subrogated insurer cases. See notes 82, 85 *infra*.

³⁵ One of the statements most quoted is that of Judge Woolsey in *In re Osofsky*, 50 F.2d 925, 927 (S.D.N.Y. 1931), describing as elements to be considered:

- (1) The time which has fairly and properly to be used in dealing with the case; because this represents the amount of work necessary.
- (2) The quality of skill which the situation facing the attorney demanded.
- (3) The skill employed in meeting that situation.
- (4) The amount involved; because that determines the risk of the client and the commensurate responsibility of the lawyer.
- (5) The result of the case, because that determines the real benefit to the client.
- (6) The eminence of the lawyer at the bar, or in the specialty in which he may be practicing.

usually and prominently mentioned is "the result obtained" as a measure of the benefit to those lawyers serve.³⁶ Understood in economic terms, this logically implies that a diminished recovery means a scaled down fee.³⁷ But in the overwhelming majority of cases the stress is laid on the gains to "funds" through successful litigation and has the effect of magnifying fees. So this strange hybrid form of restitution ends up, not as an accounting to the lawyer for whatever profit results from "his" litigation, but as a profit-sharing scheme with the shares determined by judges under variable and uncertain standards.

Most of this was still in the future at the time of the *Greenough* and *Pettus* cases. Though they fixed the main lines that have been followed since, for frequency of quotation they have both been displaced by a third case decided by the United States Supreme Court, *Sprague v. Ticonic National Bank*.³⁸ It is quoted not for its decision but for some sweeping dicta. The case was one of the rarities where a client sued, seeking contribution for litigation expenses, including counsel fees.³⁹ In fact there was already in existence a clearly identified fund, bonds that had been set aside and earmarked as the subject of an express trust previously created; the only complication was that there were fourteen beneficiaries with no allocation of any bonds to any of them in particular. Sprague sued and established her own right as one of the beneficiaries to a lien on the proceeds of the bonds, which had been sold in the meantime by a receiver. Having established her right to share in the proceeds along with the other cestuis que trust, she then sought an allowance for her counsel fees, to be paid out of the same money proceeds.

It would have been enough to cite the *Greenough* case, but Justice Frankfurter seized the occasion to speak expansively on the historic powers of equity courts to award counsel fees.⁴⁰

Each case, of course, differs to some extent from every other case in respect of the importance of these several elements.

See also ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration No. 2-18:

The fees of a lawyer will vary according to many factors, including the time required, his experience, ability and reputation, the nature of the employment, the responsibility involved, and the results obtained.

Two extensive annotations classify these and other elements that are mentioned in reported cases. Annot., 56 A.L.R.2d 13, 31-36 (1957); Annot., 143 A.L.R. 672, 693-700 (1943). Where little work is needed, the size of the fund is not controlling. See, e.g., *Allen v. City of Omaha*, 136 Neb. 620, 286 N.W. 916 (1939).

³⁶ See sources cited note 35 *supra*.

³⁷ *In re Continental Vending Mach. Co.*, 318 F. Supp. 421 (E.D.N.Y. 1970); *Baltimore & O.R.R. v. Brown*, 79 Md. 442, 29 A. 524 (1894).

³⁸ 307 U.S. 161 (1939).

³⁹ See pp. 1606-07 & note 26 *supra*.

⁴⁰ 307 U.S. at 164-67.

Though the issue had not been raised below,⁴¹ he then noted that Sprague had not brought her action as a class action so that the other thirteen beneficiaries had not had their rights established by the decree in her favor. On this point he commented: ⁴²

Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.

This statement could be read narrowly as meaning merely that the availability of a “fund” for recovery of fees is not limited to those cases where the beneficiaries can rely on the present suit as *res judicata*. This point must be discussed further in the next section but it has for long been plain enough. In the context, as a part of a sweeping assertion of the inherent power of equity courts to redistribute the costs of litigation, wider-reaching inferences have been drawn. Open-ended terms like “others” and “for all practical purposes,” and reliance on *stare decisis* as the connecting link, have made a great impression. If *stare decisis* is enough to “create” a fund, why should it be necessary that the claims of the winning litigant and his “beneficiary” be directed against the same opponent? For example, *McPherson v. Buick Motor Co.*⁴³ is well remembered as a long step in the direction of product liability. Could McPherson’s lawyer, if still alive, have liens on all the money judgments recovered by injured consumers who have since prevailed through the effect of that case as a precedent? Could the lawyers for the plaintiffs in the *Sprague* case itself retire to Bimini while the money rolls in? In that case no such extravagant notions were required, since all the claims of fourteen identified persons were directed against a common opponent, whose predecessor had clearly segregated specific bonds and declared them subject to an express trust. All that needed to be said was that the court’s receiver, who had acquired custody

⁴¹ The district court had dismissed the Sprague petition, though its purpose was only to secure reimbursement for counsel fees, on the ground that the Supreme Court in affirming an earlier decree in her favor had sent the case back with a mandate that did not provide for any supplementary proceeding. *Id.* at 163-64. The Circuit Court of Appeals had added the further reason that the term of court had expired. *Id.* at 164. The Supreme Court held that neither factor presented any obstacle. *Id.* at 163-64, 170.

⁴² *Id.* at 167.

⁴³ 217 N.Y. 382, 111 N.E. 1050 (1916).

of these and other assets of the bank, had both the means and the duty to ensure that all fourteen beneficiaries of the trust were treated alike.

The growth of the superstructure erected on *Greenough-Pettus* has not ended with the dicta in *Sprague*. It is worth noting now, however, that the superstructure that has risen so high has a base that is extremely narrow. It covers only services by lawyers and by no other members of the population. And very seldom indeed has it been allowed to include any services by lawyers other than the conduct, or at least the commencement, of litigation.⁴⁴ The only court to hold that lobbying by lawyers meets the test is the United States Supreme Court itself and that in only one case.⁴⁵ Out of the many hundreds of cases that have used the *Greenough-Pettus* doctrine to justify fee awards to lawyers, there have been perhaps seven or eight that have found it sufficient that the lawyer threatened suit, without actual start of suit.⁴⁶

But the start of suit, even securing a favorable judgment, will

⁴⁴ Litigation before an administrative agency was held to be included in *Powell v. Pennsylvania R.R.*, 267 F.2d 241 (3d Cir. 1959), where the proceeding had ended with an enforceable order for payment of money, and in *Honda v. Mitchell*, 419 F.2d 324 (D.C. Cir. 1969), where the proceeding ended in a settlement.

⁴⁵ *Winton v. Amos*, 255 U.S. 373 (1921). Here the Supreme Court declared that if a "benefit" could be proved, lawyers could recover for services in lobbying in Congress and before executive departments of the federal government to secure allotments of land to Choctaw Indians in Mississippi. Congress had passed a special statute authorizing actions "on the principle of quantum meruit" to be brought in the U.S. Court of Claims by the four lawyers who had engaged in these activities, but the Supreme Court declared emphatically that its own prior decisions awarding liens on funds preserved or augmented through professional legal services established principles that applied just as much to success in securing legislation as they did to successful litigation. *Id.* at 393.

Lobbying services were among the numerous activities, including litigation, that were lumped together in computing compensation in *Louisiana State Mineral Bd. v. Abadie*, 164 So. 2d 159 (La. Ct. App. 1964). *But see Whittier v. Emmet*, 281 F.2d 24, 32 (D.C. Cir. 1960) ("The assertion of a noncontractual claim for compensation for services rendered in sponsoring favorable legislation does not deserve prolonged discussion").

⁴⁶ An exception to the requirement that suit be started that seems to be on the way to general acceptance is the case of a stockholder whose lawyer notifies the corporation that a corporate officer has taken short-swing profits which the stockholder cannot sue to recover unless the corporation fails to act. Notice to the corporation, without suit, has been held to justify a counsel fee award where the corporation thereafter proceeds to recover the profits, also without suit. *Blau v. Rayette-Faberge, Inc.*, 389 F.2d 469 (2d Cir. 1968); *Gilson v. Chock Full O'Nuts Corp.*, 331 F.2d 107 (2d Cir. 1964); *Dottenheim v. Emerson Elec. Mfg. Co.*, 7 F.R.D. 195 (E.D.N.Y. 1947), noted in 60 HARV. L. REV. 835 (1947).

For four other decisions (or perhaps three and one-half) that seem to be clear aberrations, see notes 93, 95 *infra*. The peculiar results reached in corporate stockholders' derivative actions and in some class actions must be postponed for later discussion.

not be enough if for any reason the tests derived from *Greenough* are not met — if no fund can be found or it has been dissipated or has received no sufficient benefit — then lawyers are told what the rest of the population is told: ⁴⁷ if the services are rendered under a contract, payment must come from your contract partner; strangers are not liable for these “incidental” benefits, even when produced through litigation by a lawyer.⁴⁸

The discussion that follows will be centered on litigation that serves purely private interests. The *Greenough* and *Pettus* cases themselves will appear as prototypes, though many other types of “funds” will appear incidentally. Litigation aimed in greater degree at promoting public interests — the taxpayer’s action, other public interest litigation, especially that in the class action form, and the peculiar hybrid, the corporate stockholder’s derivative suit — will be omitted almost entirely. They must be discussed eventually,⁴⁹ for it is in these other contexts (especially the last) that funds and “common benefit” have begun to skitter over the landscape.

III. MEANS OF CREATING FUNDS

It is clear that benefits can be conferred on funds of the *Greenough-Pettus* type without the use of class actions or any of the formal rules of *res judicata*.⁵⁰ In some instances, as in the *Greenough* case itself, litigation has been formally brought “on behalf of” others and it could be that a decree in such cases would operate through *res judicata* to establish rights in passive beneficiaries. But for many years after *Greenough* the *res judicata* effect of a decree in a class action depended on distinctions between true, mixed and “spurious” types that made results extremely obscure and unpredictable.⁵¹ In most instances the class

⁴⁷ See generally Dawson, *supra* note 7.

⁴⁸ See, e.g., *Coleman v. United States*, 152 U.S. 96 (1894); *Preston v. United States*, 284 F.2d 514 (9th Cir. 1960); *Jett v. Merchants & Planters Bank*, 228 F.2d 156 (4th Cir. 1955); *Lamar v. Hall & Wimberly*, 129 F. 79 (5th Cir. 1904); *Lewis v. Railroad Retirement Bd.*, 256 Ala. 430, 54 So. 2d 777 (1951); *Commercial Union Ins. Co. v. Scott*, 116 Ga. App. 633, 158 S.E.2d 295 (1967); *Bartholomew v. Union Trust Co.*, 36 Ind. App. 328, 75 N.E. 31 (1905); *Spinner v. Fidelity & Cas. Co.*, 245 Ky. 519, 53 S.W.2d 946 (1932); *Barrett v. Indemnity Ins. Co.*, 152 Md. 253, 136 A. 542 (1927); *Williams v. Gratton*, 136 Ore. 224, 298 P. 231 (1931); *Rankin v. Superior Auto. Ins. Co.*, 237 S.C. 380, 117 S.E.2d 525 (1960).

⁴⁹ I will discuss attorney fees in public interest litigation in a future article.

⁵⁰ *United States v. American Soc’y of Composers, Authors and Publishers*, 466 F.2d 917 (2d Cir. 1972). See also *Washington Gas Light Co. v. Baker*, 195 F.2d 29 (D.C. Cir. 1951) (making this explicit); *Farmers & Merchants Nat’l Bank v. Peterson*, 5 Cal. 2d 601, 55 P.2d 867 (1936) (same); *Petition of Crum*, 196 S.C. 528, 14 S.E.2d 21 (1941) (same).

⁵¹ See Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 376-86 (1967).

action form was not used at all and in some clearly could not be, if only because the class was too small.

In some states it might be possible nowadays to invoke collateral estoppel, the modern extension of *res judicata*. The objection to collateral estoppel that for a time seemed fatal was the lack of "mutuality" if a stranger to a lawsuit was permitted to take advantage, and assert the preclusive effect, of a decision that would not have been binding on him if it had gone the other way. The discussion of this issue centered first on the defensive use of collateral estoppel, where a defendant seeks to estop the plaintiff from relitigating an issue which had been determined against him in a prior action against a different defendant, and tries to show that the adverse decision requires determination of an issue that is central to his own liability. Defensive use, which has made steady progress in the last forty years, would not contribute much in the situations here considered since it presupposes that a prior action has failed, whereas the *Greenough* doctrine presupposes that the prior action succeeded. Extremely relevant but much more disputed is the offensive or affirmative use of collateral estoppel to fortify a claim of a plaintiff in a situation where a prior action, brought by a different plaintiff, has succeeded. Such offensive use has made only irregular progress for several reasons.⁵² In 1967 the New York Court of Appeals approved it with emphasis and stated sweepingly that the doctrine of mutuality is a "dead letter," though important qualifications were added later.⁵³ But in other recent decisions offensive use of collateral

⁵² The advantages of preventing relitigation—economy of effort and consistency of results—argue in favor of permitting offensive estoppel. But plaintiffs have choices that defendants do not and it is not quite so evident that sideline-sitters who do have choices should be free to abstain from litigation brought by one or a few, but take full advantage if the litigation succeeds and suffer no prejudice if it fails. Also, troublesome problems may arise as to whether the relative unimportance of the interests at stake led the defendant to relax his effort and, conversely, whether magnifying the consequences of defeat may induce defendants to prolong litigation and exploit every resource for contesting against them.

Discussion in the law reviews of both defensive and offensive use of collateral estoppel has swollen to a torrent. Influential articles were written by Brainerd Currie. See Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957); Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965). Especially helpful are Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457 (1968); Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967).

⁵³ *B.R. Dewitt, Inc. v. Hall*, 19 N.Y.2d 141, 225 N.E.2d 195 (1967). The court stated that the first action was defended with full vigor and opportunity to be heard, and that the defendant offered no reason why he should not be estopped. In dicta the New York Court of Appeals said subsequently in *Schwartz v. Public Adm'r*, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 729 (1969), that it had adopted a "full

estoppel has been rejected altogether.⁵⁴ Its future elsewhere is shrouded in doubt.

In a large percentage of the situations that will be reviewed in this Article collateral estoppel in its offensive form could have been used by a court that accepted it, but it has emerged too recently to have played any part in establishing the doctrine of the "common fund." In any event, the *Greenough-Pettus* machinery, when invoked, aims at a different target. Unlike collateral estoppel in its affirmative or offensive form its effect is not to aid in establishing an additional liability of a defendant who has already suffered one defeat. On the contrary it operates only when the litigation against the original opponent has been finally concluded and then fastens on the fall-out gains that have accrued to outsiders. Surely a looser test than whether estoppel is available is appropriate in determining what outsiders come within the range of the fall-out and to what extent. When this issue has been determined there comes a second stage in which the role of courts can be important. For in some ninety-eight percent of the cases, where the claim for counsel fees is advanced by lawyers, not clients, the terms agreed to between lawyer and client will not control and the fee to be awarded must be judicially determined. More important, means must be found for allocating the litigation costs, thus determined, in some reasonable proportion to benefits conferred. It is supposedly for these reasons that "court control" is often named as an essential cog in the machinery. It is clear, however, that control is often remote or indirect. Whether it is essential is one of the questions to be asked.

The prototype of a fund, illustrated by the *Greenough* case itself, is an express trust. Created normally by the voluntary act of a private person, it will be subject to the traditional supervision

and fair opportunity" test, which would require examination of such issues as the size of the claim asserted in the prior action, the appropriateness of the forum, the competence and experience of counsel, any indications that the jury's verdict was compromised, differences in the applicable law and the foreseeability of future litigation.

A similar test, addressed to at least some of these elements, has been used in other cases applying collateral estoppel offensively. *Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co.*, 411 F.2d 88 (3d Cir. 1969); *Zdanok v. Glidden Co.*, 327 F.2d 944 (2d Cir. 1964); *United States v. United Airlines*, 216 F. Supp. 709, 725-29 (E.D. Wash. 1962); see *Howell v. Vito's Trucking & Excavating Co.*, 20 Mich. App. 140, 147, 173 N.W.2d 777, 780 (1969) (leaving the issue to be decided by the trial judge guided by "broad principles of justice").

⁵⁴ *Mackris v. Murray*, 397 F.2d 74 (6th Cir. 1968); *Spettigue v. Mahoney*, 8 Ariz. App. 281, 445 P.2d 557 (1968); *McDougall v. School Dist.*, 212 Cal. App. 2d 422, 28 Cal. Rptr. 37 (1963); *Albernaz v. City of Fall River*, 346 Mass. 336, 191 N.E.2d 771 (1963); *Reardon v. Allen*, 88 N.J. Super. 560, 213 A.2d 26 (1965). The indeterminate result of Wisconsin decisions is described in Note, *Mutuality of Estoppel: McCourt v. Algiers in Context*, 1967 Wis. L. Rev. 267.

of an equity court, exercised in first instance by directions to trustees, though also through power to adjudicate the rights and duties of others joined as parties. Litigation that succeeds in "preserving or increasing" trust assets will clearly justify a charge for counsel fees on the whole trust estate.⁵⁵ It is also assumed, usually without discussion, that decedents' estates constitute funds for this purpose — created by the owner's death and consisting of assets then owned and requiring administration.⁵⁶ The probate court will act through an appointee whose actions it must ultimately approve and can at any time review or correct if its intervention is needed.

Funds can also be created by the litigation itself, as with creditors' bills which aim to take control of assets that the owner was unwilling to surrender. Where the court action sought is all-inclusive (e.g., a corporate receivership, sweeping all assets into protective custody of a court appointee), it is easy to conceive of these assets as a fund, and to charge it with the fees of lawyers who secured the receiver's appointment.⁵⁷ Creditors' bills with more limited objectives — to reach particular assets or alter priorities between different classes of creditors — may not require appointment of a receiver or other court agent. Still, where such proceedings have the effect of bringing assets of the debtor within the reach of other creditors, the *Greenough* machinery can operate.⁵⁸ "Control" would then consist of a power to adjudicate conflicting claims as between all who are joined or who intervene and to compel surrender of assets improperly withheld.

There can be subgroups of beneficiaries within a larger group and minifunds within funds; it is not necessary that the interested group of beneficiaries be lined up in an unbroken phalanx. In a corporate receivership, for example, if a few unsecured creditors, in a contest with secured creditors, obtain the release of particular

⁵⁵ *Walsh v. National Sav. & Trust Co.*, 247 F.2d 781 (D.C. Cir. 1957); *Ewing v. First Nat'l Bank*, 209 Ga. 932, 76 S.E.2d 791 (1953); *German Evangelical St. Marcus Congregation v. Archambault*, 404 S.W.2d 705 (Mo. 1966); *In re Estate of Trimble*, 392 Pa. 277, 140 A.2d 609 (1958). See also pp. 1627-28 *infra*.

⁵⁶ *Becht v. Miller*, 279 Mich. 629, 273 N.W. 294 (1937); *In re Schwint's Estate*, 183 Okl. 439, 83 P.2d 161 (1938); *In re Falling's Estate*, 113 Ore. 6, 228 P. 821 (1924). See also pp. 1627-28 *infra*.

⁵⁷ *Buford v. Tobacco Growers' Co-op. Ass'n*, 42 F.2d 791 (4th Cir. 1930); *Bishop & Collins v. Macon Lumber Co.*, 149 F. Supp. 46 (W.D. Ky. 1957); *Bradshaw v. Bank of Little Rock*, 76 Ark. 501, 89 S.W. 316 (1905); *Davis v. Bay State League*, 158 Mass. 434, 33 N.E. 591 (1893).

⁵⁸ *Central Trust Co. v. Condon*, 67 F. 84, 110-11 (6th Cir. 1895); *Muskegon Boiler Works v. Tennessee Valley Iron & R.R.*, 274 F. 836 (M.D. Tenn. 1921); *White v. University Land Co.*, 49 Mo. App. 450, 466-70 (1892); *Peterson v. John J. Reilly, Inc.*, 105 N.H. 340, 200 A.2d 21 (1964); *In re Weed's Estate*, 163 Pa. 595, 30 A. 272 (1894).

assets from liens claimed by the latter and make these assets available to pay all unsecured creditors pro rata, this outcome of the contest will not in any way increase or preserve the corporate assets, but will augment the recovery of one group by diminishing that of the other. One can ignore the disadvantage to the losers, the secured creditors, and charge the counsel fees of the active litigants against the assets thus released.⁵⁹

Funds that have been impounded through direct court order are an easy target for the *Greenough* machinery. An example is *Washington Gas Light Co. v. Baker*,⁶⁰ where a federation of consumer protection groups sued to enjoin an increase in gas rates. Pending final decision the court authorized the gas company to collect higher rates but directed it to segregate the extra sums collected in a special account. By the time the rate increase was held to be invalid, excess payments totalling some 1,250,000 dollars had accumulated, to be refunded to approximately 175,000 consumers. Whether deposited by the gas company in a special bank account or merely marked as credits on its books, these sums were held by the gas company as custodian, subject to court order. It was simple enough to order it to pay counsel fees to the successful lawyers and deduct that sum from the total restored to consumers.⁶¹

The fund on which the *Greenough-Pettus* machinery can fasten does not need to be created by explicit court order, as in the cases just discussed, but can emerge as a byproduct, almost by accident. In *State Mineral Board v. Abadie*,⁶² a decree in 1941 had established that some 1200 acres of oil-bearing land were owned by the heirs of four persons as tenants in common. At the time of the decree the number of heirs was about 840 but by the 1960's the total had risen to some 4000. Two of the heirs employed a lawyer, Henriques, who persuaded the legislature to pass a statute allowing any land owned by more than 50 co-owners to be leased by the State Mineral Board with the consent of 50 co-owners. Henriques took the lead in securing consent by the needed 50 and in securing the Mineral Board's approval of oil lease forms he drafted. The only litigation in which he engaged was a successful defense of the statute he had promoted, when it was attacked on

⁵⁹ See *Nolte v. Hudson Navigation Co.*, 47 F.2d 166 (2d Cir. 1931). See also *Leeds & Lippincott Co. v. Nevius*, 30 N.J. 281, 153 A.2d 45 (1959); *Cintas v. American Car & Foundry Co.*, 133 N.J. Eq. 301, 32 A.2d 90 (1943); cases cited note 143 *infra*.

⁶⁰ 195 F.2d 29 (D.C. Cir. 1951).

⁶¹ Payment to the lawyers was made despite the fact that two lawyers who were awarded fees had agreed with their own clients not to charge the clients for their services. See p. 1608 & note 34 *supra*.

⁶² 164 So. 2d 159 (La. Ct. App. 1964).

constitutional grounds. Finally the land was leased to two lessees who paid the Board cash "bonuses" totalling 655,000 dollars. Thus there emerged a fund which Henriques could charge for his fee. The appellate court fixed the fee at 112,000 dollars and made it a first lien on the fund. The State Mineral Board could then proceed at leisure to disentangle the genealogies of the thousands of heirs to whom the balance would go.⁶³

In both *Washington Gas Light* and the oil-lease case, procedures had already been established that would ensure the ultimate distribution of the funds to the multitudes of beneficiaries involved. But the mere discovery of a chargeable fund brings temptation to a court that is inspired with sufficient zeal for the "common fund" doctrine. Does it really matter that no beneficiaries have been discovered as yet or that possibly none will turn up at all? Such inconvenient questions were brushed aside in *Gibbs v. Blackwelder*,⁶⁴ where two creditors holding a judgment rendered in Florida sued on it in a federal court in Virginia. They succeeded in unearthing an equitable interest of the judgment debtor in land owned by his wife. This interest, of "very substantial value,"⁶⁵ was more than sufficient to satisfy the judgment sued on. No other creditors had been joined in the proceeding and none had as yet attempted to reach the interest discovered, though the plaintiffs said that others were "prepared" to do so.⁶⁶ The plaintiffs — in this rare case, the clients — petitioned for a charge on the debtors' interest for the counsel fee owed their own counsel.

The Court of Appeals for the Fourth Circuit, speaking through Judge Haynsworth, responded warmly: an equity court has full power to award counsel fees to the "trail-blazer" so that "one who led in hewing the path to victory is not left saddled with extensive attorney fees" that were not incurred "by his more timid followers who held back until the fruits of the pioneer's success were laid before them."⁶⁷ But one might ask, what if this

⁶³ In justifying the size of the fee awarded, the court stressed the time and effort required in litigation (up to the United States Supreme Court) over the constitutionality of the statute that made it possible to lease the tract as a unit. *Id.* at 168. It seems likely that the years spent in lobbying with the legislature and the Mineral Board entered into the calculation.

Without the money fund that suddenly emerged it seems unlikely that either the two active co-owners of the land or their lawyer could have recovered from the other co-owners for the benefits conferred in making the tract productive, unless one owner sued for partition (the solution desired least of all). Dawson, *supra* note 7, at 1424.

⁶⁴ 346 F.2d 943 (4th Cir. 1965).

⁶⁵ *Id.* at 944.

⁶⁶ *Id.* at 946.

⁶⁷ *Id.* at 945. Since the clients, not their lawyers, presented the claim for counsel

"pioneer" blazed a trail that no one followed? Or what if his followers were not so timid and blazed their own trail, collecting from the debtor through some other means or suing in a different court whose process could not reach the particular asset? The *Greenough* doctrine would then become a pretext for charging the loser, the original judgment debtor, with the winners' counsel fee. Charging winners' fees to losers in adversary litigation may be a good thing, but this is not the announced purpose of the *Greenough* doctrine. One could put the point in a different way by saying that the *Greenough* doctrine requires not only some identified assets on which a court can impose a charge, but also beneficiaries, third parties, that can be brought within that court's reach.

Enough has been said to indicate that a court's reach or "control," though vital, can take many forms. The control can be remote or indirect, it can work through intermediaries who are obedient to instructions or who in the last resort can be coerced. Central, of course, is authority to adjudicate the rights and duties of interested parties. The tests of control must be expansive because of the variety and complexity of the tasks involved. For the declared object is to redistribute the costs of litigation in fair proportion to the benefits to strangers that it produces. What is important is the sufficiency of the means, not the form they take.

New Jersey has provided a case study of "court control." In court rules issued in 1947 by the New Jersey Supreme Court, under authority granted by a new state constitution, awards of counsel fees were severely restricted,⁶⁸ but in nonjury cases discretion was preserved to award counsel fees "out of a fund in court." For a time this phrase was literally construed, at least in the sense that depositing with a court clerk a sum of money whose ownership was in dispute gave general authority to charge it for counsel fees, even in purely adversary litigation.⁶⁹ In the

fees, it is probable that the plaintiffs' debt to their own lawyer was considered to be a ceiling. The appellate court, in remanding, suggested to the trial court that it consider deducting from plaintiffs' debt to the lawyers the fees charged other creditors, so as to relieve the plaintiffs of their "disproportionate burden." *Id.* at 946. This again presupposes, however, that other creditors would intervene before the same court and in the same proceeding.

⁶⁸ RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY § 3:54-7 (1948). These restrictions were aimed particularly at equity cases, where in the words of Chief Justice Vanderbilt, principal author of the new rules, grants of fees had become a "full scale scandal" because of the favoritism shown by some trial judges toward their "fair haired boys." Lynch, *The New Jersey Supreme Court and the Counsel Fees Rule: Procedure or Substance and Remedy?*, 4 SETON HALL L. REV. 19, 22, 423 (1972).

⁶⁹ See *Katz v. Farber*, 4 N.J. 333, 72 A.2d 862 (1950); *Baird v. Moore*, 50 N.J. Super. 156, 176, 141 A.2d 324, 334 (App. Div. 1958); *Smith v. Smith*, 78 N.J. Super. 28, 187 A.2d 367 (Ch. 1963). All three cases involved disputes over the division of

reaction that finally came against this literal reading, "fund in court" was described as meaning "the jurisdictional authority of the court to deal with the subject matter."⁷⁰ Later New Jersey decisions have held that it applies in corporate litigation where the funds that "in legal contemplation were brought within the control of the court" consisted merely of the undistributed profits of a corporation⁷¹ or the corporate assets as a whole, which had been "increased" by money decrees against a corporate officer in an accounting for misappropriated assets.⁷² In this now greatly expanded conception of "court control" New Jersey does not differ significantly from other states, except perhaps in a legacy of somewhat greater confusion.⁷³

Possession of power that must be so loosely defined and that can be exercised by such varied means sometimes brings temptation. If a fund can be found, though already created for other purposes and connected only remotely with the subject of the litigation, it seems so easy to use means at hand to tap it.⁷⁴ When

proceeds from sale of jointly owned lands, the proceeds having been turned over to the clerk of the court. "Funds in court" were found to exist in all three cases, though in *Katz* it was held to be within trial court discretion to deny an award to the loser.

One inventive litigant, disputing his liability to pay a sum of money, sued in equity for an order directing him to pay it into court so that he could charge it with his counsel's fee. Not surprisingly, this maneuver failed. *Janovsky v. American Motorists Ins. Co.*, 11 N.J. 1, 93 A.2d 1 (1952).

⁷⁰ *Sunset Beach Amusement Corp. v. Belk*, 33 N.J. 162, 168, 162 A.2d 834, 837 (1960) (interpleader by an escrow agent with deposit in court of the land contract price when he was confronted with conflicting claims of vendor and vendee held not a common fund). The case was similar on its facts to *Katz v. Farber*, 4 N.J. 333, 72 A.2d 862 (1950), see note 69 *supra*. For a discussion of the application of the *Greenough* doctrine to adversary litigation, see pp. 1636-43 *infra*.

⁷¹ *Leeds & Lippincott Co. v. Nevius*, 30 N.J. 281, 153 A.2d 45 (1959) (declaratory judgment proceeding brought by the corporation and joining certain selected preferred and common stockholders as representatives of the others in each class to determine whether the preferred stockholders were entitled to dividends).

⁷² *Sarner v. Sarner*, 38 N.J. 463, 185 A.2d 851 (1962) (minority stockholders' derivative suit).

⁷³ New Jersey decisions are discussed in Note, *Allowance of Counsel Fees Out of a "Fund in Court": The New Jersey Experience*, 17 *RUTGERS L. REV.* 634 (1963), and at greater length, with severe criticism, in Lynch, *supra* note 68. Since the state supreme court's rules on counsel fees depend upon its claim of an exclusive power to regulate procedure, the issues are greatly complicated by procedure-substance distinctions and by potential conflict between court and legislature. See *id.* at 489-97.

One aberration that apparently has not yet been overruled is *Milberg v. Seaboard Trust Co.*, 7 N.J. 236, 81 A.2d 142 (1951), in which counsel fees were awarded to losers, without even a showing that their effort produced any benefit.

⁷⁴ See *Regan v. Babcock*, 196 Minn. 243, 264 N.W. 803 (1936), where six taxpayers succeeded in securing cancellation of contracts for the construction of highways, with a saving to the state that was found to be more than 390,000 dollars.

this occurs or when the fund emerges by a sudden accident or is deliberately manufactured by court order, it appears more and more a manipulative device. Whether it is more than this is a question that must be held in abeyance while its standard workings are more closely examined.

We should take note at this point of a restriction on the "common fund" doctrine, the restriction to equitable actions, that was from the first artificial and is rapidly disappearing. New Jersey retains this restriction by express provision of its court rules, but it seems safe to say that everywhere else the *Greenough* doctrine can apply to money judgments at law. The decisions, mostly quite recent, that have made this extension involve very small numbers of competing claimants, usually (including the lawyer) no more than four, and the problems they raise relate chiefly to their priorities.

This was true in *Appeal of Harris*,⁷⁵ a condemnation proceeding brought by the City of Philadelphia against some mortgaged land. The only contest at the trial was over the value of the land and on this issue the owner's lawyer presented some expert witnesses. The final award to the owner was 67,000 dollars, but the unpaid balance on the mortgage was 109,379 dollars. The mortgagee, a bank, had notice of the condemnation proceeding and of the owner's employment of a lawyer but was wholly inactive until judgment had been entered. It then intervened to claim the whole 67,000 dollars, in partial satisfaction of the mortgage debt, and the lawyer also intervened to assert that his lien for a fee was prior.⁷⁶ As between the mortgagee-bank and the mortgagor-owner it was perfectly clear that the bank was entitled to the whole award. But the court held nevertheless that the lawyer had a "charging lien" on the judgment which would have been a first lien as against his own client and had the same priority against the

Counsel fees for the taxpayer plaintiffs were charged, first, against sums paid into court by overpaid contractors and, second, against the state highway fund which had been set up previously and was composed of revenues from the motor vehicle tax. This fund, the court concluded, was saved from paying out more money through the cancellation of the contracts. Counsel for the taxpayers did not need a "charging" lien on this fund; it sufficed for the court to issue an order that the fund pay them directly. To the objection that this was in effect a suit against the state without its consent, the court answered that the Attorney General had intervened in the taxpayers' suit, and joined in the prayer that the contracts be cancelled; a charge on the state highway fund was therefore one of the "hazards" of the litigation he joined. *Id.* at 249-53, 264 N.W. at 806-08.

⁷⁵ 323 Pa. 124, 186 A. 92 (1936).

⁷⁶ The 67,000 dollar award had already been made before the two interventions. The court in its discussion described the attorney's lien and the proceeding itself as "equitable," but if so construed it seems that it was the interventions that made it so.

bank since the money judgment for his client was a fund that he had augmented.⁷⁷ It might seem strange that an owner who comes last can hire a lawyer who comes in first, but that the lawyer comes first was one of the messages of *Pettus*.

The same result has been reached where the owner sued affirmatively and recovered a money judgment against an insurer for losses to property that was subject to a prior lien. The lien creditor, intervening, could secure a share in the judgment only by paying a fee to the owner's lawyer; if the insurance proceeds were not enough to pay lien creditor and lawyer both, the lawyer came first.⁷⁸ Again, there is nothing startlingly new in this, but one is reminded of the anomaly involved on encountering an insurance adjuster who was not a lawyer and whose claim against a fund that he produced by a settlement was given short shrift indeed.⁷⁹

Three-party contests have arisen more often recently in cases where an insured tort claimant employs a lawyer who secures a judgment or out-of-court settlement and the insurer, until then passive, intervenes to claim a partial share through subrogation.⁸⁰ The insurer's share may be partial either because the interest invaded was not fully insured or because the tortfeasor simultaneously harmed an interest that was insured (*e.g.*, property) and one that was not (*e.g.*, by causing personal injuries). If the insurer were to sue, either jointly with the insured or separately, its interest in the case would be disclosed to all concerned and, worst of all, to a jury if the case reached trial. The insurer has another recourse, to notify the tortfeasor and the latter's insurer, if he has one, of the insurer's interest as subrogee, so that any subsequent payments made to the insured will be ineffective to discharge the insurer's claim.⁸¹ After such notice has been given the spirit of mutual aid between insurance companies will prob-

⁷⁷ 323 Pa. at 135, 186 A. at 97.

⁷⁸ See *Lomack Home for the Aged v. Iowa Mut. Tornado Ins. Ass'n.*, 155 Iowa 728, 133 N.W. 725 (1911) (proceeds recovered by suit on a windstorm insurance policy were enough to pay the plaintiff owner's lawyer and the first mortgagee but not the second mortgagee); *Little Rock Road Mach. Co. v. Light*, 240 Ark. 1012, 403 S.W.2d 726 (1966) (extra fee of the owner's lawyer was deducted from the judgment rendered in favor of the lien creditor).

⁷⁹ See *Callahan v. Railroad Fed. Sav. & Loan Ass'n.*, 36 N.Y.S.2d 550 (App. T. 1942) (*per curiam*) (owner employed an insurance adjuster who procured money payable to mortgagee, but the latter's benefit was not enough to warrant liability since he had not contracted for the service).

⁸⁰ Subrogation may be "legal" and be routinely given, as in property and liability insurance, or it may be the result of express contract through standardized clauses that have come into common use. R. KEETON, *INSURANCE LAW* § 3.10(a) (1971) (describing the recognition given recently to express provisions for subrogation in types of insurance—accident, medical, and hospitalization—where it would not otherwise be awarded).

⁸¹ *Id.* § 3.10(c)(2).

ably give a sufficient guarantee without the expense of joining a lawsuit. It is quite intelligible that insurers in such cases are tempted to "sit by," leave the initiative to the party injured (the insured), yet expect to share in the proceeds.

A 1961 Nebraska case, *United Services Automobile Association v. Hills*,⁸² was not the first but is probably the most influential decision extending the "common fund" doctrine to this situation.⁸³ The insured incurred both personal injury and property damage in a collision with one Miller. He was insured, however, only against property damage by United Services, which paid him 454.93 dollars for the injury to his car. The insurance policy contained an express provision for subrogation of United Services to any claim the insured had against third persons. The insured hired an attorney who brought an action against Miller for personal injuries, deleting from his complaint the subrogation claim of United Services at its express request. United Services, however, notified Miller's insurer of its subrogation claim, and the two insurers then reached a settlement which allotted 454.93 dollars for property damage. Miller's insurer, confronted with a demand from the insured's lawyer for a fee to be deducted from this sum, brought a declaratory judgment action, paid the 454.93 dollars into court, and disappeared from the case. A majority of the Nebraska court held that the insured's lawyer had recovered or preserved a fund, and that the refusal of United Services to employ him to enforce its subrogation claim gave it no immunity after it decided to accept the "avails" of the litigation; the court ordered payment of a proportionate share of the expenses, including attorney's fees, out of the sum received.⁸⁴

⁸² 172 Neb. 128, 109 N.W.2d 174 (1961).

⁸³ Similar decisions had been reached earlier in *Stancil v. United States*, 200 F. Supp. 36, 43-47 (E.D. Va. 1961); *Brown v. T.W. Phillips Gas & Oil Co.*, 105 F. Supp. 479 (W.D. Pa. 1952).

An earlier case to the contrary is *Lewis v. Railroad Retirement Bd.*, 256 Ala. 430, 54 So. 2d 777 (1951), which used arguments that would probably be rejected now: the injured person had not sued in a class action and the "fund" doctrine applies only in equity, not at law. But the court was also influenced by the provisions of the Railroad Unemployment Insurance Act, 45 U.S.C. § 351 (1970), which gave the subrogee, the Railroad Retirement Board, a prior lien on the proceeds of the judgment.

The problems about to be discussed, involving tort claims as funds, constantly recur also in cases involving third party liability in industrial accidents. Deductions of lawyers' fees from subrogees' claims are regulated, usually in detail, by compensation statutes which give varying weight to competing interests—incentives to employers or insurers to make prompt payments as against a desire to protect the statutory scales of compensation to employees. The one consistent feature is that lawyers' fees come first. 2 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 74.32 (1970).

⁸⁴ 172 Neb. at 133, 109 N.W.2d at 177. The one-third contingent fee that his

United Services set off a considerable wave of similar decisions.⁸⁵ They present some novel aspects of "court control" since in these intimate tripartite situations involving subrogation, rights and duties are so closely interlocked. No problems arise where the lawsuit brought by the insured has proceeded to judgment and the contenders for its proceeds are duly joined, either as original parties or by intervention; the court rendering the judgment will clearly have power to allocate the sums not yet paid by the judgment debtor to the claimants found to be entitled.⁸⁶ The same will be true if the tort claim is settled before judgment, as it normally will be, and the sum agreed upon is voluntarily paid into court⁸⁷ or has not yet been paid by the judgment defendant.⁸⁸ But the principal debtor, after settlement is reached, will seldom have any stake in disputes over the lawyers' fees of his opponents. It will often be prudent for the debtor to create another minifund himself, in the form of a check payable jointly to the rival claim-

client had agreed to was carried over to the property damage "fund," 172 Neb. at 134-35, 109 N.W.2d at 178, as has occurred in a few other tort-subrogation cases of this type. The methods of calculating fees payable by nonclients are discussed in note 35 *supra*.

As to the law-equity distinction, the court described the declaratory judgment proceeding as essentially interpleader and therefore "equitable," 172 Neb. at 132, 109 N.W.2d at 177, but clearly the original damage action had been brought on the law docket.

⁸⁵ *E.g.*, *Commercial Standard Ins. Co. v. Combs*, 249 Ark. 533, 460 S.W.2d 770 (1970); *Washington Fire & Marine Ins. Co. v. Hammett*, 237 Ark. 954, 377 S.W.2d 811 (1964); *Phillips v. Liberty Mut. Ins. Co.*, 253 A.2d 502 (Del. 1969); *Forsyth v. Southern Bell Tel. & Tel. Co.*, 162 So. 2d 916 (Fla. App. 1964); *Klacik v. Kovacs*, 111 N.J. Super. 307, 268 A.2d 305 (App. Div. 1970); *Tennessee Farmers Mut. Ins. Co. v. Pritchett*, 54 Tenn. App. 410, 391 S.W.2d 671 (1964); *State Farm Mut. Auto. Ins. Co. v. Elkins*, 451 S.W.2d 528 (Tex. Ct. Civ. App. 1970); *State Farm Mut. Auto. Ins. Co. v. Geline*, 48 Wis. 2d 290, 179 N.W.2d 815 (1970). In *Klacik*, *Pritchett*, and *Elkins*, the contingent fee arrangements between the lawyer and his client were carried over and applied to the "fund."

It is worth noting that *Klacik* is a New Jersey decision that follows the *United Services* case despite the express restriction of the New Jersey "fund in court" rule to nonjury cases.

The only state that has held out against the recent tide is Montana. *E.g.*, *Wyoming Farm Bureau Mut. Ins. Co. v. Mondale*, 502 P.2d 39 (Mont. 1972); *Sisters of Charity v. Nichols*, 157 Mont. 106, 483 P.2d 279 (1971).

⁸⁶ *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Elkins*, 451 S.W.2d 528 (Tex. Ct. Civ. App. 1970) (interpleader by the judgment debtor). In *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1072-73 & n.7 (5th Cir. 1970), the subrogee-insurer intervened. In *Phillips v. Liberty Mut. Ins. Co.*, 253 A.2d 502 (Del. 1969), the subrogee secured an injunction against execution of the judgment in favor of the insured.

⁸⁷ *See, e.g.*, *United Services Auto. Ass'n v. Hills*, 172 Neb. 128, 109 N.W.2d 174 (1961). *See also* *State Farm Mut. Auto. Ins. Co. v. Geline*, 48 Wis. 2d 290, 179 N.W.2d 815 (1970).

⁸⁸ *Klacik v. Kovacs*, 111 N.J. Super. 307, 268 A.2d 305 (App. Div. 1970).

ants (subrogee-insurer against the insured or his lawyer), and cast on them the burden of seeking a court decision if they cannot agree.⁸⁹ If the debtor does accede to the claim of the insured or his lawyer and pays the extra fee demanded, the propriety of this payment can be tested by the subrogee — either by suing the principal debtor who, after notice of the subrogee's rights, will not be discharged by an unauthorized payment, or by suing the insured or his lawyer, who also owe the subrogee-insurer a duty not to impair its rights.⁹⁰

With so much of the management of their relations turned over to direct contests between the interested parties, the question was sure to arise whether a fund is needed — why not a direct action against the subrogee-insurer with personal liability for the value of the lawyer's services? This could be, again, an action by the client (the insured) for contribution to his own litigation costs or an action by his lawyer for an extra fee; for in the situations now being considered there are several cases in which clients have succeeded in their own claims for contribution, charged to funds consisting of money judgments or the money proceeds of settlement.⁹¹ It could be argued that the important step was taken when money judgments at law were fully accepted as "funds." The overwhelming majority of tort claims are settled and never reach judgment. In these cases, should the recovery of fees depend on whether the settlement provides that the principal debtor pay the agreed sum to a court clerk or a joint check is written? In all such actions so far brought seeking to make the subrogee personally liable, the lawyers and not the clients sued and the familiar objections prevailed: the insured's lawyer merely performed his contract with his own client, the insurer was a stranger to that contract, and the service rendered to it was "incidental" and also unsolicited.⁹²

⁸⁹ See, e.g., *Washington Fire & Marine Ins. Co. v. Hammett*, 237 Ark. 954, 377 S.W.2d 811 (1964); *Forsyth v. Southern Bell Tel. & Tel. Co.*, 162 So. 2d 916 (Fla. App. 1964); *Rankin v. Superior Auto. Ins. Co.*, 237 S.C. 380, 117 S.E.2d 525 (1960).

⁹⁰ As a minimum the insured or his lawyer are accountable for sums they receive that should have been paid to the subrogee. *R. KEETON, INSURANCE LAW* § 3.10(c)(2) (1971). If the subrogee sues the insured or his lawyer for siphoning off money due the subrogee, it will be a defense that the sum retained was merely the fee that was owed by the subrogee to the insured's lawyer. *National Union Fire Ins. Co. v. Grimes*, 278 Minn. 45, 153 N.W.2d 152 (1967); *Tennessee Farmers Mut. Ins. Co. v. Pritchett*, 54 Tenn. App. 410, 391 S.W.2d 671 (1964); see *General Exch. Ins. Corp. v. Driscoll*, 315 Mass. 360, 52 N.E.2d 970 (1944).

⁹¹ *Washington Fire & Marine Ins. Co. v. Hammett*, 237 Ark. 954, 377 S.W.2d 811 (1964); *Phillips v. Liberty Mut. Ins. Co.*, 253 A.2d 502 (Del. 1969); *Klatic v. Kovacs*, 111 N.J. Super. 307, 268 A.2d 305 (App. Div. 1970).

⁹² *Richter v. United States*, 190 F. Supp. 159 (E.D. Pa. 1960), *aff'd*, 269 F.2d

But Nebraska, which led the way with *United Services* in 1961, took two longer steps in 1969, holding (1) the insurer-subrogee was personally liable for the value of the services of the insured's lawyer in securing a settlement, and (2) it was unimportant that the settlement was secured without any litigation whatever.⁹³ Unless this were allowed, the court said, it would be possible to defeat the lawyer's recovery through a direct payment by the principal debtor to the insurer-subrogee, an event that had occurred in the particular case.⁹⁴ Furthermore, it seemed to the court mere formalism to deny plaintiff an attorney's fee merely because of the "fortuity" that no lawsuit had been started. In this last respect, even more than in obliterating any requirement of a "fund," the Nebraska court stepped off into outer darkness.⁹⁵

IV. MEANS OF BENEFITING FUNDS

The announced purpose of the "common fund" device for

509 (3d Cir. 1961), *cert. denied*, 369 U.S. 828 (1962); *First of Georgia Ins. Co. v. Horne*, 120 Ga. App. 379, 170 S.E.2d 452 (1969); *Commercial Union Ins. Co. v. Scott*, 116 Ga. App. 633, 158 S.E.2d 295 (1967); *Rankin v. Superior Auto. Ins. Co.*, 277 S.C. 380, 117 S.E.2d 525 (1960). The *Richter* case became tangled up with the question whether a claim in quasi-contract, assumed to be valid under Pennsylvania law, came within the tests for "contract" for suits against the United States under the Tucker Act, 28 U.S.C. § 1346 (1970).

⁹³ *Krause v. State Farm Mut. Auto. Ins. Co.*, 184 Neb. 588, 169 N.W.2d 601 (1969). The court struggled manfully to find a "fund" by arguing that subrogation is "equitable" and that the insured held the proceeds of the settlement "in trust" for the subrogee to the extent that they covered damage to property, which it had insured. But no particular asset or sum of money was identified as the subject of the trust and the remedy given was a simple money judgment.

⁹⁴ It appears that the Nebraska court has since receded on this issue somewhat. In *Moyer & Moyer v. State Farm Mut. Ins. Co.*, 190 Neb. 174, 206 N.W.2d 644 (1973), direct payment in full by the principal debtor to the subrogated insurer was held to preclude any recovery by the insured's lawyer against the insurer, since there was no benefit to the insurer from the lawyer's services.

⁹⁵ I have found two other cases where lawyers for damage claimants recovered fees from insurers where settlements were secured without suit. Both cases involved workmen's compensation payments and both decisions laid stress on statutes that drew no distinction between settlements made with or without suit. *McCally v. Hartford Accident & Indem. Co.*, 247 F. Supp. 444 (D.D.C. 1965); *Furia v. Philadelphia*, 180 Pa. Super. 50, 118 A.2d 236 (1955).

National Union Fire Ins. Co. v. Grimes, 278 Minn. 45, 153 N.W.2d 152 (1967), allowed a deduction for services in securing a settlement that seemingly was agreed to without suit.

The decision by the Nebraska court in *Krause v. State Farm Mut. Auto. Ins. Co.*, 184 Neb. 588, 169 N.W.2d 601 (1969), *see note 93 supra*, is more surprising in view of the earlier case of *Blacker v. Kitchen Bros. Hotel Co.*, 133 Neb. 66, 273 N.W. 836 (1937), where litigation had been commenced but the supreme court held it improper to award counsel fees in advance of final decision of the case, since the application of the *Greenough* "common fund" doctrine required that the litigation be brought to a final and successful conclusion.

awarding fees is to reach and prevent a peculiar form of unjust enrichment, so a benefit to the fund is supposedly required. But the tests of benefit differ markedly from those used elsewhere in the law of restitution. The standard formula suggests this in mixing together three distinct ideas: that a fund can be benefited by being "created, increased or protected" (or "preserved"). The processes described by these terms are not mutually exclusive. At least two, perhaps all three, can occur at the same time. But each of the terms has highly variable meanings and they lead in somewhat different directions. A composite picture of all the shades in their meanings would be useless. Instead these tests will be examined in two standard situations where they have been much used: funds administered by fiduciaries (express trusts and decedents' estates) and funds administered for the benefit of creditors.

It should be said at the outset that the "common fund" doctrine derived from *Greenough* presupposes that litigation has not only been commenced but has also succeeded.⁹⁶ Prosecution through to final decree is not needed; a settlement out of court will suffice if its terms can be ascribed to the pressure of a lawsuit.⁹⁷ There is good reason to require success in some form, for it would be difficult to justify any measures compelling such outsiders to contribute to a litigant's expense merely because they would have gained if he had won. Furthermore, if the failure of the litigation is clearly beneficial this will almost certainly be because the losing litigant was in some sense an adversary. It would be a strange inversion if the *Greenough* doctrine enabled

⁹⁶ *Thomas v. Peyser*, 118 F.2d 369 (D.C. Cir. 1941); *In re Marcuse & Co.*, 4 F.2d 814 (N.D. Ill. 1924), *aff'd*, 11 F.2d 513 (7th Cir. 1926); *Dent v. Foy*, 214 Ala. 243, 107 So. 210 (1925); *Coker v. Coker*, 208 Ala. 239, 94 So. 308 (1922); *In re Equitable Trust Co.*, 27 Del. Ch. 60, 30 A.2d 271 (Ch. 1943); *Blacker v. Kitchen Bros. Hotel Co.*, 133 Neb. 66, 273 N.W. 836 (1937); *In re Dreier's Estate*, 83 N.J. Eq. 618, 92 A. 51 (1914); *In re Vorndran's Estate*, 132 Misc. 611, 230 N.Y.S. 326 (Sur. Ct. 1928); *Fields v. Fields*, 139 Ore. 41, 3 P.2d 771 (1931).

⁹⁷ *Powell v. Pennsylvania R.R.*, 267 F.2d 241 (3d Cir. 1959); *Dent v. Foy*, 214 Ala. 243, 107 So. 210 (1925); *In re Schwint's Estate*, 183 Okla. 439, 83 P.2d 161 (1938); *Carmack v. Fidelity-Bankers Trust Co.*, 180 Tenn. 571, 177 S.W.2d 351 (1944). *In re Schwint's Estate* involved a lawyer employed by an administrator and two lawyers employed by four of nine heirs, who cooperated actively. The court ordered a fee splitting—four-sevenths to the former and three-sevenths to the latter.

Settlements of tort claims to which insurers seek subrogation have frequently been held to make the *Greenough-Pettus* machinery available. See, e.g., *Washington Fire & Marine Ins. Co. v. Hammett*, 237 Ark. 954, 377 S.W.2d 811 (1964); *Klacik v. Kovacs*, 111 N.J. Super. 307, 268 A.2d 305 (App. Div. 1970); *Tennessee Farmers Mut. Ins. Co. v. Pritchett*, 54 Tenn. App. 410, 391 S.W.2d 671 (1964); *State Farm Mut. Auto. Ins. Co. v. Geline*, 48 Wis. 2d 290, 179 N.W.2d 814 (1970).

losers in adversary contests to charge their counsel fees to winners. The effects on "common funds" of conflicts among claimants will be further discussed in the next section, but for the moment we can assume that the doctrine does not apply to benefits conferred by the defeat of an adversary. There are situations, some of which will be discussed presently, where losers are allowed, for somewhat different reasons, to charge counsel fees to funds. But the starting point in the discussion that follows will be that the litigation brought has succeeded and the question will be whether it has conferred a benefit on a fund.

A. *Express Trusts and Decedents' Estates*

The most obvious way to confer a benefit on an estate administered by a fiduciary is to prevent its wrongful depletion by the fiduciary himself. This will include, of course, successful litigation by a beneficiary that compels restoration of misappropriated assets.⁹⁸ A decree establishing that the fiduciary is personally liable for failure to retrieve assets belonging to the estate "increases" or at least "protects" it.⁹⁹ Preventing unauthorized charges by the fiduciary for his own services may also justify a charge for counsel fees, at least where the net saving to the estate justifies the burden cast upon it.¹⁰⁰ Still more clearly, where the fiduciary sets up an opposing claim of his own to assets included in the estate, defeat of such a claim in litigation by one or more beneficiaries will justify a charge against the whole estate if the sum total to be distributed to all beneficiaries is thereby increased.¹⁰¹

It is not only through contests with defaulting or self-serving

⁹⁸ *Kinney v. Uglow*, 163 Ore. 539, 98 P.2d 1006 (1940). This was the situation in the *Greenough* case itself. See pp. 1601-02 *supra*.

⁹⁹ *In re Simons' Will*, 55 Conn. 239, 11 A. 36 (1887); *Farmers' Bank & Trust Co. v. Stanley*, 190 Ky. 762, 228 S.W. 691 (1921); *In re Lynch's Estate*, 139 Neb. 761, 298 N.W. 697 (1941).

¹⁰⁰ See *In re Estate of Lundell*, 107 Cal. App. 2d 463, 237 P.2d 62 (1951) (allowing such charges); *In re Graves' Will*, 197 Misc. 638, 95 N.Y.S. 2d 310 (Sur. Ct. 1950) (same); *In re Estate of Heilbronner*, 39 Misc. 2d 912, 242 N.Y.S.2d 118 (Sur. Ct. 1963) (suggesting that if the benefit is in money it should exceed the cost). Where a compulsory accounting discloses no assets unaccounted for, one can conclude either that there was no benefit or that the litigation failed; in either case, there is no allowance. *In re Vorndran's Estate*, 132 Misc. 611, 230 N.Y.S. 326 (Sur. Ct. 1928).

¹⁰¹ *Kimbrough v. Dickinson*, 251 Ala. 677, 39 So. 2d 241 (1949); *Dent v. Foy*, 214 Ala. 243, 107 So. 210 (1925); *In re Estate of Reade*, 31 Cal. 2d 669, 191 P.2d 745 (1948); *Becht v. Miller*, 279 Mich. 629, 273 N.W. 294 (1937); *Trautz v. Lemp*, 334 Mo. 1085, 72 S.W.2d 104 (1934); *Bean v. Bean*, 74 N.H. 404, 68 A. 409 (1907); *Fidelity Union Trust Co. v. Berenblum*, 91 N.J. Super. 551, 221 A.2d 758 (App. Div. 1966).

fiduciaries that individual beneficiaries can increase or protect the estate for the advantage of all. Recovering from third parties assets belonging to the estate and bringing them into the general distribution will suffice, without any showing of fault in trustee or executor.¹⁰² Defeating the claim of a third person to a distributive share may also suffice if it leaves more for those who remain,¹⁰³ though there is a question how far the costs of such strife between rival claimants should burden the common estate.¹⁰⁴

It was suggested earlier that there can be funds within funds and this implies that there can be benefits that are concentrated on the minifunds. Where this occurs it turns out all too often that the main contest is between rival claimants, since an increase in one will probably be at the expense of the rest. But one can disregard the loss to the rest and disregard also the absence of any effect on the fund as a whole and focus attention on the subgroup that gains.

An illustration of a transfer strictly between subgroups, without any effect on the fund as a whole, is *Petition of Crum*.¹⁰⁵ Here a testator had made devises in identical words to three persons and their heirs and assigns. When the will took effect all three persons had already died, so the executors sued for construction of the will, to determine whether the deaths caused the legacies to lapse. The heirs of two deceased devisees, though served with process, did not appear or respond in any way. The heirs of the third-employed lawyer Crum, who appeared, actively contended, and in the end established that the devises had not lapsed. The action was not formally brought as a class action. In a state that now accepts collateral estoppel in its offensive form the decision as to one devisee would be conclusive as to the other two, since the crucial language was the same in all three. In any event, the court that decided against lapse of one would have before it, in the same proceeding, the same issue concerning the other two. It surely would be under the strongest compulsion to treat all three alike and hold all the devises effective. This would of course mean depriving persons who would have taken

¹⁰² *In re Estate of Hirsch*, 154 Misc. 736, 278 N.Y.S. 255 (Sur. Ct. 1935); *In re Estate of Lounsberry*, 226 App. Div. 291, 234 N.Y.S. 680 (Sur. Ct. 1929); *In re Schwint's Estate*, 183 Okla. 439, 83 P.2d 161 (1938); *Kauffman v. Hunt*, 65 Pa. D. & C. 566 (C.P. 1948). *In re Estate of Rosenberg*, 241 App. Div. 601, 268 N.Y.S. 733, *aff'd*, 265 N.Y. 521, 193 N.E. 302 (1934), refused an allowance because, though there was a benefit, it was not large enough.

¹⁰³ *In re Estate of Engbretson*, 68 S.D. 255, 1 N.W.2d 351 (1941).

¹⁰⁴ *Girty v. Girty's Adm'r*, 180 Ky. 786, 203 S.W. 730 (1918) (a contest between two creditors of a decedent's estate in which a charge on the estate for the winner's counsel fee was denied).

¹⁰⁵ 196 S.C. 528, 14 S.E.2d 21 (1941).

the assets in question by gifts over or intestacy. A charge against the estate as a whole would therefore be wrong, since it would cast some of the burden on those who lost. The court was clear that lawyer Crum should be able to charge the passive heirs who gained by his work and would otherwise "reap where they have not sown. . . ." ¹⁰⁶ Their shares were therefore charged with the extra fee that the court awarded lawyer Crum. ¹⁰⁷ As to the passive heirs the lands they took by the valid devises were funds created, though the estate as a whole had neither gained nor lost.

The benefits described so far have all been defined by economic tests of value added or loss prevented. But funds administered by fiduciaries can be benefited in other ways that involve no economic consequences whatever. In this context the "common fund" doctrine has borrowed some of the thinking summarized in the shorthand phrase that a trust or decedent's estate should bear the cost of "its own" administration. This notion is close enough to the "common fund" doctrine that it was used as a supportive argument in the *Greenough* case itself. But its primary meaning is not that the costs of lawsuits should be distributed in proportion to the gains they produce but rather that a fiduciary who does his duty should not be charged for administrative costs of any kind. So where there is need for "construction," *i.e.*, where there is doubt as to the meaning or validity of some provision in a will or trust, the executor or trustee can apply for instructions and any resulting litigation costs will be chargeable to the estate. ¹⁰⁸

Most states go further and permit an interested beneficiary who engages, affirmatively or defensively, in litigating such issues to charge his lawyer's fee to the whole estate. No great remorse seems to be felt about diminishing the donor's bounty in this way; in judicial opinions in these cases there is at least a hint that it serves the testator or settlor right for using ambiguous or otherwise doubtful language. But an expanded conception of benefit is also at work. Resolving such doubts will aid administration by the executor or trustee. Effective representation of opposing interests will likewise aid the court in deciding doubtful issues. The Supreme Court of Kansas epitomized the thinking that is frequently found: "it is a benefit to the estate as an entity to have a question of law determined where there is doubt as to the proper construction to be placed upon a will." ¹⁰⁹

As to contestants who prevail, a charge on the "entity" for

¹⁰⁶ *Id.* at 533, 14 S.E.2d at 24.

¹⁰⁷ *Id.* at 534, 14 S.E.2d at 24.

¹⁰⁸ 3 A. SCOTT, THE LAW OF TRUSTS § 188.4 (3d ed. 1967).

¹⁰⁹ *In re Estate of Sowder*, 185 Kan. 74, 87, 340 P.2d 907, 918 (1959).

their lawyers' fees should not be surprising,¹¹⁰ but where the contest relates to "construction" of a will even losers are usually compensated in the same way, provided their claims were "honest" and there was some basis for doubt.¹¹¹ While most of these cases have involved provisions in wills, the same reasoning has been applied to trusts created *inter vivos* and there seems to be no reason for a distinction. Where uncertainties as to the meaning or validity of trust provisions may hamper administration, even contestants who fail in asserting their own claims can render a benefit to the whole trust estate through participating actively in litigation that helps to resolve uncertainty.¹¹²

¹¹⁰ *In re Estate of Curtis*, 103 Colo. 361, 86 P.2d 260 (1938); *McCormick v. Hall*, 337 Ill. 232, 168 N.E. 900 (1929). Where the issues as to interpretation and validity are complex and interlocking, all assisting parties will be repaid by the estate for their lawyers' fees. *De Korwin v. First Nat'l Bank*, 84 F. Supp. 918, 938 (N.D. Ill.), modified, 179 F.2d 347 (7th Cir. 1949); *In re Estate of Reeve*, 393 Ill. 272, 65 N.E.2d 815 (1946).

It seems unlikely, however, that other courts would follow *Merkel v. Long*, 372 Mich. 144, 125 N.W.2d 284 (1963), where an evenly divided court affirmed an award of counsel fees, payable out of the entire estate, for lawyers who drafted a settlement fixing shares as between life and remainder beneficiaries in three testamentary trusts.

¹¹¹ *Orme v. Northern Trust Co.*, 25 Ill. 2d 151, 183 N.E.2d 505, cert. denied, 371 U.S. 935 (1962); *Eckford v. Eckford*, 53 N.W. 345 (Iowa 1892); *Central Trust Co. v. Harris*, 152 Kan. 296, 103 P.2d 902 (1940); *In re Estate of Sowder*, 185 Kan. 74, 340 P.2d 907 (1959); *Kingston v. St. Louis Trust Co.*, 348 Mo. 448, 154 S.W.2d 39 (1941); *Young v. Exum*, 110 R.I. 685, 296 A.2d 451 (1972); *Evans v. Adams*, 180 S.C. 214, 185 S.E. 57 (1936); *Vanderbilt Univ. v. Mitchell*, 162 Tenn. 217, 36 S.W.2d 83 (1931); *In re Estate of Johnson*, 46 Wash. 2d 308, 280 P.2d 1034 (1955). A case that denies any allowance because the will was unambiguous and needed no construction is *Bartlett v. Mutual Benefit Life Ins. Co.*, 358 Ill. 452, 193 N.E. 501 (1934).

Clarksdale Hosp. v. Wallis, 187 Miss. 834, 193 So. 627 (1940), refused, however, to charge against the whole estate of the decedent the counsel fees of one legatee which had merely established the validity of its own legacy, saying that to force unsuccessful adversaries to pay fees incurred in accomplishing their defeat would be "punitive damages." *Id.* at 843, 193 So. at 628. Failure to augment the estate was given in *Gregg v. Gardner*, 73 N.M. 347, 388 P.2d 68 (1963), and *Fields v. Fields*, 139 Ore. 41, 3 P.2d 771 (1931), as the reason for denying losers any allowance. In *In re Larson's Will*, 211 Wis. 237, 247 N.W. 880 (1933), the denial rested on a strict reading of the Wisconsin statute. A very guarded but not wholly negative approach was adopted in *Clayton v. Stein*, 135 Md. 684, 109 A. 444 (1920).

¹¹² *In re Atwood's Trust*, 227 Minn. 495, 35 N.W.2d 736 (1949); *Annot.*, 9 A.L.R.2d 1132 (1949). In the *Atwood* case an action for a declaratory judgment was brought by one claimant and an adverse but losing claimant, joined as defendant, was allowed his lawyer's fees from the trust estate. The court rejected any distinction between beneficiaries who sued affirmatively and those brought in as defendants and in the cases cited in notes 110, 111 *supra*, no distinction of this kind is drawn.

The requirement in *Hereford v. Unknown Heirs*, 306 S.W.2d 648 (Mo. App.

The "common fund" doctrine and the rule permitting estates to be charged for their own "construction" overlap somewhat. They both entail a conception of funds as separate entities, almost endowed with a life of their own, that are required to pay their own way. So in purporting to apply the "common fund" doctrine a benefit can be found where there was no object whatever to "create" or "increase" the fund but at most to "protect" it in a very extended sense — to ensure that a valid intent of its creator was ascertained and carried out. Numerous cases, for example, have found benefit to decedents' estates through successful contests by distributees of invalid wills proposed for probate, since an unlawful distribution of the estate is thereby prevented.¹¹³ A benefit can be conferred on a trust through "defending" it against efforts by a trustee or another beneficiary to terminate it prematurely,¹¹⁴ through opposing proposals of trustees to dispose of trust assets in a manner that would have been profitable but was not authorized by the settlor,¹¹⁵ or through securing the appointment of the full quota of trustees that the settlor had desired.¹¹⁶

1957), that an ambiguous will must also include a trust for an allowance to be made can hardly be taken seriously and was expressly rejected in *McCormick v. Hall*, 337 Ill. 232, 168 N.E. 900 (1929).

¹¹³ *Louisville Presbyterian Theolog. Sem. v. Botto*, 117 Ky. 962, 80 S.W. 177 (1904); *In re Estate of Merica*, 99 Neb. 229, 155 N.W. 887 (1915); *In re Estate of Limberg*, 255 App. Div. 855, 11 N.Y.S.2d 908 (1939); *In re Faling's Estate*, 113 Ore. 6, 228 P. 821 (1924); *Smith v. Haire*, 138 Tenn. 255, 197 S.W. 678 (1917); *In re Estate of Statler*, 58 Wash. 199, 108 P. 433 (1910). But *In re Estate of Baxter*, 94 Mont. 257, 22 P.2d 182 (1933), held that the successful defense of a contested will would not justify an allowance, and *Proudfit v. Coons*, 137 Colo. 353, 325 P.2d 273 (1958), likewise refused an allowance where heirs contested two wills and succeeded in invalidating only one of them. Success in a Florida probate court in opposing the probate of one will and securing the probate of another was held in *Estate of Brannan*, 66 Misc. 2d 283, 321 N.Y.S.2d 49 (Sur. Ct. 1971), not to justify an allowance out of the estate of a New York decedent, though the estate was to be distributed under a power of appointment exercised by the Florida will: "[A]s a matter of public policy, we should be very cautious about increasing the types of cases" in which lawyers, already paid by their own clients, seek extra pay from strangers. *Id.* at 288, 321 N.Y.S.2d at 54.

¹¹⁴ *Walsh v. National Sav. & Trust Co.*, 247 F.2d 781 (D.C. Cir. 1957); *German Evangelical St. Marcus Congregation v. Archambault*, 404 S.W.2d 705 (Mo. 1966).

¹¹⁵ *Ewing v. First Nat'l Bank*, 209 Ga. 932, 76 S.E.2d 791 (1953); *Jesser v. Mayfair Hotel, Inc.*, 360 S.W.2d 652 (Mo. 1962).

¹¹⁶ *In re Estate of Trimble*, 392 Pa. 277, 140 A.2d 609 (1958) (five trustees had been provided for and a single trustee had claimed the power to act); *Monroe v. Winn*, 19 Wash. 2d 462, 465, 142 P.2d 1022, 1024 (1943) (ordering payment out of trust assets for an *unsuccessful* suit to remove trustees, on the grounds that (1) their confirmation in office accomplished the settlor's purpose and (2) "administrative questions conductive [sic] to proper future administration of the trust estate were settled").

But see *In re Estate of Love*, 136 Neb. 458, 286 N.W. 381 (1939) (refusing to

Invalidating even a single clause in a will has been held to benefit a decedent's estate "by preventing the unlawful distribution and a miscarriage of justice. . . ." ¹¹⁷ The concept of benefit is thus loaded with a policy judgment that private litigation should be enlisted both to aid in enforcing the purposes of private donors and in policing the conduct of their fiduciaries.

B. Proceedings in Aid of Creditors

The "creation" of funds for the purpose of satisfying creditors, through various forms of receivership or creditors' bills, will ordinarily occur through the initiative of one of the creditors. Where the debtor's financial condition is found to justify such proceedings, setting the process in motion is conceived to be a benefit sufficient for an award of counsel fees, almost as though a reward in this form were deserved for bringing the assets "into court." ¹¹⁸ Then even if a receiver or other liquidator is appointed, private litigation can give reinforcement in some useful ways that the "common fund" doctrine can encourage. Here as elsewhere clients (individual creditors) can sue for contribution to their costs in counsel fees and occasionally do,¹¹⁹ though the incentive supplied almost always takes the form of an extra fee for their lawyers.

The most obvious form of "increase" of a fund assembled for these purposes is recapturing an asset of the debtor and making it available to satisfy claims of all the creditors.¹²⁰ The fact that

find any benefit because a decedent's estate had no "pecuniary interest" in whether a particular person was to serve as executor in the event that a challenged codicil were held valid); *Hempstead v. Meadville Theolog. School*, 286 Pa. 493, 134 A. 103 (1926) (an injunction had been secured by dissenting trustees against transferring to another state the assets of a school, but it did not appear that the assets themselves were threatened with dissipation).

¹¹⁷ *In re Demmel*, 129 Colo. 107, 112, 267 P.2d 647, 649 (1954). *Contra*, *McCormick v. Rand*, 246 Ore. 606, 425 P.2d 488 (1967).

¹¹⁸ *Buford v. Tobacco Growers' Co-op Ass'n*, 42 F.2d 791 (4th Cir. 1930); *Central Trust Co. v. Condon*, 67 F. 84, 110-11 (6th Cir. 1895); *Strang v. Taylor*, 82 Ala. 213, 2 So. 760 (1887); *Winslow v. Harold G. Ferguson Corp.*, 25 Cal. 2d 274, 153 P.2d 714 (1944); *White v. University Land Co.*, 49 Mo. App. 450 (1892); *In re Cooperative Wage Fund*, 65 Pa. D. & C. 274 (C.P. 1948); *Tennessee United Paint Store, Inc. v. D.H. Overmyer Warehouse Co.*, 62 Tenn. App. 721, 467 S.W.2d 806, cert. denied, 467 S.W.2d 806 (Tenn. 1971).

The Federal Bankruptcy Act provides similarly for an allowance for lawyers' fees for creditors in involuntary proceedings who succeed in securing an adjudication of bankruptcy and the appointment of a trustee. 11 U.S.C. § 104(a) (1970).

¹¹⁹ *Farmers & Merchants Nat'l Bank v. Peterson*, 5 Cal. 2d 601, 55 P.2d 867 (1936); *Swedish-American Nat'l Bank v. Davis*, 71 Minn. 508, 74 N.W. 286 (1898); *White v. University Land Co.*, 49 Mo. App. 450 (1892).

¹²⁰ *City of Wewoka v. Banker*, 117 F.2d 839 (10th Cir. 1941); *In re Continental Vending Mach. Corp.*, 318 F. Supp. 421 (E.D.N.Y. 1970); *Anniston Loan &*

the interests of the creditors are represented by a receiver will present no obstacle, for the success of the individual creditor merely shows that the receiver's representation was inadequate.¹²¹ Defeating another creditor's claim that a receiver had approved through collusion saves the assets from depletion and at least "preserves" the fund.¹²² But it does not seem that standard doctrine goes much beyond this in encouraging efforts to bring maximum returns.¹²³

Where the principal object in administering funds is not to carry out the directives of their donor-creators (as with wills and trusts) but to liquidate the assets of a debtor in decay, conflict and opposition among the claimants are likely and present some special problems. One aspect of these problems — the effect on a "common fund" of an outbreak of active litigation between adversary subgroups — will be discussed in the next section. But whether or not they have engaged in litigation, the presence of internal conflict raises other problems that are relevant here. For the "common fund" doctrine rests on the premise that the costs of litigation should be distributed, through the device of a fund, in proportion to the benefits that the litigation produced. This means that care is needed in tracking the incidence of benefits where benefit to one subgroup means loss to another.

It is interesting that *Sprague v. Ticonic National Bank*,¹²⁴ which propelled "common funds" so vividly across the modern sky, provides an excellent example of bungling on this issue. After remand by the United States Supreme Court it appeared that the bonds that Lottie Sprague had salvaged for all of the fourteen

Trust Co. v. Ward & Co., 108 Ala. 85, 18 So. 937 (1896); *Davis v. Bay State League*, 158 Mass. 434, 33 N.E. 591 (1893); *In re Estate of Weed*, 163 Pa. 595, 30 A. 272 (1894).

¹²¹ *Leggett v. Missouri State Life Ins. Co.*, 342 S.W.2d 833, 938-39 (Mo. 1960).

¹²² *Swedish-American Nat'l Bank v. Davis*, 71 Minn. 508, 74 N.W. 286 (1898). But in the absence of misconduct of the receiver, *Strang v. Taylor*, 82 Ala. 213, 2 So. 760 (1887), refused to allow charges on the debtor's estate for services by creditors in resisting each other's claims.

¹²³ In *Weinberg v. Goldenberg's, Inc.*, 81 F. Supp. 353 (D.D.C. 1948), an attorney for a creditor formally opposed the sale of an asset at a price claimed to be too low, and though the result was a substantial increase in the sum realized, a charge on the proceeds was denied. In *Geiger v. Peyser*, 123 F.2d 167 (D.C. Cir. 1941), it was held not enough to propose a plan, which the receiver adopted, for treating defrauded certificate holders; "otherwise a fund could be completely dissipated by numerous interveners eager to assist the court and its receivers." *Id.* at 168. Perhaps the denial of recovery in *Jett v. Merchants & Planters Bank*, 228 F.2d 156 (4th Cir. 1955), rests on the fact that no lawsuit was brought when creditors secured estimates from appraisers and succeeded in securing a substantial increase in the sum realized for a particular asset.

¹²⁴ 28 F. Supp. 229 (D. Me. 1939), *aff'd in part and rev'd in part*, 110 F.2d 174 (1st Cir. 1940), *rev'd*, 307 U.S. 161 (1939); see pp. 1609-10 *supra*.

beneficiaries had been sold for "nearly twice" the total of their fourteen secured claims. A balance of some 10,000 dollars was still segregated in the hands of the bank receiver, but this sum was free of any lien and was available to pay the unsecured creditors. The interests of secured and unsecured creditors were clearly hostile; the secured creditors had gained through Sprague's litigation and precisely to the same extent the general creditors had lost. Yet the award to Sprague of 1,214.51 dollars for her counsel fees was charged, not to the money fund of the fourteen beneficiaries, but to the 10,000 dollars which was part of the general assets and on which the fourteen had no claim.¹²⁵ Then the Court of Appeals approved an award of 1,877.30 dollars for counsel fees in establishing her right to a charge for the 1,214.51 dollars in counsel fees that she had spent in the original litigation. Presumably the general creditors were charged for this too.¹²⁶

Confronted with internal conflict of this kind most courts have been much more selective, but difficulties arise. Since the beneficiaries will not be found personally liable, the operation must be carried out through identifying funds and matching them with beneficiaries. Litigants at times can help to make this easy, as in a dispute over dividends as between preferred and common stock, where one preferred stockholder secured an injunction against paying dividends on the common stock; the corporation then elected to deposit its earnings in a special bank account, and when the preferred stockholders were awarded the whole amount — there, miraculously, was a fund, which was charged with the fee of the enterprising litigant's lawyer.¹²⁷ More ingenuity was

¹²⁵ The issue was sharply raised on behalf of the unsecured creditors but the court spoke soothingly: (1) the sum involved was small so that the disadvantage to the unsecured creditors was "trivial" and (2) the unsecured creditors had recovered nearly 90 percent of their claims anyway. 110 F.2d at 177.

¹²⁶ The district court was also told that it had discretion to award counsel fees for the appeal from the district court's denial of counsel fees in securing counsel fees. Nothing was said about the next stage, after the remand to the district court, *i.e.*, whether Sprague would be awarded counsel fees incurred in establishing the right to counsel fees for securing counsel fees.

Two other endless chain proposals of this kind that were denied were made by lawyers (fees for themselves in securing fees for themselves). *Forsyth v. Southern Bell Tel. & Tel. Co.*, 162 So. 2d 916 (Fla. App. 1964); *Krause v. State Farm Mut. Auto. Ins. Co.*, 184 Neb. 588, 169 N.W.2d 601 (1969). But *Cole v. Hall*, 85 L.R.R.M. 2305 (E.D.N.Y. 1974), awarded a total fee of 10,500 dollars to lawyers whose appeals to the Second Circuit Court of Appeals and the United States Supreme Court succeeded in establishing their right to counsel fees in litigation brought to vindicate rights of free speech for labor union members; this, the court said, was "a matter of public concern" and compensation for their services in protecting their own fee was "in the public interest." *Id.* at 2306.

¹²⁷ *Cintas v. American Car & Foundry Co.*, 133 N.J. Eq. 301, 32 A.2d 90 (Ch. 1943), *aff'd in part and rev'd in part per curiam*, 135 N.J. Eq. 305, 37 A.2d 205 (Ct. Err. & App. 1944).

required where stockholders of a bank then in liquidation were assigned in addition the superior rank of general creditors. The court concluded that the lawyer for some stockholders who achieved this could not be given a charge on all the free assets since there were other general creditors as well. The solution was to deduct the equivalent of his fifteen percent fee from the payments made by the bank liquidator to the promoted stockholders. The liquidator was instructed then to pay directly to the successful lawyers, out of the general assets, the equivalent of the sums so deducted. Affirmative personal liability for their shares of his fee could not be imposed on the beneficiaries (the stockholders) but a deduction from their claims on the "fund" was proper.¹²⁸

If the charges for fees are to be selective in this way it becomes necessary to examine with some care the economic realities and to determine whether the "creation" or "increase" of one mini-fund causes subtraction from another or from the funds as a whole. If the interests affected, though potentially hostile, were mutually supportive in the litigation that was actually conducted, then one group can be reimbursed for the gain of the other.¹²⁹ If analysis leads to the opposite conclusion, then the "adversary fund" that gains through the loss of another fund will take the whole charge.¹³⁰ On the other hand, if the success of one adversary group does not achieve the segregation of some identified asset on which a charge can be imposed, the fund as a whole will

¹²⁸ *Smith v. Kroeger*, 138 Ohio St. 508, 37 N.E.2d 45 (1941).

¹²⁹ *Leggett v. Missouri State Life Ins. Co.*, 342 S.W.2d 833, 937-39 (Mo. 1960). Here stockholders of a life insurance company sued on behalf of themselves and other stockholders and succeeded in extracting from the assets of a transferee corporation (which had assumed the liabilities of the transferor) more than 1,400,000 dollars which became available to pay the claims of policyholders. None of this money was left over for any of the stockholders. But the court concluded that in the particular litigation the priority of the policyholders was always conceded so the claims of both groups were mutually consistent. So a lien for counsel fees was imposed on the fund that was to be distributed to the policyholders.

But *American S.S. Co. v. Wickwire Spencer Steel Co.*, 14 F. Supp. 941 (W.D.N.Y. 1935), *aff'd mem.*, 82 F.2d 994 (2d Cir. 1936), awarded no fees because nothing was left over for the class of creditors of which the active litigants were members, even though their lawyers succeeded in releasing assets for the satisfaction of other lien creditors who had priority over them.

¹³⁰ For examples of cases using such selective methods of allocation, see *United States v. American Soc'y of Composers, Authors & Publishers*, 466 F.2d 917 (2d Cir. 1972); *Crump v. Ramish*, 86 F.2d 362 (9th Cir. 1936); *Nolte v. Hudson Navigation Co.*, 47 F.2d 166 (2d Cir. 1931); *Central Trust Co. v. Condon*, 67 F. 84, 110 (6th Cir. 1895); *Muskegon Boiler Works v. Tennessee Valley Iron & R.R.*, 274 F. 836 (M.D. Tenn. 1921); *Miller v. Kehoe*, 107 Cal. 340, 40 P. 485 (1895); *Baltimore & O.R.R. v. Brown*, 79 Md. 442, 29 A. 524 (1894); *Kelly v. Mountain City Club*, 101 Tenn. 286, 47 S.W. 426 (1898); *Lochte v. Blum*, 10 Tex. Civ. App. 385, 30 S.W. 925 (1895).

not be forced to assume it.¹³¹ Nor is it enough that the lawyer who established priority for one class of creditors clarified the issues for the benefit of receivers and thereby rendered "aid to the court." Reacting strongly against this suggestion, which has met with such success in the "construction" of wills and trusts, one court has declared that this would result in "unjust enrichment" for the lawyers if he were paid by his own clients and then were paid a second time for the same service.¹³²

It seems, then, that with funds assembled to aid creditors benefit is somewhat more strictly defined, by tests more exclusively economic, than in the earlier group involving wills and trusts, where enforcing the directives of private donors gives an additional reason for encouraging private litigation. But in both types of "fund" courts clearly play an essential role in defining and locating benefits. For in this strange nether world there is no guidance from private contract and the ordinary law of restitution does not fit. The need for an outside arbiter is most evident where internal conflict causes funds to subdivide or to break up and then reform. But the need for "court control" is continuous in an enterprise that imposes on abstract entities called funds a proportionate share of the costs incurred in their "creation, increase or protection."

V. CONFLICTING CLAIMS

The limitation excluding charges on funds in litigation between competing claimants is usually attributed to another decision of the Supreme Court, *Hobbs v. McLean*,¹³³ which was decided only five years after the *Greenough* case and two years after *Pettus*. It appeared in this case that one Peck had contracted in his own name to supply wood to the United States Government. To secure needed capital he entered into a partnership with two other persons, under an arrangement by which the three partners were to share in the proceeds of the Government contract in proportion to their money contributions. Peck, when paid by the Government less than he claimed, sued in his own name in the Court of Claims and secured a judgment for a

¹³¹ *Commissioner v. Massachusetts Accident Co.*, 318 Mass. 238, 61 N.E.2d 137 (1945). See *Abbott, Puller & Myers v. Peyser*, 124 F.2d 524 (D.C. Cir. 1941) (interests of subgroups were so entangled that no interest could be selected as the subject of the charge and therefore all remedy denied).

¹³² *Maurer v. International Re-ins. Corp.*, 33 Del. Ch. 456, 95 A.2d 827 (Sup. Ct. 1953). The court, however, conceded that the procedure of charging "common funds," approved by "eminent authority" in the *Pettus* case, was "common practice in this state." *Id.* at 464, 95 A.2d at 831.

¹³³ 117 U.S. 567 (1886).

net sum of 35,773.63 dollars. Peck was declared bankrupt while the case was pending on appeal. After the affirmance by the Supreme Court and remand to the Court of Claims, Peck's assignee in bankruptcy, Hobbs, intervened and was paid the full amount of the judgment. The other two partners sued Hobbs for an accounting and after an extended contest established that under the partnership agreement their contributions entitled them to the whole sum paid to Hobbs. When Hobbs then sought an allowance for his counsel fees in resisting the partners' suit for an accounting, he was told that *Greenough* did not apply because (1) he had acted in "hostility" to the two prevailing partners and (2) he had lost.¹³⁴ The Court added the comment that he should not recover his counsel fees from those "whose property he sought to misappropriate."¹³⁵

The claim of Hobbs for reimbursement for his counsel fees was indeed as weak a claim as one could well imagine. The contest was only two-sided, the claims on each side were in direct and total conflict (each side claimed the whole for itself), and a losing adversary was seeking to shift his litigation costs to the winners. It is true that Hobbs' loss in the litigation meant a corresponding gain to his opponents who prevailed. But they prevailed because they established that they were entitled to all the money owed by the government and that Peck and his creditors were entitled to none. To invoke notions of enrichment and crank up the *Greenough* machinery would be to introduce a new form of general insurance to losing litigants against liability for any counsel fees merely because their claims or defenses proved to be unfounded.¹³⁶

A claim for counsel fees would be more plausible if presented

¹³⁴ *Id.* at 581-82. The court also gave a third answer, that the assignee, Hobbs, was apparently seeking fees for the services of lawyers in Peck's original action, but that 10,000 dollars had already been subtracted from Peck's judgment to cover those fees and there was no showing that the assignee himself had incurred any additional costs. *Id.* at 581. There was also a fourth answer which the court did not give: that the sum due by the judgment had been paid in full without earmark to Hobbs so that the "fund" had thus been dissipated. Perhaps three answers were enough.

It should be noted that in this case Hobbs, the client, presented the claim that was denied.

¹³⁵ *Id.* at 582.

¹³⁶ For examples of other instances of adverse claimants who after losing were denied charges on "common funds," see *Caine v. Payne*, 191 F.2d 482 (D.C. Cir. 1951); *Lamar v. Hall & Wimberly*, 129 F. 79 (5th Cir. 1904); *Kimball v. Atlantic States Life Ins. Co.*, 223 F. 463 (S.D. Ga. 1915); *Dent v. Foy*, 214 Ala. 243, 107 So. 210 (1925); *In re Estate of Walden*, 174 Cal. 776, 164 P. 639 (1917); *Baltimore & O.R.R. v. Brown*, 79 Md. 442, 29 A. 524 (1894); *McCormick v. Elsea*, 107 Va. 472, 59 S.E. 411 (1907).

by the winners against a losing adversary who retains a share in the fund. The question would then become whether the adversary character of the litigation raises a distinct objection to the use of the "common fund" technique. It would no doubt be an adequate objection to say, as was said in the situations discussed in the previous section, that if the interests are in conflict, success for one side means no benefit for the other¹³⁷ and for a charge against a fund a benefit is required. But more basically, if there are really only two adversaries and no third party interests are involved, one comes back to the rule adopted by most American states that explicitly denies recovery of counsel fees by winners from losers, and while it stands it should not be evaded by transparent means.¹³⁸ Even if there is a fund in which third parties as well as the antagonists have interests, one can say (1) that the fund receives no benefit from the resolution of their conflict and (2) that despite the exceptions from it the policy behind the usual rule is still accepted, so that there is an affirmative objection to compelling losers to incur this added disadvantage, even partially or indirectly.¹³⁹

¹³⁷ This is not always or necessarily so. We should note the strange case of *Wallace v. Fiske*, 80 F.2d 897, 905-09 (8th Cir.), *cert. denied*, 298 U.S. 675 (1936), where a remainderman in an *inter vivos* trust sued to establish that stock dividends on stock included in the trust accrued to the remaindermen, not the life tenant. A majority of the remaindermen opposed this contention in litigation carried through to final decree for the plaintiff. The opposing remaindermen then discovered that their "defeat" was enormously advantageous to them through eliminating any inheritance tax. They therefore "accepted" the result of the decree by demanding that the distribution conform to it and by relying on it in state and federal litigation through which they escaped heavy taxation. As a result of this "acceptance" the plaintiff's lawyer was given a fee charged to their shares in the trust. *Id.* at 908-09.

¹³⁸ *Grober v. Kahn*, 47 N.J. 135, 219 A.2d 601 (1966), was an action for an accounting and partition brought by one partner against another, joining the latter's wife and daughters who were alleged by the plaintiff to be mere "fronts" for his opponent. After establishing in the accounting that the principal defendant owed some 430,000 dollars to the partnership, the plaintiff requested an attorney's fee of 100,000 dollars to be paid by defendant out of this sum. The court hotly rejected the suggestion: calling the partnership assets a "fund in court" was to use fiction, and defendant's breach of fiduciary obligation made no difference; this was an ordinary suit by one man against another. *Id.* at 148-51, 219 A.2d at 608-10. For references to earlier decisions interpreting the New Jersey court rules in a different way, see notes 70-72 *supra*.

¹³⁹ None of the following cases formulate their conclusions in quite these terms but they strongly indicate that losers *should not* have to assume this added cost. *Ballwanz v. Jarka Corp.*, 382 F.2d 433 (4th Cir. 1967); *Brown v. Pennsylvania RR.*, 250 F. 513 (3d Cir.), *cert. denied*, 248 U.S. 558 (1918); *In re Estate of Marré*, 18 Cal. 2d 191, 114 P.2d 591 (1941); *Scott v. Superior Ct.*, 208 Cal. 303, 281 P. 55 (1929); *Koenig v. Ward*, 104 Md. 564, 65 A. 345 (1906); *Caughman v. Caughman*, 247 S.C. 104, 146 S.E.2d 93 (1965); *Gilpin v. Burrage*, 188 Tenn. 80,

This issue takes on a different aspect, however, where the contest is with a beneficiary of the fund, who had and retains an interest but who "loses" through defeat of his attempt to misappropriate. Must he contribute to the cost of "increasing" or "preserving" the fund at his own expense? The problem is illustrated by a Tennessee case¹⁴⁰ where a widow proposed for probate a will signed by her husband, which named her the sole beneficiary and executrix. The heirs of the husband contested the will successfully, establishing the widow's fraud and undue influence exerted on the husband. The result was to reinstate an earlier, valid will under which the widow took a smaller share. The court charged the entire estate with the fees of the lawyers for the husband's heirs, brushing aside the widow's protest that she had suffered a net loss. On one view of the case, the contest was merely between competing claimants and it accomplished at most a redistribution between them, adding nothing to the estate. But if the estate, again, is thought of as an entity which the successful contest by the husband's heirs "protected," it becomes irrelevant that the widow is compelled to contribute indirectly to the cost of accomplishing her own defeat. And surely the result was laudable, for it would be difficult to justify an exemption merely because it was a beneficiary rather than some third person who was engaged in looting the estate.

Several other courts have used the same technique where the wrongdoing of the defeated beneficiary was approximately of the same degree.¹⁴¹ At times, however, it seems to have been enough that the adverse claim was merely proven unfounded, if its defeat "increased" or "protected" a fund.¹⁴² This, however, is not at

216 S.W.2d 732 (1948); *Kelly v. Mountain City Club*, 101 Tenn. 286, 47 S.W. 426 (1898); *Chapin v. Colard*, 29 Wash. 2d 788, 189 P.2d 642 (1948).

In *Bartholomew v. Union Trust Co.*, 36 Ind. App. 328, 75 N.E. 31 (1905), a lawyer argued, without success, that establishing the validity of his client's mortgage was helpful to the receiver in the particular case and to other receiverships as well, by establishing a clear rule in aid of administration so that "many similar claims . . . were expeditiously settled without litigation." *Id.* at 330, 75 N.E. at 32. When this line of argument failed, the lawyer argued that he should have a fee because the receiver had sent other claimants to him to explain the effect of the decision and he had advised them to settle in accordance therewith. On this the somewhat wry comment was that his duty to his clients was "not consistent with the payment of his fees by the opposite party." *Id.* at 331, 75 N.E. at 32.

¹⁴⁰ *Smith v. Haire*, 138 Tenn. 255, 197 S.W. 678 (1917).

¹⁴¹ *Tevander v. Ruysdael*, 299 F. 746 (7th Cir. 1924); *Louisville Presbyterian Theolog. Sem. v. Botto*, 117 Ky. 962, 80 S.W. 177 (1904); *Fidelity Union Trust Co. v. Berenblum*, 91 N.J. Super. 551, 221 A.2d 758 (App. Div. 1966); *In re Estate of Hirsch*, 154 Misc. 736, 278 N.Y.S. 255 (Sur. Ct. 1935). The *Tevander* case involved only two partners and on its facts seems not distinguishable from *Grober v. Kahn*, 47 N.J. 135, 219 A.2d 601 (1966), see note 138 *supra*.

¹⁴² *City of Wewoka v. Banker*, 117 F.2d 839 (10th Cir. 1941) (court disregards

all clear for at other times the veil of the fund has been pierced and the shares of claimants who have incurred net loss have been exempted from any charge for counsel fees.¹⁴³

Thus the protection of the fund does not provide a compelling reason for awarding counsel fees where the threat of depletion comes from one who is also a beneficiary. There is another reason for restraint in making such an award. Ever since the *Pettus* case in 1884 it has been accepted that lawyers' claims against funds are independent of and in addition to any claims of their clients to contribution. What is seldom discussed is the potential this creates for conflict of interest. This would be immediately evident if one were to say that lawyers employed by losers had claims for fees against the winning opponents for the gain to the winners through their own clients' loss; the incentive to promote their clients' interests would be, to say the least, diluted. But the same is true if fees are paid by funds which other persons beneficially own, especially if the funds grow large and the fees, as usual, are inflated in proportion.

One decision that confronts this issue is *Gabrielson v. City of Long Beach*,¹⁴⁴ an action brought in the name of one Mrs. Swart who claimed rights in land located beneath the harbor of Long Beach, California. Mrs. Swart had filed in 1939 with the United States Land Office an application for an oil and gas lease of 640 acres of this submerged land. The 640 acre tract had been part of the land earlier granted by the State of California to the City of Long Beach, under the belief, generally held at that time, that the tidelands were owned by the states. In 1947 the United States Supreme Court held the contrary, that the United States and not the states had paramount rights in the marginal seas.¹⁴⁵ Shortly thereafter the United States Department of the Interior denied the Swart application, but she persisted in litigation in Washington, D.C., to compel its approval.

contention that creditor is worse off by being deprived of an illegal priority payment); *Anniston Loan & Trust Co. v. Ward & Co.*, 108 Ala. 85, 18 So. 937 (1895) (creditor of an insolvent debtor, who resisted a contention that a mortgage made to it by the debtor was a preference, was described as a "trustee" who must bear the cost of litigation made necessary by his "delinquency" in contesting the claims of his *cestuis que trust*); *In re Weed's Estate*, 163 Pa. 595, 598-99, 30 A. 272, 273 (1894) (creditor battled "stubbornly" to retain a preferential transfer of land made on behalf of an insolvent debtor and the court blamed the debtor's "greed" for making a lawsuit necessary); *Kaufman v. Hunt*, 65 Pa. D. & C. 566 (C.P. 1948) (transferees who took in trust benefited through proof of trust despite defeat of their claim of full ownership).

¹⁴³ *Simmons v. Friday*, 190 F.2d 849 (8th Cir. 1951); *Koenig v. Ward*, 104 Md. 564, 65 A. 345 (1906); *In re Estate of Winburn*, 160 Misc. 49, 51-52, 289 N.Y.S. 717, 719-20 (Sur. Ct. 1936).

¹⁴⁴ 56 Cal. 2d 224, 363 P.2d 883, 14 Cal. Rptr. 651 (1961).

¹⁴⁵ *United States v. California*, 332 U.S. 19 (1947).

When in 1953 the Congress granted to the states a three-mile belt of submerged lands there was a saving clause for rights previously acquired.¹⁴⁶ So Mrs. Swart's lawyer, Gabrielson, persisted. He intervened in an action pending in a California state court in support of an injunction against expenditure by the City of Long Beach of revenues from oil and gas extracted from the submerged lands. This injunction was found by the court to be a holding operation in aid of Mrs. Swart's pending application for a federal grant, but in order to secure it Gabrielson was led to contest the constitutionality and construction of state legislation under which gas and oil revenues had been transferred by the state to the City of Long Beach. His attack on constitutionality failed but an argument that he alone presented, going to the construction of one of the statutes, was accepted by the state supreme court. The final result was that the state was held to be entitled, and the city not entitled, to 200,000,000 dollars in accumulated revenue.

Gabrielson petitioned for a fee to be charged to this fund but the trial court denied the petition. The supreme court affirmed in an opinion by Justice Traynor, who pointed out that the purpose of the original action had not been to create or preserve a common fund, but rather to advance adverse personal interests. Such litigation, he reasoned, calls for no additional recovery of fees charged against the fund should the ultimate object fail. In addition, permitting such recovery could create a conflict of interest between lawyer and client; an attorney retained to establish a right adverse to the fund might be inclined to forsake that claim of his client in the hope of obtaining greater fees from the fund.¹⁴⁷

This analysis projected the court into a complex inquiry into motives. Gabrielson contended that by the time he mounted his attack on the California state legislation all hope had been abandoned of establishing his client's rights in the submerged 640 acre tract which the City of Long Beach claimed by grant from the state. If hope had in fact been entirely abandoned it would then appear that Gabrielson's intervention in the California taxpayer's suit was motivated solely, as he claimed, by the purpose of preventing unlawful expenditures of public funds. The finding of the trial court, accepted by the supreme court, was that depriving the city and state of the 640 acre tract remained the "ultimate objective" and that this was enough to defeat his claim for counsel fees.

There was also another troublesome point that the court did

¹⁴⁶ See Submerged Lands Act, 43 U.S.C. §§ 1301-15 (1970).

¹⁴⁷ 56 Cal. 2d at 229-30, 363 P.2d at 886, 14 Cal. Rptr. at 654.

not discuss because it did not need to. Gabrielson injected a new issue of statutory construction into the taxpayer's suit. It was by prevailing on this issue that he "created" the 200,000,000 dollars fund (in fact the result was merely to transfer it from city to state). But any contest over the fund between city and state seemingly had no bearing whatever on his client's rights to the 640 acre tract. Should a lawyer become entitled to an extra reward, measured in some part by the size of the fund produced, for dragging in and winning on an extraneous issue on which third parties have a tremendous stake?¹⁴⁸ If this can occur the incentive to serve his client's interests with utmost diligence might be almost as much impaired as if the conflict of interest were direct.

The possibilities of contamination are suggested by a Tennessee case which deserves a special museum of its own. It involved a widow's contest, on grounds of insanity and undue influence, of two instruments executed on the same day by her deceased husband, one a will and the other an *inter vivos* trust. Her action to set aside the trust was tried first and resulted in a decree for the widow. As the court stated, there was "every reason to believe" that the will contest if pursued would have succeeded on the same grounds of insanity and undue influence. But the widow's lawyers advised her to enter into a settlement with the principal beneficiary of the will, the American Red Cross. She followed their advice and agreed to take one-third of her husband's 110,000 dollar estate, the other two-thirds to go to the Red Cross. She had already paid her lawyers the fee agreed upon with them, but they sought and received an additional fee of ten percent of the whole estate. The court argued that a fund had been preserved, for if the will contest had succeeded, as seemed extremely probable, the executors appointed in the will would have had no estate to administer and the Red Cross would have taken nothing. By advising their client to settle, the widow's lawyers "acted directly in the interest of the American Red Cross" and preserved for it a large sum that it would otherwise have lost.¹⁴⁹ It is plain that the interests of the widow and the Red Cross were mutually hostile at every stage. It seems truly aston-

¹⁴⁸ Gabrielson, it should be noted, did not admit that the rights of the state against the City of Long Beach were an extraneous issue. He contended that he had consistently sought to advance the state's interest, in particular because he believed the representation of that interest by the state Attorney General, who intervened only at a very late stage, to be seriously inadequate. *Id.* at 231-32, 393 P.2d at 888, 14 Cal. Rptr. at 656.

¹⁴⁹ *Carmack v. Fidelity-Bankers Trust Co.*, 180 Tenn. 571, 177 S.W.2d 351 (1944). The court then went on to say: "We do not mean to imply that they acted against the interest of their client in so doing. The compromise settlement appears to have been for the best interest of both parties." *Id.* at 578, 177 S.W.2d at 353-54.

ishing that her lawyers should secure an extra reward, not from their client but from her opponent, for advising her to abandon her claim. Fortunately only one other case comes within hailing distance of this aberration.¹⁵⁰

Aberrations of this kind are of course due to the original aberration of the Supreme Court in the *Pettus* case, in recognizing direct and independent claims of lawyers for extra rewards for merely performing their contracts with their clients. When conflict arises between claimed beneficiaries of a "common fund" the fund must be broken up and subdivided along these lines of conflicting interests. The courts have shown much skill in these maneuvers. What the courts have not shown, except in California, is awareness of the risk that the motives of lawyers may well be corrupted when they are left so free to go off on frolics of their own. This risk would not have existed if the counsel fees required for successful litigation were chargeable to its beneficiaries only through a claim by its promoter, the client, for contribution to his actual costs.

VI. ACCEPTANCE AND REJECTION OF BENEFITS

In numerous situations where contract or restitution remedies encounter a barrier that seems impenetrable a trapdoor is found — "acceptance" of a benefit by the recipient. An acceptance can occur in several different ways: an expression of acquiescence which amounts to a promise before the event or perhaps to a new promise after the event, "standing by" while aware that the benefit is being conferred, or retention where its return would be feasible and not costly. One or another form of acceptance will ordinarily lead to personal liability; if assent is thought to be needed, it is inferred from conduct. The *Greenough-Pettus* machinery, however, which fastens on "funds," did not originate in or depend on any notion of acceptance by the ultimate receivers. In the "common fund" cases it is rarely mentioned though often

¹⁵⁰ *In re Faling's Estate*, 113 Ore. 6, 228 P. 821 (1924). This again was a will contest by a contestant who claimed to be sole heir of the testatrix. His claim was therefore adverse to that of a charity, the Children's Home, which was given a legacy of 3000 dollars in the contested will. After most of the evidence was in, an earlier will was discovered under which the Children's Home had a 400,000 dollars legacy. The lawyers for the heir at first opposed the probate of that will also, but then switched and supported its probate. The will first attacked was then held invalid, the earlier will was probated, and the lawyers for the heir (who had already paid them in full) were given an additional fee, charged against the whole estate. *Id.* at 36, 228 P. at 831. The court found that they had "created or preserved" the estate, though they had opposed its creation until a very late stage, as their duty to their client required. There is no indication whether the prospect of an extra fee influenced their advice to their client that he switch his position.

it is no doubt presupposed.¹⁵¹ However, it is always available where benefits accrue through legal services rendered under contract with another. At times it is most appropriate to use it, as in a case in which a legatee with a 200 dollar legacy not only accepted but demanded 2,500 dollars, as a condition to her needed consent to settlement of a will contest. With a payment thus actively coerced it would seem that the least she should contribute was a fee for the other parties' lawyers.¹⁵² There are other instances also where acceptance has been found through active personal assistance to the litigation by an interested third party plus retention of its proceeds.¹⁵³

A more complex question is raised where proceeds are received or retained by third parties, beneficiaries, but some or all of them opposed the litigation and expressly refused to participate. This could occur though their own economic interest in the outcome was in no way hostile and they would gain affirmatively through success. This combination appeared in the well-known case of *Felton v. Finley*.¹⁵⁴ Here one Coleman had left a will bequeathing 500 dollars to each of his three nephews and three nieces and most of the rest of his estate to charitable organizations. Two nephews out of the group of six employed lawyer Felton to contest the will. Before filing suit lawyer Felton sent to the other four siblings a copy of his contract with the two nephews, providing for a contingent fee of fifty percent. They did not reply and when requested by the two nephews to sign up all four replied with emphatic negatives: "I will have nothing to do with it," "I am having nothing whatever to do with a dead man's money," "Forget about [me]," and "I am not going to

¹⁵¹ *Petition of Crum*, 196 S.C. 528, 14 S.E.2d 21 (1947), made as much of this as most courts would find necessary. After pointing out that the third parties, beneficiaries of the litigation, actually attended some of the court hearings in which their rights were eventually established, the court stated that "[t]hat they will accept the benefits derived thereunder goes without question." *Id.* at 533, 14 S.E.2d at 24.

¹⁵² *Thompson v. Smith*, 268 S.W.2d 653 (Ky. 1954). She had been joined as a named party in the probate proceeding so that her consent to the settlement of a will contest was necessary. The court's figure of speech suggests *Greenough*: "When she demanded and obtained a generous slice of the compromise cake, she impliedly promised to pay the bakers." *Id.* at 653-54. Again, the lawyers were assumed to be the "bakers" though the ones who should recover were their clients (the other distributees) since they were the ones who were forced to pay extra.

¹⁵³ *Bogorad v. Schwarz*, 208 F.2d 704 (4th Cir. 1953); *Manning v. Owens*, 277 Ky. 40, 125 S.W.2d 753 (1939); *Hultman v. Hanley*, 124 Neb. 757, 248 N.W. 81 (1933). *McMullin v. Klein*, 468 S.W.2d 657 (Mo. Ct. App. 1971), involved no active participation in the litigation by the person benefited but rather acceptance of the money proceeds of a settlement plus express agreement to the terms of the settlement itself. Numerous cases on the general topic of "acceptance" of lawyers' services are collected in *Annot.*, 78 A.L.R.2d 318 (1961).

¹⁵⁴ 69 Idaho 381, 209 P.2d 899 (1949).

[sign].”¹⁵⁵ One sister was very religious and it was hinted that religion was one reason for her refusal.

Lawyer Felton proceeded with the contest, which was partially successful; the gifts to the charities were held invalid because included in a will that was executed less than thirty days before the testator's death. This meant that the assets intended for the charities passed to the six nephews and nieces by intestacy. When checks were made out for their distributive shares minus the fees claimed by Felton, the reluctant four overcame their scruples and cashed the checks. On first hearing the Supreme Court of Idaho held by a 3-2 vote that lawyer Felton had a lien for his fees on the funds still held in the decedent's estate.¹⁵⁶ But on rehearing two judges switched and the court held 4-1 that acceptance by the four did not create an “implied contract,” that Felton had merely performed the services called for by his own contract with the two nephews, and that he knew when he performed them that the abstaining four would not employ him, were opposed to the contest, and would not, did not, have anything to do with it.¹⁵⁷ The difficulty then was that they did have something to do with it — they signed and cashed the checks. Up to that point they had had a choice: to let the money go to some other takers under a gift over or residuary clause or, if the will had no such provision, then to let the money escheat to the state. In substance they had one choice if they were to escape Felton's claim for a fee — to abandon the assets that he had proved to be theirs.

An express refusal to employ a particular lawyer in pending litigation should at least have the effect, if the refusal is consistently maintained, of excluding personal liability to that lawyer on “implied contract.”¹⁵⁸ But this was not the issue in *Felton v. Finley*. The issue was whether a charge on a fund “created” by the litigation should be permitted where there is subsequent acceptance of the money proceeds.¹⁵⁹ When this issue has been

¹⁵⁵ *Id.* at 383-84, 209 P.2d at 899-900.

¹⁵⁶ *Id.* at 385-86, 209 P.2d at 901.

¹⁵⁷ *Id.* at 388, 209 P.2d at 902-03.

¹⁵⁸ *Security Nat'l Bank & Trust Co. v. Willim*, 180 S.E.2d 46 (W. Va. 1971). Here a trustee had brought an action to construe a will. One beneficiary, whose share as finally determined was estimated at 400,000 dollars, refused to employ the lawyer who served the other distributees, saying she considered it the trustee's duty to construe the will. She was held not to be personally liable to the lawyer. *Id.* at 54. See also *Coleman v. United States*, 152 U.S. 96 (1894).

¹⁵⁹ In *Felton v. Finley*, 69 Idaho 381, 209 P.2d 899 (1949), the trial court found an “implied contract of employment” and both opinions in the Supreme Court use “implied contract,” suggesting that Felton sought to impose personal liability on the four abstainers. But the issue as to fees arose in an independent action based on a stipulation of the parties. The complaint incorporated the language of Felton's original complaint; in this he had asked merely for a lien on the sums held by the

raised in a somewhat different context the fund has been charged; acceptance of the proceeds then has the effect of cancelling out whatever effect the express rejection might have had.¹⁶⁰ Likewise, in other situations a more generalized opposition to the litigation or its objectives, without express refusal to participate, has not given immunity if the litigation later succeeded. Certainly where the opponents are numerous but divided, opposition by a majority will not have that effect.¹⁶¹ In at least one case the shares of the opponents were charged though they were as united in their opposition as were the four abstainers in *Felton*.¹⁶² Here too the result is not made to depend on "acceptance," from which a subsequent assent is inferred, but rather on a finding that on an objective view and under the usual tests a benefit has accrued to the fund.¹⁶³

probate court. Also the stipulation stated that the issue on the appeal was "'whether or not J.H. Felton . . . had a lien' on the distributive shares" of the heirs. *Id.* at 387, 209 P.2d at 902.

¹⁶⁰ *Commercial Standard Ins. Co. v. Combs*, 249 Ark. 533, 460 S.W.2d 770 (1970); *United Servs. Auto. Ass'n v. Hills*, 172 Neb. 128, 109 N.W.2d 174 (1961). Both these cases involved claims of insurers partially subrogated to tort claims, but one reason given in the second of these cases was that compliance with the insurer's demand that its claim be deleted from the insured's tort action was impossible since rules against splitting causes of action would in any event produce merger in the judgment of both the insured's personal injury claim and the insurer's property damage claim.

There are dicta in *State Farm Mut. Auto. Ins. Co. v. Robbins*, 237 So. 2d 208 (Fla. Ct. App. 1970), that the insurer's refusal to employ the insured's lawyer should be given effect, but the court also found no benefit to the insurer through a deposit in court of a check that it had not cashed. *Id.* at 209-10.

¹⁶¹ *Buford v. Tobacco Growers' Co-op Ass'n*, 42 F.2d 791 (4th Cir. 1930) (receivership opposed by a large percentage of the membership); *Kimbrough v. Dickinson*, 251 Ala. 677, 39 So. 2d 241 (1949) (33 out of 49 next of kin supported claims of an executrix to ownership of the estate but the fund was held to be "preserved" by defeat of her claim); *Leggett v. Missouri State Life Ins. Co.*, 342 S.W.2d 833, 936-39 (Mo. 1960) (most of the policyholders apparently supported the corporation in suit by stockholders against the corporation that brought large gains to policyholders); *In re Estate of Engebretson*, 68 S.D. 255, 1 N.W.2d 351 (1941) (one distributee defeated a claim against the estate though he acted in opposition to a "majority" of the heirs).

¹⁶² *Lovrien v. Fitzgerald*, 245 Iowa 1325, 66 N.W.2d 458 (1954) (one remainderman successfully opposed a claim asserted by a life tenant, who was supported by all the other four remaindermen). *But see McGraw v. Canton*, 74 Md. 554, 22 A. 132 (1891) (one heir succeeded in cancelling a deed made by the decedent in his lifetime). In denying a charge on the decedent's estate in *McGraw*, the court seems to have been influenced by the opposition to the proceeding by all the heirs, but the language used in the opinion seems to be a survival from pre-*Greenough* days.

¹⁶³ This is characteristic of the cases cited in notes 139, 140 *supra*. A slightly different, perhaps stronger, reason for an objective view appeared in *Ewing v. First Nat'l Bank*, 209 Ga. 932, 76 S.E.2d 791 (1953), and *Jesser v. Mayfair Hotel, Inc.*, 360 S.W.2d 652 (Mo. 1962). In both these cases a disposition of trust assets that trustees proposed and the litigation prevented would have been more profitable to the beneficiaries and was therefore supported by all (in *Ewing*)

But if the benefit is clear, though in the particular case unexpected, a belated appropriation of an increased "fund" has been held to override and cancel out even strenuous opposition, shown in adversary litigation pursued to the bitter end.¹⁶⁴ One is driven to conclude that *Felton v. Finley*, in respecting the reluctance of the abstainers to interfere with "a dead man's money," shows a solicitude for personal scruples that other courts would find excessive. These contests are over funds and funds cannot have scruples.

The workings of the *Greenough* machinery are not quite inexorable, for the third party, the potential beneficiary, can probably escape it if he has hired and paid his own attorney to take part actively in the litigation. This can be considered an implied rejection of any service to him by the mover of the litigation or his attorney. But it is more than this. It means that the ride for him is not free and that he becomes a contributor to the final result, so that two essential bases of the *Greenough* doctrine are eliminated. Immunity for this reason is occasionally mentioned as a supportive argument when other objections can be stated,¹⁶⁵ but it is also relied on by itself to deny a recovery where, without it, the *Greenough* machinery would have operated.¹⁶⁶

or most (in *Jesser*) of them, but the disposition would have been an unlawful deviation from the trust and preventing this was held to be a benefit to the fund.

¹⁶⁴ *Wallace v. Fiske*, 80 F.2d 897, 905-09 (8th Cir. 1936). This is the peculiar case referred to above, see note 137 *supra*, in which defeat in protracted adversary proceedings brought wealth to the losers. Here the plaintiff, one of nine remaindermen, contended and eventually established that stock dividends on stock held in trust accrued to the remaindermen. In this contention he had the support of two but the vigorous opposition of six other remaindermen who were joined in the litigation and hired their own attorneys. The six adversaries who "lost" then demanded distribution of their shares in the trust in conformity to the decree and invoked it successfully in protracted litigation in escaping state and federal inheritance taxes. They were held liable for fees to plaintiff's lawyer through this "acceptance."

¹⁶⁵ *Scott v. Superior Court*, 208 Cal. 303, 281 P. 55 (1929) (the contest is between adversaries); *Kelly v. Mountain City Club*, 101 Tenn. 286, 47 S.W. 426 (1898) (same); *In re Winburn's Estate*, 160 Misc. 49, 289 N.Y.S. 717 (Sur. Ct. 1936); *Lea v. Paterson Sav. Inst.*, 142 F.2d 932 (5th Cir. 1944); *In re Baxter's Estate*, 94 Mont. 257, 22 P.2d 182 (1933).

It should be noted, however, that in *Wallace v. Fiske*, 80 F.2d 897 (8th Cir. 1936), see note 164 *supra*, "acceptance" by the "defeated" adversaries overrode the fact that in the principal litigation they had hired their own attorneys.

¹⁶⁶ *Haynes v. Rederi A/S Aladdin*, 362 F.2d 345 (5th Cir. 1966); *Fletcher v. Coomes*, 285 F. 893 (D.C. Cir. 1922); *In re Estate of Bullock*, 133 Cal. App. 2d 542, 284 P.2d 960 (Dist. Ct. 1955); *Pontiac Mut. County Fire & Lightning Ins. Co. v. Sheibley*, 279 Ill. 118, 116 N.E. 644 (1917); *Wylie v. City Comm'n*, 297 Mich. 365, 297 N.W. 526 (1941); *In re Kierstead's Estate*, 121 Neb. 423, 237 N.W. 299 (1931); *In re Loomis*, 273 N.Y. 76, 6 N.E.2d 103 (1937).

Strong dicta to the same effect appear in *Washington Fire & Marine Ins. Co.*

Difficulties arise and predictions become difficult where the lawyer who initiated the litigation and the lawyer employed by the beneficiary make contributions that are manifestly unequal. This may be the explanation of two will contest cases already mentioned¹⁶⁷ in which the charities that ultimately benefited most had sat on the sidelines until a very late stage and then employed lawyers who seemingly contributed little; the fact that the charities had their own lawyers was simply ignored.¹⁶⁸ A comparable Kentucky case involved claims of eleven shareholders who had "pooled" their shares and transferred them to a bank, which paid forty dollars a share and promised to pay more on certain contingencies.¹⁶⁹ A controversy between the transferors and the bank then arose over whether more payments were due. At a meeting of the eleven, three transferors disclosed the names of lawyers they had hired and the other eight were "given an opportunity" to employ them also but none did. After the litigation begun in the names of the three had progressed for some months and was on the verge of success, the eight intervened through lawyers they had employed and claimed their shares in the lump sum tendered by the bank by way of settlement. The lawyers for the three contended that this "acceptance" of benefits justified a charge on the fund for their fees. The *Greenough* case had previously been approved with enthusiasm in Kentucky¹⁷⁰ but the court proceeded to give a whole salvo of reasons which would totally and forever outlaw from the state any "common funds" of the *Greenough* type.¹⁷¹ One might be tempted to read

v. Hammett, 237 Ark. 954, 377 S.W.2d 811 (1964), and Forsyth v. Southern Bell Tel. & Tel. Co., 162 So. 2d 916 (Fla. App. 1964).

¹⁶⁷ See *In re Faling's Estate*, 113 Ore. 6, 228 P. 821 (1924), discussed in note 150 *supra*; *Carmack v. Fidelity-Bankers Trust Co.*, 180 Tenn. 571, 177 S.W.2d 351 (1944), discussed in note 149 *supra*.

¹⁶⁸ This was clearest in *In re Faling's Estate*, 113 Ore. 6, 228 P. 821 (1924), where the charity (the Children's Home) itself pointed out that eleven-twelfths of the testimony in the contest of the later, invalid will had been taken, without the charity's participation, in several months of trial before discovery of the earlier, valid will under which the charity took a bequest of 400,000 dollars. In *Carmack v. Fidelity-Bankers Trust Co.*, 180 Tenn. 571, 177 S.W.2d 351 (1944), the charity, the Red Cross, was apparently not involved at all in the crucial litigation that set aside the trust. One hopes that the Red Cross did not pay any fee to the opponent's lawyer for advising his client to settle with the Red Cross.

¹⁶⁹ *O'Doherty & Yonts v. Bickel*, 166 Ky. 708, 179 S.W. 484 (1915).

¹⁷⁰ *Farmer's Bank & Trust Co. v. Stanley*, 190 Ky. 762, 228 S.W. 691 (1921); *Louisville Presbyterian Theolog. Sem. v. Botto*, 117 Ky. 962, 80 S.W. 177 (1904).

¹⁷¹ The reasons included: (1) the lawyer-claimants had merely performed their contracts with their own clients; (2) any benefits to the eight were merely incidental benefits that accrued necessarily from the performance plaintiffs were obligated to render; (3) the eight merely sought to collect the sums owed them; and (4) they had no choice, for if they were ever to enforce their claims against the

this as a roundabout way of saying that beneficiaries of litigation can purchase immunity from the *Greenough* treatment by hiring and paying their own lawyers, though the court was explicit that this was not what it meant.¹⁷²

One alternative is for a court, having "control" over the fund, to undertake to apportion fees according to the relative contributions of active and less active counsel. This can occur, for example, where lawyers for fiduciary and distributee cooperate in ways that are helpful to both.¹⁷³ If one lawyer is almost wholly inactive a justification could be manufactured by "implying" assent by the clients to some alterations in the scale of fees, at least insofar as they are to be charged to funds.¹⁷⁴ One court that faced these choices and refused to become involved¹⁷⁵ had before it another will contest, in which out of thirty-two distributees named in an earlier will, twenty-four challenged a will proposed for probate, all twenty-four having employed lawyers on a contingent fee basis. By the challenged will most of the decedent's estate, valued at approximately 140,000 dollars, had been left to two other legatees, who after skirmishes in court for several months agreed to relinquish their claims in return for 5,000 dollars. It was conceded that one of the lawyers, representing five of the will's opponents, had done "the lion's share" of the work in securing this favorable settlement. The California Court of Appeal nevertheless concluded that the *Greenough* doctrine, which it fully accepted, did not apply here. By employing their own lawyers the other beneficiaries had eliminated the grounds that justified *Greenough*: the unfairness of receiving gains without sharing the cost of acquiring them, the undue risk and expense born by the

bank they must necessarily profit from the litigation brought by the three. See 166 Ky. at 712, 179 S.W. at 850.

¹⁷² The court of appeals asserted that the defendants in this instance had "rejected" plaintiffs' services, but it was careful to add that the result did not rest on the fact that some of the defendants had hired their own counsel who advised them throughout. *Id.* at 713-15, 179 S.W. at 850-51.

¹⁷³ See *In re Schwint's Estate*, 183 Okla. 439, 83 P.2d 161 (1938).

¹⁷⁴ *Nolte v. Hudson Navigation Co.*, 47 F.2d 166 (2d Cir. 1931), was a contest in a creditors' bill between secured and unsecured creditors. As to 73 percent of the unsecured claims the creditors were represented by other lawyers. In reversing the lower court, which had denied any allowance to the lawyers who had taken the initiative, the court said:

Of course one who has an attorney may be shown to have expressly or impliedly consented to be represented, nevertheless, by the attorneys for other creditors who alone are active and achieve the beneficial result. In that event such creditors, notwithstanding that they were nominally represented by counsel, should share proportionally in the expense.

Id. at 168.

¹⁷⁵ *In re Estate of Korth*, 9 Cal. App. 3d 572, 88 Cal. Rptr. 465 (1970).

active litigant, and the value of an incentive to his lawyer by assuring the lawyer prompt payment in the event of success. Any inequity, it appeared, resulted from equal pay for unequal work by the lawyers but this, the court said, could only be prevented by arrangements the lawyers made between themselves. The situation, arising often, could be illustrated by a common disaster, such as the crash of a commercial airliner, where there are numerous claims but a single attorney through much effort succeeds in his conduct of a consolidated trial: "unless he has an agreement with other counsel, he must look to his own client for a fee."¹⁷⁶

One court had previously come to a more adventurous solution in the very situation that the California court imagined. In *Doherty v. Bress*¹⁷⁷ the court seems also to have assumed that merely hiring inactive lawyers will give their clients immunity, but concluded that the lawyer who pulled the laboring oar could still recover from the inactive lawyers for *their* free ride. In that case, numerous wrongful death actions were brought in the District of Columbia by representatives of passengers killed in a midair collision over the National Airport in Washington. The plaintiffs in these actions, in a stipulation approved by the trial judge, agreed that one pair of cases (the Miller cases) should proceed to trial as test cases on the issue of the fault of the United States and Eastern Airlines, the two defendants. The stipulation provided that as to that issue, the decision in the Miller cases should be conclusive on all the parties to the stipulation. Bress, the lawyer employed in the Miller cases, secured the agreement of many of the litigants that he would represent them also, but the Hartford Accident & Indemnity Co., having its own lawyer for its claim as subrogee of one of the dead passengers, expressly refused to employ Bress. After a trial had established that both defendants were at fault, Hartford's own lawyer, Doherty, secured a 14,500 dollar settlement of Hartford's claim and for this the trial court awarded him a 2,900 dollar fee to be paid by Hartford.¹⁷⁸ Bress then filed a petition to secure "the reasonable and fair value" of his services and was awarded 1,015 dollars, or thirty-five percent, of Doherty's fee from Hartford, Doherty's own fee being reduced

¹⁷⁶ *Id.* at 577, 88 Cal. Rptr. at 468.

¹⁷⁷ 262 F.2d 20 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 934 (1959).

¹⁷⁸ The court's power to fix Doherty's fee rested on Act of June 25, 1948, ch. 646, § 2678, 62 Stat. 984 (now 28 U.S.C. § 2678 (1970)), which authorizes trial courts to award lawyer's fees in amounts totaling not more than 20% of the recovery to be paid "out of" the amount of the recovery in tort claims against the United States Government. The statute, of course, had nothing to say concerning redistribution of fees between the various lawyers, and for this the Court of Appeals for the District of Columbia relied on *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167 (1939). See pp. 1609-10 *supra*.

by that amount. The court's explanation was that the success of Bress in the test cases had benefited Hartford and that Hartford had "enlisted" his services by joining in the stipulation that made the test cases decisive of the issue of fault.¹⁷⁹ In substance, however, contribution was enforced, not from Hartford, but from Doherty, Hartford's lawyer, whose task in negotiating a settlement had been greatly simplified when fault was established. The court assumed without discussion that Hartford itself was immune.

There is some irony in the thought that the *Greenough-Pettus* machinery of the "common fund," which has extracted so much from strangers for the enrichment of the legal profession, can be reversed and turned against other lawyers to generate such internecine strife. In the end the decision may turn out to be merely a freak. It can be explained in part by the statutory power of the trial judge to determine what shares all the lawyers would be given in the tort judgment against the government.¹⁸⁰ Surely much depended also on the express agreement by all plaintiffs and defendants that the test cases would determine the issue of fault.¹⁸¹ *Doherty v. Bress* has seldom been cited subsequently and seems almost to have dropped out of sight. I have found only one case in which a lawyer has used it in an active effort to re-divide the lawyers' own pie. This effort failed, the reasons given being that the lawyers concerned had represented distinct groups of clients whose contentions differed, were at times mutually hostile, and contributed in ways that were hard to measure.¹⁸² So it maybe that the gate left ajar by *Doherty v. Bress* will lead nowhere. But who can be sure since the gate is not locked?

VII. CONCLUSION

The material so far presented does not provide a sufficient basis either for appraising the total contribution made by the "common fund" device or for predicting the future paths of its active satellites. For the latter purpose, in particular, it will be

¹⁷⁹ 262 F.2d at 22.

¹⁸⁰ See note 178 *supra*.

¹⁸¹ The court in *Doherty v. Bress* explained the result through the trial court's "equitable discretion" and "the power of equity in doing justice," 262 F.2d at 22, though the action was plainly for damages with no invocation of equity powers. In a later attempt to explain how Bress could recover, *Schleit v. British Overseas Airways Corp.*, 410 F.2d 261 (D.C. Cir. 1969), *aff'g* 283 F. Supp. 99 (D.D.C. 1968), the court described the joining by Hartford in the test case as an "implied agreement of the parties to enlist his services." 410 F.2d at 262 n.2. It was not stated that Doherty, Hartford's lawyer, joined in the contract. Was Hartford's obligation to Doherty discharged or scaled down?

¹⁸² *Schmidt v. McCarthy*, 369 F.2d 176 (D.C. Cir. 1966) (a late stage in the complex litigation over the reconstruction of the Teamsters' Union).

necessary to observe the uses to which the common fund has been put in litigation that is not devoted mainly to serving private interests, as in that so far examined, but that purports to promote public interests in much greater degree.¹⁸³

The common fund doctrine emerged in situations where the interests of litigants and outsiders were so closely interlocked that success in the litigation inevitably brought evident and measurable gains to the outsiders. This was true in the *Greenough* and *Pettus* cases which, in much of this discussion, have served as prototypes. Also, in both those cases the litigation actively promoted the aims of enterprises that were directed and "controlled" by courts. Under the usual rules that exclude counsel fees from recoverable costs, the unavoidable expense of the successful litigation was a loss that the winner was expected to bear. It is not surprising that in the *Greenough* case the opportunity given by the court's administrative control through receivership was seized and the loss that was necessary to produce gain was charged to the assets in receivership.

In other, very different contexts where the promotion of self-interest inevitably brings gain to others, the promoter's claim for restitution of the unsolicited gain of the others will ordinarily have low grade appeal. This surely is not because the promotion of self-interest is suddenly thought to deserve reproach or discredit but is presumably because self-interest provides both a sufficient explanation and sufficient incentive for the gain-producing activity. Why should courts intervene? But if the interests of all are so closely interlocked as is now supposed, the actor is in a dilemma, for he cannot advance his own interests without advancing those of others; and if one looks to the other side, the passive receiver is not particularly deserving. And so where the gain of the receiver is matched with and traceable to the producer's loss and an opportunity appears to redress this imbalance, the prevention of enrichment through another's loss reasserts its appeal. As an aspiration it could never be fully realized but its appeal is persistent. It becomes a strong motive force where it can be readily achieved without further large-scale commitment.¹⁸⁴

One of the main arguments presented here has been that the reasons justifying the *Greenough* solution — contribution to the successful litigant's costs in counsel fees — were and are compelling but that none of them applies to the independent and paramount lien of the lawyer that originated in the *Pettus* case. The lawyer cannot show that he suffered a loss that was a source

¹⁸³ I will discuss attorney fees in public interest litigation in a future article.

¹⁸⁴ This general thesis is advanced in Dawson, *supra* note 7, especially at 1418.

of gain to others, since all his rights to payment by his client are preserved unimpaired and his recovery from the fund is extra. It seems likely that the *Pettus* case was simply an oversight by a court that was quite unaware of what it was doing. But the reception given the *Pettus* case can only be explained by the strong fellow-feeling of judges for brothers in the guild. Similar bounty sought by other kinds of professionals or indeed by anyone else in the population is uniformly denied, so abruptly as a rule that the claim seems to be thought not worthy of discussion.¹⁸⁵ The client's claim for contribution has a built-in ceiling, the costs that he has in fact incurred. There is no such ceiling for the lawyer's claim, which is usually fixed by a test of market value, determined in a market in which lawyers are accustomed to sharing the profits of risky litigation by express contracts for contingent fees.

The "common fund" then is in practice a device whose purposes are (1) to augment the income of lawyers and (2) to distribute the added cost that is thus created among the beneficiaries of litigation. In accomplishing both purposes judges play a crucial role: they will determine the extra income to be awarded in a free evaluation uncontrolled by contract, and more importantly, they will decide the distribution of costs among beneficiaries. This is a judicial function, and is crucial. As we have seen, funds can be created in many different ways, take many different forms, and, in effect, vanish or break up where there is internal conflict. Court control can be exerted also in various ways—indirectly or remotely, by directions to intermediaries or by adjudication of the rights and duties of persons joined as parties. But the process of distributing costs requires powers of administration and command that are administered by courts. Not even the United States Supreme Court has said as yet that an advantage secured by appropriating a lawyer's investment of time and effort in a lawsuit produces personal liability in the taker.¹⁸⁶ Recent cases still refuse awards of counsel fees against disconnected litigants in disconnected lawsuits, though their success has been assured through *stare decisis*.¹⁸⁷ The conception still survives that such burdens can be cast on funds but not on people.

¹⁸⁵ *Id.* at 1458.

¹⁸⁶ Indeed, *Coleman v. United States*, 152 U.S. 96 (1894), rather indicates the contrary.

Forman v. Sewerage & Water Bd., 119 La. 49, 43 So. 908 (1907), was an effort by a lawyer who had been hired by the state Attorney General and succeeded in the "gigantic" task, after a "mountain of work," of forfeiting the charter of a waterworks company. This gave him no claim to a fee from the defendant, which was organized a year later and which allegedly would have had to pay 2,000,000 dollars to buy out the waterworks company.

¹⁸⁷ *Schleit v. British Overseas Airways Corp.*, 410 F.2d 261 (D.C. Cir. 1969)

Whether the device of the fund should be altogether abandoned or replaced by other means in litigation whose aims are different are questions for another time.

(lawyer hired by several airlines succeeded in invalidating airport charges imposed on them and sought to recover from two other airlines that were released from such charges as a result); *Preston v. United States*, 284 F.2d 514 (9th Cir. 1960) (litigation brought on behalf of one member of an Indian tribe establishing that the Department of the Interior was required to release to other members of the tribe land held in trust for the tribe); *Whittier v. Emmet*, 281 F.2d 24 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 935 (1961) (litigation by veterans established rights of 8400 other veterans to government insurance refunds). *See also* *Honda v. Mitchell*, 419 F.2d 324 (D.C. Cir. 1969) (consent judgment secured at a rate for conversion of Japanese yen that was later applied in favor of other yen creditors).