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Recent Decisions

RECENT DECISIONS

CORPORATIONS—PARENT CORPORATION NOT RESPONSIBLE FOR NONPROFIT-SUBSIDIARY'S DEBT OBLIGATIONS.—Defendant cooperative corporation, organized for the purpose of providing low cost housing for its shareholders, formed a subsidiary to build and sell houses to the shareholders of the parent at cost. Subsequent financial difficulties resulted in creditors assuming the construction responsibilities pursuant to an extension agreement with the parent and the subsidiary. The subsidiary later was adjudicated bankrupt and the plaintiff, as its trustee, attempted to hold the parent liable for the debts of the subsidiary. The Supreme Court dismissed the complaint and the Appellate Division affirmed. Upon appeal, *held,* one judge dissenting, affirmed. The parent will not be responsible for the obligations of its subsidiary when there has been no fraud or illegality in the formation or operation of the latter. *Bartle v. Home Owners Cooperative, Inc.,* 309 N.Y. 103, 127 N.E. 2d 832 (1955).

Although the corporate form of business organization carries with it the attribute of being a non-conductor of liability to its stockholders,[1] this concept of total stockholder immunity is not without exception.[2] Where a corporation is organized for the purpose of evading existing obligations, frustrating existing laws, or perpetrating a fraud, it is generally agreed that the corporate veil will be thrown aside.[3]

Specific application of these general principles has engendered considerable controversy giving rise to varied theories of imposing liability on the stockholders.[4] In

1. Lowendahl v. Baltimore & Ohio R.R., 247 App. Div. 144, 287 N.Y. Supp. 62 (1st Dep't 1936), aff'd, 272 N.Y. 360, 6 N.E. 2d 56 (1936), motion for reargument denied, 273 N.Y. 584, 7 N.E. 2d 704 (1937); Brooklyn Savings Bank v. Wechsler Estate, 259 N.Y. 9, 14, 180 N.E. 752, 753 (1932); Berkey v. Third Avenue Ry., 244 N.Y. 84, 155 N.E. 58 (1926); Doran v. New York City Interborough Ry., 239 N.Y. 448, 147 N.E. 62 (1925); Vannier v. Anti-Saloon League, 238 N.Y. 457, 463, 144 N.E. 679, 681 (1924); Brock v. Poor, 216 N.Y. 287, 302, 111 N.E. 229, 236 (1915); Sasmor v. V. Vivaudou Inc., 200 Misc. 1020, 103 N.Y. S. 2d 640 (Sup. Ct. 1951). See 1 Fletcher, Private Corporations § 1 (perm. ed. 1931).

2. Consolidated Rock Products Co. v. DuBois, 312 U.S. 510 (1941); Davis v. Alexander, 269 U.S. 114, 117 (1925); United States v. Reading Co., 253 U.S. 26 (1920); Chicago, Milwaukee, & St. Paul Ry. v. Minneapolis Civic and Commerce Ass'n, 247 U.S. 490 (1918); Luckenback S.S. Co. v. Grace & Co., 267 Fed. 676, 681 (4th Cir. 1920), cert. denied, 254 U.S. 644 (1920); Joseph Foard Co. v. Maryland, 219 Fed. 827, 829 (4th Cir. 1914); Herman v. Mobile Homes Corp., 317 Mich. 233, 26 N.W. 2d 757 (1947); Floral Park Lawns Inc. v. O'Connell, 250 App. Div. 464, 294 N.Y. Supp. 991 (2d Dep't 1937); Pagel, Horton & Co. v. Harmon Paper Co., 236 App. Div. 47, 258 N.Y. Supp. 168 (4th Dep't 1932); Reconstruction Syndicate Inc. v. Sharpe, 186 Misc. 897, 61 N.Y.S. 2d 176 (N.Y. Munic. Ct. 1946); In re Steinberg's Estate, 153 Misc. 339, 274 N.Y. Supp. 914 (Surr. Ct. 1934); Bressman, Inc. v. Mosson, 127 Misc. 282, 215 N.Y. Supp. 766 (App. T. 1st Dep't 1926). See Elenkrieg v. Siebrecht, 238 N.Y. 254, 262, 144 N.E. 519, 521 (1924).

3. C. S. Goss & Co. v. Goss, 147 App. Div. 698, 132 N.Y. Supp. 76 (1st Dep't 1911), aff'd, 207 N.Y. 742, 101 N.E. 1099 (1913); Tompkins v. Miller, Tompkins & Co., 207 App. Div. 819, 201 N.Y. Supp. 392 (2d Dep't 1923). See People v. North River Sugar Refining Co., 121 N.Y. 582, 24 N.E. 834 (1890), appeal dismissed, 121 N.Y. 696, 24 N.E. 1099 (1890). See also 1 Fletcher, Private Corporations §§ 25, 41 (perm. ed. 1931); Powell, Parent & Subsidiary Corporations (1931); Wormser, The Disregard of the Corporate Fiction (1927).

4. See Lowendahl v. Baltimore & Ohio R.R., 247 App. Div. 144, 287 N.Y. Supp. 62 (1st Dep't 1936), aff'd, 272 N.Y. 360, 6 N.E. 2d 56 (1936), motion for reargument denied, 273 N.Y. 584, 7 N.E. 2d 704 (1937). See also Dix, The Armor of the Juridical Conception, 34 Geo. L.J. 432 (1946); Douglas & Shanks, Insulation from Liability through Subsidiary Corporations, 39 Yale L.J. 193 (1929).

small one-man corporations, the alter ego or identity theory is used to preserve the rights of creditors or otherwise prevent the commission of injustices which might arise as a result of the intermingling of funds or misrepresentations to creditors by the sole stockholder. Accordingly, at times, the stockholder is estopped from setting up the corporate fiction as a defense to his liability.[5] In the case of larger corporations, where the entity of a subsidiary has in fact been divested of all its autonomy, the so-called instrumentality theory is employed to pierce the corporate veil.[6] In still other cases, the corporate entity is recognized but liability is imposed on the parent under the principles of agency because of the contractual relationship found between the stockholder and the corporation.[7] Despite these substantive differences between the instrumentality and the agency concept of transferring liability, the courts have sometimes confused this distinction by using the terms agency and instrumentality interchangeably.[8]

New York has been regarded as a strict adherent of the corporate fiction theory[9] possibly due to the dicta in *Berkey v. Third Avenue Ry. Corp.*[10] although subsequent decisions have departed from such dicta.[11] For example even where the subsidiary

5. Quaid v. Ratkowsky, 183 App. Div. 428, 170 N.Y. Supp. 812 (1st Dep't 1918), aff'd without opinion, 224 N.Y. 624, 121 N.E. 887 (1918); C. S. Goss & Co. v. Goss, 147 App. Div. 698, 132 N.Y. Supp. 76 (1st Dep't 1911), aff'd, 207 N.Y. 742, 101 N.E. 1099 (1913); Reconstruction Syndicate, Inc. v. Sharpe, 186 Misc. 897, 61 N.Y.S. 2d 176 (N.Y. Munic. Ct. 1946); Bressman, Inc. v. Mosson, 127 Misc. 282, 215 N.Y. Supp. 766 (App. T. 1st Dep't 1926). See Fuller, The Incorporated Individual: A Study of the One-Man Company, 51 Harv. L. Rev. 1373 (1938).

6. McCaskill Co. v. United States, 216 U.S. 504 (1910); United States v. United Shoe Machinery Co., 234 Fed. 127 (E.D. Mo. 1916), appeal dismissed, 254 U.S. 666 (1921); Luckenback S.S. Co. v. Grace & Co., 267 Fed. 676, 681 (4th Cir. 1920), cert. denied, 254 U.S. 644 (1920); Proctor & Gamble Co. v. Newton, 289 Fed. 1013, 1016 (S.D.N.Y. 1923); Mangan v. Terminal Transp. System, 157 Misc. 627, 284 N.Y. Supp. 183 (Sup. Ct. 1935), aff'd, 247 App. Div. 853, 286 N.Y. Supp. 666 (3rd Dep't 1936), appeal denied, 272 N.Y. 676 (1936); People ex rel. Studebaker Corp. v. Gilchrist, 244 N.Y. 114, 123, 155 N.E. 68, 71 (1926). See Ballantine, Separate Entity of Parent & Subsidiary Corporations, 14 Calif. L. Rev. 12 (1925).

7. Lehigh Valley R.R. v. Delachesa, 145 Fed. 617 (2d Cir. 1906); Rapid Transit Subway Constr. Co. v. City of N.Y., 259 N.Y. 472, 488, 182 N.E. 145, 150 (1932); Floral Park Lawns, Inc. v. O'Connell, 250 App. Div. 464, 294 N.Y. Supp. 991 (2d Dep't 1937). See Berkey v. Third Avenue Ry., 244 N.Y. 84, 95, 155 N.E. 58, 61 (1926).

8. United States v. Reading Co., 253 U.S. 26 (1920); Chicago, Milwaukee, & St. Paul Ry. v. Minneapolis Civic and Commerce Ass'n, 247 U.S. 490 (1918); Kingston Dry Dock Co. v. Lake Champlain Transp. Co., 31 F. 2d 265, 267 (2d Cir. 1929); Lowendahl v. Baltimore & Ohio R.R., 247 App. Div. 144, 287 N.Y. Supp. 62 (1st Dep't 1936), aff'd, 272 N.Y. 360, 6 N.E. 2d 56 (1936), motion for reargument denied, 273 N.Y. 584, 7 N.E. 2d 704 (1937); Pagel, Horton & Co. v. Harmon Paper Co., 236 App. Div. 47, 258 N.Y. Supp. 168 (4th Dep't 1932). See Rohrlich, Organizing Corporate & Other Business Enterprises § 12.03 (1949); Powell, Parent & Subsidiary Corporations § 21 (1931); Douglas & Shanks, Insulation from Liability through Subsidiary Corporations, 39 Yale L.J. 193 (1929).

9. Weisser v. Mursam Shoe Corp., 127 F. 2d 344, 348 (2d Cir. 1942). See Powell, Parent & Subsidiary Corporations § 13(e) (1931); Wormser, The Disregard of the Corporate Fiction (1927).

10. 244 N.Y. 84, 155 N.E. 58 (1926).

11. The court in the Berkey case based its decision upon the ground that to hold the defendant liable, it must imply an illegal contract and find that the defendant was illegally operating the cars and lines involved. Mangan v. Terminal Transp. System, 157 Misc. 627,

has substantially no business except with the parent or no assets except for those conveyed to it by the parent,[12] or where there is control of the subsidiary through substantial stock ownership[13] or where the two corporations have similar identity in their directorial boards or executive offices,[14] New York has meticulously followed the corporate fiction theory.

In the instant case, the majority refused to impose liability on the parent because there had been no fraud or misrepresentation to the creditors of the subsidiary in its inception or operation. The trial court found that the creditors were estopped by the credit extension agreement to deny the two separate corporate entities.[15] Agreement by the majority in the present case with such finding gave it alternative grounds for holding the parent not liable.

The minority opinion stressed the subsidiary's undercapitalization and inability to make a profit as reasons for imposing liability in spite of the fact that the trial court found as a matter of fact that there was no undercapitalization.[16] In other jurisdictions such undercapitalization of a subsidiary to cope with the normal business conditions has been deemed a prime factor in piercing its corporate veil.[17] A subsidiary so organized that it must depend upon the parent's discretion for a source of working capital will be held to be a mere department or instrumentality of the parent.[18] Undercapitalization thus considered as a factor in piercing the corporate entity has never been explicitly considered by the New York courts. It would seem under New York's usual adherence to the entity theory undercapitalization by itself will not be decisive in piercing the corporate entity. This may or may not be a fair inference depending upon whether the majority relied on the trial court's findings or considered undercapitalization an irrelevant factor.[19]

Inability of a subsidiary to make a profit has been considered by the courts of

633, 284 N.Y. Supp. 183, 190 (Sup. Ct. 1935), aff'd, 247 App. Div. 853, 286 N.Y. Supp. 666 (3rd Dep't 1936), appeal denied, 272 N.Y. 676 (1936); P.S. & A. Realties, Inc. v. Lodge Gate Forest, Inc., 205 Misc. 245, 127 N.Y.S. 2d 315 (Sup. Ct. 1954).

12. Sasmor v. V. Vivaudou, Inc., 200 Misc. 1020, 103 N.Y.S. 2d 640 (Sup. Ct. 1951); Hayman v. Morris, 46 N.Y.S. 2d 482 (Sup. Ct. 1943).

13. Lowendahl v. Baltimore & Ohio R.R. Co., 247 App. Div. 144, 287 N.Y. Supp. 62 (1st Dep't 1936), aff'd, 272 N.Y. 360, 6 N.E. 2d 56 (1936), motion for reargument denied, 273 N.Y. 584, 7 N.E. 2d 704 (1937); Oceanic Insul-Lite Corp. v. Sullivan Dry Dock & Repair Corp., 191 Misc. 354, 77 N.Y.S. 2d 498 (Sup. Ct. 1947).

14. Transamerican General Corp. v. Zunino, 82 N.Y.S. 2d 595 (Sup. Ct. 1948); Oceanic Insul-Lite Corp. v. Sullivan Dry Dock & Repair Corp., 191 Misc. 354, 77 N.Y.S. 2d 498 (Sup. Ct. 1947).

15. Record on Appeal, p. 47, Bartle v. Home Owners Cooperative, Inc., 309 N.Y. 103, 127 N.E. 2d 832 (1955).

16. Id. at 46.

17. Luckenback S.S. Co. v. Grace & Co., 267 Fed. 676, 681 (4th Cir. 1920), cert. denied, 254 U.S. 644 (1920); Mosher v. Salt River Valley Water Users' Ass'n, 39 Ariz. 567, 8 P. 2d 1077 (1932); Albert Richards Co. v. The Mayfair, 287 Mass. 280, 191 N.E. 430 (1934); Herman v. Mobile Homes Corp., 137 Mich. 233, 26 N.W. 2d 757 (1947); Oriental Investment Co. v. Barclay, 25 Tex. Civ. App. 543, 64 S.W. 80 (1901); Atwater & Co. v. Fall River Pocahontas Collieries, 119 W. Va. 549, 195 S.E. 99 (1938). See Anderson v. Abbott, 321 U.S. 349, 362 (1944), rehearing denied, 321 U.S. 804 (1944). See also Latty, Subsidiaries and Affiliated Corporations, at 135 (1936).

18. Luckenback S.S. Co. v. Grace & Co., 267 Fed. 676, 681 (4th Cir. 1920), cert. denied, 254 U.S. 644 (1920).

19. See note 16 supra.

other jurisdictions to be a prime factor in their decisions rendering the parent liable for the subsidiary's obligations.[20] In the instant case, however, the majority of the court held that the inability of the subsidiary to make a profit in the absence of fraud[21] was not of sufficient magnitude to warrant disregarding the subsidiary's entity.[22]

The majority in the principal case by decreeing the two corporations were separate and distinct entities has reaffirmed the severe New York policy of not disregarding the corporate veil except in well defined circumstances.

CRIMINAL LAW—MISDEMEANOR MANSLAUGHTER—NECESSITY FOR NOTICE OF STATUTORY VIOLATIONS.—Defendant was convicted on an indictment embracing two counts. The first charged manslaughter, first degree, in that the death of two persons was caused by a fire in defendant's multiple dwelling, for which defendant had knowingly neglected to provide adequate fire protection, such failure constituting a misdemeanor under the Multiple Dwelling Law. The second, charging manslaughter, second degree, was in substance an accusation of culpable negligence under the same facts and circumstances embodied in the first count. On trial, after admitting extensive evidence offered by the prosecution on the question of notice, the court refused to allow the defendant's evidence on the same issue, ruling that lack of notice or knowledge of the building violations afforded no defense. The Appellate Division eliminated the sentence imposed on the second degree manslaughter conviction and, as modified, affirmed the conviction. On appeal, *held,* two judges dissenting, affirmed. *People v. Nelson,* 309 N.Y. 231, 128 N.E. 2d 391 (1955).

At common law involuntary manslaughter was defined as the unintentional killing of a human being while engaged in the commission of an unlawful act not amounting to a felony or as the result of culpable negligence, the former being commonly known today as misdemeanor manslaughter, and the latter, negligent homicide.[1] Several theories have been proposed to explain the rationale on which misdemeanor manslaughter, and its companion crime, felony murder, are based. One theory advanced is the unwillingness of common law judges to base convictions on implied malice where death was obviously unintentional, when a more simple and direct approach was available, viz., that the defendant was guilty because he was engaged in an unlawful act at the time the death occurred.[2] Another view attributes the development of the doctrine to a desire for vengeance on the defendant whether or not he had an intent to effect death, as the loss to society was the same in either event.[3] A third

20. Erickson v. Minnesota & Ontario Power, 134 Minn. 209, 215, 158 N.W. 979, 981 (1916); Atwater & Co. v. Fall River Pocahontas Collieries, 119 W. Va. 549, 195 S.E. 99 (1938). See Oriental Investment Co. v. Barclay, 25 Tex. Civ. App. 543, 64 S.W. 80 (1901); Latty, Subsidiaries and Affiliated Corporations, pp. 138, 139 (1936).

21. This has been treated in New York but only where there has been a fraudulent transfer. Natelson v. A.B.L. Holding Co., 260 N.Y. 233, 238, 183 N.E. 373, 374 (1932); African Metals Corp. v. Bullowa, 288 N.Y. 78, 85, 41 N.E. 2d 466, 470 (1942), motion denied, 288 N.Y. 673, 43 N.E. 2d 75 (1942).

22. See Record on Appeal, p. 264, Bartle v. Home Owners Cooperative, Inc., 309 N.Y. 103, 127 N.E. 2d 832 (1955).

1. Wharton, Homicide § 212 (3d ed. 1907).

2. Wilner, Unintentional Homicide in the Commission of an Unlawful Act. 87 Pa. L. Rev. 811 (1939).

3. 1 Hawkins, Pleas of the Crown 195 (7th ed. 1795).

theory, applicable to felony murder only, suggests that since a person may defend against felony even to the point of killing the malefactor, therefore, where one engages in a felonious act for which he may lawfully be killed, it is natural to infer that he intends to kill if necessary and that is a sufficient intent for murder.[4] The more logical view, however, is that at common law nearly all felonies were punishable by death, and where one engaged in a felony ". . . the felonious intent was imputed to the committed act, and, if it were homicide, made it murder; for it was considered immaterial whether a man hanged for one felony or another."[5] On the other hand, where no felonious intent accompanied the death-producing act, as in the case of a misdemeanor, it seemed natural for the courts to reduce the crime to manslaughter.[6]

After the promulgation of the misdemeanor-manslaughter doctrine it became very evident that few situations would arise where a defendant was not engaging in at least a minor unlawful act at the time an unintentional homicide occurred, and thus few cases where the doctrine would be inapplicable.[7] Hence it was almost inevitable that relief from the rigors of the rule would come in some form.[8] The credit for the first limitation on the rule is given, by most text writers, to Hale, who propounded the theory that only acts mala in se and not those merely mala prohibita could form the basis of an involuntary manslaughter conviction.[9] Although this is still undoubtedly true as a general principle, those jurisdictions which still observe this distinction generally relieve from criminal liability in the case of an act malum prohibitum only where it is clear that the act in question is not inherently dangerous and there is no negligence in its performance.[10] The strength of Hale's rule of distinction lay in its presupposition of the existence of moral guilt which, with limited exceptions, is the accepted criterion for determining criminal guilt.[11] On the other hand, a palpable weakness of the rule is its vagueness. Courts have found it well nigh impossible to draw a line distinguishing between acts mala in se and acts mala prohibita and each new attempt to do so has only served to confound an already thoroughly confused subject.[12] It is submitted that conviction of such a major felony as manslaughter should not depend on a distinction which few courts can comprehend much less apply.

4. Annotation to Regina v. Horsey, 3 Fost. & Fin. 287, 176 Eng. Rep. 129 (Nisi Prius 1862).

5. Powers v. Commonwealth, 110 Ky. 386, ——, 61 S.W. 735, 741 (1901).

6. Cf. Powers v. Commonwealth, 110 Ky. 386, 61 S.W. 735, 741 (1901).

7. See Report of the N.Y. State Law Revision Commission, at 744 (1937).

8. Id. at 663, 664.

9. 1 Hale, Pleas of the Crown 474, 475. See also Note, 87 Pa. L. Rev. 811, 827 n. 10 (1939).

10. Potter v. State, 162 Ind. 213, 70 N.E. 129 (1904); Thiede v. State, 105 Neb. 48, 182 N.W. 570 (1921); State v. Horton, 139 N.C. 588, 51 S.E. 945 (1905).

11. People v. Werner, 174 N.Y. 132, 66 N.E. 667 (1903); People v. D'Antonio, 150 App. Div. 109, 134 N.Y. Supp. 657 (1st Dep't 1912).

12. In Commonwealth v. Adams, 114 Mass. 323, 324 (1873) the court said: "Acts mala in se include, in addition to felonies, all breaches of public order, injuries to person or property, outrages upon public decency or good morals, and breaches of official duty, when done wilfully or corruptly. Acts mala prohibita include any matter forbidden or commanded by statute, but not otherwise wrong." In State v. Horton, 139 N.C. 588, 51 S.E. 945 (1905) it was held that an act malum in se is one which is naturally evil as adjudged by the sense of a civilized community but that an act malum prohibitum is wrong only because made so by statute. In People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924) the court held that the statutory offense of furnishing intoxicating liquors for consumption, although a felony, nevertheless was merely malum prohibitum.

An enlightened trend of authorities today disregards this distinction and accepts a rule which has both rationality and facility of application. Under this view, there is criminal responsibility for a homicide committed in the course of an unlawful act if the act is inherently dangerous or the law violated was specifically designed for the protection of human life.[13] Other means of avoiding the application of the misdemeanor manslaughter doctrine have been devised, such as arguments that the homicide was not the natural and probable consequence of the unlawful act[14] or that defendant's act was not the proximate cause of death.[15] In New York a statutory limitation has been placed upon the rule by requiring the misdemeanor on which the manslaughter is predicated to be one "affecting the person or property, either of the person killed, or of another . . . ."[16] Lastly, the doctrine of merger of assault into homicide has played an important role in limiting the application of the rules of constructive homicide.[17]

Although misdemeanor manslaughter does not require the finding of an actual design to effect death, the courts unanimously insist that there be an intent to commit the act which constitutes the misdemeanor and of which the homicide is a consequence.[18] As in felony murder, the intent to commit the independent crime is transferred, by implication of law, to the homicide,[19] in order to provide the criminal intent requisite for all felonies.

In the instant case the trial court ruled that not only was defendant strictly accountable insofar as the violations of the Multiple Dwelling Law were concerned; but furthermore, neither ignorance of the condition of the building nor ignorance of the statute afforded a defense to first degree manslaughter. In affirming the conviction, the majority of the Court of Appeals approved the trial court's finding that at the time the deaths occurred defendant was engaged in a continuing misdemenaor affecting the person or property of the two persons killed. It is to be noted that inasmuch as the majority placed particular emphasis on testimony given at trial tending to show defendant's actual knowledge of the violations, it would appear that it deemed notice

13. State v. Palmer, 197 N.C. 135, 147 S.E. 817 (1929); Commonwealth v. Samson, 130 Pa. Super. 65, 196 Atl. 564 (Super. Ct. 1938); State v. Brown, 205 S.C. 514, 32 S.E. 2d 825 (1945).

14. Votre v. State, 192 Ind. 684, 138 N.E. 257 (1923); Commonwealth v. Couch, 32 Ky. 638, 106 S.W. 830 (1908).

15. Jackson v. State, 101 Ohio St. 152, 127 N.E. 870 (1920); State v. Mulcahy, 318 Ill. 332, 149 N.E. 266 (1925).

16. N.Y. Penal Law § 1050(1). The misdemeanor referred to in this section must be one separate and apart from the act of killing and not one which merges into the homicide. People v. Vollmer, 299 N.Y. 347, 87 N.E. 2d 291 (1949); People v. Grieco, 266 N.Y. 48, 193 N.E. 634 (1934). Contra, People v. Darragh, 141 App. Div. 408, 126 N.Y. Supp. 219, aff'd without opinion, 203 N.Y. 527 (1911).

17. This doctrine has been held applicable to both misdemeanor manslaughter and felony murder. People v. Grieco, 266 N.Y. 48, 193 N.E. 634 (1934); People v. Luscomb, 292 N.Y. 390, 55 N.E. 2d 469 (1944).

18. People v. Grieco, 266 N.Y. 48, 193 N.E. 634 (1934); People v. Fitzsimmons, 11 N.Y. Crim. 391, 34 N.Y. Supp. 1102 (Ct. of Sess. 1895); Commonwealth v. Couch, 32 Ky. 638, 106 S.W. 830 (1908); State v. Goodley, 9 Houst. 484, 33 Atl. 226 (Ct. of Gen. Sess. of the Peace and Jail Delivery of Del. 1889). Cf. Commonwealth v. Adams, 114 Mass. 232 (1873). See also Wharton, Homicide § 213 (3d ed. 1907): "But while homicide perpetrated in the commission of some unlawful act is manslaughter, though the death of the person killed was not intended, yet the unlawful act must be wilful, and not a mere misadventure."

19. People v. Hubbard, 64 Cal. App. 27, 220 Pac. 315 (Dist. Ct. of App. 1923).

or knowledge, and thus intent, quite material to a conviction. It would thus seem to follow, in view of the trial court's refusal to admit evidence offered by defendant on the issue of notice, and its ruling that knowledge of the violations was not a necessary element of the crime charged, that a reversal of the conviction and the granting of a new trial would have been proper.

On the other hand, in view of the court's affirmance of the conviction without passing on the correctness of the trial court's ruling on the question of notice, the decision might impliedly be based on the ground that notice or knowledge of the statutory violations was not requisite to a conviction of manslaughter. It is unquestionable that as to acts merely mala prohibita, as the violations no doubt were, knowledge, as a basis for inferring a wrongful intent, is not a necessary factor;[20] however, to hold that notice or knowledge, and thus intent, is equally immaterial where those very acts are utilized as a basis for a conviction of homicide resulting therefrom is an altogether different proposition. Under the doctrine of transferred intent, which supplies the foundation on which the whole law of constructive felony rests, one who accidentally causes the death of another during the *intentional* commission of an unlawful act will be deemed in law to have intended such death.[21] However, it does not follow that where acts[22] have been made misdemeanors by statute even in the absence of any wrongful intention, the necessity for finding actual intent when those same acts are used as a basis for a homicide conviction is obviated. The lack of an intent *which can be transferred* precludes the finding of the mens rea necessary for a conviction.[23]

Furthermore, considerable reliance is placed by the majority on the case of *People v. Alexander*,[24] where the Court of Appeals unanimously affirmed a conviction of manslaughter in the first degree under circumstances strikingly similar to those in the principal case. In that case it unequivocally appeared that the defendant had knowledge of the facts which constituted the misdemeanor. Thus the cases are readily distinguishable on the ground that the court in the *Alexander* case might *properly* have found, on the basis of the defendant's knowledge, an actual intent to commit the independent misdemeanor.

Much revulsion has been expressed for constructive felony and the courts have tended to limit its application by requiring, among other things, affirmative proof of intentional wrongdoing with respect to the lesser crime before utilizing it as a basis for a conviction of a more grievous wrong.[25] The instant case appears to go a long way towards negativing that just and proper limitation on an unfortunate and harsh rule of law.

FEDERAL JURISDICTION—COURTS—RIGHT TO JURY TRIAL IN MARITIME TORT DENIED IN THE ABSENCE OF DIVERSITY OF CITIZENSHIP.—Plaintiff, an alien stevedore, was injured while working aboard a ship owned by defendant, a foreign corporation. Suit was commenced in the federal district court on the civil side, plaintiff alleging negligence and unseaworthiness. Defendant's motion to have the action set aside for lack of jurisdiction, at first denied, was granted on motion to reargue. Upon appeal,

20. Wharton, Homicide § 213 (3d ed. 1907).

21. Ibid. See also Commonwealth v. Adams, 114 Mass. 323 (1873).

22. Note that the act made a misdemeanor in the instant case is one of omission. That an omissive act as well as a commissive act may properly form the basis of a manslaughter conviction, see People v. Alexander, 293 N.Y. 870, 59 N.E. 2d 451 (1944).

23. Cf. Perkins, Rationale of Mens Rea, 52 Harv. L. Rev. 905, 928 (1939).

24. 293 N.Y. 870, 59 N.E. 2d 451 (1944).

25. See note 18 supra.

held, affirmed. In the absence of diversity of citizenship, a federal district court cannot entertain an action on its civil side, where a maritime tort is involved. *Paduano v. Yamashita Kisen Kabushiki Kaisha*, 221 F. 2d 615 (2d Cir. 1955).

The question of where to seek relief in causes involving maritime torts has vexed the courts for some time.[1] In the present state of the law a suitor has two established avenues of relief available: (1) he may bring suit on the admiralty side of a federal district court, based on that court's exclusive jurisdiction in admiralty and maritime matters;[2] (2) he may sue in a state court if he can satisfy jurisdictional requirements, and show a cause of action based on a maritime matter cognizable at common law.[3] The admiralty forum carries with it the questionable disadvantage of lack of trial by jury.[4] For various reasons, state forums are not always open.[5] Because of these considerations, and probably because of the federal juries' reputation for generosity, there has been a tendency of late to bring such causes into the federal district courts, on the civil side, in reliance on the "saving to suitors" clause of the admiralty grant.[6]

Today, by far the major portion of cases appearing on the civil side of the federal dockets consists of those wherein the litigants are citizens of different states,[7] or where the subject matter "arises under" the Constitution, laws, or treaties of the United States.[8] Diversity of citizenship being absent in the present case, plaintiff attempted to bring himself within the "arising under" jurisdiction. His contention was that since the federal judiciary has been granted exclusive jurisdiction over admiralty and maritime matters, such matters must ipso facto "arise under" the Constitution and laws of the United States and that he is therefore entitled to his common law remedy within the purview of the "saving to suitors" clause. While it has long been held that this clause applies in cases where there is diversity,[9] a split of authority has existed for some time as to its application in cases where diversity is lacking.[10]

1. See Note, 66 Harv. L. Rev. 315 (1952) for a discussion of this question as it existed prior to the holding in the instant case.

2. "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C.A. § 1333 (1948).

3. 1 Benedict, Admiralty § 22 (6th ed. 1940).

4. Mullen v. Eastern Transp. Co., 25 F. Supp. 62, 63 (E.D. Pa. 1938); O'Brien v. United States Tank Ship Corp., 16 F. Supp. 478, 479 (S.D.N.Y. 1936); 2 Benedict, Admiralty § 224 (6th ed. 1940). In certain cases, e.g., where a contract or tort action arises on lakes or navigable waters connecting such lakes, jury trial may be had, if either party demands it, 28 U.S.C.A. § 1873 (1948). Also, under the Jones Act, 46 U.S.C.A. § 688 (1920), an injured seaman may have a trial by jury for personal injuries suffered in the course of his employment.

5. New York has, for example, a policy of forum non conveniens as to tort actions between nonresident parties where the cause of action does not arise within the state. DeLa-Bouillerie v. DeVienne, 300 N.Y. 60, 89 N.E. 2d 15 (1949); Collard v. Beach, 81 App. Div. 582, 81 N.Y. Supp. 619 (1st Dep't 1903).

6. See note 2 supra.

7. "The district courts shall have original jurisdiction of all civil actions . . . between: (1) Citizens of different States." 28 U.S.C.A. § 1332 (1) (1948).

8. "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws or treaties of the United States." 28 U.S.C.A. § 1331 (1948).

9. Judge Dimock, concurring in the instant case seems to take issue with this however. 221 F. 2d at 620-21. Considered infra.

10. Doucette v. Vincent, 194 F. 2d 834 (1st Cir. 1952); Jordine v. Walling, 185 F. 2d

While the Supreme Court has never directly ruled on the question here presented, it has however dealt with the problem indirectly in appeal cases from lower federal and state courts.[11] In relation to the state courts at least, it would seem that the Court could assume such a position only if there was a federal question involved,[12] assuming, of course, that the constitutional rights of appellant had not been infringed upon below. The language of the Court suggests without equivocation—that maritime law, is at least, "national law." In *Southern Pacific v. Jensen* the Court said that ". . . the general maritime law as accepted by the federal courts constitutes part of our national law. . . ."[13] This ruling was recently reaffirmed by the decision in *Pope & Talbot Inc. v. Hawn*[14] where the Supreme Court ruled that the application of state law by a federal court and jury was error if such state law conflicted with established federal principles of maritime law in a case where the right to recover was based on the general maritime law. The Court said that since the cause of action arose on navigable waters, it became: ". . . a maritime tort, a type of action which the Constitution has placed under national power to control in its substantive as well as procedural features. . . ."[15]

Seizing upon this attitude of the Supreme Court, the Court of Appeals for the First Circuit, in the case of *Doucette v. Vincent*,[16] has held that since the general maritime law is national law, a cause of action based upon it properly comes within the "arising under" grant, and that a suitor with such a claim is enitled to his common-law remedy in a federal district court, by virtue of the "saving to suitors" clause, even in the absence of diversity. Whether the *Doucette* court was justified in reading such an inference into the Supreme Court holdings is highly questionable. The mere fact that a maritime tort involves the "national law" does not necessarily bring such an action within the meaning of section 1331 of the Judicial Code. It has long been established that causes of action do not "arise under" the laws of the United States unless they involve the interpretation of congressional legislation.[17] Likewise, a case "arises

662 (3d Cir. 1950); Ratto v. Pacific Transport Lines, Inc., 131 F. Supp. 117 (N.D. Cal. 1955). See also Note, 66 Harv. L. Rev. 315 (1952).

11. Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917); Pope & Talbot Inc. v. Hawn, 346 U.S. 406 (1953).

12. The term "federal question" is here used in a substantive sense, as distinguished from its use when speaking of jurisdictional requirements. In this sense it has also been called "the federal common law." In the case of Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938), the same court that decided Erie R.R. v. Tompkins, 304 U.S. 64 (1938), in ruling on a controversy between two states involving river waters said that such a problem was: ". . . a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." The courts have also referred to such questions as dealing with areas "occupied" by the federal courts and Congress. In discussing whether the Erie doctrine should be applied in a case dealing with a defamatory telegram sent from one state to another, a federal district court pointed out: "Notwithstanding Erie Railroad Co. v. Tompkins, . . . there still exist certain fields—and this is one —where legal relations are governed by a 'federal common law' . . . untrammelled by state court decisions." O'Brien v. Western Union Telegraph Co., 113 F. 2d 539, 541 (1st Cir. 1940).

13. Southern Pacific Co. v. Jensen, 244 U.S. 205, 215 (1916).

14. 346 U.S. 406 (1953).

15. Id. at 409.

16. 194 F. 2d 834 (1st Cir. 1952).

17. Gully v. First National Bank, 299 U.S. 109, 112 (1936); Tennessee v. Davis, 100 U.S. 257, 264 (1879). The Court in the Davis case said: "Cases arising under the laws of the United States are such as grow out of the legislation of Congress. . . ."

under" the Constitution, within the meaning of the "arising under" grant, only where the interpretation of some constitutional provision is in issue.[18] Moreover, it is submitted that the holdings of the Supreme Court in the *Southern Pacific Co. v. Jensen* and *Pope & Talbot Inc. v. Hawn* dealt with the "national law" in a substantive sense, i.e., in the sense that it was the proper law to be applied, and cannot be properly extended to encompass "federal questions" considered as jurisdictional requirements. This was the position assumed by the Third Circuit in *Jordine v. Walling*[19] which held that notwithstanding the presence of a substantive question involving the national maritime law, diversity of citizenship is still required to entitle a suitor to take advantage of the "saving to suitors" clause in a federal district court.

The court in the instant case arrived at the same conclusion, but apparently attached little weight to the problem presented by the presence of a question involving the "national law" in plaintiff's appeal, and confined itself to a discussion of the treatment afforded the admiralty grant by the courts and Congress to determine congressional intent. In so doing the court in effect dismissed plaintiff's appeal without really answering the question it raised, unless the court may be deemed to have answered it by incorporating the holding of the *Jordine* case in its own.

In any event, the result reached would seem to be a just and equitable one. Allowing a plaintiff, in a case such as this, to sue at admiralty or at law, at his option, would do substantial violence to the basic foundation of the admiralty grant, and to a great extent make the constitutional and congressional establishment of the admiralty jurisdiction superfluous legislation. In granting the admiralty jurisdiction, as distinct from the law jurisdiction, it must certainly have been the legislative intent as pointed out by Chief Justice Marshall,[20] and reaffirmed by the court in the instant case, to keep causes of action within its purview separate and distinct from those falling under the common law grant. The purpose of the "saving to suitors" clause, as stated by the court in the present case was to save common law remedies to those suitors who are otherwise entitled to them, viz., those who can also show diversity. It is submitted that the majority did not carry this reasoning to its logical conclusion. As the concurring opinion here maintained,[21] if it was the purpose of Congress to keep separate and distinct these two sources of jurisdiction, it would seem inconsistent to let the suitor with a maritime claim into a federal court on its law side, even with diversity. It would seem far more consistent to restrict the "saving to suitors" clause to allow such a suitor his common law remedies in the state courts only. Whichever remedy he chooses, a federal admiralty hearing or a common law trial in a state court, the fact that the same substantive law must be applied to his cause, coupled with the fact the case is subject to review by the Supreme Court, amply protects his federal rights.

LABOR LAW—UNION PRESIDENT NOT A "REPRESENTATIVE" WITHIN THE MEANING OF SECTION 302(b) OF THE LABOR MANAGEMENT RELATIONS ACT.—Defendant, a union official, was convicted on an indictment under section 302(b) of the Taft-Hartley Act for wrongfully accepting money from corporations employing members of his union. Upon appeal, *held,* one judge dissenting, reversed. Union officials are not included within the term "representative" as used in section 302(b) of the act. *United States v. Ryan,* 225 F. 2d 417 (2d Cir. 1955).

18. Gully v. First National Bank, 299 U.S. 109, 112 (1936); Bankers Mutual Casualty Co. v. Minneapolis, St. P. & S. Ste. M. Ry., 192 U.S. 371, 381 (1904).

19. 185 F. 2d 662 (3d Cir. 1950).

20. American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511, 544 (1828).

21. 221 F. 2d at 621.

Section 302(b) of the Labor Management Relations Act provides that, "It shall be unlawful for any representative of any employees . . . employed in an industry affecting commerce to receive or accept, from the employer of such employees any money or other thing of value."[1] The section includes a like prohibition with respect to employers making such payments,[2] and also sets out exceptions to the prohibitions.[3] The exceptions pertain to (1) wages which an employer pays to a representative by reason of his past or present services as an employee, (2) payments in settlement of any legal claims or awards, (3) an ordinary market transaction, (4) payroll deductions of union dues, and (5) payments by an employer to a welfare fund established and administered according to the detailed basis provided for in this section.

The United States Court of Appeals, for the Third Circuit, in a case involving an interpretation of this subsection[4] reviewed the legislative history of the act in connection with the section and concluded that Congress' intention was to forbid money from being paid to representatives of *unions* unless through a trust fund which meets the requirements of the act. Again in *United States v. Connelly*,[5] the defendant was indicted under the same section and the Federal District Court for Minnesota, ruling that the statute was not void by reason of vagueness, left no doubt that in its opinion union officials are representatives within the meaning of the act.

The majority of the court in the instant case concluded that the term representative is used as a word of art which applies only to an exclusive bargaining representative duly selected or designated for collective bargaining purposes. It recognized that there may be labor organizations other than unions and also individuals designated as exclusive bargaining representatives. The court reached this conclusion after considering section 501 of the act which reads in part: "When used in this chapter. . . . (3) The terms . . . 'labor organization', 'representative' . . . shall have the same meaning as when used in subchapter II of this chapter as amended by this chapter",[6] and section 2 of the amended National Labor Relations Act which reads: "When used in this subchapter. . . . (4) The term 'representatives' includes any individual or labor organization."[7] Since section 2(4) revealed only what the term includes, the court felt constrained to look at each section of the National Labor Relations Act in which the term was used in order to ascertain its meaning. Invariably the court found those sections referring to exclusive bargaining representatives[8] and therefore reasoned that only such representatives were meant to be included in the term.

The dissent construed the section as applying to any representative of employees whether authorized as exclusive bargaining agent or not. Particular emphasis was placed on subdivisions (1) and (3) of section 302(c) which would, it was contended, cover lawful payments to a union official as exceptions to the prohibition. Since the officials are contemplated in the exceptions as being representatives they must also have been contemplated in the prohibition. The majority disposed of this argument

1. 29 U.S.C.A. § 186(b) (1947).
2. 29 U.S.C.A. § 186(a) (1947).
3. 29 U.S.C.A. § 186(c) (1947).
4. United Marine Division, I.L.A. v. Essex Transp. Co., 216 F. 2d 410, 412 (3d Cir. 1954).
5. 129 F. Supp. 786, 789 (D. Minn. 1955).
6. 29 U.S.C.A. § 142(3) (1947).
7. 29 U.S.C.A. § 152(4) (1947).
8. Note however that § 159(a) refers to representatives selected *for the purposes of collective bargaining*. It would seem that the words 'for the purposes' etc. would be superfluous if representatives other than exclusive bargaining representatives were not contemplated by Congress. 29 U.S.C.A. § 159(a) (1951).

by explaining that those exceptions applied not to a union official but to individuals who themselves were exclusive bargaining representatives.

The term "representative" includes any *individual* or labor organization. Because it is possible, though rarely indeed is it true, that an individual can be an exclusive bargaining representative, the court in the present case would confine the word *individual* to that single application.

Section 2(4) of the National Labor Relations Act which defines representative as "including any individual or labor organization" is patently general in its language. In conformity with the rules of statutory interpretation, statutes, when phrased in general language, should be given general application. No exceptions save those provided for should be read into a statute of such character.[9] Furthermore, the use of the word *any* should reasonably be given some significance. The consequence of its use is that there are no exceptions unless they are specifically given.[10] As far as the majority opinion is concerned section 2(4) might as well have been omitted, for it has disregarded that section and has taken its definition of representative exclusively from the various sections in which the term is used. The court has, in effect, construed section 2(4) so as to have it read "the term representative includes any individual or labor organization which has been duly selected as the exclusive bargaining representative." It is submitted that if Congress had intended the restrictive interpretation which this court has given to section 302(b), it could quite plainly have added words to that effect.[11]

The defendant contended that the primary purpose of Congress in enacting section 302 was to render unlawful the creation of union welfare funds unless restricted as provided in the act. Even admitting such argument, and that Congress expected thereby to prevent the accumulation of huge "war chests" in union treasuries under the guise of welfare funds, it is not unreasonable to say that in order to effectuate that purpose Congress deemed it necessary to prohibit any sort of contributions to representatives of employees, including union officials unless such payments came under the exceptions enumerated. "Legislation, in order to effectuate its purposes, may deal with relations beyond the immediate incidence of a mischief. If a particular mischief is within the scope of Congressional power, wide discretion must be allowed to Congress for dealing with it effectively."[12] It is equally valid to argue that Congress intended in one fell swoop, not only to regulate welfare funds, but also to outlaw the acceptance by union officials of tribute from employers who seek to minimize "disputes," or have contract violations ignored, or, in short, to "harmonize" labor-management relations through the purchase of disloyalty. Most certainly the "gift-giving" by employers to union officials will reduce the effectiveness of collective bargaining machinery. One of the major purposes of the Taft-Hartley Act is to preserve the integrity of the labor-management relationship, which can realistically

9. Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 611 (1944); Adams Express Co. v. Kentucky, 238 U.S. 190, 199 (1915); Louisville and Nashville Railroad Co. v. Mottley, 219 U.S. 467, 479 (1911); United States v. National City Lines, 80 F. Supp. 734, 741 (S.D. Cal. 1948).

10. Ex Parte Collett, 337 U.S. 55, 58 (1949); United States v. National City Lines, supra note 9, at 742.

11. Commissioner v. Beck's Estate, 129 F. 2d 243, 245 (2d Cir. 1942). In this case, Judge Frank, who wrote the opinion for the majority in the instant case, said: "The familiar 'easy-to-say-so-if-that-is-what-was-meant' rule of statutory interpretation has full force here." ("here" meaning the Second Circuit).

12. American Communications Assn. v. Douds, 339 U.S. 382, 419 (1950).

be tarnished by the individual representatives whether their corrupt acts be for their own personal enrichment or that of the unions they represent.

In a decision subsequent to the present case, *United States v. Brennan*,[13] the same District Court that decided the *Connelly* case expressly refused to go along with the majority in the principal case and adopted the view that Congress intended the section to cover any responsible representative of labor including union officials. Such a view is reflective of the language employed, more consonant with the broad Congressional purpose and more consistent with the legislative history.

Where a union is designated as the exclusive bargaining representative it is prohibited from accepting any money or thing of value from an employer. But a union can act only through its officials, and yet the instant court would permit the officials to accept from an employer under identical circumstances money or other things of value so long as the entire union membership does not share in the booty. Looked at in this way it is difficult to find logic or wisdom in the court's decision.

The acts' "Findings and declarations of policy"[14] specifically cite the necessity of eliminating certain unconscionable practices by labor organizations and *their officers*. If the majority's restrictive interpretation is to prevail, it will provide judicial immunity to at least one such unconscionable practice. Is this what Congress intended?*

PARENT-CHILD—EFFECT OF INFANT'S MENTAL ATTITUDE IN NEGLECTED CHILD PROCEEDING.—The county health officer brought a petition in Children's Court to have a twelve-year-old boy, who was afflicted with a harelip and cleft palate, declared a neglected child and to have his custody transferred temporarily from his parents to the Commissioner of Social Welfare for the purpose of consenting to remedial surgery. The child's father objected to surgery and preferred to rely on "natural forces" to effect a cure. After all phases of the surgical and postoperative treatment had been explained to the infant by medical experts, the boy declined surgical treatment. Thereupon the Children's Court, noting that the boy had been imbued with dread and distrust of surgery since childhood and was psychologically unprepared for such an operation, denied the petition. The Appellate Division refused to recognize the child's ability to reach such a decision and granted the petition. Upon appeal, *held*, three judges dissenting, reversed. Although the Children's Court has the power to order an operation over parental objection, since the child's condition was not emergent, the discretion of the trier of the facts should be preferred. *In re Seiferth*, 309 N.Y. 80, 127 N.E. 2d 820 (1955).

Implicit in the relationship of parent to child is the concept of *parentum auctoritas* which guarantees to the parent the right to educate and provide for the child without external interference. At common law this doctrine was rigidly applied.[1] Even where the life of the child was at stake, courts were powerless to order surgical or medical treatment over the parents' objection.[2] Nor was a manslaughter conviction possible

13. 134 F. Supp. 42 (D. Minn. 1955).

14. 29 U.S.C.A. § 151 (1947).

* Reversed by the Supreme Court since this writing. 24 U.S.L. Week 4101 (U.S. Feb. 28, 1956 (No. 281)).

1. But not so absolutely as in early Roman law where the father could kill the child with immunity from the law. Custody and Control of Children, Comment, 5 Fordham L. Rev. 460, 461 (1936).

2. In re Hudson, 13 Wash. 2d 673, 126 P. 2d 765 (1942); Cf. Matter of Rotkowitz, 175 Misc. 948, 25 N.Y.S. 2d 624 (Dom. Rel. Ct. 1941).

when a parent, on religious grounds, refused to allow medical treatment for a child who subsequently died for lack of treatment.[3]

However, the supremacy of parental authority was gradually brought within reasonable bounds. The power of the state to legislate for the welfare of children is recognized.[4] Statutory enactments permitting punishment of parents who neglect the health of the child have been upheld.[5] Today in at least four states the courts are no longer powerless to prevent the death of a child because of the parents' refusal of medical or surgical treatment.[6]

New York has perhaps the most liberal legislation on the subject. The Children's Court Act, enacted in 1922, defines a neglected child as one ". . . whose parents, guardian or custodian neglect or refuse, when able to do so, to provide necessary medical, surgical, institutional or hospital care for such child."[7] Exclusive jurisdiction is vested in the Children's Court of all cases involving neglected children.[8] Exercise of its powers to order an examination of such a child and to provide necessary medical, surgical or institutional care is discretionary with the court.[9]

Under the provisions of the act, the constitutionality of which has been upheld,[10] surgical treatment has been ordered over the objection of the parents in an emergency situation where the infant's life was at stake.[11] Other jurisdictions with statutes similar to New York's have ruled it immaterial that the treatment ordered is contrary to the religious beliefs of the parents.[12] This question has never been adjudicated in New York, and the court in the case under review did not consider the father's objections to be based on religious grounds, but simply an expression of his personal philosophy. Nor need the life of the infant be at stake before the court will act. In

3. Cawley, Criminal Liability in Faith Healing, 39 Minn. L. Rev. 48, 54 (1954).

4. Prince v. Mass., 321 U.S. 158 (1944) (protective labor regulations); Goldberg v. Borden's Condensed Milk Co., 185 App. Div. 222, 172 N.Y. Supp. 828 (2d Dep't 1918) (parents bound to observe statutes against work by young children); De Lease v. Nolan, 185 App. Div. 82, 172 N.Y. Supp. 552 (3d Dep't 1918) (compulsory school attendance laws).

5. N.Y. Penal Law § 482 (1) formerly Penal Code § 287 (1) (1881), People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (1903); Cal. Penal Code § 270 (1923), People v. Nelson, 42 Cal. App. 2d 83, 108 P. 2d 51 (1940); Okla. Penal Code § 852 formerly Comp. Laws of 1909 § 2369, Owens v. State, 6 Okla. Crim. 110, 116 Pac. 345 (1911).

6. People ex rel. Wallace v. Labrenz, 411 Ill. 618, 104 N.E. 2d 769, cert. denied, 344 U.S. 824 (1952); Morrison v. State, 252 S.W. 2d 97 (Mo. App. 1952); Matter of Vasko, 238 App. Div. 128, 263 N.Y. Supp. 552 (2d Dep't 1933); Mitchell v. Davis, 205 S.W. 2d 812 (Tex. Civ. App. 1947). But for a situation which can render the courts even in one of these states powerless to prevent the child's death, see Cawley, Criminal Liability in Faith Healing, 39 Minn. L. Rev. 48, 62, 63 (1954).

7. N.Y. Children's Ct. Act § 2(4)(e) (1930); N.Y.C. Dom. Rel. Ct. Act § 2(17(g) (1945). The New York Children's Court Act embraces the entire state of New York except for New York City and two counties which are covered by other legislation containing substantially similar provisions.

8. N.Y. Children's Ct. Act § 6(1)(g) (1930); N.Y.C. Dom. Rel. Ct. Act § 61(1)(d) (1944).

9. N.Y. Children's Ct. Act § 24 (1930); N.Y.C. Dom. Rel. Ct. Act § 85(1) (1941).

10. Matter of Vasko, 238 App. Div. 128, 263 N.Y. Supp. 552 (2d Dep't 1933).

11. Ibid.

12. People ex rel. Wallace v. Labrenz, 411 Ill. 618, 104 N.E. 2d 769, cert. denied, 344 U.S. 824 (1952); Morrison v. State, 252 S.W. 2d 97 (Mo. App. 1952); Mitchell v. Davis, 205 S.W. 2d 812 (Tex. Civ. App. 1947).

Matter of Rotkowitz,[13] as in the instant case, the life of the child was not endangered but remedial surgery was becoming more difficult with time. There was little or no doubt as to the eventual success of the operation. Over the parents' objection surgery was ordered to correct and arrest a progressive deformity resulting from polio. Additionally, the disorder need not be a physical one; a neglected child may be removed to a hospital for psychiatric study without the parent's consent.[14] However, the Court of Appeals has insisted that parental guardianship should not be interfered with except where the physical, mental or moral health of the child is seriously endangered.[15] Thus the power of the courts is circumscribed to protect the family from unwarranted interference.

Under the provisions of the New York act, the infant's consent to medical treatment is not necessary. It is his inability to give legal consent which necessitates the proceedings and the transfer of his custody to a guardian, who is capable of giving such consent. Therefore, what, if any, merit should the infant's convictions be given in the determination of the proceedings? This new issue was raised in the present case, where the Children's Court, after noting that the father's objections did not preclude a court order for surgery, left the decision to the infant.[16]

The minority of the Court of Appeals argued that the court has the responsibility and duty under law to render the decision and this responsibility should not be passed on to an infant who, whatever his intelligence, has neither the maturity nor experience to cope with such a momentous problem. The fact that the infant is willing to let his parents do as they choose in caring for him, should not be controlling in deciding whether they are in fact guilty of neglect or not.

However, the purpose of the legislation in question is to advance and promote the welfare of the infant and the court, vested as it is with broad discretionary power, must take cognizance of the psychological aspects of a case, if its decisions are to be truly for the infant's welfare. In the principal case the infant had a sincere distrust and fear of surgery. Treatment called for three operations and a lengthy postoperative speech therapy course. His wholehearted cooperation was a prerequisite for the success of the speech course. In this situation, with all its psychological ramifications, it might well be that the lack of the child's consent would doom the postoperative therapy to failure. If that be so, the court is exercising sound discretion in refusing to compel medical treatment. However, when the court decides, as the Children's Court did in the instant case, to leave the ultimate decision with the child it is abdicating the duty imposed upon it by statute.

The determination, however, is firmly justified, as the majority of the Court of Appeals pointed out, because of the psychological factors involved. But would this result be extended to a case where the infant refuses to consent though the success of the treatment does not depend on his proper mental attitude or cooperation? While fairly debatable, such an extension would appear unwarranted for, irrespective of the infant's convictions, the treatment would promote his welfare.

13. 175 Misc. 948, 25 N.Y.S. 2d 624 (Dom. Rel. Ct. 1941).

14. In re Carstairs, 115 N.Y.S. 2d 314 (Dom. Rel. Ct. 1952).

15. People ex rel. Sisson v. Sisson, 271 N.Y. 285, 2 N.E. 2d 660 (1936).

16. In re Seiferth, 127 N.Y.S. 2d 63, 65 (Children's Ct. 1954). The judge in his order of Jan. 5, 1954, wrote, "It is the studied conviction of this court . . . that the child should be given the opportunity of making his own decision, without interference from his father. . . ." The practical difficulty of such an order is that the decision of a twelve-year-old child is bound to be influenced by his parents. The child on Feb. 11, 1954, stated to the judge that he had concluded not to undergo the treatment. The judge thereupon denied the petition.

PATENTS—STANDARD OF INVENTION UNDER ACT OF 1952.— Plaintiff brought an action for infringement of a patent granted on a process for the coating of optical lenses with a transparent film to prevent reflection. The unique portion of this process was keeping the surface of the optical element hot while the vaporization of the inorganic salt was taking place. The District Court granted an injunction against further infringement and damages for the interim period, holding that the plaintiff's process had not been "in public use or on sale nor had the invention been made by another prior to the plaintiff." Upon appeal, *held*, affirmed. Under the changed standard of invention embodied in the Patent Act of 1952, plaintiff's contribution or "added step" was sufficient to support a patent. *Lyon v. Bausch & Lomb Optical Company*, 224 F. 2d 530 (2d Cir. 1955), cert. denied, 24 U.S.L. Week 3156 (U.S. Dec. 5, 1955) (No. 379).

Prior to the Patent Act of 1952,[1] there was no statutory test for the determination of whether an invention was a sufficient contribution to prior art to support a patent. Case authority on this point commenced with the Supreme Court decision in *Hotchkiss v. Greenwood*.[2] This landmark case decided that "unless more ingenuity and skill in applying the old method . . . [were necessary] than were possessed by an ordinary mechanic acquainted with the business, there was an absence of that degree of skill and ingenuity which constitute an essential element of every invention."[3] Decisions are legion revising and rephrasing this principle; and from time to time various other terms and purported rules have been excerpted from these holdings. Within recent years the phrases "flash of genius" or "flash of creative genius," as enunciated in *Cuno Engineering Corp. v. Automatic Devices Corp.*,[4] have been used to define the mental evolution necessary for a patentable invention. This catch phrase was subject to much criticism,[5] but read in the context of the *Cuno* decision it loses much of its startling force and it would appear that no substitution for the *Hotchkiss* test was intended. Indeed, the court in the *Cuno* case reaffirmed the doctrine of *Hotchkiss v. Greenwood*.[6] The "flash of genius" concept was by no means the only "test" employed during the decade or more preceding the enactment of the Patent Act of 1952,[7] but invariably the cases deciding a question of patentability cited the *Hotchkiss* case. Upon examination of these cases it becomes apparent that judicial confusion resulted from the periodic rephrasing of the standard test. The expressions used in rephrasing were often interpreted as new and distinct "tests" but viewed from a retrospective vantage point appear to be merely attempts to define the indefinable. Generally, the underlying principle that invention demanded something more than that expected of one skilled in the art remained in force, and its effect was felt either expressly or impliedly during the period of so-called strict application of patentability rules.

Such was the state of the law in 1952 when Congress enacted the present Patent Act.[8] Section 103 of the 1952 Act provides that a patent may not be obtained if the

1. 35 U.S.C.A. (1952).

2. 52 U.S. (11 How.) 248 (1850).

3. Id. at 266.

4. 314 U.S. 84 (1941).

5. Chicago Steel Foundry Co. v. Burnside Steel Foundry Co., 132 F. 2d 812 (7th Cir. 1943).

6. 314 U.S. at 90, 92.

7. Picard v. United Aircraft Corp., 128 F. 2d 632, 639 (2d Cir. 1942); In re Replogle, 62 F. 2d 188 (Ct. of Cus. and Patent Appeals 1932); United Chromium, Inc. v. International Silver Co., 60 F. 2d 913 (2d Cir. 1932).

8. U.S. Code Cong. & Ad. News at 2394 (1952).

difference between the subject matter sought to be patented and prior art is such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which the subject matter pertains; patentability shall not be negatived by the manner in which the invention was made.[9] Section 103 is the crux of the present case, where the court thought it probable that the claims under litigation would have been invalid but for the change in the patentability test which the court found in section 103. Did Congress intend section 103 as a new test of patentability?

The purpose of the legislation, as set forth in the Committee Report,[10] is "to revise and codify the laws relating to patents. . . ."[11] In elaborating upon the purpose of the bill, the Committee Report refers to "changes in substantive *statutory* law,"[12] not pre-existing nonstatutory patent law. Prior to the 1952 Act the test of patentability was not statutory but judicial in nature.

The report later refers specifically to section 103 as the codification of "a condition which exists in the law and has existed for more than 100 years . . .",[13] viz., the *Hotchkiss* case. Again, in the appendix to the report, reference is made to section 103 identifying the codified test with the year 1850, the date of the *Hotchkiss* case.[14]

9. "A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made." 35 U.S.C.A. § 103 (1952).

10. Senate Rep. No. 1979, June 27, 1952. House Rep. No. 7794, May 12, 1942.

11. See note 8 supra.

12. "Although the principle purpose of the Bill (HR07794) is the codification of title 35, United States Code, and involves simplification and clarification of language and arrangement, and elimination of obsolete and redundant provisions, there are a number of changes in substantive statutory law. . . . The major changes or innovations in the title consist of incorporating a requirement for invention in § 103 and the judicial doctrine of contributory infringement in § 271." U.S. Code Cong. & Ad. News at 2397 (1952).

13. "Section 103, for the first time in our statute, provides a condition which exists in the law and has existed for more than 100 years, but only by reason of decisions of the courts. An invention which has been made, and which is new in the sense that the same thing has not been made before, may still not be patentable if the difference between the new thing and what was known before is not considered sufficiently great to warrant a patent. That has been expressed in a large variety of ways in decisions of the courts and in writings. Section 103 states this requirement in the title. It refers to the difference between the subject matter sought to be patented and the prior art, meaning what was known before as described in section 102. If this difference is such that the subject matter as a whole would have been obvious at the time to a person skilled in the art, then the subject matter cannot be patented.

"That provision paraphrases language which has often been used in decisions of the courts, and the section is added to the statute for uniformity and definiteness. This section should have a stabilizing effect and minimize great departures which have appeared in some cases." U.S. Code Cong. & Ad. News at 2399, 2400 (1952).

14. "Section 103—New Section

"There is no provision corresponding to the first sentence explicitly stated in the present statutes, but the refusal of patents by the Patent Office, and the holding of patents invalid by the courts, on the ground of lack of invention or lack of patentable novelty has been followed since at least as early as 1850. This paragraph is added with the view that an

It follows, therefore, that Congress considered the *Hotchkiss* test as the one still judicially applied at the time the Committee Report was written. It is equally clear that this was the test which Congress intended to embody in section 103. The similarity between the wordage of the *Hotchkiss* test and that used in section 103 lends weight to this interpretation. Before the present case there were several decisions to the effect that section 103 was merely a codification of pre-existing law and that no change in the test was intended.[15]

The present court held that the departures referred to in the Committee Report[16] must be those in the direction of strictness which it says, has occurred in the last 20 years.[17] This seems improbable. The determination of whether an innovation would be obvious to a mechanic skilled in the art, must, of necessity, rest within the sound discretion of the court. It is similar to the "due care" or "reasonable man" rule in that it varies with the circumstances and the times.[18] In the normal course of the development of an art, the test of obviousness must become more stringent as those engaged become more expert and the fund of knowledge concerning that art increases. The test remains constant, but its application changes as technological knowledge becomes available to more people and the general levels of education become higher.[19] We have a joinder of two distinct concepts. First the test of patentability itself, and second the application of the test. The application of a specific test of patentability may be strict or lenient according to the temper of the times, but the basic standard of invention remains constant. Different tests of patentability will result in varying basic standards of invention. If, in order to be patentable, the innovation must literally result from a "flash of creative genius,"[20] this would preclude many inventions which would be patentable under the *Hotchkiss* case. So, too, when this court, in a prior case, hesitated "to mistake invention for the slow but inevitable progress of industry through trial and error,"[21] it substituted a different test from that enunciated in *Hotchkiss v. Greenwood* and required by section 103. In fact, this latter distinction was expressly rejected by the second sentence of section

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explicit statement in the statute may have some stabilizing effect, and also to serve as a basis for the addition at a later time of some criteria which may be worked out.

"The second sentence states that patentability as to this requirement is not to be negatived by the manner in which the invention was made, that is, it is immaterial whether it resulted from long toil and experimentation or from a flash of genius." U.S. Code Cong. & Ad. News at 2410, 2411 (1952).

15. Wasserman v. Burgess & Blacher Co., 217 F. 2d 402 (1st Cir. 1954); Vincent v. Suni-Citrus Products Co., 215 F. 2d 305 (5th Cir. 1954); Interstate Rubber Products Corp. v. Radiator Specialty Co., 214 F. 2d 546 (4th Cir. 1954); K. Tourneau, Inc. v. Tishman & Lipp, 211 F. 2d 240 (2d Cir. 1954); United Mattress Machinery Co., Inc. v. Handy Button Machine Co. 207 F. 2d 1 (3rd Cir. 1953); General Motors Corp. v. Estate Stove Co., 203 F. 2d 912 (6th Cir. 1953); Stanley Works v. Rockwell Mfg. Co., 203 F. 2d 846 (3rd Cir. 1953); Carlson & Sullman, Inc. v. Bigelow & Dowse Co., 202 F. 2d 654 (1st Cir. 1953); Application of O'Keefe, 202 F. 2d 767 (U.S. Ct. of Cus. & Patent Appeals 1953).

16. See note 14 supra.

17. Lyon v. Bausch & Lomb Optical Co., 224 F. 2d 530, 535 (2d Cir. 1955).

18. Brown & Sharp Mfg. Co. v. Kar Engineering Company, 154 F. 2d 48 (1st Cir. 1946), cert. denied, 328 U.S. 869 (1946), rehearing denied, 329 U.S. 822 (1946).

19. Chicago Steel Foundry Company v. Burnside Steel Foundry Company, 132 F. 2d 812 (7th Cir. 1943).

20. Cuno Engineering Corp. v. Automatic Devices Corp., 314 U.S. 84 (1941).

21. Picard v. United Aircraft Corp., 128 F. 2d 632, 636 (2d Cir. 1942).

103.[22] To this extent the section did invoke a change in the prior test of patentability as applied by this court.

In the instant case the court recognizes that "the [Supreme] Court never formally abjured . . . the test set forth in the *Hotchkiss* case" and notes that section 103 is "substantially in ipsissimis verbis"[23] with the test set forth in that early decision. However, the court finds "in the recent opinions of the Supreme Court a disposition to insist upon a stricter test of invention that it used to apply . . . indubitably stricter than that defined in Section 103."[24] The court fails or refuses to recognize the distinction between the application of a test and the test itself.

The Supreme Court in the *Cuno* case was not accepting the historical test of patentability as controlling and authoritative[25] and at the same time applying a stricter test. In keeping with the times, it was insisting upon a stricter application of the traditional test as set forth in the *Hotchkiss* case. If Congress intended to lower the standards of invention or to change the test of patentability, as is contended by this court, how futile would be the enactment into statutory form of that very test which the Supreme Court had continued to find authoritative throughout the period of so-called strictness. Clearly the intention was to codify what Congress understood was existing law with the purpose of preventing large scale judicial desertions to a spurious test prompted by "catch phrase" such as "flash of creative genius."[26]

As the test has remained the same, the problem for the court in this case was the application of the traditional test, an area which, by its very nature, remains beyond the purview of Congress and within the sound discretion of the courts. This application should have been consistent with that degree of strictness which this court has "generally found in the recent opinions of the Supreme Court."[27]

PROCESS—SERVICE BY PUBLICATION—MONEY-ONLY ACTION—DOMICILIARY DEFENDANT—IN REM JURISDICTION.—In an action for conversion of money plaintiff, alleging defendant to be a resident of New York State who had been absent from the state for more than six months, had obtained in December 1942 a warrant of attachment and in January 1943 an order permitting service of the summons by publication. Defendant, who in fact had been absent for more than six months, and who had not designated anyone to accept a summons on his behalf, had a default judgment entered against him in March 1943. When the defendant inherited some real property in 1954, the plaintiff attempted to have that property applied to the default judgment. Appearing specially, the defendant alleged he was not a resident of the State of New York and that as a result personal jurisdiction was not obtained over him. *Held,* the default judgment was limited, the action being for money only, to the property attached prior to its issuance, as the court had mere in rem jurisdiction. The question as to the defendant's domicile is immaterial. *Langer v. Wiehl,* 207 Misc. 826, 140 N.Y.S. 2d 298 (Sup. Ct. 1955).

A state has the power to grant its courts in personam jurisdiction over absent

22. "Patentability shall not be negatived by the manner in which the invention was made." 35 U.S.C.A. § 103 (1952).

23. 224 F. 2d at 536.

24. Id. at 535.

25. See note 20 supra.

26. 314 U.S. at 91.

27. 224 F. 2d at 535.

domiciliaries with substituted service or personal service without the state,[1] and in fact New York has so conferred this jurisdiction.[2] The only restriction upon the state's power in this regard appears to be that, in order to safeguard due process, the constructive service employed must reasonably be calculated to give the defendant actual notice of the action against him.[3] New York's method of service by publication[4] satisfies this restriction.[5] The defendant, on the other hand, need not receive actual notice for the court to acquire jurisdiction to proceed.[6]

Section 232 of the Civil Practice Act sets out four types of actions in which service by publication may be made. Included are matrimonial actions, and actions to recover a sum of money only.[7] Section 232-a enumerates those defendants against whom service by publication may be ordered. Among the defendants included are: nonresident natural persons, residents who have concealed themselves to avoid service, and residents who have been absent from the state for more than six months without having designated a person upon whom service may be made in their behalf.[8] It is provided, in section 233, that in all cases where service by publication is ordered, the defendant may be served personally without the state, which service is equivalent to notice by publication.[9] Section 235, however, states that a defendant in any type of action as set forth by section 232, or a domiciliary defendant, may be served personally without the state without an order.

In a money-only action, before service by publication can be authorized, an attachment of a defendant's property within the state is required, regardless of whether the defendant is, or is not, a domiciliary of New York.[10] Such service, as seen in the present case, confers in rem jurisdiction regardless of the defendant's domicile.

Where a domiciliary defendant[11] is served personally without the state, without a prior order authorizing publication, the court acquires in personam jurisdiction.[12] This applies to money-only actions as well as matrimonial actions.[13] It would seem that a plaintiff who first secured an order for publication, and then had the defendant served personally without the state, should not be in a worse position than a plaintiff who had the domiciliary defendant served personally without the state without an order for publication.[14] Should not, therefore, such service grant the court in personam jurisdiction? Yet such service is equivalent to service by publication[15] and

1. Milliken v. Meyer, 311 U.S. 457 (1940).

2. N.Y. Civ. Prac. Act § 230 (Supp. 1955); Rawstorne v. Maguire, 265 N.Y. 204, 192 N.E. 294 (1934; N.Y. Civ. Prac. Act § 235 (Supp. 1955); Gordy v. Gordy, 201 Misc. 1039, 113 N.Y.S. 2d 296 (Sup. Ct. 1952).

3. See note 1 supra.

4. N.Y. Rules Civ. Prac. 50 (1945), 51 (1935), 52 (1937).

5. Valz v. Sheepshead Bay Bungalow Corp., 249 N.Y. 122, 163 N.E. 124 (1928), cert. denied, 278 U.S. 647 (1928).

6. United States Trust Co. v. United States Fire Ins. Co. (Matter of the Empire City Bank), 18 N.Y. 199 (1858).

7. N.Y. Civ. Prac. Act § 232 (1), (3) (Supp. 1955).

8. N.Y. Civ. Prac. Act § 232-a (5), (7), (8) (Supp. 1955).

9. N.Y. Civ. Prac. Act § 233 (Supp. 1955).

10. N.Y. Civ. Prac. Act §§ 232, 232-a, 232-b (Supp. 1955).

11. Pennoyer v. Neff, 95 U.S. 714 (1877); Ebsary Gypsum Co. v. Ruby, 256 N.Y. 406, 176 N.E. 820 (1931).

12. Sivakoff v. Sivakoff, 104 N.Y.S. 2d 174 (Sup. Ct. 1951).

13. Sperry v. Fliegers, 194 Misc. 438, 86 N.Y.S. 2d 830 (Sup. Ct. 1949).

14. Johnson v. Johnson, 67 N.Y.S. 2d 886 (Sup. Ct. 1946).

15. See note 9 supra.

service by publication in a money-only action grants in rem jurisdiction rather than personal jurisdiction.

In *Dirksen v. Dirksen*,[16] an action for separation and alimony, service by publication was held to give the court in personam jurisdiction over the absent defendant, a domiciliary of New York, for the purpose of granting alimony. Since alimony is a money judgment,[17] why should the court have personal jurisdiction over a defendant when plaintiff couples a money action with a separation action, but not when a money action alone is tried?

An attempt was made in 1945 to give the courts in personam jurisdiction over an absent domiciliary in a money-only action where service was by publication.[18] This attempt was vetoed,[19] presumably as being inequitable to a defendant. But in the case of a resident defendant, in a money-only action, who successfully avoids personal service, and with no known property in the state, a plaintiff is without a remedy. Where does equity lie in this situation?

One is inclined to think that the veto was invoked without present knowledge of the more than adequate relief that existed then, as now, for deserving defendants in setting aside default judgments when service is by publication in its literal sense.[20] If, however, the relief was thought to be inadequate, an examination of the law will show such a position to be untenable. Nothing need be said about a defendant who in such a case receives actual notice and simply chooses to ignore the action pending against him. Section 217 of the Civil Practice Act gives a defendant, or his representative, the right upon showing good cause to defend an action at any time prior to the final judgment.[21] A defendant or his representative must also be allowed, except in divorce actions or where expressly forbidden by law, after showing good cause, to defend an action after final judgment, as long as the defendant acts within one year after personal service of a written notice of the default judgment, or in the absence of such notice within seven years after the filing of the judgment roll. Further, for such a defendant, unlike one who has been served personally, it will usually, i.e., in the absence of proved actual knowledge or proof that he should have reasonably anticipated the action, be deemed that he had a good cause for defaulting.[22] Of course such a defendant must show a defense based on the merits of the action.[23] The court has a wide discretion in construing good cause,[24] which construction should be liberal.[25]

The consequences of the law with regard to service by publication in a money-only action are far from clear, with leading writers calling for an appellate decision

16. 72 N.Y.S. 2d 865 (Sup. Ct. 1947).

17. Shepherd v. Shepherd, 51 Misc. 418, 100 N.Y. Supp. 401 (Sup. Ct. 1906), aff'd without opinion, 117 App. Div. 924, 103 N.Y. Supp. 1141 (1st Dep't 1907).

18. The New York Judicial Council recommended, "That section 232 be amended to provide that where the defendant is a resident of the State and the complaint demands judgment for a sum of money only, an order for service of summons by publication is authorized without requiring a prior warrant of attachment and levy." Eleventh Annual Report of the New York Judicial Council 195 (1945).

19. Twelfth Annual Report of the New York Judicial Council 58 (1946).

20. N.Y. Civ. Prac. Act § 217 (1914).

21. Ibid.

22. Carpenter v. Weatherwax, 277 App. Div. 264, 98 N.Y.S. 2d 673 (3d Dep't 1950).

23. Ibid.

24. Ibid.

25. Matter of Mars, 203 Misc. 102, 115 N.Y.S. 2d 643 (Surr. Ct. 1952).

and stating that the law contains an incongruity.[26] These facts, coupled with the myriad problems presented by the law as it exists and the adequate relief already afforded defendants, clearly indicate that the legislature should amend the Civil Practice Act so as to grant the courts in personam jurisdiction over an absent domiciliary, where service is by publication, in a money-only action.

TORTS—NEGLIGENCE—DAMAGE TO ABUTTING OWNER'S PROPERTY NOT A FORESEEABLE CONSEQUENCE OF CITY'S FAILURE TO REPAIR DEFECTIVE STREET.—The street upon which plaintiff's building abutted contained holes which had been left in nonrepair for intervals ranging from one day to several weeks over a period of a year. Face brick from one of the building's walls had fallen as the result of exceedingly heavy shocks and consequent vibrations caused by the impacts of heavy vehicular traffic in the street. The presence of one of the holes had been brought to the attention of the City by the plaintiff three to four weeks prior to the occurrence of the damage. The trial court entered judgment for the property damage. On appeal, *held*, two justices dissenting, judgment reversed. Though the injury was caused by the unrepaired holes, in the absence of more specific notice of the possible consequences, this result was not within the risk to be foreseen by the City. *Trent v. City of New York*, 286 App. Div. 479, 144 N.Y.S. 2d 625 (1st Dep't 1955).

The rights of abutting owners with respect to municipal corporations include the incorporeal hereditaments of light, air, and access (i.e., ingress to and egress from the property).[1] These rights may be regarded as easements appurtenant to municipally-owned streets and parks which are inherent in the ownership of the abutting property.[2] For an actionable invasion of an abutting owner's incorporeal rights as a consequence of a defective street, it must have occurred as a result of the use of the adjoining highway for travel.[3] Incorporeal rights may also be intruded upon by a municipality's failure to carry out the making of public improvements in a careful manner.[4] A municipality will be liable for injuries to real property which involve the impairment of the structural integrity of buildings or the condition of the land itself. For example municipalities have been held liable for interference with the lateral support of buildings while making public improvements.[5] Liability has also been imposed for damages

26. Finn, Constructive Service of Process in New York, 18 Fordham L. Rev. 242 (1949); 3 Carmody-Wait 215 (1953).

1. Anzalone v. Metropolitan District Commission, 257 Mass. 32, 153 N.E. 325 (1926) (access); Farrell v. Rose, 253 N.Y. 73, 170 N.E. 498 (1930) (access); Kelbro, Inc. v. Myrick, 113 Vt. 64, 30 Atl. 2d 527 (1943) (view); St. Peter's Italian Church v. New York, 261 App. Div. 96, 24 N.Y.S. 2d 759 (4th Dep't 1941) (access); McCutcheon v. Terminal Station Commission, 168 App. Div. 301, 154 N.Y. Supp. 711 (4th Dep't 1915) (a general discussion of incorporeal rights); Hallock v. Scheyer, 33 Hun 111 (N.Y. Sup. Ct. Gen. T. 1884) (light and air).

2. Mitchell v. Thomas, 91 Mont. 370, 8 Pac. 2d 639 (1932); Kernochan v. N.Y. Elevated R.R. Co., 128 N.Y. 559, 29 N.E. 65 (1891).

3. McKenna v. Andreassi, 292 Mass. 213, 197 N.E. 879 (1935); Johnson v. City of New York, 186 N.Y. 139, 78 N.E. 715 (1906).

4. Village of Sand Point v. Doyle, 14 Idaho 749, 95 Pac. 945 (1908); Kane v. N.Y. Elevated R.R. Co., 125 N.Y. 164, 26 N.E. 278 (1891); Clymer v. Roberts 220 Pa. 162, 69 Atl. 548 (1908).

5. Crane v. City of Harrison, 40 Idaho 229, 232 Pac. 578 (1925); Matter of Rapid Transit R.R. Commissioners, 197 N.Y. 81, 90 N.E. 456 (1909).

to an abutting owner's property resulting from percolating water caused by the negligent repair of a sewer.[6] In a Pennsylvania case the City of Philadelphia was charged with liability for damages caused by its failure to remove combustible rubbish from a street; when the rubbish ignited it and burned the abutting owner's building.[7] In Illinois, liability was imposed where a city was repairing a street through a subcontractor, and where the abutting building was damaged by vibrations resulting from the impact of a wrecking ball against the pavement.[8] Of the cases that have dealt with vibration-damage most of them have implied that the injuries sustained would have been actionable had negligence on the part of the defendants been proved.[9]

The court in the instant case conceded that the action was the first time that a suit had been brought in a New York court attempting to hold a municipality liable for injuries to abutting property caused by the impact and resultant vibrations of motor vehicle traffic on a defective street. The case was decided on the basis that the injury to the property was not a foreseeable consequence with respect to the City's omission.[10] The doctrine of foreseeability in negligence actions as it was developed and refined in *Palsgraf v. Long Island R.R.* is characterized in the following statement from the majority opinion in that decision: "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."[11] This statement is a precise formula for approaching a negligence action from its most logical beginning, that is, from the underlying requisite, duty. However, authorities have expressed the view that the foreseeability formula is not a complete and final formulization of the methods for determining duty.[12] Although foreseeability has been criticized when regarded as an all-inclusive formula, it has been applied in New York decisions subsequent to the *Palsgraf* case and represents New York law on the point of determining duty.

Directly related to the issue of foreseeability in the instant case was the question of notice to the City. The general rule is that if a defect in a street which a municipality has failed to repair has caused injury, liability will not be imposed unless the municipality had actual notice of the defect or was aware of such facts and circumstances as would lead a person to knowledge of the defect by the use of reasonable diligence.[13] The underlying reason for requiring a municipality to have notice of the defect is that it is not the insurer of persons or property on the highway or property adjacent thereto.[14] Where only one inference can be drawn from the facts, the ques-

6. Schumacher v. City of New York 166 N.Y. 103, 59 N.E. 773 (1901).

7. Charles Eneu Johnson Co. v. City of Philadelphia, 236 Pa. 510, 84 Atl. 1014 (1912).

8. Macer v. O'Brien, 356 Ill. 486, 190 N.E. 904 (1934).

9. Euwema Co. v. McKay Engineering and Construction Co., 316 Ill. App. 650, 45 N.E.2d 555 (1942) (a compressor caused the vibration-damage, negligence not proved); Howard v. Robinette, 122 Ind. App. 66, 99 N.E. 2d 110 (1951) (vibration-damage caused by machinery in a municipally-owned electric plant, negligence not proved).

10. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

11. Id. at 344, 162 N.E. at 100.

12. "The attempt to sustain the foreseeability of harm . . . as adequate for the determination of negligence cases, is futile. Howsoever far these elastic terms may be stretched, there are too many cases which go beyond their bounds." Green, The Palsgraf Case, 30 Colum. L. Rev. 789, 800 (1930). "Foreseeability of risk . . . carries only an illusion of certainty in defining the consequences for which the defendant will be liable." Prosser, Palsgraf Revisited, 52 Mich. L. Rev. 1, 19 (1953).

13. Requa v. City of Rochester, 45 N.Y. 129 (1871); Hall v. Triboro Coach Corp., 274 App. Div. 803, 79 N.Y.S. 2d 777 (2d Dep't 1948).

14. Jones v. City of Binghamton, 198 App. Div. 183, 190 N.Y. Supp. 542 (3d Dep't

tion of notice is for the court; however, where different conclusions can be drawn from the facts the question of notice is for the jury.[15] In the instant case the City had no actual notice of the particular consequence to the owner's building that would result from its failure to repair the street. It is submitted, however, that whether or not it should have been charged with such knowledge by reason of the circumstances surrounding the defect, was properly a jury question and consequently the verdict of the trial court should not have been disturbed. The facts of the present decision show that (a) the street had been left in non-repair for nearly a year;[16] (b) the City had actual notice of one of the more serious defects; (c) the general nature of the defects might reasonably have been considered serious; (d) the nature of the use of the street, namely that it was regularly trafficked by heavily laden trucks, when considered with the duration and nature of the defects, might be regarded as a strong element for concluding constructive notice of the possible consequences. In any event, if reasonable men could differ as to whether or not the risk to the plaintiff's building was foreseeable, it could not be said as a matter of law that the City should or should not have anticipated the injury. The criterion that "varying inferences" determine what matters are peculiarly within the province of the jury is well-established law in New York.[17]

In the principal case the court concurred with the jury's conclusion that the injury to the owner's building was caused by the unrepaired holes. Causation in fact is not the exclusive element in negligence liability, for it is subject to the different formulae which determine an event to be the proximate or legal cause of an injury.[18] By admitting the element of a discernible causal connection between the omission and the injury in the present decision, the court indicated that perhaps it was treating the problem as one of proximate cause applying the public policy or "practical politics" formula as a means of cutting off the defendant's liability.[19] In the court's opinion considerable emphasis was placed on the aspect of public policy involved.[20] At any rate two standards seem to have been applied, foreseeability on the one hand and proximate cause as determined by public policy on the other. The decision also indicates that possibly the public policy factor was the determinant of foreseeability. In either instance the application of the general rules seems to have been incorrect or at least ambiguous.

1921) held that notice of a defect subsequent to repair was required on the basis of the City's being a non-insurer.

15. Palsgraf v. Long Island R.R., 248 N.Y. 339, 345, 162 N.E. 99, 101 (1928).

16. See Nelson v. City of New York, 264 App. Div. 786, 34 N.Y.S. 2d 963 (2d Dep't 1942). A defect in the sidewalk existing one year constituted constructive notice.

17. O'Neill v. City of Port Jervis, 253 N.Y. 423, 171 N.E. 694 (1930). In Mosher v. Buffalo Trucking Service, Inc., 277 App. Div. 1075 (3d Dep't 1950), oil from the defendant's crank case had been allowed to pour onto the street. Plaintiff's motorcycle skidded on the oil causing him severe injury. The court said: "It is our view that the condition of the roadway as created by the . . . defendants gave rise to a 'range of reasonable apprehension' which was subject to varying inferences, and hence was a jury question."

18. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928) (dissenting opinion); Prosser, Torts, 218-21 (2d ed. 1955).

19. Palsgraf v. Long Island R.R., supra note 18.

20. "In a metropolitan city with heavy traffic, much of it composed of huge trucking vehicles, we may not require that the municipality anticipate the effect that occurred here. Involved is the wide variety of structures abutting the populous and myriad streets, and all of varying degrees of strength, quality and maintenance." Trent v. City of New York 286 App. Div. 479, 481, 144 N.Y.S. 2d 625, 626 (1st Dep't 1955).

If two standards, namely foreseeability and proximate cause, were confused in the course of the opinion, ostensibly foreseeability was the principle used in deciding the case; in this event, the varying inferences from the facts made the foreseeability issue one for the jury. Authorities have been critical of instances in negligence actions when courts have relinquished their juristic functions by submitting to the jury for determination questions properly within the scope of judicial analysis and decision.[21] The converse of that criticism is applicable to the instant case where a jury question appears to have been improperly determined by the court.

WILLS—BENEFICIARY'S RENUNCIATION OF A TESTAMENTARY TRUST.—Petition was brought by the trustees for construction of a will which set up a trust fund of approximately $400,000 for the testator's son. Except for a yearly payment of $5,600 the son was sole beneficiary of the income and was entitled to the principal, in three installments, after the death of testator's former wife. After having reached majority, the beneficiary, in a formal writing, notified the trustees of his renunciation of all claims to his father's estate. *Held,* renunciation valid, the trust to continue until expiration date, when distribution of the corpus will be directed by the court. The income, in the meantime, is to be paid to those presumptively entitled to the next eventual estate. *Matter of Suter,* 207 Misc. 1002, 142 N.Y.S. 2d 353 (Surr. Ct. 1955).

Directions by a settlor that the beneficiary of a trust created by him shall not be permitted to alienate the income either voluntarily, by assignment, or involuntarily, upon suit by creditors, were not enforced at the common law of the early American era or in England, where this rule still prevails.[1] But in the American jurisdictions, beginning with the last quarter of the past century, the opposite view has gradually been accepted by case decision and statutory enactment.[2] In New York the divergence from the common law was brought about by the Revised Statutes of 1830. The statute contained a section prohibiting voluntary or involuntary alienation; this was subsequently extended to cover all trusts providing for the distribution of income to a beneficiary, whether the fund consisted of personalty or realty.[3] In its present form the statute relating to personalty reads: "The right of the beneficiary . . . to receive the income of personal property, and to apply it to the use of any person, can not be transferred by assignment or otherwise."[4] The cases interpreting this section leave

21. Green, Rationale of Proximate Cause, 66-71 (1927).

1. 1 Scott, Trusts § 152 (1939); Bogert, Trusts § 40 (3d ed. 1952); See also N.Y. Leg. Doc. No. 65 (M) at 35-38 (1938); cases illustrating the rule in England are: Brandon v. Robinson, 18 Ves. 429, 34 Eng. Rep. 379 (Ch. 1811); Graves v. Dolphin, 1 Sim. 66, 57 Eng. Rep. 503 (Ch. 1826).

2. From an historical aspect the American view is best expressed in the influential dictum of the United States Supreme Court in Nichols v. Eaton, 91 U.S. 716 (1875). See also Smith v. Towers, 69 Md. 77, 14 Atl. 497 (1888); Broadway National Bank v. Adams. 133 Mass. 170 (1882); N.Y. Rev. Stat. 2, c. 1, tit. 2, art. 2, § 63 (1830); Ind. Ann. Stat., §§ 56-604 (Burns 1933); La. Civ. Code art. 9850.28 (Dart. 1939). For a summary of the law of the states today, see Griswold, Spendthrift Trusts § 58 (2d ed. 1947).

3. For a survey of the development of the law of spendthrift trusts in New York, see Griswold, Spendthrift Trusts §§ 61-71 (2d ed. 1947) and a study of the Law Revision Commission in N.Y. Leg. Doc. No. 65 (M) at 41-53 (1938).

4. N.Y. Pers. Prop. Law § 15 (1937); this provision has subsisted in its present wording since the enactment of N.Y. Laws c. 417 § 3 (1897). A corresponding section is N.Y. Real

no doubt that all attempts to circumvent a trust provision which may appear disadvantageous to a beneficiary, will be frustrated by the courts. Not only have direct attempts to assign been held invalid[5] but the statute is read to have endowed all trusts, valid in their creation, with the attribute of indestructibility.[6] The courts refuse to terminate the trust where the life beneficiary and remainderman apply jointly,[7] or where the life beneficiary became entitled to the remainder.[8] Similarly, a beneficiary's application for permission to invade the corpus has met with refusal on the general ground of indestructibility of trusts and upon the more detailed argument that the reduction of the corpus will proportionately reduce the flow of income which is termed inalienable by the statute.[9] The avowed purpose expressed in the statute is to enable the testator to provide against the improvidence of the beneficiary.[10]

The question raised in the present decision was whether public policy, which is so emphatically manifested in both statutory and case law, prevents a beneficiary from effectively renouncing his interest where such action appears obviously improvident upon the facts of the case. The renouncing beneficiary was of a youthful age and had no other source of income. His reasons were not further specified than being of a "moral and political" nature. Should the testator's careful design in the trust arrangement only be upheld in face of the beneficiary's efforts to accelerate the enjoyment of the principal of the trust or also where the beneficiary has chosen to repudiate it altogether? The wording of the statute gives no conclusive answer to this question.[11]

In a prior decision involving the validity of a repudiation by the beneficiary the same Surrogate's Court hesitated in view of section 15 of the Personal Property Law to recognize the beneficiary's right to renounce. In *Matter of Hanna*[12] the court accepted the disclaimer by a life beneficiary in favor of the remainderman only upon the "special facts of the case" and ordered that the trust should continue and vest in the remainderman only upon the termination of the life interest as provided by the terms of the will. As was shown by that decision an acceptance of the beneficiary's

Prop. Law § 103 (1936): "1. The right of a beneficiary of an express trust to receive rents and profits of real property . . . cannot be transferred by assignment or otherwise. . . ."

5. Matter of Wentworth, 230 N.Y. 176, 129 N.E. 646 (1920); Central Trust Co. v. Gaffney, 157 App. Div. 501, 142 N.Y. Supp. 902 (1st Dep't 1913), aff'd, 215 N.Y. 740, 109 N.E. 1069 (1915); Lent v. Howard, 89 N.Y. 169 (1882); In Re Lynch's Estate, 151 Misc. 549, 272 N.Y. Supp. 79 (Surr. Ct. 1934).

6. Cuthbert v. Chauvet, 136 N.Y. 326, 32 N.E. 1088 (1893).

7. In Re Knauss' Estate, 204 Misc. 207, 121 N.Y.S. 2d 5 (Surr. Ct. 1953).

8. Metcalfe v. Union Trust Co., 181 N.Y. 39, 73 N.E. 498 (1905); Dale v. Guaranty Trust Co., 168 App. Div. 601, 153 N.Y. Supp. 1041 (1st Dep't 1915); In Re Hyatt's Will, 81 N.Y.S. 2d 911 (Surr. Ct. 1948).

9. In Re Sullard's Will, 247 App. Div. 761, 285 N.Y. Supp. 968 (2d Dep't 1936); Application of Renn, 177 Misc. 195, 29 N.Y.S. 2d 410 (Surr. Ct. 1941).

10. In Re Caswell's Estate, 185 Misc. 599, 602-03, 56 N.Y.S. 2d 507, 510 (Surr. Ct. 1944), aff'd, 269 App. Div. 809, 56 N.Y.S. 2d 407 (4th Dep't 1945); Matter of Wentworth, 230 N.Y. 176, 185, 129 N.E. 646, 648 (1920).

11. The language of the statute is sufficiently unequivocal where it prohibits transfer "by assignment" but it is not clear what is meant by the attached words "or otherwise." The words were given an inclusive effect in Matter of Perry, 126 Misc. 616, at 620, 214 N.Y. Supp. 461, 464 (Surr. Ct. 1926), where they were rephrased "in any other way." But such interpretation obviously failed to dispense with the necessity of construction of the statute by case law in a novel application as it presented itself in the principal decision.

12. 155 Misc. 833, 280 N.Y. Supp. 622 (Surr. Ct. 1935).

renunciation does not necessarily have an effect on the duration of the trust. The law provides for the distribution of the income which was renounced to those presumptively entitled to the next eventual estate.[13] However, the ruling in the *Hamm* case would seem to have carried too far the rule of indestructibility of trusts under the New York statutes. Since the protection of the beneficiary is no longer possible after the acceptance of his renunciation, the trust should be terminated where the remainder has vested.[14] The Surrogate's Court subsequently showed increasing readiness to acknowledge the beneficiary's right to renounce: "There can be no question of this renunciation not being prohibited by Sect. 15 of the Personal Property Law. . . . The trust will continue and the law provides for disposition of the renounced income. . . ."[15]

While it may be arguable whether a renunciation by the beneficiary of a testamentary trust is brought within the mandate of section 15, the law affirms that a gift cannot be forced upon a man. The Court of Appeals in *Albany Hospital v. Albany Guardian Society* stated: ". . . [I]t is settled beyond any opportunity for controversy that a devisee may refuse to accept, and renounce a provision in his favor and prevent it from being effective."[16] The right to renounce a gift is a fundamental right and the offer of a court to protect the renouncing party, where, as in the instant case, "it must be assumed . . . that the donee has weighed his decision, . . ."[17] would be, it may well be argued, an interference with his freedom as an individual. This reasoning was the basis of the Surrogate's decision in the instant case.

Although in both the *Albany* and present cases the testamentary disposition was entirely beneficial,[18] a difference existed in that no trust was involved in the former. In view of section 15 of the Personal Property Law this difference is very substantial. Where the remainder is vested the remainderman may be willing to pay a lump sum consideration for the income which the beneficiary would thereupon disclaim. In the case under review the remainder was not vested and consequently the only interest resulting to another party from the disclaimer was the payment of the income for an indefinite period to those presumptively entitled to the next eventual estate. Assuming future cases will rest on a similar fact situation the possibility of a sale of the beneficiary's interest will be slight, and presumably a secondary consideration for the deciding court, but the apparent facility with which a sale of the beneficial interest

13. N.Y. Real Prop. Law § 63 (1916): "When, in consequence of a valid limitation of an expectant estate, there is a suspension of the power of alienation, or of the ownership, during the continuance of which the rents and profits are undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate."

14. Griswold, Spendthrift Trusts § 524 (2d ed. 1947).

15. Matter of Matthiessen, 175 Misc. 466, 470, 23 N.Y.S. 2d 802, 807 (Surr. Ct. 1940).

16. 214 N.Y. 435, 440, 108 N.E. 812, 813 (1915). The cited case contains a selection of leading English and early American decisions uniformly affirming the right of a devisee to renounce a devise. For this same principle see also Burritt v. Silliman, 13 N.Y. 93 (1855), where the same court, in reference to the renunciation of an appointment for trustee, declared: ". . . [T]he law does not compel a man to accept an estate, either beneficial or trust, against his will. . . ."

17. 142 N.Y.S. 2d 353, 356 (Surr. Ct. 1955).

18. "While a devisee or legatee may renounce a devise or legacy which . . . is entirely beneficial, by far the greater number of questions of renunciation arise in cases in which testator has attempted to take some property right . . . or has attempted to satisfy a debt . . . and the like." 4 Page, Wills § 1402 (3d ed. 1941).

may be transacted where the remainder is vested[19] cautions from accepting the present decision as a binding rule for disclaimers by life beneficiaries in New York. There is little hope that in connection with this decision further clarification of the applicable principles will be made by the appellate courts since under the Surrogate's Court Act[20] an appeal can be taken only by an aggrieved party and the petitioning trustees do not qualify under that determination.[21]

WITNESSES—GRAND JURY'S IMPROPER ATTEMPT TO CONFER IMMUNITY VOIDS CONTEMPT CONVICTION.—Defendant was called to testify before a grand jury concerning "kickbacks" from insurance companies to labor unions. During his first three appearances defendant did not claim his privilege against self-incrimination, but gave evasive answers. At his fourth and final appearance, he asserted the privilege, whereon the grand jury foreman offered him immunity for the crimes of conspiracy and bribing labor officials. Defendant then continued to testify in an evasive manner, for which he was cited and subsequently convicted of contempt. On appeal, *held*, reversed. The immunity offered was incomplete, consequently defendant was compelled to give testimony in violation of his constitutional right against self-incrimination, and no proceedings for contempt could be predicated thereon. *People v. De Feo*, 308 N.Y. 595, 127 N.E. 2d 592 (1955).

The New York State Constitution provides: "No person shall be . . . compelled in any criminal case to be a witness against himself. . . ."[1] A person may be compelled to give self-incriminating testimony only if he is given immunity which is coextensive with the protection of his constitutional privilege.[2] " 'Privilege' signifies the noncompellability to speak about the offense. . . . 'Immunity' signifies the nonliability for the offense itself. . . . By an immunity the offender's guilt ceases; under a privilege, it continues."[3]

The first "immunity statute" in New York[4] offered only a limited protection. The only safeguard that it guaranteed a witness who gave self-incriminating testimony, was that the particular testimony given would not be admissible against him in a subsequent trial.[5] However, it was permissible for the prosecution to enter evidence uncovered as a result of using leads obtained from the witness' testimony. The United States Supreme Court in *Counselman v. Hitchcock*[6] refused to give a similar interpretation to the United States Constitution[7] and the federal "immunity statute." The Court ruled that, a witness who is questioned by a federal grand jury need not give

19. But to the effect that the vested or contingent nature of the remainder is not of itself a deciding criterion for the acceptance or rejection of the renunciation of the life beneficiary, see Blackwell v. Virginia Trust Co., 177 Va. 299, 305; 14 S.E. 2d 301, 303 (1941).

20. N.Y. Surr. Ct. Act § 288.

21. Matter of Heldman, 151 App. Div. 234, 135 N.Y. Supp. 143 (4th Dep't 1912).

1. N.Y. Const. art. I, § 6 (1894).

2. People ex rel. Lewisohn v. O'Brien, 176 N.Y. 253, 68 N.E. 353 (1903); People ex rel. Coyle v. Truesdell, 259 App. Div. 282, 18 N.Y.S. 2d 947 (2d Dep't 1940).

3. 8 Wigmore, Evidence § 2281 (3d ed. 1940).

4. N.Y. Laws c. 539 (1853). This became § 342 of The Penal Code in 1882, and § 996 of The Penal Law in 1909.

5. People ex rel. Hackley v. Kelly, 24 N.Y. 74 (1861).

6. 142 U.S. 547 (1892).

7. U.S. Const. amend. V (1791).

answers which might tend to incriminate him, in spite of the statutory guarantee against the use of such testimony in a subsequent trial. The immunity granted by the statute was not as broad as the peril to which his testimony would subject him. This rule was adopted in New York in *People ex rel. Lewisohn v. O'Brien*.[8]

Shortly thereafter, *People v. Gillette*[9] set forth the rule upon which the instant case seems to rely. The *Gillette* rule divides grand jury witnesses into two categories, those who are probable future defendants, and those who are not. Where the investigation is in fact directed against the witness, making him a probable future defendant, the entire proceeding is void, since it is a violation of his constitutional right to require him to appear before the grand jury and take the oath. The witness who is not a probable future defendant receives automatic immunity as soon as he claims the privilege and gives self-incriminating testimony.

Two years after the *Gillette* decision, a new immunity statute, Penal Law section 584, was passed by the New York Legislature. This statute not only prohibited the use of a witness' testimony against him in a subsequent trial, but also provided that ". . . no person will be prosecuted . . . for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence. . . ."[10] This statute was held to satisfy the guarantee found in the New York Constitution.[11]

The most recent New York immunity statute, Penal Law section 2447, under which the instant case was decided, offers the same broad immunity as did section 584, but the method of obtaining the immunity differs. Under the old law, a witness received immunity automatically, as soon as he gave self-incriminating testimony. However, section 2447 provides that ". . . if a person refuses to answer a question . . . on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question . . . such person shall comply with the order . . . then immunity shall be conferred upon him. . . . Immunity shall not be conferred upon any person except in accordance with the provisions of this section."[12]

The opinion in the instant case is unclear as to the precise ground for reversing the defendant's conviction. The court seemed to base its opinion on two grounds, viz., the *Gillette* rule and the attempt of the grand jury foreman to limit the immunity. As to the first three appearances of the defendant, the court apparently applied the *Gillette* rule, thus rendering void that which occurred. However it must be remembered that the *Gillette* case was decided when no *effective* immunity statute was in existence, and cases have held that the *Gillette* rule has no application where immunity statutes are operative.[13] In speaking of the *Gillette* case, the Appellate Division later said: "What was said, however, must be read in light of the fact that no immunity was afforded by statute."[14] This language makes it quite obvious that even the court which had written the *Gillette* opinion no longer considered the rule applicable. Thus, the only justification for defendant's refusal to answer would be that the immunity pro-

8. 176 N.Y. 253, 68 N.E. 353 (1903).

9. 126 App. Div. 665, 111 N.Y. Supp. 133 (1st Dep't 1908).

10. N.Y. Laws c. 395 (1910).

11. People v. Reiss, 255 App. Div. 509, 8 N.Y.S. 2d 209 (1st Dep't 1938), aff'd, 280 N.Y. 539, 20 N.E. 2d 8 (1939).

12. N.Y. Penal Law § 2447 (1953).

13. People v. Reiss, 255 App. Div. 509, 8 N.Y.S. 2d 209 (1st Dep't 1938), aff'd, 280 N.Y. 539, 20 N.E. 2d 8 (1939); People ex rel. Coyle v. Truesdell, 259 App. Div. 282, 18 N.Y.S. 2d 947 (2d Dep't 1940).

14. People v. Reiss, 255 App. Div. 509, 514, 8 N.Y.S. 2d 209, 214 (1st Dep't 1938), aff'd, 280 N.Y. 539, 20 N.E. 2d 8 (1939).

vided by the statute is not coextensive with his constitutional privilege.[15] But section 2447 *does* give complete immunity which is as broad as the peril.[16] Where full immunity is granted, a witness must answer or he may be adjudged in contempt.[17]

The court stated that the immunity attempted to be conferred by the grand jury was incomplete because the grand jury foreman attempted to limit it to the crimes of conspiracy and bribing labor-union officials. However, immunity can be conferred only in accordance with the statute, and the witness receives complete immunity from prosecution for any crime disclosed or revealed by his testimony.[18] Therefore, a limitation expressed in the offer of immunity does not place any limitation upon the immunity which is actually conferred. Defendant actually received no immunity, but this was not because of any defect in the statute, nor because the foreman attempted to limit the immunity. Upon being ordered to testify in spite of the fact that he had claimed his privilege, he would have received *complete* immunity for any crime he revealed. However, he continued to answer in an evasive manner, thus justifying the contempt citation.

It seems clear that the purpose of section 2447 is to assist the prosecutor in obtaining information, without the risk of unintentionally granting immunity to a witness who might later appear as a possible defendant. The statute enables this to be accomplished without in any way impairing the constitutional rights of any witness.

Section 2447 seems to set forth two propositions quite clearly: 1. any immunity which is granted is complete, 2. none can be acquired unless the witness claims his privilege. The opinion in the instant case complicates the statute and does far more to confuse the law than to clarify it.

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15. See note 2 supra.

16. N.Y. Penal Law § 2447 (1953), People v. Breslin, 306 N.Y. 294, 118 N.E. 2d 108, cert. denied, 347 U.S. 1014 (1954).

17. People ex rel. Hofsaes v. Warden, 302 N.Y. 403, 98 N.E. 2d 579 (1951).

18. See note 16 supra.