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Case Notes

CASE NOTES

Antitrust — Tying Arrangement Per Se Violation of Sherman Act.— Appellant railroad sold and leased extensive landholdings under agreements containing preferential routing clauses affecting large amounts of goods moving in interstate commerce. The district court granted the Government's motion for summary judgment, finding the agreements per se violative of section one of the Sherman Act. On direct appeal to the United States Supreme Court, *held,* three Justices dissenting, affirmed. Tying arrangements by a defendant possessed of sufficient economic power over the tying product to work an appreciable restraint on competition in the market for the tied product are per se violative of section one of the Sherman Antitrust Act when a not insignificant amount of interstate commerce is involved. *Northern Pac. Ry. v United States,* 356 U.S. 1 (1958).

Under section one of the Sherman Act all contracts, combinations and conspiracies in restraint of interstate commerce are illegal.[1] The initial construction given the act by the Supreme Court[2] developed into the celebrated Rule of Reason under which only unreasonable restraints were considered illegal. Some restraints, however, "because of their pernicious effect on competition and lack of any redeeming virtue . . ." have been established as unreasonable violations as a matter of law,[3] while others are considered illegal only after elaborate investigation of their effect upon competition. Thus, tying arrangements, which serve only to suppress competition, are unreasonable per se.[4] In many instances the legality of a particular restraining device may be tested both under the general proscriptions of the Sherman Act and the specific interdictions of the later Clayton Act.[5] As a result, tying arrangements relating to tangible commodities are the concern of both acts, while those relating to services, not expressly contemplated by the Clayton Act, more properly are reviewed only under the Sherman Act.[6]

1. "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal. . . ." 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (Supp. V, 1958).

2. Compare the opinion of Chief Justice Peckham in United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897), with Standard Oil Co. v. United States, 221 U.S. 1 (1911).

3. 356 U.S. at 5.

4. "[I]t is unreasonable, per se, to foreclose competitors from any substantial market." International Salt Co. v. United States, 332 U.S. 392, 396 (1947).

"For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." 356 U.S. at 5.

5. Tying arrangements within the proscription of § 3 of the Clayton Act relate only to "goods, wares, merchandise, machinery, supplies, or other commodities . . . ." 38 Stat. 731 (1914), 15 U.S.C. § 14 (1952).

6. The dissent in the present case feels that the distinction is neither unreal nor inoperative; "the Government necessarily based its complaint on § 1 of the Sherman Act . . . ." 356 U.S. at 13 (dissenting opinion).

In the present case, the defendant entered into contracts for the sale or lease of several million acres of land. The contracts included "preferential routing" clauses requiring all goods made or produced on the land sold or leased to be shipped by means of the lessor's railroad. The majority of the Court found that the land was strategically disposed in checkerboard fashion amid private holdings, was within economic distance of transportation facilities, and was valuable for agricultural, mining, and industrial purposes. Both the testimony of witnesses, and "common sense" made it evident to the Court that the land was often prized by, or essential to, those who leased or purchased it. Neither the lower court, nor the Supreme Court made any inquiry towards establishing the extent of the defendant's holdings in relation to the general availability of similar land. The district court felt that sufficient dominance over the tying market was evidenced by the defendant's title in fee simple absolute, and that the only relevant market to be considered was that for the *particular* land owned by the defendant.[7] While it is doubtful that the Supreme Court concurred in this particular holding, it did affirm upon the basis that the undisputed facts, including the existence of a host of tying agreements, conclusively established that the defendant had such great power over the tying market as is requisite to a determination of per se illegality, when an appreciable restraint upon competition is effected.

In the majority's view, *International Salt Co. v. United States*[8] was ample authority for affirming the decision below. In that case the manufacturer of patented salt processing machines conditioned their lease upon the agreement of the lessee to purchase from the lessor all the salt processed by them. Beyond recognizing that the patent conferred a limited monopoly,[9] the Court made no inquiry into the availability of similar machines or the proportion of the business of supplying such machines controlled by the defendant.[10] The additional fact that the defendant grossed $500,000 in one year from supplying salt for the machines evidenced sufficient effect upon interstate commerce to warrant a finding of per se illegality both under section one of the Sherman Act and section three of the Clayton Act.

The defendant in the present case argued that the holding in *International Salt* was limited by the later ruling in *Times-Picayune Publishing Co. v. United States*,[11] where a unit system of advertising which required subscribers to advertise in both a morning and evening newspaper, or in neither, was found not per se violative of section one of the Sherman Act on the grounds that the

7. United States v. Northern Pac. Ry., 142 F. Supp. 679 (W.D. Wash. 1956), aff'd, 356 U.S. 1 (1958).

8. 332 U.S. 392 (1947).

9. Id. at 396.

10. The Government there proceeded under both § 1 of the Sherman Act and § 3 of the Clayton Act, while in the instant case only violation of the Sherman Act was charged. Therefore, the present majority's seizure of the analysis of the lack of market study made by the Court in Standard Oil v. United States, 337 U.S. 293, 305 (1949), where only § 3 of the Clayton Act was involved seems to be an unfortunate misinterpretation of both the International Salt case and its reference in the Standard Oil case.

11. 345 U.S. 594 (1953).

defendant, on a percentage basis, did not possess the requisite dominance over the market for the tying product.[12] The present Court, however, did not consider that *Times-Picayune* in any way repudiated or limited the holding of *International Salt,* and construed its discussion of monopoly power and dominance over the tying product as requiring nothing more than "sufficient economic power to impose an appreciable restraint on free competition in the tied product."[13] In this Court's view, the vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another, whether the power takes the form of a monopoly or not.[14]

The dissenting Justices[15] felt that the decision in *Times-Picayune* made it abundantly clear that both relative dominance in the tying market, as well as appreciable restraint on competition in the tied market must be shown to establish a per se violation, and that the facts before the Court made such a determination impossible. While not insistent upon percentage of the relevant market as a necessary fact, the dissent argued that there was not adduced in its stead, sufficient evidence of other factors, such as the uniqueness or extreme desirability of the lands, or such use of the tying arrangements as tended to effect an economic detriment to the lessees. This, in lieu of percentage data, could validly establish a dominance over the tying market.

The essential difficulty in the present case is created by the Court's rejection of the clear statement of the law in *Times-Picayune,* and an adoption of a new and unclear standard of per se illegality under section one of the Sherman Act.

In *Times-Picayune* the Court presumed to make explicit the prerequisites to a determination of per se illegality under section one of the Sherman Act and section three of the Clayton Act. It specifically emphasized that under the Sherman Act there need be shown a controlling power over the tying market. The Court found the essential evil of tying arrangements in the wielding of a monopolistic leverage in one market to restrain competition in another; and having made reference to *United States v. Columbia Steel Co.,*[16] where the Court had spoken of the need for establishing a defendant's power in relation to market percentages, it found that a forty per cent control over the tying market was insufficient to warrant a summary per se determination. That Court recognized in previous tying cases a pattern woven of the two strands of monopolis-

12. This case has been severely criticized for its treatment and conception of the relevant market, but the value of its doctrine on the issue of requisite dominance over the tying product is not diminished by its misapplication to the facts. The four dissenting Justices apparently concurred in the statement of the rule requiring dominance, but disagreed with the conclusion because their conception of the market would have provided the requisite percentile dominance.

13. 356 U.S. at 19 (dissenting opinion).

14. Compare the statement in the Times-Picayune case, 345 U.S. at 611 "the essence of illegality in tying agreements is the wielding of monopolistic leverage. . . . "

15. It may be significant to note that Justices Harlan, Frankfurter and Whittaker dissented, while Justice Clark, who wrote the majority opinion in Times-Picayune, took no part in the consideration or decision of this case.

16. 334 U.S. 495, 524, 528 (1948).

tic power and appreciable restraint.[17] Included in this analysis was the holding in *International Salt,* because there the patent itself "conferred a monopolistic, albeit lawful, market control"[18] over the tying product. Since there had been no percentage study of market control in that case, the *Times-Picayune* Court must necessarily have concluded that such evidence could be replaced by at least one other factor, a patent. It is inaccurate to interpret the ruling of the *International Salt* case as based solely upon the quantitative substantiality of the restraint effected and its reference to patent control as an indeterminative factor only since this, more properly, is its ruling on the Government's complaint under section three of the Clayton Act.

If the analysis of the Court in *Times-Picayune* was accurate, the present case is a genuine departure. If on the other hand, the *Times-Picayune* Court read into the *International Salt* ruling considerations not actually taken, as the majority here seems to imply, then the present decision is sound.

Generally, it would seem that the functional difference between the Sherman and Clayton Acts, in so far as sections one and three are concerned, is the design of the former to destroy *established* unreasonable restraints, and the purpose of the latter to prevent the *development* of restraints which "would . . . probably lessen competition, or create an actual tendency to monopoly."[19] It seems that less should be necessary to establish the tendency of one restraint to become unreasonable than is required to show that another has already worked such an effect, since the legitimate inference of dominant power is substantial effect, and substantial restraint presupposes the means to effect it. Necessarily then, one factor infers the other, and, since either tends toward the prohibited effect, only one need be demonstrated. On the other hand, to establish that a particular practice has already resulted in unreasonable restraint, a survey of the tied market, under the Rule of Reason, must be made, unless such other evidence is introduced as would lead to no other

17. "From the 'tying' cases a perceptible pattern of illegality emerges: Where the seller enjoys a monopolistic position in the market for the 'tying' product, or if a substantial volume of commerce in the 'tied' product is restrained, a tying agreement violates the narrower standards expressed in § 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred. And because for even a lawful monopolist it is unreasonable, per se, to foreclose competitors from any substantial market, a tying arrangement is banned by § 1 of the Sherman Act whenever both conditions are met." 345 U.S. at 608-09.

18. Ibid.

19. Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 357 (1922). See Atty. Gen. Nat'l Comm. Antitrust Rep. 8 (1955). "Section 1 is thus 'an all-embracing enumeration to make sure that no form of contract or combination by which undue restraint' was brought about could save it from condemnation. The statute was to reach all 'undue' restraints, whether accomplished by methods new or old. And in determining what restraints of competition are 'undue' since Section 1 is universal in form, a rule or standard of construction is needed to guide the discretion of the courts. That rule is 'the standard of reason which had been applied at the common law and in this country dealing with subjects of the character embraced by the statute'. This was to be the measure for determining whether 'in a given case a particular act had or had not brought about the wrong against which the statute provided.'"

conclusion but that a per se illegal restraint has already been realized. However, if that evidence relates only to one of the two factors, power or restraint, then it is not so clearly shown that the restraint *is* unreasonable, as it is proven that it *may* be, under the concept of the Clayton Act.

Per se illegality under the Sherman Act should necessarily be founded upon some consideration both of dominance over the tying market, and significant restraint upon the tied product. The concurrence of a practice devoid of merit, and control over one product, with an appreciable effect on the tied product may be conclusively presumed to have worked a further and unreasonable restraint which an extended inquiry would reveal. However, under this Court's test—sufficient power, appreciable restraint, and a substantial amount of interstate commerce involved—the determination reached is closer to establishing the probability than the fact of unreasonable restraint, since, as under the Clayton Act, appreciable restraint at least infers such power as would be sufficient to effect it. Thus, while the *International Salt* Court may have used a quantitative view to find a per se violation of section three of the Clayton Act, its reference to patent monopoly was necessary for its finding of per se illegality under section one of the Sherman Act. In fact, that Court cited *Fashion Originators Guild v. FTC*[20] in support of its determination, even though the Court in that case based its findings of per se violation of the Sherman Act (through group boycott), on percentile market dominance. Certainly the fact of the patent excused the Court's lack of more extensive consideration of market dominance,[21] and as a corollary, in the instant case either percentage control or substitutive factors, more cogent than those discussed, should have been adduced, and considered not to establish merely "sufficient" power, but dominance.

The dissent in the principal case suggested that even in the absence of percentile data, there could yet be found a per se violation. It might lie in the fact that the lessees and purchasers were driven to the defendant in spite of the economic loss they would suffer because of the tied service, or in the fact that the intrinsic value of the defendant's holdings was so great as to make reference to the general market unnecessary, similar in concept to the exclusive nature of a patent right, or it might even lie in the fact that the number of agreements themselves raised the inference of economic coercion. The dissent, however, distinguished the majority's reliance on this last ground

20. 312 U.S. 457 (1941).

21. The present Court considers the question of patent rights solely as a defense raised by the lessor, while the dissent argues that it was used by the prior Court as prima facie evidence of monopoly over the tying product. In view of the particular language of the International Salt Court, and its interpretation in Times-Picayune, the dissent seems to estimate more accurately the significance of the patent. Moreover, this view is given further support by Atty. Gen. Nat'l Comm. Antitrust Rep. 144 (1955): A tying arrangement "presupposes a distinct and 'dominant' product conferring some substantial economic power . . . [and] such dominance may stem from a patent [citing International Salt] or other demonstrable market control." See also, Standard Oil Co. v. United States, 337 U.S. 293 (1949). "A patent, moreover, although in fact there may be many competing substitutes for the patented article, is at least prima facie evidence of such control." Id. at 307.

because the agreements here were not cast in such absolute terms as to result in economic detriment to the lessees, who were privileged to seek the same services at better prices, or better services for the same prices. The merit of this objection is sorely tried by the majority's reference to *International Salt,* which noted that even under such conditions the lessor maintained at all times a priority on the business at equal prices, and the majority's observation of the fact that rate competition among railroads is seldom real. Noteworthy, however, is the fact that under our interpretation of *International Salt* the host of agreements was not necessary to that Court's determination under the Sherman Act but is a keystone in the present Court's rationale.

Further, the dissenters criticized the majority's reliance on the factors of strategic disposition and desirability of the defendant's land. They pointed out that only some of the land was strategically necessary and economically desirable to private owners of contiguous grazing land who found defendant's holdings necessary to fill in existing ranges. It was argued that the factors considered by the majority were insufficient to "short circuit an inquiry into the broad issue of market dominance,"[22] and that therefore, the case should have been remanded for study of that issue. It should be noted that the authorities cited by the majority as supporting the propositions that price fixing, market division, and group boycott are per se violations, seem to some degree to have concerned themselves with market control.[23] There appears no reason why less should be necessary for the one than the other.

Where possible, economic evidence should be used in analyzing markets to determine actual or probable effects on competition.[24] When relative position in the market is not studied care should be taken that the evidence upon which the determination is made is at least as convincing. If the courts are less demanding, "the forward march of the per se doctrine will continue and the rule of reason approach . . . will lose ground."[25] Certainly the present case represents a step in that direction.[26] It may conceivably result in the drawing of

22. 356 U.S. at 18-19 (dissenting opinion).

23. Atty. Gen. Nat'l Comm. Antitrust Rep. 16-17 (1955), in reference to "price-fixing" notes that "this power [of major oil companies to materially influence market prices], its use pursuant to a common plan to stabilize prices, and the effect it had on prices, brought the program within reach of Section 1. . . ." And in connection with "market division": "Market division cases thus far have all concerned competitors who as a group possessed substantial, and often dominant, market power. The conduct struck down as price fixing in Addyston Pipe & Steel Co. v. United States, was partly based on market division among manufacturers supplying about two-thirds of markets where they did the bulk of their business." Id. at 26.

24. Antitrust Law Symposium—1955, p. 5 (CCH current law handybook ed.).

25. Id. at 6.

26. Although undisturbed by the end result of the Northern Pacific case, Milton Handler, in his survey of Recent Antitrust Developments delivered before the New York City Bar Association on June 5, 1958 (to be published in the October, 1958 issue of that association's Record), found "cause for concern in the hostile attitude toward the rule of reason which the majority opinion exhibits," and in the preference shown by certain members of the Court for adoption of "inflexible rules capable of automatic application" in lieu of alternative foundering "in a sea of judicial discretion."

but one distinction—and that at best a dubious one—between sections one and three of the Sherman and Clayton Acts, the distinction between commodities and services, with the burden of proof under each the same. More importantly however, its rejection of the *Times-Picayune* doctrine, as the dissent observes, leaves the law in a vague state with no clear guides to help.

Constitutional Law — States' Power To Tax Imports.—Plaintiff, a Wisconsin manufacturer, imported lumber and wood veneers from Canada. The veneers were stored in their original packages in plaintiff's warehouse until used in the manufacture of veneered products. The lumber, shipped in individual pieces, was piled in plaintiff's storage yard to be air-dried prior to use in manufacture. Plaintiff brought this action to recover a general property tax, paid under protest, on both the veneer and lumber. The lower court entered judgment in favor of defendant. The Supreme Court of Wisconsin *held,* three justices dissenting in part, affirmed. Goods held by the original importer in their original packages for current operational requirements or which have entered the processing stage are not immune from a state's general property tax. *United States Plywood Corp. v. City of Algoma,* 2 Wis. 2d 567, 87 N.W.2d 481 (1958).

The United States Constitution expressly prohibits state taxation of imports,[1] to prevent states through which imports enter this country from burdening the commerce of other states.[2] Under the "original package" doctrine, first applied in *Brown v. Maryland,*[3] an article imported from a foreign country is immune from taxation if it has not been sold, or has not been taken from its original package and thereby added to the mass of merchandise of the state. This case dealt with a license tax, a tax upon the importer and as such it was necessarily discriminatory. Later, in *Low v. Austin,*[4] a general property tax, although not discriminating against imports, was held to be an impost or duty on imports and therefore unconstitutional, since the goods were unsold and still in the original package. But once the goods enter the processing stage, the immunity is lost.[5] In *Hooven & Allison Co. v. Evatt,*[6] however, the Court held that the goods imported by a manufacturer for his own manufacturing use and stored in his warehouse, in their original packages, retained their immunity. It noted that, "even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the

1. U.S. Const. art. I, § 10, cl. 2: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws. . . ."

2. Madison, Debates in the Federal Convention of 1787, August 28, 1787 (Hunt & Scott ed.).

3. 25 U.S. (12 Wheat.) 419 (1827).

4. 80 U.S. (13 Wall.) 29 (1871).

5. Gulf Fisheries Co. v. MacInerney, 276 U.S. 124 (1928).

6. 324 U.S. 652 (1945).

record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question."[7] Thus the question whether imported goods essential to current manufacturing needs lose their immunity was left unanswered. The Wisconsin court in the present case gives us an affirmative answer. The present decision simply holds that once it is established that the imported items are an essential reserve for current manufacturing needs, even though they have not entered the actual manufacturing process, such items have been allocated to the use for which they were imported, and their immunity as an import is lost. This decision is a very narrow one. Indeed, to have gone further would run counter to the *Evatt* case.

The original package doctrine is not absolute and there is no reason to suppose that Mr. Chief Justice Marshall so intended it. *Brown v. Maryland*[8] reasoned that the import is immune from tax until it becomes commingled with the general property of a state even though it has not reached its ultimate destination. Justice Marshall gave two illustrations of "commingling," a breaking of the original package or a sale even while the original package remains unbroken. These were never stated to be all inclusive and it does not follow that they are. It is equally valid and consistent with *Brown v. Maryland* to say that once the import has been allocated to the use for which it was imported it becomes commingled with goods of the state and has reached its final destination. It is to be hoped that the present case will be reviewed by the Supreme Court. We can reasonably speculate that the Court will affirm, and even beyond the precise holding of this case we might speculate that an affirmance will lead to further distinctions drawn against the holding of the *Evatt* case and eventually to the overruling of that case. Such result would not only be reasonable but consistent with *Brown v. Maryland.*

The result of a slavish adherence to technical rules has given a preference to imports over domestic goods. The intention of the framers of our Constitution was to relieve the inequities and afford equal opportunities to the states.[9] The framers never intended to afford protection to one group, to the extent of discriminating against others.[10] The courts have created this discrimination by specifying the limitations without observing the principle behind the general rule. The general rule may well be stated as an *in transitu* theory, that is, "imports are immune from state taxation until their arrival at their final destination." The *License Cases*[11] stated that imports in their original package, held by

7. Id. at 667.

8. 25 U.S. (12 Wheat.) at 441.

9. See Madison, op. cit. supra note 2.

10. McCulloch v. Maryland, 17 U.S. (4 Wheat.) *316 (1819). The Court held that the immunity was given to a tax on the bank as a federal instrumentality and did not extend to a tax on real property in common with other real property within the state. The immunity is only as broad as is necessary to fulfill the intentions of the authors of the Constitution.

11. 46 U.S. (5 How.) *504 (1847). The License Cases were decided at a time when domestic goods, shipped from one state to another, were considered imports under art. I, § 10, cl. 2 of the Constitution. See Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 449 (1827)

the importer for sale, were considered *in transitu* and on the way to their destination. The Court held that, "a tax upon them while in this condition, for State purposes, whether by direct assessment, or indirectly, by requiring a license to sell, would be hardly more justifiable in principle than a transit duty upon the merchandise when passing through a State."[12] The goods while in transit retain their immunity; to hold that once the imports reach their ultimate destination their immunity is not lost is to conflict with the purpose of the constitutional provision and impose an unwarranted burden upon the states. In *Woodruff v. Parham*[13] goods shipped from one state into another were held not to be imports. The rationale behind this was based on the unwarranted burden placed upon goods of the state as distinguished from those shipped into the state.[14] Although losing their immunity under article I, section 10, clause 2, they still possessed immunity while in transit through the state and against discriminatory taxes under the commerce clause.[15] This reasoning is just as applicable to foreign goods and the immunity should last only so long as the foreign goods are in transit.[16] To follow the *in transitu* theory to its proper conclusion, the immunity should be removed from those goods to be sold or sold within the state. Certain authorities have propounded the argument that the paying of the duty is a purchase of a right to sell.[17] This argument may well be interposed with respect to a discriminatory tax but loses all relevancy when faced with a nondiscriminatory tax.[18]

The limitation upon the general rule was well stated by Justice Marshall, "when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state."[19] The constitutional immunity of imports

(dictum). This rule was abrogated in 1868 and thereafter they were within the purview of the commerce clause. Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1868).

12. Id. at *575-76.

13. 75 U.S. (8 Wall.) 123 (1868).

14. Id. at 137. A Chicago merchant who buys his goods in New York and sells at wholesale in the original packages may escape all state, county, and city taxes although gaining police protection, fire protection and other benefits afforded by the state.

15. U.S. Const. art. I, § 8, cl. 3.

16. Note, 58 Harv. L. Rev. 858, 870 (1945). "To hold that they ceased to be imports upon arrival while goods from abroad continued to be imports until sale or unpacking would require more intellectual cunning than could fairly be asked or desired from a court."

17. 25 U.S. (12 Wheat.) at *439. "No goods would be imported if none court be sold." This was a tax upon the import as an import. It was thus dealing with a tax necessarily discriminatory and put a heavier burden upon the import than upon the domestic article.

18. Note, 58 Harv. L. Rev. 858, 868. "[Purchase of a right to sell] boils down in application to saying that no goods would be imported if none could be sold at least once in the original package. This is of course true of goods imported for sale, but there would be an almost equally serious barrier to importation if goods could be sold but once and then only in the shipping case."

19. 25 U.S. (12 Wheat.) at *441-42.

will be lost in any case where there is a breaking of the original package,[20] resale,[21] or where the goods are put to the use intended.[22] Once the import reaches its final destination the immunity afforded it under the Constitution should be spent even though it has not been commingled with the mass of goods of that state.

Criminal Law — Death of Co-Felon in Perpetration of Arson as Felony Murder.—While defendant's accomplice was perpetrating an arson, a premature explosion of kerosene resulted in his death. The defendant was convicted of murder in the first degree based on a homicide committed during a felony. On appeal, the Supreme Court of Pennsylvania *held,* two justices dissenting, affirmed. Where an accomplice accidentally kills himself during the commission of an arson, his co-conspirator is guilty of felony murder. *Commonwealth v. Bolish,* 391 Pa. 550, 138 A.2d 447 (1958).

Whereas at common law malice distinguished murder from any other killing,[1] the effect of the felony murder doctrine is to make any homicide, intentional or otherwise, committed in the perpetration of a felony, murder in the first degree, thus dispensing with the necessity to plead and prove malice.[2] The Pennsylvania felony murder statute has been interpreted as imputing malice to the felon[3] and it matters not whether it be the accused or one of his confederates who is responsible for the homicide.[4]

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20. See note 3 supra.

21. Waring v. The Mayor, 75 U.S. (8 Wall.) 110 (1868).

22. Gulf Fisheries Co. v. MacInerney, 276 U.S. 124 (1928).

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1. 4 Blackstone, Commentaries *198.

2. Mansell & Herbert's Case, 2 Dyer 128B (1536).

3. Commonwealth v. Thomas, 382 Pa. 639, 658, 117 A.2d 204, 215 (1955) (dissenting opinion); Commonwealth v. Guida, 341 Pa. 305, 308, 19 A.2d 98, 100 (1941); 4 Blackstone, Commentaries *200.

4. See Commonwealth v. Moyer, 357 Pa. 181, 53 A.2d 736 (1947), where it was held that it was unimportant whether an innocent bystander was killed by one of the felons or by the robbery victim. In Commonwealth v. Lowry, 374 Pa. 594, 599, 98 A.2d 733, 735 (1953), the court held that "where a killing occurs in the course of a robbery, all who participate in the robbery . . . are equally guilty of murder in the first degree even though some one other than the defendant fired the fatal shot."

For an excellent summary of the New York law on felony murder see Corcoran, Felony Murder In New York, 6 Fordham L. Rev. 43 (1937). It would seem that under the New York felony murder doctrine a "participant" in the felony must cause the death. Thus, while the felony victim is considered a participant, where the death was inflicted by a bystander the doctrine was held not to apply. See Arent and MacDonald, The Felony Murder Doctrine and Its Application Under the New York Statutes, 20 Cornell L.Q. 288 (1935); Hitchler, The Killer and His Victim in Felony-Murder Cases, 53 Dick. L. Rev. 3 (1948), for an annotated analysis of the possible situations which may give rise to felony murder.

In Pennsylvania, as in most states,[5] the doctrine is limited to certain specified felonies.[6] The Pennsylvania statute provides that "all *murder* . . . committed in the perpetration of . . . any arson, rape, robbery, burglary or kidnapping, shall be murder in the first degree."[7]

The instant decision is undoubtedly one of the most extreme applications of the felony murder doctrine in the United States. Previously the Supreme Court of Pennsylvania in *Commonwealth v. Almeida*[8] had ruled that a defendant could be convicted of felony murder even though the homicide was committed by one other than the felons.[9] The *Almeida* court in equating the rules of proximate cause in tort and criminal law concluded that if one's felonious act was the proximate cause of another's death, then he is criminally liable. The decision has been criticized in that the rules of proximate cause are not the same in tort and criminal law,[10] and that such reasoning imputes the *act of killing* rather than malice to the accused.[11] Although this seemed to be an unwarranted extension of the felony murder doctrine, it is still the law as laid down by the Supreme Court of Pennsylvania. This reasoning was carried to its logical extreme in *Commonwealth v. Thomas*[12] where the court held that the defendant could be tried for felony murder where his accomplice was killed by the robbery victim.

In the instant case, defendant's accomplice accidentally caused his own death. On the first appeal, the court, basing its decision on the *Almeida* case, reasoned that the defendant should be guilty of murder as he had participated in an act, the natural and foreseeable consequence of which was the death of another. On appeal from the second trial, the court in the instant case again affirmed the defendant's conviction but conspicuously refrained from mentioning the proximate cause theory as enunciated in the *Almeida* case. The court reasoned that the defendant actually participated in the felony and an

5. For a complete survey of felony murder statutes, see Arent and MacDonald, op. cit. supra note 4. See also Moesel, A Survey of Felony Murder, 28 Temp. L.Q. 453, 456 (1955).

6. A few jurisdictions make a homicide committed while engaged in the commission of "any" felony murder in the first degree. However most jurisdictions limit it to certain specified felonies, e.g., arson, rape, robbery and burglary. See note 5 supra.

7. Pa. Stat. Ann. tit. 18, § 4701 (Purdon 1945). Where the killing was committed during one of the five enumerated felonies, the Pennsylvania statute merely raises the crime to murder in the first degree. "All other kinds of murder shall be murder in the second degree." Ibid. See Commonwealth v. Buzard, 365 Pa. 511, 76 A.2d 394 (1950).

8. 362 Pa. 596, 68 A.2d 595 (1949). In this case the victim was a police officer and was probably killed by a shot fired by another officer.

9. The court indicated that it was unimportant who had fired the fatal shot, so long as the death was a natural and virtually inevitable consequence of the chain of events set in motion by the defendant. Id. at 634, 68 A.2d at 614.

10. See Morris, The Felon's Responsibility For the Lethal Acts of Others, 105 U. Pa. L. Rev. 50, 52 (1956), citing two leading authorities: Green, Are There Dependable Rules of Causation?, 77 U. Pa. L. Rev. 601 (1929), and Sayre, Criminal Responsibility for the Acts of Another, 43 Harv. L. Rev. 689 (1930).

11. See note 3 supra and accompanying text.

12. 382 Pa. 639, 117 A.2d 204 (1955).

act was committed which both caused the death and was in furtherance of the felony. Thus, he was in no different position than was the accused in *Commonwealth v. Thompson*[13] and *Commonwealth v. Guida*.[14]

In his dissent, Justice Musmanno argued that the majority has misread the statute under which the defendant was convicted. The Pennsylvania statute provides that all *murder* which is committed during an arson shall be murder in the first degree, and since the statute has nowhere defined the term "murder," the dissent reasoned that it is necessary to apply the common-law definition of murder which, as distinguished from self-destruction, is the killing of another.[15] Since the accomplice killed himself in the instant case, there was no murder but rather a virtual suicide. To support his opinion, Justice Musmanno cited *People v. Ferlin*[16] and *People v. La Barbera*[17] which are almost identical situations. In both cases the defendant was acquitted, but only the *Ferlin* case was decided under a statute similar to that in Pennsylvania.[18] The dissent also claimed that the felony murder doctrine could not be applicable in the instant case because the death of the accomplice was not in furtherance of the felony. This point was not well taken for although the death of the accomplice may have hampered the perpetration of the felony, still the act of preparing the kerosene was in furtherance of the felony. The dissent also disagreed with the majority finding that the defendant was in the house and actively participating in the arson when the explosion occurred.[19] However, both would agree that he was a principal and therefore chargeable with the felony, so the only question remaining is whether he is to be charged with the murder of his accomplice.

It is submitted that the majority opinion in the instant case is unsound because of the wording of the Pennsylvania statute. As the dissent points out, the statute provides that *murder*, not any death, committed during the commission of an arson is murder in the first degree. In the present case, there was no murder committed, but rather a self-destruction, and hence this case does not fall within the statute. Nor can the conviction in the present case be justified by recourse to the *Almeida* decision since the cases are distinguishable. In that case, there was a killing of another person which could be imputed to the defendant. Such was not the situation in the instant case.

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13. 321 Pa. 327, 184 Atl. 97 (1936). The court charged the jury that they must be satisfied beyond a reasonable doubt that "defendant's" shot caused the death of the victim.

14. 341 Pa. 305, 19 A.2d 98 (1941). The defendant was convicted of murder when one of his confederates killed a housekeeper during a robbery.

15. 391 Pa. at 564, 138 A.2d at 453 (dissenting opinion).

16. 203 Cal. 587, 265 Pac. 230 (1928).

17. 159 Misc. 177, 287 N.Y. Supp. 257 (Sup. Ct. 1936).

18. People v. La Barbera, supra note 17, is distinguishable in that it was based upon New York Penal Law § 1044 which repeals the common-law rules of felony murder and expressly provides that homicide is the killing of one human being "by another." Since the accomplice accidentally killed himself it was not a killing of one "by another".

19. 391 Pa. at 559, 138 A.2d at 451 (dissenting opinion).

Federal Taxes — Priority of a Federal Tax Lien Over a Prior Mortgage. —Ball Construction Company, the contractor, entered into a subcontract with one Jacobs, the terms of which required Jacobs to furnish Ball with a surety bond guaranteeing performance of the subcontract. On July 21, 1951, Jacobs assigned to the surety all payments due or to become due under the subcontract as security for any liability it might sustain under the performance bond, and for any other indebtedness thereafter arising in favor of the surety. On April 30, 1953, a balance of $13,228.55 became due from Ball to Jacobs. In May, June, and September, 1953, federal tax liens in the amount of $17,010.85 were filed against the subcontractor. Between December 1953 and March 1954, Jacobs incurred indebtedness to the surety in the amount of $12,971.88. The contractor instituted this action and interpleaded the surety and the subcontractor. The district court held that the assignment was such as to constitute the surety a mortgagee as of July 21, 1951, and applying section 3672(a) of the Internal Revenue Act of 1939 concluded that the mortgagee's claim was superior to a subsequently filed federal tax lien. The court of appeals affirmed. The Supreme Court of the United States *held,* four Justices dissenting, reversed. The provisions of section 3672(a) are not applicable where the mortgage involved is inchoate and unperfected. *United States v. R. F. Ball Constr. Co.*, 355 U.S. 587 (1958).

Section 3670 of the Internal Revenue Code of 1939[1] provides that "if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property . . . belonging to such person." Furthermore, it is provided in section 3671[2] that "the lien shall arise at the time the assessment list was received by the collector. . . ." By the terms of section 3672(a)[3] "such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector."

Under the common law of Texas, the instant transaction was construed to be a mortgage[4] and apparently both the majority and the minority accepted the designation of the instrument as such. In its inception, it would seem to be a mortgage of sums not yet in existence and as such would technically be a mortgage of after-acquired property.[5] There are several theories as to how and when such a mortgage arises but most authorities agree that when the property comes into existence, the mortgagee's lien arises subject only to existing liens.[6] In the instant case, the mortgaged property came into existence on April 30, 1953 and the federal government's lien did not attach until

1. Int. Rev. Code of 1939, § 3670, 53 Stat. 448 (later amended by 68a Stat. 779 (1954)).

2. Int. Rev. Code of 1939, § 3671, 53 Stat. 449 (later amended by 68a Stat. 779 (1954)).

3. Int. Rev. Code of 1939, § 3672(a), 53 Stat. 448 (later amended by 68a Stat. 779 (1954)).

4. Cf. Williams v. Silliman, 27 Tex. 626, 12 S.W. 534 (1889); Southern Surety Co. v. Bering Mfg. Co., 295 S.W. 337 (Tex. Civ. App. 1927).

5. See Osborne, Mortgages §§ 37-40 (1951).

6. Id. § 40.

after that date. It is not likely, therefore, that the majority was referring to the character of this instrument as a mortgage of after-acquired property when it termed it "inchoate and unperfected." After the mortgaged sums had come into existence, the instrument might be considered analogous to a mortgage for future advances.[7] That is, the subcontractor mortgaged the sums due him as security for any payments which the mortgagee-surety might be required to make in the future. But no debt was incurred by the subcontractor to the surety and consequently there were no advances until after the federal tax liens were filed.[8] Assuming that the mortgage was, as the majority contends, "inchoate and unperfected" the question remains whether the Court was correct in applying the choate-inchoate distinction put forth in *United States v. Security Trust and Sav. Bank*[9] to the present transaction. In that case, the plaintiff brought an action and procured an attachment of property owned by the defendant. While the suit was pending, the government filed notice of tax liens against the defendant. Subsequently, the suit was decided in favor of the plaintiff and his attachment lien was perfected. The Supreme Court of the United States, reversing the decision of the lower courts, held that the attachment lienor gained only a potential or contingent right prior to judgment and the government's lien must, therefore, defeat the inchoate attachment lien.

The decision in the instant case represents an extension of the doctrine announced in the *Security Trust* case. Whereas the latter case had employed the choate-inchoate distinction in the context of a lien under section 3670, the Court here applied the same distinction to a section 3672(a) lien.

The instant case has been criticized as a blatant example of judicial legislation on the theory that had Congress, in enacting section 3672(a), intended to distinguish between choate and inchoate mortgages, it would have done so specifically.[10] In the absence of any qualifying provisions, this argument continues, it should be assumed that Congress intended to give broad protection to those interests set out in the section and the Court should not restrict the effect of the legislation.

There is, in the instant case, an important suggestion latent in the minority opinion, a suggestion which had previously been put forth by Justice Jackson in his concurring opinion in the *Security Trust* case. The Court in that case, while upholding the priority of a federal lien over a prior inchoate attachment lien, never questioned that if the attachment lien had been

7. Id. § 113.

8. It is difficult to ascertain what the majority opinion meant by "inchoate and unperfected." It may be, as the opinion suggests, that the majority designated the mortgage "inchoate" because there was no debt in existence at the time the federal tax lien was filed. Most authorities agree that where there is no debt or advancement made by the mortgagee prior to a subsequent lien but the mortgagee is absolutely obliged to make a subsequent advance, the mortgagee's lien dates for priority purposes back to the time of the mortgage agreement. See 3 Glenn, Mortgages § 402 (1943); 4 Pomeroy, Equity Jurisprudence § 1198 (1941).

9. 340 U.S. 47 (1950).

10. See Cross, Federal Tax Claims, 27 Fordham L. Rev. 1, 29 (1958).

choate it would have prevailed. Justice Jackson did. His opinion did not recognize the choate-inchoate distinction put forth by the majority but concluded that the federal lien would prevail because "the statute [sections 3670-72, Internal Revenue Code of 1939] excludes from the provisions of this secret lien those types of interests which it specifically included in the statute and no others."[11] Since this statement was made in the face of a fact situation where the attachment lien was the antecedent lien, the necessary conclusion is that, except where the lienee's interest is one of the four set out in section 3672(a), a federal tax lien will be superior to every lien regardless of the time when it attaches.

In the instant case, the dissenting opinion concluded, "the assignment was in legal effect a mortgage, completely perfected on its date, in all respects choate, and valid between the parties; and inasmuch as it antedated the filing of the federal tax liens it was expressly made superior to those liens by the terms of section 3672(a)."[12] If the assignment was choate on the date it was made and since it was antecedent to the government's tax lien, it would, unless Justice Jackson's theory were applied, prevail. There would be no need to discuss whether this assignment was a valid mortgage and this, in spite of the majority's apparent agreement, the dissent did at length. In its insistence that the assignment was in fact a valid mortgage, the dissent suggested that a choate assignee's lien would not be sufficient of itself to defeat a subsequent federal tax lien.

In spite of the brevity and ambiguity of the majority opinion, the instant case is significant in the development of the law of tax liens. It establishes the applicability of the "choate-inchoate" criterion to those interests specifically protected under section 3672(a). Interestingly, the minority, while voicing a strong dissent, is in apparent agreement with this holding. The dissent is limited to a criticism of the majority's designation of the instrument as inchoate. It never questioned the soundness of the majority's use of "choateness" as a criterion for determining the applicability of section 3672(a). The minority opinion is significant in its tacit acceptance of the theory that federal tax liens will prevail over all liens, whether antecedent or subsequent, unless they are specifically protected by statute. Both the majority and minority opinions in the instant case represent a willingness on the part of the Court to bolster the effectiveness of the federal tax lien through the use of the priority doctrine.

Labor Law — Discovery Procedure Prior to Institution of Contempt Proceedings.—An order enforcing awards for back wages arising out of unfair labor practices was not complied with because of the alleged financial inability of the respondent employer. Petitioner, National Labor Relations Board, alleging that lack of assets was caused by chicanery between respondent and its affiliates, sought an examination of their books and records to ascertain whether

11. 340 U.S. at 53 (concurring opinion).

12. 355 U.S. at 594 (dissenting opinion).

probable cause existed for instituting contempt proceedings. *Held*, an appellate court lacks jurisdiction under the National Labor Relations Act to order discovery proceedings prior to the commencement of contempt proceedings. *NLRB v. Deena Artware, Inc.*, 251 F.2d 183 (6th Cir. 1958).

Whenever inquiry is made into unfair labor practices, the NLRB has exclusive jurisdiction to prosecute, adjudicate and grant relief[1] with the supplementary power to institute contempt proceedings against any employer not complying with its orders.[2] Once a contempt action is commenced, the Board, upon request, can issue subpoenas for purposes of pretrial discovery.[3] Although these writs of discovery are not specifically authorized, they are justified by section 262 of the Judicial Code which allows federal courts to issue any writ considered necessary provided it conforms to accepted judicial custom.[4]

It has been said of the back wages award that "making an employee whole for his improper discharge is an immediate, though secondary object of those proceedings. The [National Labor Relations] Act, and all proceedings taken under it, are for the primary purpose of keeping the channels of commerce open. . . . It was not enacted for either employer or employee."[5] The NLRB has not been established to enforce private rights but rather to effectuate the public policy of the act[6] by setting up "machinery whereby the wage earners of this country may hope to have a fair determination of their rights. . . ."[7] Contempt proceedings have uniformly been considered valid applications of this jurisdiction.

In the principal case, the majority reasoned that an examination of the defendant's records in the absence of contempt proceedings would constitute the adjudication of a purely private right and granting such relief would therefore be beyond the powers of the court. The court, in so holding, was cognizant of the financial burden and inconvenience incident to sanctioning discovery writs prior to the institution of contempt proceedings. It considered that orderly procedure required the petitioner to state the facts forming the basis of the suspected contempt. Such a procedure would have the salutory effect of allowing the respondent to test the legal sufficiency of the cause of action before incurring the expense of producing his records. In a dictum, the court expressed the belief that the award was a private right and should be enforced as a private judgment by the individual beneficiaries thereof.

The dissent considered such pretrial discovery necessary to enable the Board

1. Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261, 265 (1940).

2. Bethlehem Shipbuilding Corp. v. NLRB, 120 F.2d 126 (1st Cir. 1941).

3. NLRB v. Parsons Punch Corp., 249 F.2d 956 (6th Cir. 1957).

4. 63 Stat. 102 (1949), 28 U.S.C. § 1651 (1952); Root Refining Co. v. Universal Products Co., 169 F.2d 514, 524 (3d Cir. 1948).

5. Stewart Die Casting Corp. v. NLRB, 132 F.2d 801, 804 (7th Cir. 1942).

6. Stewart Die Casting Corp. v. NLRB, supra note 5; National Licorice Co. v. NLRB, 309 U.S. 350, 362 (1940); Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261, 265 (1940).

7. 78 Cong. Rec. 12027 (1934). See also 78 Cong. Rec. 3443 (1934); 79 Cong. Rec. 6183-84 (1935).

to determine whether there was justification for citing the defendant for contempt, and argued that the present proceedings were substantially akin to an action in contempt. The minority opinion went on to say that the court of appeals exercises original jurisdiction under section 10(e) of the National Labor Relations Act[8] and that enforcement of the award is a proper function of the court which rendered the decree.

In referring to the award as a "private individual right" the majority added that "it is logical to conclude that if collection of the award [by the NLRB] is not a part of the public policy of the act, the courts are open to the claimants as individual creditors for the enforcement of their awards." This dictum is misleading and in conflict with many well reasoned decisions holding that the award is a public right which the Board enforces as agent for the beneficiaries thereof.[9] Thus, in *NLRB v. Sunshine Mining Co.*,[10] the court reasoned that creditors of an employee were unable to compel the employer to pay them the back wages award since the award is "not a private judgment or chose in action belonging to the employee and he has no property right in the award pending his actual receipt of it."[11] Therefore, one must conclude that Congress granted *exclusive* jurisdiction to enforce these awards to the NLRB as a deterrent to unfair labor practices and under no circumstances has an individual beneficiary of the award standing to enforce it.

Another dictum in the present case suggested that the Board could enforce the award for back wages in the district court. This proposition may have been based on the decision in *Nathanson v. NLRB*[12] which decided that the Board is a creditor with respect to back wages within the meaning of the Bankruptcy Act. However, this holding should not be construed to mean that the Board is to be treated as an ordinary judgment creditor in all situations.

The decision in the present case properly denied the Board the use of discovery proceedings to embark on a "fishing expedition" into the respondent's records in search of fraudulent conveyances. By requiring the petitioner to state the facts claimed to constitute contempt, the respondent is permitted to obtain a determination of the legal issues on their merits before incurring the expenses of producing his records. The result, while protecting the employer from unbridled searching of his records, does not unduly hamper the effectiveness of the NLRB. It would appear to be a sound application of the National Labor Relations Act.

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8. 63 Stat. 107 (1949), 29 U.S.C. § 160(e) (1952).

9. National Licorice Co. v. NLRB, 309 U.S. 350, 362 (1940); Stewart Die Casting Corp. v. NLRB, 132 F.2d 801, 804 (7th Cir. 1942); NLRB v. Sunshine Mining Co., 125 F.2d 757, 761 (9th Cir. 1942); Waterman S.S. Corp. v. NLRB, 119 F.2d 760 (5th Cir. 1941); Agwilines, Inc. v. NLRB, 87 F.2d 146, 151 (5th Cir. 1936).

10. NLRB v. Sunshine Mining Co., supra note 9.

11. Id. at 761.

12. Nathanson v. NLRB, 344 U.S. 25 (1952). The Court held the NLRB a creditor within the meaning of the Bankruptcy Act since to hold otherwise would defeat the very purpose of the act.

Municipal Corporations — Estoppel To Assert Failure of Notice as Condition Precedent To Suing Municipality Where Actual Notice Present.— Action by appellant for injuries suffered when a city owned truck collided with the rear of his automobile. On appeal from the circuit court's ruling striking out certain allegations of the complaint, *held,* reversed. The municipality is estopped to demand written notice of a claim as a condition precedent to filing suit where the appropriate officials had immediate actual notice of the accident, made a prompt investigation, and lulled the appellant into inaction by their representations of liability. *Tillman v. Pompano Beach,* — Fla. —, 100 So. 2d 53 (1957).

Florida is one of many states which require that written notice of an injury claim be filed with specified officials within a designated period as a condition precedent to commencing litigation against the city.[1] The rationale behind such enactments is that prompt notice of an adverse claim enables the proper officials to investigate such claims while they are still fresh, and to adjust differences without suit wherever possible.[2] Accordingly, a majority of the jurisdictions have indicated that, if the notice requirement is substantially complied with, a technical inaccuracy, absent bad faith, does not preclude a plaintiff's recovery.[3]

In the principal case, the majority, interpreting the charter as requiring written notice only as a condition precedent to *litigation,* held the city estopped because city officials, by their representations, had led plaintiff to believe that litigation would be unnecessary. Moreover, the court argued, it would be sheer literalism to insist on strict compliance here because the proper officials had actual notice of the accident and written notice could provide the authorities with no information not already possessed.

The dissenting opinion considered notice requirements mandatory and not to be ignored or respected at the will of individual agents of the city. While not denying that equitable estoppel may be invoked against a municipal corporation under certain circumstances, the dissent found the present complaint fatally defective in that it failed to aver the right of the appellant to rely on the words and conduct of the individual officers involved.

In holding that actual notice of the appropriate officials satisfied the statute and rendered filing written notice unnecessary, the court is at odds with the great weight of authority[4] which considers actual knowledge unimportant.[5]

1. 18 McQuillin, Municipal Corporations § 53.152 (1950). More than one half the states have now enacted such provisions.

2. Town of Mount Dora v. Green, 117 Fla. 385, 158 So. 131 (1934); O'Neil v. Richmond, 141 Va. 168, 126 S.E. 56 (1925).

3. Town of Mount Dora v. Green, supra note 3; Teresta v. City of New York, 304 N.Y. 440, 108 N.E.2d 397 (1952); Jackson v. Richmond, 152 Va. 74, 146 S.E. 303 (1929). Contra, Knoxville v. Bailey, 222 F.2d 520 (6th Cir. 1955).

4. See O'Brien v. San Francisco, 116 P.2d 450 (Cal. App. 1941); Williams v. Jacksonville, 118 Fla. 671, 160 So. 15 (1935); Winter v. Niagara Falls, 190 N.Y. 198, 82 N.E. 1101 (1907).

5. McCarthy v. Chicago, 312 Ill. App. 268, 38 N.E.2d 519 (1941). Neglect to file a notice which the legislature requires is the controlling factor.

Nor can one argue that such actual notice is substantial compliance with the statute since nonfiling—even in the face of actual knowledge—is not even colorable compliance. Informal defects in a written notice may be held sufficient,[6] but a court should never countenance notice with substantial defects much less no notice at all.[7] Failure to file is fatal unless excused[8] and only the disabled are excused.[9]

The estoppel theory used here is likewise at variance with the better reasoned cases.[10] Although Florida recognizes that a municipality may be estopped under certain circumstances,[11] an estoppel would have to be based on formal action taken by the properly designated body[12] because an individual officer, in the absence of explicit authority,[13] is without power to waive the notice provisions.[14] In brief, an equitable estoppel cannot be justified in the present case since the claimant failed to establish that he was excusably ignorant of the real facts, and had a right to rely on the words and conduct of the individual agents involved.[15]

To allow individual city officers to waive the requirement or by their conduct to estop the city would deprive the city of the benefit of the statute and might result in favoritism and corruption.[16] It may well be that demanding written notice may on occasion result in injustice, but "the Legislature has said that a particular form of notice . . . shall be a prerequisite to the right to sue. The courts are without power to substitute something else."[17]

Negligence — Liability of Draftsman of Will to Beneficiary Thereof.— Defendant notary public drafted a will designating the plaintiff as sole beneficiary. As a consequence of its negligent preparation, the will was denied probate, and the plaintiff sought a recovery based on negligence. The lower

6. State ex rel. Miami v. Knight, 138 Fla. 374, 189 So. 425 (1939).

7. Town of Mount Dora v. Green, 117 Fla. 385, 158 So. 131 (1934).

8. O'Brien v. San Francisco, 116 P.2d 450 (Cal. App. 1941); Adonnino v. Mt. Morris, 171 Misc. 383, 12 N.Y.S.2d 658 (Sup. Ct. 1939).

9. The only disabilities generally recognized are incapacity, both physical and mental, and nonage. Russo v. City of New York, 258 N.Y. 344, 179 N.E. 762 (1932).

10. Whether a city can ever be estopped is the source of irreconcilable conflict. See note 4 supra.

11. Daniell v. Sherill, 48 So. 2d 736 (Fla. 1950).

12. State ex rel. Miami v. Knight, 138 Fla. 374, 189 So. 425 (1939); See Robertson v. Robertson, 61 So. 2d 499 (Fla. 1952).

13. Cawthorn v. Houston, 231 S.W. 701 (Tex. Civ. App. 1919).

14. Hallman v. City of Pampa, 147 S.W.2d 543 (Tex. Civ. App. 1941). See Winter v. Niagara Falls, 190 N.Y. 198, 82 N.E. 1101 (1907).

15. Robertson v. Robertson, 61 So. 2d 499 (Fla. 1952). Farrell v. Placer County, 23 Cal. 2d 624, 145 P.2d 570 (1944), cited by the majority, is not in point. Accepting a late filing of written notice, the case held that the notice was merely a procedural requirement and that there was no reason why the defendant county could not be estopped to demand such filing. But, in the instant case, the allegation of estoppel itself was deficient.

16. See note 6 supra.

17. Thomann v. Rochester, 256 N.Y. 165, 172, 176 N.E. 129, 131 (1931).

court found for the plaintiff. On appeal, the Supreme Court of California unanimously *held,* judgment affirmed. When a will which the defendant contracted to prepare is declared invalid due to the defendant's negligence, the intended beneficiary may recover any losses suffered from defendant irrespective of lack of privity between them. *Biakanja v. Irving,* 49 Cal. 2d 647, 320 P.2d 16 (1958).

Liability for negligence can be imposed only where some duty owing to the plaintiff has been violated.[1] The scope of a party's duty was formerly confined within the bounds of contractual privity[2] but its limits have constantly been enlarged in cases where knowledge or foreseeability of a prospective use is present. This is evidenced by the general approval given the dangerous instrumentality theory.[3] *Glanzer v. Shepard*[4] marked a new line of departure from the privity "rule" by attaching liability upon a defendant whose negligent performance of a service contract resulted in pecuniary loss to a third party. The court's criterion for determining when a duty was owing apparently depended upon whether the actor had intended his performance to inure to the benefit of *this* plaintiff,[5] and it was known that this plaintiff would act in reliance on such performance. "Diligence was owing, not only to him who ordered, but to him also who relied."[6] By stressing the element of contract, perhaps the *Glanzer* decision may also be considered a further extension of the donee beneficiary right of recovery[7] since the defendant's promise, though ordered and paid for by one individual, was either wholly or in part for the benefit of another.[8]

In the principal case, the court, considering and balancing various factors,[9] concluded that the defendant had an obligation to exercise due care in the plaintiff's behalf. The defendant must have realized that a negligent performance on his part would seriously inconvenience the plaintiff because the very

1. Mink v. Keim, 291 N.Y. 300, 52 N.E.2d 444 (1943).

2. Curtain v. Somerset, 140 Pa. 70, 80, 21 Atl. 244, 245 (1891). This case reasoned that to dispense with privity would make a defendant's liability unlimited.

3. This theory is founded on the holdings of the New York Court of Appeals in Thomas v. Winchester, 6 N.Y. 397 (1852) and MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

4. 233 N.Y. 236, 135 N.E. 275 (1922).

5. In another group of cases, the addressee of a telegram has been allowed to recover from the telegraph company for loss of the opportunity of a job because of the company's failure to deliver a message. Western Union Tel. Co. v. Bowman, 141 Ala. 175, 37 So. 493 (1904); McPherson v. Western Union Tel. Co., 189 Mich. 471, 155 N.W. 557 (1915).

6. 233 N.Y. at 242, 135 N.E. at 277.

7. There is dicta to this effect in both Glanzer v. Shepard, supra note 4, and in Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931).

8. See note 4 supra.

9. The factors considered were the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to defendant's conduct, and the policy of preventing future harm. Biakanja v. Irving, 49 Cal. 2d 647, 650, 320 P.2d 16, 19 (1958).

"end and aim" of the transaction was for the latter's benefit. The decision in effect overruled *Buckley v. Gray*[10] and *Mickel v. Murphy*.[11] Decided on identical factual situations, the latter cases denied a recovery to a third party because it "is plainly necessary to restrain the remedy from being pushed to an impractical extreme."[12]

The court's rationale in the instant case is well founded and in accord with the modern trend which would seldom leave a clearly designated beneficiary without a remedy.[13] True there was no reliance or affirmative act by the third party which the *Glanzer* case would seem to require. But reliance or an affirmative act is pertinent only to the question of causation, and there is no causation problem posed in the present case because of the very nature of the contract to be performed. *Ultramares Corp. v. Touche*[14] is not in conflict with the present holding because in that case there was no contractual relation or anything approaching a contractual relation. It held that making one liable for his negligence to an indeterminate number was unreasonable. However, it is not unreasonable to give an intended beneficiary a remedy against him.

The court also maintained that the preparation of a defective will by an unlicensed practitioner[15] constituted negligence per se.[16] "Such conduct should be discouraged and not protected by immunity from civil liability, as would be the case if plaintiff, the only person who suffered a loss, were denied a cause of action."[17] Apparently the court considered it good public policy to predicate civil liability here as a deterrent to future violations of the statute. However, a criminal statute does not of itself create a civil liability and although the provisions of certain statutes have been construed to constitute a norm of conduct, departure from which may be viewed as negligence,[18] the provisions of the licensing statutes have not been so interpreted.[19] Therefore, although the defendant was in fact negligent, the court's reliance on the statute seems incorrect. Where a criminal statute makes no provisions allowing those injured by its breach a civil remedy, one can conclude that the legislature did not contemplate one.

In granting relief to a specific intended beneficiary, the case, in theory, represents no great departure from earlier exceptions to the privity requirement.

10. 110 Cal. 339, 42 Pac. 900 (1895).

11. 147 Cal. App. 2d 718, 305 P.2d 993 (1957).

12. Id. at 721-22, 305 P.2d at 995.

13. See Ultramares Corp. v. Touche, 255 N.Y. 170, 180-81, 174 N.E. 441, 445 (1931).

14. See note 13 supra.

15. The practice of law includes the dispensing of legal counsel and the preparation of legal instruments by which legal rights are secured even though such matters may not be pending in court. See People v. Alfani, 227 N.Y. 334, 125 N.E. 671 (1919).

16. See Biakanja v. Irving, 149 Cal. App. 2d 188, 310 P.2d 63 (1957). The statute violated was Cal. Bus. & Prof. Code § 6126 (1939).

17. 49 Cal. 2d at 651, 320 P.2d at 19.

18. Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920).

19. Brown v. Shyne, 242 N.Y. 176, 151 N.E. 197 (1926); Grier v. Phillips, 230 N.C. 672, 55 S.E.2d 485 (1949).

However, it is significant in that it would make an attorney, whether authorized or acting illegally as in the present case, liable for his negligence to persons other than his clients.[20]

Sales — Manufacturer's Liability to Ultimate User.—Plaintiff was induced by the manufacturer's advertisements to purchase a "Prom Home Permanent" which, when applied in accordance with the manufacturer's instructions, resulted in loss of the purchaser's hair. Plaintiff was denied recovery from the manufacturer in negligence and for breach of express and implied warranties. On appeal to the Ohio Court of Appeals, *held,* reversed. Recovery for breach of express and implied warranty is not precluded by the absence of privity between the parties. *Markovich v. McKesson and Robbins, Inc.,* — Ohio App. —, 149 N.E.2d 181 (1958).

Although manufacturers often make representations to the public which if made to an immediate buyer would amount to warranties, the majority of jurisdictions, assuming the liability of a warrantor to be contractual, have denied the subpurchaser a remedy for breach of warranty.[1] The privity requirement has been under continuous attack in an effort to align it with prevailing business practices which are "in accord with the minority of the American courts, and may, if supported by other commercial usage, justify an overthrow of the majority privity of contract theory."[2] It may have been reasonable in the early twenties to require privity but with the advent of national advertising and the consequent consumer reliance upon the manufacturer rather than the retailer, the manufacturer should be obligated to respond in damages to anyone who relied on the representations to his detriment.[3] Many courts have found the manufacturer of food liable to the ultimate consumer[4] and, using the same rationale, it would seem logical to permit a recovery in cases involving cosmetics and other preparations sold in sealed packages which are designed for application to the body.[5] Inspection by the retailer in such cases is often impractical if not impossible so the buyer's reliance as to the quality of the goods is upon the representations and reputation of the manufacturer.

The principal case correctly held that the evidence of negligence was sufficient to take the case to the jury. However, since hair dye is not ordinarily

20. Formerly, the rule had been that in the absence of fraud, an attorney was liable for his negligence only to his client. See Buckley v. Gray, 110 Cal. 339, 42 Pac. 900 (1895).

1. See 1 Williston, Sales § 244a (rev. ed. 1948). Professor Williston does not consider such an argument impressive as an original question.

2. Bogert and Fink, Business Practice Regarding Warranties in the Sale of Goods, 25 Ill. L. Rev. 400, 416 (1930).

3. Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932). This is true provided the consumer could not have discovered the defect upon inspection.

4. McAfee v. Cargill, Inc., 121 F. Supp. 5 (S.D. Cal. 1954).

5. Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958). See Sicard v. Kremer, 133 Ohio St. 291, 13 N.E.2d 250 (1938).

considered dangerous though it may become so when negligently made,[6] the court may be challenged when it refers to it as an inherently dangerous substance.

In finding the defendant manufacturer liable for breach of an express warranty, the court relied on the decision in *Rogers v. Toni Home Permanent Co.*[7] It reasoned that the defendant in his advertising aimed his representations as to the quality of his product directly at the ultimate consumer urging him to purchase the product at a local store. The fact that the plaintiff relied almost exclusively upon those representations was held to justify a recovery.[8] Where products are shipped in sealed containers, the court would consider the retailer little more than a conduit and would argue that the injured user can sue the manufacturer directly to recoup his losses since the manufacturer owes a real duty to those consuming his product.

Both the *Rogers* case and the instant case are ultimately based upon the reasoning expounded in *Baxter v. Ford Motor Co.*[9] The court there reasoned that holding the manufacturer liable to a subpurchaser "does not rest upon contractual obligations, but rather on the principle that the original act of delivering an article is wrong, when . . . the article is not safe for the purposes for which the consumer would ordinarily use it."[10] Would it not be more reasonable to argue that there was privity under the circumstances since the manufacturer made an express warranty and agreed to be obligated to any remote buyer of his product in consideration of his purchase of that product?[11] That is not to say that the warranty runs with the personalty; rather recovery would ultimately be founded upon the existence of some relationship or intended relationship between manufacturer and consumer, e.g., manufacturer's advertisements directed to the consumer. Resort to the above theories would, of course, be unnecessary if the plaintiff could prove that the representations which induced the sale were knowingly false when made, since an action in deceit would then lie in favor of the defrauded buyer.[12]

The present case, following the trend of Ohio cases, made no distinction between express and implied warranties. The court said that "a warranty, express or implied, continued to be an obligation imposed by law (not necessarily contractually assumed) and was available to an ultimate purchaser when the purchase was induced by the acts of the manufacturer or producer

6. Compare Thomas v. Winchester, 6 N.Y. 397 (1852) involving an imminently dangerous substance (poison), with Losee v. Clute, 51 N.Y. 494 (1873) which involved a product which only becomes dangerous when negligently made (steam boiler).

7. See note 5 supra.

8. Ibid. The reasoning in the principal case is identical with the Rogers case in this respect.

9. 168 Wash. 456, 12 P.2d 409 (1932).

10. Id. at 461, 12 P.2d at 412.

11. See 5 Williston, Contracts § 1506 (rev. ed. 1937). See also Pelletier v. Brown Bros. Chevrolet & Oldsmobile, Inc., 164 N.Y.S.2d 249 (Sup. Ct. 1956); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 246, 147 N.E.2d 612, 614 (1958) (concurring opinion).

12. See Ames, History of Assumpsit, 2 Harv. L. Rev. 1 (1888).

seeking to create a retail market for his goods . . . ."[13] Equating express and implied warranties is in conflict with the Uniform Sales Act which clearly differentiates between the two.[14] Although an express warranty is frequently spelled out from representations which could also be used to form the basis for a warranty implied in law, this in no way reflects on the autonomous existence of implied warranties. The presence of an express warranty merely dispenses with the necessity of finding any others.

Giving a subpurchaser a direct cause of action against the defendant manufacturer is quite reasonable here, since the manufacturer was the person primarily liable for any defects in the product, and clearly had an obligation to furnish goods with the qualities he represented them as having.

Wrongful Death — Contributory Negligence of a Statutory Beneficiary. —The deceased was a passenger in an automobile owned by the defendant but which was being operated at the time of the accident by the deceased's father. In an action for wrongful death the defendant owner, who was liable solely by virtue of section fifty-nine of the N.Y. Vehicle and Traffic Law, raised the defense that any verdict should be diminished by the amount of the share which would be payable to the father as a next of kin and distributee under the wrongful death statute. *Held,* the contributory negligence of a beneficiary under the wrongful death statute is immaterial. *Rischer v. Owens,* 8 Misc. 2d 1036, 171 N.Y.S.2d 463 (Sup. Ct. 1957).

It is firmly established that the contributory negligence of a person injured through the negligence of another will bar recovery.[1] At early common law a negligence action for personal injuries did not survive the injured party's death.[2] To rectify this inequitable situation the legislatures in about half the states have provided for the survival of personal injury actions, and others have accomplished the same result through court decisions.[3]

13. Markovich v. McKesson and Robbins, Inc., — Ohio App. —, —, 149 N.E.2d 181, 188 (1958).

14. Uniform Sales Act §§ 12, 15.

1. Restatement, Torts § 467 (1934); Prosser, Torts § 51 (2d ed. 1955). The courts are not in accord as to what effect the contributory negligence of a third party will have on the rights of the injured party. The majority of cases hold that the injured party's recovery will not be barred because the doctrine of imputed negligence has almost universally been repudiated. See Prosser, op. cit. supra, § 54. However, a recovery should be barred if the injured party had such control over the contributorily negligent party as to have been in a position to prevent the latter's wrongful conduct, as when two persons are engaged in a joint enterprise. Yarnold v. Bowers, 186 Mass. 396, 71 N.E. 799 (1904); Tannehill v. Kansas City, C. & S. Ry., 279 Mo. 158, 213 S.W. 818 (1919); Omaha & R.V. Ry. v. Talbot, 48 Neb. 627, 67 N.W. 599 (1896); Schron v. Staten Island Elec. R.R., 16 App. Div. 111, 45 N.Y. Supp. 124 (2d Dep't 1897) (two persons engaged in moving furniture were held to be engaged in a joint enterprise, so that the negligence of one was imputable to the other). See Restatement, Torts § 491 (1934).

2. See Winfield, Death as Affecting Liability in Tort, 29 Colum. L. Rev. 239 (1929).

3. Prosser, Torts § 105 (2d ed. 1955). See Evans, A Comparative Study of the

Under the survival statutes, the decedent's cause of action is merely continued and the damages recovered are the same as those which the decedent could have recovered had he survived.[4] Since an action under the survival statutes is theoretically still on behalf of the decedent, it is apparent that any defenses which would have been available against him during his lifetime should likewise still be available to the defendant.[5] Thus, it is generally held that where the decedent has contributed to his own death so as to have precluded him from maintaining an action for negligence during his lifetime such a defense should likewise be available to the defendant in that action under the survival acts.[6]

In addition to the survival acts, the legislatures of most jurisdictions have created a new cause of action where an injured party has died as the result of the wrongful act of another.[7] The progenitor of all the American wrongful death statutes is the English Fatal Accidents Act of 1846.[8] While the wrongful death acts bear a close resemblance to the survival acts, in both rationale and purpose there is a distinct and appreciable difference. The wrongful death acts give rise to a new cause of action where the decedent could have maintained one during his lifetime, with the recovery from such action awarded to certain stated beneficiaries,[9] and the damages being measured by the pecuniary loss which the stated beneficiaries suffered because of the death of the injured party.[10] Since the death of the injured party is the medium by which the

Statutory Survival of Tort Claims For and Against Executors and Administrators, 29 Mich. L. Rev. 969 (1931).

4. See, e.g., N.Y. Deced. Est. Law § 120. Where the injured party was killed instantly there can be no recovery under the survival acts. Prosser, Torts § 105 (2d ed. 1955).

5. Prior to the enactment of N.Y. Deced. Est. Law § 119 in 1935, personal injury actions for negligence did not survive the injured party's death. Herzog v. Stern, 264 N.Y. 379, 191 N.E. 23 (1934). Section 119 now provides that: "No cause of action for injury to person or property shall be lost because of the death of the person in whose favor the cause of action existed. For any injury an action may be brought or continued by the executor or administrator of the deceased person. . . ."

6. Where an action is brought under a survival act, since it is in theory merely a continuation of the decedent's cause of action, the contributory negligence of a beneficiary has been held not to prevent recovery. Stockton v. Baker, 213 Ark. 918, 213 S.W.2d 896 (1948).

N.Y. Deced. Est. Law § 119 specifically provides that the contributory negligence of the deceased shall be a defense which must be pleaded and proved by the defendant.

7. E.g., N.Y. Deced. Est. Law § 130: "The executor or administrator . . . of a decedent . . . may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who . . . would have been liable to an action in favor of the decedent by reason thereof if death had not ensued."

A few states have expanded the survival acts to include damages resulting from the injured party's death. See Rose, Foreign Enforcement of Actions for Wrongful Death, 33 Mich. L. Rev. 545 (1935), for a classification of the death statutes.

8. 9 & 10 Vict. c. 93.

9. E.g., N.Y. Deced. Est. Law § 133.

10. Id. § 132.

statutory beneficiary may recover under the statute, the courts have continually been perplexed with the problem whether to allow the beneficiary to recover where he himself has contributed to the death of the injured party.[11]

Prior to the court of appeals decision in *McKay v. Syracuse Rapid Transit Ry.*[12] the appellate courts of New York had taken opposite positions.[13] The question was however finally decided by the *McKay* court, and subsequent decisions in New York have grudgingly adhered to the ruling that the contributory negligence of a beneficiary in a wrongful death action is immaterial.[14]

The New York position is essentially predicated upon three premises: that the conditions for maintaining an action for wrongful death have been prescribed by statute and since the statute makes no reference to the contributory negligence of a beneficiary, no such limitation should be superimposed by the courts;[15] that the beneficiary's negligence could not have defeated a recovery had the decedent survived;[16] that the common-law maxim, "no one should be permitted to take advantage of his own wrong" has no application in the case of a beneficiary's contributory negligence.[17]

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11. In general, the decisions may be classified into four main categories, viz.: that the contributory negligence of one of the beneficiaries is either immaterial or a total bar to recovery; that the recovery will be diminished to the extent of the negligent beneficiary's interest; where the negligence is that of the sole beneficiary all recovery will be barred. See Annot., 2 A.L.R.2d 785 (1948) for a classification of the respective jurisdictions. The Restatement, Torts § 493, comment a (1934), takes the position that where the beneficiary is guilty of negligence which contributed to the death of the injured party recovery should not be barred unless he was the sole beneficiary, but that it should affect the amount recoverable so as to prevent the beneficiary from recovering for his own wrong.

The great majority of American courts, while recognizing that the statute creates a new cause of action, have held that the contributory negligence of the deceased is a bar because of the express language of the wrongful death statutes that the deceased must have had a right of action. Cf. Flaherty v. Meade Transfer Co., 157 App. Div. 416, 50 N.Y. Supp. 506 (1st Dep't 1913). Similarly in automobile cases where the driver is the servant or agent of the deceased passenger or guest, or in the "joint enterprise" cases the action should likewise be barred because of the doctrine of imputed negligence. See Note, Liability of Passenger in Automobile for Negligence of Driver, 12 N.C.L. Rev. 385 (1934).

12. 208 N.Y. 359, 101 N.E. 885 (1913).

13. Compare O'Shea v. Lehigh Valley R.R., 79 App. Div. 254, 79 N.Y. Supp. 890 (3d Dep't 1903) (contributory negligence of a beneficiary bars a recovery), with Lewin v. Lehigh Valley R.R., 52 App. Div. 69, 65 N.Y. Supp. 49 (4th Dep't 1900) (contributory negligence of a beneficiary is immaterial).

14. Emery v. Rochester Tel. Co., 271 N.Y. 306, 3 N.E.2d 434 (1936); Rozewski v. Rozewski, 181 Misc. 793, 46 N.Y.S.2d 743 (Sup. Ct. 1944); Zinman v. Newman, 51 N.Y.S.2d 132 (Sup. Ct. 1942); Wallace v. D'Aprile, 221 App. Div. 402, 222 N.Y. Supp. 740 (3d Dep't 1927); Matter of Brennan, 160 App. Div. 401, 145 N.Y. Supp. 440 (2d Dep't 1914).

15. McKay v. Syracuse Rapid Transit Ry., 208 N.Y. 359, 363, 101 N.E. 885, 886 (1913).

16. Emery v. Rochester Tel. Co., 271 N.Y. 306, 309, 3 N.E.2d 434, 436 (1936).

17. See note 15 supra. There has been considerable debate throughout the country over the applicability of this principle to a beneficiary's recovery for wrongful death. By far the majority of decisions, looking to the substance rather than the form of the action, have reasoned that the beneficiaries are the real parties in interest and as such should

The majority of the states[18] have taken the contrary position that the legislature, in the absence of clear evidence to the contrary, never intended to give a wrongdoing beneficiary equal rights with an innocent one.[19] This position is further fortified by the fact that the negligent beneficiary would have been liable to the injured party had not death intervened.[20]

Although those cases which have been decided on the basis of the *McKay* ruling have requested legislative action to amend the wrongful death statute, the instant ruling, if correct, was perhaps the most inequitable extension which the New York courts have been forced to follow.

In the instant case the defendant committed no actual negligence. His liability was purely derivative, based solely on section fifty-nine of the New York Vehicle and Traffic Law.[21] An almost identical situation has previously come before the courts of New York. In *Rozewski v. Rozewski*,[22] a plaintiff-administrator brought a death action against the owner of an automobile in which the decedent was a passenger. Even though the administrator was both the driver and sole beneficiary in that case, the court felt constrained to render its ruling in accordance with the *McKay* decision, although it recognized that the sole negligence which caused the death was that of the driver and agreed that its ruling would seem to be "a travesty on justice."[23]

To place the instant case in proper perspective it is necessary to examine the liability relationship of the owner and driver where section fifty-nine is involved. Where the owner is liable solely by virtue of this section there have been

not be allowed to profit by their own wrong. See Niemi v. Boston & Me. R.R., 87 N.H. 1, 173 Atl. 361 (1934).

18. See Annot., 2 A.L.R.2d 785 (1948), for classification of those jurisdictions which disallow recovery.

19. The logical extension of such reasoning, if this premise is accepted, would force one to conclude that New York instead of refraining from superimposing any further limitations on the recovery in an action for wrongful death had actually taken a liberal view and obviated limitations which the legislature never intended to dismiss. This certainly would not be in keeping with the self-professed literal interpretation given the wrongful death statute by the New York Court of Appeals. See note 15 supra.

20. N.Y. Deced. Est. Law § 119. Of course the beneficiary is still subject to a cause of action under sections 119 and 130 although, as a practical matter because of the usually close relationship with the interests of the administrator or executor-plaintiff, the action will be brought against a third party stranger where feasible.

21. N.Y. Vehicle and Traffic Law § 59: "Every owner of a motor vehicle . . . operated upon a public highway shall be liable . . . for . . . injuries to person or property resulting from negligence in the operation of such motor vehicle . . . by any person . . . using or operating the same with the permission . . . of such owner."

22. 181 Misc. 793, 46 N.Y.S.2d 743 (Sup. Ct. 1944).

23. Id. at 798, 46 N.Y.S.2d at 746. As a practical matter the injustices evoked both by the Rozewski and instant rulings fall not on the owner but on the insurer of the automobile. Since the interests of the beneficiary and plaintiff-administrator in wrongful death actions are often closely aligned, it is quite foreseeable that the choice of a defendant, especially in those instances where there is joint and severable liability will fall on the one from whom a full recovery can best be anticipated. Naturally this would be the person who is most amply insured.

dicta to the effect that he is a joint tort feasor with the negligent driver.[24] While the decisions which have adhered to this view have not examined this concept in great detail, the better reasoned view would indicate that the owner is not a joint tortfeasor where he himself has committed no active or concurrent negligence and his liability is purely an imputed or statutory one.[25] This distinction is of great significance as a matter of procedure in New York. Under section 193-a of the New York Civil Practice Act a defendant may implead a third person who is or may be liable to the defendant for all or part of the claim asserted against him.[26] The rule is likewise settled that an impleader of a joint tortfeasor *in pari delicto* is not authorized under section 193-a.[27] Reasoning further along this line, it would seem that the most important problem which faced both the *Rozewski* and the present courts was completely overlooked for, if the defendant-owner was entitled to a claim or indemnification against the driver-beneficiary, the defense that the driver's contributory negligence barred his recovery in a wrongful death becomes moot.

At common law the absentee owner was not liable for the negligence of a driver when his automobile was being operated with his consent.[28] Under section fifty-nine the negligence of the driver operating the automobile was imputed to the owner solely for the purpose of enabling injured third parties to bring an action against him.[29] The statute did not change the common-law rule

24. Royal Indemnity Co. v. Olmstead, 193 F.2d 451, 455 (9th Cir. 1951) (dictum); Sarine v. Maher, 187 Misc. 199, 200, 63 N.Y.S.2d 241, 242 (Sup. Ct. 1946) (dictum).

25. Kramer v. Morgan, 85 F.2d 96 (2d Cir. 1936) (dictum by Judge Learned Hand). In Kurzon v. Union Ry., 172 Misc. 37, 38, 14 N.Y.S.2d 530, 532 (N.Y. City Ct. 1939) it was stated that "neither can it be asserted that both driver and owner are joint tort feasors where the owner was not present at the time of the accident and no facts are alleged to assert a claim against him for actual negligence on his own part as a competent producing cause of the accident." See Roscher v. Cecere, 132 N.Y.S.2d 840 (Sup. Ct. 1954). Professor Prosser points out that "the original meaning of a 'joint tort' was that of vicarious liability for concerted action. . . . This principle somewhat extended beyond its original scope, is still law. All those who actively participate in a tortious act, by cooperation or request . . . are equally liable with him." Prosser, Torts § 46 (2d ed. 1955). This explanation would not substantiate the view that an owner who is liable solely by section 59 is a joint tortfeasor.

26. N.Y. Civ. Prac. Act § 193-a. Professor Forkosch points out that under section 193-a, "the liability of the third party to the original defendant must depend upon the liability of the original plaintiff. Impleader on the ground that the third party is liable to the original plaintiff, rather than the original defendant, is not permissible." Carmody, New York Practice 281, n.73 (7th ed. 1956).

27. Fox v. Western Motor Lines, Inc., 257 N.Y. 305, 178 N.E. 289 (1931).

28. Gochee v. Wagner, 257 N.Y. 344, 346, 178 N.E. 553, 554 (1931) (dictum). It should be noted that this discussion is not concerned with situations where the owner's liability is based on the doctrine of respondeat superior.

29. "Doubtless the Legislature, in enacting section 59, chiefly had in mind as a mischief to be cured, the remediless plight of a highway traveler injured by a motor vehicle . . . through the recklessness of an irresponsible driver to whom the owner had entrusted the vehicle." Cohen v. Neustadter, 247 N.Y. 207, 210, 160 N.E. 12, 13 (1928).

respecting the owner's right to recover from third persons where, for example, the negligent driver, to whom the owner had entrusted his vehicle, was involved in a collision with the automobile of a negligent third party.[30] Where however the third party had been injured solely by the negligence of one permitted to operate the owner's automobile, the question whether the owner is entitled to indemnification from the negligent driver for any liability to third parties has been left unanswered in many jurisdictions.[31] The majority of jurisdictions which have passed on the question give the owner a right of indemnification.[32] It is reasoned that while the owner, who has himself committed no active negligence, is primarily liable to third parties he is only secondarily liable as between himself and the driver.[33]

As applied to the present facts a proper impleader under section 193-a would have prevented the driver-beneficiary from profiting by his own wrong. Nor would other innocent beneficiaries be left without remedy by that result. While the case should be dismissed where the negligent beneficiary was the sole distributee under the statute, where there are other beneficiaries the action should be allowed, for the driver-beneficiary would still be liable under the

30. Mills v. Gabriel, 259 App. Div. 60, 18 N.Y.S.2d 78 (2d Dep't 1940).

31. Cal. Vehicle Code Ann. § 402(d) (West 1956) which is similar to § 59 provides that where a recovery is had under the provisions of the statute, the owner of the vehicle will be subrogated to all the rights of the injured party. Thus the decisions in California have generally held that an owner who is liable to a third party because of injuries inflicted by a negligent driver operating the vehicle with his permission is entitled to indemnity from the driver. See, e.g., Baugh v. Rogers, 24 Cal. 2d 200, 148 P.2d 633 (1944); Dalton v. Baldwin, 64 Cal. App. 2d 259, 148 P.2d 665 (1944).

32. Kramer v. Morgan, 85 F.2d 96 (2d Cir. 1936) (dictum); Denver-Chicago Trucking Co. v. Lindeman, 73 F. Supp. 925 (D. Iowa 1947); Farm Bureau Mut. Auto Ins. Co. v. Kohn Bros. Tobacco Co., 141 Conn. 539, 107 A.2d 406 (1954); Lunderberg v. Bierman, 241 Minn. 349, 63 N.W.2d 355 (1954); Dittman v. Davis, 274 App. Div. 836, 80 N.Y.S.2d 386 (3d Dep't 1948); Elliott v. Flushing Sand & Stone Co., 273 App. Div. 782, 75 N.Y.S.2d 333 (2d Dep't 1947). But see Parness v. Halpern, 257 App. Div. 678, 15 N.Y.S.2d 199 (2d Dep't 1939); Kurzon v. Union R. Co., 21 N.Y.S.2d 310 (N.Y. City Ct. 1940).

The Restatement, Restitution § 96 (1937) states that: "A person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to indemnity from the other for expenditures properly made in the discharge of such liability." Comment a of the same section states: "The rule applies . . . to . . . situations in which, by statute or otherwise, a person without fault is responsible for the conduct of another. Illustrations of this are found under modern decisions and statutes which impose liability upon a person who has permitted another to drive an automobile, as where . . . the owner of a car is made the insurer of the conduct of one to whom he lends the car." Substantially similar positions are enunciated in 27 Am. Jur., Indemnity § 18 (1940) and 42 C.J.S., Indemnity § 21 (1944).

33. See 42 C.J.S., Indemnity § 20 (1944) pointing out that the doctrine is based on the proposition that where one is compelled to pay money which in justice another ought to pay, the former may recover of the latter the sum so paid unless the one making the payment is barred by the wrongful nature of his conduct.

wrongful death act and perhaps, under the survival statutes. Thus, the legislature by virtue of section 193-a has provided the means to avoid the *McKay* ruling in a case such as this. Where the defendant has committed active negligence, the courts will still be troubled with the problem whether to allow the beneficiary to recover fully in a wrongful death action where he has contributed to the death of the injured party.

While not within the purview of this note, it is suggested that consideration and study should be given to the possibility of allowing a compulsory joinder[34] of a contributorily negligent beneficiary as a conditionally necessary party.[35] Although it is well established that joint tortfeasors are not normally conditionally necessary parties[36] it is likewise true that the New York Civil Practice Act has prescribed no test of general applicability by which the courts can readily ascertain whether the interests of two parties are so aligned that they should be joined in the action.[37] A motion of this nature could be made by the court itself[38] and certainly would effect more substantial justice than is now meted out by the *McKay* rule. If the courts would lend themselves to this construction they would obviate the "travesty of justice" to which they have been forced to adhere and at the same time preserve the doctrine of stare decisis.

34. N.Y. Civ. Prac. Act § 194 provides that parties "united in interest" must be joined as plaintiffs or defendants within the terms of the act.

35. Id. § 193(2) defines a "conditionally necessary party" as a person who is not an indispensable party, but who ought to be a party if complete relief is to be accorded between those already parties.

36. Creed v. Hartmann, 29 N.Y. 591 (1864).

37. Carmody, New York Practice § 248 (7th ed. 1956).

38. N.Y. Civ. Prac. Act § 193(2).