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CASE NOTES

Antitrust—Price Maintenance Through Refusal To Sell.—The United States Government sought an injunction under Section 4 of the Sherman Anti-Trust Act[1] against defendant drug manufacturer, alleging that defendant conspired and combined with retail and wholesale druggists in a particular area[2] to maintain the wholesale and retail prices of its pharmaceutical products in violation of sections 1[3] and 3[4] of the act. The violation was alleged to have occurred when there was no fair trade law in effect in the area.[5] The United States district court dismissed the complaint on the ground that "the actions of defendant were properly unilateral and sanctioned by law under the doctrine laid down in the case of *United States v. Colgate & Co.* . . . ."[6] On appeal, the Supreme Court reversed, three justices dissenting. Where a manufacturer, embarking on a program to promote compliance with its suggested retail prices, refuses to deal with wholesalers in order to elicit their cooperation in denying its products to retailers who disregard such prices, the manufacturer is the organizer of a price maintenance combination or conspiracy in violation of the Sherman Anti-Trust Act.[7] *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

1. "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of . . . [this act;] and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. . . ." 26 Stat. 209 (1890), as amended, 15 U.S.C. § 4 (1958).

2. Washington, D.C., and Richmond, Va.

3. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy declared . . . to be illegal shall be deemed guilty of a misdemeanor. . . ." 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

4. "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in . . . the District of Columbia, or in restraint of trade or commerce . . . between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor. . . ." 26 Stat. 209 (1890), as amended, 15 U.S.C. § 3 (1958).

5. In those states where fair trade laws have been enacted, the Miller-Tydings Act, 50 Stat. 693 (1937), 15 U.S.C. § 1 (1958), and the McGuire Act, 66 Stat. 631 (1952), 15 U.S.C. § 45 (1958), exempt from the operation of the Sherman Anti-Trust Act, 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958), contracts prescribing minimum prices for the sale and resale of commodities identified by a trade-mark, brand, or name of the producer or distributor and which are in free and open competition with commodities of the same general class produced by others. See generally Comment, A Symposium on the Fair Trade Laws, 27 Fordham L. Rev. 68 (1958).

6. 164 F. Supp. 827, 829 (D.D.C. 1958).

7. In the instant case, the Court held that Fed. R. Civ. P. 52(a), which provides that "findings of fact shall not be set aside unless clearly erroneous," had no application here as the district court based its findings on a misinterpretation of the legal standards to be applied.

"Scrutiny of the opinion will reveal that the Court has done no less than send to its demise the *Colgate* doctrine which has been a basic part of antitrust law concepts since it was first announced in 1919. . . ."[8] These words were stated by Mr. Justice Harlan, dissenting, as the Court in the instant case attempted to settle a controversy which began four decades ago. Because the scope of *United States v. Colgate & Co.*[9] remained unsettled then, the present conflict arose. The Court had never undertaken to define the exact limits of the broadly announced *Colgate* rule.

In *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[10] the Court invalidated a system of written contracts by which a manufacturer attempted to control the resale prices of his wholesale and retail distributors. The *Dr. Miles* decision was distinguished in *Colgate*. In *Colgate*, the Court dismissed an indictment charging defendant with violation of Section 1 of the Sherman Act because it failed to allege whether defendant entered into any agreements, express or implied, with its dealers compelling them to maintain minimum resale prices. The Court stated that in the absence of any intent to create or maintain a monopoly, the Sherman Act does not prevent a manufacturer engaged in private business from announcing in advance the prices at which his goods may be resold and refusing to deal with wholesalers and retailers who do not conform to such prices. The manufacturer has "the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade."[11]

In *FTC v. Beech-Nut Packing Co.*,[12] the next significant case,[13] while paying due respect to the *Colgate* rule, the Court stated that a manufacturer "may not, consistently with the act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade."[14] Actually, the *Beech-Nut* decision indirectly challenged not only the scope but also the validity of the *Colgate* rule because, outside of a minor detail,[15] the "*Beech-Nut* policy," designed to maintain minimum resale prices, was substantially the

8. 362 U.S. at 49.

9. 250 U.S. 300 (1919).

10. 220 U.S. 373 (1911).

11. 250 U.S. at 307, quoting Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 614 (1914).

12. 257 U.S. 441 (1922).

13. In the interim, the Court, in United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920), reversed a lower court judge who went so far as to say that Colgate overruled Dr. Miles. Then, in Frey & Son, Inc. v. Cudahy Packing Co., 256 .U.S. 208 (1921), the Court made it clear that Dr. Miles was still the law and that a combination or conspiracy could be implied from a course of dealing or other circumstances.

14. 257 U.S. at 453.

15. The manufacturer in Beech-Nut used a special number and symbol marking system in order to trace goods sold by a "price-cutter." For a detailed analysis of the manufacturer's activities in both the Colgate and Beech-Nut cases, see Dunn, Resale Price Maintenance, 32 Yale L.J. 676 (1923).

same as the plan adopted by the defendant in *Colgate*. Present in the policies of the manufacturers in both cases was an issuance of letters, circulars, and price lists to wholesale and retail dealers suggesting resale prices; an insistence upon adherence to the prices under threat of refusal to deal; a request to these dealers to cooperate and report instances of price-cutting by other dealers; the use of agents to police the dealers in order to detect price-cutting; the placing of rebellious dealers on suspended lists; a refusal to sell to dealers who would not maintain suggested prices or who would sell to others not maintaining them; and a reinstatement of offending dealers when an assurance was given that they would adhere to the prices in the future.

In *United States v. Bausch & Lomb Optical Co.*,[16] perhaps the only case in point since *Beech-Nut*, the Court again penalized activity involving price-fixing outside the *Colgate* rule. There the defendant compelled its retailers to enter into so-called "license agreements," which, among other restrictions, fixed resale prices for defendant's products. In addition, defendant exerted control over a majority of its wholesalers by refusing to deal with them unless they would agree to sell only to those retailers who were "licensed" and at prices fixed by the defendant.

In the present case, the manufacturer published suggested minimum resale prices in catalogues sent to both its wholesale and retail dealers. There was no system for maintaining minimum prices such as that established by the manufacturer in the *Colgate* and *Beech-Nut* cases. Defendant did not, for example, regularly "shop" stores, maintain card index files, or in any manner police its dealers; nor was there any evidence that it sought or obtained the cooperation of its wholesalers and retailers in reporting or policing deviations from the minimum price schedules. The defendant first learned of the price-cutting in question through its own salesmen. Acting under advice of counsel,[17] defendant informed the wholesalers that it would refuse to sell to them if they failed to adhere to the announced prices or if they sold defendant's products to retailers who did not observe the suggested minimum prices. Defendant spoke to each wholesaler individually. Each was informed, however, that the competing wholesalers were being apprised of defendant's policy. Without exception, the wholesalers were willing to acquiesce in this policy. In a similar manner, defendant announced the same policy to its retailers. Some of the retailers, however, refused to comply. Consequently, the unwilling retailers, whether dealing directly with the defendant or purchasing defendant's products from wholesalers, had their supply of goods cut off. The instant decision was based upon these and additional facts.[18]

The majority detailed the history of the *Colgate* formula. While conceding

16. 321 U.S. 707 (1944).

17. 362 U.S. at 33.

18. Because of the inventory on hand, the five retailers cut off by the defendant were able to continue selling Parke Davis products. These goods were also sold below the suggested minimum resale prices. When complaints were received, Parke Davis sought to reduce the harm by agreeing to deal with these retailers on condition that they discontinue advertising the cut-rate prices. The Court also found this phase of the manufacturer's conduct to be beyond that allowed by the "Colgate doctrine."

the accuracy of the essential holding in the *Colgate* case, the Court reasoned that "subsequent decisions of this Court compel the holding that what Parke Davis did here . . . went beyond mere customer selection and created combinations or conspiracies to enforce resale price maintenance. . . ."[19] The Court argued that the *Beech-Nut* and *Bausch & Lomb Co.* cases "plainly fashioned" the dimensions of the *Colgate* rule "as meaning no more than that a simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act."[20]

Exception must be taken to the Court's treatment of *Bausch & Lomb*. There the defendant's activity in exerting a control over its products, including resale prices, was far more extensive and intensive than that of the manufacturer in *Colgate, Beech-Nut,* or the principal case. Unlike the instant case, *Bausch & Lomb* was a clear example of the bilateral type of price-fixing which is abhorred by Section 1 of the Sherman Act.

As for *Beech-Nut,* although the Court there did limit the *Colgate* rule, it cannot be said that the question of its scope was clarified. *Beech-Nut* left what might be described as a gray area within which existed a shadowy line separating the legal use of a refusal to deal from an illegal use. *Beech-Nut* further complicated the situation because it not only limited the *Colgate* rule but also denuded the latter decision of its facts. The principal decision has drawn the line. It may now be said that the "*Colgate* doctrine" means nothing more than that a vendor has a basic but bare right of refusal to deal in order to maintain resale prices.

Despite the vigorous dissent[21] in the instant case, it is not true that the decision has stripped the *Colgate* rule of all its validity and forcefulness. The fundamental concept of *Colgate,* that a vendor in business for himself can refuse to deal with anyone not to his liking, still remains. More specifically, as applied to resale price maintenance, *Colgate* means that a vendor, when dealing directly either at the wholesale or retail level, can simply refuse to sell to anyone who will not maintain his prices; that a vendor, when dealing indirectly with such a person at the retail level, can act to protect his business by refusing to sell to the offender's wholesale supplier.

The *Colgate* rule is subject to certain practical limitations. In the case of a vendor dealing directly with a single retail price-cutter, the vendor's refusal to continue doing business is economically feasible. On the other hand, the vendor may be dealing with a single price-cutting retailer through a wholesaler who also distributes the vendor's product to conforming retailers. Unless the wholesaler initiates a preventive measure by way of an exercise of his own right of refusal to deal, the vendor, in order to prevent the one instance of price-cutting, must not only cut off the price-cutter but also the non-offending wholesaler and retailers. In most cases, a vendor will not want to take such drastic and unprofitable action. It is probably because of this situation that

19. 362 U.S. at 37-38.

20. Id. at 43.

21. The dissent argued that Parke Davis acted unilaterally. 362 U.S. at 54. But the Parke Davis plan necessarily involved and in fact received cooperation of the wholesalers. Id. at 32-34.

the dissent could not bring itself to accept the fact that the *Colgate* right could exist and yet be ineffective.

The principal case makes it clear that the Court will not tolerate a vendor in a non fair trade jurisdiction[22] using his right of refusal to deal as a threat to gain compliance with his price policy in order to achieve indirectly what he cannot achieve directly through agreements and combinations. As the "*Colgate* doctrine" now stands, a vendor's only course of action, if he wishes to eliminate price-cutting, is to cut off the offenders or those selling to offenders. The Court has served notice that conduct over and above this will be penalized.

Attorneys—Refusal To Answer Questions at a Judicial Inquiry Into Unethical Practices as Ground for Disbarment.—At a judicial inquiry into illegal and unethical practices in negligence cases, respondent refused to answer pertinent questions and to produce relevant records, invoking his constitutional privilege against self incrimination.[1] A petition was then filed to discipline respondent for violation of his obligations as a member of the legal profession. The appellate division, one justice dissenting, entered an order disbarring him, with leave to vacate the order within thirty days thereafter if he answered the questions propounded and produced his records in accordance with the subpoena.[2] The court of appeals affirmed, one judge dissenting. While an attorney has an absolute right to invoke the privilege against self incrimination, he may not use it to absolve himself of his duty, as an officer of the court, to answer pertinent questions or produce relevant records at a judicial inquiry into unethical conduct. *In the Matter of Cohen*, 7 N.Y.2d 488, 166 N.E.2d 672, 199 N.Y.S.2d 658, *cert. granted*, 363 U.S. 810 (1960).

The courts maintain full supervisory and regulatory power over the legal profession in order to insure the fair administration of justice. More particularly, the courts have the power to inquire into unethical practices of members of the Bar, and to compel attorneys to give evidence concerning such practices. Whenever the character and fitness of an attorney have been called into question as a result of such an inquiry, the court has the duty of re-examining him to determine whether he still possesses the requisite qualities to continue as a member of the Bar. If he lacks such qualities, the court must disbar him, not as punishment, but as discipline in the public interest.[3]

22. Contracts or agreements prescribing minimum resale prices in fair trade jurisdictions are excepted from the general prohibition of the Sherman Act. See note 5 supra. It is questionable, however, whether the fair trade exception is broad enough to encompass the conduct of the manufacturer in the instant case. The Court did note, nevertheless, that the case arose in a non-fair-trade jurisdiction. 362 U.S. at 31.

1. N.Y. Const. art. I, § 6.

2. In the Matter of Cohen, 9 App. Div. 2d 436, 195 N.Y.S.2d 990 (2d Dep't 1959).

3. N.Y. Judiciary Law § 90(2). See People ex rel. Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928); In the Matter of Rouss, 221 N.Y. 81, 116 N.E. 782 (1917); In the Matter of Brooklyn Bar Ass'n, 223 App. Div. 149, 227 N.Y. Supp. 666 (2d Dep't 1928); In the Matter of the Ass'n of the Bar of the City of New York, 222 App. Div. 580, 227 N.Y. Supp. 1 (2d Dep't 1928).

It was early established, in *In the Matter of Rouss*,[4] that self incriminating evidence given by an attorney, under a grant of immunity, may be used against him in subsequent disbarment proceedings, since disbarment is regarded as neither punishment for a crime nor penalty or forfeiture within the meaning of the law. Further, an attorney called before a judicial inquiry into unethical practices may be disciplined for asserting his privilege in bad faith.[5] However, the refusal of an attorney to sign a waiver of immunity in a case where he otherwise would have it automatically was held by the second department, in *In the Matter of Solovei*,[6] not to be a ground for disbarment since, by his willingness to testify, he was acting in good faith and not obstructing justice. In *In the Matter of Ellis*[7] and *In the Matter of Grae*,[8] however, the same de-

4. 221 N.Y. 81, 116 N.E. 782 (1917). Rouss testified at a conspiracy trial as a witness for the prosecution and, although granted automatic immunity under N.Y. Pen. Laws § 584, was subsequently disbarred because of admissions made during the trial. See In the Matter of Kaffenburgh, 188 N.Y. 49, 80 N.E. 570 (1907), where an attorney refused to answer on the ground of self incrimination and was subsequently disbarred, but on grounds other than his refusal to answer.

5. See, e.g., In the Matter of Levy, 255 N.Y. 223, 174 N.E. 461 (1931). The court left open the question of whether a good faith assertion of the privilege would be a ground for discipline.

6. 250 App. Div. 117, 293 N.Y. Supp. 640 (2d Dep't 1937), aff'd mem., 276 N.Y. 647, 12 N.E.2d 802 (1938). Under N.Y. Pen. Laws § 584, the witness had automatic immunity, i.e., merely by testifying, he obtained immunity, and therefore could be compelled to testify whether or not he waived immunity. In dictum, the court interpreted the holdings in Kaffenburgh, 188 N.Y. 49, 80 N.E. 570 (1907), Rouss, 221 N.Y. 81, 116 N.E. 782 (1917), and Levy, supra note 5, as indicating that an attorney who in good faith refused to answer questions because they would tend to incriminate him was not amenable to disciplinary proceedings. 250 App. Div. at 121, 293 N.Y. Supp. at 645. No distinction was made between criminal proceedings and inquiries into unethical practices. Cf. In the Matter of Schneidkraut, 231 App. Div. 109, 246 N.Y. Supp. 505 (2d Dep't 1930).

7. 258 App. Div. 558, 566, 17 N.Y.S.2d 800, 808 (2d Dep't), rev'd, 282 N.Y. 435, 26 N.E.2d 967 (1940), wherein respondent not only refused to waive immunity, but refused to testify on the ground of self incrimination, which is the precise issue in the instant case. Ellis subsequently recanted, however, and informed the court of his willingness to testify and comply with the directions of the court, but that he would not sign a waiver of immunity. The effect of this was to reduce the issue to whether refusal to sign a waiver of immunity constituted a ground for discipline. The issue of his refusal to testify was left open.

8. 258 App. Div. 576, 17 N.Y.S.2d 822 (2d Dep't), rev'd, 282 N.Y. 428, 26 N.E.2d 963 (1940). Ellis, supra note 7, and Grae, supra, were argued and decided on facts similar to those in In the Matter of Solovei, 250 App. Div. 117, 293 N.Y. Supp. 640 (2d Dep't 1937). The distinguishing factor, however, was that the hearing in Grae and Ellis was a judicial inquiry into unethical practices and not a grand jury investigation of conspiracy, under which testifying witnesses would have automatic immunity. At the judicial inquiry, the witnesses, whether they believed so or not, apparently would not have had automatic immunity and therefore could not be compelled to testify if the inquiring court could not grant them immunity. The waivers, if signed, would have relinquished their right to refuse to answer on the ground of self incrimination. To some extent, this explains the apparently contrary result reached by the second department in In the Matter of Solovei, supra, as

partment held that the refusal of an attorney to sign a waiver of immunity when subpoenaed before a judicial inquiry into unethical practices, was an obstruction of justice and ground for disbarment. Both cases were reversed by the court of appeals, which ruled that although the inquiry was not a criminal proceeding, the witnesses' testimony might expose them to subsequent criminal prosecution. Hence, they could insist upon their constitutional privilege by refusing to sign waivers of immunity which, in light of their willingness to testify, was neither bad faith nor an obstruction of justice making them amenable to discipline.[9]

In deciding the instant case, the lower court distinguished *Grae* and *Ellis*. It found that the question of an attorney's right not to testify in reliance on his constitutional privilege against self incrimination had never been reached by the court of appeals in those cases.[10] The court also advanced a second argument which had not been previously considered with regard to attorneys. Where one holds a position of trust and responsibility affecting the public interest and demanding a high degree of moral character and he then refuses on the ground of self incrimination to answer questions which seek to determine whether he still possesses such character and fitness, he may be removed from this position.[11] It is "not that he is being punished for invoking his constitutional privilege, but rather that he is being removed from his position because the agency, by reason of his refusal to furnish the information sought, is entitled to conclude that he no longer possesses the requisite character and fitness to continue in the agency's employ."[12] This rule was approved by the United States Supreme Court in *Beilan v. Board of Educ.*[13] and *Lerner v. Casey*,[14] and recently in *Nelson v. Los Angeles County*.[15] In these cases, the

well as the reasons behind the policy statement in Ellis, supra note 7, at 566, 17 N.Y.S.2d at 808.

9. In neither opinion did the court of appeals decide what the result would be if the respondents had refused to answer by invoking the privilege, but rather confined its attention to their refusal to sign waivers of immunity in advance of testifying. In In the Matter of Grae, supra note 8, at 435, 26 N.E.2d at 967, the court, in reversing the decision of the appellate division, adopted the reasoning of the dissent in Ellis, 258 App. Div. 558, 567, 17 N.Y.S.2d 800, 809 (2d Dep't 1940). For an interesting discussion of the Ellis case, see Note, 40 Colum. L. Rev. 708 (1940); Note, 25 Cornell L.Q. 420 (1940); Note, 9 Fordham L. Rev. 284 (1940); Note, 53 Harv. L. Rev. 871 (1940).

10. In the Matter of Cohen, 9 App. Div. 2d 436, 442, 195 N.Y.S.2d 990, 997 (2d Dep't 1959).

11. Id. at 444, 195 N.Y.S.2d at 999.

12. Ibid.

13. 357 U.S. 399 (1958).

14. 357 U.S. 468 (1958), affirming 2 N.Y.2d 355, 141 N.E.2d 533, 161 N.Y.S.2d 7 (1957), affirming 2 App. Div. 2d 1, 154 N.Y.S.2d 461 (2d Dep't 1956). Cf. In the Matter of Delehanty, 280 App. Div. 542, 115 N.Y.S.2d 614 (1st Dep't), aff'd, 304 N.Y. 725, 108 N.E.2d 46 (1952). But see Slochower v. Board of Educ., 350 U.S. 551 (1956), which was distinguished in Beilan, supra note 13, and Lerner, supra, on the ground that in Slochower the employee had been dismissed for refusing to answer questions before a congressional committee. The dismissal in Slochower was overturned because the employee was afforded no hearing by his superiors.

15. 362 U.S. 1 (1960).

Court upheld the dismissal of employees, disciplined as a result of their refusal on the ground of self incrimination to answer questions posed by their superiors relating to their alleged subversive political affiliations and their fitness and character.

In advancing this second argument, the lower court recognized that in cases where it had been applied previously, there had been specific statutes defining the individual's duty and the consequences of his refusal to answer. However, it also emphasized that an attorney's duty and responsibility, though not prescribed by statute, are of a higher nature. The principle of trust applicable in those cases applied here with even greater force. Affirming its former policy in *Grae* and *Ellis*, the second department stated:

> [E]very attorney has an absolute right to assert his constitutional privilege against self incrimination as the basis for his refusal to give any explanation of his conduct or his activities, and when he does so he cannot be compelled to testify. Thereupon, after opportunity for reflection (which was here given to the respondent), it is for the attorney to choose whether he will rest upon his constitutional privilege or whether he will discharge his duty to co-operate with the court in its judicial inquiry into unethical practices. If, as here, he deliberately elects not to co-operate with the court, then the court has no alternative but to revoke his privilege to continue as a member of the Bar. For his duty to the court is inviolable. He cannot remain mute, thereby sterilizing the power of the court and frustrating its inquiry into unethical practices, and yet be permitted to retain his privilege of membership in an honorable profession.[16]

In the instant decision, the court of appeals has affirmed both the reasoning employed and the result reached by the second department. In doing so, however, it has departed from the logic of its own reasoning enunciated in the *Grae* and *Ellis* cases, where it reiterated that "the constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court."[17] The present decision, sound as it may be, has placed a limit on *Grae* and *Ellis*. The latter cases are now confined to their particular facts and issues, namely, refusal to waive immunity in advance of testifying, *i.e.*, refusal to forego the right to invoke the privilege, is not a ground for discipline. But refusal to answer by invoking the privilege will be a sufficient basis for disciplinary action.

In his dissent,[18] Judge Fuld adhered to the force of the reasoning of *Grae* and *Ellis* and, upon a review of all the prior decisions, concluded that an act sanctioned by the fundamental law of the land cannot be considered a defiance of the court. The dissent, however, did not consider the "public trust"[19] im-

16. In the Matter of Cohen, 9 App. Div. 2d 436, 448, 195 N.Y.S.2d 990, 1003 (2d Dep't 1959).

17. In the Matter of Grae, 282 N.Y. 428, 435, 26 N.E.2d 963, 967 (1940), quoting In the Matter of Ellis, 258 App. Div. 558, 572, 17 N.Y.S.2d 800, 813 (2d Dep't 1940) (dissenting opinion). See note 7 supra.

18. In the Matter of Cohen, 7 N.Y.2d 488, 498, 166 N.E.2d 672, 677, 199 N.Y.S.2d 658, 664 (1960).

19. See note 11 supra and accompanying text.

posed upon and voluntarily assumed by a lawyer, whereby his constitutional rights are subordinated to the public interest. It did not deal with the argument that an individual has a constitutional privilege not to testify against himself, but does not have a constitutional right to be a teacher,[20] policeman,[21] public official,[22] or, as in the instant case, a member of the legal profession.

The reasonableness of the majority's position is strengthened by the fact that under the present immunity statute[23] the inquiring court apparently was not a "competent authority" to grant the witness immunity from prosecution for any crime revealed by self incriminating evidence. If the investigating tribunal had authority to grant immunity, a different case would be presented.[24] Then, it might be incumbent upon the tribunal to grant immunity from criminal prosecution before it could discipline for failure to speak. But when, as here, the court lacked authority to grant such immunity, the attorney's exercise of the privilege was tantamount to complete frustration of the investigation.

Judge Fuld took issue with this argument, stating that "it is hardly necessary to say that a scrupulous regard for the constitutional limitation will not

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20. See note 13 supra.

21. See note 14 supra.

22. See note 15 supra.

23. N.Y. Pen. Laws § 2447, which specifically limits the instances under which a witness may be granted immunity. N.Y. Pen. Laws § 2447(4) provides that "immunity shall not be conferred upon any person except in accordance with the provisions of this section." It must be conferred by a "competent authority," which includes:

(a) a court or a magistrate in a criminal proceeding other than a proceeding before a grand jury on application by the prosecuting attorney; or

(b) a court in a civil proceeding to which the state is a party on application by the attorney general; or

(c) a grand jury on application by the prosecuting attorney; or

(d) a legislative or state investigative body on concurrence of a majority thereof, and with twenty-four hours prior written notice to the attorney general and the appropriate district attorney having an interest therein; or

(e) the head of a state department in any investigation on twenty-four hours notice to the interested parties in (d). N.Y. Pen. Laws § 2447(3).

Subdivision 3 further provides: "[N]o such authority shall be deemed a competent authority within the meaning of this section unless expressly authorized by statute to confer immunity."

Since there is no statute expressly authorizing a judicial inquiry into unethical practices of the legal profession to confer immunity, it appears that such body was not a "competent authority" in the instant case.

24. In conjunction with the enactment of N.Y. Pen. Laws § 2447, several amendments to the existing laws providing for automatic immunity were passed. These laws were thereby made subject to the provisions of § 2447, in order to provide a uniform procedure for conferring immunity. See, e.g., N.Y. Pen. Laws § 584. In order to obtain immunity under the present rule, the witness must first invoke the privilege in good faith and, then, the competent authority must direct him to answer. If the witness fails to comply, he obtains no immunity and is therefore subject to contempt. See People v. De Feo, 308 N.Y. 595, 127 N.E.2d 592 (1955). For legislative background, see N.Y. Crime Comm'n Rep. 14-16, 26-29 (1953); N.Y. Law Revision Comm'n Rep. 33 (1943).

leave the disciplinary authority powerless or a guilty attorney immune."[25] However true this may be in the present case, his argument does not contemplate a situation where the attorney is the sole repository of the information sought to be elicited from him. In that instance, the court is in fact powerless to go further, and the attorney will be immune from discipline as well as prosecution. The only other alternative would be to bring the attorney before a grand jury, grant him immunity, order him to testify, and then hold him in criminal contempt if he persisted in his refusal.[26]

The court's decision does not deprive an attorney, as an individual, of his protection against self incrimination. However, it does place the duty of disclosure, which the attorney assumes when admitted to practice, above the privilege against self incrimination accorded to a private citizen by the state and federal constitutions. It recognizes the duty of disclosure as a condition of membership in the legal profession. While an attorney may invoke his constitutional privilege and may still immunize himself against self incrimination, he will enjoy no protection against disciplinary proceedings. By refusing to perform his duty, he violates a fundamental condition of membership in the Bar and thereby renders himself properly amenable to discipline.[27]

Bankruptcy—Right of Action for Injury to Property as Asset of Bankrupt's Estate.—Defendant, a sheriff, levied on the truck of a judgment debtor. From the sale of the truck, allegedly valued at $1,100, the defendant returned proceeds of $375. Allegedly he had "rigged" the sale by employing a third person to bid at a very low price. Three months later, the debtor having been adjudged a bankrupt, plaintiff was appointed trustee. He commenced this action under a Michigan statute providing for quintuple damages to anyone injured by an officer's fraud in conducting an execution sale,[1] expressly affirming what was a voidable sale.[2] Upon trial, defendant successfully moved for

25. 7 N.Y.2d at 501, 166 N.E.2d at 679, 199 N.Y.S.2d at 668.

26. See In the Matter of the Second Additional Grand Jury, 10 App. Div. 2d 425, 202 N.Y.S.2d 26 (2d Dep't), aff'd, 8 N.Y.2d 220, 168 N.E.2d 663, 203 N.Y.S.2d 841 (1960), where this procedure was approved.

27. In the Matter of Kaplan, 8 N.Y.2d 214, 168 N.E.2d 660, 203 N.Y.S.2d 836 (1960), leaves open the question of whether an attorney may be disbarred for a refusal based upon the attorney-client privilege.

1. "[A]nd if he [the officer conducting the sale] shall be guilty of any fraud in the sale, or in the return, or shall unreasonably neglect to pay any money collected by him on such execution, when demanded by the creditor therein, he shall be liable to an action on the case, at the suit of the party injured, for 5 times the amount of the actual damages sustained by reason of such fraud or neglect." Mich. Comp. Laws § 623.148 (1948).

2. The general rule is that a sheriff has a fiduciary obligation to the judgment debtor. A purchase by him at the execution sale which he conducts is a breach of such duty, and the sale becomes void. See, e.g., Coleman v. Malcom, 101 Ga. 303, 28 S.E. 861 (1897); Harrison v. McHenry, 9 Ga. 164 (1850); Wickliff v. Robinson, 18 Ill. 145 (1856). Some jurisdictions, apparently including Michigan, say that the sale is voidable rather than

a dismissal. The Supreme Court of Michigan affirmed, holding that a cause of action pursuant to the statute is one based on fraud, nonassignable under Michigan law, and, therefore, does not pass to the trustee in bankruptcy.[3] *Jones v. Hicks,* 358 Mich. 474, 100 N.W.2d 243 (1960).

The right of a trustee to sue on a cause of action belonging to the bankrupt is governed by section 70a, subdivisions (5) and (6) of the Bankruptcy Act.[4] This section vests in the trustee title to all "property, including rights of action," belonging to the bankrupt which, on the petition date, might have been either assigned voluntarily, or taken by judicial process pursuant to applicable state law.[5] It also vests "rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property."[6]

There has long been a conflict in the cases as to the cumulative effect of these two subdivisions, occasioned by the fact that subdivision (5) is expressly dependent on state law, while no such limitation is annexed to the provisions of subdivision (6). The confusion was more apparent in the period prior to 1938, when subdivision (5) did not expressly include rights of action.[7] The cases in this period fell into three general categories. Some cases held that the word "property" in subdivision (5) included rights of action and that before any right of action could pass to the trustee, it must be deemed assignable under applicable state law.[8] Other cases ignored the question of assignability and looked to whether the right of action passed under subdivision (6).[9] Still

void. See, e.g., Isaac v. Clarke, 2 Gill 1 (Md. Ct. App. 1844). See also People v. Township Bd. of Overyssel, 11 Mich. 222 (1863).

3. The second point of this decision was a holding that, under Michigan law, it is proper for a trial judge to grant a dismissal if the plaintiff's opening statement fails to state a cause of action.

4. 30 Stat. 565 (1898), as amended, 11 U.S.C. § 110a(5), (6) (1958).

(5) (1958). See MacLachlan, Bankruptcy § 169 (1956).

which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: Provided, that rights of actions ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process. . . ." 30 Stat. 565 (1898), as amended, 11 U.S.C. § 110a (5) (1958). See MacLachlan, Bankruptcy § 169 (1956).

At least in considering rights of action, assignability under Michigan law appears to be equated with amenability to judicial process. The approach may vary in other states. See 4 Collier, Bankruptcy ¶ 70.15 (14th ed. 1942).

6. 30 Stat. 565 (1898), as amended, 11 U.S.C. § 110a(6).

7. See note 21 infra.

8. See, e.g., Florance v. Kresge, 93 F.2d 784 (4th Cir. 1938) (right of action arising upon contract for personal services); Bonvillain v. American Sugar Ref. Co., 250 Fed. 641 (E.D. La. 1918) (right of action for violation of antitrust statute). See also Cleland v. Anderson, 66 Neb. 252, 92 N.W. 306 (1902), petition for rehearing denied, 66 Neb. 273, 96 N.W. 212 (1903), aff'd on rehearing, 66 Neb. 276, 98 N.W. 1075 (1904), rev'd on rehearing, 75 Neb. 273, 105 N.W. 1092 (1905); Kirby v. Fitzgerald, 57 S.W.2d 362 (Tex. Civ. App. 1933).

9. E.g., Henderson v. Binkley Coal Co., 74 F.2d 567 (7th Cir. 1935); Hansen Mercantile

other cases utilized subdivision (6), expressly denying the application of subdivision (5) to rights of action.[10]

The weight of authority in this period supported the view that rights of action falling within subdivision (6) need not be assignable. The trend of the cases was toward a steady expansion of the scope of that subdivision. *In re Harper*[11] held that a right of action for fraud, although nonassignable under state law, passed to the trustee under subdivision (6) as an "injury to property." An injury to property, the court stated, was "an actionable act whereby the estate of another is lessened, other than a personal injury, or the breach of a contract."[12] "Estate" in this context referred to "existing acquisitions, property which otherwise, but for the tort, would have been available to his [the bankrupt's] creditors."[13] By using this broad definition, trustees have been able to bring such tort actions as those for libel of a corporation,[14] malicious attachment,[15] violation of antitrust laws,[16] obtaining money or property by false pretenses,[17] inducing the expenditure of money by fraudulent misrepresentations,[18] and actions to recover excess tax payments.[19] The *In re Harper* decision

Co. v. Wyman, Partridge & Co., 105 Minn. 491, 117 N.W. 926 (1908); Gurfein v. Howell, 142 Va. 197, 128 S.E. 644 (1925); C.I.T. Corp. v. Smith, 161 S.C. 1, 159 S.E. 453 (1931).

10. E.g., Tamm v. Ford Motor Co., 80 F.2d 723 (8th Cir. 1935); Ruebush v. Funk, 63 F.2d 170 (4th Cir. 1933); Young v. Roodner, 123 Conn. 68, 192 Atl. 710 (1937); Cleland v. Anderson, 66 Neb. 276, 98 N.W. 1075 (1904). See Chandler v. Nathans, 6 F.2d 725 (3d Cir. 1925). Cf. In re Gay, 182 Fed. 260 (D. Mass. 1910); In re Harper, 175 Fed. 412 (N.D.N.Y. 1910).

11. 175 Fed. 412 (N.D.N.Y. 1910). This was one of the first cases to pass on the point.

12. Id. at 418, quoting N.Y. Sess. Laws 1880, ch. 22, § 3343(10). The use of the term "actionable act" is in contradistinction to a physical act resulting in damage to tangible property. The former includes the latter as well as verbal acts.

13. Boudreau v. Chesley, 135 F.2d 623, 624 (1st Cir. 1943), which held that a fraudulent scheme causing the bankrupt to lose his job was not an "injury to property" because the loss sustained was future wages and not property in existence at the time of the fraud.

14. Empire Tractor Corp. v. Time, Inc., 91 F. Supp. 311 (E.D. Pa. 1950); In re New York Woman, Inc., 34 F. Supp. 831 (S.D.N.Y. 1940). Contra, Milwaukee Mut. Fire Ins. Co. v. Sentinel Co., 81 Wis. 207, 51 N.W. 440 (1892).

15. Hansen Mercantile Co. v. Wyman, Partridge & Co., 105 Minn. 491, 117 N.W. 926 (1908). Cf. Gurfein v. Howell, 142 Va. 197, 128 S.E. 644 (1925). Contra, Noonan v. Orton, 34 Wis. 259 (1874).

16. Fazakerly v. E. Kahn's Sons Co., 75 F.2d 110 (5th Cir. 1935). Contra, Bonvillain v. American Sugar Ref. Co., 250 Fed. 641 (E.D. La. 1918).

17. Constant v. Kulukundis, 125 F. Supp. 305 (S.D.N.Y. 1954) (bonds); In re Swofford Bros. Dry Goods Co., 180 Fed. 549 (W.D. Mo. 1910) (assets of a corporation); In re Gay, 182 Fed. 260 (D. Mass. 1910); McGovern v. Kraus, 200 Wis. 64, 227 N.W. 300 (1929) (promissory note and mortgage). The case of In re Swofford Bros. Dry Goods Co., supra, presents the interesting situation of a wrongdoing corporate officer escaping liability by purchasing all the corporate assets, including the right of action against himself, from the trustee of the bankrupt corporation.

18. Herb Ford, Inc. v. Ford Motor Co., 80 F.2d 730 (8th Cir. 1935); Tamm v. Ford Motor Co., 80 F.2d 723 (8th Cir. 1935), 20 Minn. L. Rev. 814 (1936); In re Harper, 175 Fed. 412 (N.D.N.Y. 1910); Connolly v. National Sur. Co., 35 Ohio App. 76, 171 N.E. 870 (1929).

19. Charness v. Katz, 48 F. Supp. 374 (E.D. Wis. 1943).

established a definition of "injury to property" which encompassed practically all but the most personal injuries.[20]

In 1938, Congress, in an attempt to eliminate the confusion surrounding the trustee's title to rights of action, amended subdivision (5) so as to expressly include "rights of action."[21] While this solved half the problem, it tended to add some degree of credibility to the contention that all rights of action must be assignable if they are to pass to the trustee. In this regard, cases may still be found subsequent to the amendment interpreting subdivision (6) as though it were a continuation of subdivision (5), *i.e.*, they state[22] that before a right of action passes to the trustee it must be assignable.[23]

In the instant case, the bankrupt, on petition date, held title to two causes of action: one sounding in replevin; the other based on fraud. The trustee could have validly commenced an action to recover the truck under Michigan law, but instead elected to pursue the statutory remedy.[24] The majority and dissent agreed at the outset that the trustee's title to the right of action depended on its assignability under state law, but parted company on the issue of whether this was such a cause of action as could be assigned. The majority held that a right of action in the form of one for damages resulting from a fraud was "personal" and nonassignable. The dissent contended that the right of action was akin to one for conversion and therefore should pass to the trustee, since under Michigan law a right of action for conversion is assignable.[25]

20. The court in In re Harper was one of several in the period before 1938 which expressed the opinion that subdivision (5) did not cover rights of action. Injuries to the person, feelings, or reputation of the bankrupt did not come within any of the classes of actions in subdivision (6). Therefore, it was established that they could not pass to the trustee. The Chandler amendments in 1938 clarified the situation by adding a proviso to subdivision (5) covering such personal actions. Bankruptcy Act § 70a(5), 52 Stat. 879 (1938).

21. The purpose of the amendments was stated in this manner: "It is deemed advisable to set forth comprehensibly, the property of a debtor which passes, and which does not pass to the trustee. Although the additions, 'including rights of action' and the proviso excepting purely personal actions which under applicable state law are not subject to judicial process, are merely declaratory of the existing law, they are clarifying and would tend to avoid misunderstanding and misconstruction." 4 Collier, op. cit. supra note 5, ¶ 70.03.

22. With the exception of the present case there have been no actual holdings to this effect since the 1938 amendments.

23. E.g., Brown v. Guarantee Ins. Co., 155 Cal. App. 2d 679, 319 P.2d 69 (Dist. Ct. App. 1957); Cobleigh v. State Land Office Bd., 305 Mich. 434, 9 N.W.2d 665, 666 (1943); Heitfeld v. Benevolent & Protective Order of Keglers, 36 Wash. 2d 685, 220 P.2d 655 (1950). Cf. Charness v. Katz, 48 F. Supp. 374 (E.D. Wis. 1943).

24. A recovery here would have netted the bankrupt's estate $2,000, the trustee having waived all damages above the amount of the sheriff's bond.

25. The dissent takes the better position in looking beyond the apparent form of the action, for the majority approach is too rigid in the context of bankruptcy administration. It is based on the common law rule restricting assignability designed to combat the evils of champerty and maintenance, i.e., a stranger to the occurrence or transaction stirring

Although the right of action asserted by the trustee in the instant case was one arising upon an injury to property,[26] the decision was predicated solely upon the theory that the right of action must be assignable. It is submitted that the holding that state law governs the right of the trustee to sue ignores the true meaning of subdivision (6).[27] The majority of cases consider this subdivision as a separate and complete entity, either prescinding entirely from the question of assignability,[28] or expressly denying that assignability is an essential incident of rights of action which fall within the scope of subdivision (6).[29] This appears to be the better position, for, as a matter of statutory construction, if subdivision (5) is interpreted so as to cover all rights of action, the inclusion of subdivision (6) in section 70a would be mere redundancy.[30] Further, the cases deciding the issue solely under subdivision (6) indicate a trend toward expanding the category of rights of action which pass to the trustee. In making all rights of action subject to the laws of the various states, the approach would be something less than progressive, since the basic reason for restricting assignability of rights of action is based on a

up litigation which the injured party would never have brought. See, e.g., Grand Trunk W. R. R. v. H. W. Nelson Co., 116 F.2d 823, 836 (6th Cir. 1941). See also MacLachlan, Bankruptcy § 170 (1956). A category of actions known as "personal" actions were made nonassignable, and a cause of action for fraud was included within that group. But the reason behind this rule is inapplicable to a trustee in bankruptcy, since the debtor, especially in a voluntary petition, assumes an obligation to do whatever he can to preserve all his assets for the benefit of his creditors. See generally Bankruptcy Form 1, 11 U.S.C. App. (1958) (Debtor's Petition); Black, Bankruptcy § 99 (1924). See also Johnson v. Collier, 222 U.S. 538 (1912). The trustee, in bringing an action formerly belonging to the bankrupt, is not a stranger forcing litigation for some personal benefit, but rather is in effect the alter ego of the debtor assisting him to carry out his obligations in bankruptcy. See also Remmers v. Remmers, 217 Mo. 541, 117 S.W. 1117 (1909); Hyde v. Tuffts, 45 N.Y. Super. Ct. (13 Jones & S.) 56, 60 (1879).

26. It is clear that the right of action involved in the instant case does come within the meaning of subdivision (6). For when an officer, in conducting an execution sale, through fraudulent manipulation causes the property sold to be converted into a sum much less than should reasonably be expected, he has hurt the judgment debtor in one of two ways: if the proceeds which could have been reasonably expected would have been equal to or less than the debt, the debtor is now subjected to a liability which he otherwise would not have had; or, if a surplus should have resulted, the debtor has lost money which was due him. In the present case, it is not indicated which type of damage was sustained. If it were of the second type, the right of action would clearly come within the category of "injury to property" as so broadly defined by the In re Harper decision. If the injury fell within the first category, then the fraud has in effect lessened the estate of the bankrupt by increasing the amount of claims to his remaining assets.

27. Subdivision (6) is specific and subdivision (5) is a residuary clause.

28. See, e.g., Graybar Elec. Co. v. Doley, 273 F.2d 284 (4th Cir. 1959); Gochenour v. George & Francis Ball Foundation, 35 F. Supp. 508 (S.D. Ind. 1940), aff'd, 117 F.2d 259 (7th Cir. 1941). Cf. Boudreau v. Chesley, 135 F.2d 623 (1st Cir. 1943); Constant v. Kulukundis, 125 F. Supp. 305 (S.D.N.Y. 1954).

29. E.g., Empire Tractor Corp. v. Time, Inc., 91 F. Supp. 311 (E.D. Pa. 1950); In re New York Woman, Inc., 34 F. Supp. 831 (S.D.N.Y. 1940).

30. See 3 Remington, Bankruptcy § 1211.04 (1957), where such a conclusion is implied.

technical rule of common law which was not designed to cover the type of situations arising in bankruptcy administration.[31] The progressive approach is more in line with the purpose of the Bankruptcy Act, which is to marshall and distribute all nonexempt objects and things of pecuniary value belonging to the debtor, for the benefit of the creditors.[32]

The route by which the Michigan court reached its conclusion in the instant case is not uncommon, but is, nonetheless, questionable. The case relied upon by the court, though somewhat analogous, is not really in point. That case, *Cobleigh v. State Land Office Bd.*,[33] decided that a statutory right to reclaim property placed in auction at a tax sale by matching the highest bid did not pass to the trustee because Michigan had made such a right nonassignable. Clearly, no right of action coming under subdivision (6) was involved.[34] Further, the authorities cited in *Cobleigh* for the proposition that the law of

31. See note 25 supra.

32. See, e.g., Gochenour v. George & Francis Ball Foundation, 35 F. Supp. 503, 518 (S.D. Ind. 1940); In re Swofford Bros. Dry Goods Co., 180 Fed. 549, 556 (W.D. Mo. 1910). The fact that the Michigan statute provided for quintuple damages raises an interesting complication to an already clouded picture, for although the basic jury verdict for damages would be compensation for an "injury to property," the remainder of the award would be a penalty, [see Jones v. Hicks, 358 Mich. 474, 100 N.W.2d 243 (1960); Nordling v. Johnston, 205 Ore. 315, 283 P.2d 994 (1955)] which under common law can be recovered only by the party injured. See United Copper Sec. Co. v. Amalgamated Copper Co., 232 Fed. 574, 577 (2d Cir. 1916); Heitfeld v. Benevolent & Protective Order of Keglers, 36 Wash. 2d 685, 220 P.2d 655 (1950). The reason for this rule is identical to that supporting the prohibition of assignments of "personal actions." See Wilson v. Shrader, 13 W. Va. 105, 79 S.E. 1083 (1913). The reasoning is, however, inapplicable to a trustee. See note 25 supra. Nevertheless, some courts have found that the trustee could not recover because the right of action was not assignable. See, e.g., Bonvillain v. American Sugar Ref. Co., 250 Fed. 641 (E.D. La. 1918). The majority of cases considering the question, however, have been decided in favor of the trustee, the courts finding either: (1) The underlying cause of action is assignable. See, e.g., McCollum v. Hamilton Nat'l Bank, 303 U.S. 245 (1938); First Nat'l Bank v. Lasater, 196 U.S. 115 (1905), reversing 96 Tex. 345, 72 S.W. 1057 (1903) (usury statutes); Fazakerly v. E. Kahn's Sons Co., 75 F.2d 110 (5th Cir. 1935 (antitrust statute); Ripple v. Mortgage & Acceptance Corp., 193 N.C. 422, 137 S.E. 156 (1927); Nordling v. Johnston, supra. (2) The basic cause of action passes automatically by virtue of subdivision (6). See, e.g., Fazakerly v. E. Kahn's Sons Co., supra at 114. (3) The trustee is the alter ego of the bankrupt, acceding to each and every one of his rights. See, e.g., Reed v. American-German Nat'l Bank, 155 Fed. 233 (C.C.W.D. Ky. 1907) (usury statute); Kelter v. American Bankers' Fin. Co., 306 Pa. 483, 160 Atl. 127 (1932). The underlying premise in each of these cases was that the right to the penalty follows incidentally with the right of action. The courts as yet have not been called upon to consider a statute such as is found in the present case. However, it is noteworthy that they have allowed the trustee recovery of a penalty under usury statutes, since rights of action for "injury to property" and those for usury are part of the same subdivision of section 70a. See generally 4 Collier, op. cit. supra note 5, ¶ 70.28; 3 Remington, op. cit. supra note 30, §§ 1211.08, .12, .13. The fact that the latter type of action carries with it penalty rights is a strong indication that the former does also.

33. 305 Mich. 434, 9 N.W.2d 665 (1943).

34. See text accompanying notes 6 and 12 supra.

the state concerning assignability determines whether a right of action passes to the trustee were far removed from the question here involved.[35]

The decision in the principal case illustrates how general statements contained in a few cases have been perpetuated and eventually converted into holdings. Although one decision in a state court may not indicate an urgent need for amendment of the Bankruptcy Act, it would indicate the need for vigilance to insure that the error spreads no further.

Conflict of Laws—Effect of Subsequent Marriage of Litigants on Premarital Tort.—Plaintiff brought suit to recover for injuries suffered while riding in defendant's automobile in Massachusetts. Subsequent to the commencement of the action, the parties were married in Arkansas, and have since resided as husband and wife in New Hampshire. Defendant moved to dismiss the complaint on the ground that suit could not be prosecuted in New Hampshire because it could not be maintained in Massachusetts where the accident occurred. Decision was reserved by the superior court and the issue transferred, without a ruling, to the Supreme Court of New Hampshire. The court unanimously denied defendant's motion, finding no plain indication in the Massachusetts decisions that the marriage of the parties in any way extinguished a pre-existing cause of action between them. Absent such a determination by the Massachusetts judiciary, there was no basis for holding that plaintiff's cause of action was extinguished under New Hampshire law. *Morin v. Letourneau*, 102 N.H. 309, 156 A.2d 131 (1959).

At common law, neither spouse could sue the other for torts committed before[1] or during[2] coverture. The majority of American jurisdictions has adhered to the rule precluding interspousal suits for personal injuries,[3] and, in these same jurisdictions, it has generally been held that the disability obtains even if the tort occurred prior to marriage.[4] A minority, however, has permitted spouses to sue in exactly the same capacity as if they were single.[5] This confusion, occasioned by the dissimilar married women's acts, has been compounded by the application of traditional conflict of laws principles to the area of foreign torts.

35. Horton v. Moore, 110 F.2d 189 (6th Cir. 1940) (contingent future interest in real property); In re Seiffert, 18 F.2d 444 (D.C. Mont. 1926) (growing crops and wages). Neither of these cases were concerned with rights of action.

1. Spector v. Weisman, 40 F.2d 792 (D.C. Cir. 1930).

2. Thompson v. Thompson, 218 U.S. 611 (1910). See Prosser, Torts § 101 (2d ed. 1955).

3. E.g., Cubbison v. Cubbison, 73 Cal. App. 2d 437, 166 P.2d 387 (1946). See Annot., 43 A.L.R.2d 632 (1955) (comprehensive collection of cases).

4. See, e.g., Hunter v. Livingston, 125 Ind. App. 422, 123 N.E.2d 912 (1955). But see Foote v. Foote, 170 Cal. App. 2d 435, 339 P.2d 188 (1959), where a cause of action for a premarital tort was treated as a separate property right of the wife not affected by her subsequent marriage.

5. See, e.g., Leach v. Leach, 227 Ark. 599, 300 S.W.2d 15 (1957).

The general rule in conflict of laws situations is that the existence and extent of a cause of action are governed by the law of the place where the wrong occurred.[6] However, recent developments support a view that, in family suits arising out of wrongs committed in foreign jurisdictions, the rights of the parties should be determined in accordance with the law of their domicile.[7] No practical problem is presented where the domicile and the state of the wrong have the same public policy regarding the right of spouses to sue. But where public policies conflict, it becomes essential to determine whether the capacity to sue is an element of the cause of action and part of the substantive rights of the parties, or merely an element of remedial procedure.

It is clear that the public policy of Massachusetts prohibits spouses from suing one another for negligent torts.[8] Massachusetts has also determined that a subsequent marriage of the parties will bar, during the tenure of the marriage, any suit based upon a pre-existing cause of action.[9] The public policy of New Hampshire, however, is not opposed to interspousal suits, arising either prior to or during marriage.[10] Consequently, which law should be applied in determining whether a subsequent marriage extinguishes a pre-existing cause of action? The instant court, while cognizant of the recent trend in this area,[11] applied the traditional rule and approached the substantive rights of the parties via the *lex loci delicti*. In so doing, however, it reached a conclusion directly contrary to the result reached by the New York Court of Appeals in an identical case. The divergent analyses point up the inconsistency plaguing this area of the law. In *Coster v. Coster*,[12] the court of appeals analyzed the applicable Massachusetts law and found that the wife's "right to bring and to maintain the suit and to recover damages against her spouse is a substantive right, a part of her cause of action and not a mere matter of remedy . . . . As to substantive rights, the *lex loci*, not the law of the forum, controls and

6. Restatement, Conflict of Laws § 378 (1934); 2 Beale, Conflict of Laws § 378.2 (1935).

7. Emery v. Emery, 45 Cal. 2d 421, 428, 289 P.2d 218, 223 (1955); Koplik v. C. P. Trucking Corp., 27 N.J. 1, 11-12, 141 A.2d 34, 40 (1958); Ford, Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason Versus the Restatement, 15 U. Pitt. L. Rev. 397 (1954); Kelso, Automobile Accidents and Indiana Conflict of Laws: Current Dilemmas, 33 Ind. L.J. 297 (1957); Seavey, Torts, 1958 Ann. Survey Am. L., 34 N.Y.U.L. Rev. 517, 527 (1959); Comment, 15 Wash. & Lee L. Rev. 266, 275-76.

8. "A married woman may sue and be sued in the same manner as if she were sole; but this section shall not authorize suits between husband and wife." Mass. Gen. Laws Ann. ch. 209, § 6 (1955). See Callow v. Thomas, 322 Mass. 550, 552, 78 N.E.2d 637, 638 (1948), where a wife was forbidden to sue her former spouse for his tortious conduct during their marriage, "for the more fundamental reason that because of the marital relationship no cause of action ever came into existence."

9. Lubowitz v. Taines, 293 Mass. 39, 198 N.E. 320 (1936).

10. "Every married woman . . . may . . . sue and be sued, in all matters in law and equity . . . as if she were unmarried." N.H. Rev. Stat. Ann. § 460:2 (1955). See Miltimore v. Milford Motor Co., 89 N.H. 272, 197 Atl. 330 (1938).

11. 102 N.H. at —, 156 A.2d at 132. The court cited, among others, the authorities referred to in note 7 supra.

12. 289 N.Y. 438, 46 N.E.2d 509 (1943), 12 Fordham L. Rev. 182.

will be enforced in the courts of the forum . . . ."[13] The court correctly stated the traditional rule respecting substantive rights. However, its interpretation that the wife's right to sue was extinguished, rather than merely prohibited, clashes with the analysis of the instant case and, it would appear, with Massachusetts' formulation of its own law. Where a cause of action existed prior to the marriage of the parties, Massachusetts has deemed the incapacity to sue to be a disability removed by the termination of the marriage rather than an element of the cause of action.[14]

The variance between *Coster* and the present case is traceable directly to their interpretations of *Lubowitz v. Taines*.[15] The New York court construed that decision as substantively depriving a spouse of her right of action. The New Hampshire court found that *Lubowitz* merely prohibited a wife from enforcing her claim against her husband in Massachusetts. The latter court's reasoning was based primarily upon two Massachusetts decisions. It distinguished the situation in *Callow v. Thomas*,[16] where it was held that no cause of action ever arose between the spouses because they were already married, from the situation in *Lubowitz*, where it was never questioned that a right of action arose because the parties were unmarried when the accident occurred. Nowhere did the court find that *Lubowitz* stood for the proposition that a subsequent marriage extinguished the pre-existing cause of action or that its continued existence was conditioned upon remaining unmarried to the defendant.[17] The court also relied upon the discussion of *Lubowitz* in *Pittsley v. David*.[18] There the discussion indicated "that the wife's disability to maintain her action in that case rested upon the husband's 'immunity from actions at law by the wife,' rather than upon any extinguishment of the cause because of marriage or any 'universal legal identity' resulting therefrom."[19] It is submitted that the New Hampshire analysis is a more realistic appraisal of the Massachusetts law than *Coster*, and more in conformity with the public policy that the domicile should determine the right of spouses to sue.[20]

13. 289 N.Y. at 442, 46 N.E.2d at 511-12.

14. In Giles v. Giles, 279 Mass. 284, 181 N.E. 176 (1932), it was held that a wife could not maintain a suit in equity against her husband to recover money lent to him before their marriage. But after the parties were divorced, it was held that suit could be prosecuted. Giles v. Giles, 293 Mass. 495, 200 N.E. 378 (1936). See also Adams v. Adams, — Mass. —, 157 N.E.2d 405 (1959); Pittsley v. David, 298 Mass. 552, 11 N.E.2d 461 (1937).

15. 293 Mass. 39, 198 N.E. 320 (1935).

16. 322 Mass. 550, 78 N.E.2d 637 (1948).

17. Morin v. Letourneau, 102 N.H. at —, 156 A.2d at 133 (1959).

18. 298 Mass. 552, 11 N.E.2d 461 (1937).

19. 102 N.H. at —, 156 A.2d at 133-34, citing Pittsley v. David, 298 Mass. at 553, 11 N.E.2d at 463.

20. A recent New York case, Pryor v. Merchants Mut. Cas. Co., 12 Misc. 2d 801, 174 N.Y.S.2d 24 (Sup. Ct. 1958), has expressed dissatisfaction with the Coster ruling. "[S]ince New York has no law or policy against entertaining this cause of action which had accrued to plaintiff under Pennsylvania law, it should not set up an artificial barrier to defeat plaintiff's right. That is what is done when we label the limiting provision of the Massachusetts statute 'substantive.' The limitation in fact goes only to the remedy because of

In permitting the plaintiff to prosecute her suit in New Hampshire, however, the instant case conflicted with still another parallel situation, resolved in *Bohenek v. Niedzwiecki*.[21] There the Supreme Court of Errors of Connecticut, weighing the substantive rights of the parties under Pennsylvania law, also concluded that a prenuptial right to sue one's spouse was merely suspended during the period of marriage.[22] Nevertheless, the wife's right to recover in Connecticut was rejected. The court held that "the law of . . . [Pennsylvania] creates, defines and limits her right of action. As she could not maintain this cause of action in that state, she cannot maintain it here."[23] In failing to limit plaintiff's right of action in accordance with the Massachusetts prohibition, the principal case has, in effect, reduced the question of substantive rights to one of remedy, and again has adopted a more realistic view of the conflicts problem.

The frustration attendant upon applying the *lex loci delecti* to interspousal suits is obvious. That marital accord should be fostered is objected to by no one, and it is a proper state function to safeguard marital harmony. However, it should be exercised over its own domiciliaries, and should not be given extraterritorial effect. This approach has been espoused in recent decisions as the more reasonable view.[24] In *Koplik v. C. P. Trucking Corp.*,[25] the court rejected the application of New York law which permitted suit, stating:

> [W]e hold the view that even where an actual conflict of laws problem is directly presented, it is sensible and logical to have disabilities to sue and immunities from suit arising from the family relationship determined by reference to the law of the state of the family domicile when the suit is brought in that state. Otherwise, the *lex loci* will be permitted to interfere seriously with a status and a policy which the state of residence is primarily interested in maintaining.[26]

The problem of selecting a forum is also presented. Domiciliaries of a state prohibiting interspousal suits, if injured in a state allowing such actions, could

the public policy of Massachusetts. . . . Since the provision against a person suing his spouse is not consonant with New York law or public policy, it should not be given effect here. Else another State is legislating for us." Id. at 804, 174 N.Y.S.2d at 27. The court held, however, that in view of Coster the law could only be changed by the legislature or the court of appeals and the complaint was dismissed.

21. 142 Conn. 278, 113 A.2d 509 (1955).

22. The court cited Cardamone v. Cardamone, 9 Pa. D. & C. 723 (1924), as supporting the proposition that even though plaintiff had a cause of action and had instituted suit against her future husband, the subsequent marriage to him denied her that right as long as the marriage status continued. Id. at 282, 113 A.2d at 511. See also Johnson v. Peoples First Nat'l Bank & Trust Co., 394 Pa. 116, 145 A.2d 716 (1958), indicating that a widow could sue her husband's executor for the husband's negligent conduct during coverture. Her right to sue was prescribed only during the term of their marriage.

23. 142 Conn. at 283, 113 A.2d at 511.

24. See note 7 supra.

25. 27 N.J. 1, 141 A.2d 34 (1958), 27 Fordham L. Rev. 422. The facts were similar to the instant case, except that the lex loci allowed interspousal suits while the domicile, New Jersey, prohibited such suits. The subsequent marriage was held to close the state's tribunals to the wife's claim.

26. 27 N.J. at 11-12, 141 A.2d at 40 (dictum).

sue therein, thereby contravening the public policy of their domicile. But if domiciliaries of a state permitting interspousal suits are involved in an accident in a jurisdiction not allowing such suits, they would have no remedy for their wrong in either jurisdiction. In one instance, the public policy of the domicile is flaunted because of the incidence of a state line; in the other, the parties are deprived of the rights granted them by their domicile because of the extraterritorial influence of a sister state.

Regulation by the domicile state will also provide more adequate protection against collusive interspousal suits and unjust corroding of the contract between the insurer and the insured. In New York, although the legislature has permitted one spouse to sue the other,[27] policies of insurance issued to motor vehicle owners need not insure against injuries to the spouse of the owner unless specifically provided for in the policy.[28] If the policy provides for such increased coverage in the event of an accident involving the spouse of the owner, and the accident occurs in a state prohibiting interspousal suits, the insurance company is unjustly enriched to the extent of the premiums paid for such coverage, and the insured is deprived of protection which he would otherwise have had except for the incidence of state boundaries. In the same manner, an insurance company in a state prohibiting interspousal suits may not charge rates to cover this type of protection and yet may find itself liable to the insured if the accident occurs and an action is brought in a state authorizing interspousal suits.[29]

By allowing the domicile of the parties to determine the capacity of spouses to sue, a major conflict of law would be removed in both tort and contract actions. The element of doubt as to what comprises the substantive rights of the parties within the law of the place of the wrong would be removed and a uniform public policy for all domiciliaries of a state would be assured. "Forum shopping" for a favorable court within which to bring suit would be greatly reduced and state boundary lines would no longer affect the rights and duties for which the insured and the insurance company contracted. In deciding the instant case, the New Hampshire court has taken an important step forward in reducing the issue to one of prohibition of suit, a question of remedy. But the court should have stated in clear and unmistakable language, rather than merely inferred, the right of the domicile to govern the capacity of its spouses to sue.

Real Property—Affirmative Covenant Running With the Land.—Defendant's predecessor in title contracted with plaintiff's predecessor to furnish heat to a building on plaintiff's land and to maintain the necessary heating pipes for that purpose. The agreement was to continue in effect as long as both buildings remained standing and in use, and it expressly bound the heirs, adminis-

27. N.Y. Dom. Rel. Law § 57.

28. N.Y. Ins. Law § 167(3).

29. See Lumbermens Mut. Cas. Co. v. Blake, 94 N.H. 141, 47 A.2d 874 (1946), and Bradford v. Utica Mut. Ins. Co., 179 Misc. 919, 39 N.Y.S.2d 810 (Sup. Ct. 1943).

trators, and assignees of the original parties. Defendant's deed did not specifically mention the covenant. Defendant was aware of the terms, however, since the deed to its immediate predecessor, alleged to be its agent, was expressly subject to the covenant. Defendant refused to comply with the agreement. In an action for specific performance, the New York Supreme Court dismissed the complaint for failure to state a cause of action. The appellate division affirmed,[1] reasoning that a covenant to furnish heat is affirmative in nature and may not run with the land. The New York Court of Appeals reversed[2] and held that the covenant, although affirmative in nature, "touched or concerned" the land to a substantial degree and therefore ran with the land. *Nicholson v. 300 Broadway Realty Corp.*, 7 N.Y.2d 240, 164 N.E.2d 832, 196 N.Y.S.2d 945 (1959).

Prior to *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*,[3] the general attitude of the New York courts toward affirmative covenants running with the land was one of hostility. This view was crystallized in the leading case of *Miller v. Clary*,[4] wherein the court refused to enforce a covenant to construct and maintain a shaft for water power, which had been made by the predecessors of the parties in interest. The court held that subject to certain traditional exceptions,[5] affirmative covenants do not run with the land so as to place the burden of performance on a subsequent grantee.[6] The *Miller* doctrine placed New York in direct opposition with the other states.[7] In

1. 6 App. Div. 2d 627, 180 N.Y.S.2d 535 (3d Dep't 1958).

2. In conjunction with his action for specific performance, plaintiff sought to recover damages occasioned by defendant's failure to perform the agreement. Subsequent to the filing of the appeal, but prior to argument before the court of appeals, plaintiff sold his building to defendant corporation. The court held that even though a decree for specific performance had become impossible, the appeal could not be dismissed as academic since there still existed the possibility of damages for breach of the agreement. Therefore, a cause of action for damages had been sufficiently stated in the complaint on two separate theories: for breach of a covenant running with the land or for breach of a creditor beneficiary agreement.

3. 278 N.Y. 248, 15 N.E.2d 793 (1938), wherein the court held that a covenant to pay a cash assessment for the maintenance of community facilities ran with the land.

4. 210 N.Y. 127, 103 N.E. 1114 (1913).

5. E.g., Crawford v. Krollpfeiffer, 195 N.Y. 185, 88 N.E. 29 (1909) (covenant relating to party walls); Post v. West Shore R.R., 123 N.Y. 580, 26 N.E. 7 (1890) (covenant to provide railway crossings); Satterly v. Erie R.R., 113 App. Div. 462, 99 N.Y.S. 309 (2d Dep't 1906) (covenant to build fences along boundary lines). The instant case recognized these and other exceptions. 7 N.Y.2d at 244, 164 N.E.2d at 834, 196 N.Y.S.2d at 948.

6. Accord, Guaranty Trust Co. v. New York & Queens County Ry., 253 N.Y. 190, 170 N.E. 887 (1930). In that case, a mortgage, with an after-acquired property clause, was found not to bind the company merging with the mortgagor corporation so as to impose upon the company the burden of giving a mortgage upon after-acquired property. The court reasoned that since Miller held that an affirmative covenant does not run with the land, "a fortiori the same result must follow where there is an attempt to charge the burden upon another and independent parcel." 253 N.Y. at 204, 170 N.E. at 892.

7. See generally Annot., 102 A.L.R. 781 (1936); Annot., 41 A.L.R. 1363 (1926) (exhaustive collection of cases); cf. Lloyd, Enforcement of Affirmative Agreements Respecting the Use of Land, 14 Va. L. Rev. 419 (1928).

Neponsit, however, while explicitly acknowledging the broad *Miller* rule, the court of appeals mitigated the force of its prior decision by enunciating new criteria for the running of real property covenants. Adopting a practical approach to the problem, based on the effect of the covenant rather than on technical distinctions, the court said that a covenant will run if it touches or concerns land to a substantial degree.[8] This test, in essence, was employed by other states,[9] and, in effect, disposed of the artificial distinction between affirmative and negative covenants. While the more liberal "touch or concern" test advanced in *Neponsit* appeared to obliterate the distinction between affirmative and negative covenants since either type of obligation may equally alter an owner's rights, the *Neponsit* court expressly endorsed the presumption created by *Miller* against the enforceability of affirmative burdens.[10] An uncertainty remained whether *Neponsit* merely added another exception to the *Miller* doctrine or whether it in fact abolished the rule.[11] Unfortunately, this confusion has not been dispelled with complete satisfaction by the instant decision. The majority based its holding upon *Neponsit,* but cited *Miller* without in so many words overruling it,[12] thus leaving the same implication as *Neponsit,* that *Miller* is still the law. This implication was specifically embraced in the concurring opinion,[13] thereby putting life back into a distinction all but formally pronounced dead. Except for the fact that the present decision relied upon *Neponsit,* however, which in turn expressly reaffirmed *Miller,* it would appear from the court's synopsis that the latter case would unquestionably be overruled.

Neponsit and the present case are inconsistent with *Miller,* although distinguishable in the world of words as exceptions. The traditional judicial disdain for overruling decisions, often harmful, is especially evident here, since *Miller* is based upon foundations of questionable strength. The *Miller* court deemed its holding to be merely declarative of an established New York rule,

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8. The court stated:

[A] covenant which runs with the land must affect the legal relations—the advantages and the burdens—of the parties to the covenant, as owners of particular parcels of land. . . The test is based on the effect of the covenant rather than on technical distinctions. Does the covenant impose, on the one hand, a burden upon an interest in land, which on the other hand increases the value of a different interest in the same or related land? . . . [W]hether a particular covenant is sufficiently connected with the use of land to run with the land, must be in many cases a question of degree. . . . Thus, unless we exhalt technical form over substance, the distinction between covenants which run with land and covenants which are personal, must depend upon the effect of the covenant on the legal rights which otherwise would flow from ownership of land and which are connected with the land. The problem then is: Does the covenant in purpose and effect substantially alter these rights? 278 N.Y. 248, 257-58, 15 N.E.2d 793, 796 (1938).

9. See, e.g., Whittenton Mfg. Co. v. Staples, 164 Mass. 319, 41 N.E. 441 (1895). See generally Annot., 41 A.L.R. 1363, 1365 (1926).

10. The court stated in specific language: "We have not abondoned the historic distinction drawn by the English courts." 278 N.Y. at 256, 15 N.E.2d at 796.

11. See Note, 38 Colum. L. Rev. 1299 (1938); Note, 24 Cornell L.Q. 133 (1938).

12. 7 N.Y.2d 240, 244, 164 N.E.2d 832, 834, 196 N.Y.S.2d 945, 948 (1959).

13. Id. at 248, 164 N.E.2d at 837, 196 N.Y.S.2d at 952, in an opinion by Judge Van Voorhis, in which Judge Dye concurred.

which, in turn, was allied with the English view.[14] *Miller* cited the English cases of *Austerberry v. Corporation of Oldham*,[15] *London & So. W. Ry. v. Gomm*,[16] and *Haywood v. Brunswick Bldg. Soc'y*.[17] in support of its position. While the *Haywood* case stands for the proposition that affirmative covenants cannot run with the land, *Austerberry* and *Gomm* are doubtful authority on this point.[18] Nor do the New York precedents cited in *Miller* warrant formulation of the *Miller* doctrine. In *Kidder v. Port Henry Iron Ore Co.*,[19] the complaint was dismissed for technical insufficiency, and the merits of the case were not passed upon. *Reid v. McCrum*[20] held that a covenant to procure insurance in a mortgage was merely personal and did not run with the land. No mention was made of its affirmative nature. The confusion in the cases was recognized by *Miller*, and for a solution the court was quick to point out exceptions to its doctrine.[21] The instant decision acquiesced in the validity of these exceptions and introduced others.[22] The cases from which these exceptions stem, however, fail to present any rationale explaining why the particular affirmative covenant in issue should be enforced as an exception to the general rule.[23] It appears

14. 210 N.Y. at 132-36, 103 N.E. at 1116-17.

15. [1885] 29 Ch. D. 750 (alternative holding, semble) (covenant to repair a toll road; no time limit).

16. [1882] 20 Ch. D. 562 (alternative holding) (covenant by grantee to reconvey at request of grantor; no time limit).

17. [1881] 8 Q.B.D. 403 (covenant to repair buildings; no time limit).

18. The ratio decidendi of the Austerberry case is not clear. The court made the following statements, but did not indicate which was the basis of its holding: (1) affirmative covenants do not run with the land; (2) covenants requiring the expenditure of money do not run with the land; (3) the covenant in question was merely personal; (4) the parties did not intend the covenant to run with the land; and (5) the benefit of the covenant probably did run with the land. 29 Ch. D. at 773, 783-84.

The Gomm decision was based upon a violation of the rule against remoteness and a violation of a statute rendering the act ultra vires, as well as upon the reason that affirmative covenants do not run with the land.

Consideration must also be given to the facts that these cases were decided in the nineteenth century and that they do not have the force of binding authority in America. Furthermore, Spencer's Case, 5 Coke 16a, 77 Eng. Rep. 72 (K.B. 1583) (covenant to construct a brick wall), seems to have been the authority on this subject at the time the United States became a sovereign. This case approved affirmative covenants running with the land.

19. 153 App. Div. 931, 138 N.Y. Supp. 1124 (3d Dep't 1912), aff'd mem., 207 N.Y. 768, 101 N.E. 1107 (1913).

20. 91 N.Y. 412 (1883).

21. See note 5 supra. The court recognized that further limitations of the rule might be required. 210 N.Y. at 136, 103 N.E. at 1117.

22. See 7 N.Y.2d at 244 n.2, 164 N.E.2d at 834-35 n.2, 196 N.Y.S.2d at 949 n.2.

23. It would appear that the New York courts enforced these covenants because they were of reasonable duration and in accepted general usage. The benefit conferred apparently outweighed the burden upon the free alienability of land. Cf. Atlas Land Corp. v. Ettinger, 283 App. Div. 379, 128 N.Y.S.2d 73 (1st Dep't 1954). In its treatment of affirmative obligations against subsequent holders of burdened land, the instant court drew no

that the court in *Miller* unsuccessfully attempted to reconcile a confused area of law with the panacea of an arbitrary rule and exception.

Despite the latent implication of *Neponsit* and the assumption of Judges Van Voorhis and Dye in the instant case that the *Miller* rule has remained intact, it is submitted that the court has sub silentio overruled *Miller*. Approaching this issue from the context of the appellate division's determination that an affirmative covenant to provide heat cannot run with the land, the court of appeals framed the precise question for decision: "[D]oes the affirmative character of the covenant exclude it from the classification of covenants which 'touch' or 'concern' the land?"[24] The court answered negatively. Again it affirmed its disposition, manifested in *Neponsit,* to look to substance rather than technical form.[25] It again recognized the "touch or concern" test, basing its analysis not on technical distinctions but rather on the purpose and effect of the covenant, *i.e.,* did it effect a substantial alteration of the rights in the land?[26] Although *Miller* was mentioned, the court did not express approval of the rule as it had done in *Neponsit.* Rather, its emphasis was plainly focused upon the broad language and liberal criteria advanced by *Neponsit.* The crux of the opinion was the court's formulation of the present status of the law:

> Having in mind the question now presented for decision, the law may be briefly summarized. The burden of affirmative covenants may be enforced against subsequent holders of the originally burdened land whenever it appears that (1) the original covenantor and covenantee intended such a result; (2) there has been a continuous succession of conveyances between the original covenantor and the party now sought to be burdened; and (3) the covenant touches or concerns the land to a substantial degree.[27]

Nowhere did the court contrast affirmative and negative covenants. Rather, its language plainly indicated that such a distinction is no longer valid. Affirmative covenants will operate to bind subsequent grantees, provided there is a substantial alteration of the legal relations of the parties as owners of the parcels of land. In its objection, the concurring opinion failed to distinguish between substance and form. Where is the distinction between a covenant to furnish heat and maintain pipes and a covenant to construct and maintain a shaft for water power? There is an understandable policy against unduly encumbering land. A recognized onus of affirmative covenants has always been the burden placed upon subsequent holders, compelling them to act *in perpetuo* and possibly preventing the land from being put to other profitable use. Negative restrictions, however, are equally objectionable as a hinderance to marketability. It is submitted that limitations on the running of covenants should not be imposed on a basis of mere form, negative as against affirmative, but rather upon their power to encumber land indefinitely.[28]

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distinction between purely equitable servitudes and other covenants which run with the land at law. See generally Clark, Real Covenants and Other Interests Which "Run With Land" 72, 148 (1929).

24. 7 N.Y.2d at 244, 164 N.E.2d at 834, 196 N.Y.S.2d at 948.

25. Id. at 245, 164 N.E.2d at 835, 196 N.Y.S.2d at 949.

26. Ibid.

27. 7 N.Y.2d at 245, 164 N.E.2d at 835, 196 N.Y.S.2d at 949-50.

28. The court of appeals specifically noted that the covenant at bar was to run only

Sales—Absence of Privity in Breach of Warranty Action.—Plaintiff was injured while driving an allegedly defective automobile shortly after it was purchased by her husband from defendant dealer. Suit was instituted by plaintiff against both the dealer and the manufacturer. Her husband joined in the action seeking compensation for his consequential losses. The suit was predicated on breach of express and implied warranties and upon negligence. The trial court dismissed the negligence counts and submitted to the jury the issue of implied warranty of merchantability. From a verdict in favor of the plaintiffs,[1] the defendants appealed. The case was certified by the Supreme Court of New Jersey prior to consideration in the appellate division. The supreme court affirmed, holding that there was a breach of an implied warranty despite lack of privity of contract between the parties. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

The rule prevailing in most jurisdictions requires privity of contract for maintenance of breach of warranty actions. In recent times, this requirement has been subject by many courts to sharp scrutiny and criticism.[2] These courts have invoked changing economic and social conditions as reasons for rejecting the privity doctrine.[3] The cases which first allowed recovery despite lack of privity were largely in the food and drug field.[4] They were characterized as an exception to the general rule.[5] Yet some states have been recalcitrant in

as long as the buildings remained standing and in use. Id. at 246, 164 N.E.2d at 835, 196 N.Y.S.2d at 950. In view of the strong public policy favoring untrammeled use of land, the court might subsequently be required to supplement its "touch and concern" test with an additional criterion of reasonable duration. The court, however, gave no intimation of what it would consider an undue burden upon land.

1. Decision unreported.

2. Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W.2d 445 (1936); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, aff'd per curiam on rehearing, 168 Wash. 465, 15 P.2d 1118 (1932), aff'd on second appeal, 179 Wash. 123, 35 P.2d 1090 (1934); Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913). For an excellent study of the entire area, see Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960).

3. The court in the Madouros case, stated that "under modern conditions, when products . . . have been prepared under the exclusive supervision of the manufacturer and the consumer must take them as they are supplied, the representations constitute an implied . . . warranty, to the unknown and helpless consumer . . . ." 230 Mo. App. at 283, 90 S.W. 2d at 450.

4. Crystal Coca-Cola Bottling Co. v. Cathey, 83 Ariz. 163, 317 P.2d 1094 (1957); Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920); Curtiss Candy Co. v. Johnson, 163 Miss. 426, 141 So. 762 (1932); Davis v. Radford, 233 N.C. 283, 63 S.E.2d 822 (1951); Geiness v. Scow Bay Packing Co., 16 Wash. 2d 1, 132 P.2d 740 (1942); Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913). See also Conn. Gen. Stat. § 42-16 (1958), which provides that an "implied warranty shall extend to the purchaser and to all persons for whom such food or drink is intended."

5. See Rachlin v. Libby-Owens-Ford Glass Co., 96 F.2d 597 (2d Cir. 1938); Hoskins v.

going even this far.[6] Other courts have moved swiftly into broader areas, holding absence of privity no bar to recovery in actions for breach of warranty in the sale of soap detergents,[7] exploding bottles,[8] inflammable cowboy suits,[9] automobiles,[10] home permanent-wave sets,[11] and defective cinder blocks.[12]

A variety of theories has been advanced to explain the legal basis of liability of the manufacturer in absence of privity. Some courts permit recovery on the ground that the plaintiff is a third party beneficiary.[13] Other courts reason that a warranty runs with a product much as a covenant runs with land.[14] Another view would impose liability on the manufacturer by making the dealer the former's agent.[15] The theory, however, which has been received with the greatest acceptance is that public policy, in light of modern marketing conditions, requires the recognition of a warranty made directly to the consumer.[16]

Jackson Grain Co., 63 So. 2d 514 (Fla. 1953); Hertzler v. Manshum, 228 Mich. 416, 200 N.W. 155 (1924); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942); Mazetti v. Armour & Co., supra note 4.

6. Howson v. Foster Beef Co., 87 N.H. 200, 177 Atl. 656 (1935); Lombardi v. California Packing Sales Co., 83 R.I. 51, 112 A.2d 701 (1955); Cohan v. Associated Fur Farms, Inc., 261 Wis. 584, 53 N.W.2d 788 (1952). Although New York has been reluctant to find liability on the part of the manufacturer without privity of contract even in food and drug cases, recovery was allowed despite absence of privity in Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421 (1953). But see Gimenez v. Great Atl. & Pac. Tea Co., 264 N.Y. 390, 191 N.E. 27 (1934); Chysky v. Drake Bros. Co., 235 N.Y. 468, 139 N.E. 576 (1923); Burke v. Associated Coca-Cola Bottling Plants, Inc., 7 App. Div. 2d 942, 181 N.Y.S.2d 800 (3d Dep't 1959).

7. Worley v. Procter & Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W.2d 532 (1952).

8. Mahoney v. Shaker Square Beverages, Inc., 46 Ohio Op. 250, 102 N.E.2d 281 (C.P. 1951).

9. Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421 (1953).

10. Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932). See generally Gillam, Products Liability in the Automobile Industry: A Study in Strict Liability and Social Control 83-100 (1960).

11. Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958); Markovich v. McKesson & Robbins, Inc., 106 Ohio App. 265, 149 N.E.2d 181 (1958).

12. Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958).

13. E.g., Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928).

14. E.g., Anderson v. Tyler, 223 Iowa 1033, 274 N.W. 48 (1937); Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).

15. Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928). See also Bahlman v. Hudson Motor Car Co., 290 Mich. at 687, 288 N.W. at 313. It has also been held that the dealer is the agent of the consumer in purchasing from the manufacturer. Wisdom v. Morris Hardware Co., 151 Wash. 86, 274 Pac. 1050 (1929). A complete survey of theories circumventing the doctrine of privity can be found in Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960).

16. Williams v. Campbell Soup Co., 80 F. Supp. 865 (W.D. Mo. 1948); Patargias v. Coca-Cola Bottling Co., 332 Ill. App. 117, 74 N.E.2d 162 (1947); Worley v. Procter & Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W.2d 532 (1952); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932).

Breach of warranty was originally an action in tort. Later, the action became one of a purely contractual nature, and courts, following basic contract theory, required privity for recovery in breach of warranty actions.[17] But privity was not always limited solely to contracts. Before the case of *Thomas v. Winchester*,[18] and more recently *MacPherson v. Buick Motor Co.*,[19] privity was essential to a successful action against a manufacturer for negligence. Today, lack of privity is no longer fatal in most cases to an action against a negligent manufacturer. An analogy has been drawn between the decisions discrediting the privity doctrine in breach of warranty actions and the *MacPherson* case.[20] It is insisted that there is no valid distinction for retaining privity in the one and not the other. Emphasis is placed on the fact that the ordinary buyer does not, and is not expected to, buy goods exclusively for his own consumptive use.[21] It is on this assumption that manufacturers advertize and market their products. Thus, where the products sold are such that they will be dangerous if defectively manufactured, then "society's interests can only be protected by eliminating the requirement of privity between the maker and his dealers and the reasonably expected ultimate consumer."[22]

An implied warranty of merchantability is imposed upon the manufacturer in the instant case despite lack of privity between the parties. The court noted that limitations in privity in the sale of goods developed at a time when marketing conditions were not very complex.[23] With the advent of the modern economic phenomenon of mass production, the manufacturer effected his sales through intermediaries, becoming more remote from the purchaser. Judge Francis, writing the opinion in the instant case, observed yet another factor

17. In this connection Williston states: "Much of the intrinsic difficulty and still more of the divergence of authority which characterize the law of warranty are due to an imperfect recognition of the nature of the obligation imposed by a warranty. . . . It may be called an obligation either on a quasi-contract or a quasi-tort, because remedies appropriate to contract and also to tort have been applicable. That this is the character of the seller's obligation was recognized by Blackstone, and that this point of view has been lost sight of by many courts is no doubt due to the fact that assumpsit became so generally the remedy for the enforcement of a warranty." 1 Williston, Sales § 197 (rev. ed. 1948). See also Worley v. Procter & Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W.2d 532 (1952); Markovich v. McKesson & Robbins, Inc., 106 Ohio App. 265, 149 N.E.2d 181 (1958).

18. 6 N.Y. 397 (1852).

19. 217 N.Y. 382, 111 N.E. 1050 (1916).

20. One author has commented that "only time will tell whether the rule of no warranty without privity is destined to meet the same end (as negligence), but it is at least arguable that Baxter v. Ford Motor Co. [168 Wash. 456, 12 P.2d 409 (1932)] occupies the same position in the history of the warranty cases that Thomas v. Winchester [6 N.Y. 397 (1852)] fills in the development of liability for negligence. If it does, warranty awaits its MacPherson—or rather its Cardozo." Gillam, Products Liability in the Automobile Industry: A Study in Strict Liability and Social Control 86 (1960).

21. 32 N.J. 358, 378-79, 161 A.2d 69, 80-81 (1960); Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 131-34, 90 N.W.2d 873, 879-80 (1958).

22. 32 N.J. at 379, 161 A.2d at 81.

23. Id. at 379, 161 A.2d at 80.

for the evolution of a separate system of independent dealers. With the downfall of *caveat emptor,* "many manufacturers took steps to avoid these ever increasing warranty obligations."[24] They ceased selling their products directly to the consuming public through their own employees. Manufacturers instead transferred to the dealers the burdens imposed by the Sales Act by selling directly to the latter. But such practices, coupled with large-scale advertising by manufacturers to promote the purchase of these goods by the consuming public "provided a basis upon which the existence of express or implied warranties was predicated, even though the manufacturer was not a party to the contract of sale."[25]

It might be argued that courts should look through the so-called "independent" status of the dealer and impose liability on the manufacturer by reason of a principal-agent relationship. In the present case, however, the court dismissed this contention, holding the manufacturer liable irrespective of any agency relationship.[26]

In rejecting the doctrine of privity, another problem arises concerning the extent to which the courts will go in holding the manufacturer liable. In this case, for example, there existed a question as to the theory upon which the wife was allowed recovery. The court stated that the wife is entitled to an award since "she is such a person who . . . might be expected to become a user of the automobile."[27] Hence, both the automobile manufacturer and the dealer extend an implied warranty of merchantability to the "purchaser of the car, members of his family, and to other persons occupying or using it with his consent."[28] This view is somewhat similar to the test of foreseeability applied in the *MacPherson* case.[29]

It is to be noted that it is an implied warranty, not an express warranty, that the manufacturer is giving to the ultimate consumer. Some courts have held, by a mistaken assumption, that the giving of an express warranty excludes an implied warranty.[30] The court here, however, imposed an implied warranty on the manufacturer even though he had given an express warranty to the purchaser. Indeed, this case is the first to allow recovery against an automobile manufacturer on the implied warranty theory without privity of contract.[31] This is all the more significant in that the express warranty here was accompanied by a disclaimer and limitation clause. The court, in holding the clause

24. Id. at 372, 161 A.2d at 77.

25. Id. at 373, 161 A.2d at 77.

26. Id. at 384, 161 A.2d at 84.

27. Id. at 413, 161 A.2d at 99-100.

28. Id. at 414, 161 A.2d at 100. Compare this language with Uniform Commercial Code § 2-318.

29. 217 N.Y. 382, 111 N.E. 1050 (1916).

30. E.g., Springer v. Indianapolis Brewing Co., 126 Ga. 321, 55 S.E. 53 (1906); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).

31. Two other cases allowed recovery on an express warranty theory without privity of contract. Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932).

ineffective, rested its decision on a realistic appraisal of the status of the contracting parties. A buyer in need of a car is frequently not in a position to shop around for better terms since all major manufacturers use the same clauses.[32] Hence, the purchaser must agree to the disclaimer in order to obtain the car. The court remedied this situation by nullifying the disclaimer clause.

Many injustices are caused by a doctrine which, within the modern economic framework, has outlived its usefulness. Privity has become a refuge for manufacturers seeking to avoid the burdens and responsibilities which in the interests of social justice they should not be allowed to escape. It is submitted that when a manufacturer uses high-pressured advertizing and the communication media to sell his products, he is, in effect, making promises to the ultimate purchaser in the nature of warranties. Public policy demands that if the manufacturer fails to carry out these promises, with consequent injury to innocent consumers, then the latter are entitled to be compensated. It is hoped that in the near future other states will follow New Jersey in relaxing the harsh doctrine of privity.

Trade Regulation—Constitutionality of Nonsigner Clause in Resale Price Maintenance.—Plaintiff company brought suit to restrain defendant, a retail department store, from selling or offering for sale below the minimum fair-trade price certain trade-mark commodities manufactured by plaintiff. The minimum price had been "established" pursuant to Section 325.12 of the Minnesota Fair Trade Act,[1] via plaintiff manufacturer's contract with two Minnesota retailers. The price stipulation operated upon those with notice thereof, even though not parties to the agreement. The district court granted the injunction. On appeal, the Supreme Court of Minnesota reversed, declaring the nonsigner provision to be an unlawful delegation of legislative power in violation of the Minnesota Constitution.[2] *Remington Arms Co. v. G. E. M., Inc.*, — Minn. —, 102 N.W.2d 528 (1960).

Resale price maintenance, the practice of fixing the price at which one person

32. The warranty in the instant case is the uniform warranty of the Automobile Manufacturers Association, whose members include General Motors, Chrysler, Ford, Studebaker-Packard, Checker Motors Corp., and American Motors. Thus Judge Francis in the present case remarked: "The gross inequality of bargaining position occupied by the consumer in the automobile industry is thus apparent. There is no competition among the car makers in the area of the express warranty. Where can the buyer go to negotiate for better protection?" 32 N.J. at 391, 161 A.2d at 87.

1. Minn. Stat. Ann. §§ 325.08 to .14 (1947). Section 325.12, the nonsigner clause, provides: "Willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of [this act] . . . whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

2. Minn. Const. art. 3, § 1; art. 4, § 1.

must sell a commodity to another at a different level of the distribution system, has been sanctioned by the fair-trade provisions enacted by the various state legislatures. The backbone of every fair-trade law is the nonsigner clause, by which an individual not a party to a price-fixing contract may be bound by its terms. The nonsigner provision authorizes agreements between manufacturers and retailers of trade-marked or branded commodities, whereby the latter not only bind themselves but, in effect, freeze the commodity price, binding all retailers throughout the state.

In the celebrated case of *Dr. Miles Medical Co. v. John D. Park & Sons Co*,[3] the Supreme Court of the United States ruled that all resale price maintenance agreements in interstate commerce were violative of the Sherman Anti-Trust Act. However, the same Court, in *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*,[4] upheld a state statute authorizing resale price maintenance agreements as an appropriate means for protecting the good will attached to a producer's trade-mark. Shortly thereafter, Congress enacted the Miller-Tydings Act,[5] exempting fair-trade legislation from the previous prohibitions of the Sherman Act. In 1951, however, in *Schwegmann Bros. v. Calvert Distillers Corp.*,[6] the Court jeopardized effective fair-trade legislation by construing the Miller-Tydings Act as shielding only consensual agreements from the antitrust laws. This decision exposed the controversial nonsigner clause to the statutory prohibtions on restraint of trade. In an attempt to bypass the effect of *Schwegmann Bros. v. Calvert Distillers Corp.*, the McGuire Act was enacted,[7] expressly adding nonsigner enforcement to the federal antitrust exemption earlier conferred.

Relying upon *Old Dearborn*, many states passed fair-trade laws. The courts, following the rationale of this decision, held such legislation constitutional. In recent years, however, there has been a decided trend in the opposite direction. Nonsigner provisions have been declared unconstitutional in sixteen states.[8] The split in authority evidenced by these cases is clear-cut and uncompromis-

3. 220 U.S. 373 (1911). The Court found that a system of contracts between manufacturers and wholesale and retail merchants, which sought to control sale prices of such dealers by fixing the amount the consumer should pay, amounted to an unlawful restraint of trade, invalid at common law, and, so far as interstate commerce was affected, invalid under the Sherman Anti-Trust Act, 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958).

4. 299 U.S. 183 (1936). The Court, in holding a state fair-trade law constitutional, stated that the law's "sole purpose . . . is to afford a legitimate remedy for an injury to the good will which results from the use of trade-marks, brands or names. . . ." Id. at 198.

5. 50 Stat. 693 (1937), 15 U.S.C § 1 (1958).

6. 341 U.S. 384 (1951).

7. 66 Stat. 631 (1952), 15 U.S.C. § 45 (1958), which legalizes state nonsigner provisions in interstate commerce where such provisions are valid components of a state fair-trade law.

8. 2 Trade Reg. Rep. ¶ 3003. The highest courts of Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, New Mexico, Ohio, Oregon, South Carolina, Utah, Washington, and West Virginia have declared the nonsigner clause unconstitutional. See notes 10-12 infra.

ing. The difference between the two lines of decisions is the acceptance or rejection of the reasoning advanced by the Supreme Court in *Old Dearborn.* At the present time, the cases which do not accept *Old Dearborn* represent the dynamic force in the fair-trade area.

In *Old Dearborn,* the United States Supreme Court rejected the contention that the nonsigner clause of a state fair-trade law was a price-fixing provision which had the effect of denying to the owner of property, within the scope of the statute, the right to determine for himself the price at which he would sell. The Court reasoned that the nonsigner clause was not a restriction on the commodity, but rather a restraint on the use of the trade-mark or brand of the producer by which such goods were known. The essence of the violation, therefore, consisted not in the bare disposition of the product but in a prohibited use of the trade-mark or brand which was still the producer's property. The so-called property interest in the trade-mark or the goodwill of the brand name became the "polite fiction" of *Old Dearborn.* This line of reasoning has been the basis for the vast majority of state decisions holding fair-trade and nonsigner provisions to be within the ambit of their respective state constitutions.[9]

The courts opposed to the nonsigner clause have invariably attacked the property interest fiction of the Supreme Court, although the specific grounds for declaring the provisions unconstitutional have varied. The theories most often adopted are: (1) violation of due process of law;[10] (2) denial of equal protection of the laws;[11] and (3) unlawful delegation of legislative power.[12]

9. See, e.g., Max Factor & Co. v. Kunsman, 5 Cal. 2d 446, 55 P.2d 177 (1936); General Elec. Co. v. Klein, 34 Del. Ch. 491, 106 A.2d 206 (Sup. Ct. 1954); General Elec. Co. v. Kimball Jewelers, Inc., 333 Mass. 665, 132 N.E.2d 652 (1956); Bourjois Sales Corp. v. Dorfman, 273 N.Y. 167, 7 N.E.2d 30 (1937); Lionel Corp. v. Grayson-Robinson Stores, Inc., 15 N.J. 191, 104 A.2d 304 (1954).

10. Union Carbide & Carbon Corp. v. White River Distribs., 224 Ark. 558, 275 S.W.2d 455 (1955); Olin Mathieson Chem. Corp. v. Francis, 134 Colo. 160, 301 P.2d 139 (1956); Cox v. General Elec., Co., 211 Ga. 286, 85 S.E.2d 514 (1955); Bissell Carpet Sweeper Co. v. Shane Co., 237 Ind. 188, 143 N.E.2d 415 (1957); General Elec. Co. v. American Buyers Co-op., 316 S.W.2d 354 (Ky. 1958); Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Mkts., 231 La. 51, 90 So. 2d 343 (1956); Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co., 334 Mich. 109, 54 N.W.2d 268 (1952); McGraw Elec. Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 68 N.W.2d 608 (1955); Skaggs Drug Center v. General Elec. Co., 63 N.M. 215, 315 P.2d 967 (1957); Union Carbide & Carbon Corp. v. Bargain Fair, Inc., 167 Ohio St. 182, 147 N.E.2d 481 (1958); General Elec. Co. v. Wahle, 207 Ore. 302, 296 P.2d 635 (1956); Rogers-Kent, Inc. v. General Elec. Co., 231 S.C. 636, 99 S.E.2d 665 (1957); General Elec. Co. v. A. Dandy Appliance Co., — W. Va. —, 103 S.E.2d 310 (1958).

11. McGraw Elec. Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 68 N.W.2d 608 (1955); General Elec. Co. v. Wahle, 207 Ore. 302, 296 P.2d 635 (1956).

12. Olin Mathieson Chem. Corp. v. Francis, 134 Colo. 160, 301 P.2d 139 (1956); Bissell Carpet Sweeper Co. v. Shane Co., 237 Ind. 188, 143 N.E.2d 415 (1957); Quality Oil Co. v. E. I. Du Pont De Nemours & Co., 182 Kan. 488, 322 P.2d 731 (1958); Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Mkts., 231 La. 51, 90 So. 2d 343 (1956); McGraw Elec. Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 68 N.W.2d 608 (1955); Remington Arms Co. v. Skaggs, — Wash. 2d —, 345 P.2d 1085 (1959).

The Minnesota court relied upon the third theory. The nonsigner clause was found to constitute an unlawful delegation to private persons of an arbitrary right to fix future prices for brand name commodities, and, therefore, to bind nonparty retailers and consumers without the safeguard of a hearing or review, or compliance with any legislative standard. The rationale of the decision paralleled the reasoning underlying previous condemnations of nonsigner provisions as unconstitutional grants of legislative power.

In *Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Mkts.*,[13] the court, referring to a nonsigner clause as a price-fixing law, held the provision invalid as an unlawful delegation of power to fix prices, which power "to regulate private business by coercive price fixing is a legislative function which may be invoked only . . . when the measure is seen to have a reasonable relation to the public welfare and is neither arbitrary nor discriminatory."[14] The court stated that it would "not hesitate to strike down legislation vesting in private persons the right to determine the state of things upon which the effect of the law depends as this is legislative delegation in its most obnoxious form."[15] The court was unequivocally opposed to any grant of power without safeguard to the individual and, as in the present case, could under no circumstances see any economic justification for the statute.

Olin Mathieson Chem. Corp. v. Francis[16] also treated the clause as a price-fixing law, holding it to be invalid per se since it vested in a private person the right to determine the time and conditions upon which the effect of the law depends. The court considered the grant of power to be so arbitrary as to be even beyond the power of the legislature itself.[17]

Quality Oil Co. v. E. I. DuPont De Nemours & Co.[18] found that power to fix rates or prices binding upon all, irrespective of their consent, was a legislative power which cannot be abdicated. The grant of power to the manufacturer was held to be so arbitrary and without safeguard[19] as to amount to what Mr. Justice Cardozo had formerly termed "delegation running riot."[20] *Quality Oil Co.* also adopted the theory advanced in *Olin Mathieson* that such statutes, although purportedly enacted to benefit the public, are actually designed to aid the manufacturer by allowing him alone to price-fix and bind nonsigners.[21]

13. 231 La. 51, 90 So. 2d 343 (1956).
14. Id. at 66, 90 So. 2d at 348.
15. Id. at 65, 90 So. 2d at 348.
16. 134 Colo. 160, 301 P.2d 139 (1956).
17. Id. at 176, 301 P.2d at 147.
18. 182 Kan. 488, 322 P.2d 731 (1958).
19. "A trade-mark owner is thus empowered to determine whether the provisions of the law, i.e., the nonsigner clause, shall be placed into operation, and . . . to what commodities it shall apply and what minimum prices it shall make binding on nonsigning parties, and is also empowered to amend or alter the operation of the law by changing minimum prices, by eliminating or adding commodities, and fixing minimum prices for those added. In short, the trade-mark owner is privileged to place the law into effect and to amend or alter it at his whim or caprice." Id. at 496, 322 P.2d at 737.
20. Ibid., citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935).
21. Quality Oil Co. v. E. I. Du Pont De Nemours & Co., 182 Kan. 488, 497, 322 P.2d 731, 738 (1958).

In *Remington Arms v. Skaggs*,[22] as in the above mentioned decisions, the court questioned the economic reasonableness of the nonsigner provision, stating that what was described as price-fixing by coercion in *Schwegmann Bros. v. Calvert Distillers Corp.* was still compulsory price-fixing under any nonsigner clause.[23] It should be noted, however, that the first premise of any such argument is the destruction of the reasoning in *Old Dearborn,* thus opening the way for treatment of the clause as a price-fixing provision.[24] The courts here and in the instant case have, therefore, approached the problem in a radically different manner than did the Court in *Old Dearborn.* They did not attack the law of *Old Dearborn,* but rather the fundamental premise, the "property interest," upon which the decision was based.

Although aware of the reasons for fair-trade acts and the differences in opinion as to their economic soundness, the court in the principal case made no attempt to reconcile the existing conflict in authorities. Rather, it advocated a more realistic appraisal of the nonsigner act itself. Viewing the act in the context of our present economic climate, the court rejected the ostensible justification of the act as protection of trade name good will. It found the act's true character to be selective price control, leaving the manufacturer of trade-mark products the arbitrary right to determine when and if the act shall take effect.[25] While it would appear that the court's realistic appraisal of the merits or demerits of fair trade is reasonably accurate, it is almost impossible to reconcile the court's delegation argument with such United States Supreme Court decisions as *Sunshine Anthracite Coal Co. v. Adkins*,[26] *Yakus v. United States*,[27] and *American Power & Light Co. v. SEC*.[28] There was no unfettered discretion for the manufacturer to make law here. Indeed, no legislative function was involved. The right to make law had not been abdicated by the legislature. Rather, it had enacted a complete law. The individual manufacturer received only an option to bring himself within its ambit if his product were trade-marked and in free and open competition.[29]

22. — Wash. 2d —, 345 P.2d 1085 (1959).

23. Id. at —, 345 P.2d at 1086.

24. The Washington court, in considering the effects of fair trade, quoted General Elec. Co. v. Wahle, 207 Ore. 302, 322, 296 P.2d 635, 645 (1956). "From the facts and statistics given, the accuracy of which seem beyond question, it is plainly apparent that the consumer is not benefited . . . . [I]t is obvious that the whole scheme of the Fair Trade Acts is one for private, rather than public, gain. . . ." Id. at —, 345 P.2d at 1087-88.

25. "[I]t must be conceded that he is given the privilege to place the law in effect and to amend or alter it at his will. He may do this without regard to the interest or welfare of nonsigners or the consumer who represents the public. The law does not provide for any standard or condition as to the necessity for the act. It gives to the trade-mark owner carte blanche authority to make that determination alone." — Minn. at —, 102 N.W.2d at 534-35.

26. 310 U.S. 381 (1940).

27. 321 U.S. 414 (1944).

28. 329 U.S. 90 (1946).

29. See Corning Glass Works v. Max Dichter Co., — N.H. —, 161 A.2d 569, 574 (1960), where the court upheld the validity of the New Hampshire nonsigner clause. See N.H. Rev. Stat. Ann. § 357:1-4 (1955).

In determining whether such statutes are arbitrary grants of power to private individuals, numerous courts have decided the reasonableness of the delegation only through a thorough perusal of the economic facts of fair trade. The Supreme Court did so in *Old Dearborn.* Since it found the question to be debatable, however, it accepted and carried into effect the determination of the state legislature.[30] Here, the Minnesota court focused realistically on the effects of such legislation in our present day economy, and found the act unreasonably destructive of consumer interests and violative of the personal liberty and private property rights of nonsigning retailers. It is clear that the court was concerned with the wisdom of the legislation. Such is not a judicial function. The only question the court had the right to consider was the power of the legislature to enact the statute. The wisdom or economic desirability of the legislation was irrelevant to the issue of legislative power.

However questionable might be the court's right to make the appraisal, the validity of its contentions cannot be denied. The consumer is frequently neither protected from nor benefited by such legislation; the law becomes operative at the manufacturer's option; and, when enacted, a manufacturer and retailer have the power to fix prices in accordance with their own interest. It is inimical to sound legislative functioning to entrust one person with power to regulate the business of another, especially a competitor. The very existence of fair-trade acts, and, in particular, the federal statutory exemptions, conflicts with the basic philosophy of our national antitrust policy. The throttling of price competition in the process of distribution protected by fair trade is an inevitable result of such legislation. Moreover, as indicated in the instant case, fair trade facilitates horizontal price-fixing at all levels. Fair trade, to say the least, has spawned many evils.[31] There exists no compelling reason why such power should be granted to private persons at the sacrifice of safeguards to both the unwilling retailer and the consumer. Consequently, the wisdom of fair-trade laws should be reconsidered by state legislatures. The question does not belong with the courts.

Trusts—Apportionment of Dividend Between Trust Corpus and Income Under the Osborne Rule.—A trust estate created in 1915 held 26,500 shares of the stock of Standard Oil of Indiana and 4,100 shares of the stock of Borg-Warner. During the term of the trust, these companies effected an extraordinary stock distribution. In each instance, the company transferred to its capital stock account its entire capital surplus and sufficient earned surplus to support the additional shares at their par value in the capital stock account. Since the trust had been created prior to the effective date of Section

30. Old Dearborn Distrib. Co. v. Seagram-Distillers Corp. 299 U.S. 183, 195-96 (1936).

31. Typical articles attacking fair trade may be found in Fulda, Resale Price Maintenance, 21 U. Chi. L. Rev. 175 (1953); Herman, A Note on Fair Trade, 65 Yale L.J. 23 (1955). For a summary of the case in favor of fair trade and answers to the objections, see Adams, Resale Price Maintenance: Fact and Fancy, 64 Yale L.J. 967 (1955).

17-a of the New York Personal Property Law,[1] the additional shares were to be apportioned between principal and income according to the "intact value" rule formulated in 1913 by the court of appeals in *In the Matter of Osborne*.[2] The trustee applied to the shares involved the percentages in which earned surplus and capital surplus had contributed in each case to the necessary supplementation of the capital stock account. That part of the shares which represented earned surplus it allocated to income, having determined that such allocation would not violate the *Osborne* "intact value" formula. The part representing capital surplus was added directly to the trust corpus.[3] Following the death of the life tenant in 1955, the trustee brought a proceeding to settle the accounts.[4] The New York Supreme Court reserved decision and settlement of this allocation. Objections were filed by the executors of the life tenant, and the court directed a reference.[5] The appellate division struck the provision for the reference and ordered the shares distributed according to the trustee's formula.[6] The court of appeals, two judges dissenting, affirmed. That part of the total capitalization derived from capital surplus cannot be regarded as a capitalization of earnings to be apportioned under the *Osborne* rule. *In the Matter of Bingham*, 7 N.Y.2d 1, 163 N.E.2d 301, 194 N.Y.S.2d 465 (1959).

The courts have long been perplexed by the problem of the allocation of stock dividends between the life tenant and the remaindermen of a trust.[7] The issue arises because, in most instances, the settlor of the trust does not make known his intention as to how dividends are to be treated. In the absence of any stated intention, most jurisdictions have followed one of three rules, named after the states of their origin. The Kentucky rule simply allocates any dividend declared out of earnings in its entirety to the parties entitled to income at the time the dividend is declared, no matter what the source or the form of the dividend or the time when the fund out of which it is declared was earned.[8] The Massachusetts rule considers all stock dividends

1. N.Y. Pers. Prop. Law § 17-a. The effective date was May 17th, 1926. This section adopts the Massachusetts rule. See text accompanying note 9 infra.

2. 209 N.Y. 450, 103 N.E. 723 (1913). See note 20 infra.

3. Standard Oil transferred $405,746,400 to its capital stock account, of which 43.035% was charged to capital surplus. The balance, 56.965%, was charged to earned surplus. The trustee ascertained that an award of 56.965% of the new shares, or 15,095.73 shares, to income would not impair the "intact value" of the trust principal, and the award was so made. The balance, 11,404.27 shares, was awarded to principal.

Borg-Warner transferred $25,402,088 to its capital stock account, of which $21,340,734, or 84.0118%, was charged to capital surplus. The balance, 15.9882%, was charged to earned surplus. The trustee ascertained that an award of 15.9882%, or 1,311 shares, to income would not impair the "intact value" of the principal, and the award was so made. The remainder, or 6,889 shares, was awarded to principal.

4. N.Y. Civ. Prac. Act §§ 1308, 1310.

5. In the Matter of Payne, 11 Misc. 2d 367, 161 N.Y.S.2d 217 (Sup. Ct. 1957).

6. 4 App. Div. 2d 937, 167 N.Y.S.2d 999 (1st Dep't 1957) (memorandum decision).

7. "Few legal questions present greater intrinsic difficulties, or have called forth a greater contrariety of views and opinions, as well as of practical results, than the one now under consideration. . . ." Annot., 12 L.R.A. 769 (1908).

8. Hite v. Hite, 93 Ky. 257, 20 S.W. 778 (1892). See Annot., 130 A.L.R. 492 (1941).

as principal for the remaindermen and all cash or property dividends as income belonging to the life tenant.[9] The Pennsylvania rule inquires as to the time when the fund out of which the dividend is declared was earned, holding that the remaindermen are entitled to retain in the principal all that is earned prior to the creation of the trust, while the income beneficiary is entitled to all that is earned after that time.[10]

New York has followed all three rules. The Pennsylvania rule, adopted in *Osborne*,[11] supplanted the Kentucky rule, which had been followed since *In the Matter of Kernochan*.[12] In 1926 the legislature enacted Section 17-a of the Personal Property Law, embodying the Massachusetts rule.[13] However, the statutory change was not retroactive, so that all trusts created prior to 1926 are still governed by the rule of *Osborne*.[14]

The trust in *Osborne*, created in 1908, consisted of 3,000 shares of the stock of the Singer Manufacturing Company. At the time of the trust's creation the company's capital stock was $30,000,000 and its surplus of accumulated earnings amounted to $37,604,206. In June 1910, the surplus had risen to over $51,500,000. In that month, the stockholders voted to retain $30,000,000 of the surplus as additional working capital, increasing the capital stock account to $60,000,000. A dividend of $30,000,000 was declared out of the increase, the trust receiving 2,920 shares of the new stock. The question arose whether the life tenant should receive the whole dividend[15] or whether it should be apportioned between the beneficiary and the trust corpus.

The court distinguished between ordinary and extraordinary stock dividends. Ordinary dividends are deemed to have been earned at the date of their declaration, but an adherence to this rule in the case of "extraordinary and unusual dividends declared in whole or in part from earnings actually accumulated prior to the creation of the trust or the purchase of the stock . . . in many cases shocks the sense of justice."[16] The court then formulated these rules:

1. Ordinary dividends, regardless of the time when the surplus out of which they are payable was accumulated, should be paid to the life beneficiary of the trust. 2. Extraordinary dividends, payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they entrench

9. Minot v. Paine, 99 Mass. 101 (1868).

10. Nirdlinger's Estate, 290 Pa. 457, 139 Atl. 200 (1927); Earp's Appeal, 28 Pa. 368 (1857).

11. 209 N.Y. 450, 103 N.E. 723, 823 (1913).

12. 104 N.Y. 618, 11 N.E. 149 (1887).

13. See text accompanying note 9 supra.

14. See In the Matter of Hagen, 262 N.Y. 301, 186 N.E. 792 (1933); Equitable Trust Co. v. Prentice, 250 N.Y. 1, 164 N.E. 723 (1928).

15. The appellate division affirmed an award of the entire distribution to the life tenant on the basis of earlier cases, particularly Robertson v. de Brulatour, 188 N.Y. 301, 80 N.E. 938 (1907); Lowry v. Farmers' Loan & Trust Co., 172 N.Y. 137, 64 N.E. 796 (1902); and McLouth v. Hunt, 154 N.Y. 179, 48 N.E. 548 (1897). The court noted, however, that "if this were an open question," it would apportion the shares between the life tenant and the remaindermen. 153 App. Div. 312, 315, 138 N.Y. Supp. 18, 20 (2d Dep't 1912).

16. 209 N.Y. at 477, 103 N.E. at 731.

in whole or in part upon the capital of the trust fund as received from the testator or maker of the trust or invested in the stock, in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary in such a way as to preserve the integrity of the trust fund.[17]

In *Osborne,* the court did not give a thorough explanation of the theory behind its decision. Its theory, if any, was embodied in two extensive quotations from text writers.[18] In both instances, the writers discussed the Pennsylvania rule, which they expressed in terms of the time of accumulation of the fund. When speaking of extraordinary dividends, however, the court made no mention of the time of accumulation but only of "preserving the integrity of the trust fund." Consequently, what is the basis of the rule?

The *Osborne* court awarded a certain percentage of the stock to the income beneficiary and the remainder to the capital of the trust fund. No computations were included in the opinion or appended to it so as to indicate how the figure was ascertained. It has been said that it was based upon "the ratio of the amount of surplus that had accumulated before and the amount that had accumulated after the commencement of the life interest . . . ."[19] The basis seems, then, to be derived from the time of accumulation theory. Whatever the basis, the figure was changed on a motion to amend a remittitur. The court stated: "The proposition decided by us in this case is, that in all cases of extraordinary dividends, either of money or stock, sufficient of the dividend must be retained in the corpus of the trust to maintain that corpus unimpaired and the remainder thereof must be awarded to the life beneficiary."[20] In the course of developing the "intact value" formula, under which emphasis is placed on "maintaining the corpus unimpaired," the court made only passing reference to the time of accumulation theory.

The *Osborne* rule next arose in the New York Court of Appeals in *United States Trust Co. v. Heye,*[21] where it was argued that, according to *Osborne,*

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17. Ibid.

18. Id. at 475-76, 103 N.E. at 730-31, citing 2 Cook, Corporations § 552 (6th ed. 1903), and 7 Thompson, Corporations § 5414 (2d ed. 1915).

19. Annot., 130 A.L.R. 492, 546 n.14 (1941).

20. In the Matter of Osborne, 209 N.Y. 484, 485, 103 N.E. 823 (1913). To accomplish this result, the court set forth the "intact value" formula: "The intrinsic value of the trust investment is to be ascertained by dividing the capital and the surplus of the corporation existing at the time of the creation of the trust by the number of shares . . . then outstanding, which gives the value of each share, and that amount must be multiplied by the number of shares held in the trust. The value of the investment represented by the original shares after the dividend has been made is ascertained by exactly the same method. The difference between the two shows the impairment of the corpus of the trust. If the dividend is of money the amount of that difference is to be retained by the trustee as capital, and the remainder paid to the life beneficiary. If the dividend is in stock the amount of impairment in money must be divided by the intrinsic value of a share of the new stock, and the quotient gives the number of shares to be retained to make the impairment good—the remaining shares going to the life beneficiary. Market value, good will and like considerations cannot be considered in apportioning a dividend." Ibid.

21. 224 N.Y. 242, 120 N.E. 645 (1918).

the value of the trust principal was forever fixed at the time of the creation of the trust, and that all subsequent increases of value, of whatever kind, belonged to the income beneficiaries. The court rejected this argument. "While the corpus of the fund may not be depleted, yet the corpus may accumulate or increase, and until there is some division in the nature of a dividend payable out of accumulated earnings or profits, there is nothing that can be awarded as income to beneficiaries."[22] In every apportionment under the *Osborne* rule subsequent to the *Heye* decision, the value to be kept intact has been the value at the time of acquisition by the trust as augmented by any subsequent natural increments through increased capital.[23] The *Heye* court did not discuss the basis of the *Osborne* decision.

Such a discussion came seven years later in *Bourne v. Bourne*,[24] in which Judge Andrews attempted to clarify the rule while admitting the difficulties in administering it. He stated that "our main purpose has been to preserve intact the capital of the trust estate, increased or decreased by any normal rise or fall in values, assigning to the life tenant but the income therefrom."[25] This certainly sounds like the "intact value" formula. How is this result obtained?

> In other cases the directors have declared extraordinary cash dividends, payable from surplus profits, or the effect of their action has been to transfer these profits to capital, and to divide them in the form of shares. What we wish to do is clear. These profits may have been made before the trust estate was created. Or after. Or both before and after. Under the first and second contingencies the cash or stock dividends go to the remainderman or to the life tenant respectively. Under the last they should be divided between the two *in the proportion that the earnings before bear to the earnings after*.[26]

This method is strikingly similar to the one employed in the first *Osborne* opinion. It was followed in *Equitable Trust Co. v. Prentice*,[27] wherein Chief Judge Cardozo stated that "as between life beneficiary and remainderman a stock dividend would be reckoned as principal or income according to the origin of the surplus out of which it was declared. To the extent it distributed a surplus existing at the creation of the trust, it would be allocated to principal; to the extent that it distributed a surplus earned thereafter, it would be allocated to income."[28]

Chief Judge Cardozo made no mention of "intact value," nor, until the instant case, had any other decision of the New York Court of Appeals. The standard manner of explaining the *Osborne* rule, if undertaken at all, has been

22. Id. at 253, 120 N.E. at 648. See Macy v. Ladd, 227 N.Y. 670, 125 N.E. 829 (1920).

23. See, e.g., In the Matter of Hagen, 262 N.Y. 301, 306, 186 N.E. 792, 793 (1933) (subscription rights increase value of principal); Pratt v. Ladd, 253 N.Y. 213, 170 N.E. 895 (1930).

24. 240 N.Y. 172, 148 N.E. 180 (1925).

25. Id. at 175, 148 N.E. at 180-81.

26. Id. at 176, 148 N.E. at 181. (Emphasis added.)

27. 250 N.Y. 1, 164 N.E. 723 (1928).

28. Id. at 7-8, 164 N.E. at 723.

in terms of the time of accumulation.[29] It is in no way suggested that these different possible bases of the rule are contradictory. They are, in fact, two sides of the same coin. If the theory of the relative times of accumulation is accepted as the basis of the *Osborne* decision, the "intact value" formula is precisely the method by which those relative times are determined—or, at least, it is the one method for reaching a result which would satisfy that principle as closely as possible. As the majority in the instant case noted, it is impossible to "trace specific dollars of earnings or of capital as they are received and disbursed. . . ."[30]

The *Osborne* court, at least in its second opinion, did not ask for such a search. Instead, it merely sought to compensate the trust corpus for whatever dimunition the new dividend might cause in the book or intrinsic value of the original shares as they were valued at the date of the creation of the trust. By maintaining the value of the corpus as of that time (supplemented by natural increments), the "intact value" formula equivalently retains in the principal all surplus accumulated by the corporation prior to that time. Under the formula, what remains after the corpus has been restored to its original value represents what was accumulated after the creation of the trust.

The question raised by the instant case, however, is more fundamental. It arises from the fact, noted by the minority, that the bookkeeping practice of segregating "capital surplus" and "earned surplus" was introduced about 1920. At the time of the *Osborne* decision, then, all surplus was in one account. The minority concluded that the new practice should not control trust interests. "Whether the surplus is in one account, generally denominated 'surplus,' or in two accounts, denominated 'capital surplus' and 'earned surplus,' the apportionment under the Osborne-intact-value formula must be made in the same way, with the same result on the respective property rights of the life beneficiary and of the remaindermen."[31] The minority, therefore, would apply the "intact value" formula to the entire stock distribution.[32]

If the *Osborne* court meant to lay down a rule by which all manner of surplus was to be apportioned between principal and income, then the minority here must be correct. But neither surplus nor earnings, under modern corporate practice, retain the simplicity of meaning they had when the Pennsylvania (*Osborne*) rule was first enunciated.[33] If the rule were meant to apportion

29. See In the Matter of Fosdick, 4 N.Y.2d 646, 654, 152 N.E.2d 228, 233, 176 N.Y.S.2d 966, 972 (1958); Pratt v. Ladd, 253 N.Y. 213, 218, 170 N.E. 895, 897 (1930).

30. 7 N.Y.2d at 9, 163 N.E.2d at 304, 194 N.Y.S.2d at 470.

31. Id. at 24, 163 N.E.2d at 313, 194 N.Y.S.2d at 482.

32. Applied to the entire Standard Oil distribution, the "intact value" formula, as interpreted by the minority, would allocate the entire 26,500 shares to income, or 11,404.27 more than awarded by the majority. Of the 8,200 shares in Borg-Warner, 4,463.9702 shares would go to the corpus and 3,736.0298 to income, of 2,425.0298 more than awarded by the majority. Id. at 25, 163 N.E.2d at 313-14, 194 N.Y.S.2d at 482-83.

33. Cunningham Estate, 395 Pa. 1, 11, 149 A.2d 72, 78 (1959). See Cohan and Dean, Legal, Tax and Accounting Aspects of Fiduciary Apportionment of Stock Proceeds: The Non-Statutory Pennsylvania Rules, 106 U. Pa. L. Rev. 157, 205 (1957). These sources suggest that not everything labelled "earnings" should be included in apportionment. "Instead, there should be room for the concept that accumulated [earned] surplus is less an

only "earnings,"[34] then the "intact value" formula as applied to all surplus cannot meet the assignment.

Beneath this dispute there is a difference between the majority and minority opinions in their approach toward determining the probable intention of the testator, which the *Osborne* rule was designed to further. The minority[35] starts by accepting the view expressed by Chief Judge Cardozo, in *Equitable Trust Co. v. Prentice*,[36] that the primary benefit was intended to be conferred upon the life beneficiary. It therefore declares that "all that the remaindermen are entitled to is the original book value plus natural capital increments. The income beneficiary is entitled to everything else."[37] The minority, therefore, would give the whole dividend to income (to the extent that it does not impair "intact value") even where it capitalizes both capital profits and ordinary earnings.[38]

There is another side to this intention question, *i.e.*, what benefit was intended by the testator. This involves an interpretation of general terms such as "rents, issues, profits and incomes."[39] While not disputing the minority's view about the intended recipient of the primary benefit,[40] the majority's analysis of the intended subject matter of the benefit leads it to regard the "intact value" formula as a "safeguard of the rights of principal and a limitation on the rights of income"[41] and a "minimum figure below which the corpus of the trust could not be reduced, not as a jumping-off place above which income could claim everything. . . ."[42]

The majority seems to stand on better ground, for the trend of the cases has been to reduce the benefits received by the income beneficiary. By ordering an apportionment, the *Osborne* decision itself had this effect, since under the earlier rule the entire amount would have gone to the life tenant.[43] The later cases further curbed the claims of income by narrowing the concept of an "apportionable event"[44] which would call the *Osborne* rule into play.[45] The

income retention than it is a vehicle to replace capital equipment at constantly increasing costs, thereby assuring future income which otherwise might be lost to the life tenant." Cohan and Dean, op. cit. supra at 205-06.

34. The second Osborne opinion does not use the term "earnings," speaking only of surplus. See note 20 supra. The first opinion uses both terms. See text accompanying note 17 supra.

35. 7 N.Y.2d at 18, 163 N.E.2d at 310, 194 N.Y.S.2d at 477.

36. 250 N.Y. 1, 8, 164 N.E. 723, 724 (1928).

37. 7 N.Y.2d at 24, 163 N.E.2d at 313, 194 N.Y.S.2d at 482.

38. Ibid.

39. The trust in the instant case contained these terms. 7 N.Y.2d at 7, 163 N.E.2d at 303, 194 N.Y.S.2d at 468.

40. It has been questioned elsewhere. See 3 Scott, Trusts § 235A (2d ed. 1956).

41. 7 N.Y.2d at 9, 163 N.E.2d at 304, 194 N.Y.S.2d at 469.

42. Ibid.

43. See note 15 supra.

44. The term does not appear in the New York cases but has been used by the Pennsylvania courts, e.g., Cunningham Estate, 395 Pa. 1, 149 A.2d 72 (1959), and by writers, e.g., Cohan and Dean, op. cit. supra note 33.

45. In the Matter of Hagen, 262 N.Y. 301, 186 N.E. 792 (1933) (no apportionment on

legislature has completed this movement by adopting the Massachusetts rule declaring all stock dividends to be principal.[46]

The courts have all agreed that the claim of income can be made only when there has been a distribution in the nature of a dividend.[47] A question implicit in this case is whether a capital increment may also be distributed with a dividend and retain its status as a capital increment.

Modern accounting practice regards capital surplus as more akin to capital than earnings.[48] Capital surplus may be derived generally from paid-in surplus, reappraisal surplus, surplus from restatement of capital stock, and surplus from the sale of reacquired shares.[49] Here the majority saw only one situation under which capital surplus may have its origin in earnings. The New York Stock Exchange requires that the earned surplus account be charged with the market value of stock distributed through a dividend,[50] with the excess of market value over par value being transferred to capital surplus. Since, as an ordinary stock dividend, the shares originally capitalized would go to the income beneficiary, if the resulting capital surplus were then used to capitalize an extraordinary dividend, "the award of any such stock to income would actually represent a double distribution to the income beneficiary of the identical earnings!"[51] No justification appears, therefore, for regarding the distribution of capital surplus as falling under the claim of the income beneficiary.

The question presented to the New York courts in the earlier cases construing

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subscription rights); United States Trust Co. v. Heye, 224 N.Y. 242, 120 N.E. 645 (1918) (no apportionment of preacquired holdings); In the Matter of Lisberger, 189 Misc. 277, 71 N.Y.S.2d 585 (Surr. Ct. 1947), aff'd mem., 273 App. Div. 881, 78 N.Y.S.2d 199 (1st Dep't), motion for leave to appeal denied, 298 N.Y. 934 (1948) (no apportionment on stock split).

46. N.Y. Pers. Prop. Law § 17-a.

47. United States Trust Co. v. Heye, 224 N.Y. 242, 254, 120 N.E. 645, 648 (1918); Baker v. Thompson, 181 App. Div. 469, 472, 168 N.Y. Supp. 871, 873 (1st Dep't), aff'd mem., 224 N.Y. 592, 120 N.E. 858 (1918). Even where there have been transfers from earned surplus to capital and a stock split declared two years later, the distribution has been held nonapportionable since there was no intention to declare a dividend at the time the transfer was made. In the Matter of Strong, 198 Misc. 7, 96 N.Y.S.2d 75 (Surr. Ct.), aff'd mem., 277 App. Div. 1157, 101 N.Y.S.2d 1021 (4th Dep't 1950).

To equate the type of problem involved here with that of the distinction between a stock dividend and a stock split is to invite confusion. For some purposes, at least, any distribution characterized by a permanent retention of earnings in the business through formal transfer of earned surplus is a dividend, even if the shares distributed represent only in part the earnings thus retained. See, e.g., In the Matter of Davis, 11 Misc. 2d 372, 373, 128 N.Y.S.2d 152, 153 (Surr. Ct. 1953). This evades the question to be decided, however, in an Osborne apportionment. See In the Matter of Sanford, 4 Misc. 2d 487, 161 N.Y.S.2d 507 (Surr. Ct. 1957), where the court agreed that such a distribution (including the same Standard Oil distribution involved in Bingham) was a dividend, and proceeded to apportion it, as here. The dividend split terminology is used in the present case by the minority but never mentioned by the majority.

48. Am. Institute of Accounting, Accounting Research Bull. No. 43, ch. 1, at 11 (1953).

49. Sanders, Hatfield & Moore, A Statement of Accounting Principles 93-94 (1938).

50. New York Stock Exchange, Company Manual § A-13, at A-235 (Aug. 15, 1955).

51. 7 N.Y.2d at 11, 163 N.E.2d at 305, 194 N.Y.S.2d at 471.

the *Osborne* rule was fundamentally whether the corporation had distributed capital or earnings. The court now has recognized that the corporation may distribute both at once. The modern bookkeeping practice of segregating capital surplus and earned surplus, even though initiated after *Osborne,* offers an opportunity of more nearly realizing the intention of that decision than had been before possible. The New York courts have long complained about the *Osborne* rule[52] and the legislature has confined it to trusts created before 1926.[53] Perhaps it should be done away with altogether.[54] While it is still with us, however, and in the absence of a showing that the corporation erred in crediting some items to its capital surplus account,[55] there is no reason why the courts should not accept whatever help the corporate books can offer.

52. "The rule of the Osborne case was supposed to be simple and just; it proved to be confusing and at times unjust." In the Matter of Hagen, 262 N.Y. 301, 305, 186 N.E. 792, 793 (1933).

53. N.Y. Pers. Prop. Law § 17-a.

54. See Browning, Extraordinary Corporate Distributions Under the New York Law of Trusts—A Reexamination of the Osborne Rule in the Light of Experience, 4 Syracuse L. Rev. 293 (1953).

55. 7 N.Y.2d at 13, 163 N.E.2d at 306, 194 N.Y.S.2d at 473.