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Case Notes

CASE NOTES

Administrative Law—Administrative Procedure Act as Means for Production and Inspection of Papers.—Defendant was indicted on two counts of willful tax evasion[1] for the years 1954 and 1955. Defendant moved, pursuant to Rules 16 and 17(c) of the Federal Rules of Criminal Procedure,[2] for production, discovery and inspection, prior to trial, of certain papers and statements which had been obtained by the Internal Revenue Service prior to defendant's indictment. These materials had originally been taken in connection with the prosecution of defendant's husband for income tax evasion, which had resulted in mistrial three months previous to defendant's indictment. Defendant's motion was based upon the necessity of obtaining the material in order to prepare an adequate defense. The motion was sustained and the Government ordered to produce and permit defendant to inspect and copy all statements and documents obtained from defendant by the Internal Revenue Service. *United States v. Fancher,* 195 F. Supp. 448 (D. Conn. 1961).

Rule 16 of the Federal Rules of Criminal Procedure permits discovery where a defendant makes a reasonable request for inspection of documents and tangible objects, material to his defense, and obtained from defendant or from others by seizure or process.[3] The majority of federal courts have refused to allow discovery and inspection of defendant's own statements.[4] The majority rule has been criticized by those who see in pre-trial discovery a means of preventing surprise and promoting fair trial.[5] Rule 17(c) provides a pre-trial opportunity to subpoena material for inspection, which it is anticipated will be used at the

1. Int. Rev. Code of 1939, ch. 1, § 145(b), 53 Stat. 62; Int. Rev. Code of 1954, § 7201.

2. Fed. R. Crim. P. 16, 17(c).

3. Rule 16 provides: "Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable."

4. Schaffer v. United States, 221 F.2d 17 (5th Cir. 1955); Shores v. United States, 174 F.2d 838 (8th Cir. 1949); United States v. Gogel, 19 F.R.D. 107 (S.D.N.Y. 1956); United States v. Gim Hall, 18 F.R.D. 384 (S.D.N.Y. 1956), rev'd on other grounds, 245 F.2d 338 (2d Cir. 1957); United States v. Peltz, 18 F.R.D. 394 (S.D.N.Y. 1955); United States v. Pete, 111 F. Supp. 292 (D.D.C. 1953); United States v. Brumfield, 85 F. Supp. 696 (W.D. La. 1949); United States v. Chandler, 7 F.R.D. 365 (D. Mass. 1947); United States v. Black, 6 F.R.D. 270 (N.D. Ind. 1946). The words of rule 16, "obtained from," have been construed to apply to those documents and objects which were in existence and in the custody of a defendant prior to the government's procurement of them. See United States v. Black, supra, at 271. Thus, under this section, courts have denied discovery of statements or confessions, either written or oral, given by the defendant to a government agency.

5. See United States v. Singer, 19 F.R.D. 90 (S.D.N.Y. 1956); United States v. Peace, 16 F.R.D. 423 (S.D.N.Y. 1954); United States v. Carter, 15 F.R.D. 367, 371 (D.D.C. 1954). These courts have expressed the view that discovery should be permitted since there was no clear expression of an intent in the rule to exclude such confessions or statements.

trial.[6] Rule 17(c) therefore, is not properly a vehicle for discovery but rather for production and inspection.[7] The introduction, in 1945, of rules 16 and 17(c) provided the federal courts for the first time with specific authority to grant pre-trial inspection.[8] The use of the words "may order," in rule 16 and "may command" in rule 17(c), rather than "shall order" or "shall command," was construed to give the courts discretionary power to deny inspection on grounds not specified in the rules.[9] Consequently rules 16 and 17(c) both empower, but do not require, the courts to permit inspection. The discretionary nature of the procedure has resulted in serious conflict and divergent schools of thought regarding application of the rules. The Supreme Court had stated that the words of rules 16 and 17(c) were to be given their ordinary meaning to carry out the purpose of establishing a more liberal policy for production, inspection and use of materials at trial, in order to enable the accused to meet the charges presented against him.[10] The scope and purpose of the rules, however, have been narrowed in contravention of the clear direction of the Supreme Court, by the exercise of the lower courts' broad discretionary powers in the matter.[11] Some of these decisions have restricted the Supreme Court's rule by requiring, although the Court did not say so, certain definite conditions to be met by the defendant before inspection would be ordered.

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6. United States v. Carter, supra note 5, at 369; United States v. Maryland & Va. Milk Producers Ass'n, 9 F.R.D. 509 (D.D.C. 1949). The chief innovation of rule 17(c) was to expedite trial by providing a time and place before trial for inspection of the subpoenaed materials.

7. Bowman Dairy Co. v. United States, 341 U.S. 214 (1951). The Supreme Court stated: "It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms." Id. at 220. Rule 17(c) is not authority for a fishing expedition. Id. at 221. Rule 17(c) provides: "A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein . . . . The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys." Rule 17(c) is a method of inspection of evidentiary material obtained by the Government by means other than seizure or process. Bowman Dairy Co. v. United States, supra. "Evidentiary" has been construed to mean admissible in evidence. United States v. Iozia, 13 F.R.D. 335 (S.D.N.Y. 1952).

8. See Kaufman, Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts, 57 Colum. L. Rev. 1113 (1957).

9. United States v. Giramonti, 26 F.R.D. 168 (D. Conn. 1960); United States v. Brennan, 134 F. Supp. 42 (D. Minn. 1955); United States v. Ward, 120 F. Supp. 57 (S.D.N.Y. 1954); United States v. Schneiderman, 104 F. Supp. 405 (S.D. Cal. 1952).

10. Bowman Dairy Co. v. United States, 341 U.S. 214, 220 (1951). See also United States v. O'Connor, 237 F.2d 466, 476 (2d Cir. 1956).

11. United States v. Peltz, 18 F.R.D. 394 (S.D.N.Y. 1955) (motion to inspect an oral statement given by the defendant and reduced to writing by the government, denied as not being within the scope of the rule). See also State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953) (construing a similar state rule).

Judge Weinfeld, in *United States v. Peace*,[12] interpreted the rules to require a showing of "good cause" before the discretionary power of the court would be exercised in favor of inspection, *i.e.*, the defendant must establish that the documents or statements are evidentiary and relevant, and cannot be otherwise procured reasonably in advance of trial, that defendant cannot properly prepare for trial without such production and discovery, and that the application is made in good faith.[13]

Jurisdictions favoring a strict construction of the rules maintain that the Government should not be required to disclose its case to the defendant before trial, and that production and inspection of the requested documents would inevitably lead to alteration of his defense so as to conform to the material in those documents.[14] Those advocating a more liberal interpretation have argued that because of the seriousness of a criminal charge and its corresponding penalties, the defendant should not be denied any source of material beneficial to his defense.[15] Under the latter view it is argued that those who interpret the rules as an invitation to perjury, in effect, strip the defendant of the presumption of innocence and disregard the sanctions for perjury.[16] This confusion and the resulting lack of predictability have pointed out the unfairness to a defendant whose motion under rules 16 and 17(c) is to be determined according to the particular "school" which the presiding judge happens to follow. Since under the rules there is no objective basis upon which a motion for inspection may be determined, the defendant has no means of ascertaining the disposition of his motion, and no objective guide upon which to make his motion.

Judge Timbers, in the instant case,[17] here noted that aside from rules 16 and 17(c) there existed an entirely different basis for granting discovery of a statement taken by the Internal Revenue Service—Section 1005(b) of the Administrative Procedure Act.[18] This section provides in relevant part: "Every person compelled to submit data or evidence [in a proceeding conducted by an administrative agency] shall be entitled to . . . procure a copy or transcript thereof . . . ." From a defendant's standpoint, the mode of discovery provided

12. 16 F.R.D. 423 (S.D.N.Y. 1954).

13. Fryer v. United States, 207 F.2d 134 (D.C. Cir. 1953); United States v. Duncan, 22 F.R.D. 295 (S.D.N.Y. 1958); United States v. Winkler, 17 F.R.D. 213 (D.R.I. 1955); United States v. Iozia, 13 F.R.D. 335, 338 (S.D.N.Y. 1952).

14. See, e.g., United States v. Malizia, 154 F. Supp. 511 (S.D.N.Y. 1957); United States v. Palermo, 21 F.R.D. 11 (S.D.N.Y. 1957); United States v. Carter, 15 F.R.D. 367 (D.D.C. 1954).

15. See cases cited in note 5 supra.

16. United States v. Peace, 16 F.R.D. 423 (S.D.N.Y. 1954).

17. 195 F. Supp. at 457.

18. 60 Stat. 240 (1946), 5 U.S.C. § 1005(b) (1958). Only in certain instances does due process require pre-trial production and inspection of defendant's statements. See Leland v. Oregon, 343 U.S. 790, 801 (1952); Application of Tune, 230 F.2d 883, 890 (3d Cir. 1956).

under this act is more effective than rules 16 and 17(c) because it is mandatory.[19]

There has been no reported decision concerning the applicability of section 1005(b) to investigations of the Internal Revenue Service. Other provisions of the Administrative Procedure Act, however, have been held applicable to an income tax investigation by the Internal Revenue Service,[20] *e.g.*, a witness's right under the act to be accompanied by counsel.[21] However, in a recent unreported decision,[22] the District Court for the Southern District of New York denied defendant's motion, made under this section, for pre-trial discovery of statements made before the Internal Revenue Service. In so ruling the court relied on cases[23] which denied inspection of statements made before other administrative agencies; but these cases clearly illustrate the exceptions specifically provided in the act itself. Section 7(a) provides that judicial review procedures are not operative where statutes otherwise preclude judicial review,[24] or where agency action is by law committed to agency discre-

19. The use of the word "shall" in the act eliminates the possibility of the exercise of discretion by the presiding judge in entertaining a motion under the act.

20. United States v. Smith, 87 F. Supp. 293 (D. Conn. 1949). The witnesses subpoenaed appeared but declined to testify before the agent unless their attorney was permitted to be present. The Government claimed that the proceeding was investigatory, and because of its nature demanded secrecy. The court held that the Administrative Procedure Act was intended to establish uniform standards of fairness for dealings of administrative bodies with the citizen. The witnesses had the right to presence and advice of counsel, and the court issued an order enforcing the subpoena, and permitting the presence of outside counsel for the witness. See Backer v. Commissioner, 275 F.2d 141 (5th Cir. 1960). In Torras v. Stradley, 103 F. Supp. 737 (N.D. Ga. 1952), the court denied the witness the right to presence and advice of counsel and also denied the right of the witness to be accompanied by a personal stenographer on the grounds that the Internal Revenue Service tax investigation was wholly fact-finding in nature and was not an administrative hearing in which legal rights of parties may be considered and determined. The court stated that: "The provision of 5 U.S.C.A. § 1005(b), that a witness should have a right, under certain circumstances and conditions, to a copy of the transcript of his testimony refers to 'the official transcript.'" Id. at 740. The necessary inference to be drawn is that if legal rights of parties were in question the witness would be entitled to presence and advice of counsel; or if a hearing in which legal rights were to be determined followed the investigation in which testimony was given, the witness would be entitled to an official transcript of the investigation prior to trial, and, therefore, the presence of a personal stenographer would be unnecessary.

21. 60 Stat. 240 (1946), 5 U.S.C. § 1005(a) (1958).

22. United States v. Martocci, 60 Crim. 870 (S.D.N.Y. April 4, 1961).

23. United States ex rel. Belfrage v. Kenton, 224 F.2d 803, 805 (2d Cir. 1955) (immigration proceeding); Couto v. Shaughnessy, 218 F.2d 758, 759 (2d Cir.), cert. denied, 349 U.S. 952 (1955) (per curiam); Bozell v. United States, 199 F.2d 449, 450 (4th Cir. 1952) (per curiam) (parole board proceeding); Hiatt v. Compagna, 178 F.2d 42, 46 (5th Cir. 1949), aff'd by equally divided Court, 340 U.S. 880 (1950) (per curiam).

24. Administrative Procedure Act § 7(a), 60 Stat. 241 (1946), 5 U.S.C. § 1006 (1958); see H.R. Rep. No. 1980, 79th Cong., 2d Sess. 16, 17 (1946). See also Couto v. Shaughnessy, supra note 23. This was an action for deportation of an alien. The court held

tion.[25] An Internal Revenue Service income tax investigation, however, is not specifically exempt from the provisions of the act,[26] for it does not fall within either of these two areas. The Administrative Procedure Act appears, therefore, to be not only a proper, but indeed, the only reasonable alternative for a defendant seeking discovery and inspection in a prosecution for income tax evasion, in order to avoid the uncertainty of the disposition of his motion under rules 16 and 17(c).

Administrative Law—Right to Inspect Books and Records of a Public Authority.—The New York Post Corporation desired inspection of the contract files and minutes of meetings of the Triborough Bridge and Tunnel Authority, which refused access to the requested records. The Post filed a petition under Article 78 of the Civil Practice Act[1] to review the refusal and force inspection but the petition was denied by the New York Supreme Court. The appellate division unanimously reversed,[2] reasoning that Triborough was a "public business" which maintained a "public office," the records of which a citizen and taxpayer had a statutory right[3] to inspect. The court of appeals, two judges dissenting, reversed the decision of the appellate division. Triborough is neither a board acting on behalf of the City of New York nor a public office, but is a public benefit corporation whose books and records are not open to inspection by taxpayers. *New York Post Corp. v. Moses*, 10 N.Y.2d 199, 176 N.E.2d 709, 219 N.Y.S.2d 7 (1961).

A public authority is a special public benefit corporation created for the purpose of public improvement whose obligations are payable solely from its revenues or property.[4] Triborough, a public benefit corporation,[5] was created

that a deportation proceeding is specifically provided for by statute, and therefore, it is clearly within the exception set out in § 7(a) of the Administrative Procedure Act. This same principle was voiced in the opinion of a previous deportation case involving a motion under the Administrative Procedure Act. Marcello v. Ahrens, 212 F.2d 830 (5th Cir. 1954).

25. H.R. Rep. No. 1980, 79th Cong., 2d Sess. 16, 17 (1946); S. Rep. No. 752, 79th Cong., 1st Sess. 8 (1946); see Hiatt v. Campagna, 178 F.2d 42 (5th Cir. 1949). The court held that the activities of a parole board are at the board's discretion, and therefore such proceedings are not within the application of the Administrative Procedure Act.

26. See H.R. Rep. No. 1980, 79th Cong., 2d Sess. 16 (1946). "In no part of the bill is any agency exempted by name. The Bill is meant to be operative 'across the board' in accordance with its terms . . . ."

1. N.Y. Civ. Prac. Act §§ 1283-306.

2. 12 App. Div. 2d 243, 210 N.Y.S.2d 88 (1st Dep't 1961).

3. See N.Y. Pub. Officers Law § 66.

4. Nehemkis, The Public Authority: Some Legal and Practical Aspects, 47 Yale L.J. 14 (1937).

5. N.Y. Pub. Auth. Law § 552. N.Y. Gen. Corp. Law § 3(4) defines a public benefit corporation as one "organized to construct or operate a public improvement wholly or partly within the state, the profits from which enure to the benefit of this or other states, or to the people thereof."

by specific legislation for the purpose of constructing and maintaining a public highway on a self-sustaining basis. Triborough's books and records are open to inspection by numerous officials of New York State and the City of New York[6] and by a trustee designated to represent five per cent of the bondholders of Triborough.[7] But no statutory provision expressly allows examination of Triborough's records by a citizen or taxpayer.[8] At common law, every person was entitled to inspect, either personally or by his agent, public records, including legislative, executive, and judicial records, provided he had an interest upon which he might maintain or defend an action, and the document or record sought could furnish evidence or necessary information.[9] In New York, statutes[10] have enlarged this common-law right to the extent that any taxpayer may inspect public records whether or not he had any immediate or prospective interest.[11] Under Section 51 of the General Municipal Law all books and records used or filed in the office of a board acting on behalf of any municipal corporation are open to the inspection of any taxpayer.[12] Under Section 66 of the Public Officers Law any records or papers in a public office within the state are to be made available in transcript form to any taxpayer upon request.[13]

The majority of the present court reasoned that, since Triborough's enabling statute and other legislation directly affecting it had specifically allowed certain persons to inspect its books and records, and since no provision had given taxpayers such a right, it was not the legislative intent to allow inspection by taxpayers. The court cited *Benz v. New York State Thruway Authority*,[14] which held that the supreme court has no jurisdiction over equity suits brought against the Thruway Authority. The *Benz* court reasoned that the legislature had intended public authorities to be subject only to procedures specifically indicated by the legislature[15] and that the legislature had conferred no equity

6. The Comptroller of the State of New York (N.Y. Pub. Auth. Law §§ 560, 2503); the Governor, the Chairman of the State Finance Committee, the Chairman of the Assembly Ways and Means Committee (N.Y. Pub. Auth. Law § 2500); the Mayor of New York City (N.Y. Pub. Auth. Law § 552); the State Commission of Investigation (N.Y. Unconsol. Laws § 7502(1)(b) (McKinney 1961)).

7. Gen. Bond Resolutions of Triborough Bridge and Tunnel Auth. (1960).

8. The decision does not allow Triborough to carry on its operations in secrecy since the numerous statutory provisions of notes 5 and 6 supra obviate this. Accord, Borah v. White County Bridge Comm'n, 199 F.2d 213 (7th Cir. 1952).

9. Fayette County v. Martin, 279 Ky. 387, 130 S.W.2d 838 (1939); Matter of Egan, 205 N.Y. 147, 98 N.E. 467 (1912); North v. Foley, 238 App. Div. 731, 265 N.Y. Supp. 780 (3d Dep't 1933); Shelby County v. Memphis Abstract Co., 140 Tenn. 74, 203 S.W. 339 (1918).

10. N.Y. Munic. Law § 51; N.Y. Pub. Officers Law § 66.

11. Matter of Egan, 205 N.Y. 147, 98 N.E. 467 (1912); North v. Foley, 238 App. Div. 731, 265 N.Y. Supp. 780 (3d Dep't 1933).

12. N.Y. Munic. Law § 51.

13. N.Y. Pub. Officers Law § 66.

14. 9 N.Y.2d 486, 174 N.E.2d 727, 215 N.Y.S.2d 47 (1961).

15. Id. at 490, 174 N.E.2d at 728, 215 N.Y.S.2d at 49.

jurisdiction.[16] The majority in the instant case also rejected the Post's argument that it had a right of inspection under Section 51 of the General Municipal Law and Section 66 of the Public Officers Law, pointing out that cases, such as *Plumbing Ass'n v. New York State Thruway Authority*,[17] had clearly held that a public authority, although exercising governmental functions, enjoyed a corporate existence separate and distinct from the state. In *Plumbing Ass'n* the court held that Section 135 of the State Finance Law[18] did not apply to the Thruway Authority, stating that "although created by the State and subject to dissolution by the State, these public corporations are independent and autonomous, deliberately designed to be able to function with a freedom and flexibility not permitted to an ordinary State board, department or commission."[19]

Chief Judge Desmond's dissent in the present case classified Triborough as a board "acting for or on behalf of" New York City and maintained that the Post had a statutory right to inspect Triborough's records under Section 51 of the General Municipal Law.[20] He found, in *Easley v. New York State Thruway Authority*,[21] definite criteria upon which to determine whether Triborough was acting for or on behalf of the city. There the court had held that the New York State Thruway Authority was, for purposes of court of claims jurisdiction, "an arm or agency of the State . . ." owing to its close relationship to the state.[22] The *Easley* court declared constitutional Section 361(b) of the Public Authorities Law, which conferred exclusive jurisdiction for tort claims against the Thruway Authority upon the court of claims. However, if *Plumbing Ass'n* did not expressly reject the close relationship test of *Easley*, it at least confined

16. N.Y. Pub. Auth. Law § 361(b) gives jurisdiction to the court of claims for tort and breech of contract claims only.

17. 5 N.Y.2d 420, 158 N.E.2d 238, 185 N.Y.S.2d 534 (1959).

18. N.Y. State Fin. Law § 135 states: "Every officer, board, department, commission or commissions, charged with the duty of preparing specifications or awarding or entering into contracts for the erection, [or] construction . . . of buildings, for the state, when the entire cost of such work shall exceed fifty thousand dollars, must have prepared separate specifications for each of the following three subdivisions of the work to be performed: 1. Plumbing and gas fitting. 2. Steam heating, hot water heating . . . 3. Electric wiring and standard illuminating fixtures."

19. 5 N.Y.2d at 423, 158 N.E.2d at 239, 185 N.Y.S.2d at 536. The instant court implied that, if anything, Triborough was only an agent of the state, citing Matter of Reynolds, 202 N.Y. 430, 96 N.E. 87 (1911). N.Y. Munic. Law § 51 had been construed as not to apply to state officers or agents. See Bull v. Stichman, 298 N.Y. 516, 80 N.E.2d 661 (1948) (memorandum decision); Schieffelin v. Komfort, 212 N.Y. 520, 106 N.E. 675 (1914); County of Albany v. Hooker, 204 N.Y. 1, 97 N.E. 403 (1912).

20. Chief Judge Desmond pointed out that in an amicus curiae brief in Commissioner v. White's Estate, 144 F.2d 1019 (2d Cir. 1944), Triborough had stated that it acted on behalf of the city in the issuance of its bonds. The specific question in that case was limited to whether Triborough was a "political subdivision" of the state within the meaning of the phrase in the Internal Revenue Act. 10 N.Y.2d at 206, 176 N.E.2d at 712, 219 N.Y.S.2d at 11-12.

21. 1 N.Y.2d 374, 135 N.E.2d 572, 153 N.Y.S.2d 28 (1956).

22. Id. at 376, 135 N.E.2d at 573, 153 N.Y.S.2d at 29.

it to the *Easley* facts and the question of jurisdiction over actions against the Authority. The *Plumbing Ass'n* court stated in regard to the *Easley* test:

> Certainly, there is a close relationship between the Thruway Authority and the State, and we simply remarked that fact in upholding the Legislature's power to confer upon the Court of Claims jurisdiction to determine all claims against the Authority. . . . However close such relationship may be . . . it is abundantly clear that the Authority stand on its own feet, [and] transacts its business affairs through its own personnel and on its own initiative. . . .[23]

Chief Judge Desmond further contended that a statute's nature and purpose should be considered in any construction of its applicability to a public authority. He asserted that the *Plumbing Ass'n* court had refused to apply Section 135 of the State Finance Law because there was "no reason or necessity for reading . . . [it] as applicable and applicability would destroy the 'freedom and flexibility' necessary for functioning."[24] The Chief Judge then distinguished the purpose of the statute involved in *Plumbing Ass'n* and Section 51 of the General Municipal Law, finding the latter statute "of broad sweep."[25] It would not appear, however, that section 51 was intended by the legislature to be of any broader sweep than Section 135 of the State Finance Law[26] and yet section 135 was definitely construed as not applicable to public authorities.[27]

In a separate dissent Judge Fuld echoed Chief Judge Desmond's contention that the nature and purpose of statutes such as Section 51 of the General Municipal Law and Section 66 of the Public Officers Law demand liberal construction and applicability wherever there is no contrary statutory provision.[28] Citing *Benz v. New York State Thruway Authority*,[29] Judge Fuld contended that this decision pointed up the public office or "state" character of the authority since it is subject to suit only in the court of claims as is the state. However, the court's decision in *Benz* was controlled by its decision in *Easely* and the *Benz* court found that the *Easley* decision "necessarily meant that there is no jurisdiction in any court of any suit against the Thruway Authority except as the Legislature has in terms created such jurisdiction."[30] The *Benz* court thereby extended the *Easley* teaching that the Authority is an arm or agency of the state so as to allow suit against it in the court of claims (where the state, and only the state, may be a defendant) by holding the Authority so much an agent of the state that without a specific waiver of its immunity by the legislature the Authority might not be sued in equity in the supreme court.

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23. 5 N.Y.2d at 424-25, 158 N.E.2d at 240, 185 N.Y.S.2d at 537.

24. 10 N.Y.2d at 207, 176 N.E.2d at 713, 219 N.Y.S.2d at 12-13.

25. Ibid.

26. N.Y. State Fin. Law § 135 pertains to "every officer, board, department, commission or commissions. . . ." N.Y. Munic. Law § 51 pertains to "all officers, agents, [and] commissioners. . . ."

27. Plumbing Ass'n v. New York State Thruway Authority, 5 N.Y.2d 420, 158 N.E.2d 238, 185 N.Y.S.2d 534 (1959).

28. 10 N.Y.2d at 207-08, 176 N.E.2d at 713, 219 N.Y.S.2d at 13.

29. 9 N.Y.2d 486, 174 N.E.2d 727, 215 N.Y.S.2d 47 (1961).

30. Id. at 489, 174 N.E.2d at 728, 215 N.Y.S.2d at 48.

Since sueable only in the court of claims, which had no equity jurisdiction,[31] the Authority might never be sued in equity. The *Benz* court made no mention of the holding of *Plumbing Ass'n*. Yet, *Plumbing Ass'n* had boldly asserted that an authority was separate from the state in spite of the *Easley* decision.[32] It is implicit in the reasoning and hence the holding of *Plumbing Ass'n* that the *Easley* doctrine of unanimity of an authority with the state is to be confined to the question of jurisdiction. When Judge Fuld found, in *Benz*, indications that the Authority has the character of a "public office," he failed to read *Benz* as a decision involving only the question of jurisdiction. *Plumbing Ass'n* is direct holding that a case involving the status of an authority for jurisdictional purposes is inapplicable to a problem involving the application of a statute placing a restriction upon governmental agencies but not expressly upon an authority.

In view of various statutory provisions allowing inspection of Triborough's records by numerous representatives of the public, all without mention of a taxpayer as such, and the designation of authorities as separate corporate entities by decisions, such as *Plumbing Assn'n*, the majority reasoning would appear correct. Yet, in light of the recent expansion of undertakings, and thus the increase of financial expenditures, by public authorities[33] it seems preferable that the public in general should have a right to learn of their activities, and inspect, within reasonable limitations, their records. In 1956 a commission designated by the legislature to make a comprehensive study of the field of public authorities within the state made just such a recommendation.[34] At least one effort—in the form of a legislative bill—has been made to change the law and extend the right of inspection of an authority's records to the public.[35] Unfortunately, the bill moved no further than committee. Perhaps the increasing need for public scrutiny of authorities and the holding of the present court will move the legislature to reconsider the matter.

Corporations—Liability of Directors for Mismanaged Mutual Fund Holdings.—In a derivative action by plaintiff-shareholders of a diversified open-end mutual fund, defendant directors of the fund and defendant management company were charged with having conspired to waste assets to the detriment of the fund and to the profit and benefit of the defendants in violation of the Investment Company Act of 1940.[1] One of the defendants,

31. There is one exception—N.Y. Pub. Auth. Law § 368(2), which allows one type of equity suit against the Thruway Authority.

32. See note 23 supra and accompanying text.

33. This is especially true of Triborough: in 1950 it took over the Brooklyn-Battery Tunnel; in 1953 the East Side Airlines Terminal; in 1956 the New York Coliseum; and is now constructing the Verazzano Bridge. See 5 N.Y. Leg. Doc. No. 46, p. 599 (1956).

34. 5 N.Y. Leg. Doc. No. 46, pp. 576-77 (1956).

35. N.Y. Assembly No. 977 (Jan. 4, 1961). The bill reads in part "Records of authorities. All contracts, records of leaves of absence, contracts for the purchase or sale of property and all other records pertaining to the financial condition of any authority shall be available for public inspection."

1. 54 Stat. 789 (1940), as amended, 15 U.S.C. § 80a-1 to -52 (1958) (Supp. II, 1959-1960).

Bullock, was the president and a director of both the fund and the management company. Defendant Clark was a director of both companies as well as executive vice-president of the management company. Officers of the management company were the three vice-presidents, the secretary, and the treasurer of the fund. The management company was the principal underwriter of the fund, the sole distributor of its shares, and its investment adviser, with the duty of supervising its portfolio. The complaint alleged that the directors of the fund allowed the management company to charge fees far in excess of the usually accepted rates for similar services, thus constituting an "unlawful and willful conversion" and a breach of defendants' fiduciary duties.[2]

The acts complained of were not specifically designated as illegal by any federal statute. The United States District Court for the Southern District of New York, and subsequently the Court of Appeals for the Second Circuit, however, sustained the action. Applying the so-called doctrine of implication, Judge Herlands of the district court said, "The clear congressional purpose [of the Investment Company Act of 1940] was to protect investors and investment companies by imposing the duty on directors, officers, investment advisers, and principal underwriters to refrain from committing acts constituting gross misconduct or gross abuse of trust. It follows that a violation of that statutory duty renders the violator civilly liable to the victim, and that that liability may be enforced in a private action brought in the Federal court." *Brown v. Bullock*, 194 F. Supp. 207, 245 (S.D.N.Y.), aff'd, 294 F.2d 415 (2d Cir. 1961).

Two months before *Brown v. Bullock*, the United States Court of Appeals for the Eighth Circuit had reached a contrary conclusion, in *Brouk v. Managed Funds, Inc.*[3] With substantially the same allegations before it, the court dismissed a stockholder's derivative action and an action of the corporation itself for lack of jurisdiction. The action had succeeded in the trial court but was reversed on appeal. Inasmuch as the only defendants who appealed were seven "outside" directors (those with actual or constructive knowledge of the alleged fraudulent activities as opposed to direct participants), the decision is distinguishable on this basis.[4]

Unlike its four predecessor congressional enactments dealing with securities regulation,[5] the Investment Company[6] and the Investment Advisers

2. 194 F. Supp. 207, 215 (S.D.N.Y. 1961).

3. 286 F.2d 901 (8th Cir. 1961).

4. Judge Herlands made this distinction in deciding the Brown case when he said, "In the case at bar, the claim as pleaded is not based on per se or vicarious liability [as it was in the Brouk case] but on collusive or willful violations by the defendants themselves. . . ." 194 F. Supp. at 247.

5. Securities Act of 1933, 48 Stat. 74, as amended, 15 U.S.C. §§ 77a-aa (1958) (Supp. II, 1959-1960); Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. §§ 78a-jj (1958) (Supp. II, 1959-1960); Public Utility Holding Company Act of 1935, 49 Stat. 838, as amended, 15 U.S.C. §§ 79a to z-6 (1958); Trust Indenture Act of 1939, 53 Stat. 1149, as amended, 15 U.S.C. §§ 77aaa-bbbb (1958).

6. 54 Stat. 789 (1940), as amended, 15 U.S.C. §§ 80a-1 to -52 (1958) (Supp. II, 1959-1960).

Acts[7] of 1940, under which jurisdiction was sought in these cases, do not expressly provide for private civil actions. The acts neither define the duties of directors nor sanction suits by a registered investment company against one of its own directors—at least not expressly. Thus, in the absence of diversity of citizenship and specific statutory language creating civil liability respecting private actions, the jurisdictional problem reduces itself to "whether or not directors' liability to registered investment companies which they serve has been created by implication."[8]

The finding, by implication, of federal jurisdiction is not unknown in the field of security regulation, but the court in the *Brouk* case carefully pointed out that jurisdiction by implication has been accepted only in actions "respecting contracts declared void by the statute and by implying a right of action for damages in tort for violation of the federal statute."[9] The Eighth Circuit held that the doctrine of implication should not be extended to the case at bar since the 1940 act did not impose upon directors of a registered investment company any strict liability as insurers or any per se or vicarious liability.[10] The effect of the holding then, is to render any claim based upon such liability as exclusively within state jurisdiction and not cognizable in the federal courts.

The decision, with regard to "outside" directors would appear correct and desirable since holding them to liability would be tantamount to making them insurers. In view of the fact that they did not participate in the fraudulent activities, such an unreasonably harsh interpretation of the 1940 act would seem unwarranted. The court in the *Brouk* case however, went beyond this valid distinction and, in dicta, stated that *all* directors, whether "outside" or otherwise, should be immune from suit in the federal courts. The court took the position that director liability in general was not envisioned or included within the Investment Company Act of 1940. The *Brown* court specifically disagreed "with the views expressed in the *Brouk* case to the extent that they restrictively interpret the 1940 Act."[11]

The plaintiffs in each case claimed jurisdiction under Section 44 of the Investment Company Act of 1940 which provides that criminal jurisdiction for violations is exclusively in the district courts while civil jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of . . . the rules . . . thereunder . . ."[12] is concurrently in state and federal courts. The issue in each case is whether the complaint alleges civil claims arising under the 1940 act, of which the federal court has jurisdiction by virtue of section 44.

In holding against jurisdiction of private actions, the court in *Brouk* pointed out that the Investment Company and Advisers Acts of 1940 contained no

7. 54 Stat. 847 (1940), as amended, 15 U.S.C. §§ 80b-1 to -21 (1958) (Supp. II, 1959-1960).

8. Brouk v. Managed Funds, Inc., 286 F.2d 901, 906 (8th Cir. 1961).

9. Ibid. See also Loss, Securities Regulation 1043-45 (Supp. 1955).

10. 286 F.2d at 918.

11. 194 F. Supp. at 247.

12. 54 Stat. 844 (1940), 15 U.S.C. § 80a-43 (1958).

provisions for private civil actions although the four previous congressional enactments pertaining to securities all did.[13] The court pointed out that "the failure to provide for any private civil remedies or for joint and several liability of directors and persons who commit or contribute to violations or for statutes of limitations or for conditions is persuasive that the omission was deliberate."[14] While it is true that the four acts mentioned do contain provisions for private civil actions,[15] such provisions are few in number compared to the total number of prohibitory provisions contained within the acts. Furthermore, the courts have not restricted private actions to cases coming within these provisions. Private remedies have been implied notwithstanding that the same statute expressly provided for other private remedies.[16] It has, in fact, been held, in a case under the Public Utility Holding Company Act of 1935,[17] that to deny a private action to those for whose protection the statute was passed "leaves legislation highly publicized as in the public interest in fact sadly wanting, and even delusive, to that end."[18]

The Restatement of the Law of Torts makes it quite clear that the mere omission in a statute of a specific provision for private civil actions is by no means a bar to such an action in the absence of clear legislative intent to the contrary.[19] In investment company cases, not only is there a complete lack of evidence of legislative disfavor, but there is an abundance of evidence that such actions meet with congressional approval.

The 1933 Securities Act and the Securities and Exchange Act of 1934 concerned only policies of disclosure and securities registration and the regulation of certain securities practices. The Investment Act of 1940 on the other hand, provided for close supervision and regulation of the entire investment company business. The act was the result of a four year study of the perils and manipulations which have beset the field. The statute sought, as it expressly stated, to mitigate and eliminate the conditions "which adversely affect the national public interest and the *interest of investors*."[20] The ability of state

13. See note 5 supra.

14. 286 F.2d at 912.

15. Securities Act of 1933, 48 Stat. 82, as amended, 15 U.S.C. §§ 77k-l (1958); Securities Exchange Act of 1934, 48 Stat. 896, 15 U.S.C. §§ 78p(b)-r (1958); Public Utility Holding Company Act of 1935, 49 Stat. 829, 15 U.S.C. § 79p (1958); Trust Indenture Act of 1939, 53 Stat. 1176, 15 U.S.C. § 77www (1958).

16. See A.C. Frost Co. v. Coeur D'Alene Mines Corp., 312 U.S. 38, 43 (1941).

17. 49 Stat. 838 (1935), as amended, 15 U.S.C. § 79-z-6 (1958).

18. Goldstein v. Groesbeck, 142 F.2d 422, 427 (2d Cir.), cert. denied, 323 U.S. 737 (1944).

19. 2 Restatement, Torts § 286 (1934) provides: "The violation of a legislative enactment by doing a prohibited act . . . makes the actor liable for an invasion of an interest of another if: (a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and, (b) the interest invaded is one which the enactment is intended to protect; and, (c) where the enactment is intended to protect an interest from a particular hazard, the invasion of the interest results from that hazard; and, (d) the violation is a legal cause of the invasion, and the other has not so conducted himself as to disable himself from maintaining an action."

20. 54 Stat. 789 (1940), 15 U.S.C. § 80a-1 (1958). (Emphasis added.)

courts to regulate effectively such companies was questioned and the statute enumerated the conditions which threatened "the national public interest and the interest of investors." It expressly condemned investment companies managed in the interest of security holders.[21]

The *Brouk* case also reasoned that liability of directors was not intended by the legislature because Congress had deleted from the original bill a provision which would have rendered gross misconduct or gross abuse of trust a crime.[22] The House subcommittee hearings reveal, however, that the reasons for removing the clause was not the elimination of *all* director liability, but only the elimination of criminal liability, excepting only larceny and embezzlement which the statute made criminal.[23]

The final contention of *Brouk* was that the courts have consistently rejected implication of federal jurisdiction in the director liability cases. Of the three cases[24] cited by the directors in *Brouk, none* involved the Investment Company Act of 1940. In addition, in each case the decision rested on grounds other than that the defendants were directors. In one case the conduct upon which jurisdiction was claimed had never been prohibited by the statute and the court pointed out that even if plaintiff had amended his complaint, "the complaint would still stop short of being legally sufficient unless it stated facts showing that the loss suffered happened in a way the statute was enacted to prevent."[25]

The other two cases[26] were both dismissed because the specific subdivisions

21. 54 Stat. 789 (1940), 15 U.S.C. § 80a-1(b)(2) (1958).

22. 286 F.2d at 912.

23. The reason for removal was that it had subjected persons to criminal liability for violation of indefinite standards impossible of determination. With the exception of larceny and embezzlement then, liability was reduced from criminal to civil but was not eliminated. Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 76th Cong., 3d Sess., H.R. 10065, at 124 (1940). See also Greene, Fiduciary Standards of Conduct Under the Investment Company Act of 1940, 28 Geo. Wash. L. Rev. 266, 270-71, 284 (1959); Jaretzki, The Investment Company Act of 1940, 26 Wash. U.L.Q. 303, 344 (1941).

24. Howard v. Furst, 238 F.2d 790 (2d Cir. 1956), cert. denied, 353 U.S. 937 (1957); Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1952); Downing v. Howard, 162 F.2d 654 (3d Cir.), cert. denied, 332 U.S. 813 (1947).

25. Downing v. Howard, supra note 24, at 659. The court also stated that "the fatal obstacle to the plaintiff's complaint on this score is that the legislation does not require the company to furnish a plan. A cause of action can hardly be based upon disobedience of the statute when the statute does not require the act, the non-doing of which is complained of by the plaintiff." Id. at 656.

26. In Howard v. Furst, 238 F.2d 790, 793 (2d Cir. 1956) the court said, "We find nothing in the language of Section 14(a) or in the legislative history of the Securities Exchange Act of 1934 to warrant an inference that it was the intention of the Congress to create any rights whatever in a corporation whose stockholders may be solicited by proxy statements prepared in contravention of the statutory mandate." In Birnbaum v. Newport Steel Corp., 193 F.2d 461, 464 (2d Cir. 1952) it was held that "the absence of a similar provision in Section 10(b) strengthens the conclusion that that section was directed solely at that type of misrepresentation or fraudulent practice usually associated with the sale or purchase of securities rather than at fraudulent mismanagement of corporate

of the acts sued under were not intended to protect the individual investor. The *general* intent behind all congressional security enactments is the protection of the investor, but within any one act, subdivisions may be directed to specific parties or classes as was the situation in these two cases.[27] The Investment Company Act of 1940, however, is *specifically* intended for the protection of the investor. The overriding purpose of the act was to shield the individual from the fraudulent investment company practices, such as those alleged both in *Brouk* and in *Brown,* which had become prevalent.[28]

Thus, in *Cogan v. Johnston,*[29] where officers and directors of an investment company were charged with gross abuse of trust under sections 36 and 44 of the 1940 act, the court held that the claim, so far as it was based on section 36, could not be sustained because section 36 authorizes the Commission to bring an action in respect to a registered investment company,[30] whereas here the company was not registered. However, the court concluded that by virtue of the alleged conduct of the individual defendants, jurisdiction under section 44 was properly invoked. The court refused to dismiss the claim since "it . . . does not appear to a certainty that the plaintiff is entitled to no relief under any state of facts which may be proved in support of his claim."[31]

In *Schwartz v. Bowman*[32] and *Breswick & Co. v. Briggs,*[33] jurisdiction by implication was found to permit shareholders' suits against corporate directors who, it was alleged, had conspired to violate the Investment Act of 1940. The *Schwartz* and *Breswick* cases, both directly in point, are properly distinguished from *Brouk* only if the latter decision is restricted to "outside" directors. This distinction is vital and necessary since fear of personal liability will serve as a constant reminder to "inside" directors that sanctions for their misbehavior exist.[34]

"Inside" or participating directors have within their trust the savings of the public to be invested as they and their staff think best. It is a trust which should admit of close governmental scrutiny and liberal judicial enforcement in the public interest. As the case law indicates, it is not necessary to subject

affairs, and that Rule X-10B-5 [under the Securities Exchange Act of 1934] extended protection only to the defrauded purchaser or seller. Since the complaint failed to allege that any of the plaintiffs fell within either class, the judgment of the district court was correct and is accordingy affirmed."

27. Howard v. Furst and Birnbaum v. Newport Steel Corp., supra note 26.

28. See note 20 supra and accompanying text.

29. 162 F. Supp. 907 (S.D.N.Y. 1958).

30. 54 Stat. 841 (1940), 15 U.S.C. § 80a-35 (1958).

31. 162 F. Supp. at 909.

32. 156 F. Supp. 361 (S.D.N.Y. 1957).

33. 135 F. Supp. 397 (S.D.N.Y. 1955).

34. This fear of personal liability also renders unlikely the possibility of multitudinous strike suits arising under the act, and the consequent expansion of federal jurisdiction. Furthermore, most suits of this type would be admissible in federal courts in any case, with jurisdiction based on diversity of citizenship. This is usually true since either the investment company is incorporated in more than one state, or their stockholders and officers reside in various states.

all directors to absolute liability as insurers, but those who do engage in fraudulent activities should be held answerable in the federal courts under the 1940 act. This conclusion is supported by both legislative intent and judicial precedent.

Corporations—Promotion of Intrastate Sales by Foreign Corporation Constitutes Intrastate Commerce.—Eli Lilly & Co., an Indiana pharmaceutical corporation, sought an injunction under the New Jersey Fair Trade Act,[1] against a retailer, Sav-On-Drugs, Inc., which had sold Lilly's products at a price lower than the fair trade price. Sav-On moved for a dismissal under a New Jersey statute[2] which made unenforceable in New Jersey courts any contract entered into by a foreign corporation which had failed to obtain a certificate authorizing it to do business in that state.[3] The trial court dismissed the action, and the Supreme Court of New Jersey affirmed.[4] The Supreme Court of the United States affirmed and held that Eli Lilly by inducing "one local merchant to buy a particular class of goods from another . . ."[5] was engaged in a local, *intrastate* activity and therefore was subject to New Jersey licensing requirements. *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276 (1961).

Eli Lilly maintained an office in New Jersey, was listed in the Newark telephone directory, and employed there a district manager, a secretary and eighteen detailmen, all of whom were paid on a salary basis by Lilly. It was the job of these detailmen "to visit retail pharmacists, physicians and hospitals in order to acquaint them with the products of . . . [Lilly] with a view to encouraging the use of these products."[6] They also examined the stock of the retailer, made recommendations as to needs, and supplied free promotional and advertising materials. Occasionally, as a convenience to the retailer, they would receive an order and forward it to a wholesaler. However, all sales were made through independent wholesalers to whom Lilly sold exclusively in New Jersey, the shipments coming from out of state. It was assumed by the Court that the sales to wholesalers constituted an interstate business.[7]

The question of what constitutes "doing business" has produced three distinct lines of decisions in the Supreme Court, namely, cases concerning a state's power "(1) to tax an interstate enterprise, (2) to subject it to local suits, and, (3) to license it. . . ."[8] For a state to assert jurisdiction in any event some contacts must exist between the state and the person or entity it seeks to tax,

1. N.J. Rev. Stat. § 56:4-6 (1940).
2. N.J. Rev. Stat. § 14:15-3, 4 (1939).
3. Several states have statutes similar to New Jersey's. E.g., Idaho Code Ann. § 30-506 (1948); Miss. Code Ann. § 5344 (1957); N.Y. Gen. Corp. Law § 218.
4. Eli Lilly & Co. v. Sav-On-Drugs, Inc., 31 N.J. 591, 158 A.2d 528 (1960).
5. 366 U.S. 276, 282 (1961).
6. Id. at 280.
7. Id. at 278.
8. Id. at 289 (dissenting opinion).

license, or subject to service of process.[9] For the purpose of service of process the number of contacts required would appear to be quantitatively less than the number required for the purpose of taxation or qualification.[10]

In the area of taxation not only must the sufficiency of the contact be considered, but more important, the prerogative of Congress to regulate interstate commerce[11] against the right of the states to demand from foreign corporations reimbursement for the protection afforded them within the states must *also* be weighed.[12] Under this test taxes levied on the privilege of doing business,[13] and taxes which give local business an unfair advantage[14] or subject a foreign corporation to double taxation[15] have been found to be unconstitutional restrictions upon interstate commerce. Much of the uncertainty surrounding taxation, however, has been removed to the satisfaction of the states by the Supreme Court's decision in *Northwestern States Portland Cement Co. v. Minnesota*,[16] which allowed the states to levy an apportioned income tax on foreign corporations operating within their borders, even though they were engaging exclusively in interstate commerce.[17]

In reference to state licensing requirements, "doing business" has been interpreted to mean a local or intrastate business.[18] The importance of this area of

9. See Hanson v. Denckla, 357 U.S. 235 (1958).

10. The Courts in resolving the problem of "doing business" respecting service of process have developed the theories of implied consent, Railroad Co. v. Harris, 79 U.S. (12 Wall.) 65 (1870); presence, Philadelphia & Reading Ry. v. McKibben, 243 U.S. 264 (1917); and the modern test of minimum contacts as enunciated in International Shoe Co. v. Washington, 326 U.S. 310 (1945). In this area today it would appear that the extent of contact is not of as much concern as is the convenience of the litigants and the legitimacy of the interest the state is attempting to protect by the enforcement of its process. See McGee v. International Life Ins. Co., 355 U.S. 220 (1957); 18 Fletcher, Private Corporations § 8713.1 (Perm. ed. rev. repl. 1955).

11. U.S. Const. art. I, § 8; see Freeman v. Hewit, 329 U.S. 249 (1946).

12. Justice Stone has said, "[C]ourts are called upon to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed." McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 48 (1940).

13. See Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951).

14. See Memphis Steam Laundry v. Stone, 342 U.S. 389 (1952); Nippert v. City of Richmond, 327 U.S. 416 (1946).

15. See Michigan-Wis. Pipe Line Co. v. Calvert, 347 U.S. 157 (1954); J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938).

16. 358 U.S. 450 (1959).

17. "We conclude that net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." Id. at 452. Legislative reaction to the Court's decision in the Northwestern case was swift. A statute was passed immunizing from state taxation income derived from the interstate sales of a foreign corporation, whose only contact with a state was the solicitation of orders. See 73 Stat. 555 (1959), 15 U.S.C. § 381 (Supp. II, 1959-1960).

18. See Sioux Remedy Co. v. Cope, 235 U.S. 197 (1914); International Textbook Co. v. Pigg, 217 U.S. 91 (1910).

the law was increased significantly by the Court's decision in *Woods v. Interstate Realty Co.*[19] Prior to this case a foreign corporation, barred from a state court because of its failure to qualify, could on the basis of diversity of citizenship seek relief in a federal court. *Woods* applied the rule of *Erie R.R. v. Tompkins*[20] to bar the action in the federal court because under state law it was barred in the state court.

No set rules determine whether a corporation is or is not engaging in intrastate commerce and each case is decided upon its own facts.[21] In the field of sales solicitation, however, there are instances where the outcome can be predicted with some certainty. The presence of a salesman in a state to solicit orders which are accepted and filled from out of state,[22] the maintenance of truck terminals,[23] and dealing through an independent wholesaler or a commissioned broker in a state,[24] all have been held not to constitute "doing business."

The conclusion of the Court that Eli Lilly was engaged in intrastate commerce was based almost entirely on the activities of Lilly's detailmen. It was the Court's view that these detailmen, by "promoting . . . Lilly's products . . . to the physicians, hospitals and retailers who buy those products in intrastate commerce . . . ,"[25] were themselves engaging in intrastate commerce. The rule of *Cheney Bros. v. Massachusetts*[26] was considered to be controlling. There the facts were substantially the same but with one important difference;[27] the salesmen in *Cheney regularly* took orders from retailers for wholesalers. The Court there said of this activity: "Of course this is a domestic business—inducing one local merchant to buy a particular class of goods from another. . . ."[28] It is to be noted that the principal function of the salesmen in *Cheney* was the solicitation of local orders for wholesalers, whereas in the instant case the primary purpose of the detailmen was simply to encourage retailer purchases of Lilly's products. By equating the two activities the instant Court expanded the meaning of "doing business" from the actual taking of orders to encompass activities which are preparatory to sale, namely promotion and advertisement.

In a concurring opinion in the instant case Justice Harlan applied a test which had been used[29] to determine the validity of state taxes imposed on the

19. 337 U.S. 535 (1949).

20. 304 U.S. 64 (1938).

21. See Stern, The Scope of the Phrase Interstate Commerce, 41 A.B.A.J. 823 (1955).

22. See Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887).

23. See Spector Motor Serv. Inc. v. O'Connor, 340 U.S. 602 (1951).

24. J. R. Watkins Co. v. Flynt, 220 Miss. 871, 72 So. 2d 195 (1954); Levine v. Wallitzer, 130 N.Y.S.2d 346 (Sup. Ct. 1953); Holloway Material & Supply Co. v. Perfection Oak Flooring Co., 191 Okla. 350, 130 P.2d 296 (1942).

25. 366 U.S. at 281.

26. 246 U.S. 147 (1918).

27. The Court in the instant case recognized the distinction but felt it was unimportant. 366 U.S. at 282.

28. 246 U.S. at 155.

29. "It is now well settled that a tax imposed on a local activity related to interstate

local activities of foreign corporations engaged in interstate commerce, *i.e.*, since product promotion among retailers is not necessary to Lilly's continued freedom of access to the local market,[30] such promotion should therefore be considered "local business" subject to state licensing requirements. Justice Harlan never referred to Lilly's "local business" as intrastate commerce. It would appear that the Justice recognized that such activities are something less than intrastate commerce, yet he is urging that a new test be adopted to determine whether a corporation, admittedly engaged in *interstate* commerce, should be made subject to local licensing requirements.

In dissenting,[31] Justice Douglas objected that the present ruling would destroy the long established precedent of the "Drummer Cases,"[32] which held that solicitation of orders to be filled from out-of-state by a foreign corporation through local salesmen was in furtherance of interstate commerce and therefore, beyond the power of the states in the areas of taxation and qualification.[33] It is clear, however, that Lilly's detailmen did not properly fall within the category of "drummers." These detailmen did not solicit orders for out-of-state goods as salesmen would; rather they pointed out a need or manufactured a desire within the local market for their employer's product. The dissent also pointed out that only two years previously, activities such as Lilly's carried on by a foreign corporation had been found by the same Court, in *Northwestern States Portland Cement Co. v. Minnesota*,[34] to be "exclusively in furtherance

commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it." Michigan-Wis. Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954); see Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 87 (1948); Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 258 (1938).

30. A state "has no power to exclude from its limits foreign corporations or others engaged in interstate commerce, or by the imposition of conditions to fetter their right to carry on such commerce, or to subject them in respect to their transactions therein to requirements which are unreasonable or pass beyond the bounds of suitable local protection." Sioux Remedy Co. v. Cope, 235 U.S. 197, 201 (1914); see 17 Fletcher, Private Corporations §§ 8402, 8409 (Perm. ed. rev. repl. 1960).

31. 366 U.S. at 288 (dissenting opinion).

32. See, e.g., Davis v. Virginia, 236 U.S. 697 (1915); Browning v. City of Waycross, 233 U.S. 16 (1914); Stewart v. Michigan, 232 U.S. 665 (1914); Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887).

33. By far the greater majority of cases on this subject are concerned with taxation.

34. 358 U.S. 450 (1959). Here the appellant had a sales office in Minnesota and employed there a district manager, a secretary, and four salesmen, all of whom were paid a salary. The salesmen contacted potential users of cement products, solicited and took orders which they sent to local dealers. "Through this system appellant's salesmen would in effect secure orders for local dealers. . . ." Id. at 455. See also note 17 supra. In the Senate report dealing with the advisability of a bill to counteract the effect of the Northwestern case in the area of sales solicitation, it was the minority's view that such legislation would be rash. However, it added that "it should be borne in mind that the subject of this bill is a tax on net income. . . . We are not here considering licensing or franchise regulations . . . which might truly set up barriers to interstate commerce." 2 U.S. Code Cong. & Ad. News, 2548, 2556 (1959).

of interstate commerce . . ."[35]—a determination which, the dissent stated, the majority chose to ignore completely.[36]

If the Court found here facts to warrant a finding that Lilly was a legitimate object of New Jersey regulation, the result could have been reached without resorting to an expansion of the local solicitation rule of the *Cheney* case to include product promotion. The Court need only have relied on the fact that the detailmen did on occasion receive local orders from retailers.[37] As it stands now the Court's holding could lead to some regrettable and even absurd results.[38] For, if it be true that inducing retail trade constitutes a local business and that the same rule can be applied to retailer-consumer transactions as well as to wholesaler-retailer transactions,[39] then corporations instituting nationwide advertising campaigns might be said to satisfy the requirement merely by moving the general public to purchase its products from local vendors. Under this reasoning some of our larger corporations might well be held to be doing business in every state in the union. The only difference between this ultimate proposition and the present case is that the inducement here was the product of Lilly's own agents and employees whereas the magazine or newspaper carrying advertising would not be the agent or employee of the foreign corporation.

Criminal Law—Reindictment Held a Denial of Due Process When Prior Indictment for Same Felony Was Dismissed for Want of Speedy Trial.—In January 1955, defendant was indicted for felonies allegedly committed in June 1954. In October 1956, after arraignment on the 1955 indictment, defendant's motion to dismiss the indictment on the ground that he had been denied a speedy trial was denied, and defendant pleaded guilty. In December 1957, the appellate division found that he had been denied a speedy trial and dismissed the indictment, but without prejudice to the right of the People to proceed with a new indictment "as permitted in section 673 of the code, if so advised."[1] The defendant was accordingly reindicted in November 1958 for the same crime. The county court sustained the second indictment against a motion

35. 358 U.S. at 452.

36. Justice Harlan in his concurring opinion does refer to the Court's finding in the Northwestern case but considers it to be "a casual reference" and therefore not to be of any controlling value in the instant case. 366 U.S. at 286-87 n.3.

37. 366 U.S. at 280.

38. Justice Douglas warned that the rule in the present case could prove dangerous and that by its use " a State can stand over the channels of interstate commerce. . . ." 366 U.S. at 292 (dissenting opinion).

39. The majority of the present Court intimates that the rule might be extended to cover consumer-retailer transactions. 366 U.S. at 278, 281.

1. People v. Wilson, 5 App. Div. 2d 690, 169 N.Y.S.2d 285, 286 (2d Dep't 1957). The N.Y. Code Crim. Proc. § 673 provides: "An order for the dismissal of the action, as provided in this chapter, is a bar to another prosecution for the same offense, if it be a misdemeanor; but, except as provided in section six hundred sixty-nine-a hereof, it is not a bar, if the offense charged be a felony."

to dismiss,[2] holding that the delay after the first indictment had no effect as to defendant's rights under a substituted indictment because any reckoning of delay was to be measured from the date of the new indictment.[3] Defendant's conviction after a plea of guilty in June 1959, was unanimously affirmed by the appellate division.[4] The court of appeals, however, reversed and dismissed the indictment, two judges dissenting.[5] The right to a prompt trial is a fundamental one and defendant was denied due process when he was reindicted and brought to trial four and one half years after the original indictment. *People v. Wilson*, 8 N.Y.2d 391, 171 N.E.2d 310, 208 N.Y.S.2d 963 (1960).

The necessity of a speedy trial for the protection of a defendant is immediately apparent. In the leading New York case, *People v. Prosser*,[6] the court of appeals stressed that without such protection the accused could for a long period of time be subject to public distrust and suspicion, based on an untried accusation. A speedy trial would protect the accused from prolonged imprisonment, if held to await trial, and minimize the danger of his inability to prove his innocence due to the loss of witnesses and the dulling of memory. The right to a speedy trial existed at common law,[7] and was expressly guaranteed by the sixth amendment to the United States Constitution.[8] It has been said, however, that the sixth amendment does not apply to state criminal prosecutions[9] and there is in New York no constitutional guarantee of a speedy trial. It is, however, a statutory right.[10] Further,

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2. People v. Wilson, 15 Misc. 2d 858, 182 N.Y.S.2d 842 (Queens County Ct. 1959).

3. "[T]he court is constrained to follow the law of this State which measures the undue delay in such a case from the time the particular indictment to which the motion is addressed was found. Such a dismissal does not bar the District Attorney from proceeding to obtain a new indictment under section 673 of the Code of Criminal Procedure if the offense charged, as in this case, be a felony." Id. at 860, 182 N.Y.S.2d at 844.

4. People v. Wilson, 10 App. Div. 2d 297, 200 N.Y.S.2d 792 (2d Dep't 1960).

5. Chief Judge Desmond wrote the majority opinion, in which Judges Fuld, Van Voorhis, Burke, and Foster concurred. Judge Froessel wrote the dissenting opinion, in which Judge Dye concurred.

6. 309 N.Y. 353, 356, 130 N.E.2d 891, 893 (1955).

7. See 1 Bentham, Rationale of Judicial Evidence; Book II, ch. X (1827); 2 Hale, History of the Common Law of England 141 (5th ed. 1794). Under a commission to the judges of general gaol delivery, they were empowered to try and deliver every prisoner, whereby the jails were generally cleared at least twice in each year. See In re Begerow, 133 Cal. 349, 65 Pac. 828 (1901); State v. Clark, 86 Ore. 464, 168 Pac. 944 (1917); State v. Keefe, 17 Wyo. 227, 98 Pac. 122 (1908).

8. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const. amend. VI.

9. See Baker v. Utecht, 161 F.2d 304, 305 (8th Cir.), cert. denied, 331 U.S. 856 (1947); Chick v. Kentucky, 140 F. Supp. 418 (E.D. Ky. 1956). See also Wolf v. Colorado, 338 U.S. 25, 26 (1949); Adamson v. California, 332 U.S. 46, 53 (1947); People v. Jelke, 284 App. Div. 211, 225, 130 N.Y.S.2d 662, 665 (1st Dep't), aff'd, 308 N.Y. 56, 62, 123 N.E.2d 769, 771 (1954); People v. Gearns, 14 Misc. 2d 1010, 180 N.Y.S.2d 875 (Magis. Ct. 1958).

10. "In a criminal action the defendant is entitled . . . to a speedy and public trial. . . ."

if a defendant, indicted for a crime whose trial has not been postponed upon his application, be not brought to trial at the next term of the court in which the indictment is triable, after it is found the court may, on application of the defendant, order the indictment to be dismissed, unless good cause to the contrary be shown.[11] The statutory guarantee inures to the benefit of any person under indictment, whether he be imprisoned to await trial on the pending charge, or whether he be a prisoner already serving a sentence in the same jurisdiction for a different crime, or whether he be admitted to bail.[12] In New York, the state has the burden of proceeding with arraignment and of bringing the accused speedily to trial. The mere failure of the accused to take affirmative action to prevent delay may not be construed or treated as a waiver of his statutory right.[13] The accused has the right to assume that, if the district attorney intends to prosecute the indictment, he will do so with reasonable dispatch.[14] What constitutes "undue delay" presents a factual issue and no single criterion of fact is considered decisive of the issue.[15]

In finding that the defendant in the instant case had been denied due process of law by reindictment after dismissal of a prior indictment for want of a speedy trial, heavy emphasis was placed on the reasoning of *People v. Prosser*.[16] The majority asserted that the right to a prompt trial is no less fundamental in New York simply because it is not contained in the state constitution. It held that the statutory right to a speedy and public trial "cannot be reasonably reconciled" with Sections 142 and 673 of the Code of Criminal Procedure. Section 142 sets a five year limitation for the commencement of a prosecution

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N.Y. Code Crim. Proc. § 8. This is repeated in § 12 of the N.Y. Civil Rights Law: "In all criminal prosecutions, the accused has a right to a speedy and public trial. . . ."

11. N.Y. Code Crim. Proc. § 668.

12. People v. Prosser, 309 N.Y. 353, 356, 130 N.E.2d 891, 894 (1955); People v. Corrado, 150 Misc. 787, 270 N.Y. Supp. 235 (Ct. Gen. Sess. 1934).

13. People v. Prosser, supra note 12; People v. Serio, 13 Misc. 2d 973, 181 N.Y.S.2d 340 (Erie County Ct. 1958); People v. Exter, 4 Misc. 2d 651, 158 N.Y.S.2d 60 (Queens County Ct. 1956); People v. Winter, 18 Misc. 2d 205, 182 N.Y.S.2d 254 (Ct. Gen. Sess. 1958); People v. Brandfon, 4 Misc. 2d 466, 157 N.Y.S.2d 864 (Ct. Spec. Sess. 1956), rev'd on other grounds, 4 App. Div. 2d 679, 163 N.Y.S.2d 1007 (2d Dep't 1957).

14. People v. Winter, 18 Misc. 2d 205, 208, 182 N.Y.S.2d 254, 260. The accused, however, has the duty of raising his objection by motion that the prosecution has been delayed without good cause. People v. Begue, 1 App. Div. 2d 289, 149 N.Y.S.2d 791 (3d Dep't 1956).

15. People v. Prosser, 309 N.Y. 353, 130 N.E.2d 891 (1955); People v. Godwin, 2 App. Div. 2d 846, 156 N.Y.S.2d 37 (1st Dep't 1956), aff'd, 2 N.Y.2d 891, 141 N.E.2d 629, 161 N.Y.S.2d 145 (1957); People v. Hall, 51 App. Div. 57, 62, 64 N.Y. Supp. 433, 436 (4th Dep't 1900); People v. Haver, 26 Misc. 2d 565, 209 N.Y.S.2d 184 (Oneida County Ct. 1961). This does not mean that a defendant may not waive his right by consenting to a delay in bringing the indictment to trial. People v. Perry, 196 Misc. 922, 96 N.Y.S.2d 517 (St. Lawrence County Ct. 1949). Waiver may be implied from the fact that although the defendant was present in court he interposed no objection to a postponement sought by the district attorney. People v. Prosser, supra.

16. 309 N.Y. 353, 130 N.E.2d 891 (1955).

of a felony,[17] while section 673 of the Code provides that an order for dismissal will not bar reindictment if the offense is a felony.[18] The majority asserted that if these statutes were applied literally, the State of New York would present a fundamental right with one hand only to deny it with the other, as a strict reading of these statutes would allow reindictment any time within five years after the commission of the felony; this even though a prior indictment had been dismissed for want of a speedy trial. Such a result, the majority reasoned, would be "incongruous" and "cannot be squared with the guarantee of a speedy trial as found in the other statutes."[19]

The court cautioned, however, that its decision does not mean that there can never be a reindictment under section 673 after an indictment has been dismissed for delay.[20] Cognizance was taken of the fact that there might be other cases in which, although the first trial were not brought on for trial at the next term of the court, the delay would be so minor that due process would not be violated by permitting a reindictment of the accused. The court reasoned that in each case the question to be decided is whether there has been such delay as to deny the defendant a fair opportunity to prove his innocence, and that question is not automatically determined by the five year statute of limitations established by Section 142 of the Code of Criminal Procedure.

Since the right to a speedy trial is granted by statute in New York, the dissent reasoned, the statutory scheme which the legislature saw fit to enact should be literally applied. The dissent considered the right to a prompt trial a qualified one. Since it is not an absolute right it "may be given operative effect only in the light of the limitation period prescribed by statute."[21] It found in the prevailing opinion a complete disregard for "the plain language of section 673"[22] and a judicial forging of a "new limitation period for felonies, lesser than, and in contravention of, the five year period prescribed by the Legislature."[23] In the view of the dissent the suspicion and anxiety attendant upon an untried accusation of crime comes into existence when the defendant has been indicted. If there has been an undue delay in bringing the defendant to trial, the defendant is entitled to remove that cloud of doubt hanging over him by having the indictment dismissed. But he is not entitled to absolute immunity from prosecution until such time as the statute of limitations has run. Taking note that the majority stated that it did not mean that there could never be a reindictment under 673, the dissent asserted that the criteria should be those found in the statute itself. It also warned of the "great danger" in the complete liberation of a de-

17. "A prosecution for a felony, other than murder or kidnapping, or a prosecution for the crime of conspiracy to commit a felony must be commenced within five years after its commission, except where a lesser time is prescribed by statute . . . ." N.Y. Code Crim. Proc. § 142.

18. See note 1 supra.

19. 8 N.Y.2d at 395, 171 N.E.2d at 312-13, 208 N.Y.S.2d at 965-66.

20. Id. at 396, 171 N.E.2d at 313, 208 N.Y.S.2d at 966.

21. Id. at 397, 171 N.E.2d at 314, 208 N.Y.S.2d at 967.

22. Id. at 400, 171 N.E.2d at 315, 208 N.Y.S.2d at 969.

23. Id. at 397, 171 N.E.2d at 314, 208 N.Y.S.2d at 967.

fendant merely because of some oversight or neglect in the office of the district attorney, when the statute of limitations has not run.

Although the dissent is obviously correct in stating that the statutes literally interpreted would permit reindictment in a case such as the instant one, much greater merit is found in the argument of the majority that a "group of statutes must not be so read as to defeat the fundamental right of an accused citizen to be brought to trial and to be given a fair opportunity to show his innocence."[24] The position of the dissent would not appear to be entirely sound because if the original indictment was dismissed because of prejudicial delay in granting the defendant a trial, it is difficult to understand how a new indictment after so long a period of time is not subject to exactly the same criticism of essential unfairness to the accused, if not more so.

The instant decision is by no means an extreme innovation; it is merely a logical corollary which would seem to follow inevitably from the reasoning which the Court of Appeals had earlier enunciated unanimously in *People v. Prosser*:

> The speedy trial guarantee, preventing undue delay between the time of indictment and trial, serves a threefold purpose. It protects the accused, if held in jail to await trial, against prolonged imprisonment; it relieves him of the anxiety and public suspicion attendant upon an untried accusation of crime; and, finally, like statutes of limitation, it prevents him from being "exposed to the hazard of a trial, after so great a lapse of time" that "the means of proving his innocence may not be within his reach"—as, for instance, by the loss of witnesses or the dulling of memory.[25]

The present decision is an amplification of the basic rule that there must not be an undue delay in prosecution which would deny the defendant a fair opportunity to prove his innocence. The import of the decision is not to declare the five year statute of limitations unconstitutional but rather to declare that it was not intended as the sole criterion of what constitutes undue delay and, therefore, the denial of a speedy trial.

Grand Jury—Evidence Obtained From Testimony of Prospective Defendant Cannot Be Used as Basis of Indictment.—Defendant, a supplier of tires to the city of Utica, made sales to the city without the competitive bidding required by statute.[1] An extraordinary special and trial term of the New York Supreme Court and an extraordinary grand jury were created and authorized to inquire into prostitution, gambling, and official corruption in the county of Oneida. The defendant was served with a subpoena duces tecum and was required to appear with all books and records for the period being investigated. His accountant was also subpoened and instructed to bring defendant's income

24. Id. at 394, 171 N.E.2d at 312, 208 N.Y.S.2d at 965.

25. 309 N.Y. at 356, 130 N.E.2d at 893 (1955).

1. N.Y. Second Class Cities Law § 120 requires competitive bidding for contracts in excess of five hundred dollars.

tax returns, work sheets, and ledgers. *Subsequent* to the defendant's appearance, the Governor extended the powers of the extraordinary term to include violations of the tax law. Defendant was then indicted and convicted on evidence directly derived from his books and testimony, for violation of the state tax law.[2] The conviction was affirmed by the appellate division.[3] The court of appeals, two judges dissenting, reversed, holding that appellant was a prospective defendant who could not be compelled to testify, and thus such evidence might not be used as a basis for indictment. *People v. Laino*, 10 N.Y.2d 161, 176 N.E.2d 571, 218 N.Y.S.2d 647 (1961).

For many years it was the rule in New York that automatic immunity was given to witnesses or prospective defendants testifying before a grand jury.[4] This immunity could not be denied unless waived by the witness himself.[5] In *People v. Gillette*[6] the court held that

> a person against whom the inquiry of the grand jury is directed should not be required to attend before that body, much less be sworn by it, and if he is and an indictment be found, it should be set aside upon motion, and if not, if the fact appears upon the trial, it will invalidate a conviction if one be had.

However, the passage of the Witnesses' Immunity Statute,[7] which was intended "to avoid the inadvertent conferring of immunity upon witnesses unsuspected of the wrongdoing they themselves ultimately disclosed . . . ,"[8] gave rise to a problem of interpretation and of constitutionality. The dissenting opinion in *People v. DeFeo*[9] implied that the statute was unconstitutional,[10] while a concurring opinion implied that *Gillette* might still be ruling law.[11] The

2. N.Y. Tax Law § 376(4); (now N.Y. Tax Law § 376(5)).

3. 12 App. Div. 2d 880, 211 N.Y.S.2d 716 (4th Dep't 1961) (memorandum decision).

4. N.Y. Sess. Laws 1936, ch. 329, § 1; N.Y. Sess. Laws 1910, ch. 395, amended by N.Y. Sess. Laws 1931, ch. 774, § 1; N.Y. Sess. Laws 1904, ch. 659, § 1. These statutes are now N.Y. Pen. Law §§ 381, 584 and 380, respectively, amended, 1953, to conform to N.Y. Pen. Law § 2447.

5. N.Y. Pen. Law § 2446.

6. 126 App. Div. 665, 670, 111 N.Y. Supp. 133, 136 (1st Dep't 1908). In this case defendant was indicted for perjury after testifying before a grand jury investigating violations of criminal laws by officers of insurance companies. Defendant had been questioned concerning a bank account in his name as trustee for his employer insurance company. See also People v. Haines, 6 N.Y. Crim. 100, 1 N.Y. Supp. 55 (Ct. Gen. Sess. 1888).

7. N.Y. Pen. Law § 2447.

8. 10 N.Y.2d 161, 172, 176 N.E.2d 571, 578, 218 N.Y.S.2d 647, 656-57 (1961).

9. 284 App. Div. 622, 131 N.Y.S.2d 806 (1st Dep't 1954), rev'd on other grounds, 308 N.Y. 595, 127 N.E.2d 592 (1955).

10. "As the immunity granted was not complete, the testimony given by appellant . . . was also elicited in violation of his constitutional rights. . . ." Id. at 638, 131 N.Y.S.2d at 822.

11. "It is not necessary in my view to decide whether the recent immunity statute in effect overrides People v. Gillette. . . ." Id. at 632, 131 N.Y.S.2d at 817 (Peck, P. J., concurring) (Italics omitted).

appellate division in *People v. Steuding*,[12] relying on the *DeFeo* dictum,[13] held that the defendant obtained immunity and that the statute was unconstitutional insofar as it provided that compliance with its provisions was the only manner in which immunity might be conferred.[14] The court of appeals, in affirming, however, held that

> a prospective defendant or one who is a target of an investigation may not be called and examined before a Grand Jury and, if he is, his constitutionally-conferred privilege against self incrimination is deemed violated even though he does not claim or assert the privilege.[15]

Thus in *Steuding* the court of appeals did not invalidate the Immunity Statute, but as one author has stated, the statute "must have been intended to apply only to witnesses and not to prospective defendants. . . ."[16] The only question seemingly presented under this interpretation was whether a defendant was at the time of the investigation a witness or a prospective defendant. If a witness, the technical requirements of the statute would have to be satisfied[17] and a failure to do so would constitute a waiver of his immunity. If a prospective defendant, he need not fulfill the requirements of the statute.[18]

The court of appeals in the present case first determined that the appellant was a prospective defendant, notwithstanding that the basis for his indictment did not fall within the scope of the grand jury's original investigation. Thus

12. 7 App. Div. 2d 566, 185 N.Y.S.2d 34 (3d Dep't), aff'd, 6 N.Y.S.2d 214, 160 N.E.2d 468, 189 N.Y.S.2d 166 (1959).

13. The DeFeo majority decision expressed no concern over the constitutionality of the statute. Thus the appellate division in Steuding must have felt free to decide this question.

14. Under certain immunity statutes the witness has no election. He is required to testify, but receives immunity. People v. Reiss, 255 App. Div. 509, 8 N.Y.S.2d 209 (1st Dep't 1938), aff'd mem., 280 N.Y. 539, 20 N.E.2d 8 (1939); Seymour v. Larkin, 254 App. Div. 215, 4 N.Y.S.2d 428 (4th Dep't 1938); In the Matter of Solovei, 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), construing N.Y. Pen. Law §§ 1631, 381 and 584 prior to their amendment to conform to N.Y. Pen. Law § 2447. But where a constitutional provision, unaffected by an immunity statute, is directly involved, the necessity of invoking constitutional protection is dependant upon the attendant circumstances. People v. Ferola, 215 N.Y. 285, 109 N.E. 500 (1915). See also People ex rel. Coyle v. Truesdell, 259 App. Div. 282, 18 N.Y.S.2d 947 (2d Dep't 1940).

15. 6 N.Y.2d 214, 216-17, 160 N.E.2d 468, 469, 189 N.Y.S.2d 166, 167 (1959).

16. McKay, Constitutional Law, 34 N.Y.U.L. Rev. 1359, 1365 (1959), where the author notes that the Steuding decision construing the statute was "in a cryptic opinion."

17. Briefly summarized, the Immunity Statute provides that in order to obtain complete immunity, a witness (including a prospective defendant) must (1) affirmatively claim his privilege against self-incrimination, (2) be directed or ordered to answer by competent authority, for instance a grand jury at the request of the prosecutor, and (3) testify. People v. DeFeo, 284 App. Div. 622, 629, 131 N.Y.S.2d 806, 813-14 (1954).

18. 10 N.Y.2d at 172, 176 N.E.2d at 578, 218 N.Y.S.2d at 656. The court went on to say that if he is examined his constitutionally conferred privilege is violated, even though he did not assert the privilege.

the evidence may not be used as a basis for his indictment.[19] He was not, however, afforded complete immunity, and might be reindicted should evidence other than that obtained through his testimony be found.[20] None of the tainted testimony might be used against him, since defendant had testified under compulsion of subpoena.[21]

While the majority of the court of appeals in *Steuding* and in the instant case, and the appellate division in *DeFeo* felt secure that the statutory purpose—to eliminate automatic and complete immunity—would be accomplished, the dissenters in each case indicated the fear that once the witness has testified, *any* subsequent indictment would automatically convert his status to that of a prospective defendant. While it is true that a defendant may be reindicted if sufficient evidence (obtained independently of the evidence, links, or leads furnished by the prospective defendant in violation of his constitutional privilege) is adduced,[22] he is protected insofar as the testimony under compulsion tends to incriminate him. The fear is, therefore, not unfounded since a defendant will have complete immunity as to his entire testimony and all links and leads furnished by that testimony. As a result, the purpose of the statute may be completely frustrated.

To avoid this interpretation the *Steuding* dissent attempted to distinguish *DeFeo* on the ground that the *DeFeo* defendant did not know of his rights, did not claim his privilege, and did not sign any waiver of immunity; while in *Steuding,* the dissent argued, the defendant did waive his immunity, and also knew the purpose and scope of the inquiry.[23] Moreover, it was stated

19. This interpretation of the New York constitution is well-established and is no longer open to question. Id. at 171, 176 N.E.2d at 577, 218 N.Y.S.2d at 655; cf. N.Y. Const. art. I, § 6. "Whether [he] . . . was a prospective defendant is not to be determined by a subjective examination of the mind of the prosecutor. The scope of the inquiry made [him] . . . a possible defendant. . . . [He] . . . was on the target even if perchance he was not to be the bull's eye." People v. DeFoe, 284 App. Div. 622, 627, 131 N.Y.S.2d 806, 812 (1st Dep't 1954). See also People v. Bermel, 71 Misc. 356, 128 N.Y. Supp. 524 (Sup. Ct. 1911).

20. 10 N.Y.2d at 173, 176 N.E.2d at 578, 218 N.Y.S.2d at 657. See also Matter of Ryan, 7 N.Y.2d 989, 166 N.E.2d 504, 199 N.Y.S.2d 496 (1960) (memorandum decision) (reindictment of defendant in the Steuding case); People v. Ryan, 11 App. Div. 2d 155, 204 N.Y.S.2d 1 (3d Dep't 1960) (affirming reindictment and conviction).

21. An automatic result of the violation of this constitutional privilege is that defendant is protected not only from indictment based on any incriminating testimony which he may have given, but also from use of such evidence. And the right and protection thus accorded by the constitution may not be taken away or cut down by statute. People v. Steuding, 6 N.Y.2d 214, 160 N.E.2d 468, 189 N.Y.S.2d 166 (1959).

22. 10 N.Y.2d at 173, 176 N.E.2d at 578, 218 N.Y.S.2d at 657.

23. 6 N.Y.2d at 224, 160 N.E.2d at 474, 189 N.Y.S.2d at 174. So too, in the instant case, appellant cites, as important, his confusion as to the law as conveyed by the Special Assistant Attorney General. Brief for Appellant, pp. 29-31, People v. Laino, 10 N.Y.2d 161, 176 N.E.2d 571, 218 N.Y.S.2d 647 (1961). Respondent urged that no confusion existed. Brief for Respondent, pp. 31-32, People v. Laino, 10 N.Y.2d 161, 176 N.E.2d 571, 218 N.Y.S.2d 647 (1961). The instant court makes no mention of this as a basis for its decision.

that the statute "only confers immunity *after* a witness (or prospective defendant) invokes his privilege. . . ."[24] Judge Dye, in his concurring opinion, however, stated "that the refusal of the defendant witness to sign a general waiver of immunity was tantamount to a claim of privilege against self incrimination . . ."[25] —a theory diametrically opposed to the dissent.

Although the instant case has clarified the meaning of the statute and has reiterated its constitutionality, the fact does remain that it is quite difficult to distinguish between a prospective defendant and a witness before a grand jury. A subsequent indictment seems to indicate that he *was* a prospective defendant. It is true that many of the evils of automatic and complete immunity no longer exist; that subsequent reindictment may be had, and that the privilege against self-incrimination may not be asserted in advance of questions actually propounded.[26] The prospective defendant really has no need to seek protection under the statute since he is afforded immunity under the constitutional provision against self-incrimination. However the witness' only protection comes from the Immunity Statute, but subsequent indictment seems to transform the witness into the role of prospective defendant. This circuity seems to aid in the avoidance of fulfillment of the technical requirements of the legislation and confers a practical immunity upon all who testify. The barren net effect of the statute is that defendant may be reindicted upon independent evidence.

Negligence—Third Party Beneficiary Liability of Attorney to Beneficiaries of a Will.—Defendant attorney was engaged by testator to prepare a will in which testator made the plaintiffs beneficiaries of a testamentary trust. Defendant prepared testamentary instruments creating the trust which, by virtue of statutes relating to restraints on alienation and the rule against perpetuities,[1] was invalid. Plaintiffs, as a result, settled, with the blood relatives of the testator, their claims to a share of the estate for a smaller amount than they would have received had the trust been valid. Plaintiffs brought this action to recover the loss thus suffered from the attorney who drafted the will for the testator. The lower court granted defendant's motion to dismiss the complaint as failing to state either a cause of action in negligence or a cause of action for breach of contract. The Supreme Court of California affirmed, holding that the attorney's error did not constitute negligence or breach of contract.[2] The court,

24. 6 N.Y.2d at 219, 160 N.E.2d at 471, 189 N.Y.S.2d at 169.

25. Id. at 217, 160 N.E.2d at 470, 189 N.Y.S.2d at 168.

26. 10 N.Y.2d at 174, 176 N.E.2d at 579, 218 N.Y.S.2d at 658.

1. Cal. Stat. 1951, ch. 1463, § 1, at 3442 (formerly Cal. Civ. Code § 715.1, dealing with suspension of power of alienation); Cal. Civ. Code § 715.2 (dealing with vesting of interest in property); Cal. Stat. 1951, ch. 1463, § 4, at 3442 (formerly Cal. Civ. Code § 716, dealing with vesting of future interests).

2. The rule against perpetuities had been described as a "technicality ridden legal nightmare" and a "dangerous instrumentality in the hands of most members of the bar." Leach, Perpetuities Legislation, Massachusetts Style, 67 Harv. L. Rev. 1349 (1954). Noting

however, expressly overruled *Buckley v. Gray*,[3] stating that the lack of privity between plaintiffs and defendant did not preclude plaintiffs from maintaining an action in tort against defendant; and that intended beneficiaries of a will may recover as third-party beneficiaries of the contract between testator and his attorney. *Lucas v. Hamm*, — Cal. 2d —, 364 P.2d 685 (1961).

Originally, the doctrine of privity of contract deprived third persons of a cause of action for negligent performance of a contractual duty.[4] Gradually exceptions to this rule appeared. In *Thomas v. Winchester*[5] a drug manufacturer was held liable to a third person for mislabelling poison on the theory that the product was inherently dangerous. The court, in rejecting privity, reasoned that the duty of care arose from the nature of the product and the probable consequences of dealing negligently with it. A car manufacturer in *MacPherson v. Buick Motor Co.*[6] was held liable to the ultimate purchaser on the theory that a car was a product which was imminently dangerous if negligently made. Extending the *Thomas* rule, the court reasoned that the nature of the product gave a warning that if it were negligently made, injury to someone was foreseeable.

Having opened the area of product liability,[7] some courts began to speculate in the field of verbal negligence. In *Glanzer v. Shepard*[8] the *MacPherson* rule was extended to verbal negligence and a public weigher was found liable to a third party purchaser because of his negligence in weighing goods which he undertook to weigh by virtue of his contract with the seller.[9] In *Ultramares Corp. v. Touche*,[10] however, the New York Court of Appeals retreated from *Glanzer* and refused to hold an accountant liable for negligence to a third person who had relied on an erroneous certificate in making a loan.[11] Most

these descriptions, the court decided that defendants' error did not constitute a want of ordinary skill and competence. Also, since an attorney is not an insurer of his work, he is not liable for mistakes he may make. Therefore the court concluded that plaintiffs' complaint did not state a cause of action for negligence or breach of contract. — Cal. 2d —, 364 P.2d 685, 689-90 (1961).

3. 110 Cal. 339, 42 Pac. 900 (1895).

4. This rule is attributed to dictum in Winterbottom v. Wright, 10 Mees. & W. 109, 152 Eng. Rep. 402 (Ex. 1842), where the court stated: "The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty." Id. at 115, 152 Eng. Rep. at 405.

5. 6 N.Y. 397, 57 Am. Dec. 455 (1852).

6. 217 N.Y. 382, 111 N.E. 1050 (1916).

7. See generally Annot., 74 A.L.R.2d 1111 (1960), which covers the doctrine of privity in product liability from its beginnings to the present time, with a state by state discussion of the status of the privity doctrine; Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960).

8. 233 N.Y. 236, 135 N.E. 275 (1922).

9. Liability was based on the weigher's knowledge of the circumstances and his duty, if he acted at all, to act carefully. Id. at 239, 135 N.E. at 276. See also International Prods. Co. v. Erie R.R., 244 N.Y. 331, 155 N.E. 662 (1927).

10. 255 N.Y. 170, 174 N.E. 441 (1931).

11. "[In the absence of fraud] the ensuing liability for negligence is one that is

state courts have acquiesced in this decision and in the absence of fraud, liability for verbal negligence has been limited to the parties of the contract, to parties with a special relationship,[12] or to fields which are considered public.[13]

There is nothing novel in finding an attorney liable for negligence.[14] In fact, the first negligence cases concerned the liability of persons who professed competence in certain callings—among these, the legal profession.[15] It has been the universal rule, however, in this country and abroad, that an attorney, in the absence of fraud or misrepresentation is liable only to his client.[16] This rule was abandoned in the present case. The court completely rejected the need for proof of privity in a verbal negligence action.[17] In overruling *Buckley* it relied on the reasoning of *Biakanja v. Irving*,[18] which involved a fact situation similar to the instant case except that the defendant was a notary public. In holding the notary liable for the negligent preparation of a will, the *Biakanja* court itself rejected the *Buckley* reasoning. It had noted that the rule which denied recovery to third persons, not in privity, had been greatly liberalized since it made its first appearance in California law in 1895.[19] The stringent privity test having been rejected by *Biakanja*, legal writers once more[20] con-

bounded by the contract, and is to be enforced between the parties by whom the contract has been made." Id. at 189, 174 N.E. at 448.

12. International Prods. Co. v. Erie R.R., 244 N.Y. 331, 155 N.E. 662 (1927) (bailor-bailee relationship).

13. Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922) (public weigher).

14. Blaustein, Liability of Attorney to Client in New York for Negligence, 19 Brooklyn L. Rev. 233 (1953); Isaacs, Liability of the Lawyer for Bad Advice, 24 Calif. L. Rev. 39 (1935); Wade, The Attorney's Liability for Negligence, 12 Vand. L. Rev. 755 (1959).

15. See Wade, supra note 14, at 755.

16. The classic statement of the rule is found in Savings Bank v. Ward, 100 U.S. 195 (1879). "Where there is fraud or collusion, the party will be held liable, even though there is no privity of contract; but where there is neither fraud or collusion nor privity of contract, the party will not be held liable unless the act is one imminently dangerous to the lives of others, or is an act performed in pursuance of some legal duty." Id. at 205-06. See Jacobsen v. Overseas Tankship Corp., 11 F.R.D. 97, 101 (E.D.N.Y. 1950); Lackey v. Vickery, 57 F. Supp. 791 (W.D. Mo. 1944); Kasen v. Morrell, 18 Misc. 2d 158, 183 N.Y.S.2d 928 (Sup. Ct. 1959); Dallas v. Fassnacht, 42 N.Y.S.2d 415 (Sup. Ct. 1943); In re Cushman, 95 Misc. 9, 160 N.Y. Supp. 661 (Surr. Ct. 1916); Adelman v. Rosenbaum, 133 Pa. Super. 386, 3 A.2d 15 (1938); In re Fitzpatrick, 54 Ont. L.R. 3 (Can. 1923); Robertson v. Fleming, 4 Macq. H.L. Cas. 167, 1 Pater. 1057 (Scot. 1861).

17. "It follows that the lack of privity between plaintiffs and defendant does not preclude plaintiffs from maintaining an action in tort against defendant." — Cal. 2d at —, 364 P.2d at 688.

18. 49 Cal. 2d 647, 320 P.2d 16 (1958).

19. Id. at 649, 320 P.2d at 18.

20. In 1935, after the Securities Act of 1933, 48 Stat. 74, as amended, 15 U.S.C. §§ 77a-aa (1958) (Supp. II, 1959-1960) had been passed, there was some speculation, because of section 11 of the act, 48 Stat. 82 (1933), as amended, 15 U.S.C. § 77k (1958) (most probably passed because of Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931)), that attorneys might be subjected to liability to third persons for negligence. See Isaacs, Liability of the Lawyer for Bad Advice, 24 Calif. L. Rev. 39, 45 (1935).

sidered the possibility of an attorney being held liable to a third party for negligence.[21]

The instant court weighed the legal burden it was placing upon the attorney against the hardship which might result when an innocent beneficiary is denied a recovery.[22] In deciding in favor of the latter and rejecting privity as an element to be established in a verbal negligence action, the present court did not act arbitrarily. It here proposed a test which is based on sound legal principles, *i.e.*, the intent of testator, foreseeability of injury, prevention of future harm, and, ultimately, manifest justice.[23]

The court did not stop here. It went on to say that as a matter of policy, beneficiaries of a will should be entitled to recover as third-party beneficiaries of the contract between the attorney and the testator.[24] Notwithstanding the court's finding that the attorney in the instant case was not liable for breach of contract, it again clashed with the *Buckley* case. The court in the latter case reasoned that the purpose of the contract was to benefit the testator,[25] and therefore concluded that a beneficiary of a will was merely "incidentally or remotely benefited"[26] by the contract between the attorney and the testator. Consequently, he was excluded from the class of third-party beneficiaries set forth in the California statute.[27] The instant court, on the other hand, reasoned that the testator's principal purpose in making the agreement was to benefit the persons named in the will. A beneficiary named in a will was therefore a true third party beneficiary of the contract between the attorney and testator.[28] We have here the inevitable continuation of the trend in American courts toward the favoring and expansion of the concept of third party beneficiaries.[29] It is generally accepted that the liability of a promisor to a third

21. See Wade, The Attorney's Liability for Negligence, 12 Vand. L. Rev. 755, 759 (1959).

22. — Cal. 2d at —, 364 P.2d at 688.

23. "[W]hether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm." Id. at —, 364 P.2d at 687, citing Biakanja v. Irving, 49 Cal. 2d at 650, 320 P.2d at 19.

24. — Cal. 2d at —, 364 P.2d at 689.

25. The Buckley court felt that the main purpose of a testator in making his will was to enable him to dispose of his estate in accordance with his desire. 110 Cal. at 347, 42 Pac. at 902.

26. Id. at 346, 42 Pac. at 901.

27. Cal. Civ. Code § 1559 provides: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

28. — Cal. 2d at —, 364 P.2d at 689.

29. "The tendency of American authority is to sustain the gift in all such cases and to permit the donee-beneficiary to recover on the contract." Seaver v. Ransom, 224 N.Y. 233, 241, 120 N.E. 639, 642 (1918).

party depends on the intent of the promisee.[30] It is logical, therefore, to bottom liability on the intent of the testator.[31] However, the recognized test of this intent is stated to be: "To whom is performance to be rendered."[32] Applying the test to the facts in the subject case it is not so clear that the performance was not rendered to the testator exclusively and that the beneficiary was no more than an incidental beneficiary. Although the stated test is not conclusive, since the intention of the parties may turn on a great variety of facts, it does cast some doubt on the court's conclusion that the intent of the testator is "unmistakably" to benefit the persons named in the will.[33] The intention of the parties to the contract being a question of fact gleaned from a consideration of all the circumstances of the case,[34] it does not necessarily follow that the testator's main purpose is always to benefit the beneficiary or beneficiaries named in his will. This rather would be a question requiring scrutiny of the testator's agreement with his attorney. Therefore, by accepting, without inquiry, the contention that the intent of a testator in making his will "obviously" is to benefit the persons named in the will, the court may be answering a question of fact and thus is overstepping its appellate bounds.

Whatever be the case, the doctrine of privity has often been a source of obvious injustice. In rejecting it as a *sine qua non* for verbal negligence, the California court has given us a fairer, legally sound,[35] and more logical[36] standard. However true it may be in many cases that the primary intention of the testator in making his will is to benefit the persons named therein, the court, nonetheless, by its categorical and universal acceptance of legatees as third party beneficiaries to the contract between the testator and his attorney, may here be surveying too wide an area of liability.

Patents—Replacement of Single Element in a Patented Combination Is Repair and Not Reconstruction.—Defendant manufactured, sold, and installed convertible automobile tops designed to replace the original tops of a patented combination.[1] Plaintiff, who had acquired all rights to the patent, sued

30. See 4 Corbin, Contracts § 776 (1951); Simpson, Contracts § 82 (1954); 2 Williston, Contracts § 356, 356A (3d ed. 1959).

31. — Cal. 2d at —, 364 P.2d at 689.

32. Simpson, Contracts § 82 (1954).

33. — Cal. 2d at —, 364 P.2d at 689.

34. "[T]he right of a third person to recover upon a contract made by other parties for his benefit must rest upon the peculiar circumstances of each case rather than upon the law of some other case." Wright v. Glen Tel. Co., 48 Misc. 192, 195, 95 N.Y. Supp. 101, 103 (Sup. Ct. 1905), aff'd, 112 App. Div. 745, 99 N.Y. Supp. 85 (3d Dep't 1906).

35. See Prosser, Torts §§ 36, 88, 107 (2d ed. 1955).

36. "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).

1. U.S. Letters Patent 2569724 granted Oct. 2, 1951, to Harry A. Mackie and Stanley Duluk.

for an injunction[2] of the alleged infringement[3] and contributory infringement,[4] and for an accounting of profits.[5] Plaintiff argued that the replacement of the top, as relatively durable and expensive and thus the heart of the combination, was a reconstruction and hence an infringement. Defendant maintained that there was no reconstruction but merely the replacement of a single element, and hence a repair. The court of appeals affirmed[6] the district court's finding of the validity of the patent, its infringement and contributory infringement.[7] On certiorari, the Supreme Court, three Justices dissenting, reversed. The replacement of a single element in a patented combination is a permissible repair and not a reconstruction. *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336 (1961).

To maintain an action for contributory infringement a direct infringement must be shown.[8] The latter occurs when the patented article is made, used, or sold within the United States during the term of the patent without the authority of the patentee.[9] A contributory infringement occurs when a component is sold specially for use in an infringement of a patent and such component is not a staple article of commerce.[10] Generally, however, there can be no infringement of a patent unless all of the elements are used,[11] *i.e.*, unless the patented article, as such and as patented, is used. Reconstruction of a patented combination is an infringement[12] but repair of the combination is allowable.[13] The Supreme Court of the United States, in *Wilson v. Simpson*,[14] held that replacement of detachable blades in a woodplaning machine

2. See 35 U.S.C. § 283 (1958).

3. 35 U.S.C. § 271(a) (1958) provides: "Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent."

4. 35 U.S.C. § 271(c) (1958) provides: "Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer."

5. See 35 U.S.C. § 281 (1958).

6. Aro Mfg. Co. v. Convertible Top Replacement Co., 270 F.2d 200 (1st Cir. 1959).

7. Convertible Top Replacement Co. v. Aro Mfg. Co., 119 U.S.P.Q. 122 (D. Mass. 1958).

8. See, e.g., Westinghouse Elec. & Mfg. Co. v. Hesser, 131 F.2d 406, 410 (6th Cir. 1942); American Safety Razor Corp. v. Frings Bros. Co., 62 F.2d 416, 417 (3d Cir. 1932), cert. denied, 289 U.S. 726 (1933).

9. 35 U.S.C. § 271(a) (1958). The reviser's note, following this section, stated the section to be declaratory only. Hence it left intact the entire body of case law.

10. 35 U.S.C. § 271(c) (1958).

11. Cimiotti Unhairing Co. v. American Fur Ref. Co., 198 U.S. 399, 410 (1905); McClain v. Ortmayer, 141 U.S. 419, 424 (1891); Eames v. Godfrey, 68 U.S. (1 Wall.) 78, 79 (1863); Prouty v. Draper, 41 U.S. (16 Pet.) 336, 341 (1842).

12. Goodyear Shoe Mach. Co. v. Jackson, 112 Fed. 146, 148 (1st Cir. 1901).

13. Id. at 149.

14. 50 U.S. (9 How.) 109 (1850) (blades were to be replaced every sixty to ninety days).

covered by a combination patent was a permissible repair and not a reconstruction.[15] There the Court reasoned that unless the machine was made anew there could be no infringement[16] and implied from examination of the machine, that the inventor intended such a replacement.[17] Subsequently, in *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*,[18] where a patent covered the combination of a dispenser and a toilet paper roll, the Court found no infringement when the rolls alone were replaced.[19] Nor was infringement found in the replacement of gelatin bands of a patented combination covering a duplicating machine and the gelatin bands.[20] Reconstruction, however, was found in *Cotton-Tie Co. v. Simmons*,[21] where a patent covered the combination of a metal band and buckle to form ties used to bind bales of cotton in transit. After use the ties were severed and discarded. The defendant bought the scrap, riveted the bands together, and resold them. The Court reasoned that the band had been voluntarily severed; that its capacity for use voluntarily destroyed; that it could not be used again and, that, therefore, the defendant had reconstructed it.[22] In *Leeds & Catlin Co. v. Victor Talking Mach. Co.*,[23] where a patent covered the combination of a talking machine and a record, infringement was found when the purchaser bought more records merely to increase his repertory of records. The *Leeds & Catlin* Court asserted that there was no repair or pretence of repair, as there had been in *Wilson*,[24] and that the disc, unlike the roll of toilet paper, was the advance upon the prior art.[25] The Court reasoned that it was immaterial whether one or all of the elements of the combination were unpatented.[26]

More recent decisions of federal courts of appeals have considered variant elements as factors in the determination of whether there has been a repair or reconstruction.[27] In the instant case, the majority ignored this approach and

15. "[R]epairing partial injuries, whether they occur from accident or from wear and tear, is only refitting a machine for use. And it is no more than that, though it shall be a replacement of an essential part of a combination. It is the use of the whole of that which a purchaser buys, when the patentee sells to him a machine. . . ." Id. at 123.

16. Id. at 123-24.

17. Id. at 125-26.

18. 152 U.S. 425 (1894).

19. Id. at 435.

20. Heyer v. Duplicator Mfg. Co., 263 U.S. 100 (1923).

21. 106 U.S. 89 (1882).

22. Id. at 94.

23. 213 U.S. 325 (1909).

24. Id. at 336.

25. Id. at 333.

26. Ibid. This was the first case to consider the "essentialness" of an element to the combination. The Court in discussing this said, "The disc is not a mere concomitant to the stylus; it co-acts with the stylus to produce the result . . . . [I]t is the distinction of the invention, constituting . . . the advance upon the prior art." Id. at 335.

27. E.g., Landis Mach. Co. v. Chaso Tool Co., 141 F.2d 800, 804 (6th Cir. 1944) (physical domination of replaced part relative to entire combination); El Dorado Foundry, Mach. & Supply Co. v. Fluid Packed Pump Co., 81 F.2d 782, 786 (8th Cir. 1936) (cost

used an essentially simple test—was the article made anew?[28] The Court cited *Cotton-Tie* as an example of a reconstruction[29] but concluded that replacement of any single element would constitute a repair.[30] The Court rejected the proposition that a combination patent could have an "essential" element or a "heart"[31] and, while it cited *Leeds & Catlin*,[32] it did not consider that case a repair-reconstruction case.[33]

The dissent contended that reconstruction depends upon a variety of circumstances.[34] Prior cases have shown, Mr. Justice Harlan argued, that reconstruction can take place when the replacement is unpatented or only one element replaced.[35] Mr. Justice Brennan, in his concurring opinion accepted the test of reconstruction as it was set forth in the dissent,[36] but found the question of reconstruction one of law requiring an independent determination of the facts by the appellate court.[37] In his analysis of the facts, the defendant's acts constituted no more than a repair.

Mr. Justice McKenna wrote in *Leeds & Catlin*: "It can make no difference as to the infringement or non-infringement of a combination that one of its elements or all of its elements are unpatented."[38] Almost in answer, the present Court stated, "The patent is for a combination only" and since "none of the separate elements of the combination is claimed as the invention, none of them when dealt with separately, is protected by the patent monopoly."[39] *Leeds & Catlin* may, of course, be distinguished from the instant decision as it did not involve the issue of repair or replacement but merely an increase in the supply of records to enhance the enjoyment of the recording machine. The old records were not worn or broken but continued in use along with the new ones. But *Leeds & Catlin* necessarily found that the disc was the heart of the combination. It would now appear that the present Court will give short shrift to claims of reconstruction and it would appear that all that is left of the earlier cases is *Cotton-Tie*. Even then, it would appear that the complete re-

of component compared to cost of entire combination); Williams v. Barnes, 234 Fed. 339, 340 (7th Cir. 1916) (life of replaced element in relation to life of whole combination); Davis Elec. Works v. Edison Elec. Light Co., 60 Fed. 276, 282 (1st Cir. 1894) (essentialness of replaced element).

28. 365 U.S. 336, 346 (1961).

29. Ibid.

30. Ibid.

31. Id. at 344-45.

32. Id. at 346.

33. The Court cited Heyer v. Duplicator Mfg. Co., 363 U.S. 100 (1923), Morgan Envelope, Cotton-Tie, and Wilson as the only repair-reconstruction cases. Id. at 343 n.9.

34. Id. at 376.

35. The dissent cited Leeds & Catlin to show that reconstruction can take place when only one unpatented element is replaced. Id. at 375.

36. Id. at 362.

37. Id. at 367.

38. 213 U.S. at 333.

39. 365 U.S. 336, 340 (1961), citing Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661, 667 (1944).

building of a patented object which had been completely destroyed must now be shown to establish a reconstruction.

Taxation—Embezzled Funds Within the Gross Income of the Embezzler.—During the years 1951 through 1954, petitioner, a union official, misappropriated more than $738,000 from his union and from an insurance company with which the union was doing business. He was convicted of embezzlement under the penal statute of New Jersey.[1] Subsequently he was convicted of wilfully attempting to evade the income tax due for each of the years 1951 through 1954.[2] The court of appeals affirmed the conviction,[3] holding that embezzled funds constituted gross income to the embezzler within the meaning of Section 61 of the Internal Revenue Code of 1954.[4] The Supreme Court of the United States reversed, holding that the element of wilfullness required for a conviction under section 7201 of the Code could not be proven, since at the time of the embezzlement, embezzled funds were excluded from gross income. The Court, however, overruled *Commissioner v. Wilcox*,[5] which had excluded embezzled funds from the purview of gross income, thereby extending gross income to include embezzled funds and removing from future embezzlers the tax-exempt shield which *Wilcox* had afforded.[6] *James v. United States*, 366 U.S. 213 (1961).

Two dominant factors appear to have been employed by the courts in ascertaining a taxpayer's gross income: actual control over the money received and a claim of right to the receipt. In *North Am. Oil Consol. v. Burnet*,[7] the Court announced the "claim of right" test:

> If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.[8]

Applying the "claim of right" criterion to embezzled funds, the Court held in *Wilcox* that embezzled funds were not gross income to the embezzler, since "without some bona fide legal or equitable claim . . . the taxpayer cannot

1. N.J. Stat. Ann. § 2A:102-3 (1953).
2. See Int. Rev. Code of 1954, § 7201.
3. United States v. James, 273 F.2d 5 (7th Cir. 1959).
4. Int. Rev. Code of 1954, § 61(a) defines gross income as "all income from whatever source derived. . . ."
5. 327 U.S. 404 (1946).
6. The division of the Court is most interesting. Chief Justice Warren and Justices Brennan and Stewart concurred in reversing the conviction and overruling Wilcox. Justices Black, Douglas, and Whittaker concurred in reversing the conviction, but did so by relying on and reaffirming Wilcox. Justice Clark was with the majority in overruling Wilcox, but voted to affirm the conviction. While Justices Frankfurter and Harlan concurred in the overruling of Wilcox, they would have ordered a new trial.
7. 286 U.S. 417 (1932).
8. Id. at 424.

be said to have received any gain or profit within the reach of § 22(a)."[9] The legality of the means used by the taxpayer in acquiring money had never been material for the purpose of determining gross income.[10] The 1954 Code defines gross income as "all income from whatever source derived. . . ."[11] It does not exclude unlawfully acquired funds. The original enactment of 1913, however, did require that funds be acquired from the operation of a "lawful business" for net income purposes.[12] In no reenactment of this provision was the adjective "lawful" included as a qualification for determining either gross or net income, whereas "all income from whatever source derived," or provisions couched in similar language have been set out in every subsequent statutory definition of gross income. The congressional intent manifested by the consistent omission of "lawful" and by the reassertion of the generic "from whatever source derived" was to remove from consideration any test based upon legality or illegality of source and to extend the ambit of gross income indiscriminately to both lawfully and unlawfully acquired funds. Such was the construction the Court placed upon the statute in the instant case.[13]

A long line of cases has held that illegally acquired monies are includable as gross income. Accordingly, money derived from violation of the National Prohibition Act was held taxable.[14] Funds realized through usurious transactions,[15] extortion,[16] fraud or misrepresentation[17] and profits realized from mere use of embezzled funds,[18] "kickbacks" from contractors,[19] gambling prohibited by state law,[20] ransom payments[21] and numerous other unlawful acquisitions were held to be within the scope of section 61. Until the instant case, embezzled funds had constituted an exception[22] to the general trend of the courts' decisions with respect to wrongfully acquired money. In none of the cases involving wrongfully acquired funds did any court purport to say that the illegality of the acquisitions ipso facto extended a criminal's tax liability to include those funds. The courts presumably had been merely applying the same standard to lawful as to unlawful gains. In *Wilcox*, the Supreme Court, applying the "claim of right" test, first enunciated in *North Am. Oil Consol.*, held that the embezzler, unlike others who acquired money by

9. 327 U.S. at 408.

10. United States v. Sullivan, 274 U.S. 259 (1927).

11. Int. Rev. Code of 1954, § 61(a).

12. Revenue Act of 1913, ch. 16, § II(B), 38 Stat. 167.

13. 366 U.S. at 218.

14. United States v. Sullivan, 274 U.S. 259 (1927).

15. Barker v. United States, 26 F. Supp. 1004 (Ct. Cl. 1939).

16. Rutkin v. United States, 343 U.S. 130 (1952).

17. Rollinger v. United States, 208 F.2d 109 (8th Cir. 1953).

18. Kurrle v. Helvering, 126 F.2d 723 (8th Cir. 1942).

19. Caldwell v. Commissioner, 47 B.T.A. 168 (1942).

20. Anderson v. Commissioner, 35 B.T.A. 10 (1936).

21. Humphreys v. Commissioner, 125 F.2d 340 (7th Cir.), cert. denied, 317 U.S. 637 (1942).

22. See Commissioner v. Wilcox, 327 U.S. 404 (1946).

means of a criminal act, did not receive the money under a bona fide claim of right. Therefore, such money could not be included in the gross income of the embezzler.[23] Six years after *Wilcox*, the Court, in *Rutkin v. United States*,[24] held that extorted money was within the gross income of the extortioner upon the theory that extorted money was taxable when "its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it."[25] While not expressly overruling *Wilcox*,[26] *Rutkin* did limit to embezzlement the "bona fide claim of right" rationale for determining the tax liability of unlawful gains.[27]

The element of control relied upon in *Rutkin* is essentially equivalent to the absence of "restriction as to its disposition" in *North Am. Oil Consol.* This had been consistently used by the courts as one test to determine the extension of section 61 to *lawfully* acquired funds.[28] However, it was not the only test used; nor was it an exclusive test, which, if met, automatically rendered acquisitions taxable. There is nothing inconsistent between the "control" test and the "claim of right" test. Both a claim of right and the "absence of restriction as to its disposition" were announced in *North Am. Oil Consol.* as a single criterion to be used to decide the applicability of gross income to any taxpayer's acquisitions. "Claim of right" and freedom from "restrictions as to its disposition" were not proposed as alternative tests for determining gross income, but as two aspects of the same test.

The Court in the instant case recognized that petitioner had no bona fide claim of right to the embezzled funds,[29] and relying upon the control test of *Rutkin*, determined that embezzled funds were within the scope of section 61. The extortioner in *Rutkin* did, in fact, assert a "claim" to the extorted money,[30] and that Court did recognize a certain "assailable" claim in the extortioner.[31] In the instant case, the majority recognized that the embezzler gains no claim based on title, while the extortioner may gain a voidable title, though not recognizing this as a valid basis for distinguishing between the extortioner and the embezzler.[32]

An immediate result of the instant decision is the repudiation of the bona fide element of the "claim of right" test as applied to both lawfully and unlawfully acquired funds. In the case of criminally acquired funds, there can be no bona fide claim of right. In the case of lawfully acquired funds, the bona

23. Id at 408.

24. 343 U.S. 130 (1952).

25. Id. at 137.

26. It was urged by petitioner in the instant case that Congress acquiesced in the Wilcox holding by refusing to act on a bill to change it. The majority rejected this as inconclusive of the congressional intent.

27. 343 U.S. at 138.

28. See, e.g., Commissioner v. Tower, 327 U.S. 280 (1946); Funai v. Commissioner, 181 F.2d 890 (4th Cir. 1950); Wilson v. Commissioner, 161 F.2d 661 (7th Cir. 1947).

29. 366 U.S. at 216.

30. Rutkin v. United States, 343 U.S. 130, 137 (1952).

31. Id. at 136-37.

32. 366 U.S. at 216-17.

fide element is, as a matter of fact, met. The instant case has not abandoned the claim of right principle of *North Am. Oil Consol.*, but only the "bona fide" gloss which *Wilcox* had given to it. The case has amplified the original dual requirement of *North Am. Oil Consol.*:

> When a taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition, "he has received income which he is required to return. . . ."[33]

It is clear that the control element of *North Am. Oil Consol.* remains. The claim of right requirement has actually been restated with greater precision as the absence of a "consensual recognition, express or implied, of an obligation to repay."[34] Thus has the instant decision crystallized and given greater significance to the somewhat vague concept of claim of right. Under this rationale, loans are not taxable because the debtor does have a consensual recognition of an obligation to repay and consequently cannot be said to assert any claim of right to the borrowed funds. Conversely, it follows that the embezzler does meet the claim of right requirement, since by virtue of his act of criminal misappropriation, he necessarily repudiates any consensual recognition of an obligation to repay.[35] Thus, the embezzler, like every other criminal, asserts a claim of right by virtue of the crime, albeit not a bona fide claim.

Trade Regulation—Sales Commission Agreement Declared an Unfair Method of Competition Under Section 5 of the Federal Trade Commission Act.—The Atlantic Refining Company entered into an agreement with the Goodyear Tire and Rubber Company by which Goodyear promised to pay a sales commission[1] to Atlantic for all tires, batteries, and accessories (TBA) bought by Atlantic's wholesale and retail dealers.[2] Evidence was presented

33. Id. at 219.

34. Ibid.

35. Under this interpretation of claim of right, it is doubtful whether the analogy between the embezzler and the honest debtor, cited by Mr. Justice Black in his dissent, id. at 238-39, is valid. If claim of right now means the absence of consensual recognition of an obligation to repay, obviously the embezzler recognizes no consensual obligation to repay while the honest borrower does.

1. "Under the terms of the sales contracts between Goodyear and Atlantic . . . Atlantic is entitled to a commission amounting to 10 per cent of the net sales value of all sponsored (i.e., Goodyear . . .) merchandise sold by Atlantic retail dealers, as consideration for the assistance given by the Atlantic sales organization in obtaining TBA orders from Atlantic dealers." Goodyear Tire & Rubber Co., CCH Trade Reg. Rep. (FTC Orders) ¶ 29426, at 37734 (March 23, 1961). Atlantic also had a sales commission agreement with The Firestone Tire & Rubber Co. with the result that Atlantic's marketing area was divided between Goodyear and Firestone.

2. The Commission found that "motorists purchase approximately 37 per cent of their replacement tires and tubes, 44 per cent of their replacement batteries, and 20 per cent of their automotive accessories from gasoline service stations." Id. at 37728.

which showed that Atlantic had coerced its wholesale and retail dealers to purchase the sponsored TBA. The hearing examiner[3] held that the coercive tactics of Atlantic coupled with an illegal tying arrangement[4] amounted to a violation of Section 5 of the Federal Trade Commission Act.[5] The Federal Trade Commission[6] approved the findings and report of the hearing examiner, but went further and held that the sales commission agreement in and of itself was an unfair method of competition. The Commission therefore issued a cease and desist order[7] prohibiting Atlantic and Goodyear from using the sales commission plan for distributing TBA. *Goodyear Tire & Rubber Co.*, CCH Trade Reg. Rep. (FTC Orders) ¶29426 (March 23, 1961).[8]

The Federal Trade Commission was established by Congress not only to curb existing violations of the antitrust laws, but also to prevent, in their incipiency, practices which could lead to violations.[9] The Commission, as a quasi-judicial administrative agency, is empowered to restrain violations of the Clayton Act[10] or Section 5 of the Federal Trade Commission Act.[11] Under the general language of section 5 the Commission may enjoin practices which amount to incipient or consummate violations of the Sherman Act.[12] Section 5 also enables the Commission to "nip in the bud" practices which could develop into violations of the Clayton Act.[13] In employing section 5 the Commission is bound by the same substantive criteria as are the courts.[14]

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3. Goodyear Tire & Rubber Co., No. 6486, FTC, Oct. 23, 1959.

4. "[A] tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product . . . ." Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

5. "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a) (1958). The Federal Trade Commission "in the first instance, subject to the judicial review provided, has the determination of practices which come within the scope of the act." FTC v. Beech-nut Packing Co., 257 U.S. 441, 453 (1922).

6. 38 Stat. 717 (1914), as amended, 15 U.S.C. § 41 (1958).

7. See 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(b) (1958).

8. See also two companion cases: Firestone Tire & Rubber Co., CCH Trade Reg. Rep. (FTC Orders) ¶ 29427 (March 23, 1961); B. F. Goodrich Co., CCH Trade Reg. Rep. ¶ 29428 (March 23, 1961). The Federal Trade Commission issued a cease and desist order in the Firestone case, Firestone Tire & Rubber Co., supra, at 37774, but remanded the Goodrich case for further evidence of market data. B. F. Goodrich Co., supra, at 37778.

9. "It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipiency acts and practices which, when full blown, would violate those Acts . . . ." FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 394-95 (1953). See also FTC v. Cement Institute, 333 U.S. 683, 708 (1948); FTC v. R. F. Keppel & Bros., 291 U.S. 304, 314 (1934); FTC v. Raladam Co., 283 U.S. 643, 647-48 (1931).

10. 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1958) (Supp. II, 1959-1960).

11. 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a) (1958).

12. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1958).

13. FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 400-01 (1953).

14. Att'y Gen. Nat'l Comm. Antitrust Rep. 148 (1955); see Oppenheim, Guides to Harmonizing Section 5 of the Federal Trade Commission Act With the Sherman And

The sales commission agreement has become in recent years a favored economic device of the major oil companies and TBA suppliers for the distribution of TBA products.[15] Prior to the introduction of the sales commission plan the traditional method for distributing TBA was the purchase-resale plan. The oil company, under this plan, would purchase TBA from various brand manufacturers and resell it to their service station dealers. A third, but not often used method, allowed the service station dealers to make their own selection and purchase of TBA from a local wholesaler or manufacturer. The control of distribution of TBA to its service station lessees[16] and contract vendees[17] offers two distinct advantages to an oil company. The first and most important is the revenue to be gained, either through the purchase-resale or sales commission plans, for the sale of TBA by service stations.[18] The second is the opportunity to set the standards for the quality and quantity of TBA to be handled by the oil company's service station dealers in order to insure and protect its name and good will. Both the purchase-resale and sales commission plans, however, have fared poorly under the antitrust laws.

A sales commission agreement, similar to that considered in the instant case, was before the court in *Osborn v. Sinclair Ref. Co.*[19] There the plaintiff, a Sinclair lessee dealer, brought a private suit for treble damages under Section 1 of the Sherman Act,[20] alleging that Sinclair was requiring him to purchase a substantial quantity of Goodyear TBA as an implied condition of maintaining his lease. The court found that a tying arrangement existed which, under the doctrine of *Northern Pac. Ry. v. United States*,[21] was unreasonable per se and

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Clayton Acts, 59 Mich. L. Rev. 821, 826-27 (1961). See also Grand Union Co., CCH Trade Reg. Rep. (FTC Orders) ¶ 28980 (Aug. 12, 1960), where the Commission brought the action under section 5 for a practice which violated the spirit but not the letter of § 2(f) of the Robinson-Patman Act, 38 Stat. 730 (1914), as amended, 15 U.S.C. § 13(f) (1958). The Federal Trade Commission in the instant case has also enjoined practices under § 5 which did not come within the specific provisions of the Sherman or Clayton Acts. The Commission's attempt to enlarge § 5 as a "catch all" has been severely criticized. Oppenheim, supra, at 836-37 n.51; Handler, 16 Record of N.Y.C.B.A. 401-08 (1961); Note, 13 Stan. L. Rev. 657 (1961).

15. For a list of oil companies which had similar sales commission agreements with Goodyear see Goodyear Tire & Rubber Co., CCH Trade Reg. Rep. (FTC Orders) ¶ 29426 at 37726 n.1 (March 23, 1961).

16. Lessee dealers do not own their business properties but lease them from Atlantic. Atlantic had 2,493 lessee dealers with lease terms running from three months to three years. Id. at 37735-36.

17. Contract dealers either own their own stations or lease them from parties other than Atlantic. Atlantic had 3,044 contract dealers who in return for equipment agreed to purchase specified quantities of gas, oil, and other automotive lubricants. Id. at 37737.

18. For 1955, the last full year for which figures are available, Goodyear and Firestone paid sales commissions to Atlantic amounting to $11,263,057. Id. at 37733.

19. 286 F.2d 832 (4th Cir. 1960).

20. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

21. 356 U.S. 1 (1958). In Northern Pacific the Supreme Court declared tying arrangements unreasonable per se and therefore illegal under the Sherman Act "whenever a party has sufficient economic power with respect to the tying product to appreciably restrain

therefore a violation of the Sherman Act. The *Osborn* court, however, did not pass on the legality of the sales commission plan in itself. Only the tying arrangement, existing as an adjunct of the sales commission agreement, was declared illegal per se.[22]

In the present case the Commission considered the principal issue to be the legality of the sales commission agreement, even though violations could have been upheld on grounds of coercion or illegal tying arrangements under the reasoning of *Northern Pacific*[23] and *Osborn v. Sinclair Ref. Co.*[24] The Commission found that Atlantic had sufficient economic power to affect a substantial amount of commerce, and that there had been substantial anticompetitive effects on the manufacturing, wholesale, and retail levels in the TBA market as a result of the sales commission agreement between Atlantic and Goodyear.[25] The free choice of Atlantic dealers to select and buy their own TBA was found to have been stifled because of the economic control Atlantic exercised over its lessee and contract dealers. Competing TBA suppliers on the other hand were foreclosed from a substantial market through the allocation of Atlantic dealers to specific Goodyear dealers known as "supply points."[26] This foreclosure of markets was what the Commission deemed to be "a more fundamental restraint of trade inherent in the sales commission system itself."[27]

Atlantic contended that if the sales commission plan were declared illegal, its only alternative would be to resume the purchase-resale plan,[28] with the result that it too might violate the antitrust laws. The Commission, however, brushed aside this argument stating:

[W]hat course of action Atlantic may follow with respect to TBA if the sales commission plan is outlawed is entirely speculative . . . . Abolition of the sales commission system will at least terminate the unjust advantage presently enjoyed

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free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected." Id. at 6.

22. 286 F.2d 832 (4th Cir. 1960). In referring to the tie-in feature of the sales commission agreement the court stated: "The perniciousness of the imposed tie-in is aggravated by the fact that the defendant is not even in the business of selling the tied products, but is employing its economic power in the gasoline industry to force his dealers to do business with a supplier in another industry under an arrangement that yields the defendant an extraneous revenue. The defendant in this case goes a step further than the supplier in the usual tie-in case, for here the tied product is not even handled or sold by the defendant, but it farms out to another, for a price, its coercive economic power." Id. at 239-40.

23. 356 U.S. 1 (1958).

24. 286 F.2d 832 (4th Cir. 1960).

25. Goodyear Tire & Rubber Co., CCH Trade Reg. Rep. (FTC Orders) ¶ 29426, at 37751 (March 23, 1961).

26. Id. at 37746-47.

27. Id. at 37741.

28. Counsel supporting the complaint sought to enjoin Atlantic from distributing TBA to its dealers in any manner including the purchase-resale plan, but the Commission refused to go that far. Id. at 37752.

by distributors of Firestone and Goodyear over local competitors representing other tire manufacturers and TBA suppliers.[29]

Prior to the instant decision, the purchase-resale plan, like the sales commission plan, was a permissible form of distributing TBA. In *United States v. Sun Oil Co.*[30] the government sought to enjoin Sunoco from using the purchase-resale plan for distributing TBA to its service station dealers, but the agreements between defendant and its dealers did not expressly provide for purchase of TBA sponsored by defendant. The court, however, found the existence of oral or tacit agreements to purchase only sponsored TBA and that "the sale of TBA not sponsored by Sun has been substantially eliminated from over 6,500 independent dealer service stations selling Sunoco gasoline."[31] On the basis of these facts the court declared the purchase-resale plan of Sunoco a violation of Section 3 of the Clayton Act[32] and enjoined defendant from pressuring its service station dealers to purchase sponsored TBA. The purchase-resale plan in and of itself was not declared illegal, but only that purchase-resale plan involving supplemental oral and tacit agreements to purchase sponsored TBA.

Under the "rule of reason test,"[33] whether the sales commission plan is an unfair method of competition requires an evaluation of its competitive effects. The Commission has stated that it considers the sales commission plan to be productive of anticompetitive effects "even without the use of overt coercive tactics or of written or oral tying arrangements."[34] The question which the Commission has failed to ask is whether the "foreclosure of markets" in the TBA industry with its concomitant anticompetitive effects is a direct result of the sales commission plan in and of itself. The sales commission plan, like the purchase-resale plan in the *Sun Oil Co.* case,[35] does not on its face contemplate anticompetitive effects, but rather they are the result of coercion and supplemental tying arrangements. The competitive effects on which the Commission based the illegality of the sales commission plan, therefore, are a result of the very elements which the Commission contends are not necessary to its decision. On the contrary, it would appear that the sales commission plan for the marketing of TBA stands in the same light as the purchase-resale plan, and its legality should depend, therefore, on whether there is evidence of coercion or supplemental oral or tacit tying arrangements between defendant oil company and its service station dealers.

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29. Id. at 37751-52.

30. 176 F. Supp. 715 (E.D. Pa. 1959).

31. Id. at 727.

32. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 14 (1958).

33. The rule of reason test requires that proof of substantial anticompetitive effects be shown before a practice will be termed an unreasonable restraint of trade or an unfair method of competition in violation of the antitrust laws. See Standard Oil Co. v. United States, 221 U.S. 1 (1911). See also for a discussion of the rule of reason, Handler, Antitrust in Perspective 3-28 (1957); Att'y Gen. Nat'l Comm. Antitrust Rep. 5-12 (1955).

34. Goodyear Tire & Rubber Co., CCH Trade Reg. Rep. (FTC Orders) ¶ 29426, at 37751 (March 23, 1961).

35. See note 30 supra and accompanying text.

Both the courts and the Federal Trade Commission have taken a dim view of the oil companies' efforts to use their economic power in one market to obtain extraneous revenue in another market. No matter how "pernicious" a particular method of distributing TBA is considered to be, however, it should not be held to be an "unfair method of competition"[36] without establishing that it has caused the anticompetitive effects. Up to the present time the purchase-resale plan and the sales commission plan were illegal only upon a showing of coercion or supplemental tying arrangements between the oil company and its service station dealers. If the reasoning of the Commission in the instant case is upheld upon judicial review, the question then arises whether the Atlantic Refining Company may resume the purchase-resale plan without coming in conflict with the antitrust laws.

Under the Commission's reasoning it appears that the purchase-resale plan will fare no better than the sales commission plan. Upon a finding of anticompetitive effects due to the purchase-resale plan the Commission could declare it an unfair method of competition, in and of itself, without resort to evidence of coercion or supplemental tying arrangements. The logic of the present case could well foreclose the oil companies in the future from engaging in any way in the distribution of TBA to their service station dealers. Its effect at the present moment is to create more confusion in a field where predictability has long been desired.

Workmen's Compensation—Heart Attack Caused by Employment-Connected Anxiety and Worry Alone Compensable as Accidental Injury.—Decedent was employed to supervise the maintenance of defendant employer's airplanes. One of the planes under his charge developed wing corrosion and was subsequently grounded by the CAA. The employer blamed the decedent personally for the damage and gave him an ultimatum to have it repaired within a specified brief period of time. The plane was not only not repaired in time but the decedent also became involved in protracted negotiations over the exceedingly high repair bill. It was alleged that the resulting anxiety and worry which the decedent suffered caused the myocardial infarction[1] from which he died three days later. An award of death benefits to decedent's widow by the Workman's Compensation Board was reversed by the appellate division. The court found substantial medical testimony connecting decedent's heart attack to the emotional stress of his work, but held that in the absence of a showing of any phys-

36. FTC v. Gratz, 233 U.S. 421, 427-28 (1920).

1. There is a profound physiological effect of emotion on the heart and cardiovascular system. "Heavy work and physical exertion may endanger the heart, but worry, tension, pressure and emotional strain in association with such work may cause much greater damage." 5 Lawyers' Medical Cyclopedia 155-56 (1960). See also MacIver, Psychiatric Aspects of Cardiovascular Disease in Industry, in The Heart in Industry 317-18, 326-31 (Hoeber ed. 1960); Texon, Causal Relationships in Heart Diseases in Workmen's Compensation Cases, in Work and the Heart 426, at 427, 431 (Hoeber ed. 1959).

ical strain, his injury was not compensable.[2] The court of appeals, in a four to three decision,[3] reversed the appellate division and reinstated the award, holding that a heart attack, caused by employment-connected anxiety and worry alone, constituted an accidental injury justifying a compensation award. *Klimas v. Trans Caribbean Airways, Inc.*, 10 N.Y.2d 209, 219 N.Y.S.2d 14, 176 N.E.2d 714 (1961).

The history of compensation cases in New York State shows three basic prerequisites for an award: 1. The occurrence of an accident or contraction of a disease; 2. in the course of employment; 3. some causal relationship between work and the accident or disease. "These deceptively simple requirements bewail their responsibility for countless controversies, mountains (the Everest size) of testimony, and immeasureable swamps of administrative and judicial opinions."[4]

The problem in the instant case involves an interpretation of the first requirement, *i.e.*, what is an "accidental injury" within the meaning of the Workman's Compensation Law?[5] In a heart case, a distinction is to be made between an accident and a disease, the latter being non-compensable,[6] since only those "diseases" specifically listed as "occupational diseases" are compensable. A heart disease is not classified as an occupational disease. New York first notably touched on the problem in *Lerner v. Rump Bros.*[7] According to the *Lerner* rule, in order to fall within the "accidental" category and thus be compensable, the heart attack must be caused by a single and unexpected act.[8]

The *Lerner* rule was closely followed by the court of appeals in heart attack cases up through the late 1930's.[9] But, in the early 1940's the rule was "ob-

2. Klimas v. Trans Caribbean Airways, Inc., 12 App. Div. 2d 551, 207 N.Y.S.2d 72 (3d Dep't 1960).

3. Chief Judge Desmond and Judges Fuld and Van Voorhis dissenting.

4. Levitan, The Liability Phase of the Cardiac Problem, 41 Marq. L. Rev. 347, 348 (1958).

5. N.Y. Workmen's Comp. Law § 2(7) defines "injury" as meaning only "accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom."

6. 11 Syracuse L. Rev. 135 (1959).

7. 241 N.Y. 153, 149 N.E. 334 (1925). The court said, "First, the inception of the disease must be assignable to a determinate or single act, identified in space or time. . . . Secondly, it must also be assignable to something catastrophic or extraordinary." Id. at 155, 149 N.E. at 335.

8. 1 Larson, Workmen's Compensation § 38.64(a) at 548 (1952); Dittmar, Workmen's Compensation 21 (1950).

9. See, e.g., Frankel v. National 5, 10 and 25 Cent Stores, 243 App. Div. 841, 278 N.Y. Supp. 450 (3d Dep't) (memorandum decision), aff'd mem., 268 N.Y. 509, 198 N.E. 378 (1935) where a truckdriver sustained a heart attack lifting and moving merchandise, a normal activity of his job, and was denied compensation on the basis that such a cause was not extraordinary; Green v. Geiger, 255 App. Div. 903, 7 N.Y.S.2d 762 (3d Dep't 1938) (memorandum decision), aff'd mem., 280 N.Y. 610, 20 N.E.2d 559 (1939); La Fountain v. La Fountain, 259 App. Div. 1095, 21 N.Y.S.2d 193 (3d Dep't), aff'd mem., 284 N.Y. 725, 31 N.E.2d 199 (1940), where a blacksmith suffered a heart attack while shoeing a horse and was denied compensation since the activity causing the attack was not extraordinary.

served in the letter, if not in the spirit, through findings of extraordinary . . . events, even though such events, while 'determinate or single' acts are indistinguishable from the ordinary and expected situations which comprise the employment."[10] In reality, the courts no longer held that the cause had to be an unexpected one.[11]

In *Ruby v. Lustig*,[12] the court sustained an award to a painter who had placed his ladder so that he had to stretch his arm all the way out in order to paint. The court held that "extreme exertion and extension of his arms in painting" satisfied the requirement of "accidental injury," relying on the "unexpected result" of the single act causing the heart attack rather than the single act itself as the unexpected cause. In the late 1940's and early 1950's the courts continued to look more toward the unexpected result and further liberalized the rule relating to the "single act" requirement by awarding compensation for heart attacks caused by physical overexertion over a period of time.[13] The physical overexertion required by the regular job activity, however, had to entail greater exertion than the ordinary wear and tear of life in order to satisfy the standard of "accidental injury."[14]

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10. Meriam & Thornton, "Accidental Injury" in the Court of Appeals: The Metamorphosis of a Rule of Law, 16 Brooklyn L. Rev. 203, 208 (1950).

11. Godsman v. Grumman Aircraft Eng'r Corp., 268 App. Div. 945, 51 N.Y.S.2d 368 (3d Dep't 1944) (memorandum decision), aff'd mem., 295 N.Y. 708, 65 N.E.2d 339 (1946), where a fireman suffered a heart attack after he ran up two flights of stairs, came halfway down, and then went back up in answer to a fire call. Although the act was obviously routine for the fireman, he was awarded compensation; McCormack v. Wood Harmon Warranty Corp., 263 App. Div. 914, 32 N.Y.S.2d 145 (3d Dep't) (memorandum decision), aff'd mem., 288 N.Y. 614, 42 N.E.2d 613 (1942); Bohm v. L.R.S. & B. Realty Co., 264 App. Div. 962, 37 N.Y.S.2d 173 (3d Dep't 1942) (memorandum decision), aff'd mem., 289 N.Y. 803, 47 N.E.2d 52 (1943); Cooper v. Brunswick Cigar Co., 273 App. Div. 1038, 79 N.Y.S.2d 867 (3d Dep't) (memorandum decision), aff'd mem., 298 N.Y. 731, 83 N.E.2d 142 (1948); Brooks v. Elliott Bates, Inc., 269 App. Div. 792, 55 N.Y.S.2d 671 (3d Dep't 1945) (memorandum decision), aff'd mem., 295 N.Y. 710, 65 N.E.2d 340 (1946).

12. 274 App. Div. 954, 83 N.Y.S.2d 665 (3d Dep't 1948) (memorandum decision), aff'd mem., 299 N.Y. 759, 87 N.E.2d 672 (1949).

13. See, e.g., Furtardo v. American Export Airlines, Inc., 274 App. Div. 954, 83 N.Y.S.2d 745 (3d Dep't) (memorandum decision), motion for leave to appeal denied, 298 N.Y. 933 (1948) (cited in the majority opinion of Klimas), where the appellate division affirmed an award of compensation for a heart attack which the claimant had suffered at home resulting from longer hours and harder work during a preceding six month period; Carlin v. Colgate Aircraft Corp., 276 App. Div. 881, 93 N.Y.S.2d 791 (3d Dep't 1949) (memorandum decision), aff'd mem., 301 N.Y. 754, 95 N.E.2d 626 (1950); Masse v. James H. Robinson Co., 301 N.Y. 34, 92 N.E.2d 56 (1950) (reversing a denial of compensation by one appellate division which had relied on Lerner); Fisher v. Buffalo Elec. Co., 2 App. Div. 2d 612, 151 N.Y.S.2d 959 (3d Dep't 1956) (memorandum decision).

14. Masse v. James H. Robinson Co., supra note 13; Burris v. Lewis, 2 N.Y.2d 323, 141 N.E.2d 424, 160 N.Y.S.2d 853 (1957); Mathiez v. Meyer, 6 App. Div. 2d 741, 174 N.Y.S.2d 452 (3d Dep't) (memorandum decision), motion for leave to appeal denied, 5 N.Y.2d 705 (1958); Cuvelier v. Fairbanks & Walvoord, 6 App. Div. 2d 920, 175 N.Y.S.2d 677 (3d Dep't 1958) (memorandum decision). Larson sums up the history of the un-

Later cases upheld awards where the heart attack was caused by physical overexertion coupled with mental strain and anxiety over a relatively long period of time.[15] The leading case was *Lesnick v. National Carloading Corp.*,[16] which held that a compensation award could not be made for the death of a business executive caused by a heart attack allegedly brought on by the increased pressure and strain of an unusually heavy work schedule. The *Lesnick* court disengaged itself from obvious conflict with previous decisions by noting that in those cases the employees were actively engaged in the employment activity which caused the strain; while, in the case before it, there was no evidence of any physical overexertion or emotional strain at the time of the occurrence of the heart attack.[17]

The majority opinion in the instant case conceded that *Lesnick* was "superficially similar"[18] but distinguished that case on the ground that there was no incident of physical overexertion or mental strain and that the medical proof was uncertain and inconclusive. The court emphasized that even though the decedent in the present case was sitting by a swimming pool at the time of his attack, he was still in the midst of the very problem, the strain and tension which the board found caused his death. The dissent, however, underscored the reasoning of *Lesnick* "that a heart attack found to have resulted from the

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expected and single act requirement of the Lerner rule in regard to heart attacks resulting from physical cause: "New York, beginning with an emphatic requirement of unusual and even catastrophic cause, has . . . reached a point where, in effect, any heart attack contributed to by the employment seems to be held accidental." 1 Larson, Workmen's Compensation § 38.64 at 547; see Gioia v. Courtmel Co., 283 App. Div. 40, 126 N.Y.S.2d 94 (3d Dep't 1953).

15. Anderson v. New York State Dep't of Labor, 275 App. Div. 1010, 91 N.Y.S.2d 710 (3d Dep't 1949) (memorandum decision) (also cited by the majority in Klimas), where the claimant had worked long hours and was subject to continued anxiety and excessive mental strain at work under trying circumstances for a period approximately eighteen months before the attack. A similar case is Hoage v. Royal Indem. Co., 90 F.2d 387 (D.C. Cir.), cert. denied, 302 U.S. 736 (1937).

16. 285 App. Div. 649, 140 N.Y.S.2d 907 (3d Dep't 1955), aff'd mem., 309 N.Y. 958, 132 N.E.2d 326 (1956). The claimant's duties, while travelling for the firm, entailed entertaining customers at the race track where he suffered the attack. The appellate division held that the illness shown in the record was not accidental because no eventful happening could be demonstrated to have caused it and its only connection with the work was a gradual physical deterioration over a period of time. Citing the old Lerner rule, the court said, "To affirm this award we must be ready to hold that if a man increases the tension of the administrative work and later suffers a heart attack while at rest, this is a compensable accident. We are not ready to go that far in the case before us." 285 App. Div. at 652, 140 N.Y.S.2d at 910.

17. The dissent challenged this distinction as trivial on the basis of the following dicta in Masse: "Whether a particular event was an industrial accident is to be determined, not by any legal definition, but by the common-sense viewpoint of the average man." 301 N.Y. at 37, 92 N.E.2d at 57.

18. 10 N.Y.2d at 215, 176 N.E.2d at 717, 219 N.Y.S.2d at 18.

mental stresses and worries of a job could not be regarded as an industrial accident."[19]

Schechter v. State Ins. Fund[20] presents the law in its latest stage before the present decision. In that case, the court of appeals, with two judges dissenting, reinstated an award of compensation for a heart attack caused by a combination of both mental strain and physical overexertion over a seven week period of time. The court made only passing mention of *Lesnick* and stated:

> The phrase, "unusual or excessive strain" . . . is not so limited in its meaning as to include only work of an entirely different character from that customarily done. Simply stated, so long as the conditions of performing the work are such that an exceptional strain is imposed on the worker so great that his heart is affected and damaged thereby, the requirement of unusual or excessive strain is satisfied.[21]

Schechter was the first decision to award compensation for gradual physical overexertion and mental strain inherent in a professional worker's activities. It reduced the effectiveness of the *Lerner* rule not only with regard to awards for heart attacks caused by physical exertion alone, but also in respect to those caused by a combination of both physical exertion and mental strain.

Cases involving claims for compensation for heart attacks sustained through mental causes *alone* fall into two categories: 1) those involving sudden fright or shock due to some extraordinary event, and thus in keeping with the requirements of the *Lerner* rule; and 2) those due to mental strain—worry and anxiety over a period of time—as in the instant case. It is a well accepted fact that recovery can be had for claims falling within the first category.[22] Yet, New York decisions involving the second category have consistently denied recovery[23] in

19. Id. at 216, 176 N.E.2d at 718, 219 N.Y.S.2d at 19. Five appellate division cases, all dealing with purely mental causation, have relied on the Lesnick reasoning in denying awards. Tillander v. Latin Quarter Cafe, Inc., 9 App. Div. 2d 590, 189 N.Y.S.2d 239 (3d Dep't 1959) (memorandum decision); Chernin v. Progress Serv. Co., 9 App. Div. 2d 170, 192 N.Y.S.2d 758 (3d Dep't 1959) (no heart attack but rather purely mental injury), where the court said, "We find nothing in the law that connotes purely excessive emotions—anger, grief or other mental feelings—unaccompanied by physical force or exertion can be the basis of an accident." Id. at 172, 192 N.Y.S.2d at 760; Stang v. J. Peckman & Co., 7 App. Div. 2d 245, 181 N.Y.S.2d 952 (3d Dep't 1959); Ehrensal v. N.Y. State Div. of Employment, 2 App. Div. 2d 944, 156 N.Y.S.2d 472 (3d Dep't 1956) (memorandum decision); O'Rourke v. State Ins. Fund, 2 App. Div. 2d 616, 151 N.Y.S.2d 756 (3d Dep't 1956) (memorandum decision). Yet a close reading of the facts and the board's hearing in the Lesnick case will reveal that the claimant's heart attack was caused by a combination of both physical exertion and mental strain. Thus the basis of these decisions, and what the dissent in Klimas calls "holding" in the Lesnick case, in reference to purely mental stress (anxiety and worry), is really only dicta.

20. 6 N.Y.2d 506, 160 N.E.2d 901, 190 N.Y.S.2d 656 (1959). Claimant, a lawyer, suffered a myocardial infarction allegedly caused by the increased physical exertion of carrying a 25 to 35 pound briefcase all day, and more important, by the increased emotional and mental strain connected with continued trial work.

21. Id. at 510, 160 N.E.2d at 904, 190 N.Y.S.2d at 660.

22. Annot., 109 A.L.R. 887 (1937).

23. See cases cited in note 19 supra; O'Connell v. Adirondack Elec. Power Corp., 193

an attempt to draw the line on the gradual liberalization of compensation law, particularly evident in heart cases.[24] In upholding the present claim, the court, faced with the decision of the appellate division,[25] the dicta of *Lesnick*, and the lack of any cases in New York favoring the claimant in this matter, based its decision on the already well accepted practice of granting awards in the shock and fright cases of the first category,[26] and on the "common sense viewpoint" of *Masse v. James H. Robinson Co.*[27]

The instant decision is a logical extension of the trend making heart attacks suffered in the course of employment compensable. It is established that a heart attack attributable to unexpected, and non-physical causes, as in the case of shock or fright, constitutes an "accidental injury."[28] Heart failure due to physical strain has been held to be "accidental," where either the cause or the result was unexpected.[29] Furthermore, a heart attack brought on by both physical and mental strain over a period of time is compensable.[30] Where the evidence is sufficient to establish that heart failure has resulted from employment—connected mental strain alone, certainly "common sense" would dictate that the injury is compensable under the Workman's Compensation Act.

App. Div. 582, 185 N.Y. Supp. 455 (3d Dep't 1920) (cited by the dissent in Klimas) where the court denied compensation and held: "Clearly, a man has not sustained an injury whose mind has been made abnormally active or whose nerves have been more than ordinarily excited." Id. at 584, 185 N.Y. Supp. at 456.

24. Deyo v. Village of Piermont, Inc., 283 App. Div. 67, 126 N.Y.S.2d 523 (3d Dep't 1953).

25. See cases cited in note 19 supra.

26. Wachsstock v. Skyview Transp. Co., 279 App. Div. 831, 109 N.Y.S.2d 206 (3d Dep't 1952) (memorandum decision) where a cab driver suffered fright causing myocardial infarction as a result of his efforts to swerve his cab to avoid an accident with an oncoming car. See also Wiltcher v. National Transp. Co., 283 App. Div. 977, 130 N.Y.S.2d 586 (3d Dep't 1954) (memorandum decision); Krawczyk v. Jefferson Hotel, 278 App. Div. 731, 103 N.Y.S.2d 40 (3d Dep't 1951) (memorandum decision) where a witness to a fist fight between two fellow employees suffered such emotional upset and shock as to cause heart failure; Church v. County of Westchester, 253 App. Div. 859, 1 N.Y.S.2d 581 (3d Dep't 1938) (memorandum decision); Thompson v. City of Binghamton, 218 App. Div. 451, 218 N.Y. Supp. 355 (3d Dep't 1926); Pickerell v. Schumacher, 215 App. Div. 745, 212 N.Y. Supp. 899 (3d Dep't 1925) (memorandum decision), aff'd mem., 242 N.Y. 577, 152 N.E. 434 (1926).

27. 301 N.Y. 34, 37, 92 N.E.2d 56-57 (1950).

28. See note 22 supra and accompanying text.

29. Cases cited note 14 supra.

30. See note 20 supra and accompanying text.