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## Case Notes

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## CASE NOTES

**Conflict of Laws—Forum Will Not Hear Out-of-State Libel When Cause of Action Arising From Same Libel Is Barred in Forum State.**—Defendant published an article in Life magazine which was distributed to Michigan newsstands on February 18, 1959. Plaintiffs, alleging the article to be defamatory, initiated suit for libel on February 19, 1960 in the United States District Court for the Eastern District of Michigan.<sup>1</sup> The court adopted the “single-publication” rule by which the first substantial public release was deemed publication of the entire edition and held that the action was barred by Michigan’s one-year statute of limitations.<sup>2</sup> The court applied the Michigan conflict of laws rule and refused to hear any causes of action which might have arisen under the libel laws of other states. *Tocco v. Time, Inc.*, 195 F. Supp. 410 (E.D. Mich. 1961).

The common-law doctrine of libel asserts that when a defamation is communicated to a third person a publication occurs.<sup>3</sup> In 1849, *Brunswick v. Harmer*,<sup>4</sup> establishing the “multiple-publication” rule, held that the sale of a copy of libelous material seventeen years after its first publication by the defendant was a new publication giving rise to a fresh cause of action. It was reasoned that any other rule would allow malicious publishers to release a small amount of libelous material and, after the running of the statute of limitations, release their main effort with impunity. This fundamental statement was accepted as controlling on the question of the running of the statute of limitations until *Wolfson v. Syracuse Newspapers, Inc.*<sup>5</sup> was decided in 1938. There the New York court rejected *Brunswick* and held that publication took place at the time of the original circulation of the libel and that the statute of limitations ran from that time. The rationale of the court was expressed in the statement: If the bar of the statute of limitations can be lifted by [the ‘multiple publication’ rule] . . . we may no longer term it a ‘state of repose’ which makes effective [its] . . . purpose . . . to outlaw stale claims.”<sup>6</sup> Thus two rules of internal law are followed by various jurisdictions of the United States.<sup>7</sup>

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1. Federal jurisdiction was based on diversity of citizenship. *Tocco v. Time, Inc.*, 195 F. Supp. 410 (E.D. Mich. 1961).

2. Mich. Comp. Laws § 609.13(5) (1948): “Actions founded upon libel or slander shall be brought within 1 year from the time the cause of action accrues and not afterwards. . . .”

3. See, e.g., *Hartmann v. American News*, 69 F. Supp. 736 (W.D. Wis. 1947). See also Restatement, Torts § 578, comment b (1938).

4. 14 Q.B. 185, 117 Eng. Rep. 75 (1849).

5. 254 App. Div. 211, 4 N.Y.S.2d 640 (4th Dep’t 1938), *aff’d mem.*, 279 N.Y. 716, 18 N.E.2d 676 (1939).

6. *Id.* at 213, 4 N.Y.S.2d at 642. The court said that the number of copies circulated was to be considered as an element of plaintiff’s damages. *Id.* at 212, 4 N.Y.S.2d at 642. Substantial republication of the same libel gives rise to a second single cause of action. *Gregoire v. G. P. Putnam’s Sons*, 298 N.Y. 119, 81 N.E.2d 45 (1948).

7. *Hartmann v. Time, Inc.*, 166 F.2d 127, 133 (3d Cir. 1947), *cert. denied*, 334 U.S. 838 (1948); see note 21 *infra* and accompanying text.

Recently, the fact of nation-wide publication has combined with common-law doctrine to give rise to the multi-state libel, presenting a difficult problem in conflict of laws.<sup>8</sup> It is possible for a libel circulated in fifty-one jurisdictions of the United States to give rise to fifty-one separate causes of action. Libel, being a transitory tort,<sup>9</sup> is triable in a foreign jurisdiction and hence all fifty-one causes of action are triable in a single court. In the usual tort case, the forum applies the law of the jurisdiction wherein the tort occurred.<sup>10</sup> However, litigation of multi-state libels in a single forum has presented a complex problem, for it has been deemed impossible for a jury, charged with applying the varying internal laws of the jurisdictions affected, to render a competent verdict.<sup>11</sup>

Although the courts have generally ignored the causes of action arising in other jurisdictions,<sup>12</sup> *Hartmann v. Time, Inc.*<sup>13</sup> strictly applied the common-law doctrine to a logical, but highly criticized, end.<sup>14</sup> Plaintiff, the subject of a multi-state libel, had brought successive suits in the District of Columbia,<sup>15</sup> New York,<sup>16</sup> Massachusetts,<sup>17</sup> and Pennsylvania. In the first two suits<sup>18</sup> the statute of limitations was found to bar the actions; in the third suit, Massachusetts, in questionable reliance upon the two earlier decisions, ruled that the cause of action was *res judicata*. The Pennsylvania court, in applying the common-law doctrine<sup>19</sup> to the "changed conditions created by magazines and newspapers with national circulation,"<sup>20</sup> held that the publication had taken place in forty-eight states and that the plaintiff not only had a right, but was even required, to have the forty-eight causes of action litigated in the one suit.<sup>21</sup>

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8. See, e.g., *Hartmann v. Time, Inc.*, 64 F. Supp. 671 (E.D. Pa. 1946).

9. *Christopher v. American News Co.*, 171 F.2d 275 (7th Cir. 1948).

10. *Restatement, Conflict of Laws* § 377 (1934).

11. See Prosser, *Interstate Publication*, 51 Mich. L. Rev. 959, 971-73 (1953).

12. An illustration of the court's reluctance to combine all causes of action accruing in a multi-state libel was seen when Congressman Sweeney was libeled in a newspaper column syndicated in many states. He brought a single suit in every affected jurisdiction for the cause of action arising there; in each case the court confined itself to the cause of action arising in its jurisdiction. In *Sweeney v. Schenectady Union Publishing Co.*, 122 F.2d 288, 289 (2d Cir. 1941), the court judicially noted that the other similar suits acted only as inconclusive evidence in the case at bar. See Prosser, *Interstate Publication*, 51 Mich. L. Rev. 959, 964-65 (1953).

13. 166 F.2d 127 (3d Cir. 1947).

14. Note, 48 Colum. L. Rev. 932 (1948).

15. See 166 F.2d at 136.

16. *Hartmann v. Time, Inc.*, 60 N.Y.S.2d 209 (Sup. Ct. 1945), *aff'd mem.*, 271 App. Div. 781, 66 N.Y.S.2d 151 (1st Dep't 1946).

17. See 166 F.2d at 136-37.

18. The first suit was brought in the District of Columbia and its unreported opinion is discussed in 166 F.2d at 136. The second suit was *Hartmann v. Time, Inc.*, 60 N.Y.S.2d 209.

19. 166 F.2d at 132.

20. *Ibid.*

21. The court reasoned that if *Life* were to be published in England, "whether the plaintiff would have a cause of action against the defendant in England would depend on

The Pennsylvania conflict of laws rule required the application of the law of the places where the causes of action accrued. Accordingly, the court divided the affected jurisdictions into states which applied the "multiple-publication" rule, and those states where the "single-publication" rule controlled, and then determined the effect of each rule upon the causes of action.<sup>22</sup> The libel arising in Illinois, a single-publication state, was found to have been published one day before that in Pennsylvania, the other single-publication state in the litigation.<sup>23</sup> The court reasoned that the effect of successive publication in single-publication states was that the first cause of action "engrossed" the second cause of action and left the Illinois "'single publication' cause of action . . . the only [one] . . . arising under the 'single publication' rule. . . ."<sup>24</sup> The "engrossing" Illinois cause of action was subsequently barred by the Pennsylvania statute of limitations.<sup>25</sup> Thus a holding of res judicata for both single-publication states was effected. The court further held that it was not so as to the plaintiff's causes of action arising in those states which followed the older rule "that each time a [libelous] magazine . . . is sold or distributed a new publication has occurred."<sup>26</sup> Therefore the plaintiff's causes of action which were not barred in the multiple-publication states, were held to be alive and actionable in the forum.

A few courts have followed *Hartmann* to a limited extent, taking a restricted view of the facts of each case, and narrowing the applicable law to that of a single jurisdiction. In *Mattox v. News Syndicate Co.*,<sup>27</sup> plaintiff sued in New York for a libel circulated by defendant newspaper in New York, Virginia, and neighboring states. Recognizing New York's adherence to the *lex loci delicti* conflicts rule, the court discussed the problem of the applicable law when the same libel had been published in several jurisdictions and stated, "We assume that in any event a plaintiff must recover in one action all his damages for all the publications, wherever made; but, if the publication in each state is a separate wrong, the extent of the liability may vary in the

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the law of England and not on that of Pennsylvania or Illinois. This conclusion is pertinent in respect to any cause of action which the plaintiff may have in any of the States of the United States. . . . The plaintiff's statement of claim . . . does not limit the accrual of the cause or causes of action to Illinois or to any other State of the United States. . . . We, therefore . . . must treat the allegations of the complaint as to the places where publication occurred as covering the United States. . . ." *Id.* at 133.

22. *Id.* at 134-35.

23. *Id.* at 135.

24. *Ibid.* The Illinois cause of action was barred by the Illinois one-year statute of limitations. Ill. Ann. Stat. ch. 83, § 14 (Smith-Hurd 1956). The court could have found the action initiated January 17, 1945 arising from the publication at Pennsylvania newsstands on January 10, 1944, barred by the Pennsylvania one-year statute of limitations, Pa. Stat. Ann. tit. 12, § 31 (1953), without resorting to an interpretation of "engrossment." 166 F.2d at 135.

25. Pa. Stat. Ann. tit. 12, § 39 (1953) provides that when a cause of action is fully barred by the laws of the state in which it arose, such bar shall be a complete defense to an action brought in any of the courts of Pennsylvania.

26. 166 F.2d at 136.

27. 176 F.2d 897 (2d Cir.-1949).

separate jurisdictions. . . ."<sup>28</sup> The court, however, circumvented the difficulty of litigating separate wrongs by finding that plaintiff had been damaged only in Virginia, thus treating the multi-state libel as one cause of action. *Hartmann* was followed in *Kilian v. Stackpole Sons*.<sup>29</sup> There, in the forum which had litigated *Hartmann* three years previously, the court decided that the plaintiff's cause of action for publication in Pennsylvania was barred by the statute of limitations. Plaintiff then amended his pleadings and sought damages for causes of action accruing in Wisconsin, Washington, and Florida, states with declared "multiple-publication" rules. The Pennsylvania court, however, strictly applied the Wisconsin common law and the action was dismissed for lack of publication.<sup>30</sup>

After finding the "single-publication" rule controlling and finding the cause of action resulting from the multi-state libel barred by Michigan's statute of limitations, the present court concerned itself with the problem created by libels arising in other states. The court denominated the problem a "myriad [of] conceptual difficulties"<sup>31</sup> and expressly repudiated the *Hartmann* decision and rationale.<sup>32</sup> Since Michigan had chosen an internal law designed to bar the Michigan claim as stale, the court reasoned that it would defeat the legislative purpose were it to permit equally stale claims to be litigated. As a result, the court held that it was precluded by the "single-publication" doctrine from hearing the out-of-state causes of action.

A rule of consistency was thus effected in the nationwide libel: when the cause of action arising in the forum state is barred, all causes of action arising in other states are barred in the forum. This statement of the law eliminates the uncertainty common to the treatment of multi-state libels by barring the consideration of every such libel on the basis of the laws of the affected jurisdiction.<sup>33</sup> In actual practice, it is *Hartmann*, where the jury was charged to consider the effect of an overwhelming variety of libel laws on fifty-one wrongs based on the same defamatory statement, which ignores the realities of the multi-state libel. The instant court,<sup>34</sup> in limiting the problem to a single jurisdiction

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28. *Id.* at 900.

29. 98 F. Supp. 500 (M.D. Pa. 1951).

30. The Washington and Florida causes of action were dismissed because of plaintiff's failure to offer proof to support them. *Id.* at 505-06.

31. 195 F. Supp. at 414.

32. *Ibid.*

33. *Dale Sys., Inc. v. Time, Inc.*, 116 F. Supp. 527 (D.C. Conn. 1953) (court barred other actions by applying law of plaintiff's domicile); *Dale Sys., Inc. v. General Teleradio, Inc.*, 105 F. Supp. 745 (S.D.N.Y. 1952) (court discussed five conflict rules but chose none). See *Ass'n for the Preservation of Freedom of Choice v. Simon*, 298 F.2d 1007 (2d Cir. 1962). In this case, the rationale of the single-publication rule would require the barring of a cause of action arising in a foreign jurisdiction if the cause of action was barred in the forum regardless of New York's commitment to the *lex loci delicti* conflict rule.

34. In thus settling the law, the court still allows the plaintiff the opportunity to bring his cause of action in another jurisdiction, for the general rule treats a statute of limitations defense as a matter of procedure. See *Restatement, Conflict of Laws* § 603 (1934). When plaintiff's cause of action is barred by the statute of limitations in one state, plaintiff

framework, offers the only logical alternative to a federally legislated uniform law.<sup>35</sup>

**Constitutional Law—Applicability of the “Original Package” Doctrine to Prohibit State Taxation of Goods Imported for Sale.**—Plaintiff, a Wisconsin liquor dealer, imported wines and liquors from abroad which were stored in their original packages in the bonded portion of the plaintiff's warehouse.<sup>1</sup> Defendant city levied an *ad valorem* property tax on all of the imported liquor and the board of review upheld the assessment. The circuit court reversed.<sup>2</sup> On appeal the Supreme Court of Wisconsin affirmed the circuit court, holding that the tax on the imported liquor “whether inside or outside of the bonded warehouse area, not sold or consigned and still in the original unopened cases or containers . . .” violated the import-export clause of the United States Constitution. *State ex rel. H. A. Morton Co. v. Board of Review*, — Wis. 2d —, —, 112 N.W.2d 914, 917 (1962).

The import-export clause of the United States Constitution vests in the federal government the exclusive power to tax imports.<sup>3</sup> The purpose in prohibiting state taxation of imports was to insure equal taxing opportunities among the states, *i.e.*, to prevent the coastal states from levying a tax on goods originally destined for shipment to the interior states.<sup>4</sup> Thus, the general power of the states to tax property within their borders was limited by the exclusive grant of power to the federal government to tax imports. The issue arises, therefore, as to the point in time when an import ceases to be immune from the state taxing power. In 1827 Chief Justice Marshall, in *Brown v. Maryland*,<sup>5</sup> attempted to define this transition point. The State of Maryland had enacted a law requiring all importers to pay a license fee of fifty dollars. Defendant was convicted of selling foreign goods without a state license. Marshall treated the tax on the business of importing—however valid this reasoning may be—as equivalent to a tax on the thing imported.<sup>6</sup> Faced therefore,

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is not “precluded from maintaining an action to enforce the claim in another State if it is not barred by the Statute of Limitations in that State.” See also Restatement, Judgments § 49, comment a (1942); *Hartmann v. Time, Inc.*, 166 F.2d 127, 137-38 (3d Cir. 1947).

35. See Prosser, *Interstate Publication*, 51 Mich. L. Rev. 959 (1953).

1. The tax assessment also included a portion of the imported liquor which plaintiff had stored in the unbonded area of his warehouse.

2. — Wis. Cir. Ct. — (1961).

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

4. This clause was designed to prevent the “great importing states . . . [from levying] a tax on the non-importing states,” to which the imported property was or might be destined. This taxation by the importing states would of course be discriminatory and thus the “power of laying duties on imports was . . . taken from the states.” *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 440 (1827).

5. *Id.* at 419.

6. *Id.* at 437-38.

with the immunity extended to imports by the Constitution, the Court held that imported goods were not subject to state taxation until the article was either sold or removed from its original package and thereby "incorporated and mixed up with the mass of property in the country."<sup>7</sup> The purpose of Marshall's "original package" doctrine was to define that point in time when the thing imported lost its "distinctive character as an import"<sup>8</sup> and therefore its immunity. Subsequent cases applied this doctrine as a constitutional mandate rather than a rule of construction.<sup>9</sup>

Strict adherence to the "original package" rule was evidenced as late as 1945. The Court, in *Hooven & Allison Co. v. Evatt*,<sup>10</sup> held that a six months supply of goods, imported for use in manufacturing and stored in the importers' warehouse in their original packages, was not subject to state taxation. The Court, while relying upon the *Brown* decision, refused to distinguish between goods imported for sale and those imported for manufacture.<sup>11</sup>

However, in the consolidated opinion of *Youngstown Sheet & Tube Co. v. Bowers*, and *United States Plywood Corp. v. City of Algoma*,<sup>12</sup> the Court relaxed the *Brown* doctrine and devised the "current operational needs" test.<sup>13</sup> Under this test imported goods placed in reserve inventory for use in manufacturing were held to have lost their "distinctive character as 'imports'"<sup>14</sup> even though they were still in the original package. The Court reasoned that once the goods had been introduced into this reserve inventory they were so "irrevocably committed to 'use in manufacturing'" that they were already involved in the manufacturing process.<sup>15</sup>

The Court had before it three separate transactions: *Youngstown* concerned the importation of raw material in the original bales. A three to six months supply of these materials was stored in an enclosed area adjacent to the factory. *United States Plywood* concerned the importation of green lumber and finished veneers. The veneers were received in bundles and were placed unopened in the importer's warehouse. The green lumber was laid out to be air-

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7. *Id.* at 441.

8. *Id.* at 442.

9. See, e.g., *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218 (1933); *May v. New Orleans*, 178 U.S. 496 (1900). The cases after *Brown* defined other ways in which the imported article became commingled with the mass of goods in the state, e.g., placing the goods in the process of manufacturing and thereby changing their character, *Gulf Fisheries Co. v. MacInerney*, 276 U.S. 124, 126 (1928) (a tax on imported fish was not prohibited when the fish became "through processing, handling and sale a part of the mass of property subject to taxation by the state."); using the goods, *Southern Pac. Co. v. City of Calexico*, 288 Fed. 634 (S.D. Cal. 1923) (a pledging of the goods was held to be a use of them).

10. 324 U.S. 652 (1945).

11. *Id.* at 668.

12. 358 U.S. 534 (1959). See Comment, 28 *Fordham L. Rev.* 343 (1959); Note, 27 *Fordham L. Rev.* 278 (1958).

13. *Id.* at 547.

14. *Id.* at 548.

15. *Id.* at 546.

dried in a storage yard adjacent to the factory. The Court reasoned that the green lumber, since it was laid out to dry, was already in the manufacturing process and, therefore, subject to state taxation.<sup>16</sup> The raw material and veneers, however, had no immediate purpose other than as a reserve inventory. But the Court reasoned that the goods in reserve inventory were necessary in order that the importers continue their business operation, *i.e.*, production and sales, and therefore, had lost their "distinctive character as 'imports.'"<sup>17</sup> While the Court in *Youngstown* stated that it was not overruling the *Hooven* decision,<sup>18</sup> it would appear that by a process of insufficient distinction *Hooven* must be restricted to its facts.<sup>19</sup> The practical effect of the decision is that the "original package" doctrine, if it has any application at all, affects only goods imported for sale.

The instant court adhered strictly to the distinction drawn in *Youngstown* between goods imported for sale and goods imported for manufacture and, therefore, held that the "original package" doctrine still applied to the former.<sup>20</sup> While it is true that the majority in *Youngstown* did not state how goods imported for sale were to be treated, the dissent declared that the "original package" doctrine was completely overturned since there was no rational distinction between goods imported for sale and goods imported for use in manufacture under the "current operational needs" test.<sup>21</sup>

The question, therefore, is the effect of the "current operational needs" test on the status of goods imported for sale, and more precisely, the meaning of the test itself. If the Court in *Youngstown* intended that only those goods necessary to keep the business a going concern should be subject to state taxation, then the Court has, it seems, substituted a nebulous standard for the

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16. *Id.* at 549.

17. *Id.* at 543.

18. *Id.* at 544.

19. *Ibid.* The Court in *Hooven* stated that it was not considering the case where the presence of the imported goods was essential to current manufacturing requirements so that it could be said to have entered the process of manufacturing. 324 U.S. at 667. The Court in *Youngstown* predicated its opinion on this very point. 358 U.S. at 544. But Mr. Justice Frankfurter in his dissenting opinion pointed out that the vast bulk of imports are brought in for commercial purposes and to be exposed for sale in their original form or to be used as raw materials in manufacturing, *i.e.*, for operational needs. He concluded that the result of the decision was that "if imported goods are needed, they are taxable. If useless, they retain their constitutional immunity." *Id.* at 570.

20. — Wis. 2d at —, 112 N.W.2d at 916. The court quoted the *Youngstown* Court's dictum: "Whatever may be the significance of retaining in the 'original package' goods that have been imported for sale . . . goods that have been so imported for use in manufacturing are not exempt from taxation, though not removed from the 'original package,' if, as found here, they have been 'put to the use for which they [were] imported.'" — Wis. 2d at —, 112 N.W.2d at 916, citing 358 U.S. 534 at 548. The Wisconsin court states that this "clearly indicated that . . . [the Supreme Court] was not abolishing the 'original package' doctrine as applied to unopened stocks of goods imported for sale. . . ." — Wis. 2d at —, 112 N.W.2d at 916.

21. 358 U.S. 534, 564 n.12.



arbitrary, but practical "original package" doctrine.<sup>22</sup> A more reasonable interpretation would be that the "current operational needs" test is addressed to whether the imported goods have been appropriated to use within the particular state, either for resale or manufacture, *i.e.*, whether the goods have reached their ultimate destination.<sup>23</sup> Such a construction would permit state taxation of all imported goods except those imports present within a state merely for the purpose of transport to their final destination. This approach would adequately define that point when the goods lost their quality as imports, and would, on the other hand, preserve the original purpose of the constitutional provision to prevent a state from levying a tax on the goods simply because it is the importing state. Thus, *Youngstown's* "current operational needs" test belies the instant court's implication that the "original package" doctrine is a constitutional requirement.<sup>24</sup> On the contrary, the *Youngstown* decision indicates that the doctrine is, in the final analysis, merely a rule of construction.<sup>25</sup>

It is clear that the "current operational needs" test has replaced the "original package" doctrine with respect to goods imported for use in manufacturing. The latter, however, still prescribes the *outer* limits of import immunity from state taxation with respect to goods imported for sale. That is to say, an importing state may tax goods imported for sale though in their original packages, if that state is the place of ultimate destination. Under this reasoning it would

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22. "Although more subtle, more befogging cases might be imagined, it was 'plain' that, at least while in the hands of the importer in its original form or package, the foreign good remained an import and thus free from state levies." *Id.* at 559 (dissenting opinion). In all the cases prior to *Youngstown*, the state tax was allowed only where it was shown that the goods had lost their character as foreign imports by a change in their physical form or by an actual use of them or resale. Cf. cases cited note 9 *supra*. The difficulty in applying the "current operational needs" test in different manufacturing situations would be formidable if it were strictly construed. The issue would have to be determined by a subjective determination of just what the "current operational needs" actually are, which, in turn, would appear to depend solely on the intent of the importer.

23. Cf. *License Cases*, 46 U.S. (5 How.) 504 (1847). These cases were concerned with interstate commerce at a time when goods in interstate commerce were considered imports under the import-export clause. See *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1868). In the *License Cases* the Court refused to sustain a tax on goods while they were "in transitu," that is before they had reached their final destination. A tax on the goods while in transit would in effect constitute a transit duty on the goods. The Court's objection to a transit tax was based upon the realization that although the foreign importation physically ends in the coastal state, the latter may be merely a conduit for subsequent transportation to an interior state. We may derive from this a theory in favor of allowing taxation when the goods have reached their ultimate destination. This would not, it is submitted, conflict with the rationale of the import-export clause.

24. "[T]he import-export clause of the constitution protects goods imported for sale while they are in their original packages . . ." *State ex rel. H. A. Morton Co. v. Board of Review*, — Wis. 2d —, 112 N.W.2d 914, 916 (1962).

25. Cf. *Baldwin v. G. A. F. Seelig*, 294 U.S. 511 (1935), where Mr. Justice Cardozo said that "the test of the original package is not an ultimate principle. It is an illustration of a principle." *Id.* at 526-27 (dictum). It should be noted, however, that the state tax in *Baldwin* had been imposed on goods in interstate commerce.

appear that the instant court's strict adherence to the "original package" doctrine was unwarranted. Once the goods arrived at the importer's warehouses, earmarked for sale, it is submitted that they had reached their ultimate destination and therefore had lost their distinctive character as imports.

**Constitutional Law—State Statute Requiring Bible Reading in Public Schools Held Unconstitutional.**—Petitioner<sup>1</sup> contended that a Pennsylvania statute<sup>2</sup> requiring the daily reading of the Holy Bible in public schools violated the establishment clause of the first amendment.<sup>3</sup> Petitioners' children attended Abington Senior High School, where at the beginning of each school day ten verses of the King James Version of the Bible were read to the children, without comment, over a public address system. After the reading, the children recited, with the public address system leading them, the Lord's Prayer. Announcements were then made, after which the children went to class. The statute provided that a child would be excused from Bible reading upon the written request of the parents.<sup>4</sup> The district court held that the statute constituted an establishment of religion in violation of the first amendment. *Schempp v. School Dist.*, 201 F. Supp. 815 (E.D. Pa. 1962).

What is proscribed and what is permitted by the "establishment of religion" clause of the first amendment? Aid to religion—whether it be "federal fashion"<sup>5</sup> or "state style"<sup>6</sup>—starting with *Bradfield v. Roberts*<sup>7</sup> and continuing through *Engel v. Vitale*,<sup>8</sup> has been a constant source of litigation. Yet the establishment clause, despite the many opinions, legal as well as nonlegal, still defies an interpretation delineating between what is proscribed and what is permissible.

The instant court, in arriving at its decision, stated that the case was governed by *McCollum v. Board of Educ.*<sup>9</sup> In *McCollum*, a system of religious instruction conducted by representatives of various religions in public school buildings during hours when the children were compelled to attend school was

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1. Petitioners are members of the Unitarian faith.

2. "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day." Pa. Stat. Ann. tit. 24, § 15-1516 (Supp. 1960).

3. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const. amend. I.

4. "Any child shall be excused from such Bible reading . . . upon the written request of his parent or guardian." Pa. Stat. Ann. tit. 24, § 15-1516 (Supp. 1960). No penalty was directly imposed by the statute for teachers who failed to adhere to the mandatory bible reading. The teacher may, however, have his contract of employment terminated for the wilful violation of school laws. Pa. Stat. Ann. tit. 24, § 11-1122 (Supp. 1960).

5. Manning, Aid to Education—Federal Fashion, 29 Fordham L. Rev. 495 (1961).

6. Manning, Aid to Education—State Style, 29 Fordham L. Rev. 525 (1961).

7. 175 U.S. 291 (1899).

8. 10 N.Y.2d 174, 176 N.E.2d 579, 218 N.Y.S.2d 659, cert. granted, 363 U.S. 924 (1961), 30 Fordham L. Rev. 503 (1962).

9. 333 U.S. 203 (1948).

declared unconstitutional. Since the constitutionality of any released time program must be decided on an *ad hoc* basis,<sup>10</sup> the mere use of public buildings for sectarian purposes is not a per se establishment of religion.<sup>11</sup> The aid to religion which the *McCollum* Court found repugnant to the establishment clause was the integration of religious instructions with a *compulsory* school attendance law, *i.e.*, a degree of compulsion.<sup>12</sup> A released-time program carefully prepared to exclude any degree of compulsion was held constitutional in *Zorach v. Clauson*.<sup>13</sup> In *Engel v. Vitale*,<sup>14</sup> the New York Court of Appeals found the daily voluntary recitation of a non-sectarian prayer<sup>15</sup> in a public school to be a violation of neither the state nor federal constitutions. In the *Engel* case, a child could absent himself from the room or remain silent therein at the time of the recitation.<sup>16</sup> In the absence of compulsion, the New York court found no violation of the free exercise clause and held that the establishment clause was never intended to preclude the mere acknowledgment of a belief in a Supreme Being.<sup>17</sup>

A degree of compulsion was present in the instant case, in that the Pennsylvania statute required the child to be present during the Bible reading unless excused upon the written request of his parents.<sup>18</sup> The excused child could remain outside the room during the Bible reading;<sup>19</sup> however, those not present might miss important announcements which immediately followed the recitation.<sup>20</sup> The basic facts upon which the instant court predicated its finding of compulsion appear similar to the circumstances in the *Engel* decision. In *Engel*, however, the child could be excused from presence in the school building itself at the time of the recitation, and there was no possibility that a child would miss important announcements.<sup>21</sup>

Independent of compulsion, the instant court found an establishment of religion in that the Holy Bible is a Christian document, and hence the reading prefers the Christian religion over others.<sup>22</sup> The court concluded that Bible

10. *Id.* at 231.

11. See Note, 30 *Fordham L. Rev.* 503, 506 (1962).

12. 333 U.S. at 212.

13. 343 U.S. 306 (1952).

14. 10 N.Y.2d 174, 176 N.E.2d 579, 218 N.Y.S.2d 659, cert. granted, 368 U.S. 924 (1961).

15. "'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our County.'" *Id.* at 179, 176 N.E.2d at 580, 218 N.Y.S.2d at 660.

16. 18 Misc. 2d 659, 696, 191 N.Y.S.2d 453, 492-93 (Sup. Ct. 1959). The New York Supreme Court held that it was within the school board's discretion to decide which safeguards were sufficient to protect the childrens' right of free exercise of religion. Such safeguards must, of course, fit within the framework of constitutional requirements. Within this framework a provision that children may arrive a few minutes late or attend separate opening exercises was clearly allowed.

17. 10 N.Y.2d at 180, 176 N.E.2d at 581, 218 N.Y.S.2d at 661.

18. Pa. Stat. Ann. tit. 24, § 15-1516 (Supp. 1960).

19. 201 F. Supp. at 818.

20. *Ibid.*

21. See *supra* note 16.

22. 201 F. Supp. at 819.

reading followed by a mass recitation of the Lord's Prayer was in effect a "religious observance."<sup>23</sup>

The instant case appears to be correctly decided since the reading of the Bible seems to prefer the Christian religions, and further, the reading of the *King James* version and the recitation of the Lord's Prayer—by association—however valid this reasoning may be—seem to prefer one Christian religion over another. However, the court's reliance on *McCullum* is questionable on two grounds. First, the "essential facts"<sup>24</sup> in *McCullum* are quite different from the factual situation in the instant case. The Pennsylvania statute, the instant court held, violated the establishment clause even in the absence of compulsion. In *McCullum*, however, absent the compulsion, no violation of the establishment clause would have been present,<sup>25</sup> since there was neither a preference of one religion over another nor a preference of religion over irreligion. Second, it is doubtful whether *McCullum*, in light of *Zorach v. Clauson*,<sup>26</sup> represents the law today. It seems that the instant court itself was concerned with the validity of *McCullum* for it cited Mr. Justice Douglas' dictum, in the *Zorach* case, reaffirming *McCullum*.<sup>27</sup>

The decision by the court in the present case, however, does not, it is submitted, affect the reasoning of the New York Court of Appeals in the *Engel* case. In *Engel*, even if a degree of compulsion existed, the recitation of a non-sectarian prayer was not an establishment of religion.<sup>28</sup> Although there is a preference of religion over irreligion in *Engel*, the only alternative was a preference of irreligion over religion. Such a preference "is not mere neutrality . . . [but] it is an interference by the courts contrary to the plain language of the Constitution, on the side of those who oppose religion."<sup>29</sup> In other words, it is an interference with the free exercise of religion by those consenting to the program. In such a situation it is proper and logical to balance the establishment clause against the free exercise clause.<sup>30</sup> The preference of some religions over others in the instant case offers an alternative basis for the decision which is not repugnant to the Nation's religious tradition—state neutrality in religious affairs. This alternative does not require the balancing of the establishment and free exercise clauses.

**Eminent Domain—Airport Owner Liable to Adjacent Land Owner for Low-Flying Aircraft.**—Respondent, the County of Allegheny, Pennsylvania, was the owner and operator of the Greater Pittsburgh Airport. The Pennsylvania Court of Common Pleas held respondent liable in damages for low land-

23. *Ibid.*

24. "Its essential facts and those of *McCullum* are quite similar." *Ibid.*

25. See Note, 30 *Fordham L. Rev.* 503, 506 (1962).

26. 343 U.S. 306 (1952).

27. "We follow the *McCullum* case." 343 U.S. 306, 315 (1952). The instant court mentions *Torcaso v. Watkins*, 367 U.S. 488 (1961), as well, to reaffirm the holding of *McCullum*.

28. 10 N.Y.2d at 180, 176 N.E.2d at 581, 218 N.Y.S.2d at 661.

29. *Id.* at 184, 176 N.E.2d at 583, 218 N.Y.S.2d at 664.

30. See Note, 30 *Fordham L. Rev.* 503, 509 (1962).

ings and take-offs of aircraft, which rendered petitioner's property, located in the vicinity of the airfield, undesirable and useless for residential use. The trial court reasoned, that the "invasion" of petitioner's property constituted a "taking" of an air easement over the property for which, under the fourteenth amendment, just compensation must be paid.<sup>1</sup> On appeal, the Supreme Court of Pennsylvania reversed, holding that even if there had been a "taking" in the constitutional sense,<sup>2</sup> the "taking" was not the act of the county and, therefore, respondent was not liable.<sup>3</sup> The United States Supreme Court, in reversing the Supreme Court of Pennsylvania, held "that respondent, which was the promoter, owner and lessor of the airport, was in these circumstances the one who took the air easement in the constitutional sense. Respondent decided . . . where the airport would be built, what runways it would need, their direction and length, and what land and navigation easements would be needed. . . . Respondent in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough."<sup>4</sup> *Griggs v. County of Allegheny*, 369 U.S. 84, 89-90 (1962).

*Cujus est solum, ejus est usque ad coelum et ad inferos*, was, under the English common law, the accepted maxim which meant that the owner of a parcel of land also owned, in conjunction therewith, a segment of soil and atmosphere reaching from the depths of the earth to the upper reaches of the sky.<sup>5</sup> Any unprivileged penetration of either air or subterranean rights therefore constituted an actionable infringement.<sup>6</sup> This doctrine never met with favor in the United States, however, where, apart from the matter of state sovereignty in

1. *Griggs v. County of Allegheny*, 108 Pa. L.J. 65 (1961).

2. It has been held that "a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States. . . ." *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 241 (1897).

3. *Griggs v. County of Allegheny*, 402 Pa. 411, 168 A.2d 123 (1961).

4. More specifically, the uncontroverted facts of the case were as follows: "Regular and almost continuous daily flights, often several minutes apart, have been made by a number of airlines directly over and very, very close to plaintiff's residence. During these flights it was often impossible for people in the house to converse or to talk on the telephone. The plaintiff and the members of his household . . . were frequently unable to sleep even with ear plugs and sleeping pills; they would frequently be awakened by the flight and the noise of the planes; the windows of their home would frequently rattle and at times plaster fell down from the walls and ceilings; their health was affected and impaired, and they sometimes were compelled to sleep elsewhere. Moreover, their house was so close to the runways or path of glide that as the spokesman for the members of the Airlines Pilot Association admitted 'if we had engine failure we would have no course but to plow into your house.'" *Id.* at 422, 168 A.2d at 128-29.

5. 2 C.J.S. *Aerial Navigation* § 3 (1936).

6. Thus a gun shot was held actionable as a trespass in *Peabody v. United States*, 231 U.S. 530 (1913), as was a projecting eave in *Harrington v. McCarthy*, 169 Mass. 492, 48 N.E. 278 (1897). In the same vein a telephone wire was held a ground for ejection in *Butler v. Frontier Tel. Co.*, 186 N.Y. 486, 79 N.E. 716 (1906).

air space, a landowner's rights in the space above his land are not unlimited, and extend only to the point of reasonable possibility of use.<sup>7</sup>

The Air Commerce Act of 1926 expressly established national sovereignty in air space, stating that "the United States has, to the exclusion of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States . . . ."<sup>8</sup> The Civil Aeronautics Act of 1938 "recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States."<sup>9</sup> Subsequently the Civil Aeronautics Board, in accordance with its powers to implement the Civil Aeronautics Act, published a definition of navigable air space which has since been codified by Congress; its regulation prescribed the national navigable air space as that space above 1000 feet in congested areas and above 500 feet in all other areas.<sup>10</sup> Aircraft which flew beneath this navigable air space were subject to liability for damage caused thereby.<sup>11</sup> At this time, however, the navigable air space was not construed as including space necessary for landings and take-offs but was restricted to the 1000 and 500 foot minimums established for planes *in flight*.<sup>12</sup>

In the 1946 case of *United States v. Causby*,<sup>13</sup> the United States Supreme Court was, for the first time, presented with the question of liability for damage to property caused by aircraft landing and taking off. Plaintiff Causby alleged that the low-flying military aircraft caused the complete destruction of his poultry business and kept his family constantly in a state of fear, nervousness and sleeplessness. The Supreme Court held that under the circumstances there had been a taking in the constitutional sense of an air easement for which compensation was required to be paid by the federal government as the owner and operator of the low-flying aircraft.<sup>14</sup> The Court affirmed the view that the

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7. For an excellent discussion of this common law doctrine see *Swetland v. Curtiss Airports Corp.*, 41 F.2d 929, 934-40 (N.D. Ohio 1930).

8. 44 Stat. 568 (1926).

9. 52 Stat. 980 (1938), 49 U.S.C. § 1304 (1958).

10. The Board's regulation provided as follows: "Except when necessary for take-off or landing no person shall operate an aircraft below the following altitudes: (a) Anywhere. An altitude which will permit, in the event of the failure of a power unit, an emergency landing without undue hazard to persons or property on the surface; (b) Over congested areas. Over the congested areas of cities, towns or settlements, or over an open-air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet from the aircraft. . . (c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In such event, the aircraft shall not be operated closer than 500 feet to any person, vessel, vehicle, or structure. . . ." Civil Aeronautics Reg., 14 C.F.R. § 60.17 (1962).

11. Thus a farmer was permitted to recover for personal injuries sustained and for the value of horses lost when they bolted in fear and ran away due to a low-flying (150 feet high) dirigible. *Neiswonger v. Goodyear Tire & Rubber Co.*, 35 F.2d 761 (N.D. Ohio 1929).

12. *Swetland v. Curtiss Airports Corp.*, 41 F.2d 929 (N.D. Ohio 1930).

13. 328 U.S. 256.

14. *Id.* at 267.

path of the glide slope for landing and taking off was not included within the statutory definition of navigable air space.<sup>15</sup> It took pains, however, to point out that not every landing or take-off is violative even though it may occur beneath the navigable air space limit. In the language of the Court:

The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. . . . Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. . . .<sup>16</sup>

Thus aircraft making frequent low flights outside the protection of the navigable air space were not liable for a constitutional "taking" per se; some damage to the persons or property beneath had to be established.

Following the *Causby* case, Congress redefined navigable airspace to mean "airspace above the minimum altitudes of flight prescribed by regulations issued under this Act, and shall include airspace needed to insure safety in take-off and landing of aircraft."<sup>17</sup> This change was upheld in *Allegheny Airlines v. Village of Cedarhurst*<sup>18</sup> where, in an action by an airline operator to declare unconstitutional a village ordinance prohibiting flights within the defined navigable airspace, the circuit court of appeals rejected the contention of the village that government authorization for landings and take-offs at less than 500 feet constituted a "taking" without compensation. The court held that there was no evidence that the operations constituted a trespass or a nuisance to the people of the village and that "such findings preclude the possibility of finding a 'taking' within the doctrine of the *Causby* case."<sup>19</sup>

Just as flights previously under the 500 foot limit were not necessarily violative, however, flights now within the prescribed landing and take-off limits beneath 500 feet were not necessarily privileged or immune. It has been held that although a license to land and take off exists as part of the navigable air space, it cannot be used to the unlawful injury of those beneath.<sup>20</sup> Thus it would appear that an action for a "taking" exists regardless of the limits of navigable airspace on landings and take-offs, if the flights in question cause a substantial interference with the enjoyment and use of the land beneath.

The Court in the instant case recognized that the flights in question were within the established FAA-approved slope-paths and thus within the navigable airspace, but nevertheless held the respondent liable, relying in great part on the *Causby* case: "[T]he use of land presupposes the use of some of the airspace above it . . . . Otherwise, no home could be built, no trees planted, no fence constructed, no chimney erected . . . ."<sup>21</sup> In *Causby*, however, the

15. *Id.* at 264.

16. *Id.* at 266. See also *Hinman v. Pacific Air Transport*, 84 F.2d 755 (9th Cir. 1936), cert. denied, 300 U.S. 654 (1937).

17. Federal Aviation Act, 72 Stat. 789 (1958), 49 U.S.C. § 1301 (1958). (Emphasis added.)

18. 238 F.2d 812 (2d Cir. 1956).

19. *Id.* at 816. (Italics added.)

20. *Antonik v. Chamberlain*, 81 Ohio App. 465, 78 N.E.2d 752 (1947).

21. 369 U.S. at 88-89, citing *United States v. Causby*, 328 U.S. 256, 264 (1946).

federal government was liable as owner of the aircraft (although the Government was also the owner and operator of the airport). Here the owner, who was also the operator of the airport, was held liable and the majority reasoned that the federal government, which controls all flight procedures (including the angle and height of the glide slope) through the Federal Aviation Agency, would not be liable for the taking of the easement over petitioner's land.<sup>22</sup>

In other respects the two cases are quite similar. In *Causby* the family residence was located 2275 feet from the end of the runway and the barn housing the chickens only 2220 feet away. The official glide slope passed over the property at a height of eighty-three feet resulting in a sixty-seven foot clearance over the house and a sixty-three foot clearance over the barn.<sup>23</sup> Defendant was charged with having rendered the property useless as a chicken farm and for having caused the family to lose sleep and to become nervous and frightened.<sup>24</sup> In the instant case the home was located farther from the runway, 3250 feet, but its location on a small hill negated the added distance. The glide slope passed eighty-one feet over the property resulting in an 11.36 foot minimum glide slope clearance over petitioner's chimney. Flights regularly cleared the residence by as little as thirty feet on take-offs and fifty-three feet on landings.<sup>25</sup> Respondent was charged with having caused petitioner and his family to become nervous and distraught and with having rendered petitioners' home undesirable and unbearable for residential purposes.<sup>26</sup>

Inasmuch as the *Causby* decision seems to have been based on the fact that landing and take-off altitudes were not included within the definition of the navigable airspace, it is questionable whether the same defendant (the owner and operator of the aircraft) would be held liable today on the same facts. The reasoning of the instant case would seem to be that since approach and departure slopes are part of the navigable airspace, the one who chose the location of the slope (the airport owner) should be held answerable for any resulting damage rather than the owner and operator of the *aircraft* who has no choice but to follow the specified glide slope into the runway. Clearly, however, the owner and operator of the aircraft would be liable if damage ensued from a flight which was in violation of the official glide slope and thus not within the navigable airspace. This distinction would seem logical and is not without some precedent. As early as 1930 it was held that "in such instances, to fly over the lands of an adjoining owner at lower altitudes [than the navigable airspace], the owners of airports must secure the consent of adjoining property owners, or acquire such right by condemnation. . . ."<sup>27</sup> This same logic was applied more recently in the case of *Ackerman v. Port of Seattle*.<sup>28</sup> In holding the airport operator liable for low flights the court held:

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22. *Id.* at 89-90.

23. 328 U.S. at 258.

24. *Id.* at 259.

25. 369 U.S. at 86-87.

26. *Id.* at 87.

27. *Swetland v. Curtiss Airports Corp.*, 41 F.2d 929, 942 (N.D. Ohio 1930), which was decided before approaches were within the navigable airspace.

28. 55 Wash. 2d 400, 348 P.2d 664 (1960).



Having the power to acquire an approach way by condemnation, the Port, allegedly, failed to exercise that power, with the result that the appellants' private airspace is allegedly being used as an approach way, without just compensation first having been paid to them. Clearly, an adequate approach way is as necessary a part of an airport as is the ground on which the airstrip, itself, is constructed, if the private airspace of adjacent landowners is not to be invaded by airplanes using the airport.<sup>29</sup>

The dissent in the instant case argued that there could not possibly have been a "taking" by the airport owner since the United States had already acquired all necessary easements by pre-empting the navigable airspace.<sup>30</sup> The dissenting Justices argued that exclusive liability for this "taking" should rest with the federal government.<sup>31</sup> Thus Mr. Justice Black wrote: "And where Congress has already declared airspace *free* to all . . . pretty clearly it need not again be acquired by an airport."<sup>32</sup> However, if in fact Congress did intend to take easements in the navigable airspace, thus precluding anyone else from doing the same, there would have been no need for Congress to have enacted Section 1112 of the Federal Airport Act, which provides for reimbursement to airport operators for purchases of easements "through or other interests in airspace."<sup>33</sup> Although the majority in the instant case, in a dictum, rejected the dissent's argument that the federal government should be liable for having pre-empted the airspace, there is some merit to the argument that the federal government should ultimately be liable, at least in part.

It is clear that the congressional declaration with respect to United States sovereignty in navigable airspace<sup>34</sup> was not, in itself, a "taking" in the constitutional sense. It was rather the flights through this air space (including the glide slope) with their consequent damage to property rights, which constituted the "taking." However, a further question to be answered is whether the Government's general pre-emption of the navigable airspace, along with the specific authorization to respondent in this case to use the airspace, were together sufficient to constitute such a "taking." That is, did the damage accompanying the authorized use constitute a "taking" by the Government as opposed to the airport owner? This may well have been what the dissent was indicating when it emphasized the Government's *approval* of respondent's proposed airport plan and its subsequent commissioning of the glide slope.<sup>35</sup>

Another possible argument for federal liability has its foundation in contract law. Under an agreement between the airport owner and the Civil Aeronautics Administration,<sup>36</sup> the federal government was to share fifty to seventy-five per cent of allowable project costs including the "costs of acquiring land or

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29. *Id.* at 413, 348 P.2d at 671.

30. 369 U.S. at 92-93.

31. *Id.* at 94.

32. *Id.* at 93.

33. 60 Stat. 177 (1946), 49 U.S.C. § 1112 (1958).

34. See note 9 *supra* and accompanying text.

35. 369 U.S. at 91-93.

36. The agreement was executed pursuant to the terms of the Federal Airport Act. 369 U.S. at 86.

interest therein or easements through or other interests in airspace."<sup>37</sup> The agreement specifically provided that the total project cost estimate approved by the Administrator could subsequently be revised upward to include additional costs not to exceed ten per cent of the approved amount.<sup>38</sup> The majority has held that there was a "taking" by respondent of what amounted to an easement in petitioners land.<sup>39</sup> This being so, it would seem only proper that the federal government reimburse respondent for fifty to seventy-five per cent of the cost of the "easement" as it had contracted to do pursuant to the terms of the original contract. Of necessity, the reimbursable expenses would be limited to those reflecting only the value of the easement itself, and would not include other separable surface damages for which an airport owner may also have been assessed.

In any event, by holding the airport owner liable, the Court has entered into an area of litigation which could conceivably open a "Pandora's box." Care must be exercised in the application of the law of this case lest the development of the national airport plan and of commercial aviation be seriously impeded. The facts of both the *Causby* and the instant case certainly warranted holdings in favor of the property owners. However, the criterion of distance from the runway alone is inadequate, as a comparison of the two cases will show, but must be considered in conjunction with elevation and the position of the glide slope. Each case will have to be considered on an *ad hoc* basis to determine whether there was in fact a substantial interference with the use and enjoyment of the property beneath, or whether the suit is mere harassment to "retaliate" for noise which is well above tolerable limits and is one of "the inconveniences which . . . are normally not compensable . . ."<sup>40</sup>

**Evidence—Attorney-Client Privilege Includes Communications to Accountant Employed by Lawyer.**—Defendant, an accountant in the employ of a law firm, was subpoenaed by a grand jury investigating a client's alleged income tax violations, and was ordered to testify as to his knowledge of the client's finances. The defendant refused to answer several questions on the

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37. 60 Stat. 177 (1946), 49 U.S.C. § 1112(2) (1958). The act provides further in § 1112 that: "A project cost shall be allowable if—(1) it was a necessary cost incurred in accomplishing airport development in conformity with approved plans . . . (2) it was incurred subsequent to the execution of the grant agreement with respect to the project . . . (3) it is reasonable in amount, in the opinion of the Administrator. . . ." Federal Airport Act § 1112, 60 Stat. 117 (1946), 49 U.S.C. § 1112 (1958).

38. "Upon approving a project the Administrator, on behalf of the United States, shall transmit to the sponsor or sponsors of the project an offer to pay the United States share of the allowable project costs of such project. . . . Each such offer shall state a definite amount as the maximum obligation of the United States payable from funds authorized by this chapter. . . . [Once accepted] thereafter the amount stated in the accepted offer as the maximum obligation of the United States under such grant agreement shall not be increased by more than 10 per centum. . . ." Federal Airport Act § 1111, 60 Stat. 177 (1946), as amended, 72 Stat. 807 (1958), 49 U.S.C. § 1111 (1958).

39. 369 U.S. at 89.

40. *United States v. Causby*, 328 U.S. 256, 266 (1946).

ground that the requested information had been acquired by him while in the employ of attorneys, and was therefore privileged. Asserting that the attorney-client privilege is reserved only to the attorney and those in his office employed at menial and ministerial work, the United States District Court for the Southern District of New York found the defendant guilty of contempt. The United States Court of Appeals for the Second Circuit, in a unanimous decision, held that the attorney-client privilege included communications made in confidence by a client to an accountant in the attorney's employ for the purpose of obtaining legal advice from the attorney. The judgment of the district court was vacated, and the cause remanded for further hearings to determine the circumstances under which the accountant had received the information.<sup>1</sup> *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961).

The privilege which protects the client from the disclosure by his attorney of any communication made in the course of the attorney's professional employment has long been recognized at the common law.<sup>2</sup> The primary purpose of such immunity is to foster freedom of consultation for the client without fear of compulsory disclosure by the attorney,<sup>3</sup> his clerks, or staff.<sup>4</sup> Professor Wigmore states that the assistance of special agents has become indispensable to the attorney, and since the communications of the client are often necessarily committed to them by the attorney or by the client himself, the privilege must extend to all persons acting in the attorney's behalf.<sup>5</sup> The complexities of the modern business world have created an ever growing need for specialists capable of assisting the legal practitioner. Without such cooperative intercourse, the attorney-client relationship would be handicapped because of the advent of "field specialization."<sup>6</sup>

The rule in Great Britain has traditionally been that an accountant consulted by a solicitor, in respect to a client's financial situation, is included in the privilege.<sup>7</sup> As the court stated in *Walsham v. Stainton*,<sup>8</sup> "I can see no distinction in principle between accounts prepared by an accountant employed by a solicitor and those prepared by the solicitor himself. It is the case of a solicitor employing a confidential agent."<sup>9</sup>

1. Defendant had admitted receiving a statement of the client's assets and liabilities, but when asked "what was the purpose of your receiving that," [he] . . . declined to answer on the ground of privilege 'because the communication was received with a purpose, as stated by the client.'" 296 F.2d 918, 919 (2d Cir. 1961).

2. Richardson, Evidence § 426 (8th ed. 1955).

3. *People ex rel. Vogelstein v. Warden*, 150 Misc. 714, 270 N.Y. Supp. 362 (Sup. Ct. 1934).

4. Including secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and other aides.

5. 8 Wigmore, Evidence § 2301 (McNaughton rev. ed. 1961); Annot., 53 A.L.R. 369 (1928).

6. *Lourie & Cutler, Lawyer's Engagement of Accountant in a Federal Tax Fraud Case*, 10 Tax. L. Rev. 227 (1954).

7. *Westminster Airways Ltd. v. Kuwait Oil Co.*, [1951] 1 K.B. 134; *Ankin v. London & N.E. Ry.*, [1930] 1 K.B. 527; *Walsham v. Stainton*, 2 Hem. & M. 1, 71 Eng. Rep. 357 (Ch. 1863).

8. 2 Hem. & M. 1, 71 Eng. Rep. 357 (Ch. 1863).

9. *Id.* at 6, 71 Eng. Rep. at 359.

In the United States, the attorney-client privilege has been held to include the employment as consultants, by attorneys, of engineers,<sup>10</sup> patent experts,<sup>11</sup> interpreters,<sup>12</sup> medical doctors,<sup>13</sup> and psychiatrists.<sup>14</sup> This result has been achieved by a liberal interpretation of the privilege's applicability to non-attorneys. For example, in *Schmitt v. Emery*,<sup>15</sup> the court expressed the rule thusly:

Where a document is prepared by an agent or employe [sic] by direction of the employer [the client] for the purpose of obtaining the advice of the attorney or for use in prospective or pending litigation, such document is in effect a communication between attorney and client. The client is entitled to the same privilege with respect to such a communication as one prepared by himself. The agent or employe [sic] as well as the attorney is prohibited from testifying with respect thereto without the client's consent.<sup>16</sup>

In *City & County of San Francisco v. Superior Court*,<sup>17</sup> the court held that the attorney-client privilege included a physician who examined the plaintiff at the request of the attorney, on the theory that the doctor was an "intermediate agent for communication between [the plaintiff] . . . and his attorneys. . . ."<sup>18</sup>

Similarly, the attorney-client privilege has been applied to a psychiatrist hired by a defendant's lawyer to examine his client in order to ascertain whether or not a defense of insanity might be utilized upon the defendant's trial for murder.<sup>19</sup> Reasoning that the privilege was based upon the relation of attorney-client, in that the doctor was the consultant of the attorney, the court stated that "the privilege extends to the necessary intermediaries and agents through whom the communications are made. And it includes communications between the attorney and a scientific expert retained to aid in the presentation of the defense, a confidential employment."<sup>20</sup>

However, the courts have been cautious and deliberate in further extending

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10. *Schuyler v. United Air Lines, Inc.*, 10 F.R.D. 111 (M.D. Pa.), motion for new trial denied, 94 F. Supp. 472 (M.D. Pa. 1950), aff'd per curiam, 188 F.2d 963 (3d Cir. 1951); *Lewis v. United Airlines Transp. Corp.*, 32 F. Supp. 21 (W.D. Pa. 1940); *Wilson v. Superior Court*, 148 Cal. 2d 433, 307 P.2d 37 (Dist. Ct. App. 1957).

11. *Lalance & Grosjean Mfg. Co. v. Haberman Mfg. Co.*, 87 Fed. 563 (C.C.S.D.N.Y. 1898); *Cold Metal Process Co. v. Aluminum Co. of America*, 7 F.R.D. 684 (D. Mass. 1947), aff'd per curiam sub nom. *Sachs v. Aluminum Co. of America*, 167 F.2d 570 (6th Cir. 1948).

12. *Du Barre v. Livette*, 1 Pea. 108, 170 Eng. Rep. 96 (K.B. 1791).

13. *City & County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 231 P.2d 26 (1951).

14. *State v. Kociolek*, 23 N.J. 400, 129 A.2d 417 (1957).

15. 211 Minn. 547, 2 N.W.2d 413 (1942).

16. *Id.* at 551, 2 N.W.2d at 416.

17. 37 Cal. App. 2d 227, 231 P.2d 26 (1951).

18. *Id.* at 231, 231 P.2d at 29; accord, *Baird v. Koerner*, 279 F.2d 623, 635 (9th Cir. 1960), holding that the attorney-client privilege can often exist although the communications are by the client's agents, not the client, to the attorney.

19. *State v. Kociolek*, 23 N.J. 400, 129 A.2d 417 (1957).

20. *Id.* at 413, 129 A.2d at 424.

the privilege. Thus, in *Himmeljarb v. United States*,<sup>21</sup> the court found no privilege where an accountant employed by the appellant's attorney was present during discussions between the attorney and client. The court reasoned that the accountant's presence at the discussions was not "indispensable in the sense that the presence of an attorney's secretary may be. It was a convenience which . . . served to remove the privileged character of whatever communications were made."<sup>22</sup> The client had revealed the information for the purpose of transmission to an Internal Revenue agent, and therefore the court noted that the necessary element of confidentiality was lacking. That which did not bind the attorney did not bind the accountant.<sup>23</sup> Similarly, *Gariepy v. United States*,<sup>24</sup> relying on *Himmeljarb*, held that there was no privilege where there was no evidence to show that the accountant was employed by the attorney.<sup>25</sup>

In the instant case, Judge Friendly was careful to point out the necessary, albeit difficult, distinction which courts must draw between communications made by a client to an accountant for accounting advice, and those made to an accountant at the direction of his attorney for the purpose of securing better legal advice.<sup>26</sup> The court noted that as taxes and tax regulations have increased in occurrence, amount, and complexity, the assistance of an accountant has become a practical necessity to the attorney in the latter's attempt to give his client accurate counsel. The court aptly compared the situation to one where the client speaks in a foreign language. The attorney would be unable to aid his client without the services of an interpreter.<sup>27</sup> Whether provided by the client or the attorney, and whether or not the conversation occurred in the presence of the lawyer, the information confidentially given by the client to the linguist for transmission to the lawyer would be privileged.

The court, in passing,<sup>28</sup> pointed out that it was not bound to apply the New York statutory privilege<sup>29</sup> in a federal grand jury proceeding,<sup>30</sup> since, clearly, it would not be applicable in a federal criminal trial. Noting that the New York statute and the federal rule were both codifications of the common

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21. 175 F.2d 924 (9th Cir. 1949), cert. denied, 338 U.S. 860 (1949).

22. Id. at 939.

23. Ibid.

24. 189 F.2d 459 (6th Cir. 1951). The client confided in his accountant first, and later revealed the same information to his attorney.

25. Consistent with the Gariepy case is *Sachs v. Aluminum Co. of America*, 167 F.2d 570 (6th Cir. 1948) (per curiam), affirming *Cold Metal Process Co. v. Aluminum Co. of America*, 7 F.R.D. 684 (D. Mass. 1947). Where the attorney is an accountant, and is acting only as an accountant, there is no privilege. *Olender v. United States*, 210 F.2d 795 (9th Cir. 1954). Once the attorney steps outside his professional capacity, no privilege attaches. *United States v. De Vasto*, 52 F.2d 26 (2d Cir. 1931); *United States v. Chin Lim Mow*, 12 F.R.D. 433 (N.D. Cal. 1952).

26. 296 F.2d at 922.

27. Id. at 921.

28. Id. at 921 n.2.

29. N.Y. Civ. Prac. Act § 353.

30. Fed. R. Crim. P. 26.

law, the court dismissed a possible conflict of laws situation as academic because the result in the instant case, under either rule, would be the same.

A survey of New York case law on the application of the attorney-client privilege to third persons would tend to justify the court's assumption. The New York courts have extended the privilege to communications made by an agent, provided it can be proved that the agent was the authorized agent of the client for the purpose of making a communication to the attorney.<sup>31</sup> On this basis it has been held that the communications of a party to his insurance company for transmission to its attorney who will defend the insured party, are privileged.<sup>32</sup> The appellate division, in a dictum, has suggested that Section 353 of the New York Civil Practice Act might apply to some or all of the client's personal records and work sheets while in the hands of an accountant.<sup>33</sup>

Clearly the court did not intend, nor grant, the privilege to everyone employed in a law office. The case was remanded rather than reversed for the very reason that the record was not clear as to *how* the defendant had acquired the information desired by the grand jury. In the words of the court: "What is vital to the privilege is that the communication be made *in confidence* for the purpose of obtaining *legal* advice *from the lawyer*. If what is sought is not legal advice but only accounting service . . . or if the advice sought is the accountant's rather than the lawyer's, no privilege exists."<sup>34</sup> The ruling of this court sets forth an entirely reasonable standard which, while it expands the privilege's coverage, encompasses the court's recognition that modern accommodations must be brought within the spirit of antedated legal principles.

**Injunctions—Sale of Rebottled Trade-Marked Product Under Full Disclosure Labels Enjoinable.**—Plaintiff, a Delaware corporation importing perfumes and perfume extracts from France which it sells under brand names, sought an injunction and damages in New York County Supreme Court, alleging that defendant, in violation of Section 2354(6) of the New York Penal Law, had purchased and rebottled the perfumes, and had resold them under labels indicating that the contents were plaintiff's product rebottled from the original containers by defendants. The trial court denied defendants' motion to dismiss the complaint as failing to state a cause of action.<sup>1</sup> The appellate division reversed, finding no violation of the statute in the absence of a showing of fraud.<sup>2</sup> In a five to two decision the court of appeals,

31. *Le Long v. Siebrecht*, 196 App. Div. 74, 187 N.Y. Supp. 150 (2d Dep't 1921).

32. *Hollien v. Kaye*, 194 Misc. 821, 87 N.Y.S.2d 782 (Sup. Ct. 1949).

33. *In re Ryan*, 281 App. Div. 953, 120 N.Y.S.2d 110 (1st Dep't) (per curiam), appeal dismissed, 306 N.Y. 11, 114 N.E.2d 183 (1953).

34. 296 F.2d at 922.

1. The decision in the New York Supreme Court, Special Term (Steuer, J.) was unreported.

2. *Lanvin Parfums, Inc. v. Le Dans, Ltd.*, 12 App. Div. 2d 104, 203 N.Y.S.2d 675 (1st Dep't 1960).

in turn, reversed the appellate division.<sup>3</sup> Section 2354(6)<sup>4</sup> was intended to prevent the possibility of fraud and the mere acknowledgment of the repackaging upon the label did not lessen that possibility. Because defendants' alleged conduct also threatened property rights, trade-mark, and good will of the plaintiff, an injunction would issue. *Lanvin Parfums, Inc. v. Le Dans, Ltd.*, 9 N.Y.2d 516, 174 N.E.2d 920, 215 N.Y.S.2d 257, cert. denied, 368 U.S. 834 (1961).

Equity has extended its protection of property rights<sup>5</sup> to business activities through the law of unfair competition.<sup>6</sup> Originally an infringement of a trade-mark would be enjoined only where defendant was a competitor<sup>7</sup> and had "palmed off" his product as plaintiff's.<sup>8</sup> As business activities increased and

3. The dissenting judges of the court of appeals voted to affirm on the basis of the majority opinion of the appellate division.

4. N.Y. Penal Law § 2354 provides: "A person who . . . (6) Knowingly sells, offers or exposes for sale, any goods which are represented in any manner, by word or deed, to be the manufacture, packing, bottling, boxing or product of any person, firm or corporation, other than himself, unless such goods are contained in the original packages, box or bottle and under the labels, marks or names placed thereon by the manufacturer who is entitled to use such marks, names, brands, or trade-marks; . . . is guilty of a misdemeanor . . ."

5. See *In re Debs*, 158 U.S. 564 (1895).

6. *De Funiak*, *Modern Equity* § 38 (1950). "Trade-mark infringement rests on a relatively narrow principle while the law of unfair competition is a broad concept with a widening scope. Trade-mark infringement is a phase of unfair competition, while unfair competition may exist independently of trade-mark infringement." 1 Nims, *The Law of Unfair Competition and Trade-Marks* § 1, at 13 (4th ed. 1947); cf. *Guerlain, Inc. v. F. W. Woolworth Co.*, 297 N.Y. 11, 74 N.E.2d 217, cert. denied, 332 U.S. 837 (1947).

7. "The phrase 'unfair competition' presupposes competition of some sort. In the absence of competition the doctrine cannot be invoked." *Borden Ice Cream Co. v. Borden's Condensed Milk Co.*, 201 Fed. 510, 514 (7th Cir. 1912). The requirement of competition between the parties was later rejected. See *Standard Oil Co. of N.M. v. Standard Oil Co. of Cal.*, 56 F.2d 973, 977 (10th Cir. 1932), where it was stated: "[T]he Borden case is out of harmony with the modern law of unfair competition." *Ward Baking Co. v. Potter-Wrightington Inc.*, 298 Fed. 398 (1st Cir. 1924); *Long's Hat Stores Corp. v. Long's Clothes, Inc.*, 224 App. Div. 497, 231 N.Y. Supp. 107 (1st Dep't 1928). See also Note, 24 *Ind. L.J.* 575 (1949).

8. "During the early years of the development of the doctrine of unfair competition, standards of commercial morality were comparatively low, and the efforts of an able bench and a vigorous bar were largely confined to securing relief where one trader passed off his goods as those of his rival. Thus 'passing or palming off' became the criterion and test to determine whether or not the defendant was guilty of unfair competition." Oates, *Relief in Equity Against Unfair Trade Practices of Non-Competitors*, 25 *Ill. L. Rev.* 643, 644 (1931); see *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 405 (1916). In *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U.S. 118, 140 (1905) the Court stated that "the essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails." See *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U.S. 598, 604 (1888) where the Court said: "Relief in such cases is granted only where the defendant, by his marks, signs, labels,

more subtle methods of unfairness evolved, courts of equity correspondingly extended their protection to "any species of 'commercial hitch-hiking.'"<sup>9</sup> No longer was an actual intent to deceive or mislead the public necessary;<sup>10</sup> nor might a defendant answer that he was using his own name in the conduct of his business, if the result was an appropriation of another's reputation.<sup>11</sup> The standard has come to be whether acts are or are not unfair,<sup>12</sup> as determined by the individual character and circumstances of the business,<sup>13</sup> so that "appropriation of that which equitably belongs to a competitor"<sup>14</sup> can be restrained by injunction. The rights incidental to a trade-mark are acquired at common law by its exclusive use and appropriation and exist independently of registration under any trade-mark act.<sup>15</sup> It is generally agreed that a trade-mark, of itself, confers a property right upon its owner,<sup>16</sup>

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or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods. . . ." Cf. *White Studio, Inc. v. Dreyfoos*, 221 N.Y. 46, 116 N.E. 796 (1917).

9. *Harvey Machine Co. v. Harvey Aluminum Corp.*, 9 Misc. 2d 1078, 1030, 175 N.Y.S.2d 288, 291 (Sup. Ct. 1957). The historical development of this branch of the law is well traced by Justice Greenberg in both *Christian Dior, S.R.L. v. Milton*, 9 Misc. 2d 425, 155 N.Y.S.2d 443 (Sup. Ct. 1956), aff'd, 2 App. Div. 2d 878, 156 N.Y.S.2d 996 (1st Dep't 1956), and *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), aff'd, 279 App. Div. 632, 107 N.Y.S.2d 795 (1st Dep't 1951) (per curiam). See also *Norwich Pharmacal Co. v. Sterling Drug, Inc.*, 167 F. Supp. 427 (N.D.N.Y. 1958), rev'd on other grounds, 271 F.2d 569 (2d Cir. 1959), cert. denied, 362 U.S. 919 (1960); *Pharmaceuticals, Inc. v. United Whelan Corp.*, 22 Misc. 2d 532, 197 N.Y.S.2d 22 (Sup. Ct. 1959); *Vaudable v. Montmartre, Inc.*, 20 Misc. 2d 757, 193 N.Y.S.2d 332 (Sup. Ct. 1959).

10. *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N.Y. 462, 39 N.E. 490 (1895); *Madison Square Garden Corp. v. Universal Pictures Co.*, 255 App. Div. 459, 7 N.Y.S.2d 845 (1st Dep't 1938). See also *Derenberg, Trade-Mark Protection and Unfair Trading* § 6, at 55 (1936).

11. See *Sullivan v. Ed Sullivan Radio & T.V., Inc.*, 1 App. Div. 2d 669, 152 N.Y.S.2d 227 (1st Dep't 1956); *Annot.*, 107 A.L.R. 1279 (1937), supplementing 47 A.L.R. 1189 (1927).

12. *Santa's Workshop, Inc. v. Sterling*, 282 App. Div. 328, 122 N.Y.S.2d 483 (3d Dep't 1953).

13. *W. Walley, Inc. v. Saks & Co.*, 266 App. Div. 193, 41 N.Y.S.2d 739 (1st Dep't 1943).

14. *Norwich Pharmacal Co. v. Sterling Drug, Inc.*, 167 F. Supp. 427, 432 (N.D.N.Y. 1958), citing *International News Serv. v. Associated Press*, 248 U.S. 215 (1918). See also *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

15. *E. F. Prichard Co. v. Consumers Brewing Co.*, 136 F.2d 512 (6th Cir. 1943); 2 Nims, *The Law of Unfair Competition and Trade-Marks* § 223a (4th ed. 1947). See also *Trade-Mark Cases*, 100 U.S. 82 (1879). "The right to adopt and use a symbol or a device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of use by all other persons, has been long recognized by the common law and the chancery courts of England and of this country, and by the statutes of some of the States. It is a property right for the violation of which damages may be recovered in an action at law, and the continued violation of it will be enjoined by a court of equity, with compensation for past infringement." *Id.* at 92.

16. See 1 Nims, *The Law of Unfair Competition and Trade-Marks* § 198a, at 530 (4th



but good will, of which a trade-mark is only the symbol,<sup>17</sup> has long been the subject of protection as a property right in New York courts.<sup>18</sup> New York has gone so far as to hold that "any civil right not unlawful in itself nor against public policy, that has acquired a pecuniary value, becomes a property right that is entitled to protection as such."<sup>19</sup>

As a supplement to common-law protection there are state and federal registration statutes. Registration has many advantages but it is not mandatory and a failure to register forfeits no rights existing at common law.<sup>20</sup> The federal Lanham Act of 1946<sup>21</sup> affords the registrant the benefits of constructive notice of the existence of the owner's mark<sup>22</sup> and provides a federal forum<sup>23</sup> for the remedies<sup>24</sup> enumerated under the act, regardless of diversity of citizenship or the amount in controversy. New York has also provided for trade-mark protection through registration,<sup>25</sup> through remedies<sup>26</sup> in its General

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ed. 1947) and cases cited therein; cf. Derenberg, *Trade-Mark Protection and Unfair Trading* 47 (1936).

17. 1 Nims, *op. cit. supra* note 16, § 16.

18. "The plaintiffs were thereby subjected to unfair competition by a rival; to an invasion of the good will acquired by them for the trade name." *Lehrenkrauss v. Universal Tours, Inc.*, 262 N.Y. 332, 337, 186 N.E. 802, 803 (1933); "The plaintiff clearly had a property right in its good name, its reputation, its good will built up at considerable expense. . . ." *Madison Square Garden Corp. v. Universal Pictures Co.*, 255 App. Div. 459, 466, 7 N.Y.S.2d 845, 851 (1st Dep't 1938); "[P]laintiff has incurred great expense, has acquired a reputation and good will of value and has acquired valuable property rights in its good will and reputation. . . ." *Christian Dior, S.R.L. v. Milton*, 9 Misc. 2d at 428, 155 N.Y.S.2d at 449.

19. *Fisher v. Star Co.*, 231 N.Y. 414, 428, 132 N.E. 133, 137, cert. denied, 257 U.S. 654 (1921). The *Fisher* case followed *International News Serv. v. Associated Press*, 248 U.S. 215 (1918).

20. "In the United States, the statutes, both Federal and local, involving trade-marks have been registration statutes granting no rights not recognized under common law." 2 Nims, *The Law of Unfair Competition and Trade-Marks* 1116 (4th ed. 1947). See *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315 (1938).

21. 60 Stat. 427 (1946), 15 U.S.C. §§ 1051-1127 (1958). "The purpose of this bill is to place all matters relating to trade-marks in one statute and to eliminate judicial obscurity, to simplify registration and to make it stronger and more liberal, to dispense with mere technical prohibitions and arbitrary provisions, to make procedure simple, and relief against infringement prompt and effective." S. Rep. No. 1333, 79th Cong., 2d Sess. 1 (1946). Prior to the present Lanham Act, Congress had enacted major trade-mark legislation in 33 Stat. 724 (1905) and 41 Stat. 533 (1920).

22. 60 Stat. 435 (1946), 15 U.S.C. § 1072 (1958).

23. 60 Stat. 440 (1946), 15 U.S.C. § 1121 (1958).

24. 60 Stat. 437 (1946), 15 U.S.C. § 1114 (1958). "Under the new Act . . . a yardstick is available for uniform determination of what constitutes 'unfair competition.' Somewhat indirectly, but nevertheless effectively, a Federal 'code of unfair competition' is thus incorporated into our law. . . ." Roberts, *The New Trade-Mark Manual* 180 (1947).

25. N.Y. Gen. Bus. Law § 363.

26. N.Y. Gen. Bus. Law § 368-c to 68-d. When the instant case arose, the remedies section was contained entirely in § 368-c. At that time, subdivision 3 of § 368-c read: "Likelihood of injury to business reputation or of dilution of the distinctive quality of a

Business Law,<sup>27</sup> and by provisions in its Penal Law<sup>28</sup> which designate certain conduct as misdemeanors.<sup>29</sup> These penal sanctions are not exclusive of the equitable remedies<sup>30</sup> and the fact that the acts sought to be enjoined are also criminal will not, of itself, preclude an injunction,<sup>31</sup> although a crime as such would not be enjoinable.<sup>32</sup>

Prior to the decision in *Erie R.R. v. Tompkins*,<sup>33</sup> the United States Supreme

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trade name or trade-mark shall be a ground for injunctive relief in cases of trade-mark infringement or unfair competition, notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services." The court, in *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358 at 366 (2d Cir. 1959), held subdivision 3 to be applicable only to trade-marks registered under New York law because of language contained in subdivision 1 of § 368-c which refers to trade-mark counterfeits. This decision was vitiated by N.Y. Sess. Laws 1961, ch. 583, which deleted subdivision 3 from § 368-c and transferred its substance to stand alone in § 368-d, which in part now reads: "shall be ground for injunctive relief in cases of infringement of a mark registered or not registered or in cases of unfair competition. . . ."

27. N.Y. Gen. Bus. Law art. 17-A makes it unlawful to deal in empty bottles, receptacles, etc., when the owner has filed his name, mark, or device used on the containers to indicate his ownership. See *People v. Cannon*, 139 N.Y. 32, 34 N.E. 759 (1893). N.Y. Gen. Bus. Law §§ 361, 368-c, provides for registration of trade-marks and remedies against infringement. See also the New York Fair Trade Law in N.Y. Gen. Bus. Law art. 24-a.

28. N.Y. Penal Law §§ 2350-57.

29. N.Y. Penal Law §§ 2354-56.

30. 2 Nims, *The Law of Unfair Competition and Trade-marks* § 373 e, at 1183; (4th ed. 1947); *Matter of Julius Restaurant, Inc. v. Lombardi*, 282 N.Y. 126, 25 N.E.2d 874 (1940).

31. "There must be some interferences, actual or threatened, with property or rights of a pecuniary nature, but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law." *In re Debs*, 153 U.S. 564, 593 (1895). "If the interest sought to be protected is one of which equity will take cognizance, it will not refuse to take jurisdiction on the ground that the act which invades that interest is punishable by the penal statutes of the State." *People ex rel. Bennett v. Laman*, 277 N.Y. 368, 376, 14 N.E.2d 439, 442 (1938). See also *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 Pac. 374 (1897); *Cella v. People*, 112 Ill. App. 376 (1904); *State v. Ohio Oil Co.*, 150 Ind. 21, 49 N.E. 809 (1898).

32. Clark, *Principles of Equity* § 244 (1919); De Funiak, *Handbook of Modern Equity*, § 39 (2d ed. 1950); McClintock, *Equity* § 164 (2d ed. 1948). Public nuisances violative of a criminal statute are enjoinable upon suit by the state. See *In re Debs*, 153 U.S. 564 (1895); *People ex rel. Bennett v. Laman*, 277 N.Y. 368, 14 N.E.2d 439 (1938). Where the nuisance causes special damage to an individual his suit is proper. *Cranford v. Tyrrell*, 128 N.Y. 341, 28 N.E. 514 (1891). Similarly, violations of zoning ordinances can be enjoined where special damage is caused to an individual. See *Marcus v. Village of Mamaroneck*, 283 N.Y. 325, 28 N.E.2d 856 (1940); *Bailer v. Ringe*, 255 App. Div. 976, 8 N.Y.S.2d 99 (2d Dep't 1938); *Kaltenbach v. Benisch*, 252 App. Div. 788, 299 N.Y. Supp. 276 (2d Dep't 1937); *Rice v. Van Vranken*, 132 Misc. 82, 229 N.Y. Supp. 32 (Sup. Ct. 1928), aff'd, 225 App. Div. 179, 232 N.Y. Supp. 505 (3d Dep't 1929), aff'd without opinion, 255 N.Y. 541, 175 N.E. 304 (1930).

33. 304 U.S. 64 (1937).

Court, under facts substantially the same as those in the case under consideration, refused to grant an injunction in *Prestonettes, Inc. v. Coty*,<sup>34</sup> holding that a sale after rebottling under an acknowledging label was not an infringement of plaintiff's federally registered trade-mark. Although the case arose in New York, the Court's opinion did not mention Section 2354(6) of the New York Penal Law.<sup>35</sup> The leading case construing this section has been *People v. Luhrs*,<sup>36</sup> which held that section 364(6) (the predecessor of section 2354(6)) made it a crime to sell goods represented to have been made by the owner of a trade-mark unless such goods were contained in the original package and were as packaged by the manufacturer under his label. Thus, where defendant refilled a whiskey bottle, having the Wilson trade-mark and label, with a whiskey of uncertain origin and then sold the substituted whiskey as Wilson whiskey bottled by the Wilson company, he violated the act *whether or not he refilled the bottle with Wilson whiskey*. Faced then with the question of constitutionality, the court explained that the statute was a proper exercise of the state's police power in that it was a reasonable regulation designed to protect the public from fraud. *Luhrs* was a criminal prosecution in which no injunction was sought. Indeed, no case has held subdivision six of section 2354 to be the basis of an injunction.

The present majority construed the *Luhrs* violation to consist of rebottling and reselling "irrespective of an actual fraud"<sup>37</sup> or misrepresentation on the part of that defendant. The court found subdivision six designed to prevent the "possibility of fraud" and to prevent "the rebottler [from] . . . trading upon the reputation of the owner of the trade-mark."<sup>38</sup> Hence, the majority concluded that the facts of the instant case constituted a violation even though the labels used by the defendant fully disclosed the rebottling and revealed by whom it was performed. After dismissing the applicability of *Prestonettes, Inc. v. Coty* because it had not been decided under the New York statute, the

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34. 264 U.S. 359 (1924). The instant court referred only briefly to the *Prestonettes* case: "In that case, the Supreme Court of the United States held that rebottling and reselling of perfumes by the defendant, under labels substantially similar to the labels used by defendants in the case before us, constituted no infringement of plaintiff's federally registered trade-mark, despite the 'omnipresent possibility of fraud' and the likelihood of spoilage. But that case was not decided under our statute, and has no bearing here." 9 N.Y.2d at 522, 174 N.E.2d at 922, 215 N.Y.S.2d at 260. The *Prestonettes* decision by Mr. Justice Holmes makes no mention of § 2354(6) despite the fact that it was raised by the arguments of both petitioner (264 U.S. at 362) and respondent (264 U.S. at 366). When the case was in the circuit court of appeals, it was said concerning § 2354(6): "The injunction should issue not because the defendant is committing a criminal offence under New York law, but because what it is doing is an actual interference 'with property or rights of a pecuniary nature' which are recognized and protected under the law of New York . . . [W]e do not think the plaintiff's right rests alone upon the New York statute, but his right rests upon the general principles of the law of trade-marks." *Coty v. Prestonettes, Inc.*, 285 Fed. 501, 515-16 (2d Cir. 1922).

35. See note 4 supra.

36. 195 N.Y. 377, 89 N.E. 171 (1909).

37. 9 N.Y.2d at 522, 174 N.E.2d at 922, 215 N.Y.S.2d at 260.

38. *Ibid.*

court summarily held that "the alleged criminal acts also threaten plaintiff's property rights, trade-mark, and good will, and an injunction, therefore, is available."<sup>39</sup>

Chief Judge Desmond and Judge Fuld, dissenting, adopted the opinion of the appellate division, which had reasoned that statutes were not to be read with a literalness which would destroy their meaning and purpose. Section 2354(6) was held to require a showing of fraud to establish its violation. In *Luhrs* there was found to be "a tacit, and false, representation that the whiskey poured from the Wilson bottle was the same whiskey that had been last placed in that bottle, without refilling, by the distillers whose label the bottle bore."<sup>40</sup> The appellate division conceded that an injunction would be available to prevent a crime if the criminal act also damaged or impaired a property right,<sup>41</sup> but concluded that in view of *Prestonettes* there was here "no property or equivalent right to protect by injunction."<sup>42</sup>

It is to be noted that all of the subdivisions of section 2354, save subdivision six, actually require an element of fraud or falsity, and that prior to 1882, the words "with intent to defraud" appeared at the beginning of the entire section as an over-all specification for each of the subdivisions as they then read.<sup>43</sup> In that year the legislature reworded the section so that each subdivision contained its own specifications for the crime described.<sup>44</sup> Thus, it would appear that the construction given by the appellate division and the instant dissent would be an improper attempt to replace what the legislature removed in 1882. In view of the legislative intent, therefore, the court of appeals was correct in stating that there were "no sound reasons for departing from a literal construction of the statute. . . ."<sup>45</sup> Because plaintiff's suit for injunction and damages was founded exclusively upon the alleged violation of the New York Penal Law<sup>46</sup> the court was first forced into a statutory construction and properly held, in favor of a literal interpretation, that no fraud or deception of the public is necessary to constitute the crime. The appellate division and the court of appeals were in agreement that no injunction would lie merely to prevent a crime, and also, on the authority of *People ex rel. Bennett v. Laman*,<sup>47</sup> that criminal acts which threaten property rights of an individual might be enjoined.<sup>48</sup> However, the appellate division, citing *Prestonettes*, indicated that on resale, plaintiff, by virtue of his trade-mark, had no such property right to

39. *Id.* at 523, 174 N.E.2d at 922, 215 N.Y.S.2d at 261.

40. 12 App. Div. 2d at 108, 208 N.Y.S.2d at 679.

41. *Id.* at 113-14, 208 N.Y.S.2d at 683.

42. *Id.* at 114, 208 N.Y.S.2d at 683.

43. N.Y. Sess. Laws 1881, ch. 676.

44. N.Y. Sess. Laws 1882, ch. 384.

45. 9 N.Y.2d at 522, 174 N.E.2d at 922, 215 N.Y.S.2d at 260.

46. *Id.* at 520, 174 N.E.2d at 921, 215 N.Y.S.2d at 258; Brief for Plaintiff-Appellant p. 2.

47. 277 N.Y. 368, 14 N.E.2d 439 (1938), reversing 250 App. Div. 660, 295 N.Y. Supp. 728 (3d Dep't 1937), a suit to enjoin defendant from practicing medicine without a license.

48. Notes 31 and 32 *supra*.

be protected. In rejecting this contention the court of appeals explicitly stated that *Prestonettes*<sup>49</sup> was not decided on the basis of New York law and had no bearing on the present case.<sup>50</sup> It must be borne in mind that, although the statutory scheme of protection in New York affords a trade-mark owner greater protection than was available to the *Prestonettes* plaintiff under federal law in 1924,<sup>51</sup> prior to the instant case it was not clear whether the New York courts would follow the persuasive authority of *Prestonettes* and find that plaintiff had no property right to protect. Cognizant of this, plaintiff drafted his pleadings strictly on the basis of the penal statute, apparently in an attempt to remain far removed from the scope of *Prestonettes*. Such cautious procedure will probably no longer be necessary as the instant court clearly held that "the alleged criminal acts also threaten plaintiff's property rights, trade-mark, and good will, and an injunction, therefore, is available."<sup>52</sup> The result is that under New York law a trade-mark owner's protectible property interests definitely extend to resale after his product has been repackaged by another even in the absence of any deception employed in effecting the resale. At the same time the court also revealed New York's policy of extending injunctive relief to the protection of good will.<sup>53</sup> Whether, in the absence of section 2354(6), the plaintiff would have emerged successful in a suit charging common-law trade-mark infringement, has been left in doubt by the court. Considering the ever-increasing scope of protection offered in the general area of unfair competition, it is quite likely that plaintiff would have been successful, for as was held in *Christian Dior, S.R.L. v. Milton*,<sup>54</sup> "the effort to profit from the labor, skill, expenditures, name and reputation of others . . . constitutes unfair competition which will be enjoined."<sup>55</sup>

**Judgments—Res Judicata—Defense Not Available Where Both Plaintiff and Defendant Found Negligent as Codefendants in Prior Action.**—An automobile owned and operated by plaintiff collided with one owned by defendant All State Rental Corporation, and operated by defendant Brenner. After the collision, plaintiff's automobile struck a parked, unoccupied automobile owned by one Biernoff, who brought suit in negligence against the owners and operators of both of the moving cars. A judgment holding all

49. The majority of the instant court points out that: "Significantly, the doctrine of *Prestonettes* has been severely [sic] criticized by the writers . . . and by the lower Federal courts (e.g., *Bourjois, Inc. v. Hermida Labs.*, 106 F.2d 174 [3d Cir., 1939]). Thus, in *Bourjois*, the United States Circuit Court of Appeals said: 'In that case [*Prestonettes*] Mr. Justice Holmes lent the prestige of his great name to a doctrine that does not appeal very greatly to the sense of fairness of the ordinary man.'" 9 N.Y.2d at 523, 174 N.E.2d at 922, 215 N.Y.S.2d at 260-61.

50. 9 N.Y.2d at 522, 174 N.E.2d at 922, 215 N.Y.S.2d at 260.

51. I.e., Trade Mark Act of 1905, 33 Stat. 724, and Trade Mark Act of 1920, 41 Stat. 533.

52. 9 N.Y.2d at 523, 174 N.E.2d at 922, 215 N.Y.S.2d at 261.

53. Note 18 supra.

54. 9 Misc. 2d 425, 155 N.Y.S.2d 443 (Sup. Ct. 1956).

55. Id. at 435, 155 N.Y.S.2d 455.

the parties of the instant case negligent was entered in Biernoff's favor. Plaintiff then instituted this suit for damages caused to him by defendants' negligence. Defendants moved to amend their answers to plead the judgment obtained by Biernoff as *res judicata* on the issue of plaintiff's negligence. The appellate division<sup>1</sup> affirmed the order of the appellate term denying defendants' motion. The court of appeals held that the defense of *res judicata* was not available. *Minkoff v. Brenner*, 10 N.Y.2d 1030, 180 N.E.2d 434, 225 N.Y.S.2d 47 (1962) (memorandum decision).

The common-law doctrine of *res judicata* bars the relitigation of adjudicated issues; an existing final judgment rendered upon the merits by a court of competent jurisdiction binds the parties and their privies in any future actions on issues litigated in the first suit, or which might have been litigated therein.<sup>2</sup> If an action proceeds to final judgment the plaintiff's cause of action is said to have been "merged" in the judgment if he wins, or "barred" should he lose.<sup>3</sup> Collateral estoppel results when the former adjudication was between the same parties but did not involve the same cause of action. The only issues conclusively determined under collateral estoppel are those which have been actually litigated, and the test as to whether issues might have been litigated is not applied.<sup>4</sup> But the question "of what constitutes the 'same' or 'different' causes of action is not a matter free from difficulty."<sup>5</sup> In *De Coss v. Turner & Blanchard, Inc.*,<sup>6</sup> plaintiff, who had lost a negligence action in a federal court and subsequently sued in New York to recover damages for the same injury but upon different allegations of negligence, was held to be barred from a second suit. Judge Lehman applied the following definition:

A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong.<sup>7</sup>

The court of appeals was again asked to determine whether suits were based upon similar or dissimilar causes of action in *Smith v. Kirkpatrick*.<sup>8</sup> There, plaintiff sought recovery of monies due upon an alleged contract. The agreement was found to be without the Statute of Frauds and summary judgment for defendant was granted, with leave for plaintiff to amend his complaint.

1. *Minkoff v. Brenner*, 13 App. Div. 2d 838 (2d Dep't 1961) (memorandum decision).

2. *Good Health Dairy Prods. Corp. v. Emery*, 275 N.Y. 14, 17, 9 N.E.2d 758, 759 (1937); *Schuykill Fuel Corp. v. B. & C. Nieberg Realty Corp.*, 250 N.Y. 304, 165 N.E. 456 (1929).

3. Restatement, Judgments §§ 47-48 (1942).

4. *Statter v. Statter*, 2 App. Div. 2d 81, 153 N.Y.S.2d 471 (1st Dep't 1956).

5. *Smith v. Kirkpatrick*, 305 N.Y. 66, 70, 111 N.E.2d 209, 211 (1953).

6. 267 N.Y. 207, 196 N.E. 28 (1935).

7. *Id.* at 211, 196 N.E. at 30. The court quoted from *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927). "In dealing with this problem, the great majority of courts, regarding the wrongful act as the basis of the cause of action, hold that all damages which are to be obtained must be recovered in a single suit, and when that is determined the cause of action is *res judicata*." *Moschzisker*, *Res Judicata*, 38 Yale L.J. 299, 313 (1929).

8. 305 N.Y. 66, 111 N.E.2d 209 (1953).

Thereafter, plaintiff amended his complaint to set forth two causes of action, both demanding an accounting. The first alleged an informal oral agreement between the parties; the second, an oral agreement of joint venture. Judgment was directed in favor of defendant on the grounds that plaintiff had failed to establish either cause of action. Plaintiff took no appeal and subsequently sued in *quantum meruit*. The court held that the "causes of action are different and distinct and the rights and interests established by the previous adjudication will not be impaired by a recovery . . . in *quantum meruit*."<sup>9</sup>

Collateral estoppel also demands compliance with the tests of privity and of mutuality of estoppel.<sup>10</sup> The *Restatement* definition of privity corresponds to that generally approved by the courts:<sup>11</sup> "The word 'privity' includes those who control an action although not parties to it . . . , those whose interests are represented by a party to the action . . . , [and] successors in interest. . ."<sup>12</sup> In these situations persons not parties of record are held to be so closely related to the parties as to be affected by the judgment.<sup>13</sup> The mutuality requirement bars strangers from obtaining the benefits of a judgment if they are not bound by it.<sup>14</sup> Exceptions to the rule of mutuality have "been held to exist where the liability of the defendant is altogether dependent upon the culpability of the one exonerated in a prior suit. . ."<sup>15</sup> Where "the relation between the defendants in the two suits has been that of principal and agent, master and servant, or indemnitor and indemnitee"<sup>16</sup> the rule of mutuality has been relaxed.

The facts in *Glaser v. Huette*<sup>17</sup> were strikingly similar to those of the instant case. Plaintiff and defendant collided and a third person was injured. The third person sued the plaintiff and defendant for damages and both were held negligent in the operation of their automobiles. Subsequently, plaintiff sued defendant in negligence and defendant sought to assert the defense of res judicata claiming that plaintiff had been found negligent in the prior suit. The court of appeals affirmed the appellate division holding that "since the parties . . . were not adversaries in the former suits but codefendants wherein no duty existed to contest the issue of negligence as between them and no pleadings existed between them, the decisions there settled nothing as to the liability of the codefendants to each other. Therefore, the plea of res adjudicata

9. *Id.* at 72, 111 N.E.2d at 212.

10. *Elder v. New York & Penn. Motor Express, Inc.*, 284 N.Y. 350, 31 N.E.2d 188 (1940). See also 1 *Freeman*, *Judgments* § 407 (5th ed. 1925).

11. *Drummond v. United States*, 324 U.S. 316 (1945); *United States v. Dollar*, 100 F. Supp. 881 (N.D. Cal. 1951).

12. *Restatement*, *Judgments* § 83, comment a (1942).

13. *Romeo v. Western Express Co.*, 45 N.Y.S.2d 297 (Sup. Ct. 1943).

14. *Iselin v. C. W. Hunter Co.*, 173 F.2d 388 (5th Cir. 1949); 1 *Freeman*, *Judgments* § 428 (5th ed. 1925).

15. *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127 (1912).

16. *Id.* at 128. See also *Fish v. Vanderlip*, 218 N.Y. 29, 112 N.E. 425 (1916); *Pangburn v. Buick Motor Co.*, 211 N.Y. 228, 105 N.E. 423 (1914).

17. 232 App. Div. 119, 249 N.Y. Supp. 374 (1st Dep't), *aff'd mem.*, 256 N.Y. 686, 177 N.E. 193 (1931).

[sic] was not available to this defendant."<sup>18</sup> Decisions since *Glaser*, however, have undermined the requirement of mutuality<sup>19</sup> on the ground that rigid adherence to it tends to defeat the underlying policy of res judicata, i.e., that "there be an end to litigation."<sup>20</sup> The emphasis has come to be upon the question of whether a party has had his day in court on an issue, rather than on whether he has been heard on that issue against a particular party. In *Good Health Dairy Prods. Corp. v. Emery*,<sup>21</sup> defendant's car, driven by her son with her consent, collided with plaintiff-dairy corporation's truck. The son had already sued and recovered from the corporation and the driver. In this action plaintiffs, corporation and driver, sought damages from defendant as owner of the automobile. The previous judgment against the plaintiffs was held a bar to the suit against the defendant, thus allowing a stranger to the prior action to assert the defense of res judicata to the issue of plaintiffs' negligence, since "the plaintiffs . . . had a full opportunity to litigate the issue of liability . . ."<sup>22</sup> in the prior action.

In *Israel v. Wood Dolson Co.*,<sup>23</sup> plaintiff alleged two separate causes of action, the first against defendant Wood Dolson for breach of contract and the second against one Gross for knowingly inducing Wood Dolson to breach the contract. Upon plaintiff's motion the two actions were severed; in the first the court held that there had been no breach of contract. Gross, defending the action for inducing the contract's breach, then amended his answer to plead the affirmative defense of res judicata and moved for summary judgment. In affirming the appellate division which had granted the motion, the court of appeals held that the liability of Wood Dolson and Gross turned upon the single issue of whether there had been a breach of contract. The court reasoned

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18. Id. at 119, 249 N.Y. Supp. at 375. "In the cases in the Municipal Court the precise matters in issue were the negligence of this plaintiff and this defendant, and those issues were necessarily determined. The jury there decided that all the parties hereto were negligent. They had ample opportunity there to submit evidence and to definitely place the responsibility for the accident. The codefendants therein, having litigated the question of negligence, and having been found negligent, the judgment entered in the Municipal Court is a final adjudication on the issue of negligence and this plaintiff is not now in a position to relitigate that question. Codefendants who are adversaries in an action in which a judgment is rendered are such parties to the judgment as are bound thereby where the question at issue in the case is litigated and determined between the codefendants in the former action. . . . We are not here concerned with the degree of negligence which may be charged to each of the defendants in the Municipal Court action. The fact that both were held negligent and were charged with equal responsibility for the accident, disposes of that issue since there has been no reversal on appeal. . . . I am of the opinion, therefore, that the defense of res adjudicata [sic] may be pleaded herein and that the order denying leave to amend the answer should be reversed, and the motion granted." Id. at 121, 249 N.Y. Supp. at 376-77 (dissenting opinion).

19. *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956); *Good Health Dairy Prods. Corp. v. Emery*, 275 N.Y. 14, 9 N.E.2d 758 (1937).

20. 1 N.Y.2d at 120, 134 N.E.2d at 99, 151 N.Y.S.2d at 4.

21. 275 N.Y. 14, 9 N.E.2d 758 (1937).

22. Id. at 19, 9 N.E.2d at 759.

23. 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956).



that a stranger to the first action could assert the defense of res judicata where the issues litigated in the prior action were identical to those to be determined in the second suit. The court held that "Israel has had a full opportunity to prove such breach in his suit against Wood Dolson in a court of competent jurisdiction. That court has found no breach and . . . plaintiff may not relitigate that issue."<sup>24</sup> *Israel* added, however, that "our holding here is not to be treated as adding another general class of cases to the list of 'exceptions' to the rule requiring mutuality of estoppel. It is merely the announcement of the underlying principle which is found in the cases classed as 'exceptions' to the mutuality rule."<sup>25</sup>

While *Glaser* has never been expressly overruled, *Israel* caused ambiguity in the law of New York. Some lower courts<sup>26</sup> have refused to disregard *Glaser*, holding, as in *Friedman v. Salvati*,<sup>27</sup> that *Israel* "did not change the rule announced in *Glaser v. Huette*"<sup>28</sup> and that "until *Glaser v. Huette* has been specifically overturned by the court of appeals, the doctrine of that case will be applied . . ."<sup>29</sup> Several other lower courts, however, have followed *Good Health* and *Israel*, at least where the estoppel has been used only defensively.<sup>30</sup>

The present case presented the *Glaser* situation again. An injured party sued the drivers and owners of two automobiles as codefendants, for damages due to the negligent operation of their automobiles. After the plaintiff in that action obtained judgment, one of the codefendants sued the other for damages for injuries sustained in the accident and the defendant sought to assert the defense of res judicata claiming that the prior action had precluded litigation of the issue of this plaintiff's negligence and that thus the issue of this plaintiff's contributory negligence had already been tried. Defendant's argued that *Israel* had in effect overruled *Glaser*. The court, in holding that that defense was not available, followed *Glaser*, refusing to overrule *Israel*. The court wrote

24. *Id.* at 120, 134 N.E.2d at 99, 151 N.Y.S.2d at 5.

25. *Ibid.*

26. *Grande v. Torello*, 12 App. Div. 2d 937, 210 N.Y.S.2d 562 (2d Dep't 1961) (memorandum decision); *Friedman v. Salvati*, 11 App. Div. 2d 104, 201 N.Y.S.2d 709 (1st Dep't 1960); *Ordway v. White*, 25 Misc. 2d 633, 204 N.Y.S.2d 209 (Sup. Ct. 1960); *Corey v. Central Taxi*, 199 Misc. 403, 106 N.Y.S.2d 457 (Sup. Ct. 1951); *Boyne v. Samac Motors*, 22 Misc. 2d 686, 91 N.Y.S.2d 634 (Sup. Ct. 1949).

27. 11 App. Div. 2d 104, 201 N.Y.S.2d 709 (1st Dep't 1960). This was an action to recover damages resulting from a collision with a vehicle driven by the defendant. Held, that a judgment against the present plaintiff and defendant in a prior action by a passenger in defendant's car, was not res judicata, because plaintiff and defendant herein were not adversaries in the prior action.

28. *Id.* at 105, 201 N.Y.S.2d at 711.

29. *Id.* at 106, 201 N.Y.S.2d at 711.

30. *Bennett v. Mitchell*, 2 Misc. 2d 116, 151 N.Y.S.2d 574 (Sup. Ct. 1956); *Moyle v. Cronin*, 18 Misc. 2d 465, 189 N.Y.S.2d 96 (County Ct. 1959); *Light v. Quinn*, 17 Misc. 2d 1083, 189 N.Y.S.2d 94 (County Ct. 1959); *James v. Saul*, 17 Misc. 2d 371, 184 N.Y.S.2d 934 (N.Y.C. Munic. Ct. 1958); *Moran v. Lehman*, 7 Misc. 2d 994, 157 N.Y.S.2d 684 (N.Y.C. Munic. Ct. 1956).

no opinion, thus leaving *Israel* an anomaly and denying the bar any definite means of distinguishing *Israel* from the instant facts.

In the *Israel* situation there were three parties and a contract; the first *Israel* decision held that the contract had not been breached. In the instant situation there were three parties and one accident; the first decision holding that two of the parties negligently caused injury to the third. In both situations there is a relationship of sorts between all of the parties and, if anything, the relationship in the present case would appear stronger. Of the two cases it would appear more logical to allow the defense of *res judicata* here rather than in *Israel* because here the first trial involved all three of the parties whereas the first *Israel* action involved only two of the three. It must be noted, however, that there is a possible, if somewhat tenuous, distinction that may be drawn between the two cases. In *Israel* the plaintiff originally brought a single suit against two defendants. The causes of action were subsequently severed, upon the motion of plaintiff, and the actions proceeded to judgment via separate trials. On the other hand, in *Glaser* and in the instant case no attempt was made by the defendants in the first action to cross-claim against each other. *Glaser* found this lack of cross pleadings pertinent.<sup>31</sup> In both cases the party who failed to take affirmative steps to limit the number of actions was hurt by application of the doctrine of collateral estoppel. The court may be requiring parties who wish to assert the defense of *res judicata* to have taken all means possible to avert multiplicity of suits. Under this rationale, had defendants in the present action cross-claimed against each other and the court then ordered separate trials of their claims, a motion to assert the defense of *res judicata* might have been allowed under *Israel*. Similarly, if in *Israel* the motion to sever had been made, not by plaintiff but by defendant, defendant's motion to amend to enter a defense of *res judicata* might have been denied. But this is by no means certain.

A more convincing reconciliation of *Israel* and the instant decision may be made, however, by considering the determining question in both cases to have been whether the *issues* in the cases were the same, rather than whether all the *parties* to the second action had been heard. *Israel* held that the issue of the existence of a contract had been litigated and was hence *res judicata*. It is possible that *Glaser* and the instant court refused to allow the defense of *res judicata* because there was no determination in the first action of the *issue* of whether the one defendant (plaintiff in the second action) had been negligent *as to the other defendant*.<sup>32</sup> The lack of an accompanying opinion in the present case is unfortunate in view of the difficulty in distinguishing *Israel*. No clear reason

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31. 232 App. Div. at 119, 249 N.Y. Supp. at 342.

32. It is possible that the finding of joint liability in the first Minkoff action was founded upon facts similar to the following. Car A might negligently have collided with car B and car B, due to faulty brakes, might have been unable to stop and the collision with C resulted. Both A and B would be liable to C. B, however, would have a cause of action in negligence against A for the injury caused by the original collision; A would not be able to assert that B had been held contributorily negligent. We do not know, however, the facts of the accident in Minkoff.

exists why the *Israel* rationale should not have applied to the present situation and the court have found an identity of issues. As it stands *Glaser* is affirmed and *Israel* remains the law. Where before, doubt was cast upon the validity of *Glaser*, uncertainty must now surround *Israel*.

**Labor Law—Jurisdictional Standards of the National Labor Relations Board.**—Respondent was ordered by the National Labor Relations Board to cease and desist from committing unfair labor practices in violation of the National Labor Relations Act.<sup>1</sup> The Board had assumed jurisdiction of the matter since respondent's gross volume of business exceeded the Board's jurisdictional minimum of \$500,000<sup>2</sup> and it purchased products from storage within the state whose origin was without the state.<sup>3</sup> After respondent's refusal to obey the order, the Board, pursuant to Section 10(e) of the National Labor Relations Act,<sup>4</sup> petitioned the United States Court of Appeals for the Second Circuit for its enforcement. The court held that the Board's findings on the merits were "adequately supported by substantial evidence"<sup>5</sup> but denied enforcement of the order and remanded the case to the NLRB "with instructions to take further evidence and make further findings on the manner in which a labor dispute [respondent] . . . affects or tends to affect commerce." *NLRB v. Reliance Fuel Oil Corp.*, 297 F.2d 94, 99 (2d Cir. 1961).

Shortly after the decision in *Reliance*, but before rehearing was denied, the United States Court of Appeals for the First Circuit reached the same conclusion in *NLRB v. Benevento*.<sup>6</sup> With the same question before it,<sup>7</sup> the court remanded the case to the Board to make "clear findings of fact based upon legally sufficient evidence . . . to support its assertion of jurisdiction."<sup>8</sup>

The Wagner Act of 1935<sup>9</sup> grants jurisdiction to the NLRB over all employers engaged in interstate commerce or whose businesses affect interstate commerce. Section 2(7) of the act defines the term "affecting commerce" as:

1. Specifically, §§ 8(a)(1)-(a)(3), (a)(5) of the act, 49 Stat. 452 (1935), as amended, 29 U.S.C. §§ 158(a)(1)-(a)(3), (a)(5) (1958) (Supp. II, 1959-1960).

2. The Board's current standard for retail concerns is a gross yearly revenue of over \$500,000. See NLRB Press Release No. 576, Oct. 2, 1958, 42 L.R.R.M. 96 (1958).

3. *NLRB v. Reliance Fuel Oil Corp.*, 297 F.2d 94 (2d Cir. 1961). Respondent also had purchased truck parts valued at no more than a few hundred dollars from out of state. However, as the Board did not rest its jurisdiction on this, the court did not consider it. *Id.* at 95 n.1.

4. 49 Stat. 454 (1935), as amended, 29 U.S.C. § 160(e) (1958).

5. *NLRB v. Reliance Fuel Oil Corp.*, 297 F.2d at 96.

6. 297 F.2d 873 (1st Cir. 1961).

7. In *Benevento*, the Board applied its current \$50,000 outflow or inflow standard for nonretail concerns. See NLRB Press Release No. 576, Oct. 2, 1958, 42 L.R.R.M. 96 (1958).

8. 297 F.2d at 876.

9. National Labor Relations Act, 49 Stat. 449 (1935), 29 U.S.C. § 151 (1958). This was subsequently amended by the Labor Management Relations Act, 61 Stat. 136 (1947), as amended, 29 U.S.C. § 141 (1958) and the Labor-Management Reporting and Disclosure Act, 73 Stat. 519 (1959), as amended, 29 U.S.C. §§ 401-531 (Supp. II, 1959-1960), so that the composite is the present federal law in the field of labor relations.

in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.<sup>10</sup>

It has been said that this grant of jurisdiction goes to the full extent of Congress' constitutional power<sup>11</sup> to prevent obstructions to interstate and foreign commerce<sup>12</sup> and that ultimately there is no business which is not subject to the act.<sup>13</sup>

The constitutionality of the Wagner Act was upheld in *NLRB v. Jones & Laughlin Steel Corp.*,<sup>14</sup> where the Supreme Court acquiesced in the Board's *ad hoc* method of asserting jurisdiction.<sup>15</sup> In *Consolidated Edison Co. v. NLRB*,<sup>16</sup> the Court again approved the Board's *ad hoc* method<sup>17</sup> of asserting jurisdiction. The Court, however, did not predicate the Board's jurisdiction on a certain dollar value of out-of-state purchases but rather on the fact that many industries, themselves involved in interstate commerce, were supplied by Consolidated Edison.<sup>18</sup>

Both *Jones & Laughlin* and *Consolidated Edison* dealt with large corporations engaged in extensive interstate activities. But what of the small businessman whose products come from or reach interstate commerce? *NLRB v. Fainblatt*<sup>19</sup> made it clear that volume of business had little bearing on the applicability of the act.<sup>20</sup> The criterion, the Court said, was the effect which the business had on interstate commerce. A few years later in *Polish Nat'l Alliance v. NLRB*,<sup>21</sup> the Court set forth what is now the accepted test of jurisdiction:

10. 49 Stat. 450 (1935), 29 U.S.C. § 152(7) (1958).

11. U.S. Const. art. I, § 8. "The Congress shall have Power . . . To regulate Commerce . . . among the several States, [and] . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . ."

12. *International Bhd. of Elec. Workers v. NLRB*, 181 F.2d 34, 36 (2d Cir. 1950).

13. Cox, *Federalism in the Law of Labor Relations*, 67 Harv. L. Rev. 1297, 1299 (1954).

14. 301 U.S. 1 (1937).

15. "Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise." *Id.* at 32.

16. 305 U.S. 197 (1938).

17. *Id.* at 222.

18. In the instant case, the Board argued that this only infers that "where other, more dramatic, evidence of a connection with interstate commerce was present, the Court found it unnecessary to rest the case on the 'lesser' factors as well." Brief for Petitioner on Rehearing, p. 10, *NLRB v. Reliance Fuel Oil Corp.*, 297 F.2d 94 (2d Cir. 1962).

19. 306 U.S. 601 (1939).

20. "The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small. . . . The language of the National Labor Relations Act seems to make it plain that Congress has set no restrictions upon the jurisdiction of the Board to be determined or fixed exclusively by reference to the volume of interstate commerce involved." *Id.* at 606. It should be noted that while the Court here was referring to an extension rather than a restriction, as in the instant case, of the Board's jurisdiction, the applicable principle remains the same, i.e., that there must be a showing of an effect on interstate commerce.

21. 322 U.S. 643 (1944).

Congress gave the Board authority to prevent practices "tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." . . . Congress therefore left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress. Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce.<sup>22</sup>

Mr. Justice Black, however, in his concurring opinion, was not willing to go that far. He pointed out that while Congress had the power to enact laws which were "necessary and proper" to protect interstate commerce, clear findings of the effect on commerce have always been required "before subjecting local business to paramount federal regulation."<sup>23</sup>

In 1950, faced with the problem of a staggering caseload and a limited budget, the Board, in accordance with the act,<sup>24</sup> promulgated jurisdictional standards.<sup>25</sup> Under these standards, the Board would exercise its powers only when the business involved had annual interstate purchases above certain minimum dollar values.<sup>26</sup> In 1954<sup>27</sup> and 1958<sup>28</sup> these standards were revised with a view toward limiting rather than expanding the Board's jurisdiction.

The prescribed standards, at first, seemed to solve the Board's caseload problem. However, after the revision in 1954, the Supreme Court, by its decision in *Guss v. Utah Labor Relations Bd.*,<sup>29</sup> created, in the labor-relations field, a so-called "no mans land."<sup>30</sup> In 1958 the Board relaxed its 1954 tests, limiting but not eliminating the "no mans land."<sup>31</sup> Section 701 of the Labor-Manage-

22. *Id.* at 648.

23. *Id.* at 652.

24. National Labor Relations Act § 6(a), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 156 (1958).

25. For a compilation of these standards, see 26 L.R.R.M. 50 (1950). See also *Hollow Tree Lumber Co.*, 91 N.L.R.B. 635 (1950). These standards reflected, for the most part, results reached by the Board in determining prior jurisdictional questions. 15 NLRB Ann. Rep. 5 (1950).

26. The test later became a certain gross volume of business. See notes 27-28 *infra*.

27. NLRB Press Releases Nos. 445 & 449, July 1 & 15, 1954, 34 L.R.R.M. 75 (1954).

28. NLRB Press Release No. 576, Oct. 2, 1958, 42 L.R.R.M. 96 (1958). See *Slemons Mailing Service*, 122 N.L.R.B. 81 (1958). The 1958 standards are in effect today except that they were extended to include the hotel industry in 1959. NLRB Press Release No. 610, May 14, 1959, 44 L.R.R.M. 70 (1959). For a detailed enumeration of these standards, see Comment, 28 *Fordham L. Rev.* 737, 747-48 (1960).

29. 353 U.S. 1 (1957).

30. The *Guss* decision precluded state courts and agencies from acting on matters over which, because they affected commerce, the NLRB had, but declined to assert, jurisdiction since the minimum dollar value standard had not been met. *Ibid.* See Notes, 26 *Fordham L. Rev.* 349 (1957); 71 *Harv. L. Rev.* 179 (1957); 56 *Mich. L. Rev.* 133 (1957).

31. See note 28 *supra*.

ment Reporting and Disclosure Act,<sup>32</sup> amending Section 14 of the Taft-Hartley Act, attempted<sup>33</sup> to eliminate the remaining area of the "no mans land." State courts and agencies, under this amendment are permitted to act on matters over which the Board has declined to assert jurisdiction. The Board's jurisdiction has been frozen, so to speak, by the Reporting and Disclosure Act since the Board cannot "decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."<sup>34</sup> Although the standards had now received congressional approval, they have yet to be formally approved by the United States Supreme Court.<sup>35</sup>

In the present case, respondent, Reliance Fuel Oil Corp., sold fuel oil to and serviced oil burners and boilers for home owners, all of whom lived in New York State. In 1959 it purchased from Gulf Oil Corp. fuel oil and products valued at more than \$650,000. This oil was refined outside New York State and eventually shipped to stationary storage tanks in New York. Respondent's trucks then withdrew the oil from the storage tanks and delivered it directly to its customers.<sup>36</sup> The trial examiner, whose decision was adopted by the Board, found that the NLRB had jurisdiction of the dispute.<sup>37</sup>

The United States Court of Appeals for the Second Circuit, in refusing to enforce the order reasoned:

[T]he Supreme Court, however, seems never to have gone so far as to hold that mere size of a local business or amount of its purchases within the state of materials the origin of which was outside the state, without relation to other factors necessarily brings it within the Act.<sup>38</sup>

Anticipating possible review by the Supreme Court, the court stated that it seemed unlikely, because of the caution expressed in *Howell Chevrolet Co. v. NLRB*,<sup>39</sup> and *Polish Nat'l Alliance v. NLRB*,<sup>40</sup> that the Supreme Court would

32. 73 Stat. 541 (1959), 29 U.S.C. § 164 (Supp. II, 1959-1960).

33. Since the vast majority of states are without labor relations statutes, the complainant over whom the NLRB declines to assert jurisdiction because he did not meet its dollar value standard could be left without a remedy. Note, 29 Fordham L. Rev. 604 (1961). See Comment, 28 Fordham L. Rev. 737 (1960). However it might be argued that since a federal question is involved, federal law should be applied by the state. The question has yet to be answered.

34. Labor-Management Reporting and Disclosure Act of 1959 § 701(a), 73 Stat. 541, 29 U.S.C. § 164(c)(1) (Supp. II, 1959-1960).

35. "This Court has never passed and we do not pass today upon the validity of any particular declination of jurisdiction by the Board or any set of jurisdictional standards." *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1, 4 (1957). See S. Rep. No. 187, 86th Cong., 1st Sess. 26 (1959).

36. *Reliance Fuel Oil Corp.*, 129 N.L.R.B. 1166, 1170 (1961).

37. *Id.* at 1171.

38. 297 F.2d at 97.

39. 346 U.S. 482 (1953). This case involved an automobile dealer in California whose purchases from General Motors exceeded \$1,000,000. The Court upheld the Board's assertion of jurisdiction because the evidence showed such a close supervision of the dealer's activities by General Motors that it was "'an integral part' of General Motors' national system of distribution." *Id.* at 484.

40. 322 U.S. 643 (1944); see notes 21-23 *supra* and accompanying text.

today adopt a pure "quantitative" test.<sup>41</sup> Therefore the court remanded the case to the NLRB to take more evidence to fill in a "reasonably complete picture of the manner in which a work stoppage would affect commerce . . . before we rule on the jurisdictional issue."<sup>42</sup> In denying the petition for rehearing the court reiterated what it deemed to be the jurisdictional test laid down by Congress, namely:

[I]f the employer is himself engaged in interstate commerce, without more the jurisdiction of the Board is established. If the employer is not engaged in interstate commerce, the acts in question must lead or tend to lead to a dispute which must burden or obstruct the free flow of interstate commerce.<sup>43</sup>

Similarly in *Benevento*<sup>44</sup> the Board's jurisdiction was based on the trial examiner's finding that

during the calendar year preceding the issuance of the complaint, respondent sold products valued in excess of \$50,000 to . . . which company during the same calendar year purchased and received, from sources outside the Commonwealth of Massachusetts, products valued in excess of \$50,000.<sup>45</sup>

The first circuit in refusing to enforce the Board's order stated that "broad though the Board's power may be it is not unlimited."<sup>46</sup> The court reasoned that "the Board's jurisdiction is necessarily subject to bounds and the criterion for determining where those bounds lie is the effect, if any, of purely local action upon interstate commerce,"<sup>47</sup> and therefore concluded that "clear findings of fact based upon legally sufficient evidence must be made by the Board to support its assertion of jurisdiction."<sup>48</sup>

The NLRB's position in both cases is that since respondents met its gross dollar standard and dealt with firms engaged in commerce, they must necessarily affect interstate commerce. As previously noted, originally the Board's jurisdiction was so broad that it heretofore imposed limitations upon itself.<sup>49</sup> In both of these cases, however, it seems that the Board, by its preoccupation with jurisdictional standards, has overlooked the original test laid down by

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41. An analogy can be developed here. In a recent decision, *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), 30 *Fordham L. Rev.* 493 (1962), the Supreme Court abandoned a "quantitative substantiality" test in favor of a "rule of reason" or "qualitative substantiality" test to determine market foreclosure under Section 3 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958). While the "quantitative" test in *Tampa* had originally been judicially imposed and in the instant case it has been imposed by the NLRB, an administrative body, the analogy remains, for the Supreme Court showed its willingness to abandon an easier, more practical test in favor of a more difficult to apply, yet fairer test.

42. 297 F.2d at 99.

43. *Ibid.*

44. 297 F.2d 873 (1st Cir. 1961).

45. *Michael Benevento*, 131 N.L.R.B. 358, 361 (1961).

46. 297 F.2d at 874.

47. *Id.* at 875.

48. *Id.* at 876.

49. See notes 24-28 *supra* and accompanying text.

Congress.<sup>50</sup> Throughout the years the Supreme Court has consistently maintained that it is the effect on commerce and not a gross volume of business which is the standard.<sup>51</sup>

While it is arguable that a company which does a gross volume of business in excess of \$500,000 and which purchases its products from one engaged in interstate commerce<sup>52</sup> would, if involved in a labor dispute, affect interstate commerce, such a conclusion, as the NLRB has itself admitted, is not a necessary conclusion.<sup>53</sup> By virtue of its present argument, however, it would appear that the Board has reversed its former position.

The Board's present position is a pragmatic one; if it is forced to take more evidence in these cases it would have to drastically revise its present procedure of deciding jurisdictional questions. But the Board itself has recognized the dual requirement before it can assert jurisdiction.<sup>54</sup>

It may be that the Supreme Court will agree with the Board and in approving its standards promulgate an easily applied "quantitative" test. In reaching this conclusion the Court might rely on the congressional approval given the standards in the Labor-Management Reporting and Disclosure Act.<sup>55</sup> This seems unlikely for two reasons: First, the act still requires a showing of an effect on commerce and second, had Congress wanted to adopt a single quantitative test it would have expressly done so.

It is submitted that the first and second circuits' adherence to the established principles laid down in *Jones & Laughlin*, *Consolidated Edison*, *Polish Nat'l Alliance*, and *Fainblatt* is far more just and legally sound than the Board's reliance on its non-judicially approved self imposed standards.

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50. See note 15 supra.

51. See notes 14-23 supra and accompanying text.

52. Or, as in *Benevento*, that one who sells products valued in excess of \$50,000 to one who purchases products from outside the state.

53. "It is possible, although highly improbable, that an enterprise meeting the gross dollar standards of the Board would not come within the broad definition of 'affecting commerce,' even though that term has been judicially determined to indicate an intention on the part of Congress to exercise Federal jurisdiction to the fullest possible extent. For this reason we agree . . . that the gross dollar volume test, standing alone, is insufficient to confer upon the Board the jurisdiction contemplated by the Act." *International Longshoremen & Warehousemen's Union*, 124 N.L.R.B. 813, 815 (1959).

54. "The Board's current standard for exercising jurisdiction over a retail enterprise which falls within its statutory jurisdiction is 'a gross volume of business of at least \$500,000 per annum . . . .' In such instances 'some proof must be made of legal jurisdiction,' that is, that the employer involved is engaged in commerce or that his operations affect commerce . . . in addition to a showing that the relevant gross volume test has been satisfied." *Westside Market Owners Ass'n*, 126 N.L.R.B. 167, 169 (1960); see *James D. Jackson*, 126 N.L.R.B. 875 (1960); *International Longshoremen & Warehousemen's Union*, supra note 53.

55. Section 701(a) of the act, 73 Stat. 541 (1959), 29 U.S.C. § 164(c)(1) (Supp. II, 1959-1960); see notes 32-35 supra and accompanying text.



**Sales—Absence of Privity in Action for Breach of Express Warranty.**—Plaintiff brought an action in contract for breach of an express warranty<sup>1</sup> against defendant-manufacturer, alleging that fabrics treated with defendant's "Cyana" process shrank and lost their shape when washed. Plaintiff had purchased the allegedly defective fabrics from Apex Knitted Fabrics, Inc. and Fairtex Mills, Inc.<sup>2</sup> which were licensed by defendant-manufacturer to treat their textiles with the "Cyana" process.<sup>3</sup> The court at special term<sup>4</sup> denied defendant's motion for summary judgment, a motion made on the ground that there was no privity of contract. The appellate division<sup>5</sup> unanimously affirmed the order and certified the question with respect to the requirement of privity of contract to the court of appeals. The court of appeals affirmed, holding that privity of contract is not essential to the maintenance of an action against a manufacturer for breach of express warranty where the representations of the manufacturer have induced the buyer to make the purchase. *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962).

Prior to the case of *Greenberg v. Lorenz*<sup>6</sup> New York followed the general rule that "there can be no warranty where there is no privity of contract."<sup>7</sup> *Greenberg* was the first successful attack on the privity rule in a warranty

1. "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." N.Y. Pers. Prop. Law § 93.

2. In a prior action Fairtex Mills, Inc. made a motion for summary judgment on the basis of contract provisions disclaiming any liability, but the court of appeals denied the motion stating "that issues of fact exist which require a trial for their determination." *Randy Knitwear, Inc. v. American Cyanamid Co.*, 7 N.Y.2d 791, 793, 163 N.E.2d 349, 194 N.Y.S.2d 530, 531 (1959) (per curiam).

3. American Cyanamid and its licensees enter into quality control agreements under which the licensees agree to follow certain requirements set by American Cyanamid. Licensees were also required to secure letters from their customers that tags and labels furnished by American Cyanamid would only be affixed to "Cyana" treated fabrics. Applications for "Cyana" tags and labels were made by the purchaser through the licensee so that at no step of the distributive process did American Cyanamid deal directly with the subpurchaser.

4. 26 Misc. 2d 476, 207 N.Y.S.2d 580 (Sup. Ct. 1960).

5. 13 App. Div. 2d 451, 214 N.Y.S.2d 641 (1st Dep't 1961) (memorandum decision).

6. 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).

7. *Turner v. Edison Storage Battery Co.*, 248 N.Y. 73, 74, 161 N.E. 423, 424 (1928). In the leading New York case of *Chysky v. Drake Bros.*, 235 N.Y. 468, 139 N.E. 576 (1923), the court of appeals set down the general rule "that a manufacturer or seller of food, or other articles of personal property, is not liable to third persons, under an implied warranty, who have no contractual relations with him. The reason for this rule is that privity of contract does not exist between the seller and such third persons, and unless there be privity of contract, there can be no implied warranty." *Id.* at 472, 139 N.E. at 578. In *Turner* the court extended the privity rule to express warranties stating that "a cause of action for breach of warranty, either express or implied, is not, and cannot be, stated . . ." without a showing of privity. 248 N.Y. at 74, 161 N.E. at 424.

action, but the court of appeals attached a caveat, warning that its decision to extend the implied warranties of fitness and merchantability to members of the purchaser's family should not be taken as a signal that New York was prepared to completely abolish the privity rule.<sup>8</sup> The instant case, while it further weakens the traditional requirement of privity, again demonstrates the ambivalent attitude of the court of appeals towards this so-called "old court-made rule."<sup>9</sup>

It has been said that "there is no more troublesome word in the law than the word 'warranty' . . .,"<sup>10</sup> and this is due in no small part to its historical evolution from a tort to contract action.<sup>11</sup> In its origin the action for breach of warranty was on the case in deceit,<sup>12</sup> and it was not until 1778<sup>13</sup> that assumpsit was first recognized as a form of action for breach of warranty. In succeeding years the contractual aspect of warranty assumed greater importance, and the courts came to apply basic contract theory including the privity rule to warranty actions.<sup>14</sup>

An express warranty may be either: (1) a warranty derived from an express promise; or, (2) a warranty imposed by law because of express representations.<sup>15</sup> In the present case the warranty was based on the express representations embodied in American Cyanamid's advertisements in trade journals and other media.<sup>16</sup> The express warranty found by the court, there-

8. 9 N.Y.2d at 200, 173 N.E.2d at 775-76, 213 N.Y.S.2d at 42-43. Both *Deamond*, C. J., writing for the majority, and *Froessel*, J., in a concurring opinion, stressed the fact that on three different occasions the New York State Law Revision Commission had recommended that the benefits of implied warranties be extended to the purchaser's employees and members of his household, but the legislature on each occasion declined to act. For a study of these proposals see N.Y. Leg. Doc. No. 65(B) (1959); N.Y. Leg. Doc. No. 65(A) (1945); N.Y. Leg. Doc. No. 65(J) (1943). See also Comment, *Implied Warranty and the Defense of Privity in a Personal Injury Action*, 30 *Fordham L. Rev.* 484 (1962) for a study of the present effect of *Greenberg v. Lorenz* on the law of warranty in New York.

9. 11 N.Y.2d at 16, 181 N.E.2d at 404, 226 N.Y.S.2d at 370.

10. 1 *Williston, Sales* § 181, at 463 (rev. ed. 1948).

11. For an excellent study of the history of warranty see *Prosser, The Implied Warranty of Merchantable Quality*, 27 *Minn. L. Rev.* 117, 118-22 (1943).

12. *Ames, The History of Assumpsit*, 2 *Harv. L. Rev.* 1 (1833) states that warranty "was, in its origin, a pure action of tort . . . . A vendor who gives a false warranty may be charged to-day, of course, in contract; but the conception of such a warranty, as a contract, is quite modern." *Id.* at 8. See also *Prosser, Torts* § 83, at 493 (2d ed. 1955); *Williston, Sales* § 195, at 501-03 (rev. ed. 1948).

13. *Stuart v. Wilkins*, 1 *Doug.* 18, 99 *Eng. Rep.* 15 (K.B. 1778).

14. See 1 *Hursh, American Law of Products Liability* §§ 6:14-:16 (1961).

15. *Vold, Sales* § 84, at 426-27 (2d ed. 1959).

16. The court noted that plaintiff based its case not only on express representations through advertising, but also on the tags and labels bearing the legend "Cyna finish" which were affixed to the fabrics. 11 N.Y.2d at 15, 181 N.E.2d at 403, 226 N.Y.S.2d at 369. The presence of the tags and labels was indeed a strong factor in plaintiff's favor, but it appears that even in their absence defendant would have been liable for breach of express warranty solely on its express representations via advertising.

fore, was one imposed by law based on the express representations made by American Cyanamid to the public.<sup>17</sup>

In our modern system of sales distribution the manufacturer and ultimate purchaser or consumer do not, in the ordinary case, contract directly. While the products of manufacturers are sold through intermediaries, the advertising of these same manufacturers via newspapers, trade journals, television, radio, and other media is what most often induces the buyer to make the purchase. In dispensing with the privity rule in the instant case the court of appeals took note of "present-day commercial practices"<sup>18</sup> stating that "the world of merchandising is, in brief, no longer a world of contract; it is, rather, a world of advertising. . . ."<sup>19</sup> The express representations, therefore, made by a manufacturer through the mass communications media, which induce the buyer to make the purchase, constitute express warranties running to the ultimate purchaser.<sup>20</sup>

The court of appeals not only recognized that the express representations of a manufacturer will now run to the ultimate purchaser, but also allowed the injured purchaser to recover in an action in contract. The court could have rehabilitated the common-law action in deceit for breach of express warranty, which did not require scienter on the part of the seller,<sup>21</sup> but it appears that the instant decision is based on a relationship<sup>22</sup> created between the manufacturer and the ultimate purchaser due to the former's express representations. This relationship between the manufacturer and ultimate purchaser should involve a consideration of three factors: (1) the extent and nature of the express representations made by the manufacturer to the public; (2) whether these express representations had the natural tendency of inducing the buyer to make the purchase; and, (3) whether the buyer relied on the express representations in making the purchase.

While the present case represents another breach in the privity rule in New York, it must be viewed with caution.<sup>23</sup> Privity is no longer necessary in an

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17. See 2 Harper & James, *Torts* § 28.24, at 1587-88 (1956); Note, *Manufacturer's Advertisement as Express Warranty to Consumer*, 7 *Wash. L. Rev.* 351 (1932).

18. 11 *N.Y.2d* at 12, 181 *N.E.2d* at 402, 226 *N.Y.S.2d* at 367.

19. *Ibid.*

20. The court of appeals cited with approval the case of *Baxter v. Ford Motor Co.*, 168 *Wash.* 456, 12 *P.2d* 409 (1932), 18 *Cornell L.Q.* 445 (1933), 46 *Harv. L. Rev.* 162, 81 *U. Pa. L. Rev.* 94, where the requirement of privity in an action for breach of express warranty was first dispensed with.

21. *Cross v. Gardner*, 1 *Show.* 68, 89 *Eng. Rep.* 453 (K.B. 1689).

22. *Williston* states that this "relation [to support an action in contract] . . . might under some circumstances exist between manufacturer and subpurchaser and conceivably even between the manufacturer and a consumer who is neither a purchaser nor subpurchaser." 1 *Williston, Sales* § 244(a), at 649-50 (rev. ed. 1948).

23. *Froessel, J.*, in his concurring opinion, in which *Dye, J.* and *Van Voorhis, J.* joined, agreed with the result, but warned that the court should not "dispense with the requirement of privity without limitation." 11 *N.Y.2d* at 16, 181 *N.E.2d* at 405, 226 *N.Y.S.2d* at —. See also the concurring opinion of *Froessel, J.*, in *Greenberg v. Lorenz*, 9 *N.Y.2d* at 200-01, 173 *N.E.2d* at 776, 213 *N.Y.S.2d* at 43.

action for breach of express warranty imposed by law, where the requisite relationship is established between the manufacturer and his subpurchaser. If the express warranty were a term of the contract between the manufacturer and his purchaser, lack of privity would still appear to bar a subpurchaser's action. Furthermore, it is not clear whether an injured party other than a subpurchaser would be allowed a recovery without a showing of privity.

The effect of the present case is to lighten further the burden of proof for a plaintiff not in privity with a defendant-manufacturer, while in turn the area of risk for the manufacturer is extended.<sup>24</sup> To recover in negligence a plaintiff must prove not only the existence of a duty but also the breach of that duty, *i.e.*, negligence on the part of the manufacturer.<sup>25</sup> Under the rule here set forth the plaintiff need only show that the product was defective when bought.<sup>26</sup>

While the rule now announced by the court of appeals is considered more realistic in the light of modern economic and social conditions,<sup>27</sup> it must be noted that the court has said it will only "take one step at a time" in eliminating the traditional requirement of privity in warranty actions.<sup>28</sup> New York has now dispensed with the privity rule in two types of warranty cases: (1) those involving foodstuffs and household goods where the implied warranties of fitness and merchantability now run to members of the purchaser's family<sup>29</sup> and, (2) cases involving express representations by the manufacturer to the ultimate purchaser which will support an action for breach of express warranty.<sup>30</sup>

24. Meehan, "The Assault Upon the Citadel of Privity": A Recent Communique, 24 Brooklyn L. Rev. 308 (1958).

25. See Davis, A Re-Examination of the Doctrine of *MacPherson v. Buick* and Its Application and Extension in the State of New York, 24 Fordham L. Rev. 204 (1955).

26. The court stated: "If the ultimate fault for the plaintiff's loss is actually that of Fairtex and Apex, Cyanamid's appropriate recourse is against them." 11 N.Y.2d at 15, 181 N.E.2d at 404, 226 N.Y.S.2d at 370. From this statement it appears that plaintiff need only prove the product was defective when purchased from the middleman, and not when it left the manufacturer.

27. See, e.g., Llewelyn, *Cases on Sales* 342 (1930); Bogert & Fink, *Business Practice Regarding Warranties in the Sale of Goods*, 25 Ill. L. Rev. 400, 415-17 (1930); Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees*, 24 Va. L. Rev. 134 (1937); Patterson, *The Apportionment of Business Risks Through Legal Devices*, 24 Colum. L. Rev. 335, 357-59 (1924).

28. *Greenberg v. Lorenz*, 9 N.Y.2d at 200, 173 N.E.2d at 775, 213 N.Y.S.2d at 42.

29. This exception would come within the provisions of the proposed Uniform Commercial Code which provides that "a seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section." Uniform Commercial Code § 2-318.

30. The exception created by the instant case would not come within § 2-318 of the Uniform Commercial Code, but it would be within the spirit of the purpose clause to § 2-318 which states that "the section is neutral and is not intended to enlarge or restrict

It is expected that in the future there will be further successful assaults on the "citadel of privity" with the result that the privity rule in warranty will follow the same path as it did in the law of negligence with respect to a manufacturer's liability to the consumer.<sup>31</sup>

**Trade Regulation—Robinson-Patman Act—Good Faith Defense of Meeting Competition Held to Justify Major Gasoline Supplier's Discriminatory Price Reduction to Dealer Engaged in a Price Battle at Consumer Level.**—Petitioner, Sun Oil Company, filed a petition seeking to review and set aside a cease and desist order of the Federal Trade Commission.<sup>1</sup> The Commission had charged petitioner with a secondary-line<sup>2</sup> price discrimination in violation of Section 2(a) of the Robinson-Patman Act,<sup>3</sup> alleging that petitioner had sold its gasoline to a dealer, McLean, at prices substantially lower than the prices charged to its other dealers in the same market area.<sup>4</sup> In defense, petitioner asserted that its concession to McLean was a good-faith price reduction to meet competition, at the consumer level, from Super-Test, a supplier-retailer.<sup>5</sup> The Commission held that the defense provided by section 2(b)<sup>6</sup> was not available to a seller when the reduction was made to permit the seller's customers to meet their competition, regardless of whether petitioner was in danger of losing a customer. The court of appeals set aside the cease and desist order, holding that the defense of meeting competition was available to a supplier of gasoline when its purchaser was engaged in a price war with a supplier-retailer at the consumer level. *Sun Oil Co. v. FTC*, 294 F.2d 465 (5th Cir. 1961).<sup>7</sup>

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the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain."

31. See Koerner, *The Beleaguered Citadel of Privity in the Distributive Process of the Sale of Goods*, 7 N.Y.L.F. 176 (1961); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960). See also the recent case of *Thomas v. Leary*, 15 App. Div. 2d 438, 225 N.Y.S.2d 137 (4th Dep't 1962), where the court held that an employee could recover, in either express or implied warranty, for injuries sustained when a chair collapsed which was purchased by his employer from defendant-supplier.

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1. *Sun Oil Co.*, 55 F.T.C. 955 (1959).

2. See *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948). A secondary-line price discrimination occurs at the retail or intermediate level between supplier and consumer.

3. 49 Stat. 1526 (1936), as amended, 15 U.S.C. § 13(a) (Supp. II, 1959-1960).

4. McLean was one of thirty-eight retail dealers supplied by petitioner in the Jacksonville area. 55 F.T.C. at 957.

5. Super-Test Oil Co. is a so-called "independent," supplying a non-major brand of gasoline, and operating its own filling stations. The evidence established that such brands usually sell at about two cents below major brands. Super-Test cut its price as much as eight cents below McLean's. McLean could not absorb such a price cut without a reduction by Sun Oil. *Id.* at 957-58.

6. 49 Stat. 1526 (1936), as amended, 15 U.S.C. § 13(b) (Supp. II, 1959-1960).

7. Although the Commission found that petitioner and his dealer had entered into a price fixing agreement in violation of § 1 of the Sherman Act, 26 Stat. 209 (1890),

The primary purpose of the Robinson-Patman Act was to protect small buyers from price discriminations favoring large purchasers who sought to impair the commercial position of smaller competitors and thereby capture a greater portion of the market.<sup>8</sup> Consequently, section 2(a) of the act prohibits any price discrimination which may "substantially . . . lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ."<sup>9</sup> Price discrimination has been construed to mean any price differential and therefore a seller is required, under section 2(a), to offer uniform prices to his competing purchasers.<sup>10</sup>

The requisite injury to competition resulting from a price discrimination may occur at different competitive levels. In all cases, however, the burden is on the petitioner to establish: (1) the price discrimination and (2) the anti-competitive effects.<sup>11</sup> Whether the competitive injury is alleged at the primary or the secondary level, the petitioner must establish a *reasonable possibility of injury* to the competing seller (at the primary level) or competing purchaser (at the secondary level).<sup>12</sup> This burden is more easily satisfied where a secondary-line

15 U.S.C. §§ 1-7 (1958), which the Supreme Court held unlawful per se in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), the instant court found "no substantial evidence to support the Commission's finding of a price-fixing agreement." 294 F.2d at 483.

8. FTC, Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. 90 (1935).

9. 49 Stat. 1526 (1936), as amended, 15 U.S.C. § 13(a) (Supp. II, 1959-1960). The injury proviso was an addition made by the Robinson-Patman legislators with the intent of broadening the effects requirements of the original Clayton Act, which Congress considered to be too restrictive in requiring that the discrimination affect competition generally rather than the victimized competitor.

10. *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960); see *Standard Motor Prods., Inc. v. FTC*, 265 F.2d 674 (2d Cir.), cert. denied, 361 U.S. 826 (1959). "It has been many times held by the Supreme Court that price differentials, not justified by a showing of differences in the cost of manufacture, sale or delivery, become price discriminations and are prohibited by the Robinson-Patman Act . . ." *Moog Indus., Inc. v. FTC*, 238 F.2d 43, 49 (8th Cir. 1956).

11. Doubt was cast upon this proposition by a per curiam decision of the United States Court of Appeals for the Second Circuit in *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378 (1945). There the court held that the burden was on the accused to disprove, rather than on the accuser to prove, the existence of adverse effects to competition. The court reasoned that §§ 2(a) and 2(b) when read together operated to shift "the burden of proof to anyone who sets two prices . . ." *Id.* at 379. The rule, however, as enunciated in *Moss* was discredited by the FTC itself, when it stated "that under Section 2(a), counsel supporting the complaint has the burden of proof to establish the necessary competitive injury." *General Foods Corp.*, 50 F.T.C. 885, 890 (1954). Moreover, the Supreme Court in *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960), in a dictum, took pains to point out that its decision in that case should not be interpreted to "raise the specter of a flat prohibition of price differentials, inasmuch as price differences constitute but one element of a § 2(a) violation." *Id.* at 553.

12. See *FTC v. Morton Salt Co.*, 334 U.S. 37, 46, 47 (1948); *Corn Prods. Ref. Co. v.*

price discrimination is alleged, than where the requisite injury is alleged at the primary level because, as a practical matter, no reasonable possibility of injury can be shown at the primary level without extensive market surveys and studies.<sup>13</sup> At the secondary level, however, the very fact of the price differential would tend to indicate a possibility of injury.<sup>14</sup>

Not all price discriminations are prohibited. The act provides a defense to a charge of price discrimination, based on cost justification.<sup>15</sup> However, the effectiveness of this affirmative defense has been restricted due to evidentiary problems.<sup>16</sup> Section 2(b) of the act makes another defense available by providing that "nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . ." <sup>17</sup>

This section of the act has been narrowly construed by the Commission. Originally the FTC viewed the defense as merely procedural; *i.e.*, evidence that the effect of the discrimination was actually rather than potentially to injure, destroy, or prevent competition would overcome proof that the price discrimination was made to meet the price offered by a competitor.<sup>18</sup> The Supreme Court, in *Standard Oil Co. v. FTC*,<sup>19</sup> expressly rejected this conten-

FTC, 324 U.S. 726, 742 (1945); *Atlas Building Prods. Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 957 (10th Cir. 1959), cert. denied, 363 U.S. 843 (1960).

13. The lengths to which the FTC has gone in market analysis are readily cognizable from the extensiveness of its fact findings. See, e.g., *Anheuser-Busch, Inc.*, 54 F.T.C. 277 (1957); *General Motors Corp.*, 50 F.T.C. 54 (1953); *Champion Spark Plug Co.*, 50 F.T.C. 30 (1953).

14. As the Supreme Court stated in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), a showing in itself that suppliers "sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers . . . is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence." *Id.* at 50-51. Substantiality, the Court indicates earlier in this same opinion, could simply depend upon whether the "discounts . . . result in price differentials between competing purchasers sufficient in amount to influence their resale prices . . ." *Id.* at 47. Superficially this decision would appear to reinstate the Moss ruling. It is to be noted, however, that Moss' automatic violation restriction, which was founded on spurious reasoning, would have applied not only to secondary-line but also to primary-line cases.

15. 49 Stat. 1526 (1936), as amended, 15 U.S.C. § 13(a) (Supp. II, 1959-1960).

16. "Proof of a cost justification being what it is, too often no one can ascertain whether a price is cost-justified." *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 79 (1953); see *Att'y Gen. Nat'l Comm. Antitrust Rep.* 172 (1955). But see *Reid v. Harper & Bros.*, 235 F.2d 420 (2d Cir.), cert. denied, 352 U.S. 952 (1956) where a cost study made in good faith and in accord with good accounting techniques was a valid defense to a § 2(a) violation.

17. 49 Stat. 1526 (1936), as amended, 15 U.S.C. § 13(b) (Supp. II, 1959-1960).

18. *Standard Oil Co.*, 41 F.T.C. 263 (1945).

19. 340 U.S. 231 (1951). *Standard Oil* sold large quantities of gasoline to jobbers in the Detroit area at tank-car prices. *Standard* also sold gasoline directly to service stations at higher prices, called tank-wagon prices. As a result, retailers buying from jobbers enjoyed a lower price than those buying directly from *Standard*. The defense of meeting competition

tion, and held the defense to be absolute regardless of any injury to other competing purchasers. Although the defense is absolute, certain limitations on its use have been imposed by the courts. A seller may not assert the defense when the purpose is to gain a new customer and not merely to retain an old one.<sup>20</sup> Furthermore, the price met must be a lawful one.<sup>21</sup> Finally, the price reduction must be in response to an individual competitive situation, rather than the mere adoption of a competitor's pricing system.<sup>22</sup>

The defense, therefore, raises a question of fact as to whether the defendant is really meeting competition,<sup>23</sup> and places emphasis on "individual competitive situations."<sup>24</sup> The Commission in the instant case construed section 2(b) literally,<sup>25</sup> failing thereby to consider that the situation of the retailer in the gasoline industry differs significantly from that of the normal retailer.<sup>26</sup> Based on a "clear meaning" approach to the act, the Commission took the position that the defense may be validly asserted only when the competition met is at the *supplier* level, a proposition enunciated in *Enterprise Indus., Inc. v. Texas*

was held absolute. Dissenting Justices Reed, Vinson, and Black believed that the intent of the legislators was to make the defense merely procedural and that the defense would be nullified by proof of sufficient competitive injury caused by the § 2(a) violation.

20. See, e.g., *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945); *Standard Motor Prods., Inc. v. FTC*, 265 F.2d 674 (2d Cir.), cert. denied, 361 U.S. 826 (1959). But see *Att'y Gen. Nat'l Comm. Antitrust Rep.* (1955), where the committee was of the opinion that "Standard Oil does not confine the 'good faith' proviso solely to defensive reductions to retain an existing customer." *Id.* at 184.

21. See *E. Edelman & Co.*, 51 F.T.C. 978, 996, 1010 (1955), *aff'd*, 239 F.2d 152 (7th Cir. 1956). For a discussion of the meeting of an unlawful price see *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945) (illegal basing point system).

22. See *FTC v. Standard Oil Co.*, 355 U.S. 396, 401 (1958); *FTC v. National Lead Co.*, 352 U.S. 419 (1957); *FTC v. Cement Institute*, 333 U.S. 683, 725 (1948). The Commission had also taken the view that the § 2(b) defense may not be asserted where the seller discriminates by way of reimbursement to a particular buyer for supplying services and facilities in violation of § 2(d) of the act. A court of appeals has recently overruled this contention in holding that the § 2(b) defense is equally available to both § 2(d) offenses (furnishing dollar allowances) and § 2(e) offenses (furnishing services). *Exquisite Form Brassiere, Inc., v. FTC*, 5 CCH Trade Reg. Rep. (1961 Trade Cas.) ¶ 70157 (D.C. Cir. Nov. 22, 1961).

23. *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945), where the question presented was whether the competition justified the price discrimination.

24. "The Act thus places emphasis upon individual competitive situations, rather than upon a general system of competition." *FTC v. Cement Institute*, 333 U.S. 683, 725 (1948).

25. "Respondent would equate its dealers' competition with its own competition, but of course this is not the law . . . Respondent could, if it chose to, meet such competition at the dealer level by nondiscriminatory reductions in price to all dealers, or by operating its own stations and thus being in direct competition with other stations which reduce prices." 55 F.T.C. at 965 (1959).

26. "If gasoline could be canned like tomatoes and stocked like bottle goods, and if gasoline suppliers competed with each other for the retail merchant's trade, the Commission's reading of Section 2(b) would be more realistic and more reasonable than is here presented." 294 F.2d at 476 (1961).



*Co.*<sup>27</sup> In that case, defendant-oil refiner, faced with declining gasoline sales due to a local price war, granted price reductions to certain dealers who in turn matched, but did not undercut, prices charged by competing service stations selling rival brands. In an action brought by one of the defendant's dealers who had not received the discount, the district court, adopting a rather restrictive interpretation, held that the defendant was not, within the term of the act, meeting an equally low price of a competitor. Defendant could justify its discrimination, according to the court, only by demonstrating that its price reduction was accomplished to meet an equally low price made available to its customer by a competing oil company. At the same time, the court acknowledged that it was a mere fiction to speak of competition at the supplier level in the gasoline industry.

The instant court rejected the *Enterprise* approach, pointing out that the latter decision deprived the major oil companies of any realistic method of meeting a competitor's price at the only level where competition actually exists. Gasoline suppliers, because of the peculiar organization of the industry, do not compete for the business of supplying filling stations, but are in fact competing at the consumer level through dealer outlets. The instant court recognized that "a filling station operator carrying a brand-name gasoline does not buy from several competing oil companies."<sup>28</sup> The real competition is not at the supplier-to-retailer level, but rather the supplier-to-customer level, with the gasoline station operator acting as a mere conduit for a particular supplier's product. Gasoline suppliers are actually competing for customers in the consumer market through their respective dealer-outlets. This is evidenced by the fact that the supplier carries the burden of promoting and advertising the sale of its gasoline at the consumer level. It is, therefore, a fiction to speak of a secondary or retail level in the oil industry. With respect to competition, the relationship of petitioner to its retailer, McLean, is identical with that of a vertically integrated competitor to its outlet. Clearly, the supplier in the oil industry, in order to protect its market, must be allowed to make discriminatory price cuts, which, albeit indirectly, meet competition under section 2(b).<sup>29</sup>

The court found the wording of the statute sufficiently vague to support either the FTC's reasoning or its own approach. Therefore, the court reasoned that the act should be interpreted so as to provide the most meaningful solution, in light of the particular competitive situation, and attempted to reconcile the act as far as possible with the general tenets of antitrust law, *i.e.*, to preserve competition to the extent permissible under the act. The court recognized that adherence to the literal construction of section 2(b) under the Commis-

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27. 136 F. Supp. 420 (D. Conn. 1955), rev'd on other grounds, 240 F.2d 457 (2d Cir. 1957).

28. 294 F.2d at 472. The instant court also noted that in *Enterprise* the respondent, Texas Co., failed to give evidence of the price of its competing refiner. It also failed to give evidence that the prices of its competitor were lawful. Finally, Texas Co. did not show that their prices were not lower than its competitors. The case is thus distinguishable on these grounds. *Id.* at 472 n.18.

29. *Standard Oil Co. v. FTC.* 173 F.2d 210 (7th Cir. 1949).

sion's order would force a supplier to either: (1) lower its prices uniformly to all its retailers in the same area; (2) vertically integrate; or finally, (3) maintain uniform prices and place the burden on the retailer to meet its competition. The court observed that the first alternative might set off "price wars throughout Florida and the Southeastern United States."<sup>30</sup> On the other hand, vertical integration is clearly repugnant to general antitrust philosophy.<sup>31</sup> The third alternative would actually force the retailer out of business, which was the eventual result in the present case.<sup>32</sup> Although Congress did not contemplate a situation where the interests of a small merchant and a large supplier coincide, the general purpose of the legislation—to protect small businessmen—is beyond dispute.<sup>33</sup>

In effect, the Commission would have sacrificed the only existing area of competition in this industry, as well as the independent dealer, for the sake of a rigid control standard. Such a *per se* approach to a concededly ambiguous statute would frustrate the major intent of the act, the protection of the small businessman.

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30. 294 F.2d at 480.

31. E.g., *United States v. E. I. du Pont-de Nemours & Co.*, 351 U.S. 377 (1956); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). A Senate report approving of the Enterprise doctrine nevertheless strongly disapproved of increased vertical integration. S. Rep. No. 2810, 84th Cong., 2d Sess. 20-24 (1956).

32. 294 F.2d at 470.

33. See note 8 *supra* and accompanying text.