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Case Notes

CASE NOTES

Administrative Law—Motion to Quash an Internal Revenue Summons Barred by the Sovereign Immunity Doctrine.—The Internal Revenue Service served upon an accounting firm a summons requesting all records pertaining to certain taxpayers. The plaintiff-attorneys, counsel to the taxpayers, filed a complaint for a declaratory judgment and an injunction against Commissioner Caplin, joining the accountants as defendants. The accountants admitted the essential allegations of the complaint and joined in the plaintiff's prayer for relief. It was maintained that the material sought was privileged, constituting the work product of counsel who had retained the accountants. The district court granted defendant's motion to dismiss, and held, *inter alia*, that the records were the work product of the accountants rather than of the attorneys. The court of appeals affirmed, but declining to discuss the subject on its merits, held that the district court lacked jurisdiction to entertain petitioner's motion, since it was an effort to restrain the United States without its consent, and thus barred by the sovereign immunity doctrine. *Reisman v. Caplin*, 317 F.2d 123 (D.C. Cir.), *cert. granted*, 374 U.S. 825 (1963).

In holding the sovereign immunity doctrine[1] applicable, the court stressed that (1) the Commissioner had acted within his statutory authority[2] and

1. It has been recognized that although the sovereign immunity doctrine "has never been discussed or the reason for it given, . . . it has always been treated as an established doctrine." United States v. Lee, 106 U.S. 196, 207 (1882). Doubtless its conception is tied to the maxim "the king can do no wrong," though certainly this rationale is inappropriate to our present form of government.

In determining whether a suit is within the purview of the sovereign immunity doctrine it is necessary to consider the "'essential nature and effect of the proceeding,'" and if its nature is such "that the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration . . . the suit is one against the sovereign." Land v. Dollar, 330 U.S. 731, 738 (1947). Such an action will be barred unless (1) the sovereign has consented to the suit, or (2) the statute purporting to grant the authority to the government or to its officers is unconstitutional, or (3) the officer is acting outside the scope of his authority. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).

Despite this seemingly clear ruling by the Supreme Court, the controversy over the "doctrine" and its application has continued; perhaps because the decision, or the "doctrine," or both, are basically unsatisfactory. See Davis, Sovereign Immunity in Suits Against Officers for Relief Other Than Damages, 40 Cornell L.Q. 3 (1954). It is suggested, however, that the difference of opinion, at least as to the applicability of particular facts to law, may be better explained by the fact that policy considerations are often powerful factors in sovereign immunity cases. See note 15 infra and accompanying text.

2. 317 F.2d at 125. Int. Rev. Code of 1954, § 7602, provides in part: "For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax . . . the Secretary or his delegate is authorized . . . (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perfom the act, or any other person

(2) the petitioner had failed to allege that the statute involved was unconstitutional.[3] This holding is in conflict with a prior decision of the second circuit; *Application of Colton.*[4] That court, while cognizant of the fact that the Internal Revenue Code did not contain a specific provision to vacate or modify a summons issued pursuant to Section 7602 of the Internal Revenue Code,[5] denied the applicability of the sovereign immunity doctrine.[6] It held a motion to quash proper on the ground that—(1) since an enforcement proceeding was not necessarily a prerequisite to citation for criminal contempt and (2) since no other procedure existed to test the legality of a revenue summons—citation for criminal contempt might therefore force a subpoened party to assert the invalidity of a summons before a tribunal able to invoke criminal penalties for non-compliance.[7] The rationale of *Colton* was followed in *Application of Howard.*[8]

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the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data. . . ."

3. Ibid.

4. 291 F.2d 487 (2d Cir. 1961); Noted 75 Harv. L. Rev. 1222 (1962).

5. 291 F.2d at 489. The court stressed that notwithstanding the lack of statutory authorization to challenge the validity of the subpoena, prior to enforcement a number of such motions had been entertained. It cited First Nat'l City Bank v. IRS, 271 F.2d 616 (2d Cir. 1959), cert. denied, 361 U.S. 948 (1960); International Commodities Corp. v. IRS, 224 F.2d 882 (2d Cir. 1955); Application of Burr, 171 F. Supp. 448 (S.D.N.Y. 1959); Application of Daniels, 140 F. Supp. 322 (S.D.N.Y. 1956). The court restricted itself to determinations of the second circuit. A similar motion was entertained in Arend v. De Masters, 181 F. Supp. 761 (D. Ore. 1960), rev'd on other grounds, 313 F.2d 79 (9th Cir. 1963). The court of appeals in Arend stated that an action to restrain the enforcement of an Internal Revenue subpoena is not barred by the sovereign immunity doctrine. 313 F.2d at 85 (dictum).

6. 291 F.2d at 490. The court, in denying the applicability of the sovereign immunity doctrine, cited Ex parte Young, 209 U.S. 123 (1908) and Oklahoma Operating Co. v. Love, 252 U.S. 331 (1920), indicating—or so it seemed—that it felt the denial of the applicability of the doctrine to be constitutionally required. See 75 Harv. L. Rev. 1222, 1223 (1962). It has since noted it did not intend to rest its decision on a constitutional basis but rather felt its conclusion was "inherent in the statutory scheme" of § 7210. In the Matter of Turner, 309 F.2d 69, 72 (2d Cir. 1962).

7. 291 F.2d at 489-90. The court emphasized that exposure to penalty without an opportunity to test the validity of the subpoena is peculiar to the statutory scheme of the Internal Revenue Code. It has been pointed out that the Securities Exchange Act of 1934, the Federal Trade Commission Act, and the Federal Power Commission Act all contain criminal contempt provisions under which a party may be prosecuted prior to a court enforcement order. 75 Harv. L. Rev. 1222, 1224 (1962).

It must be noted that there is little likelihood of a court expanding the Colton concept to the SEC and FTC statutes as each explicitly limits criminal prosecution to a bad faith violation of the summons. See 48 Stat. 900 (1934), 15 U.S.C. § 78u(c) (1958) (SEC); 49 Stat. 856 (1935), 16 U.S.C. § 825f(c) (1958) (FTC). Note, however, that the argument proposed in Colton might be equally applicable to the FTC act. See 38 Stat. 723 (1914), 15 U.S.C. § 50 (1958).

8. 210 F. Supp. 301 (W.D. Pa. 1962), appeal docketed, No. 14272, 3d Cir., March

Basic to the disagreement between the two circuits is the difference in their interpretations of Section 7210 of the Internal Revenue Code.[9] *Colton* concluded that enforcement proceedings are not a prerequisite to prosecution for criminal contempt.[10] The instant court, attempting to circumvent the clear wording of the revenue statute, held that section 7210 was not before the court.[11] In commenting on this section, however, it pointed out that prosecution would probably not follow from a good faith refusal to comply with a revenue summons,[12] implying thereby that it considered the dangers envisioned by *Colton* to be more imaginary than real. The only two cases that have considered the subject have, as *Colton*, interpreted section 7210 as permitting

1963. The court adhered to the decision in Colton mainly due to its respect for the panel of jurists which decided the case. It added: "We also gave weight to the proposition that if a judicial subpoena can be quashed upon constitutional grounds [Hale v. Henkel, 201 U.S. 43, 76 (1906)], an administrative subpoena should also be quashable a fortiori." Id. at 302-03. (Emphasis omitted.) Henkel involved a judicial subpoena and the motion to quash was ancillary to an already existing judicial proceeding, i.e., Henkel had refused to comply with a subpoena duces tecum issued by the grand jury and that body sought to cite him for contempt of that subpoena. In the instant case, as well as in Colton and Howard, there were no proceedings already pending before the courts. The jurisdictional question presently being discussed, therefore, was not before the Suprme Court in Hale v. Henkel.

9. "Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections . . . 7602, 7603, and 7604(b), neglects to appear or produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution." Int. Rev. Code of 1954, § 7210.

10. 291 F.2d at 489. Colton also intimated that an enforcement order might not be a prerequisite to citation for contempt pursuant to § 7604(b) of the Internal Revenue Code. It is submitted that invocation of court aid in enforcement is a prerequisite to citation for civil contempt of an Internal Revenue summons. See the discussion of the legislative history of this section in 317 F.2d at 126 n.3. Cf. FTC v. Halmark, Inc., 265 F.2d 433, 437 (7th Cir. 1959); see also H. R. Rep. No. 1980, 79th Cong., 2d Sess. 33 (1946), discussed in note 13 infra.

11. The court noted: "We need not now consider what judicial response would be appropriate if enforcement were attempted under some other statute than Section 7604(6)." 317 F.2d at 126.

12. Id. at 126 n.4. The court did not discuss what would constitute a good faith refusal to comply with a subpoena. It is submitted that a subpoenaed party could conclusively prove his good faith by responding to a subpoena at the required time and asserting as his reasons for noncompliance the defenses he felt applicable in answer to specific questions or requests as they were proposed to him. Cf. Landy v. United States, 283 F.2d 303 (5th Cir. 1960) (per curiam), cert. denied, 365 U.S. 845 (1961); Shaughnessy v. Bacolas, 135 F. Supp. 15 (S.D.N.Y. 1955). It is not to be implied, however, that a mere failure to respond to a subpoena at the required time would constitute bad faith. Rather, it is believed that the Government would have the burden of proving that the subpoenaed party's disregard of the subpoena was willful. See United States v. Becker, 259 F.2d 869 (2d Cir. 1958), cert. denied, 358 U.S. 929 (1959), discussed in note 14 infra.

prosecution without enforcement.[13] However, these same cases, in agreement with the present determination, emphasized that "prosecution under Section 7210 . . . would not follow from a good faith refusal to comply with a revenue summons."[14]

While both decisions differ as to the proper construction of section 7210, they agree that (1) " 'policy considerations, not always apparent on the surface, are powerful agents of decision' in sovereign immunity cases,"[15] and (2) it is necessary to avoid delays in tax investigations.[16]

The observance of the delays resulting from its holding in *Colton*[17] has caused the second circuit to express, on two occasions, its desire to review the jurisdictional questions presented there.[18]

Historically, administrative agencies were established to expedite the management of public affairs.[19] Yet it has been noted that "inordinate delay [still] characterizes the disposition of [administrative] proceedings . . . ."[20] Noncompliance with administrative summonses has been a major source of this delay. In order to avoid the use of dilatory tactics at subpoena enforcement proceedings, the Federal Rules of Civil Procedure allow the district courts to adopt special procedures to facilitate the prompt disposition of those hearings.[21]

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13. United States v. Becker, supra note 12; Brody v. United States, 243 F.2d 378, 386 (1st Cir.) (dictum), cert. denied, 354 U.S. 923 (1957). Note, however, § 6(c) of the Administrative Procedure Act (60 Stat. 240 (1946), 5 U.S.C. § 1005(c) (1958)), which provides that "upon contest the court shall sustain any such subpena [sic] . . . to the extent that it is found to be in accordance with law. . . ." There is some support in the legislative history of this act (see H.R. Rep. No. 1980, 79th Cong., 2d Sess. 33 (1946)), for the proposition that this section was intended to provide a method for testing the validity of any subpoena before risking penalty. It is highly doubtful that a successful argument could be made that this section was intended to supersede all the previous provisions of the various administrative subpoena enforcement statutes.

14. 317 F.2d at 126 n.4. Becker is the only person who has been prosecuted pursuant to § 7210 of the Internal Revenue Code. Initially he informed revenue agents that the materials requested had been destroyed, and he was not prosecuted until one year later when he produced the same materials in response to a grand jury subpoena. The court emphasized the willfulness of his disobedience. United States v. Becker, supra note 12.

15. 317 F.2d at 126, citing the dissenting opinion of Mr. Justice Douglas, in Malone v. Bowdoin, 369 U.S. 643, 650 (1962).

16. 317 F.2d at 126; 291 F.2d at 490.

17. In the Matter of Turner, 309 F.2d 69, 72 (2d Cir. 1962).

18. Ibid. Recently, during the oral argument of United States v. McDonald, 313 F.2d 832 (2d Cir. 1963), Chief Judge Lumbard expressed the court's desire to have the jurisdictional questions presented in Colton reargued. See Brief for Appellant, p. 24, Application of Howard, appeal docketed, No. 14272, 3d Cir., March 1963.

19. See generally Administrative Procedure in Government Agencies, Doc. No. 8, 77th Cong., 1st Sess., 13-17 (1961).

20. Landis, Senate Committee on the Judiciary, 86th Cong., 2d Sess., Report on Regulatory Agencies 5 (Comm. Print 1960).

21. Section 81(a)(3) of the Federal Rules of Civil Procedure reads in part: "These rules apply (1) to proceedings to compel the giving of testimony or production of docu-

The efficient management of public affairs sometimes demands the infringement of personal conveniences. This is but a " 'part of the social burden of living under government.' "[22] In the instant case the infringement was slight. The Internal Revenue Service has only once criminally prosecuted noncompliance with its summonses;[23] in addition, the Government has declared its intention to abide by a bad faith refusal to comply as a prerequisite to prosecution.[24] Moreover, the proper time for the exercise of the extraordinary jurisdiction sought in the instant case might well be when the Government has actually sought to prosecute a good faith refusal to comply. The Supreme Court has held that, prior to the commencement of an action to compel the payment of statutory forfeitures, an injunction to restrain the enforcement of an FTC order will not lie.[25] It denied the injunction because the petitioner had not, at that point in the investigation, suffered any injury or penalty. Subsequently the Supreme Court noted that since, upon the commencement of such a suit, a party could request a stay of that prosecution pending a determination of the validity of the orders by a declaratory judgment or other equitable proceeding, a party was not by its prior holding denied the opportunity to test safely the legality of a summons.[26] It seems, therefore, that since there is little chance of prosecution and even then there is adequate protection to the subpoenaed party, the unwanted delay consequent to an extra round of litigation should be the predominant factor in a court's consideration.

Antitrust—Territorial and Customer Limitations in Agreements Between Manufacturer and Distributors Held Not Illegal Per Se on Their Face.— The defendant truck manufacturer entered into agreements with its dealers and distributors whereby the dealers and distributors were prevented from selling to certain classes of customers and their sales were restricted to customers having a place of business or purchasing headquarters located within territories designated by the defendant. The agreements also provided that the distributors would resell trucks to dealers at prices fixed by the manufacturer. The Government brought a civil antitrust suit against the manufacturer and the trial court granted summary judgment for the plaintiff, holding that these restrictions were

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ments in accordance with a subpoena issued by an officer or agency of the United States . . . except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings . . . ." See United States v. McDonald, 313 F.2d 832 (2d Cir. 1963). Note, however, that Section 81(a)(2) of the Federal Rules of Civil Procedure provides that the formal rules of procedure will apply to appeals from an enforcement hearing.

22. Petroleum Exploration Inc. v. Public Service Comm'n, 304 U.S. 209, 222 (1938).

23. See note 14 supra and accompanying text.

24. 317 F.2d at 126 n.4.

25. FTC v. Claire Furnace Co., 274 U.S. 160 (1927).

26. St. Regis Paper Co. v. United States, 368 U.S. 208, 226-27 (1961) (dictum). See also United States v. Morton Salt Co., 338 U.S. 632, 654 (1950) (dictum).

illegal per se.[1] Though the entire distribution system was condemned, it appears that the territorial and customer restrictions were held illegal per se independently of resale price maintenance.[2] On appeal, the Supreme Court reversed and held that the legality of the vertical territorial and customer restrictions should be determined at trial, since not enough was known about their impact to decide whether they were illegal per se.[3] *White Motor Co. v. United States*, 372 U.S. 253 (1963).

The courts have granted summary judgment to the Government where no genuine issue of material fact appeared and where the arrangement fell within a category deemed unreasonable per se.[4] The Supreme Court has frequently cautioned against the hasty use of summary judgment in cases where the issues are complex and of far flung import, rather than simple and clear-cut.[5] The Court has further pointed out that since the record is viewed in the light most favorable to the party opposing the motion, summary judgment should be used sparingly in antitrust litigation where motive and intent play leading roles.[6] The instant case was decided under, and was consistent with, the then existing Federal Rules of Civil Procedure[7] requiring a mere denial or allegation in the pleading by the adverse party to raise a question of fact sufficient to rebut a Government motion for summary judgment. A recent amend-

1. United States v. White Motor Co., 194 F. Supp. 562 (N.D. Ohio 1961).

2. Id. at 585. Although exclusive franchises were also present in White's contracts, the Government did not challenge their legality. However, the court indicated that these arrangements are not illegal per se and thus will be upheld when reasonable and supported by legitimate business consideration. Id. at 578.

3. "This is the first case involving a territorial restriction in a vertical arrangement; and we know too little of the actual impact both of that restriction and the one respecting customers to reach a conclusion on the bare bones of the documentary evidence before us." 372 U.S. at 261. The Justice Department has brought numerous actions attacking vertical territorial limitations, but all have resulted in consent decrees under which the defendant agreed to discontinue the arrangement, so that White was a case of first impression before the Supreme Court. The district court's holding was reversed, aside from the price-fixing phase of the case, which was not appealed by White. Where price-fixing is an integral part of the whole distribution system, restrictive practices ancillary to price-fixing (or even the entire system) are illegal. See United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944). However, no such finding was made in the instant case, so that without more detailed evidence, these territorial restrictions cannot be declared illegal under Bausch & Lomb. 372 U.S. at 257.

4. See, e.g., Northern Pac. Ry. v. United States, 356 U.S. 1 (1958). This is true since there is no defense to justify a per se violation. See Jordan, Exclusive and Restrictive Sales, 9 U.C.L.A.L. Rev. 111 (1961); Kessler & Stern, Competition, Contract and Vertical Integration, 69 Yale L.J. 1 (1959). But see Brown Shoe Co. v. United States, 370 U.S. 294 (1962); Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653 (1st Cir.), cert. denied, 368 U.S. 931 (1961).

5. See Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464 (1961); Kennedy v. Silas Mason Co., 334 U.S. 249 (1948); Arenas v. United States, 322 U.S. 419 (1944).

6. See 372 U.S. at 259; Poller v. Columbia Broadcasting Sys., Inc., supra note 5, at 473.

7. Fed. R. Civ. P. 56, 329 U.S. 862 (1946).

ment,[8] however, requires affidavits setting forth "specific facts showing that there is a genuine issue for trial"[9] to avoid summary judgement. This more stringent requirement will perhaps avoid the situation presented to the court in this case, *i.e.*, insufficiency of information, in that the record presented will afford ample ground to reach a decision.[10]

Read literally, the Sherman Antitrust Act,[11] prohibits all restraints on trade,[12] but the Supreme Court, in *Standard Oil Co. v. United States*,[13] construed the act to condemn only unreasonable restraints of trade, thus requiring the courts to make an economic analysis of the purpose and effect of the individual restriction to determine legality. However, due to an effort to expedite matters and eliminate costly economic analysis in every case, the rule of reason has been eroded by an expanded category of per se offenses.[14] They include price-fixing,[15] tying arrangements,[16] group boycotts[17] and horizontal division of mar-

8. Fed. R. Civ. P. 56.

9. Fed. R. Civ. P. 56(e).

10. See 372 U.S. at 283 n.2.

11. "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958).

12. See United States v. Trans-Missouri Freight Ass'n., 166 U.S. 290, 339-40 (1897).

13. 221 U.S. 1 (1911). "[I]t becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by established law. . . ." Id. at 62.

See also Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918). In this case, the Court emphasized the necessity for, and the application of, the rule of reason, stating: "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the Court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the Court to interpret facts and to predict consequences." Id. at 238.

14. Some practices, because of their inherent nature or necessary effect, have been conclusively presumed to restrain competition unreasonably. Northern Pac. Ry. v. United States, 356 U.S. 1 (1958). "However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Id. at 5.

15. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

16. United States v. Loew's Inc., 371 U.S. 38 (1962); International Salt Co. v. United States, 332 U.S. 392 (1947). But see cases cited note 4 supra.

17. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941).

kets.[18] While the rule of reason is not applied to these violations,[19] the validity of practices not within these categories must be determined at a full trial.[20]

The trial court in the instant case[21] held that White's vertical territorial agreements were illegal per se and employed the rationale of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[22] That Court, in order to prohibit vertical resale price-fixing agreements, pointed out that horizontal agreements to fix prices had previously been declared illegal, and that, therefore, a vertical agreement achieving the same result should also be illegal.[23] Following this reasoning, the lower court in the instant case concluded that since horizontal territorial agreements had been declared illegal,[24] defendant's vertical agreements which achieved the same result must also be illegal.[25]

This approach appears to ignore important differences between vertical and horizontal territorial agreements both in purpose and effect, rendering the analogy of these to price-fixing apparently premature without additional factual data.[26] Horizontal territorial agreements are imposed by competing manufacturers or dealers to eliminate competition and maintain or raise prices.[27] On the other hand,

18. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

19. See note 4 supra.

20. See International Salt Co. v. United States, 332 U.S. 392 (1947). See generally Jordan, supra note 4.

21. United States v. White Motor Co., 194 F. Supp. at 585 (N.D. Ohio 1961).

22. 220 U.S. 373 (1911). In this case a manufacturer of proprietary medicines entered into agreements with his distributors, whereby the distributors were to resell at prices fixed by a manufacturer. The Court held that these resale price maintenance agreements violated the Sherman Act because any agreement made for the purpose of destroying competition or fixing prices is illegal.

23. Id. at 408.

24. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951). In this case the Court held that a horizontal agreement between competitors to divide territory violates the Sherman Act because it would unreasonably restrain trade.

25. "White can fare no better in a system of identical contracts with its distributors and dealers allocating territories and customers than could the distributors and dealers themselves 'if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other.'" 194 F. Supp. at 585.

26. See Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655 (1962); id. at 795; 60 Mich. L. Rev. 1006 (1962). See also Jordan, supra note 4. The reasoning of the district court in the White case oversimplifies the problem, for, as Jordan points out, if a manufacturer is vertically integrated to the retail level, competition in the manufacturer's product is eliminated, yet this is not illegal. It can be just as validly argued that if a manufacturer can eliminate competition in the sale of his product by owning all outlets for the product, he should be able to limit competition among his sellers by restricting territories. Therefore, the holding that vertical territorial agreements are illegal per se because they have the same effect as horizontal ones (which is not necessarily true) seems faulty since vertical integration achieves the same result, but is not illegal. Jordan, supra note 4, at 153.

27. Cases cited note 18 supra.

a vertical agreement restricting dealers to predetermined territories, although effectively eliminating intrabrand competition, is usually designed to induce dealers to develop their respective markets more intensively.[28] While the agreements are similar in that they limit the area in which competitors can sell, and thus restrain trade, it has been argued that a vertical agreement, unlike its horizontal counterpart, may result in increased sales volume, lower prices and stimulation of interbrand competition[29] by permitting a new or relatively small manufacturer to compete more efficiently with larger competitors.[30]

Mr. Justice Douglas, speaking for the Court, pointed out that the types of arrangements used in this case have not been previously ruled on by the Court and that not enough is known about their effect.[31] He concluded that a trial was necessary to analyze the purpose and effect of the restrictions, prior to a determination of per se illegality.[32] Mr. Justice Brennan, in his concurring opinion, distinguished between the types of restrictions in dealers' contracts, namely, territorial and customer limitations, stating that the *customer* restrictions would be difficult to justify since they served to suppress competition between the manufacturer and his distributors for the most desirable accounts, without the compensating virtue of fostering interbrand competition. He concluded that these restrictions could be justified only if the distributors could not, in the absence of restrictions, compete in a meaningful way with White for the reserved accounts. Mr. Justice Brennan felt that the validity of *territorial* limitations should be determined by weighing the restraint on intrabrand competition against the stimulation of interbrand competition that may result and against the legitimate business purposes for imposing them. He concluded that summary judgment was improper,[33] since the motivation and source of the

28. See note 26 supra.

29. Although these agreements restrict interterritorial competition among dealers of the same manufacturer, they may increase industry-wide competition among manufacturers; thus the legitimate objectives of these agreements may outweigh their restraint on trade and render them reasonable. See 75 Harv. L. Rev. 795 (1962); 60 Mich. L. Rev. 1006 (1962).

30. Turner, supra note 26 at 698-99.

31. See note 3 supra.

32. "We conclude that the summary judgment, apart from the price-fixing phase of the case, was improperly employed in this suit. Apart from price-fixing, we do not intimate any view on the merits. We only hold that the legality of the territorial and customer limitations should be determined only after a trial." 372 U.S. at 264.

33. Id. at 264. Mr. Justice Brennan also pointed out that, "the analogy to resale price maintenance agreements is also appealing, but is no less deceptive. Resale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much between that product and competing brands. . . . While territorial restrictions may indirectly have a similar effect upon intrabrand competition, the effect upon interbrand competition is not necessarily the same as that of resale price maintenance. Indeed, the principal justification which the appellant offers for the use of these limitations is that they foster a vigorous interbrand competition which might otherwise be absent. Thus, in order to determine the lawfulness of this form of restraint, it becomes necessary to assess the merit of this and other extenuations offered by the appellant.

territorial agreement[34] as well as its effect were determinative of its legality.

Mr. Justice Clark, joined by the Chief Justice and Mr. Justice Black, dissenting, agreed with the reasoning of the trial court and said that White's imposition of the restrictions making the agreement vertical rather than horizontal, cannot legalize it, concluding that the record was sufficient to determine the legality of the agreements and the evidence ample to show a per se violation.[35] He contended that sufficient precedent for per se illegality could be found in *Interstate Circuit, Inc. v. United States*,[36] where a horizontal conspiracy was inferred from a series of vertical agreements, in the light of surrounding circumstances.[37] One of the factors noted was that each distributor knew that others were asked to participate and that their cooperation was essential to the successful operation of the scheme. *United States v. Masonite Corp.*[38] presented a similar situation. Each seller independently contracted with the manufacturer but was aware that its agreement was not an isolated transaction, but part of a plan which would restrain trade. The Court found an unlawful combination among the sellers and rejected their defense that they did not intend to join an unlawful conspiracy. On the strength of these two cases it could be found that all the dealers in the instant case formed a horizontal conspiracy and it is immaterial who imposed the restrictions as long as all were, as a practical matter, in agreement. Mr. Justice Brennan, however, suggested that it was plausible to conclude that the restraints were imposed on unwilling distributors and, therefore, a horizontal agreement should not be inferred.[39]

The dissent also attacked White's contention that the agreements allowed efficient competition with larger truck manufacturers and were necessary to profitable marketing. Mr. Justice Clark pointed out that American Motors (oper-

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Surely it would be significant to the disposition of this case if, as appellant claims, some such arrangement were a prerequisite for effective competition on the part of independent manufacturers of trucks." Id. at 268-69. (Emphasis omitted.)

34. Mr. Justice Brennan was of the opinion that if the restrictions had been induced primarily by the distributors and dealers they would be illegal even if formally imposed and enforced by the manufacturer rather than through interdealer agreement. Id. at 267.

35. Id. at 275-83.

36. 306 U.S. 208 (1939).

37. "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." Id. at 227.

38. 316 U.S. 265 (1942).

39. 372 U.S. at 267. The courts have been reluctant to infer a horizontal agreement from such a series of vertical contracts, and the Masonite and Interstate cases have been criticized and interpreted in different ways. See Turner, supra note 26; 38 Colum. L. Rev. 696 (1938); 52 Harv. L. Rev. 846 (1939). Their opinion is that unanimity of action by distributors is not proof of an agreement among them, since each was faced with the same demand and may have been coerced into complying. For the view that the subjective element of conspiracy was strongly present in the cases, so that all they decided was that the conspirators did not have to attend a meeting together, see Rahl, Conspiracy and the Anti-Trust Laws, 44 Ill. L. Rev. 743 (1950). See also United States v. Parke, Davis & Co., 362 U.S. 29, 46-47 (1960).

ating under similar competitive circumstances in the automobile industry) admitted, in hearings before a congressional subcommittee, that it did not need such restrictions to compete with other automobile manufacturers and to stimulate interbrand competition.[40]

Although the analogy between horizontal and vertical territorial restraints is appealing, it is difficult to criticize the Court's refusal to permit summary judgment. Certainly further evidence will be required to determine whether there was an unreasonable restraint in light of the economic justification offered by the defendant. It may well be that the reasons put forth to legalize the agreements do not outweigh the resulting restraint on trade. It has been suggested that other methods, free of resulting restraints, could effectively achieve the ends desired by White.[41] In the final analysis the determination of per se illegality will rest on the extent of the limitation on intrabrand competition as compared with the benefit to interbrand competition. A recent decision[42] found economic justification for a restriction similar to the restraint in the instant case. This may indicate that a per se approach to vertical territorial restrictions would foreclose a legitimate business practice fostering rather than hindering competition. The customer restrictions, however, because they tend to eliminate all competition between the manufacturer and dealers as to the most desirable accounts, will likely be declared illegal. The economic justification, *i.e.*, increased interbrand competition, found in the territorial limitations is conspicuously missing, thus leaving the customer restraints on weak ground.

40. 372 U.S. at 281-82.

41. One writer suggests that an alternate to the restrictions imposed by White would be exclusive territorial distribution, "a far cry from plunging the distributors into 'cut-throat competition.'" He concluded that "it is hard to imagine that opening territories would lead to a crumbling of White's farflung distributing empire." Stone, Closed Territorial Distribution: An Open Question in the Sherman Act, 30 U. Chi. L. Rev. 286, 308-09 (1963). See also Stewart, Exclusive Franchises and Territorial Confinement of Distributors, 22 A.B.A. Antitrust Section 33 (1963). The author suggests alternate arrangements which may satisfy the same business purposes as territorial limitations, while causing less interference with competition. These include an agency relationship between the supplier and distributors in which the agents are directed to sell only to customers located in specified territories; primary-responsibility provisions wherein the supplier designates geographical areas in which the distributors would be primarily responsible for promotion and sales; license agreements, in cases where the supplier has a patent or trademark, providing distributors are licensed to sell in a particular area; exclusive franchise agreements; and vertical integration through internal expansion.

42. Snap-On-Tools Corp. v. FTC, Trade Reg. Rep. (1963 Trade Cas.) ¶ 70861 (7th Cir.). Here, exclusive territory restrictions in contracts between a manufacturer and his dealers, which limited the geographic area in which a dealer could sell though leaving the dealer free to sell to and serve customers coming to him from outside that territory, were held not to be illegal.

Conflict of Laws—New York Abandons Traditional "Place of Tort" Rule in Determining Effect of Foreign Guest Statute.—Plaintiff guest and defendant motorist, both residents of New York, took an automobile trip to Ontario, Canada. The car was registered and insured in New York; the trip began in New York and was to end there. Plaintiff was injured in Ontario when defendant negligently drove his car into a wall. The New York Supreme Court dismissed the complaint on the ground that Ontario's guest statute[1] barred recovery, and the appellate division affirmed.[2] On appeal, the New York Court of Appeals reversed and held that the liability of an owner or driver of a motor vehicle to his guest should be determined by the law of the place which has the most significant contacts with the occurrence. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

According to the traditional choice-of-law rule, the law of the place of the tort governed the creation and extent of liability.[3] This rule was based on the "vested rights" doctrine, under which a right to recover for an injury owed its creation solely to the law of the place where the injury occurred, and thus the rights and liabilities of the parties should be determined by the law of that jurisdiction.[4] In determining substantive liability for tortious conduct, this doctrine has been consistently followed by the courts of New York,[5] whether the issue involved was the determination of a standard of conduct[6] or the existence of a cause of action or a defense to a cause of action.[7]

1. Highway Traffic Act of Province of Ontario, 1960, Ont. Rev. Stat. c. 172, § 105, subd. 2: "Notwithstanding the provisions of Subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of, any person being carried in, or upon, or entering or getting onto, or alighting from such motor vehicle."

2. Babcock v. Jackson, 17 App. Div. 2d 694, 230 N.Y.S.2d 114 (4th Dep't 1962) (per curiam, Judge Halpern dissenting).

3. See Goodrich, Conflict of Laws 260 (3d ed. 1949); Leflar, Conflict of Laws 209 (1959); 11 Am. Jur. Conflict of Laws § 182 (1937).

4. Babcock v. Jackson, 12 N.Y.2d at 477-78, 191 N.E.2d at 281, 240 N.Y.S.2d at 746 (1963) (citing authorities).

5. Poplar v. Bourjois, Inc., 298 N.Y. 62, 80 N.E.2d 334 (1948); Kerfoot v. Kelley, 294 N.Y. 288, 62 N.E.2d 74 (1945); Smith v. Clute, 277 N.Y. 407, 14 N.E.2d 455 (1938); Naphtali v. Lafazan, 8 App. Div. 2d 22, 186 N.Y.S.2d 1010 (2d Dep't 1959), aff'd mem., 8 N.Y.2d 1097, 171 N.E.2d 462, 209 N.Y.S.2d 317 (1960); Kaufman v. American Youth Hostels, Inc., 6 App. Div. 2d 223, 177 N.Y.S.2d 587 (2d Dep't 1958), modified mem., 5 N.Y.2d 1016, 158 N.E.2d 128, 185 N.Y.S.2d 268 (1959); Turnowski v. Turnowski, 33 Misc. 2d 864, 226 N.Y.S.2d 738 (Sup. Ct. 1962); Carlin v. Carlin, 29 N.Y.S.2d 925 (Sup. Ct. 1941).

6. See Smith v. Clute, supra note 5, which was followed in Kerfoot v. Kelley, supra note 5, and in Poplar v. Bourjois, Inc., supra note 5. In these cases the tort occurred outside the state of New York, and in determining whether or not the defendant's conduct was actionable, the law of the foreign state was applied. It should be noted that the departure in the instant case from the traditional rule expressly excludes cases where the issue is standard of conduct. Babcock v. Jackson, 12 N.Y.2d at 483-84, 191 N.E.2d at 284-85, 240 N.Y.S.2d at 751.

7. Carlin v. Carlin, 29 N.Y.S.2d 925 (Sup. Ct. 1941). In this case, where a guest statute

In recent years the courts have not hesitated to hold a cause of action in negligence barred by a statute of the state in which the tort occurred, regardless of which jurisdiction had the most significant contacts. In *Kaufman v. American Youth Hostels, Inc.*,[8] the defendant, a charitable institution incorporated in New York, was engaged in conducting tours of the United States. Plaintiff's daughter, a resident of New York and a member of one of these tours, was killed in a fall while exploring in Oregon. The court held that since the tort occurred in Oregon, the Oregon law which exempted charitable institutions from liability for their negligent acts[9] was effective to defeat plaintiff's *tort* action.[10]

Heretofore foreign guest statutes were no exception. In *Naphtali v. Lajazan*,[11] though all parties to the action were residents of New York, the guest statute of Ohio, the locus delicti, was applied to preclude recovery.[12] Here again the significant contacts were discarded in favor of the orthodox doctrine.

In New York the first break with traditional conflicts principles came in the field of contracts. The "contacts" test was suggested in a dictum in *Rubin v. Irving Trust Co.*[13] and a few years later became the holding in *Auten v. Auten*.[14] In contracts, although New York cases were not clear on the point, the generally accepted rule was that the law of the place where the contract was made controlled all issues involving execution, interpretation or validity of the contract, and that the law of the place of performance governed in matters connected with performance.[15] In *Auten* the issue was whether New York or English law should be applied to determine the effect of an English

was involved, the New York court went further than just applying the law of the foreign state to determine what the standard of conduct should have been, but also applied the statutory law of the place of the tort, Ontario, in determining the rights and liabilities of the parties.

8. 6 App. Div. 2d 223, 177 N.Y.S.2d 587 (2d Dep't 1958), aff'd mem., 5 N.Y.2d 1016, 158 N.E.2d 128, 185 N.Y.S.2d 268 (1959).

9. Landgraver v. Emanuel Lutheran Charity Bd., Inc., 203 Ore. 489, 280 P.2d 301 (1955). This exemption was not recognized in New York. Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).

10. The court did, however, apply New York law under the contacts test to the agreement executed by plaintiff purporting to release defendant from liability for its negligent acts. 6 App. Div. 2d at 225, 177 N.Y.S.2d at 589. See also notes 13-17 infra and accompanying text.

11. 8 App. Div. 2d 22, 186 N.Y.S.2d 1010 (2d Dep't 1959), aff'd mem., 8 N.Y.2d 1097, 171 N.E.2d 462, 209 N.Y.S.2d 317 (1960). By now the uniformity and simplicity of the "place of the tort" rule had taken such a foothold in New York in the field of substantive tort liability that it was followed without any mention of the law of New York and New York's relationship and contacts with the parties involved in the litigation.

12. Ohio Rev. Code Ann. § 4515.02 (Page 1953).

13. 305 N.Y. 288, 305, 113 N.E.2d 424, 431 (1953).

14. 308 N.Y. 155, 124 N.E.2d 99 (1954).

15. Scudder v. Union Nat'l Bank, 91 U.S. 406 (1875); Swift & Co. v. Bankers Trust Co., 280 N.Y. 135, 19 N.E.2d 992 (1939); Goodrich, Conflict of Laws 342-46 (3d ed. 1949).

separation decree on a prior New York separation agreement. The court abandoned the traditional rules set forth above and instead used the "center of gravity," or significant contacts, approach.[16] It was willing to sacrifice the certainty and predictability afforded by the old doctrine in order to allow the forum to "apply the policy of the jurisdiction 'most intimately concerned with the outcome of [the] particular litigation.' "[17]

In the tort field New York took its first major step in the direction of the present case in *Kilberg v. Northeast Airlines, Inc.*[18] Plaintiff's intestate, a New York resident, was killed in an airplane crash en route from New York to Massachusetts, and a suit was brought in New York alleging a cause of action under the Massachusetts wrongful death statute, which limited recovery to a maximum of $15,000.[19] The court held that the administrator could recover for negligence under the Massachusetts law but that the statutory limitation was to have no effect. Thus, while still applying the law of the place of the tort to determine whether defendant's conduct was actionable, the court refused to apply that law to the issue of the limitation on damages.[20]

The instant case took the final step[21] and placed New York in line with the

16. In his dissent in the instant case Judge Van Voorhis contended that Auten represented no revolution in the law of conflicts, since the result of that case could be justified under the old doctrine of place of performance. " '[E]ven if we were not to place our emphasis on the law of the place with the most significant contacts, but were instead simply to apply the rule that matters of performance and breach are governed by the law of the place of performance, the same result would follow.' " 12 N.Y.2d at 485, 191 N.E.2d at 286, 240 N.Y.S.2d at 753 (quoting Auten v. Auten, 308 N.Y. at 163, 124 N.E.2d at 103). Rather, he urged, expressions such as "center of gravity" and "grouping of contacts" were simply used "as a shorthand reference to the reconciliation of such rigid concepts in the conflict of laws as the formulae making applicable the place where the contract was signed or where it was to be performed—rules which themselves were occasionally in conflict with one another." Id. at 485, 191 N.E.2d at 286, 240 N.Y.S.2d at 752.

17. Auten v. Auten, supra note 14, at 161.

18. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

19. Mass. Ann. Laws ch. 229, § 2 (1955).

20. The court gave two reasons for refusing to enforce the limitation: (1) it was against the public policy of New York, and (2) the limitation of damages is a procedural or remedial question and therefore controlled by the law of the forum, New York. 9 N.Y.2d at 39-41, 172 N.E.2d at 528-29, 211 N.Y.S.2d at 136-37. Although this second reason was abandoned in Davenport v. Webb, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962), the first was held to be constitutional on a rehearing en banc of Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962). Thus, on the basis of public policy alone, New York had refused to apply the monetary limitation of the law of the place of the tort. See generally 63 Colum. L. Rev. 133 (1963).

21. The opinion of Judge Fuld, writing for the court, was no surprise. His leanings toward this new "grouping of contacts" theory could be seen in his opinion in Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954), and in his concurring opinion in Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d at 44-45, 172 N.E.2d at 529, 211 N.Y.S.2d at 138: "If this were a matter of first impression, it might be effectively argued that, where 'two or

most recent pronouncement of the American Law Institute.[22] In reaching its conclusion that Ontario's guest statute was inapplicable, the court argued that the immunization of a motorist from liability to his passenger was clearly opposed to the public policy of this state.[23] Thus the court could see no reason for departing from it merely because of the "fortuitous circumstance" that the accident happened outside New York.[24] This is quite obviously an abrupt change in New York's public policy, for as late as 1960 the same court in a case exactly on point[25] departed from this public policy of New York and applied the law of the place of the tort. Further, to base this decision on

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more communities are touched or affected by a factual sequence,' the 'guide to the governing law' should be the jurisdiction having 'the most significant contact or contacts' . . . . And, since the contract of safe carriage was undertaken in New York and since this fact provides a more 'significant contact' than the adventitious occurrence of the crash in Massachusetts, it might well be further urged, this State's wrongful death statute and not that of Massachusetts should apply."

22. Restatement (Second), Conflict of Laws § 379(1) (Tent. Draft No. 8, 1963): "The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort." Note, however, that the Restaters have included the place of the wrong as one of the most significant contacts to be considered in determining which law shall apply. Id. § 379(2). This doctrine has also been adopted in dictum by the present court. "[W]here the defendant's exercise of due care . . . is in issue . . . it is [usually] appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place." 12 N.Y.2d at 483, 191 N.E.2d at 284, 240 N.Y.S.2d at 750-51.

23. This appears to be true since, even apart from judicial pronouncements, the New York Legislature has time and again refused to enact a statute denying the right of a guest to recover from his host. See, e.g., Sen. Introd. No. 339, Pr. No. 349 (1930); Sen. Introd. No. 168, Pr. No. 170 (1935); Sen. Introd. No. 3662, Pr. No. 3967 (1960).

24. "The emphasis in Kilberg was plainly that the merely fortuitous circumstance that the wrong and injury occurred in Massachusetts did not give that State a controlling concern or interest in the amount of the tort recovery as against the competing interest of New York in providing its residents or users of transportation facilities there originating with full compensation for wrongful death." 12 N.Y.2d at 480, 191 N.E.2d at 282, 240 N.Y.S.2d at 748. (Italics omitted.)

Assuming that the court is correct in this conclusion, there are at least two reasons for refusing to apply the Kilberg "emphasis" to the facts of the instant case. First, the fortuity discussed in Kilberg was entirely different from the word as used in the instant decision. There the court spoke of accidents occurring in a state the parties "never intended to cross but into which the plane has flown because of . . . unexpected developments. . . ." Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d at 39, 172 N.E.2d at 527, 211 N.Y.S.2d at 135. Here, however, the parties clearly intended to pass through Ontario. Therefore they had constructive notice of Ontario's statutes, and it is at least arguable that their mutual liabilities under Canadian law were at least foreseeable. Second, in Kilberg there existed the very significant contact that an express contract of safe carriage originated in New York; here there originated in New York at most an implied promise to drive carefully, having dubious legal effect. See note 28 infra.

25. Naphtali v. Lafazan, 8 N.Y.2d 1097, 171 N.E.2d 462, 209 N.Y.S.2d 317 (1960).

whether the result would be contrary to New York's public policy is begging the question. The content of the local law of the forum or that of the place of the tort is, logically, immaterial; rather, the problem is which public policy is applicable to determine the rights and liabilities of the parties.[26] Yet, is not the result a desirable one? What interest did Ontario have in the outcome of this litigation? The principal purpose of the legislators in enacting the guest statute was to prevent fraudulent and collusive claims against Ontario insurance companies.[27] But the parties were residents of, and the car insured in, New York. Therefore, Canadian insurers would in no way be affected by a recovery on the part of the plaintiff. Thus, *on its facts*, the result of the instant case is justified.[28]

Even so, the importance of the decision lies not so much in the abandonment of a particular choice-of-law rule as in the adoption of the policy that all conflicts problems will hereafter be decided on an *ad hoc* basis, rather than by reference to a traditional guide. For example, the court speaks of the law of the place of the tort as the "appropriate" law in cases where the defendant's exercise of due care is in issue, since that jurisdiction will *usually* have the most significant contacts with the occurrence.[29] So, in reality, although such decisions will have the same *results* as under the old principles, the *reasoning* of the courts will be based on a question of fact, *i.e.*, the significant contacts theory.[30]

26. It is true that Kilberg was based upon the state's interest in applying its compensatory policy for the protection of its own residents. But the authority of Kilberg here is doubtful; there New York's position on the substantive issue was much stronger than in the instant case, since it was expressed in the state constitution. N.Y. Const. art. I, § 16.

27. Survey of Canadian Legislation, 1 U. Toronto L.J. 358, 355-66 (1935).

28. An argument advanced by Judge Halpern, dissenting from the decision in the appellate division, deserves mention. He urged that the plaintiff was entitled to have the action decided under New York law on the ground defendant's negligence constituted a breach of his implied promise to drive the automobile with care, since the law of New York would be the governing law of the "contract," citing, inter alia, Dyke v. Erie Ry., 45 N.Y. 113 (1871). Babcock v. Jackson, 17 App. Div. 2d 694, 697, 230 N.Y.S.2d 114, 119 (4th Dep't 1962) (dissenting opinion).

This reasoning is clearly specious: it is evident that the instant action sounds entirely in tort and not in contract. Also, all the cases cited for the contractual theory, Dyke included, concerned passenger-carrier relationships: Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); Fish v. Delaware, L. & W.R.R. Co., 211 N.Y. 374, 105 N.E. 661 (1914); Busch v. Interborough Rapid Transit Co., 187 N.Y. 388, 80 N.E. 197 (1907); Lays Bros. & Boss, Inc. v. American Ry. Express Co., 228 App. Div. 746, 239 N.Y. Supp. 478 (4th Dep't 1930). In the instant case there was no such relationship, no buying of a ticket and no express contract of any kind.

See also Restatement (Second), Conflict of Laws § 379, comment b at 7 (Tent. Draft No. 8, 1963), in which the Restaters apparently consider the origin of the relationship of the parties important only where there exists an express contract of safe carriage.

29. 12 N.Y.2d at 483, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

30. But see 12 N.Y.2d at 484 n. 14, 191 N.E.2d at 285 n.14, 240 N.Y.S.2d at 752 n.14,

The instant court admitted that the flexibility of the new approach has been bought at the price of the certainty, uniformity and predictability afforded by the old law, as did the court in *Auten*. However justified this bargain may be when, as here, there is no question as to which jurisdiction has the most significant contacts, serious problems could arise in a different context. Suppose, the dissent suggests, several passengers were involved: one from state *A* where causes of action against the driver are entirely prohibited; another from state *B* where the action requires a showing of gross negligence; another from state *C* where the driver's contributory negligence is a condition precedent; and still another from state *D* where comparative negligence prevails.[31] Then certainly the loss of uniformity and simplicity would be felt as different judges sitting on separate cases handed down conflicting opinions as to which state had the most significant contacts.[32]

It is submitted, however, that these difficulties and disadvantages pale in light of the fact that plaintiffs will no longer be deprived of their claims by virtue of the blind application of the law of a fortuitous place of accident.[33]

Criminal Law—Coram Nobis Will Issue When Negligent Testimony Is Unknowingly Used by the Prosecution.—Defendant, on testimony of an accomplice corroborated by his own confession, was tried and convicted of

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where the court, in dictum, expressly stated that it would not apply the law of the place of the tort under the present facts, even if "the foreign guest statute requires a showing of gross negligence." This statement appears inconsistent with the position taken in the text of the opinion on the issue of standard of conduct. See note 29 supra and accompanying text. However, the contradiction bears out the proposition that future cases on the law of conflicts will be based on a determination of a question of fact, not a question of law.

Note that the United States Supreme Court in Richards v. United States, 369 U.S. 1 (1961), gave some impetus to the contacts approach. There Mr. Chief Justice Warren noted: "Recently there has been a tendency on the part of some states to depart from the general conflicts rule in order to take into account the interests of the State having significant contact with the parties to the litigation. We can see no compelling reason . . . that would prevent the federal courts from implementing this policy in choice-of-law rules where the State in which the negligence occurred has adopted it. Should the States continue this rejection of the older rule in those situations where its application might appear inappropriate or inequitable, the flexibility inherent in our interpretation will also be more in step with that judicial approach. . . ." Id. at 12-13.

31. 12 N.Y.2d at 486, 191 N.E.2d at 286-87, 240 N.Y.S.2d at 753.

32. This is not to suggest that similar difficulties are unknown under the traditional rules: "[E]xperience has shown that the . . . [old] rule does not always work well. In the case of such torts as fraud, defamation, invasion of the right of privacy, unfair competition, and interference with a marital or parental relationship, for example, there is often no one clearly demonstrable place of injury and at times injury will have occurred in two or more states." Restatement (Second), Conflict of Laws Introductory Note, Topic 1 at 2 (Tent. Draft No. 8, 1963).

33. See generally Stumberg, Principles of Conflict of Laws 201-12 (2d ed. 1951); Morris, The Proper Law of a Tort, 64 Harv. L. Rev. 881 (1951); Ehrenzweig, Guest Statutes in the Conflict of Laws, 69 Yale L.J. 595 (1960).

robbery, grand larceny and assault. At trial, defendant repudiated his confession and alleged it was procured through the use of alcoholic beverages. This allegation was rebutted by a detective who testified that he had been present throughout the interrogation and that defendant had not been given intoxicants during that period. At subsequent coram nobis proceedings, the detective altered his previous testimony by admitting that he had not been present during the entire interrogation, although he still maintained that he had been present during the period intoxicating beverages were alleged to have been given to defendant. The court found that the testimony given by the detective at the trial was negligent and not a wilful distortion, and that the prosecution was unaware of its falsity. Therefore defendant's petition for a writ of error coram nobis was denied in the county court.[1] This denial was affirmed without opinion by the appellate division.[2] On appeal, the court of appeals, three members dissenting, reversed the lower courts and held that coram nobis would issue. The court reasoned that the "giving of carelessly false testimony is . . . as much of a 'fraud' . . . as if it were deliberate . . . ."[3] The court imputed the "fraud" to the witness for the prosecution and concluded that "*coram nobis* proceedings have as their prime purpose the redress of such frauds." *People v. Robertson*, 12 N.Y.2d 355, 360, 190 N.E.2d 19, 21-22, 239 N.Y.S.2d 673, 677 (1963).

The writ of error coram nobis is primarily used to remedy and set aside an erroneous judgment grounded on an error of fact which neither appeared in the record nor was in issue at the trial.[4] The writ has also been successfully employed in cases where a defendant was not advised of his rights prior to trial or forfeited his privilege of appeal through the negligence of his attorney.[5]

Although coram nobis dates back to the sixteenth century when it was formally termed *quae coram nobis resident*,[6] its utilization in the criminal law of New York is of relatively recent origin. In 1943, *Lyons v. Goldstein*[7] firmly established coram nobis as a proper proceeding before the criminal courts of this state. There the court of appeals stated:

> The inherent power of a court to set aside its judgment which was procured by fraud . . . cannot be doubted . . . . No logical distinction can be made between . . . judgments in civil cases and . . . judgments in criminal cases. There is nothing unique about a judgment or its execution in criminal cases which excepts it from the rules applicable to judgments generally . . . .[8]

1. People v. Robertson, Index No. 2746/1956, Kings County Ct., Feb. 17, 1961.

2. People v. Robertson, 15 App. Div. 2d 582 (2d Dep't 1961) (memorandum decision).

3. People v. Robertson, 12 N.Y.2d 355, 360, 190 N.E.2d 19, 21, 239 N.Y.S.2d 673, 677 (1963).

4. 24 C.J.S. Criminal Law § 1606(2) (1961).

5. See, e.g., People v. Adams, 12 N.Y.2d 417, 190 N.E.2d 529, 240 N.Y.S.2d 155 (1963); People v. Conklin, 19 App. Div. 2d 536, 240 N.Y.S.2d 65 (2d Dep't 1963).

6. Frank, Coram Nobis 1 (1953).

7. 290 N.Y. 19, 47 N.E.2d 425 (1943).

8. 290 N.Y. 19, 25, 47 N.E.2d 425, 428-29 (1943). Cf. United States v. Mayer, 235 U.S. 55 (1914); Robinson v. Johnston, 118 F.2d 998 (9th Cir. 1941).

Since the comparatively late entrance of coram nobis into New York criminal law, the grounds for its issuance have rapidly expanded. Coram nobis is now available to a defendant who was insane at the time of the trial;[9] who was forced to plead guilty by coercion of the court,[10] the prosecution[11] or the police;[12] whose age made him incapable by statute of committing a crime;[13] who was convicted because the prosecution withheld testimony that might have produced a different result;[14] who was induced to plead guilty for a bargain;[15] who was not represented by counsel;[16] who was guilty of no criminal act as set forth in the indictment;[17] or who was convicted by perjured testimony knowingly used by the prosecution.[18] It is this last ground on which the instant case bears.

Heretofore, allegations of perjury on the part of a witness for the prosecution,[19] and perjured testimony given during trial without the knowledge or connivance of the prosecution would not serve as a basis for coram nobis relief.[20] Illustrative

9. People v. Nickerson, 283 App. Div. 854, 128 N.Y.S.2d 797 (4th Dep't 1954) (memorandum decision); People v. Wolfe, 114 N.Y.S.2d 447 (Kings County Ct. 1952), aff'd mem., 280 App. Div. 874, 114 N.Y.S.2d 663 (4th Dep't 1952); People ex rel. Rose v. Additon, 189 Misc. 102, 73 N.Y.S.2d 561 (Sup. Ct. 1947).

10. People v. Farina, 2 N.Y.2d 454, 141 N.E.2d 589, 161 N.Y.S.2d 88 (1957); People v. Goldstein, 1 App. Div. 2d 1044, 152 N.Y.S.2d 330 (2d Dep't 1956) (memorandum decision).

11. People v. Picciotti, 4 N.Y.2d 340, 151 N.E.2d 191, 175 N.Y.S.2d 32 (1958).

12. People v. Van Nostrand, 4 App. Div. 2d 913, 166 N.Y.S.2d 823 (3d Dep't 1957) (memorandum decision).

13. People ex rel. Harrison v. Jackson, 298 N.Y. 219, 228-29 82 N.E.2d 14, 18-19 (1948) (concurring opinion) (dictum).

14. People v. Anderson, 4 App. Div. 2d 886, 167 N.Y.S.2d 464 (2d Dep't 1957) (memorandum decision); Kellogg v. Macduff, 206 Misc. 330, 132 N.Y.S.2d 912 (Sup. Ct. 1954); People v. Riley, 191 Misc. 888, 83 N.Y.S.2d 281 (Kings County Ct. 1948).

15. People v. Freeman, 7 App. Div. 2d 960, 182 N.Y.S.2d 146 (4th Dep't 1959) (memorandum decision); People v. Siliciano, 185 Misc. 149, 56 N.Y.S.2d 80 (Kings County Ct. 1945).

16. Cf. N.Y. Const. art. I, § 6; N.Y. Code of Crim. Proc. §§ 8, 188, 308; People ex rel. Sedlak v. Foster, 299 N.Y. 291, 86 N.E.2d 752 (1949); Bojinoff v. People, 299 N.Y. 145, 85 N.E.2d 909 (1949); Hogan v. Court of Gen. Sessions, 296 N.Y. 1, 68 N.E.2d 849 (1946).

17. People v. Glass, 201 Misc. 460, 114 N.Y.S.2d 635 (Ct. Gen. Sess. 1952). This ground was challenged in People v. DeBernardo (Bronx County Ct. May 26, 1952), 127 N.Y.L.J. 2120 (1952). But the ground has been upheld in two federal cases, Waldron v. United States, 146 F.2d 145 (6th Cir. 1944); Martyn v. United States, 176 F.2d 609 (8th Cir. 1949).

18. Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957) (per curiam); People v. Costello, 8 N.Y.2d 954, 168 N.E.2d 850, 204 N.Y.S.2d 184 (1960) (memorandum decision), cert. denied, 365 U.S. 852 (1961), reversing 21 Misc. 2d 8, 192 N.Y.S.2d 634 (Ct. Spec. Sess. 1959); People v. Fanning, 300 N.Y. 593, 89 N.E.2d 881 (1949) (memorandum decision); People v. Sadness, 300 N.Y. 69, 89 N.E.2d 188 (1949) (dictum); Morhous v. Supreme Court, 293 N.Y. 131, 56 N.E.2d 79 (1944).

19. Petition of Peter Meisel, 133 N.Y.S.2d 534 (Sup. Ct. 1954); People v. Oddo, 300 N.Y. 649, 90 N.E.2d 896 (1950) (memorandum decision).

20. People v. Romeo, 27 Misc. 2d 772, 210 N.Y.S.2d 431 (Ct. Gen. Sess. 1961).

of this was *People v. Fanning*,[21] where defendant, convicted of armed robbery on the testimony of four identifying witnesses, submitted affidavits by two of those witnesses admitting they were not present during the robbery, and an affidavit by his brother confessing the crime, as a basis for coram nobis relief. In denying relief the court stated per curiam:

> The defendant's petition does not sufficiently allege a case of fraudulent use of perjured testimony by the prosecuting attorney to warrant relief by a *coram nobis* proceeding.[22]

The instant court expressly concurred with *People v. Fanning*, in stating that "*coram nobis* relief will not be granted merely on a showing that false testimony was given for the prosecution, absent a showing that the prosecution knew of the falsity . . . ."[23] Nonetheless, it granted the writ although it was established that the testimony in question was negligent and not willful, and that the prosecution was unaware of its falsity. The court reasoned that since "the untrue story was given by the very police officer in charge of the investigation . . . his wrongdoing must be charged to the prosecution."[24] Continuing, the court stated that although the testimony in issue may have been negligent, "the giving of carelessly false testimony is in its way as much of a 'fraud' on the court as if it were deliberate . . . ."[25] In imputing the wrongdoing to the prosecution the court attempted to meet the requirement for issuance of coram nobis as set forth in prior holdings, *i.e.*, fraudulent use of perjured testimony by the prosecution.

Judge Dye, dissenting, rejected the court's reasoning and stated:

> We have consistently ruled that *coram nobis* does not lie without allegation and proof "of fraudulent use of perjured testimony by the prosecution."[26]

The weight of authority clearly upholds this view.[27]

The dissent further contended that defendant's petition was improper in that

21. 300 N.Y. 593, 89 N.E.2d 881 (1949) (memorandum decision).

22. Id. at 594, 89 N.E.2d at 881.

23. 12 N.Y.2d at 359, 190 N.E.2d at 21, 239 N.Y.S.2d at 677.

24. Id. at 359-60, 190 N.E.2d at 21, 239 N.Y.S.2d at 677.

25. Id. at 360, 190 N.E.2d at 21, 239 N.Y.S.2d at 677.

26. Ibid.

27. Napue v. Illinois, 360 U.S. 264 (1959) (coram nobis issued when prosecutor did nothing to correct testimony he knew to be false); Alcorta v. Texas, 355 U.S. 28 (1957) (per curiam) (coram nobis granted when prosecutor used perjured testimony he knew to be false); People v. Costello, 8 N.Y.2d 954, 168 N.E.2d 850, 204 N.Y.S.2d 184 (1960) (memorandum decision), reversing 21 Misc. 2d 8, 192 N.Y.S.2d 634 (Ct. Spec. Sess. 1959), cert. denied, 365 U.S. 852 (1961) (petitioner failed to show that prosecutor participated in fraud); People v. Fanning, 300 N.Y. 593, 89 N.E.2d 881 (1949) (memorandum decision) (petitioner did not sufficiently allege fraudulent use of perjured testimony by prosecution); People v. Sadness, 300 N.Y. 69, 89 N.E.2d 188 (1949) (coram nobis available when conviction is obtained by testimony known by prosecution to be perjured); Morhous v. Supreme Court, 293 N.Y. 131, 56 N.E.2d 79 (1944) (judgment based on fraud or misrepresentation by an officer of the State, depriving defendant of due process, is grounds for coram nobis).

coram nobis is not to be used in place of a statutory remedy such as motion for a new trial on newly discovered evidence.[28] This argument lacks validity, as the right of defendant to move for a new trial on newly discovered evidence[29] is limited to motions made within one year[30] after original judgment of conviction even where appeal has been taken, and the supreme court is without power to hear a motion for a new trial after such expiration.[31] Since defendant was convicted in 1957, and did not petition until three years later, it appears that a motion for new trial on newly discovered evidence was no longer available.

Whether the decision in the instant case is an expansion of prior holdings that perjured testimony knowingly used by the prosecution constitutes grounds for granting coram nobis, or an entirely new basis for the writ, i.e., negligent testimony innocently used, is more a question of semantics than substance. The important question is: Will the instant case be limited to its own facts? The court imputed fraud to the prosecution because "the untrue story was given by the very police officer in charge of the investigation and his wrongdoing must be charged to the prosecution."[32] This emphasis may indicate confinement of the decision to its facts, although prior rapid growth of grounds for coram nobis presages further expansion.

International Law—Jurisdiction of NLRB does Not Extend to Foreign Flag Ships Employing Alien Seamen.—The National Labor Relations Board granted a petition filed by the National Maritime Union of America seeking certification under Section 9(c) of the National Labor Relations (Wagner) Act,[1] as the representative of the unlicensed seamen employed upon certain Honduran flag vessels which were beneficially owned by an American corporation.[2] Subsequently the ships' legal owner, Empresa Hondurena de Vapores,

28. 12 N.Y.2d at 361, 190 N.E.2d at 22, 239 N.Y.S.2d at 678.

29. N.Y. Code of Crim. Proc. § 465(7).

30. N.Y. Code of Crim. Proc. § 466.

31. People v. Marano, 120 Misc. 696, 200 N.Y. Supp. 256 (Sup. Ct. 1923); People v. Pratowski, 127 N.Y.S.2d 263 (Yates County Ct. 1954).

32. 12 N.Y.2d at 359-60, 190 N.E.2d at 21, 239 N.Y.S.2d at 677.

1. National Labor Relations Act § 9(c)(1), 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(1) (1958), which provides: "Whenever a petition shall have been filed . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing on due notice."

2. United Fruit Company maintained a fleet of cargo vessels including thirteen Honduran-registered vessels operated by Empresa, which vessels were included in National Maritime Union's representation proceeding. The crews and officers, recruited in Honduras, were Honduran citizens and were required to sign Honduran shipping articles. Their wages, terms and condition of employment were subject to a bargaining agreement between Empresa and Sociedad. Under the law of Honduras, recognition of Sociedad as the bargaining agent compelled Empresa to deal exclusively with it on all matters covered by the contract, and the Honduran Labor Code further provided that only a union recognized by Honduras and composed 90% of Honduran citizens could represent seamen on Honduran-

S.A., a Honduran corporation, and Sociedad Nacional de Marineros de Honduras, the bargaining agent of the seamen, brought separate actions to enjoin the Board from conducting a representation election.[3] Petitions for certiorari were granted and the United States Supreme Court held that the jurisdictional provisions of the National Labor Relations Act did not extend to maritime operations of foreign flag ships employing alien seamen.[4] *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

Traditionally, the NLRB has refused to hear cases involving shipowner-crew relations on foreign flag vessels.[5] In *Compania Maritima Sansoc, Ltd.*,[6] a representation proceeding was dismissed on the ground that the internal discipline of a vessel of foreign registry and ownership was involved. Note that here neither the corporate owner of the Panamanian flag vessel nor the major portion of stockholders were American.[7] When dealing with American-owned vessels, however, the NLRB has asserted its jurisdiction. In *Peninsular & Occidental S.S. Co.*,[8] the Board accepted jurisdiction over representation proceedings on board two Liberian flag vessels. The Liberian corporate owners were wholly owned subsidiaries of an American corporation, which operated the ships under bareboat charter. Here, some of the crew were American citizens or resident aliens, and the main part of the crew had been recruited and had signed articles of employment in the United States. Further, in *West India Fruit & S.S. Co.*,[9] an unfair labor practice complaint had been issued against an American corporation which owned and operated a Liberian flag vessel manned by a wholly alien crew, [10] and the NLRB found that the corporation had violated Sections 8(a)(1) and 8(a)(3) of the Wagner Act.[11] These decisions gave rise to the "balancing

registered vessels. The current agreement provided for a union shop, with no-strike and no-lockout provisions. United Fruit, however, determined the ports of call of the vessels, their cargoes and sailings. Note also that United Fruit owned all of Empresa's stock and elected its directors, though no officer or director of Empresa was an officer or director of United Fruit and all were residents of Honduras.

3. Empresa Hondurena de Vapores, S.A. v. McLeod, 200 F. Supp. 484 (S.D.N.Y. 1961), rev'd, 300 F.2d 222 (2d Cir. 1962); Sociedad Nacional de Marineros de Honduras v. McCulloch, 201 F. Supp. 82 (D.D.C. 1962).

4. The Supreme Court also held that the district court had jurisdiction to enjoin the Board's order because the international problems that might have arisen affecting our national interest demanded prompt judicial resolution. McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 16-17 (1963).

5. This had been due to the NLRB's recognition of a lack of specific congressional intent to apply American statutes in these situations.

6. NLRB Case No. 20-R.C.-809 (1950).

7. However, many seamen were recruited and signed articles of employment in the United States.

8. 120 N.L.R.B. 1097 (1958).

9. 130 N.L.R.B. 343 (1961).

10. The vessel involved, though of Liberian registry, had never been in Liberian waters. Id. at 347.

11. These provisions prohibit an employer from interfering with an employee's bargaining rights and from discriminating with regard to hiring, tenure or condition of employment.

of contacts" test, whereby the NLRB weighs a ship's American contacts against those of foreign origin[12] and asserts its jurisdiction where the former are "substantial."[13]

Thus, in the instant case, the Board concluded that the maritime operations involved substantial United States contacts which outweighed the numerous foreign contacts.[14] Then, upon a literal interpretation of Sections 2(6)[15] and 2(7)[16] of the Wagner Act, the Board reasoned that not only was Empresa engaged in "commerce" within the meaning of the act but also the maritime operations "affected commerce" and thus brought them within its coverage. By directing the election, the NLRB in effect cancelled Sociedad's bargaining agreement with Empresa's seamen.[17]

Acquiescing in the demands of comity and international good faith, the Supreme Court has long recognized the theory that all merchant vessels have implied permission to enter United States ports.[18] This permission, however, has been subjected to various statutory conditions, but only, it would seem, when express statutory language puts the foreign vessels on notice prior to their entering American waters.[19] Thus, although it has been established that Congress

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National Labor Relations Act §§ 8(a)(1), (3), 61 Stat. 140 (1947), as amended, 29 U.S.C. §§ 158(a)(1), (3) (Supp. IV, 1963).

12. The NLRB derived such a theory from the opinion of the Supreme Court in Lauritzen v. Larsen, 345 U.S. 571 (1953). To determine whether or not a domestic statute applies in a given situation may be found by "ascertaining and valuing points of contact between the transactions and the states or governments whose competing laws are involved" and by "weighing . . . the significance of one or more connecting factors between the shipping transaction regulated and the national interests served by the assertion of authority." Id. at 582. However, it should be noted that in Lauritzen the Jones Act was involved, not the Wagner Act. See note 36 & 45 infra and accompanying text.

13. "Substantial" has been defined as "more than minimal but not necessarily preponderant." West India Fruit & S.S. Co., 130 N.L.R.B. 343, 355 (1961). See Bartholomew v. Universe Tankships, Inc., 263 F.2d 437, 440 (2d Cir.), cert. denied, 359 U.S. 1000 (1959).

14. Under this test the NLRB declined to impose jurisdiction in Dalzell Towing Co., 137 N.L.R.B. 427 (1962).

15. National Labor Relations Act § 2(6), 61 Stat. 138 (1947), 29 U.S.C. § 152(6) (1958): "The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."

16. National Labor Relations Act § 2(7), 61 Stat. 138 (1947), 29 U.S.C. § 152(7) (1958): "The term 'affecting commerce' means 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."

17. 372 U.S. at 15.

18. See Patterson v. Bark Eudora, 190 U.S. 169, 178 (1903); The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) (dictum).

19. When dealing with the management of foreign vessels, such language has seldom

has the constitutional power to apply the Wagner Act to the crews of foreign flag ships (at least while they are in American waters),[20] an intention to regulate labor conditions which are the primary concern of a foreign country "should not be attributed to Congress in the absence of a clearly expressed purpose."[21] Therefore the question arose whether Congress had in fact exercised the constitutional power to apply the act in this situation.[22]

Congress, of course, has passed legislation dealing with foreign nationals entering United States territory.[23] It has interfered with employer-employee relations on foreign vessels through four interrelated statutes (the "Seamen's Wage" acts).[24] However, the courts have often been loath to enforce these statutes, due to a lack of specific congressional intent. In *Sandberg v. McDon-*

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been found. See, e.g., Brown v. Duchesne, 60 U.S. (19 How.) 183 (1856) (patent laws not applicable on board foreign vessel); Petition of Canadian Pac. Ry., 278 Fed. 180 (W.D. Wash. 1921) (statute [38 Stat. 1169 (1915), 46 U.S.C. § 672(a) (1958)] requiring that 75% of crew be able to understand orders in language in which they are given held inapplicable); United States v. Ah Fook, 183 Fed. 33 (9th Cir. 1910) (immigration laws).

20. Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 142 (1957). See Blackmer v. United States, 284 U.S. 421, 437 (1932); Wildenhus's Case, 120 U.S. 1, 11 (1887); The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 144 (1812).

21. Foley Bros., Inc. v. Filardo, 336 U.S. 281, 286 (1949). "An Act of Congress, no matter how universal the scope of its terms may be, will ordinarily be confined in its operation and effect to the territorial limits of the United States, unless the contrary intention is clearly and affirmatively expressed." Sociedad Nacional de Marineros de Honduras v. McCulloch, 201 F. Supp. 82, 89 (D.D.C. 1962). See also Sandberg v. McDonald, 248 U.S. 185 (1918): "Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction." Id. at 195.

22. Apparently no legislative history exists indicating such an intent on the part of Congress. The few relevant remarks thus indicate that only American workingmen were the concern of Congress. See H.R. Rep. No. 245, 80th Cong., 1st Sess. 4 (1947) (remarks of Representative Hartley); 75 Cong. Rec. 5465 (1932) (remarks of Representative Dyer). See also 22 C.F.R. § 81.12 (1958), which provides: "United States citizens employed on foreign vessels . . . have no claim . . . to the special protection, in matters relating to their employment, which the laws of the United States afford seamen employed on vessels of the United States."

23. The principal purpose of such legislation may be found in the protection of the health and welfare of United States citizens. See 46 Stat. 748 (1930), as amended, 19 U.S.C. § 1581 (1958) (customs); 58 Stat. 705 (1944), 42 U.S.C. § 269 (1958) (health); 66 Stat. 219 (1952), 8 U.S.C. §§ 1281-87 (1958) (medical treatment of alien crews of foreign flag vessels regulated); 22 Stat. 186 (1882), as amended, 46 U.S.C. §§ 151-56(a) (1958) (health and safety conditions on board vessels carrying passengers).

24. Rev. Stat. § 4527 (1875), 46 U.S.C. § 594 (1958) (seaman discharged without fault must be paid one month's wages even if not yet earned); 38 Stat. 1164 (1915), 46 U.S.C. § 596 (1958) (provision for immediate payment of seaman after discharge of cargo or seaman); 41 Stat. 1006 (1920), 46 U.S.C. § 597 (1958) (seamen entitled at every port to part of wages earned); 30 Stat. 763 (1898), as amended, 46 U.S.C. § 599 (1958) (wage advances to seamen unlawful). See also 66 Stat. 223 (1952), 8 U.S.C. § 1286 (1958) (illegal to discharge alien seaman in United States without approval of Attorney General).

ald,[25] the prohibition against making advance payment of wages to foreign seamen was held inapplicable if advances were made outside the United States, especially where the law of the foreign country "sanctioned such contract and payment."[26] Note that the result was reached even though the statute contained no such exception.[27] A law entitling seamen to demand one half of their then-earned wages in every port entered during a voyage has been held inapplicable to foreign ships while in American ports, but only to the extent that wages had accrued.[28] It should be pointed out that the section involved was held applicable to the foreign seamen only because of an amendment explicitly extending its coverage to both American and foreign seamen.[29] The Eight Hour Law governing employment when dealing with government contracts has been held inapplicable to work performed in foreign countries,[30] even though the statute referred to "every contract" and apparently intended no exceptions.[31] Finally, the Jones Act,[32] governing rights of seamen to recover damages for personal injuries occurring in the course of employment, was held inapplicable, in *Lauritzen v. Larsen*,[33] to a foreign seaman who had been injured while in a foreign harbor. The Supreme Court held that the law of the flag governed the liability of the foreign shipowner. Yet on different facts—an American seaman as plaintiff, an American corporation as defendant—the Jones Act has been extended to injuries occurring on the high seas,[34] possibly on the assumption that the internal discipline of a vessel is not interfered with through the application of tort law. It has been said that "matters of 'internal management' are not involved in an action by a seaman to recover damages for injuries suffered through the negligence of the shipowner."[35] But even if such applica-

25. 248 U.S. 185 (1918).

26. Id. at 195. See also Jackson v. S.S. "Archimides," 275 U.S. 463 (1928).

27. 30 Stat. 763 (1898), as amended, 46 U.S.C. § 599(e) (1958) provides: "This section shall apply as well to foreign vessels while in waters of the United States. . . ."

28. Strathearn S.S. Co. v. Dillon, 252 U.S. 348 (1820).

29. 41 Stat. 1006 (1920), 46 U.S.C. § 597 (1958). See 252 U.S. at 355. Further, the National Prohibition Act had been held applicable to foreign merchant ships in United States ports, but only to the extent that liquor had to be kept sealed, i.e., the Government did not prosecute the seamen involved. See Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923).

30. Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949).

31. 37 Stat. 137 (1912), as amended, 40 U.S.C. § 324 (1958). This act provides: "Every contract made to which the United States . . . is a party . . . shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract . . . shall be required or permitted to work more than eight hours in any one calendar day upon such work. . . ."

32. Merchant Marine Act of 1920, 41 Stat. 1007, 46 U.S.C. § 688 (1958).

33. 345 U.S. 571 (1953).

34. Gerradin v. United Fruit Co., 60 F.2d 927 (2d Cir.), cert. denied, 287 U.S. 642 (1932). See also Gambera v. Bergoty, 132 F.2d 414 (2d Cir. 1942), cert. denied, 319 U.S. 742 (1943) (alien seaman could recover for injuries sustained in United States territorial waters). See Harolds, Some Legal Problems Arising Out of Foreign Flag Operations, 28 Fordham L. Rev. 295, 310-12 (1959).

35. Gerradin v. United Fruit Co., supra note 34, at 929.

tion is imposed in the situation above, the impact on the principles of comity would appear quite minute when compared with an application of the Wagner Act.[36]

In *Benz v. Compania Naviera Hidalgo, S.A.*,[37] the Supreme Court considered the application of the Taft-Hartley Act[38] in a similar situation. That case involved a ship owned by a Panamanian corporation and flying a Liberian flag. While the ship was in American waters, members of the crew, which was composed of foreign nationals who had signed a British form of articles of agreement, went on strike and picketed the vessel. The crew designated an American union as its bargaining representative. Eventually the shipowners brought an action for damages against the individual representatives of the union, and the defendants' contention that the Taft-Hartley Act had pre-empted the field, leaving the trial court without jurisdiction, was rejected. The Court held that the statute did not bar recovery and indicated that "Congress did not fashion it [the act] to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between *American* employers and employees."[39] Mr. Justice Clark, writing for the Court, pointed out that the language and legislative history of the act limited its application to American laborers.[40]

In the instant case, the NLRB sought to distinguish *Benz*[41] on the ground that the latter case involved no indirect American ownership and no regular coming to and going from American ports.[42] However, the basis of the Board's contention was, in reality, its "balancing of contacts" theory.[43] Mr. Justice Clark, again writing for the Court, rejected this theory:

> But to follow such a suggested procedure to the ultimate might require that the Board inquire into the internal discipline and order of all foreign vessels calling at American ports. Such activity would raise considerable disturbance not only in the field of maritime law but in our international relations as well. In addition, enforcement of Board orders would project the courts into application of the sanctions of the Act to foreign-flag ships on a purely *ad hoc* weighing of contacts basis. This

36. This would seem to be especially true in light of the violation of the Honduran Labor Code that would ensue if National Maritime Union became the bargaining agent. See text accompanying note 50 infra.

37. 353 U.S. 138 (1957).

38. Labor Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. §§ 141-44 (1958).

39. 353 U.S. at 143-44. (Emphasis added.)

40. Ibid.

41. 372 U.S. at 18. See also Marine Cooks v. Panama S.S. Co., 362 U.S. 365, 372 (1960): "Congress passed the Norris-La Guardia Act to curtail and regulate the jurisdiction of courts, not, as it passed the Taft-Hartley Act, to regulate the conduct of people engaged in labor disputes."

42. In Benz, "the only American connection was that the controversy erupted while the ship was transiently in a United States port. . . ." 353 U S. at 142. See also Marine Cooks v. Panama S.S. Co., supra note 41, at 369 ("temporarily").

43. 372 U.S. at 19.

would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in actual practice.[44]

The Court then proceeded to narrow the issue to whether the act was intended to have any application to foreign-registered vessels employing alien seamen. The Board could point to no language that reflected any such congressional intent.[45] In fact, the act has been characterized as a "bill of rights both for *American* workingmen and . . . their employers."[46] Moreover, lacking such a congressional intention, to allow the Board to impose its jurisdiction over the vessels involved here would do violence to the long-established doctrine that the international law of the flag state governs the internal affairs of a ship.[47] Article X of the Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras specifically provides that the merchant vessels and other privately owned vessels flying the flag of either country "shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown."[48] Further, Mr. Justice Clark alluded to the fact that by regulating the internal discipline of the vessels through application of the Wagner Act, the labor policies of the flag state, Honduras, would most certainly be displaced.[49] The Honduran Labor Code prohibits the representation of seamen on Honduran-registered vessels by a union whose "juridic personality" is not recognized by Honduras or whose personnel is not at least ninety per cent Honduran,[50] thus prohibiting representation by the National Maritime Union. Because of the international consequences involved, the Court relied on the language of Mr. Chief Justice Marshall in *The Charming Betsy*:[51]

44. Ibid.

45. Ibid. Note, however, that the procedure might be applied in a different context. Id. at 19 n.9.

46. Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. at 144. The Court rejected the Board's argument that such intent may have been shown by Congress' enactment of § 14(c)(1) of the act (73 Stat. 541 (1959), 29 U.S.C. § 164(c)(1) (Supp. IV, 1963)). 372 U.S. at 20 n.10.

47. 372 U.S. at 20-21. See also notes 22 & 39 supra and accompanying text. In Empresa Hondurena de Vapores, S.A. v. McLeod, 300 F.2d 222 (1962), an additional reason for holding the act inapplicable was given: "Our belief that the Labor Act should not be held applicable in a case such as this is reinforced by the Geneva Convention on the High Seas, ratified by the United States on March 24, 1961, but not yet effective for lack of required ratification by 22 nations. Article 5, § 1 of the Convention reads: 'Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag.'" Id. at 235.

48. Dec. 7, 1927, 45 Stat. 2618, T.S. No. 764. See Wildenhus's Case, 120 U.S. 1, 12 (1887). See also 22 C.F.R. § 81.1(f) (1958), which provides that a foreign vessel includes "any vessel regardless of ownership, which is documented under the laws of a foreign country."

49. 372 U.S. at 19.

50. Id. at 14.

51. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

[A]n act of Congress ought never to be construed to violate the law of nations, *if any other possible construction remains. . . .*[52]

Mr. Justice Douglas, in a concurring opinion,[53] did not raise again the vigorous dissent that had been previously rejected in *Benz*. There he maintained that since the foreign vessel could have sued under Section 303 of the Taft-Hartley Act, Congress had pre-empted the field.[54] However, in the present case, the fact of the treaty with Honduras persuaded him to agree that that nation had exclusive jurisdiction over the matters here involved.[55]

Therefore, the present case represents a logical extension of the Supreme Court's previous decision in *Benz*. An attempt to substitute new tests of nationality for long-settled doctrines would very likely lead to international confusion and dispute. If the NLRB's jurisdiction to direct an election had been upheld, it would result in the Board's regular application of the shifting standards of its own decisions, and those of American courts, to conduct in foreign countries where the bargaining between the employer and employee had taken place. The Board would be endeavoring to enforce its will in situations where the foreign country considered its jurisdiction exclusive. Thus, since it is not the province of the Supreme Court to legislate, that Court has properly directed that the Board should look to Congress. Further, it is submitted that until Congress shows a contrary intention with regard to vessels of foreign registry, the Supreme Court, in future decisions, will probably continue to deny jurisdiction to the NLRB, in light of the complete rejection by the instant court of the "balancing of contacts" test.

52. Id. at 118. (Emphasis added.)

53. 372 U.S. at 22.

54. 353 U.S. at 148-50.

55. 372 U.S. at 22. It should be added that as the basis for his agreement, Mr. Justice Douglas cited the Treaty of Friendship, Commerce and Consular Rights with Honduras, Dec. 7, 1927, art. 12, para. a(1), 45 Stat. 2618, T.S. No. 764, which provides: "A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, providing the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto providing local laws so permit." Note that the majority opinion did not discuss the last sentence of article XXII. For conflicting views on the effect of the treaty, see Sociedad Nacional de Marineros de Honduras v. McCulloch, 201 F. Supp. 82, 88 (D.D.C. 1962) (treaty reserves question of wages to country under whose flag the ship sailed); Empresa Hondurena de Vapores, S.A. v. McLeod, 300 F.2d 222, 236 (2d Cir. 1962) (refused to decide this issue, i.e., the effect of the treaty); Note, The Effect of United States Labor Legislation on the Flag of Convenience Fleet: Regulation of Shipboard Labor Relations and Remedies Against Shoreside Picketing, 69 Yale L.J. 498, 511-13 (1960) (application of American labor legislation to foreign-flag ships does not run counter to consular and commercial treaties).

Labor Law—Union Picketing on Railroad Right-of-Way Adjacent to Struck Employer's Premises Held To Violate National Labor Relations Act as "Secondary Activity."—Respondent union[1] struck the plant of Carrier Corporation and placed pickets at all nine entrances to the plant. One of the gates picketed was not located on the premises of the company; it was cut into a continuation of a fence enclosing the plant and surrounding a right-of-way owned by the New York Central Railroad. When the railroad attempted to run a train over its right-of-way in connection with the normal shipping operations of the plant, its employees refused to cross the picket lines. Subsequently, railroad supervisory personnel attempted to take a train past the guarded entrance but its passage was deterred by angry threats and physical obstruction. The trial examiner found this union activity to be violative of Sections 8(b)(1)(A),[2] 8(b)(4)(i) and 8(b)(4)(ii)(B)[3] of the National Labor Relations Act, but the National Labor Relations Board reversed as to sections 8(b)(4)(i) and 8(b)(4)(ii)(B).[4] Circuit Judge Waterman, writing for a divided court,[5] rein-

1. Local 5895, United Steelworkers of America.

2. National Labor Relations Act § 8(b)(1)(A), 61 Stat. 136 (1947), 29 U.S.C. § 158(b)(1)(A) (1958). The Board found that the union had violated this section by the use of threats and physical force against the employees of both the Carrier Corporation and the railroad. It issued an order to cease and desist and an uncontested decree of enforcement was entered.

3. National Labor Relations Act §§ 8(b)(4)(i), (ii)(B), 73 Stat. 542 (1959), 29 U.S.C. §§ 158(b)(4)(i), (ii)(B) (Supp. IV, 1963), amending 61 Stat. 136 (1947). The 1947 version of the statute read as follows: "It shall be an unfair labor practice . . . (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services where an object thereof is: (A) forcing or requiring any employer or self-employed person to . . . cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person."

The present (1959) version reads: "It shall be an unfair labor practice . . . (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where in either case an object thereof is . . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . ." (Emphasis omitted.)

4. Local 5895, United Steelworkers Union (Carrier Corp.), 132 N.L.R.B. 127 (1960).

5. Circuit Judge Swan concurred in the result. On the denial of the petition for rehearing, he made it clear that he concurred only in the result "not because I disagree with anything stated therein (I do not) but because Judge Waterman's opinion failed to include certain additional grounds for affirmance which I thought relevant." Carrier Corp. v. NLRB, 311 F.2d 135, 155 (2d Cir. 1962).

stated the determination of the trial examiner holding the conduct to be illegal "secondary activity" in that its sole objective was to prohibit the neutral employees of the railroad from dealing with the petitioners.[6] Chief Judge Lumbard, dissenting, sanctioned the picketing, believing it to constitute legal "primary activity."[7] *Carrier Corp. v. NLRB*, 311 F.2d 135 (2d Cir. 1962).[8]

Section 8(b)(4) is one of the provisions of the National Labor Relations Act directed against secondary boycotts. It prohibits unions from exerting on neutral employers and their employees certain pressures which are aimed at severing their business relations with the primary employer.[9] Enacted in 1947, the statute was amended in 1959 with a view toward emphasizing the act's approval of what the courts have termed legitimate "primary activity."[10]

It is clear that had the statute, as first enacted, been given a strict plain-meaning interpretation, it could have banned all picketing. However, the Board and courts early gave these sections a "complex interpretive gloss."[11] The basic difficulty lies in the fact that picketing the premises of the struck employer inevitably affects his relations with his customers or suppliers.[12] Such activity, the legislative history of the act reveals, was not intended to be outlawed. To accommodate the apparent conflict between a literal reading of the act and its underlying congressional purpose, a "primary-secondary activity" distinction has evolved. Unfortunately, the line that has been drawn between these two kinds of activity has not always been clear and has even involved distinctions which one court has termed "more nice than obvious."[13]

At first, exceptions to the literal meaning of the statute were based on the physical location of the premises picketed. Any picketing limited to the premises of the primary employer constituted legal primary activity.[14] The

6. "In picketing on the railroad right of way the union demonstrated that its manifest, and sole objective was to induce or encourage railroad employees, or to coerce the railroad, to refuse to handle Carrier goods or otherwise to deal with the primary employer. Such results, although permissible when merely incidental to the pursuit of legitimate objectives . . . here involved no such redemptive feature. The actions of the union were thus in violation of § 8(b)(4)(i) and (ii)(B) of the Act." Id. at 146. (Emphasis omitted.)

7. "It is evident that the acts complained of are covered by the terms of clauses (i) and (ii). It is equally plain that the objective of the striking Carrier employees was to prevent the railroad from performing its usual services for Carrier. However, the acts constituted 'primary picketing' which is protected by the proviso in clause (B)." Id. at 150.

8. Following the denial of the petition for rehearing, see note 5 supra, the NLRB petitioned for rehearing en banc. It was denied, Judges Clark, Smith and Hays dissenting. Dissenting in a separate opinion, Judge Clark thought the situation called strongly for review by the entire court since the facts presented "a prima facie case of conflicting precedents." Id. at 155-56. (Emphasis omitted.)

9. Id. at 137.

10. See statutes cited in note 3 supra. Note in particular the specific proviso in the 1959 amendment.

11. 311 F.2d at 138.

12. Ibid.

13. Local 761, Int'l Union of Elec. Workers v. NLRB, 366 U.S. 667, 674 (1961).

14. See Local 346, Oil Workers Union (Pure Oil Co.), 84 N.L.R.B. 315 (1949), where

NLRB maintained this position even in situations where it was obvious that the picketing could have no appeal but to employees of neutral employers. So, in *United Elec. Workers (Ryan Constr. Corp.)*,[15] the picketing of a separate gate, located on the premises of the primary employer but constructed to provide ingress for the employees of a neutral contractor doing work on the premises, was held to be legal primary activity, even though the Board recognized that

> when picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called "secondary" even though, as is virtually always the case, an object of the picketing is to dissuade all persons from entering such premises for business reasons.[16]

By implication, then, picketing conducted on the property of a neutral employer was initially deemed to be proscribed secondary activity.[17]

However, this simple geographical distinction soon proved too inflexible. Situations arose in which the job site in relation to which a dispute erupted was located on the premises of a neutral third party. Consequently, a "situs of the dispute" concept was born. Normally the situs of the dispute will be confined to the premises of the primary employer. However, in appropriate circumstances an application of this concept permitted extension to neutral construction sites and to ambulatory vehicles in the trucking industry,[18] even though incidental injury would be suffered by neutral employers occupying the common situs.

In the instant case the court was quick to realize that neither cases involving picketing limited to the premises of the primary employer, nor those concerned with union activities restricted to the situs of the dispute, were dispositive of the issue before it. Here picketing took place on the premises of a neutral employer, on which no employee of Carrier had ever worked. Hence, the court was forced to assume the task of finding "decisional guidelines behind the disparate facts of prior dissimilar cases."[19]

One of the first and most important cases which attempted to carve out a new and broader geographical area of immunity based on the "situs of the dispute" concept was *Local 807, Teamsters Union (Schultz Refrigerated Serv.)*.[20] There, union members picketed Schultz's trucks as replacement drivers made their deliveries to customers in New York. Schultz maintained

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the Board held that since the picketing was restricted to the premises of the primary employer, it constituted legal primary activity regardless of the adverse effect it had on the neutral secondary employer's employees.

15. 85 N.L.R.B. 417 (1949).

16. Id. at 418.

17. See NLRB v. Local 802, American Fed'n of Musicians, 226 F.2d 900 (2d Cir. 1955); United Bhd. of Carpenters (Wadsworth Bldg. Co.), 81 N.L.R.B. 802 (1949), enforced sub nom. NLRB v. United Bhd. of Carpenters, 184 F.2d 60 (10th Cir. 1950).

18. See Local 807, Teamsters Union (Schultz Refrigerated Serv.), 87 N.L.R.B. 502 (1949). See also, Sailor's Union (Moore Dry Dock), 92 N.L.R.B. 547 (1950).

19. Carrier Corp. v. NLRB, 311 F.2d at 139.

20. 87 N.L.R.B. 502 (1949).

his permanent place of business in New Jersey, but carried on the majority of his business in New York. The NLRB condoned the union activity on the ground that only in this manner could the pickets sufficiently publicize their dispute to fellow employees.[21] Although conceding that no real distinction exists between lawful primary picketing and unlawful secondary picketing, in that both are directed at influencing third parties to withhold their business from the struck employer, the Board nevertheless pointed to a very basic difference:

> [O]ne important test of the lawfulness of a union's picketing activities in the course of its dispute with an employer is the identification of such picketing with the actual functioning of the primary employer's business at the *situs* of the labor dispute.[22]

One year later additional qualifications were imposed upon a union's right to picket at the situs of the dispute located on neutral premises, in the form of the famous "Moore Dry Dock Criteria":

> [P]icketing of the premises of a secondary employer is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs;* and (d) the picketing discloses clearly that the dispute is with the primary employer.[23]

Yet, despite the fact that picketing was limited to the situs of the dispute and met the soon-to-be-enunciated criteria of *Moore Dry Dock*, in three contemporaneous decisions,[24] all involving the use of nonunion employees at construction sites, the NLRB found a violation of section 8(b)(4)(A). Disregarding the primary-secondary activity distinction, the Board based its decisions upon the fact that in all three cases the manifest *objective* of the picketing was to force the primary employers to cancel their contracts with subcontractor-employers of nonunion men.

Four Supreme Court decisions handed down on June 4, 1951 emphasized this shift from mechanical reliance on geographical factors as the sole evidentiary determinant of the legality of union picketing. In *NLRB v. International Rice Milling Co.*,[25] union picketing of the premises of a primary employer, during the course of which certain members sought to restrain the drivers of a truck of a neutral customer from entering the premises, was deemed primary merely

21. The Board noted that the trucks were only picketed when located in New York at the situs of the dispute and that the members' placards clearly showed that the dispute was only with Schultz. Id. at 506.

22. Id. at 505.

23. Sailor's Union (Moore Dry Dock), 92 N.L.R.B. at 549.

24. Denver Bldg. and Constr. Trades Council, 82 N.L.R.B. 93 (1949); Local 501, Int'l Bhd. of Elec. Workers (Samuel Langer), 82 N.L.R.B. 1028 (1949); Local 74, United Bhd. of Carpenters (I. A. Watson Co.), 80 N.L.R.B. 533 (1948).

25. 341 U.S. 665 (1951).

on the grounds that the activity was restricted to the immediate vicinity of the primary employer's mill and gave "no suggestion that . . . [the union's activity] sought *concerted* conduct by such other [secondary] employees."[26] Although the Court's specific *ratio decidendi* in this case was not to survive the 1959 amendment of section 8(b)(4) by which the requirement that "concerted" action be encouraged was eliminated,[27] nevertheless its basic approach was to have a profound effect on subsequent interpretations of the statute. No longer was the geographical extent of the picketing to be solely dispositive of its legality; legitimacy of union activities was to proceed on an examination of intent or objectives when third parties were in danger of harm as a result of a union dispute not their own. In the three remaining cases of June 4, 1961, the earlier Board determinations in *Watson, Langer* and *Denver*[28] were affirmed: the Court found violations by emphasizing the centrality of the unions' objectives.[29]

As a result of these decisons, to find a violation of section 8(b)(4) it became sufficient that *an* objective of the union's activity be interference with the business relations between the primary employer and a neutral third party.[30] It soon became established that harm to neutral employers could still be justified under the statute, not because it occurred at exempted locations, but only if it resulted as an incidental effect of a union's pursuit of legitimate strike objectives.[31]

In 1953 the Board, in *Local 67, Brewery Workers (Washington Coca-Cola Bottling Works, Inc.)*,[32] denied the union the right to picket the company's trucks as they made their rounds to customers' premises. Although the facts of that case closely resembled those of *Schultz*,[33] there existed one important difference: Coca-Cola carried on all its business at a permanent establishment in the immediate area, at which the pickets could adequately publicize their dispute. Within time it became recognized that this so-called "Washington Coca-Cola doctrine" had added to the four expressed in *Moore Dry Dock* a fifth condition: in order to justify picketing at neutral premises it must be shown that there was no reasonable opportunity for the union to attain its lawful objectives by picketing the premises of the primary employer.[34]

26. Id. at 671.

27. See statutes cited note 3 supra and accompanying text.

28. See note 24 supra and accompanying text.

29. Local 74, United Bhd. of Carpenters v. NLRB, 341 U.S. 707 (1951); Local 501, Int'l Bhd. of Elec. Workers v. NLRB, 341 U.S. 694 (1957); NLRB v. Denver Bldg. and Constr. Trades Council, 341 U.S. 675 (1951).

30. Senator Taft, sponsor of the bill, said of the bill as passed: "Section 8(b)(4), relating to illegal strikes and boycotts, was amended in conference by striking out the words 'for the purpose of' and inserting the clause 'where an object thereof is.'" 93 Cong. Rec. 6859 (1947).

31. NLRB v. Local 145, Service Trade Chauffers, 191 F.2d 65, 67 (2d Cir. 1951).

32. 107 N.L.R.B. 299 (1953), aff'd, 220 F.2d 380 (1955).

33. See notes 17, 19 & 20 supra and accompanying text.

34. NLRB v. Local 984, Teamsters Union, 251 F.2d 494 (6th Cir. 1958); NLRB v.

In *Local 1017, Retail Fruit Clerks Union (Crystal Palace Mkt.)*[35] the rationale of *Washington Coca-Cola* and *Moore Dry Dock* was extended to situations other than those involving an ambulatory situs. A large market hall containing sixty-four stands was owned by the primary employer. Sixty stalls were leased to neutral retailers. The Board condemned the conduct of union members who chose to picket seven of the eleven entrances to the hall instead of the four stands operated by their employer, and noted:

> In developing and applying these standards, the controlling consideration has been to require that the picketing be so conducted as *to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees.* . . . We believe . . . that the foregoing principles should apply to all common situs picketing, including cases where, as here, the picketed premises are owned by the primary employer.[36]

It is interesting to note, however, that although the test set down in *Washington Coca-Cola* has been extended to situations which find the common situs of the dispute located on the premises of primary employers, its determinative weight has been gradually modified. In *Local 861, Int'l Bhd. of Elec. Workers (Plauche Elec., Inc.)*,[37] the Board declared that failure to meet the criterion was but "one circumstance, among others, in determining an object of the picketing."[38]

Nonetheless, the gravamen of the doctrine proscribing picketing aimed at a forbidden *objective* has prevailed. Legitimate objectives have repeatedly been described as "reaching the primary employees";[39] "publiciz[ing] its labor dis-

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Local 5246, United Steel Workers Union, 250 F.2d 184 (1st Cir. 1957); Local 659, Teamsters Union (Ready Mixed Concrete Co.), 116 N.L.R.B. 461, 473 (1956).

35. 116 N.L.R.B. 856 (1956), aff'd, 249 F.2d 591 (1957).

36. Id. at 859. (Emphasis added.) In effect this decision overruled the Ryan case. See notes 14 & 15 supra and accompanying text.

37. 135 N.L.R.B. 250 (1961).

38. Id. at 254. The opinion stated it was "overruling Washington Coca-Cola to the extent it is inconsistent" in allowing union members to picket a job site owned by a neutral third party, although the primary employer had a permanent place of business where all his employees reported at the beginning and end of each day where they could have been reached by traditional primary picketing. The court in the instant case, although regarding the decision as a departure from established principles, nevertheless was of the opinion that the Plauche rationale (stressing that conduct adversely affecting neutrals was justified only as an incidental result of primary picketing) was reconcilable. See Carrier Corp. v. NLRB, 311 F.2d at 146 n.8. See also Local 859, Teamsters Union v. NLRB, 229 F.2d 514 (D.C. Cir. 1955), cert. denied, 351 U.S. 972 (1956).

39. Local 1017, Retail Fruit Clerks Union (Crystal Palace Market), 116 N.L.R.B. at 859. (Emphasis omitted.) "[T]he Board, with judicial approval, has established certain standards for 'common situs' picketing. The gist of these standards is that where picketing occurs at premises which are occupied jointly by primary and secondary employers, the timing and location of the picketing and the legends on the picket signs must be tailored to reach the employees of the primary employer, rather than those of neutral employers." Id. at 858.

pute in a traditional way among employees primarily interested";[40] "communicat[ing] to . . . [employees of the primary employer] its picketing message."[41] The embroiling of neutral employees could only be accomplished incidentally in an attempt to reach primary employees. Without substantially impairing its effectiveness on primary employees, picketing had to be conducted with an eye towards *minimizing* its impact on neutral employees.[42] Actions beyond that minimum were interpreted as the pursuit of objectives forbidden by section 8(b)(4).

These principles have been further applied to the so-called "separate gate" cases. Such decisions involve picketing of a separate entrance, accessible only to employees of neutral secondary employers and *situated on the premises of the primary employer.* Following *Crystal Palace Market*,[43] which tempered *Ryan*'s sweeping approval of such conduct on the theory that all picketing confined to the premises of the primary employer was immune from proscription, the court in *United Steelworkers v. NLRB*[44] adopted the following standard, adherence to which rendered the picketing safe from condemnation:

> There must be a separate gate marked and set apart from other gates; the work done by the men who use the gate must be unrelated to the normal operations of the employer and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations.[45]

The reasoning behind this standard would appear to be that picketing at a separate gate, not involved in the normal operations of the plant, can be directed only at secondary employees totally disinterested in the dispute.

The dissenting opinion in the instant case relies heavily on two fairly recent cases, both of which appear contrary to the principles outlined above. In *Seafarers Int'l Union v. NLRB*,[46] when the vessel *Pelican* was sent by the primary employer to a neutral shipyard for repairs, union members began picketing outside the shipyard gates and continued to do so for more than a week after all nonsupervisory personnel had been removed from the ship. Consequently the neutral employees refused to work on the *Pelican* although they continued

40. Local 659, Teamsters Union (Ready Mixed Concrete Co.), 116 N.L.R.B. at 474.

41. Ibid. See Local 55, United Bhd. of Carpenters (PBM), wherein the picketing of a construction site at which employees of neutral subcontractors were working was banned because the union failed to make it entirely clear that its dispute was solely with the general contractor. The Board went on to say: "the fact that the picketing takes place at the situs of the primary employer's regular place of business rather than at an ambulatory situs is not controlling; in both situations, picketing at a common situs is unlawful if the picketing signs fail to disclose that the dispute is confined to the primary employer." 108 N.L.R.B. 363, 366, enforced sub nom. NLRB v. Local 55, 218 F.2d 226 (10th Cir. 1954).

42. Di Giorgio Fruit Corp. v. NLRB, 191 F.2d 642 (D.C. Cir. 1951).

43. See notes 34 & 35 supra and accompanying text.

44. 289 F.2d 591 (2d Cir. 1961).

45. Id. at 595.

46. 265 F.2d 585 (D.C. Cir. 1959).

with other work about the yard. The Board ruled that the union's action clearly revealed that it was directed not at fellow workers but at the neutral employees of the secondary employer.[47] In reversing, the Court of Appeals for the District of Columbia Circuit, while conceding that "the question is the objective,"[48] nevertheless held that the effect on the neutral was but an incident of the strike's objective. Had the neutral employees been working on the *Pelican* at a dock owned by the primary employer, the court reasoned, they would have also honored the picket lines. Therefore,

> since the picketing in the case at bar cast upon Todd [neutral employer] no greater adverse effect than would thus have been the case, its interest in preventing the picketing was not as great as the employees' interest in picketing what was the situs of the dispute.[49]

In *Local 761, Int'l Union of Elec. Workers v. NLRB (General Elec. Co.)*,[50] picketing occurred at an entrance used exclusively by employees of independent contractors, but located on the premises of the primary employer. In remanding the case for further findings of fact by the Board, Mr. Justice Frankfurter stated:

> [I]f a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations.[51]

Chief Judge Lumbard attached particular significance to this latter statement. While realizing that the facts in issue did not involve a common situs in that none of Carrier's employees worked on the railroad's right-of-way, he considered this immaterial. Utilizing the "effect" criterion promulgated in *Seafarers*,[52] he argued that, since concededly bare ownership of the premises picketed is never conclusive in deciding the legitimacy of union activity,[53] and since the picketing "was designed to accomplish no more than picketing outside one of Carrier's own delivery entrances might have accomplished,"[54] and since the railroads operations were clearly in furtherance of Carrier's normal business, there remained no reason why the conduct in question should be prohibited *simply* because it occurred, not on the premises of the primary employer, but on those contiguous thereto.[55]

The majority contended that the critical fallacy of such an argument lay in its "failure to distinguish between fully legitimate objectives of a union in

47. 119 N.L.R.B. 1638 (1958).
48. Seafarer's Int'l Union v. NLRB, 265 F.2d at 590.
49. Id. at 592.
50. 366 U.S. 667 (1961).
51. Id. at 681.
52. See notes 46-49 supra and accompanying text.
53. Carrier Corp. v. NLRB, 311 F.2d at 154. See also Local 1017, Retail Fruit Clerks Union (Crystal Palace Mkt.), 116 N.L.R.B. 856 (1956).
54. Carrier Corp. v. NLRB, 311 F.2d at 154.
55. Ibid.

picketing a primary employer's premises, and those hoped-for *results which are not permissible* unless only incidentally achieved."[56] Although finding the reasoning in *Seafarers* unpersuasive, in that it appeared to sanction "economic harm suffered by a neutral, independently occasioned by aggressive union activity,"[57] the court felt no need to extend its questionable rationale beyond situations involving picketing at the *situs* of the dispute.[58] The holdings of *United Steelworkers* and *Local 761* were viewed as but judicial acknowledgments of "the special solicitude of Congress and the Board that the statute not unduly restrict traditional picketing *at the premises of the primary employer*."[59]

In effect, the division of opinion among the members of the court amounts to a reluctance on the part of the majority to extend the "separate gate" doctrine to a non-common situs situation. This the court deemed necessary in order to preserve the underlying principle that the only legitimate objective of primary picketing is the publication of the dispute to fellow workers directly involved. The dissent, in advocating an extension of the doctrine, was at least indirectly sanctioning the independent solicitation of all those "whose tasks aid the employer's everyday operations."[60]

It is submitted that the holding of the court is in keeping with the traditional approach of the NLRB and the courts in affording unions wide latitude in protesting their grievances while at the same time preserving the traditional rights of management along lines capable of evidentiary certainty. In attempting to extend the "related work" test traditionally reserved for "separate gate" cases to the facts in issue, the dissent would do away with the condition that picketing the premises of a neutral secondary employer involve a "common situs." In so doing it would leave open the possibility of unwarranted application of the "related work" standard to situations where the premises picketed were far distant from the premises struck. Further, were a court to adhere to the dissent's underlying claim that independent appeal to neutral secondary parties is legitimate "primary activity," it might well be led to the rather anomalous conclusion that the only type of picketing proscribed as "secondary" would be that directed at "tertiary personnel."

Trade Regulation—Robinson-Patman Act—Physically Identical Commodities Are of "Like Grade and Quality" Within the Meaning of the Robinson-Patman Act Notwithstanding That One Bears a Brand Name and the Other a Private Label.—Respondent, the Borden Co., sold Borden brand evaporated milk nationally on a delivered price basis, the same price prevailing

56. Id. at 147.

57. Id. at 148.

58. Id. at 147, 148.

59. Id. at 148. See also, Local 761, Int'l Union of Elec. Workers v. NLRB, 366 U.S. at 679.

60. Carrier Corp. v. NLRB, 311 F.2d at 153, citing Local 761, Int'l Union of Elec. Workers v. NLRB, 366 U.S. at 681.

throughout the United States. Simultaneously, respondent sold physically identical milk bearing the private labels of its customers, at a price which, while varying from plant to plant, was consistently lower than that received for the branded product.[1] Consequently, a Federal Trade Commission complaint was issued, alleging price discrimination in violation of Section 2(a) of the Robinson-Patman Act.[2] The hearing examiner dismissed the complaint on the grounds that there was no substantial injury or threat of injury to competition, and that the discrimination was cost-justified.[3] Both sides appealed. Counsel supporting the complaint challenged the above findings and the Borden Co. objected to the ruling that evaporated milk bearing the Borden brand and that carrying a private label were commodities of "like grade and quality." The Commission reversed and ordered respondent to cease the discrimination. The Commission, one member dissenting and two not participating, found that the requisite of "like grade and quality" was met notwithstanding the distinctions in labels, and found competitive injury not justified by an acceptable cost analysis. *Borden Co.*, Trade Reg. Rep. (FTC Orders) ¶ 16191 (Nov. 28, 1962).[4]

The Robinson-Patman Act proscribes, among other things,[5] differences in price to purchasers of commodities of "like grade and quality" which may result in competitive injury[6] provided the discrimination is not justified by cost,[7] changing marketing conditions,[8] or a good faith effort to meet competi-

1. The respondent's cost analysis showed the difference to be $1.0939 per case based on Borden brand's $6.2655 price per case and private label's $5.1716 price per case. However, the entire cost analysis was rejected because of broad averaging, which, the Commission noted, resulted in distortions of prices as well. The Commission further noted that at times, in certain areas, the price of Borden brand was as high as $6.60 a case while private label was being sold by respondent at as low as $4.8942 per case (a difference of $1.7058 per case). The Borden Co., Trade Reg. Rep. (FTC Orders) ¶ 16191, at 21024 (Nov. 28, 1962).

2. 49 Stat. 1526 (1936), as amended, 15 U.S.C. § 13(a) (Supp. IV, 1963).

3. The Borden Co., Trade Reg. Rep. (FTC Orders) ¶ 15634 (Dec. 14, 1961).

4. A final order has since issued, Borden Co., Trade Reg. Rep. (FTC Orders) ¶ 16279 (Jan. 30, 1963), over respondent's objections, Borden Co., id. ¶ 16308 (Jan. 30, 1963).

5. False brokerage, discriminatory allowances or services, buyers receipt of proscribed discriminations, 49 Stat. 1526 (1936), as amended, 15 U.S.C. § 13(c)-(f) (Supp. IV, 1963).

6. "[I]t shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition . . . 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. . . ." 49 Stat. 1526 (1936), as amended, 15 U.S.C. § 13(a) (Supp. IV, 1963).

7. "[N]othing herein . . . shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . ." 49 Stat. 1526 (1936), as amended, 15 U.S.C. § 13(a) (Supp. IV, 1963).

8. "[N]othing herein . . . shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods

tion.[9] Although present in the original Clayton Act as a defensive proviso,[10] the concept of "like grade and quality" under the Robinson-Patman amendment became one of the four elements necessary to make out a prima facie case.[11] This change was significant, for if the products do not meet this requirement, section 2(a) is wholly inapplicable.[12] The instant case, as delineated by the Commission, deals "with the precise issue [of] . . . whether the label difference alone renders the goods unlike and outside the scope of the Act."[13] It is important to note that this is but one aspect of the large multi-faceted problem of determining whether brand differentiation is to be considered a factor in ascertaining the existence of a Robinson-Patman Act violation, and, if so, what weight it is to receive[14] and in what context it will be examined. A majority of the members of the Attorney General's Committee recommended that the economic factors inherent in brand names should not be heeded under "like grade and quality" because to do so would "encourage easy evasion of the statute through artificial variations in the packaging, advertising or design of goods"; rather, "tangible consumer preferences . . . between branded and unbranded commodities should receive . . . recognition in the more flexible 'injury' and 'cost justification' provisions of the statute."[15] During the legislative hearings on the Robinson-Patman amendment it was suggested that the word *brand* be added to the phrase "like grade and quality." This was denounced as a change which would "destroy entirely the efficacy of the bill against large buyers."[16] While refusal to adopt the suggested addition

concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned." 49 Stat. 1526 (1936), as amended, 15 U.S.C. § 13(a) (Supp. IV, 1963).

9. "[N]othing herein . . . shall prevent a seller rebutting the prima-facie case . . . by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 49 Stat. 1526 (1936), as amended, 15 U.S.C. § 13(b) (Supp. IV, 1963).

10. 38 Stat. 730 (1914).

11. See Rowe, Price Discrimination Under the Robinson-Patman Act 36, 62 (1962).

12. Att'y. Gen. Nat'l Comm. Antitrust Rep. 156 (1955).

13. Trade Reg. Rep. (FTC Orders) ¶ 16191, at 21018.

14. "[T]he cold fact is that the public will pay more . . . for a nationally advertised and branded version than it would pay for the physically same but promotionally unknown product sans brand." Rowe, Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act, 66 Yale L.J. 1, 27 (1956). "Certain commodities have built up distinct consumer preferences that manifest themselves in real price margins as between branded and unbranded products the buying public is willing to pay." Att'y. Gen. Nat'l Comm. Antitrust Rep. 158 (1955). Of course, the weight to be given to brand names merits careful examination; "[T]he exuberance of admen is a frail index of the consumer's monetary preferences." Rowe, op. cit. supra note 11, at 245.

15. Att'y. Gen. Nat'l Comm. Antitrust Rep. 158-59 (1955).

16. Hearings Before a Subcommittee of the House Committee on the Judiciary on Bills to Amend the Clayton Act. 74th Cong., 2d Sess. 421, 469 (1936).

may be indicative of congressional intent to disregard brand distinctions, it has also been interpreted as merely indicating that "no *blanket* exemption was contemplated for 'like' products which differed *only* in brand or design, leaving open the application of the Act to differentiated products reflecting more than a nominal or superficial variation."[17]

In the instant case, the fact that the products were physically identical was not in dispute.[18] However, respondent argued that in the market place the Borden brand commanded a higher price, and thus the commodities were not of "like grade and quality." Respondent contended that a distinction should be made between situations "where the brand name is not shown to represent any significant added value . . . and . . . where . . . the manufacturer's well-known brand name has a very substantial and thoroughly demonstrated commercial significance."[19] The Commission noted that it had, on previous occasions,[20] held that identical goods which differed only in labels were of "like grade and quality," citing, among others, *The Goodyear Tire & Rubber Co.*[21] and *United States Rubber Co.*[22] The Commission in the instant case rejected respondent's argument and quoted with approval the Attorney General's Report, stating further:

> [T]he discriminatory price transactions should first be subject to scrutiny under the statute; the market factors which may dictate that there will be different prices between the seller's brand and private label can then be considered in connection with the provisions of Section 2.[23]

The Commission proceeded to find a price variance, the effect of which, it decided as a question of fact, might be to injure competition on the primary[24]

17. Rowe, op. cit. supra note 11, at 65.

18. "Respondent concedes in its belief that physically, at the point of manufacture, the two products . . . were alike." Trade Reg. Rep. (FTC Orders) ¶ 16191, at 21017.

19. Id. at 21018.

20. United States Rubber Co., 46 F.T.C. 998 (1950); Page Dairy Co., 50 F.T.C. 395 (1953).

21. 22 F.T.C. 232 (1936), rev'd on other grounds, 101 F.2d 620 (6th Cir.), cert. denied, 308 U.S. 557 (1939). In Goodyear, decided under the original section 2, the Commission held that the Goodyear brand of tires were of comparable quality with other tires sold for substantially less to Sears Roebuck & Co. for marketing under the latter's "Allstate" brand, and the wide price differential was therefore included in the statutory prohibition.

22. 28 F.T.C. 1489 (1939). In United States Rubber Co., decided after the Robinson-Patman amendment, an arrangement similar to that in Goodyear, supra note 21, was barred.

23. Trade Reg. Rep. (FTC Orders) ¶ 16191, at 21018-19.

24. The number of cases sold in 1957 by six of the seven midwest competitors of the Borden Co., all of whom were suppliers of private label, varied from 158,811 to 958,373, while the Borden Co. sold over 5 million cases during that period. At least 241,815 cases of private label sales were lost by the midwest competitors to Borden's private label, varying from 3,650 lost by one to 72,806 lost by another. Id. at 21020. "Respondent . . . is a large and powerful concern. . . . [T]he Midwest competitors are small companies . . . [and] . . . maintain a rather precarious hold in the market place. . . . [S]ales for evaporated milk

and secondary levels.[25] The cost analysis submitted by the respondent was disallowed as inadequate due to broad averaging[26] and a failure to relate the costs to specific customer groups.[27]

In the past the FTC has been criticized for inconsistency in disregarding brand where the goods are identical while considering brand where goods are physically disparate, even to the extent of giving brand distinctions "controlling weight . . . in other Robinson-Patman contexts. . . ."[28] The implication here was that the FTC would use whatever end of the shovel was best suited in a given case for the interment of the allegedly discriminatory practice. While the accusation of contrariness is unwarranted when based on the Commission's disinterest in brand distinctions in the "like grade and quality" context as compared with its weight-giving practice in other contexts,[29] it is not without merit. Illustrative of this are the cases of *Hansen Inoculator Co.*[30] and *General Foods Corp.*[31] In *Hansen* it was ruled that variations in labeling did not controvert "like grade and quality."[32] Conversely, in *General Foods*

diminished in the period. . . . Since 1950, at least ten concerns . . . have discontinued production. . . . There are no new concerns coming into the business. . . . In this market setting, respondent's price discrimination is a clear threat to the entire competition provided by the Midwest concerns." Id. at 21022.

25. The record showed the price discrimination and there was testimony from purchasers of Borden brand to the effect that they were unable to compete with those who purchased private label from Borden Co. The Commission relied on FTC v. Morton Salt Co., 334 U.S. 37 (1948), where, said the Commission "it was sufficient to justify a finding of the prescribed [sic] effect that some merchants had to pay more for like goods than their competitors." Trade Reg. Rep. (FTC Orders) ¶ 16191, at 21022. Note that in the Morton case there was no brand-name question, but a discriminatory pricing pattern based on quantity.

26. See note 1 supra.

27. Trade Reg. Rep. (FTC Orders) ¶ 16191, at 21025.

28. Rowe, op. cit. supra note 11, at 71.

29. True, the Commission has stated that "public acceptance rather than chemical analysis of the product is the important competitive factor," Standard Oil Co., 49 F.T.C. 923, 952 (1953), set aside, 233 F.2d 649 (7th Cir. 1956), aff'd, 355 U.S. 396 (1958); and that "the test . . . is not necessarily a difference in quality but the fact that the public is willing to buy the product at a higher price . . . ." Anheuser Busch, Inc., 54 F.T.C. 277, 301-02 (1957), set aside on other grounds, 265 F.2d 677 (7th Cir. 1959), rev'd 363 U.S. 536 (1960), FTC order set aside, 289 F.2d 835 (7th Cir. 1961). But that the Commission gives controlling weight to brand distinctions in connection with the defense of a good-faith meeting of competition is not adverse to a refusal to consider brands under the "like grade and quality" requirement is evident in the recommendation of the Attorney General's Committee, cited with approval in the instant case. Trade Reg. Rep. (FTC Orders) ¶ 16191, at 21018-19.

30. 26 F.T.C. 303 (1938).

31. 52 F.T.C. 798 (1956).

32. Note, however, that in that case the variation in the labels was inconsequential. 26 F.T.C. 303, 308-09 (1938). While this leaves it open to say that the decision does not exclude the possibility that the Commission might find substantial label variation removing the products from "like grade and quality," that possibility has been buried beyond

the fact that the "respondent . . . labeled [its] institution-pack and . . . grocery-pack coffee . . . as Maxwell House [gave rise to the] . . . presumption that the two packs are of like grade and quality."[33] Here the inconsistency is clear. However, in another instance where the Commission, relying in part on the identity of the brand name, ruled that materially distinct commodities were interchangeable for the purposes of another section of the Robinson-Patman Act, its order was set aside.[34] In that case, *Atalanta Trading Corp.*,[35] the Commission stated that the Robinson-Patman prohibition against discriminatory expense allowances[36] was not limited to identical products; rather it was the competitive situation which was to be considered. Thus, the Commission concluded that all respondent's pork products traded under the brand name "Unox" were in competition with each other and, therefore, any promotional expenditures made for one must be made for all. The Court of Appeals for the Second Circuit, reversing, held that the "like grade and quality" test of section 2(a) was to be read into section 2(d) and that the oversimplified equation of ham with pork did not meet this test.

There is no valid reason to hold physically identical goods to be of "like grade and quality," *ignoring brand distinctions*, while holding that physically unlike goods are of "like grade and quality" *because* of brand. There can be no doubt that the court in *Atalanta* expressly refused to sanction any approach which would create identity through label. However, it cannot be fairly said that the FTC consciously attempted to use this formula since, until that decision, it was not clear that the section 2(a) test was also a requirement of section 2(d). Further, it seems unlikely, despite the implication in *General Foods*, that the Commission will in the future attempt to avoid the result of the *Atalanta* decision, for, although confining itself to identical commodities, the Commission in the instant case stated flatly that "the legislative history leaves little doubt that Congress intended that brand distinctions be disregarded under the 'like grade and quality' requirement."[37]

The converse, however, continues to be urged.[38] *Atalanta* has been interpreted as authority for such a proposition since the court in that case stated there was no showing that the products were in the same price range and pricewise they were not competitive.[39] Such an interpretation appears strained

resurrection by subsequent cases. See United States Rubber Co., 28 F.T.C. 1489 (1939); United States Rubber Co., 46 F.T.C. 998 (1950); Sylvania Elec. Prod. Inc., 51 F.T.C. 282 (1954); E. Edelmann & Co., 51 F.T.C. 978 (1955), aff'd, 239 F.2d 152 (7th Cir. 1956).

33. 52 F.T.C. 798, 817 (1956). But note that where goods varied slightly physically, and the brand names were different, the goods were held to be not of "like grade and quality." Champion Spark Plug Co., 50 F.T.C. 30, 47 (1953).

34. Atalanta Trading Corp. v. FTC, 258 F.2d 365 (2d Cir. 1958).

35. 53 F.T.C. 565 (1956).

36. 49 Stat. 1526 (1936), as amended, 15 U.S.C. § 13(d) (Supp. IV, 1963) (proscribing discriminatory allowances).

37. Trade Reg. Rep. (FTC Orders) ¶ 16191, at 21018.

38. Rowe, op. cit. supra note 11, at 71-73.

39. "[Atalanta] contributes a realistic set of guides: While 'artificial distinctions' in

when the language of the court is considered in context. More precisely, the court indicated cross-elasticity of demand was not the test of a section 2(d) violation, and, in any event, there was no cross-elasticity as the products in question were not shown to be in the same price range, and as regards price, did not compete.[40]

It is submitted that in the instant case the FTC, while confining itself to physically identical products,[41] has clearly indicated that past inconsistencies will be disregarded[42] and no longer will the Commission consider brand distinctions in any manner under the "like grade and quality" requirement.[43]

Trusts—Statutory Prohibition Against Alienation of Trust Income Does Not Prevent Assignment to Spouse.—The income beneficiary of a spendthrift trust executed a support agreement[1] whereby he irrevocably assigned[2] to his

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a product will not dispel its 'like grade and quality' if otherwise physically the same, substantial brand or packaging variations may suffice to overcome the purely physical analogy of products which do not sell 'in the same price range,' appeal to distinct customer classes, or 'price-wise are not competitive.'" Rowe, op. cit. supra note 11, at 72. It should be noted, however, that the Commission apparently recognized that this interpretation might be made, as it distinguished Atalanta from the instant case, noting that Atalanta was one of several decisions construing "like grade and quality" while the instant case dealt with the precise issue of determining whether label differences alone rendered the goods outside the Act. Trade Reg. Rep. (FTC Orders) ¶ 16191, at 21018.

40. "[I]t has never been intimated that the presence of cross-elasticity of demand between various products could give rise to a violation of section 2(d). Atalanta Trading Corp. v. FTC, 258 F.2d 365, at 371 (2d Cir. 1958). The court added: "As a matter of fact, here there would appear to be little cross-elasticity of demand among the products on which the allowances were given. Simply because bacon and pork come from a common source does not mean they are of like grade and quality. There is no showing that they are in the same price range; few people eat bacon for dinner and even fewer eat roast pork for breakfast. Similarly pork shoulder meat and ham are two different cuts and pricewise are not competitive." Id. at 371 n.5.

41. Trade Reg. Rep. (FTC Orders) ¶ 16191, at 21018.

42. E.g., General Foods Corp., 52 F.T.C. 798 (1956).

43. See note 37 supra and accompanying text.

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1. It should be noted that this was not a separation agreement: "The parties were at pains to state in this contract of assignment that 'Nothing herein contained shall constitute a formal separation agreement between the parties.'" Matter of Knauth, 12 N.Y.2d 259, 266, 189 N.E.2d 482, 486, 238 N.Y.S.2d 942, 947 (1963). The importance of this fact, however, is doubtful. In Borax v. Borax, 4 N.Y.2d 113, 149 N.E.2d 326, 172 N.Y.S.2d 805 (1958), the court of appeals noted that it was the support and maintenance provisions of separation agreements which precluded judicial separation proceedings.

2. Despite the use of the word "irrevocable," the court, at the end of its opinion, said that if the assignor's circumstances changed and he required more income than he had retained, he would be free to apply to the court for reallocation of the income. 12 N.Y.2d at 265, 189 N.E.2d at 485, 238 N.Y.S.2d at 945. Evidently, therefore, the assignment was not really regarded as irrevocable. See note 46 infra and accompanying text.

wife his right to all income therefrom in excess of one hundred dollars per month.[3] A later divorce decree obtained by the wife in Connecticut, presumably taking the assignment into account, provided for alimony of only one dollar a month.[4] In a proceeding brought by the trustees to determine the effect of the assignment,[5] the New York Supreme Court found that the assignment was not invalid under Section 15 of the New York Personal Property Law, which provides that "the right of the beneficiary to enforce the performance of a trust to receive the income of personal property, and to apply it to the use of any person, can not be transferred by assignment or otherwise,"[6] because the wife herself

3. By the terms of the trust instrument, the income was to be "'free and clear of the control of [his] debts, liabilities and engagements.'" Id. at 262, 189 N.E.2d at 483, 238 N.Y.S.2d at 943. This clause, by itself, would probably not be sufficient to put the income beyond the reach of creditors. In Matter of Sand v. Beach, a testamentary trust provided, "nor shall any creditor or other person have the right or power to subject the same by legal or equitable process. . . ." 270 N.Y. 281, 283, 200 N.E. 821, 822 (1936). The court of appeals, in allowing a creditor to garnish the trust income, reasoned that the testatrix had no power to exempt the property from "the incidents of its tenure" during her life, and could not add to that power after her death. Id. at 284, 200 N.E. at 822. Generally, spendthrift trusts in New York are regarded as depending entirely upon statutes for their validity. See Griswold, Spendthrift Trusts § 67 (2d ed. 1947).

4. The agreement between the parties was entered into after they had separated, and was motivated by a desire "'to have their financial relationship so adjusted that the wife shall have an income of her own without being under the necessity of depending upon the husband for her support and the support of the children, who live with her.'" 12 N.Y.2d at 262, 189 N.E.2d at 483, 238 N.Y.S.2d at 943. It is clear that this agreement was valid under the provisions of § 51 of the New York Domestic Relations Law, which prohibits husbands and wives from contracting to relieve each other of support duties arising out of the marriage. In Winter v. Winter, 191 N.Y. 462, 84 N.E. 382 (1908), it was said, in regard to an agreement determining the amount the husband was to pay the wife for support, that "the contract does not alter or dissolve the marriage nor relieve the husband from his liability to support his wife, but rather insures the fulfillment of that liability." Id at 474, 84 N.E. at 386 (citing France v. France, 38 Misc. 459, 77 N.Y. Supp. 1015 (Sup. Ct. 1902)). There is a caveat to this rule to the effect that if the allowance so provided is inadequate, the agreement may be set aside upon restitution of any consideration not already expended. Winter v. Winter, supra at 474, 84 N.E. at 386 (citing Hungerford v. Hungerford, 161 N.Y. 550, 56 N.E. 117 (1900)). Under certain circumstances, this equitable remedy becomes statutory. N.Y. Family Ct. Act § 463.

It is equally clear that the agreement survived the decree of divorce and the award of alimony. In Hettich v. Hettich, 304 N.Y. 8, 105 N.E.2d 601 (1952), the court of appeals ruled that a foreign divorce decree did not terminate the contract rights of the parties, at least not as a matter of law. In view of the express denial by the parties that the present agreement was to be a complete settlement of their rights (see note 1 supra), and in view of the nominal award by the Connecticut court, there is no evidence to sustain a "merger" of the two rights. On the survivorship of separation agreements under divorce decrees, see generally 16 N.Y. Jur. Domestic Relations § 733 (1961).

5. Matter of Knauth, Index No. 2709/1960, Sup. Ct., N.Y. Co., July 26, 1961.

6. Similar provisions may be found with regard to the right to enforce a trust to receive the rents and profits of real property. N.Y. Real Prop. Law § 103. There have

was to be regarded as a beneficiary of the trust.[7] On appeal from a modification of this order by the appellate division,[8] the court of appeals held that assignments of trust income to a divorced spouse for support and maintenance are not invalid under section 15 and will be enforced so long as the named beneficiary remains provided for. *Matter of Knauth*, 12 N.Y.2d 259, 189 N.E.2d 482, 238 N.Y.S.2d 942 (1963).

Prior to the enactment of section 15, it was the rule in New York that "[the] power of a beneficiary in a trust created before the Revised Statutes, to alien, was plainly a right reserved from their operation."[9] The statute, however, clearly prohibited the assignment of unaccumulated income.[10]

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been several attempts in the legislature to modify § 15 of the Personal Property Law. Among the more significant were the efforts, first, in 1936, to make it possible for the instrument to create a power of alienability (see Report of the New York Law Revision Commission, 1936, at 487), and again, in 1938, to require that the trust instrument specifically state that the income is to be inalienable for it to have this effect, but the restriction still would have been limited to a specified amount. Sen. Introd. No. 81, Pr. No. 81, Ass. Introd. No. 95, Pr. No. 95, N.Y. State Leg. 161st Sess. (1938). In recent years there has been an attempt to amend the statute to permit transfers, up to a certain amount, to specified relatives, not including the wife of the beneficiary. Sen. Introd. No. 1088, Pr. Nos. 1689, 1672, Ass. Introd. No. 1164, Pr. Nos. 1164, 2142, N.Y. State Leg. 184th Sess. (1961); Sen. Introd. No. 569, Pr. No. 569, Ass. Introd. No. 660, Pr. No. 660, N.Y. State Leg. 185th Sess. (1962). For a discussion of the early history of these statutes and their interrelationship with the rule against perpetuities, see Report of the New York Law Revision Commission, 1936, at 491.

7. "There is no doubt in my mind of the validity of the assignment agreement of August 1, 1947. Even though the instrument setting up the spendthrift trust does not name the wife and children of the beneficiary, it is our settled law that they, too, are truly cestuis que trustent of such a trust." Record, p. 88. (Italics omitted.)

8. The appellate division modified the order to the extent of deleting a clause which denied the assigning husband any further interest in the fund "'so long as said trust continues to exist.'" Matter of Knauth, 15 App. Div. 2d 778 (1st Dep't 1962) (memorandum decision).

9. Dyett v. Central Trust Co., 140 N.Y. 54, 66, 35 N.E. 341, 342 (1893). Curiously enough, the question of the validity of restraints on the alienation of future interests before the statutes was not passed upon until after their enactment. See Griswold, Spendthrift Trusts § 67 (2d ed. 1947). It was also determined that they could be attached by creditors. Graff v. Bonnett, 31 N.Y. 8 (1865); Bryan v. Knickerbacker, 1 Barb. 409 (N.Y. Ch. 1846).

10. See, e.g., In re Glover's Estate, 246 App. Div. 781, 285 N.Y. Supp. 487 (2d Dep't 1935); In the Matter of Estate of Lynch, 151 Misc. 549, 272 N.Y. Supp. 79 (Surr. Ct. 1934); In the Matter of Estate of Goldman, 142 Misc. 790, 255 N.Y. Supp. 533 (Surr. Ct. 1932).

The bar applies only to the assignment of future income, not accrued income. Pray v. Boissevain, 27 Misc. 2d 703, 212 N.Y.S.2d 432 (Sup. Ct. 1961); Matter of Ohrbach, 4 Misc. 2d 964, 147 N.Y.S.2d 443 (Sup. Ct. 1955); Estate of Valentine, 5 Misc. 479, 26 N.Y. Supp. 716 (Surr. Ct. 1893). The assignment of future income, moreover, is not totally void, but acts as a revocable order to the trustee to pay over to the assignee such amounts as they come due. In re Easton's Estate, 13 N.Y.S.2d 295 (Surr. Ct. 1939); In the Matter of Estate of Van Heusen, 145 Misc. 884, 262 N.Y. Supp. 149 (Surr. Ct. 1932); Matter of the Estate of Oakley, 116 Misc. 494, 190 N.Y. Supp. 157 (Surr. Ct. 1921). This may explain the reason

In spite of this prohibition against direct alienation, the courts have been quite liberal in construing the trust instrument to include dependents of a beneficiary as cobeneficiaries of the trust, even in the absence of an assignment of income.[11] In *Pruyn v. Sears*,[12] for example, where a testator left funds in trust for the care, support, maintenance and education of his three sons, the supreme court permitted part of the income to be diverted for the support of the family of one of the beneficiaries, reasoning that "the support of the family is clearly incidental to the care, support, and maintenance of the beneficiary and that, therefore, it is the duty of the trustees to provide for the same."[13] A fortiori, the same result will be reached when the trust instrument is created for the benefit of the beneficiary "and his family,"[14] or "those dependent upon him."[15] Only one case, in fact, seems to have taken a contrary view, and that in dictum.[16]

This liberality was reflected in *Wetmore v. Wetmore*,[17] which upheld the involuntary alienation of trust income to satisfy a judgment for unpaid alimony. The former wife of a trust beneficiary had obtained such a judgment, but execution was returned unsatisfied. Having exhausted her remedies at law, she sought to have the accrued trust income applied to the judgment, and to have future alimony installments paid directly out of the trust income. The court of appeals, in allowing both remedies, reasoned that because of the then-accepted doctrine of the unity of husband and wife, and because of the husband's duty to support his wife, the trust should be regarded as having been created for her benefit as well as her husband's, in spite of the fact that the instrument itself made no such provision.[18]

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why the trustees waited for fourteen years before seeking judicial settlement of their accounts. Thus, the trustees had no reason to seek prior judicial approval before making payments under the assignment until the beneficiary had revoked his order to pay.

11. See 2 Scott, Trusts § 157.1 (2d ed. 1956).

12. 96 Misc. 200, 161 N.Y. Supp. 58 (Sup. Ct. 1916).

13. Id. at 212, 161 N.Y. Supp. at 65. Apparently there was no provision in the trust instrument for the support of persons other than the named beneficiaries.

14. Oberndorf v. Farmers' Loan & Trust Co., 208 N.Y. 367, 372, 102 N.E. 534, 535 (1913). (Emphasis omitted.)

15. Matter of Sand v. Beach, 270 N.Y. 281, 283, 200 N.E. 821, 822 (1936).

16. In the Matter of Estate of Littauer, 285 App. Div. 95, 135 N.Y.S.2d 582 (3d Dep't 1954), motion for leave to appeal denied, 285 App. Div. 845, 137 N.Y.S.2d 846 (3d Dep't 1955), where, after discussing the right of a wife to enforce an assignment of trust income, the court added: "But it does not follow from these cases that, in the absence of an assignment by the beneficiary, the members of the family have an independent right to obtain a share of the income directly from the trustee." Id. at 98, 135 N.Y.S.2d at 585. This decision was based on the inability of the court to utilize § 40 of the Surrogate's Court Act in enforcing a Cuban divorce decree against a testamentry trust.

17. 149 N.Y. 520, 44 N.E. 169 (1896).

18. "The will creating the trust for the benefit of William makes no mention of his wife. And yet, owing to their unity of person and his duty to support her, equity will not permit the interposition of creditors until there is a surplus over and above that which

The *Wetmore* decision was followed and advanced in the case of *Hoagland v. Leask*,[19] where a wife sought to have alimony paid directly out of a trust fund created for her divorced husband. The court held that where a divorce court had jurisdiction over both parties, a judgment to have the trust income, as it accrued, applied to the payment of alimony was unnecessary, but that the decree itself would effect this result.[20]

The *Wetmore* case gave divorced spouses a considerable advantage in enforcing alimony decrees, which was not available to ordinary creditors under the statute.[21] Being equitable in nature, the remedy could be terminated upon a showing that it was no longer necessary, and the *Wetmore* decision as well

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is necessary for the support of himself, his wife and infant children . . . . Equity will not feed the husband and starve the wife. Neither will it favor the wife to the detriment of the husband." Id. at 529, 44 N.E. at 170-71.

19. 154 App. Div. 101, 138 N.Y. Supp. 790 (1st Dep't 1912), aff'd mem., 214 N.Y. 645, 108 N.E. 1096 (1915).

20. An interesting variation was added to the Wetmore case by the fact that a prior judgment creditor was at the same time attempting to have the income of the trust applied to the husband's debts. This he could do under N.Y. Real Prop. Law § 98, which provides that the income from a trust to receive the rents and profits is liable to the beneficiary's creditors to the extent that the income exceeds the beneficiary's requirements for support and education; this statute has been construed to apply also to the income from a trust of personal property. In re Brown's Estate, 35 N.Y.S.2d 646 (Sup. Ct. 1941), aff'd mem., 264 App. Div. 824, 35 N.Y.S.2d 738 (4th Dep't 1942). The requirements for support of the beneficiary had already been extended to include the support of his dependents. Tolles v. Wood, 99 N.Y. 616, 1 N.E. 251 (1885); Williams v. Thorn, 70 N.Y. 270 (1877). The Wetmore court, in effect, placed the wife's requirements for alimony within the protected "support" requirement exempted by the statute. In so doing, it attempted to differentiate her claims from those of an ordinary creditor: "[T]he awarding of alimony is not on account of any debt due and owing from the husband to the wife, but . . . it is based upon a duty devolving upon the husband to support her. And . . . in awarding judgment against him the court determines the amount necessary for such support, and requires the amount so fixed to be paid to her. . . . Whilst such amount is in effect the property of the wife, yet, it, being created and protected by equity, cannot be reached by prior existing creditors." Wetmore v. Wetmore, 149 N.Y. at 528, 44 N.E. at 170.

Generally, a creditor can attach income accrued and owing to the beneficiary since it does not fall within the statutory prohibition against alienation. See note 9 supra. Where such an attachment issues, it will also be effective to reach up to 10% of the future income of the beneficiary. Kock v. Burdsal, 199 Misc. 880, 104 N.Y.S.2d 782 (N.Y. City Ct. 1951) (construing N.Y. Civ. Prac. Act § 684(1) [substantially re-enacted in N.Y. Civ. Prac. Law & Rules § 5205(e)]). In Judis v. Martin, 218 App. Div. 402, 218 N.Y. Supp. 423 (1st Dep't 1926), aff'd mem., 244 N.Y. 605, 155 N.E. 916 (1927), a statute providing that attachment might be levied on a right or interest, present or future, which could be legally assigned, released or alienated (N.Y. Civ. Prac. Act § 916) was held inapplicable to trust income because the statute specifically required that the interest be assignable or alienable. This provision was substantially re-enacted in N.Y. Civ. Prac. Law & Rules § 5201(b). For a fuller discussion of creditors' rights in trust income, see generally 3 Syracuse L. Rev. 326 (1952); 15 Brooklyn L. Rev. 259 (1949).

21. See note 20 supra.

as later cases based on *Wetmore*[22] contained provisions at the foot of the decree to this effect. In *Wetmore*, in fact, the decree was later terminated when the husband had been declared bankrupt and the wife had remarried.[23]

The next inroad upon the statutory prohibition against alienation of trust income came in *Matter of Estate of Yard*.[24] This was a proceeding brought by a wife to enforce an assignment of trust income, executed in a separation agreement. In finding for the petitioner, the court reasoned that *Wetmore* and *Hoagland* had established the right of a wife to enforce an alimony decree against trust income, and that, fundamentally, there was no difference between court-awarded alimony and support fixed by a separation agreement,[25] concluding that the two should be equally enforced. It was further determined that "the unity of the parties" enabled the wife to enforce the trust, and that the "legal and moral liability of the husband to the wife"[26] made her rights to the income irrevocable.

Whatever the merits of these arguments,[27] *Yard's Estate* at least established the validity of assignments for support under the statute, and it has, to that extent, been consistently followed by the courts of New York. On the other hand, the tendency has been to confine it rather closely to its facts. In *In the Matter of Estate of Moller*,[28] for instance, the court had to deal with both an alimony decree and a separation agreement. The agreement had been incorporated into the divorce decree, but the parties later modified the contract, increasing the allowance to the wife. When the husband failed to make payments under either decree or contract, the wife brought an action to compel the trustee of a fund established for his benefit to pay the income therefrom to her, basing her application upon both the decree and the modified agreement.[29] The court

22. E.g., Moore v. Moore, 143 App. Div. 428, 128 N.Y. Supp. 259 (1st Dep't 1911) (action against husband for support); Fox v. Fox, 276 App. Div. 859, 93 N.Y.S.2d 620 (2d Dep't 1949) (memorandum decision) (wife's claim on income from profit-sharing plan); Weigold v. Weigold, 236 App. Div. 126, 258 N.Y. Supp. 348 (1st Dep't 1932) (claim on income from pension fund).

23. Wetmore v. Wetmore, 162 N.Y. 503, 56 N.E. 997 (1900).

24. 116 Misc. 19, 189 N.Y. Supp. 190 (Surr. Ct. 1921).

25. "I see no difference between the direction in a decree of alimony, and the amount allowed in a separation agreement. In the former case there is an element of compulsion although within the proper jurisdiction of a court of equity. In the latter case, the husband consents to the allowance, thereby recognizing the duty to provide and the reasonableness of the amount fixed by both parties." Id. at 22, 189 N.Y. Supp. at 192.

26. "The separation agreement is not an alienation of income which is prohibited by statute. It is merely a direction for payment of part of his income, under the legal and moral liability of the husband to the wife. The unity of the parties enables her to bring this proceeding in his right and places her in exactly the same position that he occupies." Id. at 23, 189 N.Y. Supp. at 192.

27. See text accompanying notes 36-39 infra.

28. 157 Misc. 338, 283 N.Y. Supp. 365 (Surr. Ct. 1935).

29. It should be noted that contracts dealing with support, which are executed by divorced spouses, remain unaffected by § 51 of the Domestic Relations Law. Ostrin v.

allowed the wife only the amount provided for in the decree, holding that the "agreement must be deemed to be an ordinary contract between the former husband and wife and cannot be made the basis for relief here."[30] At first glance, this would appear to contradict the *Yard's Estate* doctrine, but it should be noted that the modification was not made until *after* the parties had been divorced. *Yard's Estate*, relying in part on the unity of husband and wife, was obviously inapplicable to such a situation. On the other hand, the *Hoagland* case was directly in point so far as the decree was concerned.[31] *Moller's Estate* thus provides an interesting study of the two doctrines; but more important, it established the principle that an agreement between *former* spouses will not fall within the *Yard's Estate* doctrine.

Within this framework, the validity of assignments of trust income has been repeatedly upheld.[32] The courts have stressed, however, that such assignments

Posner, 127 Misc. 313, 215 N.Y. Supp. 259 (Sup. Ct. 1925). See also Hoops v. Hoops, 266 App. Div. 512, 42 N.Y.S.2d 635 (1st Dep't 1943), reversed on other grounds, 292 N.Y. 428, 55 N.E.2d 488 (1943).

30. In the Matter of Estate of Moller, 157 Misc. at 340, 283 N.Y. Supp. at 367.

31. The court ruled that the modification would have to be incorporated into the decree in order for it to be enforceable against the trustee. Id. at 341, 283 N.Y. Supp. at 368-69.

32. It was upheld indirectly in the case of Bursch v. Bursch, 60 N.Y.S.2d 633 (N.Y. City Ct. 1930), where a wife was allowed to sue on such an agreement and to collect damages for its breach. The Bursch assignment was particularly interesting in that it provided, not for merely half of the income to be paid over to the wife, as had been the case in Yard's Estate, but for her to receive all the income, discretion being left to her as to how much was to be returned to the husband for his own support. In In the Matter of Estate of Littauer, 285 App. Div. 95, 135 N.Y.S.2d 582 (3d Dep't 1954), motion for leave to appeal denied, 285 App. Div. 845, 137 N.Y.S.2d 846 (3d Dep't 1955) (see note 16 supra), the court, in cataloguing the various instances when a wife had been permitted to enforce a trust on her own behalf, specifically mentioned the right of a wife to enforce an assignment for support: "An assignment by the beneficiary of a trust to his wife for her support or the support of their children may be upheld, even though the trust is of the spendthrift type and an assignment of future income is not ordinarily permissible. . . . The rule prohibiting the assignment of the income of a spendthrift trust is designed to protect the beneficiary against his own improvidence, so that the income of the trust may be preserved for the support of the beneficiary and his family. . . . An assignment within the family unit . . . does not violate this purpose but rather facilitates its execution. The rule prohibiting assignments is therefore held to be inapplicable to an agreement by the beneficiary that a designated part of the income should be paid to his wife for her support or the support of their children and the courts have directed the trustee to comply with the agreement." Id. at 98, 135 N.Y.S.2d at 584-85. In In the Matter of Estate of Newman, 17 Misc. 2d 578, 187 N.Y.S.2d 934 (Surr. Ct. 1959) the surrogate granted a wife's petition to have portions of her husband's trust income paid directly to her for support, as had been provided by their separation agreement, in spite of the fact that the trustees had discretion in paying the husband or his children. In so holding, the court went contrary to the holding of Matter of Tompkins, 28 Misc. 351, 59 N.Y. Supp. 902 (Surr. Ct. 1899) where a wife was denied such enforcement precisely because payments were discretionary with the trustees and the husband had no vested right to assign. The Newman court presumed that the trustees would

are equitable in nature. In *Matter of Estate of Randolph*,[33] a wife was an assignee, under a separation agreement, of part of the income from a trust created for her husband's benefit. A prior judgment creditor sought to have the income applied to the satisfaction of his claim.[34] The court held that the wife's rights were, at least to the extent of ten per cent of the income, inferior to those of the creditor, since the wife's interest had not vested at the time of the assignment. The validity of the assignment, however, was not questioned.[35]

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not interfere with the distribution arrangement. The Tompkins case was one of the first to recognize the right to make assignments between spouses, even though in dictum. Finally, In the Matter of Estate of Bellamore, 27 Misc. 2d 118, 211 N.Y.S.2d 826 (Surr. Ct. 1960), allowed an assignment of the entire amount from the husband's trust income to be paid directly to the wife under a separation agreement where the excess of the assignment over the wife's support was to be applied to their mutual obligations.

Only one case has seriously questioned the validity of such assignments, and that in dictum. In In the Matter of Estate of Boissevain, 34 Misc. 2d 846, 229 N.Y.S.2d 556 (Surr. Ct. 1962) a daughter who was married at the time of the proceeding tried to enforce a separation agreement providing for her support against the trustees of a fund created for her father. The surrogate refused her claim, holding that the agreement contained no purported assignment. He then speculated upon the validity of such an assignment, if one had been made. Considering the dictum in Littauer, the court said: "In discussing the cases where continuing directions for such payment of income were made, the court was not ruling that section 15 had no application at all to an assignment within the family, but was merely pointing out that this statute did not prevent the courts from giving such effect to these assignments as equity and justice demanded." Id. at 851, 229 N.Y.S.2d at 560. This language re-echoed a similar discussion in In the Matter of Will of Dieudonne, 186 Misc. 642, 53 N.Y.S.2d 56 (Surr. Ct. 1945), where a daughter of a German citizen unsuccessfully contested the right of the Alien Property Custodian to collect from a trust, which had been assigned to her by her mother, under the provisions of the Trading with the Enemy Act. But it should be noted that in neither case was the daughter in question in need of present support out of the trust. Moreover, the interpretation placed upon the enforcement of such assignments by the court seems incorrect. One of the leading cases upholding the right to make equitable assignments in general, Field v. Mayor of New York, 6 N.Y. 179 (1852), explicitly stated that such assignments would only be valid "provided the agreements are fairly entered into, and it would not be against public policy to uphold them." Id. at 187. A fortiori, it would seem that an equitable assignment prohibited by statute would be impossible to enforce under any circumstances.

33. 159 Misc. 688, 288 N.Y. Supp. 678 (Surr. Ct. 1936).

34. See note 19 supra.

35. As an incidental point, it is well established that a beneficiary will not be estopped from invoking the alienation statutes to invalidate his own acts. In Matter of Wentworth, 230 N.Y. 176, 129 N.E. 646 (1920), where a beneficiary sought to hold a trustee accountable for property which the trustee had surrendered to him in violation of § 103 of the Real Property Law (see note 6 supra), the court of appeals held that he would not be estopped from asserting such invalidity in spite of the fact that he had taken an active part in the conveyance: "If the statute prohibited alienation by the cestui que trust of his interest by direct conveyance he could not indirectly accomplish such alienation by any consent through estoppel which he might give to conveyance by the trustee." Id. at 183, 129 N.E. at 648. (Italics omitted.)

The instant decision, insofar as it represents a declaration of the validity of assignments of trust income for a divorced spouse's support under section 15, is thus a confirmation of the preceding case law on the subject. On the other hand, being heir to *Yard's Estate*, it is subject to all the infirmities of that decision, outstanding among which is that the court equated court-awarded alimony and support under a separation agreement.[36] There seems to be a vast difference between the right and power of a *court* to determine what is fair and reasonable and an *individual's* right to do so. Particularly is this so when the legislature, in enacting section 15, indicated that it did not place overwhelming confidence in the judgment of the beneficiary. Another difficulty in the *Yard's Estate* case is that it relied on the unity of the parties to enable the wife to enforce the trust. The doctrine of the unity of husband and wife, whether or not one agrees with the dissent that it is "a throwback from the trend of the Married Women's Acts" and "an outworn fiction,"[37] has been seriously restricted by legislation[38] and case law.[39]

In one respect, however, the instant case goes beyond existing law. Here the parties were not merely separated, but divorced at the time enforcement of the assignment was sought, whereas previous cases dealt with parties who were married at the time of both execution *and* enforcement of the assignment. The agreement, therefore, could not be upheld on the theory that the petitioner was merely enforcing her marital rights.[40] Thus, the emphasis of the present decision was on the equities existing at the time of the contract, rather than on the present domestic status of the parties.

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36. See note 25 supra and accompanying text.

37. 12 N.Y.2d at 265, 189 N.E.2d at 485, 238 N.Y.S.2d at 946 (dissenting opinion).

38. N.Y. Dom. Rel. Law § 50 (granting wife right to separate estate); N.Y. Dom. Rel. Law § 51 (giving wife individual powers with respect to her separate estate, as well as the right to sue and be sued); N.Y. Dom. Rel. Law § 57 (giving wife independent action for personal torts, including those committed by her husband).

39. See People v. Morton, 284 App. Div. 413, 132 N.Y.S.2d 302 (2d Dep't 1954), aff'd, 308 N.Y. 96, 123 N.E.2d 790 (1954), in which an indictment for larceny of a wife's property was sustained against her husband, and in which the court stated: "It would not be consonant with our present social concepts of husband and wife to say that one is not a person separate from the other." Id. at 418, 132 N.Y.S.2d at 308. In Phillips v. Phillips, 1 App. Div. 2d 393, 150 N.Y.S.2d 646 (1st Dep't), aff'd mem., 2 N.Y.2d 742, 157 N.Y.S.2d 378 (1956) the court denied the contention that the unity of the parties prohibited an inquiry into the wife's separate income for purposes of determining alimony, saying: "The position of the wife has changed, however. Her role as a frail, sheltered, ineffectual person—if ever authentic—is as much a thing of the past as her crinoline and whalebone. . . . 'From her old position as an identity merged in him and not separable from him, she has advanced to a position of independence in most respects fully equal with his.'" Id. at 395, 150 N.Y.S.2d at 649.

40. It should be noted that in this respect the instant case falls somewhere between Yard's Estate, where the parties remained married both at the time of the assignment and at the time of the enforcement, and Matter of Moller, where the parties were united at neither time.

It is precisely on this point that Judge Van Voorhis dissented. Equity, he argued, and not the assignment should be the governing consideration.[41] He attacked the instant holding by arguing that the intention of the legislature was clearly expressed in section 15, and that no modification of the language of the statute should be allowed. This, of course, is in direct contradiction to the statement of the majority that "absolute though the prohibition is *on its face*, there is no doubt that it is subject to qualification."[42] Perhaps neither statement is entirely correct. On the one hand, there can be no doubt that the holding in *Yard's Estate* was based on questionable arguments,[43] and that the present case deviates even further from the express language of the statute. On the other hand, the legislature, in the forty years since *Yard's Estate*, has never amended the statute to counteract the interpretation placed thereon by the courts.[44] This appears, then, to be a matter which the legislature is willing to let the courts work out for themselves.

One final argument raised by the dissent goes to the right of testators and settlors to dispose of their property as they see fit: "It can hardly be doubted that in creating spendthrift trusts the usual testator or settlor has firmly in mind to secure an improvident child or grandchild against the possible acquisitiveness of a spouse."[45] This may be the case, but the ability to make and to receive secure provision for support and maintenance between the spouses without the burden, expense and scandal of applying to the courts is very much to be desired, and may be one of the strongest arguments in favor of the present decision.

It is difficult to predict the effect of the present holding on cases to follow. The intent of the court seems to be that such assignments as are here involved should be denied enforcement only where the assignor is left "without sufficient means for his own support."[46] But there still remains the problem whether the assignments will continue to be inferior to the rights of third parties, or whether the instant decision will lead to the overruling of *Randolph's Will*. To the extent that the instant case deprives a husband of the enjoyment of

41. He concludes, "If the amount which he purported to transfer to his first wife is reasonable, it should be continued on that ground and not because he made an assignment of it." 12 N.Y.2d at 268, 189 N.E.2d at 487, 238 N.Y.S.2d at 948 (dissenting opinion).

42. Id. at 263, 189 N.E.2d at 484, 238 N.Y.S.2d at 944. (Emphasis added.) This language is unfortunate in view of the fact that the qualifications of the statutory prohibition were considered by the court to have been within the intention of the legislature. Thus, the court was not attempting a judicial amendment of the statute, merely an interpretation.

43. See text accompanying notes 36-39 supra.

44. See note 6 supra.

45. 12 N.Y.2d at 267-68, 189 N.E. at 487, 238 N.Y.S.2d at 948 (dissenting opinion).

46. Id. at 264, 189 N.E.2d at 485, 238 N.Y.S.2d at 945. One of the unanswered questions in the opinion arises out of the fact that immediately after the assignment the husband's parents created a second fund for his benefit. According to the terms of the assignment, however, it was to be valid only "'so long as the said trust income is the whole of the income of the husband.'" Id. at 262, 189 N.E.2d at 483, 238 N.Y.S.2d at 943. Query: Was this a condition subsequent rendering the assignment defeasible?

such funds once assigned, there seems little reason to deny such equitable assignments the same effect that legal assignments would enjoy in similar circumstances. Moreover, in holding a wife's rights superior to those of a third party creditor, a court would be depriving "mercenary spouses" of the opportunity to incur debts deliberately which would be satisfied, not at their own expense and embarrassment but at that of former spouses.

The present case, therefore, effectively urges that an assignment of trust income for support in a separation agreement falls within the intention of the legislature in enacting Section 15 of the Personal Property Law. It further indicates that the weight of such assignments in striking an equitable balance will be second only to the needs of the beneficiary himself. The problems it creates in dealings with third parties remain to be determined.

Workmen's Compensation—Heart Attack Caused by Emotional Strain or Tension Engendered by Employment-Connected Argument of Short Duration Not Compensable as an Accidental Injury—Claimant, a clothing salesman, worked long hours seven days a week for three weeks. He expected to receive time and a half for the seventh day of each week, but on payday he received only the regular pay. Inquiry as to his overtime pay resulted in an argument during which claimant threatened to resign unless paid in full. The supervisor did nothing to alleviate the situation; nor did he deny that claimant was entitled to the overtime money. Toward the end of the argument of twenty minutes duration, claimant began to feel sharp chest pains, and subsequently was taken to a hospital where the injury was diagnosed as a myocardinal infarction. Despite claimant's prior cardiac pathology, the Workmen's Compensation Board found as a fact that the argument caused the injury and awarded disability payments. The appellate division reversed the award on the grounds that the argument did not constitute an accident.[1] The court of appeals, in a memorandum decision, one judge dissenting, affirmed. *Cramer v. Barney's Clothing Store*, 13 N.Y.2d 711, 191 N.E.2d 901, 241 N.Y.S.2d 844 (1963) (memorandum decision).

Compensation in New York is limited to "accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom."[2] Issue can always be taken as to whether the injury occurred in the course of employment, but the great majority of heart attack cases do not turn on that issue.[3] The causal relation

1. Cramer v. Barney's Clothing Store, 15 App. Div. 2d 329, 223 N.Y.S.2d 813 (3d Dep't 1962) (per curiam).

2. N.Y. Workmen's Comp. Law § 2(7). This definition sets forth three basic requirements for a compensable injury, namely: an accidental injury or occupational disease, occasioned in the course of employment, with a causal relationship between the work and the injury.

3. From a review of the cases there is almost always a strong showing that the injury occurred while claimant was on the job, or that the injury was caused by the employment.

of injury to employment did not present a problem here for it was settled that " 'it was within the power of the Workmen's Compensation Board to decide whether in point of fact the testimony . . . established a causal relationship between the claimant's routine occupation and the harm . . . .' "[4] Thus, the Board's determination of causal relationship is not reversible even though supporting testimony be inconsistent.[5]

Only those *diseases* listed by statute[6] as "occupational diseases" are compensable. Heart attacks are not so listed,[7] and therefore to be compensable must be treated as *accidents* as provided by statute[8] and case law.[9] "Accident" was defined in an early English case as "an unlooked-for mishap or an untoward event which is not expected or designed."[10] The first New York definition required "something unforeseen, unexpected, extraordinary, an unlooked-for mishap . . . ."[11]

In *Lerner v. Rump Bros.* the court of appeals noted:

> A distinction exists between accidental injury and disease, but disease may be an accidental injury. The exception arises out of abnormal conditions which must be established to sustain an award.[12]

For a disease to be compensable as an accidental injury, the court required:

> First, [that] the inception of the disease must be assignable to a determinate or single act . . . . Secondly, it must also be assignable to something catastrophic or extraordinary.[13]

The rule set forth in this statement suffered a steady erosion over the next twenty-five years. An "unusual cause" became almost any event in the ordinary course of employment sufficient to sustain an award. Rather than unexpected *acts* the court looked to unexpected *results* from ordinary acts.[14]

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4. Schechter v. State Ins. Fund, 6 N.Y.2d 506, 512, 160 N.E.2d 901, 905, 190 N.Y.S.2d 656, 662 (1959); accord, Carpenter v. Sibley, Lindsay & Curr Co., 302 N.Y. 304, 306-07, 97 N.E.2d 915, 917 (1951).

5. Id. at 512, 160 N.E.2d at 905, 190 N.Y.S.2d at 662.

6. N.Y. Workmen's Comp. Law § 3(2).

7. Ibid.

8. N.Y. Workmen's Comp. Law § 48.

9. See, e.g., McDonough v. Whitney Cent. School, 15 App. Div. 2d 191, 222 N.Y.S.2d 678 (3d Dep't 1961), where a first grade school teacher contracted the mumps during an epidemic. It was held that the resulting disability was compensable as an accidental injury.

10. Fenton v. Thorley & Co., [1903] A.C. 443, 448 (H.L.). See generally 1 Larson, Workmen's Compensation § 37.20 (1952).

11. Lewis v. Ocean Acc. & Guar., 224 N.Y. 18, 21, 120 N.E. 56, 57 (1918). The court while attempting to define "accident" was at the same time condemning the word to an undefinable status by stating that the meaning to be given the language quoted in the text is to be determined by the ordinary usages of common speech. Since this is purely subjective, the court's statement was hardly definitive. Ibid.

12. 241 N.Y. 153, 155, 149 N.E. 334, 335 (1925).

13. Id. at 155, 149 N.E. at 335.

14. 1 Larson, Workmen's Compensation §§ 38.64, 38.64a (1952); 30 Fordham L. Rev.

The deterioration of the old criterion for accidental injury prompted the court in *Masse v. James H. Robinson Co.*[15] to enunciate a new test based solely upon the common sense viewpoint of the average man.[16] Then in *Lesnick v. National Carloading Corp.*,[17] the first leading case involving a heart attack caused by prolonged emotional stress and some physical strain, the court of appeals upheld the reversal[18] of the award by the appellate division which,

385, 386-87 (1961); 28 id. 322 (1959). See also Lurye v. Stern Bros. Dep't Store, 275 N.Y. 182, 9 N.E.2d 828 (1937) (coemployee turned on fan causing claimant to get a chill resulting in facial paralysis); Ruby v. Lustig, 274 App. Div. 954, 83 N.Y.S.2d 665 (3d Dep't 1948) (memorandum decision), aff'd mem., 299 N.Y. 759, 87 N.E.2d 672 (1949) (painter suffered heart attack caused by stretching his arm to paint); Bohm v. L. R. S. & B. Realty Co., 264 App. Div. 962, 37 N.Y.S.2d 173 (3d Dep't 1942), aff'd mem., 289 N.Y. 808, 47 N.E.2d 52 (1943) (employee collapsed after shoveling a dozen shovelfuls of coal); McCormack v. Wood Harmon Warranty Corp., 263 App. Div. 914, 32 N.Y.S.2d 145 (3d Dep't), aff'd mem., 288 N.Y. 614, 42 N.E.2d 613 (1942) (employee suffered heart attack after climbing four flights of stairs three times in fifteen to twenty minutes).

15. 301 N.Y. 34, 92 N.E.2d 56 (1950).

16. "Whether a particular event was an industrial accident is to be determined, not by any legal definition, but by the common sense viewpoint of the average man." Id. at 37, 92 N.E.2d at 57. In addition to its new definition of "accident" the court in Masse also clearly stated that, "A heart injury such as coronary occlusion or thrombosis when brought on by overexertion or strain in the course of daily work is compensable, though a pre-existing pathology may have been a contributing factor." Id. at 34, 37, 92 N.E.2d at 57. See Altschuller v. Bressler, 289 N.Y. 463, 46 N.E.2d 886 (1943); Ruby v. Lustig, 274 App. Div. 954, 83 N.Y.S.2d 665 (3d Dep't 1948) (memorandum decision), aff'd mem., 299 N.Y. 759, 87 N.E.2d 672 (1949); Cooper v. Brunswick Cigar Co., 273 App. Div. 1038, 79 N.Y.S.2d 867 (3d Dep't 1948) (memorandum decision), aff'd mem., 298 N.Y. 731, 83 N.E.2d 142 (1948); Brooks v. Elliot Bates, Inc., 269 App. Div. 792, 55 N.Y.S.2d 671 (3d Dep't 1945) (memorandum decision), aff'd mem., 295 N.Y. 710, 65 N.E.2d 340 (1946); Shaw v. Browers Garage, Inc., 268 App. Div. 946, 51 N.Y.S.2d 429 (3d Dep't 1944) (per curiam), aff'd mem., 295 N.Y. 709, 65 N.E.2d 339 (1946); Godsman v. Grumman Aircraft Eng'r Corp., 268 App. Div. 945, 51 N.Y.S.2d 368 (3d Dep't 1944) (per curiam), aff'd mem., 295 N.Y. 708, 65 N.E.2d 339 (1946); Flammer v. Bethlehem Steel Co., 268 App. Div. 944, 51 N.Y.S.2d 258 (3d Dep't 1944) (per curiam), aff'd mem., 295 N.Y. 817, 66 N.E.2d 588 (1946); Bohm v. L. R. S. & B. Realty Co., 264 App. Div. 962, 37 N.Y.S.2d 173 (3d Dep't 1942), aff'd mem., 289 N.Y. 808, 47 N.E.2d 52 (1943); McCormack v. Wood Harmon Warranty Corp., 263 App. Div. 914, 32 N.Y.S.2d 145 (3d Dep't), aff'd mem., 288 N.Y. 614, 42 N.E.2d 613 (1942).

17. 309 N.Y. 958, 132 N.E.2d 326 (1956) (memorandum decision).

18. 285 App. Div. 649, 140 N.Y.S.2d 907 (3d Dep't 1955). Claimant was a vice-president of employer corporation. Because of business losses suffered by the company he had to work harder and travel more. After five weeks of this difficult work, claimant suffered a heart attack while entertaining a customer at a race track. In reversing the award granted by the Workmen's Compensation Board, the appellate division, speaking of the "particular event" mentioned in Masse v. James H. Robinson, 301 N.Y. 34, 92 N.E.2d 56 (1950), said, "The event intended was not, of course, an entirely intraorganic physical change, since in the purely medical sense any change is regarded as an 'event'; but must be a physical happening in the external employment environment operative upon the human organism." Id. at 651, 140 N.Y.S.2d at 909.

in reviewing, the older cases, noted the broad interpretation[19] placed on the old "catastrophic event" test, and finally seemed to insist on some physical happening to cause the heart attack.[20] The court's statement that "the record shows no incident of physical stress *or of emotional* impact occurring at the race track"[21] had been interpreted as leaving the door open for awards for heart attacks brought on by purely emotional stress.[22] The *Lesnick* court itself seemed well aware of this possibility when it concluded:

> To affirm this award we must be ready to hold that if a man increases the tension of the administrative work and later suffers a heart attack while at rest, this is a compensable accident. We are not ready to go that far in the case before us.[23]

Three years later, in *Schechter v. State Ins. Fund*[24] the court of appeals seemed ready to bridge, partially at least, the gap it was reluctant to cross in *Lesnick*. The *Schechter* case firmly established that awards for heart attacks caused by long periods of stress or exertion are possible, and although the court relied to a certain extent upon some physical exertion, it set the stage for a recovery for a heart attack caused by purely emotional strain. In reinstating the Board's award the court observed that:

> The phrase "unusual or excessive strain" . . . is not so limited in its meaning as to include only work of an entirely different character from that customarily done . . . . [S]o long as the conditions of performing the work are such that an exceptional strain is imposed on the worker so great that his heart is affected and damaged thereby, the requirement of unusual or excessive strain is satisfied.[25]

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19. See Kehoe v. London Guar. & Acc. Ins. Co., 278 App. Div. 731, 103 N.Y.S.2d 72 (3d Dep't 1951), aff'd mem., 303 N.Y. 973, 106 N.E.2d 59 (1952) (climbing a long flight of stairs caused heart attack); Broderick v. Leibmann Breweries, Inc., 277 App. Div. 422, 100 N.Y.S.2d 837 (3d Dep't 1950) (normal work but at abnormally high temperatures caused heart attack).

20. "The 'catastrophic' nature of an accident . . . has been very broadly regarded in these cases, but even then the happening of some external event in connection with the work and causing the heart condition has been required." 285 App. Div. 649, 651, 140 N.Y.S.2d 907, 909-10 (3d Dep't 1955). See O'Rourke v. State Ins. Fund, 2 App. Div. 2d 616, 151 N.Y.S.2d 756 (3d Dep't 1956) (memorandum decision) (executive under increased work load and strain had a heart attack while on vacation); Ehrensal v. New York State Div. of Employment, 2 App. Div. 2d 944, 156 N.Y.S.2d 472 (3d Dep't 1956) (memorandum decision) (supervisor had an unusually hard day).

21. 285 App. Div. 649, 650, 140 N.Y.S.2d 907, 908 (3d Dep't 1955). (Emphasis added.)

22. Klimas v. Trans Caribbean Airways, Inc., 10 N.Y.2d 209, 215, 176 N.E.2d 714, 717, 219 N.Y.S.2d 14, 18 (1961).

23. 285 App. Div. 649, 652, 140 N.Y.S.2d 907, 910 (3d Dep't 1955).

24. 6 N.Y.2d 506, 160 N.E.2d 901, 190 N.Y.S.2d 656 (1959). Claimant was a senior trial lawyer who normally spent 60-70% of his time in court. For two months he was required to spend 100% of his time in court. In his work claimant carried a heavy brief case and rode the subway frequently, which required him to climb stairs. Claimant suffered a heart attack after having pains in his chest for some time.

25. Id. at 510, 160 N.E.2d at 904, 190 N.Y.S.2d at 660. See generally 11 Syracuse L. Rev. 135 (1959).

In *Klimas v. Trans Caribbean Airways*[26] the court of appeals held exactly what the court in *Lesnick* stated it was not ready to hold. As a prologue to its decision the court stated:

> We think it may not be gainsaid that undue anxiety, strain and mental stress from work are frequently more devastating than a mere physical injury . . . .[27]

The *Klimas* court added that New York had always allowed compensation for emotionally induced heart attacks. The court cited numerous cases in which it found awards based on purely emotional strain or anxiety.[28] While each case depended in varying degrees upon emotional causes, at least four[29] may be classified as shock, excitement, fright or tension cases and were probably decided under the early concept of "accident" requiring a "catastrophic" event referrable to a "determinate or single event, identified in space or time."[30]

Klimas clearly made heart injuries produced solely by long-term emotional

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26. 10 N.Y.2d 209, 176 N.E.2d 714, 219 N.Y.S.2d 14 (1961). Claimant was an executive of employer corporation charged with the responsibility of maintaining employer's airplanes. When one of the airplanes was grounded by the CAA, the employer blamed claimant and gave him only a short time to have the airplane repaired. The time passed and the repairs were not completed. Claimant then received what he thought to be an excessively high bill for the repairs. The emotional strain and anxiety throughout the repair period caused claimant to suffer a heart attack. See generally 28 Brooklyn L. Rev. 360 (1962); 30 Fordham L. Rev. 385 (1961); 75 Harv. L. Rev. 1237 (1962); 15 Vand. L. Rev. 663 (1962).

27. Id. at 213, 176 N.E.2d at 716, 219 N.Y.S.2d at 16.

28. Pickerell v. Schumacher, 242 N.Y. 577, 152 N.E. 434 (1926) (memorandum decision) (driver of a hearse suffered a heart attack caused by fright and some physical exertion when the brakes failed and the hearse started to roll downhill); Wachsstock v. Skyview Transp. Co., 5 App. Div. 2d 1028, 173 N.Y.S.2d 405 (3d Dep't 1958) (memorandum decision) (cab driver suffered heart attack caused by fright when another automobile swerved into his lane); Wachsstock v. Skyview Transp. Co., 279 App. Div. 831, 109 N.Y.S.2d 206 (3d Dep't 1952) (same facts as Wachsstock, supra); Krawczyk v. Jefferson Hotel, 278 App. Div. 731, 103 N.Y.S.2d 40 (3d Dep't 1951) (memorandum decision) (cook witnessed a fight between two coemployees and suffered a heart attack due to the shock); Anderson v. New York State Dep't of Labor, 275 App. Div. 1010, 91 N.Y.S.2d 710 (3d Dep't 1949) (memorandum decision) (a supervising labor inspector was under extraordinary pressure and strain for many months prior to heart attack); Furtado v. American Export Airlines, Inc., 274 App. Div. 954, 83 N.Y.S.2d 745 (3d Dep't 1948) (memorandum decision) (hard work and long hours for four months as a construction supervisor resulted in heart attack); Church v. County of Westchester, 253 App. Div. 859, 1 N.Y.S.2d 581 (3d Dep't 1938) (memorandum decision) (decedent died from heart attack caused by rigorous cross-examination while he was a witness for employer); Thompson v. City of Binghamton, 218 App. Div. 451, 218 N.Y. Supp. 355 (3d Dep't 1926) (janitor suffered heart attack while answering a fire alarm at the employer school).

29. Pickerell v. Schumacher, supra note 26; Wachsstock v. Skyview Transp. Co., 279 App. Div. 831, 109 N.Y.S.2d 206 (3d Dep't 1952) (memorandum decision); Krawczyk v. Jefferson Hotel, supra note 26; Thompson v. City of Binghamton, supra note 26.

30. Lerner v. Rump Bros., 241 N.Y. 153, 155, 149 N.E. 334, 335 (1925).

stress or tension compensable. Since *Klimas*, however, cases dealing with short-term emotional strain have failed to draw a clear line between compensable and noncompensable heart injuries. Two lines of cases dealing with short-term emotional strain have developed, each with uncertain distinctions.

The cases of *Santacroce v. 40 W. 20th St., Inc.*[31] and *Coleman v. Guide-Kalkhoff-Burr, Inc.*[32] present a rule limiting *Klimas*. Both cases involve friction between a supervisor and employee for malperformance of duties with a subsequent argument and heart attack. In each case the employee resumed work after the argument and later suffered the heart attack upon returning home that evening. In denying the award in *Santacroce* the court said the argument

> would be regarded as neither involving nor inducing emotional strain or tension greater than the countless differences and irritations to which all workers are occasionally subjected without untoward result. This is not to say that in many cases heated argument might not well be found causative of emotional stress constituting accident but the relatively minor incident reflected by this record does not seem so "exceptional" as to meet the test imposed by *Matter of Schechter v. State Insurance Fund* . . . .[33]

This statement presented three important points: first, that the intensity of the argument determines compensability; secondly, that the minimum requirement for emotionally-induced heart attacks is the same as that for physically-induced heart attacks, i.e., that the incident shall involve "greater exertion than the ordinary wear and tear of life";[34] thirdly, by reference to *Schechter*, that the incident must be "exceptional" for the injury to be compensable. However, in *Schechter* the term "exceptional" seemed to mean that if the strain resulted in a heart attack it was an "exceptional strain."[35] Quite obviously *Santacroce* rejected this automatic conclusion. The appellate division reached the same result in *Coleman* with identical reasoning.

Although *Santacroce* and *Coleman* were decided by the appellate division prior to the court of appeals decision in *Klimas*, they were affirmed without opinion by the same court after *Klimas*, the court, it would seem, thus indicating that it was limiting its own decision in *Klimas*.

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31. 9 App. Div. 2d 985, 194 N.Y.S.2d 541 (3d Dep't 1959) (memorandum decision), aff'd mem., 10 N.Y.2d 885, 178 N.E.2d 912, 222 N.Y.S.2d 689 (1961).

32. 12 App. Div. 2d 554, 206 N.Y.S.2d 714 (3d Dep't 1960) (memorandum decision), aff'd mem., 10 N.Y.2d 857, 178 N.E.2d 912, 222 N.Y.S.2d 689 (1961).

33. 9 App. Div. 2d 985-86, 194 N.Y.S.2d 541, 543 (3d Dep't 1959).

34. Burris v. Lewis, 2 N.Y.2d 323, 326, 141 N.E.2d 424, 426, 160 N.Y.S.2d 853, 855 (1957). "Matter of Masse v. Robinson Co. . . . overruled prior decisions that in order to be compensable, a heart attack must have been caused by a strain more severe than was imposed by the usual nature of the employee's work (e.g., Matter of Dworak v. Greenbaum Co., 278 N.Y. 555; Matter of LaFountain v. LaFountain, 284 N.Y. 729), but the Masse case nevertheless requires that the regular job activity shall entail greater exertion than the ordinary wear and tear of life. . . ." Ibid.

35. 6 N.Y.2d 506, 510, 160 N.E.2d 901, 904, 190 N.Y.S.2d 656, 660 (1959).

But then a second line of cases developed after *Klimas* and in these the *Klimas* doctrine was applied unconditionally to short-term, emotionally induced injuries. In *Schwartz v. Hampton House Management Corp.*[36] the claimant operated an elevator in a smoke-filled building for three hours suffering, as a result, " 'tremendous physical trauma, psychic and emotional strain,' "[37] which induced a massive hemorrhage of an ulcer. The court, citing *Klimas*, stated that "in our view, the decision can rest solely upon the finding of psychic trauma . . . ."[38] In a later case[39] the appellate division, referring to its decision in *Schwartz*, said:

> [W]e held that an emotional traumatic experience can constitute an accident. While *Schwartz* involved a prolonged period of anxiety, we see no reason why a sudden emotional experience resulting in a physical disability cannot also constitute an accident.[40]

Thus the appellate division has applied *Klimas* first to a relatively "prolonged period of anxiety" and then to a "sudden emotional experience." In so doing it has brought the new "psychic trauma" cases under the cloak of the seemingly broad *Klimas* rule. This same reasoning was adopted in *Eckhaus v. Adeck Stores, Inc.*,[41] wherein the court of appeals found that strain resulting from the avoidance of a near automobile collision was "within the principle that an injury caused by emotional stress or strain may be found to be accidental within the purview of the Workmen's Compensation Law."[42]

The instant case dealt with an emotional strain of neither long duration nor sudden origin. Certainly if the heart attack resulted from a long period of emotional strain the case would be squarely within the *Klimas* rule. On the other hand, if the heart attack resulted from a "sudden emotional experience,"[43] a psychic trauma, it would be compensable under the *Eckhaus* decision. The logical application and extension of either rule, particularly the one enunciated in *Klimas*, would indicate that here the heart attack should be compensable. The case, therefore, fixes a limitation beyond the restrictions found in *Santacroce* and *Coleman*. Judge Bergan, dissenting in the appellate division,[44] argued that *Klimas* required a fresh look at heart attack cases and urged abandonment of the holdings in *Santacroce* and *Coleman* simply

36. 14 App. Div. 2d 936, 221 N.Y.S.2d 286 (3d Dep't 1961) (memorandum decision).

37. Id. at 937, 221 N.Y.S.2d at 287.

38. Ibid. "Psychic trauma" may be taken as the equivalent of such other terms as shock, excitement, fright or tension.

39. Antonini v. Progressive Electronics, 15 App. Div. 2d 842, 224 N.Y.S.2d 481 (3d Dep't 1962) (memorandum decision) (truck driver awoke to find the truck in flames from an electrical fire. The fire was put out but claimant later suffered a heart attack).

40. Id. at 842, 224 N.Y.S.2d at 482.

41. 11 N.Y.2d 862, 182 N.E.2d 287, 227 N.Y.S.2d 680 (1962) (memorandum decision).

42. Id. at 863, 182 N.E.2d at 287, 227 N.Y.S.2d at 680.

43. 15 App. Div. 2d 842, 224 N.Y.S.2d 482 (3d Dep't 1962).

44. Cramer v. Barney's Clothing Store, 15 App. Div. 2d 329, 330, 223 N.Y.S.2d 813, 814 (3d Dep't 1962) (per curiam).

because the law at that time was in a transitory state and the distinctions drawn in those cases were "of marked subtlety, impracticable of being drawn effectively in the mass of claims coming before the Workmen's Compensation Board for adjudication."[45] Judge Dye, dissenting in the court of appeals, was of like mind and thought the *Klimas* case should be broadly applied.[46]

The court of appeals has not yet found an appropriate test to determine the compensability of emotionally produced heart attacks. The distinction between a compensable injury caused by psychic trauma, and the noncompensable injury caused by strain no greater than the "ordinary wear and tear of life" has been blurred by this decision. In rejecting the arguments of Judges Dye and Bergan, the court of appeals seems to be heeding the warning of Judge Finch that by further extensions the courts would "make workmen's compensation the equivalent of life and health insurance."[47]

45. Id. at 330, 223 N.Y.S.2d at 815.

46. Cramer v. Barney's Clothing Store, 13 N.Y.2d 711, 191 N.E.2d 901, 241 N.Y.S.2d 844 (1963) (memorandum decision).

47. Goldberg v. 954 Marcy Corp., 276 N.Y. 313, 317, 12 N.E.2d 311, 312 (1938), as quoted by Chief Judge Desmond in his dissenting opinion, Klimas v. Trans Caribbean Airways, Inc., 10 N.Y.2d 209, 216, 176 N.E.2d 714, 718, 219 N.Y.S.2d 14, 19 (1961).