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Case Notes

CASE NOTES

Admiralty—Liability of Shipowner-Employer to Longshoreman Arising Out of Unseaworthiness.—Petitioner, a longshoreman, was employed by Pan-Atlantic Steamship Corporation, charterer of the steamship *Yaka*, to load cargo on that vessel. While working in the hold, he fell and was injured because of a hidden defect in a wooden pallet brought on board by Pan-Atlantic. He brought a libel in rem against the *Yaka*, alleging unseaworthiness. The owner and claimant of the vessel, Waterman Steamship Corporation, brought in Pan-Atlantic as an additional defendant on the ground that at the time of the injury Pan-Atlantic was operating the ship under a demise, or bareboat, charter, which contained an express indemnity clause.[1] The trial court found that the petitioner's injury was due to unseaworthiness and held that the *Yaka* was liable in rem; that Waterman Steamship Corporation was liable as owner and claimant; and that Pan-Atlantic was liable over to the shipowner.[2] The court of appeals reversed,[3] holding that, as demisor, the shipowner was not personally liable for unseaworthiness due to the acts of the demisee occurring subsequent to the charter;[4] that the Longshoremen's and Harbor Workers' Compensation Act[5] [hereinafter referred to as the Longshoremen's Act] excluded personal liability on the employer's part, other than for compensation;[6] and that there could be no liability in rem without an underlying liability to support it.[7] Certiorari was granted[8] to determine whether any personal liability is necessary to support the

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1. A bareboat charterer, sometimes called a "special owner" or owner pro hac vice, has all the duties and liabilities of an owner. E.g., United States v. Shea, 152 U.S. 178 (1894); Leary v. United States, 81 U.S. (14 Wall.) 607, 610 (1871) (dictum). Two circuit courts have held that giving a bareboat charter relieves the actual owner from liability for unseaworthiness arising after the demise. Pichirilo v. Guzman, 290 F.2d 812 (1st Cir. 1961), rev'd on other grounds, 369 U.S. 698 (1962); Grillea v. United States, 229 F.2d 687 (2d Cir.), rev'd on other grounds on rehearing, 232 F.2d 919 (2d Cir. 1956).

2. Reed v. The Yaka, 183 F. Supp. 69 (E.D. Pa. 1960).

3. 307 F.2d 203 (3d Cir. 1962).

4. See note 1 supra.

5. 44 Stat. 1424 (1927), 33 U.S.C. §§ 901-50 (1958), as amended, 33 U.S.C. §§ 906-33 (Supp. IV, 1963).

6. "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock.)." 44 Stat. 1425 (1927), 33 U.S.C. § 902(4) (1958). "The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . ." 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1958).

7. In support of its holding the court referred to Smith v. The Mormacdale, 198 F.2d 849 (3d Cir. 1952), cert. denied, 345 U.S. 908 (1953); accord, Pichirilo v. Guzman, 290 F.2d 812 (1st Cir. 1961), rev'd on other grounds, 369 U.S. 698 (1962). Contra, Grillea v. United States, 229 F.2d 687 (2d Cir.), rev'd on other grounds on rehearing, 232 F.2d 919 (2d Cir. 1956).

8. 371 U.S. 938 (1962).

in rem liability of a ship.[9] The Supreme Court, in reversing, expressly avoided deciding whether, in the absence of personal liability, a ship could be held liable,[10] and held that Pan-Atlantic's personal liability as shipowner for injuries due to unseaworthiness of the vessel extended to longshoremen who were employed by the shipowner. *Reed v. The Yaka*, 373 U.S. 410 (1963).

The Longshoremen's Act was enacted to provide the protection of a compensation scheme to longshoremen and harbor workers who are injured while on a ship in navigable waters. While the liability of the employer was limited by the statute to the compensation award,[11] section 33 of the same act gave the employee the right to elect to bring an action for damages against a third person who was liable for the injury, in lieu of seeking an award of compensation. The statute was amended to permit an action after the acceptance of a compensation award.[12] This right to damages from third parties became especially significant when the absolute liability of a shipowner for injury to longshoremen, resulting from unseaworthiness of the vessel, was first defined by the Supreme Court in *Seas Shipping Co. v. Sieracki*.[13] The Court noted that the obligation of seaworthiness was founded not in contract, but on "the hazards of marine service which unseaworthiness places on the men who perform it . . . together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss . . . ."[14]

The *Sieracki* case started an inexorable pattern of extension of the unseaworthiness concept. In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*,[15] the shipowner was held liable for the full amount of the unseaworthiness judgment, although plaintiff's employer caused the injury. This ruling was followed in *Pope & Talbot, Inc. v. Hawn*.[16] The concept of an unseaworthy condition

9. This question had been reserved in Guzman v. Pichirilo, 369 U.S. 698, 700 (1962).

10. Reed v. The Yaka, 373 U.S. 410, 412 (1963).

11. 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1958).

12. 73 Stat. 391 (1959), 33 U.S.C. § 933 (Supp. IV, 1963).

13. 328 U.S. 85 (1946). A longshoreman was injured when a defective shackle in the ship's rigging broke and a boom fell on him. Although the defect had occurred during manufacture of the piece, and was not discoverable by visual inspection, the shipowner was held liable to the longshoreman.

14. Id. at 93. In explaining the applicability of this concept to longshoremen, the Court noted the incongruity that a seaman and a longshoreman, working side by side on the same job, would have greatly different remedies for the same injury. A strong dissent pointed out that the special remedy given to seamen arises from the discipline and perils of the sea, but a longshoreman is free to quit his job if he feels it is too hazardous. Id. at 104-05.

15. 342 U.S. 282 (1952). Halcyon Lines hired Haenn to make repairs on a ship moored in navigable waters. Haenn's employee was injured, and brought suit against Halcyon alleging unseaworthiness and negligence. Halcyon brought Haenn in as a third party defendant for contribution. A judgment was given against Halcyon, but on the question of relative degree of fault, a jury verdict of 75% was rendered against Haenn. On appeal, the Supreme Court ordered the contribution proceeding dismissed, because the admiralty rule of 50-50 contribution had previously been applied only to collision cases. "We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action." Id. at 285.

16. 346 U.S. 406 (1953). The Supreme Court affirmed a circuit court reversal of a contribution award against Hawn's employer.

was greatly extended in *Alaska S.S. Co. v. Petterson*,[17] where the defect was in a piece of equipment brought on board by the stevedore, respondent's employer. As a result the longshoreman was afforded an opportunity for a large tort verdict against the shipowner when his employer was apparently negligent, although an action directly against the employer was barred by the act.[18]

This decision placed a heavy burden on the shipowner, in view of the little control he exercises over extra equipment used by the stevedore. However, two years later, in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*,[19] an injured longshoreman's employer was held liable over to the shipowner for an in personam judgment arising out of an unseaworthy condition created by the employer's negligence. This decision completed the first circumvention of the apparent intent of the act, in that it extended liability beyond the obligation to pay compensation.[20]

Ryan was extended in *Crumady v. The Joachim Hendrik Fisser*,[21] where the stevedores operated ship equipment found to be unsafe. The Court said

17. 347 U.S. 396 (1954) (per curiam), affirming 205 F.2d 478 (9th Cir. 1953), rehearing denied, 347 U.S. 994 (1954). The injury was caused by a defective snatch block, a portable piece of rigging. The testimony was unclear regarding the ownership of the block. The court of appeals considered this fact in the light most favorable to the shipowner, i.e., that it had been brought on board by the stevedore, and then found the shipowner absolutely liable. The Supreme Court affirmed in a per curiam decision. Mr. Justice Burton, joined by Justices Frankfurter and Jackson, dissented, holding that this was an unwarranted extension of the shipowner's absolute liability, since prior unseaworthiness cases all referred to defects in the ship or its equipment; here the shipowner neither owned nor controlled the defective device. 347 U.S. at 401-02.

18. See note 6 supra.

19. 350 U.S. 124 (1956). Ryan Stevedoring Company agreed to do all the stevedoring for Pan-Atlantic, without a formal contract or express indemnity agreement. Ryan's employee was injured by unsafely stowed cargo. He collected compensation and then sued Pan-Atlantic, alleging unseaworthiness or failure to furnish a safe place to work. Pan-Atlantic filed a third-party complaint against Ryan. A directed judgment for Pan-Atlantic was affirmed by an equally divided Court in 349 U.S. 901 (1955). On rehearing, the Court held that the Longshoremen's Act did not preclude liability, because the liability was based on contract—an obligation to stow cargo in a reasonably safe manner. Competence and safe stowage were held to be inescapable elements of the service undertaken. Although one of the ship's officers had an obligation to supervise stowage, his failure to discover and correct the contractor's own breach of warranty was not permitted as a defense. The opinion noted that, although the act gives a quid pro quo to the employee for his loss of right to sue for more than compensation from the employer, "the Act prescribes no quid pro quo for a shipowner that is compelled to pay a judgment obtained against it for the full amount of a longshoreman's damages." 350 U.S. at 129. (Italics omitted.)

20. The employer's effective personal liability for negligence to his employee was no longer limited in all cases to compensation, even though the employer remained absolutely liable for injuries sustained by the longshoreman in the course of employment while on board ship.

21. 358 U.S. 423 (1959). The electrical cutoff for one of the ship's winches was set at six tons, although the winch was only rated to lift three tons. There was a conflict in the testimony as to the safety of this practice. The stevedores then operated the winch with the boom extended improperly, and part of the rigging broke.

that "the negligence of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service . . . ."[22]

In the instant case the Court declined to decide the validity of the circuit court's holding that there could be no liability in rem since there was no liability in personam to support it.[23] Instead, following the pattern of liberal construction of the Longshoremen's Act and admiralty law established in *Sieracki* and the cases following it, the Court held that Pan-Atlantic was liable in personam for injury caused by unseaworthiness.[24] Mr. Justice Black, writing for the majority, stated that it had been previously held that the act "was not intended to take away from longshoremen the traditional remedies of the sea, so that recovery for unseaworthiness could be had notwithstanding the availability of compensation"[25] even though the recovery was from the employer. The Court's guide for interpretation was that "the Longshoremen's Act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.' "[26] Mr. Justice Black stressed the harshness and incongruity of forcing the petitioner to settle for a compensation award because he worked for the shipowner, whereas if he were employed by an independent stevedore he would not be so limited.[27]

Mr. Justice Harlan, joined in his dissent by Mr. Justice Stewart, argued that "the Court has effectively 'repealed' a basic aspect of the Longshoremen's . . . Act."[28] Quoting the language of the act, he felt that the Court's decision ran counter to the plain meaning of the words of section 5 of the statute, which provides that "the liability of an employer prescribed in section 4 shall be exclusive . . . ."[29] Relying on the dissent in *Ryan*, Mr. Justice Harlan interpreted the broad exclusion clause literally.[30] He contended that the result in *Ryan* "can be squared with the statute, resting as it did on the stevedoring company's voluntarily assumed contractual obligation to indemnify the third-party shipowner, while the present result cannot."[31] He attacked the validity of

22. Id. at 429.

23. 373 U.S. at 412.

24. "[T]he Court of Appeals erred in holding that Pan-Atlantic could not be held personally liable for the unseaworthiness of the ship which caused petitioner's injury." Ibid.

25. 373 U.S. at 413.

26. Id. at 415, quoting Voris v. Eikel, 346 U.S. 328, 333 (1953). In that case the Court upheld the claim for compensation of an illiterate longshoreman who was permanently injured on the job under circumstances which gave actual notice of the injury to his supervisor. The longshoreman then failed to give the written notice of injury required by the act.

27. 373 U.S. at 415.

28. Id. at 416.

29. 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1958).

30. " '[W]hile Congress imposed absolute liability on employers, they were also accorded counterbalancing advantages. . . . Under no circumstances were they to be held liable to their own employees for more than the compensation clearly fixed in the Act.' " 373 U.S. at 418, quoting Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 140 (1956) (dissenting opinion).

31. 373 U.S. at 418. Gilmore & Black, Admiralty 369 n.372 (1957), compares various

the "incongruous result" argument, pointing out that "any anomaly . . . should be left to Congress to remedy, for it may be that it would choose means wholly different from those chosen by the Court. There is an outer limit beyond which judicial construction of the language of a statute ought not go . . . ."[32] The majority of the Court seemed to take too broad an approach in interpreting congressional intent. While the congressional reports[33] emphasized a desire to extend the protection of the compensation scheme to the employees, each report also contained a reference to consideration of the rights of the employer.[34]

A more complete exposition of congressional intent can be found in a 1959 congressional report on an amendment to the act[35] which stated that the act "involves a relinquishment of certain legal rights by employees in return for a similar surrender of rights by employers. . . . Employers are assured that regardless of fault their liability to an injured workman is limited under the act."[36] The report distinguishes clearly the liability of an employer from that of a third party, from whom damages can be recovered.[37]

Despite this apparently clear expression of congressional intent in enacting section 5, the employer of a longshoreman or harbor worker may now incur a double liability. The employee can maintain an action for damages against his employer under the unseaworthiness doctrine, after or while collecting a compensation award.[38] This is true if the employer is responsible for, or merely brings into play,[39] an unseaworthy condition of the vessel, and, while on the vessel,[40]

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compensation schemes, noting that most state statutes permit recovery in the form of an indemnity from an employer, for breach of an independent duty to a third party or if there is a basis for finding an implied promise of indemnity. See also 2 Larson, Workmen's Compensation Law § 76.00 (1961).

32. 373 U.S. at 419. Mr. Justice Harlan's conclusion is strikingly similar to the majority opinion in Halcyon Lines. See note 15 supra.

33. H.R. Rep. No. 1190, 69th Cong., 1st Sess. 1 (1926); S. Rep. No. 973, 69th Cong., 1st Sess. 16 (1926).

34. "The committee . . . endeavored to decide the points of difference with equity and fairness to both the employer and the employee." H.R. Rep. No. 1190, 69th Cong., 1st Sess. 3 (1926). "Sections (4), (5), and (6) of the bill contain the appropriate provisions for . . . abolishing liability on the part of the employer except for the payment of the prescribed compensation. . . ." S. Rep. No. 973, 69th Cong., 1st Sess. 16 (1926).

35. S. Rep. No. 428, 86th Cong., 1st Sess. 1 (1959). This report was concerned with an amendment (subsequently enacted) to the Longshoremen's Act to permit an employee to bring suit against a third party in his own name within six months of accepting compensation. See note 11 supra and accompanying text.

36. Ibid.

37. "Section 5 of the Longshoremen's Act makes the statutory liability of an employer the exclusive liability for injury to an employee arising out of employment. This section also reserves to the employee the right to recover damages against third parties causing injury." Ibid.

38. See note 12 supra and accompanying text.

39. See note 22 supra and accompanying text.

40. A stevedore's double liability probably extends also to cases where a longshoreman on the pier is injured because of an unseaworthy condition of the vessel for which the stevedore is responsible. The stevedore is liable for compensation under the applicable state

the longshoreman or harbor worker is injured as a result of the condition. It is no longer relevant whether the employer is the shipowner,[41] charterer or independent contractor.[42]

In applying the instant decision a problem may arise concerning the amount of the judgment. It can be argued that the Court's "conclusion"[43] means that there exists only sufficient liability in personam to support an in rem action, and the liability is limited to the value of the vessel. Conversely, the language used in the opinion[44] may mean that the employer is personally liable for the full amount regardless of the value of the vessel.

Constitutional Law—Counsel for Indigents in Noncapital Felony Cases Held Constitutionally Guaranteed.—Petitioner, an indigent defendant in a Florida state court charged with a felony, requested appointment of counsel. The request was denied and he was compelled to conduct his own trial defense. Upon conviction and denial of relief by the state supreme court, the United States Supreme Court granted certiorari. The Court appointed counsel for the petitioner and requested the parties to submit briefs discussing specifically whether the holding of *Betts v. Brady*[1] should be reconsidered. On review the Court overruled *Betts* and stated that the right to counsel for one charged with a crime is fundamental and essential, and held that an indigent defendant in a state criminal prosecution has the right to have counsel appointed. *Gideon v. Wainwright*, 372 U.S. 335 (1963).[2]

compensation law. See Swanson v. Marra Bros., 328 U.S. 1 (1946). The ship is liable in rem for unseaworthiness resulting in injury to a longshoreman on the pier. Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963). Applying the reasoning of the instant case or Ryan, the stevedore will be liable for any judgment resulting from the longshoreman's suit, either directly as shipowner, or indirectly through liability over to the shipowner.

41. In the instant case, after comparing the duties and obligations of a bareboat charterer to those of a shipowner, the Court spoke throughout the opinion primarily of the "shipowner's" liabilities and obligations.

42. Theoretically, the contractor might be able to escape liability through a disclaimer clause in the contract. Since this would then leave the shipowner to shoulder any claims, it is not likely that any such contracts will be written.

43. "We conclude that petitioner was not barred by the Longshoremen's Act from relying on Pan-Atlantic's liability as a shipowner for the Yaka's unseaworthiness in order to support his libel in rem against the vessel." 373 U.S. at 415-16. (Italics omitted.)

44. See note 24 supra.

1. 316 U.S. 455 (1942).

2. The decision appears to limit this constitutional right to the trial. It stated that "In deciding as it did—that 'appointment of counsel is not a fundamental right, essential to a fair trial'—the Court in Betts v. Brady made an abrupt break with its own . . . precedents. In returning to these old precedents . . . we but restore constitutional principles established to achieve a fair system of justice." 372 U.S. 335, 343-44 (1963). (Italics omitted.) This is bolstered by the fact that petitioner alleged "that at his trial on a felony information he was insolvent and requested the assistance of counsel." Gideon v. Wainwright, 153 So. 2d 299 (Fla. Sup. Ct. 1963).

In *Powell v. Alabama*[3] the Supreme Court held that failure to appoint counsel "in a capital case, where the defendant is unable to employ counsel, and is incapable of adequately making his own defense"[4] was a denial of due process under the fourteenth amendment.[5] The Court expressly limited its holding to a capital case.[6] Subsequently, *Avery v. Alabama*,[7] also a capital case, reinforced *Powell*. The Court stated that because of the "peculiar sacredness" of the right to counsel, it must be protected.[8]

The *Powell* doctrine appeared to have been broadened to include noncapital cases under the peculiar facts of *Smith v. O'Grady*[9] where the Court stated that lack of counsel, coupled with the practice of deception by the prosecution to obtain a plea of guilty, if proven, would be a denial of due process.[10]

Against this background the Court decided *Betts v. Brady*,[11] wherein an indigent indicted for robbery was refused appointment of counsel and upon conviction sought habeas corpus relief on the ground that he had been deprived of his constitutional right to assistance of counsel.[12] The Supreme Court held that the due process clause of the fourteenth amendment did not impose upon the states the duty to appoint counsel for indigents in noncapital cases[13] in the absence of "special circumstances."[14] The court in *Betts* concluded that no such circumstances were shown, pointing out that the accused was a man of ordinary intelligence and, having previously been in court as a defendant, could conduct his own defense.[15] Mr. Justice Black, joined by Justices Douglas and Murphy in dissent, argued that only counsel can guarantee the safeguards of a fair and full trial and asserted that the fourteenth amendment incorporated the sixth and made it applicable to the states.[16]

Subsequent to *Betts* a clear distinction arose between capital and non-capital crimes at the state level. Cases involving capital crimes were decided under the rationale of *Powell*,[17] while noncapital cases were controlled by *Betts* and its

3. 287 U.S. 45 (1932).

4. Id. at 71.

5. The Court stated that in a capital case "the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was . . . a denial of due process . . . ." Ibid.

6. "Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine." Ibid.

7. 308 U.S. 444 (1940).

8. Id. at 447.

9. 312 U.S. 329 (1941). In this case, defendant was promised by the prosecutor that if he would waive counsel and plead guilty to burglary, he would be given a light sentence. He complied with the request, but still received twenty years.

10. Id. at 334.

11. 316 U.S. 455 (1942).

12. Id. at 457.

13. Id. at 473.

14. Id. at 462.

15. Id. at 472.

16. Id. at 474-76.

17. Carnley v. Cochran, 369 U.S. 506 (1962); Brown v. Mississippi, 297 U.S. 278 (1936); Morrison v. California, 291 U.S. 82 (1934); United States ex rel. Tillery v. Cavell, 294 F.2d

"special circumstances" rule. However, decisions following *Betts* considered so wide a variety of factors under the "special circumstances" rule that while the "rule has continued to exist in form . . . its substance [has] been substantially and steadily eroded."[18]

Shortly before *Betts*, in reviewing state noncapital criminal cases, the Supreme Court found that both the nature of the charge[19] and the character of the defense[20] may constitute special circumstances requiring counsel. In *Wade v. Mayo*[21] the Court again widened the scope of the special circumstances rule. There an eighteen year old[22] was denied counsel in a trial for burglary. The Court found that the petitioner's age constituted a special circumstance and stated that where, because of age, ignorance or lack of mental capacity, a defendant cannot adequately represent himself, refusal to appoint counsel is a denial of due process.[23] In *Uveges v. Pennsylvania*,[24] the Court reached the same conclusion when considering a similar factual situation.

The difficulty of application and the subjectiveness of the "special circumstances" rule in noncapital cases became evident when the Court reviewed two cases involving relatively similar facts[25] and came to diametrically opposed conclusions. In *Gryger v. Burke*,[26] the petitioner alleged that failure to apprise him of the right to counsel and an improper sentence by the trial judge[27] constituted a denial of rights. The Court failed to find special circumstances justifying relief and indicated that the petitioner's long familiarity with the courts

12 (3d Cir. 1961); Holly v. Smyth, 280 F.2d 536 (4th Cir. 1960); Melanson v. O'Brien, 191 F.2d 963 (1st Cir. 1951); Edwards v. United States, 139 F.2d 365 (D.C. Cir. 1943); Beckett v. Hudspeth, 131 F.2d 195 (10th Cir. 1942); Achtien v. Dowd, 117 F.2d 989 (7th Cir. 1941).

18. 372 U.S. at 350.

19. Rice v. Olson, 324 U.S. 786 (1945). The case concerned lack of jurisdiction as a defense to the charge of robbery and the Court held it beyond the capacity of defendant (an illiterate Winnebago Indian) to recognize this defense and reversed for lack of counsel. It is interesting to note that the Court stated that the question of jurisdiction was a "problem obviously beyond the capacity of even an intelligent and educated layman." Id. at 789.

20. De Meerleer v. Michigan, 329 U.S. 663 (1947). A seventeen year old was convicted of murder in Michigan (a noncapital offense in that state) without benefit of counsel, and the Supreme Court reversed the conviction on grounds that the complex and serious nature of the charge required counsel.

21. 334 U.S. 672 (1948).

22. It should be noted that the defendant had a record of prior conviction. Id. at 683.

23. Id. at 684.

24. 335 U.S. 437 (1948). It is difficult to see that the Betts Court contemplated that mere youth and inexperience would constitute special circumstances so shocking to the universal sense of justice as to require the reversal of state court convictions. Moreover, Mr. Justice Reed gave a sign of the growing dissatisfaction with the Betts decision when he pointed out that some of the Court thought the fourteenth amendment demanded counsel in all serious state criminal trials.

25. Both cases involved the sentencing of a person defending himself without counsel against a charge of burglary.

26. 334 U.S. 728 (1948).

27. The trial judge mistakenly believed a life sentence to be mandatory under the Pennsylvania Habitual Criminals Act. Id. at 729-31.

gave him ample experience with which to know his rights and conduct his own defense.[28] Subsequently, in *Townsend v. Burke*,[29] petitioner's almost identical allegations[30] were found to be special circumstances requiring representation by counsel. The Court stated that had counsel been present, he "would have been under a duty to prevent the court from proceeding on . . . false assumptions."[31]

The *Betts* rationale became completely eroded under the holdings of the Court in *Hudson v. North Carolina*[32] and *Carnley v. Cochran*.[33] In the former, the action of the codefendant in pleading guilty and withdrawing his attorney was held to be a "special circumstance" unfair to the defendant.[34] In the latter, the very question of law involved was held a sufficient circumstance to demand counsel.[35]

Hamilton v. Alabama[36] extended both *Powell* and *Betts* by requiring counsel on request at the arraignment as well as the trial. The Court held that failure to appoint counsel at arraignment on the indictment in a capital case in Alabama was denial of due process.[37]

Although *Betts* was not precisely "an abrupt break . . . with . . . well-considered precedents,"[38] as was charged by Mr. Justice Black, nevertheless it ignored the prior trend typified by Mr. Justice Sutherland's statement in *Powell*. He contended that the right to counsel is fundamental to a fair trial because "without it, though [the layman] . . . be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[39] The instant case was an affirmation of what was truly *existing law* through the erosion of *Betts*, and an elimination of any further verbal acknowledgment of the "special circumstances" doctrine. The Court also formally eradicated the illogical distinction between trials of capital and noncapital cases.

The Court left unanswered, however, the question of whether the holding is

28. Id. at 730.

29. 334 U.S. 736 (1948).

30. Petitioner alleged denial of due process due to an absence of counsel and the judge's erroneous impression as to his prior criminal record. Id. at 740-41.

31. Id. at 740.

32. 363 U.S. 697 (1960).

33. 369 U.S. 506 (1962).

34. 363 U.S. at 703.

35. 369 U.S. at 506.

36. 368 U.S. 52 (1961).

37. The Court based its decision on the importance of an arraignment in that state. "Whatever may be the function and importance of arraignment in other jurisdictions . . . in Alabama it is a critical stage in a criminal proceeding." Id. at 54. The Court intimated that whenever the arraignment involved important steps incidental to the conduct of the trial, failure to appoint counsel would be critical. Ibid. The case dealt with arraignment on indictment. The Court left open the question of whether the holding was limited to the facts or also applied to a post-arrest arraignment before a magistrate.

38. 372 U.S. at 344. Powell and Avery were capital cases. Johnson v. Zerbst, 304 U.S. 458 (1938), was limited to federal courts.

39. 287 U.S. at 69.

applicable to all criminal cases,[40] or, as Mr. Justice Harlan in his concurring opinion intimated, to cases which "carry the responsibility of a substantial prison term."[41] He stated that "whether the rule should extend to *all* criminal cases need not now be decided."[42] If in fact the latter be the case, it raises the question of what criteria are to be used in determining substantiality. If the Court follows its precedent in *Ker v. California*,[43] wherein it directed that reasonableness of searches and seizures[44] is to be judged by the same constitutional standards as apply in the federal system,[45] uniformity will result. If, on the other hand, determination of substantiality is left to the vagaries of fifty state courts, the confusion which existed prior to the instant case will not be eliminated. Furthermore, stating the rule in terms of its application to all felonies, or to all felonies and misdemeanors, will not help if the definitions of these terms vary from state to state.

Mr. Justice Black's reference to the *Powell* Court as having limited its holding to the facts of the case, "as this Court frequently does,"[46] may have been intended to suggest that the new rule will apply only to felony prosecutions. This would refute Mr. Justice Harlan's contentions. It is perhaps permissible to conclude from that statement that as *Powell* should not have been limited to its facts, neither will the instant case. Should such be the case, all crimes, regardless of the substantiality of imprisonment, would require appointment of counsel. This interpretation would avoid the problem posed above, but would create equally serious new problems; *e.g.*, would the right to counsel extend to traffic cases and summary offenses for which incarceration may be imposed?

A further question remains unanswered. It is not clear when the right to counsel will attach.[47] It has been suggested that appointment of counsel should be available to an indigent at precisely the same time a defendant with financial resources would retain legal counsel.[48] If the indigent is to be afforded the same protection given to an accused with financial resources, it would appear that this must be the ultimate result.[49]

40. Mr. Justice Clark in his concurring opinion intimated that this decision would apply to all crimes. He stated that "the Sixth Amendment requires appointment of counsel in 'all criminal prosecutions' . . . ." He added that "the Fourteenth Amendment requires due process of law for the deprival of 'liberty' just as for deprival of 'life,' and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved." 372 U.S. at 348-49.

41. Id. at 351.

42. Ibid.

43. 374 U.S. 23 (1963).

44. See Mapp v. Ohio, 367 U.S. 643 (1961).

45. 374 U.S. at 34.

46. 372 U.S. at 343.

47. See Beaney, Right to Counsel Before Arraignment, 45 Minn. L. Rev. 771 (1961).

48. See Beaney, The Right to Counsel: Past, Present and Future, 49 Va. L. Rev. 1150 (1963). The author suggests that "if appointment is not made with arraignment on the plea, the defense will be handicapped even if a postponement of the date of trial is possible." Id. at 1158.

49. It has been recommended that "the interests of the financially disadvantaged accused

Perhaps more important than the decision in the instant case is the possible effect on prior decisions holding that the refusal to appoint counsel was not a denial of due process. The question has been raised as to whether the instant case should be given retrospective effect. A Pennsylvania state court[50] denied such effect. The rationale of its decision was questionable.[51] Precedent exists for retrospective application, for the Court in *Eskridge v. Washington State Bd.*[52] gave such effect to its holding in *Griffin v. Illinois*.[53] There the Court held that failure to furnish a transcript of the trial to an indigent at state expense to effectuate appeal was a denial of due process. This is inconsistent with recent state court and federal district court pronouncements limiting the application of *Mapp v. Ohio*[54] to cases pending at the time of the Supreme Court decision.[55]

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and the demands of orderly procedure at the preliminary stages require that counsel be appointed for the accused not later than at his first appearance before the . . . Commissioner. If, of course, the defendant is brought first before the court . . . the judge should appoint counsel at that time." Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 37-38 (1963). This report refers to the federal system, but would be equally applicable to state actions.

50. McCray v. Rundle, — Pa. D.&C.2d — (C.P. 1963).

51. The Court felt that the instant case should not be given retrospective effect for the reason that it had previously held, in Commonwealth v. Mancini, 198 Pa. Super. 642, 184 A.2d 279 (1962), that Mapp v. Ohio should only be applied prospectively. See also United States ex rel. Emerick v. Denno, 220 F. Supp. 890 (S.D.N.Y. 1963); Commonwealth ex rel. Wilson v. Rundle, 412 Pa. 109, 194 A.2d 143 (1963). State courts generally have limited application of Mapp to cases where appeal was pending at the time of that decision. See Moore v. State, 146 So. 2d 734 (Ala. Ct. App. 1962); Shorey v. State, 227 Md. 385, 177 A.2d 245 (1962); State v. Long, 71 N.J. Super. 583, 177 A.2d 609 (Essex County Ct. 1962); People v. Muller, 11 N.Y.2d 154, 182 N.E.2d 99, 227 N.Y.S.2d 421 (1962). The federal courts, however, are divided on the question. See Hall v. Warden, 313 F.2d 483 (4th Cir. 1963), where the court of appeals for the fourth circuit, sitting en banc, held that Mapp should be applied retrospectively; and United States ex rel. McCrea v. La Vallee, 219 F. Supp. 917 (N.D.N.Y. 1963), where the district court in the second circuit denied retrospective effect. The effect of Mapp therefore is unsettled and hence it is weak authority for formulating any decision as to the retrospective effect of Gideon. For a full discussion of the problem see Bender, The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio, 110 U. Pa. L. Rev. 650 (1962).

52. 357 U.S. 214 (1958) (per curiam). The Court rejected Mr. Justice Frankfurter's argument in his concurring opinion in Griffin v. Illinois, 351 U.S. 12, 25 (1956). He contended that the holding in Griffin should be given prospective effect only. The court in Eskridge ignored this and held that an indigent defendant denied a state financed transcript in 1935 was entitled to release on habeas corpus.

53. 351 U.S. 12 (1956).

54. 367 U.S. 643 (1961).

55. See note 48 supra. In Great No. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932), the Supreme Court upheld a ruling by the Supreme Court of Montana giving retrospective effect to a ruling by the Railroad Commission of Montana. It appears, however, that the Court's decision was based on the statute in question giving the Board, on the complaint of the shipper or carrier, the power to make equitable changes in the shipping rates. Id. at 359.

Criminal Law—Constutionality of Statute Which Permits Conviction of Misdemeanor by Nonunanimous Court Challenged on Ground That Dissent Evidenced Reasonable Doubt As to Guilt.—Defendant was convicted of indecent exposure of person[1] and impairment of the morals of a minor,[2] both misdemeanors. The case was tried before a panel of three judges. One judge dissented on the ground that he had a reasonable doubt as to defendant's guilt. A motion was made to set aside the conviction on the grounds that defendant's guilt had not been established beyond a reasonable doubt and that conviction of a crime by two of three judges is unconstitutional. The court denied the motion[3] but stated that a serious question had been raised requiring resolution by an appellate tribunal. *People v. Scifo*, 40 Misc. 2d 110, 242 N.Y.S.2d 986 (New York City Crim. Ct. 1963).

The instant case is one of first impression in New York. Although nonunanimous conviction by a panel of judges has been authorized in New York under colonial and state law since 1744,[4] the constitutional validity of such a provision has never been decided. The present statute, which governs the New York City Criminal Court, provides:

> When a part of the court is held by a panel of three of the judges thereof, any *determination, order or judgment* of two of them shall be the determination, order or judgment of the court. . . .[5]

The Criminal Court of the City of New York has jurisdiction over all misdemeanors (except libel) and offenses committed within the city of New York.[6] All trials before the court are without a jury.[7] A defendant may make

1. N.Y. Pen. Law § 1140.

2. N.Y. Pen. Law § 483.

3. The court gave two reasons for its denial. First, the state is entitled to the benefit of any doubt a trial judge may have on the law. See People v. Busco, 46 N.Y.S.2d 859 (Ct. Spec. Sess. 1942); People v. Richter, 182 Misc. 96, 43 N.Y.S.2d 114 (Magis. Ct. 1943). Second, all doubts should be resolved, if possible, in favor of the constitutionality of an act. See Johnson v. City of New York, 274 N.Y. 411, 9 N.E.2d 30 (1937). People v. Scifo, 40 Misc. 2d 110, 115-16, 242 N.Y.S.2d 980, 986 (New York City Crim. Ct. 1963).

4. 3 Colonial Laws of New York, ch. 767, p. 380 (1744). The provision applied to misdemeanors, breaches of the peace and other crimes of lesser degree than grand larceny committed within the city and county of New York. Trial was to be before a panel of magistrates, and judgment by a majority of them was sufficient for conviction. Essentially the same provision was enacted by the State of New York in 1787. N.Y. Sess. Laws 1787, ch. 65.

5. N.Y.C. Crim. Ct. Act § 42(4). (Emphasis added.)

6. N.Y.C. Crim. Ct. Act § 31. The court has been given jurisdiction over "crimes and other violations of law, other than those prosecuted by indictment." N.Y. Const. art. VI, § 15.

7. N.Y.C. Crim. Ct. Act § 40. Provision for trial without a jury is expressly authorized by the New York Constitution. "The legislature . . . may authorize any court which shall have jurisdiction over crimes and other violations of law, other than crimes prosecuted by indictment, to try such matters without a jury. . . ." N.Y. Const. art. VI, § 18. This section has been held to modify N.Y. Const. art. I, § 2, which provides that "trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain

application to the New York Supreme Court for a jury trial,[8] but the granting of this application is within the absolute discretion of the court.[9] Ordinarily a defendant will be tried in the criminal court by a single judge, but when charged with a misdemeanor he may elect to be tried by a three-judge panel.[10]

On the other hand, the principle that a defendant's guilt must be established beyond a reasonable doubt before he can be convicted of a crime has been the common-law rule for centuries.[11] In New York, the rule has been codified in Section 389 of the Code of Criminal Procedure:

A defendant in a criminal action is presumed to be innocent until the contrary be proved; and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal.[12]

The joint construction of this statute and the statute authorizing a two-to-one decision by a panel of judges forms the basic problem raised by the instant case. Does the "reasonable doubt" statute require unanimity of verdict, and, if so, does it apply to the New York City Criminal Court? If it does apply, is there a conflict with the "two-to-one decision" statute? Finally, is the "two-to-one decision" statute constitutional?

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inviolate forever . . . ," and to permit trials without juries in the court of special sessions, predecessor of the Criminal Court of New York City. People v. Erickson, 302 N.Y. 461, 99 N.E.2d 240 (1951); People v. Bellinger, 269 N.Y. 265, 199 N.E. 213 (1935); People ex rel. Frank v. McCann, 253 N.Y. 221, 170 N.E. 898 (1930).

8. N.Y.C. Crim. Ct. Act § 32. "The court, however, shall be divested of jurisdiction to proceed with . . . any charge of misdemeanor . . . (b) if before the commencement of such trial a judge or justice of a court having jurisdiction to try indictments . . . shall certify . . . that such charge of misdemeanor shall be prosecuted by indictment." Ibid.

9. People v. Satterthwaite, 195 Misc. 33, 91 N.Y.S.2d 597 (Sup. Ct. 1949); People v. Hughes, 161 Misc. 405, 292 N.Y. Supp. 483 (Ct. Gen. Sess.), aff'd mem., 251 App. Div. 807, 298 N.Y. Supp. 188 (1st Dep't 1937). These cases were decided under the former New York City Criminal Courts Act § 31(1)(c) (N.Y. Sess. Laws 1910, ch. 659), which provided that a jury trial could be had if "before the commencement of any such trial, a justice of the supreme court . . . shall certify that it is reasonable that such charge shall be prosecuted by indictment." This provision is essentially the same as the present statute. See note 8 supra. The grounds usually set forth in this application are that the case presents: "(1) intricate questions of fact; (2) difficult questions of law; (3) property rights of the defendants; (4) important matters of general interest to the entire legal profession; (5) that conviction will be followed by disbarment proceedings. . . ." People v. Hughes, supra at 407, 292 N.Y. Supp. at 488.

10. N.Y.C. Crim. Ct. Act § 40.

11. Thayer, Evidence at the Common Law 552-53 (1898). In Coffin v. United States, 156 U.S. 432 (1894), the Supreme Court traced the origins of presumption of innocence to early Greek and Roman law.

12. Courts have expressed this rule as requiring: "evidence which excluded every other reasonable hypothesis," People v. Orr, 243 App. Div. 394, 395, 277 N.Y. Supp. 294, 295-96 (1st Dep't 1935); "facts . . . clearly . . . inconsistent with innocence," People v. Pfingst, 1 Misc. 2d 890, 895, 148 N.Y.S.2d 640, 647 (Magis. Ct. 1956); and that "if there is the slightest doubt as to guilt, then the accused person must be acquitted," People v. Matthews, 4 Misc. 2d 278, 279, 155 N.Y.S.2d 873, 875 (Tioga County Ct. 1956).

The court here indicated that the reasonable doubt rule requires the exclusion of such doubt from the minds of *each* of the triers of fact,[13] *i.e.*, that the verdict of the panel of judges must be unanimous. This seems logically preferable to the position that reasonable doubt need only be excluded from the minds of a majority of the triers of fact. While this point has not been authoritatively settled in New York in the case of a panel of *judges*, it has been stated that the reasonable doubt rule compels a unanimous *jury* verdict.[14] It has also been held that the "unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof."[15] Since the reasonable doubt rule compels a unanimous jury verdict, it should certainly compel a unanimous verdict by a panel of judges. For if a judge, who is experienced and learned in the rules of evidence, can give a reason for his doubt, the prosecution surely has not discharged its burden of proof.[16]

The "reasonable doubt" rule is a rule of evidence, and except for constitutionally protected rights, "the Legislature has the power to alter or create any rule of Evidence."[17] For example, in *People v. Johnson*,[18] the leading New York case for this proposition, it was held that the due process clause of the state constitution did not prevent the legislature from changing the common-law rule of evidence with respect to the competency of witnesses.[19] A later case, *People ex rel. Woronoff v. Mallon*,[20] expressly stated that the

13. 40 Misc. 2d at 114, 242 N.Y.S.2d at 985.

14. People v. Light, 285 App. Div. 496, 138 N.Y.S.2d 262 (4th Dep't 1955). Accord, Billeci v. United States, 184 F.2d 394, 403 (D.C. Cir. 1950) (dictum).

15. Hibdon v. United States, 204 F.2d 834, 838 (6th Cir. 1953).

16. Recently the court of appeals in Ohio held that "if there is a difference of opinion as to guilt among the three trial judges all of whom are reasonable and experienced, this fact not only suggests that there can be more than one conclusion as to the evidence but proves it. This fact in and of itself injects reasonable doubt into the case . . . ." State v. Robbins, 189 N.E.2d 641, 643 (Ohio App. 1963). Unanimity, of course, would not be required where an issue of law is decided.

17. 1 Wigmore, Evidence § 7, at 208 (3d ed. 1940). (Emphasis omitted.) See also 3 Willoughby, The Constitutional Law of the United States (2d ed. 1929). "[S]o long as the fundamental rights of litigants to a fair trial, as regards notice, opportunity to present evidence, etc., and adequate relief are provided, and special requirements of the Constitution are not violated, Congress has a full discretion as to the form of the trial or adjudication, and the character of the remedy to be furnished." Id. § 1130, at 1721.

18. 185 N.Y. 219, 77 N.E. 1164 (1906).

19. Id. at 229, 77 N.E. at 1167. The unsworn testimony of a child less than twelve years old was admitted into evidence, contrary to the common-law rule. The court cited the following cases, inter alia, in support of its position: People v. Ebelt, 180 N.Y. 470, 73 N.E. 235 (1905) (challenges of jurors); People v. Hall, 169 N.Y. 184, 62 N.E. 170 (1901) (appointment of special jury commissioners); People v. Dunn, 157 N.Y. 528, 52 N.E. 572 (1899) (change in method of selecting of jurors); Lyon v. Manhattan Ry., 142 N.Y. 298, 37 N.E. 113 (1894) (authorizing a physical examination of plaintiff in a personal injury action); People v. Cannon, 139 N.Y. 32, 34 N.E. 759 (1893) (statutory prima facie evidence).

20. 222 N.Y. 456, 119 N.E. 102 (1918). This case involved New York Penal Law § 442, which provides that if a purchaser makes a written statement regarding his ability to pay

legislative power to change rules of evidence as they existed at common law is not restricted by the due process clause of the state constitution.[21] Whether this broad principle will be applied to the reasonable doubt rule depends upon the nature of this rule. If this right is one which is protected by constitution, it cannot be removed or restricted by the legislature.

With *Hurtardo v. California*,[22] the United States Supreme Court began to develop the theory that the application of the due process clause of the federal constitution was not limited to rights expressed in the Bill of Rights.[23] The Court affirmed this position in *Twining v. New Jersey*,[24] where it said that while not all of the rights guaranteed in the first eight amendments are protected by due process,[25] this does not mean that due process will be limited to the Bill of Rights, or to those rights existing at English common law and in the colonies at the time of the ratification of the Constitution.[26] Thus, such rights as that of a defendant to be acquitted unless his guilt is proven beyond a reasonable doubt could be protected by the due process clause.

The test to be applied in determining which of these rights are protected by due process was set forth in *Palko v. Connecticut*.[27] Mr. Justice Cardozo there used such phrases as "the very essence of a scheme of ordered liberty"[28] and a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"[29] to describe the criterion to be used.

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the purchase price and later defaults in payment, the seller may request an examination of the purchaser's books, and if the purchaser refuses such examination, this shall be presumptive evidence that the statement of the purchaser's ability to pay was false.

21. Id. at 461-62, 119 N.E. at 104.

22. 110 U.S. 516 (1884). Defendant was convicted in a prosecution initiated by an information rather than by indictment of a grand jury. The Court affirmed the conviction on the ground that the grand jury provision of the fifth amendment did not apply to the states, since the right to an indictment by grand jury was not a fundamental right guaranteed by the due process clause of the fourteenth amendment. For a discussion of the development of the "fundamental rights" concept in the Supreme Court, see Harding, Due Process: A Natural Law for Criminal Prosecutions?, in Fundamental Law in Criminal Prosecutions 1 (1959).

23. "It follows that any legal proceeding enforced by public authority, . . . in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." 110 U.S. at 537.

24. 211 U.S. 78 (1908). The jury was instructed that it could draw an unfavorable inference against the accused because of his failure to testify. The Court upheld the conviction on the grounds that protection from this type of self incrimination was not a violation of defendant's fundamental rights and hence not protected by due process.

25. Id. at 99.

26. Id. at 101. While the Supreme Court has not used it as such, it would seem that the ninth amendment provides a basis for holding that the Bill of Rights is not an exhaustive listing of rights protected by the Constitution: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

27. 302 U.S. 319 (1937).

28. Id. at 325.

29. Ibid.

Weighed against this test the Court held that the defendant was not protected against double jeopardy in a state court, as he would have been in a federal court.[30]

While these early cases used a "fundamental rights" test to exclude from the protection of due process such rights as indictment by a grand jury,[31] freedom from compulsory self-incrimination[32] and double jeopardy,[33] other cases[34] have held that due process requires reversal where the trial judge was financially interested in a conviction;[35] where counsel had not been provided to an impoverished defendant;[36] where defendant was convicted under a statute which insufficiently defined the illegal act;[37] where perjured testimony was knowingly introduced by the prosecutor;[38] where the accused was denied a public trial;[39] and where evidence procured by police brutality was admitted.[40] Two recent cases illustrating the "fundamental rights" test are *Mapp v. Ohio*,[41] where it was held that protection from unreasonable searches and seizures under the fourth amendment applied to the states; and *Gideon v. Wainwright*,[42] where it was held unconstitutional for a state to deny counsel to an indigent defendant in a noncapital case.

Apparently, only one case is directly on point as to whether the "reasonable doubt" rule gives rise to a fundamental right protected by due process. In *State v. Robbins*,[43] an Ohio court found a conviction by two of three judges violative of defendant's fundamental right to have guilt established beyond a reasonable doubt.[44] Defendant was charged with arson, but waived his right to a trial by jury and elected to be tried by a three-judge panel, thereby placing himself in the same position as the defendant in the instant case.

30. 302 U.S. 319 (1937). The State of Connecticut appealed defendant's conviction for second degree murder. The conviction was reversed and a new trial ordered at which defendant was convicted of first degree murder. On appeal to the Supreme Court the conviction was affirmed.

31. Hurtardo v. California, 110 U.S. 516 (1884).

32. Twining v. New Jersey, 211 U.S. 78 (1908). See also Adamson v. California, 332 U.S. 46 (1947).

33. Palko v. Connecticut, 302 U.S. 319 (1937).

34. These are collected in Harding, op. cit. supra note 22, at 15-16.

35. Tumey v. Ohio, 273 U.S. 510 (1927).

36. Powell v. Alabama, 287 U.S. 45 (1932); see also Gideon v. Wainwright, 372 U.S. 335 (1963).

37. Lanzetta v. New Jersey, 306 U.S. 451 (1939).

38. Mooney v. Holohan, 294 U.S. 103 (1935).

39. In re Oliver, 333 U.S. 257 (1948).

40. Rochin v. California, 342 U.S. 165 (1952).

41. 367 U.S. 643 (1961).

42. 372 U.S. 335 (1963).

43. 189 N.E.2d 641 (Ohio App. 1963).

44. "All members of this court agree that the presumption of innocence and the requirement of proof beyond a reasonable doubt require a unanimous verdict of a three-judge court. . . . To hold otherwise would violate a basic and fundamental right of a defendant." 189 N.E.2d at 644.

A two-to-one verdict of the panel was authorized by the Ohio statute.[45] While concluding that a statute removing the "reasonable doubt" rule from trials before a three-judge panel "would remove an *essential ingredient of due process of law*,"[46] the court declined to find the statute unconstitutional. Instead it was decided that the intention of the legislature was not to repeal or modify the "reasonable doubt" statute when it enacted the statute authorizing two-to-one decisions.[47] The result of the decision, however, did violence to the "two-to-one decision" statute, for it restricted it to rulings on motions, pleas, continuances, demurrers, and admissibility of evidence,[48] contrary to the clear and obvious language of the act.

Two other cases support the proposition that two-to-one decisions are unconstitutional. In *Hibdon v. United States*,[49] the court held that a defendant could not waive his right to a unanimous jury verdict because "there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt. . . . It would be a contradiction in terms."[50] The court was "of the view that the right to a unanimous verdict cannot under any circumstances be waived, that it is of the *very essence of our traditional concept of due process* in criminal cases. . . ."[51] Thus, the court applied the test of *Palko v. Connecticut* in finding that the "reasonable doubt" rule did give rise to a fundamental right protected by due process. In *Speiser v. Randall*,[52] the Supreme Court stated that "due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt [beyond a reasonable doubt]."[53] While these two cases are not directly in point, they, along with *State v. Robbins*, are indicative of a current tendency to regard

45. Ohio Rev. Code § 2945.07 (Anderson 1953), quoted in State v. Robbins, provides: "If tried by a three-judge court, such judges, or a majority of them may decide all questions of fact and law . . . and render judgment accordingly."

46. 189 N.E.2d at 644. (Emphasis added.)

47. Ibid.

48. 189 N.E.2d at 643.

49. 204 F.2d 834 (6th Cir. 1953).

50. Id. at 838. Defendant was indicted and the case submitted to the jury. After one half hour of deliberation, the jury was unable to agree. The court inquired whether a majority verdict would be acceptable to the parties. The parties so agreed. The jury voted nine to three for conviction and defendant was convicted.

51. Ibid. (Emphasis added.)

52. 357 U.S. 513 (1958). A war veteran had been denied a tax exemption because he refused to take a loyalty oath. It was held that the requirement of a loyalty oath, since it placed the burden of proving loyalty on the citizen, violated the requirements of due process and also restricted the right to free speech.

53. Id. at 526 (dictum). "There is always in litigation a margin of error. . . . Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt." Id. at 525-26.

the "reasonable doubt" rule as giving rise to a fundamental right protected by due process.

In determining whether this right is "fundamental," it is important to distinguish the presumption of innocence, which places the burden of proof upon the prosecution, from the "reasonable doubt" rule, which fixes the quantum of proof necessary for conviction.[54] When viewed as merely requiring a certain quantum of proof, the rule seems less substantial than when viewed as the basis for the principal that it is better to permit ten guilty men to escape than to punish one innocent man.[55]

An additional consideration is the possibility of legislation permitting non-unanimous jury verdicts in criminal cases.[56] In *Patton v. United States*,[57] the Supreme Court held that under the federal constitution trial by jury consists of three elements: (1) that the jury be twelve men; (2) that the jury be in the presence and under the supervision of a judge to instruct as to law, and advise as to facts; and (3) that the verdict be unanimous.[58] From this it may be argued that a defendant has a constitutional right to a unanimous jury verdict independently of the reasonable doubt concept. Thus, a finding that reasonable doubt does not give rise to a fundamental right would not necessarily open the way for legislation permitting nonunanimous jury verdicts. But what limits this line of reasoning to jury determinations? Can it be said that unanimity is fundamental to a *trial* on the facts in all criminal cases?

No clear guidelines are available in answer to these questions, nor to the basic question of whether the "reasonable doubt" rule gives rise to a constitutional right. New York courts faced with this problem will have to make an independent determination on the basis of analogous rights which have been considered constitutionally protected, and upon an examination of the nature of the right of a defendant to be acquitted unless his guilt is established

54. Thayer, op. cit. supra note 11, at 560.

55. Coffin v. United States, 156 U.S. 432, 456 (1894).

56. The New York Constitution was amended in 1938 to permit verdicts by five sixth of the jury in civil cases. N.Y. Const. art. I, § 2.

57. 281 U.S. 276 (1930). A juror became ill during the trial and could not continue to serve. The defendant, the court and the prosecution agreed to continue before eleven jurors who later returned a unanimous verdict for conviction. The Supreme Court upheld the conviction on the ground that while the defendant had a constitutional right to a trial by twelve jurors, the right could be waived. But see Maxwell v. Dow, 176 U.S. 581 (1900). The Court there held that due process does not require a verdict by twelve jurors, and indicated that the sixth amendment does not apply to the states. Mr. Justice Harlan, in a vigorous dissent, argued that the fourteenth amendment applies at least the first eight amendments to the states. Id. at 605-08 (dissenting opinion).

58. Id. at 288. The Court reached this conclusion from an examination of trial by jury in this country and in England prior to adoption of the Constitution. Unanimous verdicts have been required in England since 1367. 1 Holdsworth, History of English Law 318 (3d ed. rewritten 1922). Contra, ALI Code of Criminal Procedure § 355 (1930); "In capital cases no verdict may be rendered unless all the jurors concur in it. In other cases of felony a verdict concurred in by five-sixths of the jurors, and in cases of misdemeanor by a verdict concurred in by two-thirds of the jury may be rendered."

beyond a reasonable doubt. The strong presumption in favor of the constitutionality[59] of the statute authorizing two-to-one decisions will aid the courts in this determination.

If the courts decide that the "reasonable doubt" rule is not guaranteed by due process, they should have no difficulty resolving a possible conflict between the "reasonable doubt" statute and the "two-to-one decision" statute. Such a ruling would necessarily mean that the "reasonable doubt" rule is no more than a rule of evidence which is subject to alteration or repeal by the legislature. The distinct possibility exists that the legislature never intended that rule to apply to the New York City Criminal Court, since Section 41 of the Criminal Court Act provides only that the Code of Criminal Procedure is applicable "as far as may be, to the practice and procedure" of the Criminal Court. As pointed out by Judge Gassman in the instant case, what is meant by "practice and procedure" is largely undetermined in this respect.[60]

If this does not resolve the possible conflict, the court may resort to the assumption that, since the legislature had knowledge of existing laws and took cognizance of them in enacting the reasonable doubt statute, it did not intend a conflict[61] with the statute authorizing two-to-one decisions.[62] This reasoning would be reinforced by the strong presumption against implied repeals[63] with the result that the later statute, which codified the "reasonable doubt" rule, would be construed as not applying to the New York City Criminal Court, thereby permitting two-to-one decisions.

If the New York courts decide that due process requires a determination of guilt beyond a reasonable doubt, they should not severely limit the "two-to-one decision" statute as did the court in *State v. Robbins*. Since the language of the statute will not permit such a construction, the statute should be found unconstitutional. This course would avoid the illogical construction adopted by the Ohio court.

Along with the benefits of such a holding, however, a number of problems would arise. Since Section 40 of the New York City Criminal Court Act provides for trial before a single judge except where the defendant elects to be tried by a three-judge panel, there is a possibility that a defendant who does not choose the three-judge panel may be held to have waived his constitutional right, although a formal instrument, similar to that for a waiver of trial by jury,[64] would probably be required before section 40 would have this effect. Further, because of the great number of cases tried before the

59. Johnson v. City of New York, 274 N.Y. 411, 9 N.E.2d 30 (1937).

60. 40 Misc. 2d at 113, 242 N.Y.S.2d at 984.

61. In the Matter of Simmons, 130 App. Div. 350, 114 N.Y. Supp. 571 (3d Dep't), aff'd mem., 195 N.Y. 573, 88 N.E. 1132 (1909).

62. Successive enactments of substantially the same provisions as the present N.Y.C. Crim. Ct. Act § 42(4) date from 1787, see note 4 supra, while N.Y. Code Crim. Proc. § 389 was enacted in 1881.

63. People v. Dwyer, 215 N.Y. 46, 109 N.E. 103 (1915).

64. Cf. N.Y. Const. art. I, § 2: "A jury trial may be waived by the defendant . . . by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense."

criminal court,[65] the consequences of a possible retroactive effect of such a holding would be of some magnitude.

While it is uncertain whether the courts will declare the statute authorizing two-to-one decisions unconstitutional, the fact remains that this law permits a defendant to be convicted even though a judge, experienced in evaluating evidence, can state a reason for believing the defendant to be innocent, and not be dissuaded from that belief by two colleagues equally practiced in such skills. The continued possibility of unjust convictions, which the entire Code of Criminal Procedure is designed to prevent, should be given more weight than considerations of expediency. It is hoped that the instant case or, others like it, will move the legislature to re-evaluate the present law. That this practice has been followed for two centuries serves only to increase the necessity for legislative reform.

Eminent Domain—New York Extends the "Public Use" Doctrine to the Taking of Land for a World Trade Center.—New York and New Jersey passed statutes[1] authorizing the Port of New York Authority to take over the bankrupt Hudson tubes for the purpose of running a commuter railroad, and to erect a "World Trade Center"[2] on a thirteen block area which now comprises the terminal and adjacent buildings. The statutory scheme contemplated that the proceeds from the World Trade Center would pay for the operation of the Hudson tubes as well as the center. Plaintiff, a corporation doing business in one of the condemned buildings,[3] brought an action for a declaration that the New York statute was unconstitutional in that it authorized the taking of private property for other than public use.[4] On appeal from a decision in favor of plaintiff,[5] the New York Court of Appeals held that

65. It is estimated that 60,000 cases are tried each year before the New York City Criminal Court, in which more than 1,000 defendants are convicted by two-to-one decisions. N.Y. Times, Sept. 13, 1963, p. 15, col. 8.

1. N.Y. Unconsol. Laws § 6601-18 (McKinney 1961); N.J. Rev. Stat. § 32:1-35.50-68 (1963).

2. The World Trade Center is to be a complex of buildings that will be leased to private companies engaged in activities related to world trade.

3. This case involved two actions: one by the Port of New York Authority to condemn the Hudson tubes and adjacent buildings, and one by the plaintiff seeking an injunction and a declaratory judgment that the statute authorizing the Authority to condemn the land was unconstitutional.

4. It was also contended that the legislatures of New York and New Jersey could not grant the Port Authority the power to undertake this project without congressional approval, since when Congress originally approved the Authority, there was no contemplated purpose of building a World Trade Center. Finally, it was alleged that the statute was unconstitutional in that it did not take into account the good will of a business in the valuation of the property taken.

5. Courtesy Sandwich Shop, Inc. v. Port of New York Authority, 17 App. Div. 2d 590, 237 N.Y.S.2d 820 (1st Dep't), reversing In the Matter of the Port Authority Trans-Hudson Corp., 38 Misc. 2d 412, 239 N.Y.S.2d 782 (Sup. Ct. 1963).

the operation of a World Trade Center is a public use,[6] and therefore the statute authorizing the Port Authority to condemn land for this purpose is constitutional,[7] even though its facilities were to be leased to private individuals.[8] *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*, 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1, *appeal denied*, — U.S. — (1963).

Early American cases allowed condemnation for such clearly public uses as the construction of parks,[9] schools,[10] and roads;[11] and in New York it was held that the establishment of a public market[12] and the creation of a uniform wharf system[13] were public uses. Thus the traditional view of "public use" in

6. Until recently it had been held in New York, as elsewhere, that whether condemnation of property is or is not for a public use is a judicial question. Fifth Ave. Coach Lines, Inc. v. City of New York, 11 N.Y.2d 342, 183 N.E.2d 684, 229 N.Y.S.2d 400 (1962); Pocantico Water Works Co. v. Bird, 130 N.Y. 249, 29 N.E. 246 (1891). See Jahr, Eminent Domain § 9 (1953). One of the recent cases in New York holding that there was a justiciable issue regarding the alleged public use for which the private property was taken is Denihan Enterprises, Inc. v. O'Dwyer, 302 N.Y. 451, 99 N.E.2d 235 (1951). There New York City, pursuant to a statute, had made a contract with an insurance company under which the city would condemn certain land and then lease it at public auction for fifty years for the purpose of having the lessee build a public parking garage. Plaintiff sued, alleging that the garage was intended primarily for the use of the occupants of the apartment house also to be erected by the insurance company, contending that this would really benefit the private insurance company, rather than the public. The court said that the proposed use would not be public if the public benefit were only incidental to a private benefit, and not for the purpose authorized by the statute. Id. at 458, 99 N.E.2d at 238.

On the other hand, recent cases raise serious doubt as to whether or not the courts have really followed the principle that whether condemnation of property is or is not a public use is a judicial question. These cases held that the taking was for a public use merely because of the legislative determination to that effect in the statute. In the Matter of Public Service Comm., 217 N.Y. 61, 111 N.E. 658 (1916); Brent v. Hoch, 25 Misc. 2d 1063, 205 N.Y.S.2d 68 (Sup. Ct. 1960); Saso v. New York, 20 Misc. 2d 826, 194 N.Y.S.2d 789 (Sup. Ct. 1959).

7. Under the fourteenth amendment to the federal constitution, a state may not take private property for other than a public use without the owner's consent. Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896). N.Y. Const. art. I, § 7(a) has been similarly interpreted. Hopper v. Britt, 203 N.Y. 144, 149, 96 N.E. 371, 372 (1911) (dictum); In re Split Rock Cable-Road Co., 128 N.Y. 408, 28 N.E. 506 (1891); In the Matter of Albany Street, 11 Wend. 149 (N.Y. Sup. Ct. 1834).

8. The court also held that no congressional approval was necessary for the project once enabling legislation was passed by New York and New Jersey. 12 N.Y.2d at 391, 190 N.E.2d at 406, 240 N.Y.S.2d at 7. Finally, the court held that it is settled in New York that good will of a business is not taken into account in the valuation of the property taken under condemnation proceedings. Id. at 391, 190 N.E.2d at 406, 240 N.Y.S.2d at 8.

9. Shoemaker v. United States, 147 U.S. 282 (1893); People v. Adirondack Ry. Co., 160 N.Y. 225, 54 N.E. 689 (1899), aff'd sub. nom. Adirondack Ry. Co. v. New York, 176 U.S. 335 (1900).

10. Commissioners of D.C. v. Shannon & Luchs Constr. Co., 17 F.2d 219 (D.C. Cir. 1927).

11. Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923).

12. Ketchum v. City of Buffalo, 14 N.Y. 356 (1856).

13. In the Matter of the Mayor of the City of New York, 135 N.Y. 253, 31 N.E. 1043

New York required: (1) that the public have direct access to the constructed facilities; (2) that the public derive direct benefit from such facilities; and (3) that the government control the use to which the property was to be put.[14]

In taking property for *slum clearance*, however, these criteria were abandoned. Obviously the construction of new housing facilities could not provide direct access to the general public; it would accrue to the benefit of the public only indirectly; and the government would not always have direct control over the property.[15] In *New York City Housing Authority v. Muller*,[16] the first New York use of condemnation for slum clearance purposes, the court held that where there existed unsanitary and substandard housing conditions constituting a menace to the health, safety and morals of the public, eminent domain could not be resisted. The replacement of such buildings by sanitary housing accommodations for persons of low income was a public benefit and constituted a public use of the land. Thus the court reasoned that the fact that improved low income public housing was in the public interest was sufficient to constitute a public use.[17]

This concept was later expanded to include condemnation of land in a slum area which was to be resold to a *private* developer for the erection of private housing.[18] The theory was that the eradication of the slum *coupled with* the safe and sanitary housing to be built on the site constituted a public use.

In *Kaskel v. Impellitteri*,[19] however, slum clearance alone was considered the vital factor in determining whether land had been taken for a public use. There the later use to which the land was to be put[20] would only be of incidental benefit to the public, since it was to be run by private individuals *for their own profit.*

(1892). In this case the city was allowed to condemn private land to build the wharves even though they might later be used by private individuals under long-term leases from the city. See text accompanying note 8 supra.

14. See generally Jahr, op. cit. supra note 6, §§ 6, 7 (1953).

15. See note 14 supra and accompanying text.

16. 270 N.Y. 333, 1 N.E.2d 153 (1936).

17. Id. at 342, 1 N.E.2d at 155. The New York Constitution was subsequently amended specifically to provide that condemnation of slums for the purpose of building improved public housing constitutes a public use. N.Y. Const. art. XVIII, § 1.

Other states have reached the same result by another, and interesting, route: A state has the right, under its police power, to do anything necessary for the protection of public health, safety or morals. Because of the difficulty in finding a public use in the condemnation of land for slum clearance (see text accompanying note 15 supra), they instead found the area dangerous to the health, safety or morals of the public, thus justifying the taking as a confiscation under the police power. See Schneider v. District of Columbia, 117 F. Supp. 705 (D.D.C. 1953), and Randolph v. Wilmington Housing Authority, 139 A.2d 476 (Del. 1958). The reasoning developed that if a state could confiscate "delinquent" housing under its police power without giving the owner compensation therefor, it had the power, a fortiori, to do the same thing with the owner receiving just compensation, i.e., to take the land under eminent domain.

18. Murray v. LaGuardia, 291 N.Y. 320, 52 N.E.2d 884 (1943).

19. 306 N.Y. 73, 115 N.E.2d 659 (1953).

20. The land was to be used as the site for the New York Coliseum.

Thus the elimination of the slum by the developer, rather than the future use of the land, constituted the public use.[21]

The later use of the land still remained, however, a sufficient justification for condemnation. In *Cannata v. City of New York*,[22] for example, the land involved was for the most part undeveloped, but did contain homes that were anything but slums. The city had decided that this area would be ideal for an industrial park.[23] The court held that:

> an area does not have to be a "slum" to make its redevelopment a public use. . . . The condemnation by the city of an area such as this so that it may be turned into sites for needed industries is a public use. . . .[24]

This sweeping view of what constitutes a public use was foreshadowed in *Berman v. Parker*,[25] decided three years earlier by the United States Supreme Court. There Mr. Justice Douglas said:

> To take for the purpose of ridding the area of slums is one thing; it is quite another . . . , [plaintiff's] argument goes, to take a man's property merely to develop a better balanced, more attractive community . . . . But the means of executing the project are for Congress . . . to determine, once the public purpose has been established . . . . We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.[26]

Thus, once a public use is found to exist, the exercise of eminent domain is proper even though the land is turned over to private enterprise.

The *Cannata* case, then, stands for the proposition that when there exists even an incidental or indirect benefit to the public from the proposed undertaking, so that it can be termed a public use, condemnation will be allowed even though the development be left to, and ownership vest in, private parties.

In the instant case the court held that condemnation of land for a World Trade Center constituted a taking for a public use, since

> any use of the property sought to be condemned that is functionally related to the centralizing of all port business is unobjectionable even though private persons are to be the immediate lessees.[27]

Judge Van Voorhis, in dissent, cited the impossibility of attaining the goal of a true World Trade Center by concentrating the multifarious activities

21. It should be noted that the main controversy in Kaskel was whether or not the subject land actually constituted a slum area. 306 N.Y. at 79-80, 115 N.E.2d at 661-62.

22. 11 N.Y.2d 210, 182 N.E.2d 395, 227 N.Y.S.2d 903 (1962).

23. The "industrial park" to be erected was a privately built project that would house a complex of private industrial businesses. Compare this with the project involved in the instant case.

24. 11 N.Y.2d at 215, 182 N.E.2d at 397, 227 N.Y.S.2d at 905-06.

25. 348 U.S. 26 (1954).

26. Id. at 31-34.

27. 12 N.Y.2d at 388, 190 N.E.2d at 404, 240 N.Y.S.2d at 5. The court continued: "It is the gathering together of all business relating to world trade that is supposed to be the great convenience held out to those who use American ports and which is supposed to attract trade with a resultant stimulus to the economic well-being of the Port of New York." Id. at 388, 190 N.E.2d at 404-05, 240 N.Y.S.2d at 5.

necessary for this end in a small area. Further, even if this were possible, he could not see the logic in finding a public purpose merely because a network of commercial activities is to be centralized "in some nebulous manner in the 13 blocks on the west side of lower Manhattan . . . ."[28] He pointed out what he considered the real reason behind the project—a device to gain operating revenue for the Hudson tubes, and to put the Port Authority in the real estate business.[29]

There have been only a few modern opinions which have refused to depart from the traditional concept of public use.[30] In these cases an attempt was made to strike a balance between the taking of land actually needed for public purposes and the rights of a private citizen to use his land in the manner he sees fit. Thus, in *Hogue v. Port of Seattle*,[31] a statute had been passed which declared certain land in the city of Seattle to be "marginal land"[32] and which authorized its taking by the Port of Seattle[33] to build sites for industrial companies. The court said that while the development might constitute an economic benefit to the whole community, the project was not a public use, but the transferring of land from one private owner to another, who, in the city's judgment, would use the land to better advantage.[34] The court held that the government could not take private land under the aegis of eminent domain for a project which, in its opinion, would result merely in a better utilization of the property.[35]

The fifth amendment's requirement that eminent domain be exercised only where a public use is found reflects the fundamental precept that a person may use his property as he sees fit and that he may not be deprived of it involuntarily for the use of another private individual. On the other hand, the expansion, through the years, of the definition of public use has diminished the constitutional protection. It is true that in today's society most industrial or commercial enterprises which are conducted for the *direct* benefit of private persons result in an *incidental* benefit to the public. The problem facing the courts, then, is to determine what *degree* of public benefit is necessary to constitute a public

28. Id. at 394, 190 N.E.2d at 408, 240 N.Y.S.2d at 10. Continuing: "It is incredible that, under a free enterprise system, the 'centralization' of these multifarious activities could transform the housing of them from private to public purposes within the application of the law of eminent domain." Id. at 396, 190 N.E.2d at 409, 240 N.Y.S.2d at 11.

29. Id. at 396, 190 N.E.2d at 409, 240 N.Y.S.2d at 12.

30. See, e.g., Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P.2d 171 (1959) (en banc); Opinion of Justices, 152 Me. 440, 131 A.2d 904 (1957); In re Opinion of Justices, 332 Mass. 769, 126 N.E.2d 795 (1955); Opinion to Governor, 76 R.I. 365, 70 A.2d 817 (1950).

31. Supra note 30.

32. There were ten statutory definitions of what constituted marginal land. Wash. Rev. Code Ann. § 53.25.030 (1962). The idea, in general, was that land not used to its best advantage comes under this heading.

33. Wash. Rev. Code Ann. §§ 53.25.040, .100 (1962). The Port of Seattle is a governmental organization similar to the Port of New York Authority.

34. 54 Wash. 2d at 838, 341 P.2d at 193.

35. Ibid. This view is likely to remain a minority view in the light of the Supreme Court's decision in Berman v. Parker, 348 U.S. 26 (1954). See note 25 supra and accompanying text.

use. It may well be that New York has gone too far in enlarging the concept of "public use." Several courts in other jurisdictions, while including slum clearance under public use, have stopped short of the holding in *Cannata*, expressly stating that mere economic benefit or desirability is not the basis for the exercise of eminent domain.[36]

An example of the radical changes the New York courts have written into the concept of public use in the span of a few years may be seen through a comparison of the *Kaskel*[37] case with the present decision. *Kaskel* involved the condemnation of land for construction of the New York Coliseum; the instant case involved the taking of land for the construction of a World Trade Center. In both cases the projects were to be operated by private persons for their own benefit and an incidental benefit would accrue to the public. In the present case, in which a public use was found, the benefit was the centralization of diverse commercial activities and the economic returns to be derived therefrom, while in *Kaskel*, the Coliseum was conceived as a benefit for the community as a tourist attraction or a permanent cultural center, with its ensuing economic returns. The main controversy in *Kaskel*, however, was whether the land to be taken actually constituted a slum.[38] It stands to reason that if the court had considered the construction of the Coliseum to be a public use, it would never have reached this problem, since eminent domain would have been proper regardless of the condition of the land before condemnation.

The most telling criticism of the extension of the public use doctrine beyond the field of slum clearance was Judge Van Voorhis' strong dissent in *Cannata*. In arguing that the court had gone too far, he warned of the probable effect of its decision on future cases:

> Conceding that the power of eminent domain has been extended to the elimination of areas that are actually slum, the question here is whether this power can be further extended to the condemnation of factories, stores, private dwellings or vacant land which are properly maintained and are neither substandard nor unsanitary, so that their owners may be deprived of them against their will to be resold to a selected group of private developers whose projects are believed by the municipal administration to be more in harmony with the times.[39]

This prophecy has been fulfilled in the present case.

It may be true that changing needs dictate changing rules, but there comes a point where the right of private property cannot survive along with a broadening concept of public use. This point may have been reached in the law of eminent domain.[40] It is now incumbent upon the courts either to place a limit on the expansion of public use or to redefine the concept of private property to conform with the proper exercise of eminent domain in accordance with the needs of a modern society.

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36. See authorities cited note 30 supra.

37. 306 N.Y. 73, 115 N.E.2d 659 (1953).

38. See note 21 supra.

39. 11 N.Y.2d at 217, 182 N.E.2d at 398, 227 N.Y.S.2d at 908.

40. See Jahr, op. cit. supra note 6, § 6.

Labor Law—Captive Audience Speech Prior to a Representative Election Held Not a Per Se Unfair Labor Practice.—In 1959, the American Retail Federation and Local 880 of the Retail Stores Employees, AFL-CIO, began efforts to organize employees in two branches of the May Department Stores. Throughout the campaign the employer enforced a broad no-solicitation rule.[1] Prior to a 1960 representation election, company representatives addressed employees several times during working hours on company property. Subsequently the union demanded equal opportunity to speak to the employees. The company denied the union's request and the union alleged an unfair labor practice. The National Labor Relations Board, relying on the decision in *Bonwit Teller, Inc. v. NLRB*,[2] held that the employer's actions constituted an unfair labor practice.[3] On appeal, the court of appeals set aside and denied enforcement of the Board's order. A unanimous court held that an employer who made a non-coercive anti-union speech to a "captive audience," while continuing to enforce a broad no-solicitation rule, did not commit an unfair labor practice in refusing the union equal opportunity under similar conditions, unless it was shown that there were not sufficient alternate means of contact open to the union. *May Dep't Stores Co. v. NLRB*, 316 F.2d 797 (6th Cir. 1963).

The origin of the no-solicitation rule was the employer's need to eliminate distraction and insure efficient operation of his business. The application of such a rule outside of working hours had been confined to industries where special circumstances necessitated such a broad rule. Decisions of the NLRB have subsequently limited the broad rule to department stores. This was made clear in *May Dep't Stores*,[4] where the company was permitted to have a no-solicitation rule enforced during working hours, and even during nonworking hours on the selling floor. Although the rule is not directed solely against union solicitation, this is the area of its greatest application. It is not always condoned by the courts, and may, under certain circumstances, be itself an unfair labor practice.[5] The rule must be uniformly applied and its relaxation in favor of any faction without equal opportunity given to competing groups has been held an unfair labor practice.[6]

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1. The rule forbade "non-employees to solicit for any purpose on the company's property. It also prohibited solicitation by employees during the working time of either the employee soliciting or the employee being solicited. Further, the rule prohibited solicitation by any employee during store opening hours on any portion of the company's premises normally visited by the public or where noise or talking was not allowed." May Dep't Stores Co. v. NLRB, 316 F.2d 797, 798 (6th Cir. 1963).

2. 197 F.2d 640, 645 (2d Cir. 1952), cert. denied, 345 U.S. 905 (1953), holding that an employer enforcing a broad no-solicitation rule and making anti-union speeches, prior to an election, on company time and property was guilty of an unfair labor practice if he did not allow the union equal opportunity to do so.

3. May Dep't Stores Co., 136 N.L.R.B. 797 (1962).

4. 59 N.L.R.B. 976 (1944) and cases cited therein.

5. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 (1945); NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956) (dictum).

6. In NLRB v. Waterman S.S. Corp., 309 U.S. 206 (1940), where the company permitted one union to go aboard ship to solicit employees but refused passes to another union, the

The application of the "equal opportunity" concept to "captive audience" speeches given by an employer was first suggested in *NLRB v. Clark Bros.*, in dictum.[7] In that case, the Board found that it was an unfair labor practice for an employer to make even a noncoercive speech to employees who were a "captive audience."[8] This decision was repudiated by Congress in the new (1947) Section 8(c) of the Labor Management Relations Act.[9] But in *Bonwit Teller, Inc. v. NLRB* the court of appeals again disapproved a "captive audience" speech as being an unfair labor practice, by holding that the "equal opportunity" concept would apply where a company also enforced a broad no-solicitation rule.[10] There, the employer made a noncoercive anti-union speech to a "captive audience" prior to a union election. The court gave a broad interpretation to Sections 7 and 8(a)(1) of the Labor Management Relations Act,[11] and concluded that the company

> was . . . required to abstain from campaigning against the Union on the same premises to which the Union was denied access; if it should be otherwise, the practical advantage to the employer who was opposed to unionization would constitute a serious interference with the right of his employees to organize.[12]

Thus, the court enforced the rule enunciated by the NLRB. The Board held that an employer delivering a "captive audience" speech to his employees must give the union the opportunity to reply under substantially equal conditions.[13] Chief Judge Swan's dissent in the appellate decision, however, foreshadowed later decisions on this question. He contended that the majority's

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Court stated that "a fair election required that equal opportunities be given to both. . . ." Id. at 226. In NLRB v. American Furnace Co., 158 F.2d 376 (7th Cir. 1946), the court held an employer guilty of an unfair labor practice for granting permission to an anti-union group to distribute literature without giving an equal opportunity to the union. See NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949), where the Supreme Court held that a denial of equal opportunity to the union of use of a company town's only available meeting hall was an unfair labor practice.

7. 163 F.2d 373, 376 (2d Cir. 1947) (dictum).

8. Clark Bros., 70 N.L.R.B. 802 (1946). A "captive audience" speech is one made to an assembly of employees on company time.

9. "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." 61 Stat. 142 (1947), 29 U.S.C. § 158(c) (1958). See S & S Corrugated Paper Mach. Co., 89 N.L.R.B. 1363 (1950).

10. 197 F.2d 640 (2d Cir. 1952), cert. denied, 345 U.S. 905 (1953).

11. Section 7 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958). Section 8(a)(1) provides: "(a) It shall be unfair labor practice for an employer— (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . ." 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(1) (1958).

12. Bonwit Teller, Inc. v. NLRB, 197 F.2d at 645.

13. Bonwit Teller, Inc., 96 N.L.R.B. 608, 612 (1951).

decision was contrary to the obvious intent of Congress,[14] in that the employer's privilege of "arguing against unionization without any limitation, except that the expression of his views must contain 'no threat of reprisal or force or promise of benefit,' "[15] was being abridged. In the following year, the Board applied the *Bonwit Teller* rule in *American Tube Bending Co.*[16] This, however, was the last of the cases in the *Bonwit Teller* mold, for a newly constituted Board announced the first of a series of decisions[17] that served to weaken and destroy the *Bonwit Teller* rationale. In *Livingston Shirt Corp.*,[18] the Board stated:

> In the original *Bonwit Teller* case, the Board . . . found that a "fundamental consideration" in support of its decision was the right of employees under Section 7 to "hear both sides under circumstances which approximate equality." We have no quarrel with this principle, but we think that it is to be achieved not by administratively grafting new limbs on the statute, but by a strict enforcement of those provisions of the statute which afford employers the right of free uncoercive speech and grants [sic] employees the protected right to join labor unions free from coercion or discrimination.[19]

The Board contended that support for the *Bonwit Teller* rule could be found neither in the language of the Labor Management Relations Act nor in the intent of Congress,[20] and held that it is not an unfair labor practice for the employer to make a noncoercive, anti-union speech to a "captive audience," *provided* that he is not enforcing a broad no-solicitation rule.[21]

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14. "[T]his section [section 8(c)] provides that if, under all the circumstances there is neither an expressed nor implied threat of reprisal, force, or offer of benefit, the Board shall not predicate any finding of unfair labor practice." S. Rep. No. 105, 81st Cong., 1st Sess. 24 (1947). The House of Representatives concurred: "This [section 8(c)] guarantees free speech to employers, to employees, and to unions. Although the Labor Board says it does not limit free speech, the decisions show that it uses against people what the Constitution says they can use freely. . . . The bill corrects this, providing that nothing anyone says shall constitute or be evidence of an unfair labor practice unless it, by its own express terms, threatens force or economic reprisal. This means that a statement may not be used against the person making it unless it, standing alone, is unfair within the express terms of Section (7) and (8) of the Amended Act." H.R. Rep. No. 245, 81st Cong., 1st Sess. 32 (1947).

15. Bonwit Teller, Inc. v. NLRB, 197 F.2d at 646 (dissenting opinion).

16. 102 N.L.R.B. 735 (1953), enforced, 205. F.2d 45 (2d Cir. 1953).

17. Livingston Shirt Corp., 107 N.L.R.B. 400 (1953); Nutone, Inc., 112 N.L.R.B. 1153 (1955); Avondale Mills, 115 N.L.R.B. 840 (1956); May Dep't Stores Co., 136 N.L.R.B. 797 (1962).

18. 107 N.L.R.B. 400 (1953).

19. Id. at 406.

20. "The majority in Bonwit Teller did not cite, nor have we been able to find, any support in the statutory language or legislative history for holding that the employer who exercises his own admitted rights under the statute thereby incurs an affirmative obligation to donate his premises and working time to the union for the purpose of propagandizing the employees." Ibid.

21. Id. at 409.

In *NLRB v. F. W. Woolworth Co.*,[22] the court was faced with an attempt by the Board to apply the *Bonwit Teller* rationale to a factual situation similar to *Bonwit Teller* and the instant case.[23] The court made it clear that Section 8(c) of the Labor Management Relations Act applied to cases of this type. Basing its decision on Chief Judge Swan's dissent in *Bonwit Teller, Inc. v. NLRB*,[24] the court stated that the rights granted the employer by section 8(c) insure his ability to speak to his employees on his own time without committing an unfair labor practice. The court concluded that the exercise of this right will not be declared a discriminatory application of a no-solicitation rule.[25]

Subsequent decisions established new guidelines to fill the void left by the faltering *Bonwit Teller* rule. Several emphasized that the total picture was to be considered in no-solicitation rule cases.[26] Only if the no-solicitation rule, when coupled with all the other circumstances of the case, results in the destruction of all effective avenues of approach to the employee, is the employer guilty of an unfair labor practice.

In *NLRB v. Babcock & Wilcox Co.*[27] the Supreme Court overruled the Board[28] and enunciated a guide for no-solicitation rules in general. There, the union was forbidden to distribute handbills on company property, although the company disseminated literature of its own. The Court stated that "an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees . . . ."[29] It went on to declare that if circumstances do exist that make contact by other means ineffective, the employer must then allow the union to use the means otherwise prohibited to it. In the absence of such conditions there is no unfair labor practice.

Shortly thereafter, faced with a similar factual situation, the Supreme Court in *NLRB v. United Steelworkers*[30] made it clear that the *Bonwit Teller* rule no longer applied. Citing the dissent in that case, it said:

Of course the rules had the effect of closing off one channel of communication; but

22. 214 F.2d 78 (6th Cir. 1954).

23. F. W. Woolworth Co., 102 N.L.R.B. 581 (1953).

24. 197 F.2d at 646.

25. "The dissenting opinion of Chief Justice [sic] Swan in the Bonwit Teller case is the correct holding, that Section 8(c) has direct and controlling application and that a no-solicitation rule cannot cut down the rights given the employer under Section 8(c). In light of the sweeping statutory provision and the legislative history a no-solicitation rule cannot prevent an employer from conferring with his own employees on his own premises and on his own time and the rule is not discriminatorily applied because of the employer's refusal to permit the union to campaign on its premises when there are adequate facilities for access to the employees." 214 F.2d at 81.

26. See NLRB v. United Steelworkers, 357 U.S. 357, 363-64 (1958); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); NLRB v. Seamprufe, Inc., 222 F.2d 858 (10th Cir. 1955), aff'd, 351 U.S. 105 (1956).

27. Supra note 26.

28. Babcock & Wilcox Co., 109 N.L.R.B. 485 (1954).

29. 351 U.S. at 112.

30. 357 U.S. 357 (1958).

the Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it. . . . The Board . . . may find relevant alternative channels available for communications on the right to organize. When this important issue is not even raised before the Board and no evidence bearing on it is adduced, the concrete basis for appraising the significance of the employer's conduct is wanting.[31]

In the instant case, the Board, in an attempt to revive the *Bonwit Teller* rule, stated that to allow the employer to make a "captive audience" speech without allowing the union equal opportunity to speak would result in a "glaring 'imbalance in opportunities for organizational communication.' "[32] As in *Bonwit Teller*, the Board felt that "equal opportunity" required that the union be allowed to make a speech under the same conditions. Nothing less was considered suitable.

The court of appeals rebutted the Board's argument. It stated that there was no showing that other effective means of contact or communication with the employees were unavailable.[33] The court concluded that the fact "that a speech during working time on company premises may be preferable to use of contacts away from the work-site cannot in and of itself render the employer's conduct unfair under the Act."[34]

Thus, the court of appeals thwarted an attempt to revive a rule inconsistent with legislative intent and recent decisions. The effect of its decision was to eliminate the proviso in *Livingston Shirt* that the employer not be enforcing a broad no-solicitation rule,[35] and to require that the Board pay more heed to the ruling of the Supreme Court in *United Steelworkers*. Thus, the instant case, coupled with those preceding it, clearly indicates that it is permissible to make a "captive audience" speech while enforcing a broad no-solicitation rule, providing the total picture does not reflect a substantial imbalance in opportunities for organizational communication.

Standing to Sue—Taxpayers' Suits—Taxpayer's Right to Challenge Constitutionality of State Expenditure Denied.—Plaintiff, a citizen and taxpayer of New York State, placed small wagers[1] at various race tracks throughout the State. He later brought an action for a declaration that Section 45-a

31. Id. at 363-64.

32. May Dep't Stores Co., 136 N.L.R.B. at 801.

33. "There [were] . . . no findings of non-accessibilities by the Board in this case. There is no showing that the employees, away from their employer's premises, are removed or isolated from normal, usual communications. Indeed, there appears from the record every indication that they were accessible through alternative channels." May Dep't Stores Co. v. NLRB, 316 F.2d 797, 801 (6th Cir. 1963).

34. Id. at 800-01.

35. See note 21 supra and accompanying text.

1. Plaintiff wagered a total of $18 at the defendant race tracks.

of the Pari-Mutuel Revenue Law,[2] which provides for reimbursement to all race tracks which intend to make capital improvements,[3] is unconstitutional.[4] The supreme court, special term, entered judgment dismissing the complaint on the ground that plaintiff lacked standing to sue, which was affirmed by the appellate division.[5] On appeal, the New York Court of Appeals affirmed and held that since plaintiff was an unaggrieved citizen-taxpayer he lacked standing to challenge the constitutionality of the statute. *St. Clair v. Yonkers Raceway, Inc.*, 13 N.Y.2d 72, 192 N.E.2d 15, 242 N.Y.S.2d 43 (1963).

Throughout the United States "at least 34 states clearly sanction taxpayers' suits at the state level . . . [while] two states—New York and New Mexico—squarely prohibit such actions."[6] At the present time, the Supreme Court of the United States follows the minority rule.[7]

The doctrine of "standing to sue" has played an important role in the field of constitutional law. Where a court finds that a plaintiff lacks standing, it will usually refuse to decide the case on its merits. In determining whether a plaintiff has standing, most courts will attempt to discover whether a "peculiar interest" of the plaintiff is involved, which includes either a pecuniary loss[8] or a violation of an individual legal right.[9]

It is important to note that the two states which refuse to allow a taxpayer to maintain an action against a state official or to challenge a state expenditure do permit a taxpayer to bring an action against a municipal official and to contest the validity of a municipal expenditure. This has been justified by the courts of New Mexico by means of an analogy to a private corporation. The theory is that since a shareholder in a private corporation may bring a derivative action to recover for the wrongful acts of its officers, then for the same reason a taxpayer should have the right to maintain a suit to challenge the wrongful expenditure of municipal funds.[10]

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2. N.Y. Unconsol. Laws § 8020 (McKinney 1961).

3. Certain requirements had to be met before there could be reimbursement. N.Y. Unconsol. Laws § 8020 (10) (McKinney 1961). The money used for reimbursement came from funds that had previously gone to the State as taxes.

4. The contention was that the statute, as enacted, violated N.Y. Const. art. VII, § 8, which prohibits the expenditure of public funds to private parties. Plaintiff sought to have the race tracks pay to the State the full amount of taxes the State would have received had the statute never been passed.

5. St. Clair v. Yonkers Raceway, Inc., 17 App. Div. 2d 899 (4th Dep't 1962) (memorandum decision).

6. St. Clair v. Yonkers Raceway, Inc., 13 N.Y.2d at 78, 192 N.E.2d at 17, 242 N.Y.S.2d at 46 (dissenting opinion).

7. Id. at 76, 192 N.E.2d at 15, 242 N.Y.S.2d at 44. See Frothingham v. Mellon, 262 U.S. 447 (1923).

8. See, e.g., Doremus v. Board of Educ., 342 U.S. 429 (1952).

9. See, e.g., Brown v. Board of Educ., 349 U.S. 294 (1955). This factor also includes the element of coercion, i.e., the plaintiff may have been compelled to do something against his volition. See, e.g., Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203 (1948).

10. Shipley v. Smith, 45 N.M. 23, 107 P.2d 1050 (1940) (taxpayer's action against a county board to enjoin payment of public moneys of the county under an illegal contract). See generally 4 Dillon, Municipal Corporations §§ 574-80 (5th ed. 1911). The question of

In New York a taxpayer derives authority to maintain a suit against a municipal officer or to challenge a municipal expenditure from a specific statute.[11] The statute has been construed, however, to exclude actions against state officials or actions to challenge state expenditures.[12]

The prohibition against taxpayers' suits in New York dates back to the mid-nineteenth century, to the case of *Doolittle v. Supervisors of Broome County*,[13] and the rationale of that decision prevails today. In *Doolittle*, plaintiffs were freeholders who sought a judgment to avoid an act of the county board of supervisors which had the effect of dividing their town into three separate towns. They complained that the political division had been directed contrary to state law. The court dismissed, reasoning that where a public wrong is alleged the remedy should be sought by prosecution initiated by the state, and that relief cannot be given to individuals who have not suffered personal injury.[14] One of the arguments advanced by *Doolittle* was that if it granted relief to these petitioners, the floodgates of litigation would be opened at the whim of individual taxpayers, regardless of the *bona fides* of their complaints. The court also characterized the issue as a political question.

The New York rule on standing to sue was still more clearly expressed in *Schieffelin v. Komfort*,[15] where the plaintiff, a citizen and taxpayer of New York City, sought to enjoin state election officials from taking steps preliminary to the nomination and election of delegates to a constitutional convention. The court held that the plaintiff lacked the requisite standing since he had not alleged the violation of any rights personal to him, as distinguished from rights held in common with all other state citizens.[16] The implication from both the

whether New Mexico would allow a state taxpayer to contest the validity of a state statute was decided in 1926 in Asplund v. Hannett, 31 N.M. 641, 249 Pac. 1074 (1926), where the court held that the citizen-taxpayer lacked standing to maintain his action. "'It is not the duty of this or any other court to sit in judgment upon the action of the legislative branch of the government, except when the question is presented by a litigant claiming to be adversely affected by the legislative act on the particular ground complained of.'" Id. at 650, 249 Pac. at 1077. "'[P]laintiff must show that he has a special interest, in respect to which he will suffer special injury.'" Id. at 656, 249 Pac. at 1079.

11. N.Y. Munic. Law § 51.

12. Olmsted v. Meahl, 219 N.Y. 270, 114 N.E. 393 (1916).

13. 18 N.Y. 155 (1858).

14. "[W]here there is no direct individual injury, no action can be maintained by a citizen on the ground that his interests as a member of the state have been interfered with or disturbed . . . ." Id. at 159. "Every person may legally question the constitutional validity of an act of the legislature which affects his private rights; but if a citizen may maintain an action for such a purpose in respect to his rights as a voter and tax-payer, the courts may regularly be called upon to revise all laws which may be passed." Id. at 162. "[T]he fiscal business of the state would come to be transacted mainly in the courts." Id. at 163.

15. 212 N.Y. 520, 106 N.E. 675 (1914).

16. "There is no . . . statute expressly permitting an individual taxpayer to sustain an action to test the constitutionality of an act of the legislature without showing that his civil or property rights are specially and particularly affected and in which he demands and is entitled to relief based upon his rights. The fact that the Constitution makes express provision for a review by the Supreme Court of an act of the legislature apportioning the

Doolittle and *Schieffelin* cases is that the courts will not decide "political questions." The reasoning of *Schieffelin* was applied by the appellate division in *Bull v. Stichman*,[17] where the plaintiff, a citizen and taxpayer, sought a declaratory judgment that a $128,000 state grant to Canisius College was an unconstitutional "establishment of religion." The court of appeals,[18] in a memorandum decision, rejected the plaintiff's argument that the necessity for a "special or peculiar interest" should be discarded in cases where the issue was one of great public importance and all interested parties were before the court.[19] *Heim v. McCall*,[20] however, might be taken as a silent relaxation of the requirements of standing in taxpayers' suits. From the facts of the case it appeared that the plaintiff lacked standing, but nonetheless the appellate division decided the case on the merits without reference to the plaintiff's standing,[21] and the court of appeals followed suit although it reversed on the merits.[22] The case

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state into districts, at the suit of any citizen, and refrains from providing for such a review in other cases, is of itself evidence that it was not the intention of the people by the Constitution to confer upon the judicial branch of government general authority at the suit of a citizen as such to sit in review of the acts of other branches of government." Id. at 529, 106 N.E. at 677. "The rights to be affected must be personal as distinguished from the rights in common with the great body of people. . . . Jurisdiction, being the power to hear and determine, is not given to the courts as guardians of the rights of the people generally against illegal acts of the executive or legislative branches of government." Id. at 530, 106 N.E. at 677-78.

17. 273 App. Div. 311, 78 N.Y.S.2d 279 (3d Dep't 1948). "'The clear weight of authority in this state is against the alleged power and authority of the courts to pass upon the constitutionality of a statute except in an action or proceeding in behalf of a person whose special, peculiar personal rights are affected thereby.'" Id. at 313, 78 N.Y.S.2d at 281.

18. Bull v. Stichman, 298 N.Y. 516, 80 N.E.2d 661 (1948) (memorandum decision), affirming 273 App. Div. 311, 78 N.Y.S.2d 279 (3d Dep't).

19. The plaintiff relied on Kuhn v. Curran, 294 N.Y. 207, 61 N.E.2d 513 (1945). There a taxpayer brought proceedings for orders in the nature of mandamus directing, in effect, that state officers act as if certain acts of the legislature had never been passed. The act would have altered the judicial districts of the State. The court ignored the standing issue and stated that "in view of the importance to the public of an authoritative determination of that question at the present time, we do not pause to consider whether the question is presented in appropriate proceedings." Id. at 213, 61 N.E.2d at 515. One year after Bull v. Stichman, in Lederman v. Board of Educ., 196 Misc. 873, 95 N.Y.S.2d 114 (Sup. Ct. 1949), rev'd on other grounds, 276 App. Div. 527, 96 N.Y.S.2d 466 (2d Dep't), aff'd sub nom. Thompson v. Wallin, 301 N.Y. 476, 95 N.E.2d 806 (1950), the court cited Kuhn v. Curran, supra, stating that "it being vitally important to the public at large . . . that the real issue herein be speedily determined, the court should not 'pause to consider whether the question is presented in appropriate proceedings.'" Id. at 877, 95 N.Y.S.2d at 118.

20. 165 App. Div. 449, 150 N.Y. Supp. 933 (1st Dep't 1914).

21. "With regard to . . . [Heim's] appeal we are not unmindful of the recent expressions of the Court of Appeals adverse to the maintenance of so-called taxpayers' actions to test the validity of legislative acts. . . . In the present case, however, this objection is not raised by the respondents, and since it is represented to us that the matter is one of great public exigency, as to which all parties interested seem to desire speedy determination, we have concluded to pass upon the appeal upon its merits." Id. at 451-52, 150 N.Y. Supp. at 936.

22. Heim v. McCall, 214 N.Y. 629, 108 N.E. 1095 (1915) (memorandum decision).

went to the Supreme Court of the United States[23] where again the issue of standing was ignored.[24]

The New York rule on standing follows the reasoning of the United States Supreme Court in *Frothingham v. Mellon*,[25] applying the *Frothingham* rule at the state level. In *Frothingham* the Supreme Court denied Mrs. Frothingham, a resident of Massachusetts and a United States taxpayer, the right to challenge the constitutionality of the Federal Maternity Act.[26] The only injury alleged by the plaintiff was that congressional appropriations contemplated under the Maternity Act would necessarily increase her future federal tax burden. The Court dismissed the case for want of jurisdiction,[27] reasoning almost precisely the way the New York Court of Appeals had in *Doolittle* and *Schieffelin*.[28] The Court called a taxpayer's interest in federal funds *de minimis*.[29]

Most states today permit the taxpayer to challenge the validity of state legislation. Jurisdiction is predicated on either (1) a statute authorizing the

23. Heim v. McCall, 239 U.S. 175 (1915).

24. "There seems to have been no question raised as to the right of Heim to maintain the suit, although he is not one of the contractors nor a laborer of the excluded nationality or citizenship. The Appellate Division felt that there might be objection to the right, under the holding of a cited case. The Court of Appeals, however, made no comment, and we must—certainly may—assume that Heim had a right of suit . . . ." Id. at 186-87. The Supreme Court was here adhering to the rule, later established by Frothingham v. Mellon, 262 U.S. 447 (1923), that if a state permits taxpayers' suits the Court will not decline to exercise its jurisdiction.

25. 262 U.S. 447 (1923) (Massachusetts v. Mellon).

26. 42 Stat. 224 (1921).

27. "We have reached the conclusion that the cases must be disposed of for want of jurisdiction without considering the merits of the constitutional questions. The appellant [Frothingham] . . . has no such interest in the subject-matter, nor is any such injury inflicted or threatened, as will enable her to sue." 262 U.S. at 480.

28. "If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned." Id. at 487. "We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. . . . The party who invokes the power must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." Id. at 488.

29. The interest of a taxpayer "in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." Id. at 487. Note, however, that the Supreme Court does permit taxpayer suits on the municipal level. Crampton v. Zambriskie, 101 U.S. 601 (1879). The reasons given for permitting the municipal action are based upon the nature of the powers exercised by the municipality, "the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries . . . ." Id. at 609.

action;[30] (2) a refusal to distinguish a municipal taxpayer's suit from a state taxpayer's action;[31] or (3) the theory that a state taxpayer has an equitable interest in the state's funds, and when such funds are exhausted the burden of replenishing them necessarily falls upon the taxpayer.[32]

In brief, the majority rule is founded upon the proposition that " 'a wrongful and illegal disposal of public funds or property by those who have been entrusted with their care and preservation for public purposes, will necessarily lead to increased rates of taxation to restore the loss, and thereby become the efficient cause of special and peculiar damage to the taxpayer . . . .' "[33]

The court in the instant case made the point that the law of New York State is "also the law of the United States of America."[34] This may indicate that if the Supreme Court held that a United States taxpayer has standing to challenge a congressional appropriation, New York would follow suit on the state level. A federal decision to this effect would require an overruling or ignoring of *Frothingham*.

New York's adherence to the principles of *Schieffelin v. Komfort*, and the Supreme Court's adherence to *Frothingham*, have been criticized[35] on the grounds that the "reasons relied on by the Supreme Court . . . are contrary to . . . our present tax system . . . ,"[36] that state law is almost uniformly opposed to the doctrine,[37] and that "the fact that the Supreme Court before developing the Frothingham doctrine upheld the standing of federal taxpayers shows that nothing in the Constitution compels the denial of such standing . . . ."[38]

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30. See State v. Yelle, 52 Wash. 2d 856, 329 P.2d 841 (1958) (en banc) (where the state attorney general refused to challenge the validity of a statute, a taxpayer could do so); Mass. Ann. Laws ch. 29, § 63 (1961).

31. See Turnipseed v. Blan, 226 Ala. 548, 148 So. 116 (1933); Fergus v. Russell, 270 Ill. 304, 110 N.E. 130 (1915). Fergus is the leading case for the majority rule in this country. There a taxpayer sought to have certain provisions of an omnibus bill passed by the state legislature declared unconstitutional. The court permitted the suit because a taxpayer could challenge the validity of a municipal expenditure and the court saw no reason to deny a state taxpayer the same right. Id. at 315, 110 N.E. at 136. Another reason for the court's decision that the taxpayer could maintain the action was his equitable ownership in state funds. Id. at 314, 110 N.E. at 135.

32. See Farrell v. Oliver, 146 Ark. 599, 226 S.W. 529 (1921); Turkovich v. Board of Trustees, 11 Ill. 2d 460, 143 N.E.2d 229 (1957); Rein v. Johnson, 149 Neb. 67, 30 N.W.2d 548 (1947); Schillito v. City of Spartanburg, 214 S.C. 11, 51 S.E.2d 95 (1948).

33. Annot., 131 A.L.R. 1230 (1941).

34. 13 N.Y.2d at 76, 192 N.E.2d at 15, 242 N.Y.S.2d at 44.

35. 3 Davis, Administrative Law Treatise § 22.09 (1958).

36. Ibid.

37. Ibid.

38. Ibid. Professor Davis was probably referring to Bradfield v. Roberts, 175 U.S. 291 (1899), where an action brought by a citizen and taxpayer to enjoin the Treasurer of the United States from allocating funds to the directors of a hospital, on the ground that the act authorizing the agreement to make payment was unconstitutional. The Court overlooked the issue of standing and decided the case on its merits. "Passing the various objections made to the maintenance of this suit on account of an alleged defect of parties, and also in regard to the character in which the complainant sues, merely that of a

A review of the Court's decisions in the "prayer cases"[39] leads one to infer that the Supreme Court is now merely paying lip service to the doctrine of standing. Prior to *Engel v. Vitale*[40] a petitioner had to show either some pecuniary loss[41] or an invasion of personal liberty[42] to maintain an action in the federal courts. The petitioners in *Engel* were residents and taxpayers of New York. It was granted that they suffered no pecuniary loss, and the Supreme Court appeared satisfied that no coercion existed.[43] Although the question of petitioners' standing was not discussed by the Court, it may well be that *Engel* marks the beginning of the end of *Frothingham*:[44]

> One finds asserted in *Engel* [and *Schempp*] no requirement that a litigant, if he would invoke judicial power to forbid governmental action, must show that by it he "has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."[45]

The majority in the instant case—quoting from *Schieffelin*—equated the standing issue with the doctrine of political questions.[46] But is not the prognosis for the doctrine of political questions rather poor—at least on the federal level—after the Supreme Court's decision in *Baker v. Carr*?[47] The very issue which had been labeled a "political question" in *Colegrove v. Green*[48] was there decided by the Court, albeit with a shadowy though traditional distinguishing of *Colegrove*. In *Baker v. Carr*, suit was brought by a group of Tennessee voters who sought a declaration that a state statute providing for the apportionment of the state legislature was unconstitutional. Plaintiffs contended that by reason of the shifting of population centers over the years the statutory apportionment not only was obsolete but also operated to deprive them of equal voting rights contrary to the equal protection clause of the fourteenth amendment. The lower courts dismissed on the authority of *Colegrove*. Mr. Justice

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citizen and taxpayer of the United States . . . we come to the main question . . . ." Id. at 295.

39. School District v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

40. Supra note 39.

41. See, e.g., Doremus v. Board of Educ., 342 U.S. 429 (1952).

42. See, e.g., Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203 (1948).

43. "[T]here is no element of compulsion or coercion in New York's regulation requiring that public schools be opened each day with . . . [a] prayer . . . ." 370 U.S. 421, 438 (1962) (concurring opinion).

44. The facts in the Schempp case were quite similar to those in Engel, and again the Court decided the case on its merits. The only mention made of the issue of standing is found in a footnote to the majority opinion. "It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain." 374 U.S. 224 n.9.

45. Sutherland, Establishment According to Engel, 76 Harv. L. Rev. 25, 26-27 (1962).

46. "Jurisdiction has never been directly conferred upon the courts to supervise the acts of other departments of government." 13 N.Y.2d at 76, 192 N.E.2d at 16, 242 N.Y.S.2d at 45.

47. 369 U.S. 186 (1962).

48. 328 U.S. 549 (1946) (Illinois residents sought to have declared invalid a statute apportioning the state's congressional districts).

Frankfurter had said in *Colegrove, inter alia*, that the Court lacked jurisdiction because of the political nature of the controversy. *Baker v. Carr* was almost a complete reversal of the *Colegrove* rule. It would be most difficult, if not facetious, to attempt to distinguish the two cases. Mr. Justice Brennan in *Baker* purported to do so. But the question remains whether he really meant what he said when he spoke of distinctions.

Speaking for the majority in the present case, Judge Burke noted that New York courts "have always held that the constitutionality of a State statute may be tested only by one personally aggrieved thereby. . . ."[49] The validity of Judge Burke's statement is questionable. In cases involving nonfiscal matters the court has allowed a taxpayer to maintain his action even though not personally aggrieved.[50] It is fair to say that in the nonfiscal area the New York courts tend to overlook the doctrine of standing.[51]

If the New York taxpayer cannot judicially challenge legislative expenditures his only remedy is found in the voting booth. Is this an adequate or reasonable remedy? On election day a legislator's vote on a particular appropriation bill may be a thing of the distant past, long forgotten.

Judge Fuld, dissenting in the instant case, argued that continued adherence to the minority rule can lead to nothing but citizen apathy in public affairs.[52] His reasoning supposes that a civic interest is to be measured by litigious activity, a proposition which is palpably defective.

Judge Dye in his dissenting opinion seems to have posed the problem, and the answer as well, more realistically:

> If a choice is to be made between constitutional observance and a rule such as *Doolittle* . . . and *Schieffelin* . . . the choice should and must be the Constitution. . . . When wrong is threatened or actually accomplished, every taxpayer suffers a loss, for in the end it is his pocketbook that must bear the ultimate burden. The personal monetary interest should not be the test, but whether, in fact, the Constitution of the State of New York is being flouted.[53]

Although Judge Dye's conclusion would be the demise of the doctrine of stand-

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49. 13 N.Y.2d at 76, 192 N.E.2d at 15-16, 242 N.Y.S.2d at 44.

50. See Kuhn v. Curran, 294 N.Y. 207, 61 N.E.2d 513 (1945); Andresen v. Rice, 277 N.Y. 271, 14 N.E.2d 65 (1938). In Andresen, petitioner sought an order of mandamus to direct the Civil Service Commission of New York to classify the position of state trooper in the competitive class of the Division of Police. He contended that the authority given by a legislative act to the superintendent of police, to fix qualifications and to pass upon the standing of applicants, was unconstitutional. The court stated: "The point has been raised that the petitioner here is not capable of presenting this matter to the court, as he has not applied for a position on the force. He is of age to make such application, but, more than that, he is a citizen and resident of the State of New York, and, being such, is capable of presenting to the courts his petition. . . ." Id at 281, 14 N.E.2d at 69.

51. Cash v. Bates, 301 N.Y. 258, 93 N.E.2d 835 (1950); Andresen v. Rice, supra note 50.

52. "The apathy of the average citizen concerning public affairs has often been decried; under the court-made rule now reaffirmed, it is being compelled." 13 N.Y.2d at 81, 192 N.E.2d at 19, 242 N.Y.S.2d at 48.

53. 13 N.Y.2d at 81-82, 192 N.E.2d at 19, 242 N.Y.S.2d at 49.

ing in New York, if it be true that the other branches of government are reluctant to correct unconstitutional exercises of power,[54] is it not the lesser of two evils?

Warranty—Nonnegligent Airplane Assembler Held Liable for Wrongful Death of Passenger Not in Privity.—A wrongful death action resulting from an airplane crash was brought by plaintiff's administratrix against the assembler of the airplane (Lockheed) and the manufacturer of its altimeter (Kollsman) for breach of their respective implied warranties of marketability and fitness.[1] The defective altimeter was alleged to have caused the fatal crash. The New York Supreme Court dismissed the complaint and the appellate division affirmed.[2] The court of appeals in a four-to-three decision held that the airplane assembler's implied warranty of fitness ran in favor of the passenger despite the lack of privity of contract. Stating that such recovery afforded the plaintiff *adequate protection,* the court further held that it was *not necessary* to hold the manufacturer of the defective part liable on its warranty. *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

Originally, a manufacturer was not liable for damages resulting from his negligence unless he had personally contracted with the injured party.[3] A distinction was later recognized between an act of negligence "imminently dangerous to the lives of others"[4] and one that was not. In the former case, the negligent party was liable to the injured party, whether or not there was a contract between them; in the latter, the negligent party was liable only to the one with whom he had contracted, on the ground that "negligence is a

54. "Yet who will chide a court for having dared to right a serious and long-standing wrong when the Legislative and Executive Branches of the Government had defaulted in their prior and paramount duty to provide a remedy?" N.Y. Times, Oct. 14, 1963, p. 22, col. 5.

1. On the theory of negligence, the action originally joined the air carrier as a defendant. The suit was discontinued after the appellate division affirmed special term's dismissal of the complaint. 12 App. Div. 2d 906, 214 N.Y.S.2d 640 (1st Dep't 1961) (memorandum decision).

2. 23 Misc. 2d 215, 199 N.Y.S.2d 134 (Sup. Ct. 1960), aff'd mem., 12 App. Div. 2d 906, 214 N.Y.S.2d 640 (1st Dep't 1961).

3. Mayor of Albany v. Cunliff, 2 N.Y. 165 (1849). "If A. builds a wagon and sells it to B., who sells it to C., and C. hires it to D., who in consequence of the gross negligence of A. in building the wagon is overturned and injured, D. cannot recover damages against A., the builder. A.'s obligation to build the wagon faithfully, arises solely out of his contract with B. The public have nothing to do with it. Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence; and such negligence is not an act imminently dangerous to human life." Thomas v. Winchester, 6 N.Y. 397, 408 (1852).

4. Id. at 410.

breach of the contract."[5] Thus, *Thomas v. Winchester*[6] held the manufacturer of an erroneously labeled poison liable to an injured party not in privity,[7] while in *Loop v. Litchfield*,[8] where the manufacturer brought the buyer's attention to the product's defect and sold it at a reduced rate, he escaped liability to a subsequent user.[9] However, in *Devlin v. Smith*,[10] the manufacturer of a scaffold, who was unaware of the defect, was held liable to one not in privity on the theory that he owed a duty of proper diligence in construction.[11] The court of appeals in *MacPherson v. Buick Motor Co.*[12] held the manufacturer of an automobile liable in negligence to a subsequent user, with whom he was not in privity, for damages sustained when the automobile collapsed as the result of a defective wheel. Although Buick had purchased the wheel from another manufacturer, it could have uncovered the defect by reasonable inspection.[13] The issue was whether the defendant owed a duty of care to anyone but the *immediate purchaser*. The court decided to extend the doctrine of *Thomas v. Winchester*[14] to cover "a thing [the nature of which] is that it is reasonably certain to place life and limb in peril when negligently made. . . ."[15]

5. Ibid.

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

7. Ibid. The action was brought by a husband and wife to recover damages for injuries sustained from the defendant's putting up, labeling and selling as the extract of dandelion (a simple and harmless medicine) a jar of the extract of belladonna (a deadly poison). Although defendant here was a remote vendor, he was held liable to the plaintiffs because his negligence put human life in imminent danger. A falsely labeled poison is likely to injure anyone into whose possession it comes. Since the danger can be foreseen, there is a duty of special care to prevent the injury.

8. 42 N.Y. 351 (1870).

9. Ibid. The case involved a defect in a small balance wheel used on a circular saw. Over four years after the sale the wheel broke, and plaintiff's intestate was killed while using the machine with the buyer's consent. The court held that the manufacturer was not answerable to the plaintiff because the bursting of the wheel and the injury to human life were neither the natural result nor the expected consequence of the manufacture and sale of the wheel.

10. 89 N.Y. 470 (1882).

11. Ibid. Defendant was a contractor who built a scaffold for a painter. Plaintiff's intestate, an employee of the painter, was injured when the scaffold collapsed as a result of improper construction. The contractor was held liable on the theory that he knew that the scaffold, if improperly constructed, was a dangerous trap. He knew that it was to be used by workmen other than his immediate purchaser. Consequently, he owed them a duty to use proper diligence in construction, independently of his contract with the painter.

12. 217 N.Y. 382, 111 N.E. 1050 (1916).

13. It was not claimed that Buick knew of the defect and wilfully concealed it. The charge was in negligence rather than fraud. Id. at 385, 111 N.E. at 1051.

14. This case dispensed with the privity requirement when the injury resulted from "things which in their normal operation are implements of destruction . . . ." Id. at 389, 111 N.E. at 1053.

15. Ibid. Judge Cardozo, writing for the majority, stated that "it is a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used without new tests, then, irrespective

When the purchaser is unable to prove negligence[16] his alternative is to sue for breach of either an express or an implied warranty that the product is fit for the purpose intended, the obvious advantage being that the plaintiff is not required to prove negligence on the defendant's part.

For many years, if the injured party was not the purchaser, we was unable to sue for breach of warranty. The leading New York case was *Chysky v. Drake Bros.*,[17] where the defendant baked a nail into one of its cakes, with the result that the plaintiff was injured when she bit into the cake. Plaintiff was not the purchaser, but his employee.[18] She sought recovery under the statutory warranty set forth in Section 96 of the New York Personal Property Law, on the theory that the vendor of food warrants that it is fit for human consumption, and that the warranty inures to her benefit.[19]

The court distinguished the case from *MacPherson v. Buick Motor Co.*,[20] noting that recovery in *MacPherson* was based on defendant's negligence. Plaintiff in *Chysky* limited her right to recover to breach of warranty, despite the fact that there was no privity of contract between herself and the defendant. Absent this contractual relationship, the court found no authority on which to base an award in favor of plaintiff, and accordingly dismissed the complaint.[21]

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of contract, the manufacturer of this thing of danger is under a duty to make it carefully." Ibid.

16. The plaintiff suing on a negligence theory in a products liability case must usually rely on res ipsa loquitur, since he rarely has any direct proof as to what caused the defect in the product. In order to recover, however, the plaintiff must show the particular negligent act which resulted in his injury. Manley v. New York Tel. Co., 303 N.Y. 18, 100 N.E.2d 113 (1951). Since the product ordinarily passes through the hands of many dealers, this may make recovery in negligence impossible. See Hardie v. Charles P. Boland Co., 205 N.Y. 336, 98 N.E. 661 (1912); Jacobs v. Childs Co., 166 N.Y. Supp. 798 (New York Munic. Ct. 1916). Another obstacle to the plaintiff is that the inference of negligence may often be rebutted by evidence showing the precautions taken by the defendant in handling the product. See Shepard v. Beck Bros., Inc., 131 Misc. 164, 225 N.Y. Supp. 438 (New York City Ct. 1927).

17. 235 N.Y. 468, 139 N.E. 576 (1923).

18. Plaintiff was employed by the purchaser as a waitress for a weekly salary with board and lodging furnished. Id. at 470-71, 139 N.E. at 577.

19. N.Y. Pers. Prop. Law § 96 provides: "[T]here is no implied warranty or condition as to the quality of fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: 1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

20. 235 N.Y. at 473, 139 N.E. at 578.

21. There is no reference to privity within the statute itself. The section speaks only in terms of buyer and seller and adopts the contractual concept, specifically stating that there are no implied warranties of quality as set forth. Judge McLaughlin, writing for the majority, noted: "If there were an implied warranty which inured to the benefit of the plaintiff it must be because there was some contractual relation between her and the defendant and there was no such contract. She never saw the defendant, and so far as appears, did not know from whom her employer purchased the cake. The general rule is

Despite undercurrents of dissatisfaction in lower court cases, the rule of *Chysky v. Drake Bros.* remained unchanged until the 1961 decision in *Greenberg v. Lorenz*.[22] There the child of a purchaser of a can of salmon was allowed to recover against the manufacturer for breach of an implied warranty of fitness for consumption. The appellate division had denied recovery,[23] but the court of appeals reviewed the case law in depth[24] and concluded: "Our difficulty is not in finding the applicable rule but in deciding whether or not to change it. The decisions are clear enough."[25] Noting that approximately twenty states had abolished the requirement of privity,[26] the court cited the Uniform Commercial Code § 2-318[27] as further evidence of the widespread criticism of the privity requirement.[28]

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that a manufacturer or seller of food, or other articles of personal property, is not liable to third persons, under an implied warranty, who have no contractual relations with him. The reason for this rule is that privity of contract does not exist between the seller and such third persons, and unless there be privity of contract, there can be no implied warranty. The benefit of a warranty, either expressed or implied, does not run with a chattel on its resale, and in this respect is unlike a covenant running with the land so as to give a subsequent purchaser a right of action against the original seller on a warranty." 235 N.Y. at 472-73, 139 N.E. at 577-78.

22. 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).

23. The lower court decided that the Chysky ruling was still the law, and that it forbade a recovery on warranty to anyone but the purchaser. Consequently, it granted judgment to the father for his expenses, but dismissed the child's own suit for damages. 7 App. Div. 2d 968, 103 N.Y.S.2d 46 (1st Dep't 1959).

24. The court noted that since a warranty is an "incident of a contract of sale, and does not run with the chattel on resale," the only warranty is to the original buyer. 9 N.Y.2d at 198-99, 173 N.E.2d at 774-75, 213 N.Y.S.2d at 41 (citing Chysky v. Drake Bros., 235 N.Y. 468, 139 N.E. 576 (1923)). Certain cases, however, had allowed recovery where the purchaser could be considered the agent of the injured third party. Ibid. (citing Ryan v. Progressive Grocery Stores, 255 N.Y. 388, 175 N.E. 105 (1931) (wife buying food for her husband considered his agent); Bowman v. Great A. & P. Tea Co., 264 N.Y. 390, 191 N.E. 27 (1934) (two sisters in same household; sister who bought food considered agent of one who did not)).

25. 9 N.Y.2d at 198, 173 N.E.2d at 774, 213 N.Y.S.2d at 41.

26. Id. at 199, 173 N.E.2d at 775, 213 N.Y.S. at 41.

27. New York Uniform Commercial Code § 2-318 provides: "A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section." The Uniform Commercial Code was adopted in New York State in 1962, effective September 27, 1964.

28. 9 N.Y.2d at 199, 173 N.E.2d at 775, 213 N.Y.S.2d at 41-42. At least six jurisdictions with statutes similar to New York's Personal Property Law § 96 had recognized strict liability for breach of warranty in food cases without the benefit of additional legislation. Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939); Patargias v. Coca-Cola Bottling Co., 332 Ill. App. 117, 74 N.E.2d 162 (1947); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920); Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 577 (1928); Nock v. Coca-Cola Bottling Works, 102 Pa. Super. 515, 156 Atl. 537 (1931); Nelson v. West Coast Dairy Co., 5 Wash. 2d 284, 105 P.2d 75 (1940).

The court found authority to modify the privity requirement by accepting the premise that the rule itself was of judicial making, since section 96 did not mention privity.[29] Believing that justice demanded change, but aware of the need for caution, it adopted the attitude of taking only "one step at a time."[30] Limiting itself to the particular facts of the case, the court declared:

Today when so much of our food is bought in packages it is not just or sensible to confine the warranty's protection to the individual buyer. At least as to food and household goods, the presumption should be that the purchase was made for all members of the household.[31]

Despite this confining language, the rule was further extended in *Randy Knitwear, Inc. v. American Cyanamid Co.*[32] Food was not involved, but the question of privity was again in issue. American Cyanamid, a manufacturer of chemical resins, represented in public advertisements and direct mail, and on labels attached to clothing, that fabrics treated with its "Cyana" finish would not shrink or stretch out of fit. In an action for breach of an express warranty, the manufacturer was held liable to a remote purchaser when the product did not prove true to its claims. Privity was deemed immaterial.[33]

In many cases, the court noted, the manufacturer will ultimately be held accountable for the falsity of his representations, but only after an expensive, time-consuming and wasteful process of litigation. In allowing direct recovery on the warranty, therefore, the court was but obliging the manufacturer " 'to shoulder the responsibility which should have been his in the first instance.' "[34]

The New York State Law Revision Commission had unsuccessfully urged adoption of legislation designed to extend the implied warranties created by § 96 to the buyer's employees and members of his household. N.Y. Leg. Doc. No. 65(J), p. 5 (1943); N.Y. Leg. Doc. No. 65(A), p. 5(1945); N.Y. Leg. Doc. No. 65(B), p. 5 (1959). This was noted by the court, 9 N.Y.2d at 199, 173 N.E.2d at 775, 213 N.Y.S.2d at 41, and, it has been suggested, may have influenced its decision. See Redlich, Commercial Law, 35 N.Y.U.L. Rev. 319, 323-28 (1960).

29. 9 N.Y.2d at 199-200, 173 N.E.2d at 775, 213 N.Y.S.2d at 42. Originally, an action for breach of warranty was in tort. See Prosser, Torts § 83, at 493 (2d ed. 1955); 1 Williston, Sales § 195, at 502 (rev. ed. 1948).

30. 9 N.Y.2d at 200, 173 N.E.2d at 776, 213 N.Y.S.2d at 42.

31. Ibid.

32. 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962).

33. Commenting on the history of the privity rule, the court observed that "the world of merchandising is, in brief, no longer a world of direct contract; it is rather, a world of advertising . . . ." Id. at 12, 181 N.E.2d at 402, 226 N.Y.S.2d at 367. The court reasoned that when a manufacturer places his product on the market, advertises and labels it, he is representing its quality to the public in such a way as to induce reliance upon his representations. Unquestionably, he intends the product to be purchased and used in reliance upon his express assurance of its quality. In fact, it is so purchased and used. The manufacturer should not then be permitted to avoid responsibility when the expected use leads to injury and loss, by claiming that he made no contract directly with the user. As a result, the court felt that "the policy of protecting the public from injury, physical or pecuniary, resulting from misrepresentations outweighs allegiance to an old and out-moded technical rule of law . . . ." Id. at 13, 181 N.E.2d at 402, 226 N.Y.S.2d at 368.

34. Id. at 13, 181 N.E.2d at 403, 226 N.Y.S.2d at 368 quoting Hamon v. Digliani, 148 Conn. 710, 717, 174 A.2d 294, 297 (1961).

In again concluding that the privity rule should be modified, the court of appeals insisted that it was doing "nothing more or less than carrying out an historic and necessary function of the court to bring the law into harmony with modern-day needs and with concepts of justice and fair dealing."[35]

Thomas v. Leary,[36] a recent appellate division decision involving a nonfood product, exemplifies the increasingly liberal attitude of the courts. The issue there was whether an employee of a purchaser had a cause of action against a seller for damages caused by the collapse of a dental chair. The court felt that it could not legitimately distinguish the *Greenberg* case. It viewed the cautious words of *Greenberg* as allowing relaxation beyond the particular facts of that case, and deemed the case before it but "a logical and progressive step at this time."[37]

It is interesting to note the time sequence involved. First the appellate division in the instant case dismissed the causes of action based on warranty.[38] Then the court of appeals passed on *Greenberg* and *Randy Knitwear*. Thereupon, leave to appeal to the court of appeals was granted in the instant case for the express purpose of taking "another step toward a complete solution of the problem partially cleared up" in the foregoing cases.[39] With this in mind, Chief Judge Desmond, writing for the majority, indicated that the previous decisions have "at least suggested that all requirements of privity have been dispensed with in our state."[40] He continued:

> A breach of warranty, it is now clear, is not only a violation of the sales contract out of which the warranty arises but is a *tortious wrong suable by a noncontracting party* whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer.[41]

Aware that the *Greenberg* decision sharply limited itself to the facts of that particular case, and cognizant of the "step by step" approach of the cases,[42] the court held:

> [A]t least where an article is of such a character that when used for the purpose for which it is made it is likely to be a source of danger to several or many people if not properly designed and fashioned, the *manufacturer as well as the vendor* is

35. 11 N.Y.2d at 16, 181 N.E.2d at 404, 226 N.Y.S.2d at 370.

36. 15 App. Div. 2d 438, 225 N.Y.S.2d 137 (4th Dep't 1962).

37. Id. at 440, 225 N.Y.S.2d at 139. By way of limitation the court added: "By our determination we do not intend to hold that such warranty would necessarily extend to any person who might use the article involved. We are fully aware that any extension of the existing principles of privity will add to the present burden on retailers and others. The answer is that the statutory obligations now impose burdens and reasonable judicial interpretation of the statutory language must be expected. Also, the seller by choosing responsible suppliers may protect himself to some extent, at least, against claims for breach of warranty." Id. at 443, 225 N.Y.S.2d at 142.

38. 12 App. Div. 2d 906, 214 N.Y.S.2d 640 (1st Dep't 1961) (memorandum decision).

39. 12 N.Y.2d at 434, 191 N.E.2d at 81, 240 N.Y.S.2d at 593.

40. Id. at 435-36, 191 N.E.2d at 82, 240 N.Y.S.2d at 594.

41. Ibid. (Emphasis added.)

42. Ibid.

liable, for breach of law-implied warranties, to the person whose use is contemplated.[43]

In noting that "the *MacPherson* holding was an 'extension' of existing court-made liability law" and that the *Greenberg* and *Randy Knitwear* decisions represented "extensions in favor of noncontracting consumers," the majority further stated that it was "no extension at all to include airplanes and the passengers for whose use they are built . . . ."[44]

Taking into account the systematic confinement and the near elimination of the privity doctrine in other states,[45] the court here accepted the view recently expressed by the Supreme Court of California[46] that

the costs of injuries resulting from defective products [should be] . . . borne by the manufacturers who put the products on the market rather than by the injured persons who are powerless to protect themselves [and] that implicit in putting such articles on the market are representations that they will safely do the job for which they are built.[47]

It is interesting to note the reasoning used by the instant court to excuse the manufacturer of the defective part from liability to the injured plaintiff:

However, for the present at least we do not think it *necessary* so to extend this rule as to hold liable the manufacturer (defendant Kollsman) of a component part. *Adequate protection* is provided for the passengers by casting in liability the airplane manufacturer which put into the market the completed aircraft.[48]

Randy Knitwear, Greenberg and *Thomas* were distinguished on their facts in the dissenting opinion of Judge Burke. In those cases, the dissent pointed out, the manufacturer knew the article would not be subject to further inspection. In the instant case, "federal regulations provide for rigorous inspection and certification from the Federal Aviation Agency."[49] Judge Burke failed to see any reason why, absent negligence, the assembler of the airplane, rather than the manufacturer of the defective component part, should be deemed liable to an injured passenger. Moreover, it was pointed out that "all are aware of the hazards attending air travel, and accident and special insurance is readily available at moderate rates."[50]

43. Id. at 436-37, 191 N.E.2d at 83, 240 N.Y.S.2d at 594-95. (Emphasis added.)

44. Id. at 437, 191 N.E.2d at 83, 240 N.Y.S.2d at 595. In support, the court cited the following decisions upholding complaints sounding in warranty against aircraft manufacturers where passengers lost their lives when the planes crashed: Ewing v. Lockheed Aircraft Corp., 202 F. Supp. 216 (D. Minn. 1962); Conlon v. Republic Aviation Corp., 204 F. Supp. 865 (S.D.N.Y. 1960); Middleton v. United Aircraft Corp., 204 F. Supp. 856 (S.D.N.Y. 1960); Hinton v. Republic Aviation Corp., 180 F. Supp. 31 (S.D.N.Y. 1959).

45. See generally Jaeger, Privity of Warranty: Has the Tocsin Sounded?, 1 Duquesne University L. Rev. 1 (1963).

46. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

47. 12 N.Y.2d at 437, 191 N.E.2d at 83, 240 N.Y.S.2d at 595.

48. Ibid. (Emphasis added.)

49. 12 N.Y.2d at 438, 191 N.E.2d at 84, 240 N.Y.S.2d at 596 (dissenting opinion).

50. Ibid.

Refusing to accept the majority's equation of warranty liability and strict products liability, he challenged the majority's offhand decision to fasten enterprise liability on the assembler alone. The dissenting judges would have fixed liability upon the airline or not at all. Wrote Judge Burke:

> The principle of selection stated is that the injured passenger needs no more protection. We suggest that this approach to the identification of an appropriate defendant does not answer the question: Which enterprise should be selected if the selection is to be in accord with the rationale upon which the doctrine of strict products liability rests?[51]

The instant decision illustrates an ever increasing trend, which if carried to an extreme would guarantee recovery to an injured plaintiff whenever a manufacturer has breached his warranty. By allowing the purchaser of a ticket for passage to recover against the airplane assembler for injuries caused by a faulty altimeter manufactured by another, the court appeared reluctant to break radically with the privity of contract rule. Liability seems to have been imposed on the assembler, rather than the manufacturer of the defective part, merely because of some closer temporal connection with the plaintiff. At the same time, the court gave strong indication that had the plaintiff been unable to recover from the assembler, *adequate protection* would *not* have been afforded, and in the interest of justice it would have been necessary to fix liability on the allegedly negligent manufacturer of the altimeter.

The approach of the court in adhering to the "step by step" method of decision while simultaneously adopting an arbitrary principle of selection appears open to question. By avoiding direct confrontation of the question of whether any semblance of privity is required for recovery on warranty, the court extended protection only to the individual financially able to carry his case to the court of appeals. Paradoxically, the benevolent motives of the court strongly suggest that ultimately, whenever a plaintiff in a warranty action can prove that his injury resulted from the conduct of someone else, the courts will impose absolute liability in the fashion of workmen's compensation statutes.

51. Id. at 440, 191 N.E.2d at 85, 240 N.Y.S.2d at 597.