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Case Notes

CASE NOTES

Administrative Law—Ordinance Providing for Entry by Building Inspector for Purposes of Obtaining Evidence for Criminal Prosecution Held Invalid.—The defendant, a designer of home furnishings, lived in an area zoned for residential use. The house was owned by the corporation of which defendant was president. Several years prior to the prosecution here in question, the corporation was enjoined from using the house to carry on its business. On several occasions in 1962 the village building inspector, under the authority of a municipal ordinance,[1] entered defendant's home without his consent and observed specified zoning violations. These observations became the basis of three criminal prosecutions against defendant for violating the zoning ordinance.[2] A court of special sessions convicted defendant and imposed a six months' suspended sentence. The county court affirmed the conviction, but the New York Court of Appeals reversed. Three of the four judges who voted for reversal based their decision on the ground that the building inspector's search was of a criminal nature.[3] *People v. Laverne*, 14 N.Y.2d 304, 200 N.E.2d 441, 251 N.Y.S.2d 452 (1964).

The law in New York is in accord with the general proposition that a search of private premises for criminal evidence by a government officer must be authorized by a judicially issued search warrant.[4] This protection against unreasonable searches by the government is guaranteed both by the fourth amendment[5] and by the New York constitution.[6] The only recognized exceptions to the rule in New York are that consent of the proprietor is sufficient validation in the absence of a warrant[7] and that a search can be made in-

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1. "It shall be the duty of the Building Inspector and he is hereby given authority, to enforce the provisions of this ordinance. The Building Inspector in the discharge of his duties shall have authority to enter any building or premises at any reasonable hour." Village of Laurel Hollow, N.Y., Building Zone Ordinance art. 10, § 10.1 (1961).

2. "Any owner . . . who in any manner violates . . . any provision of this ordinance . . . shall thereby be guilty of disorderly conduct . . . and on conviction, shall be subject to a fine of not more than One Hundred ($100) Dollars for each violation." Village of Laurel Hollow, N.Y., Building Zone Ordinance art. 10, § 10.2 (1961).

3. Chief Judge Desmond, concurring, voted for reversal solely on the ground that there was no probable cause for the entry and search. People v. Laverne, 14 N.Y.2d 304, 310, 200 N.E.2d 441, 444, 251 N.Y.S.2d 452, 456 (1964) (concurring opinion).

4. See, e.g., People v. O'Neill, 11 N.Y.2d 148, 182 N.E.2d 95, 227 N.Y.S.2d 416 (1962); People v. Yarmosh, 11 N.Y.2d 397, 184 N.E.2d 165, 230 N.Y.S.2d 185 (1962); People v. Loria, 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961). But see People v. Richter's Jeweler's, 291 N.Y. 161, 51 N.E.2d 690 (1943).

5. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

6. N.Y. Const. art. I, § 12. The language is identical with that of the corresponding amendment of the United States Constitution.

7. Hook v. State, 15 Misc. 2d 672, 679, 181 N.Y.S.2d 621, 628 (Ct. Cl. 1958).

cident to a lawful arrest.[8] Since the facts of the instant case did not bring it within either of the two exceptions, it was held that the evidence obtained during the search should have been excluded from the defendant's criminal hearing under the ruling in *Mapp v. Ohio*.[9]

To escape the *Mapp* rule, the prosecution in the instant case relied on *Frank v. Maryland*[10] and *Ohio ex rel. Eaton v. Price*.[11] In *Frank*, a health inspector, acting on a complaint received from a neighbor of the petitioner, sought to enter and inspect petitioner's home. In the rear of the house the inspector found a large mass of straw, trash, debris and rodent feces. Petitioner refused to allow the inspector to see the basement, and was subsequently arrested and convicted pursuant to a city ordinance authorizing a twenty dollar fine for resisting an attempted search of private premises for violations of the Health Code.[12] The Supreme Court, in a five-to-four decision, upheld petitioner's conviction.

The majority ruled that the attempted search by the health inspector was not unreasonable, since it was an administrative action aimed at the discovery of unsanitary conditions and not a police action to obtain evidence of a criminal offense.[13] Mr. Justice Frankfurter stated that the primary right sought to be protected by the fourth amendment was "self-protection: the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual . . . . Thus, evidence of criminal action may not . . . be seized without a judicially

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8. People v. Loria, 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961); People v. Cocchiara, 31 Misc. 2d 495, 221 N.Y.S.2d 856 (Ct. Gen. Sess. 1961).

9. 367 U.S. 643 (1961). The Court held that evidence obtained through an unreasonable search and seizure is inadmissible in a criminal prosecution in a state court.

10. 359 U.S. 360 (1959).

11. 364 U.S. 263 (1960). This class of decisions also embraces District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949), aff'd on other grounds, 339 U.S. 1 (1950); City of St. Louis v. Evans, 337 S.W.2d 948 (Mo. 1960); Givner v. State, 210 Md. 484, 124 A.2d 764 (1956). In District of Columbia v. Little, defendant was convicted for interfering with a Health Department inspector in the performance of his duty pursuant to a municipal ordinance by refusing access without a warrant. The Municipal Court of Appeals for the District of Columbia reversed, and the United States Court of Appeals upheld the reversal on the grounds that defendant was protected from such intrusion by the fourth amendment. The United States Supreme Court affirmed on the grounds that defendant's actions did not constitute interference within the meaning of the ordinance, avoiding the larger issue of the validity of the ordinance. Similarly, in City of St. Louis v. Evans and Givner v. State, the convictions were for violating an inspection ordinance by denying entry to a duly authorized official.

12. Baltimore, Md., City Code art. 12, § 120 (1950).

13. "But giving the fullest scope to this constitutional right to privacy, its protection cannot here be invoked. The attempted inspection of appellant's home is merely to determine whether conditions exist which the Baltimore Health Code proscribes. If they do appellant is notified to remedy the infringing conditions. No evidence for criminal prosecution is sought to be seized." Frank v. Maryland, 359 U.S. at 366.

issued search warrant."[14] He further stated that no such right would be violated by an administrative inspection to detect violations of a municipal ordinance.[15]

In *Ohio ex rel. Eaton v. Price*, the owner of a dwelling refused to admit three housing inspectors who sought to enter and look through his home. There was no evidence that the inspectors had probable cause for the search. No complaint had been received, and nothing outside the house caused suspicion of a violation within. The justification offered to the owner was the authority of a municipal ordinance.[16] The owner was arrested and held in custody to await trial for violating that ordinance.[17] The Supreme Court affirmed the decision of the Supreme Court of Ohio which had denied a petition for a writ of habeas corpus. The Court held that *Frank* was controlling.[18]

The instant case is readily distinguishable from both *Frank* and *Eaton*. In the instant case, the defendant was prosecuted for violating that provision of an ordinance which made it unlawful to carry on a business in an area zoned for residential use. In *Frank* and *Eaton* the petitioners were prosecuted for refusing to allow the inspectors to enter their homes. Also, the language of the ordinances relied upon in both *Frank* and *Eaton* indicated that the only purpose of the inspections was to ascertain the existence of violations. The ordinances provided that if a violation was discovered during the inspection, a directive was to be sent to the owner of the premises, and only after the owner refused to comply with the directive was he subject to prosecution. The ordinance in the instant case, however, sanctioned entry into the defendant's home by the building inspector "for the purpose of obtaining evidence for a criminal prosecution."[19] It was precisely because the mere presence of violations constituted a criminal offense that the searches in *Frank* and

14. Id. at 365.

15. Id. at 366. However, Mr. Justice Douglas in the dissenting opinion argued forcefully that the fourth amendment should not be limited to searches for evidence of crime, but that any entry upon private premises is unreasonable unless authorized by a judicially issued search warrant. Id. at 374. Cf. Davis, Administrative Law Treatise § 3.01, at 35 (Supp. 1963). Professor Davis listed twenty-eight Supreme Court decisions handed down during the 1958-1963 period, all in the area of governmental power of investigation. Davis suggested that the result in Frank and Eaton would be different if the Court were to decide these cases today, on the theory that the addition of Mr. Justice Goldberg to the Court would effect a majority when his vote is added to those of the four dissenters in Frank and Eaton (Mr. Justices Black, Douglas, and Brennan and Mr. Chief Justice Warren).

16. Dayton, Ohio, Code of Gen. Ordinances § 806-30(a) (1954). The ordinance purports to allow such an inspection solely to determine whether or not the minimum standards for housing relating to safety, sanitation and fitness for human habitation set by the ordinance are being met.

17. Dayton, Ohio, Code of Gen. Ordinances § 806-83 (1954). This section of the ordinance imposes a penalty of fine or imprisonment for violation of any part of the ordinance, including that which assures to the inspector free access.

18. Ohio ex rel. Eaton v. Price, 364 U.S. at 264.

19. 14 N.Y.2d at 307, 200 N.E.2d at 442, 251 N.Y.S.2d at 454.

Eaton were distinguished from the search of defendant's home. Judge Bergen stated:

> Probably an entry into private premises by a public officer without a search warrant against the resistance of the occupant and in pursuance of the authority of law for the purpose of eliminating a hazard immediately dangerous to health and public safety is constitutionally valid if the purpose be summary or other administrative correction or as a foundation for civil judicial proceedings . . . .[20]

The decision in the instant case may have significant ramifications in New York. In one comprehensive study of the legal problems involved in housing and health inspection ordinances, fifty such ordinances were selected at random and analyzed "to determine the breadth of the powers of entry conferred upon health authorities . . . ."[21] It was discovered that "most of the ordinances permitting or requiring inspections have provisions for procedures which dangerously approach the brink of unconstitutionality . . . ."[22] New York was one of the cities whose ordinances were examined in this study.[23] Among the ordinances which may be invalid on the basis of the holding in the instant case are those relating to inspections by the Fire Department,[24] the Department of Buildings[25] and those made pursuant to the Building[26] and the Multiple Dwelling[27] Codes.

The solution to the problem is neither to abolish administrative searches nor to ignore the constitutional safeguards of the fourth amendment. The only logical remedy is a more carefully drawn ordinance authorizing entry and inspection to preserve minimal standards of health and housing while also providing that any evidence of violations obtained during the inspection would not be the basis of a criminal prosecution. The owner should first be given a warning that failure to correct the situation would result in such action.[28]

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20. Ibid.

21. Editorial Note, 28 Geo. Wash. L. Rev. 421, 447 (1960).

22. Ibid.

23. Id. at 447 n.166.

24. N.Y.C. Admin. Code §§ 487e-2.0, C19-149.0, C19-150.0, C19-151.0, C19-152.0.

25. N.Y.C. Admin. Code §§ 641-3.0, 643a-13.0, 644b-1.0.

26. N.Y.C. Admin. Code §§ C26-190.0, C26-299.0, C26-1449.0.

27. N.Y.C. Admin. Code § D26-8.0.

28. With this in mind, the American Public Health Association drafted a model housing ordinance in 1952 which provided "that such inspection, examination or survey shall not have for its purpose the undue harassment of said owner or occupant; and that such inspection, examination or survey shall be made so as to cause the least amount of inconvenience to said owner or occupant consistent with an efficient performance of the duties of the health officer: Provided further, that the purpose of such inspection, examination or survey shall not be the procurement of evidence to be used in any criminal proceeding . . . ." Editorial Note, 28 Geo. Wash. L. Rev. 421, 450-51 (1960).

Civil Rights—De Facto Segregation—Courts May Not Substitute Their Own Judgment for the Judgment of Commissioner of Education Where There Is Rational Basis for Commissioner's Determination in Ordering Rezoning of School District.—The New York State Commissioner of Education determined that racial imbalance existed in the public elementary schools of Union Free School District No. 12 of the Town of Hempstead (also known as the Malverne-Lakeview District). He ordered the attendance areas to be reorganized so that students who were in kindergarten through the third grade would attend either the Davison Avenue or the Lindner Place School, and those students in the fourth or fifth grade would attend the Woodfield Road School.[1]

Petitioners, parents of white children who were to be affected by this pairing of schools, brought this action to review the Commissioner's determinations and orders. Supreme court, special term, held for the petitioners and annulled the Commissioner's determination.[2] The appellate division reversed, holding that if there is a rational basis for the determination made by an administrative agency, that agency is the final arbiter, and the court may not make a further determination. *Vetere v. Mitchell*, 21 App. Div. 2d 561, 251 N.Y.S.2d 480 (3d Dep't 1964).

In *Brown v. Board of Educ.*,[3] the Supreme Court held that "separate educational facilities are inherently unequal."[4] The Court stated that state enforced segregation of children based solely on race deprived the minority group of equal educational opportunities.[5] On reargument,[6] the Court declared, "All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle."[7] The *Brown* decisions set forth the principle that *de jure* segregation in the public schools is unconstitutional.

It is important to note that the Supreme Court said nothing of racial imbalance arising by incidence of residence rather than mandate of law. In an early interpretation of *Brown*, a federal district court stated that integration is not required by the Constitution,[8] and that *Brown* "merely forbids the use of governmental power to enforce segregation."[9] This explanation of *Brown* has been interpreted to mean that school boards have no affirmative duty to eliminate

1. Vetere v. Mitchell, 21 App. Div. 2d 561, 563, 251 N.Y.S.2d 480, 482 (3d Dep't 1964). Prior to the Commissioner's order, Woodfield Road School had a Negro to white ratio of 75%. The other two schools had a Negro enrollment of 14%. Id. at 562, 251 N.Y.S.2d at 482.

2. Vetere v. Allen, 41 Misc. 2d 200, 245 N.Y.S.2d 682 (Sup. Ct. 1963), aff'd sub nom. Vetere v. Mitchell, 21 App. Div. 2d 561, 251 N.Y.S.2d 480 (3d Dep't 1964).

3. 347 U.S. 483 (1954).

4. Id. at 495.

5. Ibid.

6. 349 U.S. 294 (1955).

7. Id. at 298.

8. Briggs v. Elliott, 132 F. Supp. 776 (E.D.S.C. 1955). Originally this was one of the four cases decided in Brown. Negro children brought an action to enjoin enforcement of the South Carolina constitution which required segregation in the public schools.

9. Id. at 777.

de facto segregation in the public schools.[10] Another district court, in *Bell v. School City*,[11] said that where racial imbalance has been caused merely by incidence of residence, there is no need to do away with the neighborhood school concept, since in any community with a large, expanding Negro population, racial imbalance will almost inevitably arise.[12]

The federal court cases in New York have developed along slightly different lines. *Taylor v. Board of Educ.*[13] broadened the scope of *de jure* segregation by holding that where a prior school board had gerrymandered the attendance zones, the current school board, in condoning this gerrymandering by refusing to take affirmative action to ameliorate the situation, was guilty of practicing *de jure* segregation. The district court thus transmuted a case of *de facto* segregation into one of *de jure* segregation, thereby allowing the court to act.[14] However, it made no attempt to decide whether *de facto* segregation violates the Constitution.[15]

With due respect for the neighborhood school policy, Judge Kaufman stated that it "certainly is not sacrosanct. It is valid only insofar as it is operated within the confines established by the Constitution."[16] He went on to say that this policy could not be used as a subterfuge to confine Negroes in a specified area, and if it is used in such a manner, the courts must correct this violation of the Constitution.[17]

In *Blocker v. Board of Educ.*,[18] the court reached the same conclusion that was reached in *Taylor*. It held that the neighborhood school concept "is not immutable,"[19] and that defendant Board of Education had violated the equal protection clause of the fourteenth amendment by perpetuating a segregated school system.[20]

10. See, e.g., Bell v. School City, 324 F.2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964); Evans v. Buchanan, 207 F. Supp. 820 (D. Del. 1962); Henry v. Godsell, 165 F. Supp. 87 (E.D. Mich. 1958). But see Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 881, 382 P.2d 878, 882 (1963) (dictum) (where feasible, racial imbalance should be ended regardless of cause).

11. 213 F. Supp. 819 (N.D. Ind.), aff'd, 324 F.2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964).

12. Id. at 829.

13. 191 F. Supp. 181 (S.D.N.Y.), aff'd, 294 F.2d 36 (2d Cir.), cert. denied, 368 U.S. 940 (1961).

14. In a dissenting opinion in the court of appeals, Judge Moore stated that there was no evidence that the Board of Education had intentionally refused to alter the attendance area so as to maintain a segregated school. Taylor v. Board of Educ., 294 F.2d at 46.

15. 191 F. Supp. at 194 n.12.

16. Id. at 195.

17. Ibid. Judge Kaufman's position concerning the neighborhood school policy has been cited in a number of recent decisions. See, e.g., Blocker v. Board of Educ., 226 F. Supp. 208, 225 (E.D.N.Y. 1964); Shepard v. Board of Educ., 207 F. Supp. 341, 348 (D.N.J. 1962).

18. 226 F. Supp. 208 (E.D.N.Y. 1964). This was an action brought by Negro children alleging discrimination because of racial imbalance in the public schools.

19. Id. at 230.

20. The court stated that refusal to change the existing segregated district, which had

The first case in the New York state courts to consider the validity of a school board's plan to solve the problem of *de facto* segregation was *Balaban v. Rubin*.[21] The Board of Education of New York City selected a site for a new junior high school in the Brownsville section of Brooklyn, a predominantly Negro and Puerto Rican area. One of the Board's purposes in selecting the site was to prevent segregation in the school at the outset.[22] Special term held that exclusion of the white child from his traditional neighborhood school and his transfer to the new junior high school was a violation of Section 3201 of the New York Education Law[23] because race was a factor in excluding him from the school he normally would have attended.[24]

The appellate division reversed,[25] stating that "each child has the right to attend only the public school in the zone or district in which he resides . . . ."[26] Since the new junior high school was as near to the childrens' homes as the old school (and in some cases nearer), this was the school from which they could not be excluded because of race. Exclusion of the white children from the new school would be a violation of section 3201.[27] The white students were not excluded from their traditional neighborhood school because of race, but rather because they did not live within the attendance area for that school.

The appellate division stated further that there was no need to abandon the neighborhood school plan which had been constructed in good faith simply because the school district "is populated almost entirely by Negroes or whites."[28] According to the court, *Brown* gave to the school boards the authority to carry out desegregation within the framework of the school district.[29]

The holding of the court that the school boards or the Commissioner of

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been created by a previous board, was de jure segregation because the segregated district was retained as the law of the school board. Id. at 226. One district court case has gone further. Branche v. Board of Educ., 204 F. Supp. 150 (E.D.N.Y. 1962), suggested that the state may have some affirmative duty to eliminate racial imbalance. The case is limited in its effect since it was not decided on the merits, but was a denial of a motion for summary judgment.

21. 40 Misc. 2d 249, 242 N.Y.S.2d 973 (Sup. Ct. 1963), rev'd, 20 App. Div. 2d 438, 248 N.Y.S.2d 574 (2d Dep't), aff'd, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281 (1964), cert. denied, 33 U.S.L. Week 3140 (U.S. Oct. 20, 1964).

22. 20 App. Div. 2d at 441, 248 N.Y.S.2d at 577. Other factors considered were traveling distance, maximum utilization of facilities, availability of public transportation, area topography, and continuity of instruction. Ibid.

23. N.Y. Educ. Law § 3201 provides: "No person shall be refused admission into or be excluded from any public school in the state of New York on account of race, creed, color or national origin."

24. 40 Misc. 2d 249, 242 N.Y.S.2d 973 (Sup. Ct. 1963).

25. 20 App. Div. 2d 438, 248 N.Y.S.2d 574 (2d Dep't 1964).

26. Id. at 443, 248 N.Y.S.2d at 579.

27. The court interprets § 3201 to mean that "no person . . . shall be . . . excluded from any public school to which he is entitled to go as of right." (Emphasis omitted.) Ibid.

28. Id. at 446, 248 N.Y.S.2d at 582.

29. Ibid.

Education may consider racial imbalance as one of the factors in establishing new school zones was of utmost importance.[30] Such consideration of racial imbalance would not be a violation of section 3201 of the Education Law. The court stated that if section 3201 allowed opponents of desegregation to use the statute to enforce segregation, the statute would be unconstitutional in the light of the *Brown* decisions.[31]

At the time the instant case was decided, judicial authority in New York seemed to agree that while there was no duty to end *de facto* segregation, the local board or the Commissioner of Education was free to consider racial imbalance as one of the factors in constructing attendance areas.[32] The present court has expanded the rule.

In *Balaban*, the appellate division held that the pupil will be entitled to go to the school closest to his home.[33] The instant court stated that the pupil has the right to attend "any school in his attendance area and accommodating his respective grade."[34] What the court did was to substitute the attendance area for the neighborhood school concept. Therefore, when there are two schools in the attendance area which accommodate different grades, only that school accommodating the pupil's particular grade will be the school to which he is entitled to go, even if it is farther from his home than the other school.

The court of appeals in *Balaban* stated that "there are no oppressive results of the choice here made by the board. No child will have to travel farther to new School 275 than he would have to go to get to his 'neighborhood' school."[35] The situation is not the same in the Malverne-Lakeview district since in most cases the child will have to travel a greater distance to his integrated school than he would have to travel to attend another school teaching these grades. However, here, the integrated school would be the *only* school teaching those grades, and therefore the pupil is traveling no farther to this school than he would have to travel to attend another school teaching these grades.

In *Balaban*, the court held that the school board can consider racial imbalance as one of the factors in determining new school zones.[36] It is unclear from the instant case whether the Commissioner of Education has considered other factors besides racial imbalance in pairing the schools. It is proposed that it will be the rare case where no collateral factors will be found to exist when racial imbalance

30. Id. at 446-47, 248 N.Y.S.2d at 582.

31. Id. at 448, 248 N.Y.S.2d at 583. A case following Balaban was Strippoli v. Bickal, 42 Misc. 2d 475, 248 N.Y.S.2d 588 (Sup. Ct.), rev'd, 21 App. Div. 2d 365, 250 N.Y.S.2d 969 (4th Dep't 1964), which also held that the Commissioner of Education or the school board may consider racial imbalance as a criterion in changing attendance areas.

32. E.g., Balaban v. Rubin, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281 (1964), cert. denied, 33 U.S.L. Week 3140 (U.S. Oct. 20, 1964); Strippoli v. Bickal, supra note 31.

33. 20 App. Div. 2d at 443, 248 N.Y.S.2d at 579.

34. 21 App. Div. 2d at 563, 251 N.Y.S.2d at 483.

35. 14 N.Y.2d at 199, 199 N.E.2d at 377-78, 250 N.Y.S.2d at 284.

36. Ibid.

is corrected.[37] If it is assumed that there were other factors considered, then this case can be reconciled with the *Balaban* decision on this point alone.

The instant court held that utilization of Section 3201 of the New York Education Law to prevent the termination of *de facto* segregation makes that section a segregation statute.[38] This holding is in agreement with the second department's decision in *Balaban*.[39]

The present case leads to two logical conclusions. First, unless the court finds that the Commissioner's decision is arbitrary and capricious, the Commissioner, and not the court, will be the final arbiter of the validity of a program to end *de facto* segregation.[40] On the basis of the recent New York Supreme Court decisions,[41] it will be a rare case where the decisions and determinations of the Commissioner will be deemed arbitrary, capricious, or unreasonable. This is not to imply that a more radical plan than those so far submitted will be accepted.

Secondly, this decision allows the school boards or the Commissioner of Education to send students to schools farther from their homes than those that they now attend. The end result of the instant case is that the appellate division has allowed the school pairing plan as a method to eliminate *de facto* segregation in the public schools.[42]

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37. In Addabbo v. Donovan, 43 Misc. 2d 621, 251 N.Y.S.2d 856 (Sup. Ct. 1964), special term held that the pairing of two schools will result in other benefits when an attempt is made to correct racial imbalance. The case implies that whenever an attempt is made to correct racial imbalance other collateral benefits will also be present and, therefore, the courts do not have to find that correction of racial imbalance was the sole criterion that was used by the school board.

Three similar cases were decided at about the same time. In Matter of Blumberg, N.Y.L.J., July 13, 1964, p. 10, col. 7 (Sup. Ct. 1964), a compulsory transfer of students from their traditional neighborhood school to another school nine-tenths of a mile away was held arbitrary and unreasonable. In Hayes v. Donovan, N.Y.L.J., July 22, 1964, p. 7, col. 5 (Sup. Ct. 1964), also involving a school pairing plan, the court held that since there was no showing of hardship by petitioners and no discrimination against individual pupils, the Commissioner's decision was not arbitrary and capricious. The most recent decision, Van Blerkom v. Donovan, N.Y.L.J., Sept. 4, 1964, p. 14, col. 3 (Sup. Ct. 1964), which also dealt with school pairings, was decided on the same grounds as Addabbo v. Donovan, supra.

38. 21 App. Div. 2d at 563-64, 251 N.Y.S.2d at 483.

39. 20 App. Div. 2d at 448, 248 N.Y.S.2d at 583.

40. 21 App. Div. 2d at 564, 251 N.Y.S.2d at 483-84. The court stated that "the court cannot substitute some other judgment for the judgment of the Commissioner that correction of racial imbalance is an educational aid to a minority group in attaining the skills and level of education which others have had for generations and that compulsory education should be designed for the greatest good of all." Ibid.

41. Addabbo v. Donovan, 43 Misc. 2d 621, 251 N.Y.S.2d 856 (Sup. Ct. 1964); Van Blerkom v. Donovan, N.Y.L.J., Sept. 4, 1964, p. 14, col. 3 (Sup. Ct. 1964); Hayes v. Donovan, N.Y. L.J., July 22, 1964, p. 7, col. 5 (Sup. Ct. 1964). But see Matter of Blumberg, N.Y.L.J., July 13, 1964, p. 10, col. 7 (Sup. Ct. 1964).

42. For an excellent discussion of the de facto segregation problem and solutions to it, see Quinn, Boundaries, Buses and School Boards, 111 America 403 (1964).

Constitutional Law—Conflict Between the Twenty-First Amendment and the Export-Import Clause—State Tax on Liquor Imports From Abroad Held Unconstitutional.—The State of Kentucky, pursuant to a state statute,[1] taxed petitioner, a liquor importer, on each proof gallon brought in from without the state. The Kentucky Court of Appeals[2] struck down the tax as applied to liquor imported from Scotland while still in the original package and unsold by the importer. The United States Supreme Court affirmed, holding that the regulation was in fact a tax on imports and violative of the export-import clause and that the twenty-first amendment[3] does not operate to nullify the export-import clause with respect to liquor. *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964).

Since the passage of the twenty-first amendment, the states have had unique powers over the regulation of liquor. They are unique in the sense that the Court has construed the amendment as allowing a state to place its own liquor in an advantageous position by imposing high licensing fees on incoming liquor.[4] By upholding this type of discriminatory *regulation*, the Court has apparently permitted the commerce and equal protection clauses to be seriously curtailed by the twenty-first amendment. The Court, however, has not been so willing to allow discriminatory *taxation*. In *McGoldrick v. Berwind-White Coal Mining Co.*,[5] the Court ruled that articles imported from other states may be taxed so long as that tax is not discriminatory and does not place a burden on interstate commerce.[6]

The issue of a state using its taxing power as a means of control of foreign liquor imports had, until the instant case,[7] never been resolved by the Supreme

1. "No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining a permit from the department and paying a tax of ten cents on each proof gallon contained in the shipment." Ky. Rev. Stat. 243.680(2)(a) (1962).

2. James B. Beam Distilling Co. v. Department of Revenue, 367 S.W.2d 267 (Ky. 1963).

3. "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

4. Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939); Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938).

5. 309 U.S. 33 (1940).

6. "Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress." Id. at 46-47.

7. On the same day the Court decided Hostetter v. Idlewild Liquor Corp., 377 U.S. 324 (1964). The case involved a novel arrangement in which the defendant sold liquor to departing passengers but the liquor was not delivered until the passengers reached their foreign destination. New York claimed that this business was not licensable under New York State law and therefore wished to prohibit the defendant corporation from doing business. The Court ruled that since the liquor was neither "delivered" in New York nor "used therein," the twenty-first amendment did not control and New York's attempt to

Court and, in fact, the question had been decided by only two states.[8] The instant Court, citing *Brown v. Maryland*,[9] found that the tax, though occupational in form, was clearly of the kind prohibited by the export-import clause.[10] In considering the distinction between a state's enforcing a regulatory statute under the commerce clause and a taxing measure in opposition to the export-import clause, the Court noted: "What is involved in the present case, however, is not the generalized authority given to Congress by the Commerce Clause, but a constitutional provision which flatly prohibits any State from imposing a tax upon imports from abroad."[11]

Mr. Justice Black, dissenting, stated that the Court had previously upheld a "heavy importation fee" in *State Bd. v. Young's Market Co.*[12] and that the only basis for distinguishing that decision was that in the instant case the liquor was imported from abroad, while in the former the liquor was imported from another state.[13] Not only is the conclusion an oversimplification,[14] but the factual basis is faulty since the phrase "heavy importation fee," which was removed from context,[15] referred to a license fee, *i.e.*, a regulation, for the privilege of importing liquor and not to a tax on imports.[16]

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prohibit Idlewild from operating was in violation of the commerce clause. This case did not concern the export-import clause since the Court explicitly stated: "The complaint also relied on the Export-Import Clause of the Constitution, Art. I, § 10, cl. 2, but such reliance was obviously misplaced, because New York has not sought to 'lay any Imposts or Duties' upon the merchandise sold by Idlewild." Id. at 327 n.3.

8. The most extensive discussion of the problem was in Parrott & Co. v. City & County of San Francisco, 131 Cal. App. 2d 332, 280 P.2d 881 (Dist. Ct. App. 1955). The court held unconstitutional an attempt by the state to tax liquor imported from abroad on the grounds that the twenty-first amendment makes no mention of taxation (while the export-import clause does) and that the two sections are not inconsistent. Accord, State ex rel. H. A. Morton Co. v. Board of Review, 15 Wis. 2d 330, 112 N.W.2d 914 (1962).

9. 25 U.S. (12 Wheat.) 419 (1827); accord, Low v. Austin, 80 U.S. (13 Wall.) 29 (1871).

10. 377 U.S. at 343.

11. Id. at 344.

12. 299 U.S. 59 (1936).

13. 377 U.S. at 347 (dissenting opinion).

14. The distinction between imports from another state and imports from abroad is a very real one. Brown v. Houston, 114 U.S. 622 (1885); Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1868). For an excellent discussion of the problem see McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 51 n.10 (1940).

15. The entire passage reads: "There is no basis for holding that it may prohibit, or so limit, importation only if it establishes monopoly of the liquor trade. It might permit the manufacture and sale of beer, while prohibiting hard liquors absolutely. If it may permit the domestic manufacture of beer and exclude all made without the State, may it not, instead of absolute exclusion, subject the foreign article to a heavy importation fee? Moreover, in the light of history, we cannot say that the exaction of a high license fee for importation may not, like the imposition of the high license fees exacted for the privilege of selling at retail, serve as an aid in policing the liquor traffic." State Bd. v. Young's Market Co., 299 U.S. 59, 63 (1936).

16. The statute involved in Young's Market provides: "On and after July 1, 1935, no person shall perform any act or acts which would constitute such person a[n] . . . importer

Mr. Justice Black also contended that the majority rule left the states with virtually no means of restricting the importation of liquor from foreign countries.[17] On the contrary, the states may exclude all liquor by statute[18] or hamper its flow by licensing measures.[19] Indeed, as previously noted, the Court has upheld so many different discriminatory procedures[20] in its efforts to put the states in complete control of the liquor traffic that one wonders whether Congress really intended that the states exercise such arbitrary power in regard to liquor regulation.

In *Young's Market* the Court expressly refused to consider the legislative history of the twenty-first amendment or that of its precedent federal statutes, the Wilson[21] and Webb-Kenyon Acts,[22] on the theory that the "language of the Amendment is clear."[23] But the "clarity" of the language, which would implicitly prohibit discriminatory regulation, led the Court to suggest that the twenty-first amendment authorizes a state, in the regulation of liquor traffic, to ignore the equal protection clause. Such a construction is not only at odds with the literal language of the statute, but with history as well.

Congressional involvement in liquor regulation began with the Wilson Act[24] which made liquor, upon its "arrival" in a state, subject to state control even though in the original package. The states, however, were not permitted to discriminate against out-of-state liquor.[25] The purpose of the act was frustrated when the Court, in *Rhodes v. Iowa*,[26] construed "arrival" to mean "delivery . . . to the consignee"[27] and not the mere arrival within the territorial limits. This disregard of legislative intent by the Court resulted in the passage of the Webb-Kenyon Act which provided that the reception, possession, sale or use "in violation of any law of such State"[28] was prohibited. Since the anti-discriminatory

. . . of any alcoholic beverage . . . unless such person is authorized to do so by a license duly issued pursuant to provisions of this act, or pursuant to the provisions of the State Liquor Control Act, Chapter 658, Statutes of 1933." Alcoholic Beverage Control Act of June 13, 1935, Statutes of California 1935, ch. 330, § 3.

17. 377 U.S. at 348 (dissenting opinion).

18. Only Mississippi has utilized this method. Miss. Code Ann. §§ 2613, 2642 (1942).

19. State Bd. v. Young's Market Co., 299 U.S. 59 (1936); Dugan v. Bridges, 16 F. Supp. 694 (D.N.H. 1936).

20. E.g., Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939); Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938).

21. 26 Stat. 313 (1890), 27 U.S.C. § 121 (1958).

22. 49 Stat. 877 (1935), 27 U.S.C. § 122 (1958).

23. 299 U.S. 59, 63-64 (1936).

24. 26 Stat. 313 (1890), 27 U.S.C. § 121 (1958). The act was passed in response to Leisy v. Hardin, 135 U.S. 100 (1890), which had ruled that a dry state was powerless to prevent the importation and sale of liquor in its original package.

25. The anti-discrimination clause provided that the state could exercise its police powers "to the same extent . . . as though such liquids or liquors had been produced in such State . . . ." 26 Stat. 313 (1890), 27 U.S.C. § 121 (1958).

26. 170 U.S. 412 (1898).

27. Id. at 426.

28. 49 Stat. 878 (1935), 27 U.S.C. § 122 (1958).

phrase that was present in the Wilson Act was not in the Webb-Kenyon Act, this was interpreted as showing "an intent to give to the states an entirely free hand in regulating the importation and transportation of liquor."[29] This is a strange construction of an act which was passed to prevent "dry states" from being the victims of the mail order business practices of "wet state" liquor manufacturers.[30] Senator Kenyon, the bill's sponsor, endorsed this protective interpretation stating: "It is inconceivable that the well-being of any State is at the mercy of the liquor manufacturers of other States."[31]

An examination of the Congressional Record reveals that this same protective function was endorsed for the twenty-first amendment. Senator Blaine stated that its purpose was "to grant to the dry States full measure of protection, and thus prohibit the wet States from interfering in their internal affairs respecting the control of intoxicating liquors."[32]

The instant case, involving as it does, taxation, is sound law. However, the Court's consistent refusal to consider the legislative intent and historical background of the twenty-first amendment has been widely criticized[33] and a re-evaluation of its position seems in order. There is no reason to limit the present holding to the export-import clause. There is every reason to subject any state's regulation of liquor traffic to the requirements of the equal protection clause of the fourteenth amendment as well.

Constitutional Law—Section 6 of the Subversive Activities Control Act Held Unconstitutional as Violative of the Fifth Amendment.—Appellants, high ranking members of the Communist Party,[1] both native born citizens, held passports until January 22, 1962. On that date, the Passport Office of the

29. Dugan v. Bridges, 16 F. Supp. 694, 704 (D.N.H. 1936), appeal dismissed, 300 U.S. 684 (1937). The court based its construction of the Webb-Kenyon Act on the leading case in this area, Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917). An examination of that case will find no endorsement of discriminatory practices. In fact, the case involved the law of West Virginia, a "dry state."

30. 49 Cong. Rec. 700 (1912). See also id. at 700-01 (remarks of Senator McCumber); id. at 702 (remarks of Senator Borah); id. at 707 (remarks of Senator Kenyon).

31. Id. at 766 (Senator Kenyon quoting Mr. Justice Harlan's dissenting opinion in Bowman v. Chicago & Nw. Ry., 125 U.S. 465 (1888)).

32. 76 Cong. Rec. 4141 (1933) (remarks of Senator Blaine). See also id. at 4168 (remarks of Senator Fess); id. at 4170-72 (remarks of Senator Borah); id. at 4228 (remarks of Senator Bingham).

33. See Hamilton, Price and Price Policies (1938); De Ganahl, The Scope of Federal Power Over Alcoholic Beverages Since the Twenty-First Amendment, 8 Geo. Wash. L. Rev. 819 (1940); Kallenbach, Interstate Commerce in Intoxicating Liquors Under the Twenty-First Amendment, 14 Temp. L.Q. 474 (1940); Legislation, 38 Colum. L. Rev. 644 (1938); Note, 55 Yale L.J. 815 (1946).

1. Herbert Aptheker is the editor of Political Affairs, a major Communist Party periodical in this country; Elizabeth Flynn was the chairman of the Party.

State Department, acting in accordance with Section 6 of the Subversive Activities Control Act,[2] revoked their passports. After exhausting available administrative remedies, appellants sought declaratory and injunctive relief from the District Court for the District of Columbia.[3] The court, relying primarily on the congressional findings as to the nature of Communist conspiracy,[4] found section 6 constitutional and granted summary judgment for the Secretary of State. The Supreme Court,[5] three justices dissenting, reversed and found the statute patently unconstitutional as an unnecessarily drastic curtailment of the right to travel guaranteed by the fifth amendment. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

Prior to the conclusion of World War II, American citizens were required[6] to have passports for foreign travel only during periods of war. Restrictions, first imposed for the duration of the War of 1812,[7] were next enacted in 1918.[8]

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2. 64 Stat. 993 (1950), 50 U.S.C. § 785 (1958). Section 6(a) provides:
"When a Communist organization . . . is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—
(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or
(2) to use or attempt to use any such passport."
Section 6(b) makes it unlawful for a government employee to knowingly issue, or renew, a passport to an individual within the purview of § 6(a). Section 15(c) of the act makes a violation of § 6(a) or § 6(b) a felony. 64 Stat. 1003 (1950), 50 U.S.C. § 794(c) (1958). The revocation in the instant case, while not explicitly sanctioned, was consistent with the statute's prohibition against the use or renewal of passports. The Passport Office, exercising its discretion, eliminated the possibility of a transgression by recalling the appellants' passports.

3. Flynn v. Rusk, 219 F. Supp. 709 (D.D.C. 1963).

4. Section 2 of the Subversive Activities Control Act provides in part: "There exists a world Communist movement . . . whose purpose it is, by treachery, deceit, . . . espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization." 64 Stat. 987 (1950), 50 U.S.C. § 781(1) (1958). Section 2(15) states: "The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. [It is] awaiting and seeking to advance a moment when . . . overthrow of the Government of the United States by force and violence may seem possible of achievement . . . ." 64 Stat. 989 (1950), 50 U.S.C. § 781(15) (1958).

5. The parties appealed directly under 28 U.S.C. § 1253 (1958).

6. A distinction exists between a passport requirement and passport availability. Since the early 1800's, excepting periods of war and national emergency, passports have been available to citizens as documents of identification to facilitate foreign travel. Association of the Bar of the City of N.Y., Freedom to Travel 5-22 (1958).

7. Act of Feb. 4, 1815, ch. 31, § 10, 3 Stat. 199.

8. Act of May 22, 1918, ch. 81, § 2, 40 Stat. 559. President Wilson's proclamation of August 8, 1918, made the statute operative. Proclamation No. 1473, 1918 For. Rel. 809 (Supp. 2). A later congressional act rendered the statute inoperative. Act of March 3, 1921, ch. 136, 41 Stat. 1359.

This statute, which made it unlawful to depart or enter the country without a passport when a presidential proclamation of emergency was in effect, became ineffective following World War I. The provisions of the statute were amended in 1941[9] and invoked during World War II. However, termination of the war did not render the statute inoperative and, for the first time in American history, passports were required for travel in peacetime. The statute was in effect until repealed by the Immigration and Nationality Act of 1952.[10] The latter enactment, adopting the language of the World War I and World War II statutes, again required a passport in times of national emergency. President Truman's proclamation of January 17, 1953,[11] which is still in effect, made the statute operative.

Administratively, the power to issue a passport resides in the Secretary of State.[12] Following World War II, the Passport Office of the State Department, operating for the first time in a cold war situation, claimed an almost unlimited discretion in the issuance of passports. In 1958 the Supreme Court, in *Kent v. Dulles*,[13] delineated the scope of the Secretary of State's discretionary power. The Passport Office of the State Department had denied passports to two applicants pursuant to a departmental regulation prohibiting the issuance of passports to members of the Communist Party.[14] The applicants contended that the regulation exceeded the congressional grant of authority. In unreported decisions, the district court granted summary judgment to the Secretary of State in both suits. The Court of Appeals for the District of Columbia affirmed, holding that the State Department regulation was a congressionally authorized restriction.[15] The Supreme Court, by a five to four decision, reversed the court

9. Act of June 21, 1941, ch. 210, § 1, 55 Stat. 252. President Roosevelt's proclamation of Nov. 14, 1941, made the statute operative. Proclamation No. 2523, 6 Fed. Reg. 5821 (1941).

10. 66 Stat. 190 (1952), 8 U.S.C. § 1185 (1958).

11. Proclamation No. 3004, January 17, 1953, 18 Fed. Reg. 489.

12. 44 Stat. 887 (1926), 22 U.S.C. § 211a (1958), provides in part: "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate . . . and no other person shall grant . . . such passports." The statute, and appropriate legislative history, while not indicating the extent of the Secretary's discretion, seems to suggest that the power is to be confined to a more or less passive administration of presidential policy directives. Traditionally, however, the Secretary has exercised broad discretion in the granting and denying of passports. See 106 U. Pa. L. Rev. 454, 460-61 (1958); Association of the Bar of the City of N.Y., Freedom to Travel 7 (1958).

13. 357 U.S. 116 (1958).

14. State Dep't Reg. 51.135, 17 Fed. Reg. 8013 (1952) (revised January 12, 1962) provided: "[N]o passport . . . shall be issued to: (a) Persons who are members of the Communist Party . . . ; (b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement . . . . (c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe . . . they are going abroad to . . . advance the Communist movement . . . ."

15. Kent v. Dulles, 248 F.2d 600 (D.C. Cir. 1957); Briehl v. Dulles, 248 F.2d 561 (D.C. Cir. 1957).

of appeals.[16] "[Section] 1185 and § 211a do not delegate to the Secretary the kind of authority exercised here. . . . We would be faced with important constitutional questions were we to hold that Congress by § 1185 and § 211a had given the Secretary authority to withhold passports to citizens because of their beliefs or associations."[17]

The Subversive Activities Control Act of 1950,[18] required Communists to register with the Attorney General, and imposed various restrictions on all registrants. The statute provided that it would not be applicable to the Communists until a final order was promulgated requiring the Party to register. Until *Kent v. Dulles* destroyed the statutory underpinnings of the State Department regulation denying passports to Communists, the Subversive Activities Control Act was surplusage. Following *Kent v. Dulles*, the registration order was given on October 20, 1961. In January 1962, the Secretary of State revised the regulation,[19] basing the new prohibition on Sections 6 and 7 of the Subversive Activities Control Act. The gateway to the act, section 7,[20] the registration provision, was vigorously challenged by the Communist Party. In *Communist Party v. Subversive Activities Control Bd.*,[21] the Court ruled, five to four, that section 7 was constitutional. The Court, while holding that the registration requirement was a reasonable regulation of the Communist Party, declined to go beyond section 7 and comment on the constitutionality of the travel restrictions embodied in section 6.[22]

The appellants, in the instant case, contended that section 6 imposed an unconstitutional restriction on the right to travel as guaranteed by the fifth amendment.[23] Two basic issues were involved. First, was the Court constrained to apply section 6 solely to the appellants, or could the possibility of unconstitutionality as to others, who might be affected by the statute's enforcement, be considered? Second, could a travel restriction ignoring the purpose and destination of the would-be traveler be applied to the broad class of people encompassed within section 6?

As to the first issue, the Court has continuously held that the judicial function is confined to delineating the respective rights and obligations of the immediate litigants.[24] Similarly, one to whom a statute is properly applied may not chal-

16. Kent v. Dulles, 357 U.S. 116 (1958).

17. Id. at 129-30.

18. 64 Stat. 987 (1950), 50 U.S.C. §§ 781-98 (1958).

19. 22 C.F.R. § 51.135 (1962).

20. 64 Stat. 993 (1950), 50 U.S.C. § 786 (1958).

21. 367 U.S. 1 (1961).

22. "It is wholly speculative now to foreshadow whether, or under what conditions, a member of the Party may in the future apply for a passport . . . ." Id. at 79.

23. There is no question today that "freedom of movement" is embraced by the "due process" clause of the fifth amendment. See, e.g., Kent v. Dulles, 357 U.S. 116 (1958); Bauer v. Acheson, 106 F. Supp. 445 (D.D.C. 1952).

24. See, e.g., United States v. Raines, 362 U.S. 17, 20-21 (1960); Watson v. Buck, 313 U.S. 387, 402 (1941); Liverpool, N.Y. & Phila. S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885).

lenge the enactment by means of hypothetical assertions.[25] In dissent, Mr. Justice Clark, quoting extensively from *United States v. Raines*,[26] emphasized these almost axiomatic principles.[27] In *Raines*, a district court considered a section of a statute unrelated to the petitioner's requested relief, and found the entire statute constitutionally defective. The Supreme Court, in reversing, directed the lower court to restrict its opinion to the section then in issue. The distinction between going beyond the section, as in *Raines*, and considering the effect of the given section on parties foreign to the action, as in the instant case, would not have precluded the majority from relying on the principles expounded in *Raines* and considering section 6 solely with regard to the appellants.[28]

The *Raines* dictum explicitly recognized situations where "weighty countervailing policies" require the Court to consider a statute's effect on others in addition to the present litigants. The dissent used *Raines* as an introduction to *United States v. National Dairy Prods. Corp.*,[29] which, it was argued, definitively prohibited the extension of the exceptions noted in *Raines* to the instant case.[30] In *National Dairy*, the Court held that Section 3 of the Robinson-Patman Act, making it a crime to sell goods at "unreasonably low prices" with the intention of destroying competition, was not unconstitutionally vague as applied to the defendant who sold goods for the sole purpose of eliminating competitors. The Court, via dictum, stated that in first amendment cases "we are concerned with the vagueness of the statute 'on its face' because such vagueness may in itself deter constitutionally protected and socially desirable conduct."[31] The majority, in *National Dairy*, concluded that since the defendant's conduct was not socially desirable (an attempt was made to destroy competitors) the Court was "permitted to consider the warning provided by § 3 not only in terms of the statute 'on its face' but also in the light of the conduct to which it is applied."[32] A not unreasonable inference from *National Dairy* is that if the conduct was "socially desirable," the Court would be required to judge the statute "on its face." In any event, it is unnecessary to conclude, as the dissent did, that the freedom involved in the instant case was not to be protected equally with first amendment freedoms. The dissent's position that *National Dairy* forestalls the

25. See, e.g., United States v. Raines, supra note 24, at 22; Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 513 (1937); Virginian Ry. v. System Fed'n No. 40, Ry. Employees, 300 U.S. 515, 558 (1937); Ashwander v. TVA, 297 U.S. 288, 347-48 (1936) (concurring opinion).

26. 362 U.S. 17 (1960).

27. 378 U.S. at 521-22.

28. Compare Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 79 (1961) (refusal to consider sections of statute not presently applied to petitioners), with United States v. Wurzbach, 280 U.S. 396, 399 (1930) (refusal to extend section of statute to parties not presently before the bench).

29. 372 U.S. 29 (1963).

30. 378 U.S. at 522-23.

31. 372 U.S. at 36.

32. Ibid.

extension of patent unconstitutionality to fifth amendment cases appears to be ill-founded.

The majority in the instant case ignored the rule reiterated in *Raines* and, relying heavily on the philosophy expounded in *NAACP v. Button*,[33] proceeded directly to the exception hitherto reserved for first amendment cases.[34] The Court in *Button* invalidated a Virginia statute which defined attorney malpractice so as to make it an offense for an organization to solicit clients for the organization's attorneys. The NAACP had hired a staff of attorneys and actively encouraged the instigation of suits to challenge racial discrimination. The statute was held to be violative of the fourteenth amendment as an undue restriction on the protected first amendment freedoms of expression and association. While the statute was almost certainly unconstitutional as applied to the appellants in *NAACP v. Button*, the converse of the instant case situation, the Court refused to "refine" the statute. It was felt that an overly broad enactment in the area of protected freedoms, which would require a series of cases to restrict its application, should not be upheld because of its probable deterrent effects on socially desirable conduct.

The instant Court, in citing *NAACP v. Button*, clearly indicated that the right to reasonably unrestricted travel required the same protection afforded in the first amendment cases: " 'These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.' "[35]

The Court, having decided to judge section 6 on its face, was confronted with the problem of "overbreadth." The majority viewed critically the statute's possible effect on organizational members who lacked actual knowledge of a registration order. If the State Department found an organization to be within the purview of the registration provision, section 7, publication of the registration order in the *Federal Register* was deemed to provide notice to all members.[36] While extensive provisions provided for actual notification,[37] the coverage was

33. 371 U.S. 415 (1963).

34. 378 U.S. at 507-08.

35. Id. at 516, quoting NAACP v. Button, 371 U.S. 415, 433 (1963).

36. 64 Stat. 1001 (1950), 50 U.S.C. § 792(k) (1958).

37. A distinction exists between a "Communist-action" organization ("substantially directed . . . by [a] . . . foreign government") and a "Communist-front" organization ("substantially directed . . . by a [domestic] Communist-action organization"). Subversive Activities Control Act of 1950, 64 Stat. 989-90, 50 U.S.C. § 782(3),(4) (1958). Communist-front and Communist-action organizations receive written notification from the Attorney General when a registration order is issued. Their officers similarly receive notification. However, only members of Communist-action organizations are directly informed of their status. Subversive Activities Control Act of 1950, 64 Stat. 993-94, 50 U.S.C. §§ 786(d)(2), (d)(4),(g) (1958). Disregarding the implications of the time lag between registration and notification, it is apparent that the constructive-notice problem arose primarily in the cases of front-organization members.

Whether, in the event of a communications failure, parties entitled to actual notification would be within the purview of the constructive notice provision, as the section seems to imply, was never considered.

incomplete. The constructive notice issue being one of first impression, the majority relied on *Wieman v. Updegraff*,[38] one of a series of peripherally analogous cases[39] which held that prior to the application of serious sanctions, inquiry of a person's knowledge of Party objectives must be made.[40] The constructive notice provision of section 13(k) could have produced a situation where a member of a listed organization, lacking actual knowledge of a registration order, would have committed a felony by applying for a passport; the statute in *Wieman*, which was declared unconstitutional, barred Party members, past or present, from state employment regardless of the individual's awareness of organizational tenets. A comparison of the statutes in *Wieman* and the present case indicates that section 6, a violation of which constitutes a felony, contains the stronger sanction. In addition, while it could be argued that the *Wieman* decision virtually requires deciphering the subjective state of a member's mind, the deficiency embodied in section 6 could easily have been avoided. Section 6 should have been operable only to those with actual notification. No insurmountable difficulty could be anticipated from the elimination of the constructive notice provision. In this regard at least, since equally effective "less drastic" means existed, section 6 was properly found excessive. The dissent in insisting that the appellants, who received actual notification, could not assert section 6's possible unconstitutionality as to others, circumvented the constructive notice problem.

The majority further criticized section 6 for denying passports to all Party members, regardless of individual degrees of Party commitment. *Schware v. Board of Bar Examiners*,[41] cited by the Court,[42] held that an individual could not be excluded from a state bar examination because of Party membership thirteen years earlier. The petitioner in that case, after having disclosed his prior Party membership to law school officials, worked his way through law school. While the holding in *Schware* certainly appears sound in its particular context, its application to the instant case raises certain disturbing questions.[43]

38. 344 U.S. 183 (1952).

39. In Adler v. Board of Educ., 342 U.S. 485 (1952), a New York statute provided that the Board of Regents make a list, after notice and hearing, of organizations deemed subversive. Membership constituted prima facie evidence of disqualification for employment. "Where, as here, . . . the presumption . . . is not conclusive, the requirements of due process are satisfied." Id. at 496. In Garner v. Board of Pub. Works, 341 U.S. 716 (1951), a California statute provided that no person could retain or be eligible for public employment unless a "loyalty oath" was taken, relating to present or past affiliations with subversive organizations. The Court upheld the statute's validity stating, "We have no reason to suppose that the oath . . . will be construed . . . by California courts as affecting adversely those persons who during their affiliation with a proscribed organization were innocent of its purpose . . . ." Id. at 723. See also Gerende v. Board of Supervisors, 341 U.S. 56 (1951) (per curiam).

40. 344 U.S. at 191.

41. 353 U.S. 232 (1957).

42. 378 U.S. at 510-11.

43. The Court did not directly question the degree of commitment relative to the problem of criminality. In the instant case, which was a civil action, the statute was

While "subversive" listings are subject to administrative[44] and judicial review,[45] once present membership was established the restrictions were automatically imposed. No machinery existed to delve into individual degrees of Party affiliation. Was this properly found to be a deficiency in section 6? While objective facts are subject to direct proof, the state of a man's mind must be ascertained from overt acts. The Congress, after exhaustive investigations, concluded that the Communist movement is a secretive conspiracy pledged to the destruction of the Western World. Foreign travel was found essential to the scheme's implementation. From the overt act of membership, the virtually conclusive presumption was drawn that the person's travels would be against the national interest.

While it is true that not all persons within the classification would commit, if given the opportunity, unlawful acts, the Court has repeatedly held that blanket prohibitions are not necessarily invalid.[46] However, restrictions must bear a reasonable relationship to the apprehended evil.[47] It is undisputed that Congress has extensive power to combat the Communist conspiracy.[48] The legislative findings, while not binding, are presumptively valid.[49] Nonetheless, if, as the majority opinion seems to say, equally effective "less drastic" means exist to control the Communists, section 6 clearly suffered from overbreadth.

In the first related case cited by the Court, *Shelton v. Tucker*,[50] the question was "whether the State can ask every one of its teachers to disclose every single

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judged "on its face" thereby making the status of the appellants immaterial. However, violations of § 6 constituted a felony. In the Smith Act (18 U.S.C. § 2385 (Supp. V, 1964)), cases, where "knowing" membership in a "society" advocating the violent overthrow of the government is a crime, "active" Party membership is a prerequisite to a guilty verdict. See Scales v. United States, 367 U.S. 203, 219-28 (1961). Rather than rely on Schware v. Board of Bar Examiners, 353 U.S. 232, 243-46 (1957), the Court, since criminal sanctions were involved, might have cited the Scales case to demonstrate that since § 6 failed to confine its application to something approaching "active" Party members it suffered from "overbreadth."

It should be mentioned that the instant case is sufficiently unlike the Scales case to prohibit a similar statutory interpretation. The "membership-clause" of the Smith Act explicitly requires "knowledge" whereas § 6(a) is devoid of such a requirement. The Court in Scales, by saying that a conviction required "knowledge" supplemented by "active" Party participation, perhaps legislated interstitially. In contrast, any attempt by the instant Court to "clarify" the plain meaning of § 6 would be an infringement of the legislative function. 378 U.S. at 511 & n.9.

44. 64 Stat. 994-95 (1950), 50 U.S.C. § 786 (1958).

45. 64 Stat. 1001 (1950), 50 U.S.C. § 793 (1958).

46. See, e.g., American Communications Ass'n v. Douds, 339 U.S. 382, 406 (1950); North Am. Co. v. SEC, 327 U.S. 686, 710-11 (1946); Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392, 396-97 (1927); Westfall v. United States, 274 U.S. 256, 259 (1927).

47. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

48. See, e.g., Barenblatt v. United States, 360 U.S. 109 (1959); Dennis v. United States, 341 U.S. 494 (1951); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

49. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 94-5 (1961).

50. 364 U.S. 479 (1960).

organization with which he has been associated over a five-year period."[51] The Court held that the scope of the inquiry went beyond what was necessary to insure fitness and competency of teachers. The second case cited, *Joint Anti-Fascist Refugee Committee v. McGrath*,[52] involved "administrative discretion . . . run riot."[53] The Court held that the lower court's granting of summary judgment for the Attorney General as to the validity of the designation (without notice or hearing) of the petitioner's organization as "subversive" was erroneous, and a remand was ordered. Both cases are devoid of reference to a program for controlling Communists. The majority apparently only intended to indicate that if "less drastic" means exist, the present statute is excessive. This criticism was applicable to the constructive notice issue. It would seem, however, in the absence of realistic alternate means to control the Communists, and in view of the presumptive validity of the congressional findings, that the Court's argument for discerning degrees of Party affiliations was unsound.

At the present time, no regulation exists prohibiting foreign travel by Communists, other than area restrictions[54] which are indiscriminately applicable to all applicants. If the legislators' judgment was accurate, a restrictive statute is required. The series of prohibitions enunciated by the instant Court suggests that a statute drafted with blanket restrictions, based on mere Party membership, will be found wanting. Actual notice must be provided all those affected by the statute, and distinctions must be formulated to reflect degrees of Party commitment. No effective statute could be drawn within these limitations.

Damages—Interest Not Awarded in a Quantum Meruit Cause of Action.—Plaintiff, a real estate broker, sought commissions for producing a customer ready, willing and able to buy real property belonging to the defendant. The complaint stated two causes of action, breach of contract and *quantum meruit*. From the amount of the verdict, it appeared that the jury had found for the plaintiff under *quantum meruit* rather than breach of contract. Plaintiff's motion to include interest in the judgment to be filed, pursuant to section 5001 of the Civil Practice Law and Rules, was denied. *Lesjac Realty Corp. v. Mulhauser*, 43 Misc. 2d 439, 251 N.Y.S.2d 62 (Sup. Ct. 1964).

By denying plaintiff's motion the instant court has raised three questions re-

51. Id. at 487-88.

52. 341 U.S. 123 (1951).

53. Id. at 138.

54. See, e.g., Frank v. Herter, 269 F.2d 245 (D.C. Cir. 1959) (per curiam), cert. denied, 361 U.S. 918 (1959) (limiting travel to Communist China to selected news-agency personnel valid exercise of Secretary of State's power); Zemel v. Rusk, 228 F. Supp. 65 (D.C. Conn. 1964), appeal docketed, 32 U.S.L. Week 3247 (U.S. May 15, 1964) (No. 1115, 1963-1964 Term; renumbered No. 86, 1964-1965 Term) (section of Immigration and Nationality Act relating to travel controls during national emergency, and section of the Passport Act empowering the Secretary to issue passports, and present travel restrictions to Cuba are constitutional).

garding the interpretation of section 5001 of the CPLR:[1] (1) Does the fact that the court assumed that the recovery was based upon the *quantum meruit* cause of action,[2] where the damages were of necessity unliquidated, preclude the award of interest on the verdict in the way of damages? (2) Does the fact that the statute does not contain the Civil Practice Act phrasing of "express or implied" contracts,[3] permit the court to consider a *quantum meruit* cause of action to be equitable in nature and exercise discretion in the award of interest? (3) Does section 5001 of the CPLR fix the responsibility for computing and adding interest?

The law of New York regarding the award of interest on *quantum meruit* claims has always been far from clear and riddled with arbitrary distinctions. The common law rule stated that "interest is not recoverable in actions ex contractu to recover unliquidated claims as damages."[4] This strict rule was seen to work harshly on the plaintiff in many situations. It was modified in 1849 by the landmark case of *Van Rensselaer v. Jewett*,[5] in which the court of appeals held that, if the amount of the claim sought could be computed with reasonable accuracy by reference to market values, the plaintiff could recover interest on the principal sum in the way of damages.

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1. N.Y. Civ. Prac. Law & R. 5001(a) reads as follows: "Interest shall be recovered upon a sum awarded because of a breach of performance of a contract . . . except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion."

N.Y. Civ. Prac. Law & R. 5001(c) reads: "The date from which interest is to be computed shall be specified in the verdict, report or decision. If a jury is discharged without specifying the date, the court upon motion shall fix the date . . . . The amount of interest shall be computed by the clerk of the court . . . ."

2. It does not appear from the decision whether or not the court was justified in making this assumption. Undoubtedly, if the jury returned a verdict stipulating that its award was based upon the quantum meruit cause of action, no error can be found. If, however, the jury returned a general verdict only, the propriety of the assumption is put in some doubt. The fact that the award amounted to exactly 1% of the selling price of the property indicated either that the jury did not believe testimony as to the usual commission, but felt 1% was the actual contract rate (breach of contract) or that the commission rate on such sales should be 1% (quantum meruit).

3. The second sentence of § 480 of the Civil Practice Act provided: "In every action wherein any sum of money shall be awarded . . . upon a cause of action for the enforcement of . . . a contract, express or implied, interest shall be recovered upon the principal sum whether therefor liquidated or unliquidated and shall be added to and be a part of the total sum awarded." N.Y. Civil Practice Act Annotated § 480 (Gilbert-Bliss 1943).

4. 2 Clark, Damages § 873 (1925).

5. 2 N.Y. 135, 140 (1849). The court justified its modification of the common law rule by asserting that after reference to value had been made there was no reason for distinguishing a quantum meruit recovery on a debt from a debt of a sum certain of money. The court stated further that the underlying purpose of damages was to make the plaintiff whole. In order for justice to be done in this respect, interest should be added to the amount of the recovery. Accord, Livingston v. Miller, 11 N.Y. 80 (1854). Contra, Chambers v. Boyd, 116 App. Div. 208, 101 N.Y. Supp. 486 (1st Dep't 1906).

As early as 1867 there appeared a line of cases which were distinguished from the majority of *quantum meruit* claims in that the strict rule denying recovery of interest on unliquidated damages was not applied.[6] These actions concerned claims brought by attorneys to recover the reasonable value of services rendered. The rationale underlying the distinction between attorneys and other plaintiffs has no basis in logic.[7] On at least one occasion, however, a court allowed interest on a *quantum meruit* claim where the plaintiff was not an attorney.[8]

The philosophy of these cases was most clearly expressed by Chief Judge Cardozo, writing for the court, in *Prager v. New Jersey Fid. & Plate Glass Ins. Co.*[9]

> While the dispute as to value was going on, the defendant had the benefit of the money, and the plaintiff was without it. Interest must be added if we are to make the plaintiff whole .... No doubt there is difficulty in appraising the value of a lawyer's services as there is difficulty often in appraising the services of others. None the less, the standards of general custom and particular practice are not lacking altogether.[10]

The opinion noted a trend in the law which was leading the courts to fully indemnify the plaintiff for delay in payment of an unliquidated debt.[11]

The legislature attempted to resolve the controversy concerning this point of law with the adoption of section 480 of the Civil Practice Act.[12] The cases citing this provision point out that a plaintiff is entitled to "interest as a matter of right" where a *quantum meruit* claim, based upon an implied contract, is proved.[13] These holdings were recognized and sanctioned by the legislature as indicative of the intent of the statute at the time the CPLR was being con-

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6. Prager v. New Jersey Fid. & Plate Glass Ins. Co., 245 N.Y. 1, 156 N.E. 76 (1927); Blackwell v. Finlay, 233 N.Y. 361, 135 N.E. 600 (1922), modifying 196 App. Div. 436, 187 N.Y. Supp. 880 (1st Dep't 1921); Adams v. Fort Plain Bank, 36 N.Y. 255 (1867).

7. 5 Corbin, Contracts § 1048 (1964). "If the plaintiff's entire claim is for quantum meruit . . . interest is frequently not allowed by way of damages. It seems to be generally held, however, that an attorney at law is entitled to interest on his claim .... The present writer will not attempt to reconcile conflicting decisions such as these." (Footnotes omitted.)

8. Mackovsky v. Manhattan Ry., 11 N.Y. State Rep. 649 (New York City Ct. 1887) (undertaker recovered interest on a verdict for the reasonable value of the services rendered).

9. 245 N.Y. 1, 156 N.E. 76 (1927).

10. Id. at 5-6, 156 N.E. at 77.

11. Id. at 6, 156 N.E. at 77-78. "More and more the courts are coming over to the view that in actions on implied contracts to recover for services or property, interest is a concomitant very nearly automatic, and this though the value has been honestly disputed. Interest is now held to be an incident to 'just compensation' where property has been taken in the exercise of the power of the government .... It is no less such an incident where liability has its origin in the obligation of a contract."

12. See note 3 supra.

13. Elliott v. Gian, 19 App. Div. 2d 196, 197, 241 N.Y.S.2d 364, 365 (4th Dep't 1963) (per curiam). See Ingalls v. Streeter, 67 N.Y.S.2d 351 (Munic. Ct. Syracuse 1946) (plaintiff real estate broker sought commissions for the sale of defendant's property).

sidered.[14] The 1950 Law Revision Commission Reports stated that the discretionary powers granted to the courts by the section were to be exercised in tortious equitable actions solely and that contract actions "whether legal or equitable" were governed by the second sentence of the section.[15] Section 5001 (a) of the CPLR was adopted to clarify the intent of the Civil Practice Act, without any change affecting contract actions.[16]

It appears that the court in the instant case overlooked the CPLR provision and its predecessor in rendering its decision and relied upon older decisional law. These decisions were at one time strictly applied but have since been overruled by the majority of modern courts and rejected by the legislature. The instant court was aware of the progressive rationale supporting the *Prager* case, but made a subtle and arbitrary distinction between it and the instant case. "This action is distinguishable from those involving a claim for legal services rendered . . . in that the issue in this action was not *the amount* due the plaintiff but whether or not *any amount* was due the plaintiff."[17] In denying the recovery of interest, the instant court pointed out that the award in this action was one fifth of what the plaintiff demanded, and two fifths of what plaintiff's expert witness testified was often customary in transactions of that size in that jurisdiction. In *Prager* the recovery was one third of what was asked for in the complaint, yet the court there stated that the issue would become "beclouded if the right [to interest] is made dependent upon considerations of more or less."[18] This distinction does not appear to be sound. While the issue in *Prager* may have concerned mainly the value, rather than the existence, of any debt, the decisions awarding interest on *quantum meruit* recoveries where liability was the main issue are legion.[19]

While the court in the instant case did not mention the actual language of CPLR 5001(a), the most obvious change embodied in the new statute was its omission of the phrase "express or implied" which was contained in the CPA

14. N.Y. Law Revision Comm'n Report, N.Y. Leg. Doc. No. 65(E), p. 5 (1950). "By a 1927 amendment to section 480, it was further provided that in an action upon a contract, express or implied, interest should be allowed as of right for the period prior to the verdict, report or decision. The courts construe this amendment as a mandatory direction to award interest from the time of the accrual of the cause of action, that is, in most cases from the time of the breach of the contract."

15. N.Y. Leg. Doc. No. 17, p. 89 (1959). "The committee has adopted a proposal to make the award of interest in equity actions discretionary . . . . Such discretion is presently exercised in tort actions arising in equity . . . whereas in actions based upon a contract, the second sentence of section 480 of the civil practice act is held to make the award of interest at the legal rate mandatory."

16. Id. at 86-87.

17. 43 Misc. 2d at 440-41, 251 N.Y.S.2d at 64.

18. 245 N.Y. at 6, 156 N.E. at 77.

19. E.g., Blackwell v. Finlay, 233 N.Y. 361, 135 N.E. 600 (1922), modifying 196 App. Div. 436, 187 N.Y. Supp. 880 (1st Dep't 1921); Thacher v. New York, W. & B. Ry., 153 App. Div. 186, 138 N.Y. Supp. 463 (1st Dep't 1912); Lane v. Merit Enterprises Inc., 4 Misc. 2d 137, 149 N.Y.S.2d 402 (Sup. Ct. 1955). Cf. 2 Clark, Damages § 880, at 1541 (1925).

section, and the substitution of "breach of performance of a contract" in its place.[20] The adoption of the new section may have led the court to feel that this change in the wording permitted the court to view a *quantum meruit* claim as an "action of an equitable nature" and relegate the award of interest to a matter of judicial discretion. There is, however, no authority to support such a proposition. The action in *quantum meruit* grew out of the common law writ of assumpsit.[21] Although it may have had its origin in the desire to render equitable, in the sense of fair, relief to an aggrieved person, the action was from its inception not equitable but legal. In the light of this background, and since no contrary statement of legislative intent can be found, it seems certain that the contract actions portion of CPLR 5001(a) should be construed exactly as was the older provision.[22]

The law of New York regarding the third question raised by the instant court was apparently well settled until the adoption of the CPLR. The general rule had been that, unless it was clear that the jury did not take interest into account in arriving at its award, the court was powerless to amend the verdict to include interest as damages.[23] The following of such a strict rule obviously worked a hardship on the plaintiff and frustrated the legislative intent, since without a proper charge from the court it was impossible to tell from the usual general verdict if interest was included. While the legislature may have been at fault in cryptically wording the statutes, the root of the problem was the failure of judges at trials to charge the juries adequately on the point. Several courts attempted to ameliorate the situation by creating a rebuttable presumption that where no instruction was given by the court to include interest in the verdict, it was presumed not to have been done.[24] The root of the problem was attacked but once prior to the adoption of the CPLR. In *Borlan Corp. v. Oriental Quilting & Novelty Corp.*,[25] the court took great pains to instruct the jury not to take interest into account in arriving at the award, and after the trial instructed the court clerk to compute and add interest to the verdict.

With the adoption of CPLR 5001(c) it was thought that problem was elim-

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20. See note 1 supra.

21. 1 Corbin, Contracts § 20, at 50-51 (1963).

22. N.Y. Leg. Doc. No. 17, pp. 86-87 (1959). See also 5 Weinstein, Korn & Miller, New York Civil Practice ¶ 5001.04, at 50-10 (1964).

23. Mayaguez Drug Co. v. Globe & Rutgers Fire Ins. Co., 260 N.Y. 356, 183 N.E. 523 (1932) (verdict amended where uncontradicted affidavits showed that interest had not been included by the jury in the amount of the verdict); First Int'l Pictures, Inc. v. F.C. Pictures Corp., 262 App. Div. 21, 27 N.Y.S.2d 816 (4th Dep't 1941) (judge failed to award interest where plaintiff did not request a charge instructing the jury not to add interest to the verdict). See also, 5 Weinstein, Korn & Miller, New York Civil Practice, ¶ 5001.14, at 50-28 (1964).

24. Mathis v. Matthews, 39 N.Y.S.2d 242 (Sup. Ct. 1943). Since the matter of interest was not submitted to the jury it is clear that the jury did not intend to include interest in the award.

25. 34 Misc. 2d 735, 232 N.Y.S.2d 71 (Sup. Ct. 1962), aff'd, 18 App. Div. 2d 1052, 238 N.Y.S.2d 919 (1st Dep't 1963).

inated.[26] This section seems to make it clear that it is not within the jury's function to calculate and add interest to the award. The jury is authorized solely to inform the court of the date from which interest is to be computed and it is the duty of the court to proceed from that point.[27] The instant court, however, following the earlier cases, refused to add interest on the additional ground that the jury might have included interest in the amount of the verdict.[28]

The instant court, in refusing to grant plaintiff's motion, appears to have misconstrued the wording of the CPLR and lost sight of the trend noted by the *Prager* court. The holding in the instant case points up the need for counsel involved in such litigation to request the court to charge the jury as to its responsibilities regarding the award of interest. Such a charge might well contain three basic points: If the plaintiff has satisfied the jury as to the defendant's liability, (1) the plaintiff is entitled to interest as a proper element of damages. (2) It is the jurors' task to specify the date from which interest is to be computed. (3) The jury is not to consider any amount of interest in arriving at the final award. If such a charge is given by a court it seems doubtful that the problems encountered by the instant court will be met.

Estate Tax—Aircraft Accident Policies on Life of Insured Excluded From Gross Estate.—Decedent made a written application for two flight insurance policies of a total value of 125,000 dollars. His wife, the named beneficiary, paid the five dollar premium, and the policies were delivered to her upon issuance. Each policy reserved to the insured the right to assign it, or to change the beneficiary. The plane crashed, killing the insured. The executors, petitioners in this action, filed the required estate tax return, and excluded the proceeds of the aircraft accident policies. The respondent, Commissioner of Internal Revenue, declared a deficiency to exist, and gave written notice to petitioners. The Tax Court[1] held these policies to be "insurance under policies on the life of the decedent,"[2] and therefore, includible in the gross estate. The petitioners filed a petition for review and the Court of Appeals for the Third Circuit held that the term "insurance under policies on the life of the decedent" did not comprehend aircraft accident policies for purposes of includibility in the gross estate for estate taxation. *In re Noel*, 332 F.2d 950 (3d Cir. 1964).

26. See note 1 supra. CPLR 5001(c) had no counterpart in the CPA. 5 Weinstein, Korn & Miller, New York Civil Practice ¶ 5001.14, at 50-29 (1964).

27. N.Y. Leg. Doc. No. 17, p. 91 (1959). "The jury is required only to fix a date. Should the plaintiff fail to request an instruction that the date . . . be specified in the verdict . . . the court will fix the date."

28. The actual value of the verdict in the instant case makes it unlikely that the jury included interest. The award was 1% of the selling price of the property. For that amount to include interest, the principal would have to be an odd fraction of one percent completely unrelated to any standard.

1. Marshal L. Noel, 39 T.C. 466 (1962).

2. Int. Rev. Code of 1954, § 2042.

Originally, the gross estate for estate tax computation under the Revenue Act of 1916 did not specifically include the proceeds of life insurance policies.[3] But, such proceeds receivable by the executor in his fiduciary capacity were included. Because persons resorted to the device of taking out life insurance policies payable to specific beneficiaries, the estate tax was avoided.[4] Congress remedied this defect by the Revenue Act of 1918. Thereafter, the gross estate included proceeds "under policies taken out by the decedent upon his own life" receivable by the executor, and "the excess over $40,000 of the amount receivable by all other beneficiaries. . . ."[5] A later amendment changed the test of includibility of such a policy to a question of whether the decedent directly or indirectly paid the premiums, or, whether he had "incidents of ownership" in the policy at the time of his death.[6] The Internal Revenue Code of 1954 deleted the "payment of premiums" test, but included those proceeds receivable by the executor,[7] and perpetuated the "incidents of ownership" standard.[8] By narrowing the test of inclusion, Congress adopted a more lenient attitude toward the inclusion of life insurance policies.

The instant court, however, never reached the question of "incidents of ownership" since it concluded the policy was not one "on the life of the decedent" within the meaning of the Code. The rationale was that it was impossible to use such a policy to avoid an estate tax and that the Legislature intended in section 2042 to include only policies which could be so manipulated.[9] It is to be noted, however, that Congress has continually used the term "insurance under policies on the life of the decedent" rather than the term "life insurance."[10]

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3. Revenue Act of 1916, ch. 463, § 202(a), 39 Stat. 777.

4. See H.R. Rep. No. 767, 65th Cong., 2d Sess. 22 (1918).

5. Revenue Act of 1918, ch. 18, § 402(f), 40 Stat. 1098. This was continued in the Int. Rev. Code of 1939, ch. 3, § 811(g), 53 Stat. 122.

6. Revenue Act of 1942, ch. 619, § 404(g), 56 Stat. 944.

7. Int. Rev. Code of 1954, § 2042(1). In the instant case, the beneficiary was also one of of the executors, though this fact was not involved in the court's reasoning.

8. Int. Rev. Code of 1954, § 2042(2). The term "incidents of ownership" is not limited to reversionary interests. Nor is it limited to "ownership of the policy in the technical legal sense.... [I]t includes the power to change the beneficiary, to surrender or cancel the policy, to assign the policy, to revoke an assignment, to pledge the policy for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc." 26 C.F.R. § 20.2042-1(c)(2) (1961).

9. The court in the instant case stated: "The obvious intent of Congress and the purpose of the enactment was to foreclose the possibility of tax avoidance under the existing law." 332 F.2d at 953. Hence, the evitable risk which the aircraft accident policy encompassed did not thereby convert it into a life policy because of payment of the proceeds accruing from death. Ibid.

10. Life insurance proceeds are those which result from the payment of a contract involving an insurance risk. "That these elements of risk-shifting and risk-distributing are essential to a life insurance contract is agreed by courts and commentators." Helvering v. Le Gierse, 312 U.S. 531, 539 (1941).

In the Detailed Discussions of the House Report[11] and the Senate Report[12] on section 2042 of the Code, Congress used this same language, while in the General Explanation of the House Report[13] and the Senate Report,[14] Congress used the term "proceeds of life-insurance." Hence the question is raised whether Congress specifically meant to include life insurance as it is commonly known, or to include generally contracts of insurance upon life—such as accident policies—which do not necessarily involve a testamentary intent.[15] The court in the instant case reasoned that Congress intended the former, and in the light of overall legislative intent, this view would appear correct.[16]

Nevertheless, in conjunction with Congress' "narrowing"[17] of the inclusionary test, most tax court decisions have similarly broadened the meaning of the term "insurance under policies on the life of the decedent" and extended it to include accident policies.[18] Life insurance policies, however, are ordinarily considered to have a certain investment value[19] which aircraft accident policies do not. Basically, accident policies resemble a gamble on a "long shot" that the inevitable (death) will not occur at a certain time, and as such have no value until the contingency occurs. Thus, it would be impossible to utilize such a policy for the conscious avoidance of estate taxes.[20] Although the instant court's analysis of legislative intent and the resulting distinction drawn between evitability and inevitability is soundly reasoned,[21] it is safe to assume that

11. H.R. Rep. No. 1337, 83d Cong., 2d Sess. A. 313 (1954).

12. S. Rep. No. 1622, 83d Cong., 2d Sess. 472 (1954).

13. H.R. Rep. No. 1337, 83d Cong., 2d Sess. 91 (1954).

14. S. Rep. No. 1622, 83d Cong., 2d Sess. 124 (1954).

15. The Minority Views in the House Report discuss the testamentary aspects of "proceeds of life-insurance," and thus it appears that they are discussing life insurance in the ordinary sense of the term. H.R. Rep. No. 1337, 83d Cong., 2d Sess. B. 14 (1954).

16. See Helvering v. Le Gierse, 312 U.S. 531 (1941).

17. See note 8 supra and accompanying text.

18. E.g., Will Wright, 8 T.C. 531 (1947); Luman W. Goodenough, 29 B.T.A. 211 (1933); Leopold Ackerman, 15 B.T.A. 635 (1929); Rev. Rul. 61-123, 1961-2 Cum. Bull. 151.

19. The instant court emphasized this as largely determinative of the congressional intent to prevent the use of life insurance to avoid estate taxes. 332 F.2d at 952.

20. It is interesting to note that the difference between aircraft accident policies and other types of accident policies is negligible. By dictum in the instant case, the court appears to take the position that all accident policies are excludible from the gross estate. It stated that it regarded the case of Leopold Ackerman, 15 B.T.A. 635 (1929), as erroneous. 322 F.2d at 952. In that case it was held that the proceeds of accident policies, which the decedent owned insuring himself, were includible in the gross estate. This was followed in Will Wright, 8 T.C. 531 (1947) and Luman W. Goodenough, 29 B.T.A. 211 (1933), and it is apparent that the point had been settled until the present decision. The determinant at that time was that it be proceeds "under policies taken out by the decedent upon his own life." Revenue Act of 1924, ch. 234, § 302(g), 43 Stat. 305.

21. A questionable distinction arises on this point however. "Term" life insurance is similar to an accident policy because it has no value until death. Ordinarily it is used for supplementary insurance protection, but as a life insurance policy it is includible in the gross estate. Since death might not occur during such a policy term, it also is evitable, though the ultimate contingency is inevitable.

the Internal Revenue Service will persist in the contention that airplane accident policies on life, and indeed, all insurance proceeds payable on the death of the insured are includible in the phrase "insurance under policies on the life of the decedent."[22] At the Commissioner's level the "incidents of ownership" test may well remain the only determinative norm for includibility.

Since the Internal Revenue Service has ruled[23] that an airplane passenger retained the "incidents of ownership" in a flight accident policy purchased by him and delivered to his wife, even where it was impossible for him to exercise that right,[24] it would appear that only where he is not possessed of such a right at the time of his death could there be an exclusion under this section of the Code.[25] The problem of how to accomplish divestment, however, remains.

"Incidents of ownership" presents a factual question,[26] since the term is "not limited in its meaning . . . in the technical legal sense."[27] A determination of the insured's rights under the policy of insurance is governed by local law[28] and so, whether an insured possessed any of the "incidents of ownership" at the time of his death depends upon the state decisions affecting property. In a New York case,[29] it was held that an inter vivos gift of a life policy, in which the insured had the right to change the beneficiary, made by the insured to

22. See note 18 supra and accompanying text. For an analogous situation, see United States Trust Co. v. Helvering, 307 U.S. 57 (1939), where it was held that the proceeds of a War Risk insurance policy were includible in the gross estate since the decedent owned the policy, even though there was to be no taxation on the payment of the benefits.

23. Rev. Rul. 61-123, 1961-2 Cum. Bull. 151.

24. It is the existence of the right, rather than its exercise that is determinative of includibility. Singer v. Shaughnessy, 198 F.2d 178 (2d Cir. 1952); Hall v. Wheeler, 174 F. Supp. 418 (S.D. Me. 1959). See also Cowles v. United States, 152 F.2d 212 (2d Cir. 1945). The tax court decision in the instant case noted that there was no procedure available at the airport for the insured to change any of the terms of the policy.

It is irrelevant that the decedent could not exercise the right. Charles S. Inman, 18 T.C. 522 (1952), rev'd on other grounds, 203 F.2d 679 (2d Cir. 1953); Virginia H. West, 9 T.C. 736 (1947), aff'd sub nom. St. Louis Union Trust Co. v. Commissioner, 173 F.2d 505 (8th Cir. 1949); Edward L. Hurd, 6 T.C. 819 (1946), aff'd, 160 F.2d 610 (1st Cir. 1947); Rev. Rul. 61-123, 1961-2 Cum. Bull. 151. This point is striking in that the decedent, once aboard the airplane, would not be able to communicate any changes he desired to effect in the policy. However, the tax court in the instant case noted that the policy was for the round-trip flight, and that the decedent could change it prior to the return trip. 39 T.C. at 472.

25. Cowles v. United States, 152 F.2d 212 (2d Cir. 1945); John C. Morrow, 19 T.C. 1068 (1953).

26. See Fried v. Granger, 105 F. Supp. 564 (W.D. Pa. 1952), aff'd, 202 F.2d 150 (3d Cir. 1953) (per curiam).

27. 26 C.F.R. § 20.2042-1(c)(2) (1961).

28. See Lang v. Commissioner, 304 U.S. 264 (1938), where the laws of the State of Washington were applied to determine the beneficiary's share of the proceeds from life insurance policies paid in part by her in order to determine the gross estate; and Anna Rosenstock, 41 B.T.A. 635 (1940), holding that New York law was applicable in determining an assignment of life insurance policies.

29. John Hancock Mut. Life Ins. Co. v. Sandrisser, 95 N.Y.S.2d 399 (Sup. Ct. 1950).

his wife, operated to divest him of the right to exercise the change of beneficiary.[30] Under this reasoning, if the insured in the instant case had made an inter vivos gift by delivery of the policy to his wife, he would no longer have been possessed of incidents of ownership.[31]

On the other hand, inter vivos transfers of insurance policies within a short period of time prior to death are presumed to be in contemplation of death[32] and, even though the decedent may no longer possess "incidents of ownership,"[33] the policies are includible in the gross estate at their value at maturity.[34] Thus, even a transfer of the policy will not achieve the desired result. But where the decedent does not own the policy at any time, the proceeds are excludible.[35] Only where the prospective beneficiary takes out the policy is there a sure escape

30. Such gifts are valid with or without writing. Finger v. Treitler, 52 N.Y.S.2d 841 (Sup. Ct. 1945); Young v. Prudential Ins. Co., 131 N.Y. Supp. 968 (Sup. Ct. 1911). See Apt v. Birmingham, 89 F. Supp. 361, 370-72 (N.D. Iowa 1950) for a discussion of gifts inter vivos.

New York and Federal decisions both require a donative intent, delivery, and acceptance. Federal courts further require that the transfer from donor to donee divest the donor of all control and dominion. The New York decisions on this point would use similar reasoning since the "incidents of ownership" test is directly akin to creation of a divestment of all further control. John Hancock Mut. Life Ins. Co. v. Sandrisser, supra note 29.

If the same facts were held to constitute a gift causa mortis, then the proceeds would be taxable since the decedent would have the right to revoke the gift prior to death. Ridden v. Thrall, 125 N.Y. 572, 26 N.E. 627 (1891); In the Matter of Estate of Adler, 107 Misc. 574, 177 N.Y. Supp. 820 (Surr. Ct. 1919), aff'd, 191 App. Div. 40, 180 N.Y. Supp. 840 (1st Dep't 1920).

31. The same reasoning applies to assignments. Under N.Y. Pers. Prop. Law § 31(9), an assignment must be in writing to be valid. Katzman v. Aetna Life Ins. Co., 285 App. Div. 446, 137 N.Y.S.2d 583 (1st Dep't), rev'd, 309 N.Y. 197, 128 N.E.2d 307 (1955) (constructive trust imposed); McNamee v. Griffin, 285 App. Div. 886, 137 N.Y.S.2d 749 (1st Dep't), aff'd, 309 N.Y. 864, 131 N.E.2d 284 (1955). An unconditional and irrevocable assignment has the effect of divesting the decedent of the "incidents of ownership." Louis J. Dorson, 4 T.C. 463, 469 (1944).

32. Int. Rev. Code of 1954, § 2035(b). See generally Comment, Transfers of Life Insurance in Contemplation of Death, 47 Mich. L. Rev. 811 (1949). The problems associated with transfers in contemplation of death are peculiarly germane to aircraft accident policies, and it is doubtful that the presumption could be rebutted. This presumption, however, would not be critical with respect to other types of accident policies (see note 21 supra) since the transfer might have occurred several years before death, or, clearly from the circumstances surrounding the transfer no such contemplation could be found. Hence an assignment or gift of this latter type policy would not necessarily be defeated under this section of the Code. See Louis J. Dorson, supra note 31. But see Hull v. Commissioner, 325 F.2d 367 (3d Cir. 1963).

33. Speights v. United States, 214 F. Supp. 24 (D.N.J. 1962).

34. Liebmann v. Hassett, 148 F.2d 247 (1st Cir. 1945).

35. Int. Rev. Code of 1954, § 2042(2). Cf. Miran Karagheusian, 23 T.C. 806 (1955), rev'd on other grounds, 233 F.2d 197 (2d Cir. 1956).

from the estate tax.[36] And that, at least in the case of airplane accident policies, may be impractical.[37]

Jurisdiction—Jurisdiction Over a Non-Resident Predicated Solely Upon a "Continuous Tortious Act" Committed Within the State Held Valid.—Defendant corporation manufactured a hammer in Illinois, marked it "unbreakable" and shipped it, f.o.b. Illinois, to a New York dealer who had selected it from a catalogue which defendant had mailed to him. The hammer was purchased from the New York dealer by plaintiff's aunt who gave it to the plaintiff, a New York resident. While the plaintiff was on a field trip in Connecticut, the hammer broke and injured him. Plaintiff alleged two causes of action, one in breach of warranty, the other in negligence. The supreme court held that section 302(a)(2) of the New York Civil Practice Law and Rules[1] did not confer in personam jurisdiction over the defendant because defendant corporation was not doing business in New York, and further, because the cause of action did not arise from any tortious act committed in New York by the defendant.[2] The appellate division reversed, holding that the circulation in New York of the defective hammer, marked as "unbreakable," was a "continuous tortious act," and as a result of such act, in personam jurisdiction could be obtained over the defendant. *Singer v. Walker*, 21 App. Div. 2d 285, 250 N.Y.S.2d 216 (1st Dep't 1964).

In order for a court to entertain an in personam action against a foreign corporation, it is essential that jurisdiction over the defendant be acquired. Conventionally this has been composed of two elements: the power to subject the corporation to the juisdiction of the court; and the ability to bring it before

36. Under New York law, a wife or husband may insure the other without consent, and it is only necessary in the case of other beneficiaries with an "insurable interest" to get the consent of the insured. N.Y. Ins. Law § 146. See Holmes v. Nationwide Mut. Ins. Co., 40 Misc. 2d 894, 244 N.Y.S.2d 148 (Sup. Ct. 1963). The proceeds under the Int. Rev. Code of 1954, § 101(a)(1) may be excludible from the recipient's income tax as death proceeds. 26 C.F.R. § 1.101-1 (1961).

37. Some aircraft accident insurance companies require that the insured be the owner. Similarly, it is often inconvenient for the recipient to be present at the airport at the time of the purchase of the policy. On the other hand, accident policies not involving flight insurance may be taken out under circumstances more amenable to the convenience of the parties.

1. N.Y. Civ. Prac. Law & R. 302. "Personal jurisdiction by acts of non-domiciliaries. (a) Acts which are the basis of jurisdiction. A court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if in person or through an agent, he: 1. transacts any business within the state; or 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act . . . ."

2. In a prior action brought by the plaintiffs against these defendants, service of process was set aside; first, on the ground that the service was not made on a proper person, and second, on the ground that the defendant was not doing business within the state. Singer v. Walker, 21 App. Div. 2d 285, 287, 250 N.Y.S.2d 216, 219 (1st Dep't 1964).

the court by proper notice.[3] The problem that confronted the court in the instant case, as it had many courts previously, was what minimal contact with a state is needed to allow it to obtain personal jurisdiction over a non-resident without violating his right to due process.

Since *Pennoyer v. Neff*,[4] the power of a state court to obtain personal jurisdiction over an out-of-state resident has undergone a slow, but definite expansion from a strict territorial limitation to a view that virtually any contact with a state is sufficient if traditional notions of fair play and substantial justice are not violated.[5] In *Pennoyer v. Neff*, Mr. Justice Field reaffirmed the principles of law[6] which prior courts had so often followed[7] and held that in order to obtain in personam jurisdiction over a person, his presence within the territorial jurisdiction of the court was necessary.[8]

The invention and widespread use of the automobile prompted courts to move away from *Pennoyer*. The non-resident motorist might enter a state, commit a tort, and then return to relative safety beyond its borders. He could not, as a practical matter, be made to answer to the injured plaintiff in the state where he inflicted the injury. *Pennoyer* did not stand in the way of the state "non-resident motorist" statutes[9] enacted to remove this palpable injustice.[10] Thus,

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3. International Shoe Co. v. Washington, 326 U.S. 310 (1945); Milliken v. Meyer, 311 U.S. 457 (1940); Wuchter v. Pizzutti, 276 U.S. 13 (1928); Hess v. Pawloski, 274 U.S. 352 (1927); McDonald v. Mabee, 243 U.S. 90 (1917); Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913); Pennoyer v. Neff, 95 U.S. 714 (1877).

4. 95 U.S. 714 (1877).

5. Compare McGee v. International Life Ins. Co., 355 U.S. 220 (1957) and International Shoe Co. v. Washington, 326 U.S. 310 (1945), with Hunter v. Mutual Reserve Life Ins. Co., 218 U.S. 573 (1910) and Clark v. Wells, 203 U.S. 164 (1906) and Caledonian Coal Co. v. Baker, 196 U.S. 432 (1905) and Scott v. McNeal, 154 U.S. 34 (1894) and Wilson v. Seligman, 144 U.S. 41 (1892) and Freeman v. Alderson, 119 U.S. 185 (1886) and St. Clair v. Cox, 106 U.S. 350 (1882).

6. He stated "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory" and "that no State can exercise direct jurisdiction and authority over persons or property without its territory." 95 U.S. 714, 722 (1877).

7. Cooper v. Reynolds, 77 U.S. (10 Wall.) 308 (1870); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855); D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850); Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336 (1850).

8. Mr. Justice Field stated: "[F]or any other purpose than to subject the property of a non-resident to valid claims against him in the State, 'due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered.'" 95 U.S. 714, 733-34 (1877).

9. See, e.g., N.Y. Vehicle and Traffic Law § 253 (1960); N.J. Stat. Ann. § 39:7-2 (1961); R.I. Gen. Laws Ann. § 31-7-7 (1956); Wis. Stat. Ann. § 345.09 (1958). In the case of Hess v. Pawloski, 274 U.S. 352 (1927), the United States Supreme Court upheld a Massachusetts statute which allowed the Massachusetts courts to obtain personal jurisdiction over a non-resident who had left the state after he was involved in an automobile accident when driving on a Massachusetts highway. Accord, Young v. Masci, 289 U.S. 253 (1933).

10. Justice Schaefer, while speaking of the "non-resident motorist" statutes, in Nelson v. Miller, 11 Ill. 2d 378, 385, 143 N.E.2d 673, 677 (1957), said: "In many cases redress for

for the first time, one act, the accident in the foreign state, was sufficient contact to sustain in personam jurisdiction over a non-resident.

International Shoe Co. v. Washington,[11] was the next stage in the retreat from *Pennoyer*. There Mr. Chief Justice Stone laid the foundation for a "single act" statute when he wrote:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have *certain minimum contacts with it* such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[12]

This reasoning was a giant step forward in loosening the personal jurisdiction requirements. As a result of this decision, "single or occasional acts . . . because of their . . . quality and the circumstances of their commission, may be deemed

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the injury, obtainable only in a foreign court at considerable expense and under substantial handicaps, was a practical impossibility. In the light of this situation, there was no injustice to the nonresident in a requirement that he return, to make his defense, to the place to which he had come voluntarily—to the place in which the injury was inflicted." Of course, Justice Schaefer was speaking solely of the problem caused by the automobile. But the reasoning he used can be equally applied when dealing with contacts voluntarily made by nonresidents. To allow those people to return to their home state and actually be immune from the process of the state in which they voluntarily entered and caused damage, seems somewhat unjust. He went on to say that the "implied consent" theory used by the courts as a base for personal jurisdiction was a fiction, the true basis being the commission of the tort in the state. See International Shoe Co. v. Washington, 326 U.S. 310 (1945); Young v. Masci, 289 U.S. 253 (1933); Simon v. Southern Ry. Co., 236 U.S. 115 (1915); Commercial Mut. Acc. Co. v. Davis, 213 U.S. 245 (1909); Connecticut Mut. Ins. Co. v. Spratley, 172 U.S. 602 (1899).

11. 326 U.S. 310 (1945). The defendant, a Delaware corporation engaged in the sale and manufacture of footwear, had its principal place of business in Missouri. It maintained no place of business in Washington. Between 1937 and 1940, the years in question, the defendant employed about thirteen salesmen who resided in Washington and whose principal activities were confined to that state. The men were paid on a commission basis, and were under the direct supervision and control of the sales manager located in St. Louis. On occasion they rented rooms in Washington to exhibit their samples. These men were not authorized to sell but could take orders which were sent to St. Louis for acceptance. If accepted, the orders were filled in outlets outside of Washington and shipped f.o.b. to the purchasers. The State of Washington brought an action against the corporate defendant to collect unpaid contributions to the unemployment fund of the State of Washington. A Washington statute authorized service in such a proceeding, when the employer was not found within the state, by sending notice by registered mail to its last known address. Such service of process was delivered in this case. One of the defendant's salesmen was also served. The defendant moved to set aside the decree rendered against it on four grounds. The three which are of concern here are: that service upon defendant's salesman was not proper service upon defendant, that defendant was not a corporation of the State of Washington and was not doing business within the state, and that defendant had no agent within the state upon whom service could be made.

12. Id. at 316. (Emphasis added.)

sufficient" to subject a non-resident to personal jurisdiction.[13] The test was carried to its ultimate conclusion in *McGee v. International Life Ins. Co.*[14] which sustained a California statute assuming personal jurisdiction over an absentee insurance company which had but a single business contact with California—the mailing of a reinsurance certificate on a life insurance policy issued to a California resident. Jurisdiction was upheld even though the insurance company never had an office nor an agent in the state. Mr. Justice Black noted that a "trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents."[15] However, the court in *Hanson v. Denckla*[16] qualified, to some small extent, the *International Shoe* and *McGee* rationale, stating that it is "essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[17]

New York, following in the footsteps of a number of other states,[18] noted and evaluated the trend, and enacted section 302 of the CPLR. In 1957 an Illinois statute,[19] after which the New York statute was patterned,[20] was held constitutional in *Nelson v. Miller*.[21] The defendant, a resident of Wisconsin, had sold a stove to the plaintiff, a resident of Illinois. While the defendant's employee was delivering the stove in Illinois, he allegedly caused injury to the plaintiff. The court reasoned that since the defendant's employee was under the protection and advantages of Illinois law while within the state, and he could resort to its courts if injured there, he should likewise be subject to the restrictions and punishments of the same laws when he violates them. Furthermore, since the employee was a representative of the defendant, the defendant should be answerable to the Illinois courts for any actions arising out of his employee's conduct in the state. The Illinois Supreme Court went still further in *Gray v. American Radiator & Standard Sanitary Corp.*,[22] holding that when a negligent

13. Id. at 318.

14. 355 U.S. 220 (1957).

15. Id. at 222. But see Hanson v. Denckla, 357 U.S. 235 (1958). "[I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Id. at 251.

16. 357 U.S. 235 (1958).

17. Id. at 253.

18. See, e.g., Ill. Ann. Stat. ch. 110, § 17 (Smith-Hurd 1956); Md. Ann. Code art. 23, § 92 (1957); Pa. Stat. Ann. tit. 12, § 331 (1953); Vt. Stat. Ann. tit. 12, § 855 (1959).

19. Ill. Ann. Stat. ch. 110, § 17 (Smith-Hurd 1956).

20. Totero v. World Telegram Corp., 41 Misc. 2d 594, 597, 245 N.Y.S.2d 870, 873 (Sup. Ct. 1963).

21. 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

22. 22 Ill. 2d 432, 176 N.E.2d 761 (1961). The defendant manufactured a safety valve in Ohio which was attached to a hot water heater in Pennsylvania. This product was then sold to a consumer in Illinois who was injured when it exploded. The defendant was served under the Illinois statute. The defendant contended that since the tortious act was his only contact with the state, the court could not obtain personal jurisdiction over him by service

act occurs outside the state, giving rise to injury within the state, Illinois courts can obtain in personam jurisdiction over a nonresident manufacturer even though neither the defendant nor his agent had entered the state.

The constitutionality of the New York statute seems clear enough if its application by judicial construction can be kept within the boundaries of due process.[23] Justice Breitel, writing for the court in the instant case, held that the court could obtain in personam jurisdiction over the defendant under the "tortious act" section of the statute. Under this provision any act or omission within the state which would subject the defendant to an action grounded in tort is a sufficient basis for the exercise of jurisdiction, even though the cause of action technically "accrues" outside the state.[24] The courts can also obtain personal jurisdiction over a nondomiciliary when a cause of action sounding in tort arises in the state, *e.g.*, when an injury allegedly resulting from his negligence takes place within the state, although the act or omission occurred outside.[25]

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out of the state and that the statute was unconstitutional. The court did not agree with this and held that such service, in this case, did not deprive the defendant of due process. A similar Vermont statute was upheld in Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951). This case involved an action brought by a resident of Vermont against a foreign corporation whom Smyth had hired to repair his house. While doing the repair work, the corporation damaged the building and the plaintiff brought an action for damages. Defendant was sued in compliance with the statute. The Supreme Court of Vermont, per Justice Blackmer, stated: "What we are considering is the power of the State of Vermont. . . . The only limitations upon the jurisdiction of the courts of one of the United States are to be found in the constitution of the state, the Constitution of the United States. . . . No express limitation is known to us in any of these sources which prevents appropriate courts of a state from exercising jurisdiction over proceedings therein arising out of tortious acts done within the state, provided always that adequate notice of the litigation be given to the particular defendant against whom liability is sought to be enforced. There is no arbitrary exercise of the power, since the nonresident has had the protection of the state's laws while acting therein." 116 Vt. at 574, 80 A.2d at 667. Although the decision has sometimes been questioned, the principle appears to have been followed in both New York and Illinois. It was cited with approval in McGee v. International Life Ins. Co., 355 U.S. 220, 223 n.2 (1957).

23. See Feathers v. McLucas, 21 App. Div. 2d 558, 251 N.Y.S.2d 548 (3d Dep't 1964) (per curiam); Platt Corp. v. Platt, 42 Misc. 2d 640, 249 N.Y.S.2d 1 (Sup. Ct. 1964); Iroquois Gas Corp. v. Collins, 42 Misc. 2d 632, 248 N.Y.S.2d 494 (Sup. Ct. 1964); Lewin v. Bock Laundry Mach. Co., 42 Misc. 2d 599, 249 N.Y.S.2d 49 (Sup. Ct. 1964); Formabaio v. Swissair Transp. Co., 42 Misc. 2d 182, 247 N.Y.S.2d 203 (Sup. Ct. 1964); Totero v. World Telegram Corp., 41 Misc. 2d 594, 245 N.Y.S.2d 870 (Sup. Ct. 1963).

24. Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957); Platt Corp. v. Platt, 42 Misc. 2d 640, 249 N.Y.S.2d 1 (Sup. Ct. 1964). See also Hellriegel v. Sears, Roebuck & Co., 157 F. Supp. 718 (N.D. Ill. 1957); McMahon v. Boeing Airplane Co., 199 F. Supp. 903 (N.D. Ill. 1961).

25. Gray v. American Radiator & Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). Here the court actually based jurisdiction on a fiction. It reasoned that since the cause of action arose in Illinois, it would be justifiable to say that the tortious act, the negligent manufacture in Ohio, took place in Illinois. In essence the court held that if an injury occurs in Illinois all foreign tortious acts will be deemed to join it there if it was foreseeable

In *Feathers v. McLucas*,[26] the Appellate Division, Third Department, following the reasoning of *Gray v. American Radiator & Standard Sanitary Corp.*, held that in personam jurisdiction could be obtained over a nonresident manufacturer[27] based on an injury that occurred within New York. The court said that although the alleged negligent act took place outside New York, it could not be separated from the resulting New York injury.[28]

Thus, by following the reasoning of the preceding cases, in order to obtain jurisdiction under section 302(a)(2) based upon a negligence theory, one of two conditions must be met. Either plaintiff must sustain an injury in New York or the defendant must perform, or fail to perform, an act in New York which is the basis for a cause of action in negligence. In the instant case the injury to the plaintiff took place in Connecticut, while the defendant's alleged negligent act occurred in Illinois. From these facts jurisdiction grounded on negligence cannot be found.

Since a breach of warranty is now considered a tort as well as a breach of a sales contract,[29] it may serve to meet the requirement of section 302(a)(2).

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that the goods would be distributed in the state. However, Gray v. American Radiator & Standard Sanitary Corp. must be read to leave open the question of whether jurisdiction may be obtained where there is a wrongful act within the state and the injury occurs outside the state.

26. 21 App. Div. 2d 558, 251 N.Y.S.2d 548 (3d Dep't 1964) (per curiam). Accord, Fornabaio v. Swissair Transp. Co., 42 Misc. 2d 182, 247 N.Y.S.2d 203 (Sup. Ct. 1964); Lewin v. Bock Laundry Mach. Co., 42 Misc. 2d 599, 249 N.Y.S.2d 49 (Sup. Ct. 1964).

27. But see Muraco v. Ferentino, 42 Misc. 2d 104, 247 N.Y.S.2d 598 (Sup. Ct. 1964). The defendant, a nonresident manufacturer, had no contact with New York except that his product was eventually sold there to the plaintiff by a third party. The purchaser was injured and brought an action alleging negligence against the foreign manufacturer. The defendant was served in accordance with section 302(a)(2) on the theory that here, as in Gray v. American Radiator & Sanitary Corp., the occurrence of the injury within the state would bring with it the foreign tortious act. The court, holding there was no tortious act committed in New York, stated: "[S]imply because the alleged damage arose in New York State and was due to the alleged faulty manufacture of the equipment . . . in New Jersey . . . does not in and of itself constitute such an act as would give this court jurisdiction over a nondomiciliary. All the acts constituting the alleged tort . . . occurred outside New York. Only the damage occurred here. The words 'tortious act' were not intended to impose jurisdiction of New York courts upon foreign corporations under the facts as those in the present case . . . ." Id. at 106-07, 247 N.Y.S.2d at 601-02.

28. "[I]n expanding the State's in personam jurisdiction over nondomiciliaries the Legislature did not intend to separate foreign wrongful acts from resulting forum consequences and that the acts complained of here can be said to have been committed in this State." 21 App. Div. 2d at 559, 251 N.Y.S.2d at 550.

29. "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 on by a noncontracting party whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer." Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 436, 191 N.E.2d 81, 82-83, 240 N.Y.S.2d 592, 594 (1963). For a discussion of the transition of the breach of warranty action from its original classification as a tort to one in contract, see

Under this theory a breach of warranty would be recognized as a breach of contract only as to the original parties to the contract, and then only when the action is brought to recover the value of the goods. It would be considered a tort in actions between parties who are not in privity, as well as in actions brought by the original purchaser to recover for damages caused by the defective product. Since the original purchaser in a contract action could recover the difference between the cost of a defective product and the cost of a good one before the product causes injury, the cause of action for the recovery of such loss would arise upon delivery.[30] But under a tort theory, where the plaintiff's right to sue depends upon the occurrence of an injury,[31] whether it be a personal injury or damage to the plaintiff's property, it is only logical that the cause of action should arise at the time of injury.

In the instant case the defendant was injured by the breaking of a defective hammer which was circulated in New York bearing the label "unbreakable." Because the injury to the defendant took place outside of New York, the *Gray* reasoning, *i.e.*, in personam jurisdiction can be obtained when a cause of action arises in the state, is not applicable. The sole basis for obtaining jurisdiction under 302(a)(2) would therefore be the defendant's act or omission in New York resulting in injurious consequences elsewhere.

Justice Breitel correctly reached the conclusion that the circulation of the mislabelled hammer in New York was a tortious act in the state. By labelling the hammer unbreakable, the defendant made a direct express warranty to the public that it was of such a character.[32] There was no wrong, however, until the defendant released control over the goods for distribution in New York. The release of the goods for circulation in New York would be the tortious act committed by the defendant in New York.[33] The circulation was in essence a

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Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 10 n.2, 181 N.E.2d 399, 401 n.2, 226 N.Y.S.2d 363, 366 n.2 (1962).

The classification of breach of warranty as a tort does away with its traditional privity limitation and allows the ultimate user to bring suit against the manufacturer based on his representations. Randy Knitwear Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962). Speaking of the privity requirement the court wrote: "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 which, if observed, might be productive of great injustice." Id. at 13, 181 N.E.2d at 402, 226 N.Y.S.2d at 368.

30. N.Y.U.C.C. § 2-725(2).

31. In the instant case the plaintiff, a gratuitous taker, certainly could not recover until he was injured.

32. "[W]hen representations expressed and disseminated in the mass communications media and on labels (attached to the goods themselves) prove false and the user or consumer is damaged by reason of his reliance on these representations, it is difficult to justify the manufacturer's denial of liability on the sale ground of the absence of technical privity." Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 12, 181 N.E.2d 399, 402, 226 N.Y.S.2d 363, 367 (1962).

33. Even if the hammer was not mislabelled the defendant could possibly be held liable under an implied warranty of fitness for purpose.

potential tort, needing only a resultant injury to give rise to a cause of action.[34]

Although Justice Breitel implied that the tortious act committed in the instant case was a breach of warranty, he seemed to be basing his decision on a somewhat different theory which was proposed by the American Law Institute.[35] This theory places a strict liability, derived from warranty principles, upon manufacturers and sellers of goods to subsequent consumers and users.[36] The strict liability

> does not require any reliance on the part of the consumer upon the reputation, skill or judgment of the seller who is to be held liable, nor any representation or undertaking on the part of that seller. The seller is strictly liable although . . . the consumer does not even know who he is at the time of consumption. . . . [This liability] . . . is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code; and is not affected by limitations on the scope and content of warranties, or by any limitation to "buyer" and "seller" in those statutes. Nor is a consumer required to give notice to the seller of his injury within a reasonable time after it occurs, as is provided by the Uniform Act. The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the hands of the consumer. In short, "warranty" must be given a new and different meaning if it is to be used in connection with this . . . [type of liability]. It is much simpler to regard the liability here stated as merely one of strict liability in tort.[37]

The imposition of such a harsh liability is justifiable since by marketing his product for use and, or consumption, the seller has undertaken and assumed special responsibility to any member of the consuming public who may be injured by the product. The rationale is that the manufacturer or seller is in a better position than the consumer to protect himself from loss due to accidental injuries caused by the products.[38]

Justice Breitel apparently realized the vast scope of this decision and tried to

34. This is similar to the negligent manufacture of a product, a tortious act in itself, requiring a subsequent injury to give rise to a cause of action in negligence. However, in the instant case it could be argued that whatever "wrong" the defendant has committed in releasing the goods is merely a consequence of his original defective manufacture, which took place in Illinois, and thus merges with it.

35. Restatement (Second), Torts § 402(a), comment l at 8 (Tent. Draft No. 10, 1964). "A number of courts, seeking a theoretical basis for the liability, have resorted to a 'warranty,' either running with the goods sold, by analogy to covenants running with the land, or made directly to the consumer, without contract." Id. at 9.

36. See Greenman v. Yuba Power Prods. Inc., 59 Cal. 2d 57, 377 P.2d 897 (1963) (court applied a strict liability theory).

37. Restatement (Second), Torts § 402(a), comment m at 10 (Tent. Draft No. 10, 1964). Since there could be no danger or wrong, under this theory, to the public prior to the time the defective goods are released, such release is a tortious act required by CPLR 302(a)(2). In the instant case this release of the goods to the public took place in New York.

38. Id. at 5.

restrict its application by limiting it to cases where "an instrument dangerous to human life and health, if defective, is involved."[39]

But in effect, this is no limitation at all. In the instant case, the object involved was a defective hammer. Just how dangerous is a defective hammer? Certainly it is not more dangerous than a defective pair of rubber boots,[40] or a defectively made evening gown,[41] or for that matter, a defectively made bed.[42] As was stated by Chief Judge Murray in *Larson v. United States Rubber Co.*,[43] "Today . . . in our society of mass production and distribution, manufacturing processes are far more complex, defects in a product caused by negligence may be highly dangerous to life or limb, *no matter what the product is*, and yet not be discernible to either the retailer or the consumer."[44]

Although the "imminently dangerous product" restriction which Justice Breitel applied to the strict liability placed upon sellers is not a true restriction, some other restrictions proposed by the American Law Institute may prove more realistic. For example, a seller would be held liable only to purchasers or users of the goods, but not to bystanders[45] and only in the states where distribution and sale of the goods is reasonably foreseeable; he would be liable only when the goods are purchased in an unaltered form and only if defective when released by him. The seller would be free from liability where a consumer purchases and uses a product with knowledge of the defect.[46]

In the instant case, the submission of the defendant's sales catalogue to a New York dealer, the shipment of his product into the state, its subsequent circulation and sale there, all voluntary acts on the defendant's part, gave New York sufficient contacts with the defendant to satisfy the due process requirements of *International Shoe*, *McGee*, and *Hanson v. Denckla*. The plaintiff's acquisition of the hammer in New York, as was stated by Justice Breitel, may well have been an essential element to the obtaining of jurisdiction.[47] In order for a state to obtain jurisdiction and still stay within the bounds of due process, the defendant must have intended or at least foreseen that the hammer would be acquired within the state seeking to obtain jurisdiction.[48] If, in the instant case,

39. 21 App. Div. 2d 285, 291-92, 250 N.Y.S.2d 216, 223 (1st Dep't 1964).

40. Larson v. United States Rubber Co., 163 F. Supp. 327 (D. Mont. 1958).

41. Noone v. Fred Perlberg, Inc., 268 App. Div. 149, 49 N.Y.S.2d 460 (1st Dep't 1944), aff'd mem. 294 N.Y. 680, 60 N.E.2d 839 (1945).

42. Workstel v. Stern Bros., 3 Misc. 2d 858, 156 N.Y.S.2d 335 (Sup. Ct. 1956).

43. 163 F. Supp. 327 (D. Mont. 1958).

44. Id. at 330. (Emphasis added.)

45. One basis for limiting the manufacturer's liability to purchasers and users, and not to bystanders, would be on the theory of reliance. Public reliance on manufacturers to produce goods free from defects is at least one reason for imposing strict liability on the manufacturer. However, the proposed draft of the Restatement of Torts does not adopt reliance as an element of the tort.

46. Restatement (Second), Torts § 402(a), (Tent. Draft No. 10, 1964). None of these limitations are applicable to the instant case.

47. 21 App. Div. 2d at 290, 250 N.Y.S.2d at 221.

48. "The wording of the statute which makes a tort committed in whole or in part

the defendant introduced the hammer for distribution only in New York, it could justifiably be said that he foresaw its acquisition only in New York. Therefore, had the plaintiff acquired the hammer outside of New York, jurisdiction could not be obtained without violating his right of due process: the acquisition elsewhere not being foreseeable.[49]

Trade Regulation—Size and Extent of Consignment Distribution Plan Prevents Its Recognition as Agency When Used To Fix Prices.—Plaintiff alleged that as the lessee of defendant gasoline producer's service station, he was required to enter into a consignment agreement under which the defendant set plaintiff's retail gasoline prices. Plaintiff sold the gasoline consigned to him at two cents below the authorized price, allegedly to meet competition. On expiration of the lease, defendant refused to renew it, and the consignment agreement, by its terms, ended simultaneously. Plaintiff sued for treble damages under Section 4 of the Clayton Act,[1] for violation of Sections 1 and 2 of the Sherman Act.[2] The district court granted defendant summary judgment on the ground that plaintiff had not suffered any actionable damage.[3] The court of appeals affirmed.[4]

against a resident of Vermont the basis for that state's assertion of jurisdiction might have given rise to a serious constitutional question had not the Vermont supreme court interpreted it as applicable only where the tortfeasor could know that its act might have consequences in Vermont." Denveny v. Rheem Mfg. Co., 319 F.2d 124, 128 (2d Cir. 1963). See also Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). It may be justifiably argued, however, that the aunt's purchase of the hammer in New York fulfilled the foreseeability requirement and that the plaintiff's acquisition of it in New York was not at all necessary.

49. Apparently the plaintiff did not try to obtain jurisdiction under section 302(a)(1), which gives New York in personam jurisdiction over a nonresident who transacts any business within the state, because of decisions such as Grobark v. Addo Mach. Co., 16 Ill. 2d 426, 158 N.E.2d 73 (1959), and Jump v. Duplex Fending Corp., 41 Misc. 2d 950, 246 N.Y.S.2d 864 (Sup. Ct. 1964). In both these cases the court held that the mere shipment of goods into a state is not sufficient contact to allow a court to obtain in personam jurisdiction over a nondomiciliary under the single-act statute. (Grobark was brought under the analogous Illinois statute.) Query: Does it not seem strange that in the instant case the court held that under CPLR 302(a)(2) the circulation of the manufacturer's product within the state was a sufficient contact? Such a distinction within section 302 does not appear to be valid.

1. 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).

2. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1 & 2 (1958).

3. Simpson v. Union Oil Co., Trade Reg. Rep. (1961 Trade Cas.) ¶ 69,936 (N.D. Cal. 1960).

4. The court of appeals affirmed on the ground that plaintiff had not suffered any actionable damage or wrong, but did not pass on the issue of whether defendant had violated the Sherman Act. The court also held that plaintiff was not entitled to sue as he had been a willing participant in the consignment scheme. Simpson v. Union Oil Co., 311 F.2d 764 (9th Cir. 1963).

The United States Supreme Court, in reversing and remanding on the issue of damages and application of the Fair Trade Acts,[5] held that the consignment agreement, while perhaps binding on the parties as a matter of contract law, "must give way before the federal antitrust policy."[6] Because of the extent to which the defendant had used such consignments to fix prices, the Court said that the consignment could not be recognized as an agency and was in effect an agreement for resale price maintenance, coercively enforced by the lease provision, and violative of the Sherman Act.[7] *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

The efforts of name brand manufacturers and producers to control the prices at which their products are sold to the public,[8] when attempted outside the exemption of the Fair Trade Acts,[9] often run afoul of the prohibitions of Section 1 of the Sherman Act as contracts, combinations and conspiracies in restraint of trade.[10] In *Dr. Miles Medical Co. v. John D. Park & Sons*,[11] it was held that contracts between a manufacturer and its dealers, which stipulated the dealer's resale prices, were unenforcible. The Court ruled that the agreements were void because they constituted a restraint on alienation of the articles sold[12] and also

5. See Miller-Tydings Act, 50 Stat. 693 (1937), 15 U.S.C. § 1 (1958); McGuire Act, 66 Stat. 632 (1952), 15 U.S.C. § 45 (1958).

6. Simpson v. Union Oil Co., 377 U.S. 13, 18 (1964).

7. The Court also dismissed the contention of the court of appeals that the plaintiff was not entitled to sue because he could have refused to join in the consignment plan. "The fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the antitrust laws." 377 U.S. at 16.

8. The motives for fixing retail prices are generally: "(1) the protection of . . . good will, (2) the maximization of returns from advertising, (3) the creation of product differentiation in order to prevent competition from substitutes, (4) the protection from the elimination of retail outlets through loss leaders [i.e., a name brand product advertised at a low price with the hope that a buyer will purchase other and greater profit producing goods as well], (5) price stabilization, (6) price discrimination, and (7) assurance of dealer services required for the marketing of a product." Bowman, The Prerequisites and Effects of Resale Price Maintenance, 22 U. Chi. L. Rev. 825, 833 (1955). See also Comment, 43 Iowa L. Rev. 603 & n.1 (1958). For an illustration of how competition among retail dealers may result in a reduction of dealers and a consequent decrease of sales, see Klaus, Sales, Agency and Price Maintenance, 28 Colum. L. Rev. 312-13 (1928).

9. The Fair Trade Acts allow agreements between a manufacturer or producer and its immediate purchasers which set the resale prices of a commodity identifiable with the manufacturer or producer when such agreements are also lawful in the state where the product is to be resold and such commodities are sold in free and open competition with commodities of the same general class produced and distributed by others. See 1 Toulmin, Anti-Trust Laws of the United States § 10.4 (1949); cf., e.g., N.Y. Gen. Bus. Law § 369-a. Horizontal price fixing agreements, however, are prohibited. United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956); 1 Toulmin, op. cit. supra.

10. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . ." 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

11. 220 U.S. 373 (1911).

12. Id. at 404-07.

because the broad scheme under which the manufacturer had entered into similar contracts with all its dealers throughout the country was tantamount to horizontal price fixing and was illegal under the Sherman Act.[13]

While agreements to fix resale prices were barred, the Court, in *United States v. Colgate & Co.*,[14] recognized the right of a manufacturer to refuse to deal with an uncooperative purchaser as a means to enforce the manufacturer's unilaterally determined resale price policy. The extent to which a manufacturer may refuse to deal has been severely limited since *Colgate*. In the absence of an express or written contract, an illegal agreement could be implied from the conduct of the manufacturer and its purchasers.[15] In later cases, a direct agreement to fix prices was deemed unessential for a Sherman Act violation. Enforcement of resale prices by enlistment of the cooperation of purchasers to detect retailers who violated the suggested price policies and a refusal to sell to wholesalers who dealt with violators was held illegal.[16] An illegal conspiracy and combination were found where wholesalers had gone beyond mere acquiescence to the enforcement of resale price policies by participation in approval of retailers as purchasers.[17] The most severe limitation was imposed in *United States v. Parke, Davis & Co.*[18] where a threatened unilateral refusal of a manufacturer to deal with wholesalers who sold to price-cutting retailers created an illegal combination.[19] The Court in *Parke, Davis* also held that the manufacturer had organized an illegal combination or conspiracy by actively inducing retailers to abandon advertisement of its products at cut rate prices.[20] *Parke, Davis* thus limited the *Colgate* doctrine, if it did not, as the dissent charged,[21] "discard" it, to the right to refuse to deal with the recalcitrant purchaser alone and without involvement of any other parties.[22] Moreover, it proscribed as violations of the Sherman Act the use of any other means to effect adherence to resale price policies.[23]

13. Id. at 408-09.

14. 250 U.S. 300 (1919). "[T]he indictment does not charge Colgate & Company with selling its products to dealers under agreements which obligated the latter not to resell except at prices fixed by the company. . . . [T]he act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell." Id. at 307.

15. Frey & Son v. Cudahy Packing Co., 256 U.S. 208, 210 (1921); United States v. A. Schrader's Son, 252 U.S. 85, 99 (1920).

16. FTC v. Beech-Nut Packing Co., 257 U.S. 441, 454-55 (1922).

17. United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 722-23 (1944).

18. 362 U.S. 29 (1960).

19. Id. at 45.

20. Id. at 46-47.

21. Id. at 57 (Harlan, J., dissenting).

22. Id. at 43.

23. Id. at 44. Professor Turner views the right of a manufacturer to refuse to deal to enforce price maintenance as almost illusory since in the decisions following Colgate the Supreme Court has found implied agreements or illegal combinations in any conduct which went beyond a mere refusal to deal. Even a simple refusal to deal is not safe as it can be seen as a tacit agreement. Turner, The Definition of Agreement Under the Sherman Act:

Before the instant decision, it was believed that the benefits of resale price maintenance could still be achieved outside the exemptions of the Fair Trade Acts by use of an agency system of distribution. Such a program cannot, under the traditional common law definitions, properly be called one of *resale* price maintenance, since the agent sells on behalf of and at a price determined by his principal.[24]

In *United States v. General Elec. Co.*,[25] the Supreme Court held safe from the antitrust laws a system of consignments[26] between a manufacturer of patented light bulbs and its 21,000 agents. The consignment agreements required the agents to sell at the price stipulated by the manufacturer. The Court found that the relationship between General Electric and its "distributors" was a valid agency relationship. The consignment not being an actual sale labeled as an agency, the Court held there was no violation of the Sherman Act.[27]

The Government in *General Electric* argued that the very size and comprehensiveness of the distribution plan constituted a violation of the Sherman Act. The Court conceded that this fact would be significant in proof of a monopoly under section 2, but denied its relevance when the defendant owned patents to the articles which were sold and distributed under the plan.[28] The patent statutes, the Court said, gave a patentee a monopoly in making, selling and using the patented article. The distribution of the article under consignments with stipulations of the retail price is a legitimate exercise of the monopoly of use and sale. The Court concluded that as long as a patentee does not attempt to go beyond the rights granted under the statute by means of restrictions on the subsequent use or disposition of articles he had sold, there is no Sherman Act violation.[29]

Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655, 685-88 (1962). For a thorough analysis of the resale price maintenance decisions up to Parke, Davis, see Levi, The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance, Supreme Court Review 258 (Kurland ed. 1960). See also Comment, 32 Fordham L. Rev. 572 (1964).

24. See Cole Motor Car Co. v. Hurst, 228 Fed. 280 (5th Cir. 1915).

25. 272 U.S. 476 (1926).

26. A consignment is the delivery of goods to a person with authorization to make a sale of them for the account of the entruster. 2 Williston, Sales § 317 (1948). "[A] consignment in basic conception involves an agency relationship between the consignor and consignee, the goods still belong to the consignor even though they have been delivered to the consignee . . . ." Hawkland, Consignment Selling Under the Uniform Commercial Code, 67 Com. L.J. 146, 148 (1962). Besides use as a means to fix prices, consignments are also a device used by a manufacturer to extend credit to its dealers. Id. at 147.

For other uses and benefits of the consignment method of distribution, see Handler, Seventeenth Annual Review of Antitrust Developments—1964, 19 Record of N.Y.C.B.A. 379, 381 (1964). But this system also requires a larger capital investment and increased costs. Ibid.; Comment, 43 Iowa L. Rev. 603, 605-06 (1958). The attempt of the consignor to avoid the expenses or impose the burdens upon the consignee might cause the arrangement to be deemed a sale. See id. at 606-12; notes 35-40 infra and accompanying text. But see Comment, 43 Iowa L. Rev. at 608 n.30.

27. 272 U.S. at 484-85, 488.

28. Id. at 485.

29. Ibid.

The *General Electric* decision, understandably, was interpreted as holding that the legality of a consignment plan effecting price fixing was determined by the question of whether a bona fide agency existed.[30] In a later government suit against General Electric involving a similar distribution and price fixing arrangement, a district court found no Sherman Act violation when the existence of a valid agency was proved. The court did not at all consider the fact that the patents General Electric owned at the time of the earlier suit had lapsed.[31]

Under the view of the Court in the instant case, however, the validity of the *General Electric* distribution scheme was dependant upon ownership by the manufacturer of patents on the consigned articles. In *General Electric*, Mr. Chief Justice Taft wrote for a unanimous Court that:

> The validity of the Electric Company's scheme of distribution . . . turns . . . on the question whether the sales are by the company through its agents to the consumer, or are in fact by the company to the so-called agents at the time of consignment. . . . We are of opinion, therefore, that there is nothing as a matter of principle, or in the authorities, which requires us to hold that genuine contracts of agency like those before us, however comprehensive as a mass or whole in their effect, are violations of the Anti-Trust Act. The owner of an article, *patented or otherwise*, is not violating the common law, or the Anti-Trust law, by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer.[32]

The instant case, notwithstanding the "patented or otherwise" words of the court in *General Electric*, required that this language be interpreted as having its basis in the privileges granted under the patent statutes and that it be limited to the particular facts of that case.[33]

The present Court tested the validity of the agency underlying the Union Oil consignment plan by the same standards as were used in *General Electric*. In the majority opinion, Mr. Justice Douglas, evidencing his skepticism by speaking of the consignments of the defendant only in quotes, as he had also done in *United States v. Masonite Corp.*,[34] implied doubt that there did exist a bona fide principle-agent relationship. This hesitancy was based on the provisions of the consignment agreement concerning risk of loss,[35] liability for negligence,[36] the nature of the plaintiff's business,[37] payment of taxes on the

30. See Hawkland, supra note 26, at 148; Adams, Resale Price Maintenance: Fact and Fancy, 64 Yale L.J. 967, 985-86 (1955). Cf. 27 Colum. L. Rev. 567 (1927).

31. United States v. General Elec. Co., 82 F. Supp. 753, 817-27 (D.N.J. 1949). See Adams, supra note 30, at 985-86.

32. 272 U.S. at 485, 488. (Emphasis added.)

33. 377 U.S. at 23.

34. 316 U.S. 265 (1942).

35. The plaintiff consignee was responsible for all loss of gasoline consigned to him except for loss caused by acts of God. 377 U.S. at 15, 20, 23 n.10.

36. Plaintiff was required to carry personal liability and property damage insurance. Id. at 15.

37. In the General Electric case, the consignees were retailers of merchandise other than that of the defendant, while in the instant case the plaintiff and other such consignees dealt exclusively in Union Oil's product. Id. at 23 n.10.

gasoline,[38] and the method of compensation of the plaintiff.[39] But without expressly deciding whether there was a valid agency,[40] the Justice said that however effective or valid an agency agreement might be as between the parties themselves, it would not necessarily be controlling in the face of the federal antitrust policy.[41]

The defendant's distribution plan involved 1,978 retail gasoline dealers who had entered into consignment agreements in conjunction with leases of defendant's service stations and 1,327 other retail gasoline dealers who had made such agreements, but who had done so independent of a lease. The retail dealers were located in eight different states.[42] The size and extent of the distribution system, the Court concluded, prevented recognition of a consignment under the plan as an agency.[43] Stripped of its protective nature of agency, the distribution plan became a system of price-fixing agreements illegal under the doctrines of *Dr. Miles* and *United States v. Socony-Vacuum Oil Co.*,[44] and coercively enforced in violation of the rule of *Parke, Davis*.[45] The *General Electric* decision, the Court dismissed as irrelevant; the defendant in the instant case did not own a patent on the commodity consigned and was not entitled to a monopoly in its sale.[46]

The prospective effect of the instant decision is clear: all agency agreements

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38. The defendant producer paid all property taxes on the gasoline. Id. at 15.

39. The commission earned by a consignee under the plan of the instant case was determined in proportion to the amount by which the authorized price exceeded or fell below a posted "tank wagon" or "minimum retail" price. While the earnings of a consignee were not entirely at the mercy of fluctuations of the market, as would be the case of one who bought gasoline with the hope of reselling at a higher price, nevertheless the plaintiff and other consignees did share to a degree the risks of a rising or falling market. Id. at 20 & n.7.

40. The Court concluded that the plaintiff and such other consignees under the plan were independent businessmen with all the burdens attached to that status but restricted in the ability to set their prices. Id. at 21. For analysis of the various indicia of a bona fide agency, see Comment, 43 Iowa L. Rev. 603 (1958).

41. 377 U.S. at 17-18.

42. Id. at 15 n.1.

43. Id. at 21-22.

44. 310 U.S. 150 (1940); see 377 U.S. at 18.

45. 377 U.S. at 17, 24.

46. "But whatever may be said of the General Electric case on its special facts, involving patents, it is not apposite to the special facts here. . . . The patent laws which give a 17-year monopoly on 'making, using, or selling the invention' are in pari materia with the antitrust laws and modify them pro tanto. That was the ratio decidendi of the General Electric case." Id. at 23-24. (Italics omitted.) The Court guaranteed the validity of consignments at fixed retail prices when there was only one item to be sold. Id. at 18.

The Justice Department has recently challenged the validity of another aspect of the General Electric case. In an appeal from dismissal of a Sherman Act injunction suit (United States v. Huck Mfg. Co., 227 F. Supp. 791 (E.D. Mich. 1964)) the Justice Department has asked re-examination of the holding of General Electric that a patentee in granting a license to manufacture the patented article may require the licensee to agree to sell the product only on the conditions and at the price set by the patentee-licensor. BNA Antitrust & Trade Reg. Rep. No. 169, A-1 (Oct. 6, 1964).

involving retail price maintenence on a large scale, save for those dealing in patented articles, will be vulnerable to attack under the antitrust laws. This case, as well as last term's decision in *White Motor Co. v. United States*,[47] should cause extensive revisions in methods of distribution, for as Mr. Justice Stewart indicated in his dissent, consignments have been widely used.[48] The objection of the dissenting Justice that the Court was over-ruling a decision which had been relied upon in establishing such distribution plans[49] is softened by the intimation of the majority that the rule of the instant case might have only prospective application in damage suits.[50]

While the instant case may be a radical departure from the rule of *General Electric*, it is at the same time consistent with the recent approach of the Court in application of the Sherman Act. In the view of the Court, the distribution program of the defendant was "an arrangement under which . . . [the] supplier is able to impose noncompetitive prices on thousands of persons whose prices otherwise might be competitive."[51] Having such an effect on competition,

47. 372 U.S. 253 (1963). In the White Motors decision, the Court reversed a summary judgment which held illegal per se agreements of a manufacturer with its distributors and dealers restricting the sales territories of the latter and the persons with whom they could deal. The Court ruled that the question of whether these practices were unreasonable restraints of trade should be determined at a trial. See 32 Fordham L. Rev. 151 (1963). Whether such an agreement is an unreasonable restraint of trade remains as yet unsettled. Recently, White Motor, in a proposed consent decree, agreed not to require the disputed agreements in the future. BNA Antitrust & Trade Reg. Rep. No. 161, A-1 (Aug. 11, 1964). The barring of such agreements, or the uncertain legality of such practices, should result in their abandonment. Cf. Stewart, Exclusive Franchises and Territorial Confinement of Distributors, 22 A.B.A. Antitrust Section 33 (1963).

The instant decision may preclude adoption of the proposal of Mr. Stewart that an agency system of distribution can be utilized to achieve the effect of territory and customer restrictions in event these arrangements be found unreasonable restraints of trade. See Id. at 39-40.

48. 377 U.S. at 29-30 (Stewart, J., dissenting). See Handler, supra note 26, at 381.

49. 377 U.S. at 29-30 (Stewart, J., dissenting).

50. Id. at 24-25. The fact that distribution and price fixing of gasoline under consignments had been part of a consent decree entered by the Justice Department against a number of oil companies, including the defendant, was probably very persuasive in the consideration of the Court of application of the rule of the instant case only prospectively. See United States v. Standard Oil Co., Trade Reg. Rep. (1959 Trade Cas.) ¶ 69399 (S.D. Cal. 1959). See also Day, Developments in Antitrust During the Past Year, 25 A.B.A. Antitrust Section 3, 34 (1964).

The recent decision of Lyons v. Westinghouse Elec. Corp., 33 U.S.L. Week 2210 (S.D.N.Y. Nov. 3, 1964), has held that damages would not be awarded where the defendant had initiated a consignment distribution plan in which retail prices were fixed in reliance upon General Electric. The court termed the distinction of limiting and overruling General Electric one of semantics and ruled that the instant case would have only prospective effect in damage suits.

51. 377 U.S. at 21. Vertical price fixing also has an effect upon horizontal competition, as was noted by Mr. Justice Brennan in White Motor: "Resale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much between that product and competing

the agency scheme fell into that category of combinations "formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce"[52] that had been condemned in *Socony-Vacuum*. The Court in the instant case has applied the philosophy or policy of the *per se* doctrine in determining the legality of the conduct in question by looking to its purpose and effect.[53] In light of the interpretation of the Court of the purpose and effect of defendant's distribution plan, consistency with the refusal of the Court to allow matters of form to control the legality of substance[54] required that the consignments, however valid as a matter of agency law, be seen as mere contracts to fix prices.

The overruling in the instant case of the rule of *General Electric* in regard to non-patented articles seems also to have sent to its demise the notion that resale price maintenance decisions were based in part on prohibitions of restraints on alienation.[55] In *Dr. Miles Medical Co. v. John D. Park & Sons*,[56] one of the reasons for denial of enforcement of resale price contracts was the effect of such contracts as restraints on alienation of articles that had been sold. Later in *General Electric*, by framing the legality of consignment and price fixing agreements of both patented and non-patented articles in the issue of their validity as agencies, the Court restricted its inquiry of a Sherman Act violation to the question of restraints on alienation, ignoring the real purpose and intent of the Sherman Act—protection of the economy from restraints on competition.[57] In the instant case, the Court has turned its attention from collateral issues and looked to the effect of a practice on competition, thus giving paramount and proper perspective to the safeguarding of the competitive system.

But by this decision the Court has breathed new uncertainty into the antitrust field. The Court has condemned the use of consignment agreements to fix prices under a plan the scope of which is as broad as that of the instant case, while it has assured the validity of a consignment of a single article at a fixed price.[58] One can only guess at what point a consignment and price-fixing plan

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brands." 372 U.S. 253, 268 (1963) (concurring opinion). (Emphasis omitted.) This same idea is found in Berle, Bigness: Curse or Opportunity?, N.Y. Times, Feb. 18, 1962, § 6 (Magazine), p. 18, cited by the majority in the instant case at 22 n.9.

52. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

53. See Von Kalinowski, The Per Se Doctrine—An Emerging Philosophy of Antitrust Law, 11 U.C.L.A.L. Rev. 569, 575 (1964). In FTC v. Atlantic Refining Co., Trade Reg. Rep. ¶ 16422 (1963), a gasoline consignment plan was held illegal because it was clearly intended to fix prices. The court so held on the basis that, although a valid agency might have existed, in antitrust cases, the crucial fact is the impact of the practice on competition.

54. 377 U.S. at 21-22. See, e.g., United States v. Masonite Corp., 316 U.S. 265, 276-77 (1942); Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373, 398-99 (1911).

55. See Levi, supra note 23, at 270-78.

56. 220 U.S. 373, 406 (1911).

57. Cf. 27 Colum. L. Rev. 567, 572-73 (1927).

58. See note 46 supra.

involving more than one item will be so large as to be repugnant to the federal antitrust policy.[59]

Also, it is puzzling to ascertain in what manner the fact of defendant's being the lessor of the plaintiff's service station made the consignment plan of the instant case a coercive means of price fixing and consequently illegal under *Parke, Davis*.[60] Clearly, if a lessor were to threaten to terminate its dealer's lease if price policies were not followed, there would be unlawful coercion,[61] but, on the other hand, may not the lessor terminate the lease of a dealer who will not follow price policies in the same manner as he may refuse to deal within the sanction of the *Colgate* doctrine? If not, then indeed the lessee may be said to have acquired "tenure" by the fact of his initial lease[62] when he has cut prices. Or, from another view, the Court has now vindicated the idea that the *Colgate* doctrine is meaningless, since a tacit agreement to fix prices or, in this case, a tacit threat of terminating the lease to secure price maintenance, may always be implied wherever the lessor acompanies a short-term lease with a suggested price list.[63]

Verdicts—Inconsistent Verdicts and Noncompliance With Judge's Charge Held Not Grounds for Reversal.—Plaintiff child was injured when struck by defendant's automobile. Through his father, as next friend, he brought a personal injury action, and his parents sued for medical expenses and loss of services. Neglecting the trial judge's charge concerning the effect of contributory negligence on the child's cause of action and its imputation to the parents, the jury found against the child but for the parents. The child appealed on the ground that the inconsistent verdicts required reversal and a new trial of the issues raised by his cause of action. The Supreme Court of Arkansas affirmed, holding that the mere existence of inconsistent verdicts was not ground for reversal. *Pigage v. Chism*, 377 S.W.2d 32 (Sup. Ct. Ark. 1964).

Whenever an appeal is based on inconsistent verdicts, the factor most influencing the appellate court's decision is whether, according to the facts, the actions were derivative or consolidated. When actions based on the same facts and issues are brought separately by or against two or more parties,[1] they may be united into one[2] by court order.[3] This process of consolidation

59. See Handler, supra note 26, at 381-82, 384-85.

60. See id. at 383-84.

61. Lessig v. Tidewater Oil Co., 327 F.2d 459, 463-64 (9th Cir. 1964).

62. See argument of the instant case before the Supreme Court, 32 U.S.L. Week 3257-58 (U.S. Jan. 21, 1964).

63. See note 23 supra.

1. Some examples are: (a) an action by plaintiff against defendant X and a separate action against defendant Y; (b) an action by plaintiff A against defendant and a separate action by plaintiff B against defendant; (c) an action by plaintiffs A and B against defendant X and a separate action by A and B against defendant Y.

2. George v. Leonord, 84 F. Supp. 205, 208 (E.D.S.C. 1949); Hull v. Shannon, 139 Misc. 564, 567, 249 N.Y. Supp. 33, 36 (Sup. Ct. 1931); Herstein v. Kemker, 19 Tenn. App. 681, 94 S.W.2d 76 (1936).

3. N.Y. Civ. Prac. Law & R. 602(a).

of actions is permitted to avoid a multiplicity of suits and prevent delays.[4] When causes of action which are inherently distinct, and could have been tried separately,[5] are consolidated, they do not lose their individual identity,[6] and separate verdicts may be rendered without inconsistency.[7] In *MacDonald v. Perry*,[8] the court said, "when there is an allegation of a concerted action which is a tort, the joint tort-feasors are properly sued together and the jury may return a verdict against the defendants whom the evidence shows are guilty . . . ."[9] The general rule requiring consistency[10] does not preclude such a holding.

A derivative action is one that "gains its existence through the existence of the cause of action which inures to the benefit of the . . . plaintiff . . . ."[11] It is further defined as " 'coming from another; taken from something preceding; secondary . . . .' "[12] In a derivative action the primary plaintiff has

4. City of New York v. Fidelity & Deposit Co., 253 App. Div. 676, 678-79, 3 N.Y.S.2d 714, 717 (1st Dep't 1938); Lepke v. Sclafani & Sons, 20 Misc. 2d 50, 52, 192 N.Y.S.2d 58, 61 (Sup. Ct. 1959).

5. An example of such a case is where plaintiffs A and B sue defendant. A has a cause of action sounding in tort, and B has a cause of action sounding in contract. Both are consolidated for trial. See Oates v. City of Rochester, 207 Misc. 420, 137 N.Y.S.2d 586 (Sup. Ct. 1955); Friedman v. December Corp., 137 N.Y.S.2d 154 (Sup. Ct. 1954).

6. Baldwin v. Ewing, 69 Idaho 176, 204 P.2d 430 (1949). In affirming, the court stated that "while the two cases were consolidated for the purpose of trial, they remain two separate and distinct cases, both in law and in fact." Id. at 181, 204 P.2d at 433. Accord, Brown v. Parker, 217 Ark. 700, 233 S.W.2d 64 (1950); Leech v. Missouri Pac. R.R., 189 Ark. 161, 71 S.W.2d 467 (1934); People v. Green, 281 Ill. 52, 55, 117 N.E. 764, 767 (1917).

7. National Union Fire Ins. Co. v. Chesapeake & O. Ry., 4 F. Supp. 25, 29 (E.D. Ky. 1933).

8. 32 Ariz. 39, 255 Pac. 494 (1927). Plaintiff brought an action for nuisance against two defendants—a private landowner and the City of Phoenix. The jury found the landowner liable since he was the active tort-feasor and the City of Phoenix not liable. The landowner appealed on grounds of inconsistent verdicts. Although the Supreme Court of Arizona reversed because of an error in the charge relating to nuisance, it agreed with the premise in issue.

9. Id. at 46, 255 Pac. at 496. In Hawkins v. Benton Rapid Express, Inc., 82 Ga. App. 819, 62 S.E.2d 612 (1950), the court stated, citing Finley v. Southern Ry., 5 Ga. App. 722, 723, 64 S.E. 312, 313 (1909), that " 'the jury, by its verdict, can bind one [tort-feasor] and relieve another, as the evidence may authorize . . . .' " 82 Ga. App. at 823, 62 S.E.2d at 616. See Waltemath v. Western States Realty Co., 9 Cal. App. 2d 583, 50 P.2d 451 (Dist. Ct. App. 1935); Pullan v. Struthers, 201 Iowa 709, 207 N.W. 794 (1926); Candage v. Belanger, 143 Me. 165, 57 A.2d 145 (1948); White's Lumber & Supply Co. v. Collins, 186 Miss. 659, 192 So. 312 (1939); Stith v. J. J. Newberry Co., 336 Mo. 467, 79 S.W.2d 447 (1935); Ledford v. Tallassee Power Co., 194 N.C. 98, 138 S.E. 424 (1927); Louis Kamm, Inc. v. Flink, 113 N.J.L. 582, 175 Atl. 62 (Ct. Err. & App. 1934); Miranda v. Halama-Enderstein Co., 37 N.M. 87, 18 P.2d 1019 (1933); Erickson v. Walgreen Drug Co., 120 Utah 31, 232 P.2d 210 (1951).

10. Rich v. Central Electrotype Foundry Co., 121 N.J.L. 481, 485, 3 A.2d 584, 586 (Sup. Ct. 1939) (dictum).

11. Pitrelli v. Cohen, 169 Misc. 117, 119, 6 N.Y.S.2d 696, 698 (Sup. Ct. 1938), rev'd on other grounds, 257 App. Div. 845, 12 N.Y.S.2d 71 (2d Dep't 1939).

12. Hubbard v. United Wireless Tel. Co., 62 Misc. 538, 540, 115 N.Y. Supp. 1016, 1018 (Sup. Ct. 1909), citing 1 Bouvier Law Dictionary 549-50 (16th ed. 1897).

suffered the actual injury or wrong and the secondary plaintiff has a cause of action derived from that of the primary plaintiff.[13] In such instances consistency of verdicts is traditionally required.[14] For example, in *Reilly v. Shapmar Realty Corp.*,[15] the court noted: "The verdicts as finally rendered by the jury were clearly inconsistent and irreconcilable. . . . If his mother was entitled to recover for medical expenses . . . so was the infant . . . . [I]f no cause of action was made out in the infant's case, there should be no verdict in favor of the mother."[16]

Although the court in the instant case recognized the fact that the parents' actions were derivative, it dealt with them as though consolidated, and the verdicts were sustained.[17] In so doing, the court held that the primary plain-

13. See Pitrelli v. Cohen, 169 Misc. 117, 6 N.Y.S.2d 696 (Sup. Ct. 1938), rev'd on other grounds, 257 App. Div. 845, 12 N.Y.S.2d 71 (2d Dep't 1939), holding that the "parent's right to recover for loss of services for the injuries to the infant is derivative and depends upon the right of the child to recover for his injuries." 169 Misc. at 119, 6 N.Y.S.2d at 698. See also Reilly v. Rawleigh, 245 App. Div. 190, 281 N.Y. Supp. 366 (4th Dep't 1935); Maxon v. Tomek, 244 App. Div. 604, 280 N.Y. Supp. 319 (4th Dep't 1935); Bailey v. Roat, 178 Misc. 870, 36 N.Y.S.2d 465 (Sup. Ct. 1942); Curry v. City of New York, 163 Misc. 774, 297 N.Y. Supp. 742 (N.Y. City Ct. 1937); Boyett v. Airline Lumber Co., 277 P.2d 676 (Okla. 1954).

14. See note 16 infra.

15. 267 App. Div. 198, 45 N.Y.S.2d 356 (1st Dep't 1943).

16. Id. at 200, 45 N.Y.S.2d at 358. See Muha v. De Luccia, 5 N.J. Misc. 274, 136 Atl. 332 (Super. Ct. 1927). Petry v. Natural Health Institute, Inc., 249 App. Div. 756, 291 N.Y. Supp. 876 (2d Dep't 1936) (per curiam), involved a situation in which an infant's recovery for personal injuries was much less than his father's recovery for medical expenses. Defendant appealed on grounds of inconsistent verdicts. The appellate division affirmed the order to set aside the verdict for the child and granted a new trial on the ground of inconsistent damages. See also Castanos v. Lansing, 2 Misc. 2d 529, 152 N.Y.S.2d 946 (Sup. Ct. 1956); Elser v. Union Paving Co., 167 Pa. Super. 62, 74 A.2d 529 (1950).

In cases involving a master-servant or principal-agent relationship, where the master or principal is joined as a defendant due to the wrong committed by his servant or agent, the courts have treated the principal's liability as being secondary to that of his agent and totally derived from it. This is popularly known as the theory of Respondeat Superior. Therefore, verdicts exonerating the servant or agent, but finding the principal or master liable, have been considered inconsistent and grounds for reversal. E.g., Graefenhan v. Rakestraw, 279 Ky. 228, 130 S.W.2d 66 (1939); Barone v. Weinebrenner, 189 Md. 142, 55 A.2d 505 (1947); Gillespie v. Olive Branch Bldg. & Lumber Co., 174 Miss. 154, 164 So. 42 (1935) (dictum); Vaniewsky v. Demarest Bros., 106 N.J.L. 34, 148 Atl. 17 (Sup. Ct. 1929), aff'd per curiam, 107 N.J.L. 389, 154 Atl. 623 (Ct. Err. & App. 1931). See also J. R. Watkins Co. v. Fricks, 210 Ga. 83, 78 S.E.2d 2 (1953); Gerritsen v. City of Seattle, 164 Wash. 459, 2 P.2d 1092 (1931).

It should be noted, however, that in certain cases, because of special facts or peculiarities, either the principal or agent may be liable while the other is not. Therefore, what at first might appear to be inconsistent verdicts actually are not, and so are upheld. E.g., Brokaw v. Black-Foxe Military Institute, 37 Cal. 2d 529, 231 P.2d 816 (1951); Chicago, R.I. & P. Ry. v. Pedigo, 123 Okla. 213, 252 Pac. 1095 (1927); Hise v. City of No. Bend, 138 Ore. 150, 6 P.2d 30 (1931); William White & Co. v. Lichter, 16 Tenn. App. 375, 64 S.W.2d 542 (1933).

17. The court held that "the fact that there was an inconsistency in the secondary verdicts did not give Tad Pigage Jr. any further rights. . . . In asking that the secondary verdicts—in favor of the parents—control over the primary verdict against him, the appellant is, in effect, asking that the 'tail wag the dog.'" 377 S.W.2d at 34.

tiff could not appeal an unfavorable judgment by asserting an inconsistent verdict in favor of a secondary plaintiff. The court reasoned that the verdict against the principal plaintiff ended his action and that the inconsistent verdict for the secondary plaintiff did not affect this. Such reasoning is questionable.[18] In New York, inconsistent verdicts are set aside because of the fundamental jury error involved,[19] regardless of who appeals.

The instant court's thin reasoning in drawing distinctions and in disregarding the merits of the action is further emphasized by the fact that the court did not mention the jury's failure to adhere to the trial judge's instructions.[20] The general rule is that such action constitutes a ground for reversal.[21] This is true even if the trial judge erred,[22] since his instructions are, "the law of the

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18. The following cases are all similar in so far as the jury rendered inconsistent verdicts, and the primary plaintiff appealed. Each case was decided on the merits of the action; the inconsistent verdicts were set aside and a new trial was ordered. Leonard v. Home Owners' Loan Corp., 270 App. Div. 363, 60 N.Y.S.2d 78, amended mem. 270 App. Div. 785, 60 N.Y.S.2d 78 (3d Dep't 1946); Reilly v. Shapmar Realty Corp., 267 App. Div. 198, 45 N.Y.S.2d 356 (1st Dep't 1943); Bessey v. Driscoll, 202 App. Div. 817, 195 N.Y. Supp. 62 (2d Dep't 1922) (per curiam). The court in Stahl v. Niagara De Luxe Cab Co., 135 Misc. 859, 239 N.Y. Supp. 710 (Niagara County Ct. 1930), stated: "'When . . . inconsistent verdicts are rendered, we incline to the view that sound practice requires both verdicts to be set aside at once . . . . No other course is safe . . . .'" Id. at 860-61, 239 N.Y. Supp. at 712, citing Gray v. Brooklyn Heights R.R., 175 N.Y. 448, 450, 67 N.E. 899, 900 (1935).

19. In Stahl v. Niagara De Luxe Cab Co., supra note 18, the court stated: "'The presumption is that . . . [the jury] willfully disregarded the instructions of the court and reached a conclusion by some method not warranted by law.'" 135 Misc. at 861, 239 N.Y. Supp. at 712, citing Gray v. Brooklyn Heights R.R., supra note 18.

20. The trial judge, among other instructions, charged the jury as follows: "'If you find from a preponderance of the evidence that . . . [the child] was negligent, and that his negligence was the sole and proximate cause of his injuries . . . then you are told that the negligence of said plaintiff is attributable to his father and mother . . . .'" 377 S.W.2d at 32. The jury found for the father in the sum of $2,500.00, for the mother in the sum of $500.00, and in favor of the defendant on the child's claim. 377 S.W.2d at 32-33.

21. In Smith v. Atlantic Transit Sys., Inc., 106 Ga. App. 666, 127 S.E.2d 857 (1962), plaintiff-appellant, a passenger on a trolley, was injured by defendant's alleged negligence. At the trial the jury found for the defendant. The appellate court reversed the finding because the jury did not follow the judge's charge, holding: "'A jury must take the whole charge as law, and it is not for them to select between conflicting parts without being instructed to do so by the judge.'" Id. at 667, 127 S.E.2d at 858, citing Hudson v. Cole, 102 Ga. App. 300, 302, 115 S.E.2d 825, 828 (1960). Accord, Cowden v. Crippen, 101 Mont. 187, 53 P.2d 98 (1936); Corey v. Smith & Pollock, Inc., 181 Misc. 331, 43 N.Y.S.2d 250 (Sup. Ct. 1943), aff'd mem. 267 App. Div. 911, 47 N.Y.S.2d 601 (2d Dep't 1944); Brown v. Vestal, 231 N.C. 56, 55 S.E.2d 797 (1949); Medhurst v. McCrohan, 61 R.I. 150, 200 Atl. 532 (1938); Mishoe v. Atlantic Coast Line Ry., 186 S.C. 402, 197 S.E. 97 (1938).

22. Southern Ry. v. Terry, 268 Ala. 510, 109 So. 2d 919 (1959), holding: "The jury is bound by the theory of the law as charged by the judge, and they have no right to depart from it, even though the theory may be erroneous." Id. at 512, 109 So. 2d at 920. Accord, Booth v. S & H Labs., 39 Ala. App. 615, 105 So. 2d 879 (1958); Wall v. Van Meter, 311 Ky. 198, 223 S.W.2d 734 (1949).

case."[23] If such jury error is permitted to continue unchecked, the ultimate result would be the utter collapse of our uniform system of justice, for each case would rest not upon the law but upon the whims of jurors.[24]

The instant court, therefore, was in error on three grounds; (1) the misapplication of the "consolidated" rule to a "derivative" cause of action; (2) the total disregard of the jury's failure to follow instructions; and (3) the superficial distinction based on whether the primary or secondary plaintiff was appealing. Thus, it is unlikely that such an erroneous holding will be seriously considered in the decisions of other courts.

Workmen's Compensation—Double Recovery—Out of State Action Which Was Precluded by New York Statute Held Not a Third Party Action Within Meaning of New York Workmen's Compensation Law.—Decedent's administrator received a New York Workmen's Compensation award, and subsequently obtained judgment in a Connecticut wrongful death action against a coemployee of decedent.[1] Although the latter action could not have been maintained under New York law, the compensation carrier sought a partial credit in New York. The appellate division affirmed the decision of the Workmen's Compensation Board denying the credit and held that, since the Connecticut action was not a "third party action" within the meaning of Section 29 of the New York Workmen's Compensation Law, there could be no partial credit to the employer and compensation carrier for the recovery in that action. *Petterson v. Daystrom Corp.*, 21 App. Div. 2d 582, 252 N.Y.S.2d 156 (3d Dep't 1964) (per curiam).

The New York Workmen's Compensation Law permits the dependents of an employee killed in the course of employment "by the negligence or wrong of another *not in the same employ*" to pursue a third-party action.[2] It further provides that a compensation carrier is liable only for the deficiency, if any, between the recovery in the third-party action and the amount awarded under the Workmen's Compensation Law.[3]

Despite New York's clear policy against suing a fellow employee for personal injuries,[4] circumstances enabled decedent's administrator to sue before a

23. Youngkin v. Maurer, 74 Ariz. 67, 70, 243 P.2d 780, 782 (1952).

24. The Youngkin court held that the jury should "follow the instructions of the trial judge as the law of the case regardless of what its members may believe the law should be." Id. at 70, 243 P.2d at 782.

1. Greene v. Verven, 204 F. Supp. 585 (D. Conn. 1959). Decedent, a New York resident, while in the course of employment, was driving in Connecticut with a coemployee, the defendant in the action. Defendant, the driver, veered off the highway and hit a tree, fatally injuring decedent.

2. N.Y. Workmen's Comp. Law, § 29(1). (Emphasis added.)

3. "If such injured employee, or in case of death, his dependents, proceed against such other, the state insurance fund, person, association, corporation, or insurance carrier, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case." N.Y. Workmen's Comp. Law, § 29(4).

4. "The right to compensation or benefits under this chapter, shall be the exclusive

Connecticut court, which denied extraterritorial effect to New York law. Because the defendant in the Connecticut wrongful death action was a coemployee, that case was not a third-party action within the literal meaning of the statute. By strictly interpreting the statutory definition of third-party action, and by denying an offset to the insurance carrier despite the recovery in Connecticut, the court in the instant case gave judicial approval to a double recovery.

The purpose of section 29 is to ensure a full—but only a single—recovery to the injured workman or his dependents,[5] and to place the ultimate liability for the loss sustained on the responsible third party, not the compensation carrier.[6] Justice Gibson, dissenting in the instant case, argued that since the action was permissibly and successfully settled under Connecticut law, the Legislature must be deemed to have intended that it should be regarded as a third-party action within the meaning of the New York statute.[7]

The majority was most ineffective in disproving the contention that the purpose of section 29 is to prevent a double recovery. The sole authority for the majority's conclusion that section 29 was not enacted to preclude double recovery was *Meachem v. New York Cent. R.R.*[8] In that case, plaintiff, who was injured in an industrial accident, was involved in an automobile accident outside the scope of employment three years later, from which he died. The court held that he suffered two injuries remote from each other as to time and place. Since plaintiff had two separate causes of action, there was no double recovery and, hence, section 29 did not apply. In dictum, the court then said: "Even if this were a 'double recovery', that fact would not condemn it in the eyes of the law. There is nothing in the Workmen's Compensation Act forbidding collection of additional amounts from other sources."[9]

On the other hand, there are numerous instances where the court of appeals has expressed in one way or another the view that: "The law does not permit

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remedy to an employee, or in case of death his dependents, when such employee is injured or killed by the negligence or wrong of another in the same employ." N.Y. Workmen's Comp. Law, § 29(6).

5. Rauch v. Jones, 4 N.Y.2d 592, 152 N.E.2d 63, 176 N.Y.S.2d 628 (1958). Plaintiff, a passenger in a tractor-trailer driven by a coemployee was injured due to the coemployee's negligence. Plaintiff sought to recover in a negligence action against the owner of the vehicle. The court held that since § 29(6) clearly deprives the injured employee of a right to maintain an action against a negligent coemployee, it also "bars a derivative action which necessarily is dependent upon the same claim of negligence for which the exclusive remedy has been provided." Id. at 596, 152 N.E.2d at 65, 176 N.Y.S.2d at 631.

6. Parchefsky v. Kroll Bros., 267 N.Y. 410, 196 N.E. 308 (1935). The court held that plaintiff, whose injury in the course of his employment was aggravated by the malpractice of the physician who attended him, had a remedy against his employer, under the Workmen's Compensation Law, for both the result of the original injury and the result of the malpractice. However, the court stated: "If he [plaintiff] pursus his common law remedy against the negligent physician and collects more than the compensation provided by the statute, the employer or carrier is liable only for the injury, apart from the result of the malpractice." Id. at 418, 196 N.E. at 312.

7. 21 App. Div. 2d at 586, 252 N.Y.S.2d at 160 (dissenting opinion).

8. 8 N.Y.2d 293, 169 N.E.2d 913, 206 N.Y.S.2d 569 (1960).

9. Id. at 298, 169 N.E.2d at 916, 206 N.Y.S.2d at 574.

a double satisfaction for a single injury."[10] In *Hartford Acc. & Indem. Co. v. Chartrand*,[11] defendant recovered workmen's compensation benefits in New Jersey, which prohibits a double recovery, and then recovered in a common law action in New York. In impressing an equitable lien on the proceeds of this action, the court of appeals said: "[I]f the State of New Jersey by reason of its Compensation Law did not permit a double recovery, the State of New York ought not to permit it if there be an appropriate remedy whereby the limitation can be given effect. The law does not favor a double recovery nor look with favor upon a party obtaining more than he is justly entitled to."[12]

Concededly, in order to prevent a double recovery in the instant case, the court would have had to go beyond a strict interpretation of section 29. But, in *Berenberg v. Park Memorial Chapel*,[13] the court did extend the meaning of section 29 to give effect to the purpose of preventing a double recovery. In that case, plaintiff was assaulted by a coemployee and settled with him for a fixed sum before seeking compensation benefits. By a strict interpretation of subdivision 6 of section 29,[14] plaintiff had no cause of action against his coemployee and, therefore, could still recover compensation benefits. But, the court held that "an intentional tort or any intended wrong is not the 'wrong' which the Legislature intended would bar a common-law cause of action against a coemployee."[15] This interpretation made it a third-party action, and because plaintiff failed to obtain the required approval of his compromise, he was barred from recovery under the Workmen's Compensation Law.[16] In referring to the fact that section 29 did not specifically refer to this type of third-party action, the court stated: "However, reading the whole section in the light of the purpose of the Workmen's Compensation Law, we conclude that it was intended to regulate *all* third-party claims and not only those specifically mentioned."[17]

The New York statute expressly provides that benefits under this statute shall be the exclusive remedy when one is injured by a fellow employee.[18] Its purpose is clear. While the statute does not specifically mention out of state actions, the New York policy against double recovery and the resulting liberal interpretations of section 29 dictate a reversal should the instant case be appealed.

10. Milks v. McIver, 264 N.Y. 267, 270, 190 N.E. 487, 488 (1934). See Hartford Acc. & Indem. Co. v. Chartrand, 239 N.Y. 36, 145 N.E. 274 (1924); Zirpola v. Casselman, Inc., 237 N.Y. 367, 143 N.E 222 (1924); Brooks v. Rochester Ry., 156 N.Y. 244, 50 N.E. 945 (1898).

11. Supra note 10.

12. Id. at 41, 145 N.E. at 275.

13. 286 App. Div. 167, 142 N.Y.S.2d 345 (3d Dep't 1955).

14. N.Y. Workmen's Comp. Law, § 29(6). See note 4 supra.

15. 286 App. Div. at 169, 142 N.Y.S.2d at 347.

16. N.Y. Workmen's Comp. Law, § 29(5). This subsection is designed to prevent a double recovery by the injured workman and to assure reimbursement to the employer or his insurance carrier for compensation outlay by requiring its written approval of any compromise.

17. 286 App. Div. at 170, 142 N.Y.S.2d at 348. (Emphasis added.)

18. N.Y. Workmen's Comp. Law, § 29(6). See note 4 supra.