

1966

Case Notes

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Case Notes, 35 Fordham L. Rev. 337 (1966).

Available at: <https://ir.lawnet.fordham.edu/flr/vol35/iss2/5>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

CASE NOTES

Administrative Law—A Director Appearing at a Securities and Exchange Commission Investigation of a Corporation Has the Right To Be Represented by the Corporation's Counsel.—In an investigation of an offer and sale of corporate stock, the Securities and Exchange Commission subpoenaed respondent, a director of the corporation, and advised him that it was invoking its sequestration rule¹ which would preclude respondent's attorney from representing him. The ground for the invocation of the rule was that the attorney had already represented another director at the hearing and was also the corporate attorney. Because of the Commission's ruling, the respondent refused to appear. The Commission applied for, and was granted, an enforcement order by the United States district court. However, this order was conditional on the Commission's acceptance of the respondent's attorney.² This order was upheld on appeal, the court holding that the invocation of the sequestration rule violated the appellee's statutory right to counsel. *SEC v. Higashi*, 359 F.2d 550 (9th Cir. 1966).

The basis of the court's decision was that the respondent's interests were common to those of the corporation, since, as a director, he could be held responsible for the corporate acts. The attorney most familiar with his possible liabilities and defenses would be the corporate counsel. To deprive respondent of this attorney would be an unreasonable infringement upon his statutory right to counsel.³ It was also suggested that requiring independent counsel might place a financial hardship upon the respondent.⁴

The right of a witness appearing at a federal agency proceeding to be represented by counsel has been expanded over the years. The earlier decisions ruled that a witness who was compelled to appear in a purely investigative proceeding, as distinguished from an adjudicative hearing, was not entitled to counsel.⁵ It

1. 17 C.F.R. § 203.7(b) (Supp. 1966), which provides: "Any person compelled to appear, or who appears by request or permission of the Commission, in person at a formal investigative proceeding may be accompanied, represented and advised by counsel . . . provided, however, that all witnesses shall be sequestered, and unless permitted in the discretion of the officer conducting the investigation no witness or the counsel accompanying any such witness shall be permitted to be present during the examination of any other witness called in such proceeding." (Italics omitted.)

2. For a discussion of judicial supervision of administrative proceedings, see Carrow, *Types of Judicial Relief from Administrative Action*, 58 Colum. L. Rev. 1, 8-22 (1958). The author points out that adjudication, licensing and investigation proceedings are subject to judicial intervention. When deciding to intervene, the court will consider the legality of the agency action, the possible infliction of irreparable injury by the proceeding, and the extent to which such private injury is offset by the public interest.

3. The court stated: "Here the act of sequestration . . . bears directly and prejudicially upon the interests of the witness himself. Since his interests are common with those of the corporation for whose acts he may be held responsible, to sequester corporation counsel is to deprive the witness of the services of the attorney most familiar with the source of his vulnerability." 359 F.2d at 553.

4. *Id.* at 553 n.5.

5. E.g., *Bowles v. Baer*, 142 F.2d 787 (7th Cir. 1944). In this case, the Office of Price

was reasoned that since no conclusive findings were being made, representation was a privilege which could be extended at the discretion of the agency.⁶

Today, such a witness is guaranteed by statute⁷ the right to be accompanied, represented, and advised by counsel regardless of the type of proceeding involved.⁸ In *FCC v. Schreiber*,⁹ the court clearly indicated that the legislative history of the statute and its phraseology denote that Congress intended a witness in an agency investigation to have such a right to counsel.

The individual's statutory right to counsel must be balanced against the public interest served by allowing federal agencies to efficiently regulate their areas of jurisdiction. In the instant case, the court conceded the necessity for the sequestration rule,¹⁰ noting that investigation of possible federal securities law infractions is difficult to undertake, and that it is often necessary to preclude the possibility that a witness's testimony might be overheard by someone who could

Administration ordered fifteen people to testify about their dealings with a certain company under investigation. They were all represented by the attorney for the company. After asking a few questions, the presiding official of the OPA requested the attorney to leave. He responded that he could not do so unless authorized by his clients. The witnesses then refused to answer any questions without the advice of the attorney. The OPA then requested an order from the district court ordering the witnesses to appear without the attorney. The court granted the order, provided the proceeding be a public one. The OPA then appealed to the court of appeals which reasoned that the proceeding was investigative, and as such did not have to be public, nor did the OPA have to grant rights of attorney to the witnesses.

6. See *White, Weld & Co.*, 1 S.E.C. 574 (1936). Here it was indicated that respondents at an investigative proceeding could be granted the privilege of counsel at the discretion of the Commission. If extended, it was to be considered a courtesy. Cf. *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923). See also Comment, 54 Harv. L. Rev. 1214, 1216-17 (1941).

7. Administrative Procedure Act § 6(a), 60 Stat. 240 (1946), 5 U.S.C. § 1005(a) (1964), which provides: "Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative."

8. Murchison, *Rights of Persons Compelled to Appear in Federal Agency Investigational Hearings*, 62 Mich. L. Rev. 485, 492-93 (1963). See also Newman, *Federal Agency Investigations: Procedural Rights of the Subpoenaed Witness*, 60 Mich. L. Rev. 169, 170-80 (1961). In this article, the author discusses the witness's rights to counsel, to a transcript, to a public or private hearing, to notice, to answer completely, and to confront and cross examine witnesses.

9. 329 F.2d 517 (9th Cir. 1964), modified on other grounds, 381 U.S. 279 (1965). Both the majority and dissenting opinions agreed that witnesses have a right to counsel. In the dissenting opinion, a statement made by Congressman Francis Walters on the floor of the House was quoted: "The representation of counsel contemplated by the bill means full representation as the term is understood in the courts of law." *Id.* at 537 n.37. See also *In the Matter of Neil*, 209 F. Supp. 76 (S.D.W. Va. 1962); *United States v. Smith*, 87 F. Supp. 293 (D. Conn. 1949); Murchison, *supra* note 8, at 492.

10. 359 F.2d at 552. For a further discussion of when witnesses' testimony should not be disclosed to other witnesses see *In re Bonanno*, 344 F.2d 830, 834 (2d Cir. 1965); *United States v. Tramunti*, 343 F.2d 548, 552 (2d Cir. 1965).

later relate it to a future witness. Sequestration of counsel as well as witnesses, in other words, reduces the difficulties often encountered in attempting to prove a conspiracy.

*United States v. Steel*¹¹ illustrates the sequestration rule. There, the defendant was charged with violations of the Securities Act of 1933 and the mail fraud statute.¹² The defendant had been one of the officers of the corporation under investigation. When she was summoned to appear before the investigative proceedings of the Securities and Exchange Commission, she appeared with an attorney who was also general counsel to the corporation. The Commission invoked the sequestration rule. This invocation was one of the grounds used by the defendant in moving for a dismissal of the indictments. The district court denied the motion, reasoning that the Administrative Procedure Act¹³ guaranteed a right to counsel, but not an absolute right to counsel of one's choice. By precluding the corporate counsel, the Commission did not deprive the defendant of all counsel, but merely of one particular attorney. The instant case cited the *Steel* case, but distinguished it on the ground that here, "sequestration . . . bears directly and prejudicially upon the interests of the witness . . . since his interests are common with those of the corporation for whose acts he may be held responsible . . ." ¹⁴

The distinction is a questionable one. The defendant in *Steel*, as an ex-officer of the corporation, was in the same position as the respondent in the instant case. To deprive her of the corporate counsel would be to deprive her of the attorney most familiar with her sources of "vulnerability." The sequestration rule certainly bore directly on her interests.¹⁵

It would appear, therefore, that the reasoning of the instant court warrants further examination. The contention that the respondent, a corporate director, was entitled to the corporate counsel since the latter, due to his intimate knowledge of the dispute, could offer the most able representation,¹⁶ is, in the light of prior decisions, a strange one.

11. 238 F. Supp. 575 (S.D.N.Y. 1965).

12. 18 U.S.C. § 1341 (1964).

13. See note 7 supra.

14. 359 F.2d at 553. The public interest served by upholding the sequestration rule seems far more significant than the inconvenience or expense caused by requiring one individual to go to the trouble of securing a different attorney. See 6 Wigmore, Evidence § 1840, at 362 (3d ed. 1940), in which the author discusses the possibilities of abuse when an attorney consults with a sequestered witness. Cf. *FCC v. Schreiber*, 329 F.2d 517, 526 (9th Cir. 1964).

15. In *Torras v. Stradley*, 103 F. Supp. 737 (N.D. Ga. 1951), it was held that a witness in an Internal Revenue tax investigation was not entitled to the same attorney employed by the taxpayer being investigated. However, a more recent decision seems to have overruled the *Torras* case. In *Backer v. Commissioner*, 275 F.2d 141 (5th Cir. 1960), it was held that any person compelled to appear in person before any agency has the right to counsel of his choice. In this case the taxpayer's accountant was allowed to be represented by the taxpayer's attorney. See generally *Chandler v. Fretag*, 348 U.S. 3 (1954); *Powell v. Alabama*, 287 U.S. 45 (1932); *United States v. Bergamo*, 154 F.2d 31 (3d Cir. 1946). All of the above cases dealt with the individual's right to be represented by counsel of his choice.

16. See note 3 supra.

Litigation dealing with the right of an organization official to be represented by the organization's counsel when the organization itself is or may be a party in the suit generally falls within two types of cases. The first is the shareholder's derivative suit; the second is a suit by a labor union member against a union leader on behalf of the union.

In the first of these two lines of cases, the defendant director or officer is frequently represented by the corporate counsel,¹⁷ despite the fact that the corporation is, in theory at least, the plaintiff.¹⁸ In *Murphy v. Washington Am. League Base Ball Club, Inc.*,¹⁹ the plaintiff stockholder sought to enjoin the directors of the corporation from paying salary increases recently voted to the corporate officers. Although not a direct issue in the case, the court commented at length that separate counsel should be retained by the defendant director. Had the director been served in the suit, he would have been enjoined from using corporate counsel.²⁰ The problem is one of conflict of interest. Can the attorney effectively represent both the director and the corporation when their interests are theoretically adverse? The *Murphy* court thought not, despite the fact that the corporate counsel is the one attorney most qualified to represent the director, and despite financial inconvenience caused by requiring the director to secure independent counsel.

In *Milone v. English*,²¹ union members sued union officials to recover on behalf of the union monies used to defend the officials in another litigation. The union general counsel represented the defendants. The court stated:

In other words, counsel who are chosen by and represent officers . . . and who also represent the union, are not able to guide the litigation in the best interest of the union because of the conflict in counsel's loyalties. In such a situation it would be incumbent upon counsel not to represent both the union and the officers.²²

17. In *Lewis v. Shaffer Stores Co.*, 218 F. Supp. 238 (S.D.N.Y. 1963), a shareholder's derivative suit, it was held that a corporate officer and the corporation must be represented by separate counsel. In *Boyd v. Second Judicial Dist. Court*, 51 Nev. 264, 274 Pac. 7 (1929), a corporate director was not allowed to be represented by the corporation's ex-attorney. See generally *Marco v. Dulles*, 169 F. Supp. 622 (S.D.N.Y.), appeal dismissed, 268 F.2d 192 (2d Cir. 1959); *Strong v. International Bldg. Loan & Inv. Union*, 183 Ill. 97, 55 N.E. 675 (1899); *Wait v. Second Judicial Dist. Court*, 81 Nev. 612, 407 P.2d 912 (1965); *Hawkins v. Eighth Judicial Dist. Court*, 67 Nev. 248, 216 P.2d 601 (1950).

18. See Note, 74 Yale L.J. 524 (1965). For a discussion of the problems of counsel in a derivative corporate suit, see McDaniel, *Ethical Problems of Counsel for Big Business: The Burden of Resolving Conflicting Interests*, 38 A.B.A.J. 205 (1952).

19. 324 F.2d 394 (D.C. Cir. 1963).

20. *Id.* at 397-98. Plaintiff had initiated earlier unsuccessful litigation against defendant in an attempt to block the directors from moving the franchise from Washington, D.C. to Minnesota, *Murphy v. Washington Am. League Base Ball Club, Inc.*, 267 F.2d 655 (D.C. Cir.) (per curiam), cert. denied, 361 U.S. 387 (1959). Once in Minnesota, the corporation prospered and the directors voted salary increases. In addition to requesting an injunction against the salary increases, plaintiff also requested that counsel to the corporation be enjoined from representing certain directors.

21. 306 F.2d 814 (D.C. Cir. 1962).

22. *Id.* at 817.

In *International Bhd. of Teamsters v. Hoffa*,²³ plaintiff union sought to recoup from the union president monies used to defend him in a criminal proceeding. The president was represented in both suits by the union's counsel. This case is distinguished from *Milone* in that the union moved to be joined as a co-defendant. Thus, counsel would not be required to represent both plaintiff and defendants, but merely co-defendants. The court nevertheless held that separate counsel would have to be retained, and, once retained, that the union could again move to appear as a defendant.²⁴

In cases dealing with union suits, as in the corporate cases, the possibility of conflict of interest has been decisive. The court has never been disposed to determine which counsel knew more about the defendant's potential liabilities. The instant court's "vulnerability" argument²⁵ certainly departs from these precedents.

There was just such a conflict of interest in the instant case. The attorney, in addition to being the corporate counsel, represented another director of the corporation²⁶ who had made an earlier appearance at the investigation.²⁷ Either this director or the respondent, or both, could have been held responsible for the corporate act.²⁸

Also, the possibility of a derivative suit²⁹ arising out of the results of the Commission's investigation warrants consideration. Here, both parties to the suit, the plaintiff corporation and the defendant director, would have been represented by the same counsel before the investigation. Is it reasonable to expect an attorney to adequately represent two witnesses at an investigation when their testimony, given under his guidance, might make one liable to the other at a later date?

23. 242 F. Supp. 246 (D.D.C. 1965).

24. *Id.* at 256-57.

25. See note 3 *supra*.

26. Brief for Appellant, pp. 4-7, *SEC v. Higashi*, 359 F.2d 550 (9th Cir. 1966).

27. 359 F.2d at 552.

28. *Id.* at 553. The Securities Exchange Act of 1934 clearly establishes joint and several liability of all controlling persons. 48 Stat. 899 (1934), 15 U.S.C. § 78t(a) (1964). As the Commission pointed out to the court, if a violation existed the respondent would be represented by an attorney whose primary representation was of another individual who might be responsible for the same act. Brief for Appellant, pp. 28-29, *SEC v. Higashi*, 359 F.2d 550 (9th Cir. 1966).

29. The Securities Exchange Act of 1934 provides for a fine as one of the penalties for a violation of the statute. 48 Stat. 904 (1934), as amended, 15 U.S.C. § 78ff (1964). If as a result of the investigation the corporation in the instant case were fined, a stockholder could institute a derivative suit, on behalf of the corporation, against the responsible corporate official or officials to recoup the corporate assets lost in paying the fine. For examples of statutory violations being the basis of a derivative suit, see, e.g., *Kirrane v. Boone*, 334 Mo. 558, 66 S.W.2d 861 (1933); *Moore v. Keystone Macaroni Mfg. Co.*, 370 Pa. 172, 87 A.2d 295 (1952). In Lattin, *The Law of Corporations* 348 (1959), the author states: "Whether the corporation has a cause of action will depend upon whether or not its assets have been lost or destroyed or depreciated or its business interfered with by the wrongful act of the parties charged"

To compound the problem of conflicting interests, the attorney himself was an officer of the corporation and as such could also be held responsible for the corporate acts. Not only would he be aware of respondent's potential liabilities, but he would also be acutely aware of his own. As the court stated in *Teamsters*, "potential, no less than actual, conflict disqualifies counsel from serving in a double capacity"³⁰

It is therefore submitted that the instant court erred in denying the Commission's appeal. When presented with a situation where a conflict existed between both directors, between the attorney and the directors, and among all three individuals and the corporation, it should have prohibited counsel from representing more than one party.

Bankruptcy—Carry Back Refunds Held To Be an Asset of the Bankrupt's Estate.—Petitioners filed voluntary bankruptcy petitions in September 1961, and a trustee was then appointed. Since the petitioners' partnership had suffered an operating loss during the year 1961, the trustee filed for a carry back tax refund under section 172(a) of the Internal Revenue Code of 1954.¹ The Internal Revenue Service allowed the losses to be carried back to the years 1959 and 1960, reducing the tax due for those years. The refund was paid to the trustee. The petitioners then applied to the referee for the refund. The referee denied petitioners' application² and the decision was upheld by the United States Supreme Court. The Court held that the trustee was entitled to the loss carry back refund even though the claim was only a contingent or potential one at the time the petition was filed. *Segal v. Rochelle*, 382 U.S. 375 (1966).³

Under section 70(a)(5) of the Bankruptcy Act,⁴ the trustee, after his appointment, is vested by operation of law with all "property . . . which prior to the filing of the petition [the bankrupt] . . . could by any means have transferred"⁵

Thus, to award a tax carry back refund to the trustee under section 70(a)(5),

30. *International Bhd. of Teamsters v. Hoffa*, 242 F. Supp. 246, 256 (D.D.C. 1965). This potential conflict of interest was also recognized by the court in the instant case: "advice to a witness-client by an attorney whose primary representation is of someone else may not be in the witness' best interests." 359 F.2d at 552. In *Randazzo v. United States*, 339 F.2d 79 (5th Cir. 1964), counsel for appellant, who had been convicted of contempt for refusing to answer questions after a grant of immunity, was not allowed to appear since the questions related to another of his clients.

1. This section provides that "there shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year."

2. In the Matter of *Segal*, 221 F. Supp. 282 (N.D. Tex. 1963), aff'd. sub. nom. *Segal v. Rochelle*, 336 F.2d 298 (5th Cir. 1964).

3. 52 A.B.A.J. 274, 40 Ref. J. 44.

4. 52 Stat. 879 (1938), as amended, 11 U.S.C. § 110(a)(5) (1964).

5. *Ibid.*

it had to be established that at the time the bankruptcy petition was filed, the refund was both "property" and "transferable."⁶ Prior to the instant decision, two decisions of the courts of appeals, *In the Matter of Sussman*⁷ and *Fournier v. Rosenblum*,⁸ had held that a loss carry back refund was not transferable property under section 70(a)(5). In reference to the property aspect of the problem, the *Fournier* court said that the bankrupt "could point to no existing fund and to no existing right in which he had any legal or equitable interest."⁹ Although *In the Matter of Sussman* also held that a carry back tax refund did not pass to the trustee, that court felt that the result was an "unfortunate . . . 'windfall to the bankrupt at the expense of the creditors.'"¹⁰ Both courts regretted that the language of section 70(a)(5) prevented the accrual of the refund to the trustee but felt that the only remedy was legislative amendment.¹¹

The instant Court observed that numerous cases interpreting section 70(a)(5) have construed the term "property" to include contingent property.¹² The Court reasoned that since the loss was generated out of pre-bankruptcy transactions, the benefit of the refund properly belonged to the creditors, and should therefore pass to the trustee.¹³

In the Supreme Court, the trustee argued that the carry back refund was transferable by operation of law, and that this satisfied section 70(a)(5). The Court observed that this argument made "redundant the alternative route for complying with section 70a(5) through showing that the property 'might have been levied upon and sold under judicial process . . .'"¹⁴ The Court then stated that in order to satisfy the transferability requirement, the deduction must be capable of being voluntarily transferred by the bankrupt.¹⁵ The *Sussman* court also recognized that section 70(a)(5) required voluntary transferability,¹⁶ and ruled that carry back refunds do not meet this requisite because of the anti-assignment statute.¹⁷ This statute prohibits the assignment of claims against the

6. The Act defines transfer as including "the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein . . . or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor . . ." 66 Stat. 420 (1952), 11 U.S.C. § 1 (30) (1964).

7. 289 F.2d 76 (3d Cir. 1961), 14 Stan. L. Rev. 380 (1962).

8. 318 F.2d 525 (1st Cir. 1963).

9. *Id.* at 527.

10. 289 F.2d at 78.

11. *Ibid.*; *Fournier v. Rosenblum*, 318 F.2d 525, 527 (1st Cir. 1963).

12. 382 U.S. at 379.

13. *Id.* at 379-80; see 60 Nw. U.L. Rev. 122, 127 (1965); 42 Texas L. Rev. 542, 547 (1964).

14. 382 U.S. at 382. (Footnote omitted.)

15. *Id.* at 382-83.

16. Section 70(a) provides: "The trustee . . . shall . . . be vested by operation of law with . . . (5) property . . . which prior to the filing of the petition he could by any means have transferred . . ." 52 Stat. 879 (1938), as amended, 11 U.S.C. § 110(a) (1964).

17. 289 F.2d at 78.

United States unless such assignments have been specifically permitted by the government, the amounts of the claims have been ascertained, and the assignment has been made in the prescribed manner.¹⁸ The present Court stated that carry backs can be transferred voluntarily despite the anti-assignment statute, relying on *Martin v. National Sur. Co.*¹⁹ It was there held that the statute was designed to protect the government from needless litigation,²⁰ and if the government is so protected, assignments will be recognized.²¹

While the law with respect to carry back refunds is settled by this decision, the question of whether a carry-over deduction will be allowed to vest in the trustee is still undecided. The Court in the principal case expressed no opinion as to the status of the bankrupt's carry-overs,²² but pointed out that its reasoning with regard to carry backs might not be applicable to carry-overs.²³ As in the case of a carry back, the carry-over would have to satisfy the "property" and "transferability" requirements. However, it is impossible for the carry-over to meet the transfer requirement of section 70(a)(5). The individual taxpayer must either use the carry-over or forfeit the deduction. Moreover, a corporate taxpayer is in the same position. Although the Internal Revenue Code does permit a corporation to use its deduction in some instances where there has been a change in the ownership of the corporation,²⁴ this change in ownership does not transfer the carry-over from the taxpayer originally entitled to it. The corporation is still the only party entitled to use the deduction.²⁵ Furthermore, it is unclear whether the carry-over could be considered to be "property."²⁶

18. Rev. Stat. § 3477 (1875), as amended, 31 U.S.C. § 203 (1964).

19. 300 U.S. 588 (1937). The respondent entered into an agreement to act as surety for a contractor. The contractor assigned his payments under the contract to the surety. He later assigned the same monies to a creditor, the petitioner. The Court found for the surety.

20. *Id.* at 594.

21. *Id.* at 596. The instant Court cited a case from petitioner's home state, Texas, *Trinity Universal Ins. Co. v. First State Bank*, 143 Tex. 164, 183 S.W.2d 422 (1944), which enforced the transfers as between the parties. 382 U.S. at 384. The reliance on Texas cases in what is essentially a question of federal law indicates that the Court was only pointing out the de facto treatment of assignments on the state level rather than giving a definitive interpretation of the anti-assignment statute.

22. 382 U.S. at 381.

23. *Ibid.* The Court noted that there were conceptual differences between carry backs and carry-overs.

24. Int. Rev. Code of 1954, §§ 381-82.

25. The Court indicated that the requirement of transferability will not be abandoned even though no legislative intent on the requirement could be found. 382 U.S. at 383.

26. A comparison of two cases, *In re Wright*, 157 Fed. 544 (2d Cir. 1907), and *In re Coleman*, 87 F.2d 753 (2d Cir. 1937), is interesting in this context. In the *Wright* case the trustee was awarded the bankrupt's renewal commissions which were generated by pre-bankruptcy activities but were payable after the filing of the petition. Although the right of the bankrupt accrued in a contract executed prior to the bankruptcy, the actual commissions were uncertain in amount and duration. However, the court decided it was "property" of the bankrupt at the time of the petition. *In re Wright*, *supra* at 546-47; accord, *In re Fahys*, 18 F. Supp. 529 (S.D.N.Y. 1937). But see *In re Leibowitz*, 93 F.2d 333 (3d Cir. 1937), cert.

If the loss carry-over does not vest in the trustee, there will be inequitable results in at least some situations. The right to take a carry-over deduction requires, simply, losses followed by the earning of income from which to take the deduction. When the losses are the result of pre-bankruptcy transactions and the post-bankruptcy income is generated by the trustee, as he may do, for example, in arrangement proceedings, there seems to be no reason to deny the trustee the right to lessen his tax liability by taking the deduction from income he earned.

In other situations, the equities are more closely balanced. For example, following a straight bankruptcy proceeding, the bankrupt himself might generate the income from which a carry-over deduction could be taken. The trustee could be given a transferable right to require the bankrupt to account to him for the value of the deduction.²⁷ The trustee has a weaker position here than in the prior situation, since it is the bankrupt, rather than the trustee, who has earned the taxable income.

denied, 303 U.S. 652 (1938); *Equitable Life Assur. Soc'y of the United States v. Stewart*, 12 F. Supp. 186 (W.D.S.C. 1935).

In the Coleman case, on the other hand, the court held that the proceeds of an attorney's contingent fee arrangement entered into prior to bankruptcy was not "property" of his estate. *In re Coleman*, supra at 754; accord, *In re Thomas*, 204 F.2d 788, 795 (7th Cir. 1953).

In both Coleman and Wright the services which earned the "property" were rendered in part before and in part after the filing of the petitions. However, in the former case the entire property vested in the trustee, while in Coleman the entire property vested in the bankrupt. The distinguishing factor between these two cases was the type of service rendered by the bankrupt. The insurance agent renders ministerial services when renewing policies, while the attorney renders a much more substantial service when handling a case. The bankrupt who claims a carry-over deduction must earn taxable income before he may take the deduction. Further, the value of the deduction is determined by the amount of income he earns. The act of earning income would seem to be somewhat more than ministerial, but whether the acts here would come within Coleman or Wright is an academic point since under present law the trustee has no claim to the deduction in either event.

The principal exceptions to this general rule are the pension and vacation pay cases. In these cases, e.g., *Tennessee Valley Authority v. Kinzer*, 142 F.2d 833 (6th Cir. 1944); *In re Baxter*, 104 F.2d 318 (6th Cir. 1939); *In re McManaman*, 50 F. Supp. 869 (N.D. Ill. 1941), the bankrupt has contributed during his employment, through salary deductions, to the company's retirement fund which is either self-funded or insured. At the time of his bankruptcy he has a credit to the extent of his contributions plus interest. Under the usual agreement this credit cannot be assigned or withdrawn except upon death or termination of employment. The courts have been reluctant to invade these funds usually upon the ground that the monies are unassignable and non-transferable. However, such a decision also reflects a policy decision that the benefits accrued through these plans should be used solely for retirement. The outcome of the vacation pay cases is dependent upon whether the court concludes that the pay is earned before or after bankruptcy. *Tennessee Valley Authority v. Kinzer*, supra at 838.

27. Making this right transferable will avoid the problem of having to keep the estate open for up to five, or in some rare cases, ten years during which the deduction may be taken.

The instant case prevented an unwarranted gain on the part of the bankrupt at the expense of the creditors. If, in the case of a loss carry-over, the same purpose cannot be served under the existing law, then an amendment to the Bankruptcy Act would be in order.

Conflict of Laws—Connecticut Realty of a New York Partnership Included in the Gross Estate for Tax Purposes in New York.—Decedent and his son, residents of New York, formed a partnership in New York for the purpose of buying realty in Connecticut.¹ The decedent devised all his interest in the partnership to his son. The New York court of appeals held that inasmuch as the land was situated in Connecticut, the law of that state should control in determining whether New York may validly include the value of the property in decedent's gross estate subject to the New York estate tax. Upon finding that Connecticut law did not resolve the problem,² the court held that, since the agreement was executed in New York, its interpretation was subject to the New York Partnership Law which contains provisions converting partnership realty into personalty and stipulating that on the death of a partner the property shall pass to the surviving partner or partners as tenants in partnership.³ The court, therefore, concluded that the realty was converted into personalty and as such the value of the property should be included as part of the decedent's gross estate subject to New York estate tax.⁴ *Matter of Havemeyer*, 17 N.Y.2d 216, 217 N.E.2d 26, 270 N.Y.S.2d 197 (1966).

Connecticut treated the land in question as realty rather than as personalty for tax purposes.⁵ The New York State Tax Commission, in assessing the value of the decedent's estate, included the value of the Connecticut realty.⁶ Before the New York surrogate's court, the executors contended that, since Connecticut had taxed the land as realty, it should be excluded from the decedent's gross

1. In the *Matter of Estate of Havemeyer*, 42 Misc. 2d 585, 586, 248 N.Y.S.2d 412, 414 (Surr. Ct. 1964). See text accompanying note 23 *infra*.

2. See text accompanying notes 12-14 *infra*.

3. N.Y. Partnership Law § 12(1) provides: "All property originally brought into the partnership stock or subsequently acquired, by purchase or otherwise, on account of the partnership is partnership property." Section 51 provides: "1. A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership 2. . . . (d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right . . . vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose."

4. N.Y. Tax Law § 249-r.

5. Connecticut imposed a succession tax treating the land as realty rather than personalty. 42 Misc. 2d at 587, 248 N.Y.S.2d at 414. However, the succession tax on this estate was never reviewed in the Connecticut courts. 17 N.Y.2d at 218, 217 N.E.2d at 27, 270 N.Y.S.2d at 199.

6. 42 Misc. 2d at 588, 248 N.Y.S.2d at 415.

estate by virtue of New York Tax Law section 249-r as out of state realty.⁷ The Commission contended that the land was a partnership asset under New York Partnership Law section 12,⁸ and that, by virtue of section 52,⁹ decedent's only interest was in personal partnership property. The court, in rejecting the Commission's contentions, found that the partnership land passed to the son by virtue of the devise as realty, rather than as personalty by virtue of the partnership agreement.¹⁰ The appellate division affirmed the surrogate in a memorandum decision.¹¹

The instant court, in reversing, conceded that Connecticut law should govern.¹² Connecticut common law requires that, before partnership realty will be converted, there must be an explicit or implicit intent to do so, evidenced either by the acts of the partners themselves or by the language of the partnership agreement.¹³ The court, finding no requisite intent in the acts of the partners, looked to the agreement.¹⁴

The agreement which recited the terms on which capital, profits, and losses were to be distributed was silent as to conversion of the realty into personal property.¹⁵ The court, however, found that under New York law the "traditional rule has been that matters bearing upon the execution, the interpretation and the validity of contracts are governed by the law of the State where the contract was made."¹⁶ The court realized the weakness of the rule by stating that the rule is "no longer to be slavishly followed . . ." ¹⁷ Yet the court reasoned that the rule "nevertheless still signifies that the place where a contract is made

7. 42 Misc. 2d at 587, 248 N.Y.S.2d at 415. See N.Y. Tax Law § 249-r, which provides: "Gross Estate—The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated (except real property situated . . . outside this state)."

8. See note 3 supra.

9. "A partner's interest in the partnership is his share of the profits and surplus and the same is personal property." N.Y. Partnership Law § 52.

10. 42 Misc. 2d at 594, 248 N.Y.S.2d at 421-22.

11. 24 App. Div. 2d 477, 261 N.Y.S.2d 277 (2d Dep't 1965) (memorandum decision). The dissent felt that certain acts of the decedent, such as his failure to deed the land to himself or his partner as tenants in common, provided the requisite intent. *Id.* at 478, 261 N.Y.S.2d at 277.

12. 17 N.Y.2d at 220, 217 N.E.2d at 28, 270 N.Y.S.2d at 201.

13. *Steinmetz v. Steinmetz*, 125 Conn. 663, 666-67, 7 A.2d 915, 917 (1939); *Sigourney v. Mun*, 7 Conn. 11, 18 (1828).

14. 17 N.Y.2d at 221, 217 N.E.2d at 29, 270 N.Y.S.2d at 201. The acts which could be construed as intent to convert were mentioned in the dissent in the appellate division. 24 App. Div. 2d at 478, 261 N.Y.S.2d at 277-78. The instant court rejected them as being insufficient. 17 N.Y.2d at 221, 217 N.E.2d at 29, 270 N.Y.S.2d at 201.

15. The pertinent provisions of the partnership agreement are alluded to in the opinion of the surrogate. 42 Misc. 2d at 586, 248 N.Y.S.2d at 414.

16. 17 N.Y.2d at 221, 217 N.E.2d at 29, 270 N.Y.S.2d at 201. The court cited for its proposition *Swift & Co. v. Bankers Trust Co.*, 280 N.Y. 135, 19 N.E.2d 992, (1939); *Union Nat'l Bank v. Chapman*, 169 N.Y. 538, 62 N.E. 672 (1902).

17. 17 N.Y.2d at 221, 217 N.E.2d at 29, 270 N.Y.S.2d at 201.

is a significant contact in applying the center of gravity rule of [the New York case of] *Auten v. Auten*¹⁸ Since the contract was made in New York and was between New York domiciliaries, under *Auten* the significant contacts were found to be with New York. Thus, the court concluded that the partnership agreement should be interpreted in accordance with the law of New York.¹⁹ It was therefore held that the partnership agreement was made "subject to the New York State Partnership Law which . . . contains express provisions converting partnership real estate into personalty and providing that on death it shall pass to the surviving partner or partners as tenants in partnership."²⁰

The reasoning of the court is inconsistent with its premise that "Connecticut law should govern inasmuch as this real property is located in Connecticut."²¹ Instead of applying the New York rule of *Auten*, the court should have inquired into Connecticut law to determine whether, under the circumstances, Connecticut would apply the *lex loci contractus*. Under Connecticut law, if the parties to a contract execute it with the intention that it be performed in another state, then the law of the state where the contract is to be performed is the law that will control the interpretation of the contract.²² The partnership agreement in question recited that the partnership was formed for the purpose of "investing in certain real estate . . . [in Connecticut] and taking such action in connection with the investment as may be appropriate."²³ In *Chillingworth v. Eastern Tin-ware Co.*,²⁴ where it appeared that a chattel mortgage had been executed in New York by a New York domiciliary and a New York corporation covering personalty located in Connecticut, the Connecticut supreme court of errors held that "the mere fact . . . that the instrument was formally executed and delivered in New York is not, of itself, decisive of the question as to what law shall control"²⁵ Since the place of performance was in Connecticut, the law of that state was found to govern. Similarly, in *McLoughlin v. Shaw*,²⁶ where it appeared that a trust agreement respecting Connecticut land had been made in Canada between Canadian domiciliaries, the Connecticut court, upon finding that the

18. *Ibid.* In *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954), there was a separation agreement made between husband and wife in New York. Immediately after the signing of the agreement, the wife returned to England where both parties were domiciled, and brought an action for support. There was a clause in the agreement that prohibited the bringing of any matrimonial action. The court held that the significant contacts lay with England and therefore the contract should be interpreted in accordance with the law of that jurisdiction. Accord, *Oltarsh v. Aetna Ins. Co.*, 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965); *Downs v. American Mut. Liab. Ins. Co.*, 19 App. Div. 2d 376, 243 N.Y.S.2d 640 (1st Dep't 1963), *aff'd* 14 N.Y.2d 266, 200 N.E.2d 204, 251 N.Y.S.2d 19 (1964).

19. 17 N.Y.2d at 222, 217 N.E.2d at 29, 270 N.Y.S.2d at 202.

20. *Id.* at 221, 217 N.E.2d at 29, 270 N.Y.S.2d at 201. See note 3 *supra*.

21. 17 N.Y.2d at 220, 17 N.E.2d at 28, 270 N.Y.S.2d at 201.

22. *Endicott Ass'n v. Thorne*, 111 Conn. 697, 151 Atl. 187 (1930); *H.G. Craig & Co. v. Uncas Paperboard Co.*, 104 Conn. 559, 133 Atl. 673 (1926).

23. 42 Misc. 2d at 586, 248 N.Y.S.2d at 414.

24. 66 Conn. 306, 33 Atl. 1009 (1895).

25. *Id.* at 317, 33 Atl. at 1011.

26. 95 Conn. 102, 111 Atl. 62 (1920).

agreement was to be operative in Connecticut, held that Connecticut law should be applied.²⁷ Thus it appears that if the New York court of appeals had applied the Connecticut law concerning contract interpretation to the instant case, it would have found that the law of the place of performance, Connecticut, rather than the law of the place of execution, New York, would control.

Furthermore, in reaching its conclusion, the court here ignored the proposition advanced by several courts²⁸ and commentators²⁹ that although the doctrine of equitable conversion may be applied for intrastate purposes, the doctrine is a fiction which has no place in the resolution of a question of conflict of laws at least where the interest of the owner was, by the law of the situs, an interest in realty. In other words, where a question of conflict of laws is to be resolved, equitable conversion is ignored and the property is treated as realty or personalty as determined by the law of the situs.

Professor Beale³⁰ supports this conflict of laws concept by reasoning that fictions arise by the operation of some particular state law, and the operation of conflict of laws must be determined "in advance of any of the fictions created by any particular law. . . . While equitable conversion is a fiction of law, the question whether land shall be dealt with as . . . personalty is not . . . [and therefore should be] governed by the law of the state of the situs of the land."³¹

The present court, relying on *Blodgett v. Silberman*,³² found that taxation by both New York and Connecticut was not unconstitutional since the land was taxed as realty in Connecticut and as personalty in New York. Notwithstanding the constitutionality of double taxation, the result, as Judge Keating noted in his concurring opinion, was "manifestly inequitable."³³ However he felt there

27. *Id.* at 106, 111 Atl. at 64.

28. *Equitable Trust Co. v. Ward*, 29 Del. Ch. 206, 48 A.2d 519 (Ch. 1946); *Toledo Soc'y for Crippled Children v. Hickok*, 152 Tex. 578, 261 S.W.2d 692, cert. denied, 347 U.S. 936 (1954). See *Clarke v. Clarke*, 178 U.S. 186 (1900); *Pond v. Porter*, 141 Conn. 56, 104 A.2d 228 (1954); *Trowbridge v. Metcalf*, 5 App. Div. 318, 39 N.Y.S. 241 (1st Dep't 1896), aff'd mem., 158 N.Y. 682, 52 N.E. 1126 (1899); *In re Good's Estate*, 96 N.Y.S.2d 798 (Surr. Ct. 1950), aff'd mem., 278 App. Div. 806, 104 N.Y.S.2d 804 (1st Dep't 1951), aff'd, 304 N.Y. 110, 106 N.E.2d 36 (1952).

29. 2 Beale, *Conflict of Laws* § 209.1 (1935); Leflar, *Conflict of Laws* § 141, 273 (1959); Stimson, *Conflict of Laws* 156-57 (1963); Stumberg, *Conflict of Laws* 371 (3d ed. 1963). There is an apparent trend that although "there may be a conversion of local land for intrastate purposes, there can be no conversion for Conflict of Laws purposes." Leflar, *op. cit. supra*.

30. 2 Beale, *Conflict of Laws* § 209.1 (1935).

31. *Ibid.*

32. 277 U.S. 1 (1928). In that case, the Court permitted Connecticut to tax as intangible personal property a decedent's interest in a partnership which held New York realty. The Court dismissed the fact that the property was also taxable in another jurisdiction as irrelevant and found that "it suffices that intangible personalty has such a situs at the domicile of its owner that its transfer on his death may be taxed there." *Id.* at 10. (Emphasis omitted.) See also *State Tax Comm'r v. Aldrich*, 316 U.S. 174 (1942); *Frick v. Pennsylvania*, 268 U.S. 473 (1925).

33. 17 N.Y.2d at 224, 217 N.E.2d at 30, 270 N.Y.S.2d at 203.

"just seems to be no way to wriggle out of the . . . result."³⁴ The inequity of double taxation could have been avoided had the present court subscribed to the acceptable rule that the fiction of equitable conversion has no place in conflict of laws³⁵ or had the court applied the law of Connecticut in its entirety.

Constitutional Law—Commerce and Supremacy Clauses Exempt Professional Baseball from State Antitrust Statute.—The state of Wisconsin instituted action against the defendants¹ to enforce a state antitrust statute.² The circuit court for Milwaukee County determined that the defendants' decision to transfer the Milwaukee Braves baseball team to Atlanta, Georgia, and their refusal to issue a replacement franchise, was an unreasonable exercise of monopolistic control and violative of Wisconsin Statute.³ The court entered judgment⁴ awarding the state recovery of damages⁵ and injunctive relief.⁶ The supreme court of Wisconsin admitted that there was a violation of the state statute,⁷ but determined that the statute could not be applied because to do so would violate the supremacy and commerce clauses of the United States Constitution.⁸ *State v. Milwaukee Braves, Inc.*, 30 Wis. 2d —, 144 N.W.2d 1 (1966).

The commerce clause does not expressly exclude state regulation of commerce and thus there has been difficulty in determining the extent to which a state can legislate in the field of interstate commerce.⁹ In *Gibbons v. Ogden*¹⁰ the Court first said that the states have no authority to substantially impede interstate

34. *Ibid.*

35. New York perhaps does not subscribe to this rule. See *Hope v. Brewer*, 136 N.Y. 126, 32 N.E. 558 (1892), where the New York court of appeals, in a conflict of laws problem, held that realty situated in Scotland was deemed to have been equitably converted.

1. Defendants were the National League and the corporate owners of the ten National League baseball teams.

2. Wis. Stat. Ann. § 133.01 (Supp. 1966).

3. *State v. Milwaukee Braves, Inc.*, Trade Reg. Rep. (1966 Trade Cas.) ¶ 71738 (Wis. Cir. Ct. April 13, 1966) (memorandum decision). The team had a high attendance record and thus sizeable profits. Furthermore the potential financial loss to the community was substantial. Therefore the court categorized the move by the team to Atlanta as unreasonable. See note 40 *infra*.

4. Trade Reg. Rep. ¶ 71738, at 82411.

5. In the trial court, the state of Wisconsin was awarded recovery of \$5,000 plus costs and disbursements against each defendant. Trade Reg. Rep. ¶ 71738, at 82412.

6. The Milwaukee Braves Baseball Club, Inc. was enjoined from playing home games elsewhere than in Milwaukee County Stadium unless a franchise for a new team was granted to the County of Milwaukee in 1967. *Id.* at 82411-12.

7. 30 Wis. 2d. at —, 144 N.W.2d at 11.

8. *Id.* at —, 144 N.W.2d at 17-18.

9. For pre-1932 decisions which held state laws to be invalid because of the commerce clause see Gavit, *The Commerce Clause of the United States Constitution* 551-56 (1932). See also Corwin, *The Commerce Power Versus States Rights* (1936); Pritchett, *American Constitutional Issues* 200 (1932); Stern, *The Problems of Yesteryear—Commerce and Due Process*, 4 Vand. L. Rev. 446 (1951).

10. 22 U.S. (9 Wheat.) 1 (1824).

commerce when a need for national uniformity of regulation can be shown. The classic test for determining whether an activity requires national uniform regulation or local control was stated in *Cooley v. Board of Wardens*,¹¹ which dealt with the validity of state laws in the regulation of river pilots. The Court said:

Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation. . . . Whatever subjects of this power are in their nature national, or admit only of one uniform system . . . may justly be said to be of such a nature as to require exclusive legislation by Congress.¹²

Thus a lack of legislation by Congress in an area of interstate commerce does not allow unlimited legislation by each individual state¹³ if it can be shown that such local legislation would substantially impede interstate commerce. It was further determined, in *Southern Pacific Co. v. Arizona*,¹⁴ that a state legislature could not determine in each individual case whether a national interest requiring uniform federal legislation or a local interest requiring state regulation was involved. Rather the courts¹⁵ were found to be the proper vehicle for determining the propriety of state legislation in the hazy area between national and local interests in commerce.

Before choosing between national and local interests, the instant court held that the business of professional baseball is interstate in nature.¹⁶ Baseball was originally held not to be interstate activity by the Supreme Court in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.¹⁷ The Court stated that, although professional baseball necessarily involves repeated travel of players between different states, the transport was "a mere incident, not the essential thing,"¹⁸ and thus no interstate commerce was involved. "Although . . . subsequent decisions . . . under the commerce clause

11. 53 U.S. (12 How.) 299 (1851).

12. *Id.* at 318-19.

13. See, e.g., *Morgan v. Virginia*, 328 U.S. 373, 386 (1946) (Black, J., concurring); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 784 (1945) (Black, J., dissenting). It was originally the theory of Chief Justice Taney that Congress, and not the courts, should decide if state legislation was invalidated by the commerce clause. For Taney's views see Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* (1937); Dowling, *Interstate Commerce and State Power*, 27 Va. L. Rev. 1 (1940).

14. 325 U.S. 761 (1945).

15. In ruling that an Arizona statute which limited the number of railroad cars per train was invalid, the Court stated: "the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests." *Id.* at 769.

16. 30 Wis. 2d at—, 144 N.W.2d at 11.

17. 259 U.S. 200 (1922).

18. *Id.* at 209.

and expansion of baseball's activities since 1922¹⁹ indicated that the business might indeed be considered to be involved in interstate commerce, the Court, in *Toolson v. New York Yankees, Inc.*,²⁰ refused to re-examine its *Federal Baseball* holding. There the Court avoided the interstate commerce issue by stating that *Federal Baseball* determined "that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."²¹ The Court indicated that the decision was based upon the fact that the business had developed for thirty years on an understanding of exemption, and that it felt that Congress should be the one to change the rule as legislation would have only prospective effect.²² Congress has recognized that the sport is an interstate activity²³ and several courts have indicated the interstate nature by stating that the sport should be regulated by Congress.²⁴ The problem of whether a sport can be considered trade or commerce has been surmounted whenever it was proved that the clubs, as an integral part of their business, sell nationwide entertainment and make substantial profits from radio and television transmission.²⁵ Certainly this is true for baseball, and the Court was correct in finding the industry to be interstate commerce.

The court here concluded that the business of baseball required "uniformity of regulation, and since organized baseball operates widely in interstate commerce, the regulation, if there is to be any, must be prescribed by Congress,"²⁶ since the *Toolson* decision barred federal action under existing federal antitrust statutes. The correct, although anomalous, result is obvious. The *Toolson* decision was based upon *Federal Baseball* which held that baseball was not interstate commerce. The instant court has rejected the rationale of *Federal Baseball* yet necessarily has used *Toolson* to bar prosecution under federal legislation. The proponents for baseball's cause in 1922 used the local argument to bar

19. The Supreme Court, 1953 Term, 68 Harv. L. Rev. 96, 136 (1954). (Footnote omitted.)

20. 346 U.S. 356 (1953). "The present cases ask us to overrule the prior decision [Federal Baseball] . . . without re-examination of the underlying issues, the judgments below are affirmed on the authority of Federal Baseball . . ." *Id.* at 357.

21. *Ibid.* This decision has been criticized because Federal Baseball was not decided on the ground of congressional intent but rather on the fact that baseball did not constitute interstate commerce. It seems clear that although in 1953 baseball did constitute interstate commerce, the Court was attempting to avoid a ruling which would subject the sport to prosecution under federal antitrust statutes. See Eckler, *Baseball—Sport or Commerce?*, 17 U. Chi. L. Rev. 56 (1949); Neville, *Baseball and the Antitrust Laws*, 16 Fordham L. Rev. 208 (1947); The Supreme Court, 1953 Term, 68 Harv. L. Rev. 96, 136 (1954); Note, 53 Colum. L. Rev. 242 (1953); 25 Miss. L.J. 270 (1954); 22 U. Kan. City L. Rev. 173 (1954).

22. 346 U.S. at 357.

23. Subcomm. on the Study of Monopoly Power of the House Comm. on the Judiciary, *Organized Baseball*, H. R. Rep. No. 2002, 82d Cong., 2d Sess. 4, 7, 111-39 (1952).

24. *Radovich v. National Football League*, 352 U.S. 445, 452 (1957); *United States v. International Boxing Club*, 348 U.S. 236, 242-43 (1955); *United States v. Shubert*, 348 U.S. 222, 230 (1955).

25. *Radovich v. National Football League*, 352 U.S. 445, 449 (1957); *United States v. International Boxing Club*, 348 U.S. 236, 240-43 (1955).

26. 30 Wis. 2d at—, 114 N.W.2d at 18. (Footnote omitted.)

federal antitrust prosecution.²⁷ Now the reverse argument, that baseball is interstate commerce, has been successfully used to avoid a state antitrust suit creating a void in which baseball is free of all antitrust prosecution until Congress wishes to act.

Judge Fairchild, writing for the majority, proposed that the supremacy clause, and not the commerce clause, of the Constitution provides an appropriate rationale for his decision that the state statute is inapplicable.²⁸ He reasoned that congressional silence in the face of Supreme Court decisions exempting baseball from federal antitrust legislation²⁹ did not create a vacuum in which states could regulate baseball but was, rather, equivalent to a positive declaration of congressional intent that baseball should be exempt from any such legislation and that this federal policy preempted state prosecution of the sport under a state antitrust statute.

Must it follow that a lack of legislation in the face of calls for such legislation indicates a congressional intent that there should be no regulation at all? In *Helvering v. Hallock*³⁰ the Court indicated that to consider the nonaction of Congress as controlling was to "venture into speculative unrealities."³¹ In *FTC v. Dean Foods Co.*,³² it was shown that the Federal Trade Commission had sought authority from Congress to grant preliminary injunctions. Congress did not take action. The Court stated that "we cannot infer from the fact that Congress took no action at all . . . that Congress thereby expressed an intent to circumscribe traditional judicial remedies."³³ However, the argument of the dissent that preemption cannot be granted in the face of congressional silence alone is equally questionable.³⁴ Many cases hold to the contrary that preemption will be granted even though no specific congressional legislation has been enacted.³⁵

The problem with the majority's preemption reasoning is that it has concentrated on the unsound contention that intent can be shown by acquiescence in court decisions. The test of congressional intent is not based upon the intent of any particular Congress but rather consistency with the overall structure of

27. *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922).

28. 30 Wis. 2d at—, 144 N.W.2d at 16-18.

29. 30 Wis. 2d at—, 144 N.W.2d at 13-15; accord, *Radovich v. National Football League*, 352 U.S. 445 (1957); *United States v. International Boxing Club*, 348 U.S. 236 (1955); *United States v. Shubert* 348 U.S. 222 (1955); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922).

30. 309 U.S. 106 (1940).

31. *Id.* at 120. (Footnote omitted.)

32. 384 U.S. 597 (1966).

33. *Id.* at 609-10.

34. 30 Wis. 2d at—, 144 N.W.2d at 20.

35. *California v. Zook*, 336 U.S. 725, 728-29 (1949); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 479 (1939); *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U.S. 204, 212 (1894); *In re Rahrer*, 140 U.S. 545, 559-60 (1891); *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U.S. 465, 481-82 (1888); *Brown v. Houston*, 114 U.S. 622, 631-32 (1885).

congressional action³⁶ and, more importantly, is similar to that used in the commerce clause cases³⁷—whether a uniform national rule is required to keep unhampered the flow of interstate commerce.³⁸ If uniformity of regulation is necessary, state action which interferes with such a result will be invalidated.

What are the factors weighed each time the court must determine if state legislation has been preempted by federal necessity for uniform rules? Several broad tests have been suggested,³⁹ but ultimately each case must be determined on its particular facts alone. The state here argued that it would lose millions of dollars in trade and that it must be able to protect itself from unreasonable⁴⁰ monopolistic⁴¹ practices. But weighed against this is the type of relief sought by the state. It was admitted that the result of a finding for the state would require the league to admit a new franchise,⁴² thus necessitating an expansion of the league structure. This would result in expanded schedules and a partial depletion of the present team rosters in order to fill the manpower needs of the new team. If Wisconsin were successful, what would prevent other cities in other states of comparable demographic and economic characteristics from suing

36. Ribble, *State and National Power Over Commerce* 212 (1937).

37. See generally *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 *Stan. L. Rev.* 208 (1959). "The Court has adopted the same weighing of interests approach in pre-emption cases that it uses to determine whether a state law unjustifiably burdens interstate commerce." *Id.* at 220.

38. *California v. Zook*, 336 U.S. 725, 728 (1949).

39. Flynn, *Federalism and State Antitrust Regulation* 80-82 (1964). Factors which are considered in determining whether a uniform national rule should be imposed are: "the degree to which the state regulation interferes, delays, interrupts, and inconveniences the free flow of interstate commerce; the high financial cost involved in complying with the state regulation; whether the subject matter of the regulation is one where uniformity of regulation is required for the free flow of commerce among the states; and the possibility of double prosecutions based upon the same acts." *Id.* at 80-81. (Footnotes omitted.)

40. The move was considered unreasonable because during the period from 1953 through 1965 the home paid attendance was second highest in both major leagues averaging over 1.5 million per year, or 31% more than the average attendance level in the National League and 52% higher than the American League. It was found that if proper bookkeeping methods had been utilized, the team would have shown high profits from 1953 through 1964. 30 *Wis. 2d* at—, 144 *N.W.2d* at 6. Damages to the Milwaukee area were substantial; one witness testified the economic benefit to the city amounted to \$18,000,000 annually. *Id.* at —, 144 *N.W.2d* at 22 n.l. Over the period 1953-65, the Braves paid Milwaukee County \$2,800,000 rent; the County earned \$1,600,000 in parking fees; the Braves payroll was \$17,600,000 and the team purchased \$5,500,000 of perishables for resale at the games. It was estimated the Braves had brought in \$50,000,000 of out-of-town revenue to the city between 1953-63. *Petition for writ or certiorari*, p. 11 n.9, *Wisconsin v. Milwaukee Braves, Inc.*, petition for cert. filed 35 U.S.L. Week 3141 (U.S. Oct. 11, 1966) (No. 659).

41. See *American League Baseball Club v. Chase*, 86 *Misc.* 441, 149 *N.Y. Supp.* 6 (Sup. Ct. 1914).

42. The Court held that to require the Braves to be returned from Atlanta without expansion would be inconsistent with antitrust policies because it would preserve the monopoly at Atlanta's expense. Expansion of the league thus was the only feasible relief under the lower court's injunction. 30 *Wis. 2d* at—, 144 *N.W.2d* at 12.

under similar or other types of state regulatory legislation? This would affect not only those aspects of the sport within their borders but also the other league members in other states.⁴³

The instant court was correct in determining that the danger to the industry is greater than the damage to the state and that state prosecution should be struck down in the interests of national unity of regulation. Since it seems unlikely that the *Toolson* decision will be overruled,⁴⁴ there is a void in the regulation of baseball. It is suggested that if baseball should be exempt from all existing antitrust legislation, Congress should legislate to that effect or in some other manner to prevent further litigation on the point.

Constitutional Law—New York “Stop and Frisk” Law—Seizure of Burglar’s Tools and Narcotics Without Probable Cause for Arrest or Search Held Valid.—The New York court of appeals recently decided two cases which represent that court’s first effort to apply the provisions of section 180-a of the Code of Criminal Procedure.¹ In one, the defendant and a companion were observed tiptoeing in the sixth floor hallway of an apartment building by a resident off-duty policeman. As he emerged from his door with gun in hand, the two men quickly departed by the stairs. The officer apprehended the defendant on the stairs, frisked him, and, feeling a hard object, removed an opaque plastic envelope from his pocket. Upon further examination, the envelope was found to contain burglar’s tools. The county court denied defendant’s motion to suppress these articles;² the appellate division³ and the court of

43. The dissent also argued, using *Parker v. Brown*, 317 U.S. 341 (1943), that state regulation should be upheld where because of the practical difficulties involved, the subject “may never be adequately dealt with by Congress.” 30 Wis. 2d at—, 144 N.W.2d at 23. (Emphasis added.) However, there is no reason why Congress cannot pass legislation requiring management to be reasonable in its exercise of the monopoly.

44. *Radovich v. National Football League*, 352 U.S. 445 (1957). Discussing the baseball exemption and declining to overrule cases holding such, “we, therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision.” *Id.* at 452.

1. “1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

“2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.” N.Y. Code Crim. Proc. § 180-a.

2. *People v. Peters*, 44 Misc. 2d 470, 254 N.Y.S.2d 10 (Westchester County Ct. 1964).

3. *People v. Peters*, 24 App. Div. 2d 989, 265 N.Y.S.2d 612 (2d Dep’t 1965) (memorandum decision).

appeals affirmed. *People v. Peters*, 18 N.Y.2d 238, 219 N.E.2d 595, 273 N.Y.S.2d 217 (1966).

In the second case, the defendant was observed by the arresting officer from four o'clock in the afternoon until midnight conversing with six or eight persons who by their own previous admissions to the officer were drug addicts. At midnight, the officer observed the defendant sitting in a restaurant speaking with two or three more drug addicts. On the sole basis of these observations, the officer requested the defendant to step out into the street for a moment. As the officer was questioning him, the defendant "mumbled" something and reached into his coat pocket. The officer intercepted his hand and removed a tin foil wrapped package which, upon further examination, was found to contain ten glassine envelopes of heroin. The trial court denied defendant's motion to suppress; the appellate term and the court of appeals affirmed.⁴ *People v. Sibron*, 18 N.Y.2d 603, 219 N.E.2d 196, 272 N.Y.S.2d 374 (1966) (memorandum decision).

Section 180-a authorizes a police officer to "stop" a person in a public place for limited questioning when the officer "reasonably suspects"⁵ that the person has committed, is committing, or is about to commit certain specified crimes. This language has been challenged⁶ as a possible violation of the New York and federal constitutional protections against unreasonable seizure of one's person. Traditionally, this protection has meant that a police officer may not arrest a person unless he has "probable cause"⁷ for "believing" that a crime is being or has been committed.⁸ Discussions of section 180-a have questioned whether the stopping authorized by the statute is equivalent to an arrest, and, therefore, unconstitutional because it permits an "arrest" on less than probable cause.

4. In the trial court, at a hearing conducted on the motion to suppress, the court found that there was probable cause for arrest and held the search and seizure valid as incidental to a valid arrest. The appellate term and the court of appeals affirmed without opinion. However, the prosecution brief in the latter as much as conceded the absence of probable cause, and Justice Van Voorhis' dissenting opinion indicated that the conviction was affirmed on the basis of N.Y. Code Crim. Proc. § 180-a. 18 N.Y.2d at 604-05, 219 N.E.2d at 197, 272 N.Y.S.2d at 376.

5. In *People v. Peters*, reasonable suspicion was defined vaguely as "somewhat below probable cause on the scale of absolute knowledge of criminal activity." 18 N.Y.2d at 245, 219 N.E.2d at 599, 273 N.Y.S.2d at 222. The court made no attempt to provide any general standards for deciding how much less than probable cause will be accepted as reasonable suspicion. Adding to this uncertainty, the court stated that "the statute incorporates the experienced police officer's intuitive knowledge and appraisal of the appearances of criminal activity." *Ibid.*

6. See, e.g., Comment, 65 Colum. L. Rev. 848, 856-59 (1965); Note, 78 Harv. L. Rev. 473, 474-75 (1964).

7. Probable cause has been defined as facts and circumstances known to the arresting officer which would warrant a prudent and cautious man to believe that a crime has been or is being committed. *Henry v. United States*, 361 U.S. 98, 102 (1959); *United States v. Di Re*, 332 U.S. 581, 592 (1948).

8. *Ker v. California*, 374 U.S. 23, 36-37 (1963); *United States v. Di Re*, supra note 7.

Much of this discussion has concentrated on two fairly recent Supreme Court decisions in which police officers stopped vehicles, but did not have probable cause to arrest the occupants at that time. In *Henry v. United States*,⁹ two FBI agents were investigating a theft of whiskey from an interstate shipment. They had defendant's companion under surveillance because of information of an undisclosed nature linking the companion to the theft. The officers twice observed the men loading cartons into a car in an alley in a residential area. Although the officers could not determine whether the cartons were part of the stolen shipment, they followed the car and waved the men to a stop. They searched the car and took the men to their office. Two hours later, they learned that the cartons contained stolen radios and placed the men under formal arrest. For unknown reasons, the government conceded that the arrest occurred when the officers stopped the car. Without any explanation of its reasons, the Court agreed that, on the facts of this particular case, the arrest occurred when the officers stopped the car. The Court then held that there was no probable cause for the arrest and that the search of the car and the seizure of the cartons were illegal.

In *Rios v. United States*,¹⁰ two officers observed a taxicab parked in a vacant lot next to an apartment house in a neighborhood with a high incidence of narcotics activity. The defendant came out of the building and entered the cab. The officers followed the cab for two miles. When it stopped for a red light, they left their car and approached the cab. The testimony of the various parties disagreed on the sequence of the actions which followed. The cab door was opened; the defendant emerged from the cab; one officer grabbed the defendant by the arm and drew his revolver. The defendant dropped a recognizable package of narcotics. During the occurrence of these events, the traffic light had changed to green. The Court remanded the case to the district court to determine at what moment the arrest occurred. No guidelines were provided for making this determination, nor was any attempt made to distinguish the case from *Henry* on the basis that the cab in *Rios* was already stopped for a red light.

A careful examination of the two cases shows that the Supreme Court has not attempted to lay down a specific definition of "arrest." At the time the officers approached the cab in *Rios*, there was no probable cause for arrest. Therefore, if *Henry* had provided a general rule that any stopping constituted an arrest, the Court should have held that the stopping of the cab in *Rios* was an illegal arrest.¹¹ Contrasted with this absence of a square holding in the Supreme Court, New York,¹² several other states,¹³ and federal courts in the Second Circuit¹⁴ have

9. 361 U.S. 98 (1959).

10. 364 U.S. 253 (1960).

11. Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. Crim. L., C. & P.S. 393, 395 (1963). The author goes further and argues that these two decisions imply a definite power of the police to detain on less than probable cause for limited investigation. *Ibid.*

12. *People v. Rivera*, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), cert. denied, 379 U.S. 978 (1965); *People v. Entrialgo*, 19 App. Div. 2d 509, 245 N.Y.S.2d 850 (2d Dep't 1963), *aff'd mem.*, 14 N.Y.2d 733, 199 N.E.2d 384, 250 N.Y.S.2d 293 (1964). The court of

held that a police officer may temporarily detain a person for questioning on less than probable cause. However, no court has yet provided a comprehensive test for determining when a person may be detained on less than probable cause.

One specific test suggested for applying section 180-a is that it be limited, generally, to situations in which only one more detail of description or connection with the crime would be needed for probable cause to arrest or where only an overt act would be needed to constitute an attempt.¹⁵ In addition, the suggested test proposes that the police should not be allowed to use a weapon in detaining the suspect.¹⁶ It is submitted that this test is too rigid. It does not consider the seriousness of the crime being investigated in determining what are reasonable grounds for suspicion. Further, the test does not provide for the use of different degrees of force or restraint depending on the nature of the suspected crime and the weight of the grounds for suspicion. Finally, this test would substantially vitiate the purpose of the statute—to “prevent crime” by “prompt inquiry into suspicious or unusual street action”—where the police are not investigating a particular crime.¹⁷ The need for such protection today in metropolitan areas requires no documentation.

It is suggested that a more flexible standard can prevent unreasonable detentions and nevertheless protect society against criminal depredations. In each case the courts should carefully analyze the nature of the detention¹⁸ and the

appeals based its decision in *Peters on People v. Rivera*, supra, as well as on § 180-a. However, *Rivera* involved the seizure of a weapon as the result of a frisk on less than probable cause. There are no prior decisions involving seizure of contraband other than a weapon when a suspect was detained on less than probable cause.

13. *Ronayne, The Right to Investigate and New York's "Stop and Frisk" Law*, 33 *Fordham L. Rev.* 211, 215-22 (1964); *Comment*, 65 *Colum. L. Rev.* 848, 851-56 (1965).

14. *United States v. Lewis*, 362 F.2d 759 (2d Cir. 1966); *United States v. Vita*, 294 F.2d 524 (2d Cir. 1961), cert. denied, 369 U.S. 823 (1962); *United States v. Thomas*, 250 F. Supp. 771 (S.D.N.Y. 1966); *United States v. Bonanno*, 180 F. Supp. 71 (S.D.N.Y.), rev'd on other grounds sub nom. *United States v. Bufalino*, 285 F.2d 408 (2d Cir. 1960). The *Thomas* case contains a comprehensive discussion of the various arguments concerning detention on less than probable cause. 250 F. Supp. at 779-82. The court concluded that the constitutionality of a particular detention should be determined by whether the detention was reasonable under the circumstances, *id.* at 780, and “that a stop does not ipso facto by reason of some mechanical formula constitute an arrest . . .” *Id.* at 782.

15. For example, an officer investigating a purse snatching sees a man hurrying down the street with a purse in his hand. If the man meets the victim's description in all particulars except height, there would not be probable cause for arrest. Since only one detail of the description is inaccurate, there would be reasonable grounds for suspicion.

16. This test is suggested in Note, 78 *Harv. L. Rev.* 473, 476 (1964).

17. *People v. Rivera*, 14 N.Y.2d at 444-45, 201 N.E.2d at 34, 252 N.Y.S.2d at 461. See generally *Leagre*, supra note 11, at 413.

18. Although the cases dealing with the right to detain on less than probable cause have not analyzed the amount of force or restraint which may be used for this purpose, the latter would seem to be of critical importance in view of the recent decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). Although it is true that the Supreme Court was primarily concerned in that case with in-custody interrogation, the emphasis placed on the physical and psychological pressures used in such proceedings, *id.* at 445-58, is indicative of the attitude the

grounds for suspicion. The duration of the detention and the amount of force used in restraining the suspect should be weighed against the factors supporting the officer's suspicion. The more serious the crime suspected and the stronger the grounds for suspicion, the more force the officer should be allowed to use in apprehending and restraining the suspect. As a starting point, the court might begin with the concepts of probable cause and arrest. The closer a particular restraint approaches an arrest,¹⁹ the closer the grounds for suspicion must approach probable cause. Thus, the same grounds for suspicion may exist in two cases. Depending on the nature of the detention, one may be upheld while the other is struck down as unreasonable. The way in which such a rule would operate may be illustrated by comparing the detentions in the instant cases.

In *Sibron*, the officer observed defendant conversing with at least eight known drug addicts over a period of eight hours. The officer would most likely have had probable cause for arrest if he had seen money exchanged during these conversations.²⁰ In any event, the officer merely requested the defendant to step outside for a moment. The defendant complied without hesitation and without any compulsion by the officer. There is no indication that the officer would have used any force or restraint had the defendant refused to go outside with him. There is no evidence of harassment since the officer and the defendant were unknown to each other and had had no previous contacts. Weighing this minimal intrusion against the defendant's association with known drug addicts over a period of eight hours, the restriction, if any, on the defendant's liberty appears reasonable.²¹

In *Peters* there was considerably more coercion than in *Sibron*²² and, there-

present Court will bring to a consideration of § 180-a and the entire question of detention on less than probable cause. Certainly, the Court will not give the police a free hand in the streets after providing strict guidelines for the station house.

19. The difficulty, of course, is the lack of a definition of arrest. Even the briefest stopping on the street under authority of § 180-a is a total restraint for at least that moment. However, common sense would seem to dictate different justifications for restraints which are clearly distinguishable on the basis of duration and the amount of coercion employed. While the right to remove a suspect to the station house for questioning may require probable cause, the right to question a suspect on a public street should require less.

20. In *People v. White*, 16 N.Y.2d 270, 213 N.E.2d 438, 266 N.Y.S.2d 100 (1965), a police officer observed a known drug addict with money in his hand speaking to a suspected drug peddler. The officer was looking for the suspected drug peddler on the basis of information from another drug addict. As the officer approached, the addict pocketed his money and hurried away. The officer arrested the drug peddler, searched him and found narcotics. Conceding that it may have been a close case, the court of appeals held that there was probable cause for arrest without any evidence of the information obtained from the informer. *Id.* at 273, 213 N.E.2d at 440, 266 N.Y.S.2d at 102.

21. Although Justice Van Voorhis strongly dissented on the basis of the search and seizure issue, he conceded that the stopping may have been reasonable pursuant to § 180-a. 18 N.Y.2d at 604-05, 219 N.E.2d at 197, 272 N.Y.S.2d at 376.

22. Unless the officer's mere request to step outside can be considered coercion, there was no coercion at all in *Sibron*.

fore, under the rule suggested above, there should have been stronger grounds for suspicion to support the detention. The officer grasped the fleeing defendant by the shirt collar and questioned him at gunpoint. Although dressed in civilian clothes, the officer did not identify himself as a policeman. He continued to hold the defendant by the collar as he questioned him. Certainly, if this was not an arrest, it was the ultimate restraint short of an arrest.²³

The grounds for suspicion in *Peters* were threefold: the officer, a twelve-year resident of the building, did not recognize the defendant and his companion; the men were tiptoeing; and they rapidly exited by the stairs rather than the elevator when the officer opened the door of his apartment. The first ground is substantially weakened by the fact that the building housed about 120 families who presumably had relatives and friends.²⁴ It is not surprising that someone unknown to the officer might be in the building. Defendant's tiptoeing was suspicious. His flight was ambiguous.²⁵ The defendant claimed he had come to visit a girlfriend whom he refused to identify because she was a married woman. If this were true—and the prosecution did not prove otherwise—hasty retreat may have been in order, especially if the defendant observed the gun in the officer's hand.

In any event, while the defendant's conduct in *Peters* may have been sufficiently suspicious to have permitted some inquiry, the amount of force and

23. Instructions to Members of the Force Concerning the "Stop and Frisk" (chap. 86) and "No Knock" (chap. 85) Laws, Police Dep't Cir. No. 25 (June 26, 1964) (citations are to pages of mimeographed reproduction of original circular). The guidelines for the exercise of the authority conferred by § 180-a clearly provide that an officer not in uniform must promptly identify himself to the person stopped, *id.* at 2, and that no questions are to be asked until the officer has identified himself. *Id.* at 4. Further, the officer may not use a weapon in any fashion unless he is assaulted or there are circumstances to justify an arrest. *Id.* at 2-3. Even if the suspect attempts to flee after he has been stopped, the officer may not use a weapon unless he reasonably believes (not suspects) that the suspect has committed a felony. *Id.* at 5. While it should be conceded that the police wish to be officially conservative in estimating their powers under § 180-a, closer adherence to these guidelines than there was in *Peters* will better preserve § 180-a from constitutional attack.

24. Brief for ACLU as Amicus Curiae, p. 2, *People v. Peters*, 18 N.Y.2d 238, 219 N.E.2d 595, 273 N.Y.S.2d 217 (1966).

25. In *Green v. United States*, 259 F.2d 180 (D.C. Cir. 1958), two narcotics officers in plainclothes in an unmarked car observed a known drug addict walking with an unknown companion. Merely seeking information, the officers beckoned to the two men. As the addict approached the car, his companion fled up the stairs of a nearby building and attempted to force open the locked door of an apartment. The officers arrested the defendant for attempted unlawful entry. The court found probable cause for arrest and observed that "it is to-day universally conceded that the fact of an accused's flight . . . and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself." *Id.* at 182, quoting from 2 Wigmore, Evidence § 276 (3d ed. 1940). In *Wong Sun v. United States*, 371 U.S. 471 (1963), the Court refused to accept the proposition that "vague suspicion could be transformed into probable cause for arrest by reason of ambiguous conduct [flight] which the arresting officers themselves have provoked." *Id.* at 484.

intimidation used seems excessive. Certainly, the instant case must be the extreme limit of "stopping" authorized by the statute.²⁶

Assuming, *arguendo*, that the stopping or detention in the instant cases was valid, did the officer have the right to "search" the suspects? Section 180-a(2) provides that "when a police officer has stopped a person . . . and reasonably suspects . . . danger of life or limb, he may search . . . for a dangerous weapon." In *People v. Rivera*,²⁷ the court of appeals upheld the right of policemen to "frisk" suspects for dangerous weapons "upon grounds of elemental safety and precaution" in the absence of statutory authority.²⁸

The defendants seized upon the word "search" and claimed that the statute is unconstitutional on its face.²⁹ In the absence of consent or a search warrant, a search is allowed only if incidental to a valid arrest upon probable cause.²⁰ Supporters of the statute claim that it authorizes only a frisk, which they define as "a patting down for bulky objects that may be guns or knives, followed by a reaching into clothing or a turning out of pockets only when such solid bulges have been located."³¹ Several other states have endorsed this practice,³² but the federal courts have not yet squarely faced the problem.³³ If a policeman may detain a person for questioning, it seems reasonable to allow him to take minimum precautions to protect himself.³⁴ It has been suggested that the only satisfactory alternative to the frisk is to approach the suspect with drawn guns.³⁵

26. As in *Sibron*, the dissenting opinion in *Peters* (written by Judge Fuld) was aimed solely at the question of search and seizure. The detention issue was not even considered.

27. 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), cert. denied, 379 U.S. 978 (1965).

28. *Id.* at 447, 201 N.E.2d at 35-36, 252 N.Y.S.2d at 463-64. *Peters* advanced the same justification for the right of the officer to frisk. 18 N.Y.2d at 243, 219 N.E.2d at 598, 273 N.Y.S.2d at 221.

29. Brief for Defendant-Appellant, pp. 23-27, *People v. Sibron*, 18 N.Y.2d 603, 219 N.E.2d 196, 272 N.Y.S.2d 374 (1966); Brief for Defendant-Appellant, p. 11, *People v. Peters*, 24 App. Div. 2d 989, 265 N.Y.S.2d 612 (2d Dep't 1965) (memorandum decision).

30. *Henry v. United States*, 361 U.S. 98 (1959); *United States v. Di Re*, 332 U.S. 581 (1948).

31. Kuh, *New York Stop and Frisk Law*, N.Y.L.J., May 29, 1964, p. 4, col. 3. Accord, *People v. Peters*, 18 N.Y.2d at 245, 219 N.E.2d at 599, 273 N.Y.S.2d at 233; *People v. Rivera*, 14 N.Y.2d at 446, 201 N.E.2d at 35, 252 N.Y.S.2d at 463. Instructions, *op. cit. supra* note 23, at 6.

32. Comment, 65 Colum. L. Rev. 848, 859-61 (1965).

33. A frisk has occurred in several cases in the federal courts, but the decisions turned on other aspects of the cases, and the courts did not reach the question of the legality of a patting down or frisk in the absence of probable cause. E.g., *United States v. Di Re*, 332 U.S. 581 (1948); *Ellis v. United States*, 264 F.2d 372 (D.C. Cir.), cert. denied, 359 U.S. 998 (1959); *White v. United States*, 271 F.2d 829 (D.C. Cir. 1959).

34. Bristow, *Police Officer Shootings—A Tactical Evaluation*, 54 J. Crim. L., C. & P.S. 93, 94-95 (1963). In 56 cases of injuries to police officers questioning suspects in buildings, 19% of the injuries were the direct result of the officer's failure to adequately search the suspects for weapons. *Ibid.*

35. Ronayne, *supra* note 13, at 237.

This would appear to be a more serious intrusion on a person's liberty³⁶ than a rapid patting of one's clothing, and it is more likely to result in a court's finding that an arrest was made.³⁷

In *Peters*, the officer was alone on the stairs with the defendant; his companion was possibly still in the building. The officer patted the defendant's clothing and, feeling a hard object, removed the plastic envelope from the defendant's pocket. There was no further search of the defendant's person. In *Sibron*, the suspect reached into his pocket. The officer simultaneously reached into the pocket and removed the package. No further search of defendant's person was made. The limited "searches" in the instant cases, up to this point, do not seem unreasonable.

However, it is submitted that the court of appeals failed to consider adequately the critical question involved in both of the instant cases. Although section 180-a authorizes a police officer to "retain any other thing the possession of which may constitute a crime . . ." the statute initially authorizes only a search for weapons. As we have seen, the sole purpose of this power is to protect the policeman. Even after the officer had seized the articles from the defendant, there was no probable cause for arrest in either case.³⁸ There was no probable cause to believe that the article removed from the defendant's person contained contraband. Yet, in both cases the officer further examined the articles.³⁹ This was contrary to the police department guidelines⁴⁰ which clearly provide that the officer should not open any article that the suspect is carrying even if it may contain a weapon. The article should be placed out of the suspect's reach so that there is no immediate danger to the officer.⁴¹

The "frisking" provisions of section 180-a are an attempt to balance the safety of the police officer and the right of the suspect against a search on less than probable cause. Obviously, the best protection for the officer would require a thorough search of the suspect's person and any articles in his possession. However, the latter would completely abolish the present requirement for probable cause. Therefore, in the absence of probable cause, the officer's right to frisk must be restricted even though an element of danger remains. The test suggested by the police department—immediate danger—appears to be reasonable. Apply-

36. Another consideration might be the suspect's right to privacy. While the frisk is an intrusion on the privacy of the suspect, it would still appear preferable to an approach with drawn guns because this latter method involves too great a potential of danger to both the officer and the suspect.

37. Ronayne, *supra* note 13, at 237-38.

38. *People v. Peters*, 18 N.Y.2d at 248, 219 N.E.2d at 601, 273 N.Y.S.2d at 225 (Fuld, J., dissenting); *People v. Sibron*, 18 N.Y.2d at 608, 219 N.E.2d at 199, 272 N.Y.S.2d at 378 (Van Voorhis, J., dissenting).

39. In *Peters*, the court stated that the officer was justified in examining the unsealed envelope for a knife just as he would be warranted in examining a holster for a gun. 18 N.Y.2d at 244, 219 N.E.2d at 598, 273 N.Y.S.2d at 221-22. This is the sole argument advanced for allowing the officer to examine the envelope.

40. Instructions, *op. cit. supra* note 23.

41. *Id.* at 6.

ing this test to the instant cases, the examination of the articles seems unreasonable. In *Sibron*, particularly, it appears highly unlikely that the tin foil package could have contained a weapon. In *Peters*, the envelope could possibly have contained a knife. However, in neither case does it appear that there was any immediate danger. While the article was in the officer's possession, there was no danger. After returning the article to the suspect, a properly trained police officer should have been able to protect himself if the suspect attempted to open the article and remove a dangerous weapon.

The powers granted to the police under section 180-a appear to be necessary and reasonable methods of crime prevention if properly limited. Unfortunately, in the instant cases, the court of appeals failed to provide precise standards to distinguish the stop and search authorized by the statute from the arrest and search which require probable cause. In *People v. Peters*, the court used the words "frisk" and "search" interchangeably and made no attempt to limit the amount of searching authorized by the statute. In addition, the stop provisions of the statute, as interpreted in *Peters*, appear to allow total and forcible restraint of the defendant on only minimal grounds of suspicion. Since these are the only cases decided pursuant to section 180-a, the Supreme Court, if it grants certiorari, will be bound by this court's interpretation of the statute.⁴² This being so, there is reason to conclude that the statute, or at least the search provisions thereof, would be held to be unconstitutional.

Jurisdiction—New York "Long-Arm" Statute—Presence Within State Held Requisite for Commission of Tortious Act of Omission.—The defendant was a Florida resident and the director of a Delaware corporation with its principal place of business in New York. The plaintiff corporation brought an action against the defendant for a loss resulting from his failure to attend directors' meetings in New York. The defendant had done "nothing in connection with his duties as director other than to execute in Florida consents and waivers of notice of special meetings and a certificate in lieu of a directors' meeting."¹ He was served in Florida, and jurisdiction was claimed pursuant to N.Y. C.P.L.R. 302, the "long-arm" statute. Jurisdiction was sustained by the special term and affirmed by the appellate division without opinion. The court of appeals reversed. *Platt Corp. v. Platt*, 17 N.Y.2d 234, 217 N.E.2d 134, 270 N.Y.S.2d 408 (1966).

The question before the court was the construction of the provision of New York's long-arm statute which permits personal service over a non-resident who "commits a tortious act within the state."² The instant court, relying on

42. *Robinson v. California*, 370 U.S. 660, 666 (1962); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

1. *Platt Corp. v. Platt*, 17 N.Y.2d 234, 237, 217 N.E.2d 134, 135, 270 N.Y.S.2d 408, 409 (1966). Such conduct is actionable under N.Y. Bus. Corp. Law § 720(a)(1).

2. N.Y. C.P.L.R. 302(a), which at the time of this case read: "A court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, as to a cause

Feathers v. McLucas,³ held that the defendant's conduct did not constitute a "tortious act within the state."⁴ In *Feathers*, a Kansas corporation had manufactured a gas tank which exploded while being trucked through New York. The court of appeals held that manufacturing the tank was not a "tortious act within the state" of New York under the long-arm statute since the negligent manufacture had occurred in Kansas.⁵

The court of appeals reasoned in the instant case that "to treat an 'omission' as an 'act' in a particular place, one must be there to do or to omit the act."⁶ The court concluded that both the "plain words of the statute" and *Feathers* support the finding.⁷

Plaintiff made an argument similar to that maintained by the plaintiff in *Feathers*,⁸—i.e., claiming that the New York law was derived from the Illinois

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 . . . 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act. . . ." Subdivision 1 of 302(2), which precedes the first paragraph above, reads "transacts any business within the state," and was also asserted by the plaintiff, but was dismissed rather perfunctorily by the special referee to the supreme court and by the court of appeals. Plaintiff attempted to assert that by executing the consents, waivers and certificates, the defendant designated the other members of the board to act on his behalf as an agent for the transaction of business within the meaning of the long-arm statute. This contention was dismissed as it violated the rule that a director cannot delegate his power and designate another to act on his behalf. *Platt Corp. v. Platt*, 42 Misc. 2d 640, 647, 249 N.Y.S.2d 1, 9 (Sup. Ct. 1964). The court of appeals added, in further objection to the transaction of business argument, that the stipulated facts showed that defendant acted only in Florida and "these acts . . . relating to the directorship, without doing anything whatever in New York in connection with the corporation, are insufficient either as significant contacts or intrinsically within the statute as the transaction of 'any business within the state' to bring defendant within the jurisdiction of New York" 17 N.Y.2d at 239, 217 N.E.2d at 136, 270 N.Y.S.2d at 411.

3. In an omnibus decision, the court decided three cases including *Feathers*. *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965), 34 *Fordham L. Rev.* 344. The cases were decided after the appellate division affirmed the order of the supreme court in the instant case.

4. 17 N.Y.2d at 237-38, 217 N.E.2d at 135, 270 N.Y.S.2d at 410. The court did not offer an opinion as to whether defendant's conduct constituted a "tortious act," holding that, even if the act was tortious, it was not committed within the state. *Ibid.* However, the special referee reporting to the special term was clearly of the opinion that defendant's conduct constituted a "tortious act." The report disposed of defendant's contention that 302(a)(2) was not intended to cover acts of omission by reference to the legislative history of the "single-act" statute. 42 Misc. 2d at 644, 249 N.Y.S.2d at 6. The court of appeals did not deal with this question.

5. 15 N.Y.2d at 463-64, 209 N.E.2d at 79-80, 261 N.Y.S.2d at 23-24.

6. 17 N.Y.2d at 237, 217 N.E.2d at 135, 270 N.Y.S.2d at 410; the court added that "the problem is not whether the omission is right or wrong; or whether it is or is not a tort, but whether it is a 'tortious act' committed in New York." *Ibid.*

7. *Id.* at 237-38, 217 N.E.2d at 135, 270 N.Y.S.2d at 410.

8. 15 N.Y.2d at 462-64, 209 N.E.2d at 79-80, 261 N.Y.S.2d at 22-24.

long-arm statute.⁹ The phrase "commits a tortious act within the state" has been construed by Illinois' highest court¹⁰ to include cases of foreign acts resulting in local injury.¹¹ However, the court of appeals stated that, if the Illinois construction were applied to the instant case, "it would [still] not support jurisdiction under the facts" ¹²

It was clearly stated by the court in *Feathers* that, if the tortious act charged against the defendant was committed at all, it was committed in Kansas, the situs of the negligent manufacture. Since an act can only be said to be tortious when done within the context of a duty to refrain from doing that particular act, it may be said that the court was placing the situs of the tortious act at the situs of the duty which was breached. The instant court, however, chose to

9. Ill. Ann. Stat. ch. 110, § 17(1) (Smith-Hurd 1956) reads: "Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts herinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts . . . (b) The commission of a tortious act within this State"

10. *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

11. 17 N.Y.2d at 238, 217 N.E.2d at 135, 270 N.Y.S.2d at 410. The facts in the *Gray* case were similar to those in *Feathers*. Chief Judge Desmond, dissenting in *Feathers*, argued that "the statutory language . . . 'commits a tortious act within the state', is taken verbatim from Illinois law (Ill.Rev.Stat., ch.110, § 17). It has the same meaning as the phrases 'tortious conduct' in the Connecticut and North Carolina statutes (Conn. Gen. Stat. Rev., § 33-411, subd. [c.][1959]; N. C. Gen. Stat. § 55-145, subd. [a], par. [4] [1955]) and 'part of a tort' in the Minnesota, Texas, Vermont and West Virginia laws (Minn. Stat. Ann., § 303.13, subd. 1, par. [3] [1964 Supp.]; Tex. Civ. Stat., art. 2031b, § 4 [1959]; Vt. Stat. Ann., tit. 12, § 855; W. Va. Code Ann. [1961], § 3083)." 15 N.Y.2d at 470, 209 N.E.2d at 84, 261 N.Y.S.2d at 29-30. The Chief Judge, assuming the synonymous construction of "tortious act" and "part of a tort," argued that the long-arm statute did not require that every element of the tort occur in New York. *Id.* at 471, 209 N.E.2d at 84, 261 N.Y.S.2d at 30. Judge Desmond added that "when our Legislature adopted the language of the Illinois Legislature it presumably adopted with it the construction given the statutory language by the Illinois courts in *Gray*." *Ibid.* It is interesting to note that if one follows the rule that the locus of the tort is the place where the last act necessary to the accrual of the cause of action occurs, then the victim might be denied a recovery in any jurisdiction under the conflict of laws rule that "if no cause of action is created at the place of wrong, no recovery in tort can be had in any other state." Restatement, Conflict of Laws § 348(2) (1934). This, of course, would depend on the construction of the term "created."

12. 17 N.Y.2d at 238, 217 N.E.2d at 135, 270 N.Y.S.2d at 410. The Illinois federal courts adopted a view contrary to *Gray* before that case was decided by the state court. *Trippe Mfg. Co. v. Spencer Gifts, Inc.*, 270 F.2d 821 (7th Cir. 1959); *Hellriegel v. Sears Roebuck & Co.*, 157 F. Supp. 718 (N.D. Ill. 1957). Both of these cases adopted the view that "within the state" does not include the case of foreign act resulting in local injury. However, after the *Gray* case was decided the Illinois federal courts adopted the state supreme court's interpretation of the long-arm statute. *Anderson v. Penncraft Tool Co.*, 200 F. Supp. 145 (N.D. Ill. 1961); *McMahon v. Boeing Airplane Co.*, 199 F. Supp. 908 (N.D. Ill. 1961). Under a similar statute. N.C. Gen. Stat. § 55-145 (1965), a result similar to *Hellriegel* was reached in *Putnam v. Triangle Publications, Inc.* 245 N.C. 432, 96 S.E.2d 445 (1957).

read *Feathers* as standing for the proposition that the actor's physical presence in New York is required if he is to be deemed to have committed a tortious act within the state.¹³ On the facts of the instant case, however, the duty which was breached existed in New York, and this, it is submitted, is a sufficient basis on which to predicate jurisdiction.¹⁴

Subsequent to the instant case, and largely because of the undesirable holding in *Feathers*, the New York legislature amended N.Y. C.P.L.R. 302.¹⁵ The Judicial Conference said that the construction of section 302 by the court of appeals in *Feathers* was contrary to the intent of the legislature in adopting that section.¹⁶ "To accomplish [the original] . . . aim the proposed legislation . . . would broaden New York's long-arm jurisdiction so as to include non-residents who cause tortious injury in the state by an act or omission without the state."¹⁷ In the instant case, Judge Bergan noted that this amendment was an attempt to broaden 302 in light of *Feathers*. Nevertheless, he was of the opinion that its broader language would still not allow in personam jurisdiction over the defendant in the instant case.¹⁸ This is because, though the plaintiff is the victim of a tortious act without the state causing him injury within the state, none of the required additional facts of contact were present.¹⁹

It appears from the history of New York's long-arm statute, the recent

13. 17 N.Y.2d at 237, 217 N.E.2d at 135, 270 N.Y.S.2d at 410.

14. Constitutionally, the exercise of jurisdiction in this case seems well within the guidelines stated in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

15. N.Y. C.P.L.R. 302 now reads in part: "(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent . . . 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce"

New York's long-arm statute as amended is similar to the Uniform Interstate and International Procedure Act § 1.03, reads in part. "(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a [cause of action] [claim for relief] arising from the person's . . . (3) causing tortious injury by an act or omission in this state; (4) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state" The sections relating to tortious acts without the state which cause injury within the state are virtually the same and it appears that the instant case would not fall within the uniform act.

16. Legislative Memorandum of the Judicial Conference, in N.Y. Sess. Laws a-237 (McKinney's 1966).

17. *Id.* at a-238.

18. 17 N.Y.2d at 238, 217 N.E.2d at 135-36, 270 N.Y.S.2d at 410-11.

19. For additional contact requirements see N.Y. C.P.L.R. 302 (a)(3).

amendment, *Feathers* and the instant case, that the legislature is seeking to broaden New York's power to render in personam judgments over nondomiciliaries. At the same time, however, the court of appeals has required clear and explicit statutory language before it broadens the scope of the statute toward the outer limits of due process. This is a sensitive area in which it is easy to cause hardship to a plaintiff—by making him travel to a distant state to assert a cause of action if long-arm jurisdiction is not permitted—and similarly to a defendant—by causing him to travel at great length to defend if such jurisdiction is permitted. In essence, this should be the consideration of the courts in interpreting phrases such as “tortious act within the state” and “transacts business within the state.” Such phrases are meant to be guidelines and are intended to evince how far toward the limits of due process the legislature wishes to move in giving its citizens the benefits of a long-arm statute. Perhaps the fault with the long-arm statute is that the statements of jurisdictional power therein are in terms of artificial rules. The result of such rules appears to be inconsistent applications of the statute supported by ambiguous arguments based primarily upon semantics. For example,

if a New Jersey domiciliary were to lob a bazooka shell across the Hudson River at Grant's Tomb . . . *Feathers* would appear to bar the New York courts from asserting personal jurisdiction over the Jersey domiciliary in an action by an injured New York plaintiff. Yet, if the New Jersey domiciliary permitted his son to drive an automobile into the state, New York could acquire personal jurisdiction under both McKinney's Vehicle and Traffic Law, § 253, and indeed under CPLR 302.²⁰

Such a result has been strongly criticized,²¹ and indicates the danger in arbitrary jurisdiction rules. Long-arm statutes should, therefore, be clear statements of how close to constitutional limits the legislature intends to extend jurisdiction. A legislature could perhaps accomplish this admittedly difficult task by defining jurisdiction in terms of contacts and fairness to defendants, and thereby avoid the difficulties faced by the instant court.

Labor Law—Union-Antitrust—Clear Proof of Predatory Intent Necessary To Establish That a National Wage Agreement Restricting Competition Among Marginal Operators Violates the Sherman Act.—In a suit for royalty payments under a national wage agreement brought by the United Mine Workers against certain small coal companies, the defendants cross-claimed for treble damages, alleging an antitrust conspiracy. The United Mine Workers, defendants contended, conspired with certain major producers to drive the defendants out of business. As one part of a larger conspiracy, the union allegedly agreed, in return for acceptance of their wage demands, to aid in the mechanization of the industry and to impose a uniform wage scale throughout

20. McLaughlin, 1965 Supplementary Practice Commentary to McKinney's N.Y. C.P.L.R. 302, at 76 (Supp. 1966). (Emphasis added.)

21. See, e.g., Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. Ill. L.F. 533, 549.

the industry regardless of the financial ability of marginal operators to meet such demands.¹ Trying several consolidated suits without a jury, the court found no evidence of a conspiracy between union and employers to eliminate competitors. *Lewis v. Pennington*, CCH Lab. L. Rep. (53 Lab. Cas.) ¶ 11371, at 17228 (E.D. Tenn. July 15, 1966).²

In attempts to balance the conflicting policies underlying labor and antitrust legislation,³ the Supreme Court has practically immunized union activity from attack under the Sherman Act.⁴ The Court, in *Apex Hosiery Co. v. Leader*,⁵ announced a doctrine proscribing under antitrust law only those labor activities which restrain commercial competition through direct price or market control.⁶ Labor should be free, *Apex* declared, to eliminate product market competition based on differentials in labor market standards.⁷ The Court, in *United States v. Hutcheson*,⁸ held that all labor activities motivated by union self-interest and arising from a dispute over terms and conditions of employment stand exempt from antitrust liability as long as they involve no combination with non-labor groups.⁹

The concept of an illicit union-non-labor combination, only dicta in *Hutcheson*,¹⁰ received further clarification in *Allen Bradley Co. v. Local 3, Int'l Bhd. of*

1. The other grounds of the alleged conspiracy included a combination among the union, the Tennessee Valley Authority, and the large coal companies, including one financed by the union, to force the smaller companies out of the TVA market through a scheme of price-fixing and bid-rigging; and an agreement by the large companies to refuse to lease coal lands to the smaller companies as they customarily did. *Lewis v. Pennington*, CCH Lab. L. Rep. (53 Lab. Cas.) ¶ 11371, at 17230-33 (E.D. Tenn. July 15, 1966).

2. The case was tried before a federal district court on remand from the United States Supreme Court. In *UMW v. Pennington*, 381 U.S. 657 (1965), the Supreme Court reversed a lower court finding of an antitrust violation, 325 F.2d 804 (6th Cir. 1963), on grounds of an erroneous admission of evidence. 381 U.S. at 671-72. The Court held that joint efforts of union and employers to influence a public official did not violate the Sherman Act, even though intended to eliminate competition. *Id.* at 669-72.

3. For a comprehensive treatment of the inherent conflict in legislative policy on labor unions as against policy on commercial competition, and judicial attempts to construct a practical rationale for implementing these divergent policies, see Report of the Committee on Antitrust & Labor Relations Law, ABA Section of Labor Relations Law, Ann. Rep. (1966); Cox, Labor and the Antitrust Laws—A Preliminary Analysis, 104 U. Pa. L. Rev. 252 (1955); Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. Chi. L. Rev. 659 (1965); Winter, Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities, 73 Yale L.J. 14 (1963); Comment, 66 Colum. L. Rev. 742 (1966); Comment, 34 Fordham L. Rev. 286 (1965).

4. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964).

5. 310 U.S. 469 (1940).

6. *Id.* at 500-03.

7. *Id.* at 503.

8. 312 U.S. 219 (1941).

9. *Id.* at 232-34.

10. *UMW v. Pennington*, 381 U.S. 657, 662 (1965).

Elec. Workers.¹¹ In *Allen Bradley*, a union local violated the Sherman Act by participating in a conspiracy with employers which established a complete monopoly of trade in the New York City electrical goods market. The Court found that the union, although acting in its own self-interest, had aided a non-labor combination to violate the Sherman Act through an industry-wide agreement aimed at both terms and conditions of employment and direct price and market control.¹² The *Allen Bradley* Court, however, mischaracterized the facts, by not disturbing the finding below that the union had instigated the conspiracy while treating the conspiracy as employer-instigated,¹³ and thereby cast some doubt on the ultimate reach of its doctrine.¹⁴ Moreover, the Court failed to provide a sufficiently workable definition of illicit union-non-labor combination to apply to analogous variants of the *Allen Bradley* facts.¹⁵ *Allen Bradley* apparently predicated the illegality of the combination on the form of the union-employer agreement rather than on the resulting actual restraints of trade. While assuming that a union might negotiate a series of parallel restrictive agreements

11. 325 U.S. 797 (1945).

12. *Id.* at 810.

13. The trial court found that the union had been "the actuating party" in the conspiracy. 41 F. Supp. 727, 750 (S.D.N.Y. 1941) (Clark, Special Master). The Supreme Court did not disturb the lower court's findings, but mischaracterized the initiative and driving force supplied by the local as coming from the business group. 325 U.S. at 807-12; see Meltzer, *supra* note 3, at 675. Mr. Justice Roberts, concurring in *Allen Bradley*, criticized the majority opinion as conveying "an incorrect impression of the genesis and character of the conspiracy." 325 U.S. at 813. Mr. Justice Murphy dissented on the ground that on the facts found below, no loss of anti-trust immunity occurred. The union had not "aided" or "abetted" an employer violation, but had been "the dynamic force" behind the combination. *Id.* at 820-21.

14. The cases following *Allen Bradley* illustrate the uncertainty arising from this ambiguous characterization of the facts. See, e.g., *East Texas Motor Freight Lines v. International Bhd. of Teamsters*, 163 F.2d 10 (5th Cir. 1947) (neither union nor employer enjoined from union-instigated boycotting); *Greenstein v. National Skirt & Sportswear Ass'n*, 178 F. Supp. 681 (S.D.N.Y. 1959), appeal dismissed, 274 F.2d 430 (2d Cir. 1960) (collective bargaining contract insufficient evidence of illicit combination because employers were coerced by union); *United States v. Hamilton Glass Co.*, 155 F. Supp. 878 (N.D. Ill. 1957) (union not liable without independent employer conspiracy).

15. Most of the cases following *Allen Bradley* have involved union-non-labor combinations aimed at direct market restraints through price-fixing, market-allocation and bid-rigging schemes. See, e.g., *United Bhd. of Carpenters v. United States*, 330 U.S. 395 (1947); *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688 (7th Cir. 1961); *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732 (9th Cir.), cert. denied, 348 U.S. 817 (1954). *Allen Bradley*, however, lends itself to a variety of interpretations, some of which are summarized and analysed in Bernhardt, *The Allen Bradley Doctrine: An Accommodation of Conflicting Policies*, 110 U. Pa. L. Rev. 1094, 1097-1101 (1962). Since the *Allen Bradley* Court condemned the union both for aiding and abetting a non-labor combination and for agreeing to schemes of price and market control, the following interpretation of the case seems most warranted: the Sherman Act proscribes union-non-labor combinations which institute direct price and market restraints essentially similar to those instituted by businessmen not combined with labor, even though such restrictions are instigated by a union pursuant to its own self-interest. See Meltzer, *supra* note 3, at 675-76.

with competing firms without violation, the Court condemned a single agreement with a multi-employer group as a restraint of trade, even though identical restrictions would result in both cases.¹⁶

In *UMW v. Pennington*,¹⁷ the Supreme Court rendered its initial treatment of a "national wage agreement"¹⁸ under the Sherman Act and its first re-examination of labor's antitrust liability in the twenty years since *Allen Bradley*. *Pennington* augured a restriction of labor's immunity from antitrust.¹⁹ The Court, however, split into three equal factions²⁰ and offered no clear consensus as to the re-defined scope of labor's antitrust liability.

The opinion of the Court²¹ proposed to submit to antitrust scrutiny any union-employer agreement binding a union to impose a labor standard outside the immediate bargaining unit.²² Reasoning that such agreements restrict the freedom of economic units to act, this opinion considered such "extra-unit" agreements²³ inherently inimical to antitrust policy, without regard to anti-competitive intention or effect, and thereby a per se violation of the Sherman

16. 325 U.S. at 808-10. Mr. Justice Roberts criticised this distinction as "unrealistic and unworkable." *Id.* at 819 (concurring opinion). Cox, *supra* note 3, at 271, also criticised this predication of antitrust violation on the form of agreement. "An association of employers which bargains as a unit ought to have the same privilege of surrendering to union demands as a series of individual firms, yet such an arrangement . . . is vulnerable under the *Allen-Bradley* ruling" even though not involving a combination of business firms. *Ibid.* (Italics omitted.)

17. 381 U.S. 657 (1965).

18. Certain large industries, such as the coal, steel, rubber and automobile industries, engage in "national" or "pattern" bargaining, where a single union, which dominates the industry, seeks to obtain stabilization of labor standards by bargaining first with certain market leaders to set a pattern for later negotiations with smaller operators.

19. For comments on the potential impact of the *Pennington* decision, see Report of the Committee on Antitrust and Labor Relations Law, ABA Section of Labor Relations Law, Ann. Rep. 4 (1966); Hoerner, *The Supreme Court and the Labor Exemption*, 29 ABA Section of Antitrust Law 133 (1965); Meltzer, *supra* note 3; Comment, 66 *Colum. L. Rev.* 742 (1966); Comment, 34 *Fordham L. Rev.* 286 (1965).

20. Mr. Justice White, with Mr. Chief Justice Warren and Mr. Justice Brennan joining, delivered the Court's opinion. 381 U.S. 657, 659. Mr. Justice Douglas, joined by Mr. Justices Black and Clark, wrote a concurring opinion. *Id.* at 672. Mr. Justice Goldberg, with Mr. Justices Harlan and Stewart, dissented. *Id.* at 697.

21. Mr. Chief Justice Warren and Mr. Justice Brennan joined in this opinion by Mr. Justice White.

22. 381 U.S. at 668-69. The White group, however, would allow a union to impose a uniform wage scale on an industry-wide, multi-employer bargaining unit, even though it suspected that marginal operators would be unable to compete. Likewise, a union, acting unilaterally without agreement with any employer group, might legally negotiate parallel restrictive agreements. *Id.* at 665 n.2. Therefore, where *Allen Bradley* seems to condemn an anticompetitive agreement with a multi-employer unit, 325 U.S. 808-10, *Pennington* would not.

23. The term "extra-unit" refers to an agreement between union and employer wherein the union binds itself to impose a particular labor standard outside the immediate bargaining unit.

Act.²⁴ Apparently, *Allen Bradley* was interpreted as holding that a violation of antitrust law arises from the means utilized rather than the end intended or achieved.²⁵ Moreover, it was stated that evidence of parallel restrictive agreements, unilaterally negotiated by the union, would support an inference of such an illicit extra-unit agreement but would not in itself establish a violation.²⁶

The instant court considered assertions by the plaintiff that direct evidence of such an extra-unit agreement as to labor standards to prevail in other bargaining units appeared in the formal contract signed by the union and the large coal companies and that the agreement constituted a per se violation of the Sherman Act. The court noted ambiguity in the contract, but found that it obligated the union to enforce full compliance to its terms only among "parties signatory thereto."²⁷ By limiting itself to consideration of direct proof, the court impliedly rejected indirect evidence as probative of the asserted extra-unit agreement. The court, however, would have achieved a more desirable result by explicitly repudiating the per se approach apparently proposed in the *Pennington* case.

The per se doctrine received no support from the other two factions in *Pennington*. The dissent rightly questioned the validity of basing union antitrust liability "on the form of unit determination rather than the substance of the collective bargaining impact on the industry."²⁸ This opinion also criticized the per se approach as oblivious to the practical realities facing union and management in industries engaged in pattern bargaining situations.²⁹ The per se rule

24. 381 U.S. at 668-69. See Report of the Committee on Antitrust and Labor Relations Law, ABA Section of Labor Relations Law, Ann. Rep. 4, 49 (1966). The White opinion stated that extra-unit agreements as to labor standards, by surrendering a union's "freedom of action with respect to its bargaining policy," suffer from a more basic defect, from the viewpoint of antitrust policy, than anticompetitive intention or effect. 381 U.S. at 668. The logical nexus between such voluntary restriction of its freedom of action in future bargaining and per se violation of the Sherman Act seems tenuous at best. The White opinion, in concluding, explicitly stated that such agreements are "not exempt from the antitrust laws." Id. at 669. Forfeiture of exemption, however, does not in itself determine liability. See Handler, Analysis of *Pennington*, Jewel Tea Antitrust Opinions, 60 L.R.R.M. 56, 57 (1966), where it is stated that "to determine whether a union has infringed the antitrust laws, there must be a two-pronged inquiry. First we must ascertain whether the challenged acts of agreement fall within the exemption. If they do, that, of course, is the end of the matter. If they do not, we must still face the question whether they constitute an unreasonable restraint of trade." The White opinion might, therefore, lend itself to the interpretation that extra-unit agreements concerning labor standards merely forfeit labor's exemption from antitrust scrutiny without per se determining liability. See Meltzer, *supra* note 3, at 720-21, for a suggestion that the per se approach of the White group may be dismissed as dicta.

25. *UMW v. Pennington*, 381 U.S. 657, 720-21 (1965) (dissenting opinion).

26. Id. at 665 n.2. Mr. Justice Goldberg interpreted the White opinion as allowing an inference of illicit extra-unit agreement from the indirect evidence of a course of conduct. Id. at 714-15 (dissenting opinion).

27. CCH Lab. L. Rep. (53 Lab. Cas.) ¶ 11371, at 17266.

28. 381 U.S. at 722 (dissenting opinion).

29. Id. at 720 (dissenting opinion).

of the opinion of the Court in *Pennington* would handcuff negotiators in such situations, since employers will almost always seek to secure assurances from the union that the competition will suffer the same economic disadvantages with regard to labor standards. Although direct evidence of a formal agreement by a union to impose labor standards beyond a bargaining unit will rarely appear, tacit assurances of a union's intent to impose uniform standards throughout an industry will seldom be absent.³⁰ Under the per se approach, such a tacit understanding between union and employer "may start both . . . on the road to antitrust sanctions, criminal and civil."³¹ Finally, the per se approach would bar a basic element of bargaining from the conference room and "severely restrict free collective bargaining."³²

The guidelines laid down by the concurring opinion in *Pennington* would proscribe under the Sherman Act any industry-wide agreement whose high wage scale intentionally forced marginal competitors out of business.³³ This view would hold, moreover, that a prima facie case could be established against a union by showing an industry-wide agreement containing a high wage scale which would necessarily result in forcing marginal competitors out of business.³⁴ Although clearly including intent as an element of liability, the concurring opinion would consider an effectively anticompetitive wage agreement to be prima facie evidence of predatory intent.

Although the instant court found no antitrust violation in the formal contract between the union and the large coal companies, it also considered the effects of the contract under the guidelines of the concurring opinion. The court concluded that although the agreed wage scale exceeded the financial ability of the smaller companies, clear proof of predatory intent on the part of the union would have to be established before holding that the union had violated the antitrust laws.³⁵ Thus, the instant case rejected the prima facie approach. The present court failed to articulate the precise reasoning behind its holding, but the decision stems from solid ground. The wage agreement reached by the United Mine Workers and the large coal companies arose from a legitimate labor dispute

30. See Iserman, *The Labor Monopoly Problem: Gwinn-Fisher Bill Would Effect Reforms*, 38 A.B.A.J. 743, 744 (1952); *UMW v. Pennington*, 381 U.S. 657, 715-16 (1965) (dissenting opinion).

31. *Id.* at 716 (dissenting opinion).

32. *Id.* at 714 (dissenting opinion).

33. *Id.* at 672-73 (concurring opinion).

34. *Ibid.*

35. CCH Lab. L. Rep. (53 Lab. Cas.) ¶ 11371, at 17239. Intent or motive as a criterion of legality for labor activities, however, has been criticized in the past. The *Hutcheson* case held that the legitimacy of union activities should not be determined by judicial "judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." 312 U.S. at 232. "Motivation is a slippery guide, for a man can always be found to, and in a sense does, intend any consequence which foreseeably follows from his conduct." Cox, *supra* note 3, at 263-64. "[I]t is also arguable that the NLRA protection of . . . wage bargaining . . . should not be contingent on matters as elusive as the intent imputed to the parties." Meltzer, *supra* note 3, at 691.

over terms and conditions of employment, and should, therefore, enjoy exemption from antitrust scrutiny under the holding in the *Hutcheson* decision.³⁶

To retain the *Hutcheson* exemption, the wage agreement need only avoid combination with non-labor and stem from a motive of union self-interest. Under *Allen Bradley*, a collective bargaining agreement alone would fail to constitute an illicit combination without additional evidence of union conspiracy to restrain trade for the direct benefit of a business group.³⁷ The instant case adhered to the doctrine of *Allen Bradley* by requiring clear proof that the collective bargaining agreement was intended by the union to drive marginal operators out of competition for the benefit of the large coal companies.³⁸ The predatory intent test also serves to determine the union's performance of the *Hutcheson* condition that a union act in its own self-interest to retain antitrust immunity. The United Mine Workers, in negotiating the wage scale under controversy, acted pursuant to a policy of self-interest articulated by it for the past thirty years.³⁹ Realizing that the existence of marginal operators unable to afford uniformly high labor standards militates against the best interests of the workers, the union has consistently sought such uniformly high standards, agreeing, in return, to aid in the mechanization of the industry.⁴⁰ In the instant bargaining situation, therefore, the motives of union and employer coincide, the union seeking elimination of product market competition based on differentials in labor standards, a legitimate goal under *Apex*,⁴¹ and the employers seeking protection from competitors paying low wages.⁴² This coincidence of motive leaves the union vulnerable to charges of predatory intent, even though the union's intent is not specifically to restrain trade but to ameliorate labor standards.⁴³

The instant court, however, protected the union from too facile an inference of predatory intent by demanding proof of such anticompetitive intent by an evidentiary standard somewhere in the middle ground between a "preponderance of the evidence," usual in civil cases, and the criminal standard of proof "beyond a reasonable doubt."⁴⁴ The court adopted this standard of "clear proof" as enunciated by the Supreme Court in *UMW v. Gibbs*.⁴⁵ *Gibbs* applied section 6 of the Norris-LaGuardia Act⁴⁶ to a state tort claim arising from a

36. See notes 8-9 *supra* and accompanying text.

37. 325 U.S. at 809.

38. CCH Lab. L. Rep. (53 Lab. Cas.) ¶ 11371, at 17239.

39. See *UMW v. Pennington*, 381 U.S. 657, 698 (1965) (dissenting opinion).

40. See *ibid.*

41. See notes 5-7 *supra* and accompanying text.

42. See *UMW v. Pennington*, 381 U.S. 657, 720 (1965) (dissenting opinion).

43. See *ibid.*

44. CCH Lab. L. Rep. (53 Lab. Cas.) ¶ 11371, at 17239.

45. 383 U.S. 715 (1966).

46. "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in . . . or of ratification of such acts after actual knowledge thereof." 47 Stat. 71 (1932), 29 U.S.C. § 106 (1964).

labor dispute and held the union not liable for tortious acts of members, absent "clear proof" that the union participated in, authorized or ratified such acts.⁴⁷ *Gibbs*, however, contained no antitrust issue, and therefore provides somewhat dubious authority for applying the evidentiary standard of section 6 of Norris-LaGuardia to a determination of a union's intent to restrain trade.⁴⁸

Practically assessed, the instant holding⁴⁹ would appear to insulate a union engaged in national or pattern bargaining from interference through antitrust action. The requirement of clear proof of specifically predatory intent to eliminate competition, even where competitive restraints are the necessary results of a particular agreement, should prove an almost insurmountable obstacle to establishing a union antitrust violation in analogous situations.⁵⁰

47. 383 U.S. at 736-37.

48. *Gibbs*, however, relied on an earlier decision, *United Bhd. of Carpenters v. United States*, 330 U.S. 395 (1947), which provides a somewhat more analogous authority. This case held § 6 of Norris-LaGuardia applicable to a determination of the liability of a national brotherhood for antitrust conspiracies engaged in by member locals. *Id.* at 403.

49. The instant court also held that the alleged conspiracy to force the smaller companies out of the TVA market comprised nothing more than accepted business practices, without evidence of predatory intent or illegal bidding, and that the provision in the contract prohibiting the leasing of coal lands to the small companies was merely a protective clause insuring the union that the large companies would not utilize such practices to evade the payment of the agreed wage scale. CCH Lab. L. Rep. (53 Lab. Cas.) ¶ 11371, at 17259, 17266, 17267.

50. Where conduct or an agreement actually restrains trade, or where such unreasonable restraint would be the necessary consequence of particular conduct or agreements, a finding of specific predatory intent is normally deemed superfluous. E.g., *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626 (1953); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 173 (1948); *United States v. Griffith*, 334 U.S. 100, 105 (1948); *United States v. Reading Co.*, 226 U.S. 324, 370 (1912), modified on other grounds, 228 U.S. 158 (1913). For, as the courts have indicated, "no monopolist monopolizes unconscious of what he is doing." *United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (2d Cir. 1945). To require a showing of predatory intent, in addition to necessary restraints of trade, the Supreme Court has stated, "would cripple the [Sherman] Act." *United States v. Griffith*, supra at 105. Only where restraints of trade are a mere probability does intent become an important element of legality. *United States v. Reading*, supra at 370. Though the cases cited above involved business groups alone, the tenor of their holdings indicates the difficult burden imposed on a plaintiff attempting to prove predatory intent by a union in a situation similar to that in the instant case.

Moreover, the instant case's standard of proof does nothing to mollify such a plaintiff's task. In a sharp dissent in the Carpenters case, Mr. Justice Frankfurter maintained that "the conditions formulated by the Court, which must now be met before a union may be held to liability, are practically unrealizable . . . It will be difficult to charge a union with culpability unless a convention of its membership . . . should knowingly authorize or approve a violation of the Sherman Law, or give carte blanche to the officers of the union by approving in advance whatever they may do, no matter what the legal significance." 330 U.S. at 415-16. If, as Mr. Justice Frankfurter feared, clear proof of union participation in, or authorization of, conduct or agreements violating antitrust, is so difficult, then clear proof of so elusive a factor as intent or motive would be practically impossible.

Torts—Negligence—Unsafe Condition of Supermarket Floor Creates Inference of Storekeeper's Negligence.—Plaintiff, a customer in the defendant's self-service supermarket, slipped and fell when she stepped on a string bean in the vegetable section of the market. The plaintiff did not prove how the string bean came to be on the floor, nor how long it had been there prior to the accident. The trial court dismissed the action at the end of the plaintiff's case,¹ and an intermediate court affirmed.² On appeal, the Supreme Court of New Jersey reversed, holding that the supermarket owner would have to overcome an inference that the fault in the accident was his. *Wollerman v. Grand Union Stores, Inc.*, 47 N.J. 426, 221 A.2d 513 (1966).

That the supermarket is not an insurer of its business invitees is well established in the law.³ Supermarket liability in "slip and fall" accidents has depended upon proving the defendant's negligence by a preponderance of the evidence. The defendant's negligence, shown by either direct or circumstantial evidence, can consist in either initially creating the risk⁴ or in failing to eliminate it within a reasonable time after discovery.⁵ The courts have also relied upon a theory of constructive notice to hold the store liable where actual knowledge of the hazard could not be shown.⁶

In typical situations, the defendant's negligence was shown where he had overloaded the vegetable bins,⁷ used ice to preserve the vegetables,⁸ or had set up a scale at such a distance from the vegetable counter so as to necessitate excess handling by the customers.⁹ The defendant has been held to have con-

1. The trial court found that "the evidence was insufficient because there was no proof that defendant knew the bean was on the floor, or that the bean was there long enough to permit an inference that defendant knew of it." *Wollerman v. Grand Union Stores, Inc.*, 47 N.J. 426, 428, 221 A.2d 513, 514 (1966).

2. *Ibid.*

3. *Annot.*, 61 A.L.R.2d 6, 14 (1958).

4. *E.g.*, *Long v. National Food Stores, Inc.*, 262 N.C. 57, 136 S.E.2d 275 (1964). On facts similar to those in the instant case, the court in the *National Food* case reversed a non-suit for the plaintiff, noting that the grapes on which the plaintiff fell were covered with lint and dust, thus creating the likelihood that an employee had negligently swept the grapes aside instead of removing them. In *Plaga v. Foltis*, 88 N.J. Super. 209, 211 A.2d 391 (App. Div. 1965), the court found in favor of the plaintiff who had slipped in defendant's restaurant since it was shown that the debris upon which plaintiff fell could have only been dropped by defendant's employee.

5. *E.g.*, *Winsby v. Kertell*, 10 Cal. App. 2d 61, 50 P.2d 1075 (1935). In the *Winsby* case, the court affirmed a judgment for plaintiff who slipped in defendant's store. The evidence established that the defendant was given notice of the debris and had instructed an employee to clean it up, but the employee failed to do so.

6. See notes 10-11 *infra* and accompanying text.

7. *Pabst v. Hillman's*, 293 Ill. App. 547, 13 N.E.2d 77 (1938).

8. *Torda v. Grand Union Co.*, 59 N.J. Super. 41, 157 A.2d 133 (App. Div. 1959). In the *Torda* case, the plaintiff was injured when she slipped in a puddle of water presumably caused by ice melting in the vegetable bins. The court, in holding defendant-supermarket liable, reasoned that other steps could have been taken to refrigerate the vegetables and thus obviate this danger.

9. *Moone v. Kroger Grocery & Baking Co.*, 148 S.W.2d 628 (Mo. Ct. App. 1941). De-

structive notice when it was shown that the floors in general were left dirty¹⁰ or when the condition of the debris itself indicated that it had been on the floor for a long time.¹¹ Absent such a showing of the storekeeper's negligence by an injured customer, the defendant has generally prevailed.¹²

The decision in the instant case marks a break with the established precedents of other New Jersey cases. Prior to the instant holding, the 1952 case of *Simpson v. Duffy*¹³ had been the leading authority on "slip and fall" in New Jersey. Although factually similar to the problem case, the instant court made no attempt to reconcile or distinguish it. In *Simpson*, the evidence established that the plaintiff-customer slipped on a vegetable leaf near two of the supermarket's employees who were trimming vegetables and loading them into bins.¹⁴ The court, in granting the defendant's motion to dismiss at the end of the customer's case, stated that "the possibility of one customer dropping a vegetable particle while serving himself must be recognized as well as the possibility of a fall thereon by the customer who immediately succeeds him."¹⁵ To hold the supermarket liable "would in effect impose an obligation more drastic than the law considers is required by the exigencies of the business."¹⁶

It is on this point that the instant court differs from *Simpson*. The instant court felt that "substantial risk of injury"¹⁷ was "implicit in the manner

defendant-supermarket, in the Moone case, placed a scale for the customer's use on the side of the aisle opposite the vegetables. When the plaintiff fell on a string bean, the court held that by so positioning the scale the defendant was liable for creating a situation where the probability of vegetables falling was increased.

10. *Morgan v. Great Atl. & Pac. Tea Co.*, 266 N.C. 221, 145 S.E.2d 877 (1966).

11. E.g., *Great Atl. & Pac. Tea Co. v. Bennett*, 267 Ala. 538, 103 So. 2d 177 (1958). In *Bennett*, the plaintiff had slipped on a vegetable leaf in the defendant's supermarket. The court held for the plaintiff, as the dirty condition of the vegetable leaf created the inference that it had been on the floor a sufficient period of time to give the defendant notice of its presence.

The concept of holding the supermarket liable on this theory of constructive notice has met with opposition recently. In *Great Atl. & Pac. Tea Co. v. Giles*, 354 S.W.2d 410 (Tex. Ct. Civ. App. 1962), the court refused to charge the storekeeper with constructive knowledge that a grape causing plaintiff's fall had been on his floor. The court in *Great Atl. & Pac. Tea Co. v. Berry*, 203 Va. 913, 128 S.E.2d 311 (1962), expressly rejected the theory of constructive notice. *Id.* at 917, 128 S.E.2d at 314.

12. In *Todd v. Hill's, Inc.*, 383 S.W.2d 250 (Tex. Ct. Civ. App. 1964), the plaintiff was injured when she fell on a lettuce leaf in the defendant's market. In affirming a directed verdict for defendant at the close of plaintiff's case, the court said that the "mere proof of the occurrence of the fall, coupled with proof that a piece of lettuce was upon the floor, is insufficient to show negligence on the part of the appellee." *Id.* at 251. On these same facts, the appellate court of Illinois reached the same conclusion in *Wroblewski v. Hillman's, Inc.*, 43 Ill. App. 2d 246, 193 N.E.2d 470 (1963).

13. 19 N.J. Super. 339, 88 A.2d 520 (App. Div.), certification denied, 10 N.J. 315, 91 A.2d 230 (1952).

14. *Id.* at 342, 88 A.2d at 522.

15. *Id.* at 350, 88 A.2d at 526.

16. *Ibid.*

17. 47 N.J. at 430, 221 A.2d at 515.

in which"¹⁸ supermarkets do business today, and, accordingly, imposed a greater obligation upon the storeowner in forcing him to defeat an inference of his negligence. In so doing, the court has in effect applied the doctrine of *res ipsa loquitur*¹⁹ to a supermarket "slip and fall" accident. With the exception of *Barca v. Daitch Crystal Dairies, Inc.*,²⁰ a New York lower court case, this doctrine has universally been held inapplicable to an accident of this type.²¹

Prior to the *Barca* case, *res ipsa* had been applied to supermarket accidents which involved either exploding bottles²² or falling objects.²³ However, both these applications had existed prior to their extension into the supermarket²⁴

18. *Ibid.*

19. Traditionally, the requisites for the application of the doctrine of *res ipsa loquitur* have been:

"(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;

(2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;

(3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." Prosser, *Torts* § 39, at 218 (3d ed. 1964).

20. 45 Misc. 2d 30, 256 N.Y.S.2d 14 (App. T. 1965). In this case, a shopper had slipped on some sugar which had run into the aisle from a broken sack. The evidence also established that there were marks through the sugar from the wheels of shopping carts, thus indicating that the store had constructive notice of the condition. This, however, was considered by the court to be of relevance only in that it represented a second theory upon which liability could have been predicated if the court had so desired. In the instant case, constructive notice was not in issue as the evidence failed to establish how long the vegetable had been on the floor. 47 N.J. at 428, 221 A.2d at 514.

21. Annot., 61 A.L.R.2d 6, 59 (1958). The annotation remarks that "the patent inapplicability of the doctrine is indicated by the relatively small number of the cases . . . in which the courts have felt required even to mention such inapplicability." *Id.* at 59 n.6; accord, *Owen v. Beauchamp*, 66 Cal. App. 2d 750, 152 P.2d 756 (1944), wherein the plaintiff was injured when she slipped on some dental wax in the reception room of the dentist's office. The doctrine of *res ipsa loquitur* was held inapplicable as the court felt the instrumentality causing the injury was not within the sole control of the party charged with responsibility. In *Coyne v. Mutual Grocery Co.*, 116 N.J.L. 36, 181 Atl. 314 (1935), a customer was injured from a fall on vegetable debris in defendant's store. The court, in holding for the defendant, said that the doctrine of *res ipsa loquitur* was inapplicable. "It may be invoked only when the thing shown bespeaks defendant's negligence, not merely the happening of the accident." *Id.* at 38-39, 181 Atl. at 315. (Footnote omitted.) The court continued by saying "the mere presence of such vegetable matter upon the floor obviously does not bespeak the defendant's negligence." *Id.* at 39, 181 Atl. at 316.

22. *E.g.*, *Day v. Grand Union Co.*, 304 N.Y. 821, 109 N.E.2d 609 (1952) (memorandum decision); *Hyams v. King Kullen Grocery Co.*, 20 App. Div. 2d 657, 246 N.Y.S. 2d 575 (2d Dep't 1964) (memorandum decision).

23. *Perito v. Sunrise Supermarket Corp.*, 33 Misc. 2d 627, 229 N.Y.S.2d 667 (App. T. 1961) (per curiam); *Robinson v. Atl. & Pac. Tea Co.*, 184 Misc. 571, 54 N.Y.S.2d 42 (App. T.), *aff'd mem.*, 269 App. Div. 977, 59 N.Y.S.2d 290, motion for leave to appeal denied, 269 App. Div. 1024, 59 N.Y.S.2d 623 (1st Dep't 1945).

24. As to falling objects see *Byrne v. Boadle*, 2 H. & C. 722, 159 Eng. Rep. 299 (1863), in which a flour barrel fell from an upper floor of the defendant's shop and struck a pedes-

and the only controversy surrounding their extension involved the lack of complete control by the defendant storekeeper. Exclusive control had always been a requisite for the application of *res ipsa*,²⁵ but the courts, reasoning that today's self-service market posed a greater danger for the customer,²⁶ circumvented this problem by holding that the storekeeper had the *right* to control the instrumentality,²⁷ a right which he could not lose by permitting his customers to wait on themselves.²⁸ This somewhat dubious reasoning was seized upon by the *Barca* court, which interpreted the policy to be that the storekeeper has the burden of explaining all unsafe conditions,²⁹ and extended the doctrine to a type of accident heretofore not even within the realm of *res ipsa*. It appears that the *Barca* court failed to take cognizance of the fact that in the exploding bottle and falling can cases the crucial factor was the nature of the accident, and not its occurrence in a supermarket.

It is submitted that the courts in both *Barca* and the instant case should have avoided reliance upon *res ipsa loquitur*, if for no other reason than to prevent the furtherance of a doctrine which tends to place a premium on ignorance.³⁰ By forcing the defendant to defeat an inference that he was negligent, the courts would be making him liable without fault in the many situations where he is unable to give a satisfactory explanation of the circumstances surrounding the accident.³¹ The instant court, however, felt that it was just for the party with

trian. Chief Baron Pollock, speaking for the court, said that "there are certain cases of which it may be said *res ipsa loquitur*, and this seems one of them." *Id.* at 725, 159 Eng. Rep. at 300. As to exploding bottles see, e.g., *Zentz v. Coca Cola Bottling Co.*, 39 Cal. 2d 436, 247 P.2d 344 (1952); *Bonstein v. Metropolitan Bottling Co.*, 26 N.J. 263, 139 A.2d 404 (1958); *Grant v. Graham Chero-Cola Bottling Co.*, 176 N.C. 256, 97 S.E. 27 (1918).

25. See note 19 *supra*.

26. *Robinson v. Great Atl. & Pac. Tea Co.*, 184 Misc. 571, 54 N.Y.S.2d 42 (App. T.), *aff'd mem.*, 269 App. Div. 977, 59 N.Y.S.2d 290, motion for leave to appeal denied, 269 App. Div. 1024, 59 N.Y.S.2d 623 (1st Dep't 1945).

27. See, e.g., *Cole v. Great Atl. & Pac. Tea Co.*, 44 Misc. 2d 694, 254 N.Y.S.2d 929 (Sup. Ct. 1964), *aff'd mem.*, 25 App. Div. 2d 497, 267 N.Y.S.2d 328 (4th Dep't 1966).

28. *Robinson v. Great Atl. & Pac. Tea Co.*, 184 Misc. 571, 54 N.Y.S.2d 42 (App. T.), *aff'd mem.*, 269 App. Div. 977, 59 N.Y.S.2d 290, motion for leave to appeal denied, 269 App. Div. 1024, 59 N.Y.S.2d 623 (1st Dep't 1945).

29. See 45 Misc. 2d at 32, 256 N.Y.S.2d at 16.

30. See Prosser, *Res Ipsa Loquitur: A Reply to Professor Carpenter*, 10 So. Cal. L. Rev. 459 (1937). Professor Prosser stated: "Is it proper policy to require the defendant to outweigh the plaintiff's case, because the defendant is in a better position to produce evidence? Certainly it is not the general rule that a plaintiff may place the burden of proof of an issue upon his adversary merely by showing that he himself is ignorant of the facts, and the defendant knows, or should know, all about them. If it were, sheer ignorance might be the most powerful weapon in the law." *Id.* at 464. (Footnote omitted.)

31. Prosser, *Torts* § 40, at 234 (3d ed. 1964). See *Greenidge v. Great Atl. & Pac. Tea Co.*, 164 N.Y.S.2d 831 (N.Y.C. City Ct. 1957), where the plaintiff slipped on a lettuce leaf in defendant's supermarket. In reviewing the plaintiff's motion to set aside a verdict against him, the court said, "boiled down to essentials, the plaintiff's contention is that if a defendant has knowledge of the fact that from time to time customers carelessly or thoughtlessly create a condition of danger, she may go to the jury merely by proving the existence of

superior knowledge to bear the onus of producing evidence.³² This contention seems untenable in light of today's extensive opportunities for pre-trial examination.³³ It should be understood that any liability created by relying on *res ipsa*³⁴ would ultimately be borne by the consumer in the form of higher prices due to increased insurance costs.³⁵

The solution to the problem in the instant case would seem to lie in the intelligent application of the standards of reasonable care.³⁶ Admittedly, the situation in a supermarket today is different from that in prior years, and, accordingly, the course of conduct that would constitute reasonable care in the self-service market³⁷ would entail more precaution³⁸ than a course of conduct considered reasonable years ago. It should not follow, however, that the storekeeper be held to a degree of care in excess of reasonable care. Nor can justification be found for the instant court's assumption that the "overall . . . probability is that defendant did less than its duty demanded, in one respect or another."³⁹

the condition on the occasion of her fall, without any proof of prior notice of the actual existence of that particular condition at the particular time and place of the fall.

"To accept that contention would make supermarkets virtually insurers of the safety of their customers. . . . To adopt plaintiff's contention would require a holding that merely because the defendant knows that debris is from time to time dropped on the floor of a self-service store by customers, affirmative proof of notice of the existence of debris at the time of the accident is not required. We do not believe that to be the law." *Id.* at 835-36. (Italics omitted.)

32. 47 N.J. at 429, 221 A.2d at 515.

33. Cf. *Lo Piccolo v. Knight of Rest Prods. Corp.*, 7 App. Div. 2d 369, 373, 183 N.Y.S.2d 301, 306 (1st Dep't 1959), *aff'd mem.*, 9 N.Y.2d 662, 173 N.E.2d 51, 212 N.Y.S.2d 75 (1961).

34. See *Tiberi v. Fisher Bros. Co.*, 96 Ohio App. 302, 121 N.E.2d 694 (1953), where the court stated that *res ipsa* is a rule of evidence and should not be used to create liability, which it thought would be the result if it were applied in a "slip and fall" accident.

35. Cf. *Lo Piccolo v. Knight of Rest Prods. Corp.*, 7 App. Div. 2d 369, 373-74, 183 N.Y.S.2d 301, 306 (1st Dep't 1959), *aff'd mem.*, 9 N.Y.2d 662, 173 N.E.2d 51, 212 N.Y.S.2d 75 (1961). The court expressed a feeling that the awareness of the "practical consequences" of liability insurance is a factor which in part accounts for their hesitance to apply *res ipsa*. *Ibid.*; see *Prosser, Torts* § 84, at 573 (3d ed. 1964).

36. See *Comment*, 16 Ala. L. Rev. 437, 444-45 (1964).

37. In *Millheiser v. Smilen Bros.*, 183 N.Y.S.2d 183 (N.Y.C. City Ct. 1959), the court felt that "in this new era of advanced marketing, where the consumer is invited to patronize a self-service store or market for the purpose of making purchases, and makes selections of commodities without the assistance or help of a clerk or employee, the owner of such business should exercise reasonable care to maintain and keep the premises free from hazards in the form of debris, misplaced or dislodged stock or merchandise." *Id.* at 185.

38. Reasonable steps to keep the floors clean would include periodic inspection and sweeping, but to require the supermarket to package all vegetables in cellophane, *Napier v. Safeway Stores, Inc.*, 215 A.2d 479, 481 (D.C. Ct. App. 1965), or to station an employee to watch after each customer, would "inevitably make the store keeper an insurer and which burden the law declines to thrust upon him." *Bosler v. Steiden Stores, Inc.*, 297 Ky. 17, 22, 178 S.W.2d 839, 841 (1944).

39. 47 N.J. at 429, 221 A.2d at 514-15.

In an attempt to ease the burden of proof placed upon the plaintiff,⁴⁰ the court has created a definite inequity by placing the defendant in a position where he may be liable without fault.

Torts—Placing Plaintiff in a Situation Where Injury to His Reputation Is Foreseeable Held Actionable.—The plaintiff had been an innocent participant in a rigged quiz show. He alleged that he had been induced to appear by defendant's representations that the show was honest. Plaintiff further alleged that, as a result of a scandal that revealed the true nature of the show, his reputation was injured. The lower court found that plaintiff's complaint stated a cause of action in defamation,¹ but that it was barred by the statute of limitations.² On cross-appeals, the first department of the appellate division rejected theories of defamation³ and prima facie tort, but nevertheless held the complaint sufficient and not time-barred. *Morrison v. National Broadcasting Co.*, 24 App. Div. 2d 284, 266 N.Y.S.2d 406 (1st Dep't 1965).

In 1889, Lord Bowen uttered his now famous dictum: "Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse."⁴ This concept, which became known as the prima facie tort doctrine, received great impetus in the United States from Mr. Justice Holmes,⁵ and seems to have been first recognized in New York in 1923.⁶ The New York court of appeals first used it to sustain a

40. The plaintiff's burden consists in proving the defendant's negligence, as opposed to the defendant's proving his lack of it. See 9 Wigmore, Evidence § 2485 (3d ed. 1940). As to the particular burden in supermarket slip and fall cases see Note, Supermarket Liability: Problems in Proving the Slip-and-Fall Case in Florida, 18 U. Fla. L. Rev. 440 (1965).

1. *Morrison v. National Broadcasting Co.*, 40 Misc. 2d 876, 243 N.Y.S.2d 927 (Sup. Ct. 1963).

2. N.Y. C.P.L.R. 215(3) sets a one year limitation on actions in libel or slander.

3. In addition to the lower court here, two other supreme court cases based on similar facts arising out of dishonest quiz shows held the complaints sufficient to state causes of action in libel, but dismissed them on other grounds. *Davidson v. National Broadcasting Co.*, 26 Misc. 2d 936, 204 N.Y.S.2d 532 (Sup. Ct. 1960); *Goldberg v. Columbia Broadcasting Sys.*, 25 Misc. 2d 129, 205 N.Y.S.2d 611 (Sup Ct. 1960).

The instant court rejected a theory of defamation because the defendants did not publish any information concerning plaintiff. 24 App. Div. 2d at 287, 266 N.Y.S.2d at 410. The instant court would appear to have been correct since the general rule in New York is that there is no liability for a third party's publication in the absence of authorization or ratification. E.g., *Schoepflin v. Coffey*, 162 N.Y. 12, 56 N.E. 502 (1900); *Valentine v. Gonzalez*, 190 App. Div. 490, 179 N.Y. Supp. 711 (1st Dep't 1920).

4. *Mogul S.S. Co. v. McGregor, Gow, & Co.*, 23 Q.B.D. 598, 613 (C.A.) (1889), aff'd, [1892] A.C. 25. The court here found sufficient justification in the right to compete freely. *Id.* at 614.

5. See, e.g., his opinion in *Aikens v. Wisconsin*, 195 U.S. 194 (1904).

6. *Beardsley v. Kilmer*, 236 N.Y. 80, 140 N.E. 203 (1923) (dictum).

complaint in 1941,⁷ and it has since become a well-established doctrine in New York jurisprudence.⁸

The tort has four basic elements: the act complained of must be otherwise lawful,⁹ it must be malicious,¹⁰ the plaintiff must be injured,¹¹ and the defendant's conduct must be unjustified.¹² Each of these elements warrants some discussion.

The requirement that the defendant's act must be otherwise lawful is troublesome. Clearly, if the plaintiff has been libelled, he may not avoid a short statute of limitations by calling his cause of action *prima facie* tort.¹³ Similarly, "where specific acts, recognized as tortious in the law, are asserted, the remedies lie only in the classic categories of tort."¹⁴ This requirement is important mainly in providing ease for the pleading of defenses.¹⁵ However, by giving "otherwise lawful" a narrow definition, it would be possible to rob the *prima facie* tort doctrine of much of its application. For example, suppose that a defendant maliciously lies to a plaintiff, causing him to take action to his detriment. The instant case and an earlier appellate division decision both indicate that since lying is morally wrong, *prima facie* tort would be inapplicable.¹⁶

There are two views on the extent of malice required. The first is that the defendant must be motivated by a "disinterested malevolence"¹⁷ toward the plaintiff.¹⁸ Under this view, a defendant could ruthlessly destroy his competitor's

7. *Opera on Tour, Inc. v. Weber*, 285 N.Y. 348, 34 N.E.2d 349, cert. denied, 314 U.S. 615 (1941).

8. E.g., *Advance Music Corp. v. American Tobacco Co.*, 296 N.Y. 79, 70 N.E.2d 401 (1946); *American Guild of Musical Artists, Inc. v. Petrillo*, 286 N.Y. 226, 36 N.E.2d 123 (1941). The growth of the doctrine is partially attributable to a judicial willingness to accept novel causes of action. See, e.g., *Kujek v. Goldman*, 150 N.Y. 176, 178, 44 N.E. 773, 774 (1896).

9. E.g., *Brandt v. Winchell*, 3 N.Y.2d 628, 634, 148 N.E.2d 160, 163, 170 N.Y.S.2d 828, 833 (1958).

10. E.g., *Reinforce, Inc. v. Birney*, 308 N.Y. 164, 124 N.E.2d 104 (1954).

11. E.g., *Rager v. McCloskey*, 305 N.Y. 75, 81, 111 N.E.2d 214, 218 (1953).

12. E.g., *Brandt v. Winchell*, 3 N.Y.2d 628, 634-35, 148 N.E.2d 160, 164, 170 N.Y.S.2d 828, 833-34 (1958).

13. *Green v. Time, Inc.*, 3 N.Y.2d 732, 143 N.E.2d 517, 163 N.Y.S.2d 970 (1957) (memorandum decision); see, e.g., *Hart v. E. P. Dutton & Co.*, 197 Misc. 274, 93 N.Y.S.2d 871 (Sup. Ct. 1949), *aff'd mem.*, 277 App. Div. 935, 98 N.Y.S.2d 773, motion for leave to appeal denied, 277 App. Div. 962, 99 N.Y.S.2d 1014 (4th Dep't 1950).

14. *Ruza v. Ruza*, 286 App. Div. 767, 769, 146 N.Y.S.2d 808, 810 (1st Dep't 1955). *Accord*, *Knapp Engraving Co. v. Keystone Photo Engraving Corp.*, 1 App. Div. 2d 170, 172, 148 N.Y.S.2d 635, 637 (1st Dep't 1956); *Brandt v. Winchell*, 283 App. Div. 338, 342, 127 N.Y.S.2d 865, 868 (1st Dep't 1954).

15. See cases cited note 14 *supra*.

16. 24 App. Div. 2d at 287, 266 N.Y.S.2d at 409; *Penn-Ohio Steel Corp. v. Allis-Chalmers Mfg. Co.*, 7 App. Div. 2d 441, 444, 184 N.Y.S.2d 58, 61, modified on other grounds, 8 App. Div. 2d 808, 187 N.Y.S.2d 476 (1st Dep't 1959) (memorandum decision).

17. The phrase was first used in *Aikens v. Wisconsin*, 195 U.S. 194, 206 (1904).

18. E.g., *Reinforce, Inc. v. Birney*, 308 N.Y. 164, 169-70, 124 N.E.2d 104, 106 (1954); *Advance Music Corp. v. American Tobacco Co.*, 296 N.Y. 79, 83, 70 N.E.2d 401, 402 (1946).

business, since his self-interest in avoiding competition would negate disinterested malice.¹⁹ The second view requires only intent to do the act.²⁰ Thus, if the defendant-employer, for his own purposes, gives false information as to the wages paid to plaintiff-employee, and plaintiff thereafter has difficulties with the tax authorities, *prima facie* tort will lie.²¹

As to the requirement that plaintiff be damaged, all the clear holdings require that special damages be alleged and proven.²² Further, while no holding denying relief on this ground has been found, there are some dicta to the effect that *prima facie* tort only contemplates certain types of harm.²³

The remaining element to be discussed is that the defendant's conduct must be unjustified. This requires the court to balance conflicting interests. In every case, the plaintiff will have an interest in avoiding the type of harm he sustained, and the defendant will usually have an interest at stake which led him to do the acts which injured the plaintiff.²⁴ On a larger scale, society will often have a reason for encouraging or discouraging certain conduct in question.²⁵

At one time, leading authorities on tort law disagreed as to whether the tradi-

19. When applied to labor unions, the doctrine seems to require the union to pursue the court's conception of self-interest, not its own. That is, the acts of a union which harm an employer or worker must be in furtherance of a "lawful labor objective"—a term that does not include, for example, an attempt to increase membership—or else they will be actionable. E.g., *Opera on Tour, Inc. v. Weber*, 285 N.Y. 348, 355, 34 N.E.2d 349, 352, cert. denied, 314 U.S. 615 (1941); *Barile v. Fisher*, 197 Misc. 493, 498, 94 N.Y.S.2d 346, 352 (Sup. Ct. 1949).

20. E.g., *American Guild of Musical Artists, Inc. v. Petrillo*, 286 N.Y. 226, 231, 36 N.E.2d 123, 125 (1941); *Bloomer v. Thermal Fuel Corp.*, 88 N.Y.S.2d 361, 365-66 (Sup. Ct. 1949).

21. *Gale v. Ryan*, 263 App. Div. 76, 31 N.Y.S.2d 732 (1st Dep't 1941); accord, *Penn-Ohio Steel Corp. v. Allis-Chalmers Mfg. Co.*, 7 App. Div. 2d 441, 184 N.Y.S.2d 58, modified on other grounds, 8 App. Div. 2d 808, 187 N.Y.S.2d 476 (1st Dep't 1959) (memorandum decision).

22. E.g., *Nichols v. Item Publishers, Inc.*, 309 N.Y. 596, 602, 132 N.E.2d 860, 863 (1956); *Zausner v. Fotochrome, Inc.*, 18 App. Div. 2d 649, 235 N.Y.S.2d 698 (1st Dep't 1962) (memorandum decision); *Ritner v. Harris, Upham & Co.*, 46 Misc. 2d 567, 569, 260 N.Y.S.2d 379, 381 (Sup. Ct. 1965).

23. "The injury [in *prima facie* tort] is ordinarily to trade, occupation, professional reputation or property, and generally comprehends interference with some form of contractual relation . . ." *Brandt v. Winchell*, 283 App. Div. 338, 342, 127 N.Y.S.2d 865, 868 (1st Dep't 1954) (dictum); accord, *Ruza v. Ruza*, 286 App. Div. 767, 770, 146 N.Y.S.2d 808, 811 (1st Dep't 1955) (dictum).

24. As indicated in note 19 *supra*, labor unions pursuing "lawful labor objectives" are usually considered justified. Examples of the balancing of the litigants' interests may be found in Note, 52 *Colum. L. Rev.* 503, 509-12 (1952).

25. In *Brandt v. Winchell*, 3 N.Y.2d 628, 148 N.E.2d 160, 170 N.Y.S.2d 828 (1958), plaintiff alleged that defendant maliciously caused various law enforcement agencies to take action against him. The court, assuming that any information given by the defendant was true, held that the allegations of malice were irrelevant, and dismissed the complaint. "The best interests of the public are advanced by the exposure of those guilty of offenses against the public and by the unfettered dissemination of the truth about such wrongdoers. Such a person is entitled to immunity from civil suit at the hands of the one exposed, for the truth is not to be shackled by fear of a civil action for damages." *Id.* at 635, 148 N.E.2d at 164, 170 N.Y.S.2d at 834.

tional classifications of torts were all inclusive.²⁶ The existence of the prima facie tort doctrine shows New York's position clearly. However, the question is raised whether the traditional torts and prima facie tort together include all actionable intentional wrongs. Before answering this, the desirability of such a result should be questioned. "It seems inadvisable to lump all malicious and intentional harms into a grab bag labelled 'prima facie tort', especially since it is impossible to tabulate the infinite varieties of misconduct that give rise to actionable wrongs."²⁷ This provides a tentative answer as long as the prima facie tort doctrine is inflexible. So long as disinterested malevolence is required, and only certain types of harm are contemplated, and special damages are a prerequisite to recovery, and the acts complained of must be otherwise lawful and moral, then many plaintiffs deserving of recovery will be denied access to a prima facie tort cause of action. In this event, it is to be hoped that the courts would provide a third alternative to traditional and prima facie torts.

On the other hand, prima facie tort could be kept flexible enough to meet changing needs. If the broad basis is only intent, foreseeable harm, and absence of justification, then further qualifications could be built into specific cases or types of cases as needed, and further alternatives would be unnecessary.

The instant court adopted the narrow view of prima facie tort, defining it as "otherwise lawfully privileged means . . . made actionable, because without economic or social justification, and because of the exclusive purpose to injure plaintiff . . ." ²⁸ The plaintiff failed to meet this test because "the means used [by the defendants] were not lawful or privileged, in the sense of affirmatively sanctioned conduct, but were intentional falsehood without benevolent purpose uttered to induce action by another to his detriment."²⁹ Since the court was apparently intent on adopting the narrow view of prima facie tort, it could also have rejected a prima facie tort claim on the ground that defendants were not motivated by actual malice, as well as on the ground that special damages were not pleaded.

The plaintiff's failure to bring his case within the ambit of prima facie tort did not, however, bar a recovery.

[E]very element in plaintiff's claim descriptive of defendants' acts, his reliance, and the harm sustained, are identifiable in the most ancient of the tort categories and in the law of negligence. What is more important, the elements of defendants' conduct

26. In *Salmond, Torts* 9 (5th ed. 1920), it is said that "just as the criminal law consists of a body of rules establishing specific offences, so the law of torts consists of a body of rules establishing specific injuries." On the other hand, *Pollock, Torts* 22-23 (9th ed. 1912), maintained that "as our law of contract has been generalized by the doctrine of consideration and the action of assumpsit, so has our law of civil wrongs by the wide and various applications of actions on the case." (Footnote omitted.)

27. *Penn-Ohio Steel Corp. v. Allis-Chalmers Mfg. Co.*, 7 App. Div. 2d 441, 443, 184 N.Y.S.2d 58, 60, modified on other grounds, 8 App. Div. 2d 808, 187 N.Y.S.2d 476 (1st Dep't 1959) (memorandum decision). This language was quoted favorably in the instant case, 24 App. Div. 2d at 291, 266 N.Y.S.2d at 413.

28. *Id.* at 287, 266 N.Y.S.2d at 409-10.

29. *Id.* at 287, 266 N.Y.S.2d at 409.

and the harm to plaintiff fall neatly within general principles of law, even if not within any of the numbered forms of a form book. The intentional use of wrongful means and the intentional exposure of another to the known, unreasonable risk of harm, which results in such harm, provides classic basis for remedy. The harm must, of course, have been intended, foreseeable, or the "natural consequence" of the wrong.³⁰

After establishing defendants' conduct as tortious, the court turned to the issue of damages. It was held that allegations of general damage were sufficient to sustain the complaint.³¹ The court granted that special damages are required in a prima facie tort situation, but where conduct is "corrupt," "intentional," or "vicious," as here, "the law will allow general recovery for foreseeable harm to established protected interests . . ." ³² The test is that the general harm alleged must ordinarily flow from the wrong.³³ Therefore, here, where the plaintiff is beginning his career as a college professor, the law will presume damage when he is labelled a cheater.³⁴

Allowing the recovery of general damages in what is essentially a prima facie tort situation is unprecedented. However, the holding is salutary in that it reflects an ability to apply different criteria to differing cases. This flexibility is the most important feature of the instant case. While the court alternately characterized its holding as based on classic principles, and as creating a new tort, in fact, it was merely adopting the broad view of prima facie tort.³⁵ But in

30. *Id.* at 288, 266 N.Y.S.2d at 410. But see *Marinello v. Iozzo*, 18 N.Y.2d 730,—N.E.2d—, —N.Y.S.2d—(1966) (memorandum decision) (semble).

With this statement as the theory of the tort, there was no longer any limitations problem since the facts then fell into the six-year "all other cases" provision of N.Y. C.P.L.R. 213(1). 24 App. Div. 2d at 292, 266 N.Y.S.2d at 414.

One justice rejected the majority's theory of upholding the complaint, because the basic pattern of facts alleged by the plaintiff was not at all novel. *Id.* at 296-98, 266 N.Y.S.2d at 418-19 (Steuer, J., dissenting).

31. *Id.* at 293, 266 N.Y.S.2d at 415. The plaintiff alleged that he had reason to believe he would have received a fellowship but for the harm to his reputation. To qualify as an allegation of special damages, he would have had to allege that he actually would have received it. *Id.* at 293 n.4, 266 N.Y.S.2d at 415 n.4.

32. *Id.* at 293, 266 N.Y.S.2d at 415.

33. *Id.* at 294-95, 266 N.Y.S.2d at 415-16.

34. *Id.* at 293-94, 266 N.Y.S.2d at 415-16. The want of an allegation of special damages prompted one Justice to dissent in part. *Id.* at 295, 266 N.Y.S.2d at 417 (separate opinion). One case cited in support of this dissent was *Penn-Ohio Steel Corp. v. Allis-Chalmers Mfg., Co.*, 7 App. Div. 2d 941, 184 N.Y.S.2d 58, modified on other grounds, 8 App. Div. 2d 808, 187 N.Y.S.2d 476 (1st Dep't 1959) (memorandum decision). But the Penn-Ohio case resulted in subsequent litigation, and eventually the claim of general damages was allowed, on the authority, *inter alia*, of the instant case. 50 Misc. 2d 860, 877-79, 272 N.Y.S.2d 266, 284-86 (Sup. Ct. 1966).

35. Thus, although the instant court's discussion of prima facie tort supports the contention that "in New York the prima facie tort doctrine has apparently had its greatest degree of legal . . . qualification," Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 Cornell L.Q. 465, 475 (1957) (emphasis omitted), the practical effect of the present holding is to render this statement insignificant.

so doing, it has left behind the arbitrary qualifications sometimes put on that doctrine. The result is to leave the way open for rules to account for all liability for intentional acts, these rules to be tailored to the cases as they arise. The present court is to be applauded for refusing to apply "slavish formalism"³⁰ to both the substantive claim and to the rule of damages.

Unfair Competition—Utilization of News Taken From Defendant's Wire Service Held To Be Actionable as an Appropriation.—Plaintiff and defendant each sold daily publications which reported news on various government bond offerings. The plaintiff also operated a teletype service which furnished financial information to its subscribers in advance of publication of either of the news sheets. The defendant, although not a subscriber, was obtaining information from the teletype service and including it in its own publication. The New York supreme court denied the plaintiff a temporary injunction restraining defendant's use of the information. The appellate division reversed, holding that the defendant had "appropriated"¹ the plaintiff's news, and had thereby engaged in unfair competition.² *Bond Buyer v. Dealers Digest Publishing Co.*, 25 App. Div. 2d 158, 267 N.Y.S.2d 944 (1st Dep't 1966) (per curiam).

The instant court's sole reliance was placed on *International News Serv. v. Associated Press*,³ while two recent United States Supreme Court companion cases, *Sears, Roebuck & Co. v. Stiffel Co.*⁴ and *Compco Corp. v. Day-Brite Lighting, Inc.*,⁵ were ignored. In the *International News* decision, the litigants

36. 24 App. Div. 2d at 295, 266 N.Y.S.2d at 417.

1. *Bond Buyer v. Dealers Digest Publishing Co.*, 25 App. Div. 2d 158, 159, 267 N.Y.S.2d 944, 945 (1st Dep't 1966) (per curiam). The terms appropriation and misappropriation are generally used interchangeably. Attempts have been made to define misappropriation. One court called it the doctrine that "holds it unlawful for a business, without proper efforts of its own, to capitalize on the expenses and endeavors of another." *Continental Cas. Co. v. Beardsley*, 151 F. Supp. 28, 42 (S.D.N.Y. 1957). It has been said to concern itself with the "protection of intangibles of potential commercial value. . . . Misappropriation consists . . . in copying . . . the conception or underlying intangible value for the use of the appropriator." *Developments in the Law—Competitive Torts*, 77 Harv. L. Rev. 888, 932 (1964).

For a more detailed discussion of the law of unfair competition, see Callmann, *Unfair Competition and Trade-Marks* (2d ed. 1950); Chafee, *Unfair Competition*, 53 Harv. L. Rev. 1289 (1940); Handler, *Unfair Competition*, 21 Iowa L. Rev. 175 (1936); *Developments in the Law—Competitive Torts*, supra.

2. The plaintiff apparently did not hold a statutory copyright in the instant case since he assuredly would have pleaded it. It is unclear whether the plaintiff would even have been able to secure such a right. See *Triangle v. New England Newspaper Publishing Co.*, 46 F. Supp. 198 (D. Mass. 1942). Cf. *Tribune Co. v. Associated Press*, 116 Fed. 126 (C.C.N.D. Ill. 1900).

3. 248 U.S. 215 (1918).

4. 376 U.S. 225 (1964).

5. 376 U.S. 234 (1964).

were competitors in the gathering and distribution of news for profit. INS was taking items from the subscribing newspapers of the Associated Press and selling this information to its own subscribers. The nation's quadripartite time zones enabled the defendant to furnish its west coast members with timely news from the eastern seaboard. The Supreme Court granted injunctive relief on a theory of "misappropriation," the misappropriation consisting in the defendant's "taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and . . . appropriating it and selling it as its own"⁶

The Court admitted that relief could not be predicated on any recognizable property right or copyright,⁷ but held that the AP possessed "*quasi* property" rights⁸ with all the attributes of property.⁹ This protectible interest, however, existed only between the litigants, the Court eschewing the possibility of enjoining any use that the public might make of the news.¹⁰ The ratio decidendi of *International News* was simply that the defendant's practice was, in the eyes of the majority, a form of unfair competition that should be prohibited.¹¹

Dicta in the opinion couched the misappropriation theory in sweeping terms,¹²

6. 248 U.S. at 239. While the *International News* case is the "acknowledged headwaters" of the misappropriation doctrine, *Developments in the Law—Competitive Torts*, supra note 1, at 933, its genesis can be traced to earlier decisions. E.g., *National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. 294 (7th Cir. 1902) (using information on ticker tapes); *Kiernan v. Manhattan Quotation Tel. Co.*, 50 How. Pr. 194 (N.Y. Sup. Ct. 1876) (transmission of foreign news).

7. 248 U.S. at 235. A common law copyright belongs to anyone who embodies a "new and innocent product of mental labor" in some material form, *Palmer v. De Witt*, 47 N.Y. 532, 537 (1872), and it is the right to first publication. *Pushman v. New York Graphic Soc'y*, 287 N.Y. 302, 39 N.E.2d 249 (1942). Such a right is perpetual, *Caliga v. Inter Ocean Newspaper Co.*, 215 U.S. 182 (1909), until there has been a publication amounting to a dedication to the public. *Palmer v. De Witt*, supra at 543. On the question of publication, see *Werckmeister v. American Lithographic Co.*, 134 Fed. 321 (2d Cir. 1904). The statutory copyright, enacted by Congress under the power granted to it by U.S. Const. art. 1, § 8, is a "limited monopolistic privilege," *Desny v. Wilder*, 46 Cal. 2d. 715, 734, 299 P.2d 257, 271 (1956), granting the privilege of exclusive publication during a definite period. *Caliga v. Inter Ocean Newspaper Co.*, supra. When Congress enacted the statutory copyright, it expressly retained the one at common law. 17 U.S.C. § 2 (1964).

8. 248 U.S. at 236.

9. *Ibid.*

10. *Ibid.* Pragmatic considerations probably weighed on the Court's decision, since there was fear that INS, by avoiding the AP's news gathering costs and thus being able to charge lower rates, would drive the AP out of business. *Developments in the Law—Competitive Torts*, supra note 1, at 934.

11. See 2 Callmann, *op. cit.* supra note 1, at 882 n.22.

12. As competitors, "each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other." 248 U.S. at 235-36. The defendant should not "reap where it has not sown" and "is appropriating to itself the harvest of those who have sown." *Id.* at 239-40.

One commentator reasoned that the logic of the *International News* decision "supports

yet the legal theory there expounded has led a checkered existence.¹³ New York cases subsequent to *International News*, however, have expressed a liberal policy in deciding misappropriation cases so that "commercial unfairness will be restrained when it appears that there has been a misappropriation, for the commercial advantage of one person, of a benefit or property right belonging to another."¹⁴

While *International News* affirmed a state's prerogative to furnish relief in the event that neither common-law copyright nor federal statute was adequate to bestow protection,¹⁵ the Supreme Court apparently took a different approach in *Sears*¹⁶ and *Compco*.¹⁷

In both those cases, plaintiffs were lamp manufacturers who had originated and patented lighting fixtures. The defendants began producing "Chinese copies,"¹⁸ and the plaintiffs sought injunctive relief. The patents were held invalid by the lower courts,¹⁹ and the Supreme Court, deciding both cases on the

protection against any competition by similar products where it can be shown that the originator has invested something of value in the development of his product." Trece, Patent Policy and Preemption: The Stiffel and Compco Cases, 32 U. Chi. L. Rev. 80, 94 (1964).

13. See Developments in the Law—Competitive Torts, *supra* note 1. See also *Triangle Publications, Inc. v. New England Newspaper Publishing Co.*, 46 F. Supp. 198, 203-05 (D. Mass. 1942).

The classic refusal to extend *International News* beyond its facts was voiced by Judge Learned Hand in *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279 (2d Cir. 1929), cert. denied, 281 U.S. 728 (1930), when he maintained that the *International News* was that type of case where "the occasion is at once the justification for, and the limit of, what is decided." *Id.* at 280. *Cheney Bros.* involved a situation analagous to *International News*—viz., style piracy. However, outside of a competitor gaining access to another's fashions through breach of trust, *Richard J. Cole Inc. v. Manhattan Modes Co.*, 159 N.Y.S.2d 709 (Sup. Ct.), *aff'd*, 2 App. Div. 2d 593, 157 N.Y.S.2d 259 (1st Dep't 1956) (*per curiam*); accord, *Wm. Filene's Sons Co. v. Fashion Originators' Guild of America, Inc.*, 14 F. Supp. 353 (D. Mass. 1936), *aff'd*, 90 F.2d 556 (1st Cir. 1937), or infringement of common-law copyright, *Dior v. Milton*, 9 Misc. 2d 425, 155 N.Y.S.2d 443 (Sup. Ct.), *aff'd mem.*, 2 App. Div. 2d 878, 156 N.Y.S.2d 996 (1st Dep't 1956), the courts have been adamant in withholding relief once a designer has put his creations on the market. *Millinery Creators' Guild, Inc. v. FTC*, 109 F.2d 175 (2d Cir. 1940), *aff'd*, 312 U.S. 469 (1941); *Cheney Bros. v. Doris Silk Corp.*, *supra*; *Wm. Filene's Sons Co. v. Fashion Originators' Guild of America, Inc. supra*.

Neither the proposed revision of the copyright law, H.R. 4347, 89th Cong., 1st Sess., nor a pending design protection act would afford any protection to fashion designers. Hearings on H.R. 4347, H.R. 5680, H.R. 6831, & H.R. 6835 Before a Subcommittee of the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 8, pts. 1 & 2 (1965).

14. *Dior v. Milton*, *supra* note 13, at 431, 155 N.Y.S.2d at 451.

15. See notes 7-9 *supra* and accompanying text.

16. 376 U.S. 225 (1964).

17. 376 U.S. 234 (1964).

18. A "Chinese copy" is a duplication that is an exact imitation of the original. See 1 *Callmann*, *op. cit. supra* note 1, at 249.

19. The opinions of the district courts are unreported, but the decisions can be found in *Stiffel Co. v. Sears, Roebuck & Co.*, 313 F.2d 115 (7th Cir. 1963), reversed, 376 U.S. 225 (1964); and *Day-Brite Lighting, Inc. v. Compco Corp.*, 311 F.2d 26 (7th Cir. 1962), reversed, 376 U.S. 234 (1964).

same day, ruled that anything in the public domain could be freely copied and that such copying could not be enjoined under a state's unfair competition laws.²⁰ One commentator has stated:

The Supreme Court's rationale proceeds along the traditional lines of federal preemption. The federal patent system, specifically authorized by the Constitution, establishes a uniform federal standard for the protection of invention and the preservation of free competition. To give patent-like protection under state law to an article incapable of a patent grant runs counter to federal policy . . .²¹

A result similar to that in *Sears* and *Compco* had been reached by some courts even before *International News*.²² While *Sears* and *Compco* did not explicitly overrule the earlier decision—in fact, they did not even mention it—the cases pose the question of whether the misappropriation theory has been antedated.²³

The misappropriation doctrine has been emphatically rejected by two cases²⁴ involving community antenna television systems (CATV).²⁵ The most recent one,

20. In *Compco* the Court said that, unless protected by a federal statute, a design could be "copied at will." 376 U.S. at 238. *Sears* propounded substantially the same thought. 376 U.S. at 231.

21. Handler, in Symposium, *Product Simulation: A Right or a Wrong*, 64 Colum. L. Rev. 1178, 1185 (1964). (Footnote omitted.)

22. *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938) (reproducing the same shape cereal biscuit); *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169 (1896) (using design and name of previously patented sewing machine); *Flagg Mfg. Co. v. Holway*, 178 Mass. 83, 59 N.E. 667 (1901) (copying a zither); *American Merri-Lei Corp. v. Jet Party Favors, Inc.*, 123 N.Y.S.2d 136 (Sup. Ct. 1953) (copying halloween hats). In the *Kellogg* case, the court stated that "sharing in the goodwill of an article unprotected by patent or trade-mark is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested." 305 U.S. at 122.

23. This is merely one issue that the companion cases have raised. For other problems that have arisen in their wake, see Peterson, *The Legislative Mandate of Sears and Compco: A Plea for a Federal Law of Unfair Competition*, 69 Dick. L. Rev. 347, 358-63 (1965).

It is interesting to note that *International News* is nowhere mentioned in either the Supreme Court opinions or the briefs of either plaintiffs or defendants. However, the government, contributing its own brief as one of the defendant's amici, cites it, but only to the effect that the issues at bar and those in *International News* were not legally contiguous. Brief for the United States as Amicus Curiae, p. 11, *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964).

One writer remarked that *Sears* and *Compco* impliedly rejected the "misappropriation" theory. Treece, *supra* note 12, at 90.

24. *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348 (9th Cir. 1964), cert. denied, 379 U.S. 989 (1965); *Herald Publishing Co. v. Florida Antennavision Inc.*, 173 So. 2d 469 (Fla. Dist. Ct. App. 1965).

25. Historically, CATV has confined itself to receiving television signals and amplifying them so that its paying subscribers who lived in remote regions and could not ordinarily receive the programs might be able to enjoy the broadcasts. However, CATV has been burgeoning to the point where it has been invading areas which are already occupied by a licensed broadcaster. Hearings on H.R. 4347 Before a Subcommittee of the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 8, pt. 2, at 1223-26 (1965). See generally Note, *CATV: Liability for the Uncompensated Transmission of Television Programs*, 50 Minn. L. Rev. 349 (1965).

Herald Publishing Co. v. Florida Antennavision, Inc.,²⁶ distinguished *International News* as being inapplicable when the litigants are not in direct competition,²⁷ and refused to enjoin the plaintiff on the grounds that to do so would be violating *Sears and Compco* by extending a "new protectible interest beyond what the copyright laws confer"²⁸

While the Idaho district court in *Intermountain Broadcasting & Television v. Idaho Microwave, Inc.*²⁹ had reached a similar result prior to *Sears and Compco*, a pre-1964 New York decision, *Mutual Broadcasting Sys., Inc. v. Muzak Corp.*,³⁰ involving an analogous fact pattern, was decided otherwise. There, the plaintiff had secured a contract to broadcast the 1941 baseball world series. The defendant intercepted the plaintiff's radio signals and channelled them to his own listeners. The defendant's conduct was enjoined because he had invaded the "plaintiff's right" as enunciated in *International News*.³¹ Such a case could conceivably be decided otherwise today in light of *Sears and Compco*.

The liberal outlook of New York evidenced by the *Mutual Broadcasting* case and many others³² has been continued in its post-*Sears and Compco* decisions. In *New York World's Fair 1964-1965 Corp. v. Colourpicture Publishers Inc.*,³³ a defendant who had unsuccessfully bid for a contract to make and market re-

26. 173 So. 2d 469 (Fla. Dist. Ct. App. 1965).

27. *Id.* at 472. The New York courts have long since discarded this requisite in misappropriation cases. See, e.g., *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 795, 101 N.Y.S.2d 483, 491-92 (Sup. Ct. 1950), *aff'd mem.*, 279 App. Div. 632, 107 N.Y.S.2d 795 (1st Dep't 1951).

28. *Herald Publishing Co. v. Florida Antennavision Inc.*, 173 So. 2d 469, 474 (Fla. Dist. Ct. App. 1965), quoting from *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348, 351 (9th Cir. 1964), *cert. denied*, 379 U.S. 989 (1965). Both recent CATV cases left open the possibility of an action for copyright infringement. *Cable Vision, Inc. v. KUTV, Inc.*, *supra*; *Herald Publishing Co. v. Florida Antennavision Inc.*, *supra* (by implication). A court in the Second Circuit chose this path when it found a CATV station guilty of infringing the plaintiff broadcaster's statutory copyright. *United Artists Television, Inc. v. Fortnightly Corp.*, 255 F. Supp. 177 (S.D.N.Y. 1966).

The proposed revision of the copyright law will certainly have an adverse effect on the development of CATV. The "transmission" of copyrighted material, such as CATV provides, would be permissible only if there were no "direct or indirect admission charge." Hearings on H.R. 4347 Before a Subcommittee of the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 8, pt. 1, at 5 (1965).

29. 196 F. Supp. 315 (S.D. Idaho 1961).

30. 177 Misc. 489, 30 N.Y.S.2d 419 (Sup. Ct. 1941).

31. *Id.* at 491, 30 N.Y.S.2d at 420. There was no discussion of the issues, the court merely concluding that the "plaintiff's right has been invaded by defendant and that plaintiff is entitled to the injunction sought." *Ibid.*

In another decision decided before *Sears and Compco*, *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938), a radio station was restrained from stationing its observers outside a stadium and using their reports to broadcast an account of Pittsburgh games. Fitting the fact into the *International News* mold, the court found the plaintiff to have acquired through its efforts a property right in the broadcasting of the game with which the defendant was wrongfully interfering.

32. See, e.g., note 14 *supra* and accompanying text.

33. 21 App. Div. 2d 896, 251 N.Y.S.2d 885 (2d Dep't 1964) (memorandum decision).

productions of World's Fair buildings was restrained from producing the re-productions. *Columbia Broadcasting Sys., Inc. v. Documentaries Unlimited, Inc.*³⁴ held that to take an off-the-air radio broadcast of an announcement of the late President Kennedy's death and press this onto a marketable record was an unlawful appropriation. Similarly, in *Capitol Records, Inc. v. Greatest Records, Inc.*,³⁵ a record manufacturer was enjoined from utilizing a remastering process to reproduce Beatles' records, again on a theory of misappropriation. Making no reference to *International News* and deciding the case on common law copyright, the court stated in dicta that New York law protects a "plaintiff from unauthorized reproduction of the performances embodied on a master recording, basing such protection upon the doctrines of unfair competition, common-law copyright or unlawful interference with contract."³⁶

The *Capitol Records* court took great pains to point out that *Sears* and *Compco* were inapplicable there, resting its conclusion on an attempted distinction between a misappropriation and a copy.³⁷ *Sears* and *Compco* dealt with items "substantially identical"³⁸ and were concerned with "imitation,"³⁹ while the issue sub judice was whether there had been an appropriation of the very product itself.⁴⁰

A similar effort to circumvent *Sears* and *Compco* was made in *Flamingo Telefilm Sales, Inc. v. United Artists Corp.*⁴¹ There a defendant who exhibited a television program into which he had incorporated a large segment of a motion picture controlled by the plaintiff was prohibited from further telecasting. The court stated that "it is clear . . . that if defendants had copied the movie concerned and produced their own movie based upon the same plot and themes, plaintiff would be entitled to no protection outside of the Federal copyright laws. There is a distinction between such an act, i.e., the copying of an idea, and the . . . use of the identical product for the profit of another."⁴²

Yet one New York court chose not to make any distinction between a misappropriation and a copy. In *Wolf & Vine, Inc. v. Pioneer Display Fixtures Co.*,⁴³ the defendant came into possession of several of plaintiff's highly creative

34. 42 Misc. 2d 723, 248 N.Y.S.2d 809 (Sup. Ct. 1964). This case was originally decided before *Sears* and *Compco*, but the court, after considering the defendant's application for reargument, dismissed the Supreme Court's decisions as being inapplicable to questions of common law copyright, which was one theory under which the case could be and was in fact decided.

35. 43 Misc. 2d 878, 252 N.Y.S.2d 553 (Sup. Ct. 1964).

36. *Id.* at 880, 252 N.Y.S.2d at 555.

37. *Id.* at 880-81, 252 N.Y.S.2d at 556.

38. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 266 (1964).

39. *Capitol Records, Inc. v. Greatest Records, Inc.*, 43 Misc. 2d 878, 880-81, 252 N.Y.S.2d 553, 556 (Sup. Ct. 1964).

40. *Id.* at 881, 252 N.Y.S.2d at 556.

41. 141 U.S.P.Q. 461 (N.Y. Sup. Ct.), rev'd on other grounds, 22 App. Div. 2d 778, 254 N.Y.S.2d 36 (1st Dep't 1964) (memorandum decision).

42. *Id.* at 462.

43. 142 U.S.P.Q. 112 (N.Y. Sup. Ct. 1964).

mannequins and made production-line molds of them from which replicas were thereafter produced and offered for sale in direct competition with those manufactured by the plaintiff. *Sears* and *Compco* were invoked in this case to permit the defendant to continue his activities.

Both the 1918 and the 1964 Supreme Courts were confronted with the necessity of striking a balance between free access to novel and marketable creations and adequate protection to an economically injured originator.⁴⁴ *Sears* and *Compco* appear to have favored free access in accordance with Justice Brandeis' note when he dissented in *International News*: "The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use."⁴⁵

The New York courts, both before and after *Sears* and *Compco* have attempted to throw a protecting arm around the injured plaintiff.⁴⁶ After *Sears* and *Compco*, the state courts, capitalizing on the failure of the Court to explicitly overrule *International News*, have distinguished those cases as dealing with a copy rather than a misappropriation.⁴⁷

In some instances, the distinction might seem a proper one. The defendant, in *Flamingo Telefilm Sales, Inc. v. United Artists Corp.*⁴⁸ incorporated a segment of a motion picture into a television program and was clearly doing more than copying the plaintiff's ideas. However, how did making a mold from a plaintiff's mannequin amount, in *Wolf & Vine*, to a lawful copy rather than an unlawful appropriation?⁴⁹ There was no significant distinction, for example, between this situation and the fact pattern laid before the *World's Fair* court,⁵⁰ and yet the results were quite dissimilar.

The insufficiency of such a distinction is best illustrated by the dissenting opinion in *World's Fair*, where the judge commented that "if the buildings and exhibits, the designs of which have not been patented, could themselves have been copied by others, it would appear that photographic reproductions of these buildings and exhibits for the purpose of sales cannot be enjoined."⁵¹

Obviously any effort to distinguish between a misappropriation and a copy raises patent difficulties. First, neither concept has ever been adequately defined,⁵² and yet courts continually select one or the other label on the basis of

44. The existence of this tension is adverted to in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231-32 (1964).

45. 248 U.S. at 250.

46. See notes 14 and 32-42 *supra* and accompanying text.

47. See note 23 *supra*.

48. 141 U.S.P.Q. 461 (N.Y. Sup. Ct.), *rev'd* on other grounds, 22 App. Div. 2d 778, 254 N.Y.S.2d 36 (1st Dep't 1964) (memorandum decision).

49. 142 U.S.P.Q. 112 (N.Y. Sup. Ct. 1964).

50. 21 App. Div. 2d 896, 251 N.Y.S.2d 885 (2d Dep't 1964) (memorandum decision).

51. *Id.* at 898, 251 N.Y.S.2d at 888.

52. The definitions of misappropriation set down in note 1 *supra* are clearly inadequate in light of *Sears* and *Compco*.

unexpressed reasoning, as was done in the instant case. Secondly, in all cases of this type, the defendant has capitalized on the labor and skill of the plaintiff to the latter's financial detriment. Yet only some plaintiffs obtain the requested relief. The degree of the defendant's unfairness and the plaintiff's loss are ignored as the courts make distinctions based upon apparently artificial grounds.

The obstacles presented in making the distinction have placed a heavy burden on the courts. Since *Sears* and *Compco* have expressed a policy which is, at least to some extent, antithetical to *International News*,⁵³ the courts must delineate the respective areas of the cases. If there should be a distinction between a misappropriation and a copy, then workable ground rules for making such a differentiation must be set down. It appears that the instant court, unable to find a valid point on which to distinguish *Sears* and *Compco*, erred in not following them.

53. See text accompanying notes 15-23.