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Case Notes

CASE NOTES

Evidence—Impeachment of Witnesses—Illegally Obtained Statement Held Admissible for Limited Purpose of Impeaching Defendant's Testimony.— The defendant was indicted for manslaughter in the first degree. On the witness stand, testifying on his own behalf, the defendant stated that the deceased came to his apartment at about three p.m. on May 8th; that she suffered an epileptic fit and left bloodstains in his apartment; that the last time he saw her was ten p.m. on May 8th when he fell asleep; and that he stayed home all day on May 9th and did not see the deceased alive again.[1] At the police station before trial, after his request for counsel was denied, the defendant had stated to a district attorney that he last saw the deceased on the morning of May 8th when she left his apartment at 8:45 a.m.; and that he was not in his apartment the remainder of May 8th or on May 9th.[2] At trial, the prosecution did not use this statement as part of its direct case, but did seek to use it to impeach the credibility of the defendant. The New York court of appeals upheld the defendant's conviction, stating that "although the statement would not have been admissible as part of the People's direct case . . . it was admissible on the question of defendant's credibility as a witness."[3] *People v. Kulis*, 18 N.Y.2d 318, 221 N.E.2d 541, 274 N.Y.S.2d 873 (1966) (per curiam).

In *Walder v. United States*,[4] the United States Supreme Court, in an opinion by Mr. Justice Frankfurter, held that when a defendant in a federal criminal case voluntarily takes the witness stand to testify on his own behalf, the prosecution may introduce unlawfully obtained evidence to impeach his testimony. The defendant in *Walder* "went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics."[5] The prosecution was then permitted to introduce testimony that Walder had possessed narcotics. The heroin found in his possession had been obtained through an unlawful search and seizure. This evidence was not relevant to the prosecution's direct case since the indictment was for other transactions in narcotics.[6] The Court was careful to observe that the defendant "must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief."[7]

1. Brief for Respondent, pp. 20-21, People v. Kulis, 18 N.Y.2d 318, 221 N.E.2d 541, 274 N.Y.S.2d 873 (1966) (per curiam).

2. Id. at 21.

3. People v. Kulis, 18 N.Y.2d 318, 322-23, 221 N.E.2d 541, 542, 274 N.Y.S.2d 873, 875 (1966) (per curiam). The statements were illegally obtained under the rule in Escobedo v. Illinois, 378 U.S. 478 (1964).

4. 347 U.S. 62 (1954).

5. Id. at 65.

6. Id. at 62-63.

7. Id. at 65. Many state courts following Walder chose not to allow that type of evidence. See, e.g., People v. Underwood, 61 Cal. 2d 113, 389 P.2d 937 (1964); People v. Hiller 2 Ill. 2d 323, 118 N.E.2d 11 (1954); State v. Brewton — Ore. —, 422 P.2d 581 (1967).

In *Inge v. United States*,[8] the *Walder* decision was discussed in the light of subsequent circuit court holdings. The *Inge* court observed that the *Walder* doctrine today should be viewed as permitting an inadmissible statement to be used to impeach the voluntary testimony of the accused on his own behalf "only when the defendant makes 'sweeping claims' that go far beyond the crime charged . . . relating to 'lawful proper acts' 'collateral' to the issues before the jury, or is questioned about 'minor points.' In such situations, impeachment of the defendant affects only his credibility, since the truth of the impeaching statement does not itself tend to establish guilt."[9]

In considering this issue for the first time, the instant court declined to follow the extremely pertinent dictum in *Miranda v. Arizona*.[10] Mr. Chief Justice Warren, writing for the majority in that case, said that "statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement."[11] Judge Keating, in his dissent to the present case, suggested that *Miranda* "adequately disposes of any distinction between statements used on direct as opposed to cross-examination."[12]

The rationale underlying any exclusionary rule is to protect society as well as the individual.[13] The Supreme Court has indicated that the most effective deterrent to illegal police activity is to hold the evidence inadmissible.[14] If the purpose of excluding the evidence is merely to deter illegal police activity it can be argued that to overrule *Walder* may not be necessary; that to exclude the use of the evidence in the direct case is an adequate deterrent.[15] However, in a recent decision,[16] the highest court of Oregon refused to follow the *Walder* doc-

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Contra, Commonwealth v. Wright, 415 Pa. 55, 202 A.2d 79 (1964). See generally Annot., 89 A.L.R.2d 478 (1963). But see, e.g., State v. McClung, 66 Wash. 2d 654, 404 P.2d 460 (1965), cert. denied, 384 U.S. 1013 (1966).

8. 356 F.2d 345 (D.C. Cir. 1966).

9. Id. at 349. (Footnotes omitted.)

10. 384 U.S. 436 (1966). The Miranda holding was not applicable to the instant case. See Johnson v. New Jersey, 384 U.S. 719 (1966); People v. McQueen, 18 N.Y.2d 337, 221 N.E.2d 550, 274 N.Y.S.2d 886 (1966).

11. 384 U.S. at 477 (dictum).

12. 18 N.Y.2d at 324, 221 N.E.2d at 543, 274 N.Y.S.2d at 876 (dissenting opinion). Judge Keating went on to say that Miranda makes the Walder rule "of doubtful validity." Ibid. See Pye, in Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona, 35 Fordham L. Rev. 199, 218-19(1966). Even before Miranda, the Walder decision was criticized on constitutional grounds. 1 Wigmore, Evidence § 15, at 70 (3d ed. Supp. 1964).

13. See Blackburn v. Alabama, 361 U.S. 199, 207 (1960). See also Escobedo v. Illinois, 378 U.S. 478, 490 (1964).

14. E.g., Linkletter v. Walker, 381 U.S. 618, 636-37 (1965).

15. See United States v. Curry, 358 F.2d 904, 911 (2d Cir.), cert. denied, 385 U.S. 873 (1966).

16. State v. Brewton, — Ore. —, 422 P.2d 581 (1967).

trine and suggested that the admission of otherwise inadmissible evidence, even for such a limited purpose, invites the overzealous police officer to obtain evidence by unconstitutional means and hold it on file to be used should the defendant elect to testify on his own behalf at some later trial.[17]

In any event, the exclusionary rule may be justified by policies other than merely deterring police officers from illegal actions.[18] Perhaps our concepts of a fair procedure require that a conviction be obtained unaided by any violation of the defendant's constitutional guarantees, regardless of any need for deterrence.[19] This is certainly the thrust of the *Miranda* decision, and perhaps of *Mapp v. Ohio* as well.[20] Under this view, no distinctions based on the prosecution's purpose in introducing the evidence are permitted. Once the evidence is tainted, it must be completely excluded. In other words, the *Walder* case cannot stand as to confessions or admissions in light of *Miranda*; and, absent a basis for the distinction of real evidence,[21] it cannot stand at all.[22]

Unless *Walder* is expressly overruled, however, continued adherence to it by state courts reluctant to expand criminal due process protections is to be expected. These courts must observe the limitations on the *Walder* rule. While the evidence in question in the instant case was not relevant to the indictment in the sense of directly proving guilt, it did tend to disprove the alibi offered by the defendant on the witness stand. *Walder* was clear in leaving the defendant "free to deny all the elements of the case against him . . . ."[23] This must allow the defendant to testify as to his whereabouts at the time the crime was committed.[24] On this ground, at least, the present court was incorrect in allowing the admission of the evidence.

17. Id. at —, 442 P.2d at 583.

18. See Mapp v. Ohio, 367 U.S. 643 (1961), where the Court stated that " 'the relevant rules of evidence' are overridden without regard to 'the incidence of such conduct by the police'. . . ." Id. at 656.

19. Mr. Justice Black, dissenting in Linkletter v. Walker, referred to "trial protections guaranteed by the Constitution." 381 U.S. 618, 650 (1965).

20. See Miranda v. Arizona, 384 U.S. 436, 444 (1966); Mapp v. Ohio, 367 U.S. 643, 655 (1961). But see Linkletter v. Walker, 381 U.S. 618, 636-37 (1965), where the Court stressed deterrence as the underlying purpose of the exclusionary rule set forth in Mapp. However, the Court there was justifying its denial of retroactivity to the Mapp rule.

21. It has been suggested that the greater reliability of real evidence provides a basis for distinction. See, e.g., 4 Houston L. Rev. 144, 147-49 (1966). In rebuttal, first, real evidence is not inevitably reliable, such as when its authenticity depends on more or less reliable testimonial proof; and secondly, it would appear that the overriding fact of an infringement of a constitutional guarantee would obliterate any differences of relative reliability.

22. In United States v. Curry, 358 F.2d 904 (2d Cir.), cert. denied, 385 U.S. 873 (1966), the court did "not agree that the Walder doctrine was in any way weakened by Mapp . . . ." Id. at 911. Its reasoning was tenuous. The Court in Mapp stated that "a federal prosecutor may make no use of evidence illegally seized," 367 U.S. at 657, and in any event the Miranda dictum, quoted in text accompanying note 11 supra, seems completely to dispose of Walder.

23. 347 U.S. at 65.

24. See Inge v. United States, 356 F.2d 345, 349 (D.C. Cir. 1966).

Jurisdiction—Exercise of Jurisdiction Over a Newspaper Vacated on the Basis of the First Amendment.—The plaintiff, a city commissioner of Birmingham, Alabama, sought to recover for an alleged libel printed by the defendant New York Times Company.[1] Jurisdiction was acquired by substituted service pursuant to the Alabama long-arm statute.[2] The defendant's claim, rejected by the United States district court for northern Alabama,[3] was that the exercise of jurisdiction was a violation of due process and the first amendment. The United States court of appeals sustained this claim and reversed. *New York Times Co. v. Connor*, 365 F.2d 567 (5th Cir. 1966).

It is settled, in the absence of personal service of a summons upon a defendant

1. The original service of process was made pursuant to the Alabama long-arm statute: "Service on nonresident doing business or performing work or service in state.—Any . . . corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall do any business or perform any character of work or service in this state shall, by the doing of such busines or the performing of such work, or services, be deemed to have appointed the secretary of state, or his successor or successors in office, to be the true and lawful attorney or agent of such nonresident, upon whom process may be served in any action accrued or accruing from the doing of such business, or the performing of such work, or service, or as an incident thereto by any such nonresident, or his, its or their agent, servant or employee." Ala. Acts 1953, No. 282. The section was amended subsequent to the instant case. Ala. Code tit. 7, § 199(1) (Supp. 1965).

On interlocutory appeal, the United States court of appeals for the Fifth Circuit quashed the service on the ground that Alabama followed the single publication rule. The single publication rule in libel actions provides that the tort occurs only at the place where the newspaper is printed. New York Times Co. v. Connor, 291 F.2d 492, 494 (5th Cir. 1961). The rule, in effect, treats "an entire edition of a newspaper, magazine or book . . . as only one publication, and the plaintiff is permitted to plead and prove merely a general distribution of the libel and show the extent of the circulation as evidence bearing on the damages." Prosser, Torts § 108, at 788 (3d ed. 1964). (Footnotes omitted.) The service was thus improper for failure to meet the statutory requirement "that the cause of action must have accrued . . . from some business . . . or service there." New York Times Co. v. Connor, 291 F.2d 492, 496 (5th Cir. 1961). But see Buckley v. New York Post Corp., No. 30757, 2d Cir., Jan. 10, 1967.

The plaintiff amended his complaint to allege a cause of action arising from the Times' distribution in Alabama. The United States district court for the Northern District of Alabama dismissed because " 'no new matter not heretofore ruled on' " was presented. 365 F.2d at 569. This decision was appealed to the Fifth Circuit. Prior to the argument of the appeal, the Alabama supreme court held in New York Times Co. v. Sullivan, 273 Ala. 656, 144 So. 2d 25 (1962), rev'd on other grounds, 376 U.S. 254 (1964), that the Fifth Circuit's statement of Alabama law, made when quashing service in the instant case, was erroneous. 273 Ala. at 687, 144 So. 2d at 51. The court held that the Alabama long-arm statute was intended to go to the constitutional limits of due process, id. at 670, 144 So. 2d at 34, and that the distribution of a libel in Alabama, though printed elsewhere, raised a cause of action in Alabama. Id. at 687, 144 So. 2d at 51.

The Fifth Circuit then remanded the case to the district court for a trial on the merits, withholding decision of the constitutional questions. Connor v. New York Times Co., 310 F.2d 133 (5th Cir. 1962).

2. Ala. Acts 1953, No. 282 (now Ala. Code tit. 7, § 199(1) (Supp. 1965)).

3. 365 F.2d at 569.

within a state, that the defendant must have certain minimum contacts with the state if an exercise of personal jurisdiction is to be consistent with the requirements of due process.[4] The instant court found the Times' contacts with the state of Alabama to be as follows:

> The New York Times Company is a New York corporation which . . . . maintains no office, employees or agents in Alabama. Newspapers are mailed directly from New York . . . and payment is due in New York. Staff correspondents, other than [Harrison] Salisbury [who wrote the stories alleged to have been libelous], had visited Alabama on seven occasions during a period from April 1, 1959, to August 22, 1960. The Times sometimes purchased stories at a certain rate per word from [part-time] independent correspondents [called stringers] located in Alabama . . . . During the period mentioned above, The Times paid Alabama stringers . . . $415. Five times during this period, Times employees visited Alabama soliciting prospective advertisers. Alabama advertising accounted for approximately 25/1000 to 46/1000 of 1% of the total Times advertising revenue. Average daily circulation in Alabama was some 395 copies out of a total approximate circulation of 650,000. Sunday circulation . . . was about 2,455 out of roughly 1,300,000. Alabama sales revenue accounted for some 23/100 of 1% of the total sales revenue.[5]

The court found[6] that these contacts were virtually the same as those which, in *Buckley v. New York Times Co.*,[7] were found insufficient[8] to satisfy due process of law. *Buckley* held that during the pertinent period the " 'quality and nature' "[9] of these newspaper companies' business activities was not " 'continuous and systematic.' "[10] The court found, rather, that these activities amounted to at most a " 'casual presence' "[11] in Louisiana—insufficient to deem it reasonable, within the due process requirements, for Louisiana to enforce obligations arising from these activities.[12]

To apply *Buckley* to the present case, the court had to distinguish its own intervening decision in *Elkhart Eng'r Corp. v. Dornier Werke.*[13] In the latter case, long-arm jurisdiction was upheld in favor of a Wisconsin corporation and against a German corporation for damage to the former's airplane, which was being demonstrated by the defendant in Alabama. This single transaction was

4. E.g., Hanson v. Denckla, 357 U.S. 235, 251 (1958); McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

5. 365 F.2d at 570.

6. Ibid.

7. 338 F.2d 470 (5th Cir. 1964), 39 Tul. L. Rev. 927 (1965).

8. 338 F.2d at 472-75.

9. Id. at 475.

10. Ibid.

11. Ibid.

12. Ibid. In applying Buckley to the instant case, the instant court rejected a concurring opinion by Judge Rives of the Fifth Circuit in Curtis Publishing Co. v. Birdsong, 360 F.2d 344, 348 (5th Cir. 1966), which suggested that the Alabama long-arm statute was broader than the Louisiana statute. The instant court found that the Louisiana statute was in fact as broad as the limits of due process and thus as broad as the Alabama statute. 365 F.2d at 571.

13. 343 F.2d 861 (5th Cir. 1965).

held to be a transaction of business within Alabama and, therefore, service upon the defendant pursuant to the state's long-arm statute was consistent with due process of law. The *Elkhart* court, in construing the Supreme Court opinions in *International Shoe Co. v. Washington*[14] and *McGee v. International Life Ins. Co.*[15] noted that

> Alabama may, consistent with the due process clause of the Fourteenth Amendment, assert jurisdiction over a non-resident, non-qualifying corporation in suits on a claim of liability for tortious injury arising out of activity of the non-resident within the state, even though only a single transaction is involved, and regardless of whether the activity is considered dangerous.[16]

To avoid the broad *Elkhart* policy, the instant court held that "First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity."[17] The court noted[18] that this distinction was suggested in *Walker v. Savell.*[19] There, however, the court found that it was

> the policy of the state of Mississippi to require a much stricter showing of the doing of business within that state by a foreign newspaper . . . before it is to be held amenable to local service in a libel suit than would be the case in a suit against an ordinary . . . corporation. We think there is reason for such a distinction because of the inherent danger or threat to the free exercise of the right of freedom of the press if jurisdiction in every state can be inferred from minimal contacts.[20]

But the *Walker* court was not required to decide whether Mississippi's choice was a constitutional necessity.

The present court also found supportable language in the analogous cases of *Grosjean v. American Press Co.*[21] and *NAACP v. Button.*[22] In *Grosjean,* a tax "with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers" was found unconstitutional as infringing on the freedom of the press,[23] and in *Button,* statutes which regulated the legal operations of the NAACP were found unconstitutional as an encroachment on freedom of expression. In *Button,* Mr. Justice Brennan wrote that "because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[24] Subjecting a newspaper to libel suits in faraway jurisdictions may well be a burden on expression, but

14. 326 U.S. 310 (1945).
15. 355 U.S. 220 (1957).
16. 343 F.2d at 868.
17. 365 F.2d at 572.
18. Ibid.
19. 335 F.2d 536 (5th Cir. 1964).
20. Id. at 544.
21. 297 U.S. 233 (1936).
22. 371 U.S. 415 (1963).
23. 297 U.S. at 251.
24. 371 U.S. at 433.

it is questionable whether the burden is as heavy or of the same character as the restrictions on the first and fourteenth amendment freedoms present in the *Grosjean* and *Button* cases. The Supreme Court noted in *Grosjean* that the tax there was "a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties."[25] The exercise of jurisdiction over a newspaper as a result of a published libel can hardly be said to be deliberately calculated "to limit the circulation of information to which the public is entitled . . . ."[26]

In refusing to apply *Elkhart* to the instant case the court offered a policy argument, namely, that the circulation of a single copy of the newspaper could subject a foreign newspaper "to libel actions and the risk of large judgments at the hands of local juries incensed by the out-of-state newspaper's coverage of local events."[27] The court questioned whether a newspaper in the face of such a risk would freely circulate "in any state where the size of . . . circulation does not balance the danger of this liability."[28] The court argued that if service of process were permitted in the instant case it would discourage out-of-state newspapers from circulating in Alabama and thus deprive Alabama citizens of free access to these newspapers.[29] However, the other side of this coin is that if Alabama citizens are to be able to read the New York Times, they must forego the right to recover for defamation in their own courts, even though the libel be transmitted to third parties within their state. Although freedom of the press has been held to be so inviolable that publication cannot be enjoined, nevertheless, the press must be prepared to answer, as are all persons, for torts committed through publication.[30]

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25. 297 U.S. at 250.

26. Ibid.

27. 365 F.2d at 572.

28. Ibid.

29. Ibid. See also Near v. Minnesota, 283 U.S. 697 (1931).

Early this year the Second Circuit in Buckley v. New York Post Corp., No. 30757, 2d Cir., Jan. 10, 1967, found minimum contacts in permitting long-arm jurisdiction over the defendant newspaper under the tortious act provision in the Connecticut long-arm statute. Conn. Gen. Stat. Rev. § 33-411(c)(4) (1962). The court refused to use the first amendment to increase the minimum contacts requirement, thus specifically rejecting the Fifth Circuit's theory in Connor. Nor would it allow the single publication rule to upset the result. It must be remembered, however, that this case involved no hardship to the defendant, which was required to travel only forty miles to defend.

30. A possible theory in support of allowing long-arm jurisdiction in libel cases is the nexus between the cause of action and the community in which the plaintiff resides. A plaintiff might be entitled to have a judge and jury selected from the community in which he suffers the principal damage to his reputation. They may be best able to determine local sentiments and resolve ambiguities and might be in the best position to compute damages. See Comment, 67 Colum. L. Rev. 342, 363 (1967). These advantages must be measured against the defendant's right to a fair and impartial jury. Since punitive damages were sought in the instant case, the proceeding was quasi-criminal in nature; therefore, the reasons which would normally compel a change of venue, namely local prejudice, might also inveigh against allowing jurisdiction.

The instant court could have found the service of process constitutional on one of two theories. First, under the authority of *Elkhart*, there was sufficient business activity to predicate the service on the transaction of business. The New York Times, by sending news-gathering agents into Alabama and by distributing 130,000 newspapers annually in Alabama, would appear to have contacts sufficient to satisfy due process of law.[31] Secondly, perhaps jurisdiction could have been predicated on the seriousness of the tortious act committed in the state.[32] In *Hess v. Pawloski*,[33] the Court found the commission of a single tortious act within a state sufficient to give the courts of that state jurisdiction over the tortfeasor.[34] Since Alabama has abrogated the "single publication" rule,[35] a tortious act was committed by the New York Times in Alabama by circulating the libel.[36]

It may be good public policy out of simple deference to the first amendment, to give newspapers protection commensurate with their first amendment activities and under appropriate circumstances greater protection than other business organizations. However, it is another thing to conclude that the Constitution demands that newspapers, such as the New York Times, whose circulation is not limited to a particular community or to a particular jurisdiction, be answerable for libel only in that jurisdiction where it is actually published. For it appears to be valid to conclude from the present case that, if the Times is not answerable in Alabama where it libels a citizen, it may not be answerable in any state of the United States save New York.

31. See McGee v. International Life Ins. Co., 355 U.S. 220 (1957), where jurisdiction was predicated on the fact that a single insurance policy was sold within the state of California.

32. The Alabama supreme court has stated that its long-arm statute goes to the limits of due process. New York Times Co. v. Sullivan, 273 Ala. 656, 670, 144 So. 2d 25, 34 (1962), rev'd on other grounds, 376 U.S. 254 (1964). Although the statute speaks only of "doing business," it is arguable that, since the statute goes "to the limits of due process" with respect to long-arm jurisdiction, it encompasses a tortious act committed within its state. Jurisdiction is measured in terms of contacts and is far broader than the requirement of "doing business." If this interpretation was not intended by the Alabama supreme court, the jurisdiction must then be predicated solely on the theory of "doing business." Ala. Acts 1953, No. 282 (now Ala. Code tit. 7, § 199(1) (Supp. 1965)).

If both theories are available, "doing business" may be the better because of the occasional difficulty of determining the situs of a tortious act. See, e.g., Platt Corp. v. Platt, 17 N.Y.2d 234, 217 N.E.2d 134, 270 N.Y.S.2d 408 (1966), 35 Fordham L. Rev. 363; 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.

33. 274 U.S. 352 (1927).

34. Id. at 356. This case is often cited with International Shoe Co. v. Washington, 326 U.S. 310 (1945), in finding "single act" type long-arm statutes constitutional.

35. New York Times Co. v. Sullivan, 273 Ala. 656, 670, 144 So. 2d 25, 34 (1962), rev'd on other grounds, 376 U.S. 254 (1964).

36. See ibid.

Limited Partnership—Limited Partner Permitted To Bring a Derivative Action.—Riviera Congress Associates, a New York limited partnership, granted Yassky Corporation a lease on a motel. Through a series of leases, sub-leases and assignments,[1] the motel came into the hands of Mid-Manhattan Associates, another limited partnership which had as its general partners the four general partners of Riviera Congress. The limited partners of Riviera Congress brought an action in the name of the partnership for the rent due from Mid-Manhattan.[2] Mid-Manhattan set up as a defense a release given by the general partners of Riviera Congress. The plaintiffs claimed that the release was invalid since it had been given by the defendants, as general partners of Riviera Congress, to themselves, as general partners of Mid-Manhattan. The appellate division, in denying the plaintiffs' motion for summary judgment, also denied the plaintiffs' right to maintain a derivative or class action.[3] A unanimous court of appeals, per Judge Fuld, found issues of fact[4] and therefore affirmed the appellate division with respect to the denial of summary judgment. But the court further held that "the plaintiffs are authorized to sue as limited partners on behalf of the partnership entity to enforce a partnership claim when those in control of the business wrongfully decline to do so."[5] *Riviera Congress Associates v. Yassky*, 18 N.Y.2d 540, 223 N.E.2d 876, 277 N.Y.S.2d 386 (1966).

The instant court had before it at least three basic questions of partnership law which previously had been unsettled. The court had to decide whether a limited partnership constituted a separate entity, apart from its individual members, through which or on behalf of which a limited partner could bring a derivative suit. That issue raised the problem of whether the initiation and

1. The complete series of transactions was as follows: Riviera Congress Associates entered into a twenty-year lease with Yassky Corporation, a corporation controlled by the four general partners of Riviera Congress. Yassky Corporation, with the consent of the general partners of Riviera Congress, assigned the lease to the Riviera Corporation, another company wholly owned and operated by the four general partners of Riviera Congress. Riviera Corporation assigned its interest to Mid-Manhattan Associates, another limited partnership whose general partners were again the four general partners of Riviera Congress. Mid-Manhattan subleased the premises back to the Riviera Corporation. When severe operating losses were sustained, Mid-Manhattan Associates, with the approval of Riviera Congress, assigned its interest in the lease to Mid-Manhattan Hotel Associates, Inc., another corporation owned and operated by the four individual defendants. Shortly thereafter, the lease was re-assigned to Riviera Congress Associates, Inc. The Riviera Corporation then assigned its sublease to Riviera Congress Associates, Inc., thus placing Riviera Congress Associates in possession of the motel without a tenant. Riviera Congress Associates v. Yassky, 18 N.Y.2d 540, 543-44, 223 N.E.2d 876, 877-78, 277 N.Y.S.2d 386, 388-89 (1966).

2. Id. at 545, 223 N.E.2d at 878, 277 N.Y.S.2d at 390 (1966).

3. 25 App. Div. 2d 291, 296, 268 N.Y.S.2d 854, 859 (1st Dep't), aff'd, 18 N.Y.2d 540, 223 N.E.2d 876, 277 N.Y.S.2d 386 (1966).

4. The prospectus sent out to the limited partners indicated that self-dealing would be involved and the partnership agreement itself permitted such activity. The unresolved question was whether general partners had kept within the limits of these documents. 18 N.Y.2d at 548-49, 223 N.E.2d at 880, 277 N.Y.S.2d at 393.

5. Id. at 547, 223 N.E.2d at 879, 277 N.Y.S.2d at 391.

prosecution of such a suit would render the limited partners liable as general partners for participating in the management of the partnership. Finally, the court had to determine whether the wrongful failure of the general partners to enforce partnership rights was a breach of duty which would gain for the limited partners the right to bring a derivative suit on behalf of the limited partnership.

The conflict between the aggregate and entity concepts of the partnership personality has long plagued the courts.[6] The problem stems primarily from the omission of a section contained in the original drafts of the Uniform Partnership Act, which specifically defined a partnership as having an existence apart from that of its members.[7] This underlying intention is reflected in many other sections of the act,[8] which retained the entity theory, despite the exclusion of an express provision. Consequently, the courts and the legislature of New York have had to determine, in *ad hoc* fashion, if and when a partnership should be considered an entity.[9] Furthermore, the courts have been reluctant to take it upon themselves to modify the traditional aggregate concept.[10] Perhaps the most notable concession in New York, prior to the instant case, occurred in *Ruzicka v. Rager*,[11] where the court considered a limited partnership "as a distinct entity for the purposes of pleading."[12] However, the courts of New York long considered the favor granted in *Ruzicka* as a point beyond which they were unwilling to move.[13]

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6. See, e.g., Caplan v. Caplan, 268 N.Y. 445, 198 N.E. 23 (1935) (partnership not an entity for purpose of tort liability); Hartigan v. Casualty Co. of America, 227 N.Y. 175, 124 N.E. 789 (1919) (insurance policy insured the partnership as an entity, not the partners as aggregate members). See also George A. Hamid & Son v. Indemnity Ins. Co., 14 App. Div. 2d 107, 217 N.Y.S.2d 219 (1st Dep't 1961), aff'd, 13 N.Y.2d 635, 191 N.E.2d 96, 240 N.Y.S.2d 613 (1963) (memorandum decision).

7. See Lewis, The Uniform Partnership Act—A Reply to Mr. Crane's Criticism, 29 Harv. L. Rev. 158, 159 (1915); Crane, The Uniform Partnership Act—A Criticism, 28 Harv. L. Rev. 762, 769 (1915). A limited partnership under the Uniform Limited Partnership Act is not given an existence apart from its members. See Uniform Limited Partnership Act § 1; N.Y. Partnership Law § 90. As a result the ambiguity caused by the conflict between the entity and aggregate theories present under the Uniform Partnership Act is also present under the Uniform Limited Partnership Act.

8. See Jensen, Is a Partnership Under the Uniform Partnership Act an Aggregate or an Entity?, 16 Vand. L. Rev. 377, 379 & n.11 (1963). See also N.Y. Partnership Law §§ 2, 20, 21, 23, 24, 25, 26, 40, 41, 43, 50, 51, 52, 53, 54, 61, 66(1)(b), 71(a)(II), 71(h), 71(i).

9. See, e.g., In re Schwartzman, 288 N.Y. 568, 42 N.E.2d 22 (1942) (memorandum decision) (treating partnership as an entity under N.Y. Lab. Law § 502(3)); Ruzicka v. Rager, 305 N.Y. 191, 111 N.E.2d 878 (1953) (treating partnership as an entity for purposes of pleading). See also N.Y. C.P.L.R. 1025.

10. See, e.g., Williams v. Hartshorn, 296 N.Y. 49, 51, 69 N.E.2d 557, 559 (1946): "While the Legislature has the right to consider a partnership apart from its members . . . in the absence of such legislative treatment, a partnership is not to be regarded as a separate entity distinct from the persons who compose it."

11. 305 N.Y. 191, 111 N.E.2d 878 (1953).

12. Id. at 197, 111 N.E.2d at 882.

13. See, e.g., Millard v. Newmark & Co., 24 App. Div. 2d 333, 336, 266 N.Y.S.2d 254, 259 (1st Dep't 1966). But see Klebanow v. New York Produce Exch., 344 F.2d 294 (2d Cir.

The holding of the instant court was explicit in referring to the partnership as an entity,[14] at least for the purposes of bringing a derivative suit. Unfortunately, the court referred to *Williams v. Hartshorn*,[15] which was itself explicit in its denial of the entity status, except when so treated by legislative enactment.[16] It could be argued that the instant court was overruling *Williams* only insofar as its dictum would have been a bar to the commencement of a derivative action by a limited partner. On the other hand, the holding of the court might be interpreted as having a more far reaching effect, since the court in no way qualified or limited its reference to the partnership entity.

The instant court was somewhat more explicit in its treatment of the second problem which it had before it. Prior to this decision, there was some doubt with respect to what effect participation by a limited partner would have on his status as such.[17] Originally, almost any participation in the management of the limited partnership on the part of the limited partner would result in his being deemed a general partner[18] or being held liable as a general partner.[19] The adoption of the Uniform Limited Partnership Act had an ameliorative effect[20] by permitting certain activities. The areas in which a limited partner may take an active part are determined by statute.[21] By exceeding these bounds the limited partner runs the risk of unlimited liability.[22] The controversy in the instant case centered around section 115 of the New York Partnership Law, which provides that "a contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership."[23] This could be,

1965). There the court, purporting to apply New York law, allowed a limited partner to bring a derivative suit. The court found no support in New York law for treating a limited partnership as an entity for this purpose; instead, the court relied on § 4 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964), in order to deem "the partnership rather than a partner as the person injured." 344 F.2d at 296. See Comment, 65 Colum. L. Rev. 1463, 1474 (1965).

14. 18 N.Y.2d at 547, 223 N.E.2d at 879, 277 N.Y.S.2d at 391.

15. 296 N.Y. 49, 69 N.E.2d 557 (1946).

16. Id. at 51, 69 N.E.2d at 559.

17. See, e.g., Riviera Congress Associates v. Yassky, 25 App. Div. 2d 291, 296, 268 N.Y.S.2d 854, 859; Executive Hotel Associates v. Elm Hotel Corp., 41 Misc. 2d 354, 359, 245 N.Y.S.2d 929, 933 (N.Y.C. Civ. Ct.), aff'd mem., 43 Misc. 2d 153, 250 N.Y.S.2d 351 (App. T. 1964) (limited partner permitted to act as general partner only after assuming liability as a general partner).

18. See, e.g., Hogg v. Ellis, 8 How. Pr. 473 (N.Y. Sup. Ct. 1853).

19. See, e.g., Casola v. Kugelman, 33 App. Div. 428, 54 N.Y. Supp. 89 (1st Dep't 1898), aff'd sub nom. Casola v. Vasquez, 164 N.Y. 608, 58 N.E. 1085 (1900); Bulkley v. Dingman, 11 Barb. 289 (N.Y. Sup. Ct. 1851); Lewis, The Uniform Limited Partnership Act, 65 U. Pa. L. Rev. 715, 720 (1917).

20. See Comment, 65 Colum. L. Rev. 1463, 1465 (1965).

21. See, e.g., N.Y. Partnership Law §§ 98, 99, 102, 104 and 108.

22. See, e.g., N.Y. Partnership Law § 96: "A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business."

23. This section is identical to Uniform Limited Partnership Act § 26.

and often has been, put forth as a very strong argument against allowing the limited partner the right to sue on behalf of the partnership. Some courts have stated expressly that this section absolutely bars any action by the limited partner, except as provided under the statute.[24] However, a federal court[25] and several lower courts in New York[26] expressed some doubt as to whether section 115 by itself was a complete bar to action on the part of a limited partner under all circumstances.

Those courts which favored a more liberal interpretation of the section attempted to demonstrate that the purposes of a limited partnership, and section 115 in particular, would best be served by such an interpretation. These courts felt that section 115 was intended only to prevent limited partners from interfering in the management of the partnership.[27]

One of the more significant purposes of a limited partnership is the encouragement of investment.[28] This purpose would certainly be thwarted if the limited partners knew that they would be confronted with two equally discouraging alternatives, should a general partner refuse to bring an action to vindicate a wrong done to the partnership. The limited partner could meekly acquiesce in the general partner's inaction and the loss which would result, or the limited partner could himself bring the action and run the risk of substantially increased liability.

One reason offered for not permitting a limited partner to take an active role in the business of the partnership is that creditors would not want the partnership managed by one who would not be liable should the venture fail. Therefore it is understandable that the limited partner was excluded from most managerial functions.[29] However, when the general partners wrongfully refuse to

24. See, e.g., Millard v. Newmark & Co., 24 App. Div. 2d 333, 336, 266 N.Y.S.2d 254, 259 (1st Dep't 1966).

25. Klebanow v. New York Produce Exch., 344 F.2d 294, 298 (2d Cir. 1965). "Although the state decisions bearing directly on the point are from tribunals not high in the judicial hierarchy and may be susceptible of distinction, they at least reveal that the New York courts do not consider § 115 a clear mandate against limited partners' capacity to bring an action like this." This evaluation of New York law was sharply criticized in Millard v. Newmark & Co., 24 App. Div. 2d 333, 339-40, 266 N.Y.S.2d 262, 264 (1st Dep't 1966). In addition, the appellate division, when considering the instant case, claimed that § 115 would bar such an action. 25 App. Div. 2d at 296, 268 N.Y.S.2d at 859.

26. See, e.g., Cooper Prods. Co. v. Twin Bowl Co., N.Y.L.J., Aug. 21, 1962, p. 8, col. 7 (Sup. Ct.).

27. See, e.g., Klebanow v. New York Produce Exch., 344 F.2d 294, 298 (2d Cir. 1965). "The purposes of § 115, like that of its less minatory predecessor, were reasonably plain. General partners need not join limited partners in an action by the partnership; ordinarily limited partners may not sue since this will interfere with the management by the general partners . . . a suitor against the partnership need not join a limited partner . . . ." See Comment, 65 Colum. L. Rev. 1463, 1474-76 (1965); The Association of the Bar of the City of New York, Comm. on State Legislation, Bull. No. 6, March 13, 1967, pp. 303-04 [hereinafter cited as Committee Bulletin].

28. See Lanier v. Bowdoin, 282 N.Y. 32, 24 N.E.2d 732 (1939); Nadler, The Limited Partnership Under the Uniform Limited Partnership Act, 65 Com. L.J. 71 (1960).

29. See notes 26 and 27 supra and accompanying text.

enforce a partnership right, it seems that the interests of the creditors will benefit rather than suffer by allowing the limited partner to act in accordance with the holding of the instant case.[30]

In addition, it would appear that the basic assumption which supports section 115 is that the general partners will make every diligent effort necessary to prosecute wrongs committed against the partnership.[31] Should that assumption prove to be erroneous, it would seem unreasonable to permit the wrong to go unpunished,[32] leaving the limited partner virtually helpless in his own right.[33] By preventing the limited partner from prosecuting such a claim on behalf of the partnership, his liability, while remaining limited in the absolute sense, would increase significantly in the practical sense.

The present court, mindful of the lower court rulings which had held limited partners who attempted to bring suit liable as general partners,[34] authorized the plaintiffs to bring suit "as limited partners."[35] The court did not specify whether the limited partner would still be held liable as a general partner for bringing a derivative suit. The argument could be made, however, that the court, in allowing them to bring suit "as limited partners" and not as general partners, indicated an intention to permit suit while retaining limited liability.[36] As a result of the unclear language in the instant case, further judicial or legislative action might be necessary to clarify the issue.

While most courts had been willing to impose a strict fiduciary duty among

30. The fruits of an action brought on behalf of the partnership by a limited partner would increase the assets of the firm and thereby make more secure the position of the creditors of the partnership. See Comment, 40 N.Y.U.L. Rev. 1174, 1179 (1965).

31. See Lewis, The Uniform Limited Partnership Act, 65 U. Pa. L. Rev. 715, 717 (1917); Comment, 40 N.Y.U.L. Rev. 1174 (1965).

32. See Lichtyger v. Franchard Corp., 18 N.Y.2d 528, 223 N.E.2d 869, 277 N.Y.S.2d 377 (1966). "To permit stockholders to bring a representative suit but to deny the same privilege to limited partners would be highly unreasonable." Id. at 537, 223 N.E.2d at 874, 277 N.Y.S.2d at 384.

33. A limited partner is not without any legal rights or remedies in the event of misconduct on the part of the general partners. N.Y. Partnership Law § 99 gives the limited partner the right to inspect partnership books, the right to an accounting, and the right to seek a decree of dissolution. However, none of these remedies would provide an effective and efficient disposition of a situation such as that presented in the instant case. Moreover, to require a limited partner to seek dissolution as a means of redress would preclude him from continuing to profit in the future from what might well be a prospering business.

34. See 18 N.Y.2d at 546, 233 N.E.2d at 879, 277 N.Y.S.2d at 390-91. The court referred to lower court decisions, e.g., Millard v. Newmark & Co., 24 App. Div. 2d 333, 266 N.Y.S.2d 254 (1st Dep't 1966), which had expressly held limited partners liable as general partners when they attempted to bring suit on behalf of the partnership.

35. 18 N.Y.2d at 547, 223 N.E.2d at 879, 277 N.Y.S.2d at 391.

36. See Committee Bulletin at 305-06. "It is not clear whether this view [that a limited partner participates in management when he brings a derivative suit] was modified by the court of appeals' decision in the case. However, it would seem inconsistent to permit a derivative suit when the general partners who manage the partnership refuse to institute action, and yet deter the limited partner from asserting his right through fear of sacrificing his limited liability." Ibid.

the general partners of a limited partnership,[37] few had been willing to extend that duty to the limited partner.[38] However, in *Lichtyger v. Franchard Corp.*,[39] decided on the same day as the instant decision, the court of appeals reasoned that "there is no basis or warrant for distinguishing the fiduciary relationship of corporate director and shareholder from that of general partner and limited partner."[40] General partners, like corporate directors, are in control of the business and must deal fairly with the rights and interests of the investors.[41] The *Lichtyger* court by so holding imposed the same type of fiduciary relationship as exists within the corporate enterprise. The instant court, to make more emphatic its holding in *Lichtyger*, stated that "there can be no question that a managing or general partner of a limited partnership is bound in a fiduciary relationship with the limited partners . . . ."[42] Both decisions[43] imposed the standard of behavior as set forth by the court, speaking through Chief Judge Cardozo, in *Meinhard v. Salmon*.[44]

As a result of such relationship "the limited partners . . . are, therefore, *cestuis que trustent*"[45] with the managing partners as trustees. Proceeding upon the fundamental principles of the law of trusts, the *cestuis* have an equitable right,[46] independent of statute,[47] to sue on behalf of the trust when the trustees refuse to perform their duty.[48]

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37. The appellate division in the instant case stated that "undoubtedly there must be an element of mutual trust and confidence between general partners of a limited partnership." 25 App. Div. 2d at 296-97, 268 N.Y.S.2d at 859. See Skolny v. Richter, 139 App. Div. 534, 124 N.Y. Supp. 152 (1st Dep't 1910). "The element of mutual trust and confidence which is the keynote in the relation between general partners is wholly and conspicuously lacking [between general partners and limited partners] . . . ." Id. at 541, 124 N.Y. Supp. at 157.

38. See, e.g., Soffer v. Glickman, 27 Misc. 2d 721, 209 N.Y.S.2d 743 (Sup. Ct. 1961). "I hold . . . that the individual defendants [general partners] owed to their partners—limited though they be—a responsibility of sensitive fiduciary quality within the epic pronouncement of Meinhard v. Salmon . . . ." Id. at 726, 209 N.Y.S.2d at 749.

39. 18 N.Y.2d 528, 223 N.E.2d 869, 277 N.Y.S.2d 377 (1966).

40. Id. at 536, 223 N.E.2d at 873, 277 N.Y.S.2d at 383.

41. Id. at 536, 223 N.E.2d at 873-74, 277 N.Y.S.2d at 383.

42. 18 N.Y.2d at 547, 223 N.E.2d at 879, 277 N.Y.S.2d at 392.

43. See id. at 547, 223 N.E.2d at 879, 277 N.Y.S. at 392; Lichtyger v. Franchard Corp., 18 N.Y.2d 528, 536, 223 N.E.2d 869, 874, 277 N.Y.S.2d 377, 384 (1966).

44. 249 N.Y. 458, 164 N.E. 545 (1928). "Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." Id. at 464, 164 N.E. at 546.

45. 18 N.Y.2d at 547, 223 N.E.2d at 879, 277 N.Y.S.2d at 392. See Klebanow v. Funston, 35 F.R.D. 518, 520 (S.D.N.Y. 1964).

46. E.g., Robinson v. Smith, 3 Paige Ch. 222, 232 (1832).

47. Brinckerhoff v. Bostwich, 88 N.Y. 52, 59 (1882).

48. Riviera Congress Associates v. Yassky, 18 N.Y.2d 540, 547, 223 N.E.2d 876, 879, 277 N.Y.S.2d 386, 391 (1966). In Klebanow v. New York Produce Exch., 344 F.2d 294 (2d Cir. 1965), discussed at note 13 supra, the court noted that a limited partner is in a position analogous to that of a cestui que trustent, but took no decisive position on that issue. It instead stated that "it makes considerably greater sense to clothe the . . . appellants with whatever descriptive phrase is necessary to enable them to sue on behalf of the partnership . . . ." Id. at 297.

Once having established a fiduciary relationship between limited and general partners, it remains to be seen to what extent that fiduciary duty must be breached by a general partner before the limited partners' rights will become activated.[49] The instant court only indicated that such action could be brought "when those in control . . . wrongfully decline to do so."[50]

Even by limiting the use of a derivative action to situations involving disability or wrongful refusal, there remains the possibility that the limited partner might make improprietous use of his newly acquired right.[51] The right to a shareholder's derivative suit has been conditioned,[52] and it is expected that similar conditioning would be needed in the case of a limited partner's suit. The court has now opened the door to the limited partner and left it to some future court or to the legislature to impose effective methods of controlling the cases which will follow.

A bill was before the last session of the New York legislature had as its stated purpose the codification of the holding of the present case.[53] This bill also incorporated the substance of sections 626 and 627 of the New York Business Corporation Law[54] into the New York Partnership Law. To prevent general liability on the part of the limited partner bringing such a suit, Section 96 would have been modified to the extent that the "commencement of or other participation by a limited partner in [a derivative action] . . . shall not be deemed to be taking part in the control of the business within the meaning of this sec-

49. The Klebanow case illustrates a situation in which the general partners did not refuse to bring suit, but had effectively disenabled themselves from bringing suit. Id. at 295-96. Such a situation might well be excluded by a literal reading of the instant decision. It could be argued that the reference to Klebanow in the instant case, 18 N.Y.2d at 548, 223 N.E.2d at 880, 277 N.Y.S.2d at 392, indicated an intention to adopt the federal court's contention that a limited partner may "bring an action on behalf of the partnership when the general partners have disabled themselves or wrongfully refused . . . ." 344 F.2d at 298.

50. 18 N.Y.2d at 547, 223 N.E.2d at 879, 277 N.Y.S.2d at 391.

51. See Comment, 65 Colum. L. Rev. 1463, 1469-70 (1965) (abuses which existed in derivative suits, prior to judicial or statutory control).

52. See, e.g., N.Y. Bus. Corp. Law § 626, which in substance provides that while a shareholder has a right to sue derivatively, he must make a showing that he was a shareholder both at the time the cause of action accrued and at the time the action was commenced. In addition the shareholder must set forth in detail his efforts to obtain corporate action. And once having commenced such an action, it may not be discontinued without court approval. N.Y. Bus. Corp. Law § 627 provides that a shareholder, bringing a derivative suit, holding less than a certain percentage of the outstanding shares or not having an interest in excess of $50,000, may be required to post security in order to bring such action.

53. Ass. Intro. No. 3781, Pr. No. 3887, N.Y. State Leg. 190th Sess. (1967) [hereinafter cited as Assembly Bill]. This bill passed the Assembly on March 7, 1967 and on March 8, 1967 was sent to the Senate Codes Committee. That committee did not report the bill for floor action; therefore, the bill did not pass during this session of the Legislature. Letter From State Senator Jay P. Rolison, Jr. to the Fordham Law Review, April 7, 1967, on file in the Fordham Law Review Office. The bill was recommended by the Law Revision Commission to clarify and codify the holding in the instant case. Committee Bulletin 303.

54. Assembly Bill §§ 3, 4.

tion."[55] In addition, section 115 would have been modified[56] to conform the entire partnership law to the other changes which were to be made.

It would appear that this type of legislation would curtail, at the outset, the abuses which could follow from the present decision. The requirement of contemporaneous ownership[57] would prevent the purchase of a cause of action; the requirement of exhausting intra-partnership remedies[58] would limit the use of the derivative suit as a first resort; the requirement of continuing an action, unless terminated with court approval,[59] would prevent secret settlements which would prefer certain limited partners over others; the payment of the limited partner's expenses only if he is successful,[60] would discourage the commencement of ill-grounded actions; and the requirement of posting security[61] would militate against the commencement of "strike suits" by the owners of less than a substantial interest in the partnership.

Concededly, sections 626 and 627 of the Business Corporation Law have not been flawless in their operation or effectiveness. However, until some more effective solution is proposed, the adoption of such legislation in the partnership field would certainly obtain for that area the substantial benefits which these sections have brought to the corporate field, and would be a helpful corollary to the present decision.

Taxation—Business League Exemption—Bottlers' Association Held To Qualify for Income Tax Exemption as a Non-Profit Business League.— The Pepsi-Cola Bottlers' Association, a non-profit organization, was formed to promote and improve the business of bottling and selling Pepsi-Cola. Membership in the association was limited to individuals or companies engaged in the bottling and sale of Pepsi-Cola.[1] Virtually all of the members, however, also bottled other soft drinks.[2] The association disseminated reports dealing with improved procedures and equipment used in the bottling industry,[3] and conducted a program of conferences on bookkeeping, accounting methods and management

55. Assembly Bill § 1.
56. Assembly Bill § 2.
57. Assembly Bill § 3.
58. Ibid.
59. Ibid.
60. Ibid.
61. Assembly Bill § 4.

1. As of 1959, approximately 83% of all Pepsi-Cola bottlers in the United States were members. 369 F.2d 250, 251 (7th Cir. 1966).

2. Ibid. However, members who ceased to bottle Pepsi-Cola were automatically excised from the organization. Brief for Appellant, p. 2, Pepsi-Cola Bottlers' Ass'n v. United States, 369 F.2d 250 (7th Cir. 1966).

3. 369 F.2d at 252. Non-member bottlers of Pepsi-Cola also received the news bulletins, questionnaires and reports. Ibid.

training for members.[4] The court of appeals for the Seventh Circuit, in affirming the district court,[5] held that the Bottlers' Association was exempt from payment of income tax as a business league under § 501(c)(6) of the Internal Revenue Code of 1954. *Pepsi-Cola Bottlers' Ass'n v. United States*, 369 F.2d 250 (7th Cir. 1966).

Section 501(c)(6) of the Internal Revenue Code of 1954 exempts the following organizations from payment of income tax: "business leagues, chambers of commerce, real-estate boards, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual." Although the Code provides no definition of a business league, Treasury Regulation § 1.501(c)(6)-1 has defined it to be

> an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus, its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons.[6]

The instant court held that the Bottlers' Association was within the scope of § 501(c)(6) since the association was a non-profit organization and since its operations contributed to the improvement of the Pepsi-Cola bottling business, thereby incidentially benefiting the public consumers.[7] However, the regu-

4. Id. at 251-52. In addition, the association reported on types of insurance available and had auditing, by-laws, nominating and resolutions committees. Ibid.

5. Pepsi-Cola Bottlers' Ass'n v. United States, 65-2 U.S. Tax Cas. ¶ 9705 (N.D. Ill. 1965). The Internal Revenue Service had refused to grant an exemption and plaintiff, after paying a tax of $4,770, filed a claim for a refund which was denied. A refund action was commenced in the district court and was decided in favor of the plaintiff. See Brief for Appellee, p. 4.

6. Treas. Reg. § 1.501(c)(6)-1 (1954).

Congress has never indicated any dissatisfaction with the regulation. Treas. Reg. § 74 (1929 ed.), Art. 528; Treas. Reg. § 77 (Rev. Act of 1932), Art. 528; Treas. Reg. § 86 (Rev. Act of 1934), Art. 101(7)-1; Treas. Reg. § 101 (Rev. Act of 1938), Art. 101(7)-1; Treas. Reg. § 103 (1939 Code), § 19.101(7)1; Treas. Reg. § 111 (1939 Code), § 29.101(7)-1. These regulations have remained intact while the revenue laws have all contained similar sections regarding business league exemptions. Rev. Act of 1932, § 103(7), 47 Stat. 169; Rev. Act of 1934, § 101(7), 48 Stat. 680; Rev. Act of 1936, § 101(7), 49 Stat. 1648; Rev. Act of 1938, § 101(7), 52 Stat. 447; Int. Rev. Code of 1939, § 101(7). It could be argued that under the reenactment theory, since the statute was continually reenacted with an interpretative regulation outstanding, the regulation acquired the force of law. Davis, Administrative Law 118 (1965 ed.). Even the critics of the reenactment theory would give it strong authoritative weight, if not more. Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933).

7. 369 F.2d at 252. The court stated that the "association cannot be disqualified merely because its members all bottle a particular soft drink product." Ibid. However, see I.T. 4053, 1951-2 Cum. Bull. 53, where the Commissioner held that, under a similar provision in the 1939 Code, a group of automobile dealers dealing in one specific brand of automobile, whose purpose was to increase sales through cooperative advertising, was not exempt.

lation[8] and case law[9] dictate that to qualify as a business league an organization must possess the general characteristics of chambers of commerce, real-estate boards or boards of trade and have activities that are directed to the improvement of one or more lines of business. The Bottlers' Association in the instant case carried on its activities solely for the direct benefit of Pepsi-Cola bottlers and sellers rather than for the benefit of the bottling business generally or for the benefit of the community.[10] As Judge Kiley noted in his dissent

> bottling Pepsi-Cola is not a line of business. It is only one of a line—one of many competing businesses in the . . . soft drink industry. And the services rendered by the Association to its members are not incidental to a general purpose of improving business conditions. They are essential to an express general purpose, the improvement of the members' competitive position as against non-members.[11]

Northwestern Municipal Ass'n v. United States[12] held that if an association's "main purpose is to benefit its [individual members] . . . it is not exempt."[13] Similarly, in *Produce Exch. Stock Clearing Ass'n v. Helvering*,[14] where the plaintiff corporation was formed for the purpose of performing clearing house services for its members, the court held the corporation not to be a business league notwithstanding any incidental benefit to the public or the trade, since it was formed for the primary purpose of benefiting only its members.[15]

It should be noted that the legislative history is not illuminating as to Congress' specific intent in enacting the statute itself in 1913. See Note, 40 Va. L. Rev. 467 (1954). See also Seidman, Legislative History of Federal Income Tax Laws, 1938-1861, 1002-03 (1938).

8. Treas. Reg. § 1.501(c)(6)-1.

9. See, e.g., Jockey Club v. United States, 137 F. Supp. 419 (Ct. Cl.), cert. denied, 352 U.S. 834 (1956).

10. 369 F.2d at 253 (dissenting opinion). It should be noted that there was an organization, the American Bottlers of Carbonated Beverages, that represented the entire soft drink industry. The purpose of the organization was to deal with improving ethical standards of that industry. Brief for Appellee, pp. 42-43.

11. 369 F.2d at 253 (dissenting opinion).

12. 99 F.2d 460 (8th Cir. 1938). In that case a group of bond-holding banks formed a profit making organization to perform refunding operations for municipalities. The benefits inured directly to the organization and its members.

13. Id. at 463.

14. 71 F.2d 142 (2d Cir. 1934).

15. Id. at 143-44. In Automotive Elec. Ass'n v. Commissioner, 168 F.2d 366 (6th Cir. 1948), an association of manufacturers, distributors and servicers of automotive equipment, one of whose primary purposes was the publication of catalogues listing products of its members, was held to be non-exempt. Here the court said the prime consideration was whether the association was organized and operated for the benefit of members "rather than for the improvement of business conditions generally." Id. at 368. See also Growers Cold Storage Co. v. Commissioner, 17 B.T.A. 1279 (1929), where an association was formed to provide cold storage facilities for its members. In denying exemption the court reasoned that the benefits were specifically for its members and not for the common interest of the community or a line of business.

A line of business has been interpreted to mean an entire industry,[16] or all components of that industry within a city.[17] Exemption has specifically been denied where the organization dealt with only one brand of product.[18] Professor Mertens has stated that "a league organized and operated for the purpose of advertising and promoting the sale of a particular product is primarily a service organization for members and is not entitled to exemption as a business league in the view of the Revenue Service."[19]

The decisions relied upon by the present court are clearly distinguishable from the facts of the instant case. In *Crooks v. Kansas City Hay Dealers' Ass'n*,[20] hay merchants formed an association to promote fairness and to raise the standards of the entire hay business. The Hay Association had no competitors and in effect represented the entire industry. In *Associated Indus. v. Commissioner*,[21] the underlying purpose in forming the organization was to solve critical labor problems that confronted industry in the post-World War I period. This organization possessed the general characteristics of a chamber of commerce, with every facet of industry in Cleveland being represented.[22] Its main purpose was to benefit everyone living in Cleveland, workers and employers as well, by keeping all the factories open-union shops.[23] As such it fell clearly within the defined description of a business league. In citing *National Leather & Shoe Finders Ass'n v. Commissioner*,[24] the instant court again failed to recognize that the association there held exempt was formed to promote the general improvement of business conditions and the training of shoe repairmen and that it represented the entire leather and shoe finders industry.[25]

The Pepsi-Cola Bottlers' Association represented only one brand of product within the soft-drink bottling industry. In light of the facts that the Bottlers' Association was financed in part by the Pepsi-Cola Company;[26] that it was

16. National Leather & Shoe Finders Ass'n v. Commissioner, 9 T.C. 121, 127 (1947). In Commissioner v. Chicago Graphic Arts Fed'n, 128 F.2d 424 (7th Cir. 1942), an organization was upheld as being tax exempt where the organization was comprised of plant owners and operators in the entire printing industry, whose main purpose was to "promote fairness, honesty, and better conditions in the graphic arts industry . . . ." Id. at 427. Thus, the association had the characteristics of a board of trade whose activities were directed towards the improvement of business conditions in an entire industry.

17. Commissioner v. Chicago Graphic Arts Fed'n, 128 F.2d 424, 427 (7th Cir. 1942); Crooks v. Kansas City Hay Dealers' Ass'n, 37 F.2d 83 (8th Cir. 1929); Associated Indus. v. Commissioner, 7 T.C. 1449 (1946).

18. Brief for Appellant, p. 12. See Rev. Rul. 58-294, 1958-1 Cum. Bull. 244 (licenses of one patented product); I.T. 4053, 1951-2 Cum. Bull. 53 (one specific brand of automobile).

19. 6 Mertens, Federal Income Taxation § 34.20, at 90 (1957). (Footnote omitted.)

20. 37 F.2d 83 (8th Cir. 1929).

21. 7 T.C. 1449 (1946).

22. Id. at 1451. The organization included representatives of various industries including steel, laundry, bakery, dairy, meat packing, and service trades. Ibid.

23. Id. at 1456.

24. 9 T.C. 121 (1947).

25. Ibid.

26. 369 F.2d at 251; Brief for Appellee, p. 34. The Pepsi-Cola Company, at their

formed for the purpose of increasing the sales of Pepsi-Cola;[27] and that its membership was limited to bottlers and sellers of Pepsi-Cola;[28] does not the holding here permit the Pepsi-Cola Company to "obtain tax exemption for its creature"[29] at the expense of its competitors within the soft drink industry?[30]

expense, hired a firm, to create and operate a young management training program, for the benefit of members of the Bottlers' Association. Brief for Appellee, appendix, pp. 10-11. The Company not only ran but paid for a week-long management training conference for the members. Ibid. The company absorbed much of the costs of the Association's Standardization Committee. Brief for Appellant, p. 5. Pepsi-Cola furnished a custom designed cost control and accounting system to the Association. Id. at 8.

27. See note 1 supra and accompanying text. It is maintained that the Pepsi-Cola Company could have furnished these services directly and deducted any expenses as valid business expenses under the Int. Rev. Code of 1954, § 162(a).

28. Brief for Appellant, p. 2. "'[T]here is an integral relationship between the parent body and the franchised bottlers. . . . The Pepsi-Cola Bottlers Association acknowledges its role as an advisory arm to the parent organization.'" Id. at 3-4.

29. This was the evil that was expressly hoped to be avoided in Produce Exch. Stock Clearing Ass'n v. Helvering, 71 F.2d 142, 143 (2d Cir. 1934).

30. See Brief for Appellant, p. 13.