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Case Notes

CASE NOTES

Admiralty—Seaman Not Required to Exhaust Grievance Procedures Provided In Collective Bargaining Agreement Before Instituting Wage Claim.—Plaintiff was aboard his employer's ship on six-month articles of employment. When the six month period came to a close on February 3, 1966, the ship was waiting its turn to discharge its cargo in a harbor near Saigon. After a ten-day delay, the ship docked and began to discharge its cargo on February 16. The following day plaintiff was paid by voucher at the American Consulate in Saigon and repatriated to the United States. He finally arrived at the office of Bulk Carriers in Galveston, Texas, on February 22, and was paid the amount specified in the voucher. The seaman claimed that he was entitled to overtime wages in addition to the amount paid to him; and instead of invoking the grievance procedure in the collective bargaining agreement between his union[1] and employer, he brought suit in the United States District Court for the District of Maryland, at Baltimore, against his employer for overtime wages and statutory penalties for late payment of wages under the Seamen's Wage Act of 1915.[2] The district court granted the employer summary judgment[3] for the reason that the seaman had not exhausted the grievance procedure provided in the collective bargaining agreement. The United States Court of Appeals, Fourth Circuit, reversed and remanded to the district court to decide certain factual questions.[4] *Arguelles v. U.S. Bulk Carriers, Inc.*, 408 F.2d 1065 (4th Cir. 1969), *appeal docketed*, No. 284 (U.S. June 26, 1969).

A seaman's claim for wages has always been regarded as a "sacred claim;"[5] and because of his perilous and indispensable service to the country, he has

1. National Maritime Union of America, an affiliate of the AFL-CIO.

2. 46 U.S.C. § 596 (1964). Section 596 provides in substance that the master or owner of a ship making foreign voyages must pay to each seaman his wages within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged whichever happens first. In all cases the seaman must be paid at the time of his discharge on account of wages a sum equal to one-third of the amount due him. If a master or owner refuses or neglects to make payment in this manner without sufficient cause, he must pay to the seaman a sum equal to two days' pay for each day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court.

3. Arguelles v. U.S. Bulk Carriers, Inc., 408 F.2d 1065, 1069 (4th Cir. 1969), appeal docketed, No. 284 (U.S. June 26, 1969).

4. The factual questions involved were: "(1) Whether the plaintiff was entitled to overtime compensation during his period of service aboard ship prior and subsequent to February 3, 1966; (2) whether the master's delay of fifteen days after February 3, 1966, in the payment of plaintiff's wages was 'without sufficient cause' within the meaning of § 596." 408 F.2d at 1068.

5. The Samuel Little, 221 F. 308, 310 (2d Cir. 1915).

been blessed with the title "ward of the admiralty."[6] Consequently, throughout the years, he has been protected from his own carelessness.[7]

The wage statutes were originally enacted as public policy statutes[8] at a time when seamen were said to be in need of special protection.[9] Their purpose was "to secure prompt payment of seamen's wages and thus protect them from harsh consequences of arbitrary and unscrupulous action of their employers."[10] The statutes are generally considered to be penal in nature[11] but are construed liberally for the benefit of the seaman.[12]

6. Warner v. Goltra, 293 U.S. 155 (1934); Hume v. Moore-McCormack Lines, Inc., 121 F.2d 336 (2d Cir.), cert. denied, 314 U.S. 684 (1941); Parodi v. American President Lines, Ltd., 269 F. Supp. 696 (N.D. Cal. 1967); Kalantzis v. Mesar, 132 F. Supp. 745 (E.D. Va. 1955), aff'd per curiam, 245 F.2d 705 (4th Cir. 1957); Petterson v. United States, 274 F. 1000 (S.D.N.Y. 1921). Indicative of the seaman's favored status in the early nineteenth century is Justice Story's famous opinion: "[Seamen] are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians . . . ." Harden v. Gordon, 11 F. Cas. 480, 485 (No. 6047) (C.C.D. Me. 1823).

7. In 1897, the Supreme Court considered the "ward of the admiralty" characterization "even more accurate now than it was formerly." Robertson v. Baldwin, 165 U.S. 275, 287 (1897). Thirty-five years later Justice Cardozo reaffirmed the Court's position in Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 377 (1932).

As late as 1951, Martin Norris pointed out the lack of change in admiralty case law and referred to seamen today as "perhaps better educated and better dressed . . . but, in general, as improvident and prone to the extremes of trust and suspicion as their forbears . . . ." Preface to 1 M. Norris, The Law of Seamen (1st ed. 1951).

8. 408 F.2d at 1069-71; Samad v. The Etivebank, 134 F. Supp. 530, 536 (E.D. Va. 1955).

9. In 1839, Judge Ware spoke of the necessity of such protective laws when he referred to seamen as "ignorant, improvident, and necessitous . . . wholly unable to defend their rights against the superior knowledge, sagacity, and wealth of their employers." The David Pratt, 7 F. Cas. 22, 24 (No. 3597) (D.C. Me. 1839). The first wage statute was passed in 1790. Act of July 20, 1790, ch. 29, § 6, 1 Stat. 133.

10. Underwood v. Isbrandtsen Co., 100 F. Supp. 863, 865 (S.D.N.Y. 1951). See also Collie v. Fergusson, 281 U.S. 52, 55-56 (1930); Peterson v. S.S. Wahcondah, 235 F. Supp. 698 (E.D. La. 1964). The courts have assigned more specific purposes to these laws, e.g., to prevent seamen from being put ashore without funds and consequently becoming a charge upon the harbor where they disembark, Monteiro v. Sociedad Maritima San Nicolas, S.A., 280 F.2d 568, 574 (2d Cir.), cert. denied, 364 U.S. 915 (1960); Malanos v. Chandris, 181 F. Supp. 189, 191 (N.D.N.Y. 1959), or "to shield seamen against pressure to release claims, even ill-supported claims, by withholding from them sums as to which their right is not in dispute." Prindes v. The S.S. African Pilgrim, 266 F.2d 125, 128 (4th Cir. 1959).

11. Chambers v. Moore-McCormack Lines, Inc., 84 F. Supp. 1009, 1011 (E.D. Pa. 1949), aff'd, 182 F.2d 747 (3d Cir. 1950); Butler v. United States War Shipping Administration, 68 F. Supp. 441, 445 (E.D. Pa. 1946); Petterson v. United States, 274 F. 1000, 1001 (S.D.N.Y. 1921).

12. Garrett v. Moore-McCormack Co., 317 U.S. 239, 248 (1942); Bainbridge v. Merchants & Miners Transp. Co., 287 U.S. 278, 282 (1932); Wilder v. Inter-Island Steam Navigation Co., 211 U.S. 239, 246 (1908); Forster v. Oro Navigation Co., 228 F.2d 319, 320

Double wage penalties under § 596 are mandatory, and, while a judge can use his discretion as to the length of time the employer is to be liable to the seaman for double wages,[13] once this period has been determined, he cannot arbitrarily reduce the amount by considering the equities of the situation.[14] The strictness with which these penalties are to be enforced against the employer is illustrated by the fact that there are very few instances in which an employer can justifiably deduct a portion of a seaman's wage before it is paid to him; for "[t]he positive mandate of Sec. 596 . . . admits of no interpretation by which any exceptions, other than those expressly provided by other sections of the statute, can be allowed."[15] Thus not even medical expenses incurred by a seaman can be deducted from his wages;[16] nor can the cost of repatriation be deducted,[17] even if the seaman is discharged for good cause.[18]

The defendent in *Arguelles* relied on *Republic Steel Corp. v. Maddox*[19] and *Vaca v. Sipes*,[20] both of which were decided on the basis of the 1957 decision in *Textile Workers Union v. Lincoln Mills*.[21] *Lincoln Mills* involved a dispute between a union and employer over work loads and assignments. A collective bargaining agreement containing a no-strike provision was invoked; however, at the final step, the employer refused to arbitrate. The Supreme Court decided that § 301(a) of the Labor Management Relations Act[22] gave rise to a federal

(2d Cir. 1955), aff'g per curiam 128 F. Supp. 113 (S.D.N.Y. 1954); Johnson v. Isbrandtsen Co., 190 F.2d 991, 993 (3d Cir. 1951), aff'd, 343 U.S. 779 (1952); Shilman v. United States, 164 F.2d 649, 651 (2d Cir. 1947), cert. denied, 333 U.S. 837 (1948).

13. Ventiadis v. C. J. Thibodeaux & Co., 295 F. Supp. 135, 138 (S.D. Tex. 1968); Kontos v. S.S. Sophie C., 236 F. Supp. 664, 674 (E.D. Pa. 1964).

14. Swain v. Isthmian Lines, Inc., 360 F.2d 81, 87 (3d Cir. 1966).

15. Johnson v. Isbrandtsen Co., 91 F. Supp. 872, 873 (E.D. Pa. 1950), aff'd, 190 F.2d 991 (3d Cir. 1951), aff'd, 343 U.S. 779 (1952). 46 U.S.C. § 701 (1964) lists these exceptions, e.g., desertion (¶ 1), absence without leave (¶¶ 2-3), willful disobedience (¶¶ 4-5), willfully damaging the vessel (¶ 7), conviction for smuggling causing loss or damage to the master or employer (¶ 8).

16. Swain v. Isthmian Lines, Inc., 360 F.2d 81 (3d Cir. 1966); Keen v. United States, 99 F. Supp. 633 (S.D.N.Y. 1951), aff'd mem., 199 F.2d 151 (2d Cir. 1952); Leahy v. United States, 63 F. Supp. 11 (S.D.N.Y. 1945).

17. Ventiadis v. C.J. Thibodeaux & Co., 295 F. Supp. 135 (S.D. Tex. 1968).

18. Schwark v. S.S. Rio Macareo, 249 F. Supp. 375 (E.D. La. 1966). See also Mavromatis v. United Greek Shipowners Corp., 179 F.2d 310 (1st Cir. 1949) (deductions not allowed for compulsory savings); Shilman v. United States, 164 F.2d 649 (2d Cir. 1947), cert. denied, 333 U.S. 837 (1948) (deduction not allowed for court martial fine).

The seaman's "sacred claim" is further protected by the fact that his wages are not subject to deductions for advances in wages made by the employer before the seaman has earned them. 46 U.S.C. § 599 (1964). In addition, the seaman is exempt from attachment of his wages except for the support of his wife or minor children. 46 U.S.C. § 601 (Supp. IV, 1969).

19. 379 U.S. 650 (1965).

20. 386 U.S. 171 (1967).

21. 353 U.S. 448 (1957).

22. 29 U.S.C. § 185(a) (1964). This section provides that: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may

substantive body of law "which the courts must fashion from the policy of our national labor laws."[23] The decision construed § 301(a) as giving the courts power specifically to enforce agreements to arbitrate grievance disputes.[24]

Before the *Lincoln Mills* decision in 1957, *Jones v. Mississippi Valley Barge Line Co.*[25] stood as an obstacle to arbitration of the employment type of dispute presented in *Arguelles*. *Jones* involved substantially the same facts as *Arguelles*. The seaman sued for penalty wages under § 596. In *Jones*, however, defendant filed a motion for a stay of proceedings under the provisions of the Arbitration Act.[26] The court granted a stay order to compel the parties to arbitrate pursuant to the collective bargaining provisions in their contract.[27] However, in a subsequent disposition of the case,[28] the court realized it had misinterpreted the Act because § 1 specifically excluded "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"[29] from the scope of the Act. The stay order, therefore, was vacated.[30] The case indicated that an employer of seamen or other workers engaged in interstate commerce had no means whereby he could force his employees to arbitrate under the Arbitration Act. This, in effect, excluded the majority of such labor disputes from arbitration.[31]

However, since the *Lincoln Mills* decision six years later found a body of substantive law bestowing on federal courts the power to decree specific performance of agreements to arbitrate labor disputes,[32] it became unnecessary to employ the Arbitration Act to force a stay of proceedings. The employer could compel arbitration under § 301(a) of the Labor Management Relations Act.[33] Since § 301(a) did not exclude from its scope contracts of employment

be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

23. 353 U.S. at 456.

24. Id. at 451. The trilogy of steelworker cases later clarified this holding by limiting the function of the courts to deciding whether the arbitration clause was broad enough to encompass the alleged dispute, leaving the interpretation of the contract and the merits of the dispute to the arbitrator. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

25. 98 F. Supp. 787 (1951), order vacated, 107 F. Supp. 157 (W.D. Pa. 1952).

26. 9 U.S.C. §§ 1-3 (1964). These sections make a written arbitration provision in a maritime transaction or a contract evidencing a transaction involving commerce valid and allow for a stay of court proceedings if there is an issue referable to arbitration.

27. 98 F. Supp. at 788-89.

28. Jones v. Mississippi Valley Barge Line Co., 107 F. Supp. 157 (W.D. Pa. 1952).

29. 9 U.S.C. § 1 (1964).

30. 107 F. Supp. at 158.

31. Lincoln Mills by implication indicated collective bargaining agreements were included in the concept of "contracts of employment" and thus the Arbitration Act could not be invoked to obtain a stay in a dispute arising from a collective bargaining agreement. See Justice Frankfurter's dissenting opinion. 353 U.S. at 466-69.

32. 353 U.S. at 455.

33. Id.

of seamen and other workers engaged in interstate commerce, an employer who hired such employees then had a remedy to enforce arbitration agreements. Thus the decision in *Jones v. Mississippi Valley Barge Line Co.*[34] might have been different had the case arisen after *Lincoln Mills*.[35]

Republic Steel Corp. v. Maddox[36] and *Vaca v. Sipes*[37] further interpreted § 301(a) as requiring an employee to exhaust all grievance procedures in a collective bargaining agreement before bringing suit in the appropriate court. *Maddox* involved a dispute over severance pay initiated by a mining employee who was laid off as a result of his employer's closing down the mine where Maddox worked. A collective bargaining agreement between his employer and his union contained a provision for severance pay if Maddox should be laid off due to a permanent closing of the mine. According to the agreement, disputes were to be settled by a grievance procedure followed by binding arbitration. Maddox, however, elected to sue for breach of contract instead of invoking the grievance procedure.[38] The Supreme Court, interpreting § 301(a), ruled that Maddox could not bypass the grievance procedures. The Court said that "[t]he suit by Maddox clearly falls within the terms of the statute and within the principles of *Lincoln Mills*, and because we see no reason for creating an exception, we conclude that the general federal rule applies."[39]

Sipes involved the suit of an employee against his employer for wrongful discharge. After being dismissed from work because of poor health, the employee invoked the grievance procedure which his union pursued until the final step of arbitration. Having concluded that the employee's health was not sufficient to continue working, the union decided not to arbitrate. The Supreme Court, clarifying *Maddox*, held that an employee not only has to attempt to exhaust his grievance procedures before he can bring suit, but, in a case such as this, he must also show that the union breached its duty of fair representation in handling the employee's grievance.[40] Thus, failing to do so, the employee had no remedy in court.

In *Arguelles*, defendant conceded that *Maddox* and *Sipes* involved federal labor law;[41] but he contended that their principles were applied to the maritime area in *Freedman v. National Maritime Union*[42] and *Brandt v. United States Lines, Inc.*[43] Both cases involved § 301 suits for improper discharge. In both

34. 107 F. Supp. 157 (W.D. Pa. 1952).

35. While the contract of employment of the seaman in the Jones case was excluded from the scope of the Arbitration Act, it would have come under the substantive law of § 301(a) as indicated by the Lincoln Mills decision.

36. 379 U.S. 650 (1965).

37. 386 U.S. 171 (1967).

38. 379 U.S. at 650-51.

39. Id. at 657.

40. 386 U.S. at 184-86. "[The employee] could not have established a breach of that duty merely by convincing the jury that he was in fact fit for work . . . ; he must also have proved arbitrary or bad-faith conduct on the part of the Union in processing his grievance." Id. at 193.

41. 408 F.2d at 1071.

42. 347 F.2d 167 (2d Cir. 1965), cert. denied, 383 U.S. 917 (1966).

43. 246 F. Supp. 982 (S.D.N.Y. 1964).

it appeared that the seaman's union had investigated the facts, had concluded that the discharge was for proper cause, and had refused to continue grievance procedures. In *Freedman* the court of appeals affirmed a summary judgment verdict in favor of the defendant because of the lack of any genuine issue of material fact.[44] In *Brandt*, the court granted defendant's motion for summary judgment because "[t]here [were] no facts alleged from which a court or jury could reasonably find that the Union acted arbitrarily or in a discriminatory manner."[45]

While the court in *Arguelles* conceded that *Freedman* and *Brandt* involved disputes maritime in nature, it nevertheless distinguished these two decisions, along with the *Maddox* and *Sipes* cases, on the ground that the substance of their disputes differed from that in *Arguelles*.[46] *Freedman* and *Brandt* involved disputes arising directly out of a right created by private collective bargaining agreements and the *Maddox* and *Sipes* cases found this right to be within the scope of § 301. In *Arguelles*, however, the court noted, the right involved was created by Congress and was based upon the violation of "rights created by a federal statute which applies solely to seamen and the payment of their wages."[47] This right is, therefore, independent of the collective bargaining agreement. There was, furthermore, a genuine issue of fact[48] to be decided in *Arguelles* which eliminated the possibility of granting a motion for summary judgment as was done in *Freedman* and *Brandt*.[49]

Thus the problem in *Arguelles* which demanded examination was whether federal wage statutes can be circumvented by a private collective bargaining agreement. The Court of Appeals for the Second Circuit considered this question in a 1944 case[50] similar to *Arguelles* involving § 596 of the Seamen's Wage Act. Circuit Judge Chase there held that "we think that such requirement [to submit their grievance to arbitration] was in derogation of the libellants' absolute right to immediate payment, as guaranteed by our statute, and as such is void."[51]

It has also been held that a private agreement between a seaman and em-

44. 347 F.2d at 168.

45. 246 F. Supp. at 984.

46. 408 F.2d at 1071.

47. Id. 46 U.S.C. § 596 has been in existence in various forms since 1790. Its forerunners were: Act of July 20, 1790, ch. 29, § 6, 1 Stat. 133; Act of June 7, 1872, ch. 322, § 35, 17 Stat. 269.

48. See note 4 supra.

49. See, e.g., Williams v. Pacific Maritime Ass'n, 384 F.2d 935, 940 (9th Cir. 1967), cert. denied, 390 U.S. 987 (1968); Desrosiers v. American Cyanamid Co., 377 F.2d 864, 871 (2d Cir. 1967); Salyer v. American Export Isbrandtsen Lines, Inc., 262 F. Supp. 364, 365 (S.D.N.Y. 1966).

50. Glandzis v. Callinicos, 140 F.2d 111 (2d Cir. 1944). This case involved a refusal by an employer to pay seamen upon their discharge a special bonus provided for in a written agreement. The court held that this bonus was included in the term "wages" under § 596. Id. at 113-14.

51. Id. at 114.

ployer to postpone payment of wages is void,[52] as well as an agreement whereby an employer is to deposit part of a seaman's wages in a bank.[53]

Thus the case law seems to indicate that the wage statutes in the Seamen's Wage Act create an absolute right for the seaman to sue for his wages despite any private agreement to the contrary; and, as such, these statutes constitute an exception to the § 301 rule requiring, as interpreted by *Maddox*, exhaustion of grievance procedures before the courts can become available for redressing complaints.

There is an analogous situation in the case of railroad employees, another favored class of workers. The 1941 case of *Moore v. Illinois Cent. R.R.*[54] dealt with a suit by a railroad employee for wrongful discharge. Mr. Justice Black there interpreted the Railway Labor Act of 1934[55] as not requiring an employee to exhaust his grievance remedies before seeking judicial redress for wrongful discharge.[56] And in 1953,[57] applying the *Moore* rule, the Supreme Court held that if an employee accepts his dismissal as final, he may sue in court for wrongful discharge.[58] The Court, however, went on to note that if state law requires resort to grievance procedures first, then the employee must follow the state rule.[59]

This exception to § 301(a) was weakened considerably by the *Maddox* case in 1965. In *Maddox*, Justice Harlan pointed out that "a major underpinning for the continued validity of the *Moore* case in the field of the Railway Labor Act, and more importantly in the present context, for the extension of its rationale to suits under § 301(a) of the LMRA, has been removed."[60]

The question of whether the Railway Labor Act exception should be overruled in light of the *Maddox* decision presented itself in 1966 in the case of

52. Kalantzis v. Mesar, 132 F. Supp. 745, 749 (E.D. Va. 1955), aff'd per curiam, 245 F.2d 705 (4th Cir. 1957); The Constellation, 20 F. Supp. 892, 893 (E.D.N.Y. 1937); The City of Montgomery, 210 F. 673, 675-76 (S.D.N.Y. 1913).

53. Venides v. United Greek Shipowners Corp., 168 F.2d 681 (2d Cir. 1948); Lakos v. Saliaris, 116 F.2d 440, 443-44 (4th Cir. 1940). See also Forster v. Oro Navigation Co., 128 F. Supp. 113, 117 (S.D.N.Y. 1954), aff'd per curiam, 228 F.2d 319 (2d Cir. 1955) (Private agreement between union and employer fixing amount of penalty for delayed payment of overtime wages is unenforceable.).

54. 312 U.S. 630 (1941).

55. 45 U.S.C. § 153 (1964), as amended, (Supp. 1969). The Act creates the National Railroad Adjustment Board having exclusive jurisdiction over minor disputes between railroad employees and employers.

56. 312 U.S. at 636.

57. Transcontinental & W. Air, Inc. v. Koppal, 345 U.S. 653 (1953). Note that 45 U.S.C. § 185 (1964) makes the provisions of § 153 applicable to air carriers with an added provision for a National Air Transport Adjustment Board when it becomes necessary.

58. 345 U.S. at 660-61.

59. Id. at 660-62.

60. 379 U.S. at 655. Justice Black remarks that "[t]he Court recognizes the relevance of Moore and Koppal and, while declining expressly to overrule them in this case, has raised the overruling axe so high that its falling is just about as certain as the changing of the seasons." (Emphasis omitted). Id. at 667 (dissenting opinion).

Walker v. Southern Ry.[61] Unexpectedly the Court, in a 6–3 decision, refused to overrule *Moore* and instead relied upon its principle in deciding the case.[62] The Court's adherence to *Moore* seemed to be predicated on the practical observation that railroad employees had to wait as long as ten years before their grievances could be processed before the National Railroad Adjustment Board[63] and on the fact that the 1966 amendment to the Railway Labor Act,[64] which revised the procedures for remedying grievances,[65] were not available to the plaintiff in that case.[66] Thus, while *Moore* is still being followed in most courts,[67] the 1966 amendment, along with the favoritism the courts have demonstrated toward enforcing collective bargaining procedures since the *Lincoln Mills* case,[68] indicates that the *Moore* exception may be short-lived.[69]

In 1968, the District Court for the Southern District of New York in *Jones v. American Export Isbrandtsen Lines*[70] had before it the same issues presented in *Arguelles*. The district court dismissed the suit based on findings that the plaintiff had in fact not performed the overtime work in question[71] and that he had signed a valid release upon his discharge giving up any further claim for wages.[72] But the court added that since the collective bargaining agreement between the seaman's union and his employer provided a grievance procedure for settling wage disputes, that procedure must be resorted to before plaintiff can have recourse to the courts.[73]

The influence of the *Maddox* and *Sipes* rationale[74] is evident in the *American*

61. 385 U.S. 196 (1966) (per curiam), modified, 386 U.S. 988 (1967).

62. 385 U.S. at 198-99.

63. Id. at 198.

64. Act of June 20, 1966, Pub. L. No. 89-456, §§ 1-2, 80 Stat. 208, amending 45 U.S.C. § 153 (Second) (1964) [codified as 45 U.S.C. § 153 (Second) (Supp. 1969)].

65. The new procedures provide for the creation, within thirty days after a written request by either the employer or union, of a two-member special board of adjustment in order to resolve disputes otherwise referable to the Adjustment Board or disputes which have been pending before the Adjustment Board for a year. 45 U.S.C. § 153 (Second) (Supp. 1969).

66. 385 U.S. at 198-99. The following year the Supreme Court granted a motion to recall and amend the judgment in Walker, and the case was remanded to the United States Court of Appeals, Fourth Circuit, for further disposition. 386 U.S. 988 (1967).

67. See, e.g., Ferguson v. Seaboard Air Line R.R., 400 F.2d 473 (5th Cir. 1968); Belanger v. New York Cent. R.R., 384 F.2d 35 (6th Cir. 1967); Stumo v. United Air Lines, Inc., 382 F.2d 780 (7th Cir. 1967), cert. denied, 389 U.S. 1042 (1968); Dominguez v. National Airlines, Inc., 279 F. Supp. 392 (S.D.N.Y. 1968).

68. 353 U.S. 448 (1957).

69. See Slagley v. Illinois Cent. R.R., 397 F.2d 546, 549 n.3 (7th Cir. 1968).

70. 285 F. Supp. 345 (S.D.N.Y. 1968).

71. Id. at 347-48.

72. Id. at 349.

73. Id. at 349-50.

74. The court in the Jones case further states that "[i]n the absence of evidence tending to show that the Union acted in bad faith or that it abused its discretion with respect to the processing of libellant's grievances, the libellant is precluded from seeking redress in

Export decision and it can safely be said that the reasoning in *American Export* reflects a recent trend in the field of labor relations favoring arbitration of disputes when possible,[75] regardless of who the parties are.

The wage statutes were enacted to elevate the seaman to a bargaining position equal to his employer. This purpose has been accomplished with simultaneous help from unions emerging as powerful bargaining representatives for seamen. Exclusiveness of remedy has been largely responsible for the growth of unions to their present status.[76] The issue in *Arguelles* thus centers on the question of whether union procedure can operate side by side with the seamen's wage statutes. Since resort to grievance procedure does not necessarily deprive a seaman of his right to wages but merely alters the process by which he can obtain that right, it would seem that there is room for union grievance procedures to operate within § 596 of the Seamen's Wage Act. Under this view a collective bargaining agreement would not circumvent the statute; it would provide a means of enforcing the statute's provisions and at the same time remain consistent with the strong federal policy favoring arbitration of labor disputes. This federal policy, signified by the emergence of a substantive law under § 301 (a) supplying a broader and more effective means of enforcing arbitration agreements than the Arbitration Act and by the current disfavor of the exemption from bargaining requirements allowed to railroad employees, leads to the conclusion that the seamen's wage claim exception to the *Maddox* rule may be approaching perilous waters in the federal courts.

Admiralty—Workmen's Compensation—Jurisdiction of Federal Longshoremen's and Harbor Workers' Compensation Act of 1927 Held Not to Extend to Longshoremen Injured on a Pier While Engaged in Maritime Activities.—Petitioners, longshoremen, were all injured on a pier while loading a vessel lying in navigable waters. All applied for compensation under the Federal Longshoremen's and Harbor Workers' Act of 1927. The deputy commissioner denied recovery on the ground that the injury did not take place "upon navigable waters" as required by the Act. The district court in each

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the courts where the grievance procedures provided for by contract have not been pursued." Id. at 350.

75. "The entire import of the Supreme Court cases beginning with Lincoln Mills, through the trilogy of the Steelworker cases . . . is that arbitration, when agreed upon by the parties, is the best method for reconciliation of disputes arising out of collective agreements. Where an arbitration clause admits of a construction including the dispute in question within its ambit, recourse to the courts before any effort is made to process the dispute through arbitration is to be looked upon with disfavor." Belk v. Allied Aviation Serv. Co., 315 F.2d 513, 517 (2d Cir.), cert. denied, 375 U.S. 847 (1963). See also Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123 (3d Cir. 1969); H. K. Porter Co. v. Local 37, United Steelworkers, 400 F.2d 691 (4th Cir. 1968).

76. See Judge Haynsworth's dissenting opinion in Arguelles. 408 F.2d at 1072-73.

case affirmed the commissioner's findings.[1] The Court of Appeals for the Fourth Circuit, sitting *en banc*, reversed[2] and certiorari was granted.[3] The United States Supreme Court, Mr. Justice White, held that "upon the navigable waters" did not include injuries on piers and wharves even though they extend over navigable waters, and the injured parties are engaged in a traditionally maritime activity. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969).

In 1917, the Supreme Court ruled that recovery for fatal injuries incurred by a stevedore on the gangway of a ship under the New York workmen's compensation statute was unconstitutional.[4] Both the situs of the injury and the type of work being performed were clearly maritime, and thus within the exclusive federal admiralty jurisdiction. If individual state statutes were allowed to apply, "[t]he necessary consequence would be destruction of the very uniformity in respect to maritime matters which the constitution was designed to establish."[5] Since at this time there was no federal workmen's compensation law, the immediate effect of the ruling was to deprive longshoremen injured seaward of the pier of any workmen's compensation remedy whatsoever. These workers were left with only their common law tort remedy which was subject to the defenses of contributory negligence, assumption of the risk, and the fellow servant doctrine.[6] Those injured on the landward side of the pier were deemed to be properly within the state's jurisdiction and were able to proceed under state compensation statutes.[7]

1. East v. Oosting, 245 F. Supp. 51 (E.D. Va. 1965); Johnson v. Traynor, 243 F. Supp. 184 (D. Md. 1965). The cases were then consolidated on appeal. In a fourth case an award to a longshoreman who drowned after being knocked off a pier into the water was affirmed by both the district court and the court of appeals. Marine Stevedoring Corp. v. Oosting, 398 F.2d 900 (4th Cir. 1968), rev'd sub nom. Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969).

2. 398 F.2d 900 (4th Cir. 1968).

3. 393 U.S. 976 (1968).

4. Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917).

5. Id. at 217. Federal jurisdiction in admiralty matters is derived from art. III, § 2 of the Constitution: "The judicial Power shall extend . . . to all Cases of Admiralty and maritime jurisdiction." By § 9 of the Judiciary Act of 1789, the district courts of the United States were given "exclusive original cognizance of all civil causes of admiralty and maritime Jurisdiction." 1 Stat. 76-77, as amended and codified, 28 U.S.C. § 1333(1) (1964).

6. § 9 of the Judiciary Act of 1789, 1 Stat. 76-77, as amended and codified, 28 U.S.C. § 1333(1) (1964), contains the "saving to suitors" clause which preserves all common law remedies "where the common law is competent to give it." Id. at 77. As Mr. Justice McReynolds pointed out in Jensen, however, workman's compensation was a remedy wholly unknown at common law and thus not saved to suitors from the grant of exclusive jurisdiction to the federal courts. 244 U.S. at 218. Admiralty jurisdiction, prior to the 1948 Admiralty Extension Act, 46 U.S.C. § 740 (1964), required that both the commission and consummation of the tort occur on navigable waters; accordingly, the tort remedy was available only at common law. See The Plymouth, 70 U.S. (3 Wall.) 20 (1866). Admiralty tort law is not subject to the defenses of contributory negligence or assumption of the risk. See The Max Morris, 137 U.S. 1 (1890).

7. Piers, wharves and docks had traditionally been held to be extensions of the land and thus validly within the states' jurisdiction to regulate. State Indus. Comm'n v. Nordenholt

Congress twice attempted to remedy this situation by delegating its jurisdiction over maritime claims so that state compensation laws would apply.[8] However, the Supreme Court struck down both of these acts on the grounds that they were an unlawful delegation of Federal Power.[9] In an attempt to mitigate the harsh result of *Jensen* the Supreme Court in *Grant Smith-Porter Ship Co. v. Rohde*,[10] allowed recovery under state compensation laws to a carpenter who was injured while working in the hold of a partially completed vessel that was lying in navigable waters. Mr. Justice McReynolds, again writing for the majority, enunciated the famous "maritime but local doctrine," which held that injuries that resulted from work that was not traditionally maritime in nature and which did not have any direct relation to navigation or commerce were compensable under state laws, regardless of the fact that the injury occurred upon navigable waters, *i.e.*, seaward of the *Jensen* line.[11] After *Rohde* there grew up an extensive body of case law which employed the "maritime but local" test to allow compensation for maritime injuries under state statutes.[12]

In 1927, in response to a suggestion by the Supreme Court,[13] Congress enacted the Longshoremen's and Harbor Workers' Compensation Act.[14] The Act

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Corp., 259 U.S. 263 (1922); Cleveland Terminal & V. R.R. v. Cleveland S.S. Co., 208 U.S. 316 (1908). See also note 61 infra. In Nordenholt, the Supreme Court upheld recovery under a state workmen's compensation statute for injuries received by a longshoreman on the pier while engaged in unloading a ship lying in navigable waters. The "Jensen Line" was thus established. The dividing line between federal and state jurisdiction was fixed at the seaward edge of the pier.

8. Act of June 10, 1922, ch. 216, 42 Stat. 634; Act of Oct. 6, 1917, ch. 97, 40 Stat. 395.

9. Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920).

10. 257 U.S. 469 (1922).

11. See note 7 supra.

12. Alaska Packers' Ass'n v. Industrial Acc. Comm'n, 276 U.S. 467 (1928) (seaman attempting to launch a stranded boat); Miller's Indemnity Underwriters v. Braud, 270 U.S. 59 (1926) (diver killed while removing underwater obstruction); Zahler v. Department of Labor, 125 Wash. 410, 217 P. 55 (1923) (carpenter killed while working on an incompleted ship lying in navigable waters); 3 A. Larsen, The Law of Workmen's Compensation § 89.22 (1968); Annot., 56 A.L.R. 352 (1928).

13. In Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924), a decision which invalidated a congressional attempt to extend the jurisdiction of a state compensation statute, the Supreme Court noted: "Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several States." Id. at 227.

14. Act of Mar. 4, 1927, ch. 509, 44 Stat. 1424, 33 U.S.C. §§ 901-50 (1964). Section 903(a) sets forth the jurisdictional requirements: "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

provided compensation for those employees[15] injured "upon the navigable waters of the United States (including any dry dock) *and if* recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law."[16] The jurisdictional section was poorly worded at best, and open to several possible interpretations. First, the Act embodied the *Rohde* line of cases and would continue to allow state recovery in a "maritime but local" situation, since recovery in a "maritime but local" situation *could* validly be provided by state law. Federal jurisdiction would be limited under this interpretation to cases where *both* the situs and status of the injury and injured party were maritime. Second, the Act did not embody the *Rohde's* line of cases but intended to cover *all* injuries on navigable waters. The "and if" clause then became merely redundant and the *Rohde's* line of cases were to be disregarded as inconsistent with *Jensen*. Third, the wording of the jurisdictional provision was so ambiguous that in a proper situation recovery under *either* the federal or the relevant state compensation statute would be upheld by the courts.[17]

As could be expected, this section brought heavy litigation and wide divergence of opinion as to the exact meaning of its language.

The lower federal courts held that recovery under the federal act was valid only where state coverage was precluded by the Constitution. This led to the use of the "maritime but local" doctrine as a defense to federal compensation claims under the Longshoremen's Act on the grounds that state compensation could have validly been applied.[18] Ironically, the "maritime but local" doctrine originally sprung up to alleviate the harsh result of *Jensen* which prohibited state workmen's compensation to employees injured seaward of the pier. This interpretation clearly frustrated the purpose of the statute which was to provide a quick, uncomplicated compensation remedy for those injured employees held to be outside the jurisdiction of the state act.

Finally, in 1941, in *Parker v. Motor Boat Sales, Inc.*,[19] the Supreme Court addressed itself to the problem of the extent of concurrent jurisdiction between the federal and state compensation acts. In *Parker* an employee of the Motor Boat Co., who was hired principally as a janitor, was drowned when a boat in

15. The Act specifically omitted from coverage a master or member of the crew of any vessel. It was the intent of Congress in passing this Act to fill the gap and to provide coverage for those people who were neither covered by the Jones Act nor the state compensation act. See Hearings on S. 3170 before a Subcomm. of the Senate Comm. on the Judiciary, 69th Cong., 1st Sess. 26-31 (1926).

16. 33 U.S.C. § 903(a) (1964) (emphasis added).

17. For a somewhat confusing discussion of congressional intent, see Longshoremen's Act, Op. No. 30, United States Employees' Compensation Comm., Washington, Jan. 26, 1928, 1 A.M.C. 417 (1928).

18. Motor Boat Sales, Inc. v. Parker, 116 F.2d 789 (4th Cir.), rev'd, 314 U.S. 244 (1941); Alaska Packers Ass'n v. Marshall, 95 F.2d 279 (9th Cir. 1938); New Amsterdam Cas. Co. v. McManigal, 87 F.2d 332 (2d Cir. 1937); United States Cas. Co. v. Taylor, 64 F.2d 521 (4th Cir.), cert. denied, 290 U.S. 639 (1933).

19. 314 U.S. 244 (1941).

which he was riding capsized. The deputy commissioner had awarded compensation on the basis of the federal act, holding that the death occurred in the course of employment and upon navigable waters. The district court sustained the award, but the court of appeals reversed[20] on two grounds. First, the employee was not acting in the course of his employment at the time of the accident and second, a literal reading of section 903(a) barred recovery where a state act could validly be applied.[21] The Supreme Court reversed and reinstated the award.[22] Mr. Justice Black found that there was clearly enough evidence to support the commissioner's finding that the employee was acting in the course of his employment, and the court of appeals should have accepted this finding as final.[23] The court then discussed the jurisdictional problem raised by section 903(a) of the Act. Noting that Congress certainly could have provided coverage in this situation, the question was whether Congress had so provided in this statute. If the proviso in section 903(a) were not present, Justice Black argued, there would be no difficulty at all in concluding that it had. While this section "appears to be a subtraction from the scope of the Act thus outlined by Congress, we believe that, properly interpreted, it is not a large enough subtraction to place this case outside the coverage which Congress intended to provide."[24] By this act Congress intended to provide federal compensation coverage in an area which specific Supreme Court decisions[25] had placed beyond the reach of the states.

"The proviso permitting recovery only when compensation 'may not validly be provided by State law' cannot be read in a manner that would defeat this purpose. An interpretation which would enlarge or contract the effect of the proviso in accordance with whether this Court rejected or reaffirmed the constitutional basis of the *Jensen* and its companion cases cannot be acceptable. The result of such an interpretation would be to subject the scope of protection that Congress wished to provide, to uncertainties that Congress wished to avoid."[26]

The Court avoided the question, however, of whether or not state compensation could validly be provided.[27] Justice Black stated that it made no differ-

20. 116 F.2d 789 (4th Cir. 1941).

21. Id. at 791-96. Since the boat company did not have enough employees to bring it under the Virginia compensation statute, this decision left the plaintiff without a compensation remedy. The court of appeals termed this result "unfortunate and regrettable" but held that it was their function to interpret and construe statutes, not to make them, noting that "[w]e cannot obey the Shakespearian maxim and wrest the law to our authority, even once." Id. at 796.

22. 314 U.S. 244 (1941).

23. Id. at 246.

24. Id. at 249.

25. Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917).

26. 314 U.S. at 249-50.

27. "What we are called upon to decide is not of constitutional magnitude. . . .

. . . .

. . . We believe that there is only one interpretation of the proviso . . . which would accord

ence that the claimant was primarily a non-maritime employee because he had been injured on navigable waters. He failed even to mention the "maritime but local" doctrine of *Rohde*, even though this was a classic maritime but local situation. It could now be argued that the Court was back to the strict situs test of *Jensen* and that state coverage was preempted seaward of the dock.

The sorely needed clarification of the jurisdictional section of the Longshoremen's Act was not provided by the Supreme Court's next opinion on the subject in *Davis v. Department of Labor & Industries*.[28] There, decedent was engaged in dismantling a bridge over navigable waters and stowing the sections on a barge when he either fell or was knocked into the river. His representative claimed an award under the state compensation law on the theory that decedent's employment brought him within the "maritime but local" doctrine of *Rohde*. Compensation was denied and the Washington Supreme Court affirmed.[29] The Supreme Court granted certiorari and reversed.[30] The Court was again confronted with the question of the "maritime but local" doctrine versus exclusive federal jurisdiction which it had avoided in the *Parker* case.[31] Mr. Justice Black noted that the "maritime but local" doctrine's application had not achieved satisfactory results. The failure of the Supreme Court to set forth definitive guidelines had caused serious confusion to both claimants[32] and employers. "It is fair to say," the Court pointed out, "that a number of cases

with the aim of Congress; the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the Jensen line of decision excluded from state compensation laws. Without affirming or rejecting the constitutional implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence." Id. at 248, 250 (emphasis deleted).

28. 317 U.S. 249 (1942). It was said of the case: "[a] year later Davis v. Department of Labor and Industries of Washington gave an unexpected continuation to the discussion, [maritime but local] together with an analysis of the rationale of the Motor Boat case which, had it been suggested in a law review article, would have been dismissed as academic fantasy bordering on insanity." G. Gilmore & C. Black, The Law of Admiralty § 6-49, at 348 (1957) (footnote omitted).

29. Davis v. Department of Labor & Indus., 12 Wash. 2d 349, 121 P.2d 365 (1942). The Washington court equated the work decedent was performing with that of a stevedore loading and unloading a vessel on navigable waters which, according to the Jensen line of decisions, was clearly outside the state's control. "[The Supreme Court] has uniformly held that the 'loading and stowing the ship's cargo' in navigable waters is a 'maritime service,' and that claims for injury incident thereto are exclusively within admiralty jurisdiction." Id. at 352-53, 121 P.2d at 366.

30. 317 U.S. 249 (1942).

31. It is interesting that Justice Black wrote the majority opinions in both Parker and Davis.

32. "It must be remembered that under the Jensen hypothesis, basic conditions are factual: Does the state law 'interfere with the proper harmony and uniformity' of maritime law? Yet, employees are asked to determine with certainty before bringing their actions that factual question over which courts regularly divide among themselves and within their own membership." 317 U.S. at 254 (emphasis deleted).

can be cited both in behalf of and in opposition to recovery here."[33] The penalty for a wrong decision on the part of the claimant was not only serious financial loss through the delay and the expense of litigation, but in many cases the claim was barred by the statute of limitation in the proper forum "while he was erroneously pursuing it elsewhere."[34] This was obviously not the purpose of the federal act.

The solution, the court decided, did not lie in the repeal of the *Jensen* line of decisions. Too much was already predicated on *Jensen*[35] and overruling it would only bring about further confusion.[36] The Court reasoned that the basic problem, in the light of *Jensen* and *Rohde*, was that claimants and employers in certain 'grey' areas of possibly concurrent jurisdiction had to decide questions of law long before a competent court could rule on them. These people were in the famous "twilight zone."[37] Mr. Justice Black then enunciated the new policy of the Court: "[f]aced with this factual problem we must give great—indeed, presumptive—weight to the conclusions of the appropriate federal authorities and to the state statutes themselves."[38] Under this theory fact findings of the agency, if supported by evidence, would be final. They would be overruled only if clearly erroneous. Thus, when a state agency made the determination, in cases of uncertain jurisdiction, *i.e.*, within the "twilight zone," that state law could validly be applied, this would be treated as a conclusive finding of fact. Prior to *Davis*, these same facts would have required a determination of constitutionality as a matter of law. *Davis*, however, created several problems. First, what was the extent of the "twilight zone"? Second, could there possibly be concurrent coverage under the federal and state acts?[39]

Shortly after *Davis*, in two per curiam decisions, the Supreme Court indicated

33. Id. at 253 (footnote omitted).

34. Id. at 254. The employer, likewise, faced confusion as to the type of insurance he should carry, and the penalty for a wrong guess could be substantial additional payments and, under the federal law, 33 U.S.C. §§ 938, 932, the employer was subject to a fine and imprisonment for the misdemeanor of having failed to properly insure under the federal act. Id. at 255.

35. See 317 U.S. at 259 (Frankfurter, J., concurring).

36. The Court noted that petitioner had not asked that the Jensen case be overruled and that much had been accomplished by state and federal agencies to close the gap between Jensen and state compensation. Id. at 255.

37. "There is, in the light of the cases referred to, clearly a twilight zone in which . . . particular facts and circumstances are vital elements." Id. at 256.

38. Id.

39. Both Justice Frankfurter in his concurring opinion and Chief Justice Stone in his dissent assumed that the Court had created an area of overlapping jurisdiction where, presumably, recovery could validly be had under either federal or state law. "Theoretic illogic is inevitable so long as the employee in a situation like the present is permitted to recover either under the federal act . . . or under a state statute." 317 U.S. at 259 (Frankfurter, J., concurring) (citations omitted). "Congress . . . has left no room for an overlapping dual system of the sort which the Court now espouses by placing its decision on a new doctrine that recovery under either the state or the federal act is to be sustained if the case is thought a close one." Id. at 261 (Stone, C.J., dissenting).

that the scope of the "twilight zone" was to be somewhat larger than that previously encompassed by the "maritime but local" doctrine. in *Moores' Case*,[40] a state board awarded compensation to a shipyard worker injured while repairing a completed ship on navigable waters. Recognizing that injuries sustained while working on a completed ship were traditionally within exclusive federal jurisdiction, the Supreme Court of Massachusetts, relying heavily on *Davis*, nevertheless sustained the state award.[41] The Supreme Court affirmed per curiam, citing *Davis*.[42] In *Baskin v. Industrial Accident Commission*[43] the Supreme Court reversed, citing *Moores' Case*, a California decision denying recovery under the state compensation statute on facts identical with those of the Massachusetts case.[44]

The result of the Supreme Court's summary treatment of these two cases led inevitably to more confusion. Some courts used the "twilight zone" to extend state jurisdiction into areas heretofore exclusively federal.[45] One court went so far as to hold that state and federal jurisdiction were completely concurrent.[46] Other courts refused to apply the doctrine at all and held that the federal act was the exclusive remedy when the injury occurred on navigable waters.[47]

40. 323 Mass. 162, 80 N.E.2d 478, aff'd per curiam sub nom. Bethlehem Steel Co. v. Moores, 335 U.S. 874 (1948).

41. A cogent insight into the confused state of the law at this time is evident in the following excerpt from the Massachusetts opinion: "[p]robably therefore our proper course is not to attempt to reason the matter through and to reconcile previous authorities, or to preserve fine lines of distinction, but rather simply to recognize the futility of attempting to reason logically about 'illogic,' and to treat the Davis case as intended to be a revolutionary decision deemed necessary to escape an intolerable situation and as designed to include within a wide circle of doubt all waterfront cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way, even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other." 323 Mass. at 167, 80 N.E.2d at 481.

42. 335 U.S. 874 (1948).

43. 89 Cal. App. 2d 632, 201 P.2d 549, vacated per curiam, 338 U.S. 854 (1949).

44. The California court had taken the exact opposite position from that of the Massachusetts court and held that Baskin could not be within the twilight zone because prior precedent was clear that an accident of this nature was within exclusive federal jurisdiction. 89 Cal. App. 2d at 638, 201 P.2d at 552-53.

45. Sullivan v. Travelers Ins. Co., 95 So. 2d 834 (La. Ct. App. 1957) (longshoreman injured while working on a vessel in navigable waters); Allisot v. Federal Shipbuilding & Drydock Co., 4 N.J. 445, 73 A.2d 153 (1950) (worker injured while performing extensive repairs to a vessel lying in navigable waters); De Graw v. Todd Shipyards Co., 134 N.J.L. 315, 47 A.2d 338 (Ct. Err. & App.), cert. denied, 329 U.S. 759 (1946) (pipefitter injured while working on completed ship lying in navigable waters); Indemnity Ins. Co. of N. America v. Marshall, 308 S.W.2d 174 (Tex. Civ. App. 1957) (pipefitter injured while working on a completed vessel lying in a floating dry dock); Commissioner v. Oceanic Serv. Corp., 276 App. Div. 725, 97 N.Y.S.2d 401 (3d Dep't 1950) (night watchman who apparently fell from ship moored in the North River).

46. Richard v. Lake Charles Stevedores, Inc., 95 So. 2d 830 (La. Ct. App. 1957), cert. denied, 355 U.S. 952 (1958) (longshoreman injured in the course of his employment while working in the hold of a ship lying in navigable waters allowed to recover under state act).

47. In Thibodeaux v. J. Ray McDermott & Co., 276 F.2d 42 (5th Cir. 1960), the facts

The Fifth Circuit's dislike of the "twilight zone" concept[48] led the Supreme Court to speak again on the troublesome jurisdictional problem. In *Calbeck v. Travelers Ins. Co.*,[49] the Fifth Circuit Court of Appeals ruled that a worker who was injured while working on a vessel under construction lying in navigable waters was within the exclusive jurisdiction of the state, did not fall within the "twilight zone," and thus could not elect to recover compensation under state or federal law.[50] The Supreme Court reversed and allowed recovery under the Federal Longshoremen's and Harbor Workers' Compensation Act.[51] Mr. Justice Brennan pointed out that the effect of the lower court's ruling would be to exempt from the Longshoremen Act's coverage "not only the injuries suffered by employees while engaged in ship construction but also any other injuries—even though incurred on navigable waters and so within the reach of Congress—for which a state law could, constitutionally, provide compensation."[52] This interpretation was incorrect. "Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law."[53] Thus *Calbeck* adopted, at least seaward of the pier, a pure situs test for recovery under the federal act.[54]

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were unclear as to whether decedent fell from a barge or the bank of a river. The court held that if he fell from the barge the federal act would be his exclusive remedy; if he fell from the bank, the state act would be his sole remedy. In Noah v. Liberty Mut. Ins. Co., 267 F.2d 218 (5th Cir. 1959), the court refused to allow state compensation under Louisiana law for a longshoreman killed while loading cargo on a ship in navigable waters. A prior Louisiana case, Richard v. Lake Charles Stevedore, Inc., 95 So. 2d 830 (La. Ct. App. 1957), cert. denied, 355 U.S. 952 (1958), allowed state recovery under similar facts. In Flowers v. Travelers Ins. Co., 258 F.2d 220 (5th Cir. 1958), a workman injured while repairing a completed ship was held to be within the exclusive jurisdiction of the federal act. In Warner v. Travelers Ins. Co., 332 S.W.2d 789 (Tex. Civ. App. 1960), a workman, who, at the time of the accident was standing on a scaffold approximately twelve feet above the water and whose work consisted of peeling down and caulking rivets on the outside of the hull of a vessel floating in navigable waters, was held to be within the exclusive jurisdiction of the Federal Longshoremen's and Harbor Workers' Act.

48. See the Fifth Circuit cases cited note 47 supra.

49. 293 F.2d 52 (5th Cir. 1961), rev'd, 370 U.S. 114 (1962).

50. 293 F.2d at 59-60. For a critical discussion of Calbeck before it reached the Supreme Court see 50 Calif. L. Rev. 342, 345 (1962).

51. 370 U.S. 114 (1962).

52. Id. at 117.

53. Id. (footnote omitted). Arguments were made that Calbeck made the "'twilight zone' extinct." Gainsburgh & Fallon, Calbeck v. Travelers Insurance Company: The Twilight's Last Gleaming?, 37 Tul. L. Rev. 79, 87 (1962) (footnote omitted).

54. However, Calbeck was not subsequently interpreted as precluding state recovery seaward of the pier in proper circumstances, i.e., in the "twilight zone." In Michigan Mut. Liab. Co. v. Arrien, 344 F.2d 640 (2d Cir.), cert. denied, 382 U.S. 835 (1965), the court, holding that an injury which occurred on a skid which protruded from the wharf over navigable waters was compensable under the federal statute, quoted Calbeck, stating: "We do not question that the skid on which Parisi was injured was sufficiently connected with the land to sustain an award under the State Compensation Act. But to concede this does

Certain broad dicta in *Calbeck* provided the foundation for *Nacirema*. In discussing what jurisdiction Congress intended to exercise when it originally passed the Federal Longshoremen's and Harbor Workers' Compensation Act, the Supreme Court quoted with approval the opinion in *De Bardeleben Coal Corp. v. Henderson*:[55] "[C]ongress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject-matter. . . . Congress intended the compensation act to have a coverage co-extensive with the limits of its authority . . . ."[56] By this language the Supreme Court arguably implied that the Longshoremen's Act was status-oriented, rather than situs-oriented. If jurisdiction was intended to be status-oriented, then the Longshoremen's Act could logically be extended to cover injuries sustained by longshoremen on the pier while engaged in maritime activities. The *status* of the injured rather than the *situs* of the injury would be controlling. This was precisely the conclusion the Fourth Circuit came to in *Marine Stevedoring*.[57] In a thorough opinion, Judge Sobeloff explored the legislative history of the act and its subsequent judicial development. After first noting that Congress certainly could have "grounded jurisdiction on the function or status of the employees . . . and thus extend coverage to all longshoremen . . . regardless of the situs of the injury," the question was whether Congress fully exercised this power or whether it intended by the phrase "upon the navigable waters" to "freeze coverage to injuries occurring within the admiralty tort jurisdiction as it was thought to exist in 1927 . . . ."[58] Relying heavily on the dicta in *Calbeck*, the Court concluded that: "Congress designed the Act to be status-oriented, reaching all injuries sustained by longshoremen in the course of their employment."[59]

In reversing the Fourth Circuit,[60] Mr. Justice White, writing for the majority, in *Nacirema*, first noted that prior to the Longshoremen's Act it had been settled law that wharves, piers, and docks were extensions of the land and not

not mean that a federal remedy is precluded; the Longshoremen's Act was intended to provide compensation for all injuries occurring upon navigable waters 'whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law.'" Id. at 645 (citation omitted).

55. 142 F.2d 481, 483-84 (5th Cir. 1944).

56. 370 U.S. at 130.

57. Marine Stevedoring Corp. v. Oosting, 398 F.2d 900 (4th Cir. 1968), rev'd sub nom. Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969).

58. 398 F.2d at 904. This is the same observation Justice Black made twenty-seven years earlier in Parker v. Motor Boat Sales, Inc., 314 U.S. 244, 248-49 (1941).

59. Id. (footnote omitted). Chief Judge Haynsworth and Judge Boreman dissented from the majority opinion. It was clear to the dissent that the intent of Congress was to provide coverage in an area that was heretofore excluded from any compensation remedy. The Calbeck decision did not reach the issue of pierside injuries and there was nothing in Calbeck to suggest that the Act should include such injuries. Finally, Judge Haynsworth argued that the status theory of the majority would open the door to litigation by maritime workers injured away from the pier. This was clearly not within the intention of Congress in 1927 when they passed the federal act. Id. at 909-14.

60. Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969).

within traditional admiralty jurisdiction.[61] He pointed out that the phrase in the statute, "upon the navigable waters" if read literally, would not include injuries on the pier. However, even though the Longshoremen's Act "employs language which determines coverage by the 'situs' of the injury,"[62] respondents urged that it should be interpreted to cover the "status" of the employee. In rejecting this argument the Court reasoned that the legislative and judicial history of the Longshoremen's Act clearly pointed to a narrower construction.[63] The Longshoremen's Act was passed after two attempts by Congress to extend state coverage seaward were declared unconstitutional.[64] As originally drafted the bill extended coverage to injuries "on a place within the admiralty jurisdiction of the United States, except employment of local concern and no direct relation to navigation or commerce."[65] During the hearings on the proposed bill, the majority pointed out, it was repeatedly assumed that docks and piers were not within the admiralty jurisdiction. "In fact, a representative of the Labor Department objected to the bill precisely for that reason, urging the Committee to extend coverage to cover the contract 'and not the man simply when he is on the ship.' "[66] Justice White argued that if Congress had intended to adopt that suggestion, "it could not have chosen a more inappropriate way of expressing its intent than by substituting the words 'upon the navigable waters' for the words 'within the admiralty jurisdiction.' "[67]

The court then turned to subsequent judicial interpretations of the statute. Conceding that since *Jensen* there had been cases allowing recovery under state laws in particular situations *seaward* of the pier, Mr. Justice White went on to say that this "is a far cry from construing the Act to reach injuries on land traditionally within the ambit of state compensation acts."[68] The *Calbeck* case, on which the lower court relied so heavily, merely made it clear that Congress intended to exercise its full jurisdiction *seaward* of the *Jensen* line. It was not concerned with, nor did it mention, pierside injuries. "Indeed," the court argued, "*Calbeck* freely cited the *Parker* and *Davis* declarations that the Longshoremen's Act adopted the *Jensen* line, and *Calbeck's* holding rejected the notion

61. Justice White cited several cases as well as two well-known hornbooks for this proposition. 396 U.S. at 215 n.5.

62. Id. at 215.

63. "Congress might have extended coverage to all longshoremen by exercising its power over maritime contracts. But the language of the Act is to the contrary and the background of the statute leaves little doubt that Congress' concern in providing compensation was a narrower one." Id. at 215-16 (footnote omitted).

64. See note 9 supra.

65. Hearings on S. 3170 Before a Subcomm. of the Senate Comm. on the Judiciary, 69th Cong., 1st Sess. 2 (1926).

66. 396 U.S. at 217-18 (footnote omitted).

67. Id. (footnote omitted). The court felt that, indeed, this suggestion was explicitly rejected rather than adopted. It quoted the Senate report which accompanied the revised bill. " '[I]njuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States.' " Id. at 218-19.

68. Id. at 221.

that the line should advance or recede simply because decisions of this Court had permitted state remedies in narrow areas seaward of that line. Otherwise, the reach of the federal act would be subject to uncertainty, and its coverage would 'expand and recede in harness with developments in constitutional interpretation as to the scope of state power to compensate injuries on navigable waters' . . . . As in *Calbeck*, we refuse to impute to Congress the intent of burdening the administration of compensation by perpetuating such confusion."[69]

Finally, the Court rejected the argument that the Admiralty Extension Act[70] extended the jurisdiction of the Longshoremen's Act.[71] Justice White pointed out that the Extension Act was passed to remedy the completely different situation where "parties aggrieved by injuries done by ships to bridges, docks, and the like could not get into admiralty at all."[72] Also, the legislative history of the Extension Act was completely devoid "of any reference to the Longshoremen's Act, as might well be expected in an act dealing with a wholly unrelated problem."[73]

In summation, the court stated the practical consideration involved in its narrow construction of the Act: "and construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion which previously existed on the seaward side."[74]

Mr. Justice Douglas, Black and Brennan dissented for the reasons stated in the Court of Appeals by Judge Sobeloff that the Longshoremen's Act jurisdiction after *Calbeck* was *status* and not *situs*-oriented.[75] They also pointed out the incongruity that in one of the cases being reviewed, the Court of Appeals affirmed federal recovery since the deceased, after being struck by a cable on the pier, fell into the water where he died.

It could be argued that *Nacirema* will have little effect on the controversy

69. Id. (citation omitted).

70. 46 U.S.C. § 740 (1964). The Act, in pertinent part, states: "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, or person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

71. Some lower courts had used the Extension Act as justification for extending federal jurisdiction. See Spann v. Lauritzen, 344 F.2d 204 (3d Cir. 1965); Interlake S.S. Co. v. Nielsen, 338 F.2d 879 (6th Cir. 1964); Puget Sound Bridge & Dry Dock Co. v. O'Leary, 260 F. Supp. 260 (W.D. Wash. 1966).

72. 396 U.S. at 222 (footnote omitted). This was a result of the Supreme Court's ruling in The Plymouth, 70 U.S. (3 Wall.) 20 (1866), that sparks from a burning ship that set a wharf afire was not within the tort jurisdiction of admiralty and a suit in rem may not be brought against the vessel.

73. 396 U.S. at 222 n.18.

74. 396 U.S. at 223.

75. It may be useful in anticipating future decisions in this still unsettled field to note that Mr. Justice Brennan joined the dissent in the principal case on the basis of the Calbeck case in which he wrote the majority opinion.

that has raged seaward of the pier since *Jensen* in 1917 and has produced such anomalies as the "twilight zone" and the "maritime but local" doctrine. Read narrowly on its facts the case may in the future be held to apply only to injuries occurring landward of the *Jensen* line. It could also be argued that *Nacirema*, through its interpretation of *Calbeck*, has adopted a strict situs test on either side of the pier.[76] If this approach is accepted it will significantly alleviate the uncertainty and doubt that has for too long surrounded this area.

However, in view of the tortured history of section 903(a) of the Longshoremen's Act, perhaps the most succinct assessment of the problem was made by Judge Brown, writing for the Fifth Circuit, in *Travelers Insurance Co. v. Calbeck:* "We know by now that nothing written in this field is the last word. All it can be is 'the latest word.' "[77]

Constitutional Law—Abortion—California Statute Held Unconstitutional. —Petitioner, a physician, gave an unmarried woman the telephone number of a Los Angeles abortionist who subsequently performed an abortion on the woman. Petitioner contended that he had done this to save the woman's life, since she had threatened to go to Tijuana for an abortion, an act which the petitioner felt might result in her death. When the police raided the abortionist's apartment, they discovered two notebooks containing names of abortees, fourteen of which were followed by notations indicating that they had been referred by the petitioner. The discovery of the notebooks led to petitioner's arrest, trial and conviction for "procur[ing] the miscarriage of [a] . . . woman" without its being "necessary to preserve her life."[1] The conviction was affirmed by the California Court of Appeal.[2] The California Supreme Court reversed and, over a strong dissent, held the above statute to be invalid both because the words "necessary to preserve" were too vague to satisfy constitutional standards of clarity in criminal statutes, and because the statute interfered with the woman's right to life under the due process clause of the fourteenth amendment,

76. Thus an injured man would know immediately where his remedy lay based upon the situs of his injury. Of course there will still be some inconsistencies as, for example, the Longshoreman who was injured on the pier but was allowed federal recovery because he fell in navigable waters.

The argument that employers will be forced to pay double premiums is largely illusory in that most states allow employers to self insure. See 3 A. Larson, The Law of Workmen's Compensation § 92.10, at 444 (1968). Also there is a standard nationwide compensation policy which may be extended to cover the Longshoremen's Act. Employer's premiums are divided between the amount of the employer's operation that fall under the Federal and State Act. This avoids duplication of premiums. See e.g., Rate Adjustment Endorsement Form Y-383, Marine Office of America; see Note, Injured Maritime Worker's and the "twilight zone," 50 Calif. L. Rev. 342, 347 (1962).

77. 293 F.2d 52, 60 (5th Cir. 1961).

1. Cal. Penal Code § 274 (West 1955).

2. 276 Cal. App. 2d 329 (1969).

and with her right to privacy under the first amendment. *People v. Belous*, 71 Cal. 2d 996, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

Abortion is defined, medically, as "the premature delivery or expulsion of a human fetus before it is capable of sustaining life."[3] The legal definition of abortion is "the wilful bringing about of the miscarriage of a woman without justification or excuse."[4] Abortion has been known and practiced to varying degrees in nearly every culture since ancient times;[5] today, it is a crime in all fifty states.[6] However, forty-six states exclude from their criminal sanctions abortions necessary to preserve the life of the woman.[7] The *Belous* opinion, and the more recent case of *United States v. Vuitch*,[8] are the first decisions to successfully challenge the validity of these acts.

The *Belous* opinion initially set forth the standards applicable in determining the constitutionality of a criminal statute and noted that the degree of clarity required for a penal statute is higher than that required for a civil law:[9]

> The requirement of a reasonable degree of certainty in legislation, especially in the criminal law, is a well established element of the guarantee of due process of law. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State com-

3. S. Kling, Sexual Behavior and the Law 1 (1969).

4. R. Perkins, Criminal Law 140 (2d ed. 1969) (footnote omitted).

5. S. Kling, supra note 3, at 1. See also Devereux, A Typological Study of Abortion in 350 Primitive, Ancient and Pre-Industrial Societies, in Abortion in America 97-152 (H. Rosen ed. 1967). At common law abortion was not an offense unless the woman was "quick with childe." If the child was delivered alive, and lived, even if for only a few minutes, before succumbing, the abortional act was punished as murder. R. Perkins, supra note 4, at 140.

6. For the present situation in Washington, D.C., see United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969).

7. Lucas, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes, 46 N.C.L. Rev. 730, 731-35. The abortion statutes fall into three main types: those states which do not provide for any "unjustified" abortions; those which permit it if "necessary to preserve the life [or health] of the mother;" and those which are based on the more liberal American Law Institute model abortion law—The Model Abortion Act—which reads as follows:

> (2) Justifiable Abortion. A licensed physician is justified in terminating a pregnancy if:
> (a) he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or the pregnancy resulted from rape by force or its equivalent as defined in Section 207.4(1) or from incest as defined in Section 207.3; and
> (b) two physicians, one of whom may be the person performing the abortion, have certified in writing their belief in the justifying circumstances, and have filed such certificate prior to the abortion in the licensed hospital where it was to be performed, or in such other place as may be designated by law.

Model Penal Code § 207.11(2)(a)-(b). For a conclusive listing of the abortion statutes and relevant discussion, see Lucas, supra, 733-35 and notes accompanying.

8. 305 F. Supp. 1032 (D.D.C. 1969). But see State v. Moretti, 52 N.J. 182, 191, 244 A.2d 499, 504, cert. denied, 393 U.S. 952 (1968).

9. This is presumably due to the greater potential severity of punishment and community condemnation.

mands or forbids. . . . [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[10]

In *Belous*, the court utilized two methods of discovering the meaning of the key phrase "necessary to preserve the life of the woman:" first, scrutiny of the words "necessary" and "preserve" independently of the phrase in which they were found in the statute and, secondly, examination of case law. The court admitted, however, that it was not searching for "mathematical certainty,"[11] but "reasonable certainty," recognizing that "some matter of degree" is involved in the interpretation of all penal statutes.[12]

After some effort,[13] the *Belous* majority decided that the meaning of the word "necessary" was unclear: "The courts have recognized that " 'necessary' has not a fixed meaning, but is flexible and relative."[14] An examination of "preserve," based on Webster's *New International Dictionary*, proved equally unclear.[15] The word "preserve" could be interpreted as either merely keeping the woman's health from deteriorating, or as keeping the woman alive, in the most minimal sense of that word.[16] The same phraseology was criticized in the only other decision holding an abortion law unconstitutional: *United States v. Vuitch*:[17]

10. 71 Cal. 2d at 1002, 458 P.2d at 197, 80 Cal. Rptr. at 357, citing Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

11. 71 Cal. 2d at 1003, 458 P.2d at 198, 80 Cal. Rptr. at 358.

12. Nash v. United States, 229 U.S. 373, 377 (1913).

13. The court noted: "Dictionary definitions and judicial interpretations fail to provide a clear meaning for the words, 'necessary' or 'preserve.' There is, of course, no standard definition of 'necessary to preserve,' and taking the words separately, no clear meaning emerges." 71 Cal. 2d at 1003, 458 P.2d at 198, 80 Cal. Rptr. at 358.

14. Id., citing Westphal v. Westphal, 122 Cal. App. 379, 382, 10 P.2d 119, 120 (Dist. Ct. App. 1932): "The word ['necessary'] must be considered in the connection in which it is used, as it is a word susceptible of various meanings." See Black's Law Dictionary at 1181 (4th ed. 1968). Webster defines the word as: "1. essential to a desirable or projected end or condition; not to be dispensed with without loss, damage, inefficiency or the like. . . ." Webster's International Dictionary (2d ed. 1959). In addition to scrutinizing the case law and Webster's Dictionary for the meaning of the disputed phrase, the court searched the face of the statute for an express definition. Failing to find one, it then considered legislative intent but found that, although there was historical basis for a restrictive abortion statute, that view was no longer valid. 71 Cal. 2d at 1007, 458 P.2d at 200, 80 Cal. Rptr. at 360.

15. Webster defines "preserve" as "1. to keep or save from injury or destruction; to guard or defend from evil; to protect; save. 2. To keep in existence or intact . . . To save from decomposition. . . . 3. To maintain; to keep up . . ." Webster's International Dictionary (2d ed. 1959) at 1794.

16. 71 Cal. 2d at 1003, 458 P.2d at 198, 80 Cal. Rptr. at 358. Roy Lucas, author of the model abortion brief designed to test the abortion law of any state, asks the question: "Does it mean that without an abortion a woman has to die immediately, or that she will have her life span shortened by two days?" Greenhouse, Constitutional Question: Is There a Right to Abortion?, N.Y. Times, Jan. 25, 1970, § 6 (Magazine), at 31, col. 2.

17. 305 F. Supp. 1032 (D.D.C. 1969).

The jury's acceptance or nonacceptance of an individual doctor's interpretation of the ambivalent and uncertain word 'health' should not determine whether he stands convicted of a felony, facing ten years imprisonment. His professional judgment made in good faith should not be challenged. There is no clear standard to guide either the doctor, the jury or the Court. . . .

Thus the phrase under discussion will not withstand attack for it fails to give that certainty which due process of law considers essential in a criminal statute. Its many ambiguities are particularly subject to criticism for the statute unquestionably impinges to an appreciable extent on significant constitutional rights of individuals.[18]

Failing to find an adequate basis for decision from an independent study of the words themselves, the *Belous* court then turned to case law for a workable definition of "necessary to preserve the life of the woman." It first discussed California's suggested meaning of the words: "If medical science feels the abortion should be performed as it is necessary to preserve her life, then it may be performed; that is, unless it is performed the patient will die."[19] It rejected this view, interpreting it as requiring "certainty or immediacy of death,"[20] a definition which California courts had already considered and rejected in *People v. Abarbanel*[21] and in *People v. Ballard*.[22]

The court then considered a second definition, implicitly upheld in *People v. Abarbanel*,[23] that "necessary to preserve" denoted "a possibility of death different from or greater than the ordinary risk of childbirth."[24] However, if the "psychological factor"—that aspect of the woman's mental condition which suggests to the psychiatrists that she might endanger herself if she were not aborted—is thus "decisive," it could result in abortion virtually on demand.[25]

18. Id. at 1034.

19. 71 Cal. 2d at 1004, 458 P.2d at 198, 80 Cal. Rptr. at 358.

20. Id.

21. 239 Cal. App. 2d 31, 48 Cal. Rptr. 336 (Dist. Ct. App. 1965). Two psychiatrists found the "possibility of suicide" of a pregnant woman to be so great as to warrant recommending an abortion for her. Id. at 32, 48 Cal. Rptr. at 337.

22. 218 Cal. App. 2d 295, 32 Cal. Rptr. 233 (Dist. Ct. App. 1963). In Ballard, a pregnant woman came to defendant-doctor and told him that she had been taking nine to twelve turpentine pills a day and had passed blood and tissue and had severe headaches. The doctor testified that he, relying on her information, made no examination but told her that the fetus was dead and that a miscarriage had already begun. He stated that if a dilation and curettage were not soon performed, hemorrhage could set in and the patient "might very well die." Id. at 295, 32 Cal. Rptr. at 235. From these two decisions the Belous court concluded that either "ill health or the mere 'possibility' of suicide," not "immediacy or certainty of death," would constitute necessity to preserve the woman's life. 71 Cal. 2d at 1005, 458 P.2d at 199, 80 Cal. Rptr. at 359. It is "'enough that the dangerous condition be potentially present, even though its full development might be delayed to a greater or less extent.'" Id. at 1005, 458 P.2d at 198-99, 80 Cal. Rptr. at 358-59, citing People v. Abarbanel, 239 Cal. App. 2d at 34, 48 Cal. Rptr. at 338.

23. 239 Cal. App. 2d 31, 48 Cal. Rptr. 364.

24. 71 Cal. 2d at 1012, 458 P.2d at 204, 80 Cal. Rptr. at 364.

25. Id. See also R. Perkins, supra note 4, at 147: "[T]he fact that a woman has threatened to commit suicide unless relieved of her unborn child does not establish that the miscarriage was necessary to save her life. The need for such a holding is obvious. Under

This construction of the statute had to be rejected by the California court since it would mean that the legislature had intended to pass a "virtually meaningless" statute.[26]

A third definition, that the statute meant "substantially or reasonably" necessary to preserve the mother's life, was considered and rejected as not being "sufficiently precise."[27] The court added, however, that, with respect to other statutes, the addition of the words "substantially or reasonably" to "necessary" may have the effect of rendering such statutes sufficiently clear so that their constitutionality may be sustained, but: "[I]n the instant situation the implication of such words would merely increase the uncertainty."[28]

The court's fourth possible interpretation of the words "necessary to preserve the life of the woman" was that abortion would be legal "when the risk of death [of the woman] due to the abortion was less than the risk of death in childbirth."[29] This has been named the "relative safety" test.[30] Although the court believed this to have been the test which probably best reflected the California legislature's intent, it still rejected it because the relative safety test was not incorporated specifically into the statute, nor could it reasonably be implied in the words "unless the same is necessary to preserve her life."[31] It is not a meaning of the phrase at which reasonable "men of 'common' intelligence" could have arrived.[32]

An additional problem created by the statute's vagueness was that the doctor —an individual with a "direct, personal, substantial, pecuniary interest" in the matter—was delegated the duty to determine whether or not to perform the abortion.[33] Such a "delegation of decision-making power to a directly involved individual" was said to violate the fourteenth amendment.[34] In addition, the

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any other rule a woman could always make such a threat,—which would be a boon to the 'quack' and an embarrassment to the ethical practitioner." (Footnote omitted). Most authorities seem to agree that a suicide threat by a pregnant woman is very rarely carried out, at least not for reasons related to the pregnancy.

26. 71 Cal. 2d at 1012, 458 P.2d at 204, 80 Cal. Rptr. at 364.

27. Id.

28. Id.

29. Id. at 1013, 458 P.2d at 204, 80 Cal. Rptr. at 364.

30. Id.

31. Id. at 1013-14, 458 P.2d at 204-05, 80 Cal. Rptr. at 364-65.

32. Id. at 1014, 458 P.2d at 205, 80 Cal. Rptr. at 365.

33. Id. at 1015, 458 P.2d at 206, 80 Cal. Rptr. at 366, citing Tumey v. Ohio, 273 U.S. 510, 523 (1927): "[I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." It may be, however, that since the petitioner also received money as a "professional courtesy" for abortions performed on his recommendations that this served to counterbalance his interest in not risking legal retribution by performing an abortion.

34. 71 Cal. 2d at 1015, 458 P.2d at 206, 80 Cal. Rptr. at 366. See Tumey v. Ohio, 273 U.S. 510, 523 (1927). Because of the doctor's interest in her not having an abortion, the court noted that some women whose medical condition actually indicates that an abortion

statute also imposed "enormous" pressure on the doctor to decide against an abortion because, if he decided incorrectly to perform such an operation, he would be liable to prosecution and withdrawal of his license to practice medicine.[35]

Belous concluded its discussion of the vagueness of the statute by stating that it would not uphold a construction of the statute so thoroughly rejected by the California courts[36] "unless there was a clear showing of a strong public policy or legislative intent requiring [such] adoption."[37] Apparently, it could find no such policy or intent. The district court in *Vuitch* agreed:[38] "[A] woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy. . . . [A] sound, informed interest of the state must affirmatively appear before the state infringes unduly on such rights."[39]

The *Belous* court, perhaps unnecessarily,[40] then went beyond a mere finding that the language of the statute was too vague to support a conviction. It decided that the statute could also be violative of "the *woman's rights to life* and *to choose whether to bear children.*"[41] Both of these rights are said to stem from the federal and state courts' respect for the right of privacy "in matters related to marriage, family, and sex."[42] The right to privacy is one of the many acknowledged constitutional rights which are not enumerated in the Constitution.[43] It has been defined simply as the "right to be let alone"[44] and it is considered to be "necessary for a civilized society."[45] Furthermore, the court

is necessary would not have been recommended or been given it by their physicians. 71 Cal. 2d at 1015, 458 P.2d at 206, 80 Cal. Rptr. at 366.

35. 71 Cal. 2d at 1015, 458 P.2d at 206, 80 Cal. Rptr. at 366. The court cites, as authority for its proposition that the statute is so vague that doctors can only guess at its meaning, a study reported in Packer & Gampell, Therapeutic Abortion: A Problem in Law and Medicine, 11 Stan. L. Rev. 417, 444 (1959) in which eleven hypothetical cases were distributed to twenty-nine hospitals, twenty-six of which then answered whether they thought that an abortion was called for. Most of the cases so described were plainly outside the California statute.

36. See cases cited notes 21-22 supra.

37. 71 Cal. 2d at 1005, 458 P.2d at 199, 80 Cal. Rptr. at 359.

38. United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969).

39. Id. at 1035 (citation omitted).

40. See text accompanying note 79 infra.

41. 71 Cal. 2d at 1005, 458 P.2d at 199, 80 Cal. Rptr. at 359 (emphasis added). The woman's right to life is said to be involved because, statistically, a pregnant woman has about one chance in 3,426 of dying in childbirth. See, id. n.6. The court does not discuss the cause of death for those who died in childbirth. The emphasis, thus far, has been put by the courts entirely on the mother's right to bear or not to bear the child. See C. Rice, The Vanishing Right to Live 35-37 (1969).

42. 71 Cal. 2d at 1006, 458 P.2d at 199, 80 Cal. Rptr. at 359.

43. Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965). See Dixon, The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?, 64 Mich. L. Rev. 197, 200-02 (1966). See also 71 Cal. 2d at 1006, 458 P.2d at 199-200, 80 Cal. Rptr. at 359-60.

44. Dixon, supra note 43, at 199.

45. Jacob & Jacob, Protection of Privacy, 119 New L.J. 157 (1969). At common law,

impliedly found a possible violation of a second right of privacy—this one between a *citizen* and his Government.[46] This right of privacy emanates from the first amendment,[47] the ninth amendment,[48] and the due process clause of the fourteenth amendment,[49] and involves undue governmental interference with a citizen's affairs.[50] However, the chief difficulty, and one which the *Belous* court did not attempt to alleviate, despite the ever-expanding right to privacy, is that "[f]ew concepts . . . are more vague or less amenable to definition and structured treatment than privacy."[51]

In reaching its determination that a right of privacy might be involved, the California court conceded the state's power to enact laws infringing on the individual's rights if his rights as an individual are superseded by the state's "compelling interest in the regulation of a subject which is within the police

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little remedy could be had for its intrusion by private persons except in rare instances. Eventually, a limited remedy for invasion of privacy found a place in tort law. W. Prosser, Torts § 112, at 829-51 (3d ed. 1964). See Dixon, supra note 43, at 199-200.

46. Dixon, supra note 43, at 200-02.

47. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). An interesting convergence of the Griswold-Belous holdings will occur with the "morning after pill," soon to be on the market. This will be sold as a contraceptive but will have abortive effects. See Joseph P. Kennedy Jr. Foundation, The Terrible Choice: The Abortion Dilemma 65, 71 (1968) [hereinafter cited as The Terrible Choice]. See also R. Shaw, Abortion on Trial 82-83 (1968).

48. Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (Goldberg, J., concurring).

49. Id. at 500 (Harlan, J., concurring); Id. at 502 (White, J., concurring). The protection of this fundamental personal right is also said to be the policy lying behind the third, fourth and fifth amendments. Dixon, supra note 43, at 200.

50. Lucas, supra note 7, at 738.

51. Dixon, supra note 43, at 199. This is illustrated by Griswold v. Connecticut, 381 U.S. 479 (1965), a decision in which the majority required four separate opinions, each of which acknowledged a right to privacy but based upon a different test of constitutionality, so as to arrive at the same conclusion: that a Connecticut law forbidding the dispensing of birth control information was, as applied to married couples, an unconstitutional invasion of their right to marital privacy. The Justices noted that an actual enforcement of the long ignored law would require a search of marital bedrooms and a questioning of married couples about the details of their marital relationship, both of which courses would be outrageously violative of the husband's and wife's right to privacy.

In further support of its holding, the Belous court cited Loving v. Virginia, 388 U.S. 1 (1967) (Virginia statute forbidding interracial marriage is unconstitutional); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (state's involuntary sterilization of criminal is unconstitutional); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (law forbidding parents to send children to private or religious schools is unconstitutional); Meyer v. Nebraska, 262 U.S. 390 (1923) (law stating that no foreign language could be taught in school is unconstitutional); Perez v. Lippold, 32 Cal. 2d 711, 198 P.2d 17 (1948) (California statute forbidding miscegenation is unconstitutional. "If the miscegenation law . . . is directed at a social evil and employs a reasonable means to prevent that evil, it is valid regardless of its incidental effect upon the conduct of particular religious groups." The law is unconstitutional only if it is "discriminatory and irrational." Id. at 713, 198 P.2d at 18).

powers of the state."[52] However, such legislation which does necessarily infringe on the personal rights of an individual must be "narrowly drawn."[53] In deciding whether to retain such a statute, the court must find that the state has a "compelling interest" in the regulation[54] of abortion and must also find that, though such a law might be said to intrude upon a constitutionally protected area, it is drawn with sufficient restraint and is not of "unlimited and indiscriminate sweep."[55] In *Belous*, the court found no compelling interest because 1) the statutes and cases which recognize property and tort rights in unborn children require that the child eventually be born alive,[56] 2) the law differentiates between the killing of an unborn child, which is murder, and the killing of an unborn child, which is abortion, a "lesser offense,"[57] and 3) the abortion laws in every state have constantly been aware of a legal exception to the criminality of abortion, *i.e.*, where the doctor has sacrificed the child to save the mother's life.[58] The state, therefore, "has always recognized that the pregnant woman's

52. 71 Cal. 2d at 1006, 458 P.2d at 200, 80 Cal. Rptr. at 360. That the state has a "compelling interest" in the lives of its citizens would not seem to be in doubt. See also Prince v. Massachusetts, 321 U.S. 158, 168-69 (1944). Some contend, however, that this is no longer the case because of the "population explosion."

53. 71 Cal. 2d at 1007, 458 P.2d at 200, 80 Cal. Rptr. at 360.

54. Id. One interpretation of the state's "compelling interest" in regulating abortion would be its interest in the health of the mother, as shown by the fact that the D.C. statute and Vuitch emphasize that it must be a doctor who interprets the abortion law. The doctor in Vuitch was acquitted but the nurse was convicted. The presumption of good faith applies only to a doctor. For a second interpretation of the state's "compelling interest" in the regulation of abortion—its interest in the life of the child—see note 51 supra.

55. See Shelton v. Tucker, 364 U.S. 479, 490 (1960).

56. 71 Cal. 2d at 1010, 458 P.2d at 202, 80 Cal. Rptr. at 362. The reason for this requirement is not that the law does not recognize the "child en ventre sa mere" as a human with legal rights, but is founded upon the difficulties of assessing damages and proving causation. There are many causes of action which do not survive the death of the plaintiff, but this does not mean that the tort did not occur or that the legal right did not exist in the beginning. See D. Louisell, Abortion, The Process of Medicine and the Due Process of Law 233, 242 n. (1969). See also C. Rice, supra note 40, at 33. Property rights: See Thurmond v. Superior Court, 66 Cal. 2d 836, 427 P.2d 985, 59 Cal. Rptr. 273 (1967); Metzger v. People, 98 Colo. 133, 53 P.2d 1189 (1936); Tort Rights: Cooper v. Blanck, 39 So. 2d 352 (La. Ct. App. 1923); Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949). Several cases have arisen lately which refuse to find a cause of action for "wrongful life." See, e.g., Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), cert. denied, 379 U.S. 945 (1964). See also Gleitman v. Cosgrove, 49 N.J. 22, 30-31, 227 A.2d 689, 693 (1967): "[T]he right of [the] child to live is greater than and precludes [the] right [of the parents] not to endure emotional and financial injury." The fact that the fetus is said to have a right to live leads to the suggestion that he might also be entitled, like other minors, to due process to protect that right. See The Terrible Choice at 99. With respect to the rights of juveniles, see Note, 19 Hastings L.J. 223 (1967).

57. It is, however, usually placed under the heading of "homicide." See The Terrible Choice at 94.

58. "'Lawful justification is used in the sense of necessity. It is a defense that the destruction of the child's life was necessary to save that of the mother, but it should be

right to life takes precedence over any interest the state may have in the unborn."[59] It is clear that the state could not require a woman to sacrifice her life for the child's, nor, concluded the court, may it require that a woman undergo the degree of risk in which death in childbirth would be, not absolutely certain, but even "substantially certain."[60]

The *Belous* decision is open to severe criticism. The majority seems to have ignored a fundamental rule of statutory interpretation: "[W]here the words assailed, taken in connection with the context, are commonly understood, their use does not render a statute invalid."[61] For over a hundred years the California abortion law has been in existence "without evoking a single whimpering cry against it."[62] The dissent found that the "mandate of the section is plain and clear" and stated that "the average man in the street, confronted with this law, would have little trouble in extracting its sense (we hold him accountable to much more complicated enactments); and the doctor, with his professional training and expertise would have even less."[63] " '[T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . . .' "[64]

The *Belous* court also failed to recognize that the right to privacy, like other first amendment rights, while an important one, is not absolute.[65] The state often is permitted to intervene in "matters related to marriage, family, and sex."[66] For example, although parents do have the right to choose their child's

remembered that necessity of this class must be strictly limited. The right can only be exercised in extremity.' " State v. Brandenburg, 137 N.J.L. 124, 126, 58 A.2d 709, 710 (1948). Actually, the choice between mother and child almost never arises in twentieth century medicine, as the medical indications for abortion are considered to be virtually nonexistent. H. Rosen, supra note 5, at 302. See also R. Shaw, supra note 47, at 71.

59. 71 Cal. 2d at 1011, 458 P.2d at 203, 80 Cal. Rptr. at 363.

60. Id. at 1012, 458 P.2d at 203, 80 Cal. Rptr. at 363.

61. 16 Am. Jur. 2d Constitutional Law § 552 at 951 (1964) (footnote omitted). See Bandini Petroleum Co. v. Superior Court, 284 U.S. 8 (1931); Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922). See also McLean v. Arkansas, 211 U.S. 539, 547-48 (1909) (If state law has reasonable relationship to protection of public health, safety, and welfare, a court may not set it aside because it thinks law is unwise); Jordan v. De George, 341 U.S. 223 (1951) ("It is significant that the phrase ['crime involving moral turpitude'] has been part of the immigration laws for more than sixty years. . . . [and] has also been used for many years as a criterion in a variety of other statutes."). Id. at 229-30.

62. 71 Cal. 2d at 1023, 458 P.2d at 211, 80 Cal. Rptr. at 371 (dissenting opinion).

63. Id. See Westphal v. Westphal, 122 Cal. App. 379, 382, 10 P.2d 119, 120 (Dist. Ct. App. 1932).

64. 71 Cal. 2d at 1021, 458 P.2d at 209, 80 Cal. Rptr. at 369, citing United States v. Petrillo, 332 U.S. 1, 7-8 (1947).

65. " '[T]he family . . . is not beyond regulation . . . and it would be an absurdity to suggest . . . that the home can be made a sanctuary for crime. The right of privacy most manifestly is not an absolute.' " Poe v. Ullman, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting).

66. 71 Cal. 2d at 1006, 458 P.2d at 199, 80 Cal. Rptr. at 359.

school, they may not choose *whether* or not to send him to school.[67] The state permits a further interference with the delicate parent-child relationship when it authorizes the child to sue its parents for tortious acts.[68] In the child abuse statutes, the state recognizes that the parents do not own the child; he is not theirs to kill or to beat.[69] In ruling that a statute forbidding minor children to distribute religious literature at the bidding of their church and parents was constitutional, *Prince v. Massachusetts*[70] stated that "neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways."[71] *Prince* also stated that the power of the state to protect the child is not lessened merely because the parent couches his complaint in terms of a valid first amendment right. Thus, a parent may be forced to allow his child to be vaccinated,[72] and is obliged by law to call for medical assistance when his child requires it.[73] "The right to practice religion freely does not include liberty to expose the community *or the child* to communicable disease or the latter to ill health or *death*. . . . [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and . . . this includes, to some extent, matters of conscience and religious conviction."[74] Thus, the state has a "compelling interest" in the child and may protect it from its parents even though this may involve an invasion of the parent's constitutionally guaranteed rights.

Furthermore, the right to privacy may not even have been involved in *Belous*. Every case cited by the California court to support its view of a right to privacy was actually based on only "the sacred precincts of marital bedrooms," *i.e.*, marital sex.[75] The state has never extended its protection to extramarital sex acts and, in fact, has punished them with penal statutes, forbidding adultery and sodomy.[76] The Supreme Court in *Griswold*[77] accepted the constitutionality of such statutes.[78] Had the California court followed one of the cardinal rules

67. Pierce v. Society of Sisters, 268 U.S. 510 (1925); State v. Bailey, 157 Ind. 324, 61 N.E. 730 (1901).

68. See generally Comment, Child v. Parent: Erosion of the Immunity Rule, 19 Hastings L.J. 201 (1967); 38 Fordham L. Rev. 138 (1969).

69. See, e.g., D.C. Code Encycl. Ann. § 22-901 (1967).

70. 321 U.S. 158 (1944).

71. Id. at 166 (footnotes omitted), citing Sturges & Burn Mfg. Co. v. Beauchamp, 231 U.S. 320 (1913); State v. Bailey, 157 Ind. 324, 61 N.E. 730 (1901); People v. Ewer, 141 N.Y. 129, 36 N.E. 4 (1894) (N.Y. law forbidding parents to consent to the exhibition of their under-14 year old daughter as a dancer is constitutional).

72. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

73. People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (1903).

74. 321 U.S. at 166-67 (emphasis added) (citation omitted).

75. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

76. Cal. Penal Code §§ 269 a-b (West 1955) [Adultery]; Cal. Penal Code §§ 286, 287 (West 1955) [Sodomy].

77. 381 U.S. 479 (1965).

78. Id. at 498 (Goldberg, J., concurring).

of statutory interpretation—that the court will limit itself to the narrow facts of the case and not consider the constitutionality of the statute involved unless it is an unavoidable part of the relevant issues[79]—it may never have had to reach the right of privacy issue.

Finally, the *Belous* decision is wholly out of line with the virtually unanimous medical and scientific opinion[80] that the embryo and the fetus are human life[81] and, as such, are worthy of protection: "[M]edical authority has recognized long since that the child is in existence from the moment of conception, and for many purposes its existence is recognized by the law. The criminal law regards it as a separate entity, and the law of property considers it in being for all purposes which are to its benefit, such as taking by will or descent. . . . [T]he unborn child in the path of an automobile is as much a person in the street as the mother . . . ."[82] California statutes, as interpreted by the California courts, have also revealed a recognition of the child as a human being from the moment of conception.[83]

The future of abortion statutes is difficult to chart after *Belous;* it is probable that the final answer to the question of their constitutionality will come from the Supreme Court with the *Belous* and the more recent *Vuitch* appeals.[84] Meanwhile, the state legislatures really are left with two choices: they can wait for their own states' courts to accept or reject *Belous* or they can revise their abortion statutes to make the meaning of each phrase more explicit.[85] The

79. See Poe v. Ullman, 367 U.S. 497, 526-27 (1961) (Harlan, J., dissenting).

80. The union of egg and sperm "initiates the life of a new individual." N. Mietus, The Therapeutic Abortion Act—A Statement in Opposition 12, citing B. Patten, Foundations of Embryology 35, 82 (2d ed. 1964). See also Nilsson, Drama of Life Before Birth, Life, April 30, 1966, at 54.

81. This medical climate has developed the specialty of fetology which has humanized the fetus so that it may no longer be considered by its mother or by doctors—or by modern courts—as "a quasi-living thing" with a right to life that is subservient to the mother's right to privacy and to liberty. See N. Mietus, supra note 80, at 13. See also Hixson, Forecasts From the Womb, N.Y. Times, Jan. 19, 1968, at 72; Conniff, The World of the Unborn, N.Y. Times, Jan. 8, 1967, § 6 (Magazine), at 41. "[T]he law should endeavor to keep abreast with the marvelous developments of science and the rapidly-changing conditions of the world. Precedents are valuable so long as they do not obstruct justice or destroy progress." Scott v. McPheeters, 33 Cal. App. 2d 629, 637, 92 P.2d 678, 683 (Dist. Ct. App. 1939).

82. W. Prosser, Torts § 56, at 355 (3d ed. 1964) (footnotes omitted).

83. 71 Cal. 2d at 1020, 458 P.2d at 209, 80 Cal. Rptr. at 369 (dissenting opinion).

84. The court in Vuitch urged that "[a] prompt appeal to the United States Supreme Court under 18 U.S.C. § 3731 is highly desirable." 305 F. Supp. at 1036 (D.D.C. 1969).

85. This will be very difficult, however. The laymen in the legislatures will probably be unable to devise a statute giving a clear medical test which can be applied to every situation. The language the legislature used originally seemed, until Belous, to have met the various constitutional standards for clarity. See, e.g., United States v. Petrillo, 332 U.S. 1 (1947): "Clearer and more precise language might have been framed . . . [b]ut none occurs to us, nor has any better language been suggested, effectively to carry out . . . the Congressional purpose." Id. at 7. See also United States v. Wurzbach, 280 U.S. 396, 399

latter course, however, is the more hazardous since it will not answer the constitutional objection that *all* abortion statutes—including the therapeutic abortion acts of several states—are *per se* violative of a woman's right to privacy and to life and liberty.[86]

Patents—Licensee Estoppel Doctrine Overruled.—In 1955 Lear, Inc. and Adkins entered into a licensing agreement under which the former agreed to pay Adkins royalties on gyroscopes manufactured using an apparatus designed by Adkins for which a patent was pending, subject to a denial of the patent application by the Patent Office or a subsequent holding of invalidity. Subsequently, Lear refused to continue royalty payments but continued to make use of the design. After the patent was finally issued in 1960,[1] Adkins brought an action in the California Superior Court for breach of the licensing contract. The court awarded royalties on one set of gyroscopes, holding the licensee estopped from challenging the validity of the patent, while finding the remaining gyroscopes fully anticipated by prior art and, therefore, not subject to royalties.[2]

On appeal, the District Court of Appeal held that Lear had correctly ter-

(1930); Smith v. Peterson, 131 Cal. App. 2d 241, 246, 280 P.2d 522, 525 (Dist. Ct. App. 1955).

86. For an extensive discussion of other possible arguments for repeal of the abortion statutes not covered in Belous, see Greenhouse, supra note 16, at 30, 88. Plaintiff's arguments are mainly based on Lucas, supra note 7. The contentions are that 1) the law violates the right to privacy with respect to the doctor-patient privilege and violates the right of access to information, freedom of speech, and freedom of association; 2) the law deprives doctors of the right to practice medicine according to the higest standards of their profession; 3) the law violates the right of the poor to equal protection of the laws since poor women cannot afford to go to a jurisdiction where they may obtain a legal abortion and cannot afford to pay for a competent physician to perform an illegal abortion in this jurisdiction. The result is that a proportionately higher rate of poor—usually black and Puerto Rican—women die as a result of bungled abortions; 4) the law violates the first amendment requirement of separation of church and state (based on the traditional opposition of the Catholic Church to abortion and on the contention that the significance of the fetus as human person or non-person is a theological and personal opinion, rather than a scientific fact); 5) the law violates the eighth amendment's prohibition against cruel and unusual punishment.

1. "This long delay has its source in the special character of Patent Office procedures. . . . [W]hen Adkins made his original application in 1954, it took the average inventor more than three years before he obtained a final administrative decision on the patentability of his ideas, with the Patent Office acting on the average application from two to four times." Lear, Inc. v. Adkins, 395 U.S. 653, 658-59 (1969) (citation omitted).

2. The remaining gyroscopes were found to have been made by a process whose development was independent of Adkins' patented invention.

A second and parallel cause of action in tort for wrongful appropriation of a trade secret was abandoned when the court forced Adkins to choose between the contract and tort claims. 395 U.S. at 660 & n.9 (The decision of the trial court is unreported).

minated the royalty payments under contract principles, and that Adkin's only chance of recovery was an infringement action in the federal courts.[3] The California Supreme Court, on appeal, held that the doctrine of licensee estoppel, by which a licensee, so long as there is an existing license agreement, is estopped to deny the validity of his licensor's patent in a suit for royalties under the agreement, prevented Lear's questioning the validity of the subject patent.[4] The United States Supreme Court rejected the doctrine of licensee estoppel and remanded to the California Supreme Court to decide the question of patent invalidity.[5] *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969).

Kinsman v. Parkhurst[6] is the foundation case of licensee estoppel in the United States.[7] *Kinsman* held that, while a patent is normally subject to challenge in a suit involving that patent,[8] it cannot be so challenged when the relationship of the parties to the suit is that of assignor-assignee or, by implication, licensor-licensee. Courts employed various devices to justify the doctrine, such as analogies to a landlord-tenant estoppel[9] and later an estoppel by deed.[10] But the most widely accepted rationale for the doctrine was the underlying contractual concepts of fairness and justice. While an attack on the validity of a patent is based on a lack of mutuality of consideration, the theory of estoppel is based on a contractual promise, express or implied, not to contest the validity of the patent. If a licensee enters into a licensing agreement, it was believed, because of a reluctance to risk a possible infringement suit even though he may doubt the validity of a patent, part of the bargained-for con-

3. Adkins v. Lear, Inc., 52 Cal. Rptr. 795, 151 U.S.P.Q. 119 (Dist. Ct. App. 1966).

4. Adkins v. Lear, Inc., 67 Cal. 2d 882, 435 P.2d 321, 64 Cal. Rptr. 545 (1967). Had the court found, however, that the contract had been validly terminated by Adkins, there would have been no estoppel.

5. As a collateral issue to an action regarding a licensing agreement, invalidity can be ruled upon by a state court. Otherwise, it must be litigated in an infringement action in the federal courts which have exclusive jurisdiction in any civil action arising under any act of Congress relating to patents. 28 U.S.C. § 1338 (1964).

6. 59 U.S. (18 How.) 289 (1855).

7. Prior authority, however, does appear to exist. Cf. Wilder v. Adams, 29 F. Cas. 1216 (No. 17,647) (C.C.D. Mass. 1846), which, in an action brought for royalties under a license, denied the defense that an allegedly invalid patent represented consideration.

8. See 35 U.S.C. § 282 (1964), as amended, 35 U.S.C. § 282 (Supp. IV, 1969).

9. As a tenant is denied the power to dispute the title of his landlord while he remains on the premises, so a licensee is estopped from disputing the licensor's patent while he continues to make use of it. Covell v. Bostwick, 39 F. 421, 424 (C.C.S.D.N.Y. 1889); White v. Lee, 14 F. 789, 790-91 (C.C.D. Mass. 1882).

10. Westinghouse Elec. & Mfg. Co. v. Formica Insulation Co., 266 U.S. 342, 348-49 (1924); Hall Laboratories, Inc. v. National Aluminate Corp., 224 F.2d 303, 306 n.1 (3d Cir. 1955), cert. denied, 350 U.S. 932 (1956). "The doctrine of estoppel by deed arose by way of the solemn assurance presumed to have been given by the grantor to the grantee that the lands and title which were conveyed were as the grantor represented or warranted them to be, an assurance on which the grantee was assumed to have relied." Automatic Paper Mach. Co. v. Marcalus Mfg. Co., 147 F.2d 608, 613 (3d Cir.), aff'd sub nom., Scott Paper Co. v. Marcalus Mfg. Co., 326 U.S. 249 (1945).

sideration should be his promise not to contest.[11] It was considered inequitable to prevent a patentee from manufacturing by holding him to his agreement with the licensee while defeating a suit by him on the agreement by denying the validity of the patent.[12]

The high water mark of licensee estoppel was apparently reached in 1905 when the federal government was estopped from asserting patent invalidity as a defense in a suit for royalties under a licensing agreement.[13] Thirteen years earlier, however, the Supreme Court, while refusing to enforce as unconscionable a licensing agreement which included an agreement not to import, make, or sell any machines covered by patents not within the scope of the agreement, questioned whether a defendant in a patent suit could estop himself from denying the validity of a patent which was wholly void.[14]

In 1924 the first breach in the virtually solid wall of estoppel came in *Westinghouse Electric & Manufacturing Co. v. Formica Insulation Co.*[15] in which the Supreme Court affirmed the analogous doctrine of assignor estoppel,[16] stating that "this Court will not now lightly disturb a rule well settled by forty-five years of judicial consideration and conclusion in those courts."[17] It admitted evidence of prior art, however, to narrow the patent claims[18] rather than to allow the assignee to rely on the plain meaning of the language in his claims.[19]

11. E.g., Hall Laboratories, Inc. v. National Aluminate Corp., 224 F.2d 303 (3d Cir. 1955), cert. denied, 350 U.S. 932 (1956); Marston v. Swett, 82 N.Y. 526, 533-34 (1880); Marston v. Swett, 66 N.Y. 206, 212-13 (1876). See also MacGregor v. Westinghouse Elec. & Mfg. Co., 329 U.S. 402, 413-15 (1947) (Frankfurter, J., dissenting).

12. Milligan v. Lalance & Grosjean Mfg. Co., 21 F. 570, 572 (C.C.S.D.N.Y. 1884) (a decision involving an assignment).

13. United States v. Harvey Steel Co., 196 U.S. 310 (1905).

14. Pope Mfg. Co. v. Gormully, 144 U.S. 224 (1892). The Court, in dictum, quotes Crane v. French, 38 Miss. 503, 532 (1860): "[w]ith regard to all such matters of public policy, it would seem that no man can bind himself by estoppel not to assert a right which the law gives him on reasons of public policy." Id. at 235.

15. 266 U.S. 342 (1924).

16. The Court affirmed assignor estoppel by analogy to an estoppel by deed. See 4 H. Tiffany, The Law of Real Property § 1230 (3d ed. B. Jones 1939); note 10 supra. This theory has been criticized on the basis that, since estoppel could not be invoked if an unauthorized grantor conveyed public lands, it could not be invoked if the assigned patent(s) are invalid. Kramer, Estoppel to Deny Validity—A Slender Reed, 23 N.Y.U. Intra. L. Rev. 237, 239 (1968).

17. 266 U.S. at 349.

18. The typical patent contains: necessary drawings, an introductory explanation of the state of the art and the specific innovation thereto, a detailed explanation of the operation of the invention (specifications) and the claims. The claims are the heart of the patent since infringement is determined by reading the claims against the offending item. See 35 U.S.C. §§ 111-14 (1964), as amended, 35 U.S.C. § 112 (Supp. IV, 1969).

19. 266 U.S. at 352-55. The reasoning of Formica has been applied likewise to licensee cases. E.g., New Wrinkle, Inc. v. John L. Armitage & Co., 277 F.2d 409, 411 (3d Cir. 1960).

One writer in his interpretation of Formica suggests: "Once a court marshals enough prior art to seriously narrow a patent, it would seem that it has impliedly ruled the patent

The doctrine was further eroded by the 1942 Supreme Court decision in *Sola Electric Co. v. Jefferson Electric Co.*[20] which permitted the licensee to contest patent validity when the patentee sought to enjoin his licensee from avoiding certain price fixing provisions in the licensing agreement since such provisions would be in violation of the antitrust laws if the patent were invalid.[21] The Court held that when a state rule of estoppel conflicted with federal policy, in this case the antitrust laws, the state rule must give way.[22] Five years later the Supreme Court rendered similar rulings in two companion cases, *Edward Katzinger Co. v. Chicago Metallic Manufacturing Co.*[23] and *MacGregor v. Westinghouse Electric & Manufacturing Co.*,[24] even though the licensor was not attempting to enforce the price fixing provisions. Thus, the doctrine no longer applied where the license agreement merely contained clauses ostensibly illegal under the antitrust laws. These decisions seemed to follow a public policy approach set forth in *Scott Paper Co. v. Marcalus Manufacturing Co.*[25] which, while refusing to decide whether the doctrine of estoppel was in conflict with the antitrust laws, stated that "[i]f a manufacturer or user could restrict himself, by express contract, or by any action which would give rise to an 'estoppel,' from using the invention of an expired patent, he would deprive himself and the consuming public of the advantage to be derived from his free use of the disclosures. The public has invested in such free use by the grant of a monopoly to the patentee for a limited time."[26]

At this point it would have seemed that the Court was prepared to completely abrogate the doctrine of licensee estoppel. It had in *Katzinger* and *MacGregor*

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would be found invalid, but for the estoppel. Any drastic curtailment of the patent's scope would appear to be nearly as effective as a declaration of invalidity in freeing commerce from the clog of an unwarranted monopoly." Kramer, supra note 16, at 251. See Casco Prods. Corp. v. Sinko Tool & Mfg. Co., 116 F.2d 119 (7th Cir. 1940), cert. denied, 312 U.S. 693 (1941), which held that prior art, employed to prove noninfringement, can be used to reduce the scope of the claims to zero without overruling estoppel. But even if any drastic curtailment of the scope of the claims in an application of Formica does effectively invalidate the patent such a result was unintended by Formica. The Patent Office's function is to limit the claims to that which is novel and not obvious from prior art. Formica might be best understood as a continuation of that function in the courts upon the application of the licensee after the granting of the patent. The Formica court, in stating that prior art may be used not to invalidate the patent but merely to construe and narrow the claims, calls the distinction a "nice one but . . . workable." 266 U.S. at 351.

20. 317 U.S. 173 (1942).

21. Id. at 175-77. Thus, if we consider the limited monopoly granted by the patent laws as an exception to the antitrust laws, price fixing provisions would clearly be illegal if the patent is held invalid.

22. Id. at 177. This is an application of the supremacy clause of the Constitution under which the state contractual law of estoppel must fall.

23. 329 U.S. 394 (1947).

24. 329 U.S. 402 (1947).

25. 326 U.S. 249 (1945).

26. Id. at 255-56. After a patent has expired everyone is free to practice the invention and no question of estoppel arises. Id. at 254.

apparently adopted the expansive policy reasoning of *Scott* rather than kill it by the slow death of exceptions, such as those for prior expired patents[27] and price fixing.[28] Mr. Justice Frankfurter, in fact, believed that the *Katzinger* and *MacGregor* decisions effectively overruled the estoppel doctrine.[29] In 1950, however, the Court in *Automatic Radio Manufacturing Co. v. Hazeltine Research, Inc.*[30] reaffirmed the doctrine of licensee estoppel, merely noting in passing the then recent exceptions in the area of price fixing provisions.[31] Although the strong public policy arguments of *Scott, Katzinger,* and *MacGregor,* as well as the earlier language in *Pope Manufacturing Co. v. Gormully,*[32] were not followed in *Automatic Radio,* one subsequent commentator concluded: "It is obvious that in any conflict with public policy the doctrine of estoppel will be the loser . . . . However, the areas in which this conflict exists are far from certain. If it is considered that any limitation on the right to challenge the validity of a patent contravenes public policy . . . then the doctrine of estoppel is obviously a dead issue."[33] The decision that estoppel does indeed contravene public policy has now been made in *Lear, Inc. v. Adkins.*

By the Court's own admission it granted certiorari in this case "to reconsider the validity of the *Hazeltine* rule in the light of our recent decisions emphasizing the strong federal policy favoring free competition in ideas which do not merit patent protection."[34] The Court in the decisions to which it referred, *Sears, Roebuck & Co. v. Stiffel Co.*[35] and *Compco Corp. v. Day-Brite Lighting Inc.*,[36] in language so sweeping that it could be interpreted as sounding the death knell of all state laws of unfair competition,[37] had held that the copying

27. See note 26 supra.

28. See notes 20-24 supra and accompanying text.

29. He charged that the Court ignored the consideration of private good faith, saying: "If a doctrine that was vital law for more than ninety years will be found to have been deprived of life, we ought at least to give it decent public burial." 329 U.S. at 416 (Frankfurter, J., in a joint dissent in Katzinger and MacGregor). Mr. Justice Frankfurter, dissenting in Scott as well as Katzinger and MacGregor, found it fundamentally incompatible with fair play to permit one to sell and then use a defense that he has sold nothing. 326 U.S. at 258-59 (dissenting opinion).

30. 339 U.S. 827 (1950).

31. Id. at 836.

32. 144 U.S. 224 (1892).

33. Cooper, Estoppel to Challenge Patent Validity: The Case of Private Good Faith vs. Public Policy, 18 W. Res. L. Rev. 1122, 1153 (1967).

34. 395 U.S. at 656. In a previous decision Mr. Justice White had stated: "The Court has already held similar agreements contrary to public policy and unenforceable. In the 'patent estoppel' cases, the Court found that public policy favors the exposure of invalid patent monopolies before the courts in order to free the public from their effects. Thus a licensee may not be prevented from attacking the validity of his licensor's patent." United States v. Singer Mfg. Co., 374 U.S. 174, 200 n. (1963) (concurring opinion in which he cites Scott and a number of price fixing cases).

35. 376 U.S. 225 (1964).

36. 376 U.S. 234 (1964).

37. "To allow a State by use of its law of unfair competition to prevent the copying of

of articles not covered by a federal patent or copyright is an act protected by federal law against state interference.

Whereas a number of lower court cases have limited *Sears* and *Compco* to their specific facts,[38] another line of cases broadly interpreted these decisions so that any product which could be the subject of a federal patent or copyright under the Constitution was precluded from state protection.[39] Thus, the patent clause[40] may be interpreted as a grant of exclusive power to Congress pre-empting all state protection of creative rights whether patented or not[41] or in such a way that the supremacy clause operates to invalidate the state law only where such a law is in direct conflict with federal patent legislation.[42] In *Lear* the Court was faced with a situation similar to *Sears* and *Compco* in which an article, which may not be worthy of a patent, may nevertheless be protected

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an article which represents too slight an advance to be patented would be to permit the State to block off from the public something which federal law has said belongs to the public. The result would be that while federal law grants only 14 or 17 years' protection to genuine inventions . . . States could allow perpetual protection to articles too lacking in novelty to merit any patent at all under federal constitutional standards. This would be too great an encroachment on the federal patent system to be tolerated." 376 U.S. at 231-32. See Van Prods. Co. v. General Welding & Fabricating Co., 419 Pa. 248, 269-71, 213 A.2d 769, 780-81 (1965) (concurring opinion); Adelman, Trade Secrets and Federal Pre-Emption—The Aftermath of Sears and Compco, 49 J. Pat. Off. Soc'y 713, 717-24 (1967); cf. Columbia Broadcasting Sys., Inc. v. De Costa, 377 F.2d 315 (1st Cir.), cert. denied, 389 U.S. 1007 (1967); Cable Vision, Inc. v. KUTV, Inc., 335 F.2d 348 (9th Cir. 1964), cert. denied, 379 U.S. 989 (1965). Although Sears and Compco were not without precedent in invoking federal patent policy to strike down a state law of unfair competition, previous decisions were based not on federal preemption but on the principle that the subject of an expired patent was dedicated to the public. See, e.g., Singer Mfg. Co. v. June Mfg. Co., 163 U.S. 169 (1896); Coats v. Merrick Thread Co., 149 U.S. 562 (1893); West Point Mfg. Co. v. Detroit Stamping Co., 222 F.2d 581 (6th Cir.), cert. denied, 350 U.S. 840 (1955); Zippo Mfg. Co. v. Manners Jewelers, Inc., 180 F. Supp. 845 (E.D. La. 1960).

38. See, e.g., Grove Press, Inc. v. Collectors Publication, Inc., 264 F. Supp. 603 (C.D. Cal. 1967); Pottstown Daily News Publishing Co. v. Pottstown Broadcasting Co., 247 F. Supp. 578 (E.D. Pa. 1965); Flamingo Telefilm Sales, Inc. v. United Artists Corp., 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).

39. See, e.g., Columbia Broadcasting Sys., Inc. v. De Costa, 377 F.2d 315 (1st Cir.), cert. denied, 389 U.S. 1007 (1967); Cable Vision, Inc. v. KUTV, Inc., 335 F.2d 348 (9th Cir. 1964), cert. denied, 379 U.S. 989 (1965).

40. U.S. Const. art. I, § 8, cl. 8.

41. Contra, Patterson v. Kentucky, 97 U.S. 501, 508-09 (1878); Livingston v. Van Ingen, 9 Johns. 507, 581 (N.Y. Sup. Ct. Jud. 1812).

42. The alternatives have been aptly phrased by one writer: "The extent to which this preemption theory [as found in Sears and Compco] will effect areas previously regarded as within the competence of the states may turn in part upon whether the disability is viewed as imposed by negative implications from the patent clause or by the operation of the supremacy clause upon situations where state law conflicts with the federal statutory patent policy." Treece, Patent Policy and Preemption: The Stiffel and Compco Cases, 32 U. Chi. L. Rev. 80, 83 (1964). See also Adelman, supra note 37.

by a state estoppel doctrine. The Court, however, declined to decide between these alternative theories.[43] It did acknowledge, however, that the importance of the federal question involved may require further review after a "fully focused inquiry" by the state courts.[44] It thus left open the potentially troublesome question of the status of the royalties paid by Lear to Adkins prior to the issuance of the patent.

The encouragement of disclosure and public use is the *raison d'etre* of federal patent law and its quite limited monopoly grant. The Supreme Court by its abrogation of licensee estoppel has perhaps reached a paradoxical result, for the holding, especially in view of the fact that even before *Lear* the chances that a patent litigation would be worthwhile to the holder of the patent were minimal,[45] has now made trade secret protection[46] an even more attractive alternative to patent protection,[47] a development which may prove inimical

43. The Lear-Adkins relationship deviated from the normal licensing agreement in at least one aspect—the patent had not yet been granted. Lear, therefore, had the unusual advantage of immediate access to ideas which it would normally learn only after issuance of the patent, since pending patent applications and their contents are kept secret until final action. 37 C.F.R. § 1.14(a) (1969). The Supreme Court, by considering the pre-patent royalties, thus had the opportunity to decide whether Adkins should receive payment for revealing what would normally be a trade secret. Since trade secret protection is a concern of state law, the Court could have properly decided which interpretation of Sears and Compco was the valid one by either accepting state trade secret law because Congress had not passed any preemptive legislation or precluding trade secret protection on the ground that the patent clause relegates all protection of creative rights to the federal patent or copyright statutes.

44. 395 U.S. at 675. Contrast, however, the opinion of Mr. Justice Black, with whom Chief Justice Warren and Mr. Justice Douglas agreed, which dissented as to this point. See note 52 infra and accompanying text.

45. Since the odds of a patent being sustained in an infringement suit are one in three, and since the chances of recovering more in damages than the cost of the original patent prosecution and the present litigation are about one in ten even if the patent is held valid and infringed, the chances of a profitable termination of the suit are one in thirty. Chope, Conflicts Between Patents and the Antitrust Laws, 49 J. Pat. Off. Soc'y 819, 826-27 (1967). In the United States approximately 60% of all patents considered by the courts are wholly or partially invalidated. Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, Review of the American Patent System, S. Rep. No. 1464, 84th Cong., 2d Sess. 4 (1956). Of the 686 federal court of appeals decisions reported in the United States Patent Quarterly between January of 1956 and March of 1967, plaintiff was successful in only 29% of the cases. Mahon, Trade Secrets and Patents Compared, 50 J. Pat. Off. Soc'y 536, 540 (1968).

46. A generally accepted definition of trade secrets is found in the Restatement of Torts § 757, comment b at 5 (1939): "A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." See generally 2 R. Callman, The Law of Unfair Competition, Trademarks and Monopolies §§ 51-59 (3d ed. 1968).

47. See Mahon, supra note 45, for a good contrast between patents and trade secrets. A prerequisite of patent protection is the issuance of a patent which must first overcome statutory hurdles of utility (35 U.S.C. § 101 (1964)), novelty (35 U.S.C. § 102 (1964)),

to the disclosure of new inventions.[48] "To the extent scientific information is kept secret, there is a strong retarding factor in the advance of technology. . . . There are many fields where trade secrets are now the practical substitute or alternative to patent protection . . . . To the extent secrets such as these are

nonobviousness (35 U.S.C. § 103 (1964)), risk of interference proceedings (35 U.S.C. § 135 (1964)), and often the time and expense of patent prosecution. Trade secret protection, on the other hand, requires "discovery," rather than the higher form of "invention" required by patents, a discovery which is secret in fact. See Atlantic Wool Combing Co. v. Norfolk Mills, Inc., 357 F.2d 866 (1st Cir. 1966). The nature of the discovery must be such that the developed product is not amenable to an analysis which by retrofitting or "back-engineering" will readily give up the secret. A wrist watch, for example, can hardly be protected as a trade secret since it can readily be taken apart and the secret discovered, whereas the Coca-Cola formula remains a secret and thus protectable. Trade secret protection, therefore, requires less original effort than the patent novelty search, the effectiveness of which the inventor-patentee cannot be certain until after litigation. Meanwhile, he has lost all chance of trade secret protection, for upon issuance the contents of the patent are made public. 37 C.F.R. § 1.11 (Supp. 1969); 37 C.F.R. § 1.13 (1967). A finding of invalidity in a later infringement suit, therefore, leaves the inventor with nothing. See note 45 supra for the probabilities of such a finding.

Once the protection exists the nature of the right is likewise different. Patent protection is for seventeen years and the holder's remedy is an infringement suit, while trade secret protection is theoretically unlimited, although the possibility of its disclosure by inspection or independent discovery is ever-present. In litigation seeking to protect a trade secret the chances of success, on the other hand, are approximately 47%. Mahon, supra note 45, at 540 (the author arrives at this figure from an examination of trade secret cases found in the American Digest System from 1936-1966). While the scope of a patent is precisely defined by the claims, a court in a trade secret case will apply equity rather than a minute analysis and comparison. See Engelhard Indus., Inc. v. Research Instruments Corp., 324 F.2d 347 (9th Cir. 1963), cert. denied, 377 U.S. 923 (1964). Furthermore, in such a suit secrecy can be preserved by requesting in camera proceedings. See State ex rel. Ampco Metal, Inc. v. O'Neill, 273 Wis. 530, 78 N.W.2d 921 (1956); Annot., 62 A.L.R.2d 509 (1958). When the holder of a patent loses his suit, the outcome opens up the know-how of the patent to the public at large, whereas the owner of a trade secret, having gained the "lead time" for his own development of the discovery while it was still secret, may find that a competitor, who has won the suit, recognizes the commercial advantage of keeping the discovery secret. Although the former, therefore, loses his knowledge to the world, the latter may lose it only to his adversary in the suit.

Even if the trade secret is discovered and then patented, the original owner of the secret is probably safe. Although he cannot claim to have anticipated the patent so as to invalidate it, see, e.g., Gillman v. Stern, 114 F.2d 28 (2d Cir. 1940), cert. denied, 311 U.S. 718 (1941), in an infringement suit the patentee must seek discovery in the nature of a "fishing expedition" which few courts will condone or else make out a prima facie case raising questions to which the information sought is material. Lever Bros. Co. v. Proctor & Gamble Mfg. Co., 38 F. Supp. 680 (D. Md. 1941). See generally Annot., 17 A.L.R.2d 383 (1951).

48. This is a fundamental purpose of the federal patent laws. See Pennock v. Dialogue, 27 U.S. (2 Pet.) 1 (1829). They were proposed to replace the system of trade secrecy which existed in the guilds during the Middle Ages. Harris, Patents and Trade Secrets: Instruments of Positive Competition, 12 Idea 631, 633 (1968).

relied upon and maintained, the patent system has failed and the interchange of scientific information is retarded."[49]

A reshifting of the balance of attractiveness, either by relaxing the limits of patent protection or by limiting the scope of trade secret protection,[50] may be necessary to resolve this apparent policy contradiction in *Lear*. The majority in *Lear* has reserved for future decision after further determinations by state courts "whether, and to what extent, the States may protect the owners of *unpatented* inventions who are willing to disclose their ideas to manufacturers only upon payment of royalties."[51] The question whether *Sears* and *Compco* are to be interpreted as precluding trade secret protection as an alternative to patent protection, therefore, is left open. Justices Black, Warren, and Douglas dissented on this point since they believed this reservation to be in conflict with *Sears* and *Compco*: "One who makes a discovery may, of course, keep it secret if he wishes, but private arrangements under which self-styled 'inventors' do not keep their discoveries secret, but rather disclose them, in return for contractual payments, run counter to the plan of our patent laws . . . ."[52] This view seems to be at least more consistent with the promotion of disclosure since it makes trade secret protection less attractive. Such a view, in fact, is an interpretation of *Sears* and *Compco* as a "disability . . . as imposed . . . from the patent clause"[53] preempting all state law protecting creative rights, with the possible exception of situations involving breach of a fiduciary relationship by employees or others and industrial espionage.[54]

49. Frost, Patent Rights and the Stimulation of Technical Change, in Patents and Progress 61, 67-68 (W. Alderson, V. Terpstra, and S. Shapiro ed. 1965).

50. Although the Lear decision left open the trade secret question, it should be noted again that there is authority for the proposition that trade secret protection has been abrogated since Sears and Compco. 395 U.S. at 677 (dissenting opinion); Van Prods. Co. v. General Welding & Fabricating Co., 419 Pa. 248, 269-71, 213 A.2d 769, 780-81 (1965) (concurring opinion); Adelman, supra note 37, at 715-16; see Columbia Broadcasting Sys., Inc. v. De Costa, 377 F.2d 315 (1st Cir.), cert. denied, 389 U.S. 1007 (1967); Cable Vision, Inc. v. KUTV, Inc., 335 F.2d 348 (9th Cir. 1964), cert. denied, 379 U.S. 989 (1965) (these last two cases felt that the Sears and Compco decisions killed all state unfair competition laws and, by implication, this would include trade secret protection). Contra, Doerfer, The Limits on Trade Secret Law Imposed by Federal Patent and Antitrust Supremacy, 80 Harv. L. Rev. 1432 (1967); Comment, The Stiffel Doctrine and the Law of Trade Secrets, 62 Nw. L. Rev. 956 (1968); Note, Trade Secrets After Sears and Compco, 53 Va. L. Rev. 356 (1967); see cases cited in note 54 infra.

51. 395 U.S. at 674. This is the situation with respect to the royalties paid prior to the 1960 grant of the patent, during which period the relationship between the parties was, in effect, that of licensor and licensee of a trade secret.

52. Id. at 677 (dissenting opinion). A similar view was proposed by Adelman: "[T]he law of trade secrets should not be applied to protect any invention in commercial use which can be maintained in secret indefinitely if it is not the subject of a pending patent application." Adelman, supra note 37, at 715.

53. Treece, supra note 42, at 83.

54. A number of decisions, in fact, have distinguished trade secrets from the scope of the Sears and Compco reasoning on such a basis. E.g., Winston Research Corp. v. Minnesota Mining & Mfg. Co., 350 F.2d 134, 138 (9th Cir. 1965); Servo Corp. of America v. General

The possibility that the rationale of the *Sears* and *Compco* decisions will lead to the abrogation of all state law of unfair competition, a course left open by the *Lear* court's refusal to decide the question of royalties on an unpatented article, has, in fact, prompted a legislative proposal which would undermine such an interpretation.[55] The following amendment to the patent law was recently introduced:

§ 301 Preservation of other rights.

This title shall not be construed to pre-empt or otherwise affect in any way, contractual or other rights or obligations, not in the nature of patent rights, imposed by State or Federal law on particular parties with regard to inventions or discoveries, whether or not subject to this title.[56]

A claim of patent invalidity has long been a defense to an infringement suit which was available to those not in privity with the holder of the patent. *Lear* has now made it available to those enjoying a contractual relationship with the holder. The question arises, however, whether an allegation of invalidity can be used not only as a defense to a suit for royalties, but also as a counterclaim for previously paid royalties in a licensee-infringement suit or even as a separate cause of action for breach of contract for failure of consideration, with the return of all previously paid royalties as damages.[57]

Elec. Co., 337 F.2d 716, 723-25 (4th Cir. 1964), cert. denied, 383 U.S. 934 (1966); Schulenburg v. Signatrol, Inc., 33 Ill. 2d 379, 386-87, 212 N.E.2d 865, 868-69 (1965), cert. denied, 383 U.S. 959 (1966).

55. In 1944, for example, the Mercoid cases virtually eliminated the remedy of contributory infringement. Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944); Mercoid Corp. v. Minneapolis-Honeywell Regulator Co., 320 U.S. 680 (1944). The remedy, however, was reinstated in the 1952 revision of the patent laws. Act of July 19, 1952, ch. 950, § 271(c), 66 Stat. 811 (codified at 35 U.S.C. § 271(c) (1964)).

56. S. 2756, 91st Cong., 1st Sess. § 301 (1969).

57. The following situation may well be imagined: A Corporation, even though it is unsure as to the validity of B's patent, decides that it cannot now afford the cost or uncertainty of an infringement suit and, therefore, agrees to operate under a licensing agreement with B. After A Corp. has made a large profit from the sale of the product covered by the patent, it decides that it no longer desires to pay royalties. It not only refuses to pay royalties any longer, but it also sues B for all previously paid royalties on the ground that the patent was invalid, thus constituting a failure of consideration and an unlawful monopoly in violation of the policy of the antitrust laws. Though the result of this hypothetical situation cannot be found in existing case law due to the heretofore existence of the doctrine of licensee estoppel, there have been decisions as to the effect of a declaration of patent invalidity in an action between the patentee and a third party not in privity with him in which a licensee was released from any further obligation to pay royalties because of a failure of consideration once the patent was declared invalid. Patterson-Ballagh Corp. v. Byron Jackson Co., 145 F.2d 786, 789 (9th Cir. 1944); Drackett Chem. Co. v. Chamberlain Co., 63 F.2d 853 (6th Cir. 1933); Ross v. Fuller & Warren Co., 105 F. 510 (C.C.N.D.N.Y. 1900). For the reasoning behind such holdings see R. Ellis, Patent Assignments §§ 347-48 (3d ed. 1955); A. Deller, Deller's Walker on Patents § 355 (2d ed. 1965), in which it is stated that a patent has some value until it is held invalid and, having some value, cannot be questioned by the courts as to the sufficiency of that value. See Warner Bros. Co. v.

The *Lear* Court did state that if Lear can prove patent invalidity it may avoid payment of all royalties due after issuance of Adkins' patent, but the problem never actually arose since Lear refused to honor the license agreement before the patent ever issued. Since the *Lear* holding adds a public interest consideration to a purely contractual approach, it seems at least arguable that past royalties can also be recovered.

One additional problem created by the rejection of licensee estoppel is the possibility that patent validity will be decided in any suit for royalties. Hence, if the amount involved is quite small, even municipal courts may be ruling on the numerous and complex reasons for patent invalidity.[58] The desirability of such a result seems highly debatable.[59]

Perhaps the root cause of the problems raised by this decision, however, is not the recent incursions of antitrust policy, by which any scheme which derogates free competition and the free flow of ideas is strictly construed, upon the realm of the patent monopoly[60]—the public policy approach. On the con-

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American Lady Corset Co., 48 F. Supp. 417 (S.D.N.Y. 1942), aff'd, 136 F.2d 93 (2d Cir. 1943), for a holding that invalidity does not absolve a licensee from royalties; Wynne v. Aluminum Awning Prods. Co., 148 F. Supp. 212 (M.D.N.C. 1952), aff'd, 202 F.2d 130 (4th Cir. 1953), for a holding that a licensee is entitled to recover prior payments.

In addition, there has been a long standing exception to the doctrine of licensee estoppel known as repudiation. Because of a public interest that commerce and production should not be clogged by invalid patents, a licensee has been permitted to repudiate the licensing contract and, having abandoned the protection of the patent, assert the invalidity of the patent as a defense to a suit by the licensor for the repudiation and the subsequent failure to pay royalties. See, e.g., Universal Rim Co. v. Scott, 21 F.2d 346 (N.D. Ohio 1922); Armstrong Co. v. Shell Co., 98 Cal. App. 769, 277 P. 887 (Dist. Ct. App. 1929); Marston v. Swett, 82 N.Y. 526 (1880); Elgin Nat'l Watch Co. v. Bulova Watch Co., 281 App. Div. 219, 118 N.Y.S.2d 197 (1st Dep't 1953). See generally Note, The Doctrine of Licensee Repudiation in Patent Law, 63 Yale L.J. 125 (1953). In the hypothetical case, the result in the event that there was a repudiation would be that the licensee could not recover previous royalties paid while he was protected by the patent. Universal Rim. Co. v. Scott, supra; Armstrong Co. v. Shell Co., supra.

In Lear there was no repudiation, since its actions did not equal the degree of definiteness which is required since "an equivocal stand would permit a licensee to defend an action for royalties with a claim of repudiation and to defeat a suit for infringement by pointing to the license." Note, supra, at 128.

58. See N.Y.L.J., July 10, 1969, at 1, col. 7-8.

59. A possible solution to such a problem would be the adoption by Congress of the American Law Institute proposal that a federal defense, such as patent invalidity, serve as a basis for removal to a federal district court. See ALI, Study of the Division of Jurisdiction Between State and Federal Courts, Proposed Judicial Code § 1312(a)(2) (Tentative Draft No. 3, April 15, 1965). This proposal would, in effect, if adopted, supersede the ruling in Shamrock Oil & Gas Co. v. Sheets, 313 U.S. 100 (1941).

60. If, however, one does view the Lear decision solely as an antitrust one, by its removal of the bar of estoppel to challenge the patent, the Court seems consistent with other recent antitrust decisions which seem to have rejected the defenses of pari delicto, Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), and unclean hands, Keifer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).

trary, the basic problem may very well be the current lack of predictability as to the validity of a patent upon its issuance since so many patents are subsequently invalidated by the courts.[61] Business considerations of considerable import may be vitally dependent upon the patent's validity,[62] and it seems as if judicial conceptions of patentability are quite different from those of the Patent Office.[63] Two available cures would be a strong financial boost which would give the Patent Office the resources to make a complete decision as to patentability, or a change in the patent system so that judicial review of patentability occurs before, not after, issuance.[64] These may create an attractive reason for opting for patent protection—the certainty of a patent whose validity has been fully litigated prior to the making of necessary and costly business decisions.

Torts—California Allows Bystander Recovery Under Doctrine of Strict Tort Liability.—In 1962, plaintiff Elmore purchased a new automobile; less than two months later, she was involved in a collision with the automobile of plaintiff Waters. At the time of the accident, the Elmore car had been driven less than 3,000 miles and had been properly serviced at a facility operated by defendant Mission, a distributor authorized by the manufacturer. Examination of the vehicle after the accident produced evidence of a defective driveshaft and steering box, although there was no direct evidence that these defects existed at the time of sale, or that they were the proximate cause of the accident. Alleging strict tort liability, plaintiff Waters brought suit against both the manufacturer and distributor of plaintiff Elmore's car to recover for her personal injuries and for the wrongful death of her husband.[1] The trial court granted defendants' motion for nonsuit without allowing the case to go to the jury.[2] The court of appeal affirmed on the grounds that the evidence introduced

61. See note 45 supra.

62. For a recognition of this problem by the President see 3 Weekly Compilation of Presidential Documents 294 (1967).

63. It is apparent that lack of personnel and equipment has forced the Patent Office into the position of granting patents without an adequate investigation into the novelty, utility, invention, and prior art necessary for a proper determination of patentability. The result is the plethora of subsequent findings of invalidity by the judiciary. See note 45 supra. A key argument, for example, against the patentability of computer programs is the lack of classification technique and research files. Bender, Computer Programs: Should They Be Patentable?, 68 Colum. L. Rev. 241, 250-51 n.47 (1968).

64. See Topol, Patents and Hunting Licenses—Some Iconoclastic Comments and an Irreverent Solution, 17 Am. U.L. Rev. 424, 439-43 (1968).

1. This action was consolidated for trial with the personal injury action of plaintiff Elmore, who proceeded against the same parties.

2. Elmore v. American Motors Corp., 70 Cal. 2d 615, 617, 451 P.2d 84, 85, 75 Cal. Rptr. 652, 653 (1969) (en banc).

was insufficient to make out a prima facie case of strict tort liability,[3] and did not discuss plaintiff Waters' status as a bystander.[4] On appeal, the Supreme Court of California, sitting en banc, reversed, and held that a prima facie case had been made out and, further, that an action in strict tort liability was maintainable by an injured bystander.[5] *Elmore v. American Motors Corp.*, 70 Cal.2d 615, 451 P.2d 84, 75 Cal. Rptr. 652 (1969) (en banc).

In 1962, California took a progressive step in the development of products liability law by imposing manufacturers' strict liability in tort, independent from warranty. In *Greenman v. Yuba Power Products, Inc.*,[6] plaintiff was injured while using a power tool received by him as a gift. In his suit against the manufacturer, plaintiff alleged both negligence and breach of an express warranty contained in the manufacturer's brochure. Defendant claimed plaintiff's failure to fulfill the notice requirement of the Uniform Sales Act[7] was a defense to the warranty claim. The Supreme Court of California, sitting en banc, refused to apply the notice requirement of the Sales Act in actions by injured consumers against manufacturers with whom they have not dealt.[8] Noting the growth of strict liability in cases involving products inherently dangerous if defective, the court declared that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[9]

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3. Waters v. American Motors Corp., 69 Cal. Rptr. 799 (Ct. App. 1968). The court felt that there was insufficient evidence to support an inference that a defect existed at the time of sale and that this defect was the proximate cause of the accident. Id. at 805. The court relied on Jakubowski v. Minnesota Mining and Mfg. Co., 42 N.J. 177, 199 A.2d 826 (1964), where the New Jersey court held: "[I]n the absence of direct evidence that the product is defective because of a manufacturing flaw or inadequate design, or other evidence which would permit an inference that a dangerous condition existed prior to sale, it is necessary to negate other causes of the failure of the product for which the defendant would not be responsible, in order to make it reasonable to infer that a dangerous condition existed at the time defendant had control." Id. at 184, 199 A.2d at 830.

4. 69 Cal. Rptr. at 806.

5. The court distinguished Jakubowski, finding that there a fellow employee had used the defective disc, creating the possibility that plaintiff's injuries were caused by prior misuse and not by a manufacturing defect; in Elmore there was no evidence that anyone had handled the driveshaft after the car was sold. 70 Cal. 2d at 621-22, 451 P.2d at 87-88, 75 Cal. Rptr. at 655-56. Therefore, the court found an inference that a dangerous condition existed prior to sale. Quaere: Is the distinction sound, or has California, in effect, held that the plaintiff can establish both defect and proximate cause by circumstantial evidence, without negating the possibility that the injury might have been caused by something for which neither the defendant manufacturer nor retailer would be liable?

6. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (en banc).

7. Uniform Sales Act § 49 (act withdrawn 1965) provided: "But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor." Cf. Uniform Commercial Code § 2-607(3)(a) [hereinafter cited as U.C.C.].

8. 59 Cal. 2d at 61, 377 P.2d at 900, 27 Cal. Rptr. at 700.

9. Id. at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

Under *Greenman*, liability is established when the plaintiff proves he was injured while using the product in the manner for which it was intended, under such circumstances that he was not aware of the defect which made the product unsafe for its intended use.[10] The court established that this liability is imposed by law and not voluntarily assumed by the sales contract.[11] It observed that such liability would "insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[12]

In *Vandermark v. Ford Motor Co.*,[13] this liability was extended to include distributors of defective products. There, plaintiff had purchased an automobile from defendant dealer. After an accident resulting from defective brakes, plaintiff brought a personal injury action against both the manufacturer and distributor. Defendant retailer denied liability, claiming the liability imposed by *Greenman* was applicable only to manufacturers, thus allowing retailers to contractually limit their liability.[14] The court disagreed, stressing that the retailer was an integral part of the producing and marketing complex which properly should bear the cost of injuries resulting from defective products.[15] The court felt that imposing strict liability on both the manufacturer and the distributor would not be unjust, as they could "adjust the costs of such protection between them in the course of their continuing business relationship."[16] Furthermore, the distributor's liability would be an additional incentive to producing safe products. Therefore, the court found the retailer "strictly liable in tort for personal injuries caused by defects in cars sold by it,"[17] in spite of its contractual warranty disclaimer.

As of 1964, strict tort liability allowed recovery by purchasers and users from both manufacturers and retailers of defective products. It was unclear whether an injured bystander could recover, although *Greenman's* definition of tort liability for "injury to a *human being*,"[18] appears to allow bystander recovery. Since the privity requirement arose out of warranty,[19] a specie of re-

10. Id. at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

11. Id. at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

12. Id.

13. 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) (en banc).

14. Id. at 262 n.1, 391 P.2d at 171 n.1, 37 Cal. Rptr. at 899 n.1. The retailer warranted that the product was free from defects in material and workmanship, but limited the warranty to the lesser of 90 days or 4,000 miles. Liability was limited to replacement of defective parts, and this warranty was in lieu of all other warranties and obligations express or implied. See Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

15. 61 Cal. 2d at 262, 391 P.2d at 171, 37 Cal. Rptr. at 899.

16. Id. at 263, 391 P.2d at 172, 37 Cal. Rptr. at 900.

17. Id.

18. 59 Cal. 2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700 (emphasis added).

19. Breach of warranty was originally a tort action. See Ames, The History of Assumpsit, 2 Harv. L. Rev. 1 (1888). Subsequently, it developed into an action based solely upon contract. See Hamilton, The Ancient Maxim Caveat Emptor, 40 Yale L.J. 1133 (1931). Accordingly, in 1842, the English Court of Exchequer held that the manufacturer or vendor of a chattel owed a duty of care only to those with whom he contracted, stating:

covery independent from strict tort liability,[20] its incorporation into the law of strict liability does not seem mandatory. In light of the social engineering apparent in *Greenman, Elmore* must be regarded as a logical step. The possibility of allowing bystander recovery in such cases also has been noted in section 402A of the Restatement (Second) of Torts, which abolished lack of privity as a defense, resorting to strict liability limited by a foreseeability test.[21] However, in an Official Comment, the Institute expressed "neither approval nor disapproval of expansion of the rule to permit recovery by such persons [casual bystanders]."[22]

The first California movement toward allowing bystander recovery absent proof of negligence began in 1944. In *Escola v. Coca Cola Bottling Co.*,[23] plaintiff waitress was injured when a bottle of soft drink exploded in her hand. She alleged negligence and relied on the res ipsa loquitur doctrine, as she was unable to prove any specific acts of negligence.[24] Although the majority allowed recovery on a negligence theory,[25] Justice Traynor, concurring, as he did in *Elmore*, observed:

[I] believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. . . . Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. . . . Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or

"Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." Winterbottom v. Wright, 152 Eng. Rep. 402, 405 (Ex. 1842). See W. Prosser, Torts § 96 (3d ed. 1964); Prosser, The Implied Warranty of Merchantable Quality, 27 Minn. L. Rev. 117 (1943); Prosser, The Assault Upon the Citadel, 69 Yale L.J. 1099 (1960).

20. Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 263, 391 P.2d 168, 172, 37 Cal. Rptr. 896, 900 (1964) (en banc).

21. Restatement (Second) of Torts, § 402A (1965) provides:

Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any produce in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

22. Id., comment o at 357. The drafters further commented that strict liability may also be treated as a matter of warranty. Id., comment m at 355.

23. 24 Cal. 2d 453, 150 P.2d 436 (1944).

24. Id. at 457, 150 P.2d at 438.

25. Id. at 460-61, 150 P.2d at 440.

health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.[26]

Recently a number of jurisdictions have cast Lord Abinger's dire warnings[27] to the winds and have rejected the privity barrier. In *Piercefield v. Remington Arms Co.*,[28] the Michigan Supreme Court allowed a bystander recovery on a theory of breach of warranty. There, the plaintiff was injured when the barrel of a shotgun fired by his brother exploded due to defendant's defective ammunition. Although the court did not adopt the strict liability doctrine, it ruled that the bystander's lack of privity did not preclude recovery for breach of warranty.[29] Further, the court held that the warranty breached was implied by law, independently of the sales contract;[30] therefore, plaintiff's failure to meet the Uniform Sales Act notice requirement[31] did not defeat the action.[32] In *Mitchell v. Miller*,[33] an automobile with a defective transmission rolled driverless down an incline, striking the plaintiff's decedent, a bystander. The Superior Court of Connecticut observed a significant trend towards imposing strict liability for injuries resulting from defective products if the injury is foreseeable or reasonable.[34] In adopting the doctrine, the court stated: "The public policy which protects the user and consumer should also protect the innocent bystander."[35]

Perhaps the most novel philosophy justifying bystander recovery was advanced by the *Elmore* court, which expressed the belief that bystanders are entitled to an even greater amount of protection than consumers or users if a bystander injury is reasonably foreseeable. The court noted that consumers and users have an opportunity to inspect products and limit purchases, while bystanders are truly innocent and powerless.[36] Thus, the concepts of social engineering first expressed by Justice Traynor in *Escola* dictate extension of the strict tort liability doctrine.

Other states have not yet permitted bystander recovery as California did in *Elmore*. For example, while greatly expanding the protection of products

26. Id. at 461-62, 150 P.2d at 440-41 (citation omitted). It is noteworthy that the majority did not concur in Justice Traynor's opinion. See generally R. Pound, New Paths of the Law 38-47 (1950); Pound, The Problem of the Exploding Bottle, 40 Boston U.L. Rev. 167 (1960).

27. Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842). See note 19 supra.

28. 375 Mich. 85, 133 N.W.2d 129 (1965).

29. Id. at 98, 133 N.W.2d at 135.

30. Id. at 100, 133 N.W.2d at 136.

31. See note 7 supra.

32. 375 Mich. at 100, 133 N.W.2d at 136. Although the court specifically declined to adopt the strict tort liability doctrine, its citation of, and adherence to, Greenman indicates it may have achieved the same result.

33. 26 Conn. Supp. 142, 214 A.2d 694 (Super. Ct. 1965).

34. Id. at 149-50, 214 A.2d at 698.

35. Id. at 150, 214 A.2d at 699.

36. 70 Cal. 2d at 623-24, 451 P.2d at 89, 75 Cal. Rptr. at 657.

liability in other areas,[37] New York has not allowed bystander recovery for breach of warranty, or, perhaps more appropriately, for strict tort liability.[38] Despite Chief Judge Cardozo's now familiar statement that "[t]he assault upon the citadel of privity is proceeding in these days apace,"[39] the courts have been adamant in this area.

In its 1916 decision in *MacPherson v. Buick Motor Co.*,[40] the court of appeals abolished the privity requirement in negligence actions. Yet, in 1928, the same court unanimously held that "[t]here can be no warranty where there is no privity of contract."[41] After the privity requirement was relaxed somewhat through the use of an agency theory,[42] in *Greenberg v. Lorenz*,[43] the court of appeals extended warranty protection for food and household goods to the purchaser's entire household, irrespective of privity. While responding to past injustice and impracticality,[44] the court suggested taking only one step at a time.[45] In 1962, *Randy Knitwear, Inc. v. American Cyanamid Co.*,[46] abrogated

37. See Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962); Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961); Thomas v. Leary, 15 App. Div. 2d 438, 225 N.Y.S.2d 137 (4th Dep't 1962).

38. See Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 437, 191 N.E.2d 81, 83, 240 N.Y.S.2d 592, 595 (1963). While the decision was based on warranty, the court of appeals cited Greenman and its strict liability theory as "surely a more accurate phrase." Id. The dissent found an implication in the majority opinion that the only difference between warranty and strict liability was one of phrasing. Id. at 440, 191 N.E.2d at 85, 240 N.Y.S.2d at 597. Cf. Guarino v. Mine Safety Appliance Co., 25 N.Y.2d 460, 466-67, 255 N.E.2d 173, 176-77, 306 N.Y.S.2d 942, 946-47 (1969) (concurring opinion); Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

39. Ultramares Corp. v. Touche, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931).

40. 217 N.Y. 382, 111 N.E. 1050 (1916).

41. Turner v. Edison Storage Battery Co., 248 N.Y. 73, 74, 161 N.E. 423, 424 (1928).

42. See Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 175 N.E. 105 (1931) (wife purchased bread containing a foreign substance for plaintiff husband); Bowman v. Great Atl. & Pac. Tea Co., 284 App. Div. 663, 133 N.Y.S.2d 904 (4th Dep't 1954), aff'd mem., 308 N.Y. 780, 125 N.E.2d 165 (1955) (sister purchased salad oil containing decayed mouse for plaintiff sister); Mouren v. Great Atl. & Pac. Tea Co., 139 N.Y.S.2d 375 (Sup. Ct. 1955), modified, 1 App. Div. 2d 767, 148 N.Y.S.2d 1 (1st Dep't), aff'd mem., 1 N.Y.2d 884, 136 N.E.2d 715, 154 N.Y.S.2d 642 (1956) (plaintiff husband purchased tainted meat for plaintiff wife).

43. 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961), where infant plaintiff's father purchased food for the family. The court cited U.C.C. § 2-318, which at the time had not been adopted in New York, and established a presumption that the purchase was for the entire household.

44. See, e.g., N.Y. L. Revision Commission, Act and Recommendation Relating to Warranties of Fitness, No. 65(A), at 21 (1945); Miller, Manufacturers' Product Liability, 24 N.Y. State B. Bull. 313 (1952); Gearing v. Berkson, 223 Mass. 257, 111 N.E. 785 (1916), where a butcher who sold tainted pork chops was held to warrant them to husband purchaser, but not to purchaser's wife.

45. 9 N.Y.2d at 200, 173 N.E.2d at 776, 213 N.Y.S.2d at 42.

46. 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962). There, the defendant manufacturer advertised that fabrics finished with his product would not shrink. The plaintiff, a clothing manufacturer, purchased treated fabric from a fabric manufacturer, but

the privity requirement in actions for breach of express warranty brought by remote purchasers of non-foodstuffs, as the court of appeals concluded that the privity requirement, as enunciated in *Chysky v. Drake Brothers Co.*,[47] should be rejected.

Interpreting *Randy*, the appellate division, second department said: "[I]t would appear that the majority of the Court of Appeals has dispensed, *without qualification*, with the court-made traditional requirement of privity."[48] However, it is significant that the case involved an employee of the contracting party, not a traditional bystander. In *Goldberg v. Kollsman Instrument Corp.*,[49] the court applied a warranty theory to permit recovery without privity. However, it should be noted that the plaintiff was a "consumer" or "user" within the scope of the Restatement (Second) of Torts,[50] and not a bystander. Finally, in *Berzon v. Don Allen Motors, Inc.*,[51] a case involving a bystander plaintiff, the appellate division, fourth department dismissed the complaint, stating: "To extend *Goldberg* further to include bystanders and strangers, such as the plaintiffs, would be such a radical departure from established law that if it is accomplished it should be done by legislative action and not judicial pronouncement."[52]

However, the courts' passing of the issue to the legislature[53] is open to

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the finished garments shrank. The remote purchaser was found to have a cause of action against the manufacturer who induced the purchase by express warranty, despite the lack of privity.

47. 235 N.Y. 468, 139 N.E. 576 (1923).

48. Williams v. Union Carbide Corp., 17 App. Div. 2d 661, 662, 230 N.Y.S.2d 476, 478 (2d Dep't 1962) (mem.) (emphasis added), where plaintiff's employer purchased a safety mask from defendant. Plaintiff alleged that he was seriously injured as a consequence of defendant's breach of implied warranties. The court held that the implied warranties ran to the purchaser's employees regardless of contractual privity. It should be noted that the dictum mentioned by the appellate division was not truly dictum. Further, the phrases "without qualification" and "without limitation" are contained in the concurring, and not the majority opinion.

49. 12 N.Y.2d 432, 191 N.E.2d 781, 240 N.Y.S.2d 592 (1963). After an airplane crash, plaintiff administratrix sued for the wrongful death of her daughter, alleging breach of warranty by the airline, the manufacturer of the plane, and the manufacturer of the plane's allegedly defective altimeter. The court of appeals held that passengers on the plane were "users" entitled to the protection of the manufacturer's waranty, but refused to impose liability on the component part manufacturer.

50. Restatement (Second) of Torts § 402A (1965). See note 21 supra.

51. 23 App. Div. 2d 530, 256 N.Y.S.2d 643 (4th Dep't 1965) (mem.).

52. Id. at 530, 256 N.Y.S.2d at 644. But see Accelerated Trucking Corp. v. McLean Trucking Co., 51 Misc. 2d 321, 278 N.Y.S.2d 516 (Civ. Ct. 1967), where a lower court observed that "[w]hether liability extends to bystanders and strangers, not employees of the lessee or bailee, on the theory of strict liability in tort, founded upon breach of implied warranty of fitness, is unresolved in New York." Id. at 326, 278 N.Y.S.2d at 522.

53. See, e.g., Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 16, 181 N.E.2d 399, 405, 226 N.Y.S.2d 363, 371 (1962) (Froessel, J., concurring); Greenberg v. Lorenz, 9 N.Y.2d 195, 201, 173 N.E.2d 773, 776, 213 N.Y.S.2d 39, 44 (1961) (Froessel, J., concurring); Thomas v. Leary, 15 App. Div. 2d 438, 443, 225 N.Y.S.2d 137, 143 (4th Dep't 1962) (McClusky, J., dissenting).

serious question. Section 2-318 of the New York Uniform Commercial Code limited the privity requirement by extending the vendor's warranties to include the family or household of the buyer and household guests, if they are reasonably foreseeable.[54] It should be noted that this section was specifically designed to set minimum warranty protections arising out of the sales contract; it was not intended to restrict developing case law.[55] The 1965 Conference of New York Supreme Court Trial Justices noted that "Section 2-318 dealing with the requirement of privity in a breach of warranty action does not freeze court development of policy in the area of products liability. Rather, it sets forth a rule of minimum liberality which is below the present New York common law development in this area, and far below the expected future development."[56]

Other states have begun this development. For example, in 1962, Virginia abolished the privity requirement in its Uniform Commercial Code, employing a foreseeability test to limit liability.[57] In 1966, the foreseeability standard was also shattered, apparently to permit true bystander recovery.[58] Nevertheless, New York's legislative attempts to permit bystander recovery for breach of warranty[59] have been to no avail; section 2-318 remains unamended. In light of the avowed legislative purpose to allow judicial expansion of products liability, it seems unwise for New York's courts to further await legislative action.

It is strange that New York, which has taken the lead in many areas of the tort law in the past two decades,[60] has failed to move forward to protect the

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54. N.Y. U.C.C. § 2-318. This result was often reached under the privity and notice requirements of the Uniform Sales Act. See, e.g., Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) (en banc); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (en banc); Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965).

55. N.Y. U.C.C. § 2-318, Comment 3.

56. Ad. Board of the Judicial Conference of the State of N.Y., Eleventh Annual Report, Leg. Doc. (1966) No. 90, at 118.

57. Va. Code Ann. § 8.2-318 (1965) provides: "Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods . . . ."

58. Va. Code Ann. § 8-654.4 (Supp. 1968) provides: "In cases not provided for in § 8.2-318 where recovery of damages for injury to person, including death, or to property resulting from negligence is sought, lack of privity between the parties shall be no defense."

59. See, e.g., 1969 N.Y. Legislative Record and Index: Senate Introductory Rec., No. 1429, at S129; Assembly Introductory Rec., No. 2737, at A248.

60. See, e.g., Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 708, 240 N.Y.S.2d 592 (1963); Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961); Ferrara v. Galluchio, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958); Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951).

bystander. "There is no earthly reason why the pernicious life of the privity requirement . . . persists insofar as warranty actions are concerned when as far back as 1916, it had been removed from the negligence action . . . ."[61] If the purpose of products liability law is to provide compensation to victims of defective goods, that purpose is frustrated by refusing to allow bystander recovery where it is reasonably foreseeable that such injury may result. In *Elmore*, California has taken a progressive step.

Torts—Rescue Doctrine—Not Limited to Negligence Situations.—Due to a defective gas mask manufactured by defendant, decedent Rooney died of asphyxiation, despite the plaintiffs'[1] rescue efforts. Rooney's estate recovered damages from defendant for breach of warranty.[2] Thereafter, plaintiffs brought suit to recover for their injuries, alleging the defendant's breach of warranty served as a basis for application of the rescue doctrine.[3] The trial court entered judgment for plaintiffs; the appellate division affirmed.[4] On appeal, a unanimous court of appeals, two justices concurring in a separate opinion, affirmed and held that the rescue doctrine is not restricted to cases where the causative wrong is negligence, but is available wherever a person, by his culpable act, places another in peril. *Guarino v. Mine Safety Appliance Co.*, 25 N.Y.2d 460, 255 N.E.2d 173, 306 N.Y.S.2d 942 (1969).

The rescue doctrine is by no means new to New York law. Nearly a century and a half ago, in the famous *Balloon* case,[5] the court recognized that catastrophic occurrences have a magnetic influence upon bystanders which attracts

61. Parish v. Great Atl. & Pac. Tea Co., 13 Misc. 2d 33, 46, 177 N.Y.S.2d 7, 20 (Mun. Ct. 1958) (citation omitted). Privity has also been called an "artificial structure," Jaeger, Privity of Warranty: Has the Tocsin Sounded?, 1 Duquesne L. Rev. 1 (1963), an "archaic and senseless doctrine," id. at 3, an "outmoded and harsh 'requirement,'" id., and a "baseless and untoward defense." Id. at 56.

1. Of the seven co-workers who attempted to rescue Rooney, three died and four were seriously injured. For convenience, "plaintiffs" herein shall refer to the decedents as well as to the surviving plaintiffs.

2. Rooney v. S.A. Healy Co., 20 N.Y.2d 42, 228 N.E.2d 383, 281 N.Y.S.2d 321 (1967).

3. The rescue doctrine is ordinarily applied when a plaintiff sustains injuries while attempting to rescue an imperiled party. Recovery is then sought against the person responsible for the peril. See 38 Am. Jur. Negligence § 228 (1941).

4. 31 App. Div. 2d 255, 297 N.Y.S.2d 639 (2d Dep't 1969). Originally, the jury awarded a total of $403,000 of which $300,000 was awarded to Guarino's administratrix. This was reduced to $225,000 by stipulation. The appellate division affirmance was conditioned upon the consent of Guarino's administratrix to a reduction to $185,000. Id. at 261, 297 N.Y.S.2d at 645.

5. Guille v. Swan, 19 Johns. 381 (N.Y.C. Justice Ct. 1822). There defendant was found liable for trespass when his balloon landed in plaintiff's garden. The recovery was held properly to include as consequential damages the value of flowers trampled by a crowd in attempting to aid the defendant in landing.

them toward peril.[6] In 1871, New York first officially recognized the rescue doctrine in *Eckert v. Long Island Railroad.*[7] There, plaintiff's intestate was struck by defendant's locomotive while on the railroad tracks attempting a rescue. Defendant contended that plaintiff's contributory negligence in going on the tracks was a bar to recovery.[8] The court of appeals disagreed,[9] stating: "The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons."[10] Thus, as originally constituted,[11] the rescue doctrine was of tertiary importance; it was merely an exception to an exception[12] whereby the plaintiff sought to overcome the traditional negligence defenses by an allegation of humanitarian rescue.[13]

Some fifty years after *Eckert*, the rescue doctrine was given more substance by Judge Cardozo's opinion in *Wagner v. International Railway.*[14] There, owing to defendant's negligence, decedent was thrown from defendant's train. While attempting a rescue, plaintiff fell down a raised trestle to the ground below. In holding the defendant liable, Judge Cardozo wrote the now famous words:

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6. The court said: "[I]f his descent . . . would ordinarily and naturally draw a crowd of people about him . . . for the purpose of rescuing [him] from a perilous situation—all this he ought to have foreseen, and must be responsible for." Id. at 383. Although the case concerned trespass, it may be looked upon as an early indication of the foreseeability of the rescuer.

7. 43 N.Y. 502 (1871).

8. In New York, contributory negligence is a complete bar to recovery in negligence actions. See 41 N.Y. Jur. Negligence § 52 (1965).

9. The court held: "For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent unless such as to be regarded either rash or reckless." 43 N.Y. at 506. However, rescuers of property now may recover under the rescue doctrine. Restatement of Torts § 472 (1934); Annot., 64 A.L.R. 515 (1930). See, e.g., Breslin v. State, 189 Misc. 547, 72 N.Y.S.2d 62 (Ct. Cl. 1947).

10. 43 N.Y. at 506.

11. See, e.g., Manzella v. Rochester Ry., 105 App. Div. 12, 93 N.Y.S. 457 (4th Dep't 1905); Muhs v. Fire Ins. Salvage Corps., 89 App. Div. 389, 85 N.Y.S. 911 (2d Dep't 1903); Manthey v. Rauenbuehler, 71 App. Div. 173, 75 N.Y.S. 714 (1st Dep't 1902); Sann v. H.W. Johns Mfg. Co., 16 App. Div. 252, 44 N.Y.S. 641 (1st Dep't 1897); Williams v. United States Mut. Acc. Ass'n, 82 Hun 268, 31 N.Y.S. 343 (Sup. Ct. 1894), aff'd, 147 N.Y. 693, 42 N.E. 726 (1895); Roll v. Northern Cent. Ry., 15 Hun 496 (Sup. Ct. 1878), aff'd mem., 80 N.Y. 647 (1880). See also Spooner v. Delaware, L. & W.R.R., 115 N.Y. 22 (1889).

12. Thus, the contributory negligence and assumption of the risk defenses are exceptions to the rule of negligence liability; the rescue doctrine was an exception to those defenses.

13. See Manzella v. Rochester Ry., 105 App. Div. 12, 93 N.Y.S. 457 (4th Dep't 1905); Muhs v. Fire Ins. Salvage Corps., 89 App. Div. 389, 85 N.Y.S. 911 (2d Dep't 1903); Manthey v. Rauenbuehler, 71 App. Div. 173, 75 N.Y.S. 714 (1st Dep't 1902); Sann v. H.W. Johns Mfg. Co., 16 App. Div. 252, 44 N.Y.S. 641 (1st Dep't 1897); Williams v. United States Mut. Acc. Ass'n, 82 Hun 268, 31 N.Y.S. 343 (Sup. Ct. 1894), aff'd, 147 N.Y. 693, 42 N.E. 726 (1895).

14. 232 N.Y. 176, 133 N.E. 437 (1921).

Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer.[15]

Wagner clearly established the two bases of the rescue doctrine. First, the rescuer was a foreseeable party.[16] Second, the negligent defendant owed a duty to the rescuer independent of that owed to the victim.[17]

Thus, the rescuer's cause of action was based on the traditional negligence tests—duty, foreseeability, and breach.[18] Prior to *Guarino*, the negligence oriented basis of the rescue doctrine[19] remained constant, with only small variations,[20] and two minor extensions. In *Talbert v. Talbert*,[21] plaintiff-son recovered for injuries sustained while rescuing defendant-father, who attempted suicide. The court found the rescue doctrine applicable to an *intentional* host wrong as well as to negligence.[22] Second, although it was generally held that defendant's duty to the rescuer did not arise until there was some breach of duty toward the imperiled party,[23] liability was found in situations where the rescuer was injured while seeking to correct a potentially dangerous condition.[24]

15. Id. at 180, 133 N.E. at 437.

16. The Wagner court said: "The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had . . . ." Id. (citation omitted). However, at least two commentators find this view of foreseeability farfetched. See Note, The Extent to Which Foreseeability as to the Persons Injured is Required in Imposing Liability for Negligence, 29 Colum. L. Rev. 53, 58 (1929); Bohlen, Book Review, 47 Harv. L. Rev. 556, 557 (1934).

17. In Wagner, the court of appeals said: "The railroad company whose train approaches without signal is a wrongdoer toward the traveler surprised between the rails, but a wrongdoer also to the bystander who drags him from the path . . . ." 232 N.Y. at 180, 133 N.E. at 438 (citation omitted).

18. See Carney v. Buyea, 271 App. Div. 338, 65 N.Y.S.2d 902 (4th Dep't 1946); Laufer v. Shapiro, 210 App. Div. 436, 206 N.Y.S. 189 (1st Dep't 1924); Talbert v. Talbert, 22 Misc. 2d 782, 199 N.Y.S.2d 212 (Sup. Ct. 1960); Breslin v. State, 189 Misc. 547, 72 N.Y.S.2d 62 (Ct. Cl. 1947); Farber v. Bryce, 40 Misc. 2d 899, 244 N.Y.S.2d 212 (N.Y.C. Civ. Ct. 1963).

19. For an unusual argument that rescue liability might be based on principles of quasi contract or on the civil code's theory of negotiorum gestio, see Comment, Recovery By The Rescuer, 28 La. L. Rev. 609, 616 (1968).

20. For example, recovery was allowed in situations where defendant negligently placed himself in danger and was the object of the rescue, where plaintiff was the rescued party and defendant was liable for injuries sustained at the hands of the rescuer, and where the rescuer has injured a stranger. Also, rescuers of rescuers have recovered under the doctrine. An attempted rescue of property will invoke the doctrine, and it need not belong to the plaintiff, nor must he be under a duty to rescue it. Even rescuers of rescuers of property have been allowed recovery. W. Prosser, Torts § 51 (3d ed. 1964) [hereinafter cited as W. Prosser]. See note 26 infra.

21. 22 Misc. 2d 782, 199 N.Y.S.2d 212 (Sup. Ct. 1960).

22. Id. at 784, 199 N.Y.S.2d at 215.

23. W. Prosser § 50, at 297 and sources cited.

24. These situations may be called preventive rescue. See Hammonds v. Haven, 280 S.W.2d 814 (Mo. 1955); 21 Mo. L. Rev. 193 (1956); 1955 Wash. U.L.Q. 427. See, e.g., Bernardine v. New York, 268 App. Div. 444, 51 N.Y.S.2d 888 (1st Dep't 1944), aff'd, 294 N.Y. 361, 62 N.E.2d 604 (1945); Hollaran v. New York, 168 App. Div. 469, 153 N.Y.S. 447 (2d Dep't

It was also held that the rescue need not be spontaneous, but could be the product of planning and deliberation.[25] The rescue might be carried out in a variety of ways,[26] so long as the rescuer's conduct was not rash, reckless, or wanton.[27] However, the object of the rescue must be reasonably commensurate with the risk involved in the attempt.[28] Although the doctrine was generally found applicable only where the peril was a genuine one,[29] the recent court of appeals decision in *Provenzo v. Sam*[30] softened this requirement. There, plaintiff undertook the rescue under the mistaken belief that defendant had suffered a heart attack; actually she was intoxicated. In holding the rescue doctrine applicable, the court of appeals said: "[T]he wisdom of hindsight is not determinative on the issue of the [rescue] doctrine's applicability. So long as the rescue attempted can be said to have been a reasonable course of conduct at the time, it is of no import that the danger was not as real as it appeared . . . ."[31]

1915); Manthey v. Rauenbuehler, 71 App. Div. 173, 75 N.Y.S. 714 (1st Dep't 1902); Roll v. Northern Cent. Ry., 15 Hun 496 (Sup. Ct. 1878), aff'd mem., 80 N.Y. 647 (1880).

25. As the court of appeals has said: "The law does not discriminate between the rescuer oblivious of peril and the one who counts the cost. It is enough that the act, whether impulsive or deliberate, is the child of the occasion." Wagner v. International Ry., 232 N.Y. 176, 181, 133 N.E. 437, 438 (1921). But see Sirianni v. Anna, 55 Misc. 2d 553, 285 N.Y.S.2d 709 (Sup. Ct. 1967), where plaintiff was denied recovery after donating her kidney to her son in a rescue attempt necessitated by defendant's negligence. It has been submitted that the court improperly applied the spontaneity test to defeat recovery. See 37 Fordham L. Rev. 133 (1968).

26. For an exhaustive listing of situations in which rescuers have recovered, see Annot., 19 A.L.R. 4 (1922), supplemented by Annot., 158 A.L.R. 189 (1945). For instances involving the rescue of property, see Annot., 64 A.L.R. 515 (1930). As to when the rescued party himself may be liable to the rescuer, see Annot., 4 A.L.R.3d 558 (1965).

27. Provenzo v. Sam, 23 N.Y.2d 256, 244 N.E.2d 26, 296 N.Y.S.2d 322 (1968); Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921); Eckert v. Long Island R.R., 43 N.Y. 502 (1871). Thus, a charge of contributory negligence will not prevent recovery unless the rescue appears foolhardy in its inception. "The risk of rescue, if only it be not wanton, is born of the occasion." Wagner v. International Ry., 232 N.Y. 176, 180, 133 N.E. 437, 438. Similarly, it is generally said that assumption of the risk will not defeat recovery where contributory negligence cannot. See Annot., 158 A.L.R. 189, 197-98 (1945).

28. To determine the reasonableness of rescuer's conduct, the courts weigh the danger involved against the probability of success and the value of the subject property. See 3 Okla. L. Rev. 476, 477-78 (1950), citing Terry, Negligence, 29 Harv. L. Rev. 40 (1915).

29. W. Prosser § 51, at 317; Annot., 19 A.L.R. 4, 10 (1922). But see note 31 infra.

30. 23 N.Y.2d 256, 244 N.E.2d 26, 296 N.Y.S.2d 322 (1968).

31. Id. at 260, 244 N.E.2d at 28, 296 N.Y.S.2d at 325 (citation omitted). The court further stated: "It is conceded that something more than a mere suspicion of danger to the life of another is requisite before the [rescue] doctrine should be implemented. However, the applicability of the doctrine cannot be decided in vacuo. It must be viewed in the light of all the facts and circumstances in each case." Id. at 261, 244 N.E.2d at 28, 296 N.Y.S.2d at 326. It should be noted that the court said the doctrine would be applicable where "one party by his culpable act has placed another person in a position of imminent peril which invites a third person, the rescuing plaintiff, to come to his aid." Id. at 260, 244 N.E.2d at 28, 296 N.Y.S.2d at 325. Although dictum, as Provenzo involved the traditional negligence fact pattern, this language was used as precedent for the Guarino holding. See note 36 infra.

While the rescue doctrine normally has been justified by the law's high regard for human life,[32] and its desire to encourage good Samaritans, the doctrine is more than morally justifiable. As a matter of risk allocation, it is reasonable that the rescuer should not be forced to bear the risk inherent in his undertaking—he who is ultimately at fault should be responsible for the total loss proximately resulting from his wrongdoing. However, the rescue doctrine traditionally has been restricted to cases in which the causative wrong was negligence.[33] With the recent growth in warranty and strict tort liability,[34] the extension of the rescue doctrine to accommodate such cases was inevitable.

Noting that the case was one of first impression,[35] the court of appeals in *Guarino* held: "We conclude that a person who by his culpable act, whether it stems from negligence or breach of warranty, places another person in a position of imminent peril, may be held liable for any damages sustained by a rescuer in his attempt to aid the imperiled victim."[36] The court further stated: "To require that a rescuer answering the cry for help make inquiry as to the nature of the culpable act that imperils someone's life would defy all logic."[37] Since both negligence and breach of warranty are culpable acts,[38] distinctions based on the form of the action chosen should be insignificant;[39] the rescued party's decision to rely on breach of warranty, rather than on negligence, should not impede a subsequent action based on rescue.[40]

Judges Scileppi and Burke concurred only in the result. They would limit any extension of the doctrine "to those cases evidencing the great moral obliga-

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32. See text accompanying note 10 supra.

33. Guarino v. Mine Safety Appliance Co., 25 N.Y.2d 460, 463, 255 N.E.2d 173, 174, 306 N.Y.S.2d 942, 944 (1969).

34. See Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791 (1966); Prosser, The Assault Upon the Citadel, 69 Yale L.J. 1099 (1960).

35. "This is, we believe, the first instance in which the doctrine has been invoked in an action where the gravamen of the wrong complained of has been breach of warranty." 25 N.Y.2d at 464, 255, N.E.2d at 175, 306 N.Y.S.2d at 944.

36. Id. at 465, 255 N.E.2d at 176, 306 N.Y.S.2d at 945-46. As authority for its holding, the court cited Provenzo: "As we recently held in Provenzo v. Sam . . . the rescue doctrine should be applied when 'one party by his culpable act has placed another person in a position of imminent peril which invites a third person, the rescuing plaintiff, to come to his aid.'" Id. at 464, 255 N.E.2d at 175, 306 N.Y.S.2d at 945 (citation omitted).

37. Id.

38. The court said: "A breach of warranty and an act of negligence are each clearly wrongful acts. Both terms are synonymous as regards fixation of liability, differing primarily in their requirements of proof." Id. at 464, 255 N.E.2d at 175, 306 N.Y.S.2d at 944-45. But see note 44 infra.

39. "We do not believe that the theory of the action, whether it be negligence or breach of warranty is significant where the doctrine of 'danger invites rescue' applies." Id. at 464, 255 N.E.2d at 175, 306 N.Y.S.2d at 944.

40. The Guarino court called the rescue doctrine: "'[A] concept unaffected by the exact label put upon the wrong which created the danger to the imperiled victim.'" Id. at 465, 255 N.E.2d at 175, 306 N.Y.S.2d at 945, quoting the opinion of the appellate division; 31 App. Div. 2d at 261, 297 N.Y.S.2d at 644.

tions present in the case at bar."[41] However, this reasoning was founded more upon a fear that *Guarino* might be interpreted as an approach to strict tort liability, than upon considerations of the rescue doctrine. The concurring judges expressly stated that they did not wish " 'to join the crowd rushing through the breaches made in the ramparts of the citadel of liability based upon fault.' "[42] Thus, both the majority and the concurring opinions attempted to limit the *Guarino* holding to the rescue doctrine and to avoid the possibility that it might be construed as an extension of warranty liability to allow bystander recovery.[43]

Although the court of appeals specifically held the rescue doctrine to be applicable whether the rescue was necessitated by negligence or by breach of warranty,[44] it also stated that "the rescue doctrine should be applied when 'one

41. Id. at 466, 255 N.E.2d at 176, 306 N.Y.S.2d at 946 (concurring opinion). It is difficult to determine exactly what is meant by "great moral obligation." The fact that the rescuers were co-workers who presumably knew Rooney personally is relevant. Presumably they should have felt a strong compulsion to attempt rescue. However, it must be questioned whether the rescue doctrine's high regard for human life should rest on so tenuous a rule of law.

42. Id. at 466, 255 N.E.2d at 176-77, 306 N.Y.S.2d at 946 (concurring opinion). They also stated: "We are fundamentally opposed to a general application of the 'danger invites rescue' doctrine to cases bottomed on the theory of breach of warranty for we envision a myriad of situations where the application of the doctrine would result in unjustified liability to manufacturers. . . . Moreover, the onrushing attempt to eliminate all distinctions between breach of warranty and negligence liability has already gone too far." Id. at 466, 255 N.E.2d at 176, 306 N.Y.S.2d at 946-47 (concurring opinion).

43. Both the appellate division and the court of appeals specifically restricted their decisions to the rescue doctrine. The appellate division said: "The defendant attacks the judgment as an unwarranted and unjustified extension of breach of warranty liability to non-users of the defective instrumentality. We do not reach that question here." 31 App. Div. 2d at 258, 297 N.Y.S.2d at 642. The court of appeals said: "This appeal presents for our review the 'danger invites rescue' doctrine." 25 N.Y.2d at 463, 255 N.E.2d at 174, 306 N.Y.S.2d at 944. The court of appeals did not deal with defendant's contention of unwarranted products liability extension except to state that " 'the rescuer's status as a user of nonuser of the defective instrumentality is not directly relevant to our analysis.' " Id. at 465, 255 N.E.2d at 175, 306 N.Y.S.2d at 945.

44. Id. In Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969), decided five weeks prior to Guarino, the court of appeals, in a 4-3 decision over a strong dissent, held breach of warranty actions to be governed by the contract statute of limitations, running from the date of sale, rather than from the date of injury, as in tort. There, plaintiff's warranty action was time-barred before she was injured. However, in light of the later holding in Guarino that " '[a] breach of warranty . . . is not only a violation of the sales contract out of which the warranty arises but is a tortious wrong.' " 25 N.Y.2d at 464, 255 N.E.2d at 175, 306 N.Y.S.2d at 945 (quoting Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 436, 191 N.E.2d 81, 82, 240 N.Y.S.2d 592, 594 (1963)), it appears the Mendel holding may well be limited to issues concerning statutes of limitation. Query: Would a rescuer be allowed to recover under Guarino where the underlying warranty action is barred under the Mendel holding? Since the court of appeals in Guarino found the manufacture and distribution of the defective mask sufficient culpability to impose rescue liability, see note 48 infra, it is submitted that the breach of warranty would be a "culpable act" allowing rescue recovery, although the underlying claim is time-barred.

party *by his culpable act* has placed another person in a position of imminent peril which invites a third person, the rescuing plaintiff, to come to his aid.' "[45] Since this statement clearly implies that any culpable act may be the basis for rescue recovery, the definition of the term obviously will be determinative of future rescue actions. Clearly, it does not require that the defendant be found liable to the victim, as it is generally held that the rescuer can recover where the victim cannot, because of, for example, the victim's contributory negligence.[46] Although there have been no decisions on point, it seems clear that a culpable act giving rise to rescue liability would be found even where there is no completed tort as to the victim. If, for example, defendant placed victim in a position inviting rescue, but the plaintiff-rescuer's intervention prevented any physical or emotional injury, there would be no actionable negligence as to the victim since injury, an essential element in negligence,[47] would be lacking. Nevertheless, recovery for the rescuer seems proper as he should not be denied recovery merely because he was successful in his efforts.

The *Guarino* court found the culpable act leading to rescue recovery to be the manufacture and distribution of the defective gas mask.[48] Since "culpable act" presumably does not require a completed tort, the implication is that mere manufacture and distribution of a defective product is sufficient culpability to give rise to rescue liability. This view suggests an approach to strict liability in rescue situations. It must be questioned what the result would be where a defectively manufactured product causes bystander injury and the plaintiff is injured in attempting to rescue the bystander. In New York, the bystander could not at present recover from defendant for breach of warranty.[49] But, if under *Guarino* the rescuer need not inquire as to the nature of the culpable act which placed the imperiled party in danger, arguably it would be inconsistent to require that his recovery be contingent on the victim's *status*. Hence, the rescuer might recover. However, in light of *Guarino's* limited majority opinion and explicit concurring opinion,[50] an answer to the problem must await future decision. But if such a future decision affords recovery to the rescuer, it would be anomalous to deny recovery to the bystander. Thus, the future may see *Guarino* cited as authority for exactly the result feared in the concurring opinion. If such a result does arise, the court of appeals might well be forced to re-evaluate its position on the scope of warranty protection.

45. 25 N.Y.2d at 464, 255 N.E.2d at 175, 306 N.Y.S.2d at 945.

46. See W. Prosser § 50, at 297; Annot., 5 A.L.R. 206 (1920). Should the victim recover from the defendant, however, the rescuer may make offensive use of the collateral estoppel doctrine to avoid relitigating the causality issue. See B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967); 47 Boston U.L. Rev. 636 (1967); 36 Fordham L. Rev. 121 (1967); 52 Minn. L. Rev. 768 (1968). See also Guarino v. Mine Safety Appliances Co., 31 App. Div. 2d 255, 297 N.Y.S.2d 639 (2d Dep't 1969). However, should the defendant win the prior action, the rescuer would not be bound. See 5 J. Weinstein, H. Korn & A. Miller, New York Civil Practice ¶ 5011.23 (1969).

47. W. Prosser § 30, at 146.

48. The court said: "Here the defendant committed a culpable act against the decedent Rooney, by manufacturing and distributing a defective oxygen-producing mask . . . ." 25 N.Y.2d at 464, 255 N.E.2d at 175, 306 N.Y.S.2d at 945.

49. See 38 Fordham L. Rev. 579 (1970).

50. 25 N.Y.2d at 466, 255 N.E.2d at 176, 306 N.Y.S.2d at 946-47.

However, despite the possible future problems inherent in defining "culpable act," *Guarino's* statement that any such act may be the basis for rescue recovery[51] suggests that the court may have implied recognition of an independent status[52] for causes of action based on rescue. At least one commentator has previously adopted this position.[53] Once it is clear that the rescue doctrine is not merely an exception to the rule that contributory negligence is an absolute bar to recovery, it is submitted that there is no logical basis for retaining the doctrine in its present limited status.[54] However, whether the rescuer's right to recover develops its own name as an independent tort,[55] remains nameless,[56]

51. See note 36 supra and accompanying text.

52. Language in the appellate division suggests the same result. "The predicate wrongdoing creates a new basis of recovery for the rescuers. That concept, enunciated in Wagner, permits recovery on behalf of a rescuer injured, not as a direct result of the original wrongdoing by the tortfeasor, but by some related circumstance." 31 App. Div. at 259, 297 N.Y.S.2d at 644.

53. F. Bohlen, Studies in the Law of Torts 569 n.33 (1926) states: "The rescuer's right of action, therefore, must rest upon the view that one who imperils another, at a place where there may be bystanders, must take into account the chance that some bystander will yield to the meritorious impulse to save life or even property from destruction, and attempt a rescue. If this is so, the right of action depends not upon the wrongfulness of the defendant's conduct in its tendency to imperil the person whose rescue is attempted, but upon its tendency to cause the rescuer to take the risk involved in the attempted rescue." Furthermore, Professor Bohlen states: "The right to recover cannot be based solely upon the wrongful conduct of the defendant towards the person imperiled. To give one person a right of action, it is not enough that he is harmed by an act which is wrongful towards another. The act must be wrongful to the person injured as at least tending to create an undue risk of injury to him. Nor has the [ordinary] rescuer any interest in the person rescued such as a husband in the services of his wife or a master in the services of his servant. His right to recover is, therefore, not derived from the wrong to the person imperiled." Id.

54. For example, the traditional rescue doctrine would allow recovery where a rescuer was injured rescuing a victim negligently placed in peril. Should he be less entitled to recover where the defendant intentionally created the peril? An affirmative answer produces an anomaly in which the passively negligent tortfeasor has a greater liability than the intentional wrongdoer. A negative answer is suggested by Talbert v. Talbert, 22 Misc. 2d 782, 199 N.Y.S.2d 212 (Sup. Ct. 1960), a two-party situation where rescue liability was imposed upon the defendant who intentionally imperiled himself by attempting suicide.

55. Such a cause of action would not be the first parasitic tort doctrine to achieve independence in its own right. Originally, mental distress was merely an element of special damages, requiring proof of impact. Recently, however, it has grown into the tort of "Infliction of Mental or Emotional Distress." W. Prosser § 11. See, e.g., Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

56. There now exist several "nameless" torts collectively called "prima facie tort." "A prima facie tort derives from the ancient form of action on the case, covering those situations where intentional harm has been inflicted, resulting in damage, by an act or series of acts which might otherwise be lawful and which do not fall within the category of traditional tort actions." 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). See also Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946); American Guild of Musical Artists v. Petrillo, 286 N.Y. 226, 36 N.E.2d 123 (1941); Opera on Tour, Inc. v. Weber, 285 N.Y. 348, 34 N.E.2d 349 (1941). See generally Forkosch, Analysis of the "Prima Facie Tort" Cause of Action, 42 Cornell L.Q. 465 (1957).

or continues to be justified under the rescue doctrine, its newly broadened basis will provide a salutory remedy for good Samaritans whose only previous remedy required the onerous proof of negligence. Short of a legally recognized duty to rescue,[57] it should supply the necessary impetus for socially desirable rescue efforts.

Uniform Commercial Code—Secured Transactions—Assignee Held to be in Bad Faith and Subject to Obligor's Defenses Despite Waiver of Defense Clauses.—Defendants, husband and wife, contracted to purchase a food freezer from Peoples Foods, Inc., and five days later also signed a contract with Peoples Food Packaging Corp. for the purchase of a food plan. Each contract was separately assigned within twenty-four hours of each transaction to the plaintiff, Star Credit Corp., for a discount of twenty percent from the face value of each contract. Included within each contract was a clause prohibiting the purchaser from asserting against the assignee any defense that he might have against the assignor, provided that the assignee acquired the contract in good faith, for value, and without written notice of any claim or defense communicated within ten days of notice of the assignment by the assignee to the obligor.[1] Defendants subsequently received the freezer, but received only one-third of the food plan agreed upon. Thereafter, Peoples Food Packaging Corp. went out of business, and the defendants declined to make any further payments to the plaintiff on either contract.[2] Star Credit then brought suit "to recover the balance due on both contracts, together with late charges and attorneys' fees."[3] Plaintiff claimed that it had procured its rights in accordance with the provisos of the prohibition clauses, and was thus immune from any defenses that the defendants might have against the assignor. The trial court, however, held that the plaintiff had not acquired its rights in "good faith," and thus allowed the defendants to assert the defense of failure of consideration against the plain-

57. It is noteworthy that an affirmative duty to rescue is recognized only in the U.S.S.R. See Note, The Failure to Rescue: A Comparative Study, 52 Colum. L. Rev. 631 (1952). Dean Prosser has observed that "[b]ecause of [the] reluctance to countenance 'nonfeasance' as a basis of liability, the law has persistently refused to recognize the moral obligation of common decency and humanity, to come to the aid of another human being who is in danger, even though the outcome is to cost [the victim] his life." W. Prosser § 54, at 336.

1. Each contract provided: " 'This agreement may be assigned without notice to Buyer. The Buyer agrees not to assert against an assignee a claim or defense arising out of the sale under this contract provided that the assignee acquires this contract in good faith and for value and has no notice of the facts giving rise to the claim or defense in writing within ten days after such assignee mails to the Buyer at his address shown above notice of the assignment of this contract.' " Star Credit Corp. v. Molina, 59 Misc. 2d 290, 292, 298 N.Y.S.2d 570, 573 (Civ. Ct. 1969).

2. The price of the freezer was $1222.15, while the cost of the food plan was $445.82. The defendants had made $168.75 in payments for the freezer, and $111.47 for the food plan. Id. at 291, 298 N.Y.S.2d at 572.

3. Id. The defendants counterclaimed for $169.75, the amount paid on the freezer contract.

tiff and to rescind the contract. *Star Credit Corp. v. Molina*, 59 Misc. 2d 290, 298 N.Y.S.2d 570 (Civ. Ct. 1969).[4]

Generally, an assignee is said to stand in the shoes of his assignor, that is, he acquires the assignment subject to the equities and defenses available to the obligor against the assignor.[5] The obligor, however, may be prohibited, by valid agreement with the assignor, from asserting any such equities or defenses against the assignee.[6] These waivers have been judicially outlawed as contrary to public policy in various jurisdictions,[7] but have been legislatively sanctioned in others, including New York.[8]

The Uniform Commercial Code (U.C.C.) § 9-206(1)[9] provides for the in-

4. See Star Credit Corp. v. Crumb, N.Y.L.J., Jan. 9, 1970, at 17, col. 8, where Judge Browne stated: "I find . . . that this case is on all fours with Star Credit Corporation v. Molina . . . . This court cannot but fully agree with the decision and judgment of Judge Younger in that case and I make the same judgment here." Id. at 18, col. 1.

5. 4 A. Corbin, Contracts § 892, at 585 (1951); 3 S. Williston, Contracts § 432, at 177-80 (3d ed. W. Jaeger 1960); Restatement of Contracts § 167(1) (1932); Restatement (Second) of Contracts § 168(1)-(3) (Tent. Draft No. 4, 1968); 6 Am. Jur. 2d Assignments § 102 (1963).

6. See, e.g., N.Y. Pers. Prop. Law § 403(3)(a) (Supp. 1969); N.Y. U.C.C. § 9-206(1) (1964); see notes 8, 10 infra.

7. See San Francisco Sec. Corp. v. Phoenix Motor Co., 25 Ariz. 531, 220 P. 229 (1923); Dearborn Motors Credit Corp. v. Neel, 184 Kan. 437, 337 P.2d 992 (1959); Unico v. Owen, 50 N.J. 101, 123-26, 232 A.2d 405, 417-18 (1967). Contra, Root v. John Deere Co., 413 S.W.2d 901 (Ky. 1967); Walter J. Hieb Sand & Gravel, Inc. v. Universal C.I.T. Credit Corp., 332 S.W.2d 619 (Ky. 1960); cf. Littlefield, Good Faith Purchase of Consumer Paper: The Failure of the Subjective Test, 39 S. Cal. L. Rev. 48, 75 (1966).

8. See N.Y. Pers. Prop. Law § 403(3)(a) (Supp. 1969). Similar statutes exist in California (Cal. Civ. Code Ann. § 2983.5 (West Supp. 1969)), and in Delaware (Del. Code Ann. tit. 6, § 4312 (Supp. 1969)).

9. "Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the Article on Commercial Paper (Article 3)." See also Uniform Consumer Credit Code § 2.404, Alt. A: "With respect to a consumer credit sale or consumer lease, other than a sale or lease primarily for an agricultural purpose, an assignee of the rights of the seller or lessor is subject to all claims and defenses of the buyer or lessee against the seller or lessor arising out of the sale or lease notwithstanding an agreement to the contrary, but the assignee's liability under this section may not exceed the amount owing to the assignee at the time the claim or defense is asserted against the assignee. Rights of the buyer or lessee under this section can only be asserted as a matter of defense to or set-off against a claim by the assignee." See Murphy, Lawyers for the Poor View the UCCC, 44 N.Y.U.L. Rev. 298, 319 (1969). Article 9 of the U.C.C. covers "any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures" and "any sale of accounts, contract rights or chattel paper" concerning any fixtures or personal property within the jurisdiction of the state. N.Y. U.C.C. § 9-102(1)(a)-(b) (1964); see N.Y. U.C.C. § 9-106 (Supp. 1969). Note, however, that N.Y. U.C.C. § 9-104(f) (1964) excludes from coverage of Article 9 "an assign-

sulation of the assignee from defenses and claims available to the obligor against the assignor. To be so protected, however, the assignor must qualify as a good faith purchaser for value and acquire his rights unaware of any such claims and defenses. Regardless of his position, the assignee remains subject to the "real" defenses which are available against a holder in due course of a negotiable instrument.[10] In addition, the U.C.C. provision is made expressly subject to "any statute or decision which establishes a different rule for buyers or lessees of consumer goods . . . ."[11]

As previously mentioned, good faith is a *sine qua non* of an assignee who wishes to remain immune from defenses which the obligor has available against the assignor. The U.C.C. supplies a general definition for the term, providing: " 'Good faith' means honesty in fact in the conduct or transaction concerned."[12]

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ment of accounts, contract rights or chattel paper which is for the purpose of collection only . . . ." Although this section appears to exclude the applicability of Article 9 of the U.C.C. to the transactions involved in the case, based upon the sketchy facts provided by the court, the Official Commentary to that section provides that "[p]aragraph (f) excludes from the Article certain transfers of such intangibles which, by their nature, have nothing to do with commercial financing transactions." Thus, since it is obvious that the transactions essentially involved commercial financing, the exception provided in § 9-104(f) is inapplicable.

10. N.Y. U.C.C. § 9-206(1) (1964). These "real" defenses are enumerated in N.Y. U.C.C. § 3-305 (1964). Basically, they include infancy, incapacity, duress, illegality or fraud in the underlying transaction, discharge in insolvency or any other defense of which the holder has notice in taking the instrument.

11. N.Y. U.C.C. § 9-206(1) (1964). New York has enacted Pers. Prop. Law § 403(3) (Supp. 1969): "No contract or obligation shall contain any provision by which: (a) The buyer agrees not to assert against an assignee a claim or defense arising out of the sale, but it may contain such a provision as to an assignee who acquires the contract, obligation or obligation together with any related note in good faith and for value and to whom the buyer has not mailed written notice of the facts giving rise to the claim or defense within ten days after such assignee mails to the buyer, at his address shown on the contract or obligation, notice of the assignment." N.Y. U.C.C. § 9-203(2) (1964) provides that a transaction can be subject to both Article 9 of the Code and Article 10 of the Personal Property Law (which contains § 403(3)), although the latter article is controlling in case of conflict. An obvious conflict between N.Y. Pers. Prop. Law § 403(3) (Supp. 1969) and N.Y. U.C.C. § 9-206(1) (1964) is that the former requires a written notice of the defective performance, while the latter does not. See also Uniform Consumer Credit Code § 2.404(1), Alt. B: "With respect to a consumer credit sale or consumer lease, other than a sale or lease primarily for an agricultural purpose, an agreement by the buyer or lessee not to assert against an assignee a claim or defense arising out of the sale or lease is enforceable only by an assignee not related to the seller or lessor who acquires the buyer's or lessee's contract in good faith and for value, who gives the buyer or lessee notice of the assignment as provided in this section and who, within 3 months after the mailing of the notice of assignment, receives no written notice of the facts giving rise to the buyer's or lessee's claim or defense. This agreement is enforceable only with respect to claims or defenses which have arisen before the end of the 3-month period after notice was mailed." See Murphy, supra note 9, at 319-20.

12. N.Y. U.C.C. § 1-201(19) (1964). The definitions in Article 1 of the Code are applicable to all articles of the U.C.C., unless additional requirements are stated for a particular article. For example, in sales transactions covered by Article 2, " 'Good faith'

The thrust of this definition had been previously adopted by other Uniform Acts—"A thing is done 'in good faith' . . . when it is in fact done honestly, whether it be done negligently or not."[13] Thus, the approach of the U.C.C. and prior Uniform Acts to "good faith" is the subjective or "white-heart" standard—a party's good faith is to be determined by what he actually knows or willfully ignores, and not by what he, as a reasonably prudent man, should have known—the objective test.[14] Thus the subjective standard consists of actual knowledge or willful ignorance, while the objective test essentially comprises negligence or failure to inquire.

Obviously, an assignee cannot be acting in "good faith" if his conscious objective is to disregard or even defeat the rights of the obligor.[15] Nevertheless, the existence of bad faith or collusion between the assignor and the assignee more often than not presents difficult problems of proof. In *Nassau Discount Corp. v. Allen*,[16] for example, the trial court found that the existence of a printed assignment clause containing the assignee's name, and other references by name to the assignee throughout the contract between the buyer and the assignor, sufficiently indicated the assignee's intent to defeat the buyer's rights. The appellate court, however, thought differently, indicating that the facts elicited were insufficient to establish bad faith, and ordered a new trial on the question of the extent of the assignee's knowledge.[17] Nevertheless, extreme cases of obvious collusion have been countered by a different theory. *Commercial Credit Co. v. Childs*,[18] for example, held that a finance company which had

in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." N.Y. U.C.C. § 2-103(1)(b) (1964). See Norman v. World Wide Distribs., Inc., 202 Pa. Super. 53, 195 A.2d 115 (1963).

13. Uniform Bills of Lading Act § 53(2); Uniform Sales Act § 76(2); Uniform Stock Transfer Act § 22(2); Uniform Warehouse Receipts Act § 58(2). These acts have been superceded by various sections found in U.C.C. arts. 7, 2, 8 and 7 respectively.

14. Braucher, The Legislative History of the Uniform Commercial Code, 58 Colum. L. Rev. 798, 812 (1958); Felsenfeld, Knowledge as a Factor in Determining Priorities Under the Uniform Commercial Code, 42 N.Y.U.L. Rev. 246, 264 (1967).

15. Glens Falls Nat'l Bank & Trust Co. v. Sansivere, 136 N.Y.S.2d 672, 674 (Saratoga County Ct. 1955). "He who seeks protection as a holder in due course must have dealt fairly and honestly in acquring the instrument, as to the rights of prior parties . . . ." In re Stroudsburg Security Trust Co., 145 Pa. Super. 44, 48, 20 A.2d 890, 892 (1941).

16. 44 Misc. 2d 1007, 255 N.Y.S.2d 608 (Civ. Ct.), rev'd, 47 Misc. 2d 671, 262 N.Y.S.2d 967 (App. T. 1965); see 65 Colum. L. Rev. 733 (1965).

17. 47 Misc. 2d at 671-72, 262 N.Y.S.2d at 968.

18. 199 Ark. 1073, 137 S.W.2d 260 (1940). Swanson v. Commercial Acceptance Corp., 381 F.2d 296 (9th Cir. 1967) contains a summary of the judicial reasoning for and against the party-to-the-transaction rule. See Schuck v. Murdock Acceptance Corp., 220 Ark. 56, 247 S.W.2d 1 (1952); Commercial Credit Corp. v. Orange County Mach. Works, 34 Cal. 2d 766, 214 P.2d 819 (1950); United Sec. Corp. v. Franklin, 180 A.2d 505 (D.C. Mun. Ct. App. 1962); C.I.T. Corp. v. Emmons, 197 So. 662 (La. Ct. App. 1940). The cases are collected in Annot., 44 A.L.R.2d 8, 134-57 (1955). It is a well settled rule in many jurisdictions that the privileges afforded a good faith assignee, or a holder in due course of a negotiable instrument are negated when that party has intimate knowledge of the transaction between the principals. Such knowledge negates the possible injury to the innocent party, and thus

prepared the contract, financed the transaction, and received an assignment within one day of the transaction was not a good faith purchaser, but a *party-to-the-transaction* from its inception—evidently a few steps beyond bad faith. This position, however, has been criticized as essentially fallacious.[19] The finance company is considered to be a party to the transaction for the purpose of impugning its status as a holder in due course or a good faith assignee, yet would not be held liable for breach of warranty in an action commenced by the obligor for damage caused by defective goods sold by the retailer.[20] Nevertheless, however valid may be the above criticism, the rationale of the *party-to-the-transaction* doctrine is fundamentally sound—one who has been a significant economic force in the transaction should not be afforded the protection of an innocent party.

Taking its cue from the Official Commentary to U.C.C. § 1-201(19) which states that good faith "means at least what is here stated," the court in *Star Credit* found that the plaintiff had demonstrated a lack of good faith in acquiring the assignments.[21] The court premised this finding primarily upon a discussion of factors more closely related to the issue of unconscionability than that of good faith—*i.e.*, defendants' lack of bargaining power and commercial sophistication.[22] It read the printed assignment clause on the reverse of the contract as a provision which obviously had not been bargained for, and which most likely could not have been varied. Such a bargain, aptly termed a contract of adhesion or a "pad contract," is one in which a party has little or no bargaining power—he must "take it or leave it."[23] While it may be true that adhesion contracts are not necessarily illegal or unfair in themselves,[24] although various provisions have been held contrary to public policy,[25] the court indicated that lack of bargaining power was a highly relevant consideration regarding the existence of good faith during the transaction.[26]

Related to the question of adhesion contracts is the commercial ineptness

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those freedoms from defenses available to the obligor against the assignor are not acquired by those who are in a position to know of the defenses prior to taking the assignment. See Unico v. Owen, 50 N.J. 101, 109-10, 232 A.2d 405, 410 (1967); American Plan Corp. v. Woods, 16 Ohio App. 2d 1, 240 N.E.2d 886 (1968).

19. Littlefield, supra note 7, at 68-70. See Comment, Negotiable Instruments Law—"Close Connexity" and the Finance Company as a Holder in Due Course, 18 La. L. Rev. 322 (1958).

20. Littlefield, supra note 7, at 68-70.

21. 59 Misc. 2d at 294, 298 N.Y.S.2d at 574.

22. Id. at 293, 298 N.Y.S.2d at 574.

23. Siegelman v. Cunard White Star Ltd., 221 F.2d 189, 204-05 (2d Cir. 1955) (Frank, J., dissenting); Kessler, Contracts of Adhesion–Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629, 632 (1943); Shuchman, Consumer Credit by Adhesion Contracts, 35 Temp. L.Q. 125, 128-30 (1962).

24. Campbell Soup Co. v. Wentz, 172 F.2d 80, 83 (3d Cir. 1948); Schmidt v. Pacific Mut. Life Ins. Co., 268 Cal. App. 2d 735, 74 Cal. Rptr. 367 (Dist. Ct. App. 1969); Unico v. Owen, 50 N.J. 101, 111, 232 A.2d 405, 411 (1967). But cf. Ehrenzweig, Adhesion Contracts in the Conflict of Laws, 53 Colum. L. Rev. 1072, 1088-89 (1953).

25. See, e.g., Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

26. 59 Misc. 2d at 293, 298 N.Y.S.2d at 574.

of buyers. The court indicated that while the defendants were literate, they were not possessed of knowledge of the precise meaning of the "cut-off" provisions in the contracts.[27] Cognizance of the lack of commercial experience of one party to a transaction is certainly not a new development in the law,[28] and presumably the current trend is away from the principle of the Restatement of Contracts that "[o]ne who makes a written offer which is accepted, or who manifests acceptance of the terms of a writing which he should reasonably understand to be an offer or proposed contract, is bound by the contract, though ignorant of the terms of the writing or of its proper interpretation."[29] While ignorance might be a defense for some, lack of it may well mean liability for others.[30]

By indicating that the above two factors were highly relevant to a determination of the plaintiff's good faith, the court resolved that issue in a novel and interesting manner. "Good faith" essentially relates to the performance of the contract, while unconscionability primarily concerns its formation and its terms.[31] Since the problems of commercial inexperience and adhesion obviously arise at or before the time the buyer signed the contract, *i.e.*, the formation stage, these difficulties should have been interpreted to resolve the issue of unconscionable formation rather than good faith performance. The Official Commentary to U.C.C. § 2-302, the provision relating to unconscionability, however, states that "[t]he principle [unconscionability] is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power." Since the waiver of defense clauses were merely the result of superior bargaining power, the situation could not have been validly treated under the principle of unconscionability. Nevertheless, the court related adhesion and commercial ineptness to a determination of the assignee's good faith, *i.e.*, the performance of the contract.

In addition to the above two considerations, the court pointed to several factors which were indicative of a conspiracy between the assignor and the assignee, namely, the assignment of each contract within twenty-four hours,

27. Id.

28. See Comment, Unconscionable Contracts Under the Uniform Commercial Code, 109 U. Pa. L. Rev. 401, 409-10 (1961).

29. Restatement of Contracts § 70 (1932). Accord, Restatement (Second) of Contracts § 23, Comment b (Tent. Draft No. 1, 1964); see Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449-50 (D.C. Cir. 1965) for a case exemplifying the trend away from the Restatement position.

30. In Refrigeration Discount Corp. v. Haskew, 194 Ark. 549, 108 S.W.2d 908 (1937) the court took cognizance of the fact that the defendant was an adult teacher who should have understood the warranty provisions of the contract he signed. This is merely a restatement of the rule that a court will not remake a contract so as to structure a better bargain than what competent parties have already made. Accord, Weiland Tool & Mfg. Co. v. Whitney, 40 Ill. App. 2d 70, 91, 188 N.E.2d 756, 765 (1963); Kahn v. Janowski, 191 Md. 279, 60 A.2d 519 (1948); Mountain Springs Ass'n v. Wilson, 81 N.J. Super. 564, 575, 196 A.2d 270, 277 (Super. Ct. 1963); Harnish v. Shannon, 392 Pa. 419, 141 A.2d 347 (1958).

31. 1 Report of the N.Y. Law Revision Comm'n, Study of the Uniform Commercial Code 658 (1955).

the identical account numbers on the assignor's contracts and the assignee's records, the strong probability that the defendants' credit rating had not been checked by the plaintiff despite its statement to the contrary, and the discount rate of twenty percent at which plaintiff took both assignments.[32] The court failed, however, to delve into the question of whether Star Credit was actually aware of the seller's plans to go out of business, but from the foregoing facts, merely surmised that the assignee's knowledge of the transaction itself negated its alleged good faith.[33] Although the court did not elaborate on the point, it can be seen that the entire transaction, from the inclusion of the clauses in the contracts to their ultimate assignments to the plaintiff, was structured so as to enable the assignee to defeat the defendants' rights.

The defendants had actually signed two contract forms, but the evidence persuaded the court that there was in effect only one contract for both the freezer and the food.[34] A finding that only one contract rather than two exists is generally based upon the intent of the parties to the transaction, and such circumstances as separate delivery of each article, or separate prices for each commodity, do not conclusively establish the existence of separate contracts.[35] However, the evidence before the court in *Star Credit* demonstrated that Peoples Foods, Inc. and Peoples Food Packaging Corp., while purportedly separate entities, shared the same vice-president, had the same address, and used identical form contracts. In addition, both contracts contained a provision to the effect that, if both a freezer contract and a food plan contract were executed, the two were to be considered as a single contract.[36]

Since the court found that the contract had been substantially breached by the failure of the assignor to provide all the food agreed upon, the assignee, having lost its privileged status, was held subject to the defense of substantial failure of consideration, and the contract was rescinded.[37]

The court in *Star Credit* was ultimately confronted with a delicate policy question, namely, the balancing of the need of legitimate retail merchants to acquire working capital by discounting their "paper," with the protection which must be afforded consumers from unscrupulous tradesmen.[38] Such a balancing

32. 59 Misc. 2d at 293-94, 298 N.Y.S.2d at 574.

33. "We are therefore persuaded that the sellers entered into these contracts not primarily to sell a freezer and food to the Molinas, but primarily to obtain commercial paper for assignment to Star; and that Star accepted the assignments with full knowledge of the seller's conduct and intention. Id.

34. Id. at 295, 298 N.Y.S.2d at 575-76.

35. Bethea v. Investors Loan Corp., 197 A.2d 448 (D.C. Mun. Ct. App. 1964); Farmers Union Coop. Elevator Fed'n v. Carter, 152 Neb. 266, 40 N.W.2d 870 (1950); Sal's Furniture Co. v. Peterson, 86 R.I. 203, 133 A.2d 770 (1957).

36. 59 Misc. 2d at 295, 298 N.Y.S.2d at 575-76.

37. Id. at 295, 298 N.Y.S.2d at 576. The defendants had also asserted two other defenses against Star Credit, namely, fraud in the inducement and unconscionability. They failed, however, to produce any substantiating evidence for either, and accordingly the court declined to further consider those defenses.

38. See Jones v. Approved Bancredit Corp., 256 A.2d 739 (Del. Sup. Ct. 1969); American Plan Corp. v. Woods, 16 Ohio App. 2d 1, 240 N.E.2d 886 (1968); Implement Credit Corp.

essentially involves a question of the allocation of the risks of the trade. As the Supreme Court of Florida stated: "It may be that our holding here will require some changes in business methods and will impose a greater burden on the finance companies. We think the buyer—Mr. & Mrs. General Public—should have some protection somewhere along the line. We believe the finance company is better able to bear the risk of the dealer's insolvency than the buyer and in a far better position to protect his interests against unscrupulous and insolvent dealers."[39] Furthermore, this allocation requires special consideration for both legitimate businessmen and consumers, "[b]ut the need for special care in application should not foreclose the adoption of the rule [of balancing interests] and its application in a proper case."[40] The retail merchant and the finance company go hand in hand. As one court has expressed it: "The finance company and the merchant-seller are as a fact engaged in one business, like Longfellow's description of man and woman, useless one without the other. To pretend that they are separate and distinct enterprises is to draw the veil of fiction over the face of fact."[41] The court in *Star Credit* utilized workable criteria in its determination of the finance company's good faith without holding that the financier had been a party to the transaction from its inception.

The result in *Star Credit* was unquestionably just—no one appreciates paying for what he will not receive, especially when there is an aroma of fraud in the air. Even if recent cases may be considered consumer oriented, it is necessary to keep in mind that those institutions best able to protect themselves—those with unquestioned superior bargaining power—should bear the risks inherent in the market place.

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v. Elsinger, 268 Wis. 143, 66 N.W.2d 657 (1954). For a discussion of the balancing of interests between consumers and finance companies, see Hogan, A Survey of State Retail Instalment Sales Legislation, 44 Corn. L.Q. 38, 65-67 (1958).

39. Mutual Fin. Co. v. Martin, 63 So. 2d 649, 653 (Fla. 1953).

40. Jones v. Approved Bancredit Corp., 256 A.2d 739, 743 (Del. Sup. Ct. 1969).

41. Buffalo Indus. Bank v. De Marzio, 162 Misc. 742, 744, 296 N.Y.S. 783, 785-86 (Buffalo City Ct.), rev'd on other grounds, 6 N.Y.S.2d 568 (Sup. Ct. 1937).