Vanderbilt Law Review

Volume 17
Issue 4 *Issue 4 - October 1964*

Article 9

10-1964

Recent Cases

Law Review Staff

RECENT CASES

Antitrust Law—Violation of Section 7 of the Clayton Act by Joint Venture

On February 25, 1960, Penn-Olin Chemical Company was jointly formed by Olin Mathieson Chemical Corporation and Pennsalt Chemicals Corporation, eaeh owning fifty percent of the stock. Its purpose was to produce and sell sodium chlorate, a chemical widely used in the manufacture of pulp and paper, in the southeastern United States market. Prior to the formation of the joint venture, both companies were studying the feasibility of independent, as well as joint, entry into that market. Their studies indicated that the market, which in 1960 was divided among three firms,[1] was ripe for the entry of a new production facility within its geographical confines. The government sought to dissolve the joint venture under section 1 of the Sherman Act and section 7 of the Clayton Act[2] on the grounds that the market was being deprived of potential competition. The district court dismissed the complaint, finding no evidence that both companies would have entered the market simultaneously.[3] It refused to consider whether competition would have been "substantially lessened" had one parent firm entered the market while the other remained only a potential competitor. On appeal[4] to the United States Supreme Court, *held*, vacated and remanded for a re-evaluation of the anti-competitive probabilities of the latter situation. If a joint venture's parent firms are both motivated and able to enter a new market independently, the impact upon the industry's competitive atmosphere resulting from the loss of potential entrants must be

1. Hooker Chemical Corporation, 49.5 per cent; American Potash & Chemical Corporation, 41.6 per cent; and Pennsalt, 8.9 per cent supplied from temporary excess capacity in its Oregon plant.

2. Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is deelared to be illegal." 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1955).

Section 7 of the Clayton Act provides: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1950).

3. Umted States v. Penn-Olin Chemical Co., 217 F. Supp. 110 (D. Del. 1963).

4. Generally, where the United States is a complainant in antitrust actions, appeal from the final judgment of a district court lies only to the United States Supreme Court. 32 Stat. 823 (1903), as amended, 15 U.S.C. § 29 (1948).

assessed to determine whether there is a substantial lessening of competition. *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).

The Supreme Court here for the first time applies section 7 to a domestic joint venture[5] formed by corporations not already competing within the market. Technically, section 7 prohibits the acquisition of a corporation "engaged in commerce," not one intending to become so engaged.[6] However, courts interpreting legislative intent[7] to give short shrift to such technical arguments, have refused, in view of the Celler-Kefauver Amendment,[8] to create another loophole. The real question is not how a joint subsidiary is acquired, but how it affects competition within the industry.[9] Under section 7 an amalgamation is illegal if its probable effect[10] is "substantially to lessen competition." To determine anti-competitive effect, analysis of the resultant market structure should include evaluation of the number and size of sellers, the conditions of entry, the rate of growth of the industry, industry pricing policies; and, in the case of a joint venture, the reasons for its creation, its relations to its parents, and the ability of its parents to enter the industry alone.[11] A particularly important question is whether the joint venture forecloses potential competition, either between its parents[12] or between itself and other

5. The term "joint venture" will be used only to denote joint participation in the creation of a new producing organization.

6. But in Aluminum Company of America v. FTC, 284 Fed. 401 (3d Cir. 1922), *cert. denied*, 261 U.S. 616 (1923), where two corporations contrived a transfer of assets of one to a newly formed subsidiary, the court held the subsidiary to be engaged in commerce while the assets were being transferred at its inception, before its operations commenced.

7. "Congress contemplated that the 1950 amendment would . . . bring the entire range of corporate amalgamations . . . within the scope of § 7." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 342 (1963). Judicial disdain for the technical argument is illustrated by United States v. Columbia Pictures Corp., 189 F. Supp. 153, 181-82 (S.D.N.Y. 1960). For the legislative background see H.R. REP. No. 1191, 81st Cong., 1st Sess. 11 (1949).

8. Many economists have argued that Congress' failure to include asset sales under the original section 7, which only applied to combinations effected by stock sales, was a loophole in its anti-competitive design. The Celler-Kefauver Amendment brought asset acquisitions within the scope of section 7.

9. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957), requires that the economic effects of an acquisition be measured at the time of suit rather than at the time of acquisition, thus further nullifying the technical "engaged in commerce" argument.

10. A mere possibility of lessened competition is not enough. There must be a reasonable probability that the anti-competitive effect will occur before the acquisition will be condemned. *Id.* at 598.

11. See KAYSEN & TURNER, ANTITRUST POLICY 136-41 (1959); U.S. DEPT. OF JUSTICE, ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 32-36 (1955); Hale, *Joint Ventures: Collaborative Subsidiaries and the Antitrust Laws*, 42 VA. L. REV. 927, 937 (1956); Comment, 37 N.Y.U.L. REV. 712, 732-33 (1962).

12. As in the *Penn-Olin* case.

firms within the industry.[13] In another context, an amalgamation eliminating a highly significant potential competitor has been condemned,[14] for, as one observer has put it, "potential competition . . . may restrain producers from overcharging those to whom they sell or underpaying those from whom they buy."[15]

In the principal case the Court, in view of the legislative history of section 7, struck aside the technical question of whether the firm acquired was "engaged in commerce" and went on to consider the anti-competitive effect of the acquisition. The lower court had ruled that section 7 would not apply to Penn-Olin unless it could be shown as a matter of probability that both joint venturers would have entered the market. The Supreme Court, in remanding, added another area of applicability of section 7's "lessening of competition": the possibility of foreclosure of competition when only one firm enters while the other remains a significant potential competitor at the edge of the market. This question the lower court had deliberately refrained from deciding. But the Supreme Court, pointing to factors[16] that might have motivated at least one or possibly both of the joint venturers to enter singly if joint entry were prohibited, concluded that a prima facie case had been stated under section 7, since entry was financially and technologically possible for each. The area of probabilities relating to potential competition must be assessed, the Court stated, even though precise competitive effects cannot be measured.

Dismissing the applicability of the Sherman Act to this set of facts without additional comment,[17] the Court required only an evaluation of incipient anti-competitive probabilities. By thus emphasizing incipiencies, the Court comes to the essential difficulty inherent in the problem of joint ventures. When competition is foreclosed by merger, the foreclosure is present and obvious—one merged firm now exists where there had been two competitors. On the other hand, foreclosure by a joint venture entering a new market is purely prospective,

13. The test is whether an acquisition resulting in vertical integration would "unreasonably restrict the opportunities of competitor producers . . . to market their product." United States v. Columbia Steel Co., 334 U.S. 495, 527 (1948).

14. United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964), where an established firm, seeking to protect its market share, acquired a potential competitor.

15. WILCOX, COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY 7 (TNEC Monograph No. 21, 1940).

16. Among these were an expanding market; both parents being "identified" with the industry, *i.e.*, one was a producer in another geographical market while the other, through patent ownership, had extensive selling contacts in the market; and both having long been interested in entering the market. United States v. Penn-Olin Chemical Co., 378 U.S. 158, 174-75 (1964).

17. *Id.* at 161. Implicit in this summary dismissal of the Sherman Act's applicability is the recognition of its more restrictive scope. See Brown Shoe Co. v. United States, 370 U.S. 294, 329 (1962).

while at the same time competition within the present market is actually being stimulated by the presence of the new firm. Compare the competitive effect of the joint venture to that of the other entry possibilities absent the joint venture: no entry with both joint venturer firms remaining only potential competitors (neither immediately willing to take the risk alone); one entry with no potential competitor (the other firm being discouraged by the entry of the first and thus dropping its own entry plans); one entry with one remaining significant potential competitor; and two entries. The first two possibilities give a less competitive result than the joint venture entry, while the latter two, in the absence of significant time lags, give a more competitive result. Furthermore, one presently effective entrant can greatly jar a complacent, tightly oligopolistic market as, indeed, this joint venture did.[18] Entry time-lags in the absence of the collaborative action should also be considered.

In any event, by collusive action, competition between the actors is definitely precluded. This is the danger with which the court is concerned:[19] whether it is reasonably probable that the two might have been competitors, potential or actual. In view of the demonstrable, present enhancement of competition caused by the presence of a new firm, a strong probability of foreclosure of competition should be demonstrated because of the uncertainties in the evaluation of prospective foreclosure of competition. It is in this area that the Court is perhaps over-enthusiastic in seeking to arrest incipient anti-competitive tendencies. Any firm entering the sodium chlorate industry that achieves competitive economies of scale will necessarily obtain a significant market share.[20] Consequently, in the absence of explosive market demand, entrants will be few, since a prospective entrant will not be attracted by a market where recent entry has created excess capacity. Other potential competitors were present, one having since entered,[21] with resultant dampening effect on the desirability of entry to any one of the others. The joint venture, though obtaining a significant market share due to scale requirements, did not attain a ma-

18. *Id.* at 174.

19. No doubt, much recent comment about the joint venture serving business as a collusive device whereby competition can be eliminated before it is begun, coupled with increasing use of the form by large corporations, also concerns the Court. See, for example, Dixon, *Joint Ventures: What is their Impact on Competition?*, 7 ANTITRUST BULL. 397 (1962).

20. Apparently the minimum optimal scale is approximately 15,000 tons capacity per annum, as indicated by the smallest plant in the market. This size is about one-sixth of 1962 capacity in the Southeast. See United States v. Penn-Olin Chemical Co., *supra* note 16, at 164-65.

21. Pittsburg Plate Glass Company built a plant in the market after Penn-Olin. *Id.* at 165.

jority share of the market.[22] Opportunities for entry had been known to both firms for years, yet neither had entered, perhaps because of anticipated risks or anticipated marginal profitability.[23] The joint arrangement succeeded in crystallizing entry into an industry where it was sorely needed.[24] These factors, unemphasized by the Court, tend to make the illegality of Penn-Olin highly questionable. Nevertheless, it is important that elimination of potential competition be considered in joint venture situations. For that reason the precise holding itself is to be approved, although the Court should have also stressed the actual, present enhancement of competition as a factor to be balanced against the uncertainties inherent in the evaluation of anti-competitive probabilities.

Civil Rights—Anti-discrimination Law as a Vehicle for a Private Civil Action

Plaintiff, a member of the Jewish faith, submitted his application for the purchase of an apartment in defendant corporation's cooperative apartment building. Approximately three months later, the plaintiff's application was rejected at a meeting of defendant's board of directors.[1] Plaintiff then filed suit against the defendant, seeking compensatory and punitive damages.[2] In his complaint, plaintiff alleged that the defendant's failure to approve the application was motivated by religious discrimination, contrary to public policy as expressed in the New York City anti-discrimination law,[3]

22. Its precise share was 27.6 per cent. *Ibid.*

23. See the district court's opinion, *supra* note 3, at 128-30.

24. For the duopoly background of the industry see *id.* at 115-18.

1. The by-laws of defendant corporation required that its board of directors consent to the sale of each apartment. To this end plaintiff had submitted his social, business, and credit references to the board of directors for their consideration. Bachrach v. 1001 Tenant's Corp., 41 Misc. 2d 512, 514, 245 N.Y.S.2d 912, 914 (Sup. Ct. 1963).

2. Plaintiff claimed he incurred $70,000 compensatory damages since he had to buy another apartment at a higher cost and also claimed $250,000 punitive damages. *Id.* at 514, 245 N.Y.S.2d at 914.

3. "In the City of New York, with its great cosmopolitan population consisting of large numbers of people of every race, color, creed, national origin and ancestry, there is no greater danger to the health, morals, safety and welfare of the city, and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of differences of race, color, creed, national origin or ancestry." NEW YORK CITY ADMINISTRATIVE CODE § B1-1.0. The court then quoted another section of the code: "Section X41-1.0 of the code, with an exception not relevant here, prohibits an 'owner, lessee, sub-lessee, assignee . . . or managing agent of, or other person having the right to sell, rent, [or] lease, a housing accommodation which is located in a multiple dwelling' from denying these accommo-

and that such action was intended to injure the plaintiff. The defendant moved that the complaint be dismissed since it failed to state a cause of action.[4] *Held,* motion denied. Where an anti-discrimination law does not expressly provide an exclusive remedy, it may serve as the basis for a private civil action. *Bachrach v. 1001 Tenants Corp.,* 41 Misc. 2d 512, 245 N.Y.S.2d 912 (Sup. Ct. 1963).

By allowing a private civil action to be based upon the violation of a legislative enactment, the courts accomplish a two-fold purpose: the injured plaintiff is provided with relief where he would ordinarily have none, and an additional deterrent is provided. In *Fitzgerald v. Pan American World Airways, Inc.,*[5] Negro passengers enroute from California to Australia were not allowed to reboard their plane after a stopover in Hawaii. Such conduct was prohibited by the Civil Aeronautics Act,[6] which afforded criminal penalties and injunctive relief.[7] However, the act contained no provision under which the injured plaintiff might recover damages. The court there said that the statute was intended to protect the class of individuals of which plaintiff was a member, and held that "consequently, by implication, its violation creates an actionable civil right for the vindication of which a civil action may be maintained by any such person who has been harmed by the violation."[8] In reaching its decision the court in *Fitzgerald*[9] recognized that even though the criminal penalties and injunctive relief provided in the act might deter such conduct by the defendant in the future, the dominant purpose of the act could not be realized unless the injured plaintiff was allowed to seek relief.[10] Other cases have refused a private cause of action where the statute contained sanctions sufficient to insure compliance[11] or where its allowance would too greatly broaden the impact of the statute.[12] When allowing a civil remedy some

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dations to any person because of his 'race, color, religion, national origin or ancestry;' and directs that he may not discriminate against or segregate any person on these grounds." Bachrach v. 1001 Tenants Corp., *supra* note 1, at 515, 245 N.Y.S.2d at 916.

4. Defendant based his motion on N.Y. CIV. PRAC. LAW § 3211(a)7.

5. 229 F.2d 499 (2d Cir. 1956).

6. Civil Aeronautics Act of 1938, ch. 601, § 404(b), 52 Stat. 993.

7. Civil Aeronautics Act of 1938, ch. 601, § 902(a), 52 Stat. 1015; Civil Aeronautics Act of 1938, ch. 601, § 1002(c), 52 Stat. 1018.

8. 229 F.2d at 501.

9. *Supra* note 5.

10. *Id.* at 502.

11. See, *e.g.,* Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co. 341 U.S. 246 (1951); Consolidated Freightways, Inc. v. United Truck Lines, Inc., 216 F.2d 543 (9th Cir. 1954); Farmer v. Philadelphia Elec. Co., 215 F. Supp. 729 (E.D. Pa. 1963).

12. Vance v. Safeway Stores, Inc., 137 F. Supp. 841 (D.N.M. 1956).

courts[13] have relied on section 286 of the *Restatement of Torts*.[14] However, this section pertains only to the establishment of a standard of conduct in negligence cases and not to the creation of a private civil action.[15] In *Wills v. Trans World Airlines, Inc.*,[16] the court used the fiction of "presumed" legislative intent to create a civil remedy. Those who argue against this theory contend that had the legislature intended to provide the plaintiff with a private cause of action, it would have expressed it in the statute.[17] Before any legislative enactment can be used as the basis for civil relief, the statute itself must not exceed the constitutional authority of the legislative body. In *Tynes v. Gogos*,[18] a municipal ordinance was not allowed to serve as the basis for a civil remedy because the city lacked the power to enact the particular type of ordinance involved. In general, cases which allow a private civil action have involved penal statutes.[19] The court, in *Farmer v. Philadelphia Electric Co.*,[20] held that an executive order forbidding discrimination in employment by federal contractors would not support a civil right of action since such conduct had not been declared criminal.

In the instant case the court did not discuss whether the statute involved could be used as the basis for the plaintiff's action but rather held that the plaintiff had sufficiently stated a cause of action in "prima facie tort."[21] The court said that " '[t]he key to the prima facie tort is the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful.' "[22] Here the defendant could lawfully refuse to lease an apartment to the plaintiff, but, if the refusal was based upon "illegal or ulterior reasons,"[23] the injured plaintiff could seek damages. After finding that the plaintiff's complaint stated a cause of action, the court then considered whether the New York

13. Fisehman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951); Osborne v. Mallory, 86 F. Supp. 869 (S.D.N.Y. 1949); Remar v. Clayton Securities Corp., 81 F. Supp. 1014 (D. Mass. 1949).

14. "Violations creating Civil Liability. The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another . . . ." RESTATEMENT, TORTS § 286 (1934).

15. This view has now been made clear in the *Restatement*. See RESTATEMENT (SECOND), TORTS § 286 (Tent. Draft No. 4, 1958).

16. 200 F. Supp. 360 (S.D. Cal. 1961).

17. Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361, 364 (1932).

18. 144 A.2d 412 (D.C. Munic. Ct. App. 1958).

19. See PROSSER, TORTS § 34 (2d ed. 1955).

20. 215 F. Supp. 729 (E.D. Pa. 1963).

21. 41 Misc. 2d 515, 245 N.Y.S.2d at 914.

22. *Id.* at 515, 245 N.Y.S.2d at 915, quoting Ruza v. Ruza, 286 App. Div. 767, 769, 146 N.Y.S.2d 808, 811 (1955).

23. *Ibid.*

City anti-discrimination ordinance[24] provided an exclusive remedy. The court noted that, while a similar state statute[25] limited remedies for its breach only to those expressly provided within the statute, the subsequently enacted city ordinance contained no similar limitation.[26] Applying a traditional method of statutory interpretation, the court concluded that such an "omission was intentional and a limitation may not therefore be implied."[27]

The perplexity of the courts over whether a particular statute may be used as the basis for civil relief could, of course, be avoided by careful draftsmanship, specifying in the statutes themselves whether such relief is to be granted. Lacking this it seems reasonable that a member of a class for whose protection the legislature has enacted a statute should be allowed to seek relief in a civil action for injuries arising from violation of the statute. True, the statute may be sufficiently enforced by the criminal penalties and injunctive relief provided, but too often these sanctions are of little help to an injured plaintiff.[28] This is particularly true in cases involving a violation of a civil rights statute, since the injured plaintiff probably will not be able to seek relief at common law. Furthermore, it does not seem reasonable to restrict the allowance of a civil action to those statutes which are penal in nature. The fact that the legislature has declared certain conduct detrimental to the public welfare is itself sufficient reason to grant a civil action.[29] In retrospect, one feels that the court in *Fitzgerald*[30] would have allowed the plaintiff's action even had the statute contained no criminal penalty. Justice Frankfurter gave support to this view when he stated that, "if civil liability is appropriate to effectuate the purposes of a statute, courts are not denied this traditional remedy because it is not specifically authorized."[31] Courts today are becoming more sensitive to the problems of victims

24. See note 3 *supra.*

25. N.Y. Civ. Rights Law § 18(a). The constitutionality of this statute has been upheld in New York State Comm'n Against Discrimination v. Pelham Hall Apartments, Inc., 170 N.Y.S.2d 750 (Sup. Ct. 1958).

26. 41 Misc. 2d at 517, 245 N.Y.S.2d at 917. The enforcement of the city ordinance is accomplished by having the plaintiff present his complaint before a city commissioner. If the commission believes there has been discrimination, it attempts to conciliate the matter. If this method fails, the matter is referred to the city attorney who then seeks an injunction against the offender.

27. *Ibid.*

28. See Coldstein v. Groesbeck, 142 F.2d 422 (2d Cir. 1944).

29. Landis, *Statutes and the Sources of Law,* in Harvard Legal Essays 213, 220 (1934).

30. 229 F.2d 499 (2d Cir. 1956).

31. Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 261 (1951) (dissenting opinion).

of discrimination. As a result, courts will undoubtedly base their decision on whether to allow a private civil action on the merits of the individual case and on the capacity of the particular anti-discrimination statute to permit an interpretation that allows such an action.

Condemnation—Landowner Cannot Recover From Federal Government for Damages Caused Before Date of Taking Where Government Did Not Previously Contemplate Condemning Property

The United States Government sued to condemn 3,276.21 acres of land adjacent to a military airfield[1] and was awarded a fee simple in July, 1958. Since at least 1952 the land had been under the flight pattern of government planes as they took off and landed; however, the court in a non-jury proceeding fixed the date of valuation as August, 1955, when the interference from the flights became severe enough to constitute a taking.[2] On the issue of valuation, the government contended that the land should be valued by taking into account flights over the land prior to August, 1955, which flights had already depreciated the value of the land. The landowners contended that the government should be liable for the full value of the land as if the property had not been depreciated by the flights prior to the date of taking. After asking the jury to return alternate valuation verdicts,[3] the United States District Court for the Southern District of California *held*, in a condemnation proceeding under the federal constitution where the government did not contemplate taking the land in question at the time the project was initiated, the landowners may not recover for damage caused by the government before the date of taking.

1. An earlier decision had settled the issue as to the ownership of the property. United States v. 3,276.21 Acres of Land, 194 F. Supp. 297 (S.D. Cal. 1961).

2. The government in the instant case is taking a fee simple. The government claimed that it already had an aviational easement over the land because there had been an incipient easement beginning in 1952 and that the easement had been acquired after six years by adverse possession. Thus, the government claimed it should pay the value of the fee simple less the value of the easement. However, the court found that there had not been an incipient taking until August, 1955, when jet flights first became frequent. See Glaves, *Date of Valuation in Eminent Domain: Irreverence for Unconstitutional Practice*, 30 U. CHI. L. REV. 319 (1963); Harvey, *Landowners' Rights in the Air Age: The Airport Dilemma*, 56 MICH. L. REV. 1313 (1958). See note 6 *infra*.

3. The court asked for alternate verdicts so that if, on appeal, it was held that the court picked the wrong measure of damages, it would not be necessary to have a new trial. The verdict ignoring the overflights was $3,250,000. The verdict considering the overflights was $3,075,000.

United States v. 3,276.21 Acres of Land (Miramar), 222 F. Supp. 887 (S.D. Cal. 1963).

The fifth amendment of the United States Constitution provides that private property cannot be taken without just compensation.[4] The constitutions in many states require payment of compensation when private property is either taken or damaged for public use.[5] The United States Supreme Court has held that there may be a taking of a permanent easement for the purpose of the fifth amendment where government planes fly over private land so low and so frequently as to be a direct and immediate interference with the enjoyment and use of the land.[6] There can never be a taking, however, unless the planes fly directly over the property; that is, there must be a direct physical invasion of the airspace over the property.[7] The market value of the interest taken for public use has been the general standard for measuring compensation to the owner.[8] In determining the market value of the interest taken, it is necessary to decide whether or not any change in the value of the land has been caused by government activity in the area before the date of valuation. If there has been such a change in value, it is then necessary to determine if it is to be considered in making the condemnation award.[9] Where there is an increase in value as a result of government activity before the date of taking, such as buying nearby land, and where the land in question is probably within the area to be condemned, this increase in value is excluded in arriving at the value of the property being condemned.[10] The converse of this is that the court must exclude any depreciation in value caused by government activity once the government is committed to the project.[11] Prior to the case at hand, there apparently had been no decision directly in point as to

4. U.S. CONST. amend. V. "nor shall private property be taken for public use, without just compensation . . . ."

5. 2 NICHOLS, EMINENT DOMAIN § 6.1[3] (4th ed. 1963) [hereinafter cited as NICHOLS].

6. United States v. Causby, 328 U.S. 256 (1946). See Dugan, *The Causby Doctrine —Medieval Concept of the Jet-Age*, 2 WASHBURN L.J. 272 (1963). Since the government in the instant case is actually taking a fee simple, the amount of recovery includes the amount that would have been awarded if the government had only taken an easement.

7. Batten v. United States, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955, *rehearing denied*, 372 U.S. 925 (1963), 16 VAND. L. REV. 430 (1963).

8. 4 NICHOLS § 12.1[5].

9. MCCORMICK, DAMAGES § 129 (1935); 4 NICHOLS § 12.3151.

10. United States v. Cors, 337 U.S. 325 (1949); United States v. Miller, 317 U.S. 369 (1943); 4 NICHOLS § 12.3151.

11. United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961); 4 NICHOLS § 12.3151. "It would be manifestly unjust to permit a public authority to depreciate property values by a threat to erect an offensive structure and then to take advantage of this depression in the price which it must pay for the property." 1 ORGEL, VALUATION UNDER EMINENT DOMAIN 447 (2d ed. 1953).

whether or not the last stated rule should apply to facts similar to these in the instant case. An earlier case held that there would be no compensation for a loss caused by overhead flights before the date of the taking.[12] However, in that case the federal government had bought a municipal airport shortly before the date of taking and the court felt that most of the loss in the value of the property had occurred before the purchase; thus, the government was not responsible for the loss.[13] There is support for defendant's contention in a concurring opinion to a 1961 Court of Claims decision[14] wherein it was argued that the landowner should be entitled to an award greater than the difference in value immediately before and after the advent of the jets, the date of the taking, since the government activities before the date of taking had lowered the value of the property. However, the landowner had not claimed the damage so the issue was not decided.[15]

In the instant case the court rejected the measure of damages requested by the landowners. The court indicated that such a measure of damages applies only where the government contemplated condemning the land when the project was initiated and that the present case did not come within that rule.[16] Although many state constitutions provide that property shall not be taken or damaged for public use without just compensation, the fifth amendment of the federal constitution says only that property shall not be taken.[17] The court said, "we think that incidental damage short of a taking, must be damage which must be borne by the landowner in this type of condemnation action and that if he has any remedy, it may be a remedy in the court of claims."[18] The court indicated that the defendants made a plausible argument to the effect that the government should not be permitted to depreciate property by trespass short of taking, and then condemn the property and have it valued at a lesser figure because of the trespass.[19] The court thought it was a close question, therefore, the jury was instructed to return alternate valuation verdicts. However, the court held that the measure of damages requested by the landowners was not applicable to this case.

The court justifies its measure of damages by saying that if there is any recovery for the damage caused prior to the taking, it would

12. Jensen v. United States, 305 F.2d 444 (Ct. Cl. 1962).
13. *Ibid.* There was also a serious question whether or not there had been *any* loss in value to the land by overflights before the taking.
14. Davis v. United States, 295 F.2d 931 (Ct. Cl. 1961).
15. *Id.* at 936.
16. 222 F. Supp. at 889.
17. See note 4 *supra.*
18. 222 F. Supp. at 890.
19. *Id.* at 892.

be in the Court of Claims. However, the only possible cause of action would be under the Federal Tort Claims Act[20] for trespass or nuisance, and it would seem unlikely that an adequate or indeed any recovery would be possible.[21] In denying recovery there is another argument not mentioned by the court. In this mechanical age there are many small annoyances that have to be tolerated without a legal remedy such as the noise of passing trucks and trains. Likewise our society must tolerate a certain amount of inconvenience from the noise of airplanes. However, in a condemnation proceeding it would appear that the landowner shonld be compensated for the depreciation of his land caused by government action before the land is actually condemned. It is reasonable that the government should not have to pay profits to specnlators who buy land in anticipation of the government later condemning the land. The converse of this rule should apply to the instant case, that is—where government activity lessens the value of land before it takes the land, the government should pay for this loss of value. This shonld apply whether or not the government contemplated taking the land when the project was initiated. Whenever the government, by virtue of interference caused by overflights, takes land near an airport, it is probably true that the government did not contemplate taking that land when the project was started. This absence of an initial intent to condemn does not, however, change the fact that the landowner has incurred damages caused by the government interference prior to the date of taking. For this reason the test of contemplation shonld not be applicable to such proceedings. The government is put in the position of being a wrongdoer profiting from its own wrong.

20. 28 U.S.C. § 2674 (1958).

21. Some of the problems in obtaining recovery under the Federal Tort Claims Act are:

(a) In 1958 Congress extended the definition of navigable airspace to include "airspace needed to insure safety in take-off and landing." See 72 Stat. 739 (1958), 49 U.S.C. § 1301 (1958). Prior to the 1958 Act it had been suggested that there is an implied statutory immunity from suits against the Government resulting from flights in navigable airspace since such flights were legislatively authorized. See Matson v. United States, 171 F. Supp. 283, 286 (Ct. Cl. 1959); Note, 74 HARV. L. REV. 1581 (1961); 29 J. AIR L. & COM. 72 (1963). Thus it may be held that there is no cause of action under the Federal Tort Claims Act.

(b) The limit of recovery under the Federal Tort Claims Act is $10,000. 28 U.S.C. § 1346 (1958).

(c) The two year statute of limitations would often bar recovery. 28 U.S.C. § 2401(b) (1958).

See generally: Abend, *Federal Liability for Takings and Torts*, 31 FORDHAM L. REV. 481 (1963); Comment, 31 So. CAL. L. REV. 259 (1958).

Constitutional Law—Loss of Nationality—Foreign Residency Statute Held Violative of Due Process

A German national who had acquired derivative American citizenship through her mother in 1950, subsequently married a German national and returned to her land of birth in 1956. She was denied a United States passport in 1959 by the State Department on the ground that by residing in Germany for more than three years she suffered automatic loss of citizenship under section 352(a)(1) of the Immigration and Nationality Act of 1952.[1] In accordance with the procedural provisions of the Act, she sued in the district court for a declaratory judgment that she was still an American citizen, at the same time asking for, and ultimately being granted[2] a three judge panel to contest the constitutionality of the section. This panel upheld the constitutionality of section 352(a)(1) as a valid congressional exercise of the foreign relations power. On appeal to the Supreme Court, *held*, the statute providing for loss of citizenship of a naturalized citizen having continuous residence for three years in the country of his birth constitutes discrimination so unjustifiable as to be violative of due process. *Schneider v. Rusk*, 377 U.S. 163 (1964).

While the Constitution expressly gives Congress the power "to establish an uniform Rule of Naturalization,"[3] there is no such provision regarding expatriation. Yet the broad power over foreign affairs, coupled with the necessary and proper clause, has afforded a basis for congressional action.[4] Another basis for such power is the doctrine of the "inherent power of sovereignty."[5] Prior to the Nationality Act of 1907,[6] Congress had repeatedly failed to enact necessary legislation in this area. The consequent statutory void forced

1. Immigration and Nationality Act § 352(a)(1), 66 Stat. 269 (1952), 8 U.S.C. § 1484(a)(1) (1958): "(a) A person who has become a national by naturalization shall lose his nationality by—(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 1485 of this title, whether such residence commenced before or after the effective date of this chapter."

2. The district court denied her motion to convene a three-judge court deciding that she had raised no substantial constitutional issues. The action was affirmed by the court of appeals and the Supreme Court reversed and remanded her case for a trial on the merits. Schneider v. Rusk, 372 U.S. 224 (1963).

3. U.S. CONST. art. I, § 8.

4. Perez v. Brownell, 356 U.S. 44, 57 (1957); Mackenzie v. Hare, 239 U.S. 299, 311-12 (1915).

5. It has been held in external affairs that the United States, independent of the Constitution, possesses all the powers of any sovereign. Expatriation has been included. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Mackenzie v. Hare, *supra* note 4, at 311.

6. Ch. 2534, 34 Stat. 1228.

the State Department to rely on executive messages and other sources to determine pertinent policy regarding expatriation.[7] The State Department's desire to avoid further policy fragmentation led to efforts to obtain positive law in the area. These efforts culminated in a two-year provision comparable to that involved in the instant case, except that there was a rebuttable presumption of loss of citizenship.[8] In implementation, the provision was made less drastic by many courts, which treated the presumption as relating only to a loss of diplomatic protection.[9] In 1933, President Roosevelt appointed a committee to codify existing statutes. For the sake of administrative convenience and in order to avoid long and expensive litigation in the courts, the committee recommended that loss of citizenship be automatic upon determination of the necessary facts.[10] This approach was in agreement with the dictum in a recent Supreme Court opinion that "the termination of citizenship terminates the problem."[11] An examination of the history of section 352(a)(1) discloses a legislative purpose of avoiding embarrassment to the United States that might arise from the conduct of naturalized citizens while residing in their respective fatherlands.[12] In more recent decisions, the Court has held unconstitutional similar sections providing for loss of citizenship by those convicted of desertion from our armed forces in wartime[13] and by those who remain outside the jurisdiction of the United States in wartime for the purpose of evading military service.[14] In these cases the Court was concerned with the penal nature of the sections as a violation of the procedural guaranties of the fifth, sixth, and eighth amendments. In the instant case, however, as in *Perez v. Brownell*, the Court was confronted with the question whether the statute met the substantive due process requirement of the fifth amendment.

The Court's continued recognition of the sanctity of citizenship, coupled with constitutional silence on the explicit power of expatria-

7. For a discussion see Roche, *Pre-Statutory Denaturalization*, 35 CORNELL L.Q. 120 (1949), and Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25 (1950).

8. Nationality Act of 1907, ch. 2534, 34 Stat. 1128.

9. This idea was first expressed by Attorney Ceneral Wickersham in 1910. 28 OPS. ATT'Y GEN. 504, 510 (1910). It was followed in Stein v. Fleischmann Co., 237 Fed. 679, 681-82 (S.D.N.Y. 1916).

10. STAFF OF HOUSE COMM. ON IMMIGRATION AND NATURALIZATION, 76TH CONG., 1ST SESS., REPORT ON THE CODIFICATION OF NATIONALITY LAWS OF THE UNITED STATES 69 (Comm. Print 1938).

11. Perez v. Brownell, *supra* note 4 at 60. (Majority opinion by J. Frankfurter).

12. For a historical background of expatriation see Boudin, *Involuntary Loss of American Nationality*, 73 HARV. L. REV. 1510 (1960); GORDON, *Loss of Citizenship by Continuous Residence Abroad*, 53 COLUM. L. REV. 451 (1953); and Roche, *supra* note 7.

13. Trop v. Dulles, 356 U.S. 86 (1958).

14. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

tion, has resulted in curtailment of congressional exercise of the foreign affairs power in the name of substantive due process. While recognizing the power of Congress to employ means reasonably calculated to avoid embarrassment to the United States abroad, Mr. Justice Douglas, speaking for the Court, was of the opinion that section 352(a)(1) created a "second-class citizenship." He noted that although the fifth amendment contained no equal protection clause, it did forbid discrimination "so unjustifiable as to be violative of due process,"[15] that the statute, by proceeding on the "impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance," worked an unwarranted hardship on a particular limited class; and that the non-affirmative act of residing abroad could not be automatically construed as voluntary renunciation of citizenship without consideration of compelling business and family reasons. Mr. Justice Clark, joined by Justices Harlan and White in the dissent, followed a line of reasoning earlier employed in the landmark decision of *Mackenzie v. Hare*.[16] The dissenting Justices reasoned that petitioner, Mrs. Schneider, by acting with statutory notice of the consequences of her act, made a voluntary renunciation of her citizenship.[17]

Thus, in the instant case, the lines of judicial disagreement were clearly drawn. The majority espoused a personal approach which would require judicial determination on a case-by-case basis. The gravamen of this approach is contained in an earlier concurring opinion by Justice Douglas in *Hirabayashi v. United States:* "Loyalty is a matter of mind and of heart not of race."[18] The dissent, adhering to a non-absolutist notion of citizenship, was satisfied with the present "institutional approach," which recognizes the need for congressional power to deal with problems on a group basis.[19] Though Mr. Justice Douglas failed sufficiently to demonstrate why the statutory classification was unreasonable, his conclusion was consistent with his position in upholding the Japanese curfew during World War II—that "group" treatment should be limited to periods of national emergency when public necessity so requires.[20] His dissent in *Perez* and certain dicta in the present case seem to indicate that Justice Douglas would require a clear and unequivocal statement of renunciation before loss of citizenship could be invoked. Such a

15. Bolling v. Sharpe, 347 U.S. 497, 499 (1953).
16. 239 U.S. 299, 311-12 (1915).
17. 377 U.S. at 169.
18. 320 U.S. 81, 107 (1942).
19. The distinction between the institutional and personal approaches was noted in Roche, *The Expatriation Cases*, 1963 SUP. CT. REV. 325, 342.
20. Hirabayashi v. United States, *supra* note 18.

position circumscribes congressional action to such a degree that citizenship obtained through naturalization is almost as absolute as that guaranteed the native-born by the fourteenth amendment. "The power of Congress to . . . modify it, or cancel it does not exist."[21] While there is still room for Congress to lay down procedural guidelines, "group" treatment with regard to expatriation seems limited to the instance of an "urgent public necessity."

The marked absence of explicit reasoning to support the decision is in contrast to the lucid dissent of Circuit Judge Fahy.[22] Conceding that a valid legislative purpose might be served by this section of the act, and that international embarrassment resulting from prolonged residency abroad might be more prevalent among naturalized citizens, Judge Fahy felt it unreasonable to issue a blanket indictment against all naturalized citizens while granting a blanket immunity to all native-born who are not within the purview of the statute but who are a source of embarrassment abroad. "A reasonable classification for some purposes does not justify the law in imposing an inequality among citizens out of proportion to the purpose for which the classification was made."[23]

Recent Supreme Court decisions involving the Immigration and Nationality Act of 1952 demonstrate the Court's increasing determination to place American citizenship status in a highly preferred position.[24] Any statutory or administrative abridgement of such citizenship, whether acquired at birth or by means of naturalization, has been received critically, given narrow scope, and accorded a heavy burden of proving its reasonableness. While a divided Court, in *Perez v. Brownell*,[25] upheld the constitutionality of another section of the act providing for loss of nationality by voting in a foreign political election, it is questionable whether that decision may be distinguished from the present one. It may be argued that *Perez* can be distinguished on the following points: the affirmative act of voting is in contrast to the neutral act of residency abroad due to compelling business or family reasons; voting in political elections applies to both naturalized and native-born citizens, thereby creating

21. Perez v. Brownell, *supra* note 4, at 84. This absolutist approach to citizenship stems from dicta by Chief Justice Marshall in Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 827 (1824): "The simple power of the national Legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual." Thus, Mr. Justice Douglas reasons from the premise that the naturalized citizen stands on an equal footing with the native-born, excepting constitutional eligibility for the Presidency.

22. 218 F. Supp. 302 (D.D.C. 1963).

23. *Id.* at 322.

24. Kennedy v. Mendoza-Martinez, *supra* note 14; Trop v. Dulles, *supra* note 13; and Perez v. Brownell, *supra* note 4.

25. *Supra* note 4.

no "second-class citizenship"; and the statutory phrase "political election" has been left open to definition, thereby providing for a case-by-case determination to some degree. The fact remains, however, that the legislative approach of group treatment is present in both sections.[26] Regardless of the course the Supreme Court may follow with regard to voting in a foreign political election, the present decision will be dispositive of the five-year residency provision contained in section 352(a)(2) of the Immigration and Nationality Act of 1952.[27] These recent decisions by the Court have made one thing apparent: "Congressional exercise of the power to expatriate may be subject to a further constitutional restriction—a limitation upon the kind of activity which may be made the basis of denationalization."[28] Certain avenues appear to remain open to Congress in the regulation of expatriation procedure: a rebuttable presumption of loss of citizenship, suspension of citizenship until return to the United States, and loss of diplomatic protection. Such legislation would quite likely have to apply to all American citizens, both native-born and naturalized.[29] In light of changing currents in foreign affairs, a sound approach to the problem of embarrassment caused by the prolonged residency of American citizens abroad would be to avoid legislative action and to rely upon the use of treaties and executive orders. Such an approach would mark a return to the pre-statutory expatriation measures of the early twentieth century.[30] This would enable the United States to meet expatriation problems on a more individualized basis, thus avoiding the Court's objections to group treatment.

26. In some countries it is possible for an American citizen to vote in national political elections without renouncing allegiance to the United States. Thus, it is difficult to see how embarassment abroad or a dilution of allegiance would be the necessary result in every instance. Perez v. Brownell, *supra* note 4, at 77 (Warren, C.J., dissenting).

27. 66 Stat. 269 (1952), 8 U.S.C. § 1484(a)(2) (1958): "(a) A person who has become a national by naturalization shall lose his nationality by . . . (2) having a continuous residence for five years in any foreign state or states, except as provided in sections 1485 and 1486 of this title, whether such residence commenced before or after the effective date of this chapter."

28. Stewart, J., in Kennedy v. Mendoza-Martinez, *supra* note 14.

29. While classification of citizens, if reasonable, could be upheld as a valid congressional exercise of the foreign affairs power, the present case imposes an almost insurmountable burden of demonstrating a valid legislative objective.

30. See note 7 *supra* and accompanying text.

Constitutional Law–Reapportionment–Both Houses of a State Legislature Must Be Based as Nearly as Is Practicable on Population

Plaintiffs, residents, taxpayers, and voters of Jefferson County, Alabama, filed a complaint in the district court challenging the apportionment of the Alabama Legislature. The existing apportionment was based upon the 1900 federal census, despite the requirement of the state constitution that the legislature be reapportioned decenially.[1] Plaintiffs asserted that, since the population growth in the state had been uneven,[2] Jefferson and other counties were now victims of serious discrimination which deprived them of their rights under the Alabama Constitution and under the equal protection clause of the United States Constitution. Defendants, sued in their representative capacities, were various state and political party officials charged with the performance of certain duties in connection with state elections. A three judge federal district court ruled that the existing system of apportionment and the two legislatively proposed plans for the apportionment of seats in the two houses of the Alabama Legislature were invalid under the equal protection clause of the fourteenth amendment, and ordered into effect a temporary apportionment plan.[3] On appeal to the Supreme Court of the United States, *held*, affirmed. The existing system of apportionment and the two legislatively proposed plans for apportionment are invalid under the equal protection clause, which requires that each house of a state legislature be composed of districts as nearly of equal population as is practicable.[4] *Reynolds v. Sims*, 377 U.S. 533 (1964).

When the United States Supreme Court rendered its decision in *Baker v. Carr*,[5] overruling a long line of decisions holding that the Court would not attempt to adjudicate political questions in the areas of legislative apportionment and dilution of individual voting power by state laws,[6] public attention suddenly focused on the

1. ALA. CONST. art. IX, §§ 198-200 (1901).

2. See Sims v. Frink, 208 F. Supp. 431, 447 (1962).

3. Sims v. Frink, *supra* note 2.

4. This is one of a group of six apportionment cases. The other cases which explain and clarify some of the points discussed in this case are Davis v. Mann, 377 U.S. 678 (1964); Lucas v. General Assembly, 377 U.S. 713 (1964); Maryland Comm'n for Fair Representation v. Tawes, 377 U.S. 656 (1964); Roman v. Sincock, 377 U.S. 695 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964).

5. 369 U.S. 186 (1962).

6. See Matthews v. Handley, 361 U.S. 127 (1959); Hartsfield v. Sloan, 357 U.S. 916 (1958); Radford v. Gary, 352 U.S. 991 (1957); Kidd v. McCanless, 352 U.S. 920 (1956); Remmy v. Smith, 342 U.S. 916 (1952); Colegrove v. Barrett, 330 U.S. 804 (1947). *But see* United States v. Classic, 313 U.S. 299 (1941), where the court did intervene in a state electoral process where there had been stuffing of ballot boxes.

apportionment of state legislatures.[7] With the decision in *Baker*[8] the Court entered the "political thicket[s]"[9] of apportionment of legislative representation and voter equality; but it laid down no guide lines for the states or the courts to follow in determining what apportionment schemes would satisfy constitutional requirements. Subsequently, in *Gray v. Sanders*[10] the Court struck down Georgia's county unit method of electing its governor. In an opinion by Mr. Justice Douglas, expressing the views of eight of the justices,[11] the Court held that under the equal protection clause every voter is entitled to a vote equal in weight to the vote of every other voter in a statewide primary. The Court rejected any analogy between the Georgia unit system and the electoral college,[12] but explicitly refused to express an opinion as to whether bicameral state legislatures could ignore population in the apportionment of one house.[13] In *Wesberry v. Sanders*,[14] the Court once again discussed the issue spotlighted in *Baker*.[15] Basing its decision on article I, section 2 of the Constitution,[16] the Court held that congressional districts must be drawn so as to be approximately equal in population. By resting its decision upon article I, section 2, the Court did not establish precedent for state legislative apportionment cases, which must rest upon the equal protection clause; but the tenor of the *Wesberry* opinion and its complete disregard for nonpopulation factors left little doubt that it stood for the principle of voter equality.

The reasoning of the Court in *Reynolds*, and the five companion cases, is consistent with the reasoning of the recent cases discussed above. The Court could find no cases that were directly controlling on the question, but it did find that *Gray*[17] and *Wesberry*[18] had

7. See BOYD, PATTERNS OF APPORTIONMENT (National Municipal League Pamphlet 1962); LARSON, REAPPORTIONMENT AND THE COURTS, (1962); MCKAY, REAPPORTIONMENT AND THE FEDERAL ANALOGY (National Municipal League Pamphlet 1962).

8. Baker v. Carr, *supra* note 5.

9. Colegrove v. Green, 328 U.S. 549, 556 (1946) (dissenting opinion of Mr. Justice Frankfurter).

10. 372 U.S. 368 (1963) (8-1 decision).

11. Justice Harlan dissented expressing the view that the Court's "one person, one vote" principle was constitutionally untenable.

12. 372 U.S. at 378-79.

13. *Ibid.*

14. 376 U.S. 1 (1964).

15. Baker v. Carr, *supra* note 5.

16. "The House of Representatives shall be composed of Members chosen every second Year *by the People of the several States*, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2. (Emphasis added.) The Court held that, construed in its historical context, "by the People of the several States" means that as nearly as is practicable there must be voter equality. Wesberry v. Sanders, *supra* note 14, at 7-8.

17. Gray v. Sanders, *supra* note 10.

18. Wesberry v. Sanders, *supra* note 14.

established certain principles that were relevant to the question under consideration.[19] The Court's sweeping assertions in *Gray*,[20] that the equal protection clause requires that all who participate in an election must have an equal vote—whatever their race, whatever their sex, whatever their occupation, and wherever their home may be in that geographical unit[21]—established the basic principle of equality among voters within a state.[22] Although the decision in *Wesberry*[23] neither rests on the equal protection clause[24] nor involves the election of state officials,[25] it clearly stands for the principle of "one man, one vote" as the standard governing apportionment.[26] In considering the contention that the apportionment of a state is analogous to the requirement of the United States Constitution that the Senate "shall be composed of two Senators from each State"[27] the Court found that an examination of the history of our nation and of the Constitution does not support this proposition.[28] The Court does indicate, however, that some deviations from the equal population standard might be permitted "[s]o long as the divergences . . . are based on legitimate considerations incident to the effectuation of a rational state policy . . . ."[29] Among such considerations the Court does not include economic or other sorts of group interests, geographical considerations, or history; however, the Court does state that political subdivisions might be an adequate basis for deviation provided that "population is [not] submerged as the controlling consideration . . . ."[30] A careful analysis of the opinion leads to the conclusion that what this means is that a *slight* deviation might be allowed in order to recognize a political subdivision, but that the guiding and controlling principle must be equal population.

Upon the basic premise that the equal protection clause requires both houses of a bicameral state legislature to be apportioned on a population basis, the Court struck down the apportionment plans of

19. Reynolds v. Sims, 377 U.S. 533, 561 (1964).
20. Gray v. Sanders, *supra* note 10.
21. 372 U.S. at 379-80.
22. See 77 HARV. L. REV. 62, 133 (1963).
23. Wesberry v. Sanders, *supra* note 14.
24. *Id.* at 7-8.
25. *Wesberry* involves the state apportionment of Georgia's fifth congressional district.
26. See Note, 39 N.Y.U.L. REV. 264 (1964). *Contra*, Reynolds v. Sims, *supra* note 19, at 589 (dissenting opinion).
27. U.S. CONST. art. I, § 3, cl. 1, superceded by amend. XVII.
28. 377 U.S. at 572-75. See also MCKAY, REAPPORTIONMENT AND THE FEDERAL ANALOGY (1962); McKay, *Federal Analogy and State Apportionment Standards*, 38 NOTRE DAME LAW. 487 (1963). *Contra*, Baker v. Carr, 369 U.S. 186, 266 (1962) (dissent of Mr. Justice Frankfurter); Scholle v. Hare, 360 Mich. 1, 85, 104 N.W.2d 63, 107 (1960) (opinion of Justice Edwards).
29. 377 U.S. at 579.
30. *Id.* at 581.

Alabama,[31] Colorado,[32] Delaware,[33] Maryland,[34] New York,[35] and Virginia.[36] Dissenting in the Colorado case, where the apportionment plan was adopted by the people in a 1962 popular referendum as a state constitutional amendment and in the New York case, Mr. Justice Stewart argued that a state legislative apportionment scheme is constitutional if it is: (1) rational in light of the state's own characteristics and needs, and (2) not such as to permit the systematic frustration of the majority's will.[37] He accuses the Court of saying "that the requirements of the equal protection clause can be met in any state, only by the uncritical, simplistic, and heavy-handed application of sixth-grade arithmetic."[38] Mr. Justice Clark, who concurred in Mr. Justice Stewart's dissent, made some additional observations with reference to the Colorado case stating that the Colorado apportionment should not be held invalid, particularly because of (1) the public approval of this apportionment by referendum, (2) the frequency of reapportionment in that state, (3) special geographic and economic conditions in the state, and (4) the necessity of granting some latitude within the limits of rationality for the apportionment of the seats in one house, when the seats in the other house are apportioned on a population basis.[39] Mr. Justice Harlan dissented in all of the cases on the ground that state legislative apportionments should be wholly free of constitutional limitations, except the guarantee to each state of a republican form of government, which cannot be the foundation for judicial relief.[40] Although *Reynolds* was an eight to one decision, on the issue of whether the apportionment of both houses of a state legislature must be on an equal population basis, the Court split six to three.[41]

The decision in *Reynolds* may not be surprising to those who have followed the Court's recent decisions in election and apportionment

31. Reynolds v. Sims, *supra* note 19.
32. Lucas v. General Assembly, *supra* note 4.
33. Roman v. Sincock, *supra* note 4.
34. Maryland Comm'n for Fair Representation, *supra* note 4.
35. WMCA, Inc. v. Lomenzo, *supra* note 4. Here the Court said that the federal district court may consider the imminency of the 1964 state elections in determining whether to permit such elections under the existing unconstitutional apportionment plan.
36. Davis v. Mann, *supra* note 4.
37. The dissent in the Colorado case is also for the New York case. Lucas v. General Assembly, *supra* note 4 (dissenting opinion).
38. Lucas v. General Assembly, *supra* note 4, at 750 (dissenting opinion).
39. *Id.* at 741 (dissenting opinion).
40. Reynolds v. Sims, *supra* note 4, at 589 (dissenting opinion).
41. Those in favor of the equal population principle are Mr. Chief Justice Warren, Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Brennan, Mr. Justice White, and Mr. Justice Goldberg. Dissenting are Mr. Justice Clark, Mr. Justice Harlan, and Mr. Justice Stewart.

cases, but the effect which this decision will have upon state legislatures is difficult to estimate. The apportionment problem is serious, and also far more complicated than many of the opinions indicate. Mr. Justice Stewart, in his dissenting opinion, accuses the majority of converting "a particular political philosophy into a constitutional rule."[42] Among political scientists, historians, and others who have considered the various theories of apportionment for representative government,[43] no one theory has ever commanded unanimous approval.[44] The vital component of any apportionment plan is people, and any system which consistently denies large majorities any effective voice in the state legislature should not be allowed. But it does not necessarily follow that the equal population principle is the most desirable rule which can be devised as a standard for apportioning both houses of a state legislature. Legislators represent a majority of the voters in their districts and quite often the needs and interests of these voters can be related to the geographical areas in which they live. Mr. Justice Stewart submits that if, as the Court suggests, geographical residence is irrelevant, the equal population principle should require the abolition of districts and the holding of all elections at large.[45] This observation may overstate the Court's reasoning, but it does seem that the Court should give, in addition to the legalistic analysis of the problem, some recognition to rational state apportionment plans where the districts of one house are based on non-population factors.

42. Lucas v. General Assembly, *supra* note 4, at 748 (dissenting opinion). See also Mr. Justice Frankfurter, dissenting in Baker v. Carr, *supra* note 5, at 300: "What is actually asked of the Court in this case is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy . . . ."

43. Some of the possible bases upon which the states could be apportioned are: (1) territorial surveys, (2) governmental boundaries, (3) official bodies, (4) functional divisions of the population, or (5) free population alignments. These and other theories of representative government are discussed and evaluated in the material cited in note 44 *infra*.

44. See, *e.g.*, CUBER & KENKEL, SOCIAL STRATIFICATION IN THE UNITED STATES 227-48, 292-96 (1954); DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); DE GRAZIA, APPORTIONMENT AND REPRESENTATIVE GOVERNMENT (1963); HARRIS, THE QUEST FOR EQUALITY (1960); MILL, REPRESENTATIVE GOVERNMENT (1961); de Grazia, *General Theory of Apportionment*, 17 LAW & CONTEMP. PROB. 256 (1952).

45. Lucas v. General Assembly, *supra* note 4, at 750 (dissenting opinion).

Constitutional Law—Twenty-first Amendment—Scope of State Power Over Intoxicants Moving Within Its Borders

The Supreme Court recently gave a fresh examination to the scope of the states' power over alcoholic beverages under the twenty-first amendment. At Kennedy International Airport a unique type of export business was being conducted by the Idlewild Bon Voyage Liquor Corp. Under the provisions of the Tariff Act of 1930,[1] liquor was purchased from bonded warehouses outside New York and brought directly to Bon Voyage's place of business at the airport. There it was sold duty free to passengers boarding international flights. The passengers chose and paid for their liquor at embarkation; however, the liquor was placed directly on the plane to be delivered to the purchaser at his foreign destination. A New York statute requires that establishments selling liquor must have an entrance at street level.[2] Being unable to conform to this requirement, Bon Voyage was informed that its business would have to be terminated. Bon Voyage sought to enjoin the New York liquor authorities from interfering in its business, alleging that such restrictions were a violation of the commerce clause and contrary to the Tariff Act of 1930.[3] A three judge federal court granted the injunction[4] and on direct appeal, the United States Supreme Court *held*, affirmed. Transportation of liquor through New York was not importation "for delivery or use therein" within the meaning of the twenty-first amendment and thus could not be completely prohibited. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

A decision handed down at the same time concerned the power of Kentucky to levy an importation tax of ten cents per proof gallon on incoming Scotch whiskey.[5] James B. Beam Distilling Co., an importer, held the exclusive franchise in the United States for a well-known brand of Scotch, which was brought into the country via the ports of New Orleans and Chicago and then shipped direct to the Beam warehouses in Kentucky. After paying the required tax, the distilling company filed a claim for a refund, alleging that the tax

1. 46 Stat. 691 (1930), 19 U.S.C. § 1311 (1958). This law provides that goods produced under its provisions may be shipped duty free under the control of customs officials.

2. N.Y. ALCOHOLIC BEVERAGE CONTROL LAW § 105(2).

3. 46 Stat. 691 (1930), 19 U.S.C. § 1311 (1958).

4. Idlewild Bon-Voyage Liquor Corp. v. Epstein, 212 F. Supp. 376 (1962).

5. There was some question whether the tax was a license tax or an import tax but the Kentucky Court of Appeals held that the incidence of the tax was on the act of transporting the liquor. James B. Beam Distilling Co. v. Dept. of Revenue, 367 S.W.2d 267, at 270 (Ky. 1963).

was an impost in violation of the import-export clause. The Kentucky Court of Appeals reversed the Kentucky Tax Commission and the circuit court and granted the refund.[6] On certiorari, the United States Supreme Court, *held*, affirmed. The tax upon the importation of the liquor was an impost within the meaning of the import-export clause, and, being expressly forbidden by this clause, could not be permitted under the twenty-first amendment. *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964).

Section 2 of the twenty-first amendment provides: "The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[7] This obviously places in the hands of the states a large measure of control over intoxicants, but the history of the amendment shows that the extent of this power has been the source of much controversy and litigation.[8] Some authorities contend, as is claimed by the states in the present cases, that Congress intended for each state to have absolute power over all intoxicants within its borders, at any time, for any purpose.[9] Others take a more liberal view and would grant the states only the amount of control reasonably necessary to protect the integrity of their own laws.[10] The Supreme Court seemed to embrace the former view in *State Board of Equalization v. Young's Market Co.*[11] There the Court upheld the right of California to impose a license fee upon importers of beer, saying that while such a discriminatory[12] action would have been a violation of the commerce clause prior to the twenty-first amendment, this was not the case after its passage. The Court dismissed the contention that the tax was a denial of equal protection of the law stating that "a classification recognized by the twenty-first amendment cannot be deemed forbidden by the fourteenth."[13] That this case suggested no limits to

6. James B. Beam Distilling Co. v. Dept. of Revenue, *supra* note 5.

7. U.S. CONST. amend. XXI, § 2.

8. Prior to the enactment of the twenty-first amendment, the Congress had acted to give the states some control over liquor in interstate commerce. The Webb-Kenyon Act and the Wilson Act were voided by the eighteenth amendment, but with the twenty-first amendment they are once again in force. 37 Stat. 699 (1913), 27 U.S.C. § 122 (1958); 26 Stat. 313 (1890), 27 U.S.C. § 121 (1958).

9. Kallenbach, *Interstate Commerce in Intoxicating Liquors Under the 21st Amendment*, 14 TEMP. L.Q. 474 (1940).

10. Crabb, *State Power Over Liquor Under the Twenty-First Amendment*, 12 U. DET. L.J. 11 (1949); DeGanahl, *The Scope of Federal Power Over Alcoholic Beverages Since the Twenty-first Amendment*, 8 GEO. WASH. L. REV. 819 (1940).

11. 299 U.S. 59 (1936).

12. This was a license fee upon the right to import beer. Even though sellers of beer within the state had to pay a tax; any tax upon the right to import is a violation of the commerce clause. *Id.* at 62.

13. *Supra* note 11, at 64.

the power of the states is indicated by the description of the amendment in Mr. Justice Brandeis' opinion: "The Amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof,' abrogated the right to import free, so far as concerns intoxicating liquors."[14] It is small wonder that *Young's Market*[15] came to stand for the proposition that there were no restrictions upon a state's power under the twenty-first amendment. Inevitably the states sought to extend their control over liquor to shipments merely moving through their boundaries. In *Duckworth v. Arkansas*[16] and *Carter v. Virginia*,[17] Arkansas and Virginia had enacted statutes which required a license to ship liquor across the state. These requirements were objected to as violating the commerce clause. Thus, the Court was faced squarely with the opportunity to decide whether the twenty-first amendment and *Young's Market*[18] covered the regulation of such through shipments. However, the Court circumvented the issue by upholding the statutes upon entirely different grounds. The Virginia action was allowed because the liquor shipment was in violation of the laws of the state for which it was intended, and the Arkansas statute was held a legitimate exercise of the state police power to protect against the possible diversion of the liquor into illegal channels. The result of these decisions was that the scope of the states' authority over liquor was not limited, although several Justices concurring in the results stated their belief that the statutes should have been upheld on the basis of the twenty-first amendment.[19] A single exception to the state's plenary power over intoxicants concerned the passage of liquor through the territory of a state into a federal enclave. In *Collins v. Yosemite Park & Curry Co.*[20] and *Johnson v. Yellow Cab Transit Co.*[21] the Court denied the right of a state to prohibit such shipments into an area under federal jurisdiction.

Few cases have arisen involving the propriety of taxes upon the importation of foreign liquor. None, prior to the *Beam*[22] case, had reached the Supreme Court since the enactment of the twenty-first

14. *Supra* note 11, at 62.
15. *Supra* note 11.
16. 314 U.S. 390 (1941).
17. 321 U.S. 131 (1944).
18. *Supra* note 11.
19. Mr. Justice Jackson in *Duckworth v. Arkansas* felt this was a "gross and unwarranted extension of the police power," but that the statute was permissible under the twenty-first amendment. 314 U.S. at 397. Three Justices concurred in *Carter v. Virginia* on the theory that the abrogation of the commerce clause extended to transportation of liquor through the state. 321 U.S. at 138, 139.
20. 304 U.S. 518 (1938).
21. 321 U.S. 383 (1944).
22. Dept. of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964).

amendment. Two state court decisions involving the imposition of personal property taxes upon imports stored in the "original package" invalidated the taxes as violative of the import-export clause of the Constitution.[23]

In both *Hostetter*[24] and *Beam*[25] it is conceded that as a result of the twenty-first amendment the traditional commerce clause limitations do not restrict the states in their action concerning alcoholic beverages intended for use, distribution, or consumption within their borders. Additionally, it is recognized that states have broad discretionary powers to regulate and channel the flow of liquor both from within the state out and from without their borders through them, although as indicated previously there is some doubt as to the source of this latter power. However, in the instant decisions, the Court emphatically denies that the twenty-first amendment has completely abrogated either the commerce clause or the import-export clause. The Court points out that in any concrete factual situation the seemingly conflicting parts of the Constitution must be considered together as parts of the same document. This was the case, so the Court says, in *Collins v. Yosemite Park & Curry Co.*,[26] where it was held that the words "for delivery or use therein" had a very distinct meaning and did not contemplate the inclusion of all liquor traffic. These words, which were omitted by the Court in *Young's Market*,[27] became the basis of a significant limitation in *Hostetter*.[28] Had New York acted in an attempt "to regulate or control the passage of intoxicants through her territory in the interest of preventing their unlawful diversion into the internal commerce,"[29] it is assumed that the action would have been proper. However, this was not the manifest purpose of the New York statute, and since these intoxicants were intended ultimately for delivery and use in some foreign jurisdiction, the total prevention of their passage was beyond the scope of the authority of New York. Transportation through a state for use elsewhere is not "delivery or use therein" within the meaning of the twenty-first amendment.

The rationale of *Beam* is that while the twenty-first amendment has abrogated traditional commerce clause limitations on a state's power to control liquor for "delivery or use" within its borders, the

23. Parrot & Co. v. City & County of San Francisco, 131 Cal. App. 2d 332, 280 P.2d 881 (1955); State *ex rel.* H. A. Morton Co. v. Board of Review, 15 Wis. 2d 330, 112 N.W.2d 914 (1962).
24. Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964).
25. *Supra* note 22.
26. *Supra* note 20.
27. *Supra* note 11.
28. *Supra* note 24.
29. *Id.* at 333.

amendment has had no similar effect upon the import-export clause. Rather than a broad grant of power to Congress, as is given by the commerce clause, the import-export clause flatly prohibits any impost upon foreign goods entering the United States. Accommodation of the import-export prohibition with the twenty-first amendment is somewhat more difficult in this case than in *Hostetter*,[30] and the Court states bluntly that the allowance of this tax would "require nothing short of squarely holding that the twenty-first amendment has completely repealed the import-export clause as far as intoxicants are concerned."[31]

By virtue of these cases the Supreme Court has completely extinguished as a valid legal proposition the claim that a state has unlimited power over all alcoholic beverages within its borders. Hereafter a state may exclude or place discriminatory burdens only upon liquor which is intended "for delivery or use" within the state. Only regulations reasonably calculated to protect the laws of the state may be imposed upon liquor within the confines of the state but not intended for "delivery or use" therein. This seems to be a reasonable interpretation of the twenty-first amendment and in harmony with the concept of unfettered commerce among the states. However, the Court has created something of an ambiguity by failing adequately to define "delivery or use therein" or the much broader phrase adopted by the Court—"use, distribution, or consumption." Since the meaning of these terms defines the scope of the power a state possesses over certain intoxicants, it is imperative that they be more clearly delineated. The most logical conclusion is that the liquor must be intended for human consumption—actual drinking within a state before it is "importation . . . for use, distribution, or consumption." This interpretation is borne out by the facts in both *Hostetter* and *Beam*. In *Hostetter* the Court emphasizes that the intoxicants involved are intended for "ultimate" delivery and use outside New York, even though there is a preliminary transaction within the state which would qualify as "use" or "distribution" under any normal construction of the terms. Consider the situation that arises in *Beam* if "use, distribution, or consumption" is interpreted in the customary sense of meaning any sort of commercial activity within the state. Surely the storage of liquor in warehouses and subsequent shipment to other states qualifies as distribution or use. But if such be the case, Kentucky will be allowed to prohibit the entry of liquor which she could not under the same circumstances tax; thus thwarting the purpose of the import-export prohibition, *i.e.*, the retention of control

30. *Supra* note 24.

31. Dept. of Revenue v. James B. Beam Distilling Co., *supra* note 22, at 345.

over international trade by the federal government. A more dramatic example of the problems which could arise if use and distribution might mean something other than human consumption is presented in the case of port cities. Once again there is no denying that the operation involved here is a classic example of both use and distribution, but it seems improbable that the twenty-first amendment was intended to allow states to prohibit the entrance of these foreign intoxicants. Yet in spite of the facts which indicate human consumption should be the sole criterion and the seeming acceptance of this in *Hostetter*, the Court continues to treat "use, distribution, and consumption" as mutually exclusive terms, indicating that at times liquor could be in a state for use or distribution, although intended to be consumed elsewhere. The resulting ambiguity is almost certain to lead to confusion and additional litigation.

Evidence—Statutory Presumptions—Reasonableness Is Implicit in Test of Rational Connection

Defendants drove to an unregistered still early one morning and upon their arrival were immediately arrested. On trial in federal district court, defendants were convicted on three counts of violating Internal Revenue Code provisions regulating illegal distilling. On appeal to the Court of Appeals for the Fifth Circuit, *held*, reversed.[1] Although the government had presented enough evidence to prove defendants' guilt,[2] the statutory presumptions created by section 5601(b) of the Code,[3] allowing the presence of a person at the site of an unregistered still to be sufficient evidence to authorize conviction, are unconstitutional, thus necessitating a new trial. *Barrett v. United States*, 322 F.2d 292 (5th Cir. 1963).

1. Defendants were tried on four counts of violating Internal Revenue Code provisions pertaining to illegal distilling. Count one charged possession of an unregistered still under § 5601(a)(1). Count two charged the carrying on of the business of a distiller without having posted the bond required under § 5601(a)(4). Count three charged the carrying on of the business of a distiller with intent to defraud the United States of taxes under § 5602. Count four charged work in a distillery which neither posted the name of the operator nor identified the business. The court of appeals directed a new trial on counts one and two, the ones in issue for the purpose of this comment. The court further found no intent to defraud and reversed a conviction on count three. A verdict of not guilty had been directed on the fourth count in the district court. Barrett v. United States, 322 F.2d 292, 294 (5th Cir. 1963).

2. Commenting on the evidence which the government had presented, the court concluded "that the record shows sufficient evidence on the first two counts to support a jury finding that the defendants were in possession of the unregistered distillery." Barrett v. United States, *supra* note 1, at 301.

3. INT. REV. CODE OF 1954, § 5601(b):

Generally, the legislature has power to create and determine the effect of evidentiary presumptions. However, this power is subject to limitations which are especially important in criminal statutes.[4] The problem inherent in presumptions in criminal cases is that while presumptions serve to relieve the state of the necessity of producing certain evidence, they must not be allowed to substitute for proof itself. That is, the constitutional protections afforded a defendant in a criminal trial may not be jeopardized by the legislature's desire to ease the burden of the state in prosecuting that trial. Awareness of this problem led the Supreme Court, in 1910, to formulate a test by which such legislative presumptions could be examined:

> That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.[5]

The Court did not adhere to this test of rational connection between fact proved and ultimate fact presumed, and in 1934, in *Morrison v. California*,[6] it propounded another test. "What is proved must be so related to what is inferred in the case of a true presumption as to

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(1) "Whenever . . . the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)."

(2) "Whenever . . . the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or carried on, such presence of the defendant shall he deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)."

4. "In the judicial decisions and in the text books there is much confused and confusing language about presumptions, presumptions of law, presumptions of fact, presumptive evidence, conclusive presumptions. Speaking generally whenever the term is used, it describes a relationship between one fact or group of facts and another fact or group of facts." MORGAN, BASIC PROBLEMS OF EVIDENCE 31 (1962) [hereinafter cited as MORGAN, BASIC PROBLEMS]. For a good basic discussion of the subject of presumptions see MORGAN, MAGUIRE, & WEINSTEIN, CASES ON EVIDENCE 438-43 (1957). For one view of the legislature's power to change or establish presumptions see 4 WIGMORE, EVIDENCE § 1356 (3d ed. 1940). Wigmore's broad statement of the legislature's power over presumptions has not been universally accepted; Mr. Justice Holmes stated the power a bit more restrictively. "As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. . . . [I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." McFarland v. American Sugar Ref. Co., 241 U.S. 79, 86 (1916). Some five approaches to statutory presumptions have been noted. MCCORMICK, EVIDENCE § 313 (1954).

5. Mobile, J. & K.C.R.R. v. Turnipseed, 219 U.S. 35, 43 (1910).

6. 291 U.S. 82 (1934).

be at least a warning signal according to the teachings of experience."[7] While commentators generally favor this test,[8] the Court finally accepted the test of rational connection as the sole test of a statutory presumption in *Tot v. United States*.[9] Holding that rational connection was the only test that could be used, the Court, in the following language, rejected the government's proffer of a second test based on comparative convenience in the production of evidence: "We are of the opinion that these are not independent tests but that the first is controlling and the second but a corollary."[10] Unfortunately, the Court did not indicate the importance or relevance of this corollary. Comparative convenience seems to have no place under an exclusive test of rational connection; if the inference created is permissible under the test of rational connection, comparative convenience can add nothing to uphold the presumption in question. For these reasons, the decision in *Tot* has been criticized,[11] as has the selection of the standard of rational connection as the sole test of statutory presumptions.[12] *Tot* did firmly establish one test by which to measure presumptions, but it left much to be desired in the way of analysis of statutory pre-presumptions.[13] *Manning v. United States*,[14] decided by

7. *Id.* at 90. Mr. Justice Cardozo, in writing the majority opinion, would undoubtedly deny that he was advocating a "test" as such. *Id.* at 91.

8. See note 11 *infra*.

9. 319 U.S. 463 (1943). The section of the Federal Firearms Act, 52 Stat. 1250 (1938), which established a presumption that a person previously convicted of a crime of violence found possessing a firearm had received it in interstate commerce was declared unconstitutional.

10. 319 U.S. at 467. The Court noted that defendants generally have a better means of knowledge of the alleged crime than does the government, but concluded that this imbalance could not support such a presumption. "In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible." *Id.* at 469.

11. McCormick, *supra* note 4, at 657-58; Hale, *Necessity of Logical Inference to Support a Presumption*, 17 So. Cal. L. Rev. 48 (1943); Morgan, *Tot v. United States: Constitutional Restrictions on Statutory Presumptions*, 56 Harv. L. Rev. 1324 (1943).

12. Morgan, *supra* note 11, at 1328-29.

13. "The Court did not trouble to consider critically the words of the Act. . . . The Court cited indiscriminately previous decisions dealing with state statutes and with congressional acts in civil and criminal cases; and it made no distinction between statutes making one fact prima facie evidence of another and statutes making the establishment of one fact in an action determine the allocation of the burden of going forward with evidence, or the burden of persuading the trier, as to another fact. In short, it treated every such enactment as creating a presumption and proceeded to state general rules concerning the validity of all statutory presumptions. It did not define a presumption or describe its exact operation in an action." *Id.* at 1326.

14. 274 F.2d 926 (5th Cir. 1960).

the same court which decided the instant case, best demonstrates the difficulty of attempting to blend the test of rational connection with the doctrine of comparative convenience. There, a statute was upheld that raised a presumption, for purposes of venue, that marihuana was obtained in the jurisdiction in which possession was proved. The court stated that legislature had broad power to "establish a rule of presumptive evidence that is essentially a reasonable regulation of the burden of proof, reasonable because the explanation of the possession of marihuana is peculiarly within the knowledge of the defendant."[15] The court does not clarify whether it found a rational connection and employed comparative convenience as a makeweight argument or, burden of the government in obtaining conviction, it found the rational connection required by *Tot*.[16] Regrettably, as the Court in *Tot*, the court in *Manning* made no attempt to explain precisely what the "secondary test" of comparative convenience means. Left in this unsatisfactory state, the treatment given statutory presumptions is more confusing than enlightening, and, except for the test of rational connection, no realistic method has been set out to analyze presumptions—one leading to distinctions between the various types and differentiating between the treatment that should be accorded each.

The difficulty of obtaining conviction under the statutes concerning illegal distilling was highlighted by the Supreme Court's holding in *Bozza v. United States*[17] that, because several offenses have been created by breaking down the process of illicit distilling, testimony to prove any specific offense "must point directly to conduct within the narrow margins which the statute alone defines."[18] The practical impossibility of meeting this judicial standard prompted Congress' express circumvention of *Bozza*,[19] in the statute declared unconstitu-

15. *Id.* at 930.

16. The language of the court, in speaking of the report of the House Committee on Ways and Means concerning the statute involved in *Manning*, indicates this uncertainty. "To our mind, the language of the Committee Report simply indicates an awareness by Congress of the difficulties inherent in the administration of the act. These difficulties were the reason for the statutory presumption. The language of the report is consistent with the principle of comparative convenience, the secondary test of the validity of a statutory presumption, as expressed in Tot . . . ." *Id.* at 931.

17. 330 U.S. 160 (1947).

18. *Id.* at 163.

19. The language of the report of the Senate Finance Committee indicated this intent. "Their purpose is to create a rebuttable presumption of guilt in the case of a person who is found at illicit distilling or rectifying premises, but who, because of the practical impossibility of proving his actual participation in the illegal activities except by inference drawn from his presence when the illegal acts were committed, cannot be convicted under the ruling of the Supreme Court in *Bozza v. United States* (330 U.S. 160). The prevention of the illicit production or rectification of alcoholic spirits, and the consequent defrauding of the United States of tax, has long been rendered more difficult by the failure to obtain a conviction of a person discovered at the site of illicit distilling or rectifying premises, but who was not, at the time of

tional in the instant case. Congress did so by making presence at the site of a still sufficient evidence to warrant conviction of the crime of possession of that still unless the defendant explains such presence to the satisfaction of the trier of fact.

The court in the instant case read the test of rational connection "as a test of *reasonableness* more than of bare *rationality*: to comply with the due process clause, proof of the fact upon which the statutory presumption is based must carry a reasonable inference of the ultimate fact presumed."[20] Under this construction of rational connection, the court held that the presumptions created here could not stand, as "possession of a thing such as a still involves the highly technical legal concept of dominion, control."[21] Mere presence at a still has repeatedly been held not to be enough to give an inference of possession of that still.[22] While noting that the presumptions were grounded on the comparative convenience in the production of evidence in these cases, the court did not let this affect its determination of the reasonableness of the presumptions.[23] Finally, the court, holding that the evidence was otherwise sufficient to warrant a verdict of guilty, remanded the case for a new trial, since it was impossible to determine the extent to which the jury might have been influenced by the instructions as to the presumptions.[24]

Much of the confusion about statutory presumptions results from an unfortunate tendency of the courts to rely too much on a test of constitutionality that can be applied to presumptions and too little on an analysis of the presumptions themselves to determine their purposes and effects. "There is an important difference between using one fact as evidence of another, and causing the establishment

such discovery, engaged in doing any specific act. In the Bozza case, the Supreme Court took the position that to sustain conviction, the testimony 'must point directly to conduct within the narrow margins which the statute alone defines.' These new provisions are designed to avoid the effect of that holding as to future violations." S. REP. No. 2090, 85th Cong., 2d Sess. 188-89 (1958).

20. 322 F.2d at 297. As to the reasonableness of the inference created here, "there are many inferences other than possession which can be drawn from presence at a still. A defendant might be a hunter who stumbled upon the still . . . . He might even be a prospective purchaser of the liquor. He might be present for any one of dozens of other equally probable reasons having nothing to do with possession." *Id.* at 300.

21. *Id.* at 299.

22. "This Court has held, time and again, that 'mere presence at a still site cannot support a conviction for violation of the liquor laws relative to the still." *Ibid.*, citing cases.

23. "Mere convenience to the Government in proving its case is not a sufficient basis for presumption. That is Tot's teaching." *Id.* at 298. *Tot's* teaching is, unfortunately, not that simple. If courts ignore comparative convenience, that part of *Tot* will not have to be worried about. This is perhaps the preferable way for comparative convenience to be dealt with, at least until the Supreme Court spells out what is meant by this corollary.

24. *Id.* at 301. See note 2 *supra.*

of one fact to fix the burden of coming forward with evidence tending to establish the other or the burden of persuading the trier of fact of the existence of the other."[25] That such a difference in the nature of the presumptions considered in this comment exists is shown when an analysis of the presumptions involved is made.[26] The presumption created in the instant case made presence at the site of a still prima facie evidence of a crime—possession of an unregistered still. In *Tot*, on the other hand, the establishment of the fact of possession of a firearm by a person previously convicted of a crime of violence determined the allocation of the burden of proof.[27] The same is true of the presumption created in *Manning*. The *Tot* and *Manning* type of presumption has been upheld and generally should be, for such a presumption "is a necessary concomitant to our adversary system. It involves judgment as to practicability, convenience, and fairness which has no necessary connection with the process of reason-

25. Morgan, *supra* note 11, at 1328.

26. The presumptions created in the instant case appear in note 3 *supra*. The *Tot* presumption was: "[T]he possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped . . . in violation of this Act." Tot v. United States, 319 U.S. 463, 464 (1943). The *Manning* presumption was: "Proof that any person shall have had in his possession any marihuana . . . shall be presumptive evidence of guilt under this subsection . . ." Manning v. United States, 274 F.2d 926, 928 (1960).

27. A very legitimate argument can be raised as to which burden was actually placed on the defendant in a *Tot*-type situation. "But very often the term burden of proof is used to describe either one of these risks [the risk of non-production of evidence and the risk of non-persuasion of the jury] of [*sic*] both of them combined. At times the meaning will be clear from the context; at other times, the result would be the same whether one or the other or both of the risks is meant; at still other times the result seems to indicate a failure to discriminate." MORGAN, BASIC PROBLEMS 19. In *Tot*, the burden of producing evidence rather than the risk of non-persuasion of the jury appears to have been placed on the defendant. Query, however, whether both burdens of proof may be placed on a defendant in a criminal trial? Thus, Mr. Justice Cardozo wrote in *Morrison*: "The decisions are manifold that within limits of reason and fairness *the burden of proof* may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression." Morrison v. United States, 291 U.S. 82, 88-89 (1933). (Emphasis added.) Query as to which burden Cardozo meant? Both? The commentators are of little help in this area. "In the long course of the history of burden of proof—whether it be the burden of going forward with the evidence or the burden of persuasion—one will look in vain for any single principle for determining its allocation either in civil or criminal procedure." Hale, *supra* note 11, at 51. Wigmore says that the risk of non-persuasion of the jury never "shifts." 9 WIGMORE, *op. cit. supra* note 4, § 2489. Professor Morgan disagrees with Wigmore; he contends that each, or both, burden can rest on either party. "In other words, the judge must decide which party must carry the risk of non-production of evidence sufficient to justify a jury in making a specified finding, and which party the risk of non-persuasion of the jury to make the finding. The former is usually called the burden of producing evidence and the latter the

ing from one fact to another."[28] Rational connection as a test of presumptions has no logical application to such a presumption.[29] Only in a case such as the instant one, where evidence of one fact (presence) is to be used as evidence of another (possession), can the test of rational connection, if it is to be used at all, have a logical application.[30] It is in such a case that the constitutional safeguards of a defendant's rights in a criminal trial need to be protected by a "test" of statutory presumptions against a legislative attempt to ease the government's ability to secure convictions. Attempting to apply one test to all statutory presumptions has obviously led to confusion;[31] that it is foolish to insist on only one such test of all such presumptions[32] was perhaps best spelled out by Mr. Justice Cardozo in *Morrison v. California*:

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burden of persuasion." MORGAN, BASIC PROBLEMS 18-19. While this analysis does not necessarily support the power of the legislature to place the risk of non-persuasion of the jury on the defendant in a criminal trial, Professor Morgan's analysis of the decision in *Tot* does. Morgan, *supra* note 11, at 1328-30. One final query: whether, for the purposes of analyzing statutory presumptions, it makes any difference to distinguish between the two burdens of proof? "[I]t is quite immaterial whether the procedural effect given to the statute is to place the one or the other burden upon the party upon whom the presumption operates." Hale, *supra* note 11, at 48.

28. Morgan, *supra* note 11, at 1328. This analysis strongly suggests that comparative convenience can be one factor, and a very valid one, in determining whether the limits imposed on a presumption which changes the burden of proof have been transcended.

29. "But how does it follow that the Constitution makes the same demand where the establishment of A fixes the burden of producing evidence or the burden of persuasion as to B?" *Id.* at 1329. See note 30 *infra.*

30. "If the statute as construed permits or requires evidence of A to be used as evidence of B, then the existence of a rational connection between them is demanded by the Constitution." *Id.* at 1328-29.

31. Thus the court in the instant case had a great deal of trouble in distinguishing its decision from its earlier decision in *Manning v. United States.* The language of the report of the House Committee on Ways and Means given at the time of passage of the statute upheld in *Manning* was very similar to the language used by the Senate Finance Committee in this case. See note 19 *supra.* "Under existing law it is unlawful for any transferee to acquire or otherwise obtain marihuana without payment of tax. It is difficult under existing law to prove the unlawful acquisition of marihuana in the jurisdiction where the defendant is apprehended. Sometimes the Government's own evidence will indicate that the defendant acquired the marihuana in another venue. This handicap would be overcome by providing for venue not only in the jurisdiction where acquisition occurred but also in the jurisdiction where possession was discovered." H. R. REP. No. 2388, 84th Cong., 2d Sess. 3 (1956). The court's answer to this attempt was favorable, as was noted previously. Note 11 *supra.* The only way the two cases can reasonably be harmonized is to note that the presumptions created in the two cases were different with different criteria needed to examine them.

32. If only one test is to be used, the "test" of *Morrison* would seem designed to fill that purpose. "What is proved must be so related to what is inferred in the case of a true presumption as to be at least a warning signal according to the teachings of experience." 291 U.S. at 90. This test has a great deal of application here in light of the repeated judicial holdings that presence at a still is not sufficient, without more, to show possession of that still. While it may be granted that the difficulty in obtaining conviction under the statutes concerning illicit distilling was equal to that

> The decisive considerations are too variable, too much distinctions of degree, too dependent in the last analysis upon a common sense estimate of fairness or of facilities of proof, to be crowded into a formula. One can do no more than adumbrate them; sharper definition must await the specific case as it arises.[33]

Perhaps Justice Cardozo's structure can be modified if the use of the test of rational connection is limited to only those cases in which proof of one fact is to be used as evidence of another fact; to do so, of course, a detailed analysis of the particular presumption involved is essential. Having made such an analysis, however, a court can eliminate much of the confusion inherent in the use of one test to examine all statutory presumptions and provide a flexibility of treatment without sacrificing clarity and consistency of application that cannot exist when only one test is used.

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of obtaining conviction under the narcotics laws and was a strong arguing point in favor of the presumptions created here, such difficulty may not be used to support a presumption when experience doesn't indicate that such an inference exists in faet. "No doubt the court may be convinced that the legislature in a given case is not purporting to exercise a judgment as to the relationship in experience betweon two facts, but is using a formula expressing such a relationship in order to accomplish quite another purpose. If so, then it may well ignore the expression and insist that, however desirable the purpose, it must not be accomplished by illegitimate means." Morgan, *supra* note 11, at 1325.

33. 291 U.S. at 91.

Products Liability—Uniform Commercial Code—Implied Warranty Extends to Employee Who Contracts to Buy in Behalf of Employer

Plaintiff, an employee of a hotel, purchased from a retail liquor store four bottles of champagne to be consumed by guests at the hotel. As plaintiff was preparing to serve the champagne, a cap blew off one of the bottles, striking and injuring his eye. Plaintiff brought an action against the defendant wine producer, contending that the alleged defect in the bottle or cap constituted a breach of an implied warranty that (1) the goods were safely packaged, and (2) the goods were fit for such purposes as were intended by the sale. The trial court dismissed the complaint on the grounds that implied warranty is limited to purchasers or sub-purchasers[1] who are in the contractual chain of purchase. On appeal to the Supreme Court of Pennsylvania, *held*, reversed. An employee who contracts to buy in behalf of his employer is placed within the definition of "buyer" in section 2-103[2] of the Uniform Commercial Code and is therefore within the chain of distribution and can avail himself of the remedy of breach of implied warranty conferred under section 2.318.[3] *Yentzer v. Taylor Wine Co.*, 414 Pa. 272, 199 A.2d 463 (1964).

The requirement that there be privity of contract before an action can be brought on implied warranty against the manufacturer of an allegedly defective product has received considerable attention in both case law and treatises.[4] Most of the older cases adhered to the rigid privity requirement for implied warranty actions.[5] The essence

1. The sub-purchaser is not the immediate vendee of the manufacturer but is at least one sale removed from the manufacturer.

2. "'Buyer' means a person who buys or contracts to buy goods." PA. STAT. ANN. tit. 12A, § 2-103(1)(a) (1954).

3. "A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty." PA. STAT. ANN. tit. 12A, § 2-318 (1954).

4. For excellent articles dealing with strict liability, privity, and implied warranty in products liability, see Jaeger, *Warranties of Merchantability and Fitness for Use: Recent Developments*, 16 RUTGERS L. REV. 493 (1962); Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957); Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960); Roberts, *Implied Warranties—The Privity Rule and Strict Liability*, 27 Mo. L. REV. 194 (1962).

For an article supporting the requirement of privity, see Waite, *Retail Responsibility and Judicial Law Making*, 34 MICH. L. REV. 494 (1936). For good discussions of the privity concept see also Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960); Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942).

5. Nehi Bottling Co. v. Thomas, 236 Ky. 684, 33 S.W.2d 701 (1930); Kennedy v. Brockelman Bros., 334 Mass. 225, 134 N.E.2d 747 (1956). But it should be noted that privity is not a requirement in products liability cases based on negligence. See Loch v. Confair, 372 Pa. 212, 93 A.2d 451 (1953).

of this requirement is that the injured party may bring his action of implied warranty only against his immediate seller,[6] or, as one court stated, the warranty does not "run with the goods."[7] As a result of the recent trend toward consumer protection, the privity requirement has been eliminated in certain areas: first in cases involving dangerous instrumentalities,[8] then in food cases,[9] and, more recently, in cases where the plaintiff had relied on the national advertising of the producer defendant.[10] These extensions of the implied warranty actions against the manufacturer limited the action to the actual sub-purchaser and did not extend the chain of distribution to the family[11] or employees[12] of the sub-purchaser, who were limited to an action of trespass for alleged negligence in the manufacturing process.[13] The privity barrier has now been further diminished by the extension of implied warranty to the family[14] and guests[15] of the purchaser. Both case law[16] and the Code[17] have adopted this view. The cases are split, however, as to whether an injured employee who consumes or uses the goods of the sub-buyer can bring an action of implied

6. Smith v. Salem Coca-Cola Bottling Co., 92 N.H. 97, 25 A.2d 125 (1942); Wood v. General Elec. Co., 159 Ohio St. 273, 112 N.E.2d 8 (1953), 8 VAND. L. REV. 149 (1954).

7. Gearing v. Berkson, 223 Mass. 257, 260, 111 N.E. 785, 786 (1916).

8. Greenman v. Yuba Power Prod., Inc., 59 Cal. App. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962) (power tool); Henningsen v. Bloomfield Motors, *supra* note 4 (automobile); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E.2d 81 (1963) (airplane).

9. Jackson Coca-Cola Bottling Co. v. Chapman, 106 Miss. 864, 64 So. 791 (1914); Nock v. Coca-Cola Bottling Works, 102 Pa. Super. 515, 156 Atl. 537 (1931); Catani v. Swift & Co., 251 Pa. 52, 95 Atl. 931 (1915); Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913) (food product in a sealed package). See also CONN. GEN. STAT. § 42-16 (1958).

10. Swift & Co. v. Wells, 201 Va. 213, 110 S.E.2d 203 (1959); PROSSER, TORTS § 97, at 674 (3d ed. 1964).

11. Hazelton v. First Nat'l Stores, Inc., 88 N.H. 409, 190 Atl. 280 (1937); Duncan v. Juman, 25 N.J. Super. 330, 96 A.2d 415 (1953). (child denied recovery because mother was actual purchaser).

12. Bourcheix v. Willow Brook Dairy, Inc., 268 N.Y. 1, 196 N.E. 617 (1935); Chysky v. Drake Bros. Co., 235 N.Y. 468, 139 N.E. 576 (1923).

13. Loch v. Confair, *supra* note 5.

14. Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953); Bender v. Champion Light Works, 40 Misc. 2d 139, 242 N.Y.S.2d 835 (1963); Decker & Sons v. Capps, *supra* note 4; Swift & Co. v. Wells, *supra* note 10.

15. Welch v. Schiebelhuth, 11 Misc. 2d 312, 169 N.Y.S.2d 309 (1957). *Contra*, Serrano v. Riverside Dinette Prod. Co., 222 N.Y.S.2d 537 (Sup. Ct. 1961).

16. See notes 14 & 15 *supra*.

17. UNIFORM COMMERCIAL CODE § 2-318, quoted *supra* note 3 [hereinafter cited as U.C.C.]. See also comment 3 to § 2-318. "[B]eyond this the section is neutral and not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extends to other persons in the distributive chain."

warranty.[18] The 1949 Tentative Draft of the Uniform Commercial Code (which was not adopted) would have substantially resolved this problem by providing that the implied warranty would be extended to "one whose relationship to . . . [the buyer] is such as to make it reasonable to expect that such person may use, consume or *be affected by* the goods . . . ."[19] This proposal conforms with the trend of implied warranty in recent years. In order to avoid the strict privity requirement, the courts have invented such ingenious theories as a fictitious agency to purchase for the injured consumer or user,[20] an assignment of the manufacturer's warranty to the immediate vendee,[21] and third party beneficiary contracts.[22] Some state statutes enacted before the adoption of the Code have also negated the privity barrier. Indiana extended the action of implied warranty by defining "buyer" as "a person who buys or agrees to buy goods . . .

18. For cases allowing the employee's recovery in implied warranty, see Jakubowski v. Minnesota Mining & Mfg. Corp., 80 N.J. Super. 184, 186, 193 A.2d 275, 282. (1963). "It [implied warranty action] arises because the manufacturer or seller, in marketing his goods, assumes such a responsibility toward any consumer or user who, in reasonable contemplation, might be injured."; Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 347-48, 353 P.2d 575, 581 (1960). " 'Privity' denotes mutual or successive relationship to the same thing or right of property; it implies succession . . . . Thus . . . the employee had the successive right to the possession and use of the grinding wheel handed over to him by his purchaser-employer, and, we believe, should fairly be considered to be in privity to the vendor-manufacturer . . . ." This court allowed recovery on grounds that the employees were part of the "industrial 'family.' "; Vallis v. Canada Dry Ginger Ale, Inc., 190 Cal. App. 2d 35, 11 Cal. Rptr. 823 (1961); Williams v. Union Carbide Corp., 17 App. Div. 2d 661, 230 N.Y.S.2d 476 (1962); See also Hart v. Goodyear Tire and Rubber Co., 214 F. Supp. 817, 819 (N.D. Ind. 1963), where the court relied on IND. STAT. ANN. §§ 58-115 and 58-606 (1961), which defines "buyer" as "a person who buys or agrees to buy goods . . . [or] any legal succession in interest of such person" to make the action in implied warranty available to the sub-buyer's employee. For cases which have not allowed consumer employees to recover on implied warranty, see Odum v. Gulf Tire & Supply Co., 196 F. Supp. 35 (N.D. Fla. 1961); Revlon, Inc. v. Murdock, 103 Ga. App. 842, 120 S.E.2d 912 (1961) (relying on GA. CODE ANN. § 96-307); Long v. Flanigan Warehouse Co., 79 Nev. 241, 382 P.2d 399 (1963) (employee injured by a defective ladder purchased by his employer from the defendant-manufacturer could not recover on implied warranty because of the lack of privity); Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963) (bartender injured by defendant-manufacturer's bottle exploding could not sue on implied warranty as this action is limited to the actual sub-purchaser or his family or household guests; this court would not extend the action beyond § 2-318 of the U.C.C.); Barlow v. DeVilBiss Co., 214 F. Supp. 540, 543 (E.D. WIS. 1963) (refusal to extend privity to an industrial employee). See also Waite, *Retail Responsibility and Judicial Law Making, supra* note 4, for policy arguments for not extending the manufacturer's liability without privity of contract.

19. U.C.C. § 2-318 (May 1949 Tentative Draft). (Emphasis added.)

20. Grinnel v. Carbide & Carbon Chem. Corp., 282 Mich. 509, 276 N.W. 535 (1937); Freeman v. Navarre, 47 Wash. 2d 760, 289 P.2d 1015 (1955); PROSSER, TORTS § 97, at 678 (3d ed. 1964); Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 153-55 (1957) (a collection of at least twenty-nine such theories).

21. Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W.2d 445 (1936).

22. Singer v. Zabelin, 24 N.Y.S.2d 962 (1941).

[or] any legal successor in interest of such person."[23] Connecticut extended the right of recovery to any member of the buyer's household.[24] The Code broadens the Connecticut statute by allowing the action to be brought by a "person who is in the family or household of his buyer or who is a guest in his home . . . ."[25] Except for this section, the Code remains neutral on the requirements of privity for an action of implied warranty and allows the states to develop their own case law on this point.[26] Thus, far, however, no court has allowed recovery on implied warranty to an injured bystander who was outside the chain of distribution and who neither used nor consumed the product.[27]

In the instant case, the court based its decision on sections 2-103[28] and 2-318[29] of the Code. It first classified the plaintiff-employee as a "buyer," using the definition found in section 2-103.[30] The majority interpreted the phrase "contracts to buy"[31] as encompassing an agency type of relationship between the actual buyer and his employee, holding that a person who "contracts to buy" means a person who purchases in behalf of the vendee. Second, the court applied section 2-318[32] and placed the plaintiff-buyer within the protected category of that section.[33] The dissenting opinion argues that in order for the plaintiff to come within section 2-318,[34] he must be vested with a beneficial interest in the wine. Since the plaintiff had no interest in the product, the dissent argued that he does not come within the statutory definition of "purchaser"[35] and cannot recover on implied warranty.[36]

23. IND. STAT. ANN. § 58-606 (1961) (cited in Hart v. Goodyear Tire & Rubber Co., *supra* note 18, at 819).

24. CONN. GEN. STAT., § 1276e (1939), cited in *Duart v. Axton-Cross Co.*, 19 Conn. Sup. 188, 110 A.2d 647, 648 (1954), and extending the implied warranty "to all members of the buyer's household." Cook in the college kitchen was held not be within the household of the buyer college.

25. U.C.C. § 2-318, quoted *supra* note 3.

26. See U.C.C. § 2-318, comment 3, quoted *supra* note 17.

27. PROSSER, TORTS § 97, at 683 (3d ed. 1964); Jax Beer Co. v. Schaeffer, 173 S.W.2d 285, (Tex. Civ. App. 1943) (employee of retailer who was injured by an exploding beer bottle was denied recover on implied warranty).

28. U.C.C. § 2-103(1)(a), *supra* note 2.

29. U.C.C. § 2-318, quoted *supra* note 3.

30. U.C.C. § 2-103, quoted *supra* note 2.

31. *Ibid.*

32. U.C.C. § 2-318.

33. *Ibid.*

34. *Ibid.*

35. " 'Purchase' includes taking by sale . . . or any other voluntary transaction creating an interest in property." U.C.C. § 1-201(32). " 'Purchaser' means a person who takes by purchase." U.C.C. § 1-201(33).

36. The dissent lost contact with the real issue when it placed its emphasis on the definition of "purchaser," for even if the plaintiff *were* classified as a purchaser, he would still be outside the protected category of § 2-318, which refers to "buyers."

The majority opinion in this case reaches a commendable result, but the underlying rationale of the decision is open to controversy. Section 2-103,[37] on which the court placed heavy reliance, is certainly susceptible to two interpretations, and it appears that the court has misunderstood the definition of "buyer" found in that section. Correctly analyzed, this definition of "buyer" refers to a person who has contracted to buy but has not paid for the product, rather than to an agent of the actual vendee. There are several considerations which lend weight to this interpretation. First, since the conditional sales contract or credit financing arrangement is so often employed in the business world, it seems likely that section 2-103 was intended to refer to this type of financing procedure, thereby giving the person who contracts to buy goods for himself the consumer protection of implied warranty.[38] Second, comment 3 to section 2-318[39] states that "the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain."[40] If the draftsmen of the Code had intended to extend the implied warranty action to agents who contract to buy goods for their employers, then this statement of neutrality in comment 3 would not have been inserted. Third, if the interpretation of section 2-103[41] applied in this case were in accord with the intent of the legislature and the draftsmen of the Code, the extension of the warranty would have been stated in more explicit terms than the language used in section 2-103.[42] It appears that the majority opinion misapplied section 2-103[43] in order to avoid the rigid privity requirement of implied warranty,[44] while still paying lip service to this antiquated doctrine. Since the Code is neutral on this point,[45] the Pennsylvania Supreme Court should have taken the progressive step of disregarding the privity requirement, rather than trying to hang the case on a questionable, or, at least, a somewhat technical point. A substantial majority of the text-writers contend that public policy considerations necessi-

37. U.C.C. § 2-103.

38. The problem arises where the contract to buy has been made, the goods are delivered but have not been paid for, and the receiver of the goods is injured by a defective product before the bargain has been consummated.

39. U.C.C. § 2-318, comment 3.

40. *Ibid.*

41. U.C.C. § 2-103.

42. *Ibid.*

43. *Ibid.*

44. For cases showing Pennsylvania's adherence to the privity requirement, see Hochgertel v. Canada Dry Corp., *supra* note 18; Loch v. Confair, *supra* note 5.

45. U.C.C. § 2-318 comment 3.

tate additional consumer protection.[46] First, the manufacturer or producer is in a better position to bear the burden of the risk of injury to the consumer, because the manufacturer is able to take out liability insurance and to produce a safer article. The added cost of these measures can easily be passed on to the vendee by price increases. Second, without the action in implied warranty, an individual consumer often finds that the process of proving actionable negligence against a large manufacturer is virtually impossible, as well as prohibitively expensive.[47] Although it is argued that, even where privity is strictly enforced, the implied warranty action is still available by ascending the distributive chain from buyer to retailer, retailer to wholesaler, and wholesaler to manufacturer,[48] this process involves a multiplicity of litigation, and a break in this chain[49] will leave a negligent manufacturer untouched. A manufacturer who has advertised the quality and safety of his product should not be allowed to use the technical requirement of privity as a screen to protect himself from liability by merely proving that he had made no contract with the injured party. In states where the courts have persisted in adhering to the strict privity requirement in the face of opposing policy considerations, the legislatures could remedy the situation by adopting a statute similar to section 2-318 of the 1949 draft of the Uniform Commercial Code, which extended the liability of the manufacturer in implied warranty to "one whose relationship to him [the buyer] is such as to make it reasonable to expect that such person may use, consume or *be affected by* the goods. . . ."[50]

46. PROSSER, TORTS § 97, at 673 (3d ed. 1964); Jaeger, *Privity of Warranty: Has the Tocsin Sounded,* 1 DUQUESNE L. REV. 1 (1963); Prosser, *supra* note 4; Roberts, *supra* note 4.

47. The investigation of massive assembly lines in a large manufacturing plant in order to prove that a single article was defectively made would be especially prohibitive when the prospective recovery was not a large sum.

48. See Waite, *Retail Responsibility and Judicial Law Making, supra* note 4, for these policy considerations.

49. This break can occur by the insolvency of one of the parties, the running of the statute of limitations, a disclaimer of liability, or by jurisdictional problems. See PROSSER, TORTS § 97, at 674 (3d ed. 1964).

50. U.C.C. § 2-318 (May 1959 Tentative Draft). (Emphasis added.) See also 2 HARPER & JAMES, TORTS § 28.16, at 1572 n.6 (1956).

State Taxation—Federal Governmental Immunity—Use Tax Levied on Cost-Plus-Fixed-Fee Contractor Not Violative of Constitutional Immunity

Tennessee collected from Union Carbide and H. K. Ferguson Company a sales and use tax[1] upon purchases made by them pursuant to their contract with the Atomic Energy Commission (hereinafter referred to as the AEC). The companies and the AEC, seeking to recover these taxes under the concept of governmental immunity, asserted that the United States was the actual purchaser, and that the use of the property purchased was not for the companies' commercial benefit, but was a use exclusively for the benefit of the United States.[2] Operating under a cost-plus-a-fixed-fee management contract, Carbide was obligated to manage the AEC installation at Oak Ridge, with the AEC retaining the right to supervise and issue major policy directives. A specific function of Carbide was the procurement of supplies and equipment, which it was free to do without AEC approval in amounts not exceeding 100,000 dollars.[3] Ferguson's cost-plus-a-fixed-fee contract required construction services at the plant. Purchase of essential equipment was handled similar to the system used by Carbide, except Ferguson was restricted to 10,000

1. The Tennessee sales tax is a tax imposed upon the privileges of selling, leasing, renting, importing for distribution, storage, use or consumption, and using per se in the performance or fulfillment of a contract tangible personal property. TENN. CODE ANN. § 67-3000 (Supp. 1963). Whereas the original Tennessee sales tax was a typical sales tax embodying the conventional complementary use tax designed to reach goods imported from without the state, the statute was amended in 1955 to cover all use of tangible personal property within the state where no tax had previously been paid on the property, irrespective of ownership of the property, and including specifically use by a contractor in the fulfillment of his contract obligations. TENN. CODE ANN. § 67-3004 (Supp. 1963). See also TENN. CODE ANN. §§ 67-3002, 3003, 3008, 3012 (Supp. 1964).

2. Carbide was a litigant in an earlier case with the Tennessee Department of Revenue, wherein it contended that it was not subject to Tennessee sales and use taxes. Its claim was based on two premises: (1) that it was an agent of the United States, and (2) that section 9(b) of the Atomic Energy Act, 60 Stat. 765 (1946), afforded statutory exemption. The Supreme Court of Tennessee held in Carbide and Carbon Chemical Corp. v. Carson, 192 Tenn. 150, 239 S.W.2d. 27 (1951), that Carbide was not an agent but an independent contractor, but that it was exempt under section 9(b). The Supreme Court of the United States affirmed. Carson v. Roane-Anderson Co., 342 U.S. 232 (1952). In 1953 Congress repealed the language of section 9(b). 67 Stat. 575 (1953).

3. The following is included among the terms and conditions attached to the order forms: "It is understood and agreed that the Order is entered into by the Company for and on behalf of the Government; that title to all supplies furnished hereunder by the Seller shall pass directly from the Seller to the Government, as purchaser, at the point of delivery; that the Company is authorized to and will make payment hereunder from Government funds advanced and agreed to be advanced to it by the Commission . . ." United States v. Boyd, 378 U.S. 39, 42 n.4.

dollars without approval.[4] In the trial court the chancellor entered a decree holding the companies liable for the sales and use taxes. On appeal, the Tennessee Supreme Court reversed as to the sales tax,[5] but sustained the collection of the contractors' use tax on the theory that the companies were independent contractors.[6] Considering only the validity of the use tax, the United States Supreme Court, affirming the Tennessee court, *held* the tax was not levied directly upon the government, but levied upon the companies' private use, and was therefore not violative of the constitutional immunity of the United States. *United States v. Boyd,* 378 U.S. 39 (1964).

State sales and use taxes are subject to restrictions imposed by the Constitution. One of those restrictions, although not explicit in the Constitution, is governmental immunity. Chief Justice Marshall in *McCulloch v. Maryland*[7] declared that federal instrumentalities were by constitutional implication immune from state taxation, for such taxation, if allowed, would work a disparagement of national sovereignty. From this premise developed the concept that states were prohibited from levying a tax, the economic burden of which was borne by the federal government.[8] Once crystallized, the doctrine of governmental immunity was applied with indistinguishable rigidity, and it foreclosed to the states for approximately one-hundred years revenue from any transaction to which the Government was a party.[9] The economic and social adjustments of the 1930's, requiring increased governmental activities, caused the states to enact general sales taxes to meet the demands for increased expenditures. With the purchasing power of the nation supported by federal work programs, the states viewed these projects as a lucrative source of revenue.[10] *James v. Dravo Contracting Co.*[11] presented the issue of whether state

4. See note 3 *supra.*

5. United States v. Boyd, 211 Tenn. 139, 363 S.W.2d 193 (1962). Relying on Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954), the court determined that Carbide and Ferguson acted only as purchasing agents, and that the United States was the actual purchaser.

6. *Id.* at 204.

7. 17 U.S. (4 Wheat.) 316 (1819).

8. See Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

9. For cases dealing with state tax upon telegraph companies, see Williams v. Talladega, 226 U.S. 404 (1912); Telegraph Co. v. Texas, 105 U.S. 460 (1882); Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1 (1878). For cases dealing with state tax upon gasoline see Graves v. Texas, 298 U.S. 393 (1936); Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218 (1928). See also, Rice & Estes, *Sales and Use Tax as Affected by Federal Governmental Immunity,* 9 VAND. L. REV. 204, 207-11 (1956).

10. Rice & Estes, *supra* note 9, at 211.

11. 302 U.S. 134 (1937). It overruled no prior decisions, but attempted rather to distinguish Telegraph Co. v. Texas and Williams v. Talladega, *supra* note 9, and dismissed the cases of Panhandle Oil Co. v. Mississippi *ex rel* Knox and Graves v. Texas Co., *supra* note 9, as limited to their particular facts.

taxation of contractors involved in these projects was an intrusion upon federal immunity. A West Virginia sales tax upon a contractor engaged in constructing a dam for the United States was upheld as a tax not upon the Government or its property, but upon an independent contractor.[12] The advent of the Second World War and the attendant dependence of the Government upon private contractors again raised the immunity question. Two cases asserting immunity from Alabama tax, *Alabama v. King & Boozer*,[13] involving the sales tax, and *Curry v. United States*,[14] involving the use tax, were concluded in favor of the state's right to tax. The Court declared that the Government was not the purchaser and reasoned that "the Constitution without implementation by Congressional legislation, does not forbid a tax upon Government contractors because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the Government."[15] In place of the economic burden test, the Court espoused the legal incidence test: if the legal incidence of the state tax is directly upon the United States, it is violative of the federal government's immunity; if the Government is only indirectly affected through increased cost of materials or services, the tax is valid.[16] The states' victory as represented by this criterion emphasizing form rather than substance was lessened by *Kern-Limerick, Inc. v. Scurlock*,[17] a case factually similar to *King & Boozer*.[18] The important distinction was that the *Kern-Limerick* contract labeled the contractor as a purchasing agent for the United States, with the United States directly liable to the vendor for the cost and with the title vesting immediately in the United States.[19] Holding the purchase to have been made by an authorized agent of the United States, the Court viewed the transaction as constitutionally immune from sales taxation.[20] The case is significant because of its recognition of the concept of "contract agency." Logically, the decision represented not an overruling of *King & Boozer*,[21] but a corollary to it, with the states feeling the adverse effects of

12. James v. Dravo Contracting Co., 302 U.S. 134 (1937).

13. 314 U.S. 1 (1941).

14. 314 U.S. 14 (1941).

15. *Id.* at 18.

16. For application of the legal incidence test see Esso Standard Oil Co. v. Evans, 345 U.S. 495 (1953); United States v. Alleghney County, 322 U.S. 174 (1944). See also, Rice & Estes, *supra* note 9, at 214.

17. 347 U.S. 110 (1954).

18. *Supra* note 13.

19. Kern-Limerick, Inc. v. Scurlock, *supra* note 17, at 112 n.2. The contract was entered into by the Department of the Navy pursuant to sections 2(c)(10) and 4(b) of the Armed Services Procurement Act, 62 Stat. 21 (1948), 41 U.S.C. § 151 (1958).

20. Kern-Limerick, Inc. v. Scurlock, *supra* note 17, at 122.

21. *Supra* note 13; Rice & Estes, *supra* note 9, at 218-21.

the criterion.[22] To counteract this effect, several states amended their sales tax statutes, imposing tax liability on property *used* in the performance of a contract, regardless of the immunity of the title holder.[23] Concluding the existing authority are three decisions involving a Michigan statute which provided that when tax exempt realty is used by a private party conducting a business for profit, that party is subject to taxation to the same extent as though he owned the property.[24] In *United States v. Detroit*[25] the taxpayer, a lessee of a government owned plant, used the property for his private benefit. The Court held that the tax was not on the property, but on the lessee's use of the property in a private business.[26] The same result was reached in *United States v. Muskegon*,[27] where the taxpayer was utilizing government property under a formal permit while in performance of a contract with the Government. The same statute[28] provides that owners or persons in possession of personal property shall pay all taxes assessed thereon. In *Detroit v. Murray*,[29] the taxpayer was operating under a government contract by which title to all parts and materials was in the United States. The Court viewed the tax as imposing a levy on a private party possessing government property, which it was using in the conduct of its own business.[30]

The Court in the instant case accepted the principles of *Boozer*,[31] *Curry*,[32] *Esso*,[33] and *Muskegon*[34] as providing the proper balance between the interest of the state to tax and the interest of the United States to be free from taxation. Alteration of these principles the Court found not to be its responsibility, but that of Congress.[35] As to the applicability of these principles to the instant case, the Court established as the vital consideration the fact that Carbide and Ferguson were using the property for their own commercial benefit as part of their regular business activities. It is this use for private

22. Rice & Estes, *supra* note 9, at 218-21.
23. CAL. REV. & TAX. CODE ANN. § 6384; GA. CODE ANN. § 92-3448 (a) (Cum. Supp. 1955); S.C. CODE ANN. § 65-1361.1 (Cum. Supp. 1955); TENN. CODE ANN. § 67-3004 (1956).
24. MICH. STAT. ANN. §§ 7.7 (5), (6) (Supp. 1957).
25. 355 U.S. 466 (1958).
26. *Id.* at 469.
27. 355 U.S. 484 (1958).
28. MICH. STAT. ANN. §§ 7.1, -.10, -.81 (1950).
29. 355 U.S. 489 (1958).
30. *Id.* at 493.
31. *Supra* note 13.
32. *Supra* note 14.
33. *Supra* note 16.
34. *Supra* note 27.
35. United States v. Boyd, 378 U.S. 39, 51 (1964).

ends that the Court marked as a separate and taxable activity.[36] Rejecting the Government's application of the *Muskegon* dictum[37] to the present facts, the Court concluded that the companies had not become so incorporated within the governmental structure as to be constituent parts, with the benefit the Government's, and the legal incidence of the tax on the Government. In reaching this conclusion the Court reasoned that at the inception of the operation, the AEC, by authorization of Congress, chose to perform its functions by contract with private industry, rather than by using its own personnel.[38] As a last consideration the Court rejected the time-worn argument that future government costs would be substantially increased. Replying that Congress, aware that "constitutional immunity does not extend to cost-plus-fixed-fee contractors of the Federal Government, but is limited to taxes imposed directly upon the United States,"[39] repealed section 9(b)[40] with the declared intent to make the activity taxable.[41]

The decision in the instant case is significant in two regards. First, as an immediate practical consideration, AEC contractors, previously granted statutory immunity[42] from state taxation, are placed in the same position as all other government contractors. Of greater significance, however, is the resulting contraction of the immunity area, and a further isolation of *Kern-Limerick*.[43] The opinion, though terse, reveals a categorical affirmance of the *King & Boozer* legal incidence test,[44] with the measure of "benefit" to the contractor serving as an additional determining factor. The present victory for state tax administrators may, however, prove to be an illusory one. Although in the instant case the contractors' relationship with the Government presented an appearance of incorporation within the governmental structure, it was far less than the formal declaration of agency in the *Kern-Limerick* contract.[45] Remaining for speculation is a factual situation presenting the *Kern-Limerick* form, but with substantial commercial benefits accruing to the contractor. A future Court might

36. *Id.* at 45. Compare Livingston v. United States, 179 F. Supp. 9. (E.D.S.C. 1959), *aff'd per curiam*, 364 U.S. 281 (1960).

37. The Court remarked that, "The case might well be different if the Government had reserved such control over the activities and financial gain of Continental that it could properly be called a 'servant' of the United States in agency terms." United States v. Muskegon, *supra* note 27, at 486.

38. *Supra* note 35, at 47.

39. S. REP. No. 694, 83d Cong., 1st Sess. 2 (1953).

40. 67 Stat. 575 (1953). See note 2 *supra*.

41. *Supra* note 35, at 50.

42. 60 Stat. 765 (1946), 42 U.S.C. § 1809 (b) (1958).

43. *Supra* note 17.

44. Alabama v. King & Boozer, *supra* note 13.

45. Kern-Limerick, Inc. v. Scurlock, *supra* note 17, at 112 n.2.

well look through the present decision, distinguish it on its facts, and find no commitment to disregard the *Kern-Limerick* "contract agency" principle.[46] What is perhaps more likely is that a future Court, on finding some minimum amount of initiative and independent responsibility left to the contractor, will hold to the commitment here established; that commercial benefit is the decisive factor in the application of the legal incidence test, regardless of a formal declaration or attempted construction of an agency relationship. Though the merits and demerits of affording tax immunity to government contractors are asserted vigorously by the respective interest groups the Court's attitude here of allowing state taxation reflects a proper appreciation of the policy considerations. Federal agencies faced with budgetary commands and taxpayer demands for maximum utilization of tax dollars are naturally reluctant to pay allocated funds indirectly to the states. But if the absence of immunity deprives the federal government of maximum use of its money, immunity deprives the states of a substantial tax loss that they cannot afford to lose. Exceptions and exclusions to a tax base produce administrative complications, which provide increased opportunities for concealable taxable transactions. From the standpoint of constitutional theory the primary objection to the granting of tax immunity to contractors with the government is that private commercial concerns are thereby cloaked with federal sovereignty in derogation of state sovereignty.[47] Whatever the view may be as to the merits and demerits of immunity, for the present the limits remain prescribed by the legal incidence test. In the absence of a formal declaration of agency as existed in *Kern-Limerick*,[48] the states can tax those contractors who purchase or use the property for their own private commercial benefit.

46. *Ibid.*
47. Rice & Estes, *supra* note 9, at 218.
48. *Supra* note 17.

Taxation—Federal Income Tax—Wage Continuation Payment Not Excludable From Employee's Gross Income Where Payment Discretionary With Management

Taxpayer was absent from work on account of illness for a period of sixteen weeks.[1] During this period, pursuant to a "general practice,"[2] but at the discretion of the management, the company continued to pay the taxpayer's salary. On his income tax return for 1960, taxpayer excluded from gross income 1,600 dollars, representing pay received over this sixteen-week period, as payments made to him pursuant to a "wage continuation plan" under section 105(d) of the Internal Revenue Code of 1954.[3] The Commissioner disallowed the exclusion and assessed a tax deficiency. On petition to the Tax Court of the United States, *held*, the exclusion was properly disallowed because the payments, being discretionary with the management, were not made pursuant to a "plan" within the meaning of section 105(e).[4] *John C. Lang*, 41 T.C. 352 (1963).

Prior to 1954, when the word "insurance" was part of the Code but the word "plan" was not,[5] there was concern as to how far the definition of insurance could be expanded to allow employees to exclude from income payments from an employer's plan to benefit sick employees.[6] For these health payments to be excludable, the

1. Tho government contended that the taxpayer was "absent" from work for a period of only about six weeks, after which time he was allowed by his doctor to return to work for only about two hours a day. Taxpayer did not resume full activities for a total of sixteen weeks.

2. John C. Lang, 41 T.C. 352, 353 (1963).

3. INT. REV. CODE OF 1954, § 105(a), "Except as otherwise provided in this section, amounts received by an employee through accident or health insurance for personal injuries or sickness shall be included in gross income to the extent such amounts (1) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (2) are paid by the employer . . . . (d) Wage continuation plans.—Gross income does not include amounts referred to in subsection (a) if such amounts constitute wages or payments in lieu of wages for a period during which the employee is absent from work on account of personal injuries or sickness; but this subsection shall not apply to the extent that such amounts exceed a weekly rate of $100."

4. INT. REV. CODE OF 1954, § 105(e), "Accident and Health Plans.—For purposes of this section . . .

(1) amounts received under an accident or health plan for employees . . . shall be treated as amounts received through accident or health insurance." A "plan" under subsection (e) merely places it in the same category as "insurance" in subsection (a). Being then in the same category as insurance in subsection (a), payments under the plan become excludible under subsection (d).

5. Int. Rev. Code of 1939, ch. 1, § 22(b)(5), 53 Stat. 10: the forerunner of sections 104 and 105 of the 1954 Code. Under the 1939 Code, health and accident insurance payments were excluded without qualification.

6. Schlenger, *Disability Benefits Under Section 22(b)(5)*, 40 VA. L. REV. 549, 565-81 (1954.)

plan under which they were paid had to meet the formalities of an insurance contract. These formalities—basically the payment of premiums and enforceability—were held to be satisfied by the mutual obligations of employer and employee in the employment contract itself.[7] It was held that a non-commercial, non-premium, solely intra-company health plan could be considered insurance.[8] The Treasury continued to advocate an insurance-like definition of a health plan, requiring an independent fund for employee contributions,[9] an upper limit on the amount the employee could receive, and a period of payments not dependent on an employee's length of service.[10] Nevertheless, the scope of health plans under the 1939 Code was broadened and such plans could qualify even though not utilizing an independent fund or prospective employment as premium consideration.[11] Even plans covering only one employee could qualify,[12] but that employee had to have either actual or constructive knowledge of such a plan before his illness.[13] Plans could even be voluntary and non-contractual and still qualify.[14] With the advent of the 1954 Code, however, it had to be determined whether the case-by-case interpretation of the 1939 Code as to what constituted a plan could be carried over into the specific language of the 1954 statute. At the outset, more than

7. Epmeier v. United States, 199 F.2d 508 (7th Cir. 1952).

8. Haynes v. United States, 353 U.S. 81 (1957).

9. Under the 1939 Code, the Treasury tried to differentiate between employer- and employee-funded accident and health insurance, but the broad term "insurance" precluded this dichotomy. Under the 1954 code, insurance still remains excludible from income under § 104(a) except to the extent paid for by the employer under § 105(a). Section 105(d) is an exception to the employer payment provision, so the dichotomy has been only partially perfected. See Comment, 64 YALE L.J. 222, 227-28 (1954).

10. Cornick, *The 1954 Internal Revenue Code: Sick Pay, Meals, Lodging, Salesmen's Expenses,* 41 A.B.A.J. 612 (1955). Even when the 1954 Code brought in section 105, it was at first thought that a health plan had to be contractual and thus enforceable like insurance. See Epmeier v. United States, *supra* note 7. H. R. REP. No. 1337, 83d Cong., 2d Sess. 15 (1954). *But see* H. R. REP. No. 1337, 83d Cong., 2d Sess. A 33-34 (1954): "All of the employees covered by the plan must have an enforceable right to the compensation covered under the plan during the period when the plan remains in effect. Under this rule any employee who is covered by the plan during such period must have a non-forfeitable right to the benefits which are provided by the plan, *i.e.,* his rights to receive the benefits may not depend on the whim of the employer. *However, the term enforceable is not used in an absolute sense . . . .*" (Emphasis added.) Nevertheless, it has been thought that any practicable plan must be under commercial insurance and thus contractual since employers might find themselves subject to insurance regulations under state law if they tried to act as their own insurer. Pyle, *Accident and Sickness Insurance Under Sections 104, 105, 106 and 213 of the 1954 Internal Revenue Code,* 1956 INS. L.J. 51, 56.

11. Kuhn v. United States, 258 F.2d 840 (3d Cir. 1958).

12. *Ibid.*

13. Charles J. Jackson, 28 T.C. 36 (1957); J. Wesley Sibole, 28 T.C. 40 (1957).

14. Branham v. United States, 245 F.2d 235 (6th Cir. 1957), *reversing per curiam* 136 F. Supp. 342 (W.D. Ky. 1955)

one *ad hoc* payment was felt to be necessary to constitute a plan.[15] However, it would seem that discriminatory plans in favor of one or more employees were intended to be acceptable.[16] The regulations attempted to apply with more clarity essentially the same qualifying factors that were necessary for a health plan to be considered "insurance" under the 1939 Code's case law.[17] The leading case under the 1954 Code, *Estate of Leo P. Kaufman*,[18] held that the continued compensation to a sick employee, made on an *ad hoc* basis, was not excludable under section 105(d), even though it was the company's policy to pay sick employees. Hence the basic requirements of either knowledge of a pre-existing method for dispensing sickness benefits *or* an enforceable insurance-like contract, as under the 1939 Code, remained limitations on any liberal interpretation of accident or health "plan."[19] One reason for exacting the rigid requirement of a pre-existing plan may stem from the policy behind inclusion of payments from employer-contributed funds under section 105(a), *i.e.*, the preclusion of the possibility that an employer, at his own whim, could send a high salaried executive-stockholder to Florida on compensated, tax-free "sick leave."[20]

In the instant case, the Tax Court relied heavily on its factual finding that the "general practice" of the company in paying sick employees offered no "definite expectation" to the petitioner that he

15. S. REP. No. 1622, 83d Cong., 2d Sess. 185 (1954); Comment, *supra* note 9, at 231. *But see* Andress v. United States, 198 F. Supp. 371 (1961).

16. S. REP. No. 1622, 83d Cong., 2d Sess. 186 (1954); Rev. Rul. 58-90, 1958-1 CUM. BULL. 88; Pyle, *supra* note 11, at 59. The Senate Finance Committee report's deletion of the House requirement for qualification was said to be to eliminate the requirement that plans be non-discriminatory. Comment, 64 YALE L.J. 222, 234 n.79. This idea is probably based on the Committee's stated desire to steer away from the possible analogy to qualified pension, profit-sharing and stock bonus plans under § 401 of the Code—one of the requirements for qualification thereunder being that the plan be non-discriminatory. It was feared that if the qualification requirement were kept in § 105, each plan would have to be submitted for an administrative ruling.

17. "In general, an accident or health plan is an arrangement for the payment of amounts to employees in the event of personal injuries or sickness. A plan may cover one or more employees, and there may be different plans for different employees or classes of employees. . . . [I]t is not necessary that the plan be in writing or that the employee's rights to benefits under the plan be enforceable. However, if the employee's rights are not enforceable, an amount will be deemed to be received under a plan only if, on the date the employee became sick or injured, the employee was covered by a plan (or a program, policy or custom having the effect of a plan) . . . and notice or knowledge of such a plan was reasonably available to the employee. It is immaterial who makes payment of the benefits provided by the plan." Treas. Reg. § 1.105-5 (1956). *But see* Pyle, *supra* note 11, at 60, where the author doubts, in the light of the *whole* of § 105, that the Regulations mean what they say when it is stated that a plan need not be enforceable.

18. 35 T.C. 663 (1961).

19. *Accord*, Chism's Estate v. Commissioner, 322 F.2d 956 (9th Cir. 1963).

20. BITTKER, FEDERAL INCOME, ESTATE, AND GIFT TAXATION 147 (1958).

would receive continued salary if he became sick.[21] The expectation was nothing more than an anticipation of the favorable exercise of discretion by the employer when the sickness arises.[22] Since, then, there was no definite pre-determined course of action, the case presented a question of simply *ad hoc* benefit payments and was controlled, thought the court, by the *Kaufman* case.[23] It should be noted that by stipulation there was no issue whether the payments made to the taxpayer in this case came under an insurance arrangement as such,[24] which obviated the problem of whether insurance existed within the meaning of section 105(a).

Since the Regulations do not require that there be a "definite expectation" of payments any more than they require the plan to be enforceable, it is doubtful whether the court was correct in using this criterion to determine whether compensation should qualify for exclusion as being made under an "accident or health plan." A plan could stipulate that on occurrence of certain contingencies after the employee became sick, he would be denied payments; on the date he became sick, his expectations of payments are then *indefinite* and yet under the regulations he is still "covered by a plan" and entitled to an income exclusion if he receives payments. Even if the holding is well grounded, the case calls attention to a basic question of tax policy—is there really any need for a pre-existing benefit plan in order to fulfill the policy of easing the burden of illness expenses by permitting offsetting income to be free from tax? What dangers of misuse of this legislative grace will be avoided by requiring a specific plan, known to the employee beforehand? The danger of approving tax-free "sick leave" in Florida at the employer's whim is largely avoided by the regulations, which prohibit such a practice[25] and revenue rulings which make actual facts, rather than the employer's determinations, final on the question whether or not an employee is sick.[26] However, with the retention of the present requirement of a plan, especially since such plans may discriminate in favor of particular employees, there is a favorable loophole available for semi-retired incapacitated employees, which may not have been foreseen by the

21. John C. Lang, 41 T.C. 352, 357 (1963).

22. *Id.* at 356.

23. The *Kaufman* case may be distinquishable from the instant case since there the employee still continued in service as a consultant. These consulting services may have been the main reason for continued payment. 2 RABKIN & JOHNSON, FEDERAL INCOME, GIFT AND ESTATE TAXATION § 14.12(5), at 1489 (1962).

24. 41 T.C. at 355.

25. Treas. Reg. § 1.105-4(a)(3)(i), (ii) (1956).

26. See citations in 1 MERTENS, LAW OF FEDERAL INCOME TAXATION § 7.31, at 78 (1962). For a case dealing with the situation where an employer did not follow his own intra-company regulations, see Hall v. United States, 242 F.2d 412 (7th Cir. 1957), *cert. denied*, 355 U.S. 821 (1958).

drafters of section 105.[27] Such an employee who is used for consulting duties only may receive "pension" salary up until retirement age[28] under a wage continuation plan and have it tax exempt; otherwise, if it were a regular pension, it would have to qualify as a non-discriminatory plan under section 401 before it could get any favorable deferred income treatment—present current deduction treatment.[29] To qualify for this pre-retirement tax exemption, the employee must nevertheless receive his "pension" under a "plan" for the purposes of section 105(d) and (e).[30] Perhaps, then, any revamping of the requirement of wage continuation plans under section 105 might follow these lines: (1) an elimination of the requirement of a pre-existing plan where the employee is legitimately sick[31] and unable to be of any service to an employer, as in the present case; but (2) a retention of the necessity for a pre-existing plan, which may have to qualify beforehand with the Treasury to prevent abuses in retirement age discrepancies, where a semi-retired, pension arrangement is desired.

Torts—Duty Owed Property Owners by Private Water Company Contracting With Municipality To Provide Water for Fire Hydrants

The plaintiffs' home was destroyed by a fire which the municipal fire department could have contained but for the failure of the water supply from nearby fire hydrants. The homeowners brought an action *ex delicto* for damages against the water company, which had contracted with the municipality to furnish water to hydrants for fire extinguishment purposes, charging the company with negligence in

27. Comment, 4 VILL. L. REV. 567, 571-75 (1959).

28. Rev. Rul. 57-76, 1957-1 CUM. BULL. 66, discusses what determines retirement age. A particular employee may under certain circumstances reach "retirement" age *later* than employees who are subject to pension plans which get special favorable treatment only if they are qualified under section 401.

29. See note 28 *supra*. The favorable treatment of sections 402 and 404 which grant current deductions of employer contributions and deferred income for employee until he retires are still not as favorable as having *in addition*, up to the maximum retirement age, as much as $5200 exempted from annual income. The Kuhn case, *supra* note 11, indicates that this may be possible at least for a man up to age 66. *Accord*, Jackson v. United States, 59-1 U.S. Tax Cas. ¶ 9171 (E.D. Wis. Dec. 16, 1958) (though designated a "pension" on employer's books, payments were nevertheless held to be made under a wage continuation plan).

30. Hall v. United States, *supra* note 26; Estate of Leo P. Kaufman, *supra* note 18.

31. See note 27 *supra* and accompanying text.

the maintenance[1] of its water system. The Court of Common Pleas of Allegheny County dismissed the case for failure to state a cause of action. On appeal to the Supreme Court of Pennsylvania, *held*, reversed. A water company which contracts with a municipality to provide water for fire hydrants is under a duty to property owners to perform its contractual duties with due care, since it is foreseeable that negligence in the performance of these duties may cause damage to the property owner. *Doyle v. South Pittsburgh Water Co.*, 199 A.2d 875 (Pa. 1964).

Where there is no direct contractual relationship between the property owner and the water company, the overwhelming majority of jurisdictions have held that the property owner cannot maintain an action *ex delicto*[2] against the water company to recover damages for a fire loss, even though the loss was sustained by reason of the water company's negligent failure to provide water as required by its contract with the municipality.[3] The "classic"[4] statement in support of this majority position is the unanimous decision by the New York Court of Appeals in *H. R. Moch Co. v. Rensselaer Water Co.*,[5] in which Judge Cardozo wrote the opinion. The decision, sustaining the lower court's dismissal of the plaintiff's complaint for failure to state a cause of action,[6] based its conclusions on the following reasons, which have been generally expressed in support of the rule denying recovery: (1) the relationship between the parties is such that the water company's conduct in failing to perform its contract with the municipality, "a mere negligent omission," results only in denying to the plaintiff a benefit he might otherwise receive as distinguished

1. "The Complaint states that the defendant allowed the water in the crucial hydrants to freeze so that they became useless for fire-fighting emergencies; that it failed to inspect the hydrants, failed to maintain sufficient pressure in the hydrants, failed to replace or repair inoperative valves and, inter alia, failed to notify the plaintiffs or the Pittsburgh Fire Department that the hydrants were inoperative." Doyle v. South Pittsburgh Water Co., 199 A.2d 875, 876 (Pa. 1964).

2. The majority of jurisdictions here similarly denied the plaintiff the right to sue *ex contractu* as a third party beneficiary of the contract between the water company and the municipality, generally concluding that the property owner is a mere incidental beneficiary to the contract. 56 AM. JUR. *Waterworks* §§ 65, 66 (1947); 94 C.J.S. *Waters* § 310 (1956).

3. 56 AM. JUR. *Waterworks* § 67 (1947); 94 C.J.S. *Waters* § 310 (1956). See also Annot., 62 A.L.R. 1205 (1929), which cites decisions from twenty jurisdictions, including Pennsylvania, following this rule.

4. In Luis v. Orcutt Town Water Co., 204 Cal. App. 2d 433, 446 (1962), the court follows H. R. Moch Co. v. Rensselaer Water Co., *infra* note 5, referring to the decision as "the classic case."

5. 247 N.Y. 160, 159 N.E. 896 (1928).

6. The complaint charged that the water company had "omitted and neglected after such notice, to supply or furnish sufficient or adequate quantity of water, with adequate pressure. . . ." *Id.* at 163, 159 N.E. at 896.

from the inflicting of a tortious injury;[7] (2) the imposition of liability upon the water company for such failure would be an objectionable policy because it would constitute an "undue extension of the zone of duty;"[8] (3) the relevant state statute, which is applicable to all public service corporations and makes it the duty of a water company "to furnish water, upon demand by the inhabitants, at reasonable rates, through suitable connections," is held to evidence no intention to enlarge the water company's zone of liability where an inhabitant suffers "indirect or incidental" damage.[9] A further reason frequently expressed in support of the majority position is that the water company, as the agent of the municipality, shares the governmental immunity with which the municipality would be clothed were it to perform the service of providing water.[10] The Supreme Court of Pennsylvania had previously adopted this reason in denying a property owner recovery.[11] A minority of two jurisdictions[12] have considered unsound the conclusion that a property owner has no right of action in tort against a water company that has negligently breached its contract with the municipality. A similar result has also been reached in Kentucky by recognizing a right in the property owner to sue as a third party beneficiary of the contract between the water company and the municipality.[13] However, this small minority

7. *Id.* at 168, 159 N.E. at 898-99. Dean Prosser describes the decisions that follow the majority rule as those in the law of torts in which "the nonfeasance line" has been most sharply drawn. PROSSER, TORTS § 99 (3d ed. 1964).

8. H. R. Moch Co. v. Rensselaer Water Co., 247 N.Y. at 168, 159 N.E. at 899. The view has been frequently expressed that the rates for water are set to compensate the water company for providing water as a commodity only. For example, in Atlas Finishing Co. v. Hackensack Water Co., 10 N.J. Misc. 1197, 163 Atl. 20, 22 (Sup. Ct. 1932), the court concluded that, "in the nature of things, the compensation fixed by the supervising state agency has no relation to the assumption of any such liability; that compensation is based on the expense of furnishing water simply as a commodity. . . ."

9. H. R. Moch Co. v. Rensselaer Water Co., 247 N.Y. at 169, 170, 159 N.E. at 899.

10. The United States Supreme Court approved this argument in the following language: "But the city was under no legal obligation to furnish the water; and if it voluntarily undertook to do more than the law required, it did not thereby subject itself to a new or greater liability. It acted in a governmental capacity, and was no more responsible for failure in that respect than it would have been for failure to furnish adequate police protection.

"If the common law did not impose such duty upon a public corporation, neither did it require private companies to furnish fire protection to property reached by their pipes." German Alliance Ins. Co. v. Home Water Supply Co., 226 U.S. 220, 227-28 (1912).

11. Thompson v. Springfield Water Co., 215 Pa. 275, 64 Atl. 521 (1906).

12. The jurisdictions recognizing a right to recovery in tort are Florida and North Carolina. See, *e.g.*, Woodbury v. Tampa Waterworks Co., 57 Fla. 243, 49 So. 556 (1909); Fisher v. Greensboro Water Supply Co., 128 N.C. 375, 38 S.E. 912 (1901).

13. See Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky. 340, 12 S.W. 554 (1889). This jurisdiction has, however, refused to hold the water company liable in tort. "It will be noted that our court is in the minority in holding to the rule that

of three has been joined in its condemnation of the prevailing rule by the near unanimous voice of the legal authorities that have considered the question.[14] The jurisdictions that have held water companies liable in tort for their negligence have differed as to the exact nature of the duty which has been breached. The Supreme Court of Florida has emphasized the water company's privileged status as a public service monopoly and concluded that a public duty of care is incumbent upon one in such a favored position.[15] In North Carolina it has been held that when a water company undertakes to provide water to a community it thereby assumes the obligation of using due care in the performance of its undertaking.[16] The United States Supreme Court has recognized the minority view as a tenable conclusion and followed an applicable decision by the Supreme Court of North Carolina in which the water company had been held liable.[17] However, the Court subsequently approved the majority rule, when considering the question "as [a] matter of general law."[18]

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a water company is liable for loss resulting from failure to perform its contract to furnish water for fire protection. . . . While adhering to the minority rule, we are not prepared to carry it to the extent of holding the company liable for a common-law tort." Clay v. Catlettsburg, Kenova & Credo Water Co., 301 Ky. 456, 457, 192 S.W.2d 358, 359 (1946).

14. See, *e.g.*, Seavey, *Reliance On Gratuitous Promises Or Other Conduct*, 64 HARV. L. REV. 913 (1951), in which Judge Cardozo's opinion in H. R. Moch Co. v. Rensselaer Water Co., *supra* note 5, is described as "perhaps his most unsatisfactory opinion in the field of torts. . . ." Seavey, *supra* at 920-21. See also Corbin, *Liability of Water Companies for Losses by Fire*, 19 YALE L.J. 425 (1909); Sunderland, *The Liability of Water Companies for Fire Losses*, 3 MICH. L. REV. 442 (1905). The only legal writing contra is Kales, *Liability Of Water Companies For Fire Losses—Another View*, 3 MICH. L. REV. 501 (1905).

15. See, *e.g.*, Muggee v. Tampa Waterworks Co., 52 Fla. 371, 42 So. 81 (1906), in which the Supreme Court of Florida said that "We are of the opinion that the defendant in error, enjoying, as it does, extensive franchises and privileges under its contract . . . has assumed the public duty of furnishing water for extinguishing fires, according to the terms of its contract . . . ." *Id.* at 388, 42 So. at 86.

16. See, *e.g.*, Fisher v. Greensboro Water Supply Co., *supra* note 12, at 376, 38 S.E. at 913, holding that a complaint which charged the water company with "breach of the duties, obligations, and responsibilities which it assumed when it undertook to supply water for a stipulated price," sufficiently stated a cause of action *ex delicto*.

17. In determining whether a claim against a water company filed in a bankruptcy proceeding in North Carolina was a preferred tort claim or a general contract claim, the Court followed the state court's interpretation, and held: "From the conclusion thus reached [by the Supreme Court of North Carolina in Fisher v. Greensboro Water Supply Co., *supra* note 12] we are not inclined to dissent and for these reasons. One may acquire by contract an opportunity for acts and conduct in which parties other than those with whom he contracts are interested and for negligence in which he is liable in damages to such other parties." Guardian Trust & Deposit Co. v. Fisher, 200 U.S. 57, 67 (1906).

18. German Alliance Ins. Co. v. Home Water Supply Co., *supra* note 10. There was no settled applicable state law at the time the action was begun in the district court, and the Supreme Court, therefore, accepted the plaintiff's contention that "the Federal courts must decide for themselves, as matter of general law, the much controverted question as to a water company's liability. . . ." *Id.* at 227.

The decision of the Supreme Court of Pennsylvania in *Doyle v. South Pittsburgh Water Co.*[19] seemingly aligns that jurisdiction with the minority position discussed above. Judge Musmanno, writing for the court, proceeds carefully but forcefully to develop the arguments in support of imposing liability upon the water company, while attacking the well-established reasons upon which the majority rule is based, especially Judge Cardozo's reasoning in *H. R. Moch Co. v. Rensselaer Water Co.*[20] The first of the defendant water company's arguments to be considered and rejected was that the destruction of the plaintiffs' homes was proximately caused by the fire itself, the lack of water being, at most a remote cause of the damage. The court held that the fire, although an intervening cause, was a foreseeable factor, and, therefore, one against which the water company was under a duty to guard.[21] Moreover, the issue of causation was considered one for jury determination.[22] The next issue for consideration was the question of the existence and nature of the duty owed the property owners by the water company. Judge Musmanno concluded that the factual context of the case placed it squarely within the principle of liability enunciated in *MacPherson v. Buick Motor Co.*,[23] a landmark decision in the law of products liability. The Buick Motor Company was held to owe to the ultimate consumer of its product a duty of care in manufacturing the product, because it knew or had reason to know that persons other than the immediate purchaser would use the product and that such use would be without further inspection.[24] The court in the instant case analogized that the water company, which had reason to know that its service was to be used by the inhabitants of the community in reliance upon the company's care in establishing and maintaining the water system,

19. *Supra* note 1.

20. *Supra* note 5.

21. "It would be wholly unrealistic to say that the water company was not to anticipate the likelihood of a fire, in which event its failing to keep the hydrants and their appurtenances in proper repair could result in the very loss which occurred and in the very manner it occurred." Doyle v. South Pittsburgh Water Co., *supra* note 1, at 877.

22. *Ibid.*

23. "The physical situation in the case at bar and the facts evolving therefrom bring this litigation squarely within the rule that where a party to a contract assumes a duty to the other party to the contract, and it is foreseeable that a breach of that duty will cause injury to some third person not a party to the contract, the contracting party owes a duty to all those falling within the foreseeable orbit of risk of harm." *Id.* at 878.

24. "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of a contract, the manufacturer of this thing of danger is under a duty to make it carefully." MacPherson v. Buick Motor Co., 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916).

owed a similar duty of care to the ultimate consumer of its service.[25] After relying upon the rule in *MacPherson*[26] as the basis of the duty owed by the water company, it was nearly imperative that the opinion deal specifically with *H. R. Moch Co. v. Rensselaer Water Co.*,[27] in which Judge Cardozo had refused to apply the principle of liability which he had expressed earlier in *MacPherson*.[28] The court first attempted to distinguish the case under consideration on the ground that the plaintiff had charged specific acts of negligence, whereas the complaint in *H. R. Moch Co. v. Rensselaer Water Co.*[29] had charged the water company merely with failure to perform its contract with the municipality.[30] Moreover, Judge Musmanno considered the result in *Moch*[31] erroneous even on the facts there alleged. Once Judge Cardozo had admitted that the water company's conduct constituted a negligent omission,[32] it was then inconsistent with the rule in *MacPherson*[33] to conclude that such conduct was not tortious because it merely failed to bestow a benefit. According to the *MacPherson*[34] principle, Judge Musmanno contended, the refusal to bestow a benefit may in itself result in such refusal becoming an instrument of harm.[35] The policy argument against imposing liability on the ground that to do so would place an unbearable financial burden upon the water company was regarded as unjustifiable fear,[36] and an insignifi-

25. "To erect fire hydrants close to dwellings is to assure the inhabitants of those homes that potential fire engines stand guard to fight an invading conflagration. To erect fire hydrants and then not inspect them with some reasonable regularity is like setting sentinels and then offering them no relief or food so that they fall over from exhanstion and thereby become useless as watchful guardians. . . . Could there be a greater lapse of care than to fail to properly inspect and maintain fire hydrants once they have been established and the community has accepted them as being live guardians and not mere painted cast iron?" Doyle v. South Pittsburgh Water Co., *supra* note 1, at 878-79.

26. *Supra* note 24.

27. *Supra* note 5.

28. *Supra* note 24.

29. *Supra* note 5.

30. "It is to be particularly noted in that case that in its complaint the plaintiff alleged that the water company *failed to 'fulfill the provisions of the contract between it and the city of Rensselaer.'*. . . No breach of any duty to use reasonable care in the erection, operation and maintenance of the water system was alleged or relied upon." Doyle v. South Pittsburgh Water Co., *supra* note 1, at 881.

31. *Supra* note 5.

32. See note 7 *supra*.

33. MacPherson v. Buick Motor Co., *supra* note 24.

34. *Ibid.*

35. Justice Musmanno continued: "It will be recalled that Justice Cardozo said in the MacPherson case: '[T]he presence of a known danger, attendant upon a known use, makes vigilance a duty. . . . We have put the source of the obligation where it ought to be. We have put its source in the law.'" Doyle v. South Pittsburgh Water Co., *supra* note 1, at 882.

36. "Throughout the entire history of the law, legal Jeremiahs have moaned that if financial responsibility were imposed in the accomplishment of certain enterprises,

cant consideration when the grossness of the water company's negligence was considered.[37] The final obstacle to imposing liability considered was the contention that the water company was clothed with immunity since it was performing a governmental function on behalf of the municipality. It was held that on the facts, a finding that the water company was an independent contractor could be supported, in which case the municipality's sovereign immunity, if such existed, would not be imputed to the water company.[38] The broad reasoning found in Judge Musmanno's opinion for the court was, however, acceptable to only one other judge. In a very brief opinion, two of the six judges considering the case concurred in the result because "the complaint alleges negligence in the failure to inspect hydrants and to replace or repair inoperative valves and in allowing the water in the hydrants to freeze."[39] The two remaining judges dissented[40] in an opinion that reiterated most of the arguments against liability that are presented in the previous discussion of the majority rule. The dissent placed a particular emphasis on the theory of imputed sovereign immunity.[41]

The *Doyle*[42] decision will probably have fewer direct effects upon the question of liability in this area than might be expected from a decision of a prominent and respected court. Judge Musmanno's reasoning, while sufficiently broad to admit of application in a wide variety of factual situations, was approved by only one of the other six judges considering the case. This leads one to wonder what the same court would do in a case where the negligence charged to the water company is more clearly nonfeasance.[43] Nevertheless, Judge Musmanno's opinion is a well-reasoned presentation of the arguments favoring the imposition of liability, and it may well encourage other

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the ensuing litigation would be great, chaos would reign and civilization would stand still . . . . Nevertheles [*sic*], liability has been imposed in accordance with elementary rules of justice and the moral code, and civilization in consequence, has not been bankrupted, nor have the courts been inundated with confusion." *Id.* at 884.

37. *Id.* 884, 885.

38. *Id.* at 885.

39. *Ibid.* These judges support the conclusion of liability only because active misfeasance was alleged. They were unwilling to support liability in the case of negligent nonfeasance.

40. *Ibid.*

41. *Id.* at 885-87.

42. *Supra* note 1.

43. The negligence with which the water company is charged has, in a few cases, been clearly misfeasance. See, *e.g.*, Cole v. Arizona Edison Co., 53 Ariz. 141, 86 P.2d 946 (1939) (lines not kept free of "weeds, vegetation and other foreign substances"); Anderson v. Iron Mountain Water Works, 225 Mich. 574, 196 N.W. 357 (1923) (water hydrants "frozen and useless"). However, the overwhelming majority of decisions have considered complaints in which the negligence charged is a failure to provide sufficient water under sufficient pressure. Heretofore, the character of the water company's negligence has not been considered material.

jurisdictions to reconsider an area of the law which has been considered "well-settled" for nearly half a century.[44] The theory that a supplier of products or services may have imposed upon him duties of care to an ultimate consumer not in privity of contract is being applied in an expanding variety of factual contexts,[45] and to impose such an obligation upon water companies would not be inconsistent with this trend. Several theories for tort liability have commended themselves as proper reasons for holding a water company liable for negligently failing to provide water to fire hydrants as it has contracted to do. A party who negligently cuts off the source of water at a critical time has been held answerable in damages to a property owner injured by this negligence.[46] The water company which negligently fails to provide water may reasonably be considered equally misfeasant in preventing the taxpayer or the municipality from procuring a reliable source of protection. Also, the water company, by establishing its water system and placing fire hydrants in proximity to valuable property, has represented that it is able to provide water should a fire erupt and has induced the community to rely completely upon its ability to do so.[47] These theories supporting the position of liability for the water company reflect a sound policy of public responsibility. When a water company fails to provide water to fight a fire, it fails in the very function for which it was established and for which it is compensated by the taxpayers. The water company also fails to do what it alone is able to do by virtue of its monopolistic position. A company unable or unwilling to bear the "burden" of its negligence in providing the service it has chosen to produce for the public may reasonably be called upon to retire from "its public service."

44. See, *e.g.*, Anderson v. Iron Mountain Water Works, *supra* note 40, at 576, 196 N.W. 357, wherein the Supreme Court of Michigan considering the question for the first time summarily concluded: "The question, while of first impression in this state, has been so often decided adversely to plaintiff in the federal courts, in other states, and in England and Canada, as to render an extended opinion on the subject supererogatory."

45. Prosser, *The Assault Upon The Citadel*, 69 YALE L.J. 1099 (1960).

46. See, *e.g.*, Gilbert v. New Mexico Construction Co., 39 N.M. 216, 44 P.2d 489 (1935), in which a construction company which had negligently broken a watermain was held liable to a homeowner because it had deprived the homeowner of the assistance of the fire department in quenching a fire.

47. Corbin, *supra* note 14, at 439.

Unfair Competition—Extent to Which State Law of Unfair Competition May Prohibit Imitation of Commercial Product Designs

Two recent United States Supreme Court decisions go far toward clarifying the hitherto unanswered question of how far states may go in prohibiting product imitation of unpatented articles. In each case an action was brought in federal district court[1] for infringement of patents and for unfair competition. In the first case the defendant marketed a nearly exact copy of a floor-to-ceiling pole lamp on which plaintiff held design and mechanical patents. In the second case defendant copied a flourescent lighting fixture on which plaintiff had secured a design patent. In each instance the lower court held these patents invalid but nevertheless enjoined the defendants from further imitation on the grounds that they were engaged in unfair competition.[2] The court of appeals affirmed in each case,[3] and the Supreme Court granted certiorari.[4] *Held,* reversed. When an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. *Sears, Roebuck & Co. v. Stiffel Co.,* 376 U.S. 225 (1964). *Compco Corp. v. Day-Brite Lighting, Inc.,* 376 U.S. 234 (1964).

Traditionally the law of unfair competition has been invoked to prevent "passing off" or "palming off" one person's goods as those of another.[5] The objective of the law of unfair competition is the prevention of consumer confusion[6]—an objective vastly different from that of the federal patent laws, which is to protect the originator of a design. However, in many instances, the effect of the law of unfair competition has been to give protection similar to that available under a patent. The relief granted to plaintiffs has usually been an injunction which prevents the copying of the article, not merely an order to defendant to identify his own product so as to distinguish

1. Jurisdiction rested on 28 U.S.C. § 1338(b) (1958), which allows federal courts to hear unfair competition claims when "joined with a substantial and related claim under the copyright, patent or trade-mark laws."

2. The federal courts must apply local law to claims of unfair competition. Pecheur Lozenge Co. v. National Candy Co., 315 U.S. 666, 667 (1942).

3. Stiffel Co. v. Sears, Roebuck & Co., 313 F.2d 115 (7th Cir. 1963). Day-Brite Lighting Inc. v. Compco Corp., 311 F.2d 26 (7th Cir. 1962).

4. Sears, Roebuck & Co. v. Stiffel Co., 374 U.S. 826 (1963). Compco Corp. v. Day-Brite Lighting, Inc., 374 U.S. 825 (1963).
No review was sought of the ruling affirming the district court's holding that the patents were invalid. 376 U.S. 225, 227 n.1; 376 U.S. 234, 236, n.2.

5. See 1 NIMS, UNFAIR COMPETITION AND TRADE-MARKS § 9a (4th ed. 1947).

6. Crescent Tool Co. v. Kilborn & Bishop Co., 247 Fed. 299 (2d Cir. 1917); Zippo Mfg. Co. v. Rogers Imports, Inc., 216 F. Supp. 670 (S.D.N.Y. 1963).

it from that of plaintiff's.[7] The problem of consumer confusion seems to have arisen first in trade name and trade-mark cases, where the question is whether the buying public associated the name or mark with a single source and bought the product due to their belief that it came from that source.[8] This idea of unfair competition was extended to product imitation on the theory that just as with trade marks, so may a particular feature of a product have acquired secondary meaning—that is, a capacity for identifying its source to the consumer.[9] There is something of a split among the cases as to whether in order to make out a case of unfair competition the first producer must meet the strict requirements of secondary meaning,[10] or whether a showing of the mere likelihood of confusion is sufficient.[11] Although subject to increasing criticism[12] and to a number of adverse holdings,[13] the view that secondary meaning must be conclusively established seems to be supported by the majority of cases.[14] In applying the law of unfair competition to cases of product simulation, courts have also distinguished between functional[15] and non-

7. Upjohn Co. v. Schwartz, 246 F.2d 254 (2d Cir. 1957); Flint. v. Oleet Jewelry Mfg. Co., 133 F. Supp. 459 (S.D.N.Y. 1955). *Cf.* relief given in the lower courts in the instant cases. 313 F.2d 115; 311 F.2d 26.

8. 1 NIMS, *op. cit. supra* note 5, § 37.

9. Upjohn Co. v. William S. Merrell Chemical Co., 269 Fed. 209 (6th Cir. 1920); Crescent Tool Co. v. Kilborn & Bishop Co., *supra* note 6.

Learned Hand, in *Crescent Tool Co. v. Kilborn & Bishop Co.,* set down the strict requirements necessary for finding secondary meaning: (1) The plaintiff must "show that the appearance of his wares has in fact come to mean that some particular person —the plaintiff may not be individually known—makes them, and that the public cares who does make them . . . ." (2) "[T]he public is moved . . . to buy the article because of its source." 247 F.2d at 300.

10. Hygienic Specialties Co. v. H. G. Salzman, Inc., 302 F.2d 614 (2d Cir. 1962); American-Marietta Co. v. Krigsman, 275 F.2d 287 (2d Cir. 1960); Crescent Tool Co. v. Kilborn & Bishop Co., *supra* note 6; Zippo Mfg. Co. v. Rogers Imports, Inc., *supra* note 6.

11. McGill Mfg. Co. v. Leviton Mfg. Co., 43 F.2d 607 (E.D.N.Y. 1930); Rushmore v. Manhattan Screw & Stamping Works, 163 Fed. 939 (2d Cir. 1908); Flint v. Oleet Jewelry Mfg. Co., *supra* note 7; Oneida, Ltd. v. National Silver Co., 25 N.Y.S.2d 271 (Sup. Ct. 1940).

12. See Galbally, *Unfair Trade in the Simulation of Rival Goods—The Test of Commercial Necessity,* 3 VILL. L. REV. 333 (1958). See also Pollack, *Unfair Trading by Product Simulation: Rule or Rankle?,* 23 OHIO ST. L.J. 74, 86 (1962), who suggests that the so-called minority view as to secondary meaning—that simulation will be enjoined if the copying of non-functional features is merely *likely* to deceive consumers —is simply a procedural variation of the majority rule: "[A] study makes it apparent that secondary meaning, which is presupposed, is not eliminated as an essential element under the . . . [minority] doctrine, but merely that *proof* of secondary meaning is excluded."

13. Cases cited note 11 *supra.*

14. Cases cited note 10 *supra.*

15. "Functional features include not only those which lend utility and efficiency to the articles but also those which contribute to its appearance, or may affect the cost of production." 1 NIMS, *op. cit. supra* note 5, § 134, at 375. See also, Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 122, *rehearing denied,* 305 U.S. 674 (1938);

functional[16] features of an article;[17] and the general rule has been that only non-functional elements of the design will be protected against an infringing copy.[18] Essentially, then, the status of authority in this area has been that non-functional elements which have achieved secondary meaning will be protected against copying.

In reversing the court of appeals,[19] the Supreme Court noted that provision for a federal patent law was made one of the enumerated powers of Congress by the Constitution, and that ever since the ratification of the Constitution Congress has fixed the conditions upon which patents and copyrights may be granted.[20] The Court went on to point out that it is well established that the federal law may not be encroached upon by a state law.[21] Furthermore, just as a state cannot encroach upon the federal patent laws directly, by extending the life of a federal patent beyond its expiration date, neither can it do so indirectly by some other method, such as the use of the law of unfair competition. To permit a state to do so would be to allow it to grant "protection of a kind that clashes with the objectives of the federal patent laws."[22] When a federal patent expires the monopoly created by it also expires, and the right to make the article in exactly the shape it carried when patented passes into the public domain. So also to the public belongs the right precisely to duplicate any article which for any reason is unpatentable. To hold otherwise, said the Court, would mean that while federal law grants only fourteen or seventeen years' protection under the patent laws, the states could grant perpetual protection to articles which were not sufficiently novel

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Zippo Mfg. Co. v. Rogers Imports, Inc., *supra* note 6. On the other hand, Lektro-Shave Corp. v. General Shaver Corp., 92 F.2d 435 (2d Cir. 1937), defines functional features as those which, in an engineering sense, are essential to the construction of a commodity. For other "strict" definitions of "functional" see also, Haeger Potteries, Inc. v. Gilner Potteries, 123 F. Supp. 261, 271 (S.D. Cal. 1954); McGill Mfg. Co. v. Leviton Mfg. Co., *supra* note 11.

16. A non-functional feature is described as "a mere arbitrary embellishment" on the product which may serve to identify its source. Pagliero v. Wallace China Co., 198 F.2d 339, 343 (9th Cir. 1952). See Crescent Tool Co. v. Kilborn & Bishop Co., *supra* note 6.

17. This distinction finds its basis in the belief that a second comer should be able to duplicate unpatented features of an article which lend utility and efficiency to the article. On the other hand, to allow copying of mere arbitrary embellishments which serve no useful function would be to contribute greatly to consumer confusion. Zippo Mfg. Co. v. Rogers Imports, Inc., *supra* note 6; Smith, Kline & French Labs. v. Waldman, 69 F. Supp. 646 (E.D. Pa. 1946).

18. American-Marietta Co. v. Krigsman, *supra* note 10; West Point Mfg. Co. v. Detroit Stamping Co., 222 F.2d 581 (6th Cir. 1955); Sinko v. Snow-Craggs Corp., 105 F.2d 450 (7th Cir. 1939); Crescent Tool Co. v. Kilborn & Bishop Co., *supra* note 6; Zippo Mfg. Co. v. Rogers Imports, Inc., *supra* note 6.

19. 376 U.S. 225 (1964); 376 U.S. 234 (1964).

20. 376 U.S. at 229.

21. *Ibid.*

22. *Id.* at 231.

to merit any patent at all under federal law and the Constitution.[23] Such an encroachment is too great to be tolerated.[24] However, the Court went on to point out that a state *may* require that goods be labeled or that other precautionary steps be taken to prevent customers from being misled as to the source of the articles.[25]

In holding there cannot be actionable unfair competition from the copying of an unpatented article,[26] the Court has rejected the idea that the law of unfair competition may be utilized by the states to set up a sort of common law patent.[27] It has not, however, eliminated the law of unfair competition or even eliminated the states from the field of unfair competition. To the contrary, all that the Court has done is to restrict the doctrine of unfair competition to its original objective—the prevention of consumer confusion. The Court has in fact indicated, in the form of dictum, how far states may go in protecting a manufacturer against product imitation: They may require proper labeling and advertising of the product in order to prevent the consumer from being misled as to its source; they may *not* enjoin the imitation itself.[28] It should be noted that possibly the main reason that the law of unfair competition had been extended to the point of granting common law patents was the failure of the federal patent laws to grant adequate protection against product imitation. Now that whatever protection the states felt justified in giving to a first comer has been largely swept away, there is an even larger void in the amount of protection one may secure for an original product or design. As a result, assuming that federal common law will not be applied,[29] the demands of the public for an extension of the patent laws to fill this void may be expected to increase.

23. *Id.* at 232.
24. *Ibid.*
25. 376 U.S. at 232; 376 U.S. at 238.
26. 376 U.S. at 232-33; 376 U.S. at 238.
27. In holding that a *state* may not enjoin the copying of an unpatented article, the Court seems likely to have also foreclosed the possibility of obtaining such relief under *federal* common law. Prior to Erie R.R. v. Tompkins, 304 U.S. 64 (1938), the attitude of the federal courts in cases of product imitation was that by creating property rights in articles which are within the scope of the patents and copyrights clause of the Constitution, they would be infringing on an area reserved to Congress by the Constitution. Cheney Bros. v. Doris Silk Corp., 35 F.2d 279 (2d Cir. 1929). However, since *Erie R.R. v. Tompkins* state law has been applied in such cases. Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir. 1956). The above federal common law view on this subject is therefore no longer followed. In light of the holdings in *Sears* and *Compco*, however, there is a possibility that an action might be brought on the basis of federal common law in hopes that states having been prohibited from granting common law patents, the federal courts might take up the task. It seems highly unlikely that they will do so, see Cheney Bros. v. Doris Silk Corp., *supra*, and we may surmise that there will be no such thing as a common law patent, in either state or federal courts.
28. 376 U.S. at 232-33; 376 U.S. at 238.
29. See note 27 *supra*.