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Recent Decisions

RECENT DECISIONS

CONSTITUTIONAL LAW—BUS TRANSPORTATION FOR PUPILS OF SECTARIAN SCHOOLS.—An amendment to the New York Education Law[1] provided for free bus transportation of pupils to and from sectarian schools[2] whenever bus transportation was furnished the pupils of public schools. The constitutionality of the law was raised by a taxpayer's action to restrain the Board of Education of Hempstead from furnishing the transportation. On appeal from a judgment dismissing the complaint, *held,* three judges dissenting,[3] the statute authorizing free transportation for pupils of denominational schools was an aid to such schools and unconstitutional.[4] Judgment reversed. *Judd et al. v. Board of Education of Union Free School District No. 2, Town of Hempstead, Nassau County, et al.* (Bennett, Att'y Gen. *et al.,* Interveners), 278 N. Y. 200, 15 N. E. (2d) 576 (1938).

While New York, as most states, in conformity with the well established principle of separation of the Church and the State, has long unequivocally indicated that there must be no aid to sectarian or denominational schools from public money,[5] these holdings do not appear to be conclusive of the question of bus transportation for the pupils of such schools. This question is a rather late development. It seems that the demand for bus transportation for public school children was a direct result of the fairly recent mergers of several district schools into one consolidated school, sometimes more remote from the home of the student.[6] Provisions that *all* pupils of school age should be afforded transportation facilities whether they attended the free common school or not came in the form of amendments to existing statutes. We must bear this in mind because in many instances it has been urged upon the courts that a statute providing for free bus transportation for children attending parochial schools was a valid exercise of police power of the state. The theory is that since the highways are extremely dangerous, especially to children, buses were provided in an effort to protect *all* children from this known danger as a valid exercise of police power. If this be so any advantage received by the parochial schools would be incidental and immaterial.[7] Indeed this was the very ground upon which

1. N. Y. EDUCATION LAW § 206, as amended, LAWS OF 1936, c. 541, in effect Sept. 1, 1936.

2. It was admitted in this, and the other cases cited, that the schools in question were denominational sectarian schools.

3. The justice in Special Term who dismissed the complaint was unanimously supported by the five justices in the Appellate Division and by the three dissenting judges in the Court of Appeals. In the last court, four judges made up the majority. Thus it appeared that a total of nine judges voted in favor of the constitutionality of the free bus legislation and four judges voted against it. *Cf.* a similar judicial count of judges for the purpose of criticising the majority opinion in Children's Hospital v. Adkins, 261 U. S. 525 (1923); Powell, *Judiciality of Minimum Wage Legislation* (1924) 37 HARV. L. REV. 545, 549.

4. N. Y. CONST. Art. 9 § 4 which reads "Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught."

5. People *ex rel.* R. C. Orphan Asylum in City of Brooklyn v. Board of Ed. City of Brooklyn, 13 Barb. 400 (N. Y. 1851); see Williams v. Board of Trustees Stanton Common School District, 173 Ky. 708, 191 S. W. 507 (1917) for a well reasoned case.

6. Before the 1937 amendment the Maryland law read "The county board of education shall consolidate schools whenever in their judgment it is practical, and arrange, when possible without charge to the county, and shall pay when necessary for the transportation of pupils to and from such consolidated schools." MD. ANN. CODE (Bagley, 1924) Art. 77, Sec. 50. See also 8 N. Y. EDUCATION LAW § 206 as amended, LAWS OF 1936, c. 547, in effect Sept. 1, 1936.

7. See (1938) 51 Harv. L. Rev. 935 in support of this view.

the Supreme Court of Maryland relied in deciding[8] that a similar statute[9] was constitutional.

It has also been argued, unsuccessfully, when this question and the analogous question of furnishing free text books directly to the pupils of sectarian schools arose, that the aid furnished is a direct aid to the pupils and not an aid to the school.[10] Such a contention was adopted in *Borden v. La. St. Board of Ed.*[11] This reasoning[12] has been criticized on the ground that it would lead to an ever-widening class of grants in aid of sectarian school pupils.[13] However, there are substantial grounds, for considering that the aid is given directly to the pupil and not to the school in either the text book or bus cases. The argument[14] is most soundly stated when it is said that such statutes are an aid to children in their compliance with the compulsory education law.[15] All states recognize the right of parents to send their children for instruction to schools other than public schools.[16] But the state exercises its control over education and compels attendance of all children between certain ages, whether they attend public or private schools. It cannot well be urged that the transportation of a school child is any more an aid to the educational institution which he attends than the bottle of milk or clothing furnished[17] him to help him comply with the laws

8. Board of Education of Baltimore County v. Wheat, 199 Atl. 628 (Md. 1938).

9. § 142 A, 146 B CODE OF PUBLIC LOCAL LAWS OF BALTIMORE COUNTY. The Maryland Declaration of Rights does not specifically prohibit "indirect" aid to sectarian schools. MD. ANN. CODE, (Bagley, 1924) DECLARATION OF RIGHTS, art. 36. An appropriation however, may not accomplish indirectly what it is forbidden to accomplish directly.

10. State v. Milquet, 180 Wis. 109, 192 N. W. 392 (1923) (bus transportation); State *ex rel.* Traub v. Brown, 6 W. W. Harrington 181, 172 Atl. 835 (Del. 1934) (bus transportation); Smith v. Donahue, 202 App. Div. 656, 195 N. Y. Supp. 715 (2d Dep't 1922) (textbooks); MINN. REP. OF ATTY. GEN. (1920) 300.

11. Borden v. La. State Board of Education, 168 La. 1005, 123 So. 655 (1929). This view seems to be adopted also by the Atty. Gen. of New Hampshire. In an opinion (not yet officially reported) on the constitutionality of a 1937 amendment to the NEW HAMPSHIRE EDUCATION LAW he says ". . . Our constitutional limitation . . . relates to aid to such schools and institutions as distinguished from the pupils thereof and does not in any way prohibit aid to a pupil getting to and from school."

It is well to note that the often cited case of Cochran v. La. State Board of Education, 281 U. S. 370 (1930) is no authority for the proposition that the United States Supreme Court has decided that free bus transportation or text books are constitutionally permitted. This case stands only for the proposition that the decision on the constitutionality of the Louisiana statute was a matter for the state court alone and that the statute as construed by the Louisiana state court was not in violation of the Fourteenth Amendment to the Federal Constitution.

12. "One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public schools. The appropriations were made for the specific purpose of purchasing school books for the use of school children of the state, free of cost to them." Borden v. La. State Bd. of Ed., 168 La. 1005, 123 So. 655 (1929).

13. See (1930) 25 ILL. LAW REV. 547.

14. This is the argument of the dissenting opinion in the principal case. It is interesting to note that this opinion of Judge Crane and the concurring opinion of Judge Sloan in the Maryland case have adopted identical reasoning in cases decided only four days apart.

15. N. Y. EDUCATION LAW (1929) § 627.

16. Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U. S. 510 (1924).

17. N. Y. EDUCATION LAW (1929) § 627 f, provides: "Public welfare officials except as otherwise provided by law, shall furnish indigent children with suitable clothing, shoes,

laid down by the states requiring education. The institution must be considered as aided only incidentally.

In the few states[18] where this question has been brought before the courts, the courts, with the single exception of Maryland have held, with the instant case, that bus transportation was an aid to the sectarian schools and unconstitutional under the provisions providing for separation of Church and State. In this the courts have but followed the previous strict construction of such provisions.

The weight of case authority and the broad terms of the constitutional prohibition against direct or indirect aid to private schools may be urged for the soundness of the instant case. But the minority opinion persuasively establishes that the object of the legislation permitting the use of bus transportation by pupils of public or private schools was to insure the attendance of children at their respective schools, and that there is no benefit to the schools except accidentally. Indeed, the enlarged enrolment possibly resulting from bus transportation may increase the financial burden of those private schools, such as parochial schools, where no tuition is charged. The ambiguity of the constitutional clause and the inequality of treatment arising therefrom as well as the conflict of judicial opinion[19] can, and should be, removed by constitutional amendment.[20]

CONSTITUTIONAL LAW—POWER OF FEDERAL COURTS IN MATTERS OF DIVERSITY OF CITIZENSHIP—MAY NOT DISREGARD STATE DECISIONS.—Tompkins, a citizen of Pennsylvania, was injured by a train owned by the Erie R. R., a New York corporation. The accident occurred in Pennsylvania. The law of that state at the time was not definitely decided, but it seemed that the injured man would have been a trespasser, while in the federal courts the rule was more favorable. The plaintiff brought his action in the federal court on the ground of diversity of citizenship.[1] Recovery was allowed by the trial court and affirmed by the Circuit Court of Appeals on the ground that the federal common law governed. They declined to decide the issue of state law. On appeal from the Circuit Court of Appeals to the United States Supreme Court, *held,* two justices dissenting, that whenever the federal courts exercise jurisdiction on the grounds of diversity of citizenship they must apply the written and unwritten law of the state in which the controversy arose. *Erie R. R. v. Tompkins,* 304 U. S. 64, 58 Sup. Ct. 817 (1938).

In the instant decision, *Swift v. Tyson,*[2] one of the best known and one of the

books, food and other necessaries to enable them to attend upon instruction as hereinbefore required by law."

18. See note 10, *supra.*

19. See note 3, *supra.*

20. It is submitted that the action of the New York State Constitutional Convention in providing in its proposed draft of the new constitution for the legalization of free bus transportation is to be commended. Considering the great benefit derived by the state and by the taxpayers from the parochial and private school system, and the enormous savings accomplished by it, the permission granted by the state to its young citizens attending sectarian schools to ride along with their fellow play mates is little enough return. The questions of justice and fair play which were not before the court in the instant case, are now properly before the voters. It is hoped that this constitutional provision will receive the indorsement of the electorate. Proposed N. Y. CONST. art. XI, § 4.

1. "The judicial power shall extend to all cases . . . between citizens of different states. . . ." U. S. CONST. Art. III § 2. This section was intended to enable non-residents of a state to have their day in court free from local prejudices.

2. 16 Pet. 1 (U. S. 1842). In this case the court was concerned with the issue of whether a pre-existing debt was consideration on a bill of exchange. The New York

most important cases ever decided by the United States Supreme Court has been liquidated by its creators.[3] The basis for the ruling of that famous case was Mr. Justice Story's[4] contention that Section 34 of the Judiciary Act[5] providing that the "laws of the several states . . . shall be regarded as rules of decision" (in the federal courts) did not include judicial decisions of the state courts on matters of common law,[6] but merely extended to state statutes and to the right or title to things of a permanent nature. It was also believed that such freedom of judicial decision in the federal courts would provide the litigants with an impartial tribunal and make for uniformity of law.[7]

Throughout the long existence of the doctrine of the *Tyson* case, it was both ably attacked[8] and well defended.[9] Mr. Justice Brandeis in the instant case particularly stressed the research of Professor Warren which contended that Mr. Justice Story was in error in concluding that Section 34 did not extend to unwritten law.[10] His

courts held it was not. Mr. Justice Story speaking for the Supreme Court held *contra* to the New York courts.

3. The importance of the instant case was not noticed for one week until Arthur Krock devoted two columns to a discussion of it. Krock, *In the Nation*, N. Y. Times, May 3, 1938, p. 22, col. 5 and May 4, 1938, p. 22, col. 5. See also NEW REPUBLIC, May 11, 1938, p. 1, col. 1; NEWSWEEK, May 16, 1938, p. 33, col. 1.

4. One prominent writer places the cause which led to the Tyson case in the personality of its author. Mr. Justice Story at the time was writing a text on negotiable instruments law and so would be expected to dogmatize on the subject. GRAY, THE NATURE AND SOURCES OF THE LAW (2d ed. 1921) 253.

5. 28 U. S. C. A. § 725 (1789).

6. "General common law" included non-statutory commercial law, insurance, contracts, torts, agency, and damages. Schmidt, *Substantive Law Applied by the Federal Courts—Effect of Erie R. Co. v. Tompkins* (1938) 16 TEX. L. REV. 512, 516. See Erie R. Co. v. Tompkins, 304 U. S. 64, 76, 58 Sup. Ct. 817, 821 (1938) where the court indicates that state decisions construing local deeds, mineral conveyances, and devises of real property were disregarded. This conflicts with the usual practice of the Supreme Court which was to follow the state decisions on questions of local character and especially where real property is involved. Schmidt, *loc. cit. supra.*

7. This hope was not realized because New York disapproved of Swift v. Tyson. *Stalker v. McDonald,* 6 Hill 93 (N. Y. 1843). On many other questions of general law an unusually large number of the states refused to follow the federal pronouncements. Professor Frankfurter ascribes this to "the temptation of judges to make law according to their own views when untrammeled by authority." Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 CORN. L. Q. 499, 529. Shulman, *The Demise of Swift v. Tyson* (1938) 47 YALE L. J. 1336, 1339.

8. One attack suggested a remedy in either amending § 34 to clearly include state common-law decisions or an abolition of diversity of citizenship jurisdiction. Campbell, *Is Swift v. Tyson an Argument for or Against Abolishing Diversity of Citizenship Jurisdiction?* (1932) 18 A. B. A. J. 809. See Note (1938) 12 TEMP. L. Q. 486, 496. Another prophetically added that Swift v. Tyson should be overruled. Dobie, *Seven Implications of Swift v. Tyson* (1930) 16 VA. L. REV. 225, 241. Another suggested raising the jurisdictional amount to $10,000 to save the poorer litigants the expense of federal courts. Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 CORN. L. Q. 499, 526, n. 143. See also list of authorities in Erie R. Co. v. Tompkins, 304 U. S. 64, 72, n. 4, 58 Sup. Ct. 817, 822, n. 4 (1938).

9. For a collection of these authorities see Erie R. Co. v. Tompkins, 304 U. S. 64, 77, 58 Sup. Ct. 817, 822, n. 22 (1938).

10. Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923)

research had indicated that the draftsmen of that statute did not mean to limit the freedom of the federal courts merely to statute law because that term, statute law, was stricken from the original text and simply the word "laws" inserted. Another anomaly of the case was that although Congress is powerless to legislate in the field of general jurisprudence, the federal courts extended its judicial powers to this area.[11] A third objection to the *Tyson* case was that the federal courts distinguished between local and general law, a tenuous and difficult distinction for the courts to apply.[12] Perhaps a more important result was that far from attaining the objective of national uniformity, there was a definite lack of uniformity of law in each state.[13] The height of the uncertainty of the law was reached in the *Black and White Taxicab*[14] case where a corporation of one state reincorporated under the laws of another state merely to acquire the requisite diversity of citizenship necessary to evade an unfavorable state law. A final objection offered was that the *Tyson* case assumed that the common law in the American states was a single system of law. This conception was prevalent at the time because American lawyers likened our system to the single system in England.[15] Instead of one comprehensive system of common law, the states individually have shaped the principles of those operative within their respective boundaries.

Despite all the criticism evoked by the doctrine it remained the law until destroyed by the instant case.[16] The court held that it, the guardian of the constitution, had

37 HARV. L. REV. 49, 82-88. Despite the acceptance of Professor Warren's theory by the majority opinion of the Tompkins case, doubt has been expressed concerning its soundness. For nearly a century Congress did not indicate that § 34 had been misinterpreted by the passage of corrective legislation although many bills were introduced to amend the aforesaid section. Shulman, *The Demise of Swift v. Tyson* (1938) 47 YALE L. J. 1336, 1345. See, Schweppe, *What Has Happened to Federal Jurisprudence?* (1938) 24 A. B. A. J. 421, 425.

§ 34 (28 U. S. C. A. § 725 [1789]) applies only to "trials at common law," yet it was extended to include equity suits. Mason v. United States, 260 U. S. 545 (1923). Since the Tompkins case the Supreme Court has held that in equity suits the federal court would likewise defer to the state courts. This brings the entire Tyson doctrine to a logical conclusion. Ruhlin v. N. Y. Life Ins. Co., 304 U. S. 202, 58 Sup. Ct. 860 (1938).

11. See Erie R. Co. v. Tompkins, 304 U. S. 64, 77, 58 Sup. Ct. 817, 822 (1938). The court declared that it had been acting unconstitutionally for nearly 100 years. They found no clause in the Constitution which conferred the power upon the federal courts.

12. Dobie, *Seven Implications of Swift v. Tyson* (1930) 16 VA. L. REV. 225, 235. See Erie R. Co. v. Tompkins, 304 U. S. 64, 74, 58 Sup. Ct. 817, 822, n. 8 (1938). The Supreme Court points out there that the Federal Digest lists nearly a thousand decisions on the distinction between general and local law.

13. See note 7, *supra*.

14. Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co., 276 U. S. 518 (1928). Even individuals removed themselves from their own state for this purpose. See Erie Co. v. Tompkins, 304 U. S. 64, 76, 58 Sup. Ct. 817, 821, n. 19 (1938). When defeated on a point of law non-resident plaintiffs have been known to take a nonsuit and begin all over again in the federal courts. Gardner v. Michigan Cent. R.R. Co., 150 U. S. 349 (1893); Harrison v. Foley, 206 Fed. 57 (C. C. A. 8th, 1913); Interstate Realty and Inv. Co. of La., Inc. v. Bibb County, Ga., 293 Fed. 721 (C. C. A. 5th, 1923).

15. McCormick & Hewins, *The Collapse of "General" Law in the Federal Courts* (1938) 33 ILL. L. REV. 126, 128.

16. The court didn't find that § 34 was unconstitutional (the dissent by Butler, J. in

overreached its powers and had been acting unconstitutionally.[17] It did this, and more. It annihilated as precedents thousands of federal cases[18] in which the doctrine of the *Tyson* case was applied.

Just how far this decision will extend remains a riddle at present. Many questions have been proposed but few have been answered. However, it is clear that in construing the Federal Constitution, statutes, and treaties the federal courts will remain supreme.[19] The most obvious result of the decision[20] is the abolition of uncertainty and the restoration of equal rights under the law. No longer will there be a separate and different rule of law applied to non-citizens of a state who choose the federal courts to air their difficulties rather than the state court of one of the parties; nor will there be a possible situation where two persons sitting in the same seat in a train are injured in an accident but only one can recover damages.[21] From now on federal courts must obediently decide in accordance with state decisions. But even this mandate is fraught with difficulties.

Will the federal judges insist on a line of state decisions before adjudicating a case in accordance with the state law? It seems not. Only one decision will be required. This was indicated long before *Swift v. Tyson* was decided while a case was pending in the federal courts. Just before the federal appellate judge rendered his decision, the highest state court in a similar case expounded the law and the federal judge

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Erie R. Co. v. Tompkins, 304 U. S. 64, 82, 58 Sup. Ct. 817, 823 (1938) indicates that unless the constitutionality is argued below, it may not be raised on appeal) but that § 34 had been originally misinterpreted. This holding of the court is weak because there was too long a period of silent acquiescence by Congress. Shulman, *The Demise of Swift v. Tyson* (1938) 47 YALE L. J. 1336, 1345. Under principles of statutory construction this is an indication that the original interpretation was correct or was at least a ratification of that interpretation. Costanzo v. Tillinghast, 287 U. S. 341 (1932); Conservative Homestead Ass'n v. Conery, 169 La. 573, 125 So. 621 (1929); Succession of Sciacaluga, 177 La. 795, 149 So. 458 (1933).

17. See note 11, *supra*.

18. See note 12, *supra*.

19. There are other classes of cases, peculiarly federal, in which the federal courts remain independent. They are: admiralty: Southern Pacific Co. v. Jensen, 244 U. S. 205 (1917); interstate commerce: Western Union Telegraph Co. v. Call Publishing Co., 181 U. S. 92 (1901); suits between states of the United States: Kansas v. Colorado, 206 U. S. 46 (1907). These examples do not refute the statement of the instant case that "there is no federal common law." Erie R. Co. v. Tompkins, 304 U. S. 64, 74, 58 Sup. Ct. 817, 822 (1938). See Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U. S. 92, 110, 58 Sup. Ct. 803, 811 (1938). This case, decided on the same day, recognizes that there is a federal common law. But it is considerably delimited. No longer is it a *general* common law but merely a common law *technique*. Such a technique would be embodied in decisions standing as precedent for statutory and constitutional interpretation. Mochzisker, *The Common Law & Our Federal Jurisprudence* (1926) 74 U. OF PA. L. REV. 270, 271. There is one author who agrees with the minority of the court in the instant case in that there is a federal general common law. Schweppe, *What Has Happened to Federal Jurisprudence?* (1938) 24 A. B. A. J. 421.

20. A more immediate result has been the number of recent cases reversed on the authority of the instant case. Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 58 Sup. Ct. 860 (1938); New York Life Ins. Co. v. Jackson, 304 U. S. 261, 58 Sup. Ct. 871 (1938); Rosenthal v. New York Life Ins. Co., 304 U. S. 263, 58 Sup. Ct. 874 (1938); Hudson v. Moonier, 304 U. S. 397, 58 Sup. Ct. 954 (1938).

21. PEPPER, THE BORDERLAND OF FEDERAL AND STATE DECISIONS, 65.

accepted it without question.[22] Whether this same procedure would have been followed had a lower court decided this case is hard to say.[23] Well reasoned decisions of lower courts have been known to command recognition. But it can confidently be said that the law must at least be set forth authoritatively.[24] It can further be argued that if an incorrect or outmoded state decision would be overruled at the first opportunity in the state courts, the federal courts would be free to take the initial step. Of course, this seems to bring back the situation existing under *Swift v. Tyson.* But this power is justified because refusal to permit the federal courts this freedom would be to perpetuate obvious error. This is in keeping with the spirit of the *Erie* case. The only restriction on the federal courts is that they cannot now decide as they think the state courts *ought* to decide, but as they think they *would* decide.[25] Another liberty which the federal courts retain is the power to honestly distinguish cases. Under the guise of exercising this power, it is possible that the courts could revive the evils of the *Tyson* case but this need not create any undue alarm. It would be attacking the integrity of the federal judiciary without basis to believe that a judge who objected to a state precedent would use this power as a means of escape.[26]

It is submitted that the instant decision will not diminish the attractiveness of prosecuting a suit in the federal courts. There still remains the benefits of a trial judge appointed for life and a jury selected from a wide area.[27]

CONSTITUTIONAL LAW—VALIDITY OF CAPITAL STOCK TAX.—Plaintiff files a claim for a refund of a sum paid as an excess profits tax, alleging that Sections 701 and 702 of the Revenue Act of 1934,[1] upon which the tax was based, were unconstitutional. His ground was that the statute deprived the taxpayer of his property without due process of law,[2] by raising a conclusive presumption that the value of a corporation's capital stock as declared in the taxpayer's return was its actual value. On defendant's demurrer to the petition, *held,* that the provisions of the act in reference to the declaration of value of the capital stock did not deprive the plaintiff of its property without due process of law; that the tax was not imposed arbitrarily

22. United States v. Morrison, 4 Pet. 123 (U. S. 1830). Disagreeing with this view is Burgess v. Seligman, 107 U. S. 20, 35 (1882). Now, of course, this latter case and all others based on Swift v. Tyson have been overruled as precedents by the instant case, and the Morrison case is re-established as the law.

23. The instant case at p. 78 specifically refers to the "highest" court of the state.

24. Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 CORN. L. Q. 499, 526. In Graham v. White-Phillips Co., 296 U. S. 27 (1935) the court refused to follow an intermediate appellate court as not authoritative.

25. Note (1938) 12 TEMP. L. Q. 486. *Cf.* Corbin, *The Common Law of the United States* (1938) 47 YALE L. J. 1351, 1353. McCormick & Hewins, *The Collapse of "General" Law* (1938) 33 ILL. L. REV. 126, 136. Shulman, *The Demise of Swift v. Tyson* (1938) 47 YALE L. J. 1336, 1350 (The author is probably not certain what the answers are, and merely propounds the questions.) Even dicta construing a statute have been accepted as indicating the direction of future state decisions and have been followed by the federal courts. Badger v. Hoidale, 88 F. (2d) 208, 109 A. L. R. 805 (C. C. A. 8th, 1937).

26. *Cf.* Note (1938) 12 TEMP L. J. 486, 496.

27. McCormick Hewins, *The Collapse of "General" Law* (1938) 33 ILL. L. REV. 126, 144.

1. 48 Stat. 769, 26 U. S. C. A. § 1358 (f) (1934).

2. U. S. CONST. Amend. V

nor was the taxpayer denied the required opportunity to be heard before the stock value was fixed. Demurrer sustained. *Chicago Telephone Supply Co. v. United States,* 23 F. Supp. 471 (Ct. Claims 1938).

The instant case is novel in that it involves the constitutionality of a statute wherein the assessment of a tax is based upon value as declared by the taxpayer; and as so declared binding on the United States.[3] For the purpose of assessing a capital stock tax on corporations Congress had allowed the taxpayer to declare its value as he saw fit under 701 and 702 of the Revenue Act of 1934.[4] At the same time the Revenue Act refused to allow the declarant to amend its original return after it had been filed.[5] Subdivision (f) of Section 701 levied another tax, the excess-profits tax, computed on the capital stock value as so declared.[6] It seems that the statutory device interlocking the capital stock tax and the excess-profits tax was framed for a specific purpose: it penalized the taxpayer who unduly depressed the value of its capital stock by increasing the amount of the excess-profits tax. So also it rewarded the taxpayer who set down the true value of its capital stock by lowering the related excess-profits tax. However, there was no method provided to prevent the taxpayer from fixing the capital stock value to its own advantage on the original declaration in the computation of the capital stock tax.

As the court in the instant case admits,[7] the tax might in fact be levied on property not according to its real value but according to a misstatement of its worth. So one question put by the case is really whether the plaintiff's property is taken without due process of law, since he might be paying a tax for property not in fact worth the sum at which he valued it.

The result reached seemed in the court's opinion to conflict with some of the principles stated in the case of *Oertel Co. v. Glenn,*[8] in which the taxpayer was permitted to file an amended capital stock return before the time for filing such return

3. Subdivision (f) of § 701 provided that for the first year ending June 30, 1934, "the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section."

In the case of William B. Scaife & Sons Co. v. Driscoll, 94 F. (2d) 664 (C. C. A. 3d, 1937) the plaintiff sought to have an act similar to the one in the instant case declared unconstitutional. The Circuit Court of Appeals upheld the District Court in the ruling that the question of constitutionality called for a declaratory judgment, but that subjects of federal taxation were specifically excluded from the operation of the Declaratory Judgment Act. 49 Stat. 1027 § 405 (1935) 28 U. S. C. A. § 400 (Supp. 1937).

4. This appears to be the first provision in any Revenue Act which allows the taxpayer rather than the government to fix conclusively the value of the subject to be taxed.

5. It has been the general policy not to allow amended tax returns to be filed after the taxpayer has made a valuation with full knowledge of the facts. See Pacific National Co. v. Welch, 304 U. S. 191 (1938) (income tax); Commissioner v. Moore, 48 F. (2d) 526, 528 (C. C. A. 10th, 1931) (excess profits tax); Marks v. United States, 18 F. Supp. 911, 918 (S. D. New York 1937) (income tax); United States v. Kaplan, 304 U. S. 195 (1938) (income tax). See also Paul and Mertens, Law of Federal Income Taxation, (1934) § 53.05.

6. The act computed the excess-profits tax at 5 per cent of such portion of the net income of the corporation as was in excess of 12½ per cent of the adjusted declared value of its capital stock.

7. See instant case at page 474.

8. 13 F. Supp. 651, 653 (D. Kentucky 1936), *aff'd,* 97 F. (2d) 495, 496 (C. C. A. 6th, 1938).

had expired. It was said by the court in that case that if the declaration of value of the capital stock cannot be amended to show the real value, the statute raises a conclusive presumption that the tax is to be levied on the declared value, regardless of the actual value, and thus it is violative of the Fifth Amendment.

The due process clause of the Constitution does limit the taxing power of Congress in those instances where a tax is so arbitrary or capricious as to transgress the constitutional bounds.[9] Nevertheless, due process of law is saved in the assessment of the tax in question in one respect at least. The taxpayer was given an opportunity to be heard, in effect similar to the opportunity granted in the ordinary assessment. In the usual assessment proceedings, the value of the subject to be taxed is fixed by the government after submission of schedules by the taxpayer, and the taxpayer is allowed to appeal any assessment which he feels to be unreasonable.[10] The party taxed must then declare a value and the courts will say whether the declarant shall receive or be refused the value so set. In the instant case the taxpayer is heard favorably without court action.

Nor does it seem that because the property value may be set at the caprice of the taxpayer, the tax in the instant case is unconstitutional. It is submitted that the method will not be oppressive nor lack uniform application. A taxpayer is not oppressed by a law which gives complete freedom to make an honest return. Nor does the method deprive any taxpayer of the equal protection of the law. Ordinary arithmetic will usually indicate to the careful taxpayer that valuation of stock which will permit him or it to pay the least total tax. All corporations have this opportunity and pay according to the same rate.

Admitting the constitutionality of the tax, it must be pointed out that there were equitable grounds for the instant decision which distinguish the principal case from the *Oertel* case. In that case the amended return was filed before the tax liability had accrued.[11] In the instant case the taxpayer filed a claim for a refund of its paid excess-profits taxes a year after they were due. Permitting an amended return under these circumstances would place a burden upon the government since the tax liabilities would have to be readjusted and recomputed.[12] Likewise plans and expenditures were probably made by the government on the basis of the collections to come due. Its books were closed and could be reopened only at much expense.

Logically then, the instant decision seems to be placed on strong grounds and

9. Tyler v. United States, 281 U. S. 497, 504 (1930); Brushaber v. Union Pacific R. R. Co., 240 U. S. 1, 24 (1915).

10. Turner v. Wade, 254 U. S. 64, 68 (1920); Londerer v. City and County of Denver, 210 U. S. 373, 385 (1908). For a discussion of the requirements of notice under taxation statutes, see Cooley, Taxation (Nichols ed. 1924) § 1113.

11. See Glenn v. Certel, 13 F. Supp. 654 (Kentucky 1936) *aff'd*, 97 F. (2d) 495, 496 (C. C. A. 6th, 1938). The courts seem willing to allow the taxpayer to file an amended tax return as long as it is within the permissible limit and no question of estoppel arises. See the case of Lucas v. Sterling Oil & Gas Co., 62 F. (2d) 951 (C. C. A. 6th, 1933) where the taxpayer was allowed to file an amended income tax return within the permissible limit, the original return having been filed without complete knowledge of the material facts.

In William B. Scaife & Sons Co. v. Driscoll, 94 F. (2d) 664 (C. C. A. 3d, 1937), the plaintiff sought as alternative relief, an order enjoining the collector of Internal Revenue from refusing to accept an amended capital stock return. The court held that the plaintiff's suit was to restrain the assessment and collection of excess-profits taxes and such a suit cannot be maintained in view of the provisions of § 3224 of the Revised Statutes, 26 U. S. C. A. § 1543. However, the court said that the plaintiff had an action at law for the recovery of any taxes based upon the value given in its first return.

12. Pacific National Co. v. Welch, 304 U. S. 191 (1938).

the *Oertel* case is weak insofar as its dicta disagree. It is submitted that the method of assessment used by the statute is not perfect[13] but as a practical matter the only one feasible. True, this statute and decision will allow the government to levy a tax even where the taxpayer has made an innocent mistake[14] and the tax will not be based on actual values. It makes the collection of taxes something of a battle of wits between government experts and private tax consultants, on the part of the latter to juggle values to the profit of the taxpayer and on the part of the former to devise defenses against the overly shrewd. But nevertheless, if the government were to be forced to employ assessors, sending them into each corporation in the country to investigate and determine the actual value of its capital stock, the costs of such visitations would probably defeat the purpose of the tax as a revenue producer.

CONTRACTS—INFANCY—RIGHT OF DISAFFIRMANCE.—The plaintiff almost one year after attaining his majority sued the defendant corporation to recover money paid as tuition for instruction in aviation. The instruction was contracted for and received by the plaintiff while he was between the ages of twenty and twenty-one years. On appeal from an order for judgment for the defendant, *held*, that the plaintiff might disaffirm the contracts and recover in full the consideration that he had paid. Order reversed. *Adamowski v. Curtiss-Wright Flying Service, Inc.*, 15 N. E. (2d) 467 (Mass. 1938).

With a few exceptions and limitations imposed by statute and otherwise,[1] the contracts of infants are now treated as voidable.[2] But from ancient times minors have been held liable for the reasonable value of the necessaries purchased by them.[3] Such is the law in New York today.[4] The basis of this obligation, it may be noted,

13. The validity of the act may be questioned on other grounds which were not included in the plaintiff's argument but which the court mentioned in an *obiter dictum* (p. 473). The act permitted the taxpayer to declare the value of its capital stock before July 31, 1934. The declared value applied not only to the year 1934 but to all subsequent years and no changes could be made. The court says that this may be challenged on constitutional grounds. The fluctuations in the value of a share of stock from year to year preclude any attempt to fix a reasonable settled value for it over a period of years.

14. But there was no sign of innocent mistake in the present case. The declared value of the capital stock was $444,847.99 and the actual value was in excess of $2,000,000.

1. *In re* W. J. Floyd & Co., 156 Fed. 206 (E. D. N. C. 1907); Gay v. Johnson, 32 N. H. 167 (1855); Rahman v. Bethel, 236 App. Div. 182, 258 N. Y. Supp. 286 (3d Dep't 1932) (statute); N. Y. INS. LAW (1930) § 55; N. Y. PERS. PROP. LAW (1913) §§ 163, 169; 3 PAGE, CONTRACTS (rev. ed. 1920) §1574.

2. Sternlieb v. Normandie National Securities Corp., 263 N. Y. 245, 188 N. E. 726 (1934); Casey v. Kastel, 237 N. Y. 305, 143 N. E. 671 (1924); *In re* Willmott's Estate, 211 Iowa 34, 230 N. W. 330 (1930); McDonald v. Sargent, 171 Mass. 492, 51 N. E. 17 (1898).

3. As early as the fifteenth century it was well settled that an infant was liable for necessaries. To be sure, this does not mean that the infant is liable where necessaries are already being supplied by a guardian or parent ready, willing and able to supply them. The articles must be *actually* necessary before he can be held. 1 WILLISTON, CONTRACTS (rev. ed. 1938) §§ 223, 240.

4. N. Y. PERS. PROP. LAW (1911) § 83 codifies the common law liability of infants for necessaries.

is not contractual but quasi-contractual,[5] though the minor may if he choose stand upon his contract and enjoy the advantage of a good bargain.

In the light of precedent in New York[6] and elsewhere, it cannot be said that the court ran counter to established principle in its rejection of the defendant's first contention, that the contract was for necessaries. Instruction in aviation may reasonably be deemed unessential[7] to the welfare of the young man of twenty, even in the highly mechanized civilization of the present era. American judges,[8] like their English brethren,[9] have not been willing to give the word "necessary" a broad interpretation. While both have declared a proper education necessary[10] and have suggested that under certain circumstances the word might be applied to a classical or professional training,[11] the judiciary has been reluctant to apply it beyond the limits of the trade[12] and grammar[13] schools. It would appear that the courts in reaching their conclusions look particularly to the nexus between the instruction given the infant and its practical value to him in the earning and preservation of his livelihood. An extended education, they feel, is more apt to be a gem adorning the personality than a tool in the hand of the breadwinner.[14] In the present case it might conceivably have been found that the courses given the minor by the defendant fell into the category of "trades" and were perhaps necessary as such.[15] But the court was not required to make such a finding as a matter of law. What consti-

5. The infant need not even have promised to pay for the necessaries furnished. See Trainer v. Trumbull, 141 Mass. 527, 530, 6 N. E. 761, 762 (1886); 1 WILLISTON, CONTRACTS (rev. ed. 1938) § 240.

6. Since the contracts were made in New York, the Massachusetts court determined the issues involved by the New York law. See principal case at p. 467; 2 BEALE, CONFLICT OF LAWS (1935) § 332.4.

7. But see Curtiss v. Roosevelt Aviation School, 5 AIR LAW REVIEW 382 (Mun. Ct. 1934), where a contract for aviation instruction to prepare an infant to be a mechanic was considered a contract for necessaries. The fact that some of our public schools now offer courses in aeronautics is also worthy of attention in this regard.

8. International Text Book Co. v. Doran, 80 Conn. 307, 68 Atl. 255 (1907) wherein a course in electricity was held unnecessary for a minor; Ryan v. Smith, 165 Mass. 303, 43 N. E. 109 (1895), wherein chairs and other articles of furniture for infant's barber shop were held not to be necessaries; Schoenung v. Gallet, 206 Wis. 52, 238 N. W. 852 (1931), where it was held that an automobile used to carry the infant to and from work was not necessary, there being other means of transportation.

9. But in England the law is more lenient than in the United States. Roberts v. Gray [1913] 1 K. B. 520: instructions in billiards is a necessary; see Barnes v. Toye (1884) 13 Q. B. 410, 414. I WILLISTON, CONTRACTS (rev. ed. 1938) § 241.

10. See International Text Book v. Connelly, 206 N. Y. 188, 195, 99 N. E. 722, 725 (1912); Walter v. Everard (1891) 2 Q. B. 369, 376.

11. International Text Book Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722 (1912); see Halsted v. Halsted, 228 App. Div. 298, 299, 239 N. Y. Supp. 422, 424 (1930).

12. Pardy v. American Ship-Windlass Co., 20 R. I. 147, 37 Atl. 706 (1897); Walter v. Everard (1891) 2 Q. B. 369.

13. Stone v. Dennison, 30 Mass. 1 (1832); Middlebury College v. Chandler, 16 Vt. 683, 42 Am. Dec. 537 (1844).

14. Middlebury College v. Chandler, 16 Vt. 683, 42 Am. Dec. 537 (1844). But see 3 PAGE, CONTRACTS (rev. ed. 1920) § 1588 for a criticism of this attitude.

15. It is well to note that although instruction may be calculated to prepare an infant for a trade, it does not follow inevitably that it is a necessary so far as he individually is concerned. He may already be well equipped in other fields and the instruction a mere superfluity.

tutes a necessary is a mixed question of law and fact, the judge deciding whether as a matter of law the articles may be considered necessaries, the jury determining whether they were so in fact under the peculiar circumstances of the infant's way of life, his station and his prospects.[16]

As for the defendant's second contention, that the infant's disaffirmance was too late, coming a year after attainment of majority, the circumstances of the individual case must determine whether indeed the minor has acquiesced too long after coming to adulthood to disaffirm an executed contract.[17] The courts in general insist upon a clear, unequivocal ratification.[18] But in one case a delay of thirteen months after attainment of majority has been declared unreasonable.[19] In another case a delay of three years has been held not to constitute ratification.[20] In the instant case the court observed that by the quondam infant's failure to disaffirm the executed contracts sooner he gained nothing and the defendant lost nothing. Hence the court was not obliged to look to the insinuation of equitable considerations.[21]

It is the defendant's last contention that is especially interesting, providing as it does a fairly novel twist to a familiar situation. For whether he would have it so or not, the infant cannot restore the intangible consideration received from the other party. On this ground the defendant sought judgment.

Where tangible property has been the consideration received, New York judicial policy has compelled the infant disaffirming to return it[22] or as much of it as he is able.[23] Yet in the event that he has lost, squandered or otherwise disposed of it, the right of renunciation is not denied him.[24] In the leading case of *Rice v. Butler*,[25] an infant who purchased a bicycle on the instalment plan sought to disaffirm the contract of purchase and recover the instalments she had paid. She was compelled to account for the deterioration in value of the property from the use of which she had received benefit. For, said the court, the plea of infancy must be used as a shield, not as a sword.[26] When later confronted with the case of *Sternlieb*

16. McKanna v. Merry, 61 Ill. 177 (1871).

17. Levenberg v. Ludington, 152 Misc. 735, 274 N. Y. Supp. 193 (Co. Ct. 1934); Horowitz v. Manufacturers Trust Co., 239 App. Div. 693, 268 N Y. Supp. 729 (1st Dep't 1934). Note that contracts relating to personal property may be avoided even during minority, whereas those relating to realty may be disaffirmed only after attainment of majority. O'Donohue v. Smith, 130 App. Div. 214, 114 N. Y. Supp. 536 (1st Dep't 1909).

18. International Text Book Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722 (1912); Parsons v. Teller, 188 N. Y. 318, 80 N. E. 930 (1907).

19. Campbell v. Sears, Roebuck & Co., 307 Pa. 365, 161 Atl. 310 (1932).

20. Green v. Green, 69 N. Y. 553 (1877). If the contract be in the executory stage it need not be disaffirmed at all until suit is actually brought to enforce it. The burden, moreover, is on the other party to prove the infant's ratification. Washington Street Garage, Inc. v. Maloy, 230 App. Div. 266, 243 N. Y. Supp. 467 (4th Dep't 1930).

21. Where an infant's delay unduly embarrasses the adult party to the infant's advantage, the courts are quick to curtail the prerogative of disaffirmance. Levenberg v. Ludington, 152 Misc. 735, 274 N. Y. Supp. 193 (Co. Ct. 1934).

22. Sperandera v. Staten Is. Garage, 117 Misc. 780, 193 N. Y. Supp. 392 (Mun. Ct. 1921).

23. Casey v. Kastel, 237 N. Y. 305, 142 N. E. 671 (1924); McCarthy v. Bowling Green Storage & Van Co., 182 App. Div. 18, 169 N. Y. Supp. 463 (1st Dep't 1918)

24. Petrie v. Williams, 68 Hun. 589, 23 N. Y. Supp. 237 (Sup. Ct. 1893).

25. Rice v. Butler, 160 N. Y. 578, 55 N. E. 275 (1899). *Cf.* Myers v. Hurley Motor Co. Inc., 273 U. S 18 (1927).

26. For the same thought *cf.* Lown v. Spoon, 158 App. Div. 900, 143 N. Y. Supp. 275 (2d Dep't 1913).

v. Normandie National Securities Corp.,[27] the Court of Appeals refused to extend the rule laid down in *Rice v. Butler*. In that case a minor who had falsely represented himself to be an adult in purchasing shares of stock was permitted to disaffirm the contract of purchase upon the unsuccessful eventuation of his experiment with the market. Upon returning the worthless stock he recovered the money paid. He received through the contract no substantial benefit for which the court might compel him to account, whereas in the bicycle case the minor did enjoy material benefits.

The instant case is of course distinguishable from both of these in one important respect. While the minor cannot restore the consideration received, he has nevertheless kept all the advantages accruing from his bargain. The query is, may he equitably be charged for such benefits retained by him?[28] The Massachusetts Court confessed to some confusion because of the seeming logical vacillation of the New York cases[29] and with diffidence gave its judgment to the plaintiff. The infant appears thereby to have accomplished the difficult task of "eating his cake and having it too." It seems clear that he has been unjustly enriched, from the academic if not also the utilitarian standpoint, at the expense of the innocent defendant.

It is rather to be wished, in pursuit of equity, that the Massachusetts court had adopted the spirit of the case of *Rice v. Butler*. As it was, the Court seemed much impressed by the fact that the contract was not for necessaries and concluded therefore that the infant ought to be permitted to disaffirm. But the New York Court of Appeals in *Rice v. Butler* did not consider such a fact sufficient grounds for permitting the minor to escape liability for benefits received. The test of liability would seem not always to be whether the consideration received was in truth necessary for the infant, but whether the infant received material benefit therefrom at the expense of the innocent adult. Can it be said with logical or ethical consistency that an infant must pay for the pleasure of bicycling and the resultant deterioration

27. Sternlieb v. Normandie National Securities Corp., 263 N. Y. 245, 188 N. E. 726 (1934).

28. For holdings in jurisdictions outside New York, see Johnson v. Northwestern Mutual Life Insurance Co., 56 Minn. 365, 59 N. W. 992 (1894), where an infant avoided an insurance policy on his own life and recovered the premiums. He was required to pay the reasonable value of insurance protection enjoyed. (This is definitely a minority view, however.) Note, too, the interesting case of Neilson v. International Text Book Co., 106 Me. 104, 75 Atl. 330 (1909) wherein a minor who entered into a contract for courses in electrical engineering and paid $88 in advance was permitted to disaffirm and recover the money paid, after returning the books supplied by the defendant. The court considered no bar to such action the fact that the infant retained intangible intellectual benefit from the use of the property purchased.

Compare the case of Wallin v. Highland Park Co., 127 Iowa 131, 102 N. W. 839 (1905). In that case an infant repudiated a contract for a course in pharmacy and was permitted to recover only the amount paid in by him less reasonable compensation for the instruction received. Observe, however, that the course in pharmacy was considered a necessary, a fact which obviously distinguishes the case from the principal one.

29. The New York courts insist that the minor account for the depreciation resulting from the use to which he has put the articles received by him, in virtue of the disaffirmed contract. But if the consideration received was money and he has spent it, such fact will not prejudice his right of disaffirmance. Or if he disposed of whatever goods he received after using them for a time, it would seem that he might recover all his payments without deduction. This particular problem, however, has not been definitely settled.

of the machine, but not for the intellectual and possibly practical benefits of a course in aviation, given by the adult at no little cost in time, money and effort?

All in all, the fact of the matter seems to be that the New York law of infant's contracts is in need of reform with relation to the maturer youth who has passed the age of eighteen or nineteen.[30] The law is solicitous of the minor for his improvidence and his folly. He is not protected from either by the complete legal condonation of his own bad faith and inequitable conduct. Reform has of late years been attempted in the legislature, thus far without success.[31]

CRIMINAL LAW—RIGHT OF THE ACCUSED TO INSPECT THE PROSECUTION'S EVIDENCE BEFORE TRIAL.—The defendant was indicted for murder in the first degree. Before trial, he moved for an order directing the district attorney to permit a fingerprint expert, retained by the defendant, to examine a pistol bearing fingerprints alleged to be the defendant's and to furnish a photostatic copy of his fingerprints taken at the time of his arrest. Defendant learned of the pistol by newspaper articles to the effect that such evidence existed. *Held*, application will be denied where the defendant merely surmises that the district attorney is in possession of such evidence. *People v. Gatti*, 167 Misc. 545, 4 N. Y. S. (2d) 130 (Sup. Ct. 1938).

In the instant case the court denied the defendant's application on the ground that his moving papers failed to establish that the evidence of which an inspection was desired was really in the district attorney's hands. Yet the court wrote an extended opinion indicating its hope that the State Legislature would remove the present uncertainty surrounding the problem of the inspection of evidence in criminal cases before trial. It is unfortunate that this problem[1] has been the source of

30. Some reform has been accomplished statutorily and judicially in several other jurisdictions. New Hampshire and Minnesota have adopted in their decisions the so-called "Provident Rule", by which an infant is liable on contracts to the extent that they have benefited him. Hall v. Butterfield, 59 N. H. 354, 359 (1879); Berglund v. American Multigraph Sales Co., 135 Minn. 67, 160 N. W. 191 (1916). But note that even under the Provident Rule, the infant in the principal case would probably have recovered. For the court thought that the courses were of no apparent benefit to him. For similar reforms, effected by statute, see among others CAL. CIV. CODE (Deering, 1931) § 33-37; IDAHO CODE ANN. (1932) § 31-103, 31-105; IOWA CODE (1935) § 10493, 10494; KAN. GEN. STAT. ANN. (1935) c. 38 § 102-3; TENN. CODE (Will. Shan. & Harsh 1932) § 10370; VA. CODE ANN. (1930) § 6108; WASH. REV. STAT. ANN. (Remington, 1932) § 5829, 5830.

31. The most recent proposal in the New York legislature was to lower the age of contractual capacity to eighteen years in cases:

"(a) where the contract was made for purposes of the infant's education and was reasonable and provident when made, (b) where the contract was made in connection with a business in which the infant was engaged and was reasonable and provident when made and (c) where, from a misrepresentation as to his majority made in the handwriting of the infant, the other party to the contract had, at the time the contract was made, reasonable cause to believe, and did believe, that the infant was of full age." LEGISLATIVE DOCUMENT (1938) § 65(I).

1. The question, herein, does not concern the accused's right to inspection of the minutes of the grand jury, his right to be furnished with the names of the state's witnesses, nor his right to be confronted with the witnesses against him. N. Y. CODE CRIM. PROC. §§ 8, 952t; People *ex rel.* Hirschberg v. Supreme Court of New York, 269 N. Y. 392, 199 N. E. 634

such great judicial conflict and that authoritative decisions are lacking in this state.

At common law, the courts denied that they had any power, even in civil cases, to order an inspection of evidence in advance of a trial.[2] Equity sought to remedy this defect by framing a separate and awkward kind of suit known as discovery and inspection,[3] by which the production of evidence in the possession of an adverse party and material to the right, title or defence of the party seeking the relief could be compelled. The New York Civil Practice Act has borrowed this equitable remedy so that a party to a civil suit may be allowed to inspect, copy or photograph a book, document, other paper or chattel which is held or controlled by the adverse party.[4] Yet, even in these cases, the jurisdiction is limited, so that an order of inspection will not be granted for purely exploratory purposes,[5] nor where the subject sought to be inspected will be inadmissible at the trial.[6]

However, there is no statute in this state available to a party in a criminal cause under which he may be granted the remedy of discovery and inspection before trial as may be done in a civil case under the present Civil Practice Act.[7] Consequently,

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(1936); People v. Beyer, 163 Misc. 890, 297 N. Y. Supp. 913 (County Ct. 1937). But rather, we are concerned with his right to obtain, before trial, an examination of evidence of a material nature which is held by the prosecution.

2. Carpenter v. Winn, 221 U. S. 533 (1911); Denslow v. Fowler, 2 Cow. 592 (N. Y. 1824); McQuigan v. Delaware, L. & W. R. R., 129 N. Y. 50, 29 N. E. 235 (1891). In 3 WIGMORE, EVIDENCE (2d ed. 1923) § 1862 it is said, "So far as concerned chattels and premises in his possession or control, the adversary in common law actions, like the true gamester that the law encouraged him to be, held safely the trump cards of the situation, free from any legal liability of disclosure before trial."

3. Sloss-Sheffield Steel & Iron Co. v. Maryland Casualty Co., 167 Ala. 557, 52 So. 751 (1910); Shotwell v. Struble, 21 N. J. Eq. 31 (1870); State v. Security Savings & Trust Co., 28 Ore. 410, 43 Pac. 162 (1910); 2 STORY, EQUITY JURISPRUDENCE (13th ed. 1886) § 1485.

4. The codification of the equitable remedy began with the N. Y. Revised Statutes of 1829, 2 REV. STAT. 199, c. 1, § 21 which gave to the Supreme Court the power to compel a party to a civil suit, "to produce and discover books, papers and documents in his possession or power relating to the merits of any such suit, or of any defense therein." This remedy was extended to other courts of record by the CODE OF CIVIL PROCEDURE § 803 and the scope of the remedy was enlarged allowing, in addition, discovery of "any article or property" in an adversary's possession. N. Y. CIV. PRAC. ACT (1920) § 324 has in turn adopted this rule.

5. Woods v. De Figaniere, 25 How. Pr. 522 (N. Y. 1863); Falco v. New York, N. H. & H. R.R., 161 App. Div. 735, 146 N. Y. Supp. 1024 (2d Dep't 1914); Chandler v. State, 60 Tex. Cr. R. 329, 131 S. W. 598 (1910). *Cf.* National Bank of Ridgewood v. American Surety Co, 239 App. Div. 853, 264 N. Y. Supp. 421 (2d Dep't 1933) (wherein the court held that the examination may be terminated at any time if it appears that the defendant is pursuing a policy of delay).

6. Knight v. Waterford, 2 Younge & Coll. Ex. 22, 36, 160 Eng. Reprints 296, 302 (1836). In the leading New York case, People *ex rel.* Lemon v. Supreme Court of New York, 245 N. Y. 24, 29, 156 N. E. 84, 85 (1927), Cardozo, Ch. J., said "Documents to be subject to inspection must be evidence themselves"; 4 CARMODY, NEW YORK PRACTICE (2d ed. 1932) § 1276.

7. There is no provision in the Code of Criminal Procedure which will authorize an inspection of evidence before trial. Nor does § 392, of the code, which is to the effect that the rules of evidence shall be the same in criminal as in civil causes, aid us since the provisions of the CIVIL PRACTICE ACT § 324 which deal with the remedy of discovery

our courts must turn to the common law, where as a general rule, the accused is denied the right of inspection.[8] But this general rule denying the accused the right of inspection is not universally followed and contrary decisions have been numerous, with the result that we have, at present, clashing and contradictory rules and precedents, even in New York where lower courts of equal rank disagree.[9]

The question first arose in *Rex. v. Holland*,[10] decided in England, which held that where an information was filed against the defendant, an officer of the East India Co., on charges of delinquency, based on a report of a board of inquiry in India, the defendant had no right to inspect that report. This ruling has been explained on the ground that the court could find neither principle nor precedent to warrant the granting of an inspection.[11] But it is important to note that the report sought to be inspected in the *Holland* case would have been inadmissible as evidence at the trial[12] and perhaps the decision can be distinguished on that ground. Whether the holding of the English Court was justified or not, the fact remains that its decision has been approved not only in the instant case but by the majority of the courts in this country.[13] Many other courts, however, committed themselves to a more conciliatory attitude and it appears to be the trend of the modern decisions to grant an inspection where the subject sought to be inspected is itself evidence and a failure of justice may result from its suppression.[14]

The cases that allow an inspection find justification for their decision on the ground that the primary purpose of a trial, civil or criminal, is to ascertain the truth and that by giving the defendant an opportunity to know what will be charged

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and inspection are not strictly rules of evidence. For the distinctions between a rule of evidence and a rule of procedure or pleading, see 3 WIGMORE, EVIDENCE (2d ed. 1923) § 1848.

8. State v. Jeffries, 117 Kan. 742, 232 Pac. 873 (1925); Wendling v. Commonwealth, 143 Ky. 587, 137 S. W. 205 (1911); Commonwealth v. Jordan, 207 Mass. 259, 93 N. E. 809 (1911); 2 WHARTON, CRIMINAL EVIDENCE (11th ed. 1935) § 770. In 9 HALSBURY, LAWS OF ENGLAND (2d ed. 1933) § 280, it is said "In criminal cases neither party can obtain evidence from the opposite side by means of interrogations or discovery of documents."

It goes without saying, of course, that the constitutional privilege against self-incrimination prevents any such concession to the prosecution. U. S. CONST. Amend. V; N. Y. STATE CONST. Art. 1, § 6.

9. An inspection has been allowed in the following cases: People v. Gerold, 265 Ill. 448, 107 N. E. 165 (1914); State v. Howland, 100 Kan. 181, 163 Pac. 1071 (1917); Sprinkle v. State, 137 Miss. 731, 102 So. 844 (1925); State v. Tippett, 317 Mo. 319, 296 S. W. 132 (1927). The New York cases which disagree with the holding of the instant cases are: People v. Terzani, 149 Misc. 818, 269 N. Y. Supp. 620 (County Ct. 1933) wherein the court granted an inspection of the gun held by the district attorney saying that the defendant should be entitled to the benefit of any reasonable opportunity to prepare his defence. People v. Wargo, 149 Misc. 461, 268 N. Y. Supp. 400 (Sup. Ct. 1933).

10. 4 T. R. 691, 100 Eng. Reprints 1248 (K. B. 1792).

11. *Ibid.*; State *ex rel.* Robertson v. Steele, 117 Minn. 384, 135 N. W. 1129 (1912).

12. The report of the board of inquiry was mere hearsay and as such would have been inadmissable upon the trial of the defendant since it is an elementary rule of evidence that the declarations of third parties, who are not examined as witnesses, made out of court, are inadmissable. RICHARDSON, EVIDENCE (5th ed. 1936) § 239.

13. See note 8, *supra.*

14. People v. Radeloff, 140 Misc. 690, 252 N. Y. Supp. 290 (Sup. Ct. 1931); cases cited in note 9 *supra.*

against him, he may investigate and prepare for trial.[15] It is because of their desire to effect justice that these courts allow an inspection of the prosecution's evidence, sometimes despite the absence of either statute or precedent authorizing them to do so.[16] It would seem that the result reached by these courts is the more favorable one, inasmuch as the state should not seek to procure a conviction by unfair concealment nor should it be less concerned with having the innocent acquitted than with convicting the guilty. The argument advanced by those favoring the majority rule, to the effect that there may be an unscrupulous tampering with the evidence, and that the inspection might lead to a manufacturing of a denial or alibi, does not carry enough weight to counterbalance the advantages of allowing an inspection.[17] If the evidence which is sought to be examined is true and is as damaging as the prosecution contends, then the state can suffer no harm by the examination, for where justice and fairness are concerned the truth can produce no harm.[18] If such an examination is properly supervised, as is done in civil cases, there will be no tampering nor injury to the evidence. On the other hand, if the evidence in the prosecution's hands is false or manufactured, the accused should be given an opportunity to expose its falsity and prepare his defense. Without the inspection he might have been convicted by false accusations and fabricated evidence.

This leads us to condemn the common law rule.[19] It is suggested that because of this, the legislature take a hand in the matter and, by statute, provide for a remedy similar to that granted in civil cases.

EVIDENCE—IMPEACHMENT OF PARTY'S OWN WITNESS.—Defendant was charged with the murder of an internal revenue investigator. The government introduced a witness who, prior to the trial, had, in a sworn statement, said, that he was present, when the defendant ordered a lookout to shoot any person approaching his illegal still. The District Attorney, several days before the trial, had obtained written evidence that the witness, while in jail had been persuaded by his sister to change his testimony when he came before the judge. However, the witness was placed on the stand and after obtaining his testimony, the government proceeded to introduce

15. State v. Hinkley, 81 Kan. 838, 106 Pac. 1088 (1910); State v. Jeffries, 117 Kan. 742, 232 Pac. 873 (1925) (dissent by Johnston, Ch. J.); State v. Tippett, 317 Mo. 319, 296 S. W. 132 (1927) (the court, in allowing a pre-trial inspection of a state witness' written statement, said "That it was desired that the state's evidence remain undisclosed, partakes of the nature of a game, rather than judicial procedure.")

16. United States v. Rich, 6 Alaska 670 (1922) (the accused sought to inspect and photograph a piece of glass in the custody of the prosecutor upon which it was claimed were fingerprints of the defendant. In granting the right to inspect, the court said "I am unable to see any ground for refusing the application except that there is no express statutory provision for granting it, and no precedent has been cited. . . . The defendant is entitled to have every opportunity to prepare his defense."). See State v. Bramhall, 134 La. 1, 63 So. 603 (1913).

17. See Daly v. Dimock, 55 Conn. 579, 589, 12 Atl. 405, 406 (1888); 3 WIGMORE, EVIDENCE (2d ed. 1923) § 1859g.

18. People v. Rogas, 158 Misc. 567, 287 N. Y. Supp. 100 (County Ct. 1936) (the accused's motion to permit his alienists to examine all statements made by him to members of the police department or members of the district attorney's staff was granted).

19. See 3 WIGMORE, EVIDENCE (2d ed. 1923) § 1863 wherein the learned commentator says "Modern rationalism should extend to the accused this right of inspection."

into evidence his prior inconsistent statements. On appeal from a judgment of conviction, *held*, one judge dissenting, the party offering the witness must be really surprised at his testimony before he may impeach him. A witness whose testimony the offeror knows will be adverse may not be called in order to get before the jury in the form of impeachment, contradictory statements of his, which are useful to the offeror. Judgment reversed. *Young v. The United States*, 97 F. (2d) 200 (C. C. A. 5th, 1938).

The extent of the right to impeach one's own witness has always been troublesome.[1] To this day the courts of various jurisdictions are unsettled. The strict common law rule would not permit a party under any circumstances to impeach his own witness.[2] However, inroads upon this rule have been made through the medium of alleged exceptions to the rule[3] and by legislation.[4]

Yet even today the various states by decision and by legislation seem almost unanimous in prohibiting the impeachment of a party's own witness by proof of poor character, supposedly upon the theory that the party producing the witness vouches for him.[5] However, they are far from unanimous in their attitude toward

1. As early as 1681 the courts of England were being vexed by the problem. Fitzharris Trial, 8 How. St. Tr. 233, 369, 373. It made its debut in this country in the early North Carolina case of State v. Norris, 1 Hay 429, 1 Am. Dec. 564 (N. C. 1796); and in New York with the case of Lawrence v. Barker, 5 Wend. 301 (N. Y. 1830).

2. Coolidge's Trial, 8 How. St. Tr. 549, 636 (1681); Warren Hastings' Trial, 31 Parl. Hist. 369 (1788); Ewer v. Ambrose, 2 B. & C. 746 (1825); Barham v. State, 130 Tex. Cr. Rep. 223, 93 S. W. (2d) 741 (1936); (1936) 15 TEX. L. REV. 132-3.

Supposedly the doctrine was the outcome of the ancient system of "oath helpers" or "compurgators". 2 WIGMORE, EVIDENCE (2d ed. 1923) 896. However, this theory has been discredited to some extent by writers. See M. Ladd, *Impeachment of One's Own Witness—New Developments* (1936) 4 U. CHI. L. REV. 69; Pollock & Maitland, 10 HISTORY OF ENGLISH LAW (1923) § 4; HOLMES, THE COMMON LAW (1881) 255 *et seq.*

3. Among the exceptions listed are, surprise, hostility of the witness, *etc.* See discussion in Putnam v. U. S. 162 U. S. 687, 697 (1896); see note 6, *infra.*

4. 15 & 16 Vict. C. 27 III (1852); 17 & 18 Vict. C. 125 § 22 (1854); TEX. ANN. CODE CRIM. PROC. (Vernon, 1926) art. 732; NEW YORK LAWS 1936, c. 191, amend. N. Y. LAWS 1937 c. 307 (affecting N. Y. CIV. PRAC. ACT § 343a and N. Y. CODE OF CRIM. PROC. § 8a. The New York statute provides that:

"In addition to impeachment in the manner now permitted by law, any party may introduce proof that a witness has made a prior statement, inconsistent with his testimony, irrespective of the fact that the party has called the witness or made the witness his own, provided that such prior inconsistent statement was made in any writing by him subscribed or was made under oath."

5. People v. Minsky, 227 N. Y. 94, 124 N. E. 126 (1919); see Coolidge's Trial, 8 How St. Tr. 549, 636 (1681); Hastings' Trial, 31 Parl. Hist. 369. However, this has been severely criticized. M. Ladd, *Impeachment of One's Witness—New Developments* (1936) 4 U. OF CHI. L. REV. 69, 2 WIGMORE, EVIDENCE 896. In 1934 The Commission on the Administration of Justice in the State of New York, in their report for that year (at p. 299) argued that since it often happens that counsel is "surprised" by the hostility of a witness, and since it is often necessary to produce witnesses that are hostile, the New York Civil Practice Act should be amended to provide that if the court should believe that such is the case, then the party should be permitted to give such proof of poor character of the witness (a) before the witness gives his testimony or (b) afterward, provided counsel first learned of the witness' hostility after he had testified. The New York State Bar Association adopted this proposal. (1935) 58 REP. N. Y. S. B. A. 235. In spite of this the New York Legislature completely omitted this provision when they adopted the new sections. N. Y. CIV. PRAC. ACT (1936) § 343a; N. Y. CODE CRIM. PROC. (1936) § 8a.

counsel attempting to get alleged prior inconsistent statements into evidence for the purpose of neutralizing the evidence given at the trial and impeaching the credibility of their own witness.[6] For years many courts in the United States have adhered to the old common law rule holding proof of such statements inadmissible.[7] Other courts have admitted them.[8] After the decision of *Melhuish v. Collier*,[9] the English Parliament passed a statute, providing in effect that when, in the opinion of the court, a party's own witness should prove adverse, the court may in its discretion permit proof of such prior inconsistent statements.[10]

Perhaps the most substantial reason for the rule against any impeachment of a party's own witness by the introduction of prior inconsistent statements, is the fear that the jury will consider the prior statement as proof of the material facts in issue and will not use it merely to impeach the credibility of the witness or nullify him as a witness.[11] The chief criticism of this reasoning seems to be that since a

6. These courts are not inconsistent in ruling that the ". . . trial court can in its discretion, permit upon direct examination a leading question to be asked when counsel conducting the examination is surprised by the statement of his witness." St. Clare v. United States, 154 U. S. 134, 150 (1894); 1 GREENLEAF, EVIDENCE (12 ed. 1866) § 444. Usually it is done for the purpose of refreshing or to clarify the witness' recollection. But it must be noted that there is a very important distinction between using a prior inconsistent statement for the purpose of refreshing recollection and its use to impeach. When used to impeach, the prior statement is proved in order to show that the testimony given should be regarded as a nullity. The effect sought when the party is merely attempting to refresh recollection by questioning the witness as to prior inconsistent statements, is to have the witness himself recall what he has formerly stated to admit its truth and if possible to explain away his apparent inconsistency.

It was the failure to recognize this distinction in two early English cases, Wright v. Becker, 1 Moo. & Rob. 414, 174 Eng. Reprint 143 (1833) and Melhuish v. Collier, 15 Q. B. 878, 117 Eng. Reprint 690 (1850), that has led many of our courts into the error of making exceptions to some of the most fundamental rules of evidence, on the ground of "surprise." See Putnam v. United States, 162 U. S. 687, 703 (1896), criticizing Bullard v. Pearsall, 53 N. Y. 230 (1873) on this ground. As a matter of fact the right to "refresh the memory of the witness" exists independent of surprise. Putnam v. United States, 162 U. S. 687 (1896); London Guarantee and Acc. Co. v. Woelfle, 83 F. (2d) 325, 334 (C. C. A. 8th, 1936); Ellicot v. Pearl, 10 Pet. 412 (1836); Sneed v. United States, 298 Fed. 911, 914 (1924); People v. Minsky, 227 N. Y. 94, 124 N. E. 126 (1919); 17 & 18 Vict. C. 125 § 22 (1854); TEX. ANN. CODE CRIM. PROC. (Vernon, 1926) art. 732.

7. People v. Di Martini, 213 N. Y. 203, 107 N. E. 501 (1914); Hurley v. State, 46 Ohio St. 320, 21 N. E. 645 (1889).

8. Selover v. Bryant, 54 Minn. 434, 56 N. W. 58 (1893); *cf.*, Fox v. Forty Four Cigar Co., 90 N. J. L. 483, 101 Atl. 184 (1917) (the court takes the stand that using prior inconsistent statements is not impeaching a witness, but rather contradicting him and it was admissible to show what he said was untrue). *Quaere:* whether this admission of proof of something the witness has formerly said does not operate as proof of the material fact, which the witness now swears to be otherwise? If his prior statement is to be proved by another witness as in Adams v. Wheeler, 97 Mass. 67 (1867) it is clearly "hearsay evidence". (1936) 15 Tex. L. Rev. 132-3 *citing:* State v. Gargano, 99 Conn. 103, 121 Atl. 657 (1923); State v. Bassone, 109 N. J. L. 176, 160 Atl. 391 (1932); 6 JONES, EVIDENCE, § 905; but *cf.* n. 6 *supra.*

9. 15 Q. B. 878 (1850).

10. 17 & 18 Vict. C. 125 § 22 (1854). It was also required that a proper foundation be laid for its admission.

11. Other reasons have been given, such as, that a party vouches for the credibility of

party is permitted to introduce proof that his opponent's witnesses have made prior inconsistent statements without hindrance from this fear, why then, should he not be permitted to introduce prior inconsistent statements made by his own witness?[12] Why could not the evidence be admitted with judicial instructions placing limitations on the right of the jury to consider it?

Yet it may be answered that when a party is dealing with *his own witness*, the situation is not the same. In the first place it is not necessary, then, for him to put the testimony before the jury. Generally speaking a party must allow his adversary's witness to speak his piece, even though he knows in advance how damaging that witness' testimony will be. Because this is true, the court will allow the wide latitude permitted on cross examination. In doing this the court does not mean to permit a prior inconsistent statement to go as proof of the material fact, but solely for the purpose of casting doubt upon the credibility of the witness and neutralizing the effect of his damaging testimony. Of course, when the party knows in advance that his witness will be adverse the best way to nullify his testimony is simply not to place him on the stand.

When a party produces a witness innocently, in the belief that he will testify as he has formerly stated and is suddenly confronted with a contrary statement the situation is different. It is only fair then that the party be given as wide latitude in the examination of his witness as he would have, had the witness been produced by his opponent. But here also the purpose of admitting any prior inconsistent statement is to cast doubt upon the credibility of the witness. His testimony ought never to be regarded as substantive and careful instructions should be given to the jury as to their limitations in considering it.[13]

So it seems that the court in the instant case is quite sound in deciding that when the government permitted itself to be entrapped, and then sought to have the court admit evidence which would not only free it from its predicament, but be the basis for a verdict in its favor, the rule must be against it.[14]

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his witness' statements. This is of course no more true than the argument that a party producing a witness always vouches for the good character of the witness.

12. When the actual testimony is not prejudicial to the party, proof of prior inconsistent statements is not admissible even though the party is actually surprised. Hickory v. United States, 151 U. S. 303, 308 (1894). Nor is it admissible when the witness has merely failed to render the full co-operation anticipated. Kuhn v. United States, 24 F. (2d) 910 (C. C. A. 9th, 1928). Nor where the party has unduly delayed in asserting "surprise". Royal Insurance Co. v. Eastham, 71 F. (2d) 385, 388 (C. C. A. 5th, 1938).

13 "The maximum legitimate effect of impeaching testimony can never be more than the cancellation of the adverse answer by which the party is surprised." Kuhn v. United States, 24 F. (2d) 910 (C. C. A. 9th, 1928).

A party may not as a matter of right have such statements put before the jury from which they may draw an inference as to the facts, and if the other evidence is not sufficient the court may direct a verdict. N. Y. Life Insurance Co. v. Bacalis, 94 F. (2d) 200 (C. C. A. 5th, 1938).

14. A study of the statute recently enacted on this topic by the New York Legislature (see n. 4 *supra*) seems to indicate that even under it, the statements will be admitted only after surprise and only for the purpose of nullifying the witness. The law was passed in response to sponsors who argued that "counsel is often taken by surprise" by the testimony of his witness. Again the remedy is in addition to the method of impeachment "now permitted by law." But as the notion of impeachment implies merely nullification of a witness and as the best means of nullifying a witness, known to be adverse, is to keep him off the stand, unless an attorney is really surprised, he should not be permitted to avail himself of the statute.

NEGLIGENCE—LIABILITY OF VENDOR TO VENDEE IN THE SALE OF ARTICLES POTENTIALLY DANGEROUS.—Defendant, a vendor of various electrical appliances, sold plaintiff an electric washing machine with wringer attachment. The wringer was equipped with a safety device which, unknown to the parties concerned, had been faultily constructed. Plaintiff's hand was injured by the subsequent failure of the device to function. Plaintiff sued in trespass for the injuries resulting from defendant's negligence in representing the machine as free from defects, and in failing to inspect the machine before sale. On appeal from a judgment for plaintiff, based upon a jury's verdict, *held,* first, negligent misrepresentation[1] had been shown, and second, the defendant, as vendor of a machine which would be dangerous if faultily constructed, had assumed the duty to inspect and was under a duty to inspect it for defects before selling it. Judgment affirmed, one judge dissenting. *Ebbert v. Phila. Electric Co.,* 298 Atl. 323 (Penn. Sup. Ct., 1938).

The attempt to fashion a single standard of liability for both manufacturers and subsequent vendors in regulating their duties to their immediate vendees and to third persons with whom they are not in privity has never been more than partially successful.[2] In this respect, liability for negligence resulting in injury to vendees or third persons is no exception. Thus, although both the remote manufacturers and the immediate vendor can be held liable for affirmative negligence in the making, handling, etc., of the articles of their business,[3] a double set of rules applies to their negligent omissions to inspect those articles for defects.[4] This is true particularly in the case of articles inherently dangerous.[5] In such case the manufacturer is liable to all, vendees and third persons, for injuries occasioned by his dangerous instrumentality, if he has neglected to inspect it.[6] The vendor of such article, however, is not burdened with the same liability. Subject to certain exceptions, the vendor of a potentially dangerous article is under no duty to inspect it before transferring it to the vendee.[7] The reasons for this are obvious: A vendee who pur-

1. The instant decision will not be considered in this discussion insofar as it is based upon the point of negligent misrepresentation. However, for discussions of the effect of the decision in the lower court [126 Pa. Sup. 351, 191 Atl. 384 (1937)], which this decision affirmed, on the rules governing negligent misrepresentation in the courts of Pennsylvania, see 86 U. of Pa. L. Rev. 107 (1937), and 4 U. of Pittsburgh L. Rev. 82 (1937).

2. 1 WILLISTON, SALES (2d ed. 1924) § 233; VOLD SALES (1931) § 146 (a); Note (1937) 37 Col. L. Rev. 382.

3. Employers' Liability Corp. v. Columbus McKinnon Chain Co., 13 F. (2d) 128 (W. D. N. Y. 1926) (manufacturers); Favo v. Remington Arms Corp., 67 App. Div. 414, 73 N. Y. Supp. 788 (3d Dep't 1901) (manufacturers); Pelletier v. Dupont, 124 Me. 269, 128 Atl. 186 (1925) (manufacturer); Hasbrouck v. Armour, 139 Wis. 357, 121 N. W. 157 (1909) (manufacturer and vendor interpleaded).

4. Peaslee-Gaulbert Co. v. McMath, 148 Ky. 265, 274, 276, 146 S. W. 770 (1912) (vendor); Simons v. Sun Ray Water Co., 162 N. Y. Supp. 968 (1917) (vendor); Miller v. Steinfeld, 174 App. Div. 337, 160 N. Y. Supp. 800 (3d Dep't 1916) (manufacturer).

5. The definition of the phrase "inherently dangerous" varies from "necessarily and naturally dangerous" to "potentially dangerous". The instant case opines that every machine which is electrically driven should be considered inherently dangerous (page 326). For an excellent discussion of this phrase, see McPherson v. Buick Motor Co., 217 N. Y. 382, 387 *et seq.* (1916).

6. Heckel v. Ford Motor Co., 101 N. J. L. 385, 128 Atl. 242 (1925); McPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916); Stultz v. Benson Lumber Co., 49 F. (2d) 848 (Cal. App. 1935).

7. Gould v. Slater Woolen Co., 147 Mass. 315, 17 N. E. 531 (1888); Hasbrouck v. Armour & Co., 139 Wis. 357, 121 N. W. 157 (1904); Miller v. Senson, 189 Ill. App. 355,

chases an article, knowing it was manufactured by a person other than the vendor, and relying on the reputation of that manufacturer, certainly cannot impose a tort liability on the vendor, for any defect in the article occasioned by the manufacturer's negligence.[8] Again, a vendor ignorant of a defect and unfamiliar with the process of manufacture of the article would not suspect any risk in delivering it to another, and his action in doing so would not be unreasonably careless. The exceptions to this rule can be grouped into three general classes: First, where the vendor has expressly or impliedly[9] obligated himself to perform such inspection;[10] second, where the vendor, because of special knowledge of or previous experience with the articles, should know that they are dangerous for use;[11] and third, where the vendor, by reason of having changed, installed, stored or worked on the articles in question, or represented himself as their manufacturer, has stepped over into the manufacturer's field, and accepted his liability.[12]

Grounded as the general rule is on vague and generalized principles of negligence, its boundaries are naturally difficult to define, and there have been cases which seem to have disregarded the rule,[13] in favor of a more stringent check on vendors. But by far the great majority of cases, in New York as well as in the country at large, have accepted the double standard rule.[14]

It will readily be seen, then, how far beyond the warrant of satisfactory authority

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7 N. C. C. A. 1073 (1914); Bruckel v. F. Milhau's & Sons, 116 App. Div. 832, 102 N. Y. Supp. 395 (2d Dep't 1903); Miller v. Steinfeld, 174 App. Div. 337, 160 N. Y. Supp. 800 (3d Dep't 1916); Liedeker v. Sears, Roebuck & Co., 249 App. Div. 835, 292 N. Y. Supp. (2d Dep't 1937); Simons v. Sun Ray Water Co., 162 N. Y. Supp. 968 (1917).

8. Peaslee-Gaulbert Co. v. McMath, 148 Ky. 265, 146 S. W. 770 (1912).

9. The distinction, often overlooked in discussions of cases of this character, must be constantly kept in mind, between the obligations expressly or impliedly assumed by vendors as governed by the laws of negligence, which we are considering here, and the obligations (express and implied) which are forced upon vendors by UNIFORM SALES ACT (1911) §§ 15, 16, but which we are not considering here. Of course plaintiff, if she had so desired, could have included in her complaint a cause of action based on the above-mentioned sections of the Sales Act, together with her cause in negligence. It has been held that Section 69 (2) of the Act (governing the vendee's selection of remedies) does not preclude the combination of the two. Friedman v. Swift Packing Co., 18 F. Supp. 596 (S. D. N. Y. 1937). This case was favorably commented upon in Llewellyn, On Warranty of Quality, and Society II (1937) 37 Col. L. Rev. 341, 390.

10. UNIFORM SALES ACT (1911) § 15; Ryan v. Progressive Grocery Stores, 255 N. Y. 388, 175 N. E. 105 (1931); Note (1937) 37 Col. L. Rev. 77.

11. Clarke v. Army & Navy Co-operative Society, 1 K. B. 155 (1903), Gerkin v. Brown & S. Co., 177 Mich. 45, 143 N. W. 49; Restatement, Torts, § 402.

12. Cox v. Mason, 89 App. Div. 219, 85 N. Y. Supp. 973 (2nd Dep't. 1903); Heinimann v. Barfield, 136 Ark. 456, 207 S. W. 58 (1918); King Hardman Co. v. Ennis, 39 Ga. App. 355, 147 S. E. 119 (1929); Restatement, Torts, § 401.

13. Cox v. Mason, 89 App. Div. 219, 85, N. Y. Supp. 973 (2d Dep't 1903); Garvey v. Namm, 136 App. Div. 815, 121 N. Y. Supp. 442 (2d Dep't 1910). But both of these cases can be considered as coming under two of the exceptions to the general rule. In Cox v. Mason, the vendor installed the article and his installation may have been faulty. Garvey v. Namm, which the prevailing opinion cites as a case in point, seems to have been decided on the assumption that the vendor had represented himself as the manufacturer of the articles in question, even though such assumption is nowhere expressly stated.

14. For a comprehensive list of such cases, see 13 A. L. R. 1184, *et seq.* (1921). See note 7, *supra*.

the present decision goes.[15] It is not alleged that the vendor worked on the article, to make him liable under the third exception,[16] nor that he had any special knowledge of or previous experience with its faulty character which would make him as a reasonable man foresee a risk to the plaintiff, and so be brought within the second exception. But the majority opinion holds that he has impliedly obligated himself to make the inspection because he employed service men,—and thus the case seems to be brought by the court within the first exception.

The prevailing opinion contends that the defendant assumed the duty to inspect. The basis for the inference that defendant promised to inspect is found in the fact that defendant employed service men whose salaries obviously were paid from the retailer's mark-up price charged the vendee. The vendor, says the court, impliedly promised to use those service men for the protection of the vendee by having them inspect all machines before sale. But unless the vendor represented to the vendee that he would inspect and the vendee relied upon the representation, how can he be bound to inspect? Here, there was no such representation, and the vendee's only natural reliance was on the manufacturer. The court's intimation that the vendee was paying for such inspection in his purchase price might well be met with the claim that such a charge would be applied to the expense of the service men for repairing the machines *after* sale. When there is no duty to inspect imposed by the law of negligence on the vendor it cannot be said that he can assume the duty merely by hiring potential inspectors. In effect then, the prevailing opinion seems to extend the responsibility of vendors to liability for careful inspection of all machinery[17] sold out of the "original package".[18] It does this by placing the *ratio decidendi* on the opportunity, rather than the duty, to inspect. This seems at variance with the basic concepts of negligence.[19]

15. As precedent for its startling decision, the majority opinion cites but four cases: King Hardware Co. v. Ennis, 39 Ga. App. 355, 147 S. E. 119 (1929); Moore v. Jefferson Distilling Co., 12 La. App. 405, 123 So. 384 (1929); Garvey v. Namm, 136 App. Div. 815, 121 N. Y. Supp. 442 (2d Dep't 1910); Guinan v. Famous Players-Lasky Co., 267 Mass. 501, 167 N. E. 235 (1929). Of these, the King Hardware case was decided on the ground of negligent misrepresentation, rather than simple negligence in failing to inspect. Moore v. Jefferson Co. was reversed on appeal, 169 La. 1156, 126 So. 691 (1930). Garvey v. Namm is probably not in point (see note 14). In the Guinan case, the vendor-defendant negligently wrapped the article, so that it caught fire; that constitutes affirmative negligence, which is not at issue in this case.

16. The court, however, intimates that the demonstration of the washing-machine by defendant's salesman was such a "working" on the article as would lay on defendant the duty to inspect. This would bring the case within the third exception, if true. However, it would seem to be stretching the meaning of the word "demonstration" to bring it under the classification of actual handling. A demonstration of an article is generally not, as this court thinks, intended to test *how the machine works,* but to show *how to work the machine.* The buyer is still relying on the manufacturer's trade name as his guaranty of fitness.

17. It may be noted here that food and drugs are subject to a more stringent rule in this regard than articles of less perishable nature. Ward v. Great A. & P. Tea Co., 231 Mass. 90, 120 N. E. 225 (1918) (canned beans); Ryan v. Progressive Grocery Stores, 255 N. Y. 388, 175 N. E. 105 (1931) (bread); Perkins, Unwholesome Food as a Source of Liability (1919) 51 IOWA L. BULL. 6.

18. The so-called "original package" rule is, however, not inflexible. If from past experience or special training with articles of the same sort, the vendor ought to know of defects, he is liable even though the article is sold in a sealed carton. Gerkin v. Brown, 177 Mich. 45, 143 N. W. 48 (1913).

19. Restatement, Torts, § 282.

The decision also imposes a burden on all business, by necessitating the wasteful maintenance of a double inspection force, one at the plant and one at the store. The dissenting opinion's position was wisely taken.

PARENT & CHILD—LIABILITY OF PARENT TO CHILD IN PERSONAL INJURY ACTION.—Plaintiff's father negligently backed his truck over the plaintiff, a minor, causing him serious injuries. Action was brought against the parent by the plaintiff's cousin, who was appointed his guardian. On appeal from an order granting the defendent's motion for judgment in his favor, *held,* exceptions overruled. An unemancipated minor child can not maintain an action against his parent for personal injuries caused by the negligence of the parent. *Luster v. Luster,* 13 N. E. (2d) 438 (Mass. 1938).

There has been no English decision on the question of the liability of a parent for a negligent personal injury to his minor child.[1] However, English authorities about 1870 seemed unanimous in the opinion that a child could recover for intentional wrongs, such as assault and defamation.[2] American writers of the nineteenth century, prior to 1891, were not in accord as to whether the child should have an action for any personal injuries where a parent was concerned.[3] Before 1891, decisions in the United States, seemed to lean towards allowing the child some civil rights for personal torts against a person standing *in loco parentis,* whether the harm was intentional or negligent.[4] However, in the leading United States case of *Hewellette v. George,*[5] in 1891, where the tort was intentional the child was denied the right to sue the parent on the ground that it was against public policy, and in *Small v. Morrison*[6] the same rule was adopted where the tort was a negligent harm. These cases were followed by others all in accord with rules laid down in the *Hewellette* case[7] and in the *Small* case.[8] The general weight of authority then

1. See Small v. Morrison, 185 N. C. 577, 584, 118 S. E. 12, 18, (1923); Dunlap v. Dunlap, 84 N. H. 354, 357, 150 Atl. 905, 907 (1930). But see EVERSLEY, DOMESTIC RELATIONS (1885) 601; BEVANS, NEGLIGENCE (4th ed.) 232.

2. ADDISON, TORTS (1860) 423; POLLACK, TORTS (1887) 107; CLERK AND LINDSELL, TORTS (1889) 152; REEVES, DOMESTIC RELATIONS (3d ed. 1867) 421. See also Small v. Morrison, 185 N. C. 577, 584, 118 S. E. 12, 18 (1923); Dunlap v. Dunlap, 84 N. H. 354, 357, 150 Atl. 905, 907.

3. COOLEY, TORTS (1879) 171, says that on principle there seems to be no reason for not allowing the action.

SCHOULER, DOMESTIC RELATIONS (6th ed. 1921) § 275, would prohibit suits for payment of wages promised and also for torts.

4. McCurdy, *Torts Between Persons in Domestic Relations* (1930) 43 HARV. L. REV. 1030, 1061, 1062, (1929-1930) cites Fitzgerald v. Northcote, 4 F. & F. 651 (1865); Gould v. Christienson, Fed. Cas. No. 5, 636 (S. D. N. Y. 1836); Lander v. Seaver, 32 Vt. 114 (1859).

5. 68 Miss. 703, 9 So. 885, 13 L. R. A. 682 (1891).

6. Small v. Morrison, 185 N. C. 577, 118 S. E. 12, (1923).

7. Cases where the child was denied recovery for intentional injuries are: Smith v. Smith, 81 Ind. App. 566, 142 N. E. 128 (1924); McKelvey v. McKelvey, 111 Tenn. 383, 77 S. W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905).

Several courts have held that an unemancipated minor child may maintain an action against a person standing *in loco parentis* for malicious assault or cruel and inhuman treatment. They are: Treschman v. Treschman, 28 Ind. App. 206, 61 N. E. 961 (1901); Dix v. Martin, 171 Mo. App. 266, 127 S. W. 133 (1913); Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640 (1903); Steber v. Norris, 188 Wis. 366, 296 N. W. 173 (1925); Wick v. Wick, 192 Wis. 260, 212 N. W. 787 (1927).

has been in favor of refusing the child a cause of action where the parent is the defendant. Thus the principle case is in line with established authority.

Although this is the first decision to this effect in Massachusetts, the result was expected not only because it accords with precedent, but also because Massachusetts still clings to rather outmoded concepts of family law, for example in denying a wife a right of action against her husband for bodily injuries.[9] But when one considers that the rule of the instant case obtains even in states where a wife is permitted such an action,[10] the situation raises a query as to its soundness.

Those who believe that the child should not be allowed an action point out that from ancient times it has been held that the family constitutes the basic unit of society. The law has always aimed to maintain family integrity, and to preserve domestic peace and tranquility.[11] It is said that actions by the child against the parent militate against this purpose of the law. They tend to alienate the members of the domestic unit.[12] During the minority of the child, any possible claims which he might have would have to be investigated, often by outsiders whose intrusions would stir up dissension.[13]

While it is easy to agree with the thesis that the family is the basic unit of society, it may be noted that after the child has received personal injuries caused by the parent, particularly if they are serious, there is not much domestic peace to be preserved.[14] Domestic tranquility does not concern the courts in other related fields. A child has a right to sue his parent for his property, if misused,[15] or on a contract,[16] which law suits are as disruptive of family harmony as those

8. Cases where child was denied recovery for unintentional injuries are: Mesite v. Kirchenstein, 109 Conn. 77, 145 Atl. 753 (1929); Elias v. Collins, 237 Mich. 175, 211 N. W. 88 (1926); Beleson v. Skilbeck, 185 Minn. 537, 242 N. W. 1 (1932); Reingold v. Reingold, 115 N. J. L. 532, 181 Atl. 153 (1935); Ciani v. Ciani, 127 Misc. 304, 215 N. Y. Supp. 767 (Sup. Ct. 1926); Sorrentino v. Sorrentino, 248 N. Y. 626, 162 N. E. 551 (1928); Kelly v. Kelly, 158 S. C. 517, 155 S. E. 888 (1930). The writer has found only one case squarely recognizing a cause of action against the parent by a minor child, and this was decided in Canada. The harm in this case was an unintentional one. Fidelity & Casualty Co. v. Marchand, 4 D. L. R. 157 (Can. 1924).

However, a different result may be reached where the child was emancipated. Crosby v. Crosby, 230 App. Div. 651, 246 N. Y. Supp. 384 (1st Dep't 1930) held that a mother could sue an emancipated child for negligence. It would seem that the courts, to be consistent, would have to allow also an emancipated child to sue its parent.

9. MASS. GEN. STAT. (1932) c. 209, § 6.

10. *E.g.* New York, Rhode Island, New Jersey, New Hampshire and North Carolina.

11. Hewellette v. George, 68 Miss. 703, 9 So. 885, 887 (1891); Small v. Morrison, 185 N. C. 577, 118 S. E. 12, 13 (1923); Wick v. Wick, 192 Wis. 260, 212 N. W. 787 (1927).

12. The desire of the law to avoid this, is said to be evidenced by the fact that some states still deny the wife actions at law against her husband. The Massachusetts court in the instant case points out that the reason "would seem to lie in views of public policy equally applicable as between parent and minor child."

13. Luster v. Luster, 13 N. E. (2d) 438, 439 (Mass. 1938).—The only other alternative, it is said, would be to withhold the prosecution of such claims until the child reached majority. By this time, however, witnesses would probably be difficult to obtain.

14. McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1074 (1929-30).

15. Lamb v. Lamb, 146 N. Y. 317, 41 N. E. 26 (1895).

16. *In re* Merchant's Estate, 53 Hun. 638, 6 N. Y. Supp. 875 (Sup. Ct. 1889); Hall v. Hall, 43 N. H. 293.

for bodily injuries.[17] May it not be claimed that truly the rights of a child concerning his person are of greater importance to him than his property rights?[18]

An "intruder," a friend represents the child in actions against his parent on a contract or for misuse of his property. He is in fact required by law in the Surrogate's court as special guardian where infants interests are involved.[19] There seems to be no legal reason for distinguishing between guardians appointed by the courts in these cases and in cases where the action is for personal injuries, as to their effect on the family unit.

It is significant that in New York and many other states[20] a married woman now "has a right of action against her husband for his wrongful or tortious acts resulting to her in any personal injury."[21] Certainly actions between husband and wife are as disruptive of domestic tranquility as between parent and child.[22] The present trend of the courts appears to be towards allowing members of the family unit causes of action against each other.

Another argument urged on behalf of the rule in the principal case is that the parent must be privileged in rearing and disciplining his child and he should not be impeded by threats of possible civil action.[23] Granted that the parent must have certain rights in rearing his child and that *reasonable* family discipline must be permitted, it does not follow that the child's right to recover for personal injuries must be refused in all cases.[24] The law should not allow the parent to conceal himself behind a parent's immunity for injuries to his child for which he would be liable if the victim were a child other than his own. To the claim that the child is sufficiently protected by the criminal law,[25] it may be said that it would not be deemed enough as to any other wrong.[26] Also the remedy of monetary compensation is certainly important to the child, if he is disabled. It would seem then that the child should certainly be allowed to sue in those cases where the wrong is intentional.[27] Moreover, when one considers purely negligent acts, which are unintentional, the domestic tranquility here may often be as disturbed as in the case of intentional harms. A careless father should not be excused on the grounds that he is a father. The parent ought not be excused particularly where

17. Wick v. Wick, 192 Wis. 260, 261, 212 N. W. 787, 788 (1927).

18. Wick v. Wick, 192 Wis. 260, 261, 212 N. W. 787, 788 (1927).

19. N. Y. SURR. CT. ACT, §§ 173, 175, 179.

20. New York, Rhode Island, New Hampshire, and North Carolina.

21. N. Y. LAWS 1937, c. 669, amendment to N. Y. DOM. REL. LAW (1909) § 57. For discussion of the law see 6 FORDHAM L. REV. (1937) 493.

The New York cases denying the child the right to sue were both decided prior to the passage of this law. Ciani v. Ciani, 127 Misc. 304, 215 N. Y. Supp. 767 (Sup. Ct. 1926); Sorrentino v. Sorrentino, 248 N. Y. 626, 162 N. E. 551 (1928).

22. Dunlap v. Dunlap 84 N. H. 354, 356, 150 Atl. 905, 906 (1930).

23. McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV., 1030, 1076 (1930).

24. Dunlap v. Dunlap, 84 N. H. 354, 150 Atl. 905, 909, 910 (1930).

25. Hewellette v. George, 68 Miss. 703, 704, 9 So. 885, 886 (1891); Materese v. Materese, 47 R. I. 131, 131 Atl. 198 (1925).

26. Dunlap v. Dunlap, 84 N. H. 354, 150 Atl. 905 (1930).

27. *Cf.* Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891), with Roller v. Roller, 185 N. C. 577, 178 S. E. 12 (1923), holding that a father is not liable civilly to his minor daughter for rape.

The two New York cases were concerned with unintentional injuries caused by the parent. Possibly the Court of Appeals will distinguish between them and an action by the child for intentional injuries, if the case comes up.

it appears probable that the future welfare of the child can only be protected by recovery from the careless parent and putting the sum aside for the child's care.

A curious problem arises where an insurer of a parent seeks to avoid liability by claiming that there is danger of a fraud if the child be permitted civil actions against the father. The danger of collusion would be reason for carefully examining the cases which come up.[28] A trust fund could be set up for the child consisting of the damages recovered, until the child is emancipated or reaches majority, so as to prevent the parent from gaining as a result of his own misdeeds.[29] Furthermore, the danger of collusion may be diminished by a statutory provision similar to that recently added to the Insurance Law when the wife was granted a right of action for personal injuries against her husband.[30] It was provided that policies must be extended in writing to include the insured's family, before courts will allow recovery on the basis of the new right granted to the wife.

REAL PROPERTY—AFFIRMATIVE COVENANTS—ENFORCEMENT AGAINST GRANTEES OF COVENANTOR.—The defendant's predecessor in title had for himself and his successors in interest covenanted with his grantor that the land in question should be subject to the payment of a stated yearly sum of money. This sum, which was to be a lien on the land until paid, was to be devoted to public purposes in the neighborhood by the grantor or its assignees. It was agreed between the parties that this covenant, which was limited in its duration to twenty-three years, was to run with the land. An action was brought by the plaintiff, as assignee of the grantor, to foreclose the lien claimed to be created by the covenant, against the defendant, who purchased the land subject to the covenant. On appeal from a judgment on the pleadings for the plaintiff' *held,* the covenant ran with the land and is enforceable by the plaintiff.[1] *Neponsit Property Owners' Ass'n v. Emigrant Ind. Savings Bank,* 278 N. Y. 248, 15 N. E. (2d) 793 (1938).

The difficulties which courts have always encountered in the subject of covenants running with the land are sharply accentuated when the covenant involved calls for the doing of an affirmative act. The English courts have steadfastly adhered to their policy of non-enforcement of affirmative covenants, by refusing to let the burden of the covenant run with the land.[2] But most American courts have rejected the consistent rigidity of the English rule, and as a consequence flounder helplessly in a welter of divergent authority.[3] New York more than any other

28. See (1933) 33 COL. L. REV. 360, 361; also (1931) 16 CORN. L. REV. 386, 390.

29. See (1931) 16 CORN. L. REV. 386, 390.

30. N. Y. LAWS OF 1937, c. 669, adding subd. 3a to § 109 of the Insurance Law. See (1937) 6 FORDHAM L. REV. 496.

1. In holding that the covenant was enforcible by the plaintiff Property Owners' Association, the court chose to disregard the corporate entity of the plaintiff and to view it as a group of individual property owners who were bringing this action in furtherance of their common interests. In so doing it carefully left open the question whether covenants in a deed will be enforced on equitable principles against subsequent purchasers with notice, at the suit of a party without privity of contract or estate. This aspect of the court's decision will not be discussed.

2. Austerberry v. Oldham Corp., 29 Ch. D. 750 (1884); E. & G. C., Ltd. v. Bate, 79 L. J. 203 (K. B. 1935); *cf.* Spencer's Case, 5 Coke 16a, 77 Eng. Reprints 72 (K. B. 1583).

3. A recent compilation of forty-two affirmative covenant cases decided within the past ten years gives some interesting figures on the conflict in the American cases: twenty-one cases enforced the covenants, nineteen refused to enforce them, and two agreed in *dicta* that they were enforceable. See Note (1938) 47 YALE L. J. 821.

state has adhered to the pattern of the English rule, and but twenty-five years ago bluntly refused to sanction the running of any affirmative covenants, with stated exceptions,[4] none of which contemplated the positive act of paying money for use in connection with land. With the present case, it appears that a new class of exceptions is created.

More than any other of the so-called "essentials" of enforceable real covenants,[5] the centuries-old requirement that the covenant must "touch" or "concern" the land[6] has provoked confusion. In the instant case the court's decision to test the covenant in this respect by its effect on the legal relations of the parties,[7] rather than by the hypertechnical distinctions so often employed,[8] has the merit of using a realistic and practical approach to arrive at a just result. Yet the vagueness and generality of the rule so formulated lessens its workability as a standard of comparison, for it will not always be easy to say whether a given covenant *substantially* alters the rights of the parties flowing from the ownership of the land. But assuming the desirability of enforcing a covenant such as is here involved, it is clear that the New York attitude toward affirmative covenants has been considerably revised for the better, as was inevitable. It is to be remembered that heretofore courts in this jurisdiction have been overly hesitant about requiring the owner of land to perform positive acts in relation thereto,[9] and even party wall

4. See Miller v. Clary, 210 N. Y. 127, 132, 134, 103 N. E. 1114, 1116 (1913). The court conceded the necessity for some flexibility in the rule, and listed as exceptions affirmative covenants relating to party walls (but see note 10, *infra*) and the building of fences along boundaries, to provide railroad crossings, to repair private ways, and covenants in leases. The New York rule is discussed at some length in Friedman, *The Scope of Mortgage Liens on Fixtures and Personal Property in New York*, p. 360 n. 131, *supra*.

5. Dean Clark lists the essential characteristics, aside from the form of the covenant, as follows: (1) the parties must intend that the covenant should run with the land; (2) it must touch or concern the land with which it runs; and (3) there must be privity of estate between the promisee or party claiming the benefit of the covenant and the right to enforce it, and the promisor or party who rests under the burden of the covenant. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" (1929) 74. It has been suggested that "privity of estate" in the last requirement be done away with, as meaningless and confusing. WALSH, LAW OF PROPERTY (2d ed. 1927) 685.

6. Spencer's Case, 5 Coke 16a, 77 Eng. Reprints 72 (K. B. 1583). It has been suggested that it would be more accurate to say that the covenant touched and concerned the *ownership* of land, rather than the land itself. Gavit, *Covenants Running with the Land* (1930) 24 ILL. L. REV. 786, 787. At any event, the courts' lack of accuracy in using the phrase has caused much of the confusion. Bigelow, *The Content of Covenants in Leases* (1914) 12 MICH. L. REV. 639.

7. This test is suggested in CLARK, *op. cit. supra* note 5, at 76.

8. *E.g.*, Coulter v. Sausalito Bay Water Co., 122 Cal. App. 480, 10 P. (2d) 780 (1932) (covenant must be strictly construed even though parties intend it to run); Poage v. Quincy, O. & K. C. R. R., 23 S. W. (2d) 221 (Mo. App. 1930) (applies equitable doctrine that purchaser must have notice, although covenant was clearly enforceable at law); Epting v. Lexington Water Power Co., 177 S. C. 308, 181 S. E. 66 (1936) (covenant by riprarian owner to supply power does not "touch" or "concern" land); see (1936) 13 N. Y. U. L. Q. REV. 313.

9. Miller v. Clary, 210 N. Y. 127, 103 N. E. 1114 (1913); Guaranty Trust Co. v. New York & Q. C. Ry., 253 N. Y. 190, 170 N. E. 887 (1930); Riverview Manor Ass'n v. Bruckner, 170 App. Div. 918, 154 N. Y. Supp. 1142 (2d Dep't 1915), *aff'd*, 223 N. Y. 526, 119 N. E. 1074 (1918).

agreements have not been treated too tenderly.[10] That recent years have witnessed some laudable liberalization of this view, both in the Court of Appeals[11] and the lower courts,[12] cannot be denied, but such decisions were content to whittle away at *Miller v. Clary*.[13] A re-examination and restatement of the principles of affirmative covenants was needed, and the instant case fulfills that need, though it cannot, and does not pretend to, furnish a convenient rule of thumb to test the enforceability of any given real covenant.[14]

10. The liberal view on party wall agreements was supported in one of the earliest cases. See Van Renssalaer v. Hays, 19 N. Y. 68, 91 (1859). But the court retrogressed in Cole v. Hughes, 54 N. Y. 444 (1873), and held such a covenant to be merely personal. The rule was again extended in Mott v. Oppenheimer, 135 N. Y. 312, 31 N. E. 1097 (1892), to permit the covenant to run, and the cases are reviewed and distinguished at painstaking length in Sebald v. Mulholland, 155 N. Y. 455, 50 N. E. 260 (1898). For a criticism of the New York rule see Clark, *Party Wall Agreements as Real Covenants* (1924) 37 HARV. L. REV. 301, 317.

11. Morgan Lake Co. v. New York, N. H. & H. R. R., 262 N. Y. 234, 186 N. E. 685 (1933) (covenant to pay for any damage done to ice in lake enforced against covenantor's successor in interest).

12. Especially Lawrence Park Realty Co. v. Crichton, 218 App. Div. 374, 218 N. Y. Supp. 278 (2d Dep't 1926); Kenilwood Owners' Corp. v. Jaybro Realty & Devel. Co., 156 Misc. 604, 281 N. Y. Supp. 541 (Sup. Ct. 1935).

13. 210 N. Y. 127, 103 N. E. 1114 (1913); see note 4, *supra*.

14. For example, a *perpetual* covenant to pay an *unlimited* sum of money for use in connection with land would seem enforceable under the text here. However, it is doubtful whether a court would enforce the running of such a covenant in an extreme case—*e.g.*, where the land is sought to be charged with an exorbitant sum to be expended for improvements. In such a case it would seem that a realistic approach coupled with the policy of fostering the alienability of land would impel the court to refuse enforcement.