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RECENT DECISIONS

COLLECTIVE BARGAINING — GOOD FAITH BARGAINING — EMPLOYER'S INSISTENCE UPON BENEFICIAL CONTRACT IS NOT PER SE EVIDENCE OF BAD FAITH BARGAINING. — Petitioners sought to have a cease and desist order of the NLRB set aside.[1] The Board's order was based on findings that petitioners had violated the Labor Management Relations Act[2] by making various threats and promises to the employees, instituting several unilateral wage increases without consulting the employees' representatives, and failing to bargain in good faith. In regard to the refusal to bargain in good faith, it was found that throughout the negotiations, petitioners insisted upon provisions which gave the union little, if any, real voice in important aspects of employment relations. The Board felt that, although none of the petitioners' proposals in the negotiations were in themselves violative of the act, taken as a whole they reflected bad faith. The court found substantial evidence to support the 8(a)(1) violations in coercing the employees; however, regarding the 8(a)(5) violation, it *held*: petition granted. The fact that an employer insists on a contract which leaves the employees in no better state than they were without it is not a failure to bargain in good faith. *White v. NLRB*, 255 F.2d 564 (5th Cir. 1958).

Since the passage of the Wagner Act in 1935,[3] it has been unlawful for an employer "to refuse to bargain collectively with the representatives of his employees . . . ."[4] The NLRB and courts quickly added the requirement that the bargaining be carried on in good faith.[5] This need for implication was eliminated in 1947 with the enactment of the Labor Management Relations Act, whereby the parties are expressly required "to confer in good faith with respect to wages, hours and other terms and conditions of employment . . . ."[6] Good faith is a question of fact for the Board,[7] and its decision will not be overthrown if supported by substantial evidence.[8]

The purpose of § 8(a)(5) is not to compel employers to reach an agreement with their employees,[9] nor to dictate to the parties what provisions are to be contained in any agreement they might reach.[10] Rather, the purpose is to require the parties "to enter into discussion with an open and fair mind and a sincere purpose to find a basis of agreement . . . ."[11] The obvious goal of the legislation is the reconciliation of demands on both sides in the form of a compromise agreement. Therefore, it is a subjective state of mind to which the Board and courts must address themselves in considering alleged violations of § 8(a) (5).

As with all subjective standards, there is the immediate difficulty of determining what the requirement entails. It is impossible to state with certainty which of the many aspects of the employer-employee relationship has exerted the greatest influence; but it is clear that reliance is placed on no one factor. Both the Board[12] and the courts[13] have phrased tests which are substantially the same. They require a consideration of the sum

1 White's Uvalde Mines, 117 N.L.R.B. 1128 (1957).
2 61 Stat. 140, 141 (1947), 29 U.S.C. § 158(a)(1), (5) (1952).
3 49 Stat. 453 (1935), as amended, 29 U.S.C. § 141 (1952).
4 49 Stat. 453 (1935), as amended, 29 U.S.C. § 158(d) (1952).
5 Globe Cotton Mills v. NLRB, 103 F.2d 91 (5th Cir. 1939).
6 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1952).
7 Singer Mfg. Co. v. NLRB, 119 F.2d 131 (7th Cir. 1941).
8 61 Stat. 148 (1947), 29 U.S.C. § 160(e) (1952).
9 Wilson & Co. v. NLRB, 115 F.2d 759 (8th Cir. 1940).
10 S. REP. No. 573, 74th Cong., 1st Sess. 595 (1935).
11 Globe Cotton Mills v. NLRB, 103 F.2d 91, 94 (5th Cir. 1939).
12 Gay Paree Undergarment, 91 N.L.R.B. 1363 (1950).
13 NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir. 1953).

total of the employer's acts, in the hope that such consideration will indicate either an elaborate pretense by the employer with no real effort to reach an agreement, or an actual attempt at good faith bargaining within the meaning of the act. To reach such a determination, the history of the parties' labor relations[14] and the negotiations themselves[15] are relevant factors.

In regard to negotiations, no one is denied the right to advocate a contract favorable to himself if, while doing so, he has a sincere desire to reach an agreement.[16] However, in order to facilitate the negotiations, the employer has been required to give reasons for the position he has assumed, and a mere terse statement of his position has been held to be a sign of bad faith.[17] Also, the rejection of proposals put forth by the union, without explanation, has been held indicative of bad faith bargaining.[18] However, the extent to which a company must state reasons for its own position or the rejection of union proposals is not clear. In some instances, the company has been required to furnish the union with information to substantiate its position;[19] yet one need not furnish information unless a failure to do so would hamper negotiations.[20]

Within the negotiations themselves, both the Board and courts have given much consideration to the presentation of counterproposals.[21] The act expressly states that a party need not concede to a proposal advanced by the other party.[22] However, if one party is truly acting in good faith, it seems reasonable to ask that he return a counterproposal; consequently, a failure to advance them has been held indicative of bad faith.[23] The Board also has frowned upon counterproposals which do no more than continue the status quo.[24]

In the instant case, the Board contended that the "record as a whole" indicated substantial evidence that the employer had not bargained in good faith. In considering the "record as a whole," the majority disjoined the unilateral wage increases and the coercive action taken by the employer, thereby leaving only the attitude reflected by the proposals and counterproposals. The opinion then concluded that since none of these were per se evidence of bad faith, they could not collectively or separately constitute such proof.

The majority opinion's segregation of the unilateral wage increases is not contrary to present case law,[25] since increases were granted to only five workers, out of a total of sixty. Each of the cases cited by the Board concerned general wage increases to groups of employees rather than the merit increases to individuals, as found in the instant case. However, the court's failure to consider the coercive acts found to violate § 8(a)(1) is more difficult to accept. Earlier cases have held that acts in violation of § 8(a) (1), preceding or during negotiations, have been considered noteworthy in an attempt to characterize the attitude with which the employer approached the bargaining table.[26] They constitute a valid background against which *other acts* of the parties can be evaluated.

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14 NLRB v. Reed & Prince Mfg. Co., *supra* note 13, at 139.

15 Universal Camera Corp. v. NLRB, 340 U.S. 474 (1950).

16 Globe Cotton Mills v. NLRB, 103 F.2d 91, 94 (5th Cir. 1939).

17 Singer Mfg. Co. v. NLRB, 119 F.2d 131 (7th Cir. 1941).

18 Singer Mfg. Co. v. NLRB, *supra* note 17, at 136; Bethlehem Shipbuilding Corp. v. NLRB, 114 F.2d 930 (1st Cir. 1940).

19 NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1955); NLRB v. J. H. Allison & Co., 165 F.2d 766 (6th Cir. 1948) *enforcing* 70 N.L.R.B. 377 (1946); Sherman-Williams Co., 34 N.L.R.B. 651 (1941), *enforcement granted per curiam,* 130 F.2d 255 (3rd Cir. 1942).

20 Pool Mfg. Co., 70 N.L.R.B. 540 (1946).

21 Adams Bros. Manifold Printing Co., 17 N.L.R.B. 974 (1939); Globe Cotton Mills v. NLRB, 103 F.2d 91, 94 (5th Cir. 1939).

22 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1952).

23 Singer Mfg Co. v. NLRB, 119 F.2d 131 (7th Cir. 1941).

24 Benson Produce Co., 71 N.L.R.B. 888 (1946).

25 NLRB v. Crompton-Highland Mills, 337 U.S. 217 (1948); May Dep't Stores v. NLRB, 326 U.S. 376 (1945); Armstrong Cork Co. v. NLRB, 211 F.2d 843 (5th Cir. 1954).

26 Great Southern Trucking Co. v. NLRB, 127 F.2d 180, 186 (4th Cir. 1942). See also NLRB v. Truitt Mfg. Co., 351 U.S. 149, 155 (1955) (concurring opinion).

As a reason for its failure to consider the violations, the majority states that neither in the Board's opinion nor its brief is the matter mentioned. However, it is expressly stated in the Board's opinion[27] that it adopted the findings of the examiner, who found that these acts were performed while the negotiations were in progress. According to *Universal Camera Corp. v. NLRB*,[28] an appellate court, in determining substantive evidence, is not precluded from considering the findings of the trial examiner.

The decision of the majority on what it considered to be the "record as a whole" also can not pass without criticism. Not only did the company demand a contract extremely favorable to itself, but it also failed to give any reason why such a contract was necessary; nor did it give reasons for refusing to accept the union proposals. They were dismissed with the summary comment that they were "not substantially different from the first." With the exception of five "concessions" or "counterproposals," there is nothing to indicate that the company offered to change its original position, and a glance at these "concessions" shows little, if any, change of position.[29] The company agreed not to discriminate against employees because of union membership, but that was its obligation under the Labor Management Relations Act. It added a "no-lock-out" clause, but refused to accept liability for its breach. It agreed to certain wage increases, but demanded unilateral control over all such increases. Finally, it would permit the union limited bulletin-board space for its notices, and allow the use of the office and commissary area for the collection of dues. These seem insignificant when contrasted with the negotiations as a whole, and did little to change the status quo. Viewed in this light, the Board's ruling of bad faith seems far from unreasonable.

The entire court agreed that the § 8(a)(1) violations were supported by substantial evidence. The dissenting opinion considered "these violations, along with other evidence, both positive and negative" in reaching its conslusion of bad faith.[30] This approach seems more in keeping with the established tests and the spirit of the act. The majority seems too concerned with appraising the objective validity of the particular proposals and acts of the company rather than using the entire record for its determination.

Alfred Kaelin

CONSTITUTIONAL LAW — REGISTRATION STATUTES — STATE STATUTES REQUIRING REGISTRATION OF ANYONE ENGAGING IN ACTIVITIES AFFECTING INTEGRATION OR SEGREGATION HELD UNCONSTITUTIONAL. — Petitioners, two corporations, brought action to secure a declaratory judgment and an injunction restraining enforcement of five Virginia statutes,[1] as being violative of the fourteenth amendment.[2] Briefly, two of the statutes, chapters 31 and 32, require registration with a state authority of any person or corporation engaged in promoting or opposing the rights of any race or color by lobbying or advocacy, or whose "activities tend to cause racial conflicts or violence." The other three, chapters 33, 35 and 36, relate to procedures for suspension and revocation of attorneys' licenses, and to the crimes of barratry, champerty and maintenance.[3] *Held*: injunction granted. Chapters 31, 32 and 35 were unconstitutional because the former two abridged petitioners' right to free speech and the latter was violative of the due process and equal protection clauses. Chapters 33 and 36 were vague and ambiguous,

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27 White's Uvalde Mines, 117 N.L.R.B. 1128 (1958).
28 340 U.S. 474, 493 (1951).
29 White's Uvalde Mines, 117 N.L.R.B. 1128, 1159 (1958).
30 255 F.2d at 570.

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1 VA. CODE ANN. § § 18-349.9-.37, 54-74,78,79 (Supp. 1958).
2 A three-judge federal district court was convened pursuant to 28 U.S.C. § 2281 (1952).
3 The scope of this comment encompasses the court's treatment of chapters 31 and 32. Space does not permit an analysis of the issues presented by chapters 33, 35 and 36.

and their constitutionality would not be passed on until after state courts had interpreted them. *NAACP v. Patty*, 159 F. Supp. 503 (E.D. Va. 1958), *petition for cert. filed sub. nom. Harrison v. NAACP*, 26 U.S.L. WEEK 3379 (U.S. June 25, 1958) (No. 1093, 1957 Term; renumbered No. 127, 1958 Term); *prob. juris. noted*, 79 S. Ct. 33 (1958).

Before it could determine the constitutionality of the statutes in question, the court had to contend with two formidable jurisdictional attacks: First, a federal court should not pass on the constitutionality of a state statute prior to an authoritative interpretation by a state court;[4] secondly, a corporation cannot be said to be deprived of the civil rights of freedom of speech and of assembly because the liberty guaranteed by the fourteenth amendment is the liberty of natural, not artificial persons.[5]

The theory of the first defense is within the well-defined policy of the Supreme Court to avoid considering constitutional questions whenever possible.[6] However, this does not mean that federal courts are powerless to act until a state court has rendered a decision. Federal statutes expressly confer jurisdiction to federal courts where civil rights have been violated,[7] or where federal questions are involved.[8] The Supreme Court upheld the power of a federal district court to enjoin the enforcement of a state licensing and regulatory statute in *Doud v Hodge*[9] because of its repugnance to the Constitution, despite the fact that the state courts had not yet rendered a definitive decision as to the meaning or constitutionality of the statute.

The majority in the instant case interpreted the policy of the Supreme Court as endeavoring to grant cautious discretion to district courts in determining whether jurisdiction should be exercised in the absence of an authoritative state court decision. They reasoned that where a statute is free from ambiguity and no reasonable interpretation will render it constitutional, jurisdiction should be exercised in order to bring about an expeditious and final determination of its constitutionality.[10]

The jurisdiction of the court was also disputed on the ground that petitioners were corporations, created under the laws of New York, and not "persons" entitled to bring suit for deprivation of rights, privileges or immunities granted by the Constitution[11] and the Civil Rights Act[12] of the United States. In *Hague v. CIO*,[13] the Supreme Court held that "natural persons" and they alone were entitled to the privileges and immunities guaranteed citizens of the United States. Justice Stone, in a concurring opinion, went further and said that the liberty guaranteed by the due process clause is the liberty of natural, not artificial persons.[14] However, a case prior to *Hague* held that freedom of speech was safeguarded by the due process clause against abridgment by state legislation, and that although a corporation is not a *citizen* within the meaning of the privileges and immunities clause, it is a *person* within the meaning of the equal protection and due process clauses.[15] Subsequent cases have held that a corporation is also a "person" within the meaning of the Civil Rights Act.[16]

However, these cases involved corporations whose apparent purpose was the pursuit of profit for its shareholders. Consequently, the issues involved were centered on

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4 Government & Civic Employees Organizing Comm., CIO v Windsor, 116 F. Supp. 354, 357 (N.D. Ala. 1953), *aff'd per curiam*, 347 U.S. 901 (1954); Railroad Comm'n v. Texas, 312 U.S. 496, 501 (1941).

5 Hague v. CIO, 307 U.S. 496, 527 (1939) (concurring opinion).

6 See Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (concurring opinion).

7 28 U.S.C. § 1343(3) (1952).

8 28 U.S.C. § 1331 (1952).

9 350 U.S. 485 (1956).

10 159 F. Supp. at 523.

11 U.S. CONST. amend. XIV, § 1.

12 REV. STAT. § 1979 (1871), 42 U.S.C. § 1983 (1952).

13 307 U.S. 496, 514 (1939).

14 Hague v. CIO, *supra* note 13, at 527.

15 Grosjean v. American Press Co., 297 U.S. 233, 244 (1936). See also Jos. Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Pennekamp v. Florida, U.S. 331 (1946).

16 McCoy v. Providence Journal Co., 190 F.2d 760, 764 (1st Cir. 1951); Watchtower Bible & Tract Soc'y v. Los Angeles County, 181 F.2d 739, 740 (9th Cir. 1950).

property rights of the corporations. The corporations in the present case were distinguished on the grounds that they were non-profit organizations whose goal was the protection of the *personal* liberties of their natural members. They alleged that past experience had shown the necessity of utilizing a corporation or similar large-scale organization to safeguard the rights of their defenseless members. The court, after reviewing the historical development of the broad construction of the word "person" within the fourteenth amendment, concluded that the same liberality should be used when a corporation is formed not for profit but for the protection of the liberties of natural persons.[17]

The Supreme Court, in a decision subsequent to the instant case—*NAACP v Alabama ex rel. Patterson*[18] — had occasion to pass on this issue, since it was objected that the NAACP had no standing to prosecute such an action. Reviewing past decisions, the Court found that although parties usually must rely on constitutional rights personal to themselves,[19] nevertheless, where the individual constitutional rights of a group of persons could not be effectively vindicated except through a proper representative, it was permissable for the Court to pass on the constitutional questions involved.[20] The Court then upheld the right of the NAACP to assert the constitutional rights of its members who were not parties to the litigation, because of its nexus with them. This decision, along with the ruling in the present case, seems to have avoided the issue of a corporation's rights under the fourteenth amendment by "piercing the veil" of the NAACP and granting the remedy directly to the natural persons involved.

Before considering the statutes in question, the court in the instant case considered some of the prior acts of state officials, in an attempt to evaluate the purpose for which the statutes were passed. It is a well-settled principle that legislative motive—whether good or bad—may not be scrutinized by a court.[21] However, the contrary holds for legislative purpose, especially when the constitutionality of the act is questioned.[22] The Supreme Court in *Lane v. Wilson*[23] looked into legislative history to show that a state statute was merely an attempt to avoid the earlier decision of *Guinn v. United States*,[24] in which the "grandfather" clause of an earlier statute had been held unconstitutional.

Thus, in order to discern the Virginia legislative purpose, the court took note of a special legislative commission's conclusion that compulsory integration should be resisted, a resolution of the Virginia General Assembly decrying the segregation decisions, and a speech by the Governor before the General Assembly urging the passage of anti-integration legislation.[25] The majority concluded that the statutes were merely one method of carrying out a plan of general resistance against integration which had resulted in a loss of members and revenues to the NAACP.

The majority's use of reports and speeches to show legislative purpose seems reasonable since they were matters of public record and were, in part, the utterances of a state officer in his official capacity. The Supreme Court has recently stated that the segregation decisions can neither be nullified openly and directly by state legislatures, executives, or judicial officers, nor indirectly through evasive schemes for segregation, whether attempted "ingeniously or ingenuously."[26]

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17 159 F. Supp. at 519.

18 357 U.S. 449 (1958).

19 Tileston v. Ullman, 318 U.S. 44, 46 (1943).

20 See Barrows v. Jackson, 346 U.S. 249, 255-59 (1953); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 186-87 (1951) (concurring opinion); Pierce v. Society of Sisters, 268 U.S. 510, 534-36 (1925).

21 Tenney v. Brandhove, 341 U.S. 367, 377 (1951).

22 Davis v. Schnell, 81 F. Supp. 872, 878-80 (S.D. Ala. 1949), *aff'd per curiam*, 336 U.S. 933 (1949).

23 307 U.S. 268 (1939).

24 238 U.S. 347 (1915).

25 159 F. Supp. at 512-14. These ideas were enacted into law, part of which was declared unconstitutional in Adkins v. School Board, 148 F. Supp. 430 (E.D. Va. 1957).

26 Cooper v. Aaron, 358 U.S. 1, 17 (1958) (dictum).

Lastly, the instant court considered the constitutional issue. The court found that in the past, revelation of membership in the NAACP had led to economic reprisals, threats of coercion, and other manifestations of public hostility which adversely affected the ability of the Association and its members to advocate their beliefs. Yet, conceding this, if the state can show an over-riding interest in the disclosure of membership lists which is sufficient to justify the probable deterrent effect of such disclosure, the statute will be brought under the police powers of the state.[27] In an analogous case, *New York ex rel. Bryant v. Zimmerman,*[28] the Supreme Court upheld a New York statute which required associations having an oath as a condition of membership to file lists of their members and officers with a state official. The statute was specifically aimed at curtailing the activities of the Ku Klux Klan. It was held that the statute did not violate the due process clause because the state, for its own protection, is entitled to disclosure as a deterrent to possible violations of the law. The majority in the instant case distinguished *Zimmerman* on the ground that the New York statute was aimed at curbing the activities of an association likely to engage in violations of the law, while the Virginia statute was aimed at curbing the activities of an association trying to abide by and enforce the law and whose members had not engaged in acts of violence or disturbances of the public peace.[29] It concluded that the statutes requiring registration of anyone engaged in promoting or opposing in any manner the passage of legislation by the General Assembly on behalf of any race or color, or who advocates racial integration or segregation, were an unconstitutional restriction on the right of free speech.[30]

In a decision subsequent to the instant case, the Supreme Court has held that compulsory disclosure of membership lists, similar to the disclosure required by the Virginia statute, abridges the rights of rank-and-file members of the NAACP to engage in lawful associations in support of their common interests and that this right is an inseparable aspect of liberty assured by the fourteenth amendment.[31] It was reasoned that in many circumstances inviolability of privacy in group associations may be indispensable to the preservation of freedom of association, particularly when the group espouses unpopular beliefs.[32]

The defendants have petitioned the decision for certiorari to the Supreme Court. It is submitted that the Court will find that the district court did not abuse its discretion in accepting jurisdiction and that it will find the elaborate registration statutes unconstitutional for the reasons cited by the majority.

An honest recognition of the realities of the present situation shows that if the activities of the NAACP were outlawed, the state of Virginia could use all its resources to find lawful methods to carry out its avowed intention of postponing and, if possible, defeating the constitutional rights of a group of its citizens, while that group would be deprived of the resources needed to resist such an attack.

John F. Beggan

FEDERAL RULES OF CIVIL PROCEDURE — IMPLEADER — IMPLEADING JOINT TORT-FEASOR PERMITTED IN DIVERSITY ACTION ALTHOUGH STATE PROHIBITED PRESENT INDEPENDENT ACTION. — The original plaintiff brought a negligence action against the defendant, plaintiff here, in federal court, alleging he was injured on May 4, 1955.

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27 American Communications Ass'n v. Douds, 339 U.S. 382, 399-400 (1950). See also Dennis v. United States, 341 U.S. 494, 510 (1951).

28 278 U.S. 63 (1928).

29 159 F. Supp. at 526. See NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 465 (1958) upholding this distinction and pointing out that the Supreme Court had taken judicial notice of the particular character of the Klan's activities which it assumed was before the legislature when the statute was enacted.

30 159 F. Supp. at 524.

31 NAACP v. Alabama *ex rel.* Patterson, *supra* note 29, at 462-53.

32 *Cf.* United States v. Rumely, 345 U.S. 41, 56-58 (1953) (concurring opinion).

Jurisdiction was based on diversity of citizenship. On February 13, 1957, defendant was granted leave to implead the Recon Co. as third-party defendant on alternative claims of either indemnity or contribution.[1] In its answer, filed on May 28, 1957, Recon moved to strike all reference to a claim for contribution for the reason that the third-party plaintiff had not yet discharged any common liability as is required by the applicable Rhode Island statute. In addition, it asserted that the Rhode Island two-year statute of limitations had run, precluding recovery of contribution.[2] The motion to strike was granted and the third-party plaintiff appealed. *Held,* reversed. The original defendant may implead a joint tort-feasor even though his right to a judgment for contribution must await payment of more than his pro rata share of a common liability, and the filing of the third-party complaint tolls the statute of limitations if filed within the two year period of limitation. *D'Onofrio Constr. Co. v. Recon Co.,* 255 F.2d 904 (1st Cir. 1958).

Rule 14(a) provides for the impleader of a person "who is or may be liable" to the defendant for all or a part of the plaintiff's claim against the defendant.[3] It is well established that for the purposes of the doctrine of *Erie R.R. v. Tompkins,*[4] the right to contribution from a co-tort-feasor is a matter of substantive law which is determined by reference to the applicable state law in diversity suits.[5] Consequently, whenever the substantive law of the state does not allow contribution among joint tort-feasors impleader under Rule 14(a) is not allowed.[6]

At common law, by virtue of the decision in *Merryweather v. Nixan,*[7] contribution among joint tort-feasors was denied only when the tortious act resulted from intentional or wilful conduct on their part. However, by judicial interpretation in the United States, this doctrine was extended to deny contribution where the conduct of the joint tort-feasors was merely negligent.[8] This common law non-contribution rule has been severely criticized by leading authorities,[9] and in some jurisdictions the denial of contribution has been limited by judicial decision to situations involving wilful or intentional misconduct.[10] In the absence of statute, however, the majority of states continue to apply the common law rule and in these states the *Erie* doctrine prohibits invocation of Rule 14(a) by the defendant joint tort-feasor.[11]

The severity of the common law non-contribution rule has persuaded many states to adopt statutes permitting contribution to both negligent and wilful joint tort-

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1 Pursuant to the Rhode Island Contribution Among Tort-feasors Act, R.I. GEN. LAWS ANN. § 10-6 (1957).

2 R.I. GEN. LAWS ANN. § 10-6-4 (1957), provides:

> A joint tort-feasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro-rata share thereof. Actions for contribution shall be commenced and sued within two (2) years next after the cause of action shall accrue *to the injured person,* and not after. (Emphasis added.)

3 FED. R. CIV. P. 14(a).

4 304 U.S. 64 (1938).

5 Fidelity & Cas. Co. v. Federal Express, Inc., 136 F.2d 778 (6th Cir. 1943); Fontenot v. Roach, 120 F. Supp. 788 (E.D. Tenn. 1954); Kravas v. Great Atl. & Pac. Tea Co., 28 F. Supp. 66 (W.D. Pa. 1939).

6 Friend v. Middle Atl. Transp. Co., 153 F.2d 778 (2d Cir.), *cert denied,* 328 U.S. 865 (1946) (applying Connecticut law); Roth v. Greyhound Corp., 149 F. Supp. 454 (E.D. Pa. 1957) (applying Indiana law); Hills v. Price, 79 F. Supp. 494 (E.D.S.C. 1948) (applying South Carolina law).

7 8 Term. R. 186, 101 Eng. Rep. 1337 (K.B. 1799). Although this case did not state the general rule, subsequent cases construing the decision formulated this rule. *Cf.* PROSSER, TORTS 247 (2d ed. 1955).

8 Union Stock Yards Co. v. Chicago B. & O. R.R., 196 U.S. 217 (1905).

9 1 HARPER & JAMES, TORTS § 10.2 (1956); PROSSER, *op. cit. supra* note 7, at 248.

10 Knell v. Feltman, 174 F.2d 662 (D.C. Cir. 1949); Campbell v. Maine Cent. Transp. Co., 20 F.R.D. 629 (D. Me. 1957) *following* Hobbs v. Hurley, 117 Me. 449, 104 Atl. 815 (1918); Jacobs v. Pollard, 64 Mass. (10 Cush.) 287, 57 Am. Dec. 105 (1852).

11 See cases cited note 6 *supra*; U.S. v. Accord, 209 F.2d 709 (10th Cir.), *cert. denied,* 347 U.S. 975 (1954) (applying Oklahoma law); Andromidas v. Theisen Bros., 94 F. Supp. 150 (D. Neb. 1950) (applying Nebraska law).

feasors.[12] These statutes generally contain one of two provisions governing the right to contribution. The first type permits contribution only among tort-feasors whom the plaintiff has chosen to sue and against whom he has obtained a joint judgment.[13] Under this type of statute the federal courts have denied impleader of a joint tort-feasor where it was sought on the grounds of a "possible" liability for contribution, except in those instances where the plaintiff amends his complaint to claim relief against the new party.[14] However, construction of the Texas contribution statute would seem to permit the use of Rule 14(a) against a joint tort-feasor not a party to the original suit.[15] The general refusal to permit impleader under this type of statute seems sound since a contrary holding would give the defendant an action in the federal courts which could not be had in the state tribunals, thus extending his substantive rights in a manner not permissible under the *Erie* doctrine.

The second type of statutes,[16] as well as the recommended Uniform Act,[17] permits contribution from a joint tort-feasor not joined by the plaintiff in the original action. In addition, they also require payment by the joint tort-feasor in the original suit of more than his pro rata share of the plaintiff's judgment before he can obtain a money judgment from his co-tort-feasor. It is under this type of statute that the federal courts are in substantial conflict concerning the use of Rule 14(a).

Under this statute the joint tort-feasor in the original suit attempts to accelerate the claim for contribution by impleading his co-tort-feasor. The courts denying impleader purport to distinguish the right to contribution before payment as a mere "inchoate right" rather than one in "being" and, therefore, one which is not judicially enforceable as a substantive right until after the defendant has made the requisite payment.[18] One court has gone so far as to deny impleader on these grounds even though the applicable state law permitted impleader.[19] Other courts have allowed impleader on the theory that the right of contribution arose at the time of the injury-producing negligent acts, the requirement of payment being merely a condi-

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12 See statutes cited notes 13 and 16 *infra*. *But see* KY. REV. STAT. § 412.030 (1955); VA. CODE ANN. § 8-627 (1957): "Contribution among wrongdoers may be enforced where the wrong is a mere act of negligence and involves no moral turpitude."

13 See, *e.g.*, CAL. CIV. PROC. CODE § 875; MICH. COMP. LAWS § 691.561 (1948); MINN. STAT. ANN. § 548.19 (1947); MO. ANN. STAT. § 537.060 (1953); N.Y. CIV. PRAC. ACT § 211(a).

14 Baltimore & O. R.R. v. Saunders, 159 F.2d 481 (4th Cir. 1947) (applying West Virginia law); Brown v. Cranston, 132 F.2d 631 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943) (applying New York law); Buckner v. Foster, 105 F. Supp. 270 (E. D. Mich. 1952), *aff'd* 203 F.2d 527 (6th Cir.), *cert. denied*, 346 U.S. 818 (1953) (applying Michigan law); Vaughn v. Guenther, 8 F.R.D. 157 (N.D. Ga. 1948) (applying Georgia law); Malkin v. Arundel Corp., 36 F. Supp. 948 (D. Md. 1941) (applying Maryland law). *But see* Pucheu v. National Sur. Corp., 87 F. Supp. 558 (W.D. La. 1949) (applying Louisiana law); Jeub v. B/G Foods, Inc., 2 F.R.D. 238 (D. Minn. 1942) (applying Minnesota law). However, these latter two courts assumed that under the statute the joint tort-feasor who was sued could have a later action against his co-tort-feasor after the conclusion of the original suit. The reasoning in *Jeub* seems contrary to the plain meaning of the state statute. MINN. STAT. ANN. § 548.19 (1947). The court in *Pucheu* appears to be in disagreement with the state court's interpretation of the statute. See De Cuers v. Crane Co., 40 So. 2d 61, 71 (La. App. 1949).

15 Lottman v. Cuilla, 288 S.W. 123 (Tex. Comm. App. 1926), where the court allowed impleader despite the statutory requirement of a joint judgment and the absence of procedural impleader.

16 See, *e.g.*, ARK. STAT. ANN. § 34-1002 (1947); MD. ANN. CODE art. 50, § 17(b) (1957); N.C. GEN. STAT. ANN. § 1-240 (1953); PA. STAT. ANN. tit. 12, § 2083 (Supp. 1957).

17 UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2(2), 9 U.L.A. 235 (1957). For a list of states adopting this statute see Annot., 34 A.L.R.2d 1107 (1954).

18 Geborek v. Briggs Transp. Co., 139 F. Supp. 7 (N.D. Ill. 1956) (applying Wisconsin law); Fontenot v. Roach, 120 F. Supp. 788 (E.D. Tenn. 1954) (applying Tennessee law); Lamport Co. v. Teppel, 3 F.R.D. 49 (D.N.J. 1943) (applying New Jersey law).

19 Geborek v. Briggs Transp. Co., *supra* note 18.

tion precedent to the satisfaction of the contribution judgment.[20] However, the original defendant is entitled to reimbursement only upon payment by him of more than his pro rata share of the plaintiff's judgment.[21]

Support for this position is available in the commissioners' notes which accompany Section 7 of the 1939 Uniform Act.[22] The note explains that the use of impleader "does not affect in any way the substantive law of contribution," but instead, "merely provides for a litigation, in advance, of those issues upon which the claim for a money judgment for contribution will ultimately depend." Other leading authorities are in full accord with this position.[23]

The Rhode Island act, with which the instant court had to contend, is similar to the second classification. It does not embody a provision for impleader and it does not seem that impleader is permitted by the Rhode Island courts under these circumstances.[24] However, the mere absence of a state procedural rule does not preclude a litigant's use of 14(a) in the federal court. Under *Erie*, the federal courts "retain their independence in matters of procedure."[25]

It is apparent that the decision in the instant case allowing impleader under this type of statute is in accord with both the leading authorities and the better reasoned judicial decisions. The court's position on this issue is consistent with *Erie* since it creates no new substantive right. It merely provides the original defendant with the procedural means of avoiding the circuity of action which would otherwise result from the necessity of bringing a subsequent independent action for contribution. Refusal to permit acceleration of the contribution action deprives Rule 14(a) of all its procedural advantages and, in addition, defeats the very intent and purpose of the Rule. The very language of Rule 14(a) contemplates a contingent claim, similar to that of contribution, when it speaks of impleading a party "who is or may be liable" to the defendant.

However, a more complex problem arises with respect to the peculiarity of the Rhode Island statute. The act is unique in that it provides that "actions for contribution shall be commenced and sued within two (2) years next after the cause of action shall accrue *to the injured person*, and not after."[26] (Emphasis added.) Generally, the period of limitations starts to run after the defendant has paid more than his pro rata share of the plaintiff's judgment.[27] In the instant case, the filing of the third-party complaint and service of summons on the third-party defendant was within the two year period; however, the third party defendant interposed no answer until after the two-year period had run. Consequently, according to the plain meaning of the statute, a state court could no longer entertain a subsequent action for contribution. In principle, this situation is similar to *Ragan v. Merchants Transfer & Warehouse Co.*,[28] where the Supreme Court refused to apply the federal rules. In that case it was held that the filing of a complaint in

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20 Keller v. Kornegay, 9 F.R.D. 103 (E.D.N.C. 1949) (applying North Carolina law); Maryland v. Robinson, 74 F. Supp. 279 (D. Md. 1947) (applying Maryland law). See also Gersich v. London & Lancashire Indem. Co. v. Rosen, 135 Supp. 22 (W.D. Pa. 1955).

21 *Cf.* Pucheu v. National Sur. Corp., 87 F. Supp. 558 (W.D. La. 1949); Jeub v. B/G Foods, Inc., 2 F.R.D. 238 (D. Minn. 1940).

22 Commissioners' Note, 9 U.L.A. 248 (1957). This section provides for a third-party practice similar to Rule 14(a). However, it is interesting to note that no provision for third-party practice is included in the Revised Act, Uniform Contribution Among Tort-feasors Act § 3, 9 U.L.A. 17 (Supp. 1957).

23 1 Barron & Holtzoff, Federal Practice & Pleading § 422 (1950); 3 Moore, Federal Practice § 14.03 (2d ed. 1948).

24 In adopting the Uniform Act, the Rhode Island Legislature specifically excluded the provision for impleader, thereby creating the negative implication. *Compare* Uniform Contribution Among Tortfeasors Act § 7, 9 U.L.A. 235 (1957) *with* R.I. Gen. Laws Ann. § 10-6 (1957). The appellant in the instant case assumed this to be true. Brief for Appellant, pp. 8-9. The annotation to R.I. Gen. Laws Ann. alludes to this practice; however, it contains no Rhode Island cases.

25 2 Moore, *op. cit. supra* note 23, at 30.

26 R.I. Gen. Laws § 10-6-4 (1956).

27 New York & Puerto Rico S.S. Co. v. Lee's Lighters, 48 F.2d 372 (E.D.N.Y. 1930). See also, generally, Annot., 20 A.L.R.2d 925 (1951).

28 337 U.S. 530 (1949).

a diversity action pursuant to Rule 3[29] did not toll the state statute of limitations because the statute provided that an action was properly commenced so as to toll the statute of limitations only upon service of summons. A strict observance of the *Ragan* principle in this situation, however, would create a procedural morass. On the one hand, the court would allow the impleader (if brought within the two-year statute of limitations), since the right and remedy are still alive in the state court. However, if the original action between the plaintiff and defendant did not result in judgment and payment by the defendant within two years (a not unlikely result with today's crowded court calendars), the court would be precluded from enforcing contribution.

The instant court held that the statute of limitations was tolled by the filing of the third-party complaint and service of summons on the third-party defendant.[30] With this, all the purposes of the statute of limitations were fulfilled since notice of the contingent claim for contribution was given. No rational justification exists for holding that an action properly commenced can be dismissed because judgment was not rendered within a specified period of time. Certainly, neither *Erie, Guaranty Trust,*[31] nor *Ragan* envisioned such an anomalous application of their rules.

Arthur J. Perry

INCOME TAX — CONSTRUCTIVE DIVIDENDS — FUNDS DISTRIBUTED BY A CORPORATION IN REDEMPTION OF STOCK HELD BY A SHAREHOLDER ARE NOT TAXABLE TO THE ONLY REMAINING SHAREHOLDER UNDER SECTION 115(g) (1), INTERNAL REVENUE CODE OF 1939. — Taxpayer, a 50% stockholder of a closely held corporation, assigned an option to the corporation which gave it the right to purchase the remaining 50% of its outstanding shares then being held by another corporation. On the very same day the corporation exercised the option and purchased the shares for $80,000. The result of the transaction was that the taxpayer became the sole shareholder of the corporation.. The $80,000 was taken from the corporation surplus and the record indicates that the taxpayer was the motivating force behind the transaction. The Commissioner determined that the purchase price should be included as a dividend in the taxpayer's income for 1951, under Section 115(g) (1) of the Internal Revenue Code of 1939.[1] This determination was upheld by the Tax Court[2] and the taxpayer appealed. *Held*, reversed. Money distributed by a corporation in redemption of 50% of its outstanding stock is not taxable as a constructive dividend to the remaining shareholder, even though the transaction resulted in an increase in the shareholder's control over the corporation and an appreciation in the value of his stocks. *Holsey v. Commissioner*, 2 A.F.T.R. 2d 5660 (3d Cir. 1958). Am. Fed. Tax. R.2d.

The oft-litigated section 115(g)(1)[3] of the 1939 Internal Revenue Code basically had a simple purpose. It was designed to prevent corporations from making payments

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29 FED. R. CIV. P. 3.
30 *Cf.* Adam v. Vacquier, 48 F. Supp. 275 (W.D. Pa. 1942); Gray v. Hartford Acc. & Indem. Co., 36 F. Supp. 780 (D. La. 1941).
31 Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

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1 Int. Rev. Code of 1939, § 115(g)(1), 53 Stat. 48 (now INT. REV. CODE OF 1954, § 302(b)).
2 J. R. Holsey, 28 T.C. 962 (1957).
3 Int. Rev. Code of 1939, § 115(g)(1), 53 Stat. 48 (now INT. REV. CODE OF 1954, § 302(b)):

> If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in a redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

out of surplus to shareholders under the guise of a stock redemption or a partial liquidation, when the corporate purpose was actually the payment of a dividend.[4] The difficulty of discerning a "dividend" within the meaning of the section made it a focal point of litigation, as both the Internal Revenue Service and taxpayers attempted to determine just when a distribution in redemption of stock was essentially equivalent to a taxable dividend, as defined in Section 115(a) of the 1939 Code.[5]

These cases involved corporations which had made a payment of money or property to a shareholder in exchange for stock.[6] The first step in determining the applicability of section 115(g) (1) was the determination of an actual distribution to the stockholder. The next step was a determination of whether or not the distribution should be treated as capital gain under Section 117 of the 1939 Code, or as a distribution essentially equivalent to a divident under section 115(g) (1). This determination was all-important, by reason of the fact that Congress had specifically excluded certain transactions with respect to stock redemption from the classification of capital gains by section 115(g)(1).[7]

In the instant case it was necessary to determine whether money paid by a corporation to a third person was taxable to the sole remaining shareholder. Since the distribution was not made directly to the shareholder, the question was presented as to whether the taxpayer was the recipient of income, giving rise to a constructive dividend. In *Wall v. United States*[8] it was held that when a corporation assumed payment of a liability for a taxpayer in exchange for stock held by the taxpayer, this was essentially equivalent to a dividend. The taxpayer purchased the stock and regained sole control of the corporation. He then transferred the stock to the corporation in exchange for the corporation assuming his note. The court held that it was precisely the payment of the obligation which constituted income to the taxpayer. Since the stock redemption had not affected the taxpayer's ownership, the distribution was equivalent to a dividend.

The same result was reached in *Ferro v. Commissioner*,[9] where the stock exchange was even more complicated. The taxpayer had purchased all of the shares of another stockholder in exchange for a promissory note. When the corporation's financial situation improved the taxpayer returned the stock to the original owner who accepted it as full payment of the note and then sold the stock to the corporation. The court held this payment of liability by the corporation was income to the taxpayer, and the redemption of the stock without a reduction in control brought the transaction under section 115(g) (1). This doctrine of constructive dividend has been applied in situations where the actual transfer of income to the taxpayer has been even more difficult to ascertain.[10]

The courts have declared that a reduction of the taxpayer's control over the corporation is one of the most important factors in determining the true nature of a stock redemption. When control is proportionately reduced, as, for example when

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4 In Northup v. United States, 240 F.2d 304 (2d Cir. 1957), the court stated, at 306: "To prevent taxpayers from avoiding the higher rate of taxation by consummating transactions that are in form partial liquidations and in actuality disguised dividends, the Congress adopted the 'essentially equivalent' rule of section 115(g)."

5 Int. Rev. Code of 1939, § 115(a), 53 Stat. 46 (now INT. REV. CODE OF 1954, § 316).

6 See, *e.g.*, Boyle v. Commissioner, 187 F.2d 557 (3d Cir.), *cert. denied*, 342 U.S. 817 (1951).

7 See Chamberlin v. Commissioner, 207 F.2d 462, 472 (6th Cir. 1953), *cert. denied*, 347 U.S. 918 (1954).

8 164 F.2d 462 (4th Cir. 1947).

9 242 F.2d 838 (3d. Cir. 1957).

10 For an example of an extended concept of income that was held to be a constructive dividend, see Zipp v. Commissioner, 58-2 U.S.T.C. ¶ 9546 (6th Cir. 1958), *affirming per curiam* Louis H. Zipp, 28 T.C. 314 (1957). A closely held family corporation purchased all of the president's stock holding. The stock was not transferred to the corporation but was transferred directly to the president's sons. *Held*, this redemption and transfer resulted in a stock dividend to the sons, taxable under § 115(g)(1) of the 1939 Code.

the taxpayer embarks on a gradual withdrawal from the affairs of the corporation, the distribution made upon the surrender of his stock is not essentially equivalent to a dividend. This was the factual situation in *In re Lukens*[11] where the Third Circuit, reversing the Tax Court, held that the result was no different from a routine sale of corporate stock, and therefore the dividend analogy must fail.[12] The court stated that a distribution in redemption of stock can properly be treated as essentially equivalent to a dividend only if it exhibits, or is attended by, significant consequences which cause it in net effect to resemble a dividend; that is to say, that 115(g)(1) applies to one who has received a dividend on stock he continues to own.

In *Boyle v. Commissioner*,[13] the corporation had paid the taxpayer for a portion of his shares. This payment was held to be a taxable dividend. The court based its holding on the fact that after distribution there had been no reduction in control and a substantial reduction in corporate surplus. The court also considered the fact that the corporation had never paid any cash dividends, there had been no contraction in corporate activities (thus negating any claim that the transaction was a partial liquidation), and the initiative for the redemption had come from the benefiting shareholders. The court resolved the problem of distinction between redemption as treasury stock and redemption for retirement by stating that this distinction would only frustrate the purpose of 115(g) (1).[14]

The basic test in determining essential equivalence is the "net effect" of the transaction.[15] That is, was the taxpayer's relation to the corporation the same after the distribution as before? Some courts have taken the view that motive is important, in that a clearly defined business purpose must be found behind the redemption,[16] as opposed to private purposes of interested shareholders. But the prevailing view holds that this is relatively unimportant, and that essential equivalence is to be decided as a question of fact[17] by examining all the circumstances of the case, so as to determine the net effect of the transaction.[18]

The only factors present in the instant case which would be helpful in determining whether or not the taxpayer received a taxable dividend are the fact that his corporate control was strengthened when the stock was redeemed, and the value of his own stock was increased by reason of the fact that the redemption was less than the book value of the stock. But these benefits operate only to increase the value of the stock as held, and could not be taxable until the stock was sold by the taxpayer.[19]

It does not seem logical to say that the taxpayer could be taxed under section 115(g) (1), when the other corporation which actually received the distribution was not taxable because it relinquished all control. Nor does it seem logical to say that section 115(g)(1) applies to a party who could not be taxed under Section 117 of the 1939 Code until he disposed of his stock holding, when section 115(g) (1) was designed to distinguish between capital gain and ordinary income.

The tax court considered this transaction as income to the taxpayer because of the benefits which he received, without concerning itself with the nature of the dis-

11 246 F.2d 403 (3d Cir. 1957).

12 See Treas. Reg. 111, § 29.115-9(1939):

> A cancellation or redemption by a corporation of a portion of its stock pro rata among all the shareholders will generally be considered as effecting a distribution essentially equivalent to a dividend distribution. . . . On the other hand, a cancellation or redemption by a corporation of all of the stock of a particular shareholder, so that the shareholder ceases to be interested in the affairs of the corporation, does not effect a distribution of a taxable dividend.

13 187 F.2d 557 (3d Cir.), *cert denied*, 342 U..S. 817 (1951).

14 187 F.2d at 561.

15 Kessner v. Commissioner, 248 F.2d 943 (3d Cir. 1957).

16 Jones v. Griffin, 216 F.2d 885 (10th Cir. 1954); Keefe v. Cote, 213 F.2d 651 (1st Cir. 1951).

17 But the Second Circuit, in Northup v. United States, 240 F.2d 304 (2d Cir. 1957), said that this was to be decided as a question of law.

18 See the various tests set out in Earle v. Woodlaw, 245 F.2d 119, 126 (9th Cir.), *cert. denied*, 354 U.S. 942 (1957).

19 Schmitt v. Commissioner, 208 F.2d 819 (3d Cir. 1954).

tribution. The court of appeals was correct in holding that this transaction did not result in a taxable dividend to the taxpayer, because the increases in control and in stock value would not be classified as income until the stock was further transferred.[20]

Jerome M. Lynes

INCOME TAX — EXEMPTION — KANSAS — EXEMPTION TO "FEEDER" CORPORATION OF EXEMPT CHARITABLE ORGANIZATION DENIED. — Plaintiff taxpayer is a Kansas corporation engaged in the manufacture and sale of alcohol. All of its stock is owned by the Atchinson Hospital Association, a charitable organization admittedly exempt from state income tax under Kansas law.[1] Plaintiff's charter provides that all of its profits shall belong to the hospital association and never be used for private profit to any person or corporation, and that its net assets upon dissolution shall be distributed to the association. It applied to the State Commission of Revenue and Taxation for exemption under the above provision on the ground that the destination of income, and not its source, is the ultimate test of exemption. The application was refused by the Commission, but this order was subsequently reversed by a trial court. On appeal, *held*, reversed. A corporation engaged in ordinary commercial activities and "feeding" its income to an exempt parent organization is not entitled to an exemption from income tax on its profits. *Midwest Solvents Co. v. State Comm'n of Revenue & Taxation*, 183 Kan. 104, 325 P.2d 311 (1958).

The instant court stated that exemptions from the general burden of taxation are to be strictly construed, even when applied to charities and other exempt organizations. This is undoubtedly supported by the Kansas decisions[2] and has in the past been the traditional view in this country.[3] However, the federal courts, while wrestling with the "feeder" organization problem, have often preferred a liberal construction of exemption provisions on the policy grounds that the public derives important benefits from such organizations.

The Kansas statute in question is an adoption of a provision of the Federal Internal Revenue Code,[4] identical in the relevant parts. The question presented here has thus been before the federal courts on a number of occasions.[5] It is now largely moot as far as federal taxation is concerned, for such "feeder" organizations have been specifically denied exemption by amendment under the federal income tax since 1950,[6] but no similar amendment was made to the Kansas statute. These federal cases are therefore relevent to the present problem.

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20 Only time will tell whether the more detailed tests for determining essential equivalence under Section 302(b), and the new provision concerning constructive ownership of stock under Section 302(c) of the 1954 Code, will result in a wider application of the constructive dividend rule.

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1 KAN GEN STAT. ANN. § 79-3204(5) (1949). This section provides exemption for:
(5) corporations . . . organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual. . . .

2 State *ex rel.* Goodell v. Security Benefit Ass'n, 149 Kan. 84, 87 P.2d 560 (1939).

3 ZOOLLMANN, AMERICAN LAW OF CHARITIES §§ 686-96, 790 (1924).

4 INT. REV. CODE OF 1954, § 501(c)(3).

5 Lichter Foundation v. Welch, 247 F.2d 431 (6th Cir. 1957), and cases cited therein.

6 INT. REV. CODE OF 1954, § 502. It may be noted that this section does not affect the criteria for identifying an organization whose donors are permitted charitable contributions under INT. REV. CODE OF 1954, § 170 (c)(2)(b). The revelant language used in this section is essentially similar to that of § 501(c)(3), and has been held to permit deduction of contributions made to "feeder" organizations. Boman v. Commissioner, 240 F.2d 767 (8th Cir. 1957).

The federal cases stem mainly from the Supreme Court's opinion in *Trinidad v. Sagrada Orden*,[7] which stated that the federal statute "says nothing about the source of the income, but makes the destination the ultimate test of exemption." Plaintiff conteded that *Trinidad* was controlling here since it was decided prior to the adoption of this provision in Kansas. However, the instant court distinguished the case, in that it involved an organization engaged primarily and directly in religious work which had realized a small income from certain incidental sales made within its own organization.

Many of the federal courts of appeals, applying *Trinidad* in situations involving "feeder" organizations, did not generally make this distinction. The leading case here, decided after Kansas had adopted its present income tax law, is *Roche's Beach, Inc. v. Commissioner*.[8] A corporation set up to operate a bathing beach business and turn the profits over to an exempt charitable organization was held to be organized exclusively for a charitable purpose. The court explained that the destination was more important than the source of the corporation's income and cited *Trinidad* as authority. Later cases generally applied the "destination test"[9] and by 1951 it was cited as "the established rationale" in "feeder" situations.[10] The same year (subsequently, it might be noted, to congressional action expressly denying "feeder" organizations an exemption) saw the first, and possibly the only, definite rejection of the "destination test" in *United States v. Community Services*.[11] While this case is distinguishable from the usual "feeder" case in that although the profits of the "feeder" were distributed to charity, a non-exempt manufacturing corporation was deriving an important, if not the main, benefit from the activities of the "feeder" corporation, the Fourth Circuit left little doubt of its disapproval of the "destination test." The Ninth Circuit could possibly be said to share this view, though its decisions have varied a great deal depending on the particular facts;[12] in its own words, it "has not gone overboard in its application of this statute"[13] but "insists on maintaining its independence."[14]

The court in the present case gave these decisions little consideration in its opinion, other than to say that they were in conflict and not binding since decided after Kansas adopted its present act. The federal cases employing a liberal construction of the statute were "merely persuasive" according to the court, citing a prior Kansas case[15] which did not qualify "persuasive" by "merely," and intended to approve rather than qualify the consideration of a non-Kansas opinion in such a situation.

Two other aspects of the statute also deserve notice. Kansas specifically exempts one type of "feeder" organization from its income tax, namely, the corporation organized to hold property, collect the income from it, and turn the net income over to an exempt organization.[16] The court inferred from this specific exemption that the legislature did not intend to exempt any other type of "feeder." The same situation is true with regard to the federal income tax,[17] and Judge Learned Hand based his dissent in *Roche's* Beach chiefly on the negative implications of this specific exemption. Similarly, the limitation on deductions for charitable contributions from

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7 263 U.S. 578, 581 (1924).
8 96 F.2d 776 (2d Cir. 1938).
9 See cases cited note 5, *supra*.
10 C. F. Mueller Co. v. Commissioner, 190 F.2d 120 (3d Cir. 1951). See also Lichter Foundation v. Welch, 247 F.2d 431 (6th Cir. 1957), where the test is referred to as the "judicially approved rule."
11 189 F.2d 421 (4th Cir. 1951).
12 Riker v. Commissioner, 244 F.2d 220 (9th Cir.), *cert. denied*, 355 U.S. 839 (1957); Ralph H. Eaton Foundation v. Commissioner, 219 F. 2d 527 (9th Cir. 1955); Squire v. Students Book Corp., 191 F.2d 1018 (9th Cir. 1951).
13 Ralph H. Eaton Foundation v. Commissioner, *supra* note 12, at 529.
14 Riker v. Commissioner, 244 F.2d 220, 233 (9th Cir.), *cert denied*, 355 U.S. 839 (1957).
15 Standard Steel Works v. Crutcher-Rolfs-Cummings, Inc., 176 Kan. 121, 269 P.2d 402 (1954).
16 KAN. GEN. STAT. ANN § 79-3204(12) (1949).
17 INT. REV. CODE OF 1954, § 501(c) (2).

corporation's found both in the Kansas [18] and federal acts[19] reflects a negative implication, although the "destination test" requirement that the "feeder" be bound absolutely to use its profits for its exempt parent's benefit may serve to distinguish this latter situation.

It is highly questionable whether these rules of construction are really reasons for, or conclusions drawn from, the result reached in the particular instances. Nevertheless, they seem to furnish the Kansas court with good reason to discount the federal authorities in view of the settled rule in that state. The policy considerations favoring charities and other such organizations have been recongnized in the creation of charitable exemptions. However, their application must be considered in perspective with competing policy demands, such as the need of the state for revenue and the fact that exemptions increase the tax burdens of the non-exempt taxpayers. The relative desirability of encouraging private organizations to carry on beneficial activities must be reflected. These organizations often perform functions which the government would otherwise be called upon to fulfill. On the other hand, organizations such as religious societies could never be administered by the government. It is also apparent that favorable tax treatment, especially in the case of religious institutions, has the effect of indirectly subsidizing an organization with a limited appeal at the expense of the general taxpaying public. In any event, even under a strict construction the exempt parent organization would escape the double taxation to which the non-exempt stockholder is subject.

Probably the most persuasive factor in this problem is the economic advantage the tax-exempt "feeder" would have over its less fortunate, though possibly less worthy, commercial competitors. According to the rationale of the present court and the federal courts[20] rejecting the "destination test," plaintiff and similar "feeders" are organized and operated for a two-fold purpose: (1) to engage in commercial business for profit, and (2) to turn over the profits realized from its commercial activities to its exempt parent. The latter, say these courts, is a charitable purposes; the former is not. Whatever one might say regarding the logical defects in this schizophrenic "purpose" rationale, it is apparent that whenever both elements are present, aid to the organization's charitable personality through tax emption is necessarily aid of the business personality. The favored tax treatment would enable the "feeder" to undersell its rivals, feasibly to the point of eliminating them. This, of course, is subject to some limitation; there must be income before tax exemptions assume any importance. Nevertheless, the managers of a tax-exempt "feeder" could be satisfied with a lower return on the invested capital than if they had to devote a portion of this return to the payment of an income tax.

In view of these considerations, the court isolated the "feeder," splitting its "person" into commercial and charitable elements. Since the statute required the organization and operation of the corporation to be *exclusively* charitable, the court withheld the exemption because of plaintiff's commercial characteristics. This method of determining the "charitableness" of an entity, *i.e.*, distinguishing activity accruing income for charity from activity disepnsing it to charity, is rather narrow. It would apply in like manner to the simple organization with a single activity closely related to a charitable purpose[21] and the complex organization with many activities. The court should consider all aspects of the entity's operation in determining purpose.

Notwithstanding the criticism one might direct at the court's dissection of the "feeder" problem, however, it must be admitted that the result reached in the instant case is well grounded both in case law and policy despite contrary decisions by many of the federal courts.

Robert E. Curley

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18 KAN. GEN. STAT. ANN. §§ 79-3206(a)(13), (14) (1949).
19 INT. REV. CODE OF 1954, § 170(b)(2).
20 Ralph H. Eaton Foundation v. Commissioner, 219 F.2d 527 (9th Cir. 1955).
21 Squire v. Students Book Corp., 191 F.2d 1018 (9th Cir. 1951) (small book store).

INSURANCE — NEGLIGENCE — INSURER LIABLE IN WRONGFUL DEATH ACTION FOR MURDER OF INSURED BY BENEFICIARY WHO HAD NO INSURABLE INTEREST. — Plaintiff brought this action to recover damages for the wrongful death of his daughter.[1] The defendant insurance companies had issued insurance policies on the life of the child in favor of an aunt-in-law. The beneficiary-aunt murdered the child to collect the insurance proceeds. Plaintiff charged the insurance companies with negligence for failure to use reasonable care to ascertain the aunt-in-law's insurable interest, alleging such negligence to be the proximate cause of the child's death. The court and jury awarded a $75,000 judgment. On appeal, *held,* affirmed. A life insurance company has the duty to use reasonable care not to issue a policy of life insurance in favor of a beneficiary who has no insurable interest in the life of the insured. *Liberty Nat'l Life Ins. Co. v. Weldon,* 100 So. 2d 696 (Ala. 1958).

The duty of all persons to exercise reasonable care not to injure another has been phrased as "an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."[2] In order to determine actionable negligence in the instant case, the court had to extend the purview of this duty to include an insurance company's investigation in issuing policies to beneficiaries who have no insurable interest in the life of the insured. The present court apparently found the answer in the policy requiring insurable interest.

It is well established that one cannot take out a valid policy of life insurance for his own benefit on the life of a person in which he has no insurable interest.[3] Several states have statutory provisions requiring an insurable interest.[4] The requirement is explained as an interest in the preservation of the life insured in spite of the insurance, as opposed to an interest in the destruction of the life because of the insurance.[5] It finds its basis in opposition to (a) wager contracts as contrary to public policy,[6] (b) the creation of temptation to hasten the death of the insured,[7] and (c) public opportunity to engage in the business of buying and selling policies on the lives of others.[8] From these policy considerations it is safe to conclude that the protection of the insurance company is never given as a basis for the insurable interest requirement.[9]

However, it appears that only the insurer may raise the defense of the lack of insurable interest,[10] although the insurer may waive the defense or be estopped from asserting it.[11] Consequently, the rule necessarily inures to the benefit of insurance companies. Where the policy has proved profitable to the insurance company by reason of the premiums paid being in excess of the policy indemnity, the insurance company can waive the defense and retain the profits. But where the policy has matured by reason of an early death of the insured before the premiums paid exceed the indemnity benefits, the company can interpose the defense of lack of insurable interest, refund the premiums paid, absolve themselves from liability under the policy, and thus avert any risk that might have been upon them had the policy been valid.

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1 Pursuant to ALA. CODE tit. 7 § 119 (1940).

2 PROSSER, TORTS 167 (2d ed. 1955).

3 See, *e.g.,* Commonwealth Life Ins. Co. v. George, 248 Ala. 649, 28 So. 2d 910 (1947); VANCE, INSURANCE 183 (3d ed. 1951); 1 COOLEY, BRIEFS ON INSURANCE 330 (2d ed. 1928).

4 See, *e.g.,* KY. REV. STAT. § 304.650 (1950); PA. STAT. ANN. tit. 40, § 512 (1954).

5 See Rumsey v. New York Life Ins. Co., 25 Hawaii 141 (1919).

6 Knott v. State *ex rel.* Guaranty Income Life Ins. Co., 136 Fla. 184, 186 So. 788 (1939).

7 Helmetag's Adm'r v. Miller, 76 Ala. 183, 52 Am. Rep. 316 (1884).

8 Watson v. Massachusetts Mut. Life Ins. Co., 140 F.2d 673 (D.C. Cir. 1943), *cert. denied,* 322 U.S. 746 (1944).

9 *But see* Worthington v. Curtis, L.R. 1 Ch. 419 (1875) where The Life Assurance Act, 1874, 14 Geo. 3, c. 48, § 1, requiring insurable interest was interpreted as constituting "a defence for the insurance company only, if they choose to avail themselves of it."

10 See *e.g.,* Clements v. Terrell, 167 Ga. 237, 145 S.E. 78 (1928); VANCE, INSURANCE 199 (3d ed. 1951). *But see* Smith v. Coleman, 183 Va. 601, 32 S.E.2d 704, *rev'd on other grounds,* 184 Va. 259, 35 S.E. 2d 107 (1945) where it was held that any interested party may raise the question.

11 Kelly v. Prudential Ins. Co., 334 Pa. 143, 6 A.2d 55 (1939); Lawrence v. Travelers' Ins. Co., 6 F. Supp. 428 (E.D. Pa. 1934).

With reference to life insurance contracts, the court in the instant case said, "Policies in violation of the insurable interest rule are not dangerous because they are illegal; they are illegal because they are dangerous."[12] In this we find intimation of particular emphasis being placed on the danger to the insured when a policy on his life is issued to a beneficiary not having an insurable interest. The court felt that protection of human life was a sufficient basis for the law to recognize an obligation on an insurance company to conform to the particular standard of conduct requiring the insurer to use reasonable care in investigating insurable interest before issuing a policy of life insurance.

Inherent in the recognition of such a duty is the acknowledgment that a violation of the duty might proximately cause injury. Here the court was faced with the equally complex problem of showing the requisite proximate causation. Generally, the proximate cause question is approached through analysis of distinct problems, among them being the problem of causation in fact, apportionment of damages among causes, extent of liability for unforseeable consequences, intervening causes and shifting responsibility.[13] In the instant case particular emphasis was placed by the defendant on the unforeseeable consequences and intervening cause problems.

Those courts using the foreseeability test to determine proximate cause hold that, in order for negligence to be the proximate cause of the injury, the injury must be one which would have been foreseeable to the ordinary prudent man.[14] The applicability of the foreseeability test is to be determined "by considerations of logic, common sense, justice, policy and precedent."[15] Here, the court found a duty based on public policy as presumably effectuated in the insurable interest requirement. They reasoned that not only was the injury foreseeable, but the danger was judicially recognized and made a basis for the insurable interest requirement.

The defendants also interposed the theory that the intervening criminal act of another broke the chain of causation. The majority of the courts have found liability where the intervening criminal act was reasonably foreseeable.[16] Again the court reasoned that the foreseeability of the criminal act in the instant case could hardly be refuted when the courts have held that the insurable interest rule is designed to give protection against such acts.

The rule as established by the instant court does not appear to be a harsh one. The court was apparently aware of the law's inconsistency with the public policy considerations upon which the requirement of insurable interest is based. The requirement is intended to protect the public, but past applications of the rule have given effective protection only to insurance companies. Insurers may contend that the public is protected sufficiently, though indirectly, by the criminal law or by the established rule that a beneficiary who murders the insured cannot recover the proceeds of the policy.[17] However, the continued recurrence of cases involving policies in the hands of beneficiaries with no insurable interest, despite the widespread adoption of the insurable interest requirement, seems to be an adequate indication of society's felt need for an additional safeguard.

The intended protection to the public might be provided by permitting any interested party to raise the insurable interest question and by invalidating the insurance policy only with respect to the named beneficiary lacking the insurable interest, with the pay-

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12 100 So. 2d at 708.

13 PROSSER, TORTS 257 (1955).

14 *E.g.*, Greiving v. La Plante, 156 Kan. 196, 131 P.2d 898, 901 (1942). *But see* Mahoney v. Beatman, 110 Conn. 191, 147 Atl. 762, 765 (1929), where it was held that the foreseeability test is not a sound basis for the determination of the extent of the responsibility.

15 Hill v. Day, 39 Del. (9 W.W. Harr.) 400, 199 Atl. 920, 922 (1938); 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 110 (1906).

16 See, *e.g.*, Nichols v. City of Phoenix, 68 Ariz. 124, 202 P.2d 201 (1949); RESTATEMENT, TORTS § 448 (1934).

17 See Patterson, *Insurable Interest in Life*, 18 COLUM. L. REV. 381 389 (1918).

ment of the proceeds being made to the heirs of the insured.[18] This would take the benefit of the rule from the insurance companies, and might check to some extent the flow of sales to beneficiaries without insurable interest.

The same result is reached more directly, however, by placing an affirmative duty on the insurer to investigate the insurable interest of the beneficiary. Penalty for violation of the duty is heavy enough (as shown by the size of the verdict in the instant case) to enforce compliance by the companies and thereby allay the fears of those who may charge that the additional risk will merely be reflected in higher premiums. The duty is not excessively onerous, however. As the court pointed out, it is no more of an impossible burden to require an insurer to exercise reasonable care to determine whether the beneficiary has an insurable interest in the insured before it issues the policy than after the insured is dead. The prior effort may prevent the risk of murder. The subsequent effort merely effects a saving to the insurance company. To say that protection of human life is a sufficient basis for a duty of reasonable care is unassailable.

Nicholas J. Neiers

LABOR LAW — SECONDARY BOYCOTT — POLITICAL SUBDIVISION GRANTED PROTECTION FROM SECONDARY BOYCOTT UNDER SECTION 8(b)(4)(A) OF TAFT-HARTLEY ACT. — The National Labor Relations Board petitioned for an enforcement order to restrain a secondary boycott initiated by defendant Local 313 of the International Brotherhood of Electrical Workers. A county airport commission, a political subdivision of the State of Delaware, had awarded contracts to various construction companies for the erection of an airport passenger terminal. Electrical installations were to be performed by a non-union electrical contractor, and the facilities were installed as the erection of the terminal progressed. Shortly after the work began, a picket line was formed at the construction site by the defendant union, and employees of the various construction companies refused to cross the line. In this manner the defendant forced a work stoppage and prevented the electrical contractor from performing his contract. The contractor subsequently charged defendant with an unfair labor practice. The Board found that the purpose of defendant's conduct was to force the airport commission to cease doing business with the electrical contractor.[1] Local 313 was charged with violation of Section 8(b)(4)(A) of the Taft-Hartley Act.[2] *Held,* petition granted. A political subdivision is a "person" within the meaning of section 8(b)(4)(A) and may therefore be protected against a secondary boycott. *NLRB v. Local 313, International Bhd. of Elec. Workers,* 254 F.2d 221 (3d Cir. 1958).

Section 8(b)(4)(A), regarding secondary boycotts, makes it unlawful for a labor organization:

> (4) . . . to induce or encourage the employees of *any employer* to engage in . . . a concerted refusal in the course of their employment . . . to perform any services, where an object thereof is: (A) forcing or requiring . . . *any employer* or other *person* . . . to cease doing business with any other person. . . .[3] [Emphasis added.]

Section 2(2) of the Taft-Hartley Act, in defining the term "employer," specifically excludes any person subject to the Railway Labor Act and any political subdivision[4] such as the New Castle Airport Commission. In its definition of "person" however, the

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18 See Cheeves v. Anders, 87 Tex. 287, 28 S.W. 274 (1894); Note, 11 N.Y.U. INTRA. L. REV. 239 (1956).

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1 Peter D. Furness Elec. Co., 117 N.L.R.B. 437, 438 (1957).
2 Labor Management Relations Act, 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(4)(A) (1952).
3 *Ibid.*
4 Labor Management Relations Act, 61 Stat. 137 (1947), 29 U.S.C. § 152(2) (1952).

inclusive method of defining the term fails to mention a governmental agency.[5] In the light of these provisions, the apparent conclusion is that Congress, in excluding a political subdivision as an employer, intended that the entire act should be made inapplicable to it.

A labor union is restrained by 8(b)(4)(A) when the object of the enumerated activities is to force any employer or other person to cease doing business with any other person. The interpretation of the phrase "or other person" is brought to light in the instant case. The question presented to the court was: "Did Congress intend by this phrase to include within this provision groups which, by virtue of another section, are excluded from the operation of the act?"

The present issue was first presented to the NLRB in 1950 in the *Al J. Schneider Co.* case.[6] The facts were similar to those presented in the instant case. There the union, through picketing activities, induced the employees of Schneider to cease work on a contract with the Board of Education of Owensboro, Kentucky. These union activities were intended to coerce the Board of Education, a political subdivision, to refrain from dealing with a third party. The Board held that a political subdivision was not within the purview of 8(b)(4)(A) since the act excluded it as an employer. The Board decided that Congress legislated a scheme of correlative rights and duties from which the government was expressly excluded. This scheme would have been violated if an excluded group was granted protection under 8(b)(4)(A) and at the same time was immune from charges of unfair labor practices.[7] This strict construction of the terms "employer" and "person" as used in the secondary boycott provision was adopted by the Board in subsequent decisions.[8]

The Board's position was strengthened by the decision of the District of Columbia Circuit in *DiGiorgio Fruit Corp. v. NLRB.*[9] Relief was denied to the plaintiff when an agricultural union, a group excluded from the provisions of the act, induced other parties to cease handling the plaintiff's products. The reasoning of the court coincided with that of the Board in the *Schneider* case. In addition to the cases involving agricultural workers and political subdivisions, the Board later included within the scope of their reasoning persons subject to the Railway Labor Act. Protection under 8(b)(4)(A) was denied when a labor organization coerced the employees of a railroad to cease transporting the products of another employer.[10]

The courts on the other hand, have adopted a liberal interpretation of 8(b)(4)(A). Groups excluded from the provisions of the act under the definition of employer and employee have been granted protection from secondary boycotts. The reasons for doing so are based on two grounds — the interpretation of "any employer" and "person" as used in 8(b)(4)(A).

The courts stated their position in 1950 when the 5th Circuit decided *International Rice Milling Co. v. NLRB.*[11] The petitioner in that case sought to enjoin a secondary boycott ordered by the union. The picketing extended to the tracks of certain railroad companies. Relief had been denied by the Board. In reversing the Board's decision, the court inferred that Congress' use of the word "any" before the word "employer" indicated that protection from secondary boycotts was to be granted to *all* employers. The phrase was interpreted in its generic sense and was not restricted to the defined meaning

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5 Labor Management Relations Act, 61 Stat. 137 (1947), 29 U.S.C. § 152(1) (1952).

6 89 N.L.R.B. 221 (1950).

7 Al J. Schneider Co., *supra* note 6, at 223.

8 Paper Makers Importing Co., 116 N.L.R.B. 267 (1956); Sprys Elec. Co., 104 N.L.R.B. 1128 (1953).

9 191 F.2d 642 (D.C. Cir. 1951).

10 W. T. Smith Lumber Co., 116 N.L.R.B. 1756, 1760 (1956), *rev'd*, W. T. Smith Lumber Co. v. NLRB 246 F.2d 129 (5th Cir. 1957).

11 International Rice Milling Co. v. NLRB, 183 F.2d 21 (5th Cir. 1950), *rev'd on other grounds*, 341 U.S. 665 (1951).

as set out in section 2(2) of the act. The court reasoned that if Congress intended to restrict the application of this provision, an indefinite article such as "an" employer would have been used.

The second basis for judicial liberalization of the prohibition of secondary boycotts is the interpretation of "person." The act defines the term as "one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."[12] Neither a political subdivision nor a person subject to the Railway Labor Act were expressly excluded. However, in the celebrated "Piggy-back" case, *Local 25, Teamsters Union v. New York, N.H. & H.R.R.*,[13] the Supreme Court indicated that the term was to be construed liberally. In that case a railroad hauled trailers which normally were driven over highways by motor carriers. This freight hauling by the railroad was popularly known as "piggy-backing." The union prevented these trailers from being delivered to the freight yard. Denouncing this union activity the Court said:

> We think it clear that Congress, in excluding 'any person subject to the Railway Labor Act' from the statutory definition of 'employer,' carved out of the Labor Management Relations Act the railroads' employer-employee relationships which were, and are, governed by the Railway Labor Act. . . . Furthermore, since railroads are not *excluded* from the Act's definition of 'person', they are entitled to Board protection from the kind of unfair labor practice proscribed by § 8(b)(4)(A).[14] [Emphasis added.]

This dictum has formed the basis for several judicial decisions.[15]

In the instant case, the Board reversed its former position announced in the *Schneider* case and held that a political subdivision was a person within the meaning of 8(b)(4)(A).[16] The dictum enunciated in the *"Piggy-back"* case was a major factor in pursuading the Board despite the fact that the cases are distinguishable. The instant court, while affirming the Board's decision, emphasized this factor with the statement that the "point is not sun clear."[17]

Whether the view formerly taken by the Board before the persuasive dictum in the "Piggy-back" case is to be preferred over the judicial position is fundamentally a question of congressional intent. Congress has recognized that secondary boycotts, regardless of the parties involved, are inimical to the public welfare.[18] The courts reason that Congress in enacting this provision intended to protect commerce from injury, impairment and interruption. To accomplish this, all employers and persons should be granted protection from secondary boycotts.[19]

However, Congress has also explained that its reason for exempting persons subject to the Railway Labor Act "is to make it perfectly clear that in providing remedies for unfair labor practices of unions and their agents it was not intended to include such employees."[20] The significance of the instant decision lies in the inequitable status imposed on a union in relation to a political subdivision. The Commission may be afforded protection under 8(b)(4)(A) but at the same time, labor unions may not charge it with an employer unfair labor practice, since a political subdivision is not an employer for the purposes of the act. The more cogent arguments rest in the reasoning of the Board, for if Congress had intended to include a political subdivision within the definition of "person," it would have done so since the other entities are expressly enumerated.[21].

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12 Labor Management Relations Act, 61 Stat. 137 (1947), 29 U.S.C. § 152(1) (1952).

13 350 U.S. 155, 160 (1956).

14 Local 25, Teamsters Union v. New York N.H. & H.R.R., *supra* note 13 at 160 (dictum).

15 W. T. Smith Lumber Co. v. NLRB, 246 F.2d 129 (5th Cir. 1957). Douds v. Seafarers' Int'l Union, 148 F. Supp. 953 (E.D.N.Y. 1957).

16 Peter D. Furness Elec. Co., 117 N.L.R.B. 437 (1957).

17 254 F.2d at 224.

18 93 CONG. REC. 4836, 4843 (1947) (remarks of Senators Ball & Smith).

19 Local 25, Teamsters Union v. New York, N.H. & H.R.R., 350 U.S. 155 (1956); International Rice Milling Co. v. NLRB, 183 F.2d 21 (5th Cir. 1950), *rev'd on other grounds*, 341 U.S. 665 (1951).

20 S. REP. No. 105, 80th Cong., 1st Sess. 19 (1947).

21 Al J. Schneider Co., 89 N.L.R.B. 221 (1950).

It is submitted, however, that the motive for the position taken by the judiciary rather than the reasoning advanced by the courts bears more weight in determining the correct position. The instant court stated that it was a matter of *public policy* that protection from an unfair labor practice be granted to an entity even though that entity is not subjected to the statutory obligations of an "employer."

Gordon C. Ho

TORTS — HUSBAND AND WIFE — MARRIAGE OF PLAINTIFF TO DEFENDENT PRIOR TO JUDGMENT EXTINGUISHES RIGHT OF ACTION FOR ANTENUPTIAL TORT. — Plaintiff, while a passenger in defendant's automobile, was injured in a collision with another vehicle. The accident occurred in the state of New York, but plaintiff instituted suit in New Jersey, where both she and defendant are domiciled. Six months after instituting this action, but prior to the trial, plaintiff married defendant. On appeal from a decision of the appellate division reversing summary judgment for defendant, *held*, reversed. The public policy of New Jersey prohibits personal tort actions between husband and wife.[1] *Koplik v. C. P. Trucking Corp.*, 27 N.J. 1, 141 A.2d 34 (1958).

At common law, husband and wife were considered as one legal entity and, consequently, no actions between spouses were permitted. Beginning about 1844, statutes known as Married Women's Acts were enacted in all American jurisdictions, securing to married women a separate legal identity from their husband and a separate legal estate in their own property.[2] However, a majority of these jurisdictions have not construed these statutes to authorize suits for personal torts between husband and wife.[3] Many were persuaded by the reasoning of the United States Supreme Court in *Thompson v. Thompson*,[4] where a District of Columbia statute,[5] authorizing married women to sue separately for torts committed against them as fully and freely as if they were unmarried, was held not to allow a wife to sue her husband for assault and battery.

The maintenance of the peace and harmony of the home seems to be the policy most often cited in favor of disallowing interspousal suits.[6] Also the existence of liability insurance in cases arising out of automobile accidents has given rise to the fear of collusion as a policy reason for maintaining the disability.[7] The fact that insurance companies usually conduct the defense in actions against their insured, however, would seem adequate protection against the possibility of collusion in suits of this type. Nor would such an action tend to disrupt the peace and harmony of the home since it must be assumed that both spouses will be interested in reimbursing the joint family exchequer for medical expenses incurred as the result of the other's negligence.[8]

In the instant case, the majority relied on the section of the New Jersey Married Persons Act which specifies: "Nothing in this chapter contained shall enable a husband or wife to contract with or to sue each other, except as heretofore, and except as authorized by this chapter."[9] However, the plaintiff in the instant case was not married to the defendant either at the time of the accident or at the time the suit was filed. The minority felt that this fact required the application of other sections of the act,[10] one of which

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1 N.J. STAT. ANN. § 37:2-5 (1940).

2 PROSSER, TORTS § 101 (2d ed. 1955).

3 *E.g.*, Hunter v. Livingston, 125 Ind. App. 422, 123 N.E.2d 912 (1955); Ferguson v. Davis, 48 Del. 299, 102 A.2d 707 (1954); Paulus v. Bauder, 106 Cal. App. 2d 589, 235 P.2d 422 (1951). See also Haglund, *Tort Actions Between Husband and Wife*, 27 GEO. L.J. 697, 713 (1939). Pennsylvania specifically prohibits such suits by statute. PA. STAT. ANN. tit. 48, § 111 (1930).

4 218 U.S. 611 (1910).

5 D.C. CODE ANN. § 30-208 (1951).

6 PROSSER, *op. cit. supra* note 2, at 674. See also Wright v. Davis, 132 W. Va. 722, 53 S.E.2d 335 (1949), where the court dismissed an action for wrongful death brought by the administrator of the wife's estate against the husband's estate on the ground that the public policy was to discourage litigation between spouses since it tended to produce a disruption of their relation.

7 Newton v. Weber, 119 Misc. 240, 196 N.Y. Supp. 113 (Sup. Ct. 1922).

8 Haglund, *Tort Actions Between Husband and Wife*, 27 GEO. L.J. 893, 915-16 (1939).

9 N.J. STAT. ANN. § 37:2-5 (1940).

10 141 A.2d at 45.

provides that, if a female plaintiff marries after she has instituted a legal action, the action shall not abate but proceed to final judgment notwithstanding such marriage.[11]

While most of the jurisdictions prohibiting interspousal tort actions have held that a marriage of the parties will extinguish the right of action for antenuptial torts not reduced to judgment,[12] some have allowed the suit on the ground that the wife's cause of action was her separate property, for the protection of which she could maintain an action against her husband.[13] In *Curtis v. Wilcox,*[14] an English court placed such a construction on the provisions of its statute, which are similar to those contained in the New Jersey Act.[15]

A further complication of the instant case arises from the fact that the situs of the alleged tort was New York, which has, by statute, expressly removed a wife's disability to sue her husband for personal injuries.[16] In similar situations, jurisdictions allowing interspousal tort actions have not hesitated to apply the *lex loci* against their own residents, even though that law would bar the action.[17] In contrast, states which prohibit such suits have refused to apply the *lex loci* where that law permits interspousal suits, as this would violate the public policy of the forum state.[18] There is some question as to the constitutional validity of such refusal, however, in view of the Supreme Court's recent enforcement of foreign statutes in the forum state under the full faith and credit clause, despite the forum's decision that such statutes contravened the public policy of the forum state.[19]

The practical effects of refusing a remedy in interspousal tort actions add little to the attempt to equate law with justice. The most frequent occupants of the increasingly dangerous family automobile, the husband and wife, remain unprotected by liability insurance. Notwithstanding this consideration, the factual situation of the instant case furnishes an even stronger ground for criticizing the decision. Since the antenuptial tort situation was one of first instance before the New Jersey Supreme Court, it is difficult to see any "strong public policy" against such suits as was found by the majority in the New Jersey Married Persons Act. As the minority pointed out, two sections of the same act seem contrary to such a conclusion. In effect, this holding amounts to a windfall for liability insurance companies. The engaged couple is left with the unhappy choice of either postponing their marriage until the injured party's suit can be reduced to judgment, a process which may take years in the larger metropolitan centers, or beginning their wedded life under the burden of medical and other expenses with no hope of compensation. That such a result is required by the plain meaning of the statute is highly questionable.

Donald A. Garrity

UNAUTHORIZED PRACTICE OF LAW — ATTORNEYS — ATTORNEY ADMITTED TO FEDERAL BAR ENJOINED FROM PRACTICING LAW WITHIN THE STATE. — Plaintiffs, members of the Committee on Unauthorized Practice of the Philadelphia Bar Association, brought action to enjoin defendant from holding himself out as a practicing attorney within

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11 N.J. STAT. ANN. § 37:2-7 (1940).

12 *E.g.*, Carmicheal v. Carmicheal, 53 Ga. App. 663, 187 S.E. 116 (1936); Patenaude v. Patenaude, 195 Minn. 523, 263 N.W. 546 (1935); Webster v. Snyder, 103 Fla. 1131, 138 So. 755 (1932).

13 Hamilton v. Fulkerson, 285 S.W.2d 642 (Mo. 1956); Corver v. Ferguson, 40 Cal. App. 2d 459, 254 P.2d 44 (1953); Prosser v. Prosser, 114 S.C. 45, 102 S.E. 787 (1920). See also Curtis v. Wilcox, [1948] 2 K.B. 474.

14 [1948] 2 K.B. 474. *But see* Baylis v. Blackwell, [1952] 1 K.B. 154.

15 *Compare* The Married Woman's Property Act, 1882, 45 & 46 Vict., c. 75, §§ 12, 24, *with* N.J. STAT. ANN. §§ 37:2-12, 1:1-2 (1940).

16 N.Y. DOM. REL. LAW § 57.

17 Bohenek v. Niedzwiecki, 142 Conn. 278, 113 A.2d 509 (1955); Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509 (1943).

18 Kyle v. Kyle, 210 Minn. 204, 297 N.W. 744 (1941); Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936); Poling v. Poling, 116 W. Va. 187, 179 S.E. 604 (1935).

19 *Cf.* First Nat'l Bank v. United Air Lines, 342 U.S. 396 (1952); Hughes v. Fetter, 341 U.S. 609 (1951).

Philadelphia County in violation of the Pennsylvania Unauthorized Practice Statute.[1] Defendant was admitted to the bar of the Supreme Court and various other federal courts, including that of the Eastern District of Pennsylvania. The facts indicate that the defendant had law offices within the county and that he listed himself as an attorney in the telephone book and in a legal directory. Defendant claimed the legal right to practice law anywhere in the Eastern District of Pennsylvania with regard to any legal matter in which a federal question was involved. The lower court granted the injunction, and defendant appealed. *Held:* affirmed. The injunction did not infringe upon any federal rights guaranteed the appellant by either the statutes or the Constitution of the United States. *Ginsburg v. Kovrak,* 392 Pa. 143, 139 A.2d 889 (1958).

It is generally accepted that the right to control and regulate the practice of law is held by the states and the right to practice law is not a privilege or immunity guaranteed citizens by the Federal Constitution.[2] The states have this control in the interest of public protection because of the public nature of legal services and the fact that the attorney is essentially a public officer.[3] It is for the supreme court of a state to construe the state statutes relating to the practice of law.[4] The problem presented to this court represents one of many difficulties created by our peculiar federal-state relationship. In order to have the federal court system function effectively, virtually all the trial and appellate courts must be located within the confines of one or more states. The issue presented by the instant case is whether a state has the power to restrict the practice of law of an attorney admitted to the federal bar within the state.

The facts and pleadings clearly demonstrate that appellant was not asking to be allowed to practice before the state courts, and it is equally apparent that the issued injunction in no way interfered with his right to try cases before the federal district court.[5] However, the "practice of law" also includes advice given to clients outside the courtroom and the preparation of legal documents of a nature beyond the knowledge of the ordinary layman.[6] It was against these practices that the Unauthorized Practice Statute[7] was primarily aimed in order to protect the public from the dire consequences of entrusting legal matters to unfit or untrained persons.[8] These two areas are deserving of special consideration since they exist outside the domain of the public court proceeding and the watchful eye of the judge.[9]

The instant court sustained the constitutionality of the Unauthorized Practice Act, relying on *Commonwealth v. Branthoover,*[10] decided under the original act of 1899.[11] It should be pointed out, however, that the problem presented here would never have arisen under the original act since the advertising forbidden was restricted to that representing the accused "as being entitled to practice law before the courts *of the country* . . . ."[21] (Emphasis added.) Thus, in *Commonwealth v. Branthoover,* if the attorney were admitted to practice in the federal court, the statute would not preclude his holding himself out as an attorney outside the courtroom.[13] In 1913, however, the act was amended to include one representing himself as an attorney of any other state, nation, country or land, and the practice of law outside the court as well as before the tribunal

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1 PA. STAT. ANN. tit. 17, § 1608 (Supp. 1957).
2 Bradwell v. Illinois, 83 U. S. (16 Wall.) 130 (1873).
3 Keeley v. Evans, 271 Fed. 520 (D. Ore. 1921).
4 *In re* Lockwood, 154 U.S. 116 (1894).
5 139 A.2d at 893.
6 Shortz v. Farrell, 327 Pa. 81, 193 Atl. 20 (1937).
7 PA. STAT. ANN. tit. 17, § 1608 (Supp. 1957).
8 Burch v. Mellor, 43 Pa. D. & C. 597 (1942); Childs v. Smeltzer, 315 Pa. 9, 171 Atl. 883 (1934).
9 People v. Alfani, 227 N.Y. 334, 125 N.E. 671 (1919).
10 24 Pa. County Ct. 353, 48 Pittsb. Leg. J. (O.S.) 267 (1901).
11 Pa. Laws 1899, No. 95.
12 *Ibid.*
13 24 Pa. County Ct. 353, 48 Pittsb. Leg. J. (O.S.) 267, 269 (1901). See also Selling v. Radford, 243 U.S. 46 (1917).

itself.[14] Therefore, this amendment, and not the original act, specifically prohibited the conduct of the defendant in the instant case. The present court's reliance on *Branthoover,* decided prior to the amendment, was unwarranted.

The dissent discusses, at great length, the fitness of defendant to practice law.[15] Yet it was never contended that defendant was unfit, but only that he had violated the statute, which makes no mention of fitness. The fact that defendant has fulfilled the requirements of the highest federal courts would at first glance seem to preclude any challenge of unfitness. However, the requirements of some other federal courts are definitely inferior to the states within which they are located.[16] The majority may have feared the precedent it would have created by ruling for the defendant in the instant case.

The few cases decided under the present statute gave the court little aid in reaching its decision. In one instance, an injunction was granted restraining a person from habitually drafting legal papers, such as trust agreements and wills, for consideration, and from holding herself out as being capable of doing this work.[17] Also, it was held to be unauthorized practice of law for an insurer's agent to appear at a workmen's compensation hearing to represent litigants, although he could prepare the forms to be used because this merely entailed the filling out of standardized forms supplied by the Board.[18] In *Blair v. Motor Carriers Serv. Bureau,*[19] although it was held that a corporation could not retain an employee to represent its customers before the Interstate Commerce Commission, an employee could appear independently before the Commission and could also advertise his competency in such appearances, since the ICC regulates its own bar and by examination passes on the character of its applicants.

In the instant case, all forms of holding out as alleged in the complaint were enjoined. Defendant may not even set himself up as a limited attorney. This emphasized the element of public protection in forbidding any use of the term "attorney-at-law" by an unauthorized person, even where limited by an expressed area of specialization.[20] It is submitted that the court's action was a valid exercise of state sovereignty in an area where such action is necessary and proper. The solution to the instant problem lies not in diluting the power of the state to regulate the practice of law, but in systematizing the requirements of admission to the federal courts. In twenty-two district courts, a rule obtains which obviates the difficulty encountered here and re-enforces the idea of state sovereignty in admission procedure, *i.e.,* one may practice in such district courts only after being licensed to practice in the state where the district is located.[21]

Under the decisions in *Erie R.R. v. Tompkins*[22] and *Guaranty Trust Co. v. York,*[23] a large amount of the litigation in the federal courts is governed by state substantive law. It follows that a competent practitioner in the federal courts should have a familiarity with state law and there is no better way to insure such competency than to require the attorney to meet such standards as the state bar may prescribe for the practice of law within its borders. This would insure the public fair and adequate representation from every person holding himself out as an attorney within that state.

F. James Kane

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14 PA. STAT. ANN. tit. 17, § 1608 (1930). The statute in its present form is essentially the same as the amendment. See PA. STAT. ANN. tit. 17, § 1608 (Supp. 1957).

15 139 A.2d at 894.

16 Admission to the bar of the Supreme Court is by motion, conditioned only upon three years past admission in the highest court of any state, territory or insular possession. In seven of the eleven Courts of Appeals, the same requirement will suffice. Only two District Courts require that an examination be taken. Williamson, *Disparate Rules of Admission in Federal Courts,* 42 A.B.A.J. 720 (1956).

17 Childs v. Smeltzer, 315 Pa. 9, 171 Atl. 883 (1934).

18 Shortz v. Farrell, 327 Pa. 81, 193 Atl. 20 (1937).

19 40 Pa. D. & C. 413 (1941).

20 See also People *ex rel.* Colorado Bar Ass'n v. Erbaugh, 42 Colo. 480, 94 Pac. 349 (1908).

21 Williamson, *op. cit. supra* note 16, at 721.

22 304 U.S. 64 (1938).

23 326 U.S. 99 (1945).

WARRANTY — NEGLIGENCE — NEGLIGENT MANUFACTURER LIABLE FOR BREACH OF IMPLIED WARRANTY DESPITE LACK OF PRIVITY OF CONTRACT. — Plaintiff owned several resort cottages, one of which was built upon cinder blocks manufactured by defendant. The blocks had been purchased from defendant by plaintiff's building contractor. A few months after the cottage was built the blocks cracked causing damage to the cottage and, consequently, plaintiff brought action for breach of warranty. The trial court found a breach of implied warranty but denied recovery in the absence of privity of contract. On appeal, *held,* reversed. Lack of privity of contract will not preclude a remote vendee from recovering from a manufacturer in an action based on negligence or breach of implied warranty. *Spence v. Three Rivers Builders & Masonry Supply,* 353 Mich. 120, 90 N.W.2d 873 (1958).

The doctrine of privity of contract in a negligence action is a disappearing enigma in the law. The rule was fashioned from the case of *Winterbottom v. Wright*[1] where a coach driver was denied recovery from the owner of the vehicle for injuries resulting from negligence in its maintenance. His recovery was precluded because he was not a party to a maintenance contract between the owner and his employer, the operator of the coach. Subsequent cases relied on dictum in this case to formulate a general rule of non-liability in the absence of privity.[2]

Thomas v. Winchester[3] provided an exception to the rule. If the article made was inherently dangerous, *e.g.*, a poison, the manufacturer would be liable for his negligence regardless of privity. In *MacPherson v. Buick Motors Co.*,[4] Cardozo J., expanded this exception by winding the scope of inherently dangerous products to include those which, if negligently made, would endanger the purchaser or anyone who would in due course use the article. The exception soon appeared larger than the rule itself. The decisions interpreting *MacPherson* have tended to ignore the requirement that the article be "imminently," "intrinsically," or "inherently" dangerous, and have permitted recovery if the defective article could reasonably be foreseen to cause injury to a person using it.[5] However, this movement has been sporadic and within the same jurisdiction it has been held that a negligently made coffee-urn handle would qualify as a dangerous object,[6] while a negligently made automobile-door handle would not.[7] Other courts feel that some objects can never be "inherently dangerous" and negligence of the manufacturer will not render him liable for injury to a remote vendee.[8]

Massachusetts has taken the lead in the attempt to obliterate the general rule. In *Carter v. Yardley & Co.*,[9] a plaintiff recovered for injury from a skin disease caused by the use of cosmetics. Although the cosmetic could easily have been found "inherently dangerous," the court felt that *MacPherson* had "caused the exception to swallow the asserted general rule of nonliability, leaving nothing upon which that rule could operate."[10] The court then concluded that the rule no longer existed.

The reaction to this case has been varied. Although the decision has not been extensively cited, it has met with some degree of approval in various jurisdictions. The First Circuit has assumed that the Supreme Court of Mississippi would reverse

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1 10 M. & W. 109, 152 Eng. Rep. 402 (1842).
2 See generally Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693, 698 (1946).
3 6 N.Y. (2 Seld.) 397, 57 Am. Dec. 455 (1852).
4 217 N.Y. 382, 111 N.E. 1050 (1916).
5 PROSSER, TORTS 500 (2d ed. 1955).
6 Hoenig v. Central Stamping Co., 247 App. Div. 895, 287 N.Y. Supp. 118 (2d Dep't), *aff'd per curiam,* 273 N.Y. 485, 6 N.E.2d 415 (1936).
7 Cohen v. Brockway Motor Truck Corp., 240 App. Div. 18, 268 N.Y. Supp. 545 (1st Dep't 1934).
8 Timpson v. Marshall, Meadows & Stewart, Inc., 198 Misc. 1034, 101 N.Y.S.2d 583 (Sup. Ct. 1951) (shoes); Isbell v. Biederman Furniture Co., 115 S.W.2d 46 (Mo. App. 1938) (wooden bed); Osheroff v. Rhodes-Burford Co., 203 Ky. 408, 262 S.W. 583 (1924) (porch swing hook).
9 319 Mass. 92, 64 N.E.2d 693 (1946).
10 *Id.* at 700.

its former holdings requiring privity of contract in negligence actions, citing the *Yardley* case as support for the modern trend.[11] Some states have spoken of *Yardley* but have disposed of the cases at hand either by using the established exceptions to the rule of privity,[12] or by observing that, even if the rule of privity were completely abandoned, recovery could not be had because of failure of proof.[13] Other states have recognized the validity of the *Yardley* case.[14]

The rationale in *MacPherson* and *Yardley* is not limited to personal injuries alone. Once the normal concept of negligence plus proximate cause is accepted as the basis for suit by a remote vendee against a manufacturer, the courts are not inclined to differentiate between personal injury and property damage.[15]

In the instant case, plaintiff's suit was for breach of express or implied warranty. In the majority opinion, the court spoke at great length of the *Yardley* case and cited it as the culmination of the modern trend. But *Yardley* does not stand for the proposition that privity is unnecessary in an action for breach of warranty. The court in *Yardley* considered only the question of liability for negligence in the absence of privity.[16]

If the majority has intimated that privity is unnecessary in a suit on warranty, its position is contrary to existing case law. The general rule that privity is required in any breach of warranty suit still obtains.[17] An exception to this rule has been recognized in the case of foodstuffs.[18] The furthest extension of this exception is found in cases where the producer has by extensive advertising warranted his product to the public at large. In a very recent case, a remote vendee sued the manufacturer of a nationally advertised home permanent for breach of express warranty. The court allowed recovery notwithstanding a lack of direct contractual relationship between them.[19] This hesitancy to abandon the requirement of privity indicates an attempt by the courts to shield the manufacturer from strict liability to the remote vendee in warranty actions which, for all practical purposes, would provide recovery on a mere showing of damages.

However, the court in the instant case may have adhered to the requirement of privity in warranty suits. Although it equated implied warranty with negligence and said that a remedy would not be withheld for failure to plead negligence, it nevertheless cautioned future litigants to make an express allegation of negligence in cases of this type.[20] This warning suggests that the majority does not intend to use the terms "implied warranty" and "negligence" interchangeably in the future. The court's action in equating them is not without basis, at least in theory. Implied warranty is a curious hybrid of both tort and contract. It involves the violation of a duty not assumed voluntarily, but enforced irrespective of any agreement.[21] Originally the remedy for breach of warranty was in tort, in an action similar to deceit, except that knowledge of the falsity of the affirmation was not required. Later, either by design or convenience, assumpsit was used although the requirements of the action were not changed.[22] The nature of the action still resembles tort in that recovery is had

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11 Mason v. American Emery Wheel Works, 241 F.2d 906 (1st Cir.), *cert. denied,* 355 U.S. 815 (1957).

12 Stout v. Madden, 208 Ore. 294, 300 P.2d 461 (1956).

13 H. M. Gleason & Co. v. International Havester Co., 197 Va. 255, 88 S.E.2d 904 (1955).

14 See Dunn v. Ralston Purina Co., 38 Tenn. App. 229, 272 S.W.2d 479 (1954).

15 See Gruman v. Navarre, 47 Wash. 2d 760, 289 P.2d 1015, 1021 (1955). See also Todd Shipyard Corp. v. United States, 69 F. Supp. 609 (D. Me. 1947).

16 Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693, 696 (1946).

17 1 WILLISTON, SALES 645-48 (Rev. ed. 1948).

18 Coca-Cola Bottling Co. of Puerto Rico v. Negron Torres, 255 F.2d 149 (1st Cir. 1958); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942).

19 Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).

20 90 N.W.2d at 879.

21 PROSSER, TORTS 493 (2d ed. 1955).

22 1 WILLISTON, *op. cit. supra* note 17, §§ 195-97.

only when the manufacturer has violated an assumed duty. One leading authority feels that because of this strong tortious element, a convincing argument can be made for removing the "privity" rule in actions on implied warranty.[23] Consequently, the similarity of the actions, added to the expense involved in re-litigating the case, and the possibility that the defenses of the statute of limitations or res judicata would be raised to bar a new action may have persuaded the court in that instant case to cut through the preventive form for the purpose of doing justice.

The court in adopting the *Yardley* rationale and ridding itself of the outmoded concept of privity in negligence suits has greatly clarified and advanced the law of Michigan. However, its position on warranty and privity remains unsettled. The tenor of the majority opinion suggests that if the need arises the court will feel no qualms in again dispensing with the requirement of privity in breach of implied warranty actions.

Matthew T. Hogan

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23 Prosser, *Warranty of Merchantable Quality,* 27 MINN. L. REV. 117, 119 (1943). See also 2 HARPER & JAMES, TORTS 1573 (1956).