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# Recent Decisions

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# RECENT DECISIONS

CIVIL PROCEDURE — SERVICE ON NONRESIDENT MOTORIST — STATUTE PROVIDING FOR SUBSTITUTED SERVICE NOT APPLICABLE TO ACTION FOR SERVICES ARISING FROM COLLISION ON STATE HIGHWAY. — *Aldrich v. Johns*, 93 Ga. App. 787, 92 S.E.2d 804 (1956). Defendant was sued in Georgia for professional medical services rendered to two employees of defendant, a nonresident truck owner, for injuries sustained in a collision on a state highway. Plaintiff was assignee of accounts of certain physicians who treated defendant's employees. Service of process was made upon the Secretary of State, pursuant to the Georgia Nonresident Motorist Act, GA. CODE ANN. § 68-801 (Supp. 1955), which applies to actions allegedly arising out of:

> . . . any accident or collision in which any such nonresident user may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on any such highways, streets, or public roads in said State. . . .

The trial court sustained a general demurrer to the petition. On appeal the court affirmed, holding that the nonresident motorist act applies only to tort claims; substituted service under such act does not provide jurisdiction over the nonresident for recovery of medical services rendered.

Nonresident motorist statutes are an example of the continuing trend of the courts away from the rule first enunciated in *Pennoyer v. Neff*, 95 U.S. 714 (1877), that jurisdiction for actions in personam is based upon the physical power of the state over the individual. At the present time, the emphasis is placed upon the concept of notice to the defendant sufficient to satisfy "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The nonresident motorist statutes indicate the extent to which legislatures have gone in expanding the jurisdiction of state courts over litigation based on activities within the state. Following the trend toward expansion of state jurisdiction, the Supreme Court first upheld the constitutionality of these statutes in *Hess v. Pawloski*, 274 U.S. 352 (1927), reasoning that the automobile is a dangerous instrumentality and that the statute does not deprive the nonresident of due process under the Fourteenth Amendment, but rather, puts the nonresident on equal footing with the resident. However, the statutory scheme must provide for reasonable attempts to notify the nonresident. *Wuchter v. Pizzutti*, 276 U.S. 13 (1928).

The great diversity of actions that can arise out of an auto accident creates a growing problem of determining what causes of action are comprehended by nonresident motorist statutes. In the

usual case of the nonresident tort-feasor being sued by the injured resident, casual connection between the accident and the injury seems to be the prime consideration. In *Lindsay v. Short,* 210 N.C. 287, 186 S.E. 239 (1936), an action for abuse of process for having the plaintiff arrested after the accident, was held to be too remote to be within the statute. But where third parties are concerned, as in the instant case, substituted service is often sought in suits involving statutory and contractual obligations as well as tort liabilities. Despite the fact that the broad language of the Georgia statute includes "any accident or collision" by which "any action" arises, the Georgia Court of Appeals limited the nonresident's liability to tort claims only.

Other jurisdictions, with statutory provisions similarly broad, have held such service valid as to statutory and contractual causes of action. In a suit under a workmen's compensation act, *Maddry v. Moore Bros. Lumber Co.,* 195 La. 979, 197 So. 651 (1940), the Louisiana Supreme Court upheld substituted service under the Louisiana Nonresident Motorist Statute by the injured employee upon his nonresident employer, stating at 197 So. 652: "[I]t would appear that it was the intention of the Legislature to embrace actions of any and every nature growing out of an accident or collision . . . ." Substituted service on nonresident motorists in actions for wrongful death have been permitted, whether based upon a survival statute, as in *Hunt v. Noll,* 112 F.2d 288 (6th Cir. 1940), *cert. denied,* 311 U.S. 690 (1941), or a wrongful death statute which creates a new cause of action, *Wynn v. Robinson,* 216 N.C. 347, 4 S.E.2d 884 (1939).

In *Southeastern Greyhound Lines v. Myers,* 288 Ky. 337, 156 S.W.2d 161 (1941), the Kentucky court allowed substituted service in an action for contribution brought by the bus company against the nonresident truck owner, holding that although the right of action based upon implied contract was given only by the contribution statute, substituted service was permitted since the operative facts arose out of the collision. The Kentucky Nonresident Motorist Statute, KY. REV. STAT. ANN. § 188.020 (Baldwin 1955), is in all respects similar to that in the instant case. Subrogation of the right to contribution was also permitted in *McKay v. Citizens Rapid Transit Co.,* 190 Va. 851, 59 S.E.2d 121 (1950), under a similar statute, VA. CODE ANN. § 8-67.1 (1950).

A recent interpretation of a nonresident motorist statute to include a contractual claim was made in *Dart Transit Co. v. Wiggins,* 1 Ill. App. 2d 126, 117 N.E.2d 314 (1953), where the court, in construing the Illinois statute, ILL. ANN. STAT. c. 95½ § 23 (Smith-Hurd 1950), allowed a suit for indemnity, stating that the statute is not limited to actions ex delicto.

The court in the instant case construed the statute strictly since it was in derogation of common law; however, the decisions contrary to the instant case interpret the nonresident motorist statute as essentially a *remedial* measure and give it a correspondingly broad construction. *Jones v. Pebler,* 371 Ill. 309, 20 N.E.2d 592 (1939). This latter interpretation is correct, being in conformity with the underlying policy of the law to broaden the scope of in personam jurisdiction.

A further and perhaps more important basis for the decision in the instant case is the limitation imposed by the consent theory. At 92 S.E.2d 806, the court stated, "[B]y using Georgia Highways he [defendant] *consents* to be sued in Georgia on causes of action arising from an alleged *tort* liability incurred by his use of the highways," (Emphasis added), and cited *Pennoyer v. Neff, supra,* as authority for that proposition. While it is true that the constitutionality of these statutes has in the past been based on the fiction of "impliedly consenting" to the appointment of a designated state official for service of process due to the nonresident's use of the state highways, a contrary rationale was recently expressed by Mr. Justice Frankfurter:

> . . . [T]here has been some fictive talk to the effect that the reason why a non-resident can be subjected to a state's jurisdiction is that the non-resident has 'impliedly' consented to be sued there. In point of fact, however, jurisdiction in these cases does not rest on consent at all. . . . The liability rests on the inroad which the automobile has made on the decision of *Pennoyer v. Neff,* 95 U.S. 714, as it has on so many aspects of our social scene. *Olberding v. Illinois Central R.R.,* 346 U. S. 338 at 341 (1953).

In view of the foregoing, the reliance by the Georgia court upon the "consent" of the defendant does not appear to be in conformity with the present trend of judicial opinion.

Nonresident motorist statutes have been enacted in all of the forty-eight states and the District of Columbia. See *Knoop v. Anderson,* 71 F. Supp. 832, 836-37 (N.D. Iowa 1947). It is clear that these statutes are being broadly applied to remedy problems created by new situations. To deny recovery on contractual claims because of adherence to outmoded fictions, ignores the practical advantages of settling all the litigation arising in fact from the accident and the prevention of a muliplicity of suits.

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CORPORATIONS—LIABILITY OF OFFICERS FOR TRADEMARK AND PATENT INFRINGEMENT.—*Admiral Corp. v. Price Vacuum Stores, Inc.,* 141 F. Supp. 796 (E.D. Pa. 1956). Plaintiff brought action

for an injunction and damages against the corporate defendant and its officers for the illegal use of its trade name, "Admiral." The products to which defendant corporation had attached this name were not identical with those manufactured and sold by the plaintiff, but were of the same general type—standard household appliances. Defendant president owned fifty-five percent of the stock in the corporation, was both treasurer and a director as well as president, and was the one who made the decision to use the name "Admiral." Held, since the president of the corporation was charged with knowledge of the illegal acts, was recognized by the managers as having ultimate authority, and could have stopped the infringement, he was severally liable with the corporate defendant for damages.

The defendant president had not received any dividends during the period of infringement, but he had taken a salary and he was unable to show that it was derived from activities of the corporation other than those found to be illegal. Consequently the court computed the percentage of his salary which was attributable to the infringement, on the basis of the ratio of the corporation's net sales of "Admiral" products to its total net sales during the period of infringement, and damages were assessed against him personally in that amount.

In imposing personal liability upon officers of a corporation as a result of its infringing actions, the courts have followed two theories. The first imposes personal liability when it is shown that the officer acted outside the scope of his duties. *Art Metal Works, Inc. v. Henry Lederer & Bro., Inc.*, 36 F.2d 267 (S.D.N.Y. 1929). The second theory holds an officer liable when he wilfully and knowingly uses the corporation as an instrument to carry out his deliberate infringment. *Wisconsin Alumni Research Foundation v. Vitamin Technologists, Inc.*, 41 F. Supp. 857 (S.D. Cal. 1941), *cert. denied*, 325 U.S. 876 (1945). The distinction between the two theories is shadowy and elements of both theories are often present in the same factual situation.

The act of infringement is considered to be a branch of the broader doctrine of unfair competition. See *National Geographic Soc. v. Classified Geographic, Inc.*, 27 F. Supp. 655 (D. Mass. 1939). Officers and directors may be held responsible for the acts of unfair competition and are therefore properly joined in an action against the corporation. *Willaims Soap Co. v. J. B. Williams Soap Co.*, 193 Fed. 384 (7th Cir. 1911), *cert. denied*, 225 U. S. 712 (1912); *Elgin Nat'l Watch Co. v. Loveland*, 132 Fed. 41 (C.C.N.D. Iowa 1904).

The officer must account for the infringing profits he has actually received. *Prest-O-Lite Co. v. Acetylene Welding Co.*,

259 Fed. 940 (D.N.J. 1916). These profits may be received in the form of a salary, dividends, or in some other way. The officer is not, however, liable for profits received by the corporation and either retained by it or distributed to others. *Hitchcock v. American Plate Glass Co.*, 259 Fed. 948 (3d Cir. 1919).

When the scope of duty test is used as a standard of liability, the mere serving as an organizer or an officer of a corporation is not sufficient in itself to impose personal liability. As long as the officer acts only in his normal capacity no liability ensues, even though he is indirectly interested and benefits from the infringing acts of the corporation. The officer is considered to be the mere agent of the corporation and therefore not personally liable. *Hall's Safe Co. v. Herring-Hall-Marvin Safe Co.*, 146 Fed. 37 (6th Cir. 1906), *aff'd*, 208 U.S. 554 (1908). Mere receipt of a salary or commission is not enough to create personal liability under this theory even where the corporation's business was derived solely from infringement.

Under the second theory, however, knowledge of the officer that the corporation is engaging in infringement is the controlling factor which determines personal liability. Liability will be imposed even if the acts are within the scope of his official duties. *Wisconsin Alumni Research Foundation v. Vitamins Technologists, Inc.*, 41 F. Supp. 857, 871 (S.D. Cal. 1941). Actual knowledge need not be shown where the officer's position in the corporation imputes knowledge, *General Motors Corp. v. Provus*, 100 F.2d 562 (7th Cir. 1938), or where it would be reasonable to assume that infringement was taking place because of the nature of the articles which were being manufactured, *Claude Neon Lights, Inc. v. American Neon Light Corp.*, 39 F.2d 584 (2d Cir. 1930). This is particularly true in the case of a close corporation, as in the instant decision, because the infringing acts of the corporation are in effect treated as being the acts of the officers. See *General Electric Co. v. Wabash Appliance Corp.*, 93 F.2d 671 (2d Cir.), *cert. denied*, 303 U.S. 641 (1938).

Where the officer participates in the production or sale of the infringing articles, liability under the "knowledge" theory is a necessary result. Moreover, direction and control of subordinates is as blameworthy as personal participation. *Saxlehner v. Eisner*, 147 Fed. 189 (2d Cir.), *cert. denied*, 203 U.S. 591 (1906). This supervision may be active or it may result indirectly from the corporate officer's exercise of his voting power. *Claude Neon Lights, Inc. v. American Neon Light Corp., supra.*

In the principal case it could be found that the defendant corporation's president was personally liable under either of the

above theories. However, the court's decision was apparently based upon the willful and delibrate infringing acts of the corporation which the president had directed and planned, imputing knowledge of the illegality to him. Both the scope of duty standard and the willful and deliberate test respect the separate legal identity of the corporation in theory. The practical effect of these tests, however, is to disregard the corporation and to place the liability on the individual who was the sponsor of the wrong. This result is justified, as it gives the holder of the trademark or patent a greater opportunity for relief, particularly where the corporation may be judgment-proof, as in the instant case, and it places primary liability on the guilty corporate officer. It is submitted that the willful and deliberate test is the most effective in bringing about this result while the scope of duty test makes undue concessions in an attempt to adhere to the corporate identity theory.

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CORPORATIONS — FOREIGN PARENT NOT AMENABLE TO SERVICE WHERE WHOLLY OWNED SUBSIDIARY MAINTAINS SEPARATE IDENTITY. — *Berkman v. Ann Lewis Shops, Inc.*, 142 F. Supp. 417 (S.D.N.Y. 1956). Three judgments were returned in a Florida court against defendant, a Delaware corporation, in suits arising out of a lease taken by its Florida subsidiary. Defendant had organized a wholly owned subsidiary, incorporated in Delaware, under the name of Ann Lewis Shops of Tampa, Inc., which did business in Florida. Both the parent and the subsidiary kept separate books and bank accounts. The officers and directors for both were substantially the same. The parent maintained a central buying service and each subsidiary was charged with its maintenance expense. When defendant-parent did not appear in Florida, it suffered a default judgment upon which plaintiff, assignee of the original lessor, attempted to recover in New York under the full faith and credit rule 28 U.S.C. § 1738 (1952). The district court gave judgment for the defendant, on the ground that the Florida court had no jurisdiction over the defendant. A state cannot obtain jurisdiction over a foreign corporation merely because such corporation has a wholly owned subsidiary doing business in that state, if the corporation and subsidiary are kept separate and distinct.

The court cited *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), as controlling. There, under facts much the same

as the instant case, the Supreme Court said through Mr. Justice Brandeis that the existence of the subsidiary as a distinct corporate entity was in all respects observed, and therefore the parent was not present in North Carolina for the purpose of suit in that state. Although the soundness of this decision has been questioned, it has been followed in recent federal cases, at least where the parent corporation has no other contacts with the forum of the subsidiary. See, *e.g., Harris v. Deere,* 223 F.2d 161 (4th Cir. 1955); *State Street Trust Co. v. British Overseas Airways Corp.,* 144 F. Supp. 241 (S.D.N.Y. 1956). The district court concluded that the Florida court was without jurisdiction to render judgment against the defendant, since the presence of the Florida subsidiary did not constitute "doing business" by the defendant, within the meaning of the Florida statute providing for fictitious appointment of a state official as agent to receive service upon any foreign corporation choosing to exercise the privilege extended by the state to nonresidents to " . . . operate, conduct, engage in, or carry on a business or business venture, in the state . . . . ," FLA. STAT. ANN. § 47.16 (Supp. 1955).

Some support for the plaintiff's contention that the existence of a subsidiary constitutes "doing business" by the parent can be derived from *International Shoe Co. v. Washington,* 326 U.S. 310 (1945). However, the court refused to apply the International Shoe standard of "minimum contacts" in the absence of any legislative determination that presence of the subsidiary would render the parent amenable to suit. The court suggested that the International Shoe doctrine could be followed by the Florida courts in subsidiary cases only by appropriate legislation, as the question turned on public policy rather than on constitutional grounds. Whereas *International Shoe* decided a constitutional question of due process, holding that the company was present within the state for service of process under a "minimum contacts" theory, so that subjecting it to suit would not offend "traditional notions of fair play and substantial justice," the *Cannon* case did not decide the constitutional question, but merely held that defendant was not present within the state for the purpose of service of process, since the separate identities of both corporations were maintained.

The *International Shoe* doctrine was affirmed in *Traveler's Health Association v. Virginia,* 339 U.S. 643 (1950). There, a mail order insurance company, which had no agents or office within the state of Virginia, was served with a cease and desist order by the Virginia Corporation Commission to restrain violation of the state's "Blue Sky Law." Service of process was effected by registered mail pursuant to statutory provision. The Court upheld this

substituted service by referring to its prior decisions which had condemned the injustice of requiring policyholders to seek redress only in another state, and held that the due process clause did not forbid a state to adopt this means to provide a local forum for claims against a foreign insurer.

The instant case follows the *Cannon* rule, and applies to it the Florida statute on the theory that a parent corporation is not "doing business" in a state where its wholly owned subsidiary is located and "doing business." On the other hand, *International Shoe* and *Traveler's Health* decided a basic constitutional issue — whether the method employed to render the corporation subject to local jurisdiction was within the "traditional conception of fair play and substantial justice" — which logically arises only after a prior determination that the corporation is subject to local jurisdiction. Therefore, in the absence of an appropriate statute, the *Cannon* rule prevails on precedent alone when the facts are similar to those in the instant case.

The case of *Hess v. Pawloski*, 274 U.S. 352 (1927), decided eighteen years prior to *International Shoe*, serves to support the policy assertions in *International Shoe* and *Traveler's Health*. The statute in that case established a fictitious appointment of a state official to receive process for a non-resident motorist and was most certainly enacted pursuant to the policy of providing a local forum to facilitate the enforcement of claims against non-residents.

Using this policy as a basis, a state could enact a statute which would enable a local citizen to serve a foreign corporation with process and thereby acquire jurisdiction over it, through its subsidiary. Such a statute would appear to satisfy the due process requirement, since the presence of a subsidiary would go beyond the "minimum contacts" standard of the *International Shoe* and *Traveler's Health* cases.

The statute might read:

> Any corporation which conducts business within this state through a wholly-owned subsidiary or through a subsidiary of which it owns at least a majority of the stock, regardless of the fact that both corporations maintain separate corporate identities, shall be deemed, by such operations, to have voluntarily agreed to subject itself to the jurisdiction of the courts of this state for the service of process in any action brought against it, which arises from the conduct of such business by its subsidiary.

This statute would effectively discard the separate entity fiction found in the *Cannon* case and in the instant case. Separate identities would not render the parent immune to service of process, since by creating the subsidiary in a state where the proposed statute is enacted, the parent would voluntarily waive any immunity afforded it by the *Cannon* decision, and would agree to subject

itself to the jurisdiction of the state in order that service of process might be made upon it in any action brought against it arising out of the conduct of the business by its subsidiary within the state. In the absence of such statute, however, the International Shoe doctrine logically is not brought into play.

The federal courts have frequently stated their dislike for the rule in the *Cannon* case; see the instant case and *Harris v. Deere & Co., supra;* but they have stated that they were not at liberty to disregard the ruling. It would appear that the courts are bound to follow this doctrine until rescued by legislation or by Supreme Court overthrow of the *Cannon* decision.

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LABOR LAW — ARBITRATION — U.S. ARBITRATION ACT APPLICABLE TO COLLECTIVE BARGAINING AGREEMENTS. — *Signal-Stat Corp. v. Local 475, United Electrical Workers,* 235 F.2d 298 (2d Cir. 1956), *petition for cert. filed,* 25 U.S.L. WEEK 3128 (U.S. Oct. 20, 1956) (No. 520). Plaintiff, a manufacturer of goods for interstate commerce, brought suit for breach of contract under § 301 (a) of the Labor Management Relations Act, 61 STAT. 156 (1947), 29 U.S.C. § 185 (1952), alleging that defendant union had violated the no-strike clause in their collective bargaining agreement when it called a strike and sitdown of production employees. Defendant moved for a stay of the action pending arbitration of the dispute as provided for in their agreement. The district court's denial of the stay was appealed, the defendant contending that it was entitled to a stay under the provisions of the United States Arbitration Act, 61 STAT. 669 (1947), 9 U.S.C. § 3 (1952), or under section 301 (a) of the Taft-Hartley Act. The circuit court reversed, finding the Arbitration Act applicable because the employees were not *actually* engaged in interstate commerce within the meaning of the exclusionary clause of section one of the act, although they manufactured goods for interstate commerce; therefore, the defendant was entitled to a stay under section three of that act. The United States Aribitration Act applies to collective bargaining agreements of employees engaged in manufacturing goods for interstate commerce as distinguished from those engaged in the actual transporting processes of interstate commerce.

The Supreme Court has yet to interpret section one of the Arbitration Act, which excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged

in foreign or interstate commerce" from the provisions of the act. Until it does so, the decisions of the lower federal courts will continue to remain in conflict. Even though these courts approach the question in the same manner, *ie.*, by determining whether or not the collective bargaining agreement is within the exclusionary clause of section one, their decisions vary as to whether they should grant a stay under section three, which provides for the issuance of a stay, pending arbitration in ".... any suit or proceeding ... brought in any of the courts of the United States upon any issue referable to arbitration. ..."

The Fourth Circuit has held that the provisions of the Arbitration Act may not be applied to a collective bargaining agreement since it is a contract relating to the employment of workers engaged in interstate commerce within the clear meaning of the exclusion clause contained in the first section. *International Furniture Workers v. Colonial Hardwood Flooring Co.*, 168 F.2d 33 (4th Cir. 1948). In refusing to grant a stay as provided for in section three, the court decided that the clear intention of Congress was to have the exclusion clause apply not only to the first section but to the act in its entirety. Subsequently, in *United Electrical Workers v. Miller Metal Products, Inc.*, 215 F.2d 221 (4th Cir. 1954), the court re-affirmed its position when called upon to overrule the *Colonial Hardwood* case in view of the distinction drawn between contracts of employment and collective bargaining agreements in *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

Recently the Fifth Circuit, after considering the diverse interpretations of the Arbitration Act, followed the reasoning of the Fourth Circuit and held that the collective bargaining contract was excluded from enforcement by section one of the act. *Lincoln Mills v. Textile Workers Union, CIO*, 230 F.2d 81 (5th Cir. 1956), *cert. granted*, 25 U.S.L. WEEK 3104 (U.S. Oct. 8, 1956) (No. 211). Earlier the Tenth Circuit, relying on *International Furniture Workers v. Colonial Hardwood Flooring Co., supra*, also reached this conclusion. *Mercury Oil Refining Co. v. Oil Workers International Union, CIO*, 187 F.2d 980, 983 (10th Cir. 1951) (dictum).

However, the First Circuit in *Local 205, United Electrical Workers v. General Electric Co.*, 233 F.2d 85 (1st Cir. 1956), *cert. granted*, 25 U.S.L. WEEK 3104 (U.S. Oct. 8, 1956) (No. 276), and the Sixth Circuit in *Hoover Motor Express Co. v. Local 327, Teamsters Union, AFL*, 217 F.2d 49 (6th Cir. 1954), found similar collective bargaining agreements not to be "contracts of employment" within the meaning of section one, and stays were granted as provided for in section three. Both courts adhered to the dictum of *J. I. Case Co. v. NLRB, supra*, which stated that the end product of negotiations between the employer and the

union is not a contract of employment, but rather a trade agreement. However, since that case was not concerned with the interpretation of the Arbitration Act, these two decisions do not appear to be warranted in so far as they extract that dictum from its proper context and subscribe to it when confronted with the problem of interpreting section one.

The Third Circuit determined that a collective bargaining agreement is a "contract of employment" within the meaning of section one, but held the Arbitration Act applicable, and granted a stay, on another ground, interpreting the exclusionary clause of section one as being applicable only to those workers who are *actually* engaged in the transportation industries and therefore not to those who merely produce goods for interstate commerce. *Tenney Engineering Inc. v. Local 437, United Electrical Workers,* 207 F.2d 450 (3d Cir. 1953). In the instant case, the Second Circuit, while adopting this reasoning and decision of the Third Circuit, was influenced also by its earlier implied holding that a collective bargaining agreement constituted a "contract of employment." *Shirley-Herman Co. v. Local 210, International Hod Carriers Union,* 182 F.2d 806, 809 (2d Cir. 1950) (dictum). Obviously these two courts were sympathetic toward the present almost universal approval of arbitration as a means for settling labor disputes and maintaining industrial peace. See Kaye and Allen, *Union Responsibility and Enforcement of Collective Bargaining Agreements,* 30 B.U.L. REV. 1, 22-30 (1950). They had to tread a narrow path if a result favorable to this end was to be reached. To give such a strict interpretation to the Arbitration Act in order to achieve this desirable goal does not appear necessary, however, when the same goal could have been attained under section 301(a) of the Taft-Hartley Act.

Although the court in the instant case found section three of the Arbitration Act applicable, it did not reach the question whether the arbitration clause in the collective bargaining agreement would be enforceable under section 301(a) of the Taft-Hartley Act. Yet federal courts have permitted specific enforcement of arbitration agreements in collective bargaining contracts under authority of this section. *Wilson Brothers v. Textile Workers Union, CIO,* 132 F. Supp. 163 (S.D.N.Y. 1954), *appeal dismissed,* 224 F.2d 176 (2d Cir.), *cert. denied,* 350 U.S. 834 (1955); *Textile Workers Union, CIO v. American Thread Co.,* 113 F. Supp. 137 (D. Mass. 1953) (critized and in effect overruled by *Local 205, United Electrical Workers v. General Electric Co., supra). Contra, Lincoln Mills v. Textile Workers Union, CIO, supra.* While both the Arbitration Act and section 301(a) of the Taft-Hartley Act may be used as a means of requiring the parties to proceed to arbitration, it is suggested that section 301(a) is the

more practical at present in view of the existing conflict among the federal courts when called upon to interpret section one of the Arbitration Act. Certainly the declaration of national policy contained in section 201 of the Taft-Hartley Act favors arbitration, thus supporting the right to specific enforcement of arbitration agreements in collective bargarining contracts under the provisions of section 301(a) of that act.

*Edward N. Denn*

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TORTS—LIBEL—ACCUSATION OF PARTICIPATION IN COMMUNIST INFILTRATION OF COMMUNICATIONS INDUSTRY.—*Julian v. American Business Consultants, Inc.*, 2 N.Y.2d 1, 137 N.E.2d 1 (1956). Defendant's booklet *Red Channels,* published in 1950, was allegedly an attempt to alert the American people to the Communist "plan of infiltration of the radio and television industry." Defendant listed the occasions upon which performers associated themselves with "organizations espousing Communist causes." Plaintiff was among the performers listed. Plaintiff admitted having attended the meetings of two such organizations as reported by defendant. Conceding the truth of defendant's listings, plaintiff brought this libel suit alleging that defendant unjustifiably conferred upon plaintiff the opprobrium of Communist affiliation. Plaintiff alleged further that such degradation in the public esteem severely circumscribed his employment opportunities and generally resulted in social ostracism. Defendant set up the defense of fair comment based upon the right to criticize (a) the activities of a public performer, and (b) anyone who undertakes to comment publicly on political matters. The trial court dismissed the complaint, 131 N.Y.S.2d 374 (Sup. Ct. 1956), and the appellate division unanimously affirmed, 285 App. Div. 944, 139 N.Y.S.2d 903 (1st Dep't 1956). The court of appeals reviewed the decisions below and affirmed, two justices dissenting.

*Hays v. American Defense Soc'y, Inc.*, 252 N.Y. 266, 169 N.E. 380 (1929), was cited by the majority in the instant case as the controlling precedent for its decision. In the *Hays* case the same New York court held that listing of plaintiff's name as one of 396 named directors of an organization indirectly connected with a group which aided the Communist party was not sufficient to sustain a charge of libel. The focal problem presented in *Hays* as well as in the instant case is that of ascertaining whether an allegedly libelous statement about an entire group is

sufficiently personal to a given individual within the group to be "of and concerning" him so that he individually has been libeled.

The law of group libel focuses upon the size of the group and the probability of individual identification. If the group is small enough so that a person reading the defamatory statement can readily identify the plaintiff as one of the group, then the plaintiff has a cause of action. *Neiman-Marcus v. Lait,* 13 F.R.D. 311 (S.D.N.Y. 1952) (the four members of a sales personnel force). However, if the group is large enough to preclude individual identification, the plaintiff has not been defamed. *Latimer v. Chicago Daily News Inc.,* 330 Ill. App. 295, 71 N.E.2d 553 (1947) (a group of twenty-three lawyers). Where the plaintiff is part of a group mentioned in the allegedly defamatory statement, he "must first of all show that he is in fact a member of the class defamed. Beyond this, he must establish some reasonable personal application of the words to himself." PROSSER, TORTS § 92, p. 583 (2d ed. 1955).

In the *Hays* decision, plaintiff was but one of 396 persons about whom the allegedly defamatory statements were made; in the instant case plaintiff was but one of 151 such persons. On both occasions the court held that the plaintiff had failed to establish sufficient personal application of the allegedly defamatory statement. Under the ordinary group libel test, such a conclusion is correct enough. There is, however, an element present in both cases which warrants treatment apart from the group libel: over and above any reference to a group, there also was a listing of individuals, and thereby a singling out of the plaintiff as specific person.

If the language in the instant case be found to apply to the plaintiff in his individual person, there would seem to be little doubt that it was defamatory in character, since it allegedly consisted of a characterization of the plaintiff as a Communist tool, dupe, and sympathizer. Such a gravamen finds sustenance in the concern which the various state and federal courts have shown in situations of Communist accusation. In the day of emerging Communism, the label of "Red" was deemed "capable of being used to designate a person believing in disobedience to the laws of his country and intent upon forcibly seizing and appropriating the property of others", and if so understood would be libelous per se. *Toomey v. Jones,* 124 Okla. 167, 254 Pac. 736, 737-38 (1926). In the present era of Communism, an accusation of Communist membership constitutes libel per se, "because the label of 'Communist' today in the minds of many average and respectable persons places the accused beyond the pale of respectability and makes him a symbol of public hatred . . . ." *Spanel v. Pegler,* 160 F.2d 619, 622 (7th Cir. 1947).

Nor does it matter that the accusation is one of mere association and sympathy rather than of actual membership, for "any difference is one of degree only . . . ." *Grant v. Readers Digest Ass'n Inc.*, 151 F.2d 733, 735 (2d Cir. 1945), *cert. denied*, 326 U.S. 797 (1946). See also, *Utah State Farm Bureau Federation v. National Farmers Union Service Corp.*, 198 F.2d (10th Cir. 1952); *Ward v. League for Justice*, 93 N.E.2d 723 (Ohio 1950).

The *Hays* case was not the sole precedent for the instant case. A contrary result was reached in *Derounian v. Stokes*, 168 F.2d 305 (10th Cir. 1948), where the defendant was the author of a book which purported to expose pro-Fascist elements in the United States. Despite the fact that, as in the instant case, the plaintiff was not specifically accused of disloyalty, the references to the plaintiff when read in connection with the entire book, and in view of the state of public opinion at the time of publication, were such as to convey connotations of disloyalty and consequently were libelous per se. Also, in a prior New York decision, *Mencher v. Chesley*, 297 N.Y. 94, 75 N.E.2d 257 (1947), the libelous character of imputations of Communist association was recognized and the question of actual defamation submitted to the jury. Despite the distinguishing features of the latter case—direct reference to the plaintiff, and absence of an issue of fair comment—it is submitted that the procedure followed in that decision was far more equitable than that of the instant case, for the issue of defamation was answered by those to whom the words in question were addressed.

In deciding as a matter of law that no defamation existed in the publication in the instant case, the majority failed to assess properly the temper of the times. The court underestimated the impact upon the public of defendant's purported expose of political intrigue in the entertainment industry, and failed to consider properly the reverence of the reading public for the printed word. The net result is to permit a publisher to "brand his victims with suspicion and then avoid liability by attempting to foist upon the reader the burden and responsibility of ascertaining whether or not there is anything to the charge." *Julian v. American Business Consultants, Inc., supra,* dissenting opinion at 23.

*William C. Rindone, Jr.*

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TORTS — PRENATAL INJURIES — CAUSE OF ACTION ARISES ANY TIME AFTER CONCEPTION.—*Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504, 93 S.E.2d 727 (1956). Plaintiff, an infant, instituted

this suit to recover for prenatal injuries allegedly sustained when defendant's automobile struck the car in which plaintiff's mother, then pregnant for about six weeks, was riding. The injuries resulted in deformities of the right foot, ankle and leg. The trial court, having overruled a general demurrer to the complaint, was reversed by the court of appeals, *Plantation Pipe Line Co. v. Hornbuckle,* 93 Ga. App. 391, 91 S.E.2d 773 (1956), on the ground that no cause of action accrues to a child for tortious injuries sustained as an embryo or foetus "not quick in its mother's womb." 91 S.E.2d at 774. On certiorari, the Supreme Court of Georgia reversed. An infant has a right to recover for injuries inflicted "at any period of its prenatal life," if it can properly prove causation, for in matters beneficial to a child, it is to be regarded as a person in being from the moment of its conception.

This ruling is the first categorical pronouncement on the part of a court of final jurisdiction that injuries to an embryo are compensable. Only one other court, one of intermediate jurisdiction, professed such a liberal view on the issue of recovery for prenatal injuries. *Kelly v. Gregory,* 282 App. Div. 542, 125 N.Y. Supp. 696 (3d Dep't 1953). In that case plaintiff's mother was in the third month of pregnancy when the injury occurred.

The question as to whether an infant may maintain an action founded on injuries sustained by the child during its prenatal existence received a negative answer in *Dietrich v. Northampton,* 138 Mass. 14 (1884), where the question first arose. For some time after this decision in the majority of jurisdictions where the issue subsequently was raised the courts arrived at the same conclusion. *Buel v. United Railways Co.,* 248 Mo. 126, 154 S.W. 71 (1913); *Drobner v. Peters,* 232 N.Y. 220, 133 N.E. 567 (1921); *Gorman v. Budlong,* 23 R.I. 169, 49 Atl. 704 (1901). See 10 A.L.R.2d 1059 (1950). Reasons cited to justify this harsh doctrine were lack of precedent for such a cause of action, *Allaire v. St. Luke's Hospital,* 184 Ill. 359, 56 N.E. 638 (1900); belief that the child, not being a separate entity apart from the mother, was not a human person in esse to whom the tortfeasor owed a duty to exercise reasonable care, *Stanford v. St. Louis-San Francisco Ry.,* 214 Ala. 611, 108 So. 566 (1926); and apprehension that a ruling permitting recovery would lead to fraudulent claims, since it would be difficult to establish causation between a prenatal injury and a postnatal handicap, *Magnolia Coca Cola Bottling Co. v. Jordan,* 124 Tex. 347, 78 S.W.2d 944 (1935). See *Bliss v. Passanesi,* 326 Mass. 461, 95 N.E.2d 206 (1950), for a reaffirmance, although a reluctant one, of the grounds for non-recovery.

However, the Canadian Supreme Court in *Montreal Tramways v. Leveille,* [1933] Can. Sup. Ct. 456, 4 D.L.R. 337, held that a

child could recover for injuries sustained by the child as a foetus of seven months. Although this case was decided in accordance with the civil law, it exerted great influence on the American courts and by 1953 the American weight of authority had shifted to a rule granting such a cause of action. *Amann v. Faidy*, 415 Ill. 422, 114 N.E.2d 412 (1953); *Steggal v. Morris*, 363 Mo. 1224, 258 S.W.2d 577 (1953). See Note, 39 CORNELL L. Q. 542, 543 n.6 (1954). But, with the exception of *Kelly v. Gregory, supra*, and the instant case, the decisions in which a child is accorded a right to recover confine their holding to viable foeti. A viable foetus is defined as one that "has reached such a stage of development, that it can live outside of the uterus." DORLAND, AMERICAN ILLUSTRATED MEDICAL DICTIONARY (22d ed. 1951). See also *Allaire v. St. Luke's Hospital, supra*, at 642.

The arguments, notably the argument by analogy to other branches of the law, advanced in favor of permitting a right of action in cases where prenatal injuries occurred to viable foeti are, however, equally applicable to cases of nonviable foeti and embryos sustaining injuries. Indeed they have been utilized in both *Kelly v. Gregory, supra*, and the instant case.

It is a well established principle that in the law of property, especially in matters of descent and inheritance, unborn children, irrespective of whether or not they are viable, are considered as in esse from the time of conception, whenever it would be advantageous for the infants to be so considered. See 1 BLACKSTONE, COMMENTARIES 130 (Lewis ed. 1897). The permissible period allowed by the Rule against Perpetuities includes the entire period of gestation. See *Thelluson v. Woodford*, 4 Ves. Jr. 322, 31 Eng. Rep. 117 (Ch. 1798). In *Quinlen v. Welch*, 69 Hun 584 (N.Y. Sup. Ct. Gen. T. 1893), the court held an infant could bring an action for the wrongful death of his parent occurring at any time during the period of gestation.

The Georgia Supreme Court, in holding that a child could recover for her prenatal injury suffered while her mother was on the way to the hospital for delivery, stated in *Tucker v. Howard L. Carmichael & Sons*, 208 Ga. 201, 65 S.E.2d 909 at 911 (1951), that it "... would be illogical, unrealistic, and unjust — both to child and society — for the law to withhold its processes necessary for the protection of persons of an unborn child, while, at the same time, making such processes available for purposes of protecting its property."

As to the argument that fictitious claims will arise because it is difficult to prove causation between a prenatal injury and a postnatal condition, in *Damasiewicz v. Gorsuch*, 197 Md. 417, 79 A.2d 550 at 559 (1951), the right to institute a suit was clearly distin-

guished from the ability to prove the facts: "The first cannot be denied because the second may not exist." The view that uncertainty of proof can destroy a legal right was termed an erroneous concept in *Woods v. Lancet,* 303 N.Y. 349, 102 N.E.2d 691 (1951). See *Bonbrest v. Kotz,* 65 F. Supp. 138 at 143 (D.D.C. 1946). Although the difficulties of proper proof are much greater if the injury was received in an early stage of gestation, this should not impair the principle involved. The courts and textwriters have been confident that the "rules of evidence are adequate to require satisfactory proof" of prenatal injury. *Montreal Tramways v. Leveille, supra,* at 346 (there the problem was to trace the cause of clubfeet to a prenatal injury and on appeal the court was satisfied that it had properly been done); PROSSER, TORTS, 174 (2d ed. 1955); Gamble, *Tort Actions for Injuries to Unborn Infants,* 3 VAND L. REV. 282, 289-92 (1950). On the contrary, " . . . the difficulty of obtaining proof of the wrong should prompt greater leniency in affording the remedy, rather than a denial of plain justice." *Scott v. McPheeters,* 33 Cal. App.2d 629, 92 P.2d 678 at 682 (1939).

Finally, the refutation of the argument that an unborn child is *pars viscerum matris* until birth and hence not a person in being to whom an action for prenatal injuries could accrue, can also be extended to embryos and non-viable foeti — not only to viable foeti — on the basis of medical and physiological facts. Medical science has demonstrated that not only a viable foetus but also an embryo and a non-viable foetus have an independent existence from the moment of conception. GREISHEIMER, PHYSIOLOGY AND ANATOMY, 738 (5th ed. 1945). See *Bonbrest v. Kotz, supra,* at 140, for other medical authorities. It is a matter of elementary physiology that a mother and her child in utero are two separate and distinct entities with separate circulatory systems without any communication between them, and with different heartbeats, that of the child being faster. The child, in other words, is not a constituent part of the mother, but rather lives with her. *Kine v. Zuckerman,* 4 Pa.D.&C. 227, 228 (1924), later overruled by *Berlin v. J. C. Penny Co.,* 339 Pa. 547, 16 A.2d 28 (1940); *Stemmer v. Kline,* 128 N.J.L. 455, 25 A.2d 489, 685 (1942) (dissent). In *Kelly v. Gregory, supra* at 697, the court, discussing the difficulty of fixing the point of legal separability from the mother, stated:

> . . . legal separability should begin where there is biological separability. We know something more of the actual process of conception and foetal development now than when some of the common law cases were decided; and what we know makes it possible to demonstrate clearly that *separability begins at conception.* (Emphasis added.)

The principle enunciated in *Kelly v. Gregory, supra,* and the

instant case, obviates the difficulties as to when the viability stage is reached. There is no certainty as to when a child becomes viable; it may be at any time from six to eight months. *Cooper v. Blanck*, 39 So.2d 352, 355 (La. 1923). The concept of viability in the law governing prenatal injuries with its distinction between viable and non-viable foeti, on the basis of which the right to recover is either accorded or denied, still leaves a large area in which there is no relief for tortious injuries. In a case where a non-viable foetus of six months has been injured, denial of its right to bring an action would be purely arbitrary.

Another possible point of legal separability as alluded to by way of dicta in the *Damasiewicz* case, *supra* at 559, and the *Tucker* case, *supra* at 910, is the moment when the child quickens in the mother's womb, *i.e.* when the mother first feels its movements, which is normally between the fourth and fifth month. But such a theory would also be unsatisfactory: first, because the mother would be the only person who could testify as to when the child becomes "quick" and this could easily increase the danger of fraudulent claims; and secondly, there is still a period during which injury could be inflicted with impunity.

It is submitted that the rationale of the instant case which gives the child a right of action from the time of conception, removes the injustice of an injury without compensation.

*Karl Jorda*