1967

Case Notes

Catholic University Law Review

Follow this and additional works at: http://scholarship.law.edu/lawreview

Recommended Citation
Available at: http://scholarship.law.edu/lawreview/vol16/iss4/7

This Notes is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
The plaintiff-payee sued the defendant-maker on the latter's failure to redeem its promissory note at maturity. The maker defended that consideration for the note failed. Special Term entered summary judgment for the plaintiff as a holder in due course.

The transaction arose when the corporate defendant agreed to purchase a quantity of identified steel coil, which it later alleged did not meet the specifications of the sample inspected. Originally, the plaintiff had imported the coil and insured it against damage in transit. Upon its receipt, the plaintiff notified the insurer of a damage claim, which was allowed, though the insurer did not immediately indemnify its claimant. The insurer advertised a salvage sale for account of "whom it may concern." After the defendant bid, the plaintiff investigated and approved its credit background, approved the credit terms and made a signed release of the goods to the defendant, which gave the note to the insurer for delivery to the plaintiff. On appeal, a divided court affirmed.

Anglo-American common law was in general accord on the matter of payees as holders in due course; the payee of a negotiable bill of exchange or promissory note could be a holder in due course. To qualify, it was necessary that he acquire the instrument before maturity, in good faith, for value, and without notice of defenses available to the maker, acceptor, drawer or irregular indorser, against the intermediary or remitter from whom he received it. Nebraska, prior to its adoption of the Uniform Negotiable Instruments Law, was the only American state expressly refusing to accede to the majority view.

The result reached at common law was not as easily achieved under the N.I.L. The difficulty had its basis in the interpretation of § 52 of the uniform law, specifi-
ally § 52 (4), requiring that the instrument be "negotiated." There is nothing in § 52 (1), (2), or (3) which in any way tends to exclude a payee from being a holder in due course. By 1923, because of nice distinctions over § 52 (4), all hope for a uniform construction of the section was in vain. Notwithstanding the split, there did emerge a prevailing view that, since a payee was a holder, a transfer to him by the maker, drawer or remitter was negotiation within the meaning of the N.I.L., and payees could be holders in due course to the same extent as other holders. New York was in agreement, Nebraska assented; but, instead of a sole dissenter, as at common law, there was a proliferation with Iowa leading nine other states in a contrary view. Later adoption of the Uniform Commercial Code by each of these jurisdictions is a legislative expression of the dominant view that a payee may be a holder in due course on a par with other holders.

Common law courts and those applying the N.I.L., though not otherwise opposed to the holder in due course status, have denied it in some circumstances. Grounds for the refusal have included: after a title defense is interposed, holder failed to meet his burden of proving himself to be a favored holder; and holder was a principal to whom was imputed the knowledge of his agent.

---

1. That it is complete and regular upon its face;
2. That he became the holder of it before it was overdue, and without notice that it had been dishonored, if such was the fact;
3. That he took it in good faith and for value;
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

*Uniform Negotiable Instruments Law* § 52 (4). For text, supra note 8.

BRITTON, *op. cit. supra* note 7, § 122.


BRITTON, *op. cit. supra* note 7, at § 122.


Feezer, *supra* note 3, at 118.


*Uniform Commercial Code* § 3-302 (2) and official comment No. 2.


In Alpert v. City Motor Sales the court applied the rule of Munn v. Boasberg. The court held the payee not to be a holder in due course because a check imports on its face that the money represented is drawer's property, that the drawer is paying it to the payee, that a remitter has no apparent title to the check, is to be regarded as the agent of the drawer; and, when the agent attempts to apply it to a personal debt, the payee has a duty to inquire and, failing to do so, will be charged with the knowledge, inquiry might have disclosed.

One authority has classed Alpert as contrary to the preferred view that payees may be holders in due course. This observation is perplexing for the case clearly recognizes the possibility of a payee holding in due course. The court merely asserts that when a defense is raised the holder has the burden of proving he took title to the instrument in due course.

In Alpert the drawer, not the payee, was the principal, and for that reason some courts, in similar fact settings, have rejected the agency related portion of the decision, though it remains the law in New York. However, when the principal-agent relationship is between the payee and another, common law rules of agency are applicable and, if the agent would be barred as a holder in due course, so too will the payee-principal.

Saale was decided under the Code, adopted by New York in 1962. In his opinion Justice Breitel calls the agency relationship, between the plaintiff and its insurer, solely a technical one to implement the transfer of plaintiff's nominal ownership. The court did not deem significant the plaintiff's role in connection with the defendant's request for credit, nor did it give any weight to the plaintiff's control of the goods and probable retention of title. The majority concluded that the sale was between the insurer and the defendant and that no one has ever "suggested that being a party to the underlying transaction bars the holder from being one in due course."

A case relied on, South Shore Securities v. Goode, held that under the Code the payee was a holder in due course, where a builder assigned to a finance company the right to money owed pursuant to a building contract. There, the obligor's wife sent a check, designating the finance company payee, to the builder for approval; the latter forwarded it to his assignee. The builder defaulted; payment was stopped, but the assignee was allowed to recover from the drawer. Professor Allan Farnsworth has called the reason for protecting this payee obscure:

---

28 Wabash Valley Trust Co. v. Fisher, 220 Ind. 133, 41 N.E.2d 352 (1942); Lincoln Trust Co. v. Birch, 106 N.J.L. 255, 149 Atl. 120 (1930).  
30 Cases cited note 23 *supra*; Saale v. Interstate Steel Co., *supra* note 1, at 7, 275 N.Y.S.2d at 538 (dissenting on other grounds); see Britton, *op. cit. supra* note 7, § 162.  
33 5 Misc. 2d 972, 162 N.Y.S.2d 962 (Sup. Ct. 1957).
Since the check was given in payment of a conditional obligation owed by the obligor directly to the payee and not one owed by the builder to the payee, the builder was not a remitter.  

The justification for protecting the plaintiff in the instant case is equally obscure if one posits, as the court does, that the sale was between the insurer and the defendant and "... transmittal of the notes from the buyer to the plaintiff was in discharge of an arrangement between the insurer and insured."  

Juxtaposed to that is Justice Rabin's minority view that the plaintiff was the vendor and the insurer only its agent for whose acts the former is responsible as at common law.

The defendant's insistence on either of the court's two views would have seemed unnecessary to his avoiding summary judgment. Code § 3-305 enumerates the rights of a holder in due course—among them is freedom from the defenses of any party to the instrument with whom he has not dealt; excepted are particularized real defenses. Absent a definition of the word "dealt" and articulation of what minimal contacts are necessary to have so "dealt" with the aggrieved party, an absolute, all-inclusive interpretation might reasonably be given the word. "Dealt," therefore, may possibly be thought to include credit checking and releasing goods before the sale and execution of the note. There is indication that the absence of any and all dealing was the New York Legislature's intention in adopting the Code.

In addition, after a simple contract defense is shown to exist, the Code explicitly lodges the burden of establishing due course holding on the party seeking that position. That one is a holder in due course, is not a presumption to be disproven or called into question by the defendant, as the Saale court suggests. Instead, plaintiff "must sustain this burden by affirmative proof that the instrument was taken for value, that it was taken in good faith, and that it was taken without notice." The foregoing has been given a literal application by the District of Columbia,

... a defense of defective workmanship in the article sold was shown. Appellant made no attempt to meet the merits of that defense, but sought to avoid the defense by its claim of being a holder in due course. Under present law the

---

5 Saale v. Interstate Steel Co., supra note 1, at 5, 275 N.Y.S.2d at 535.
6 Ibid.
7 Id. at 7, 275 N.Y.S.2d at 538.
8 Cases cited note 23 supra.
9 Uniform Commercial Code § 3-305 provides:
   To the extent that a holder is a holder in due course he takes the instrument free from
   (1) all claims to it on the part of any person; and
   (2) all defenses of any party to the instrument with whom the holder has not dealt except
   (real defenses follow).
11 See McKinney's Uniform Commercial Code § 3-302 and Practice Commentary. Courts
   have relied on the Practice Commentaries. See, e.g., Ando Int'l Ltd. v. Woolmaster Corp., 3
   UCC Rptr. 1071 (N.Y. Sup. Ct. 1966).
12 McKinney's Uniform Commercial Code § 3-307 (3) and official comment No. 3.
13 Supra note 1, at 4, 275 N.Y.S.2d at 535.
14 Official comment cited note 42 supra.

---
burden was on appellant to prove that it was "in all respects a holder in due course."\textsuperscript{46}

Georgia,

\ldots the plaintiff was claiming the rights of a holder in due course, his prima facie right of action on the note was challenged by the allegation that the defense of failure of consideration exists, which thereby cast the burden on him "of establishing that he or some person under whom he claims is in all respects a holder in due course."\textsuperscript{46}

and other states.\textsuperscript{47} In an earlier case under the Code, Justice Breitel wrote that the plaintiff holder had the burden of showing it was a holder in due course.\textsuperscript{48}

Recognizing that plaintiff was probably impotent to actually control the insurance company, the court's refusal to find a viable agency relationship is understandable, though it is difficult to perceive how the extent of any agency would be realistically discernable without trial. That notwithstanding, the plaintiff, having entered the negotiations and dealt with the vendee, has made agency unnecessary to the defense. Moreover, in neglecting to finally determine if there was a failure of consideration, the court deprives the defendant of putting the plaintiff to his proof of due course holding. On the one hand, the decision ignores a defense which would be good against a mere holder; while, on the other, it says that the defendant failed to show the plaintiff to be a mere holder. Even if the law did require the defendant to rebut plaintiff's claim of due course holding, that would be an exercise in futility unless the court had first determined that there was a defense militating against the claim of a holder not in due course.

\begin{itemize}
\item\textsuperscript{46} United Sec. Corp. v. Bruton, 213 A.2d 892, 894 (D.C. Cir. 1965).
\end{itemize}

\begin{itemize}
\item\textsuperscript{49} Maber, Inc. v. Factor Cab Corp., \textit{supra} note 29, at 504, 244 N.Y.S.2d at 772. \textit{But see} Certified Indus., Inc. v. Monvent, Inc., 2 UCC Rptr. 531 (Sup. Ct. 1965), \textit{aff'd mem.}, 25 App. Div. 2d 561, 267 N.Y.S.2d 1014 (1966), where the court held it is necessary to specifically deny that the holder is one in due course.
\end{itemize}


On June 30, 1964, Deborah Coleman, age ten, was murdered. On July 2, 1964, Thomas Stasilowitz and Jose Angel Carlo were separately brought to the police station for questioning. Stasilowitz was questioned by at least two police officers for ten consecutive hours, and Carlo was questioned for about seven hours. The questioning was stopped after each boy confessed. At the juvenile court proceeding, although both boys maintained their innocence, the confessions were admitted into evidence,
and the boys were found to be juvenile delinquents. On appeal, the primary issue was the admissibility of the confessions. The Supreme Court of New Jersey, citing Kent v. United States, held that a juvenile proceeding must comply with the constitutional requirement of due process and fair treatment and that the use of an involuntary confession violates this requirement.

The first juvenile court was established in this country in 1897 when the citizenry became aware of the anomaly of trying juveniles and adults in the same courts. The juvenile courts, as they were first established and still operate, are not criminal courts but are civil courts, primarily concerned with the welfare and rehabilitation of the juvenile. A trial in a juvenile court is in the nature of a guardianship proceeding; the state's role in the proceeding is that of Parens Patriae.

Since the juvenile proceeding is a civil proceeding, many courts have held that the juvenile in a juvenile proceeding is not entitled to the constitutional protections afforded defendants in a criminal trial. The Supreme Court first undertook to study the possible application of constitutional protection to juveniles in juvenile proceedings in 1966, some sixty-eight years after the establishment of juvenile court, in the case of Kent v. United States. In Kent, the Court while recognizing that the juvenile courts are civil courts which seek to guide and rehabilitate rather than punish, stated that "... the admonition to function in a parental relationship is not an invitation to procedural arbitrariness," and questioned whether the actual operation of the courts measures well enough against the theory so as to "... make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults." The Court, however, specifically declined to apply these constitutional guarantees to juveniles in juvenile proceedings, but indicated that juvenile proceedings must conform to the essentials of due process and fair treatment. A clear reading of Kent indicates that the Supreme Court is concerned with

---

1 This opinion was not reported.
5 The Parens Patriae doctrine is based upon the early common law concept of the King as the "... ultimate guardian of his subjects, who by reason of helplessness could not help themselves" and the juvenile courts are a modern application of this concept as it was administered by the English courts of Chancery. Waters, The Socialization of Juvenile Court Procedure, 13 J. Cumm. L. C. & P. S. 61, 63 (1922).
6 Kent v. United States, supra note 2; In re Holmes, 379 Pa. 599, 109 A.2d 523 (1954); State v. Naylor, ——— Del. ———, 207 A.2d 1 (1965); Pee v. United States 274 F.2d 556 (D.C. Cir. 1959). Among the constitutional rights denied the juvenile have been the right to indictment by grand jury, to bail, to trial by jury, to immunity against self incrimination, to confrontation by his accusers, and in some jurisdictions to the aid of legal counsel. Kent v. United States, supra note 2. State v. Naylor and Pee v. United States, supra note 6, contain excellent compilations of cases which deal with denial to the juvenile of many of the specific constitutional privileges enumerated above.
7 Supra note 2.
8 Id. at 555.
9 Ibid.
10 Id. at 556.
11 Id. at 562.
the juvenile problem and is ready to hear more cases in this area, as indeed it has in this term.12

The court in the present case was cognizant of Kent and the problems it raised. It recognized the weight of authority to the effect that constitutional safeguards are not applicable to juvenile proceedings, but it was not willing to accept this completely and, while the court13 recognized that a juvenile may not be entitled to all the constitutional protections afforded an adult in a criminal proceeding, relying on Kent, it found that, at a minimum, a juvenile is "...entitled to a fact-finding process which measures up to the essentials of due process and fair treatment."14 The court, recognizing the unreliability of involuntary confessions, found that the use of an involuntary confession fell within the scope of "due process and fair treatment" and was consequently inadmissible in a juvenile proceeding.15

A number of other recent cases have followed the lead of Kent and have applied various constitutional protections to juveniles in juvenile proceedings. Thus, in the case of In re Two Brothers and a Case of Whiskey,16 the Juvenile Court of the District of Columbia relied on Kent in applying the exclusionary rule of the fourth and fifth amendments of the Constitution as enunciated by the Supreme Court in Mapp v. Ohio.17 Again, in People v. Roberts18 and In re Castro,19 two other courts found that the "due process and fair treatment" criteria of Kent requires that the juvenile must be informed of his immunity against self-incrimination and that evidence obtained without so informing him is inadmissible in juvenile courts.20 Another court has relied on Kent in finding that evidence obtained from a juvenile when he was in custody of the juvenile court was obtained when he was denied constitutional protection, and was therefore inadmissible in subsequent criminal proceedings.21 Kent has also been relied on to support the use of an insanity plea in a juvenile proceeding.22

However, the use of Kent to support a juvenile's right to effective assistance of counsel23 and to a jury trial has been rejected by other courts.24 In a case presenting an issue similar to one raised in Kent, the denial of a waiver hearing, whereby a juvenile was waived from the juvenile court to a criminal court, was upheld despite the fact that Kent found that such a denial was not "due process."25

12 In re Gault, 99 Ariz. 181, 407 P.2d 760 (1965), cert. granted, (No. 116, 1966 Term). Appellant Gault in his brief relies on the Kent case and presents issues basic to the Constitution and the juvenile courts, such as the right against self-incrimination.
13 State v. Carlo, supra note 3, at 115-16.
14 Id. at 116.
15 Ibid.
19 64 Cal. 2d 467, 52 Cal. Rptr. 469 (1966).
20 The courts in these cases applied the Supreme Court's rulings in Escobedo v. Illinois, 378 U.S. 478 (1964), and Miranda v. Arizona, 384 U.S. 436 (1966), to juveniles in juvenile proceedings.
21 Gercas v. Davis, 188 So. 2d 7 (Fla. 1966).
22 In re Winburn, _____ Wis. _____, 145 N.W.2d 178 (1966).
While it is impossible to establish a trend developing from the cases which have been decided since *Kent*, it can be said that *Kent* has stirred up a healthy controversy. Until *Kent*, the inapplicability of constitutional protections to a juvenile in juvenile proceedings was virtually a settled question; now the courts are being called upon to reconsider their decisions and, for those courts inclined to apply constitutional protection to juveniles in juvenile proceedings, *Kent* provides a convincing precedent.

Recognizing that juveniles were entitled to constitutional protections prior to the adoption of the juvenile court acts;²⁶ that adults who are before the juvenile courts must be accorded constitutional protections;²⁷ and that juveniles who are tried in a criminal trial must be given all the constitutional protections accorded adults in criminal proceedings,²⁸ it becomes even more unacceptable that these constitutional protections are denied juveniles in juvenile proceedings. It is granted that all constitutional protections afforded in criminal trials may not be applicable to juvenile proceedings because of the informal nature of the proceedings and the individual attention afforded the juvenile. Thus, the denial of a jury trial as in the *Elmore*²⁹ case might be justified because of the confidential nature of the juvenile hearing.³⁰ However, the effective right to counsel³¹ and to a “hearing upon waiver” from a juvenile court³² would seem to be among the essentials of due process and fair treatment and should not be denied.³³

The inadmissibility of involuntary confessions in a juvenile court, as recognized by the court in the instant case, is perhaps one of the most important constitutional protections which should be afforded a juvenile. The protection is important not only because the juvenile would have this specific protection in a criminal court³⁴ but also because of the susceptibility of a youth to police pressure. As the court recognized in the present case, “Boys of 13 and 15 lack the judgment to appreciate... the harm which they may do themselves by yielding to the pressures of insistent police questioning.”³⁵ In addition, juveniles do not normally have the maturity and judgment to understand the ramifications of the questions presented or to appreciate how best to avail themselves of their rights.³⁶ It is imperative that an involuntary

---
²⁹ In re *Elmore*, supra note 24.
³¹ Jackson v. Johnson, supra note 23.
³² Dillenburg v. Maxwell, supra note 25.
³³ In reviewing the denial of counsel and a hearing under the District of Columbia Juvenile Court Act, the Court in *Kent* said: “The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice. Appointment of counsel without affording an opportunity for a hearing on a 'critically important' decision [waiver] is tantamount to denial of counsel.” *Kent* v. United States, supra note 2, at 562.
³⁵ In re *Carlo*, supra, note 3, at 119.
³⁶ Gallegos v. Colorado, supra note 28, at 54.
confession be banned from a juvenile proceeding, for it is difficult to imagine a
greater injustice than the imprisonment of a juvenile for a crime he did not commit
on the basis of a confession obtained in part because of his very youth.\textsuperscript{37}

The Constitution is intended to prevent miscarriages of justice and procedural
arbitrariness; the juvenile, who is often not represented by counsel,\textsuperscript{38} is in grave need
of these protections. This was best stated by Justice Fortas in Kent when he said,
"There is evidence, in fact, that there may be grounds for concern that the child re-
ceives the worst of both worlds that he gets neither the protections accorded to adults
nor the solicitous care and regenerative treatments postulated for children."
\textsuperscript{39}

The question of the applicability of constitutional protections to juveniles in ju-
venile proceedings is most important, in retrospect, when it is realized that the end
result of a juvenile proceeding and a criminal trial are often the same, \textit{i.e.,} imprison-
ment. The courts and the judges may talk in lofty terms about the juvenile proceed-
ings, and state that they are directed to the proper care, guidance, custody and dis-
cipline of the child, and not, as in a criminal trial, to his guilt or innocence as a
criminal offender.\textsuperscript{40} But, when a juvenile is sent to reform school for "rehabilitation," he
is deprived of his freedom and restrained against his will just as is any other crim-
inal offender; and this is the real issue.

\textsuperscript{37} As a general rule, no appellate court will uphold the conviction of a juvenile in a juvenile
court solely on the basis of a coerced confession, but the standard applied in a
juvenile court is guilty, not beyond a reasonable doubt, but only by a preponderence
of evidence, and there is always the danger that the findings of the juvenile court may have
been influenced by the use of the confession in evidence. See Comment, \textit{Criminal Offenders

\textsuperscript{38} Surveys indicate that the representation by attorneys in juvenile cases may be as low
as 5\%, Barrett, Brown, \& Cramer, \textit{supra} note 30, at 796. In the District of Columbia, for
example, lawyers are requested or appear in 10 to 15\% of the cases. \textit{Report of the President's
Commission on Crime in the District of Columbia}, 681-82.

\textsuperscript{39} Kent v. United States, \textit{supra} note 2, at 556.

\textsuperscript{40} Waters, \textit{supra} note 5. Dillenburg \textit{v.} Maxwell, \textit{supra} note 25. One of the most quoted refu-
tations to this position is the statement of a California court, "While the juvenile court law
provides the adjudication of a minor to be a ward of the court shall not be deemed to be a
conviction of a crime, nevertheless, for all practical purposes this is a legel fiction, presenting
a challenge to credulity and doing violence to reason." \textit{In re Contreras}, 109 Cal. App. 2d 787,

Domestic Relations—Custody of Infants—Jurisdiction of Probate Courts—

Mr. \& Mrs. Walter Green had been separated for some time prior to 1965, both
remaining in the state of their original domicile, Massachusetts. In February of 1965,
the husband was transferred by his employer to Danville, Illinois, where he has
since resided. The two minor children of the couple remained with their mother at
her residence in Pittsfield, Massachusetts until June of 1965, when the husband's
mother took the children, without the consent or knowledge of the mother, to live
with their father. Mrs. Green filed a petition for separate support on June 23, 1965,
seeking, among other things, an order for the "care, custody and maintenance of the children." A citation was issued on the same day and later served on the husband personally while he was in Massachusetts. The husband appeared specially, contesting the jurisdiction of the probate court. The judge denied the plea but reserved to the Supreme Judicial Court the final determination of the question of whether the probate court has jurisdiction to make an order relative to the care, custody, and maintenance of minor children when the parents are both subject to the court's jurisdiction but the children themselves are resident and domiciled in another state. In affirming denial of the plea, the court held that personal jurisdiction is a sufficient basis for jurisdiction, regardless of the residence or domicile of the children.2

The husband supported his plea of lack of jurisdiction on two main grounds. His first contention was based upon an interpretation of the "twin" sections providing for the care and support of minor children of separated parents—sections 32 and 37 of chapter 29.3 Since both sections are closely allied, and have been used alternatively at times,4 the husband contended that the jurisdiction requirement of 37 must necessarily apply to 32. The court dismissed this rather easily by noting that the provision for jurisdiction of section 37 is really in the nature of a venue clause. Since, the court concluded, section 32 has its own venue requirement different from that of section 37 the interpretation suggested by the husband would lead to the rather anomalous result that there are two different venue requirements for the same provision!

The husband's second contention was that in custody proceedings, the jurisdiction of the probate court must be based upon either the domicile or residence of the children within the Commonwealth. In passing on this point, the court first examined the cases decided under section 32. The two major cases are cited by the court: Schmidt v. Schmidt5 and Conley v. Conley,6 both of which held that either domicile or residence were sufficient to confer jurisdiction upon the court. However, neither case held that domicile or residence were exclusive prerequisites of jurisdiction. In fact, continued the court, in the Conley case it was held: "We need not consider whether the decree can be supported on other grounds."7 Thus, the court did

1 Pursuant to G.L. c. 209, section 32.
3 Section 32: Support of Wife and Children; Order Prohibiting Personal Restraint of Other Spouse; Custody of Children; Investigations:
Upon the application of the husband or wife, the court can make further orders relative to the support of the wife and the care, custody and maintenance of their minor children...

Section 37: Minor Children of Separated Parents; Care and Custody:
If the parents of minor children live apart from each other, not being divorced, the probate court for the county in which said minors or any of them are residents or inhabitants, shall have the power to make decrees relative to their care, education and maintenance, and to revise and alter such decree.

5 Section 34: Venue:
A petition under section 32 may be brought in the county where either of the parties lives, except that if the petitioner has left the county where the parties have lived together and the respondent still lives therein, the petition shall be brought in that county.

8 Id. at 532, 87 N.E.2d at 155.
not feel constrained to follow precedent and proceeded to investigate the general rules governing the jurisdiction of the probate court in such custody cases with the hope of formulating its own rule.

From the earliest time infants were regarded as entitled to the special protection of the state, which acted as "parens patriae." Thus, there is no doubt that a state is authorized to legislate for the protection, care, custody and maintenance of children within its jurisdiction. Independently of any statute, however, the custody of minor children is a subject of which a court of equity will take cognizance in a proper case. The problem arises when there are two equity courts which have an interest in the child. It then becomes necessary to determine exactly what requirements are needed to give a court of equity jurisdiction to adjudicate the custody of the infants.

Essentially three theories have developed as to what is necessary to confer jurisdiction on a court in such custody cases. The traditional rule relative to these cases is that in order for the court to have jurisdiction, the children must be domiciled within the state where the proceedings are brought. Such a view, while followed by some courts, is favored mostly by the writers. The rationale given by the proponents of this theory is expressed by the Supreme Court of Florida in Dorman v. Friendly:

The subject matter involved in the question... is the children themselves, and, if a court does not have jurisdiction of them, it does not have jurisdiction of the subject matter to determine the right of custody...

Domicile is, however, a very technical concept and wrought with complexities. This led the more practical courts to adopt a somewhat more flexible basis for jurisdiction—residency. Justice Cardozo eloquently rejected the domicile standard for jurisdiction and adopted the test of residency: "It [the state's jurisdiction] has its origin in the protection that is due to the incompetent or helpless. For this, the residence of the child suffices though the domicile be elsewhere." This result has gained favor with the courts and is accepted by a majority of them. Indeed, as the court pointed out, Massachusetts had adhered to this view.

Even this expansion has been considered too narrow a basis for jurisdiction and some courts have gone further and extended jurisdiction in those cases where the court has in personam jurisdiction over the parents. This theory is illustrated by the excellent opinion of Judge Traynor in the landmark case of Sampsell v. Superior Court of Los Angeles County. In that case the parents were both subject to the

---

12 In re: Guardianship of Skinner, 230 Iowa 1016, 300 N.W. 1 (1941).
13 See BEALE, CONFLICT OF LAWS § 144.3 (1929); GOODRICH, CONFLICT OF LAWS § 186 (3d ed. 1949).
14 146 Fla. 732, 1 So. 2d 734 (1941).
15 Id. at 734, 1 So. 2d at 736.
18 Schmidt v. Schmidt, supra note 6.
20 32 Cal. 2d 763, 197 P.2d 739 (1948).
The court's jurisdiction and the child was domiciled in California, although not a resident there. The court did not take the easy escape of domicile but held:

It is a sufficient basis for jurisdiction that the state has a substantial interest in the welfare of the child or in the preservation of the family unit of which he is a part.22

It is difficult to imagine any broader language conferring jurisdiction on a court. Certainly any state can claim such "substantial interest."

The approach taken by the California court seems to have found the immediate support of a growing number of state courts.23 Although the courts differ among themselves as to why they adopt the "California theory," the basic ideas of Judge Traynor are present, especially the one giving the court jurisdiction if there is a substantial interest. These recurrent themes are well illustrated by the decision of the Missouri Court of Appeals in the 1960 case of Weiler v. Weiler.24

It appears logical that the court having jurisdiction over both parents should have jurisdiction to determine and award custody of the children. A multiplicity of suits would otherwise result and the "best interest" of the children would not thereby be served.25

Similar results have been reached by the courts of: Alaska,26 Nevada,27 New Mexico,28 South Carolina,29 and Illinois.30

After a thorough review of the authorities and possibilities open to it, the Supreme Judicial Court in Green decided to adopt the rule expounded by the California court. While realizing that the ideal situation for determining custody is when the children, as well as both parents, are in the presence of the court, the court admitted that such a situation is often difficult or impossible to achieve. Thus, the presence of both parents will afford a reasonable opportunity for this determination—at least as reasonable as the presence of one parent with the child (under the resident requirement) or one parent alone (under the domicile requirement).

The result reached by the court seems to be desirable from two points of view. Under the domicile theory, a court could have jurisdiction to determine the custody of minor children when in fact only the father is domiciled in that state, since the place of the father's domicile, is legally that of the children also.31 One party is certainly not sufficient for a valid adjudication of the child's life. Residency would seem a little more equitable since only one party may be before the court, even though the child is present. It is not essential that the children themselves be before the court but it would seem essential that both parties involved would be, since the decision and award of the court will have the greatest effect upon them. The court's

22 Id. at 774, 197 P.2d at 750.
23 Annot., supra note 12, 30-32.
24 311 S.W. 2d 165 (Mo. App. 1966).
25 Id. at 168.
30 In re Guardianship of Smythe, 65 Ill. 2d 431, 213 N.E.2d 609 (1965).
decision in Green is a realistic one, regarding the children not as mere property, which must be within the state for an in rem proceeding, but as true objects of their concern—the state is truly acting as "parens patriae." The second reason why the court's decision seems desirable is that it may work to avoid a multiplicity of suits. By attaining personal jurisdiction over both parents and settling all the problems in one litigation, it would certainly be in the best interest of all the parties.

Finally, it must be admitted that the decision of the court is in line with the recent trend of expanding a court's jurisdiction over subject matter traditionally denied to it. Thus, the Green decision may be to the law of domestic relations what the International Shoe decision was to contracts and what the Kilberg decision was to torts.

---


DIVESTITURE without DELAY was the MANDATE handed down by the Supreme Court nearly three years ago in their holding that the acquisition of Pacific Northwest Corp. by El Paso Natural Gas Co. violated section 7 of the Clayton Act. During the three years since that decision, the district court has approved negotiations among the Department of Justice, El Paso, and the new company, which will not restore the new company to the position of competition once held by Pacific Northwest Corp. In this respect the Department of Justice "knuckled under" to El Paso. Appellants, the State of California, Southern California Edison (a large industrial user of natural gas in the state of California) and Cascade Natural Gas (a distributor in Washington and Oregon), seek intervention as of right under Rule 24 (a) (3) of the Federal Rules of Civil Procedure, desiring the retention of competition in California. The Court holds that California as well as Southern California Edison may intervene because they are "so situated" geographically as to be 'adversely affected' within the meaning of Rule 24 (a) (3) by a merger that reduces the competitive factor

---

3 Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 35 U.S.L. Week 4227, 4229 (Feb. 27, 1967). In laying down the guidelines for establishing the new company, the Court points out that the Federal Power Commission has not had the opportunity to pass upon the contract. The Federal Power Commission "...indicated its approval of this merger as being in the public interest." United States v. El Paso Natural Gas Co., supra note 1, at 663. For a provocative comment on the element of dual control existing between the Justice Department and the Federal Power Commission, see Mr. Justice Harlan's dissent in United States v. El Paso Natural Gas Co., supra note 1, at 664.
4 Cascade Natural Gas Corp. v. El Paso Natural Gas Co., supra note 3, at 4231.
5 Id. at 4228.
in natural gas available to California." The Court did not decide whether Cascade may intervene, since de novo hearings were ordered and a new version of Rule 24 (a) came in effect as of July 1, 1966; this version was not in effect at the time of the district court's denial of intervention.

Rule 24 (a), governing intervention of right, is as follows:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof. (Emphasis added.)

Courts have differed in the interpretation of "interest" necessary for intervention as of right under 24 (a) (2). The phrase "may be bound," also in 24 (a) (2), has been interpreted to mean bound in a res judicata sense. Because the judgment in a government antitrust action is not res judicata in private antitrust actions, none of the applicants can intervene under 24 (a) (2).

Intervention in government antitrust suits has been constantly denied because of the underlying rationale that the United States alone can represent the public interest. Statutory power is in the Attorney General to prosecute violators. Private parties would only cause added delay in already prolonged litigation, by asserting their view of the public interest. Since antitrust litigation is inherently protracted, courts have been reluctant to grant intervention under Rule 24 (a) (3). As a practical matter, an individual cannot spend a vast amount of time and money litigating an issue that has already been decided, and for this reason some courts have recognized the injustice in not permitting a private party to intervene. Thus the different interpretations of "interest" in 24 (a) (2). Some courts have found the concept of property in a secret formula. These developments are a nat-

---

6 Id. at 4229.
7 Supreme Court Order of February 28, 1966, 384 U.S. 1031 (1966). The new version of the rules applies "... also in all further proceedings in actions then pending, except to the extent that in the opinion of the Court their application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies."
11 Sam Fox Publishing Co. v. United States, supra note 10. Here intervention as of right was denied in a government antitrust suit against a music association of which applicant Sam Fox was a member. Theoretically Fox could bring his own antitrust action, but practically this was almost impossible.
14 This seems to be the main concern of the dissent in Cascade Natural Gas Corp. v. El Paso Natural Gas Co., supra note 3.
ural result of the technical rigidity enveloped in 24(a). In the new version of Rule 24(a), which will be in effect when this case again visits the district court, the technical concepts embodied in the old Rule 24(a) have been eliminated. It states that a party may intervene:

... when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. (Emphasis added.)

This is very liberal in relation to the old rule previously mentioned. The infusion of such phrases as "relating to," "property or transaction," and "as a practical matter" provides a very flexible rule. Notice must be given to the last phrase of the new version: "... unless the applicant's interest is adequately represented by existing parties," the key to intervention in the future, was formally embodied only in Rule 24(a)(2).

Cascade Natural Gas Corp. v. El Paso Natural Gas Co. is decided in the spirit of the new version of Rule 24(a) as well as in the spirit of Missouri-Kansas Pipe Line Co. v. United States, although the former case's interpretation is classified according to the old Rule 24(a)(2).

In Missouri Pipe, intervention, as of right, was allowed, however it was not dependent on Rule 24(a). Here, a consent decree had been entered providing that, on application, Panhandle Eastern, a competitor of the defendant, might become a party to the litigation in order to protect its interests. Five years later the government decided to reopen the decree and a security holder of Panhandle Eastern was allowed to intervene as of right. Intervention was allowed outside of the provisions of Rule 24(a) only because Panhandle's right to intervene was expressly established in the consent decree itself, thus, in no way dependent on Rule 24(a). The economic independence of Panhandle in Missouri Pipe and the economic independ-

---

18 See 1966 Advisory Committee's note on revision of Rule 24(a).
17 FED. R. CIV. P. 24(a)(2) effective as mentioned supra note 7.
18 It is questionable whether Cascade has an interest "in" California competition, but certainly it has an interest "relating to."
19 This revision eliminates the difficulty of obtaining a just decision as in Formulabs, Inc. v. Hartley Pen Co., supra note 15, which was decided under the old rule.
20 In Sam Fox Publishing Co. v. United States, supra note 10, as "a practical matter," for a private individual to prosecute an antitrust action, is by far the exception. Perhaps, if the new version of the Rule were used, the Court would have reached a different result.
21 Supra note 7.
22 312 U.S. 502 (1941).
23 The Court specifically points out that the new version will be used when the case goes back to the District Court for de novo hearings. Cascade Natural Gas Corp. v. El Paso Natural Gas Co., supra note 3, at 4229.
24 Missouri-Kansas Pipe Line Co. v. United States, supra note 22, n.1 at 507 (expressly giving Panhandle Eastern certain rights). See 40 Mich. L. Rev. 146 n.12 (1941), which posits that the case must be construed very narrowly, and states "A corporation in the position of Panhandle in the principal case would have no absolute right of intervention under the federal rules."
25 Ibid.
26 Id. at 506.
ence of California in *El Paso* formed the heart of the controversies. Thus, in assimilating a divestiture decree issued almost three years ago, the Court finds a close analogy to rights derived from a five year old consent decree, and the "spirit" of *Missouri Pipe* is adhered to.

In *Cascade* Justices Stewart and Harlan dissent, stating "... nothing could be better calculated to confuse and prolong antitrust litigation than the rule which the Court today announces." While it is true that the Court did take a liberal view of intervention, the rule it used, because it is now supplanted by a new version, is a mere nullity.

Because the Department of Justice "knuckled under" and the district court approved contracts which would saddle "onerous prices and other conditions on the new company," thus leading the Court to remove the District Judge, the necessary element of inadequate representation was fulfilled which will satisfy all of the elements of the new Rule 24 (a). Intervention will perhaps be more frequent in the future under Rule 24 (a); but, it will not unduly protract antitrust litigation. Delay will only be caused when there is a violation of the last phrase of the new rule "... unless the applicant's interest is adequately represented by existing parties." Certainly a jurisprudential quagmire would result if intervention had no limit, but adequate representation provides such a limit. Cascade could not have intervened under the new Rule 24 (a) if the Department of Justice had been acting with due regard to the mandate of the Supreme Court.

Upon the admittance of Cascade and the other appellants, the individual consumer of natural gas in California will again be adequately represented, thus intervention will be denied. Under the new Rule 24 (a), all parties that fulfill the requirements will be represented, and the least amount of delay necessary to accomplish a just result will be achieved.

It is submitted that the cases discussed below will prove to be valuable guidelines for intervention in the future. In *Wolpe v. Poretsky* a Zoning Commission brought suit to enforce its zoning order for the benefit of adjoining property owners. "At the close of a trial on the merits the court found that the action of the Zoning Commission in adopting the zoning order in question was arbitrary, capricious and void." The Zoning Commission decided not to appeal the decision. The adjoining property owners applied to intervene. The court held:

The failure of the Zoning Commission to take an appeal clearly indicates that its representation of the interest of the interveners was inadequate. We do not go so far as to hold that adequate representation requires an appeal in every case, but in the absence of an appeal, the representation is inadequate. The court found the action of the Zoning Commission "... arbitrary, capricious and void." The Zoning Commission could not have intervened under the new Rule 24 (a) if the Department of Justice had been acting with due regard to the mandate of the Supreme Court.

Upon the admittance of Cascade and the other appellants, the individual consumer of natural gas in California will again be adequately represented, thus intervention will be denied. Under the new Rule 24 (a), all parties that fulfill the requirements will be represented, and the least amount of delay necessary to accomplish a just result will be achieved.

It is submitted that the cases discussed below will prove to be valuable guidelines for intervention in the future. In *Wolpe v. Poretsky* a Zoning Commission brought suit to enforce its zoning order for the benefit of adjoining property owners. "At the close of a trial on the merits the court found that the action of the Zoning Commission in adopting the zoning order in question was arbitrary, capricious and void." The Zoning Commission decided not to appeal the decision. The adjoining property owners applied to intervene. The court held:

The failure of the Zoning Commission to take an appeal clearly indicates that its representation of the interest of the interveners was inadequate. We do not go so far as to hold that adequate representation requires an appeal in every case, but in the absence of an appeal, the representation is inadequate. The court found the action of the Zoning Commission "... arbitrary, capricious and void." The Zoning Commission could not have intervened under the new Rule 24 (a) if the Department of Justice had been acting with due regard to the mandate of the Supreme Court.
case. But here an administrative body is charged with arbitrary and capricious action in favor of a strong presumption that they properly performed their duties.

Intervention was allowed only when it was determined that inadequate representation existed. This result is similar to results which probably will be reached under the new Rule 24 (a).

In citing Wolpe, Pallegrine v. Nesbit allowed a stockholder who owned but two shares of stock to intervene when his corporation refused to appeal an adverse judgment brought to recover profits against the corporation's officers obtained from a stock purchase agreement. The court held “Intervention should be allowed even after a final judgment where it is necessary to preserve some right which cannot otherwise be protected.... In the instant case appellant had no right to intervene so long as the corporation was diligently prosecuting the action.” Before failure to appeal, intervention would not have been allowed.

Cascade v. El Paso is an unusual case in the respect that it is couched in the language of a rule which, because of the new version, is a nullity. The issues it presents are moot since old Rule 24 (a) is supplanted, but its reasoning does present valuable insights into intervention in the future. Intervention of right was properly granted, couched in the language of an obsolete rule, but in the “spirit” of Missouri Pipe and with foresight relating to future litigation under the new Rule 24 (a) (2).


HAGAN ADVERTISING DISPLAYS, Inc. is a manufacturer of dealer identification signs for national advertisers. In attempting to forecast their needs for signs a year in advance, the advertisers placed blanket orders with Hagan for the number of signs which their estimates showed would be needed in the ensuing year. Although normally these orders reflected a year's needs, on some occasions their budgets were inaccurate or orders were placed for more than a year. In such instances shipments of signs under the blanket orders would extend over a period longer than a year, sometimes two or three years. Some of Hagan's customers made payments on their contracts in advance of shipment. In computing taxable income for the year Hagan would include only so much of the advance payments as were evidenced by signs shipped to the purchasers. Advance payments included in the "advances from customers" account as of the end of any year were removed from that account and cred-
The Commissioner of Internal Revenue assessed a deficiency\(^1\) for two taxable years, noting that Hagan's taxable income should be increased by the amount of the advances received during those years. The Tax Court agreed with the Commissioner\(^2\) and held: that the Commissioner had acted within his discretionary limits in denying the deferral of the advances to subsequent years to more clearly reflect income.

Although initially the claim of right doctrine\(^3\) was relied upon as a bar to deferral of advances by accrual basis taxpayers, recently the courts have concentrated less on this approach.\(^4\)

In *Automobile Club of Michigan v. Commissioner*,\(^5\) the taxpayer sought to defer dues income over a twelve month period, one-twelfth of the dues received being recognized as income each month. The dues were deposited in a general bank account with no restrictions on use. The Commissioner argued that since the dues were received under a claim of right without restriction as to disposition, the entire amount should be reported as income in the year received. The Court, in holding for the Commissioner, skirted the claim of right argument and held only that the pro-rata allocation of membership dues in monthly amounts was purely artificial and bore no relation to the services which petitioner might be called upon to render.\(^6\)

In *Bressner Radio, Inc. v. Commissioner*,\(^7\) the court pointed out that although section 41 of the Code\(^8\) provided for net income to be determined on an annual basis, the exception provided in section 42\(^9\) would allow deferral of prepaid income if, under an accounting method allowed under section 41, the amounts were to be properly accounted for as of a different period.\(^10\) Therefore, the court held, the tax-

---

3. If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.” *North American Consolidated Oil Co. v. Burnet*, 286 U.S. 417, 424 (1932), See *Curtis R. Andrews v. Commissioner*, 23 T.C. 1026 (1955) (prepaid tuition for dancing lessons); *South Dade Farms v. Commissioner*, 138 F.2d 818 (5th Cir. 1943) (rent received in advance); *Clay Sewer Pipe Ass'n v. Commissioner*, 139 F.2d 130 (3d Cir. 1943) (subscription for promotion campaign to be consummated in years subsequent to receipt). The Tax Court has carried the claim of right doctrine to the point where it was found applicable to advance fees which were due but not yet paid. *Your Health Club, Inc.*, 4 T.C. 385 (1944).
6. *Id.* at 189. The Court distinguished *Beacon Pub. Co. v. Commissioner*, 218 F.2d 697 (10th Cir. 1955) (prepaid newspaper subscriptions) and *Schuessler v. Commissioner*, 230 F.2d 722 (5th Cir. 1956) (customer advances to cover cost of turning furnaces on and off over several year period) on their facts. In both cases performance was necessarily postponed by the nature of the enterprise. Therefore, deferral was warranted.
7. 267 F.2d 520 (2d Cir. 1959).
10. *Taxpayer was engaged in the sale of television receivers, had long employed the accrual method of accounting and sold twelve month servicing contracts for which it received lump*
payer's method of accounting did clearly reflect income inasmuch as the taxpayer took into income of the year such portion of the total as, in accordance with its accounting procedures, it then considered to be earned.11 The court distinguished Automobile Club of Michigan by noting that the Supreme Court had held for the Commissioner on the narrow ground that pro-rata allocation of membership dues in monthly installments was purely artificial.12

However, in American Automobile Association v. Commissioner,13 the rationale in Bressner was rejected.14 Notwithstanding expert accounting testimony to the effect that the method used was in accord with generally accepted accounting principles, the Court held that for tax purposes the system of accounting was "purely artificial" since the performance of the services was contingent upon member demand and not related to fixed dates after the tax year.15 The Court also held that although the method used conformed to generally accepted accounting principles for performing the function of business accounting, representing a rather accurate image of total financial structure, it nevertheless failed to respect the criteria of annual tax accounting and was not conclusive on the issue of clearly reflecting income.16 That being the case, the Commissioner had not breached his discretion in disallowing deferral.17 Moreover, the retroactive repeal of sections 45218 and 462,19 the Court found,

sum payments. Taxpayer, in accordance with the method of accounting regularly employed in keeping its books, allocated 25% of the service contract price to installation cost and deferred the balance over the twelve month period of the contract. Bressner Radio, Inc. v. Commissioner, supra note 7, at 521.

Ibid. 12
Therefore, as the court found a "realistic" deferral, clearly reflecting income, the Commissioner's discretion was nullified. Id. at 526.


Certiorari was granted because of the conflict between Bressner and the Court of Claims decision in American Automobile. Id. at 689.

Id. at 691.

Id. at 692-93.

Historically, the Commissioner has been given wide latitude in determining the computation of net income. See Lucas v. American Code Co., 280 U.S. 445, 449 (1930) wherein it was stated, "And the direction that net income be computed according to the method of accounting regularly employed by the taxpayer is expressly limited to cases where the Commissioner believes that the accounts clearly reflect income. Much latitude for discretion is thus given to the administrative board charged with the duty of enforcing the [revenue] Act. Its interpretation of the statute and the practice adopted by it should not be interfered with unless clearly unlawful." Accord, Brown v. Helvering, 291 U.S. 193 (1934); Commissioner v. Hansen, 360 U.S. 446 (1959). But see, Pacific Grape Products, Co. v. Commissioner, 219 F.2d 882 (9th Cir. 1955) (deduction case) wherein Commissioner's holding that no sales of unshipped fruit products had been made, thus allowing taxpayer less deduction for cost of goods sold, reversed, on the ground that usage and custom in regard to standard contracts used throughout the industry warranted finding of passage of title.

It has been noted that in light of the courts' recent decisions, the Commissioner's discretion seemingly has been eliminated. Alvin, Tax Court Extends Prepaid Income Rules to Sales of Goods; New Tax Headaches for Many, 23 J. TAXATION 210, 211 (1965).

INT. REV. CODE of 1954, ch. 1, § 452, 68A Stat. 152. This section specifically provided for deferral of prepaid income by accrual basis taxpayers.

INT. REV. CODE of 1954, ch. 1, § 462, 68A Stat. 158. This section specifically provided for reserves for estimated expenses to be taken into account in computing taxable income by accrual basis taxpayers.
was clearly a mandate from Congress that petitioner's system of accounting was not acceptable for tax purposes.\textsuperscript{20}

In reaching its decision, the court in \textit{Hagan} relied on the underlying rationale of \textit{American Automobile} and \textit{Schlude}.\textsuperscript{21} The fact that the advance payments were for goods rather than services, the court found, did not render those decisions inapplicable.\textsuperscript{22} Although noting that not all receipts of money or property constitute part of his gross or taxable income,\textsuperscript{23} the court found the advances includible in taxable income on the grounds that they were received for firm orders without restriction as to use.\textsuperscript{24} Money thus received, the court held, was for sales in the ordinary course of business.\textsuperscript{25}

However, under the regulations applicable to producers of goods, the use of inventories is mandatory to determine taxable income.\textsuperscript{26} Merchandise is to be included in inventory only if title is vested in the taxpayer, and excluded from inventory where the goods have been sold.\textsuperscript{27} An accrual method taxpayer engaged in a manufacturing business may account for sales of his product when the goods are shipped, when the product is delivered, or when title passes to the customer.\textsuperscript{28} Hagan, then, in deferring recognition of income until the signs were ordered delivered by its customers, seemingly was in accord with the statutory guidelines applicable to businesses of its type.

Yet the court held that to allow Hagan to wait until the goods were shipped so that the cost of goods sold could be subtracted from gross receipts would, in effect, be placing it on a "transactional"\textsuperscript{29} basis of accounting.\textsuperscript{30} Further, the court noted, nothing in the regulations suggested that an attempt be made to match a particular purchase with a particular sale or a particular item in inventory.\textsuperscript{31} Thus, the "sales"
the court referred to were based upon the fixed contractual obligations between the
parties and not upon completion of goods or passage of title.

Although the dissent in Hagan raises the constitutional issue of taxing more than
gross income, it is well to note that essentially the same argument could have been
rendered in the service cases. For in those cases none of the expenses in rendering
the services had been incurred beyond the year of receipt of the prepayments, yet
their total advances were subject to taxation. Here, too, the situation is similar in that
Hagan would be allowed to account for cost of goods sold within the taxable year of
receipt, but is not allowed to defer recognition of income until the transac-
tion would be complete in some future year. Thus, the court in Hagan maintained
the integrity of the “annual” basis of collection of revenues.

Recognition of the accrual method of accounting and the regulatory dictates for
dealing with inventories and sales notwithstanding, the overriding principles of the
tax system demand inclusion in income of payments in the year received. Thus, the
need for legislation to coordinate more closely the revenue needs of the nation and
commercial practice in reflecting financial position is markedly elucidated by this case.

82 Lela Sullenger, 11 T.C. 1076 (1948). But see Bent v. Commissioner, 56 F.2d 99 (9th Cir.
1932).

Fourteenth Amendment—Clause Against Self-Incrimination—No Sanction
to Attorney Using Privilege—Spevack v. Klein, — U.S.—, 87 S. Ct. 625
(1967).

Samuel Spevack, a New York attorney, refused to honor a subpoena duces tecum
and produce financial records and refused to testify at a judicial inquiry. The at-
torney’s only defense was that the records and his testimony would tend to incrimi-
nate him. The Appellate Division, Second Department, entered an order confirm-
ing the report of the referee directing that the attorney be disbarred. The Court of
Appeals of New York affirmed, basing its decision on the authority of Cohen v.
Hurley and on the premise that the fifth amendment did not apply to records re-
quired to be kept under law.

The principle issue in the case is whether a lawyer who is asked to produce docu-
ments and records at a judicial inquiry under Rule IV (6) of the Civil Practice An-
nual of New York can invoke his constitutional privilege against self-incrimination
without having to fear the sanction of disbarment.

The United States Supreme Court reversed the New York court and held that no
sanction can be imposed on one claiming the privilege not to incriminate himself
and that the documents required to be kept by the attorney were not “public” and
so were within the privilege.

3 Civil Practice Annual of New York, Rule IV (6), 9-24 (1964).
Cohen v. Hurley, the authority for the Court of Appeals of New York, held that an attorney who refused to testify could be disbarred. It permitted New York to interpret its own privilege against self-incrimination, and New York refused to make it available in judicial inquiries similar to the one in Spevack. Cohen also held that the fourteenth amendment did not apply the fifth amendment's self-incrimination clause to the states. Twining v. New Jersey had set the ground work for decisions like the one in Cohen by declaring that states would allow the privilege only when "necessary and expedient" and that exemption from "compulsory self-incrimination" could be a "forced construction of the Constitution."

In Malloy v. Hogan, the Court, while it did not explicitly overrule Cohen, held that the self-incrimination clause of the fifth amendment applied to the states through the fourteenth. In Spevack, Cohen is finally expressly overruled.

The Court in the instant case is especially alarmed with the imposition of a "penalty" on anyone pleading the privilege against self-incrimination. It insists that no sanction influence the constitutional right to remain silent. It insists the potency of the privilege is diminished by anything less than a liberal construction. Though these principles are by no means new, many cases, though not all, had found their way around them and virtually disregarded them. In Beilan v. Board of Public Education, School Dist. of Philadelphia and Lerner v. Case, a teacher and a subway conductor had refused to answer questions concerning affiliations past or present with the Communist Party, and their employers summarily discharged them on grounds of "incompetency" and "doubtful trust and reliability."

The majority opinion of the Court in these cases and in many similar cases insisted that the discharge...
of the employees was not a direct sanction on their use of the privilege against self-incrimination, but the dissenting Justices adamantly objected. "We compound error in these decisions. We not only impute wrongdoing to those who invoke their constitutional rights. We go further and impute the worst possible motives to them." 19

It is interesting to note that the Special Committee on Communist Tactics, Strategy and Objections was quoted as commenting, "We should and must protect fundamental rights—even of Communists." 20 The article went on to note that the individual's fundamental rights are hardly protected if their exercise is a reason for disbarment. 21

The application of the privilege against self-incrimination to the states will obviously have an impact on the states' power to require an attorney to demonstrate his qualifications for admission to the bar. It will have an even greater impact on the states burden of proving failure of qualification after admission. The Spevack case magnifies its effect. In general, as the Court indicated in Dent v. West Virginia, 22 "The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud." 23 In Orloff v. Willoughby, 24 the Court affirmed the appellate court's decision to refuse a physician a commission as an officer after he was inducted into the Army, because he refused to answer whether he was or ever had been a member of the Communist Party. The majority opinion said that the Army had the discretion to decide what qualifications need be met before a commission be granted; it interpreted as it pleased the applicant's refusal to assist in determining his qualifications by his pleading the fifth amendment. Justice Black dissented in Orloff, writing:

Doubtless there are some who would make it a crime for a person to claim this privilege. If an attempt is to be made to punish draftees for asserting constitutional claims, as I can hardly believe it would, it should be done only by an act of Congress. Should such be attempted I would hope that this Court would promptly declare an act to that effect unconstitutional. 25

This is the rationale that the Court in Spevack weights heavily to balance the "public interest" which concerned the Court in Dent. Though it is obviously inaccurate to describe privilege to practice law as a constitutional right, it is important to recognize that this privilege once it has vested is not without clear and valuable rights and should not "be subject to arbitrary revocation." 26

Spevack also touches on the problem: what records and documents come under

---

21 Id. at 407.
22 129 U.S. 118 (1889).
23 Id. at 122. See also Hawker v. New Jersey, 170 U.S. 189 (1897). "It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there." Barsky v. Board of Regents, 347 U.S. 442 (1954).
24 345 U.S. 83 (1953).
25 Id. at 97 (dissenting opinion).
the privilege? Generally, a state employee keeping public books for the state, or a corporate agent keeping records for the corporation, must produce the same upon request, and has no privilege regarding them. In Shapiro v. United States, the Court distinguished between “papers exclusively private and documents having public aspects.” In United States v. White, the Court held that “The Constitutional privilege against self-incrimination is essentially a personal one, applying to natural individuals,” and this includes their individual property. In Spevack, the Court decided that the records requested were private papers and so subject to the privilege, and did not find it necessary to reach the problem of whether Shapiro should be overruled in its entirety.

There has always been a conflict between the public interest and the clause against self-incrimination. Today the courts are gradually expanding the privilege. The Court wrote, in Murphy v. Waterfront Comm’n:

It [the privilege] reflects many of our fundamental values and the most noble aspirations; our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice...

Justice Black, in In re Anastaplo, warned the courts that there was a trend driving men to become “government-fearing” and “time serving” because the Government is being permitted to strike out at those who are fearless enough to say what they think. He insisted that this trend must be stopped, “if we are to keep faith with the Founders of our Nation and pass on to future generations of Americans the great

27 See Davis v. United States, 528 U.S. 582, 588-90 (1946); Wilson v. United States, 221 U.S. 361 (1911); Drier v. United States, 221 U.S. 394 (1911); Baltimore & Ohio R.R. v. Interstate Commerce Comm’n, 221 U.S. 612 (1911); Wheeler v. United States, 226 U.S. 478 (1913); Grant v. United States, 227 U.S. 74 (1913); Essgee Co. v. United States, 262 U.S. 151 (1923).  
28 355 U.S. 1 (1948).  
29 Id. at 34.  
30 322 U.S. 694 (1944).  
31 Id. at 698.  
33 Ibid.  
34 “One of the most valuable prerogatives of the citizen.” Brown v. Walker, 161 U.S. 591, 610 (1896). “Recent re-examination of the history and meaning of the fifth amendment has emphasized anew that one of the basic functions of the privilege is to protect innocent men.” Grunewald v. United States, 353 U.S. 391, 421 (1957). See also Slockower v. Board of Higher Education, supra note 22, at 557-58. “It is a barrier interposed between the individual and the power of the government, a barrier interposed by the sovereign people of the state; and neither legislators nor judges are free to overleap it.” Matter of Doyle, 257 N.Y. 244, 250 (1921); the clause against self-incrimination “is both an expression of our opposition to justice administered by inquisition and, at the same time, the bulwark of our protection from inquisitorial practices.” Huard, The Fifth Amendment—An Evaluation, 42 Geo. L. J. 345 (1954).  
36 Id. at 55.  
heritage of freedom. . . . [W]e must return to the original language of the Bill of Rights."\textsuperscript{38} This is the driving force behind the decision in \textit{Spevack v. Klein} and a legion of other recent decisions of the Supreme Court.\textsuperscript{39}

\footnotesize
\textsuperscript{38} Id. at 116.


\textbf{Garwin Corporation}, closed its \textbf{New York plant} and moved its operations to Florida, without notifying the New York employees or their majority representative, \textit{Local 57, International Ladies’ Garment Workers’ Union, AFL-CIO}. The union filed unfair labor practice charges against Garwin under the National Labor Relations Act, sections 8 (a) (5), (3) and (1).\textsuperscript{1} Upon hearing, the trial examiner found that Garwin had violated the act by shutting down its New York plant and discharging its employees for the purposes of (1) depriving the employees of their organizational and collective bargaining rights protected under section 7 of the act\textsuperscript{2}; and (2) avoiding its duty to bargain with the union;\textsuperscript{3} and by failing to notify and bargain with the union concerning the move and its effects upon employees.\textsuperscript{4} Considering Garwin’s possible choices of either resuming its New York operations or continuing its new Florida operations, the trial examiner recommended the Board’s standard order in runaway shop cases, \textit{i.e.}, an order that Garwin offer the discharged employees reinstatement and back pay at either site, and that it bargain with the union either in New York or, if it remained in Florida, upon the union’s re-establishment of its majority among the Florida employees.\textsuperscript{5} The Board, upon reviewing the trial examiner’s decision, affirmed his findings, but enlarged his suggested bargaining order. It ordered Garwin, even if it chose to remain in Florida, to bargain with the union upon request, without requiring the union to re-establish its majority. The Board’s order, however, limited the “bar” of any resulting Florida contract, during which the union’s majority might not be questioned, to a period of one year instead of the usual three.\textsuperscript{6} The Board reasoned that to deprive the employer of the “fruits” of his illegal action, and in “balancing” the various interests involved, the

\footnotesize
\textsuperscript{5} See note 13 and accompanying text on standard runaway shop order.
\textsuperscript{6} The Board’s original contract bar period was only one year. See, Reed Roller Brt. Co., 72 N.L.R.B. 927 (1947), for early history of contract bar rule. It is now ordinarily three years. General Cable Corp., 139 N.L.R. B. 1123 (1962).
rights of the newly hired Florida employees to choose their own bargaining representative "must yield to the statutory objective of fashioning a meaningful remedy for the unfair labor practices found."

On cross petitions for enforcement and review, the Court of Appeals for the District of Columbia, in a split decision, set aside that part of the Board's order requiring the employer to bargain without re-establishment of the union's majority, holding that such an order violated the statutorily protected rights of the new Florida employees to choose to be represented or not to be represented by a union. The majority felt that the Board should not discipline the employer "at the expense" of the new employees. The dissent, on the other hand, expressed the view that the Board's order represented a proper exercise of its discretionary power to fashion a remedy to effectuate the policies of the act. This was one of those instances in which the Board might well refuse to regard the new employees' right of choice as absolute in light of the employer's unlawful action and accordingly, in the balance, require this right to yield to an order which would deprive the runaway employer of the benefits of his anti-union move and illegal refusal to bargain.

An employer who moves his plant to avoid the unionization of his employees or to avoid bargaining with a union selected by his employees in an appropriate bargaining unit commits an unfair labor practice. The Board has broad authority to fashion remedies for such unfair labor practices. For section 10 (c) of the act empowers the Board to issue orders requiring a respondent, not only to cease and desist from his unfair labor practices, but also "to take such affirmative action . . . as will effectuate the policies of this Act." In view of this wide discretion, the courts will not disturb a Board order "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."

Although the Board has claimed for itself the power to order a runaway employer to return to his original location, traditional Board orders dealing with runaway shops have prescribed alternate courses of action, at the option of the employer.


9 Sidele Fashions, Inc., 133 N.L.R.B. 547 (1961), enforced sub nom., Garment Workers v. NLRB, 116 F.2d 281 (8th Cir. 1940); Industrial Fabricating, Inc., 119 N.L.R.B. 162 (1957), enforced per curiam sub nom., NLRB v. Macneish, 272 F.2d 184 (6th Cir. 1959); California Footwear Co., 114 N.L.R.B. 765 (1955), enforced in part sub nom., NLRB v. Lewis, 246 F.2d 886 (9th Cir. 1957); Rome Products Co., 77 N.L.R.B. 1217 (1948). When motivation is predominantly economic, an employer's relocation of his plant is, of course, not an unfair labor practice. Brown Truck & Trailer Mfg. Co., 106 N.L.R.B. 999 (1953); Mount Hope Finishing Co. v. NLRB, 211 F.2d 565 (4th Cir. 1954), setting aside 106 N.L.R.B. 480 (1953); NLRB v. Rapid Bindery, 293 F.2d 170 (2d Cir. 1961), setting aside 127 N.L.R.B. 212 (1960). Although relocating a plant has thus been held to be an unfair labor practice when motivated by anti-union animus, an employer's closing his plant and going completely out of business is not an unfair labor practice even if the employer's action is discriminatorily motivated. Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965).


12 Schieber Millinery Co., supra note 9.
Under these orders, the employer may either return to the original site or he may remain at the new location in which case he must either offer re-employment with moving costs to unlawfully discharged employees plus reimbursement for lost earnings or compensate these employees for lost earnings until they find substantially equivalent employment. Furthermore, under the usual order before Garwin, the employer was required to bargain with the union at the new plant site only if the union again demonstrated its majority.

In Garwin, the Board felt that this standard remedy was insufficient. It was almost certain that none of the New York employees would move to Florida in view of the distance involved and the fact that many of them were married women. Furthermore, the tight state of the New York labor market made re-employment there not only possible, but probable. Consequently, the Board's use in the Garwin case of its standard order with its requirement that the union re-establish its majority as a condition precedent to the employer's bargaining with it, would have resulted in the employer's escape from the bargaining obligation established at the New York plant. He would thereby enjoy the "fruit" of his New York unfair labor practice. To prevent this and to deter the employer's future repetition of similar unfair labor practices, the Board refashioned its standard remedy and ordered the employer to bargain with a union which not only did not have a majority but did not represent any of the new Florida employees.

Leaving aside, for a moment, the fact that no New York employees moved to Florida, it may be noted that an absence of majority status has not prevented the issuance and enforcement of bargaining orders when the circumstances have required the dissipation of the effect and/or the continuance of an employer's unfair labor practices. In such cases, the employer has not been permitted to benefit from his own wrongdoing, and the original selection of the union as bargaining representative by a majority of the employees has not been disregarded because in the meantime the majority had been dissipated either by the passage of time or as a result of the employer's unfair labor practices.

In short distance plant relocation cases such an NLRB v. Lewis, it has been held that a bargaining order should not depend upon a re-established majority at the new plant consisting of reinstated as well as new employees. Such a position was adopted as a justifiable and appropriate remedy in the Lewis case. The court held that under normal circumstances, in cases of short distance plant relocations, it might be fairly assumed that upon being offered reinstatement at the nearby new location under a Board order, the old employees would accept it and that the original majority established at the old plant would continue and be preserved at the new plant. But in

\[\text{[Vol. XVI}\]
NLRB v. Rapid Bindery, the court refused to enforce such an unconditional bargaining order. In that case, the Board found anti-union animus; but the court of appeals held that the predominant motivation for moving was economic. Thus, Rapid Bindery is distinguishable from Lewis in which anti-unionism was found to be predominant. In Garwin, the court did not distinguish Rapid Bindery from Lewis on the basis of difference in predominant motivation, but viewed the holdings as conflicting and accepted Rapid Bindery as controlling.

When an unlawful relocation has been made at a long distance, the union has been required to re-establish its majority before the Board would issue a bargaining order. Admittedly, long distance moves do not subject the employee to the same type of on-the-job discrimination that is present in short moves. But it seems unsatisfactory to distinguish between short distance discrimination which will discourage employees from taking up their old jobs at new sites and carrying the union majority with them, and that type of discrimination involved in long distance moves which by their very nature discourage social uprooting and transplantation. And yet a short move may engender an unconditional bargaining order on this discriminatory basis, whereas a long move will not.

The second part of the representation problem in Garwin is raised by the fact that no New York discriminatees had moved to Florida to reclaim their old jobs. Thus, even if the court had accepted the rationale of Lewis, there would still be the problem that, at least in Lewis, some of the discriminatees had moved to the new plant, while none had moved in Garwin. It has been held, in Sakrete of Northern California v. NLRB, that even an absence from employment of all union members at the time of a Board order to bargain would not defeat the order, when the unfair labor practices of the employer had occasioned the absence. Although Sakrete does not involve a plant relocation, the predominance of anti-union motivation is similar to that in Garwin, as is the fact that the Board order to bargain involved a situation in which none of the discriminatees were re-employed by the employer.

The court in Garwin expressed disapproval of what it believed to be the punitive aspects of the Board's order with respect to the employer. But it is arguable whether requiring an employer to fulfill the bargaining obligation, which he avoided by his unfair labor practices, can realistically be regarded as punishment. Instead, the court's opinion in Garwin reversing the Board in so far as the unconditional bargaining order is concerned, leaves the Board without an effective deterrent in plant relocations spurred by anti-unionism when the labor market at the old plant site quickly absorbs discharged employees.

17 Supra note 9.
18 The majority was not bothered by the possibility that Rapid Bindery might have been decided differently if anti-union animus has been found predominant.
20 Supra note 15.
21 The character of a deterring order in such situations has been aptly described by the Supreme Court in National Licorice Co. v. NLRB, 309 U.S. 350, 364 (1940):
The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. The public right and duty extend not only to the prevention of unfair labor practices by the employer in the future,
At first blush, it might seem that the Board order in *Garwin* was, as the court held, unjustifiably harsh in its impact upon the rights of the new Florida employees to choose their own representative. But these rights, as the Board pointed out, were themselves the product of the employer’s unfair labor practices. These people would not have been employed in the first place had the employer not committed the unfair labor practices of moving his plant to escape unionism and the obligation to bargain. Under these circumstances, the Board’s order appears less harsh than upon first glance.

Given the competing factors in *Garwin* and cases like it: the relocation of a plant for anti-union reasons, the relatively unaffected position of the employer under the standard order and the right of new employees to choose representation, there is much to be said for the new remedy fashioned by the Board but rejected by the court. Its impact on the freedom of the new Florida employees would have been minimized by reduction of the contract bar period to one year. In the meantime, the Board’s order would have prevented the employer from reaping the benefit of his unfair labor practices, while at the same time, the Florida employees would not have been saddled with the union beyond the one year period unless they so desired.

Secured Transactions—Effect Given UCC Article 9 in Petition for Reclamation Under Chapter X of Bankruptcy Act—*Fruehauf Corp. v. Yale Express System*, 370 F.2d 433 (2d Cir. 1966).

**DURING THE SUMMER AND FALL OF 1964**, Yale Express System purchased truck bodies and trailers from Fruehauf on credit, payment to be made 30 days after each delivery of truck bodies and 90 days after delivery of trailers. Fruehauf extended credit in reliance on a current Dun & Bradstreet report which reflected Yale’s apparently sound financial condition. In February, 1965, Yale informed Fruehauf that the financial statements used in preparing the credit report were incorrect and that instead of operating at a profit during 1963, Yale had sustained a net loss in excess of one million dollars. Fruehauf immediately asserted its right to reclaim the equipment and rescind the contract based on Yale’s material misrepresentation of its financial position. In subsequent negotiations, however, Fruehauf agreed to waive this right and allowed Yale to retain possession of the equipment and repay the debt on an installment basis extended over 68 months. To secure payment, Yale gave Fruehauf chattel mortgage liens on the truck bodies and trailers, the security agree-
ments being executed in accordance with provisions of New York's Uniform Commercial Code. Yale filed a petition for reorganization under Chapter X of the Bankruptcy Act. Claiming that Yale had failed to make five required payments, Fruehauf made formal demand to Yale's trustee in bankruptcy for repossession of the property covered by the security agreement. Upon the trustee's refusal to comply with the demand, Fruehauf brought a petition for reclamation in the reorganization court.

The district court, adhering to the traditional distinction between chattel mortgages and conditional sales for the purpose of locating title to the property, held that the security agreement gave Fruehauf a mere lien on the equipment, that it was the property of the debtor and therefore not subject to reclamation by the secured creditor. On appeal, the Court of Appeals, Second Circuit, reversed and remanded, holding:

Since the Uniform Commercial Code has abolished the technical distinctions between the various security devices, federal bankruptcy courts should no longer feel compelled to engage in the purely theoretical exercises of locating "title," nor should considerations of where "title lies" influence the courts in the exercise of their equitable discretion. . . . Equitable considerations and the substance of the transaction should govern, regardless of the form of the security agreement.

Chapter X of the Bankruptcy Act is, as its title 'Corporate Reorganizations' indicates, remedial in nature, seeking the preservation rather than the (forced) liquidation of corporate assets. To this end, the statute gives the reorganization courts wide discretionary powers over the disposition of the debtor's property, in hopes that corporate integrity can be preserved sufficient to support a revitalization of the business. Specifically, section 116 (4) of the Act allows the court to enjoin any further proceedings against the debtor to enforce a lien, pending a final decree approving the petition for reorganization. Section 148 provides, "Until otherwise ordered by the judge, an order approving a petition shall operate as a stay of a prior pending bankruptcy, mortgage foreclosure, . . . and of any act or other proceeding to enforce a lien against the debtor's property." Thus, once the petition has won approval, the court will seek to give the debtor sufficient time to stabilize his position without the burden of fending off creditors seeking immediate satisfaction of prior

---

1 N.Y. UNIFORM COMMERCIAL CODE §§ 9-302 and 9-304 [Hereinafter cited as UCC].
4 Fruehauf Corp. v. Yale Express System, 370 F.2d 433, 438 (2d Cir. 1966).
5 For a discussion of the nature and purpose of Chapter X, together with an analysis of judicial remedies prior to 1938, see 6 COLLE, BANKRUPTCY ¶ 0.01-0.08 (14th ed. 1964).
   Upon the approval of a petition [for reorganization], the judge may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon him and the court— . . . .
   (4) in addition to the relief provided by section 11 of this Act, enjoin or stay until final decree the commencement or continuance of a suit against the debtor or its trustee or any act or proceeding to enforce a lien upon the property of the debtor.
8 Ibid.
claims. In theory, this will allow the debtor to eventually settle all debts as the necessary assets become available and, at the same time, salvage a going concern.

The essence of a secured transaction is the creditor's acquisition of a property right in the collateral. In bankruptcy proceedings, his position is superior to that of the general (unsecured) creditors. Where outright liquidation is sought, the secured creditor's claim will be satisfied from the proceeds of the liquid capital flowing from that collateral in which his "property right" resided. In Chapter X proceedings, however, a creditor must show more than a perfected security interest. As is stated in In re Lake's Laundry, reclamation will only be granted if the petitioner can show that the collateral belongs to him and is not the property of the debtor. In granting reclamation, the court used the time-honored concept of "title" to determine ownership to the property, and in doing so looked to the state law governing the form of the transaction—in this case, a conditional sales contract—to determine that title to the property was retained by the petitioner and it was not the property of the debtor for purposes of a reorganization proceeding. As the court pointed out in Lake's Laundry, state laws then in effect generally placed title to the collateral in the hands of the conditional vendor, while limiting a chattel mortgagee to a mere lien on the property. Despite a vigorous dissent by Judge Learned Hand, who argued that the distinction between title and lien was an absurd basis upon which to exercise the court's equitable-discretionary powers in a reorganization proceeding, it was to this state law-controlled distinction that the majority turned for resolution of the secured creditor's rights. Under the rule of Lake's Laundry then, the petitioner in a reclamation proceeding must: (1) prove a perfected security interest in the collateral under the provisions of the applicable state law, and (2) then show that the form of the security interest gives him something more than a mere lien on the collateral, i.e. that he has a property right therein.

6 In any proceeding brought under provisions of the Bankruptcy Act other than those contained in Chapters X and XI.


10 One might ask why the creditor need go further once he has proved a perfected security interest. As noted in the text, this would be to lose sight of the basic philosophy behind Chapter X proceedings. Rather than looking primarily to the immediate satisfaction of creditors' claims—unsecured as well as secured—the provisions of the Chapter are designed to effectuate a stabilization of corporate assets in hopes that it will once again be capable of meeting all its obligations. To achieve this end, it is of paramount importance that the immediate drain on existing assets be minimized as much as possible. It was precisely this argument that Judge Hand raised in Lake Laundry—see note 14 infra—when the court there allowed a conditional sales vendor to withdraw assets from the debtor's estate. Of course, the justification offered by the majority in that case rested squarely on the existing state law, with its clear-cut distinction between the rights of conditional vendors and chattel mortgagees.

12 Supra note 10, at 327-28.

13 Ibid.

14 In re Lake's Laundry, supra note 10, at 328 (L. Hand, J., dissenting).

It seems to me a barren distinction, though indubitably true, that title does not pass upon a conditional sale; "title" is a formal word for a purely conceptual notion; I do not know what it means and I question whether anybody does, except perhaps legal historians. The relations resulting from conditional sales are practically the same as those resulting from mortgages; I would treat them as the same when we are dealing with the reorganization of the debtor's property.
As noted earlier, at the time this case was decided the New York Legislature had adopted the Uniform Commercial Code, which is now in effect in 47 states and the District of Columbia. Thus, in each of these jurisdictions, prior state law controlling secured transactions has been pre-empted by the Code provisions contained in Article 9. The most monumental change wrought by the Code was the formulation of an entirely new policy governing the creation of security interests. Pre-Code law rested on a carefully structured series of designated form-transactions—e.g., chattel mortgages, conditional sales, trust receipts, factor's liens, assignments of accounts receivable, etc.—each of which had arisen to meet a specific demand of secured financing. Surrounding each security device was a complex body of law governing the rights and duties of each party affected by the instrument. Despite the fact that there was little justification for these distinctions in a modern commercial setting, state courts were reluctant to overturn precedent, and the Code draftsmen were confronted with a situation which was needlessly tedious and complex for the lawyer and dangerous and misleading for the unwary layman entering a secured financing agreement.

It can be said then, that prior to the Code, truly "the form was the thing."

The Code's solution to this problem is as simple as it is sweeping: it abolishes the categorization of interests as dictated by the form of the security device employed, thereby erasing the title-lien distinction which formerly denominated the interests held by conditional sales vendors and chattel mortgagees. Instead, the Code substituted a policy whereby the substantive transaction governs, not its form. Thus, while the Code allows utilization of the standard forms in preparing secured financing agreements, it specifically negates any attempt to place reliance upon these forms as determinative of the rights and obligations of the parties to the agreement.

Only Arizona, Idaho, and Louisiana have not enacted the Code, and legislation for 1967 is pending in the former two.

See Note, appended to Uniform Commercial Code § 9-102, to this effect.


As stated in the official comment to Uniform Commercial Code § 9-101:

The recognition of so many separate security devices has the result that half a dozen filing systems covering chattel security devices may be maintained within a state, some on a county basis, others on a state-wide basis, each of which must be separately checked to determine a debtor's status.

This is specifically provided for in Uniform Commercial Code § 9-202; Title to Collateral Immaterial:

Each provision of this Article with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor.

The comment to this section reads in part:

The rights and duties of the parties to a secured transaction and of third parties are stated in this Article without reference to location of "title" to the collateral. Thus the incidents of a security interest which secures the purchase price of goods are the same under this Article whether the secured party appears to have retained title or the debtor appears to have obtained title and then conveyed it or a lien to the secured party. . . . (emphasis added).

As stated in the official comment to the Uniform Commercial Code § 9-101:

The aim of this Article is to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty.

Under this Article the traditional distinctions among security devices, based largely
Yale Express involves the application of the Code's Article 9 provisions to bankruptcy proceedings. Of course, the Code can in no way be construed as limiting the authority or discretion of federal courts acting under the Bankruptcy Act. Nevertheless, the term "property of the debtor" as set forth in sections 116 (4) and 148 of the Act is not statutorily defined, and following the rule of Lake's Laundry, federal courts have turned to state law to determine in whom the property right to the collateral rested. In the instant case, Fruehauf asserted that with the adoption of the Code, prior New York law in the field of secured transactions had been preempted and the provisions of Article 9 were controlling as to the rights of creditors holding a perfected security interest in collateral then in possession of the debtor. To support their petition under Article 9, Fruehauf cited the Code's total departure from the title-lien test, as expressed in section 9-202. Fruehauf further buttressed its argument by citing the court to the official comment to section 9-507 of the Code, which urged adoption by the bankruptcy courts of the Code's policy of avoiding artificial distinction based on form alone.

The district court chose to ignore the innovations made by the Code, relying instead upon the traditional title-lien distinction. In reaching its decision, the court turned to prior law as established in bankruptcy proceedings, dismissing Fruehauf's reliance on Article 9 as "misplaced." Apparently the court felt that the Code should not be allowed to intrude into an area more properly controlled by settled bankruptcy precedents as expressed in Lake's Laundry.

on form, are not retained; the Article applies to all transactions intended to create security interests in personal property and fixtures, and the single term "security interest" substitutes for the variety of descriptive terms which has grown up at common law and under a hundred year accretion of statutes. This does not mean that the old forms may not be used, and § 9-102 (2) makes it clear that they may be.

This is expressly recognized by both courts in the instant case. See, Matter of Yale Express System, Inc., supra note 3 at 254, n. 8; Fruehauf Corp. v. Yale Express System, Inc., supra note 4 at 438, n.3.

The official comment to Uniform Commercial Code § 9-507 reads, in part:

But since this Article adopts neither a "title" nor a "lien" theory of security interests . . . the granting or denying of, for example, petitions of reclamation in bankruptcy proceedings should not be influenced by speculations as to whether the secured party had "title" to the collateral or "merely a lien."

In re Lake's Laundry, supra note 10. It should be noted that the lower court's opinion has not accepted the rule of Lake's Laundry in toto. As noted in the text, the holding of that case was two-part: First, that the bankruptcy court should look to existing state law in order to ascertain whether or not the creditor has a perfected security interest; secondly, to once again turn to state law to determine if the particular interest of the creditor gave him title, i.e. a property interest in the collateral. The lower court here has read the rule to mean that bankruptcy courts are to look to prior bankruptcy proceedings construing the (then) existing state law. There is insufficient material in the court's opinion to indicate by what method this construction was arrived at, other than the court's apparent antagonism to the Code's intrusion in a bankruptcy proceeding under Chapter X. The irony is that, by disregarding the Code provision and adhering to prior bankruptcy precedents, the court is, in effect, limiting its own equitable powers. For although not specifically stated,
In reversing the district court's ruling, Circuit Judge Kaufman, speaking for the majority, noted past criticism of the "judicially developed doctrine that a creditor's right to reclamation is dependent on who has 'title' to the property," and pointed out that the commercial doctrines underpinning that precedent have now been abrogated by the Code's widespread adoption. In its consideration of the official comment to section 9-507, the court cited with approval the national trend toward uniformity in commercial law and expressed a desire not to impede its progress by employing "anachronistic distinctions" to determine property rights in proceedings brought under Chapter X. Inasmuch as the lower court appeared to have placed emphasis on the title-lien distinction in reaching its conclusion, the appellate court reversed and remanded with instructions to reconsider the petition on the basis of "equitable considerations and the substance of the transaction, regardless of the form of the security agreement."

In reaching this decision the court apparently sought to preserve its own best interests. With the Code fast becoming the law of the land, it is inconceivable that it should be construed as to be incompatible with Chapter X of the Bankruptcy Act when both statutes must necessarily govern rights in identical transactions. Although many provisions of the federal act are deeply rooted in precedent, judicial application of Chapter X and its predecessor was initially guided by then-prevailing standards of commercial law. The appellate decision can only be construed as judicial recognition of the demise of many previously acceptable standards, now supplanted by Code provisions, at least as they were once applied in Chapter X proceedings. The viability of the new Code provisions was not the question confronting the court. Fundamentally, it had to determine what purpose it would serve to maintain the old standards while the rest of the commercial world was changing theirs. And, as one commentator recently pointed out, "It should be recognized that it is the courts and not the [Bankruptcy] Act itself, which equate 'property' with 'title' [in proceedings brought under Chapter X]." In its analysis the court perceived the weakness of adhering to stale precedent. Not only would this put Chapter X of the Bankruptcy Act at odds with Article 9 of the Code—a result which the court points to as undesirable purely from a policy standpoint—but it would tend to effectively inhibit the free application of both statutes: Bankruptcy courts would be restricting their own discretionary powers to control the property of the debtor in Chapter X proceedings, and this restriction would provide secured creditors with incentive to demand retention of the old forms as additional protection in the event

the court implicitly holds that had the Fruehauf security interest been evidenced by a conditional sales contract it would have been powerless to deny reclamation, which in turn points up the validity of Judge Hands' dissent in Lake's Laundry, supra note 14).

Fruehauf Corp. v. Yale Express System, supra note 4, at 436.

Supra note 25.

Fruehauf Corp. v. Yale Express System, supra note 4, at 437.

Id. at 438.

The statutory forerunner of Chapter X was § 77B of the Bankruptcy Act, 11 U.S.C. § 207. For an analysis of the provisions of this section prior to amendment by the Chandler Act in 1938, see material in note 5 supra.


See discussion in note 27 supra.
their debtor was thrown into a reorganization proceeding, thus restricting the effectiveness of the new security interests contained in Article 9 of the U.C.C.

As the reaction to the lower court decision in this case indicates, the appellate decision has perhaps forestalled what in time might have become the shrill clamor for amendment to either Chapter X or Article 9 or both in an attempt to bring them in line with each other. While the decision here certainly can not be read as demanding compatibility of the two at any cost, it has at least posed the question: At what cost incompatibility?


Torts—Parent-Child Immunity—An Analysis of Two Recent Decisions


Helen Briere brought an action on behalf of her two unemancipated minor children, against their father, Maurice Briere, to recover damages for personal injuries arising from an automobile accident on November 4, 1965. The defendant father's motions to dismiss the action, on the ground that the parental immunity rule precluded it, were granted, and the plaintiffs excepted. On appeal, the parties agreed that the sole question for disposition was "whether unemancipated minor children may sue their father in tort for injuries sustained in an automobile accident." The Supreme Court of New Hampshire unanimously sustained the exceptions and held that the children's cause of action was maintainable, overruling the prior case of *Levesque v. Levesque.*

The parental immunity rule was born in 1891 with the case of *Hewlett v. George,* a false imprisonment case in which the Mississippi court, citing no authorities, denied the right of action of a minor daughter against her mother's estate, for reasons that the action would disturb domestic tranquillity and interfere with parental control. The *Hewlett* holding became the established general rule in American jurisdictions with the subsequent cases of *McKelvey v. McKelvey* in 1903 and *Roller v. Roller* in 1905. In *McKelvey* the dismissal of an action against a father and a stepmother was upheld, citing *Hewlett.* The same result was reached in *Roller,* where a father had been convicted of rape of his minor child and damages were sought for the personal injuries inflicted. These cases were followed in other jurisdictions, whether the conduct involved was wilful or negligent, and whether the action was

---

2 *99 N.H. 147, 106 A.2d 563 (1954).*
3 *68 Miss. 703, 9 So. 885 (1891).*
4 *68 Tenn. 388, 77 S.W. 694 (1905).*
5 *37 Wash. 242, 79 Pac. 788 (1905).*
6 *Cook v. Cook, 292 Mo. App. 994, 124 S.W.2d 675 (1939); Miller v. Pelzer, 159 Minn. 375, 199 N.W. 97 (1924); Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924).*
7 *Ball v. Ball, 73 Wyo. 29, 269 P.2d 302 (1954) (Montana law); Villaret v. Villaret, 169 F.2d
brought before or after majority. Professor McCurdy, in examining the opinions denying a personal injury action between parent and child, found no less than seven reasons advanced by the courts for this stand: (1) position of the family as a quasi-governing unit; (2) the husband-wife cases denying an action despite a married women's statute; (3) danger of fraud; (4) possibility of succession (inheritance of amount received in damages); (5) family exchequer (financial detriment to other children); (6) disturbance of domestic tranquillity; and (7) interference with parental discipline and control. The two principal reasons relied upon have been danger of disturbing domestic harmony and interference with parental discipline. The other reasons have been stressed to one degree or another; some have been held to be unsound. However, none of these reasons have been held sufficient to bar an action for injury to personal property between parent and child. Furthermore, they have not been sufficient to prevent an action for personal injuries between brothers and sisters.

As the parental immunity rule became firmly entrenched in the court-made principles of the American jurisdictions, a number of exceptions were steadily carved out. The first was that the action would be permitted where the child had been "emanacipated"—i.e., parents surrendered claim to his earnings and services, and to parental control. Another has been where the conduct was intentional and wilful or wanton. Some courts have held that the action could be maintained against the estate of the deceased parent-tortfeasor. And the further exception was made where the child was injured in the course of the parent's business activity. The most liberal approach up to the time of the instant case had been that of the Wisconsin Supreme Court which had abrogated the parental immunity rule entirely, except in two specific cases: (1) where the alleged negligent act involves an exercise of parental authority over the child; and (2) where the alleged negligent act involves


10 43 HARV. L. REV. 1030, 1072-77 (1930).

11 Crowley v. Crowley, 72 N.H. 241, 56 Atl. 190 (1903).


an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.\(^1\)

Justice Blandin, writing for the unanimous New Hampshire court and citing the case of \textit{Dean v. Smith},\(^1\)9 stated that the parental immunity rule "is a 'court-made rule,' and that it is the duty of the judiciary to examine it and make changes as justice requires when the Legislature has chosen not to act."\(^2\)0 The court, in further laying the groundwork for its opinion, observed that the law of torts is not, as erroneously considered, a "law of wrongs," but rather a "means for the creation and protection of rights."\(^2\)1 Recognizing the need for dynamism in the law of torts to meet changing social and economic conditions, the \textit{Briere} court noted that there was no common law rule corresponding to the parental immunity doctrine and that suits have been permitted on contract,\(^2\)2 to protect the child's property rights,\(^2\)3 and against the parent for malicious assault.\(^2\)4

The court then discussed the reasons advanced by the defendant father in support of his position: (1) preservation of parental authority and family harmony; (2) depletion of the family exchequer; and (3) the danger of fraud and collusion. It was agreed that there was danger of fraud and collusion, but this danger is also present in other suits, such as those between close relatives, and host and guest; yet, these suits stand on the same footing as actions between strangers. Moreover, it is the court system's expertise and duty to ferret out trickery or fraud in cases where it might exist. The court refused to allow such a mere opportunity to act as an insurmountable barrier to an "honest and meritorious action by a minor."\(^2\)5

In 1930, in \textit{Dunlap v. Dunlap},\(^2\)6 the New Hampshire courts had rejected the "family exchequer" argument as having no substantial weight, stating that it "ignored the parent's power to distribute favors as he will, and leaves out of the picture the depletion of the child's assets of health and strength through the injury."\(^2\)7 The court reinforced the rationale of \textit{Dunlap} in noting that the prevalence of insurance "cannot be ignored in determining whether a court should continue to discriminate against a class of individuals by depriving them of a right enjoyed by all other individuals."\(^2\)8

The court found it difficult to realize how parental authority and family well-being is jeopardized anymore in cases of this nature than in the suits uniformly allowed in contract\(^2\)9 and for assault.\(^3\)0 The "parent nearly always desires above all to

\(^{19}\) Dean v. Smith, 106 N.H. 314, 211 A.2d 410 (1965).
\(^{20}\) Briere v. Briere, \textit{supra} note 1, at 590.
\(^{21}\) Ibid.
\(^{22}\) Hall v. Hall, 44 N.H. 293 (1862).
\(^{23}\) Crowley v. Crowley, \textit{supra} note 11.
\(^{24}\) Zebnik v. Rozmus, 81 N.H. 45, 124 Atl. 460 (1923).
\(^{25}\) Briere v. Briere, \textit{supra} note 1 at 590.
\(^{26}\) 84 N.H. 352, 150 Atl. 905 (1930).
\(^{27}\) Id. at 361, 150 Atl. at 909.
\(^{28}\) Briere v. Briere, \textit{supra} note 1, at 590.
\(^{29}\) See \textit{supra} note 22.
\(^{30}\) See \textit{supra} note 24.
The court cited Dean v. Smith and Gaudreau v. Gaudreau, two decisions of the New Hampshire court which have "paved the way" for the present decision. In the Dean case the child was injured in an automobile accident in which the father was killed. Holding that the child was entitled to maintain the action against the father's estate, the court stated that no reason based upon the parental immunity rule existed to prevent the suit once the relationship was terminated. The same reasoning was employed in Gaudreau where the deceased father's administrator was allowed to maintain a suit against an unemancipated minor child for wrongful death arising out of an automobile accident. The Briere court, in concluding, states:

[T]he Dean and Gandreau cases have already charted the course for a voyage upon which it appears we, as well as many other courts, will inevitably embark. It would serve no useful purpose to hesitate longer because we are faced with objections based upon distinctions where, in the conditions existing today, no substantial differences can be perceived.

Seemingly, the court's sweeping language in totally rejecting the parental immunity rule goes much further than the resolution of the issue stipulated at the beginning of the opinion. Hopefully more courts will recognize the need for allowing actions by unemancipated minor children against their parents in tort for personal injuries. The Briere opinion should be regarded as the end of the voyage charted by the Dean and Gaudreau cases and must stand as a map for other courts to follow in ending the discrimination against this class of persons.


Plaintiff, an unemancipated infant, brought an action against Rockland Leasing Corporation to recover damages for injuries sustained while a passenger in a motor vehicle operated by plaintiff's mother and owned by defendant Rockland. The cause of action was based on a statutory provision which attributes to the owner of a motor vehicle the negligence of a person "using or operating the same with the permission, expressed or implied, of such owner." The defendant moved to dismiss the complaint for insufficiency, contending that, since under New York case law an unemancipated infant cannot bring an action for non-willful negligence against his

1 N. Y. VEHICLE AND TRAFFIC LAW § 388 (1966).
parent, the plaintiff could not recover from the defendant because his liability under
the statute is derived from the liability of the operator of the motor vehicle, the
plaintiff’s mother. Treating the problem without binding authority, the court found
that the public policy considerations underlying parent-child immunity would not
be offended by allowing the action. Held, that the immunity of the mother was per-
sonal to her and could not be asserted in the defense of defendant Rockland. The
motion to dismiss for insufficiency was denied.2

The principle that a child cannot sue his parents for a tort is not derived from the
common law but is rather a product of American case law.8 The doctrine first ap-
peared in a Mississippi case in 18914 and has since been adopted by virtually all of the
states.5 The State of New York adopted the rule in 1928 in Sorrentino v. Sorrentino.6
The basic reasons presented by the courts for the rule are to prevent litigation from
disturbing family unity, to preserve domestic tranquility and parental discipline,
to keep the family funds undivided and to prevent collusion within the family where
there is insurance coverage.7 Although the rule has been the object of severe criti-
cism,8 it has been changed in only a few states.9

In 1928, the same year the New York courts adopted the parent-child immunity
document, Schubert v. August Schubert Wagon Co. was decided.10 There the court al-
lowed a wife to recover from her husband’s employer, under the doctrine of re-
spondeat superior, for damages resulting from her husband’s negligence although
there was a general rule in New York that a wife could not sue her husband for negli-
gence.11 The court held that the disability of the wife or husband to maintain an
action against the other for injuries to the person was not a disability to maintain a
like action against the other’s principal or master.12 The basis of the reasoning is that
the employee “has committed a tort which by ordinary rules of law should make the
master liable, and there is no reason to include the latter within the purely personal
immunity of the family.”13 The court in Schubert points out that for the defendant
to assert the immunity he would have “to maintain that the act, however negligent,

9 Dunlap v. Dunlap, 84 N.H. 905 (1930).
10 Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891). For the extension of the parent-child
immunity doctrine to negligence see, e.g., Taubert v. Taubert, 103 Minn. 247, 114 N.W. 763
(1908).
11 PROSSER, TORTS 675 (2d ed. 1955).
12 248 N.Y. 626, 162 N.E. 551 (1928); see also Cannon v. Cannon, 287 N.Y. 425, 40 N.E.2d 236
(1942).
13 PROSSER, supra note 5, at 676.
14 See listing of critical material by Justice Jacobs in Hasting v. Hasting, 35 N.J. 247, 163
A.2d 147 (1960).
15 Goller v. White, 20 Wis.2d 402, 122 N.W.2d 195 (1963); Briere v. Briere, —— N.H. —— 224
A.2d 588 (1966). See also Young v. Rankin [1934] Sess. Cas. 499 (Scot.); Deziel v. Deziel,
16 249 N.Y. 253, 164 N.E. 42 (1928).
19 PROSSER, supra note 5, at 678; RESTATEMENT (SECOND) AGENCY § 217, comment b (1958):
“Immunity” is a word which denotes the absence of civil liability for what would be a
tortious act but for the relation between the parties or the status or position of the
actor . . . . Immunities, unlike privileges, are delegable and are available as a defense
only to persons who have them.
was none the less lawful because committed by a husband upon the person of the wife."

The courts which had decided the issue before Schubert and those which have subsequently rejected the reasoning in Schubert have pointed out that if recovery is allowed from the employer, then the employer has a cause of action against the parent. The end result would be that the child would indirectly recover from the parent via the employer and the policy considerations which give rise to parent-child immunity would be defeated by circumvention. The decision in Schubert recognized this possibility but rejected it, finding that the employee had an independent duty to the employer to protect the employer's interest, and any subsequent action by the employer was based on a cause of action completely independent from the action by the child against the employer. The reasoning in Schubert was extended to parent-child immunity in New York in 1939 and today all states except Illinois, whether Schubert is accepted or rejected, appear to come to the same conclusion when dealing with husband-wife immunity or parent-child immunity.

The court in deciding this case distinguished it from those cases where the liability was based on respondeat superior on the basis that the principle of liability is different. Thus distinguished, the case presented an issue having no binding authority from a higher court in New York. The court, turning to policy considerations, found that although the principle of liability based on the statute in the present case is different from the principle of liability in respondeat superior, the nature and extent of liability for both are the same and the same policy considerations govern both. The court reiterated that the "purpose underlying the parent-child immunity is to prevent litigation from disrupting the family and thus preserve domestic tranquility and parental discipline." The court concluded that to allow this suit would in no way contravene this policy. The result reached by the court is a logical extension of Schubert and is a result that should be expected in a state where Schubert is accepted and the opposite result should be expected in a state where Schubert is rejected.

---

20 Annot., supra note 16, at 683 n.l.
21 The court also distinguished the present case from Sikoran v. Keillor, 15 App. Div. 2d 6, 230 N.Y.S.2d 571 (1962), aff'd., 13 N.Y.2d 610, 240 N.Y.S.2d 601, 191 N.E.2d 88 (1963). There the injured person sued the owner of the motor vehicle using the same statutory provision. The defendant owner was allowed to assert a statutory exception of the driver which provided to volunteer firemen an exception from civil liability for acts done in the course of their duties, except for willful negligence or malfeasance. The court distinguished this statutory exception from parent-child immunity on public policy considerations, saying that the purpose of the statute granting such immunity to volunteer firemen would be defeated if recovery was allowed from the owner.
22 But see Schomber v. Tait, 207 Misc. 328, 140 N.Y.S.2d 746 (1955) (where the owner was in the motor vehicle); Baker v. Gaffney, 141 F.Supp. 602 (D.D.C. 1956) (applying Maryland law to the same N.Y. statute with opposite result.)
23 Kemp v. Rockland Leasing Inc., supra note 2, at 958.
24 Ibid.
Schubert is rejected. The majority of courts which have decided similar issues have found that a *respondeat superior* relationship is created by implication of law and have held the Schubert rule, if accepted by that state, as binding.

There is strong indication that insurance has played a role in the development of parent-child immunity. Where there is insurance which will protect the parent, the basic policy considerations for the immunity are no longer present. One policy consideration remaining—the possibility of collusion—has in essence been rejected by New York. The barrier to allowing recovery where insurance is present is that the presence of insurance should not create a cause of action where none would exist without the presence of insurance. New Hampshire has approached the problem by dropping parent-child immunity as a defense. New York appears unwilling to follow because of those torts, usually those occurring in the home, where there is no insurance coverage and where all of the reasons for the rule are present. However, it appears that the courts will avoid the immunity, if logically possible, where there is reasonable assurance that the policy considerations are not present. For example, where the parent injures his child with a motor vehicle the child can recover if the parent uses the motor vehicle in connection with his business. In New York the presence of compulsory automobile insurance protects the parent. Where the injury is not by motor vehicle, but by other means, the presence of widespread use of public liability insurance would in most cases protect the parent-businessman. In the usual *respondeat superior* case involving a motor vehicle, the courts are reasonably assured that the fear expressed by the courts rejecting Schubert—that the parent-employee will eventually bear the cost of the child's suit against the employer—will not materialize since the insurance that the employer is required to carry must protect not only the employer-owner but also the employee-driver. In a *respondeat superior* case not involving a motor vehicle, the parent may eventually bear the cost of the child's recovery, unless the employer carries insurance with omnibus type coverage similar to that required by the compulsory motor vehicle

---

2 Annot., *supra* note 16.
20 Miller v. J. A. Tyrholm & Co., 196 Minn. 438, 265 N.W. 324 (1936); Broaddus v. Wilken-son, 281 Ky. 601, 136 S.W.2d 1052 (1940); Le Sage v. Le Sage, 224 Wis. 257, 271 N.W. 369 (1937); May v. Palm Beach Chemical Co., 77 So. 2d 468 (Fla. 1955); Ownby v. Kleyhammer, 194 Tenn. 109, 250 S.W.2d 37 (1952); Baker v. Gaffney, *supra* note 22.
27 PROSSER, *supra* note 5, at 677.
30 Siembab v. Siembab, 202 Misc. 1053, 112 N.Y.S.2d 82 (Sup. Ct. 1952); but see Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); Edwards v. Royal Indemnity Co., 182 La. 171, 161 So. 191 (1935).
36 Annot., *supra* note 16.
insurance. If the employer is not insured or if his insurance does not have such omnibus coverage, the employer or his insurance company can recover the amount of their loss to the child from the parent. In the present type of case, there is assurance that the parent will not eventually pay the amount of his child's recovery to either the owner of the motor vehicle or to such owner's insurance company, because of the compulsory insurance. The omnibus clause in the compulsory insurance protects the parent. Where the motor vehicle is registered in a state not requiring such coverage, or where the owner fails to comply with the statutory requirements of insurance, the result can be different, but such situations are remote and insignificant, especially in light of the child's ability to recover indirectly from his parent in a respondeat superior case not involving an automobile.

The result in this case is desirable, but it is not logical to require the parent's insurer to indirectly pay the child via itself as also the insurer of the owner, when the car driven by the parent belongs to someone else, and then to not require the parent's insurer to directly pay the child if the car belongs to the parent. The desired result could be achieved by not applying parent-child immunity to torts involving motor vehicles; this can be achieved by the legislature. Another method, perhaps the better, would be for the courts to follow the lead of those courts which have dropped parent-child immunity as a defense in negligence actions.