Recent Developments

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RECENT DEVELOPMENTS

ADMARLTY — RESPONSIBILITY FOR MAINTENANCE AND CURE PAYMENTS ESTABLISHED BETWEEN COEXTENSIVELY LIABLE SHIPOWNERS.


Seaman Gooden, through no fault of his own, injured his back while employed on one of Texaco's ships. Before reaching the point of maximum cure, Gooden was subsequently employed on a ship owned by Sinclair. As a result of this employment, his back injury was "heightened," through no fault of Gooden or Sinclair. In his suit against Sinclair for maintenance and cure, the district court ruled in Gooden's favor and also held implicated defendant, Texaco, liable over to Sinclair for all of these payments. On appeal, the Third Circuit Court of Appeals, per Judge Seitz, vacated and remanded, holding that where two or more shipowners' obligations to make maintenance and cure payments are coextensive, and none of them are at fault for the seaman's injury or illness, in the absence of a release, the shipowners must share the payments equally. However, if the prior shipowner was at fault in causing the seaman's initial injury, the later shipowner is entitled to full indemnification from the prior shipowner for all coextensive maintenance and cure payments made to the seaman. Gooden v. Sinclair Ref. Co., 378 F.2d 576 (3d Cir. 1967).

The coextensive liability of the parties in Gooden was based on firmly embedded rules of admiralty law. When a seaman is injured or becomes ill while under articles, the shipowner is liable for his maintenance and cure up to the point of his maximum cure, regardless of subsequent employment or origin of the injury or illness. Thus, both Texaco and

1. The maintenance and cure claim covered the period between the "heightening" of the injury on Sinclair's ship and the time of trial.
3. Remand was necessary because the district court did not determine whether Gooden's initial back injury was caused by a violation of any duty owed to him by Texaco.
5. Maintenance and cure includes lost wages and out-of-pocket expenses in payment of room and board and medical costs.
Sinclair were coextensively liable for maintenance and cure payments covering the period after Gooden's back injury was "heightened" on Sinclair's ship. Texaco's liability had not ended because Gooden had not reached maximum cure prior to the subsequent aggravation of his injury. Sinclair's liability arose simply because Gooden was employed on its ship at the time his back injury was "heightened."

The Gooden court concluded that if Texaco was not at fault in causing Gooden's back injury, then equitable considerations would demand that Texaco and Sinclair share their coextensive maintenance and cure obligations. In support of this conclusion, the court relied on Vaughan v. Atkinson which stated that "[E]quity is no stranger in admiralty; admiralty courts are, indeed, authorized to grant equitable relief." Conceivably, the court could have relied on the analogous tort concept of contribution in cases involving concurrent tortfeasors acting independently and unintentionally in causing a single indivisible injury. Both Texaco and Sinclair were, like concurrent tortfeasors, jointly and severally liable to a third party for the same claim. The probable rationale underlying contribution in the concurrent tortfeasor situation is that:

There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shoulders onto one alone, according to the accident of a successful levy of execution... [or] plaintiff's whim or spite, ... while the latter goes scott free.

Accordingly, the Gooden court had sound equitable justification for resolving the issue of contribution as it did.

The court was also confronted with resolving the liability of Texaco to Sinclair if, on remand, the district court concluded that Texaco was at fault in causing Gooden's back injury. It reached its indemnification holding by applying the admiralty principle which requires a prior negligent shipowner to respond primarily for damages, and a subsequent non-

11,641) (C.C.D. Mass. 1832). However, a shipowner is not liable when the injury or illness is caused by the seaman's gross or willful misconduct or when the condition existed at the time the seaman signed on the ship and was knowingly concealed by him. Aguilar v. Standard Oil Co., 318 U.S. 724, 732 (1943); The Osceola, 189 U.S. 158, 169 (1903); Harden v. Gordon, 11 F. Cas. 480, 482 (No. 6,047) (C.C.D. Me. 1823).

9. There is no legal case law precedent for the "equal share" doctrine espoused by the court. There is, however, an analogous situation in which two ships, equally at fault in causing a collision, must equally share the aggregate resulting damages. See G. Gilmore & C. Black, THE LAW OF AD Miralty § 7-4, at 402 (1957).


13. Id. § 47, at 275.

14. See supra notes 8-10.

15. Damages in such cases invariably include all the maintenance and cure expenses of the seaman.
negligent shipowner to respond secondarily for maintenance and cure payments, when the injured seaman sues both shipowners jointly. The avowed purpose of the court was to insure that the ultimate liability remained the same regardless of the seaman’s arbitrary choice to proceed against either shipowner to satisfy his claim for maintenance and cure. The cogency of this argument is compelling, and since an admiralty court may choose to apply equitable principles, its adoption is difficult to criticize.

In arriving at its decision to allow indemnity, the court was faced with the problem of distinguishing two cases which appeared to contravene its indemnification result. A close examination of these cases, however, indicates that they are not on point, and therefore caused the court unnecessary concern. Crab Orchard Improvement Co. v. Chesapeake & O. Ry. concerned a West Virginia workman’s compensation statute. There the court held that an employer who discharges his duty to make workman’s compensation payments to an employee injured by a third-party tortfeasor may not seek indemnity from that third party for such payments absent a violation of a contractual or legal duty owed by the tortfeasor to the employer. While this case, by analogy, would appear to militate against the instant court’s indemnification holding, it is not apposite since the Crab Orchard court was primarily interested in preventing double liability from being imposed upon the third party tortfeasor. The Federal No. involved a shipowner’s indemnity claim for maintenance and cure payments made to a seaman injured by a third-party’s negligence. In that case indemnification was again denied. But, this case cannot be compared with the indemnification situation considered by the Gooden court since denial of indemnification in Federal No. 2 was predicated on the court’s finding that a causal connection did not exist between the tortfeasor’s negligence and the maintenance and cure payments made by the non-negligent shipowner. The court reasoned that the cause of the non-negligent shipowner’s duty to pay was his contractual obligation to the injured seaman; the negligent conduct of the third party was but the “remote occasion” that precipitated the contingency that the contract contemplated.


17. See cases cited infra note 11.

18. 115 F.2d 277 (4th Cir. 1940).

19. Such dual liability was possible under the West Virginia compensation statute in question. That possibility will not exist in the instant case if it is determined that Texaco was at fault. See p. 190 & note 25 infra.

20. 21 F.2d 313 (2d Cir. 1927).

21. Id. at 314. Although The Federal No. 2 can be distinguished from the instant case on the basis of its holding, Judge Seitz in his dissenting opinion 177 underlying rationale may be essentially inconsistent with the indemnity decision proffered by Judge Seitz.
Jones v. Waterman S.S. Co.\textsuperscript{22} was employed by the Gooden court in support of its indemnity decision. While the court's treatment of this case was not extensive, closer scrutiny indicates that Jones does not compel the indemnification result reached. Jones dealt with an indemnity cross-claim for maintenance and cure paid by the defendant shipowner to one of its seaman who was injured through the negligent maintenance of a pier owned and operated by the implicated defendant. The Jones court, in requiring the indemnification, stated, in \textit{dicta}, that a shipowner has an indemnity cause of action against a negligent third party for maintenance and cure paid to a seaman injured by the third party, and that this right exists even in the absence of a contractual or legal duty owed to the shipowner by the tortfeasor. Jones becomes distinguishable, however, when it is realized that the shipowner was granted indemnification based on the violation of an implicit contractual duty owed to him by the indemnitor.\textsuperscript{23}

In Gooden, Judge Seitz stated that a multiplicity of suits would not result from the instant decision. Granting the propriety of this consideration as a criterion for deciding the rights of the litigants before the court, the conclusion reached would nevertheless seem to be open to question. As a result of Gooden, a cause of action for contribution or indemnity has been created which did not previously exist, and another possibility for litigation has been introduced.

It may be contended that the holding in Gooden will subject shipowners in situations similar to Texaco to open-ended liability over to an indefinite number of unknown shipowners. However, as the appellee pointed out: "We fail to understand how the first shipowner's burden becomes any greater solely because a subsequent shipowner, rather than the seaman himself, is the moving party."\textsuperscript{24} Effectively, then, the holding will not increase a prior shipowner's liability for maintenance and cure. Furthermore, the possibility of double liability on the part of a prior shipowner who must respond either for contribution or indemnity under Gooden is negated by the fact that a seaman cannot have a double recovery on a single claim.\textsuperscript{25}

Although the Gooden court did not mention the significance of a causal connection between the seaman's initial injury and his "heightening" of that injury, it is logical to assume that if the causal connection does not exist, equities would dictate a denial of either contribution or indemnity.

The court in the case at bar has endeavored to establish a right of contribution or indemnity between shipowners so that the ultimate liability

\textsuperscript{22} 155 F.2d 992 (3d Cir. 1946).

\textsuperscript{23} \textit{Id.} at 999–1,000. The duty was to maintain a pier fit for the use for which it was intended. It arose impliedly as a result of a contractual relationship between the shipowner and the pier owner.


for the seaman's maintenance and cure will not be governed by the seaman's capriciousness in deciding against whom to proceed to satisfy his claim for maintenance and cure. This end will be achieved, but only if the seaman does not give the prior shipowner a release from the coextensive claim. Consequently, to a degree, the seaman still controls the subsequent shipowner's rights against the prior shipowner, for the subsequent shipowner has no cause of action for contribution or indemnity where the prior shipowner has acquired a valid release from the seaman. The equitable purpose of Gooden, then, conceivably could be frustrated by the conduct of the seaman, the very person against whom the court has attempted to insulate shipowners by creating these new rights of contribution and indemnity.

An ancillary effect of the Gooden holding will be to encourage out-of-court settlements by prior shipowners, thereby insuring prompt payment to seamen. Previously, the prior shipowner could not be sued for contribution or indemnity by the subsequent shipowner when the subsequent shipowner completely satisfied the coextensive maintenance and cure claim. Therefore, the prior shipowner was less likely to settle out of court because, by waiting, he could be released of all liability on a coextensive claim if the subsequent shipowner satisfied the claim. Under Gooden, however, the prior owner will not be released from liability for contribution or indemnity unless he settles out of court and acquires a release from the seaman. Thus, the incidence of immediate payments to seamen by prior shipowners will necessarily increase.

Despite the lack of case precedent which directly supported its conclusion, the result reached by the court in Gooden is justifiable in light of the underlying equities it sought to effectuate. With respect to practical considerations, the effects of the holding will not prejudice the rights of either shipowners or seamen. Shipowners are not subjected to any greater liability, and seamen will still be able to get prompt payment for their maintenance and cure claim. In fact, the number of instances in which they will receive immediate payment will be increased.

Ralph J. Scola

26. The court expressly conditioned the right of contribution or indemnity between shipowners on the absence of a release. 378 F.2d at 581. Thus when a shipowner settles out of court with a seaman and procures a release, the shipowner becomes insulated from another shipowner's action for either contribution or indemnity.

27. There is no doubt that prompt payment will result where the seaman seeks satisfaction from the subsequent shipowner initially. If the subsequent shipowner does not settle out of court, the procedure established by Gooden in the event of a suit will insure immediate payment. The court required that immediate payment be made to the seaman by the shipowner against whom the seaman proceeded regardless of the continuation of the litigation to determine contribution and indemnity. 378 F.2d at 582 n.5.
ANTITRUST — FRANCHISING — VERTICAL CUSTOMER AND TERRITORIAL RESTRICTIONS ON GOODS SOLD BY MANUFACTURER ARE ILLEGAL PER SE.


In 1951, in order to compete more effectively with mass merchandisers, discounters, and importers, appellee, then the leading bicycle manufacturer in the United States,¹ initiated a distribution system aimed at limiting the number of its outlets to those which would actively promote and service Schwinn products.² Schwinn’s principal methods of distribution under this new scheme were (1) sales to distributors, primarily cycle distributors, B. F. Goodrich, and hardware jobbers, (2) sales to retailers by means of consignment or agency arrangements with distributors, and (3) sales to retailers under the Schwinn Plan by which Schwinn shipped directly to the retailers, invoiced the retailers, extended credit, and paid a commission to the distributor taking the order. Schwinn’s distributors were instructed to sell only to franchised Schwinn retailers within specifically assigned territories, and the franchised retailers were in turn requested to sell only to consumers and not to unfranchised retailers or discount houses. Schwinn threatened to refuse to deal with those distributors, and to cancel the franchise of those retailers who failed to comply.³

The Justice Department brought a civil action against Schwinn, Schwinn Cycle Distributors, and B. F. Goodrich, charging them with price-fixing and with the imposition of territorial and customer restrictions in violation of section 1 of the Sherman Antitrust Act.⁴ The district court rejected the charge of price-fixing, but found that the territorial restrictions, stemming from a conspiracy between the distributors and Schwinn, were illegal per se as to Schwinn products sold outright.⁵ The Justice Department on appeal to the Supreme Court asked that the district court decision be expanded to forbid territorial limitations in the agency, consignment, and Schwinn Plan transactions, and also that customer restriction in such transactions, as well as in the sale for resale situation, be forbidden. The Court, relying on the ancient doctrine against restraints

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¹ Schwinn’s share of the market had fallen from 22.5% in 1951 to 12.8% in 1961, but its dollar and unit sales had risen substantially. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 368 (1967).
³ As a result of the new distribution scheme the number of Schwinn sales per dealer and the number of overall sales have increased sharply, while retail prices of Schwinn bicycles have decreased. Id. at 40-42. The Court did not find that Schwinn had actually cancelled the franchises of any non-conforming dealers.
⁴ 15 U.S.C. § 1 (1964) provides:

   Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

on alienation, held that passage of title cuts off the seller's right to impose any restrictions, territorial or customer, upon the buyer, and any attempts to do so are illegal per se. Furthermore, vertical customer and territorial restraints in non-sale situations are to continue to be tested by the "rule of reason," which, in this case, operates in favor of the appellee. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

Trade between men has from early ages been subject to various social restrictions. Our present antitrust laws governing restraint of trade date back to fifteenth century English cases which made it illegal for a man to contract not to practice his trade. Later, however, such an agreement became permissible when ancillary to the sale of a business, provided it did not restrict the promissor-seller more than reasonably necessary to protect the buyer's interest. The common law precept of free trade tempered by those restrictions ancillary to doing business were assimilated, along with the statutes of several states, into the Sherman Antitrust Act of 1890. Section 1 of the Act does not literally embody a principle of reasonableness and it was not until Standard Oil Co. v. United States that the Supreme Court read a standard of reasonableness into the Sherman Act. The basic theory of the rule was subsequently explained in Board of Trade v. United States:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

With the number of antitrust cases rapidly multiplying, and each defendant attempting to justify its activities as reasonable in the light of its particular economic fact situation, the courts developed a doctrine of

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10. See note 4 supra.
11. On its face, section 1 applies if there is a contract, combination, or conspiracy and this contract, combination, or conspiracy is in restraint of interstate or foreign trade.
12. 221 U.S. 1 (1911).
13. [1] It was intended that the standard of reason which had been applied at the common law . . . be the measure used for . . . determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.
14. Id. at 60.
per se Sherman Act violations, branding certain restrictions patently illegal.16 As explained in Northern Pac. Ry. v. United States:

[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.17

Though the FTC has rejected a per se approach to vertical18 customer restrictions,19 the Justice Department has continually pressed its argument that both customer and territorial limitations, vertically imposed, should be per se illegal.20 Justice Department policy statements and threats of criminal prosecution21 resulted in a series of unlitigated consent decrees,22 but it was not until White Motor Co. v. United States23 that the issue was brought before the Supreme Court. The Court there refused to find vertical customer and territorial limitations to be illegal per se and remanded the case,24 claiming it knew too little of the impact of such restrictions to reach a conclusion solely on the basis of the documentary evidence before it. Using the rule of reason approach, the cases following White have continually permitted vertically imposed outlet limitations provided

19. The term "vertical" refers to arrangements initiating with the manufacturer and going down the distributive chain to distributors and/or retailers, while "horizontal" indicates arrangements among parties at the same level of the distribution ladder, e.g., agreements among retailers to divide territory.
22. See cases collected in Robinson, supra note 20, at n.34.
24. There was no further trial. White signed a consent decree ordering the removal of territorial and customer restrictions from White franchise agreements. United States v. White Motor Co., 1964 Trade Cas. ¶ 711,195 (N.D. Ohio 1964).
they are justified by sound business reasons and do not unduly restrict
competition in the industry affected.25

A brief look at the "economic and business stuff"26 out of which
customer and territorial restraints arise is mandatory for an intelligible
analysis of the instant case. It is around "shopping goods,"27 such as
bicycles, cars, and appliances, which require a selective distribution
scheme,28 that the American system of franchising arose.29 These goods
do not sell themselves; they require expert salesmen to point out
the product’s hidden qualities and to help the customer choose the model best
suited to his particular needs.30 These goods may also need pre-condition-
ing or post-sale servicing, and the manufacturer, interested in preserving
customer good will, wants only reliable retailers selling and servicing
his products.31

Because of the tremendous outlay necessary for successful distributing
and retailing, most manufacturers cannot afford to vertically integrate
and take over the distribution and retailing of their product.32 To compete
with the large corporate chains, a small manufacturer will, instead, grant
exclusive franchises to selected retailers, promising to supply his product
to no other retailer in each delineated area but the holder of the franchise
for that territory and reserving the right to terminate the franchises of
those who fail to pass muster. To keep his product out of unreliable hands,
he may, as Schwinn did, demand that his distributors sell only to franchised
retailers and that his retailers sell only to consumers.33 To protect the

25. See, e.g., Sandura Co. v. FTC, 339 F.2d 847 (6th Cir. 1964); Snap-On Tools
Corp. v. FTC, 321 F.2d 825 (7th Cir. 1963); C.B.S. Business Equip. Co. v. Under-
Co., 217 F. Supp. 110 (D. Del. 1963); rev’d on other grounds, 378 U.S. 158 (1964);
tensive discussion of the economics of franchising and accompanying vertical restric-
tions see Comment, supra note 21; Jordan, supra note 20; Handler, supra note 20;
Statement by Milton Handler before the Small Business Administration, March 11,
27. "Shopping goods" are those more expensive, less frequently purchased items
for which a buyer will shop around and compare before buying. They are to be dis-
tinguished from "convenience goods," i.e., low-priced necessity-type items (toothpaste,
cereal, etc.) for which a buyer will readily accept substitute brands rather than go
out of his way. Convenience goods, therefore, require intensive distribution by getting
the product into as many outlets as possible.
28. Comment, supra note 21, at 795.
29. An SBA study found that four main factors gave rise to the great growth in
franchising: (1) Other distributive systems could not have been effected with
the same capital, the same trained personnel, and within the same period of time; (2)
"Voluntary" chains were established to compete with the corporate chains of the
twenties; (3) The franchise system lends itself to marketing those types of products
which will fare better when sold alone rather than in a variety store; and (4)
Franchising enables many men to satisfy their natural drive to own their own busi-
ness. Covey, Franchising and the Antitrust Laws: Panacea or Problem?, 42 Notre-
 Dame Law. 605, 607 (1967).
365 (1967); see Jordan, supra note 20, at 117.
31. Jordan, supra note 20, at 123.
32. Handler Statement, supra note 26, at 419; Jordan, supra note 20, at 111.
33. Schwinn’s restriction of the use of the "Panacea" modifier to its "consumer classes of
customers is more easily justified as efficiency oriented than was White Motor’s
"customer reservation" whereby White set aside for itself particular choice accounts.
retailers from raids on their territories by other franchised retailers, he may, by agreement or by threatening to refuse to deal with raiders, restrict each retailer to his assigned territory.\textsuperscript{34}

The Court in \textit{Schwinn} found that only if a manufacturer has parted with title are customer and territorial restraints imposed by him illegal per se. It could have found such restraints illegal per se in both sale and non-sale situations and justified such a holding if an intensive investigation into the economics of the area, as suggested by \textit{White}, had revealed that, in the vast majority of instances, such restrictions have resulted in undue restraint of competition. Per se rules, in the past, rationally evolved by applying the rule of reason to the area in general rather than to a specific fact situation.\textsuperscript{35}

\begin{quote}
[\textit{In deciding whether to place a practice in the \textit{per se} illegal class, we ask whether actual experience over the years has demonstrated that the practice is so harmful and so without redeeming virtue as to warrant forbidding it across the board, without consideration of its particular effects in every case. . . .} \textit{[P]er se} rules are not drawn out of thin air; they are the product not of abstract theory but of practical experience and market realities.\textsuperscript{36}]
\end{quote}

The Court in \textit{Schwinn}, however, does not appear to have followed this procedure in arriving at its decision to apply a per se ban on vertical outlet restraints. It made no claim to have based its conclusion on an investigative finding that outlet limitations do, in fact, hamper inter-brand competition. The Court could also have reasoned, along the lines of \textit{Northern Pacific},\textsuperscript{37} that the multiplicity of suits and the cost of lengthy investigation into an infinite variety of fact situations warranted a per se approach which would, in addition, provide more certainty to the businessman honestly trying to conform to the Sherman Act.\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{34} In holding that a manufacturer's use of a mere threat of refusal to deal, aimed at influencing distributors to whom he has sold his product, may constitute a per se violation of section 1 of the Sherman Act, the Schwinn decision has eliminated much of the battles as to whether some kind of "agreement" falling within section 1 has occurred. See discussion of United States v. Colgate & Co., 250 U.S. 300 (1919) in 1955 \textit{REPORT OF THE ATT’Y GEN'L’S NAT’L. COMM. TO STUDY THE ANTITRUST LAWS} 15–16; United States v. Arnold, Schwinn & Co., 388 U.S. 365, 391 n.12 (1967) (dissent); Halper, \textit{Individual Refusals to Deal: Customer Selection or Dealer Protection?}, 22 ABA \textit{ANTITRUST SECTION} 49 (1963).
\item \textsuperscript{35} A number of business requirements may be served by vertical arrangements. They may assure sources of supply or market outlets; enable the manufacturer to obtain energetic distribution and insure that the distributor devote its time and effort to developing sales in its territory; and extend limited protection to distributors against intra-brand competition, thereby stimulating inter-brand competition. These arrangements enable manufacturers to reduce selling costs and minimize credit risks. Furthermore, a manufacturer can derive prestige for his product by dealing with only one dealer in a market, particularly where that dealer has established goodwill in the area.
\item von Kalinowski, \textit{supra} note 16, at 590.
\item \textsuperscript{36} Id., at n.5.
\item \textsuperscript{37} Elman, \textit{"Petrified Opinions" and Competitive Realities}, 66 COLUM. L. REV. 625, 626–27 (1966).
\item \textsuperscript{38} \textit{Northern Pac. Ry. v. United States}, 356 U.S. 1, 5 (1958).
\item \textsuperscript{39} Both, \textit{The Rule of Reason and the Per Se Concept: Price Fixing and Market Division}, 75 YALE L.J. 373, 387 (1966); Loevinger, \textit{supra} note 8, at 250.
\end{itemize}
Instead, the Court's decision to condemn as illegal per se only those vertical customer and territorial restraints imposed on goods actually sold by the manufacturer was based on the ancient prohibition against restraints on alienation rather than on a finding of actual restraint of trade. While the doctrine against restraints on alienation of property might have had meaning in Lord Coke's day, it is doubtful whether the doctrine has relevance in a twentieth century business setting. The Court decided that a manufacturer has no right to control the marketing of his product once he has sold it because technically, it is no longer his. But, as Professor Chafee has noted:

[T]he strictly legal situation corresponds inadequately with the practical situation. Actually, the manufacturer by his advertising and other commercial devices has brought the consumers into a direct relation with himself. He is trying to make them buy his product, and they think of themselves as buying his product.

Moreover, the manufacturer may be called upon to service the product, repair or replace a defective model, or perhaps even pay for damages caused by it. Therefore, even after a manufacturer has parted with his goods, and parted with title to them, he nevertheless retains a very real interest in what becomes of them.

In basing its decision on the pure form of an arrangement rather than on substantive impact on competition, the Court has reversed its position taken in Simpson v. Union Oil Co. There the respondents had refused leases to "consignees" who had neglected to maintain suggested prices. Said the Court then:

To allow Union Oil to achieve price fixing in this vast distribution system through this "consignment" device would be to make legality for antitrust purposes turn on clever draftsmanship. We refuse to let a matter so vital to a competitive system rest on such easy manipulation.

Unfortunately, the ruling in Schwinn will result in just such outward form changes for those who can easily effect them. For those who cannot,
vertical integration to the distributor level will at least allow a manufacturer to choose his own retailers. But such vertical integration will inescapably result in the elimination of the middlemen and the relegation of small distributors and retailers to the status of agents or employees, thereby subverting Congress’ declared national policy of protecting small business.

The Court, however, has left a tiny crack in its “wall” of per se prohibition when early in the opinion it intimates that a vertical restraint might be shielded by the rule of reason if the restraining manufacturer is a failing company or a newcomer. A per se rule that is not applicable in all circumstances seems not to be strictly per se in the dictionary sense, or as applied in price-fixing, boycott, and other typical per se cases. Instead, it approaches the reasoning used in holding tying arrangements per se violations only if a substantial portion of the market is foreclosed to competitors of the tied product.

An absolute per se rule should not be applied to vertically imposed territorial and customer restrictions in sale for resale situations as they have not been shown to unduly limit competition either generally or in this particular case. Indeed, the Court called the restraints on Schwinn products reasonable and necessary for Schwinn’s survival — if title to the goods had not passed. It failed to explain why the limitations suddenly become unreasonable if title has in fact passed. If a manufacturer can control its outlets by vertical integration, it should also be able to do so to be superficial, regardless of the actual economic impact of the restrictions themselves. See Address by Mary Gardner Jones to 1967 F.B.A. Convention as reported in BNA ANTITRUST & TRADE REP. Rep. No. 316, A-1 (Aug. 1, 1967).

47. According to the Schwinn decision, a manufacturer may still grant exclusive franchises, though the franchisees will be unprotected from raiders, provided “nothing more is involved than vertical ‘confinement’ of the manufacturer’s own sales of the merchandise to selected dealers, and if competitive products are readily available.” 388 U.S. at 376. Accord, Cherokee Laboratories, Inc. v. Rotary Drilling Service, Inc., 5 TRADE REP. REP. (1967 Trade Cas.) ¶ 72,167, at 84,191 (5th Cir. July 25, 1967). The court there stated that if the jury found that the defendant manufacturer refused to sell to the plaintiff marketer, although a substitute product was unavailable, but sold exclusively to another marketer who priced plaintiff out of business, a per se Sherman violation might be found.


50. Webster defines per se as “by or of itself, intrinsically.” WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1826 (2d ed. 1959).


52. There is not one iota of evidence that Schwinn’s franchise program has injured any dealer or any distributor, or has restrained trade in Schwinn’s bicycles, or in any other bicycle, domestic or foreign . . . . The evidence is abundantly clear that Schwinn’s practice of eliminating dead timber, useless and inactive or relatively inactive accounts, and persons and firms unable or unwilling to provide service and parts replacements, and adopting and adhering to a franchise program instead of restraining trade in Schwinn bicycles, has greatly enhanced trade in Schwinn bicycles and has in fact been the salvation of Schwinn, just as it has been of other small businesses . . . and has actually made for genuine competition in the bicycle manufacturing industry.
by exclusive franchising coupled with vertical outlet restrictions. The franchisor and franchisee may be viewed as parts of a single business organization whose activities should be tested by their effect on inter, rather than intra, brand competition, as indicated by market share and the availability of comparable products. It is hoped that the Court will widen the "crack" in the wall of per se illegality to once more let in the light of the rule of reason.

Fortunata Giudice

CONSTITUTIONAL LAW — EQUAL PROTECTION — CONSTITUTIONAL AMENDMENT PROHIBITING STATE FAIR HOUSING LAWS IS STATE ACTION DENYING EQUAL PROTECTION OF THE LAWS.

Reitman v. Mulkey (U.S. 1967)

The Mulkeys, a Negro couple, instituted an action for damages and injunctive relief against the owner and manager of an apartment house who had refused to rent an apartment to them because of their race. The action was brought under sections 51 and 52 of the California Civil Code.1 The trial court granted judgment on the pleadings in favor of the defendants on the grounds that sections 51 and 52 had been repealed by the adoption of Proposition Fourteen at the 1964 general election. Proposition Fourteen, which presently appears as article 1 section 26 of the California Constitution, provides in part:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent said property to such person or persons as he, in his absolute discretion, chooses.

The Prendergasts, an interracial couple, filed suit under the same sections of the California Civil Code to enjoin eviction from their apart-

1. All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.


Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of color, race, religion, ancestry, or national origin, contrary to the provisions of Section 51 of this code, is liable for each and every such offense for the actual damages, and two hundred fifty dollars ($250), in addition thereto, suffered by any person denied the rights provided in Section 51 of this code.

ment. The lessor cross-complained for a declaratory judgment entitling him to terminate the tenancy even though his decision to evict was based on race. The court denied defendant’s motion for summary judgment concluding that judicial enforcement of an eviction would violate the equal protection clause of the fourteenth amendment.²

Both cases were appealed to the California Supreme Court where the trial court was reversed in Mulkey v. Reitman³ and affirmed in Prendergast v. Snyder.⁴ Giving careful consideration to the views of the California Supreme Court, the United States Supreme Court affirmed, holding that article 1, section 26 of the California Constitution would involve the state in private racial discrimination to such a degree that it would be in violation of the equal protection clause of the fourteenth amendment. Reitman v. Mulkey, 387 U.S. 369 (1967).

It is well-established that the restrictions of the fourteenth amendment apply only to action by the state, and not to private discriminatory activity.⁵ For this reason, the sine qua non of successful civil rights cases based on the equal protection clause has been the existence of state action.⁶ This concept, as it has been judicially defined, has been found in two general areas. The first includes those cases where the state, through its own exertion of power, directly contributes in some way to private discriminatory activity. The cases in this area may be further subdivided into two categories, the former involving the judiciary in state action,⁷ the latter involving legislative or executive action.⁸ The second general area in which state action has been found is where the private discriminator may be said to be acting as the state because of the private individual’s relationship to the state, or because of the function involved.⁹

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2. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.
3. 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966).
4. 64 Cal. 2d 877, 413 P.2d 847, 50 Cal. Rptr. 903 (1966).
In such cases no affirmative exertion of state power directly contributing to the private discrimination is required, but special circumstances relating to the private discrimination may cause the state to be responsible therefor, even though it is only indirectly involved in such action.

The concept of state action in general appears to be undergoing judicial reevaluation. Language in the two concurring opinions, involving six Justices, in the recent Supreme Court case of United States v. Guest\(^\text{10}\) indicates an inclination to eliminate the requirements of state action altogether.\(^\text{11}\) In the area of housing in particular, the Court of Appeals for the Eighth Circuit, in a case\(^\text{12}\) decided after Reitman, denied the existence of a right to be free from private discrimination. However, the court expressed its opinion that it would not be surprising if the Supreme Court were to hold that the right to purchase property without discrimination\(^\text{13}\) may be judicially enforced without consideration of the constraining state action requirement of the fourteenth amendment.\(^\text{14}\) In view of this judicial uncertainty, and of the recent failure of Congress to pass open housing legislation, it is extremely important to examine the implications of the Reitman decision with a view toward future development in this area.

The majority opinion of the United States Supreme Court, written by Mr. Justice White, limited itself almost exclusively to a consideration of the direct relationship of the exertion of state power to private discrimination. The Court concluded that the state had established a constitutional right to discriminate, and had thereby encouraged and authorized such private action. In coming to this conclusion, the Court relied heavily on the California Court's findings concerning the impact, objectives, and historical context of the adoption of Proposition Fourteen.\(^\text{15}\)

Mr. Justice Douglas, in a concurring opinion, emphasized the nature of the private activity itself rather than the nature of Proposition Fourteen. He concluded that because of the close connection between the private marketing of housing and the zoning function, the large amount of public finance involved, and the existence and amount of state regulation and licensing in that area, urban housing is in the public domain,

\(^{10}\) 383 U.S. 745 (1966).

\(^{11}\) In that case, the six concurring Justices felt that section 5 of the fourteenth amendment, which grants the power to Congress "to enforce, by appropriate legislation, the provisions" of the amendment, empower Congress to prescribe purely private conduct. Id. at 761.


\(^{13}\) The right to purchase property was set forth in the Civil Rights Act of 1866 which granted to all citizens of the United States the same right as is enjoyed by white citizens to inherit, purchase, lease, sell, hold, and convey real and personal property. Civil Rights Act of 1866, 14 Stat. 27 (1866).

\(^{14}\) Although the statute had originally been passed pursuant to the thirteenth amendment, the case of Hurd v. Hodge, 334 U.S. 24 (1948), indicated that the 1870 recastment of the statute imposed the fourteenth amendment restriction on the right created.

\(^{15}\) In addition to the sections of the California Civil Code on which the plaintiffs relied, California had enacted an impressive quantity of antidiscrimination legislation. See Reitman v. Mulkey, 387 U.S. 360, 374 (1967). The enactment of Proposition Fourteen against this background was considered a critical factor by both the California and United States Supreme Courts.
involves a public function, and therefore must meet fourteenth amendment standards.

The dissent, written by Mr. Justice Harlan, criticizes the majority's characterization of article 1, section 26 as affirmative state action which encouraged and authorized the private discriminatory activity. The dissenting Justices view the provision as merely an expression of governmental neutrality replacing a former policy of antidiscrimination.

In addition to its criticism of the result reached, the dissent also finds fault with the analysis employed by the majority. Although the examination of state action in terms of its impact, objective, and historical context is a permissible technique of ascertaining the discriminatory nature of such action, Mr. Justice Harlan strongly objects to the reliance placed on the California Supreme Court's findings in this respect. The dissent seems to feel that by relying on the California Court the majority was, in effect, placing the burden on the petitioners to show the constitutionality of article 1, section 26 rather than requiring the original plaintiffs to demonstrate its unconstitutionality. While it is not at all clear that the majority is doing anything more than simply "giving careful consideration to its [the California Court's] views," the criticism of the dissent may prove to be a possible basis for distinguishing the Reitman case in the future.

A serious practical problem created by the decision, and perhaps the basis of the dissent's most justifiable criticism, concerns the inhibition of legislative flexibility in the area of housing which might result from the Reitman opinion. Mr. Justice Harlan points out that state legislatures in the future will be reluctant to enact antidiscrimination legislation in the fear that such legislation may be unenforceable as a result of this decision. Further, the decision has the effect of shifting the emphasis in this area to the judiciary from the legislative process which, because of its flexibility and political responsiveness, is better equipped to deal with the problem.

The majority might have reached the same result and avoided most of the dissent's criticism by applying the public function approach suggested by Mr. Justice Douglas in his concurring opinion.

Although the California court did not base its decision on the public function theory, its citation and discussion of cases in that area suggested the possibility of such an approach had the Supreme Court been anxious to take it, and thereby establish an affirmative duty to prevent discrimination in housing. However, by focusing on Proposition Fourteen as a posi-

17. 387 U.S. at 374.
18. Id. at 395-96.
tive assertion of state power, the court chose not to adopt the broader approach in the field of housing, but rather to limit the implications of its decision by a very specific holding.\textsuperscript{21}

Although one may only speculate on the reasons underlying the majority's rejection of the public function approach, one possibility is that the Court felt that by adhering to the more traditional "direct" state action analysis it would avoid conflict with congressional attempts to deal with the politically sensitive problem of open housing.\textsuperscript{22} By reaching the desired result without finding affirmative governmental responsibility or the correlative individual right to be free from private discrimination in the field of housing, the Supreme Court may be, in effect, evidencing a reluctance to usurp the congressional function in this area. Further, by rejecting Mr. Justice Douglas' suggestion, the Court may be expressing its disapproval of the broad, nondiscriminatory approach to the area of housing which that theory necessarily entails and its recognition of the legislature as the appropriate place for establishing the demarcation of specific areas in which open housing should apply. How the Court analyzes this problem in the future may very well depend upon the development of the open housing question in the political arena.

Nevertheless, a close examination of the Reitman opinion reveals that the majority may have left room for the employment of the theory of governmental responsibility in the field of housing. In fact, it might be argued from an analysis of the cases cited by the majority that the requirement of state action is actually so dramatically relaxed by the instant case as to be virtually meaningless in this field, and possibly in other areas as well.

The Court begins its opinion with a discussion of the nature of Proposition Fourteen as a positive assertion of state power.\textsuperscript{23} It then reviews several cases which define the concept of "significant involvement" in private discrimination, and this section of the opinion creates a great deal of analytical difficulty.\textsuperscript{24} A state may become "significantly involved"

\textsuperscript{21} It should be noted that the Supreme Court also ignored the California Court's interpretation of the rule of Shelley v. Kraemer. The California Court relied on the case of Abstract Inv. Co. v. Hutchinson, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (1962) where it held that evidence of the plaintiff landlord's racial motivation in an eviction proceeding must be admitted because judicial enforcement of a discriminatory eviction would violate the Shelley rule. The Shelley rule, however, covered only the situation where both parties to the immediate transaction were willing to deal with each other and a third party attempted to use the judicial process to compel discrimination through the enforcement of a restrictive covenant. The California Supreme Court's interpretation of Shelley extends the rule to cover the situation where one party to the transaction is unwilling to deal with the other and the court, by giving effect to his desires, merely makes discrimination possible.

Although the Supreme Court might also have avoided the problems cited by the dissent by adopting this approach, in view of the Court's reluctance in the past to give breadth to its opinion in Shelley, the Court's attitude on this point is not difficult to understand. \textit{See Shelley v. Kraemer: Notes for a Revised Opinion}, 110 U. Pa. L. Rev. 473 (1962).

\textsuperscript{22} It is paradoxical that the Court may be causing exactly the opposite effect to that intended by the proponents of the public function approach, i.e., the state will only be involved in areas where genuine state action is involved as opposed to areas where third party dealings which are part of the housing market would be allowed to continue, and it is the court, rather than the state, which is the final arbiter of the question.

\textsuperscript{23} Id. at 377.

\textsuperscript{24} Id. at 378-80.
in private discrimination either directly\textsuperscript{25} or indirectly,\textsuperscript{26} and the Court, by citing both types of cases in its discussion of "significant involvement," makes no distinction along these lines. On the one hand, the Court cites cases like \textit{Robinson v. Florida,\textsuperscript{27} Lombard v. Louisiana,\textsuperscript{28} and Peterson v. City of Greenville\textsuperscript{29}} which involve direct affirmative state action and on which it had relied in the first part of the opinion.\textsuperscript{30} However, it also cites \textit{Burton v. Wilmington Parking Authority\textsuperscript{31} and Nixon v. Condon\textsuperscript{32}} in which no direct exertions of state power were present but which involved discrimination in "public functions" for which the state could otherwise be held responsible.\textsuperscript{33}

The use of the \textit{Burton} and \textit{Nixon} cases along with the \textit{Peterson, Robinson} and \textit{Lombard} cases may be interpreted in either of two ways. The first interpretation is that the Court may now be willing to find the requisite direct assertion of state power through such \textit{passive} activity as "reposing authority," "surrendering its function," or "permitting." Since any state posture with respect to private activities might be viewed in terms of affirmative characteristics,\textsuperscript{34} such an interpretation would lead to the virtual dilution of the state action requirement altogether.

The other possible implication of the Court's analysis is the effective elimination of the state action requirement through the extension of the "public function" theory. As illustrated by \textit{Nixon} and \textit{Burton}, the state may be held responsible for private discrimination because of the public nature of the private activity, even though no direct assertion of state power is involved. However, in the \textit{Reitman} case, no such public nature is recognized by the majority. The resulting situation, in which the Supreme Court is apparently willing to find the requisite "significant involvement," involves the combination of a \textit{lack} of positive direct state action,

\textsuperscript{25} See notes 7 and 8 supra.
\textsuperscript{26} See note 9 supra.
\textsuperscript{27} 378 U.S. 153 (1964).
\textsuperscript{28} 373 U.S. 267 (1963).
\textsuperscript{29} 373 U.S. 244 (1963).
\textsuperscript{30} See p. 200 & note 8 supra.
\textsuperscript{31} 365 U.S. 715 (1961).
\textsuperscript{32} In commenting upon the \textit{Burton} case, which involved discrimination by the lessee of a state-owned building, the Court stated: Although the State neither commanded nor expressly authorized or encouraged the discriminations, the State had "elected to place its power, property and prestige behind the admitted discrimination" and by "its inaction . . . has . . . made itself a party to the refusal of service . . ." which therefore could not be considered the purely private choice of the restaurant operator.
\textsuperscript{33} 387 U.S. at 380.
\textsuperscript{34} 286 U.S. 73 (1932).
\textsuperscript{35} In considering the \textit{Nixon} case, where the executive committee of a political party was permitted by the state to prescribe the qualifications of its members for voting, the Court declared: "Reposing this power in the executive committee was said to insinuate the State into the self-regulatory, decision-making scheme of the voluntary association . . ." 387 U.S. at 379.
\textsuperscript{36} See p. 202 supra.
\textsuperscript{37} See 387 U.S. at 394-95 (dissenting opinion). For an interesting approach along these lines, see generally Horowitz, \textit{Fourteenth Amendment Aspects of Racial Discrimination in Private Housing}, 52 \textit{Calif. L. Rev.} 1 (1964).
and a lack of those special circumstances which have enabled the Court to find state responsibility through application of the public function doctrine. Therefore, by applying the public function cases, which do not require direct assertion of state power, in its discussion of "significant involvement" in an essentially private area, the Court has left room for the interpretation that it is in effect discarding the state action limitation of the fourteenth amendment. 35

A review of the Supreme Court's opinion in Reitman v. Mulkey in terms of guidelines for future development must take into account two significant points. The first is that the Supreme Court is reluctant, at the present time, to apply the public function theory to the field of urban housing and thereby establish affirmative governmental responsibility in that area. This is evidenced by its strained finding of state action in this case through the characterization of Proposition Fourteen as a positive assertion of state power directly contributing to the private discriminatory activity. However, it should also be noted that in its desire to limit the basis of its decision, the Supreme Court has left room for a much more radical inference, that is, that the state action requirement has been effectively eliminated, not only in the area of housing, but in other fields as well.

Michael F. Rosenblum

CONSTITUTIONAL LAW — RENT ABATEMENT — SECTION 143-(b) OF THE NEW YORK SOCIAL WELFARE LAW PERMITTING RENT ABATEMENT AND BARRING EVICTION OF WELFARE TENANTS HELD CONSTITUTIONAL.

Farrell v. Drew (N.Y. 1967)

In 1962 the New York Legislature enacted the Spiegel Law which provides that the Department of Welfare may make direct payments of rent to the landlords of welfare recipients; that such payments may be withheld from the landlord when violations of law "dangerous, hazardous or detrimental to life or health" exist on the premises; that proof of

35. For an illustration of the confusion of the two areas which has already resulted, see Commonwealth v. Brown, 36 U.S.L.W. 2027 (E.D. Pa., July 5, 1967), involving the controversial Girard College problem. The court found that because of the combination of such factors as the prior trusteeship of the city, the present general governmental supervision, the tax exemptions and other special concessions granted to Girard College, and the general "public" nature of the institution, the state was involved in the discriminatory conduct to an unconstitutional degree. To support a finding of unconstitutional state involvement in the indirect state activity, the court relied upon the Reitman case along with Burton and Evans.
existing dangerous violations shall be a valid defense to any action by the landlord for nonpayment of rent; that the welfare department may make provision for payment of rent which was withheld, upon proof that the dangerous violation was corrected. As amended in 1965 the law further provides that in such actions the landlord shall not be entitled to possession of the premises, eviction of the tenant, or a money judgment against the tenant for nonpayment of rent.\(^1\) Pursuant to these provisions, the Department of Welfare abated all rent payments to the petitioner, the lessor of an apartment building in which three welfare recipients were tenants. The basis of the abatement was the existence of a door which led to the apartment of another tenant. The door was not completely self-closing, as required by law, and it had been reported as a violation of the building code by a New York building inspector. Petitioner brought summary eviction proceedings against the three tenants for nonpayment of rent, and the Department of Welfare appeared on behalf of the tenants, interposing the Spiegel Law as a defense to petitioner's actions.

The trial court held that section 143-(b) was constitutional, and after finding that a condition hazardous to life and health did in fact exist in the building, dismissed the eviction proceedings. On direct appeal, the New York Court of Appeals affirmed, holding that section 143-(b) of the New York Social Welfare Law is not a denial of equal protection of the laws, an unconstitutional impairment of the landlord's contractual rights, nor a deprivation of property without due process of law. *Farrell v. Drew*, 19 N.Y.2d 486, 227 N.E.2d 824, 281 N.Y.S.2d 1 (1967).

The failure of the common law to provide adequate rules of law to ameliorate the substandard condition of slum housing\(^2\) has required the passage of detailed housing codes which set minimum standards of safety and decency for urban tenements.\(^3\) Generally, the sanctions imposed by these codes have been unsuccessful in compelling slum landlords to comply with the standards.\(^4\) In order to remedy this, state legislatures have felt constrained to provide that rent payments to violating landlords shall be abated, at least until the violation is remedied.\(^5\)

There are several statutory provisions presently in force in New York which provide for the withholding of rent. Notable among these are the receivership law\(^6\) and the rent impairing violations statute.\(^7\) The former provides for the appointment of a receiver to collect and apportion rents


\(^3\) Id. at 579-80. N.Y. Mult. Dwell. Law (McKinney 1966) is an example of a legislative attempt to cope with this problem.


\(^5\) See, e.g., Iowa Code § 413.106 (1962); Conn. Gen. Stat. Ann. § 47-24(a) (1960). It is the practice of the Department of Welfare of Chicago to withhold rents under circumstances similar to those provided for by the Spiegel Law, but apparently not under the current provisions, supra note 2, at 573 n.8.


for the repair of buildings declared public nuisances, and the latter for the abatement of rent if a rent impairing violation is not officially dismissed by the Department of Buildings within six months after it notifies the landlord of the violation.

The New York courts, when faced with an attack on the constitutionality of such statutes, have generally taken a common approach, upholding them as valid exercises of the police power of the state. These courts, however, seem to deemphasize the constitutional issues raised by the statutes and to emphasize the fact that rent laws foster the public interest in the maintenance of safe and sanitary housing and that public policy demands that the legislature provide adequate means to remedy the deplorable conditions of urban slums.

Not all rent withholding legislation, however, has been without constitutional defect. In *Central Sav. Bank v. City of New York, 11* the court held the receivership law of 1937 to be a deprivation of property without

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8. The law further provides that the receiver shall have a lien for any expenses incurred in the repair of a building and that this lien has priority over all other liens, except taxes and assessments. N.Y. MULT. DWELL. LAW § 309(4)(a) (McKinney Supp. 1967).

9. A rent impairing violation is one that constitutes, or will constitute if not promptly corrected, a serious hazard to health and life. N.Y. MULT. DWELL. LAW § 302-(a)(2) (a) (McKinney Supp. 1967).

The procedure provided for determining what violations will be classified as rent impairing is particularly noteworthy. Within six months after the enactment of § 302-(a), the Department of Buildings was to promulgate a list of violations which it proposed to classify as rent impairing. Within thirty days thereafter, the Department was to hold a public hearing at which time all interested parties were to be heard as to the propriety of the classifications. A final list would then be promulgated which could be amended only after notice and public hearing. N.Y. MULT. DWELL. LAW § 302-(a)(2) (b)-(e) (McKinney Supp. 1967).

10. In addition to the receivership law and the rent impairing violations statute, the following provide for rent withholding: N.Y. MULT. DWELL. LAW § 302(1) (a)-(b) (McKinney 1966) provides for the abatement of rent when a multiple dwelling is occupied without the issuance of a certificate of occupancy; N.Y. REAL PROP. ACTIONS § 755 (McKinney 1966) provides for a stay of eviction proceedings or action for rent in New York City upon proof that a landlord has failed to make repairs ordered by the Department of Buildings, if the conditions ordered to be remedied are such as to constructively evict the tenant; N.Y. REAL PROP. ACTIONS §§ 769–82 (McKinney Supp. 1967) provides that one-third or more of the tenants of a multiple dwelling in New York City may petition for a special proceeding to have their rent payments deposited into court to remedy conditions dangerous to life, health, or safety; N.Y. CPF. N.Y., ADMIN. CODE § 751-50(h)(3) (1963) provides that the City Rent and Rehabilitation Administration may reduce the maximum rents of a building certified by the proper agency to be a fire hazard or in a continually dangerous condition.


13. *N.Y. Sess. Laws 1929, ch. 713, § 306, as amended, N.Y. Sess. Laws 1937 ch. 880, § 309(b)(a). This law, similar to the present receivership law, provided that, upon failure of a landlord to repair his building when so ordered by the Department,*
due process of law insofar as it provided for a lien prior to a previously recorded mortgage. The court reasoned that since the mortgagee was not afforded an opportunity to be heard in regard to the actions of the Department of Buildings, he was compelled to "sit idly by" while the value of his lien was diminished.\textsuperscript{14}

The instant case presents several constitutional questions which will be raised with greater frequency in the future, as additional states attempt to legislate slum conditions out of existence.\textsuperscript{15} Most significant of these is whether the Spiegel Law deprives the landlord of his property without due process of law. This issue has two aspects: first, whether the character of notice and hearing provided for is violative of procedural due process, and second, whether rent curtailment legislation is a valid exercise of the police power of the state.

Since the Spiegel Law provides that it is a defense to the actions of a landlord, it is incumbent upon him, not the Department of Welfare, to initiate the suit in which the question of whether the rent should be paid will be adjudicated. If he fails to bring eviction proceedings, he will never have an opportunity to refute the withholding of his rents. Thus, while the landlord is not compelled to "sit idly by," as was the mortgagee under the receivership law of 1937,\textsuperscript{16} the Department of Welfare is not required to initiate proceedings in which it will be compelled to substantiate its finding. Such hearing is only afforded after rent has been withheld, and after the landlord has taken action to collect it. In addition, the Spiegel Law fails to provide for notice to the landlord of the existence of dangerous conditions on his premises prior to the withholding of his rents.

The New York Court of Appeals held that procedural due process was satisfied even though the statute lacks explicit provision for notice of violations, and hearing initiated by tenants or an appropriate agency. The court reasoned that since the landlord can bring eviction proceedings after his rents are abated, he is given ample opportunity for a hearing, and, since the Spiegel Law is a defense to these proceedings, to be pleaded as such, he is given sufficient notice of the existence of dangerous viola-

of Buildings, that Department may make the repairs. The expenses incurred were to be assessed against the building, and the lien of the assessment was to have priority over all other liens, except taxes and assessments. See pp. 206-07 & notes 6 and 8 supra.

14. 279 N.Y. at 275, 18 N.E.2d at 154.

15. The present receivership law obviates the deficiencies of the receivership law of 1937 by providing for detailed notice and hearing procedures before rents are withheld. In re Department of Bldgs., 14 N.Y.2d 291, 200 N.E.2d 432, 251 N.Y.S.2d 441 (1964).

16. Three lower courts have considered the constitutionality of the Spiegel Law. In Milchman v. Rivera, 39 Misc. 2d 347, 240 N.Y.S.2d 859 (Bronx Civ. Ct. 1963), appeal dismissed, 13 N.Y.2d 1123, 196 N.E.2d 55, 247 N.Y.S.2d 122 (1964), and in Schaefer v. Montes, 37 Misc. 2d 722, 233 N.Y.S.2d 444 (Bronx Civ. Ct. 1962), the Spiegel Law was upheld as a valid exercise of the police power of the state to promote safe and sanitary housing conditions. In Trozze v. Drooney, 35 Misc. 2d 1060, 232 N.Y.S.2d 139 (Binghampton City Ct. 1962), it was held unconstitutional, apparently on the grounds that "[t]he Social Welfare Law is not the proper vehicle to require improvements in housing standards." Id. at 1064, 232 N.Y.S.2d at 139.
tions on his premises when he files suit. 17 Although this procedure places the burden of litigation on the landlord, there is ample authority to support the court's conclusion that the character of the notice and hearing provided for is without constitutional defect. In Ewing v. Mytinger & Casselberry, Inc., 18 the United States Supreme Court stated that, "It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination." 19 Due process, it would seem, does not require notice and hearing prior to the abatement of rent, as long as the landlord is at some time given notice and an opportunity to be heard. In no instance does it appear that due process demands that a property owner be heard before he is deprived of his property or that the hearing be initiated by the party seeking to affect his property rights.

Though not violative of procedural due process, it is significant to note that the notice and hearing procedures of the Spiegel Law are substantially different from those of other New York rent abatement statutes. Some give the landlord a hearing before he is deprived of his rents, 20 and in others he must be given notice of the existence of violations on his premises. 21

Objection to the Spiegel Law, based on the contention that it is an abuse of the police power of the state, was dismissed by the court by the citation of a number of cases which have held that the elimination of dangerous housing conditions is a valid exercise of that power. 22 In Levy Leasing Co. v. Siegel 23 and in Nordred Realities, Inc. v. Langley, 24 two statutes analogous to the Spiegel Law were upheld. In the Levy case, the United States Supreme Court declared that a statute 25 which provided that the existence of an unreasonable and oppressive lease agreement for the payment of rent shall be a defense to any action for rent, was a valid exercise of the police power in promoting the public welfare. Similarly, in Nordred, the New York Court of Appeals affirmed the finding of a lower court that a statute 26 which provided for partial rent abatement when a landlord fails to comply with certain provisions of the Multiple

20. Both the present receivership law and the tenants' petition statute provide for a hearing before abatement of rent. The former places the burden of initiating appropriate proceedings on the Department of Buildings, the latter on one-third of the tenants of a multiple dwelling. See pp. 206-07 & notes 6, 8 and 10 supra.
21. The present receivership law, the tenants' petition statute, the rent impairing violations statute, and the constructive eviction violations law all provide for notice to the landlord of the existence of conditions that will cause his rents to be abated. See pp. 206-07 & notes 6, 8 and 10 supra.
22. 19 N.Y.2d at 492, 227 N.E.2d at 827, 281 N.Y.S.2d at 5-6.
23. 258 U.S. 242 (1922).
Dwelling Law, "is one for the general health, safety, and welfare of the public, and as such is valid. . . ."  

The only fairly recent authority that can be found to support the position that rent laws are an abuse of the legislative power is Willson v. McDonnell. This case held that a joint resolution of Congress known as the Saulsbury resolution, which prohibited eviction proceedings and, with certain exceptions, perpetuated all existing leases in the District of Columbia until a treaty was concluded with Germany after World War I, was beyond the police power and as such an unconstitutional deprivation of property. The precedential value of this decision is questionable, however, in light of the Levy decision two years later and the difference between the operative provisions of Saulsbury and Spiegel.

It has been contended that the Spiegel Law is unconstitutionally vague because it fails to establish clear standards by which to determine those violations that will be classified "dangerous, hazardous or detrimental to life or health." While the court dismissed this contention by apparently grouping it with those arguments of the appellant that challenged the statute's wisdom, as opposed to its constitutionality, there is sufficient authority to support the dismissal. Courts generally scrutinize statutes imposing civil sanctions less severely than those imposing criminal sanctions, and, with but one exception, vagueness attacks on non-criminal statutes have not succeeded in the Supreme Court. Furthermore, the holding of the Supreme Court in Levy, that the phrase "payment of rent under an unreasonable agreement" was a sufficiently definite standard, would lend strong support to the argument that the phrase "dangerous, hazardous or detrimental to life or health" does not render the Spiegel Law void-for-vagueness.

27. 169 Misc. at 661, 7 N.Y.S.2d at 905.
Although it can be argued that the Levy and Nordred cases can be distinguished from the instant case because they upheld temporary emergency laws, it seems more likely that a court faced with a law similar to the Spiegel Law would accept these decisions as significant precedent in light of the many cases upholding non-emergency rent legislation which have relied on them and other similar decisions. Other cases upholding emergency rent laws are: Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921); Block v. Hirsh, 256 U.S. 135 (1921); People ex rel. Durham Realty Corp. v. La Petra, 230 N.Y. 429, 130 N.E. 601 (1921). See cases cited in note 11 supra for examples of cases which uphold nonemergency rent legislation by relying on cases sustaining emergency rent legislation.

28. 265 F. 432 (D.C. Cir. 1919). The Willson case was followed in Groot v. Reilly, 266 F. 1008 (D.C. Cir. 1919), and Heitmuller v. Stokes, 266 F. 1011 (D.C. Cir. 1920). Palaiaret's Appeal, 67 Pa. 479, 5 Am. R. 450 (1871), also, held a rent law to be an abuse of the police power.
33. 249 U.S. at 249-50.
34. 258 U.S. at 249-50.
Again, it is significant to compare this enactment with other New York rent abatement statutes. Specifically, it can be seen that although the rent impairing violations statute contains an equally vague general statement concerning violations that are hazardous to health, it also establishes an appropriate procedure for determining which violations will be deemed rent impairing.\textsuperscript{35}

In addition to the propositions that the Spiegel Law is unconstitutionally vague and a deprivation of property without due process of law, it has been argued that it authorizes state action which denies equal protection of the laws. This argument may take either of two routes. First, it is advanced that the statute creates a special category of tenants, welfare recipients, who have been given special rights not granted to other tenants in similar circumstances, thus denying equal protection to nonwelfare tenants.\textsuperscript{36} This approach was dismissed by the court in the instant case because the landlord lacked standing to raise the objection that the enactment denies equal protection to someone else.\textsuperscript{37} However, he may raise the argument that the Spiegel Law discriminates against landlords of welfare recipients in that it classifies them differently from all other landlords. The court rejected this contention, reasoning that a reasonable basis exists for distinguishing between landlords of welfare recipients and landlords of nonwelfare recipients because the former are notorious for failing to remedy the despicable condition of their premises.\textsuperscript{38} The court's conclusion is again strongly supported by authority. As the United States Supreme Court stated in \textit{Lindsley v. Natural Carbonic Gas Co.}:

The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.\textsuperscript{39}

\textsuperscript{35} See p. 207 & note 9 supra.
\textsuperscript{37} 19 N.Y.2d at 491, 227 N.E.2d at 826, 281 N.Y.S.2d at 4; see, \textit{e.g.}, United States v. Raines, 362 U.S. 17 (1960); Guardian Life Ins. Co. v. Chapman, 302 N.Y. 226, 97 N.E.2d 877 (1951).
\textsuperscript{38} Since only a nonwelfare tenant — a party disinterested in the landlord, Department of Welfare, welfare tenant triangle — has standing to sue, it is unlikely that this objection will ever be considered by an appellate court.
\textsuperscript{39} 19 N.Y.2d at 491-92, 227 N.E.2d at 826-27, 281 N.Y.S.2d at 5.

Only the holding of the court in \textit{Wilson}, that the Saulsbury resolution discriminated against owners of property already under lease, would support the proposition that laws similar to Spiegel deny landlords equal protection of the laws.

The court's decision to reject the landlord's final argument that the Spiegel laws are unconstitutional, implying that the statute violates his right to due process, was also well-supported by authority. See, \textit{e.g.}, East New York Sav. Bank v. Hahn, 326 U.S. 230 (1945); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934); People \textit{ex rel.}
Although the conclusion of the court cannot be questioned from the point of view of the application of constitutional precedent, examination of the provisions of similar New York enactments raises the question of whether the legislature has proceeded in the wisest manner in its effort to eliminate slum conditions. The legislature could have required the Department of Welfare to specify those violations it deemed hazardous to life and health, to notify the landlord of the existence of dangerous violations on his premises, and to hold an administrative hearing to determine whether rent should be abated. It is suggested, however, that the implementation of these alternatives would severely impede the realization of the basic objective of the enactment, that is, to eliminate slum conditions in the quickest, most efficient manner.\(^{40}\)

\[\text{Joseph Torregrossa.}\]

CONSTITUTIONAL LAW — STATE TAXATION OF INTERSTATE COMMERCE — OUT-OF-STATE MAIL ORDER HOUSE NOT REQUIRED TO COLLECT ANOTHER STATE'S USE TAX WITHOUT HAVING LOCAL NEXUS IN TAXING STATE.

National Bellas Hess, Inc. v. Department of Revenue (U.S. 1967)

Appellant, a Missouri mail order house, solicited sales from, and shipped goods to, consumers in Illinois. Appellant had neither retail outlets nor sales representatives in Illinois. All solicitations were conducted through the mail and all shipments were delivered by mail or common carrier. The Illinois Department of Revenue, pursuant to the Illinois Use Tax Act,\(^1\) assessed use tax collection liability against appellant for all sales to Illinois purchasers from July 17, 1961 to October 30, 1962. In an action to determine the propriety of this assessment, the Illinois trial court ruled for the appellee. This decision was affirmed by the Supreme Court of Illinois.\(^2\) The United States Supreme Court reversed, holding that the commerce clause and the fourteenth amendment prevent a state from requiring an out-of-state mail order house to collect a local use tax on goods mailed or shipped by common carrier into the taxing state where the out-of-state seller has no agents or business property in the taxing state and does

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\(^{1}\) Simmons, supra note 2, for an excellent discussion of the Spiegel Law and its numerous problems of statutory interpretation.


The tax which Illinois had imposed was a general use tax, that is, a tax levied on the privilege of using, storing, or consuming personal property within the boundaries of the taxing state.\(^8\) It was complementary to the sales tax, and its purpose was to discourage residents of the taxing state from purchasing goods in a neighboring state where the sales tax was lower or non-existent. The constitutionality of a general use tax was first upheld in *Henneford v. Silas Mason Co.*,\(^4\) where the Court said that a use tax imposed "when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate."\(^5\) At present, there is no federal statutory law on the question of interstate use tax collection.\(^6\) For such federal limitations as there may be, the businessman must look to the Constitution and the applicable cases interpreting it.

In both *Felt & Tarrant Mfg. Co. v. Gallagher*,\(^7\) and *General Trading Co. v. Tax Commission*,\(^8\) the state power to impose use tax collection on out-of-state vendors was upheld because the sales were arranged by local agents of the vendor in the taxing state. The same result was reached where the mail order seller maintained local retail stores in the taxing state.\(^9\) In these cases, the out-of-state vendor was plainly accorded the protections and services of the taxing state. The case which represents the furthest constitutional reach of a state's power to deputize an out-of-state seller as its use tax collector is *Scripto, Inc. v. Carson*.\(^10\) There, the Court held that Florida could impose upon a Georgia seller the duty of collecting the Florida use tax, for the seller had ten independent contractors conducting continuous solicitation in Florida and forwarding the resulting orders to the Georgia seller for shipment of the ordered goods.\(^11\) In *Miller Bros. v. Maryland*,\(^12\) however, the Court denied the taxing state the power to deputize an out-of-state vendor as its use tax collector. There, a Delaware seller sold its merchandise at its Delaware store to residents of

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5. Id. at 583.
6. There is, however, a bill presently before the House, H.R. 2158, 90th Cong., 1st Sess. (1967), which deals with the problem of interstate use tax collection. This bill was reported out favorably by the House Committee on the Judiciary on March 7, 1967. See Dane, *A Solution to the Problem of State Taxation of Interstate Commerce*, 12 *Vill. L. Rev.* 507 (1967).
8. 322 U.S. 335 (1944).
Maryland, the state imposing the use tax. There was no solicitation of Maryland residents by the seller other than the incidental effects of general advertising. Clearly, there was no invasion or exploitation of the out-of-state consumer market.13

An analysis of the present decision must necessarily consider the commerce clause impediments to Illinois' right to impose the burden of use tax collection upon National Bellas Hess. Mr. Justice Stewart, speaking for the Court, noted that the very purpose of the commerce clause was to insure a national economy free from unjustifiable local entanglements and concluded that the imposition of use tax collection would result in impediments upon the free conduct of National Bellas Hess' interstate business.14 In so doing, the Court reasoned that state taxation falling on interstate commerce can only be justified when designed to make such commerce bear a fair share of the costs of the state whose protection it enjoys.15 This statement compels the conclusion that many cases which are ostensibly decided on the basis of the commerce clause contain language with strong due process overtones, which in turn suggests that the two concepts, at times, are inextricably entwined. Apparently, the Court becomes confused as to whether a denial of due process or an undue burden upon interstate commerce is in issue.16 It is clear, however, that some of the burdens on interstate commerce which Mr. Justice Stewart considered onerous were the duty of recordkeeping and other administrative tasks which must be performed incidental to compliance with the collection of a use tax.17

In support of its holding, the Court relied heavily on the findings of the Subcommittee of the House of Representatives in their special study dealing with state taxation of interstate commerce.18 The study repeatedly refers to the onus on the small mail order house that would result if they were required to collect use taxes.19 However, it is extremely doubtful

13. The Court held that the State of Maryland had no jurisdiction to make Miller Bros. a use tax collector and stated that, "due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." 347 U.S. at 344-45. The Scripto Court, in distinguishing Miller Bros., stated that in Miller Bros., "there was no 'exploitation of the consumer market'; no regular, systematic displaying of its products by catalogs, samples or the like." 362 U.S. at 212. In the instant case, the dissent relies on this language in Scripto to support its economic exploitation standard. 386 U.S. at 762.

14. 386 U.S. at 759-60.


16. In General Motors Corp. v. Washington, 377 U.S. 436 (1964), the Court answered a commerce clause challenge to a gross receipts tax with due process precedent, as was aptly pointed out in Justice Brennan's dissent. Id. at 449, 450.

17. 386 U.S. at 755, 759-60.


19. Small mail order houses do not keep records of sales by states, and to require them to do so would add a hardship on them. These small mail order businesses realize a considerable saving by not keeping detailed records of invoices. The added expense of recordkeeping which would be necessary to comply with
whether National Bellas Hess can be said to fit into this small mail order house category. In addition, the same House Report which seems to have influenced the majority, and which was cited by appellant’s counsel in his brief, states that the use tax collection problem, and thus the burden on interstate commerce, is considerably mitigated where goods are offered in a catalog operation. Of course, it is conceded that against the state’s legitimate taxing rights must be weighed the burden placed on interstate commerce by compelling the seller (1) to allocate his sales by states; (2) to inform himself with respect to the use tax laws of the states in which he sells; (3) to determine in some cases whether the article is a taxable or non-taxable item; and (4) to prepare and file use tax returns.

In this respect, both Miller Bros. and Scripto indicate that one decisive question is whether, in a particular case, the seller knows, or reasonably should know, the destination of the goods which he sells. The fact that the seller did not, in most instances, know that the goods sold over the counter were going to incur a use tax liability was of considerable import in Miller Bros. Similarly, the Scripto Court was influenced by the fact that all of the goods upon which a use tax was assessed were delivered by shipment from the seller’s warehouse to the out-of-state buyers. It was, therefore, a slight burden on interstate commerce to require the seller to ascertain the orders upon which the use tax was due. Giving weight to the knowledge of destination factor is actually to employ a test of practical fairness, since it would be unfair to make the seller liable for collecting taxes that it did not know were due. Employing this factor in the instant case, it would appear that there was no burden on interstate commerce since National Bellas Hess necessarily knew the states in which its goods would be used.

The Court, in dealing with the due process question, considered two issues: (1) whether the taxing state can impose a burden of use tax collection on an out-of-state vendor; and (2) whether the vendor has submitted himself to the state’s jurisdiction. The first issue seemingly has never caused serious difficulty, for the Court has usually dismissed it with the statement that to make the vendor a tax collector is a “familiar and sanctioned device.” This casual handling of the problem prompted one commentator to assert that the “propriety of the arrangement whereby the out-of-state seller is required to act as collector of the use tax on goods


20. In 1961, appellant’s net sales were in the neighborhood of $60,000,000. This substantial volume is obtained by twice-a-year catalog mailings, supplemented by intermediate smaller sales books or flyers as the court below categorized them. The company’s mailing list includes over 5,000,000 names. National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 760-61 (1967) (dissenting opinion).


sold in interstate commerce and shipped into the taxing state [is a matter] that must be taken on faith." 26 The second issue has proved to be more vexing to the Court. It has been stated that a state may properly make the out-of-state seller a use tax collector if he comes into the state and does business, for he thereby submits himself to its power. 27 The Court in Scripto rejected Scripto's contention that because their solicitors were independent contractors, not employees, they did not subject themselves to the taxing power of the state. The Court observed: "To permit such formal 'contractual shifts' to make a constitutional difference would open the gates to a stampede of tax avoidance." 28 In the instant case, Justice Stewart simply noted the absence of any physical bodies or physical plants, and ignored the sweeping dictum in Scripto which supports the view that a regular and systematic economic exploitation of the market in the taxing state should be a sufficient "nexus." 29 In short, the issue resolves itself into whether the Court should have employed an economic exploitation standard or the traditional one of some kind of physical presence.

In line with the economic exploitation standard, Justice Fortas in dissent asserted that:

There should be no doubt that this large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market is a sufficient "nexus" to require Bellas Hess to collect from Illinois customers and to remit the use tax, especially when coupled with the use of the credit resources of residents of Illinois, dependent as that mechanism is upon the State's banking and credit institutions. 30

He then contended that National Bellas Hess enjoyed the benefits and profited from the facilities nurtured by the State of Illinois as fully as if it had a retail store or maintained salesmen therein. 31 In the due process

28. 362 U.S. at 211. Additionally, the Court stated, "The formal shift in the contractual tagging of the salesmen as 'independent' neither results in changing his local function of solicitation nor bears upon its [Scripto's] effectiveness in securing a substantial flow of goods into Florida." Id. (emphasis added). This explicit reference in the Scripto case to the "effectiveness" of the economic exploitation of the consumer market reinforces the economic exploitation standard proffered by the dissent in National Bellas Hess.
29. See note 13 supra.
31. Id. This reasoning was also employed by the Illinois Supreme Court which contended that regular, continuous, persistent solicitation has the same economic, and should, therefore, have the same legal, consequences as does maintaining an office for soliciting and contracting business. Department of Revenue v. National Bellas Hess, Inc., 34 III.2d 164, 172, 214 N.E.2d 755, 759 (1966). Contra, State v. Lane Bryant, Inc., 277 Ala. 385, 171 So.2d 91 (1965). In reply to the argument that the state does not really confer any benefits upon a foreign vendor, the Court has recognized that the foreign vendor benefits indirectly from the services the state provides for its own citizens. These benefits include the stability of laws governing the market place, transportation systems, and police protection. H. Henn, Handbook of the Law of Corporations § 91, at 105-14 (1961). In this respect, Justice Frankfurter
sense, Justice Fortas felt that the present case was not at all controlled by Miller Bros. because in that case there was no regular, systematic displaying of products by catalogs, samples, or the like, to out-of-state consumers, whereas in the instant case, appellant regularly exploited the Illinois market by periodically mailing catalogs to regular customers and bulk flyers to "occupant."32

The economic exploitation standard for sufficient "nexus" is supported by analogous cases in the area of in personam jurisdiction.33 In determining the amenability of non-domiciliary corporations to the in personam jurisdiction of state courts, the Supreme Court has based its opinions upon what it has considered to be "traditional notions of fair play and substantial justice."34 Since McGee v. International Life Ins. Co.,35 the test for in personam jurisdiction can apparently be satisfied by the minimal contact of a single solicitation without actual physical presence in the state. In McGee, a single life insurance contract issued by the defendant to a resident of the forum state and payment of premiums from the forum state was sufficient contact to justify the exercise of in personam jurisdiction over the insurance company. Since jurisdiction over nonresidents for taxing purposes and jurisdiction for the purpose of exercising judicial power over them have been intimated to be coextensive,36 it would have been a logical extension for the Court in the instant case to equate the two tests. Indeed, a test for taxing jurisdiction based on traditional notions of fair play and substantial justice is hardly unreasonable. Such a test would give the economic exploitation standard the vitality it deserves. Thus, it could be argued that National Bellas Hess represents an entirely outmoded approach to the problem, an approach that the majority should not have taken.37

The dissent in the instant case is an express recognition that the economic effect of an out-of-state seller's connection with the taxing state

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33. In Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502, 506 (4th Cir. 1956), it was said: "While the due process test applied to the problem of state jurisdiction over non-residents for taxing purposes is not identical with the due process test for the exercise over them of state judicial power, the two present a close parallel." The distinction between these two concepts of jurisdiction is that substantive or legislative jurisdiction is the permissible range within which a state may create legal rights and duties, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 43 (Tent. Draft No. 3, 1956), while judicial jurisdiction means the extent to which a state's court may render valid judgments. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 74-77 (Tent. Draft No. 3, 1956).
34. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). There, the Court intimated that taxation and service of process jurisdiction were closely related if not coextensive when it noted that, "The activities which establish its 'presence' subject it alike to taxation by the state and to suit to recover the tax." Id. at 321.
35. See notes 33 & 34 supra.
36. See P. Hartman, STATE TAXATION OF INTERSTATE COMMERCE 177 (1953).
should determine whether those connections are constitutionally sufficient to allow a state to exercise jurisdiction over him for taxing purposes. With respect to the “nexus” requirement for the imposition of the burden of use tax collection, the Court should depart from its unwavering reliance upon physical presence, and recognize the economic exploitation standard, with the qualification that businesses dealing in a sporadic manner in a state be excepted. It is clear that a large-scale mail order operation enjoys the benefits of, and profits from, the facilities nurtured by the taxing state as fully as if it had a retail store or maintained salesmen therein, and these benefits should not be enjoyed without their concomitant burdens.

James J. Ryan

EMINENT DOMAIN — MACHINERY AND EQUIPMENT VALUATION — ASSEMBLED INDUSTRIAL PLANT DOCTRINE APPLIED TO EMINENT DOMAIN PROCEEDINGS.

Gottus v. Redevelopment Authority (Pa. 1967)

Condemnees were the owners of a laundry and cleaning plant. When they vacated the premises, they left behind cleaning and washing machines which, while only bolted to the floor, required special plumbing and wiring. Condemnees sought to fix the fair market value of the premises at the value of the cleaning plant in operation (which included the value of the cleaning and washing machines) minus the value of those items which they chose to remove. The condemnor argued that the cleaning and washing machines could easily have been removed without substantial damage to the realty, were thus personal property, and should not be considered in fixing the fair market value of the realty. The Board of View and the trial court accepted the condemnees' approach and granted an award including the machinery and equipment. On appeal, the Pennsylvania Supreme Court, in a case of first impression, affirmed, holding that the

38. The economic exploitation standard was accepted by the Harvard Journal on Legislation, in a proposed act which accepts the Scripto principle that regular and continuous exploitation of a local market affords a sufficient basis for state taxation. 2 Harv. J. Legis. 167 (1965). The Act is designed to reduce the existing burden on interstate business by: (1) limiting the number of returns a state may require each year; (2) reimbursing the vendor for his collecting expenses; (3) shifting auditing expenses to the taxing jurisdiction; (4) providing a relatively short period of limitation, thus reducing the risk to the vendor of having to pay uncollected use taxes out of his own pocket. But see H.R. 2138, 90th Cong., 1st Sess. (1967); Dane, supra note 6.


2. These included clothes racks and pressing equipment.
assembled industrial plant doctrine applies to eminent domain proceedings.  


The assembled industrial plant doctrine had its origin in the oft-quoted "whether fast or loose" phrase of Chief Justice Gibson in _Voorhis v. Freeman_, and prior to the instant decision was applied in two major areas in Pennsylvania: the determination of priorities among competing mortgage interests, as in _Voorhis_, and in the area of real property tax assessments. The doctrine makes physical annexation to the freehold irrelevant as a critical factor in determining what is part of the realty. If machinery and equipment fall within the doctrine's coverage, then, regardless of its size or the ease and expense of its removal, it becomes a part of the realty.

Reference to some of the more recent cases in those areas where the doctrine has been applied will be helpful in predicting the scope of the doctrine when applied to eminent domain proceedings. Initially, Chief Justice Drew defined "industrial plant" in _North Side Laundry v. Board of Property Assessment_ when he stated:

By no stretch of the imagination could a bank building, a hotel, a theater or any of the other business establishments referred to by plaintiff be considered an industrial plant. It is true that we sometimes speak of "the movie industry," or "the hotel industry" or "the banking industry", but that is merely a loose use of language to convey the idea that the particular business is a sizable one. In spite of that colloquialism, we do not speak of the buildings housing such businesses as "industrial plants"... The law can do no better than to define an industrial plant as that type of establishment which the ordinary man thinks of as such.

3. 2 W.S. 116, 119 (Pa. 1841). "Whether fast or loose, therefore, all the machinery of a manufactory which is necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold." _See generally Leary, Financing New Machinery for Mortgaged Plant, Vella's Plant Laws_, 4 VILL. L. REV. 498 (1959); Robinson, McGough, and Scheinholtz, _The Effect of the Uniform Commercial Code on the Pennsylvania Industrial Plant Doctrine_, 16 U. PIR. L. REV. 89 (1955).

4. Less significant areas in which the doctrine has been applied are bankruptcy, _In re Taylor & Dean Mfg. Co., 136 F.2d 370 (3d Cir. 1943)_ and the rights of a purchaser at a sheriff's sale, _Central Lithograph Co. v. Eatnor Chocolate Co._, 316 Pa. 300, 175 A. 697 (1934).


7. The doctrine is broader than the traditional fixture doctrine under which both intention and physical attachment are necessary elements. _See American Laundry Mach. Co. v. Miners Trust Co.,_ 307 Pa. 395, 161 A. 306 (1932); _Justice v. Nesquehoning Valley R.R.,_ 87 Pa. 28 (1878).

8. These included theaters, cab companies, service stations, auto repair companies, restaurants, chemical plants, office buildings, and self-service laundries (footnote added).

In *First Nat'l Bank v. Reighneder*, Justice Stern discussed the doctrine's application to industrial mortgages:

"Such a mortgage does not include in its coverage everything used in the operation of the business... but only such articles as are contained in or about the premises and are essential to the manufacture of the product... [T]he following cannot be held to have been covered by the Bank's mortgage: flat-top desks, typewriters, safe, checkwriter, chairs, adding machine, filing cabinet, and the five trucks."

More recently, in the *Jones & Laughlin Tax Assessment Case*, the court, in construing and upholding an amendment to the local real estate assessment law, held that machinery and equipment used directly in the manufacturing process and used solely for effectuating that purpose are excluded from real estate assessment and taxation.

The Pennsylvania Eminent Domain Code did not take effect until June 22, 1964, and applies to all condemnations effected after that date. The condemnation in the *Gottus* decision occurred prior to the effective date of the Code and thus was decided under the applicable pre-Code law. The decision, however, applies to condemnations which are now governed by the Code. As such, three sections of the Code will be particularly affected by the application of the doctrine to eminent domain proceedings. Section 1-603(3) speaks of machinery and equipment which form part of the real estate, but does not say *what* machinery and equipment form part of the real estate. Section 1-607 pertains to removal of machinery

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12. The amendment applies to the fourth to eighth class county assessment law and provides:

[M]achinery tools, appliances and other equipment contained in any mill, mine, manufactury or industrial establishment shall not be considered or included as part of the real estate in determining the value of such mill, mine, manufactury or industrial establishment.

13. While the application of the industrial plant doctrine to eminent domain proceedings benefits the condemnee by inclusion of the machinery and equipment in the real estate, those industrial property owners that qualify under the statutes in note 12 supra benefit as taxpayers by exclusion of the machinery and equipment from the real estate when it is assessed for taxing purposes.
15. PA. STAT. ANN. tit. 26, § 1-603(3) (Supp. 1966) provides:

Fair market value shall be the price which would be agreed to by a willing and informed seller and buyer, taking into consideration, but not limited to, the following factors:

(3) The machinery, equipment and fixtures forming part of the real estate (emphasis added).

16. PA. STAT. ANN. tit. 26, § 1-607 (Supp. 1966) provides:

In the event the condemnor does not require for its use machinery, equipment or fixtures forming part of the real estate, it shall so notify the condemnee. The
and equipment, while section 1-608\textsuperscript{17} provides a new element of condemnation law — awarding as a separate item of damages the cost of removal, transportation, and reinstallation for those items which are not considered to be a part of the condemned real estate. After the effective date of the Code and prior to the instant decision, the practice was that machinery and equipment which easily could be removed without substantial damage to the freehold was removed and removal–transportation–reinstallation expenses were paid by the condemnor pursuant to section 1-608. For that machinery and equipment which was substantially attached to the freehold and which could not be easily removed, the owner was given its fair market value in accordance with section 1-603.\textsuperscript{18} The \textit{Gottus} decision has the apparent effect of broadly defining the heretofore undefined statutory phrase "forming part of the real estate."\textsuperscript{19}

The \textit{Gottus} court quoted from \textit{Jackson v. New York}\textsuperscript{20} to explain why it was appropriate to apply the industrial plant doctrine to eminent domain proceedings.\textsuperscript{21} In \textit{Jackson}, the New York court wanted to avoid the condemnor discharging the full measure of its duty by providing compensation for the condemned land alone without regard to the machinery and equipment which was on the land. Although the Pennsylvania Supreme Court was justifiably concerned with this problem of the condemnor destroying the economic integrity of the condemnee in the pre-Code \textit{Gottus} condemnation, the concern is no longer appropriate in light of section 1-608\textsuperscript{22} of the Pennsylvania Eminent Domain Code which requires the condemnor to pay a removal–transportation–reinstallation award to the condemnee. Thus, it can be forcefully argued that the Pennsylvania General Assembly intended to preserve the condemnee's economic integrity by requiring the condemnee to remove his machinery and equipment at the expense of the condemnor. The instant decision greatly undermines this apparent intention.

The application of the doctrine to eminent domain proceedings will not be without ramifications. The landlord-tenant relationship in an industrial setting provides an excellent example. It is rare to find an industrial

\textsuperscript{17} PA. STAT. ANN. tit. 26, § 1-608 (Supp. 1966) provides:

The person having legal possession of machinery, equipment or fixtures on the condemned property, not forming part of the realty, including a tenant not entitled to any proceeds of the condemnation, if under the lease the tenant has the right to remove said machinery, equipment or fixtures, shall be entitled, as damages, to the reasonable expenses of the removal, transportation and reinstallation of such machinery, equipment or fixtures. Reasonable expenses under the provisions of this section shall not exceed twenty-five thousand dollars ($25,000) and in no event shall such expenses exceed the market value of the machinery, equipment and fixtures.

\textsuperscript{18} See note 15 supra.

\textsuperscript{19} PA. STAT. ANN. tit. 26, § 1-603(3) (Supp. 1966).

\textsuperscript{20} 213 N.Y. 34, 106 N.E. 758 (1914).

\textsuperscript{21} 225 Pa. 1, 88 S.W. 229, 229 Pa. 1d at 872.

\textsuperscript{22} See note 17 supra.
lease in Pennsylvania without a "condemnation clause." The validity of such clauses has been upheld and they have the effect of eliminating the possibility of the lessee receiving a condemnation award for his unexpired leasehold interest. Another common feature of industrial leases is a "removal clause" as a result of which the lessee relinquishes his right to remove the machinery and equipment which he installed during his tenancy. If the condemnee has not relinquished his right of removal, he can receive a removal—transportation—reinstallation award under section 1—608 of the Code. However, where the lessee has relinquished his right of removal, the machinery and equipment he had installed will remain with the freehold and become the property of the owner of the freehold. If the machinery and equipment is then considered as part of the realty, the owner will be given its fair market value pursuant to section 1—603. This award for the real estate, which includes the tenant’s former machinery and equipment, can only benefit the tenant when he has a sufficient leasehold interest and when he has not executed a condemnation clause in conjunction with the removal clause. In this situation, the tenant will share the condemnation award with the landlord, the tenant’s percentage depending on the extent of his leasehold interest. Where there is neither a condemnation nor a removal clause the doctrine should apply to the tenant’s benefit, enabling him to claim a greater interest in the condemned property and, therefore, a larger percentage of the condemnation award. A possible consequence of Gottus is that industrial tenants will be more reluctant to waive their rights, resulting in arduous negotiation of condemnation and removal clauses in industrial leases.

Another ramification of the application of the doctrine to eminent domain will arise as a result of the holding in Dyer v. Commonwealth. In Dyer the condemnor was ordered to pay for the value of the land plus the house on it, even though the house had been physically removed

23. The clause has two important points:
   (1) The lease terminates as of the date of condemnation.
   (2) The lessee relinquishes all claims against the lessor. Occasionally, the lease will also state that the lessee waives all claims against the condemnor.

24. Scholl’s Appeal, 292 Pa. 262, 141 A. 44 (1928). Not only was the clause upheld as between the lessor and the lessee, but the court said that a third party (the condemnor) could take advantage of its terms and use it as a defense in an action for damages.


26. See note 15 supra.


28. Prior to Gottus, where machinery and equipment in industrial plants were not easily removable and, hence, considered part of the real estate, tenants had rights to condemnation awards, but frequently waived these rights by executing leases with condemnation and removal clauses. The sheer increase in the number of cases, where, because of Gottus, the machinery and equipment will be considered as part of the real estate, should clause industrial tenants to be more reluctant to waive these rights.

to another location by the condemnee subsequent to the acquisition of title by the condemnor.30 Accordingly, a condemnor will be placed in a difficult situation with respect to easily removable machinery and equipment that is left behind pursuant to the condemnee's allegation that it falls within the doctrine. Although the condemnor will undoubtedly sell the machinery and equipment as quickly as possible,31 there invariably will be a lapse of time between the condemnation and the public sale. If the machinery and equipment is stolen during this period, the condemnor will, of course, not be able to sell it and apply the proceeds to the condemnee's damage award, assuming that the condemnee later prevails at trial. Even if the condemnor prevails at trial, he may be liable to the condemnee for the fair market value of the machinery and equipment as a result of breaching his duty of care as an involuntary bailee.32

Perhaps an even greater burden falls on the relocating condemnee33 who must decide whether to claim his machinery and equipment under the doctrine or to waive the doctrine and seek removal-transportation-reinstallation expenses under section 1-60834 of the Code. If he avails himself of the doctrine and is successful at trial, he will, in accord with the instant decision and section 1-603 of the Code,35 receive the fair market value of his land, including the machinery and equipment. But if he loses at trial, his decision may have been a costly one. When he left his machinery and equipment behind as allegedly within the scope of the doctrine the condemnor took title to the land and possession of the machinery and equipment. By taking possession of the machinery and equipment the condemnor may have become an involuntary bailee.36

30. Where the property is removed by the condemnee as in Dyer, the condemnor has an action against the condemnee for the value of the property, but if the property were stolen by an unknown party, the condemnor would still have to pay for the property without any means of recouping its value.


32. See note 36 infra. The trend of modern judicial opinion is to require the gratuitous (involuntary) bailee to exercise reasonable care with respect to the bailed property. See 8 Am. Jur. 2d Bailments §§ 204, 210 (1963).

33. One comprehensive report indicates that 89% of those businesses and industrial establishments which are condemned do relocate. COMMUNITY RENEWAL PROGRAM, CITY OF PHILADELPHIA, TECH. REP. NO. 19, RELOCATION OF BUSINESS AND INDUSTRIAL FIRMS, table A-1 (1966). See also H. ZIMMER, REBUILDING CITIES: THE EFFECTS OF DISPLACEMENT AND RELOCATION ON SMALL BUSINESS (1964).

34. See note 17 supra.

35. See note 15 supra.

36. The law will create an involuntary or constructive bailee where one comes into bona fide possession of the property of another. See Foulke v. New York Consol. R.R., 228 N.Y. 269, 127 N.E. 237 (1920); Burns v. State, 145 Wisc. 373, 128 N.W. 987 (1910). See also State v. Carr, 118 N.J.L. 233, 234, 192 A. 36, 37 (Ct. Err. & App. 1937), in which the court said:

[There is also a class of bailments, quasi contractual in nature, which arise by operation of law "where, otherwise than by a mutual contract of bailment, one person has lawfully acquired the possession of personal property of another and holds it under circumstances whereby he ought, upon principles of justice, to keep, restore and deliver it to the owner."

In a situation analogous to one where a condemnee vacates and leaves his machinery and equipment behind, the court in *Grice v. Berkner* held that the party who came into possession of the property was an involuntary depository of it and had a duty to care for it. This duty can be satisfied by the condemnor storing the machinery and equipment. However, a more reasonable method of satisfying this duty would be for the condemnor to immediately sell the machinery and equipment at public sale. The condemnee could hardly object to public sale since he will have no further use for the machinery and equipment, and subjecting him to storage expenses would be against his best interests. Thus, a relocating condemnee by his decision to leave the machinery and equipment behind will have had to purchase new machinery and equipment, and having been unsuccessful in establishing the doctrine's applicability, the proceeds of the public sale will be of little consolation to him in light of the fact that he could have had his old machinery and equipment moved to his new location at no expense to him.

Another conceivable and even more costly alternative when the condemnee chooses not to remove his machinery and equipment and later loses at trial is that it may be considered abandoned property as a result of which no compensation would inure to the condemnee. While a proponent of this theory may have some difficulty proving intent to abandon, the question is one of fact and depends on the particular circumstances involved.

The application of the assembled industrial plant doctrine to eminent domain proceedings foreshadows an increased amount of complex litiga-
tion. The doctrine itself is undefined and replete with equitable overtones which have long outlived the occasions which gave rise to their creation. In addition to the need to define it, very specific attention must be given to the doctrine's effect on the Pennsylvania Eminent Domain Code. The official comment to section 1-608 reads in part:

This section adds a new element of damages in eminent domain cases. There is nothing in existing law which gives a condemnor or the tenant of a condemnor the right to recover as a separate item of damages, removal, transportation and reinstallation expenses of machinery, equipment and fixtures which are on the condemned property but which are not a part of the real estate.

This novel provision for removal, transportation, and reinstallation expenses was introduced to provide an equitable and complete solution to the complicated problem of distributing costs in condemnation proceedings. The additional introduction of the assembled industrial plant doctrine into eminent domain proceedings now governed by the recently enacted Eminent Domain Code will not only compound the complexity of these proceedings, but also may frustrate the legislative purpose to define the condemnor's damages in terms of section 1-608's provisions.

Ian Karl Portnoy

FEDERAL COURTS — MANDAMUS — FEDERAL DISTRICT COURT LACKS JURISDICTION TO GRANT MANDAMUS PROCEDURES AVAILABLE UNDER STATE LAW.

Stern v. South Chester Tube Co. (3d Cir. 1967)

Plaintiffs, stockholders of the defendant corporation, instituted a diversity action in the United States District Court for the Eastern District of Pennsylvania to compel the corporate officials to permit them to examine the share register, books of account, and other corporate records. The District Court dismissed their complaint for lack of jurisdiction, and appeal was taken to the United States Court of Appeals for the Third

44. See Leary, supra note 3, at 498.
45. In the great majority of cases in other jurisdictions, and in Pennsylvania prior to the enactment of the Code, the condemnor was not entitled to compensation for removal expenses (footnote added). See Annot., 69 A.L.R.2d 1454 (1960), and cases cited therein.
47. See p. 221 & note 17 supra.
The dismissal was affirmed, the court holding that an action to examine company records, though enforceable in the state courts through a writ of mandamus, is not maintainable in the federal courts because of their limited jurisdiction to issue writs of mandamus. *Stern v. South Chester Tube Co.*, 378 F.2d 205 (3d Cir. 1967), cert. granted, 36 U.S.L.W. 3167 (U.S. Oct. 24, 1967) (No. 487).

The conclusion reached by the circuit court in *Stern* is virtually identical to that of a federal district court in New York in the recent case of *Newwirth v. Merin*.\(^2\) There, while granting the defendant corporation's motion for an order requiring that the plaintiff shareholder deposit security for expenses in a derivative suit, pursuant to a New York statute,\(^3\) the court denied the plaintiff's cross-motion to compel the defendant to produce the shareholder list so that the plaintiff would have the opportunity to bring other shareholders into the action and thus avoid the burden of raising the security.\(^4\) While admitting the severity of its ruling and that the lack of power to issue writs of mandamus in the federal courts has been criticized on more than one occasion,\(^5\) the court expressed the opinion that the law on this subject has been so well settled that any change would have to be made by congressional enactment rather than by judicial legislation.\(^6\)

Despite the positions taken by these two courts, the law may not be as well settled as they indicate. Within the last year, the same Pennsylvania district court which refused relief in *Stern*\(^1\) successfully aided another complaining shareholder who sought to examine corporate records. In *Susquehanna Corp. v. General Refractories Co.*\(^7\) the court felt empowered to issue an injunction prohibiting the corporation from completing the contested transaction until it had furnished the plaintiff with the information requested, even though it might not have the jurisdiction to issue a writ of mandamus ordering that the material be turned over.\(^8\) By giving relief in the form of a prohibitory injunction, rather than a writ of man-

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9. Plaintiff charged that the defendant directors were about to embark on a planned sale of the corporate assets which would result in a wrongful dilution of plaintiff's proportional interest in the corporation. It asked the court to enjoin the proposed transaction and to require that the directors provide a list of stockholders so that the plaintiff could communicate with them concerning the transaction. While the court decided that it could not order the defendants to turn over the stockholder list at that point an injunction preventing any meeting on the subject until the defendants provided the plaintiff with the information it needed.
mandamus, the court arrived at a solution which neither the court in Stern nor Neuwirth thought it could reach.

The fact that a federal court can grant relief in one instance and refuse it in a basically similar situation stems primarily from the multifaceted nature of the equitable powers available to the court. Generally, where there is no adequate remedy at law, courts have the power to grant equitable relief in order to protect persons or property from injury. Such relief may take the form of a command by the court to refrain from doing certain acts, or, where the relief is mandatory in form, it may be a command to take certain steps required by the court. Although some courts are reluctant to issue mandatory injunctions and occasionally restrict their use to extraordinary circumstances, it is generally recognized that an equity court can decree mandatory as well as prohibitory relief. The difficult problem arises where a federal court is requested to issue a mandatory injunction in circumstances where mandamus, a separate and distinct remedy, would be appropriate.

Mandamus is broadly defined as a writ, given by a court of competent jurisdiction, directed to a person, corporation, officer, or inferior court, commanding the performance of a particular duty which results from the official station of the one to whom it is directed or from the operation of law. This particular type of writ, commanding the performance of a legal duty, traditionally has been regarded as a legal rather than an equitable proceeding, and federal courts have no jurisdiction to issue mandamus in the absence of constitutional or statutory provisions granting such power. This writ is to be distinguished from a mandatory injunction which is equitable in nature and is appropriately issued against any defendant who may act or refrain from acting in an unjust, inequitable, or injurious manner, and where there is no adequate remedy available at law. The jurisdictional restriction against federal court issuance of writs of mandamus in original proceedings has been extended by many courts to

11. E.g., Schubach v. McDonald, 179 Mo. 163, 78 S.W. 1020, appeal dismissed, 196 U.S. 644 (1905).
19. Since McIntire v. Wood, 11 U.S. (7 Cranch) 504 (1813), federal district courts have lacked jurisdiction to issue original writs of mandamus. The Court in McIntire, interpreting sections 11 and 14 of the Judiciary Act of 1789, held that mandamus, a prerogative writ in England, was not a writ in law or equity and could not be granted in this country. In Graham v. Norton, 82 U.S. (15 Wall.) 427 (1873), the district court for the District of
include mandatory injunctions which would have the effect of, or be equivalent to, mandamus. In such cases the restrictions on the federal court’s power to issue writs of mandamus are thereby extended to the area of injunctive relief.

This is particularly significant, for, while the writ of mandamus as such has been abolished by the Federal Rules of Civil Procedure, and replaced by an order in the nature of mandamus, such relief may be extended only if the remedy of mandamus would have been available before the adoption of 81(b). The court of appeals in Stern held that the relief available in place of mandamus is governed by the All Writs Act, which gives federal courts the power to issue all writs “necessary . . . in aid of their . . . jurisdictions . . . .” Citing decisions to the effect that a federal court is without the authority to issue a writ of mandamus “except in aid of its jurisdiction already acquired under an applicable federal statute,” the court concluded that, since the only relief requested by the plaintiff was an order which would allow him to examine the defendant corporation’s records, the issuance of such relief would not be in aid of jurisdiction already acquired, and therefore not within the power of a federal court.

This analysis makes jurisdiction dependent upon the nature of the relief to be granted and thereby precludes jurisdiction in all cases where a request is made solely for relief in the nature of mandamus. However, it may be argued, as it was in the three cases being considered, that jurisdiction had been acquired by reason of the diversity of citizenship of the parties. Furthermore, each of the plaintiffs had a state law right of access to stockholder lists and corporate books. Since diversity of citizenship


20. Miguel v. McCarl, 291 U.S. 442 (1934); Smith v. Bourbon County, 127 U.S. 105 (1888); Johnson v. Interstate Power Co., 187 F. Supp. 36 (D.S.D. 1960), noted in 14 Stan. L. Rev. 167 (1961). The note lists 27 cases since 1947 in which original mandamus has been denied for jurisdictional reasons. The Johnson court said that it would look through the substance of the complaint to see if the relief demanded was mandamus, even though a mandatory injunction had been requested.

21. Fed. R. Civ. P. 81(b) provides: “The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.”


24. 378 F.2d at 206.

25. 28 U.S.C. § 1332(a) (1964) provides that: “The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between — (1) citizens of different States . . . .”

had been shown, the plaintiffs argued that the federal courts in question should extend relief consonant with that extant in state practice. The court of appeals in *Stern* replied that this could not be done since diversity jurisdiction is limited to civil actions,27 and mandamus is not a civil action, but a special proceeding in which a court is called upon to exercise its prerogative power.28 It may be argued, however, that a proceeding for relief in the nature of mandamus is a civil action, especially in instances such as this where a stockholder is seeking to inspect corporate records.29

In *Susquehanna* the district court bypassed the above limitation upon mandamus by asserting authority to act when the appropriate state remedy is inadequate.30 The state mandamus procedure would merely entail an order compelling the inspection, and the court felt that if this were done the corporation could allow the inspection, and while the plaintiff was contacting the required number of shareholders needed to prevent corporate action, consummate such action.31 It therefore enjoined the transaction until the plaintiff both received the information it needed and had time to circulate its views among the other stockholders.32 By issuing a prohibitory injunction the court avoided the problem of whether a federal court can grant a writ of mandamus,33 but it left the plaintiff stockholder with only partial relief, since the most appropriate remedy would include both an order to turn over the records and an injunction to restrain the contested transaction.34 By proceeding in this way it also allowed other courts, such as the district court in *Stern*, to distinguish its decision on the basis of the peculiar need for prohibitory relief.35

While *Susquehanna* does not provide a solution to the problems inherent in granting mandamus relief to stockholders such as those in *Stern* and *Newwirth*, it does reveal a flaw in the opinion expressed in *Stern* that

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27. 378 F.2d at 206.
28. *Id.* See note 19 supra.
29. H. Ballantine, *Corporations § 166* (rev. ed. 1946). The author notes that mandamus, when used to enforce writs of inspection, is "essentially only a civil action between private parties...." *Id.* at 386.
31. Plaintiff needed time to formulate a position on the transaction and to circulate a proxy statement in opposition to the one already drafted by the defendants. This is a valid purpose for inspection under Pennsylvania law. *Goldman v. Trans-United Indus.*, 404 Pa. 289, 292, 171 A.2d 788, 791 (1961).
35. 252 F. Supp. at 332.
the law on the question of mandatory relief to stockholders seeking orders to review corporate records from federal courts is settled. The impact of *Susquehanna* is amplified when it is realized that in a corporate context almost any action which can be stated in terms of a plea for mandatory relief can also be stated in terms of a plea for prohibitory relief.36

This is not the first time federal courts have managed to circumvent the prohibitions upon their jurisdiction to issue writs of mandamus, and the technique used in *Susquehanna* is but one of the methods which have been employed.37 A method which strikes closer to the crux of the problem was employed in *Johnson v. Interstate Power Co.*,38 where a district court explained that it had the authority to issue mandatory injunctions unless they were in the nature of a "true" mandamus. Courts originally defined mandamus as a prerogative writ of extraordinary character used to force public officials to perform their duties,39 and the restrictions upon the federal courts' power to issue writs of mandamus were enacted to prevent the federal judiciary from exercising their jurisdiction in questions of local government administration.40 Today, relief in the nature of mandamus is appropriate in situations which were never contemplated when the original restrictions upon its use were devised.41 Therefore, the advisability of extending the restrictions upon mandamus to these new situations is doubtful.42 Judge Ganey, in his dissent in *Stern*, recognized this fact, and proposed that notwithstanding existing authority against the employ-

36. By issuing a restraining injunction the court follows the distinction other courts have made between mandamus and an ordinary injunction, that is, that mandamus is an order for someone to undo his wrongful act, while an injunction is a prohibition of a threatened wrongful act. Mitchell v. Jewish Progressive Club, 253 Ala. 195, 43 So. 2d 520 (1949); cf. Annot., 20 A.L.R.2d 344, 387-99 (1951). However, the result is the same, and if a mandatory injunction is equivalent to mandamus so is this prohibitory injunction. See Developments in the Law — Injunctions, 78 HARV. L. REV. 994 (1965):

"To the extent that mandatory and prohibitory represent semantic opposites, any rule based upon them is ridiculously easy to circumvent. The "mandatory" injunction has not yet been devised which could not be stated in "prohibitory" terms."


38. 187 F. Supp. 36, 39-40 (D.S.D. 1960). While *Johnson* defined "true mandamus" as an order requiring affirmative action which is addressed to public officials, public utilities and corporations, it seems that the definition should be less extensive.


41. See 2 L. Loss, *Securities Regulation* 1004 (2d ed. 1961), wherein the author points out that until the advent of the S.E.C. proxy rules there was little reason for anyone to attempt to review corporate elections in the federal courts.

42. *Davis, Mandatory Relief from Administrative Action in the Federal Courts*, 22 U. CHI. L. REV. 585 (1955). Professor Davis, noting that the need for mandatory relief in regard to administrative proceedings had greatly expanded, suggests that federal courts be allowed jurisdiction to issue mandamus against federal officials. In 3 K. Davis, *Administrative Law* §§ 23.09-.11 (1958), the author asserts that otherwise the federal courts have no jurisdiction to issue mandamus relief against federal officials. The restrictions upon it are only justified when directed against state officials.
ment of mandamus by the federal courts, authority to issue such writs could be found under the rule of *Erie R.R. v. Tompkins.* He felt that federal courts must be able to meet the "growing needs of the substantive rights embodied in state statutes and grant a remedy, if one is provided by state statutes, as in our case, and, even in its absence, fashion a remedy of its own under its inherent equity power."  

The solution to this problem may lie in the realization by the courts that the restrictions upon mandamus in federal courts are not appropriately applicable to the relief being sought in the present case, and there is nothing which necessitates applying them. While the Supreme Court has recognized the existence of the restrictions, it has never let them cut deeply into the separate equitable remedies given in the form of injunctions. It has been the rule to uphold the right of district courts to grant both prohibitory and mandatory injunctions under appropriate circumstances. In fact, the Supreme Court specifically allowed their use in cases like *Susquehanna* where the form of the language is prohibitory while the substance is mandatory, thereby allowing district courts to evade mandamus restrictions. The reason for this is that there is a distinct tradition of equitable relief which must be viewed separately from that of mandamus relief, and it is suggested that this distinction should be the basis for relief in this case and all other cases where "true" mandamus is not involved.

The area of equitable relief has been vastly extended in recent years to meet the demands of an increasingly complex society. Not only

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43. 378 F.2d at 207–08 (dissenting opinion), citing *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938). Judge Ganey does not meet the argument that mandamus is not a civil action. See note 29 *supra,* concerning a possible solution to this problem.

44. 378 F.2d at 208 (dissenting opinion). The court in *Susquehanna* suggested that there would be a special problem when a state mandamus statute is appealed to under *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938). The "remedy" of mandamus may be a matter of substantive state law which the diversity court would be bound to apply. 250 F. Supp. at 802. It would seem important to insure that a diversity plaintiff gets no less relief in a federal court than he would in the state court. Cf. Hanna v. Plumer, 380 U.S. 460 (1965).

45. The unfortunate situation today arises out of the fact that many district courts have followed those decisions of the Supreme Court holding that federal courts generally do not have jurisdiction to issue mandamus relief. E.g., Palmer v. Walsh, 78 F. Supp. 64 (D. Ore. 1948) following White v. Berry, 171 U.S. 366 (1898). Note that the *White* case dealt with the removal of an executive official.

46. Cases like *White v. Berry,* 171 U.S. 366 (1898), discussed in note 45 *supra,* are the exception rather than the rule, and are contrary to the general practice of the Supreme Court. See *Porter v. Lee,* 328 U.S. 246, 251 (1946); *Johnson v. Yellow Cab Transit Co.,* 321 U.S. 383 (1944); *Virginia Ry. v. System Fed'n 40,* Ry. Employees, AFL, 300 U.S. 515, 551 (1937); *Ex parte Lennon,* 166 U.S. 548, 556 (1897); *Davis,* *Mandatory Relief from Administrative Action in the Federal Courts,* 22 U. Chi. L. Rev. 585, 589 (1955).

47. See note 42 *supra.*

48. American School of Magnetic Healing v. *McAnulty,* 187 U.S. 94 (1902), held that a district court had the jurisdiction to enjoin a postmaster from enforcing a fraud order which had the effect of compelling him to deliver mail to the complainer. *Accord,* Stanford v. Lunde Arms Corp., 211 F.2d 464 (9th Cir. 1954).


50. *Developments in the Law — Injunctions,* 78 Harv. L. Rev. 994 (1965). "The expanding role of the injunction is based on the fact that it is the only flexible a remedy in a modern society with expanding regulation of complex economic and
administrative organs of the government, but independent organizations such as corporations must be brought within the control of federal as well as state courts.\textsuperscript{51} It is not necessary that legislation be enacted to make this possible, for where a federal court has jurisdiction by reason of a proper diversity claim it should be able to exercise its full equitable powers to grant relief. If the claim is valid the form of the remedy should not matter,\textsuperscript{52} certainly not enough to justify granting relief in Susquehanna and denying it in Stern and Neuwirth. It should not matter that the equitable relief requested resembles a mandamus procedure which has been restricted in the past, not to prevent federal courts from exercising control over corporations, but primarily to prevent them from interfering with the functioning of state government, courts, and officials.

\textit{James A. Burger}

\textbf{LABOR LAW — REMEDIAL ORDERS — PURCHASER'S LIABILITY FOR PREDECESSOR'S UNFAIR PRACTICES — DUTY TO REINSTATE WITH BACK PAY.}

\textit{Perma Vinyl Corp. (N.L.R.B. 1967)}

In April, 1965, Perma Vinyl Corporation was directed by the National Labor Relations Board to offer immediate reinstatement to four employees who had previously been dismissed and to compensate five others for the pay losses suffered by them through the corporation's unfair labor practices. Following that hearing, U.S. Pipe & Foundry Company, with full knowledge of its seller's labor liabilities, purchased Perma Vinyl's facilities and operated the same without substantial change; that is, the operations continued at the same location with the same supervisors directing the old Perma Vinyl employees. Perma Vinyl paid the workers the back pay owed them from the date of their wrongful discharge to the date of the sale to U.S. Pipe. This precipitated the question of U.S. Pipe's responsibility to remedy its predecessor's liabilities; specifically, would U.S. Pipe, as a bona fide purchaser, be compelled to reinstate those wrongfully discharged workers with back pay from the

social affairs." \textit{Id.} at 996. The authors note that restrictions on injunctive power have become the butt of so many exceptions that the rules themselves are in doubt.\textsuperscript{51} \textit{Cf.} 2 L. Loss, \textit{Securities Regulations} 1004 (2d ed. 1961).

\textsuperscript{52} The usual remedies to compel inspection and prevent the injury complained of include both mandamus and the injunction. H. Henn, \textit{Handbook of the Law of Securities} 329 (1961). Some states allow mandamus only when public interest is affected. The stockholder's normal remedy would be mandatory injunction. Bregman v. Orkin Exterminating Co., 213 Ga. 561, 100 S.E.2d 267 (1957).
date of the sale? The National Labor Relations Board answered that question in the affirmative, holding that one who acquires and operates, in a basically unchanged form, the business of an employer who had been found guilty of unfair labor practices, under circumstances that charge him with notice of the unfair practices of his predecessor, is liable to remedy that predecessor's wrongful conduct. Perma Vinyl Corp., 2 LAB. REL. REP. (65 L.R.R.M.) 1168 (NLRB May 24, 1967).

The Board's authority to bind successors and assigns by its orders has been well settled; however, the fundamental problem of whether the respondent in a particular case qualified as a successor or assign has perplexed the courts and the Board for a number of years. The Board has had little difficulty when the transaction could be categorized as a "disguised continuance of the old employer," or when it could characterize the transferee as the transferor's "alter ego." Thus, in each transfer of ownership, the transferee's liability became contingent upon an adjudication that the sale was in good faith. If the sale were labeled bona fide, the purchaser escaped the obligation to rectify its seller's wrongs; however, if it were determined that the motivation for the transfer was the desire to evade the Board's remedial order, the responsibility

2. See, e.g., NLRB v. Mastro Plastics Corp., 354 F.2d 170 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966), where the court stated that: "Whether a successor corporation is liable is a question of fact which turns on whether, for example, it is the alter ego ... or whether it has participated in an attempted evasion of obligations imposed by the Board." Id. at 160, and 55 COLUM. L. REV. 405, 409 (1955), where it is stated that:

Successors, for the purpose of unfair labor practice proceedings involving transferee liability, have been defined as meaning those persons who continue the business of the predecessor on the same premises without interruption or substantial change in personnel or method of operation. See NLRB v. Deena Artware, Inc., 361 U.S. 398 (1960).
6. See NLRB v. Birdsall-Stockdale Motor Co., 208 F.2d 234 (10th Cir. 1953), which suggested that because a bona fide purchaser was not a party to the unfair practice, it could not be a successor. Consequently, any Board order directed at its predecessor could not ipso facto affect the purchaser. The court reasoned that since the requisite successor relationship was lacking, the buyer's liability could only be based upon a finding that he had participated in an unfair practice. Since due process demanded that a party charged with potential liability be afforded a hearing and an opportunity to prepare a defense, the cause against the respondent-purchaser was dismissed, for under this doctrine, a bona fide purchaser's refusal to remedy its seller's labor wrongs was not itself an unfair practice unless that purchaser was a party thereto. Id. at 237. See 55 COLUM. L. REV. 405, 407 (1955). See generally NLRB v. Parran, 237 F.2d 373 (4th Cir. 1956); NLRB v. Armstrong, 192 F.2d 860 (7th Cir. 1952); New England Paint, Inc. v. NLRB, 147 N.L.R.B. 396 (1964); Edward H. McLaughlin, 135 N.L.R.B. 586 (1962).
to repair the seller's unfair practices attached to the purchaser.⁷ Consequently, the problem resolved into affixing the appropriate label.⁸

The question before the Board in *Perma Vinyl* was not unique; it had previously been considered in the 1954 case of *Symns Grocer Co.*⁹ There, the Board concluded that its powers were insufficient to bind the purchaser with the task of rectifying its predecessor's unfair practices¹⁰ since an innocent good faith purchaser was not a successor.¹¹ This result left the victimized worker without a remedy.¹²

However, the traditional definition of successor,¹³ which focused on whether the transaction was bona fide, did not remain unchallenged. Several circuits¹⁴ redefined that concept by concentrating on whether the corporate identity remained basically unchanged subsequent to the transfer of ownership.¹⁵ This approach was ratified in 1964 when the United States Supreme Court decided *John Wiley & Sons v. Livingston*¹⁶ and thereupon laid the semantic haggle to rest. The posture of successorship ceased, said the Court, only upon proof of manifest lack of continuity in

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10. Symns Grocer Co., 109 N.L.R.B. 346 (1954). In reaching this solution the Board expressly reversed Alexander Milburn Co., 78 N.L.R.B. 747 (1947), which, on the authority of Regal Knitwear Co. v. NLRB, 324 U.S. 9 (1945), had concluded that a bona fide purchaser was a successor, and, hence, subject to the same labor obligations of its predecessor.

In *Symns* the Board followed NLRB v. Lunder Shoe Corp., 211 F.2d 284 (1st Cir. 1954) and NLRB v. Birdsall-Stockdale Motor Co., 208 F.2d 234 (10th Cir. 1953) and established the policy that unless the bona fide purchaser-successor was adjudged guilty of unfair labor practices, the order to the predecessor could not be enforced against the purchaser. *See also note 6 supra.*

11. *See Birdsall-Stockdale Motor Co., 208 F.2d 234 (10th Cir. 1953); Great Leopard Mkt. Corp., 150 N.L.R.B. 1384 (1965); Symns Grocer Co., 109 N.L.R.B. 346 (1954).*


13. *See NLRB v. Malcolm Konner Chevrolet, Inc., 338 F.2d 972 (3d Cir. 1964); NLRB v. Birdsall-Stockdale Motor Co., 208 F.2d 234 (10th Cir. 1953); Symns Grocer Co., 109 N.L.R.B. 346 (1954).* *See also note 2 supra.*


15. If the transfer operated to effect a basic change in the employing industry, in the sense that the . . . operation of the predecessor became merged or integrated into the larger business of Respondent so as to lose its identity, then the bargaining unit is no longer appropriate and enforcement of the order should be denied.

NLRB v. McFarland, 306 F.2d 219, 220 (10th Cir. 1962).

The mere fact that management or supervisory personnel have been replaced does not render the violations they commit moot . . . Accordingly, a remedial order is still proper. With respect to the bargaining order, the designation of the Union by a majority of the employees in the appropriate unit is still effective regardless of the fact that the actual ownership of the stock . . . has changed hands. *See* NLRB v. U.S. Mfg. Co., 1222 F.2d 1224 n.2 (1965).

identity and similarity between the transferor and transferee.\textsuperscript{17} It is noteworthy that nowhere in the opinion did the Court speak of good or bad faith as a criterion for identifying the successor-predecessor relationship; substantial similarity was the key. To meet the Wiley standard a transferee disclaiming successor liability would have to establish that the newly formed business was virtually unrecognizable from its predecessor.\textsuperscript{18}

Wiley's contribution to labor law was not limited to semantics. Its paramount significance lay in the judicial recognition that the prerogative of businessmen to rearrange their affairs had to be balanced against the protection to be afforded employees affected by these sudden changes.\textsuperscript{10} Thus, against the backdrop of Wiley's redirection in policy, Perma Vinyl did not come as a surprise.\textsuperscript{20}

While the Board was mindful of the developing trend in the circuit courts to redefine the successor concept, its opinion is not merely a further logical extension of that trend. Instead, the analysis is predicated upon the same policy consideration expounded in Wiley. Hence, the Board declared:

Especially in need of help it seems to us, are the employee victims of unfair labor practices who, because of their unlawful discharge, are now without meaningful remedy when title to the employing business operation changes hands.\textsuperscript{21}

Although Wiley's observation\textsuperscript{22} that workers should be buffered against sudden changes in the employment relationship suggested the above

\textsuperscript{17} Id. at 551.


\textsuperscript{19} Although the avenue of transfer in Wiley had been merger, that alone was not crucial since both United Steelworkers v. Reliance Universal, Inc., 335 F.2d 891, 894 (3d Cir. 1964) and Wackenhut Corp. v. United Plant Guard Workers, 332 F.2d 954, 958 (9th Cir. 1964) held that the Wiley decision would have been the same had the facts shown a transfer by sale rather than by merger. Cf. Overnight Transp. Co. v. NLRB, 372 F.2d 765 (4th Cir. 1967).

\textsuperscript{20} The issue in Wiley as well as in both Wackenhut and Reliance Universal was whether the transferee who succeeded to ownership by a bona fide transfer became bound by its predecessor's collective bargaining agreement. Specifically, since the respondent in Wiley refused to recognize the union as bargaining agent, the question presented was whether the arbitration provision contained in that agreement survived the merger. The Court decided that it did. 376 U.S. at 550.

\textsuperscript{21} For further analysis of John Wiley & Sons v. Livingston, see The Supreme Court, 1963 Term, 78 Harv. L. Rev. 177, 285-88 (1964); 60 Nw. U.L. Rev. 724 (1965); 1964 U. Ill. L.F. 847.

\textsuperscript{22} See notes 17-21 supra.
declaration, the problem before the Supreme Court was fundamentally different from that faced by the Board in the present case. The issue involved in *Wiley* was whether the assignor's contractual duty to arbitrate survived the assignment. This should be contrasted with the problem of whether liability for infractions of public law survives the *bona fide* transfer of ownership. Without mention of this variance, the Board indicated that it intends to protect both with equal vigor. This result is sound, for while the rights guaranteed by a labor contract are often greater than those granted statutorily, the difference is one of degree and is not significant enough to justify the preservation of the former and the denial of the latter.

The imposition of liability upon the transferee in all situations except where it succeeds in demonstrating that the resulting business is unrecognizable from the transferor's, required that the Board balance several interests. On one hand was the consideration that the purchaser was not a party to its seller's wrongdoings. Similarly, the Board weighed the possible economic distress that would visit a buyer if he were declared liable. On the other hand, however, was the realization that the victims of the labor wrongs had no other effective recourse.

In order to resolve this dilemma the Board reviewed the policy of the National Labor Relations Act, concluding that the Act sought to advance industrial peace by directing its corrective and remedial provisions not at the owner of the corporation, but at the employing corporate entity itself. Thus, with *Wiley's* policy and its endorsed definition of "success-

will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship.

376 U.S. at 549.

23. We find this authority in the Act's delegation of broad administrative power to the Board to frame such remedial orders "as will effectuate the policies of the Act." ... [T]he Board is not ... restricted to requiring remedial action by the offending employer alone; hence its orders run to such employer's successors and assigns, ... .

2 LAB. REL. REP. (65 L.R.R.M.) at 1168-69. See generally Regal Knitwear Co. v. NLRB, 324 U.S. 9 (1945).

24. See note 6 supra.

25. In the instant case the Board made a special exception for U.S. Pipe which lessened its obligations.

With respect to U.S. Pipe, at the time of its takeover of Perma Vinyl's business, Board law imposed no obligation upon it to take any action regarding the unremedied unfair labor practices of its predecessor. We believe it would be inequitable now to require of it the full remedial action which we believe needs to be taken in the appropriate case by successors like it if the policies of the Act are to be meaningfully effectuated.

2 LAB. REL. REP. (65 L.R.R.M.) at 1170 (emphasis added).


28. NLRB v. Colten, 105 F.2d 179, 183 (6th Cir. 1939). The question there presented was whether the Board's cease and desist order remained in force against the successor to the offending partnership which committed the unfair practices. The newly created establishment contended that the order was ineffective against it. The Board, however, held that the concern would have to abide by the order because the Act was directed to the whole employment complex in an operation and not merely the employer. *Id.* at 183.
coloring the NLRA's focus on the employing industry, the finding that U.S. Pipe continued to operate the facilities at Perma Vinyl without substantial change while employing the same personnel, and the realization that the by-product of the transfer of corporate ownership included certain wronged employees, the Board felt constrained to intervene to assure the wronged employees that their statutory rights, like their contractual equivalents, were not illusory. Since the Board was concerned with both resolving a real problem and balancing the equities in the process, it avoided, and hence did not become distracted by, the semantic difficulties that befell Symns and the cases which preceded it. Here, the utilization of Wiley's workable definition of "successor" enabled the Board to ignore the immaterial question of good faith and to proceed with the real task of fashioning a remedy for the previously unprotected employees.

By requiring that the successor stand in the posture of its predecessor, the Board not only guaranteed recourse to the employee, but also, indirectly, required that the primary obligation of compensating the victim of the unfair practice be assumed by the perpetrator of that wrongful act. Thus, in view of the strong presumption that a purchaser-employer is aware of its seller's labor ills, the Board observed that the purchase price would vary inversely with the degree of potential liability undertaken by the successor. Moreover, any miscalculation in that mathematical relationship could be corrected by the inclusion of an indemnity clause in the sales agreement. In effect, the Board has decreed that henceforth the purchaser's status will be that of a surety.

The consequences of the instant decision are more pervasive than the simple reversal of Symns. It is significant that its rationale was predicated on the policy that the well-being of employees should be protected from adverse changes in the industrial complex precipitated by business transactions that ignored the worker. Hereinafter, contractual rights and

30. The term "employing industry" is taken from NLRB v. Colten, 105 F.2d 179, 183 (6th Cir. 1939). While the term is not without ambiguity, it evidently refers to the corporate entity as opposed to the owners of the industrial assets.
31. 2 LAB. REL. REP. (65 L.R.R.M.) at 1168.
32. Id. at 1169.
35. 2 LAB. REL. REP. (65 L.R.R.M.) at 1169.
36. Id.
37. The purchaser will effectively assume the position of a surety by virtue of the Board's finding of joint and several liability of the purchaser and seller and its observation that a prudent transferee will require indemnity against possible successor liability. Therefore, the purchaser will sustain liability only in those cases where he fails to secure an indemnity clause or where he has obtained the clause and the indemnitor becomes financially unable to discharge the liability.
statutory rights will be assured protection. In addition, *Perma Vinyl* succeeded in halting an illogical, dualistic growth in this area of successor liability. Although the law had been well settled that the bona fide purchaser-successor was required to comply with a National Labor Relations Board union certification order which had been directed to its predecessor, prior to *Perma Vinyl*, that same type of successor, much to the dismay of the wronged employees, was generally free to disregard an order to reinstate improperly dismissed employees. Ostensibly, both situations depended upon the successor concept; however, while the former resolved into an analysis of whether substantial continuity of identity existed, the latter had been resolved by the implementation of the well-worn good faith concept. This confusion, fortunately, was eliminated by *Perma Vinyl* which, when analyzing the aforementioned reinstatement question, focused on the substantially unchanged character of the corporate entity that survived the transfer, rather than on notions of good faith.

In the final analysis, the solution announced in *Perma Vinyl* is both sound and enlightening. Its consonance with the policy set forth in *Wiley* cannot be questioned. Secondly, it has correctly extracted the issue of good faith from this area and replaced it with a more workable standard. Finally, the decision ended the illogical duality which had developed in the related areas of union certification and employee reinstatement proceedings. Nevertheless, this adjudication may prove distressing to the business community, for it has made it incumbent upon a would-be purchaser to either obtain an indemnity clause from its seller, or establish that the resultant business is virtually unrecognizable from its predecessor. Also, notwithstanding the presence of an indemnity agreement, there is no absolute guarantee that the successor will be saved harmless, for in the event that its seller is insolvent or otherwise immune, liability will attach. Moreover, *Perma Vinyl*‘s seemingly strong policy commitment to protect the employee’s right to recourse for labor wrongs from being precluded by a business transfer suggests that the purchaser who either fails to require an indemnity agreement, or who finds himself saddled with liability notwithstanding such an agreement, will be hard-pressed to meet the “virtually unrecognizable” standard. This, therefore, introduces what should be the next development in this area; where should a wronged employee look when the resulting operation is in fact unrecognizable from its predecessor?

*William E. Benner*

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40. *See* note 38 supra.


42. *See* p. 235 & note 18 supra.