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Recent Developments

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CREDITORS RIGHTS — A Trustee In Bankruptcy May Not Appoint Counsel From His Own Law Office. *Rule 67, United States District Court for the District of Maryland.* Under this rule, effective May 21, 1965, "[a] receiver or trustee shall not be authorized to retain the law firm of which he is a member or any of his law partners or office associates as his attorney unless it appears to the satisfaction of the Court that special circumstances make the retention of such firm or attorney advisable." The first such rule of this nature appeared as Bankruptcy Rule 8, Southern District of New York, which states, "[A] receiver or trustee shall not retain any of his law partners or associates" as attorney unless there are special circumstances which would permit it.[1]

The federal judges for the District of Maryland found the rule necessary after they had been presented with a delicate problem involving the distribution of a fee between law partners. The rule clearly will be followed in the federal courts, but the question remains as to its application in the Maryland state courts. They need not adopt Rule 67 officially; withholding approval of such related counsel will produce the same effect. A definite problem exists where there is no formal legal partnership involved, but merely an office-sharing agreement. Although the attorneys might regularly work together as partners, their nominal arrangement may avoid the application of Rule 67.[2]

CRIMINAL LAW — Privilege Against Self-Incrimination and Immunity From Prosecution. *State v. Comes,* 237 Md. 271, 206 A.2d 124 (1965). Appellee was a road superintendent for Baltimore County. While at work, he received radioed instructions from his employer's dispatcher to appear before the Baltimore County Grand Jury, which was conducting an investigation of possible violations in the sale and delivery of road construction materials to the County. The dispatcher received the request from the Assistant State's Attorney, who had been instructed by the Grand Jury to call the appellee. Although never formally subpoenaed, the appellee complied with the request. As a result of his self-incriminating testimony before that body, he was indicted for violations of the bribery laws.[1] During his appearance, the appellee was not formally offered statutory immunity from prosecution,

1. *Cf.,* COLLIER, BANKRUPTCY § 62.12(3) (1956).
2. The Grievances Committee of the Maryland State Bar Association rendered an opinion in a related area (Transactions — *Maryland State Bar Association* — 1961, page 220; *The Daily Record,* May 22, 1961) that in a case of a deed of trust for the benefit of creditors, it is a violation of Canon 22 of the Canons of Professional Ethics for a trustee and his counsel to participate in the practice of fee splitting without disclosure to the courts.

1. MD. CODE ANN. art. 27, § 23 (1957):
". . . [A]nd any person so bribing or attempting to bribe or so demanding or receiving a bribe shall be a competent witness, and compellable to testify against

nor did he at any time assert his privilege against self-incrimination.[2] In sustaining the trial court's dismissal of the indictments and in holding that the appellee was immune from prosecution by statute, the Court of Appeals stated that the appellee's testimony had been "compelled," as the term was used in the statute, and that a claim of the privilege against self-incrimination is unnecessary to entitle a "compelled" witness to statutory protection.[3]

Many immunity statutes explicitly require that a witness claim his privilege against self-incrimination before immunity is granted,[4] but the Maryland statutes offer no directives as to the manner in which a compelled witness might secure his right to immunity.[5] However, since *United States v. Monia*,[6] courts have generally agreed that a witness who is compelled to testify before a grand jury need not, in the absence of any express statutory provision, claim the privilege against self-incrimination as a prerequisite to the acquisition of immunity. In that case Justice Roberts, over the vigorous dissent of Justice Frankfurter, declined to impose a qualification not included in the plain wording of the statute.[7]

The other issue in this case was whether the appellee's testimony was compelled, and the Court of Appeals concluded the disclosures were not voluntarily made. The witness was presumed to know the law that once before a grand jury, he was subject to contempt proceedings upon refusal to answer questions relating to the bribery laws.

The cases do not reveal consistent or well articulated criteria for distinguishing between voluntary and compelled testimony.[8] In some

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any person or persons who may have committed any of the aforesaid offenses; provided, that any person so compelled to testify in behalf of the state in any such case shall be exempt from prosecution, trial and punishment for any such crime of which such person so testifying may have been guilty or a participant therein, and about which he was so compelled to testify."

As the statute indicates, only a witness who has been compelled to forfeit the privilege against self-incrimination qualifies for a grant of immunity. A witness who testifies voluntarily is not protected, see Annot., 38 A.L.R.2d 306 (1954).

This section was enacted pursuant to MD. CONST. art. III, § 50. In Brown v. State, 233 Md. 288, 196 A.2d 614 (1964), the above-mentioned exemptions were held to apply to grand jury proceedings.

2. See MD. CONST., Declaration of Rights, art. 22 and U.S. CONST. amend. V.

3. 237 Md. 271, 278–82, 206 A.2d 124 (1965).

4. *Compare* 74 Stat. 811 (1960), 18 U.S.C. § 835(b) (1964 Supp.), which requires that the witness specifically claim his privilege and that he be specifically advised above the necessity of asserting the claim; *with* 48 Stat. 86 (1933), as amended, 15 U.S.C. § 77v(c) (1958), which merely provides that the witness must claim the privilege. For a construction of a similar statute, see People v. Steuding, 6 N.Y.2d 214, 160 N.E.2d 468 (1959), which held unconstitutional a statutory requirement that an uninformed witness must claim his privilege against self-incrimination. For a compendium of the various types of federal immunity acts and an analysis of operation, see Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568 (1963). Some statutes, however, require a signed waiver of immunity by the witness precedent to the loss of such immunity. For such a statute and its operation, see Regan v. New York, 349 U.S. 58 (1955), noted in 41 CORNELL L.Q. 294 (1955).

5. Compare MD. ANN. CODE art. 27, § 24, § 39, § 262, § 371, § 400, § 540 (1957), all of which contain similar immunity provisions.

6. 317 U.S. 424 (1943).

7. For further discussions on these matters, see MCCORMICK, EVIDENCE § 135, 136 (1954); 8 WIGMORE EVIDENCE § 2282 (3d ed. 1940); and State v. Grosnickle, 189 Wisc. 17, 206 N.W. 895 (1926).

8. MCCORMICK, EVIDENCE § 135 (1954). See also 41 CORNELL L.Q. 294 (1955).

courts, a subpoena has been required as evidence of compulsion,[9] and elsewhere a potentially compellable witness has been equated with a compelled witness.[10] Maryland has aligned itself with the latter category, and in so doing, the Court of Appeals has narrowly circumscribed the definition of a voluntary witness.

CRIMINAL PROCEDURE — Right of Defendant to Waive Jury Trial Denied Without Consent of the Prosecution. *Singer v. United States,* ... U.S. ..., 58 S.Ct. 783 (1965). The defendant in a criminal action sought to waive a jury trial in a Federal District Court, allegedly to save time. The government refused to give its consent, and the defendant was convicted of twenty-nine counts of mail fraud by a jury. In the Supreme Court the defendant contended that Rule 23(a) of the Federal Rules of Criminal Procedure,[1] requiring the consent of both the court and the government before a defendant can waive a jury trial, was unconstitutional, upon the premise that the Sixth Amendment's guarantee of a jury trial inferred a right to waive a jury trial whenever the defendant believed it to be in his best interest. The Court, in rejecting the defendant's argument, held that Rule 23(a) did not guarantee an absolute right to a trial by the court.[2]

Prior to 1930, there was no right to waive a jury trial in a criminal case in the federal courts.[3] In that year the Supreme Court allowed such a waiver, implying however that the consent of the prosecution and the court would be required.[4] This dictum was subsequently codified in Rule 23(a) of the Federal Rules of Criminal Procedure.[5] The trend in state courts today is in favor of allowing a defendant to waive a jury trial in all types of cases.[6] Among the thirty states now allowing the waiver of a jury trial in felony prosecutions, there is a diversity of opinion as to whose consent is required for such a waiver. The consent of both the court and the prosecution is required in some

9. See, *e.g.*, Metz v. State, 217 Ind. 293, 27 N.E.2d 761 (1940); Bentler v. Commonwealth, 143 Ky. 503, 136 S.W. 896 (1911). See generally Annot., 38 A.L.R.2d 300 (1954).

10. See Bolton v. State, 159 Tex. Crim. 454, 265 S.W.2d 84 (1954); Atkinson v. State, 190 Ind. 1, 128 N.E. 433 (1920). *Contra:* Colley v. State, 179 Tenn. 651, 169 S.W.2d 848 (1943), *cert. denied,* 320 U.S. 766. *Cf.* Lucas v. State, 130 Miss. 8, 93 So. 437 (1922), where the evidence was unclear as to whether testimony was voluntary or compelled and the court held the distinction of no importance; this view has received no wider acceptance.

1. "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." FED. R. CRIM. P. 23(a).

2. See Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240 (1964) (waiver of right to be tried in the state and district where the crime was committed); United States v. Kobli, 172 F.2d 919 (3d Cir. 1949) (waiver of public trial).

3. See Coates v. United States, 290 Fed. 134 (4th Cir. 1923); Blair v. United States, 241 Fed. 217 (9th Cir. 1917); Low v. United States, 169 Fed. 86 (6th Cir. 1909).

4. Patton v. United States, 281 U.S. 276 (1930).

5. Several cases followed the *Patton* rule, C.I.T. Corp. v. United States, 150 F.2d 85 (9th Cir. 1945); Rees v. United States, 95 F.2d 784 (4th Cir. 1938); United States v. Dubrin, 93 F.2d 499 (2d Cir. 1937).

6. See 5 WHARTON'S CRIMINAL LAW AND PROCEDURE § 1948 (1957).

states for the waiver of a jury trial,[7] while others require only the consent of the prosecution,[8] and still others require only the consent of the court.[9] In a number of states, the defendant need obtain neither the consent of the court nor of the prosecution.[10]

Maryland's history of trial by the court in criminal cases goes back to colonial times,[11] and a jury trial may be waived in all types of criminal prosecutions.[12] Rule 741 of the Maryland Rules of Procedure specifically provides that a criminal defendant can waive a jury trial over the objection of the prosecution;[13] however, there is no express provision pertaining to the denial of such a waiver by a court. To date, the Maryland Court of Appeals has not been asked to pass upon the validity of such a denial.

DIVORCE — Waiver Signed By Wife While Confused And Upset Upon Promise Of Husband Not To Use It Not Sufficient Participation To Bar Later Collateral Attack. *Day v. Day*, 237 Md. 229, 205 A.2d 798 (1965). Plaintiff brought this action in Maryland to have an Alabama divorce awarded to her husband voided, since the Alabama court did not have jurisdiction.[1] The husband appealed a decision for the wife, claiming she had participated in the proceedings and was, therefore, barred by res judicata from collaterally attacking the divorce. The alleged participation of the wife consisted of signing a consent and waiver form[2] — used especially in Alabama — whereby the defendant spouse waives the right to contest jurisdiction.[3] The wife claimed that she had signed the waiver while emotionally upset and confused and that her husband had promised not to use the waiver. The Maryland Court of Appeals affirmed the lower court's ruling that

7. IND. STAT. ANN. § 9-1803 (Burns 1956); GEN. STAT. OF KAN. § 62-1401 (Supp. 1961); N.J. RULES 3:7-1(a) (1954); State v. Shroyer, 49 N.M. 196, 160 P.2d 444 (1945); PA. STAT. ANN. tit. 19, § 786 (1963); Morrison v. State, 31 Okla. Crim. 11, 236 P. 901 (1925); TEX. STAT. art. 10(a) (Vernon 1954); CODE OF VA. § 19.1-192 (1950); WIS. STAT. ANN. § 957.01 (1958).

8. ARK. STAT. OF 1947 ANN. tit. 43, § 2108 (1947); CAL. CONST. art. 1, § 7; N.D. CENTURY CODE ch. 29-16-02 (1959); State v. Nash, 51 S.C. 319, 28 S.E. 946 (1898).

9. MO. CONST. art. 1, § 22(a); ORE. CONST. art. 1, § 11; GEN. LAWS OF R.I. § 12-17-3 (1956); REV. CODE OF WASH. § 10.01.060 (1961); REV. LAWS OF HAWAII 1955 § 258-35 (1955).

10. COLO. R. PROC. 23 (1953); CONN. GEN. STAT. ANN. tit. 54, § 82 (1958); FLA. STAT. ANN. § 912.01 (1944); LA. REV. STAT. tit. 15, § 342 (1950); ILL. ANN. STAT. tit. 38, § 103-6 (1964); MD. R. PROC. 741 (1963); MASS. GEN. LAWS ANN. ch. 263, § 6 (1959); MICH. STAT. ANN. § 28.856 (1954); MINN. STAT. ANN. § 631.01 (1947); N.H. REV. STAT. ANN. § 606.7 (1955); OHIO REV. CODE ANN. § 2945.05 (1954); UTAH CODE ANN. 77-27-2 (1953).

11. Bond, *The Maryland Practice of Trying Criminal Cases by Judges Alone, Without Juries*, 11 A.B.A.J. 699 (1925).

12. Byrd v. Warden, 210 Md. 662, 124 A.2d 284, *cert. denied*, 352 U.S. 932 (1956).

13. "An accused may waive a jury trial and elect to be tried by the court. If an accused elects to be tried by the court the State may not elect a jury trial. An election to be tried by the court must be made before any evidence in the trial on the merits is taken unless otherwise provided by local rule of court." MD. R. PROC. 741 (1963).

1. Title 34, § 29 ALA. CODE (1958) required husband to have been an Alabama resident for one year prior to the institution of the suit.

2. Specifically, "Acceptance of Service of Process and Answer and Waiver of Response."

3. On Alabama consent divorces see Note, *The Present Validity of Alabama "Consent" Divorces*, 23 MD. L. REV. 359 (1963); Reese, *Alabama Divorces*, PRAC.

the wife had not participated sufficiently to be barred by res judicata from collaterally attacking the decree.

In *Sherrer v. Sherrer*[4] and *Coe v. Coe*[5] the Supreme Court qualified the rule of *Williams v. North Carolina*,[6] by holding that where the defendant spouse participated in the divorce proceedings and had sufficient opportunity to raise the issue of jurisdiction, res judicata barred a later collateral attack in the resident state on the issue of jurisdiction.[7] Some states flatly reject the waiver as sufficient participation under the *Sherrer* doctrine,[8] while others take the opposite view.[9] However, most courts considering the issue have held that where the waiver was obtained under circumstances indicating the signing spouse did not intend to consent or did not understand the import of the act, participation is insufficient.[10]

Both waiver cases decided in Maryland have found insufficient participation. In the present case the spouse signed the form unknowingly and while emotionally upset and did not intend for the waiver to be used. In *Pelle v. Pelle*[11] the court found insufficient participation when the waiving spouse could not read, write or speak English. Thus, the issue of the validity of the waiver as participation where the signing spouse agreed willingly and understandingly has not yet been presented in Maryland.[12]

LABOR LAW — Representation Election Not Vitiated by Union Appeal to Racial Unity. *Archer Laundry Co.*, 150 N.L.R.B. No. 139, 58 L.R.R.M. 1212 (1965). An election was held among the primarily Negro employees of a laundry to determine a bargaining

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LAW (March, 1961) 78, 83; Ross and Crawford, *Gresham's Law of Domestic Relations: The Alabama Quickie*, 27 BROOKLYN L. REV. 224 (1961); Rosenau, *Those "Quickie" Alabama Divorces*, 18 ALA. LAWYER 37 (1957).

4. 334 U.S. 343 (1948).

5. 334 U.S. 378 (1948).

6. 325 U.S. 226 (1945), holding that when a divorce obtained in an *ex parte* action in a foreign state is collaterally attacked, the state examining has the power to look into the jurisdiction of the foreign court.

7. See Annot., 28 A.L.R.2d 1303; and see generally Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees — A Comparative Study*, 65 HARV. L. REV. 193 (1951).

8. See, *e.g.*, De Parata v. De Parata, 179 A.2d 723 (D.D.C. 1962), noted 23 MD. L. REV. 359 (1963); Eaton v. Eaton, 227 La. 992, 81 So. 2d 371 (1955), *cert. denied*, 350 U.S. 873.

9. See, *e.g.*, Greene v. Greene, 236 N.Y.S.2d 732 (1963) (voluntary signing and forwarding); Boxer v. Boxer, 12 Misc. 2d 205, 177 N.Y.S.2d 85, *aff'd*, 7 N.Y.2d 781, 194 N.Y.S.2d 47 (1959) (mailed power of attorney to Alabama attorney); *In re* Raynor's Estate, 165 Cal. App. 2d 715, 332 P.2d 416 (1958) (willingly and knowingly signed). *Cf.*, Nitschke v. Nitschke, 21 Misc. 2d 632, 195 N.Y.S.2d 224 (1959) (voluntary signing).

10. See, *e.g.*, Pelle v. Pelle, 229 Md. 160, 182 A.2d 37 (1962) (wife could not comprehend English); Guierieri v. Guierieri, 75 N.J. Super. 541, 183 A.2d 499 (1962) (signed in anticipation of litigation, wife not notified of proceedings); White v. White, 208 N.Y.S.2d 746 (1960) (refusal to sign new waiver in 1960 held revocation of consent given by waiver in 1956).

11. 229 Md. 160, 182 A.2d 37 (1962).

12. A clue, however, to the probable Maryland rule in a true consent waiver case can be found in *Pelle*, where the court favorably took notice of De Parata v. De Parata, 179 A.2d 723 (D.D.C. 1962), which flatly rejected the signing of the waiver as sufficient participation, notwithstanding the fact that the signing spouse did so freely, fully appreciating the import of the act. 229 Md. at 165, 182 A.2d 37.

representative. Prior to the election, the union, through the Interdenominational Ministerial Alliance, distributed literature to employees which stated that Negro employees generally received lower wages than whites, were discriminated against by white employers, and that a vote for the union was a vote for freedom. One leaflet appeared to equate the white employer with anti-Negro bigots. The employer filed objections to the election with the Regional Director of the NLRB, attempting to have the Board set aside the union victory and hold a new election. The Regional Director, whose findings were adopted by the Board, declined to set aside the election and ruled that where the appeal to racial attitudes was germane to the larger issue of the advantages and disadvantages of a union for the workers, isolated references to the Negro fight for civil liberties considered in the context of the entire campaign were permissible propaganda.[1]

The Board has traditionally stated that in election proceedings it seeks to provide an ideal "laboratory condition" in which an experiment may be conducted to determine the uninhibited desires of the employees.[2] Where these conditions have not existed, the Board has directed a new election.[3] The NLRB initially took the position that the mere mention of the racial issue in a pre-election campaign afforded no basis for voiding the results of the election in the absence of violence or coercion, provided the statements were temperate and factually correct.[4] However, in *Sewell Mfg. Co.*[5] the Board ruled that it would not tolerate as "electoral propaganda" appeals or arguments which had no purpose other than inflaming the racial feelings of voters in the election. Unless a party limited itself to setting forth truthfully another party's position on matters of racial interest, and avoided deliberate efforts to overstress and embitter social feelings by irrelevant and inflammatory appeals,[6] the NLRB declared it would not hesitate to set aside an election on grounds of racial bias. According to *Sewell*, the

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1. *Accord*, Aristocrat Linen Supply Co., 150 N.L.R.B. No. 140, 58 L.R.R.M. 1216 (1965), decided with instant case.

2. General Shoe Corp., 77 N.L.R.B. 124, 127, 21 L.R.R.M. 1337 (1948). See generally Bok, *Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964). A comprehensive survey of the effect of statutory limits placed upon the employer is found in Pokempner, *Employer Free Speech Under the National Labor Relations Act*, 25 MD. L. REV. 111 (1965).

3. See, *e.g.*, United States Gypsum Co., 130 N.L.R.B. 901, 47 L.R.R.M. 1436 (1961), election set aside because of employer misrepresentation; Heintz Division, Kelsey-Hayes Co., 126 N.L.R.B. 151, 45 L.R.R.M. 1290 (1960), deceptive tactics of local union; Shovel Supply Co., 121 N.L.R.B. 1485, 43 L.R.R.M. 1014 (1958), employer coercion; The Gummed Products Co., 112 N.L.R.B. 1092, 36 L.R.R.M. 1156 (1955), union misrepresentation.

4. Sharnay Hosiery Mills, Inc., 120 N.L.R.B. 750, 42 L.R.R.M. 1036 (1958); Chock Full O'Nuts, 120 N.L.R.B. 1296, 42 L.R.R.M. 1152 (1958).

5. 138 N.L.R.B. 66, 50 L.R.R.M. 1532 (1962). In *Sewell*, where the Board set aside the election, a Southern employer used propaganda to arouse his white workers against the union's pro-integration policy.

6. *Id.* at 71. See Allen-Morrison Sign Co., 138 N.L.R.B. 73, 50 L.R.R.M. 1535 (1962), citing *Sewell* and applying the same standard. For extensive discussion of this area see Sachs, *The Racial Issue as an Antiunion Tool and the National Labor Relations Board*, 14 LAB. L.J. 849 (1963). The problem of a truthful but inflammatory presentation of the union's position on racial equality was raised in Durant Sportswear, Inc., 147 N.L.R.B. No. 110, 56 L.R.R.M. 1365 (1964).

burden is on the party using a racial message to establish that it was truthful and germane, with any doubts being resolved against him.[7]

In the instant case, the Regional Director distinguished the propaganda used by the union from that used by the employer in *Sewell,* and concluded that the union's statements were not inflammatory or designed to engender race hatred. Rather, they were meant to create "racial self-consciousness" and "united action for economic betterment." The Board concluded the campaign did not prevent the voters from making a free choice.[8]

LABOR LAW — Termination Of Part Of Business Operations. *Textile Workers Union v. Darlington Manufacturing Co.,* 380 U.S. 263 (1965). In September, 1956, the Textile Workers Union was selected by the employees of the Darlington Manufacturing Company as their exclusive bargaining representative in an election conducted by the National Labor Relations Board. However, Darlington refused to bargain with the union and closed down soon after its victory. This was done under the direction of the common president of Darlington and Deering-Milliken, the textile complex that had extensive holdings in Darlington and several other corporations. The charges that the union filed with the NLRB contended that the employer violated § 8(a)(1) and 8(a)(3) of the National Labor Relations Act by closing the plant, and § 8(a)(5) by refusing to bargain with the certified union.[1] The NLRB upheld these charges and found Darlington and Deering-Milliken jointly and severally liable for the unfair labor practices and the extensive back pay remedy involved.[2] The Fourth Circuit Court of Appeals denied enforcement of the Board's order on the theory that an employer has the absolute right to cease part or all of his business even if motivated by an anti-union bias.[3] The Supreme Court

7. This presumption against the speaker has been attacked in Pollitt, *The National Labor Relations Board and Race Hate Propaganda in Union Organization Drives,* 17 STAN. L. REV. 373, 404 (1965). The author states that the presumption may violate constitutional freedom of expression, and proposes that the Board assume the burden of proving that the speech has exceeded permissible limits, without destroying the individual's right to speak out on any issue deemed relevant by him.

8. See generally Note, *Employee Choice and Some Problems of Race and Remedies in Representation Campaigns,* 72 YALE L.J. 1243 (1962).

1. National Labor Relations Act, § 8(a)(1), 8(a)(3) and 8(a)(5), 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(1), 158(a)(3), 158(a)(5) (1958), provides:

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7 [section 157] of this title; . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section a [159(a)] of this title."

2. 139 N.L.R.B. 241, 51 L.R.R.M. 1278 (1962). In its opinion the Board also stated that it is a violation of the NLRA for an employer to terminate its entire business because of its employees' union activities. See NLRB v. Norma Mining Corp., 101 N.L.R.B. 944, 31 L.R.R.M. 1155 (1952), *enf'd as modif'd,* 206 F.2d 38 (4th Cir. 1953), where the Fourth Circuit held that an employer unlawfully discriminated against his employees by shutting down his mine after threatening to do so if the union persisted in organizational activities. See also NLRB v. Waterman Steamship Corporation, 304 U.S. 206 (1940); NLRB v. Joseph Stremel d/b/a Crow Bar Coal Company, 141 F.2d 317 (10th Cir. 1944); 28 Annual Report of National Labor Relations Board 76, 78 (1963).

3. 325 F.2d 682 (4th Cir. 1963). See NLRB v. New Madrid Manufacturing Company, 104 N.L.R.B. 117, 32 L.R.R.M. (1953), *enf'd as modif'd,* 215 F.2d 908

agreed that an employer has the right to permanently close down his entire business for any reason he chooses, including his desire to avoid dealing with a union; but the Court denied that an employer is so privileged in closing a part of his business.[4]

The Court, in remanding the case for further findings by the Board, expressly set out standards by which the Board is to determine the issue of the liability of Deering-Milliken. The Court said that a violation of the NLRA occurs when those controlling the plant which is shut down for anti-union motives: (1) expect benefits to accrue from the shut down through discouraging unionization in another business in which they have an interest;[5] (2) close down the plant in order to receive these benefits; and (3) are in such a relationship with the other business that it is "realistically foreseeable" that its employees will fear similar acts of retribution for their involvement in organizational activities.

This decision gives the Board more freedom than it was willing to give itself in determining whether a commercial combination constitutes a single employer for the purposes of the NLRA. Determination of single employer status requires examination of questions of common ownership, common control of operations, and common labor relations policies.[6] Liability is now to be fixed primarily by determining the employer's purpose and the effect its actions tend to have upon the employees of any business with which the employer is closely connected, rather than by examining the organization and administration of the business operations involved.[7]

SALES — Extension of Manufacturers' Implied Warranty Liability Despite Lack of Privity of Contract. *Piercefield v. Remington Arms Co., Inc.*, 375 Mich. 85, 133 N.W.2d 129 (1965). Plaintiff was an "innocent bystander,"[1] who ". . . did not at any time stand in

(8th Cir. 1954) (involving sale of plant, court stated that employer may dispose of his business for whatever reason he pleases); NLRB v. New England Web, Inc., 135 N.L.R.B. 1019, 49 L.R.R.M. 1620 (1962), *rev'd*, 309 F.2d 696 (1st Cir. 1962) (union organization one of several factors to be considered in making decision to go out of business); NLRB v. Neiderman, d/b/a Star Baby Co., 140 N.L.R.B. 678, 52 L.R.R.M. 1094 (1963), *enf'd as modif'd*, 334 F.2d 601 (2d Cir. 1964) (evidence showed that primary reason for dissolution was economic factors, not anti-union motive).

4. For cases involving shut down of part of an operation to deter unionism in the remaining business, see NLRB v. Savoy Laundry, Inc., 137 N.L.R.B. 306, 50 L.R.R.M. 1127 (1962), *enf'd as modif'd*, 327 F.2d 370 (2d Cir. 1964); and NLRB v. Missouri Transit Co., 116 N.L.R.B. 587, 38 L.R.R.M. 1301 (1956), *enf'd*, 250 F.2d 261 (8th Cir. 1957).

5. Cases cited note 4 *supra*.

6. Recent Court of Appeals decisions analyzing the Board's determination of single employer status are NLRB v. Majestic Molded Products, Inc., 143 N.L.R.B. 71, 53 L.R.R.M. 1284 (1963), *enf'd as modif'd*, 330 F.2d 603 (2d Cir. 1964); and NLRB v. W. L. Rives Co., 136 N.L.R.B. 1050, 49 L.R.R.M. 1902 (1962), *enf'd in part*, 328 F.2d 464 (5th Cir. 1964). See also Israel Taub, d/b/a Dove Flocking and Screening Co., 145 N.L.R.B. 682, 55 L.R.R.M. 1013 (1963).

7. For further reference see Glushien, *Plant Removal*, NEW YORK UNIVERSITY FIFTEENTH ANNUAL CONFERENCE ON LABOR 237 (1962); Rothman, *The Right to Go Out of Business*, 6 BOST. COLL. IND. & COMM. L. REV. 1 (1964); *Labor Law Problems in Plant Relocation*, 77 HARV. L. REV. 1100 (1964); *Plant Removals, Shutdowns and Subcontracts Under the National Labor Relations Act*, 38 TEMP. L.Q. 299 (1965). For a subsequent NLRB decision, see Royal Plating and Polishing Co., 152 N.L.R.B. No. 76, 59 L.R.R.M. 1141 (1965).

1. Plaintiff did not seek relief on the basis of any relationship between himself and his brother. For a discussion of the plight of the "innocent bystander" in product

a position of legal privity with any defendant;" he was injured when a shotgun fired by his brother exploded, allegedly because of a defective shell purchased by plaintiff's brother at a hardware store. Plaintiff sued the manufacturer and the hardware store for negligence and breach of warranty. The trial court dismissed the warranty count on the ground that plaintiff, neither a purchaser nor a user of the product, could not benefit by any warranty. The Michigan Supreme Court, having already extended the manufacturer's implied warranty to the ultimate purchaser for property damage[2] as well as personal injury,[3] reversed, holding that the manufacturer is best able to control the dangers of defective manufacture, and so an implied warranty of fitness is imposed on him as a matter of law. Consequently, lack of privity is no defense for a breach of the warranty. The court said that this is not liability without fault because the plaintiff must prove the defect of manufacture and a causal relationship between the defect and the injury.

Most states no longer require privity of contract to recover on an implied warranty theory in regard to food and beverages,[4] and a growing number of jurisdictions have gone beyond food products in establishing strict liability.[5] However, the Maryland Court of Appeals has insisted on privity even in regard to the "food" cases,[6] although it has not directly considered the question since 1943.

In cases decided before *Piercefield,* plaintiffs were either purchasers or users of the product or recovered on the basis of a relationship between plaintiff and a purchaser or user.[7] The Uniform Commercial Code[8] extends a seller's warranty to the family and guests of the buyer and has largely left any further extensions to the courts.[9] RESTATEMENT OF TORTS (SECOND) holds the seller strictly liable to consumers or users for either personal injury or property damage,[10] but expresses no opinion as to whether a "bystander" may recover.[11] *Piercefield* now provides some authority for the proposition that an "innocent bystander" has a cause of action against the manufacturer for breach of an implied warranty of reasonable fitness.

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liability law, see *Strict Products Liability And The Bystander,* 64 COL. L. REV. 916 (1964).

2. Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958). The court held in *Spence* that plaintiff, a buyer of defective cinder blocks, could recover from the manufacturer on either an implied warranty or negligence theory.

3. Manzoni v. Detroit Coca-Cola Bottling Co., 363 Mich. 235, 109 N.W.2d 918 (1961) (a "food" case, with dictum extending the rule to all products).

4. For a list of these states, see PROSSER, TORTS § 97, n.53 ff. (3d ed. 1964).

5. For a list of these states, see Noel, *Strict Liability of Manufacturers,* 50 A.B.A.J. 446, n.16 (1964).

6. Vaccarino v. Cozzubo, 181 Md. 614, 31 A.2d 316 (1943); Poplar v. Hochschild Kohn & Co., 180 Md. 389, 24 A.2d 783 (1942); Flaccomio v. Eysink, 129 Md. 367, 100 Atl. 510 (1916). See Bryer v. Rath Packaging Co., 221 Md. 105, 156 A.2d 442 (1959); Cloverland Farms Dairy v. Ellin, 195 Md. 663, 75 A.2d 116 (1950).

7. PROSSER, *op. cit. supra* note 4, at 682; *Strict Products Liability And The Bystander, supra* note 1, at 917-18.

8. UNIFORM COMMERCIAL CODE § 2-318.

9. See *id.* at comment 3.

10. RESTATEMENT (SECOND), TORTS § 402a (1965).

11. See *id.* at comment *o*. For discussion as to the merits of holding the manufacturer strictly liable, *compare* Jaeger, *Privity of Warranty: Has The Tocsin Sounded?,* 1 DUQUESNE L. REV. 1 (1963) *with* Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products — An Opposing View,* 24 TENN. L. REV. 938 (1957).