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NOTES

A Governmental Duty to Protect the Citizen—The Schuster Case

The sovereign immunity that today exists, at least to some extent, in a majority of the American states[1] has, as its remote ancestor, the doctrine that the "King can do no wrong" found in the English Common Law of the sixteenth and seventeenth centuries.[2] It has been said that the survival of this immunity after the Revolutionary War was attributable "in all likelihood, to the financial instability of the infant American states rather than to the stability of the doctrine's theoretical foundations."[3] So it was that the state of New York came to enjoy this immunity from suit and liability. The only recourse for an injured party was a legislative grant, the so-called private bill, which depended more upon political influence and legislative friendship than the justice of a particular claim.[4]

As the state of New York grew, there began a delegation of state functions to political subdivisions, for example, its counties,

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[1] See Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L. Rev. 1363 (1954) for a summary of the law of tort liability of the then-existing states.

[2] Borchard, *Governmental Responsibility in Tort, VI*, 36 Yale L.J. 1, 30-34 (1926).

[3] Gellhorn & Schenck, *Tort Actions Against the Federal Government*, 47 Colum. L. Rev. 722 (1947). See generally Borchard, *Governmental Responsibility in Tort, V*, 36 Yale L.J. 757, 798-807 (1927).

[4] See Freund, *Private Claims Against the State*, 8 Pol. Sci. Q. 625-28 (1893). After a discussion of the petition of right and the bill of manifestation of right (*monstrans de droit*) Professor Freund continues:

> "Neither of the remedies [mentioned above] against the sovereign in use in England became part of the common law of the American states upon their assuming independence. In England and in the colonies, in all relations of property, the sovereignty was represented by the crown, but in this country all the rights of the crown in this respect devolved upon the people. And while, upon the constitutional organization of the people, the judiciary department succeeded to all the powers held by the courts in England, the executive became vested only with such powers as were expressed and specified in the written constitutions. All residuary public power, even such as was not of a strictly legislative nature, remained in the legislature. . . . The privilege of petitioning for the redress of any grievance was guaranteed by the federal and by most state constitutions, and petitions of right respecting private claims against the government were directed to the legislature." *Id.* at 626-27.

municipal corporations, state institutions and school districts. An effect of this delegation was the succession by these subdivisions to the sovereign's immunity, when performing the delegated state function.[5]

In the municipal corporation area, there came into being the distinction between the governmental functions delegated by the state and the proprietary or corporate functions.[6] Where the injury resulted from an act or failure to act, characterized as governmental, the municipality enjoyed its derivative sovereign immunity from suit. Where the act was classified as proprietary there was liability, for the function was strictly corporate and not delegated by the state, hence there was no derivative immunity. Traditionally the functions of the police and fire departments have been treated as governmental so that the immunity was available in this area.[7]

At this stage of the development of nonliability the legislature acted. In 1920 the Court of Claims Act[8] was passed, section 12 of which read:

> The court of claims . . . has jurisdiction to hear and determine a private claim against the state . . . and the state hereby consents, in all such claims, to have its liability determined.[9]

From the wording it would appear that the act waived the sovereign's immunity from suit and subjected the state to liability. Identical wording was so construed by lower courts when interpreting section

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[5] See Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 22-28 (1924). It is to this man, more than any other, that much of the work in the field owes its impetus. A series of his articles are: *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924-1925); *Governmental Responsibility in Tort*, 36 YALE L.J. 1, 757, 1039 (1926-1927); *Governmental Responsibility in Tort*, 28 COLUM. L. REV. 577 (1928); *Theories of Governmental Responsibility in Tort, id.* at 734.

[6] See Lloyd, *Municipal Tort Liability in New York, A Legislative Challenge*, 23 N.Y.U.L.Q. REV. 278 (1948). "The first suggestiion of a distinction between governmental and proprietary functions occurred in *Bailey v. The Mayor of New York.*" *Id.* at 279-80. Speaking of the distinction, the court said:

> "But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company." Bailey v. Mayor of the City of New York, 3 Hill 531, 539 (N.Y. Sup. Ct. 1842).

[7] See PROSSER, TORTS 775-76 (2d ed. 1955).

[8] N.Y. Sess. Laws 1920, ch. 922.

[9] N.Y. Sess. Laws 1920, ch. 922, § 12.

264 of the Code of Civil Procedure.[10] But in *Smith v. New York*[11] the Court of Appeals held that, while section 264 was a waiver of the state's immunity from suit, it was not a consent to liability by the state.[12] Nine years later the effect of this decision was overcome by the enactment of section 12-a of the Court of Claims Act:

> The state hereby waives its immunity from liability for the torts of its officers and employees and consents to have its liability for such torts determined in accordance with the same rules of law as apply to an action in the supreme court against an individual or a corporation, and the state hereby assumes liability for such acts, and jurisdiction is hereby conferred upon the court of claims to hear and determine all claims against the state to recover damages for injuries to property or for personal injury caused by the misfeasance or negligence of the officers or employees of the state while acting as such officer or employee.[13]

This wording left little room for doubt; liability was assumed. The section was applied to the county in *Holmes v. County of Erie*,[14] to the municipal corporation in *Bernardine v. City of New York*,[15] and to the state institutions in *Bloom v. Jewish Bd. of Guardians*.[16] But there still were difficulties, as exemplified in subsequent decisions relating to the police department, wherein was developed a distinction between the commission of, and the omission of an act that is part of the governmental function.[17]

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[10] When the Court of Claims Act of 1920 was passed, it included, in § 12, the identical wording then in existence in § 264 of the Code of Civil Procedure. See, *e.g.*, Arnold v. New York, 163 App. Div. 253, 148 N.Y. Supp. 479 (3d Dep't 1914); Burke v. New York, 64 Misc. 558, 119 N.Y. Supp. 1089 (Ct. Cl. 1909).

[11] 227 N.Y. 405, 125 N.E. 841 (1920).

[12] Smith v. New York, 227 N.Y. 405, 409, 125 N.E. 841, 842 (1920).

[13] N.Y. Sess. Laws 1929, ch. 467, § 12-a.

[14] 266 App. Div. 220, 42 N.Y.S.2d 243 (4th Dep't 1943), *aff'd mem.*, 291 N.Y. 798, 53 N.E.2d 243 (1944). "When the State waived immunity and assumed liability, the immunity of its civil division, the county, vanished also." *Id.* at 222, 42 N.Y.S.2d at 245.

[15] 294 N.Y. 361, 62 N.E.2d 604 (1945). "None of the civil divisions of the State—its counties, cities, towns and villages—has any independent sovereignty. . . ." *Id.* at 365, 62 N.E.2d at 605.

[16] 286 N.Y. 349, 36 N.E.2d 617 (1941). "The same principles of justice and equity which constrained the State to reject the immunity conceded to it as sovereign, dictates the conclusion that the derivative immunity of the agent does not survive when the immunity of the principal is destroyed." *Id.* at 352, 36 N.E.2d at 618.

[17] Some of the cases where the liability has been found in the action or commission area are: McCrink v. City of New York, 296 N.Y. 99, 71 N.E.2d 419 (1947), which reversed the lower court's dismissal where the plaintiff's theory of negligence was based on the act of the Police Commissioner in permitting an officer with known dangerous propensities to remain on the force, which resulted in injury to plaintiff when these propensities were actualized; Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945), where the act of negligence was the mishandling of a horse by a mounted policeman which caused the injury to the plaintiff; McCarthy v.

The Murrain, Landby and King Decisions

In *Murrain v. Wilson Line, Inc.*,[18] the defendant Wilson Line leased its excursion vessel for a lodge outing. The defendant City of New York, issued a permit for the use of a public pier and arranged for two patrolmen to be on the pier. When it appeared that bogus tickets had been circulated, the lessee closed all but one gate leading onto the pier. Signs of impending violence brought seven more policemen to the scene, but they were not able to restrain the mob. Two people were killed and others injured. An action was brought against the defendants upon the theory of negligence. Wilson Line's motion for a directed verdict was granted. The trial court denied the city's motion for dismissal and judgment was subsequently given against the city on the ground that it had neglected to provide adequate police protection. The appellate division reversed, dismissing the complaint as to the city on the ground that there was no duty of protection owed to the plaintiffs. The court said:

> The claim is that the police force failed to take the affirmative action which was necessary to avoid injury to members of the public, which is simply a failure of police protection. Such failure is not a basis of civil liability to individuals.[19]

As to the effect of section 8 (formerly section 12-a) of the Court of Claims Act the court said:

> The waiver simply subjects the State and its subdivisions to the same liability as individuals or corporations for the same acts. It does not create liability on the part of a city for failure to exercise a governmental function.[20]

In *Landby v. New York, N.H. & H.R.R.*,[21] a wrongful death action, the plaintiff's testator, while passing through the property of the defendant railroad, was killed in the course of attempting to remove a wire which was hanging from a high tension wire. The

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City of Saratoga Springs, 269 App. Div. 469, 56 N.Y.S.2d 600 (3d Dep't 1945), where the plaintiff was injured through the willful assault of a member of the defendant's police force; Collins v. City of New York, 11 Misc. 2d 76, 171 N.Y.S.2d 710 (Sup. Ct. 1958), where the plaintiff was injured through the negligent handling of a revolver by a city policeman; Joy v. City of Jamestown, 207 Misc. 873, 141 N.Y.S.2d 325 (Sup. Ct. 1955), where plaintiff was injured through a traffic officer's negligent directing of a bus to proceed across a crosswalk where plaintiff was walking.

[18] 270 App. Div. 372, 59 N.Y.S.2d 750 (1st Dep't 1946), *aff'd mem.*, 296 N.Y. 845, 72 N.E.2d 29 (1947).

[19] Murrain v. Wilson Line, Inc., 270 App. Div. 372, 377, 59 N.Y.S.2d 750, 754 (1st Dep't 1946).

[20] *Ibid.*

[21] 199 Misc. 73, 105 N.Y.S.2d 836 (Sup. Ct. 1950), *aff'd mem.*, 278 App. Div. 965, 105 N.Y.S.2d 839 (2d Dep't), *appeal denied*, 303 N.Y. 1014, 102 N.E.2d 840 (1951).

Village of Mamaroneck was made a party defendant, the theory of liability being that although it had actual knowledge of the circumstances, it left the dangerous condition unguarded, thereby violating its duty to protect the public. In granting this defendant's motion to dismiss, the court said:

> The specification of negligence against the municipality was strictly one of omission. Its negligence, if any, was merely passive—a failure to perform a governmental function. As indicated under the authorities cited, there appears to be no basis for imposing liability upon the Village of Mamaroneck.[22]

In 1956, the failure to perform a governmental function was the issue in *King v. City of New York*.[23] The plaintiff was injured by pickets of the codefendant union. Previous violence at the same location had been brought to the attention of the city. The basis of the negligence action against the city was the failure to provide adequate police protection. A motion to dismiss was granted, the court citing the *Murrain, Landby* and *Schuster*[24] cases as authority for nonliability for failure to perform a governmental duty. Concerning section 435 of the New York City Charter, which enumerates the duties of the police department, the court quoted a related passage from *Steitz v. City of Beacon*:[25]

> Such enactments do not import intention to protect the interests of any individual except as they secure to all members of the community the enjoyment of rights and privileges to which they are entitled only as members of the public. *Neglect* in the performance of such requirements creates no civil liability to individuals.[26]

These three cases suffice to indicate that there had developed a distinction under which some part of sovereign immunity had survived the waiver given by the Court of Claims Act.

The Focal Point—Schuster v. City of New York

The above distinction had been firmly imbedded in the law when young Arnold Schuster was mortally wounded on a street in Brooklyn, New York.

"Willie the Actor" Sutton, an infamous bankrobber and escaped felon, was wanted by the Federal Bureau of Investigation, the New York City Police Department and other law enforcement agencies. On February 18, 1952, Sutton was recognized by Schuster in

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[22] Landby v. New York, N.H. & H.R.R., 199 Misc. 73, 76, 105 N.Y.S.2d 836, 839 (Sup. Ct. 1950).

[23] 3 Misc. 2d 241, 152 N.Y.S.2d 110 (Sup. Ct. 1956).

[24] Schuster v. City of New York, 286 App. Div. 389, 143 N.Y.S.2d 778 (2d Dep't 1955) (per curiam). This appellate division decision in the *Schuster* case is discussed at length *infra*.

[25] 295 N.Y. 51, 56, 64 N.E.2d 704, 706 (1945).

[26] King v. City of New York, 3 Misc. 2d 241, 245, 152 N.Y.S.2d 110, 114 (Sup. Ct. 1956). (Emphasis added.)

Brooklyn and this knowledge was conveyed by Schuster to certain patrolmen, employees of the police department. Sutton was duly apprehended and the part played by Schuster in the arrest was acknowledged by the police department. After this, Schuster and his immediate family received "threatening and menacing anonymous letters, messages, notes, missives and telephone calls," as a result of which they were placed under limited police protection. But this protection was subsequently discontinued despite the continuance of the threats and requests by Schuster for protection. He was told that the threats were from "cranks and crackpots and were child's stuff." Paragraph 23 of the complaint alleged:

> On or about the 8th day of March, 1952, at or about 9:10 P.M. while plaintiff's intestate [Arnold Schuster] was lawfully and rightfully at said 45th Street near the neighborhood of 9th Avenue in the Borough of Brooklyn, City and State of New York, by reason of the negligence of the defendant . . . plaintiff's intestate was caused, permitted and allowed to be shot with a lethal weapon, to be battered by four bullets and to sustain severe injuries [of which he soon died].[27]

An action was brought against the City of New York by Max Schuster, father and administrator of Arnold. The complaint set forth four causes of action.[28] The defendant city entered a motion to dismiss the complaint for failure to state a cause of action.[29] This motion was granted by the trial court upon the ground that the municipality was not liable for its failure to perform a governmental function, the court citing the *Murrain*, *Landby* and *Steitz* cases. The court also pointed out that it had not been established that defendant owed a duty to the plaintiff's intestate. Since the duty of police protection was considered by the court to be a general duty owed to the public, it concludes that it did not inure to the benefit of a private individual.[30] Also discussed and dismissed as not applicable was section 1848 of the New York Penal Law.[31]

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[27] Record, pp. 15-16.

[28] Record, pp. 10-22. The four causes of action were: (1) wrongful death sounding in negligence—damages sought—$500,000; (2) conscious pain and suffering due to the negligence—damages sought—$25,000; (3) wrongful death sounding in fraud and deceit—damages sought—$500,000; (4) conscious pain and suffering due to the fraud and deceit—damages sought—$25,000. The observations of this article will be limited to the theory of negligence, which was the theory upheld by the Court of Appeals.

[29] The motion to dismiss was pursuant to rule 106 of the Rules of Civil Practice, which states in part that "after the service of the complaint, the defendant may serve notice of motion for judgment dismissing the complaint, or one or more causes of action stated therein, where it appears on the face thereof: . . . . 4. That the complaint does not state facts sufficient to constitute a cause of action. . . ."

[30] Schuster v. City of New York, 207 Misc. 1102, 121 N.Y.S.2d 735 (Sup. Ct. 1953).

[31] *Id.* at 1112-13, 121 N.Y.S.2d at 747. Section 1848 provides that if a citizen willfully neglects or refuses to obey when "commandeered" by an officer,

Upon appeal, the Appellate Division, Second Department, affirmed the decision upon two grounds. First, there is no duty of police protection owing to the private individual.[32] And second, assuming there was a duty owed, it extended only "against acts of violence by the criminal or his associates or agents or those who had made threats, *the identity of whom the police had knowledge or notice,* and which violence by such persons might reasonably have been anticipated." [33]

Justice Beldock, dissenting, prefaced his opinion with this observation:

> Whether for a negligent act of commission or omission the sovereign is now liable to any person who, as an individual, is entitled to the proper performance of the governmental function and who has been damaged by reason of the sovereign's careless action or nonaction.[34]

For him, the two vital questions were:

> (1) whether under the circumstances alleged in the complaint the city owed to plaintiff's intestate a duty of personal police protection against unknown potential assailants; and (2) if it did, whether its breach of that duty may be said to be the cause of his death.[35]

Justice Beldock found that under the circumstances of the case, there was a duty to protect the private individual and that knowledge of the identity of the would-be assailants was no condition precedent, for if that were so,

> the city's obligation would forever remain dormant; it would never come to life. No assailant, in advance of the attack, could be expected to divulge his identity. Consequently, such a condition, practically impossible of fulfilment, should not be allowed to vitiate the city's positive duty of protection.[36]

Upon a further appeal to the Court of Appeals the judgment in favor of the city was reversed, and the complaint ruled to be legally sufficient.[37] The court found that the defendant had a duty to protect the plaintiff's intestate. This duty rested on three bases. *First,* that the private citizen has a duty, be it legal or moral, to

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he will be guilty of a misdemeanor. If the citizen obeys and is injured or killed he has a cause of action for his damages against the municipality.

[32] Schuster v. City of New York, 286 App. Div. 389, 143 N.Y.S.2d 778 (2d Dep't 1955) (per curiam).

[33] *Id.* at 391, 143 N.Y.S.2d at 780-81. (Emphasis added.)

[34] *Id.* at 391, 143 N.Y.S.2d at 781 (dissenting opinion).

[35] Schuster v. City of New York, 286 App. Div. 389, 392, 143 N.Y.S.2d 778, 781-82 (2d Dep't 1955) (dissenting opinion).

[36] *Id.* at 395, 143 N.Y.S.2d at 784.

[37] Although there are seven judges on the New York Court of Appeals, Judge Burke had disqualified himself because, at the time the case first arose, he was Corporation Counsel for the city. When the court split, 3-3, Justice McNally was called from the Appellate Division, First Department, and cast his vote, in a concurring opinion, for reversal.

aid the proper authorities in the cause of justice. Once this duty has been fulfilled, it "begets an answering duty on the part of government, under the circumstances of contemporary life, reasonably to protect those who have come to its assistance in this manner." [38] *Second,* "Schuster's case is within the spirit if not the coverage of section 1848 of the Penal Law," [39] which provides that a person who is commanded to aid an officer must do so under pain of being guilty of a misdemeanor. Where the command is obeyed and results in injury to the person or property of the one obeying, such person shall have a cause of action to recover the amount of such damage against the municipal corporation. *Third,* the finding of a duty would tend to promote the co-operation of the citizenry with law-enforcement agencies.[40]

Three dissenting judges found no duty. Chief Judge Conway saw in section 435 of the New York City Charter a general duty to the public, but not one that inures to the benefit of a private individual, and he was "unable to find any warrant in common law for the imposition of such a special duty." [41] The Chief Judge argued that the offer of a reward to the public at large was the appropriate means to encourage co-operation between the citizen and the police, rather than the imposition of a legal duty to protect the citizen.[42]

In answering the majority's suggested application of the spirit of section 1848, Judge Froessel wrote:

> That section sets the limit to which the Legislature has been willing to go in establishing liability against municipal corporations to compensate individuals who aid the police. One can only conclude therefrom that the Legislature, as a matter of public policy, does not wish to extend liability to situations not embraced within the statute, for, as we said in the Steitz case . . . ,
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> "An intention to impose upon the city the crushing burden of such an obligation [liability to individual citizens for inadequate fire protection] should not be imputed to the Legislature in the absence of language clearly designed to have that effect." [43]

Effect of the Schuster Decision

"There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and nonfeasance," *i.e.,* between active misconduct working positive injury to others and passive inaction or failure to take steps to protect them

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[38] Schuster v. City of New York, 5 N.Y.2d 75, 81, 154 N.E.2d 534, 537, 180 N.Y.S.2d 265, 270 (1958).

[39] *Id.* at 86, 154 N.E.2d at 540, 180 N.Y.S.2d at 274.

[40] *Id.* at 80-81, 154 N.E.2d at 537, 180 N.Y.S.2d at 269.

[41] *Id.* at 92, 154 N.E.2d at 544, 180 N.Y.S.2d at 279 (dissenting opinion).

[42] *Id.* at 92-93, 154 N.E.2d at 544, 180 N.Y.S.2d at 279-80 (dissenting opinion).

[43] *Id.* at 100, 154 N.E.2d at 548-49, 180 N.Y.S.2d at 285-86 (dissenting opinion).

from harm.[44] Dean Prosser points out that an affirmative duty to act is "imposed where the relation is of some actual or potential economic advantage to the defendant, and the expected benefit justifies the requirement of special obligations." [45] Where this affirmative duty to act is imposed and there is a failure to act, the party under that duty is, of course, liable for such failure.[46]

Applying Prosser's words to the facts of this case, can we not impose upon the City of New York an affirmative duty to act? Has not the city received an "actual or potential economic advantage" and does not this benefit received justify the special obligation? It would appear that the answer to both questions is "Yes." Thus the majority decision in the *Schuster* case seems correct as a matter of general theory. Moreover, from the policy standpoint, it will tend to encourage rather than discourage co-operation by the private citizen with the authorities.[47]

The majority opinion in the *Schuster* case referred to the argument that imposing liability would result in "dire financial consequences to municipalities." [48] This fear of raiding the public treasury was one of the bases underlying the doctrine of sovereign immunity.[49] Undeniably it is a factor to be weighed in the balance but it would not seem that financial considerations alone should be permitted to absolve a municipality where its action or inaction has caused injury.

In 1929 the legislature expressed its will and the will of the people of the state by the enactment of section 12-a of the Court of Claims Act.[50] If we assume that the words of this section mean what they say, *i.e.,* that the sovereign (here the municipal corporation) is to be treated in the same fashion as the individual or the private corporation, then where there is found an affirmative duty to act [51] and a failure to act which is the proximate cause of the injury, there should be liability.

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[44] See Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability,* 56 U. PA. L. REV. 217, 219 (1908). That this distinction has its shadowy area, see Professor Bohlen's now classic example, *id.* at 220 n.6.

[45] PROSSER, TORTS 183 (2d ed. 1955). See McNiece & Thornton, *Affirmative Duties in Tort,* 58 YALE L.J. 1272 (1949). Where there is no relationship between the parties upon which to predicate this duty of affirmative action, then there is no liability in law for failure to act. See Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability,* 56 U. PA L. REV. 217, 218 n.3 (1908).

[46] See 58 W. Va. L. REV. 308 (1956).

[47] *Ibid.*

[48] Schuster v. City of New York, 5 N.Y.2d 75, 80, 154 N.E.2d 534, 537, 180 N.Y.S.2d 265, 269 (1958).

[49] See note 3 *supra* and accompanying text.

[50] See note 12 *supra* and accompanying text.

[51] This affirmative duty to act need not be prescribed by statute; it may be found in common law and imposed because of the relationship between the parties. That the duty found owing to plaintiff's intestate was just such a common-law duty, see Schuster v. City of New York, 5 N.Y.2d 75, 83, 154 N.E.2d 534, 539, 180 N.Y.S.2d 265, 271-72 (1958).

Reduced to essentials, the *Schuster* case presents a situation where the public at large received an important benefit from an act which ultimately cost a citizen his life. It seems entirely just, therefore, that the public should reimburse the family of the citizen for the economic detriment which it sustained as a result of that loss of life.

RESTRICTIVE LICENSING OF PATENTS AND TRADE SECRETS UNDER THE ANTITRUST LAWS

The ideal of free enterprise has been ingrained in the economic fiber of America since its birth as a nation. This concept has always included the element of competition. When the competitive factor is lacking, abuses of the free enterprise system arise: the power to combine increases while the power to compete decreases. Combinations and monopolies are often prejudicial to the public interest because they leave the consumer at the mercy of unscrupulous profiteers. To guard against this, monopolies and combinations in restraint of trade have been declared illegal under the antitrust laws.[1]

But not every monopoly will automatically be condemned. Under the patent laws the holder of a protected property acquires a right to exclude others from making or selling his patented item [2] without his express consent.[3] He has a practical monopoly on his invention.

In like manner, some trade restraints are lawful. The Supreme Court, in *Standard Oil Co. v. United States,*[4] formulated the "Rule of Reason" which declares that only *unreasonable* restraints of trade are prohibited.[5] The difficulty lies in determining whether a given course of action falls within the prohibition of the antitrust laws or is saved because, though it is to some extent a restraint of trade, it is a reasonable one. The problem under consideration here is the reasonableness of certain common restrictions as to resale price and territorial limitations which are imposed on the recipient of a license involving patents or trade secrets. To state the question another way: May the licensor of a patent fix the price at which his licensee may sell the finished product, or the licensor of a trade secret delineate

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[1] See The Sherman Anti-Trust Act, 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1952); The Clayton Act, 38 Stat. 730 (1914), 15 U.S.C. §§ 12-27 (1952).
[2] 35 U.S.C. § 154 (1952).
[3] See Special Equip. Co. v. Coe, 324 U.S. 370, 378 (1945).
[4] 221 U.S. 1, 62 (1911).
[5] See BURNS, A STUDY OF THE ANTITRUST LAWS 7 (1958).