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Recent Cases

RECENT CASES

ELKINS v. UNITED STATES: AN EXTENSION OF THE FEDERAL RULE OF EXCLUSION

In a recent case, *Elkins v. United States*,[1] the Supreme Court of the United States enlarged the *federal rule of exclusion* for illegally obtained evidence. The case arose when Oregon state police searched the home of one Clark for the purpose of confiscating obscene motion pictures which they had reason to believe were on the premises. Instead of the obscene motion pictures the police found wiretap equipment and recordings which indicated that the equipment may have been used in violation of the state communications statute. After an indictment by a state grand jury, the local district court held that the evidence was illegally seized and granted defendant's motion to suppress it. The local district attorney challenged the power of the court to suppress evidence after an indictment was in. During subsequent state proceedings but prior to final state judicial determination, federal officials, acting under a federal search warrant, obtained the paraphernalia from the state officials. Immediately after the state dropped the case, federal officials indicted the defendant for the violation of and conspiracy to violate the Federal Communications Act.[2] Before trial in the United States District Court of Oregon, defendant moved to have the evidence excluded on the grounds that it was the product of an unreasonable search and seizure by state and federal officials. The district court denied the motion without determining the legality of the seizure by the state officials and held that, since federal agents had not participated in the search and had neither knowledge, nor information, nor suspicion that the search was being contemplated, the evidence was admissible. This decision was upheld by the Court of Appeals for the Ninth Circuit.[3] Upon appeal to the Supreme Court of the United States, this decision was reversed by a divided Court.[4] (Justices Frankfurter, Clark, Harlan and Whittaker dissenting.)

In reversing the court of appeals, the Supreme Court enlarged an evidentiary rule of law established almost fifty years ago in *Weeks v. United*

1. 80 Sup. Ct. 1437 (1960).
2. 47 U.S.C. §§ 501, 605 (1954) (violation of the Communications Act); 18 U.S.C. § 371 (1948) (conspiracy to commit any offense against the United States).
3. 266 F.2d 588 (9th Cir. 1959).
4. Elkins v. United States, 80 Sup. Ct. 1453; this dissenting opinion was also the dissent for Rios v. United States, 80 Sup. Ct. 1431 (1960).

States.[5] Though the rule excluding evidence which had been acquired through an illegal search and seizure had been discussed in the dictum of an earlier case,[6] it was not clearly established until the *Weeks* decision. In *Weeks,* it was held that the fourth amendment to the Federal Constitution should be enforced (against federal officials) by having evidence obtained in an illegal search and seizure excluded in a federal criminal prosecution. This doctrine became known as the *federal rule of exclusion.*[7]

This rule of exclusion as established by the *Weeks* case did not apply to state officials, for a second principle laid down was that the fourth amendment applied only to the federal government and its agencies. Hence, the federal courts did not have to take cognizance of the illegality of the search or seizure by state officials in a federal criminal prosecution. This gave rise to the "silver platter" doctrine,[8] whereby evidence illegally seized by state officials could be handed over on a "silver platter" for use in a federal criminal prosecution. However, two restrictions on this doctrine remained: federal agents could not participate in an illegal search[9] and state officials could not illegally search "solely on behalf" of the United States.[10] A breach of either of these restrictions constituted a violation of the fourth amendment and the exclusionary rule was applicable.

This was the law until 1960. However, the foundation for its abolition was established in 1949 in *Wolf v. Colorado.*[11] In that case, the Supreme Court of the United States construed the due process clause of the fourteenth amendment so that an illegal search and seizure by state officers was a violation of the Federal Constitution. The facts giving rise to the case occurred when local officials illegally seized two day-books from the offices of a local physician and used them as evidence in a state criminal prosecution for conspiracy to commit abortion. A conviction was obtained and subsequently was affirmed by the Colorado Supreme Court.[12] Upon appeal to

5. 232 U.S. 383 (1914).

6. Boyd v. United States, 116 U.S. 616 (1886).

7. Feldman v. United States, 322 U.S. 487 (1944); see also, McCORMICK, EVIDENCE, §§ 139 and 140 (1954).

8. The doctrine was so labeled in Lustig v. United States, 338 U.S. 74 at 79 (1949).

9. For varying degrees of participation see: Byars v. United States, 273 U.S. 28 (1927) (state and federal officials acting jointly); Gambino v. United States, 275 U.S. 310 (1927) (federal officials instigated search by tacit general agreement); Burdeau v. McDowell, 256 U.S. 465 (1921) (mere notorious practice of using evidence seized by others insufficient to render the evidence inadmissible).

10. In Gambino v. United States, *supra* note 9, state officials seized liquor from defendant's automobile and the prosecution sought to use this evidence. The Court held the evidence inadmissible since at the time of the search and seizure there was no indication that defendants were committing a state offense, therefore, the illegal search and seizure was conducted solely on behalf of the United States.

11. 338 U.S. 25 (1949).

12. Wolf v. People, 117 Colo. 279, 187 P.2d 926 (1947).

the Supreme Court of the United States, the issue presented for judicial determination was: Does the due process clause of the fourteenth amendment protect the individual from state action in the form of an illegal search and seizure? In answering in the affirmative, Justice Frankfurter, speaking for the majority of the Court said: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in the 'concept of ordered liberty' and as such enforceable against the states through the Due Process Clause."[13] In holding that the rights granted under the fourth amendment were in substance included in the fourteenth amendment, the Court by implication struck down the "silver platter" doctrine.

Since the "silver platter" doctrine rested upon the fact that the federal courts did not have to take cognizance of the illegality of searches and seizures by state officials, participation by federal officers was the crucial test applied to state-seized evidence in a federal criminal prosecution. Prior to the *Wolf* case, federal courts concerned themselves only with this participation—if federal agents had participated in the search, the next inquiry was to the legality of the search; but if federal agents had not participated in the search, the evidence was admissible. Under the *Wolf* decision, the legality of the state search and seizure became an imperative inquiry, for thereafter an illegal search and seizure was deemed violative of the fourteenth amendment. It became incumbent upon federal courts to consider the legality of any search and seizure which yielded evidence to be used in a federal criminal proceeding without regard to participation by federal officials. Since state-seized evidence could no longer be used in a federal criminal prosecution without judicial scrutiny, it would seem then, that the "silver platter" doctrine no longer existed. But only recently in the *Elkins* case, decided June 27, 1960, did the Court explicitly declare its non-existence. By so doing, the Court was faced with a problem: the admissibility of evidence in the federal courts seized in violation of the Federal Constitution by state officials. To be logically consistent there was only one solution to the problem before the Court—namely, to extend the rule excluding evidence illegally seized by federal officials to include evidence seized illegally by state officials.

The Court provided that state officials procuring evidence to be used in a federal criminal prosecution must adhere to the standard of conduct established for federal officials by the fourth amendment. To determine whether the standard has been met is a question which must be finally resolved by the federal courts. Hence, the federal courts "must make an independent

13. Wolf v. Colorado, 338 U.S. at 27.

inquiry [since] the test is one of federal law."[14] Recognizing the dangers and gravity of a rule that would exclude competent and relevant evidence of a crime, the Court stated the basis underlying the exclusionary rule: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[15] It appears that the primary aim of the Court is to deter police officials from unreasonably invading the privacy of individuals and thereby infringing upon the rights guaranteed by the Federal Constitution. With the incentive for illegal searches and seizures eliminated, overzealous state officials would find themselves wasting time and effort while acquiring incriminating evidence by an illegal search.

However, it must also be recognized that public opinion is an effective control on the conduct of local officials because the community will not tolerate oppressive acts. This is the regulatory function of public opinion referred to by Justice Frankfurter in *Wolf v. Colorado*.[16] Though this public opinion is effective in a given locale, it is doubtful whether it has much force at the federal level, for these prosecutions are far removed from the attention of the general public. In addition, any misconduct in obtaining evidence for a federal criminal prosecution is unlikely to be widely noticed. It should also be recognized that state officials are presented with a very limited number of opportunities to acquire evidence for use in a federal criminal prosecution. This fact limits the opportunities for the general public to exert any regulatory pressure on state officials who abuse their authority. Therefore, control by the federal judiciary seems to be the only effective means of deterring illegal searches and seizures on the federal court level.

Moreover, the Court recognized that the exclusionary rule prior to the *Elkins* case tended to discourage free and open cooperation between federal and state law enforcement agencies. Rather than risk being declared "participants" and having incriminating evidence excluded, federal agents found it advantageous to withdraw from open alliances with state agencies. Actually, the rule, through the "silver platter" doctrine, operated as an inducement for subterfuge by overzealous federal officials to obscure their participation in questionable searches and seizures. For it would be a relatively simple matter, if they were so inclined, for federal agents to make clandestine agreements with state officials to procure illegally-seized evidence for use in a federal criminal prosecution. The Court must have also realized the extreme burden of showing "participation" when, in fact, the officials had engaged in

14. Elkins v. United States, 80 Sup. Ct. at 1447.

15. *Id.* at 1444.

16. One of the reasons given for not requiring the adoption of the exclusionary rule by states in order to assure due process of law was that public opinion is an effective control at this level. See Wolf v. Colorado, *supra* note 11, at 32.

subterfuge. The exclusionary rule, as extended by *Elkins,* removes this impediment and invites forthright cooperation between the two agencies, for now participation is no longer an issue as previously indicated. Such open cooperation will result in the increased efforts by the two agencies to procure evidence without the taint of illegality and thereby accomplish the aim of the Court.

Commentators and legal scholars may argue the relative merits of the exclusionary rule,[17] but the position of the Court is very clear in that it refuses to become "accomplices in the willful disobedience of a constitution (it) is sworn to uphold"[18] by admitting into evidence the fruits of an illegal search and seizure. The dissenting opinion of the *Elkins* case stated the basic objection to the rule—"the underlying aim of judicial inquiry is ascertainable truth, everything rationally related to ascertaining truth is presumptively admissible."[19] The Court, while seeking just and expeditious fulfillment of criminal investigation and law enforcement, nevertheless refused to sacrifice basic human rights guaranteed by the Federal Constitution.

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17. 8 WIGMORE, EVIDENCE (3d ed. 1940), § 2184; ALLEN, *The Wolf Case: Search and Seizure, Federalism and the Civil Liberties,* 45 ILL. L. REV. 1, 14-25; Comment, *Judicial Control of Illegal Search and Seizure,* 58 YALE L.J. 144.

18. Elkins v. United States, *supra* note 14.

19. Elkins v. United States, 80 Sup. Ct. at 1454.

THE RELIGIOUS FACTOR IN ADOPTION PROCEEDINGS

When abandonment of a child by its parents is established, or absolute consent to adopt is given by them, what role should religion play in determining the suitability of the adopting parents? Should the religion of the adopting parents and the child always be identical? Or should other factors outweigh this under certain circumstances? Natural rights of the blood parents versus "the welfare of the child" is the crux of the problem. In an attempt to solve this problem, some states have enacted statutes which require the courts to consider the religious factor in adoption proceedings.[1] In 1953, Pennsylvania enacted a statute of this type, providing: "Whenever possible, the petitioners shall be of the same religious faith as the natural parents of the child to be adopted."[2]

Stone Adoption Case[3] was the first Pennsylvania decision to construe this section of the statute. In this case baby girl Stone had been reared for over two years by petitioners with much "love and care." The conflict arose from the fact that the petitioners were of the Jewish faith and the natural mother was Protestant. Upon appeal from the original proceedings, in which adoption was denied because consent to adopt had not been given and abandonment was not established,[4] the Pennsylvania Supreme Court found abandonment and remanded the case stating the religious factor had not been resolved.[5] Subsequently, adoption was granted on the ground that the two year period of togetherness, the "love and care" bestowed on the child during that time, and the financial means of petitioners outweighed the diversity of religion.

The courts have generally considered three norms in deciding whether or not to decree adoption in a particular case. Where abandonment of the child by its parents has been established, the parents' fundamental right to control their child's education is given effect only by providing that the child's religion is deemed to be that of the parent.[6] Another norm is that the decree of adoption should promote the best interests of the child with

1. DEL. LAWS 1951, c. 134, § 3; R.I. LAWS 1944, c. 1441, § 26 as amended, R.I. LAWS 1946, c. 1772, § 1; N.Y. SOC. WEL. LAW § 373 (1924); MO. REV. STAT. § 392 (1939); PA. STAT. ANN. tit. 1, § 1 (1953); ILL. REV. STAT. c. 4, § 42 (1953).

2. PA. STAT. ANN. tit. 1, § 1 (1953).

3. 57 Lancaster L. Rev. 51 (Pa. 1960).

4. Abandonment is an ultimate conclusion of fact; it is conduct on the part of the parent evidencing a settled purpose of relinquishing parental claim to the child and of not performing parental duties for a period of at least six months. PA. STAT. ANN. tit. 1, § 1 *et seq.* (1953).

5. Stone Adoption Case, 398 Pa. 190, 156 A.2d 808 (1959). The court also indicated that the abandonment period could only be broken by the bringing of a habeas corpus action.

6. Matter of Santos, 278 App. Div. 373, 105 N.Y.S.2d 716 (1951); discussed in 65 HARV. L. REV. 694 (1952) and 54 COL. L. REV. 376, 378 (1954).

the religion merely being one factor in arriving at a final decision. The third basic norm is that the principle of religious freedom prevents the courts, as political organs of the state, from heeding religious differences. It is by a judicial balancing of these norms, in accordance with the particular facts of a given case, that the courts have sought to solve this problem.[7]

Other courts have faced the same problem as the lower court in the *Stone* case when construing comparable adoption statutes. An Illinois court, in construing a statute similar to the Pennsylvania statute, reached the same decision in *Cooper v. Hinrick*[8] as the court did in the *Stone* case. As the basis for its decision, the court stated: "the polestar . . . has always been the welfare and best interests of the child . . . [and] identity of religion between the child and the adoptive parents is a significant and desirable but not an exclusive factor to be considered by the court in the exercise of its discretion."[9] However, a Massachusetts statute, similar to those of Pennsylvania and Illinois except where it provides that "whenever practicable [the adoption] *must* be decreed,"[10] has been interpreted as being mandatory.[11] (Emphasis added.) The court gave two basic reasons for its decision:

(1) Even though the mother consented to placing the children in a Jewish home and having them reared in the Jewish faith, the statute contemplates the welfare of the children after adoption and therefore the *best interests* of the children are determinative.

(2) "There are . . . many Catholic couples of fine family life and excellent reputation who have filed applications . . . for the purpose of adopting Catholic children of the type of the twins, and are able to provide the twins with a material status equivalent to or better than that of petitioners. . . ."[12] Hence, it can be stated that the statutory language will relegate the importance of religion in an adoption decree.

The efficacy of such a decree must nevertheless be tested from the viewpoint of the child, the natural parents, and religion. Most courts would probably agree that the best interests of the child should be paramount in making the award. In this respect the disagreement is not over the preferable result, but rather in determining how "the best interests of the child" is to be interpreted and in ascertaining how to best realize this objective.

Although the law must ignore the possibility that one religion rather

7. See 54 COL. L. REV. 376, 377 (1954).

8. 10 Ill. 2d 269, 140 N.E.2d 293 (1957) *discussing* ILL. REV. STAT., ch. 4, § 4-2 (1953).

9. Cooper v. Hinricks, 10 Ill. 2d 269, —, 140 N.E.2d 293, 297 (1957).

10. MASS. LAWS ANN. c. 210, § 5B (1950).

11. Petitions of Goldman, 331 Mass. 647, 121 N.E.2d 843 (1954).

12. Id. at —, 121 N.E.2d at 844-845. The New York position tends toward that taken by Massachusetts: Matter of Santos, *supra* note 6; *In re* Maxwell's Adoption, 4 N.Y.2d 429, 176 N.Y.S.2d 281, 151 N.E.2d 848 (1958).

than another may better further the spiritual salvation of the child,[13] the child's psychological make-up is deeply affected by its religion.[14] Hence, the "best interests" of the child are very much affected by the religious factor unless it can be said that it would not be psychologically detrimental for the child to be reared in a new religion or in none at all.[15] Indeed, the probability of serious mental disturbance might require temporary placement of the child in an institution of his religion rather than with a family of a different religion.[16] Of course, the age of the child at the time of this change in environment is material.

Another consideration for testing the efficacy of the decree is the parental right theory. Should this theory be strictly applied to the point of excluding adoptions by those of a different religion from that of the child? But is it not always best for the child to be trained in the religion of his natural parents? If we answer "no" to the latter question, should we then distinguish between those children formally inducted into a religion, as in baptism, and those not so inducted? A problem exists if baptism is made determinative of a child's faith. Emphasis upon this factor might tend to favor those religions in which faith is determined by baptism as compared to those who view a child's faith as purely derivative until the child is able to understand and accept church doctrines.[17] Perhaps one might see as the solution a conditioned decree requiring the adopting parents to rear the child in his faith rather than their own.[18] But this result does not seem likely; and, if it were attempted, the training would not be as adequate as that received from "parents" of the same religious faith. As a result, psychological problems might also be presented here.

If we now concede that, in some cases, the temporal well-being should outweigh the religious factor, of what must this "well-being" consist? In several cases the child has been in the home of petitioners for one, two or three years prior to the decree,[19] which contributes to the "love and affection" as mentioned in the *Stone* case.[20] There may also be times when other qualified families of the same religious background are not available. It is sug-

13. *In re Doyle,* 16 Mo. App. 159 (1884).

14. *Religion and Custody,* 95 SOL. J. 325 (1951).

15. See: *In re* Waite, 190 Iowa 182, 187, 180 N.W. 159, 160 (1920); Leinke N. Guthmann, 105 Neb. 251, 253, 181 N.W. 132 (1920).

16. Hernandez N. Thomas, 50 Fla. 522, 39 So. 641 (1905); *In re* Cunningham, 61 N.J. Eq. 454, 48 Atl. 391 (Ch. 1901).

17. See 65 HARV. L. REV. 694 (1952).

18. *E.g.* Lemke N. Guthmann, 105 Neb. 251, 181 N.W. 132 (1920); *cf.* Guardianship of Bynum, 72 Cal. App. 2d 120, 164 P.2d 25 (1945). But see *In re* Flynn, 87 N.J. Eq. 413, 423, 100 Atl. 861, 865 (Ch. 1917) questioning a court's power to condition decrees of custody.

19. Stone Adoption Case, *supra* note 3; Cooper v. Hinricks, *supra* note 9; *In re* Maxwell's Adoption, *supra* note 12.

20. 57 Lancaster L. Rev. 51 (Pa. 1960).

gested, under these circumstances, that the *Stone* case represents an appropriate disposition. However, in those cases where a family of the same religion is available, the "well being" of a child would seem to require that the religious factor outweigh the circumstances giving rise to "love and affection."

Beyond the psychological and other problems already discussed, there is a constitutional issue facing the statutory solutions. It was mentioned in a Massachusetts case when the petitioners contended that the statute was unconstitutional as a law "respecting an establishment of religion, or prohibiting the free exercise thereof," contrary to the first amendment to the Constitution of the United States.[21] However, this contention was rejected by the Massachusetts court[22] as was a petition to the United States Supreme Court for a writ of certiorari.[23] This summary decision appears to have foreclosed the possibility that the contention urged by petitioners will be accepted by the United States Supreme Court in the immediate future. In view of the *Stone* case,[24] is the Pennsylvania statute unconstitutional as evidencing undue state support of religion? Or does the fact that the statute is discretionary on this point remove this objection because consideration of the religious factor is deemed to be an appropriate government recognition of religion? At present the latter must be answered in the affirmative.

Consequently, the Pennsylvania courts are to be confronted in the future with the seemingly simple norms and tests already discussed while at the same time trying to use them to reach the most just result in the particular case. Some attempt to achieve predictability in the law of this area must be made even though one might be forced to adopt the mandatory Massachusetts view, which may perhaps be the best solution to the problem. The religion of a child of tender years should be preserved as long as a family of adequate temporal means, of the same religion, is ready and willing to adopt the child.

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21. Petitions of Goldman, *supra* note 11.
22. *Ibid.*
23. 348 U.S. 942 (1954).
24. 57 Lancaster L. Rev. 51 (Pa. 1960).

WARRANTY LIABILITY OF A MANUFACTURER IN NEW JERSEY

In *Henningsen v. Bloomfield Motors, Inc.*,[1] the New Jersey Supreme Court has dealt what appears to be a crippling blow to the common law requirement of privity of contract with respect to potentially dangerous instrumentalities, thereby removing the manufacturer from his lofty pedestal of immunity from warranty liability.

Although privity is still a requirement in the large majority of jurisdictions when basing liability upon a warranty,[2] the modern trend is away from a strict adherence to this doctrine.[3] The landmark case of *MacPherson v. Buick Motor Co.*[4] seriously threatened the efficacy of the privity rule when New York's highest court held that an injured buyer could sue a manufacturer on a negligence theory in the absence of privity of contract. More recently, many courts, dictated by the demands of public policy, have held that cases involving food commodities which the retailer cannot reasonably inspect need not comply with the privity requirement when asserting liability under the warranty doctrine.[5] In fact, this limited field is now recognized as an exception to the general rule.[6] A small minority of jurisdictions, sensing the illogical distinction between the food cases and those of certain potentially dangerous commodities, have applied the reasoning of the food cases to other areas.[7] Among these minority decisions, the *Henningsen* case must be recognized as revolutionary for its powerful reasoning and for the mass of litigation which it forecasts for one of our largest industries.

In the *Henningsen* case the action was brought by the purchaser of an automobile and his wife against the manufacturer of the vehicle and the dealer for injuries sustained by the wife while she was driving the allegedly defective automobile. The plaintiffs based their suit on the grounds of negli-

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1. 32 N.J. 358, 161 A.2d 69 (1960).

2. PROSSER, TORTS, § 84 (2d ed. 1955); 27 U. CIN. L. REV. 124 (1958). See, *e.g.*, Green v. Equitable Powder Mfg. Co., 94 F. Supp. 126 (W.D. Ark. 1950); Barni v. Kutner, 6 Del. 550, 7 A.2d 801 (1950); Prater v. Campbell, 110 Ky. L. Rep. 23, 60 S.W. 918 (1901); Poplar v. Hochschild, 180 Md. 389, 24 A.2d 783 (1942); Odom v. Ford Motor Co., 230 S.C. 320, 95 S.E.2d 601 (1956).

3. See 2 HARPER AND JAMES, TORTS, § 28.1 (1956); 13 U. MIAMI L. REV. 252 (1958).

4. 217 N.Y. 382, 111 N.E. 1050 (1916).

5. Davis v. VanCamp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920); Catani v. Swift & Co., 251 Pa. 52, 95 Atl. 931 (1915); Parks v. C. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914). See also Annot., 142 A.L.R. 1490, 1494-1495 (1943).

6. See 9 SYRACUSE L. REV. 326 (1958); 46 HARV. L. REV. 161 (1958); 31 TEMP. L.Q. 62 (1957).

7. Mannsz v. MacWhyte Co., 155 F.2d 445 (3d Cir. 1946) (defective rope); Divello v. Gardner Mach. Co., — Ohio —, 102 N.E.2d 289 (Ohio C.P. 1951) (defective grinding wheel); Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421, 37 A.L.R.2d 698 (Ct. App. 1953) (inflammable cowboy suit).

gence and implied warranty. The lower court held that there was not enough evidence to submit the negligence charge to the jury. Nevertheless, it allowed the jury to decide the question of whether or not there was an implied warranty. After a verdict for the plaintiffs, the manufacturer, Chrysler Corporation, and the dealer appealed. The matter was certified by the supreme court prior to consideration in the intermediate appellate division.

In affirming the verdict of the lower court, the New Jersey Supreme Court made significant rulings on two separate questions of law. The court held that neither Henningsen nor his wife would be precluded from warranty protection by the absence of privity with Chrysler Corporation. Secondly, a uniform warranty disclaimer clause, used successfully by automobile manufacturers, would not avoid the plaintiffs' count of implied warranty.

In holding that lack of privity does not preclude warranty relief in suits against automobile manufacturers, the New Jersey Court does not indulge in any of the legal fictions often employed by courts desirous of eluding the privity barrier.[8] Justice Francis, speaking for the court, stated that the complexity of the modern commercial world has given the manufacturer an all too powerful bargaining power over the buyer. Modern marketing methods have caused the disappearance of "face-to-face" bargaining, which was the sole type of sale when the doctrine of *caveat emptor* was popular,[9] and have brought about mass advertising which has caused the buyer to rely on the representations of a seller whom he never confronts.[10] Moreover, the court was strongly influenced by the fact that the manufacturer has been able to maintain an almost unassailable immunity by selling to a dealer, thus avoiding privity of contract with the ultimate consumer.[11] Finally, it was the apparent social need to protect the buyer that brought the New Jersey court to conclude:

> We see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile. The unwholesome beverage may bring illness to one person, the defective car, with its great potentiality for harm to the driver, occupants, and others, demands even less adherence to the narrow barrier of privity.[12]

The New Jersey court went even further in holding that the wife, in

8. In Coca Cola Bottling Wks. v. Lyons, 145 Miss. 876, 111 So. 305 (1927), the theory is advanced that the original warranty runs with the title as in a conveyance of land. In Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1943), the implied warranty was treated as an express warranty, thereby avoiding the privity requirement. In Welter v. Bowman Dairy Co., 318 Ill. App. 305, 47 N.E.2d 739 (App. Ct. 1933), the third party beneficiary thesis provides the basis for disregarding the lack of privity.

9. See 2 HARPER AND JAMES, TORTS, 28.1 (1956).

10. Henningsen v. Bloomfield Motors, Inc., 32 N.J. at —, 161 A.2d at 80.

11. *Id.* at —, 161 A.2d at 81.

12. *Id.* at —, 161 A.2d at 83.

no way connected with the sale, could sue under an implied warranty. In deducing that the manufacturer should reasonably expect others to drive the car, the court suggests that not only the owner's family but his friends as well should be protected by the implied warranty doctrine.[13]

Though the court's holding with regard to privity is indeed significant, the most difficult obstacle the New Jersey tribunal had to overcome in reaching its final decision was a disclaimer and limitation of warranty clause in the contract, which is used by almost all automobile manufacturers. The warranty clause provided that the manufacturer would replace any defective part if the buyer mailed the part prepaid to the manufacturer and examination by the latter showed to his satisfaction that the part was defective. This clause further provided for the exclusion "of all other obligations and liabilities on its part."[14] In an effort to avoid this very explicit provision, the New Jersey court utilizes the legal doctrines of strict construction of warranties against their maker and unconscionable contract provisions.[15] However, it is apparent that both of these tenets are ineffective in their application to the warranty clause in question because of its verbal clarity and bold-faced inclusion in the sales contract.[16] Actually, it is the abuse of the seller-manufacturer's superior bargaining power over the buyer, by giving the buyer only illusory warranty relief, that echoes throughout Justice Francis' opinion and leads the court to discount the warranty provision.[17] It is evident that even the court seems dissatisfied with its own legal arguments, when Justice Francis stated:

The task of the judiciary is to administer the spirit as well as the

13. *Id.* at —, 161 A.2d at 100. In the recent case of Faber v. Greswick, 32 N.J. 234, 156 A.2d 252 (1959), the New Jersey Supreme Court held that the wife of a lessee could recover for injuries from the lessor arising from a breach of a covenant to have the premises in good repair, although she was not a party to the lease.

14. *Id.* at —, 161 A.2d at 80.

15. *Id.* at —, 161 A.2d at 86-94.

16. The disclaimer clause was set out on the reverse side of the sales contract and contained 8½ inches of print which was divided into 10 paragraphs totaling 65 lines. Paragraph 7, which was the focal point of the case, reads as follows: "7. It is expressly agreed that there are no warranties, express or implied, made by either the dealer or manufacturer on the motor vehicle, chassis, of parts furnished hereunder except as follows. The manufacturer warrants each new motor vehicle (including original equipment placed thereon by the manufacturer except tires), chassis or parts manufactured by it to be free from defects in material or workmanship under normal use and service. Its obligation under this warranty being limited to making good at its factory any part thereof which shall, within ninety (90) days after delivery of such vehicle to the original purchaser or before such vehicle has been driven 4,000 miles, whichever event shall first occur, be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective; this warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities on its part, and it neither assumes nor authorizes any other person to assume for it any other liability in connection with the sale of its vehicles." *Id.* at —, 161 A.2d at 74.

17. *Id.* at —, 161 A.2d at 94.

> letter of the law. On issues such as the present one, part of the burden is to protect the ordinary man against the loss of important rights through, what, in effect, is the unilateral act of the manufacturer.[18]

Upon analysis, it is the strong public policy in favor of the buyer and a sweeping use of the court's broad discretion, not the technical legal arguments, that enable this highest New Jersey court to hold the disclaimer clause void.[19]

Finally, consideration must be given to the impact of this decision and the manner in which it drastically alters the position of the buyer and the seller. In his opinion, Justice Francis states that the reason for the trend towards a liberalization of the common law privity requirement is motivated in part by the desire "to ameliorate the harsh doctrine of *caveat emptor,* and in some measure to impose a reciprocal obligation on the seller to beware."[20] There can be no doubt that the *Henningsen* case has shifted a burden to the seller. But, could it not be possible that this liberal New Jersey court has tipped the scales so heavily against the manufacturer that the buyer need no longer beware and the manufacturer is *entirely* unprotected? Will there not follow a mass of litigation with the possibility of false or unfounded claims against which the manufacturer has inadequate defenses? On the other hand, is this rejection of the privity doctrine anything more than another example of a progressive court abolishing an old common law rule which has lost all of its original purpose in a changed society? Whatever the answers to these queries, there can be no doubt that the privity holding, coupled with the even more devastating voidance of the disclaimer clause, place the *Henningsen* case at the fore-front in the modern trend towards more protection for the buyer.

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18. *Ibid.*

19. The court states at 94-95; "Public policy is a term not easily defined. Its significance varies as the habits and needs of people may vary. It is not static and *the field of application* is an ever increasing one. A contract, or a particular provision therein, valid in one era may be wholly opposed to the public policy of another. . . . Courts keep in mind the principle that the best interests of society demand that people should not be unnecessarily restricted in their freedom to contract. *But they do not hesitate to declare void as against public policy contractual provisions which clearly tend to the injury of the public in some way.*" (Emphasis added.)

20. *Id.* at —, 161 A.2d at 77.