perhaps, the courts have never explicitly discussed the close interrelationship of the Stevinson, subrogation, and collateral-benefits rules.

Scholarly attempts to link the recent extensions of Lumley v. Gye with master-servant and consortium cases on the theory that each constitutes a significant inroad on the Stevinson doctrine cannot be supported. While the master-servant and consortium decisions are true exceptions to the Stevinson rule, each has an historical setting which divorces it from the stream of modern liability development. The recent decisions under Lumley v. Gye, while dispensing with the "intentional harm" requirement, have never been extended to encompass liability for merely negligent acts. The one case granting relief for "negligent" interference does so entirely without reference to these recent extensions.

Master-servant and consortium exceptions aside, all of the cases purportedly carving inroads into the Stevinson rule involve the requirement that the injured relationship be "particularly foreseeable." While the particular-general limitation is analytically nonsensical, it is explicable as a significant judicial attempt to grant recovery for third-party economic harm whenever the possibilities of unlimited liability are absent. This explanation also accords with the continued vitality of the master-servant and consortium cases. As yet, however, the courts have failed to appreciate the true basis for the particular-knowledge requirement and have made ignorance of other people's affairs, instead of the tortfeasor's degree of fault, the basis for imposing liability. But the Stevinson doctrine, in general, seems justified. The harshness that it has engendered could have been avoided had proper analysis guided its use.

THE MULTIEMPLOYER LOCKOUT

The NLRB and the courts in the Seventh and Ninth Circuits have sharply divided on the legality of a defensive multiemployer lockout conducted by unstruck employers in response to a strike against a single member of the employer group.1 In this context, the lockout involves not a permanent discharge but a temporary severance of employment until the strike has been lifted. Absent such

1 The defensive lockout should be distinguished from the so-called "bargaining lockout," which is designed to break a bargaining impasse independently of any union strike action. Management control over the terms of employment eliminates any real need for such a weapon, hence its infrequent use. However, Judge Lindley of the Seventh Circuit apparently believes in the legality of both the defensive and bargaining lockouts. See Morand Bros. Beverage Co. v. NLRB, 190 F. 2d 576 (C.A. 7th, 1951). For a discussion of both types of lockouts, see The Multi-Employer Lockout, 3 Utah L. Rev. 122, 128 (1952). In Continental Baking Co., NLRB Trial Examiner's Intermediate Report and Recommended Order IR-827, at p. 11 (1952), one NLRB Trial Examiner suggested a view favoring the legality of the defensive lockout but not the bargaining lockout. The Examiner, bound by the Board's decisions, declared the defensive lockout in that case unlawful, but added his thought that "the better view would be that an employer may resort to a lockout as a defensive measure after a strike is called, but if he does it beforehand he discriminates unlawfully against his employees. Preventative warfare would be barred to the employer as vitally affecting the right to strike which is guaranteed by the Act."
lockout power, the union's "chipping off" tactic\(^2\) compels the individual member of the employer association to grant the union's demands or to run the risk of a stoppage while his competitors continue to operate. Since the first settlement may set a pattern, the tactic also enables the union to place pressure on the entire association while only a small proportion of union members suffer the hardships of a strike. In *Morand Brothers Beverage Company*\(^3\) and *Davis Furniture Company*,\(^4\) the Board on remand flouted the clearly expressed view of both circuit courts and held the defensive lockout to be an unfair labor practice.\(^5\)

The Board's decisions are in accord with its steadfast refusal to permit any employer lockout which is prompted by bargaining considerations, as distinguished from strictly economic considerations, instances of the latter being the desire to avoid inventory spoilage\(^6\) or to cease generally unprofitable operations.\(^7\) The Board considers such economically motivated lockouts justified because they permit an employer to protect himself from business losses which he would suffer if a strike against him materialized suddenly. But the Board


\(^5\) In the Morand case, the Court of Appeals for the Seventh Circuit remanded for want of a clear and explicit finding on whether the employers' action was a lockout or a discharge. In so doing, the court agreed with the Board that a discharge would constitute an unfair labor practice, but thought the lockout unlawful. On remand, the Board found that the employers' action constituted a discharge and was thus unlawful. However, the Board then took the opportunity (over the protest of Chairman Herzog, who preferred to reserve his opinion on the legality of the lockout for the Davis case) to argue that the action would have been unlawful even if it were assumed to have been a lockout.

In the Davis case, the Court of Appeals for the Ninth Circuit remanded because it found insufficient evidence to sustain the Board's original finding that the employers had conducted their lockout in reprisal for the strike against their fellow-member. The Board was ordered to determine the legality of the lockout assuming no reprisal motive, but the court was clearly in favor of the defensive lockout. Nevertheless, the Board held the lockout unlawful, with Chairman Herzog this time writing a clear-cut dissenting opinion.

\(^6\) Duluth Bottling Ass'n, 48 N.L.R.B. 1335 (1943).

views the defensive lockout as a reprisal against the protected activity, viz., the strike against the single employer, designed "to interfere with, restrain, and coerce the [striking] employees in the exercise of their right to strike [because of the common union membership of the striking and locked out employees], and to discourage membership in the Union which called the strike" on the part of the locked out employees, thus violating sections 8(a)(1) and 8(a)(3) of the Act.

The Seventh and Ninth Circuits, on the other hand, have approved the defensive lockout on the ground that the unstruck association members "could quite properly view the strike ... as a strike which, though tactically against but one [association member], was, in the strategic sense, a strike against the entire membership of their Associations, aimed at compelling all of them ultimately to accept the contract terms demanded by the Union." The courts have also found support for their view in the language of the Taft-Hartley Act. In arguing for the existence of the lockout power as a corollary of the union's right to strike individual association members, Chief Judge Denman of the Ninth Circuit derived from section 8(d)(4) of the NLRA and from the legislative history of the Taft-Hartley Act a recognition by Congress of the legality of both the strike and lockout.

8 Davis Furniture Co., 2 CCH Lab. L. Rep. ¶ 11,812, 100 N.L.R.B. No. 158, at 5-6 (1952).
11 Morand Bros. Beverage Co. v. NLRB, 190 F. 2d 576, 582 (C.A. 7th, 1951). See also dissenting opinion of Member Reynolds in Morand Bros. Beverage Co., 91 N.L.R.B. 409, 421 et seq. (1950). Interestingly enough, Robert Denham, while General Counsel, expressed the similar opinion that "a strike against one or more of [those] who collectively make up the employer group becomes a strike against the entire organization and justifies all the members of the employer group in exercising their full economic force to counteract the economic force of the union represented by its strike call." 2 CCH Lab. L. Rep. ¶ 14,038 (1950).
12 National Labor Relations Act, § 8(d)(4), 61 Stat. 142 (1947), 29 U.S.C.A. § 158(d)(4) (Supp., 1951). The section provides a 60-day waiting period during which a party desiring modification or termination of a contract must continue in force the terms of the existing contract "without resorting to strike or lockout." To Judge Denman, the linking of strike and lockout implies, first, Congress' belief that they should be considered analogous and coexistent. The reference to lockout in this context, furthermore, must contemplate the otherwise legal use of the strategic lockout, rather than merely that of the economically motivated lockout, just as the provision must contemplate use of the economic strike. The term "strategic lockout" here includes both the bargaining lockout and the defensive lockout. Thus did Judge Denman derive from 8(d)(4) the argument that "Congress has recognized strikes and lockouts as correlative powers, to be employed by the adversaries in collective bargaining when an impasse in negotiations is reached." Leonard v. NLRB, 197 F. 2d 435, 441 (C.A. 9th, 1952).

In arguing for the correlative powers theory, Judge Lindley of the Seventh Circuit expressly went beyond the implications of 8(d)(4) to what the lockout "actually is," i.e., "the corollary of the right to strike." Morand Bros. Beverage Co. v. NLRB, 190 F. 2d 576, 582 (C.A. 7th, 1951).

13 See Leonard v. NLRB, 197 F. 2d 435, 439 ff. (C.A. 9th, 1952), and the various legislative materials and LMRA provisions cited therein.
The Board, however, has criticized the courts' correlative powers theory as having "a kind of superficial appeal, an aura of fairness," but being basically "untenable under Section 8(a)(3) and 8(a)(1) [and finding] no real support in Section 8(d)(4)." The Board pointed out that neither 8(a)(3) nor 8(a)(1) makes any distinction between a discharge, which the Seventh Circuit admitted would be an unfair labor practice, and a lockout, and argued that the 8(d)(4) correlation of strike and lockout is irrelevant, since that section is not concerned with the status of the strike or lockout but only with its existence. According to the Board, "the sole concern of Congress [in enacting 8(d)(4)] was to discourage the resort to selfhelp by both employees [sic] and unions during the sixty-day period and to induce them to bargain collectively during that period."

The language of the statute is not a touchstone for resolving the conflict between the courts and the Board. While it is true that 8(a)(3) and 8(a)(1) do not distinguish between a discharge and a lockout, neither do they distinguish between a discharge and the replacement of economic strikers by the individual employer. Yet the Supreme Court has recognized the employer's right to replace economic strikers, despite the fact that replacement minimizes the effectiveness of strike action and therefore "interferes," to use the language of section 8(a)(1), with the exercise by employees of a right protected by section 7. The Court's action grew out of a conviction that the employees' interest in concerted activity had to be qualified because of its clash with the employer's interest in continuing operations. The defensive lockout raises a similar problem—the accommodation of the employer's interest in preserving the integrity, unity and power of the employer group with the employees' interest in concerted activity, as well as the community interest in confining the scope of the dispute.

The Board's position rests on a conviction that a consequence of permitting the defensive lockout would be to increase industrial strife in the community by expanding a strike in one plant to inactivity in many. For the Court it may be answered that the existence of the lockout power would tend to deter the union from striking and provide an inducement to the settlement of differences through peaceful negotiation with the association. But this argument must be qualified because of the possibility that recognition of the lockout power would deter unions from entering into joint bargaining and induce unions already bar-

16 For a thorough analysis of the discharge-lockout and permanent-temporary severance distinctions, see Petro, The NLRB on Lockouts—I, 3 CCH Lab. L.J. 659 (1952).
gaining in such units to withdraw. Should such withdrawals take place, the lockout would, of course, no longer serve as a deterrent to strikes. It might also be argued that increased management power at the economic warfare stage would result in increased management intransigence at the bargaining table, leading to more unsatisfied union demands and providing a greater stimulus to strike than existed before. On the other hand, the ban on defensive lockouts might increase union intransigence and also tend to increase strife.

Perhaps these arguments may be resolved by a consideration of the policy of the Taft-Hartley Act and of the Board's sanctioning of multiemployer units. Although the multiemployer bargaining system is admittedly controversial,21 it may be argued that since the Board has sanctioned the creation of multiemploy-

20 The Board has thus far refused to pass directly upon the question of a union withdrawal power, though specifically asked to do so by one union in Continental Baking Co., 2 CCH Lab. L. Rep. ¶ 11,600, 99 N.L.R.B. No. 123 (1952). The union there had cited "the Board's alleged policy against permitting unions, although not employers, to sever from a multi-employer group the employees of a particular member of the group." See ibid., at 12. Member Styles, in a dissenting opinion, called upon his colleagues to decide the union withdrawal power question, and expressed himself as favoring such a power, equivalent to that allowed employers. See ibid., at 12 et seq. The Board has frequently permitted employers to withdraw from multi-employer bargaining relationships. See, e.g., Milk Dealers of Greater Cincinnati, 94 N.L.R.B. 23, 25 (1951); NLRB, 16th Annual Report 103-4 (1951). However, the Board has indicated that it may still consider appropriate a multiemployer bargaining unit, despite an employer's desire to withdraw from it, when the facts indicate that "adequate machinery exists for the conduct of multiple-employer bargaining." See, e.g., Waterfront Employers of the Pacific Coast, 71 N.L.R.B. 80, 111 (1946); NLRB, 12th Annual Report 21 (1947). The Board's closest approach to the question of a right of withdrawal for unions was its holding in Morand Bros. Beverage Co., 91 N.L.R.B. 409 (1950), that a single employer unit resulting from a union's seeking individual contracts after an impasse in joint negotiations could be considered appropriate. But the Seventh Circuit court, in its remanding opinion, did not go beyond approval of the union's submission of its proposed contract to individual employers, and specifically refused to endorse the Board's contention that once a joint bargaining impasse had been reached, the union was free to disregard the multiemployer unit and fashion a new bargaining unit. See Morand Bros. Beverage Co. v. NLRB, 190 F. 2d 576, 582 (C.A. 7th, 1951). The court did not, of course, find that the union "withdrawal" constituted such a formal return to individual bargaining as to preclude the employers' use of a collective defensive lockout.

Styles' argument for a union withdrawal power is that section 9(b) of the Act, 61 Stat. 143 (1947), 29 U.S.C.A. § 159(b) (Supp., 1951), does not authorize the creation of multiemployer bargaining units and that the basis of such units must therefore be the consent of both parties. But see, e.g., Waterfront Employers of the Pacific Coast, 71 N.L.R.B. 80, 109-10 (1946), where, as in other cases, the Board indicated that it has the power under section 9(b) to certify multiemployer bargaining units as appropriate under the established interpretation of "employer unit" as including a multiemployer unit for the purposes of 9(b), i.e., the association is said to qualify as an "employer" within the meaning of section 2(2) of the Act. National Labor Relations Act, at § 2(2), as amended, 61 Stat. 137 (1947), 29 U.S.C.A. § 152(2) (Supp., 1951).

er bargaining units it should act to protect the integrity of the association and the system, and that this requires recognition of the lockout power. Joint bargaining involves a bargaining relationship between a single union and a single collective employer. Absent a lockout power, the employers will be unable to preserve the integrity of their association since the union will deliberately create an artificial bargaining impasse in order to pick off the employers one by one whenever such a move suits its purpose. It was apparently this consideration which prompted Chairman Herzog to change his position and to urge the legality of the defensive lockout. As Herzog pointed out in his dissenting opinion in the Davis case, it is the union which takes "the initiative in selecting the particular weapons of economic combat," and the employers, by means of the lockout, can only "defend themselves with commensurate weapons." Proscription of this defense will result in a multiemployer unit which the union can disregard at will, thus retaining the form but not the substance of multiemployer bargaining. On the other hand, sanction of the lockout power would not only be consistent with the Board's recognition of multiemployer units but would, insofar as it strengthens single employers, tend to offset labor's bargaining advantage and thus would be consistent with the overall objective of the Taft-Hartley Act.

THE NORRIS-LA GUARDIA ACT AND ERIE RAILROAD CO. V. TOMPKINS

An interesting but little explored aspect of the Norris-La Guardia Act is the possibility that certain of its provisions are unconstitutional under the doctrine of Erie R. Co. v. Tompkins. The stated object of the Erie decision was to prevent

22 It should be noted that the Board first sanctioned multiemployer bargaining units as early as 1938. See NLRB, 4th Annual Report 92–93 (1939), and cases cited ibid., in notes 82 and 83. Section 9(b), as originally enacted in the Wagner Act, 49 Stat. 453 (1935), 29 U.S.C.A. § 159(b) (1947), provided the basis for such determinations. The provision was re-enacted with only a few qualifications not pertinent to this point in the Taft-Hartley Act, 61 Stat. 143 (1947), 29 U.S.C.A. § 159(b) (Supp., 1951).

23 Chairman Herzog signed the Board's original decisions in both the Morand and Davis cases. When the Morand case was returned to the Board on remand from the Seventh Circuit court, however, Herzog refrained from joining in the Board's dictum on the illegality of the defensive lockout, though he signed the decision. See Morand Bros. Beverage Co., 2 CCH Lab. L. Rep. ¶11,646, 99 N.L.R.B. No. 55, at 16 n. 20 (1952). When the Davis case was returned to the Board on remand from the Ninth Circuit court, Herzog's reservation of opinion turned into direct opposition to the majority's position, expressed in a brief dissenting opinion. See Davis Furniture Co., 2 CCH Lab. L. Rep. ¶11,812, 100 N.L.R.B. No. 158, at 8 (1952).


2 304 U.S. 64 (1938). The problem was hinted at by Clark, State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins, 55 Yale L.J. 267 (1946). An attempt to re-