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RECENT CASES

Conflict of Laws—Significant Interest Doctrine Extended to Marital Property Litigation

Crichton, a native of Louisiana who had lived in New York most of his life, died in 1962. The bulk of his fortune was made in Louisiana. Decedent was survived by his second wife, from whom he had been separated since 1935, and four children, two of whom were issue of an earlier marriage. Decedent's will made no provision for his second wife, and all of his estate passed in trust with the income to be distributed among his four surviving children. The bulk of the estate consisted of intangible personal property in the form of bank accounts and stocks and bonds held in custody accounts in Louisiana.[1] In June, 1965, the executrix initiated an ancillary proceeding in Louisiana for approval of her inventory and computation of Louisiana inheritance taxes. Decedent's widow asserted a claim to community property rights in the intangible personal property there inventoried.[2] The two children of decedent's first marriage objected on the ground that the Louisiana court did not have jurisdiction to determine ownership of the property. Rejecting the children's contention, the Louisiana court issued an order "permanently" restraining the executrix from disposing of or removing the property from Louisiana. The executrix had also filed an intermediate account in the New York Surrogate Court in September, 1965, setting forth as allowed but unpaid the widow's share of the alleged community property. One child of the first marriage subsequently filed an objection to allowance of the community property claim on the ground that Louisiana's community property laws were inapplicable to govern marital property rights of New York domiciliaries. In granting the daughter's motion for partial summary judgment, the Surrogate decided that Louisiana's community property laws were inapplicable and the Appellate Division unanimously affirmed the judgment. On appeal by the executrix to the

1. The decedent owned gas and oil producing lands in Louisiana which were managed by his brother. Acting for the decedent, the brother invested the income derived from these lands in stocks and bonds and maintained the bank accounts.

2. The widow based her claim primarily on LA. CIV. CODE ANN. art. 2400 (West 1952) (hereinafter cited as art. 2400). That statute provides: "All property acquired in this State by nonresident married persons, whether the title thereto be in the name of either the husband or wife, or in their joint names, shall be subject to the same provisions of law which regulate the community of acquets and gains between citizens of this State."

Court of Appeals of New York, *held,* affirmed. In a marital property dispute involving intangible personal property, the choice of law problem should be resolved by determining which jurisdiction has the most significant interest in the application of its law. *Estate of Crichton,* 20 N.Y.2d 124, 228 N.E.2d 799, 281 N.Y.S.2d 811 (1967).

Traditionally, in the choice of law situation involving marital property rights where both husband and wife are domiciled in one state and one of the marital partners acquires movable (or intangible) property in another state, the law governing the marital property interest of the other spouse in that property has been held to be the law of the domicile of husband and wife at the time the property was acquired.[3] It should be noted that intangible and tangible personality are both treated as "movables" for the purposes of making a choice of law. A minority of jurisdictions have sometimes applied, often inconsistently, an alternative rule providing that the applicable law in such disputes is the law of the situs of the movable at the

3. H. MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS 192-97 (1952). Marsh points out that there may be some variation in the application of this rule depending on the method by which the property was acquired. He lists these variations as follows: (1) Marital property interests in movables acquired by a marital partner through the process of *gift, devise,* or *descent* in a non-domiciliary jurisdiction are governed by the law of the marital domicile at the time of acquisition; (2) marital property rights in movables acquired by one spouse in a non-domiciliary state *in return for services* will generally be determined by the law of the marital domicile at the time of acquisition; (3) where the movable acquired in a non-domiciliary state *is* a *chose in action* (specifically a cause of action in tort) the authorities are divided between the rule of lex loci delicti (the law of the place of injury) and that of the law of the marital domicile; (4) where *movables* are *acquired by purchase* in a non-domiciliary state, the usual rule is that the law of the marital domicile governs. *See* Birmingham Waterworks Co. v. Hume, 121 Ala. 168, 25 So. 806 (1899), (involving rights in intangible property). The court held that "as between the husband and the wife, their rights in personal property coming to the wife attach under, and are governed by, the law of the place where they are domiciled at the time the property is received." *Id.* at 170, 25 So. at 807. It must be noted that none of Marsh's four categories exactly fits the situation in the instant case. In *Crichton,* the movables (stocks, bonds and bank accounts) are acquired by the non-domiciliaries through the process of converting income from the real property (or immovable) holdings in Louisiana into intangibles. However, the law of the domicile at the time of acquisition (New York) would probably still have applied. *See* MARSH, *supra* at 110. *See also* Castleman v. Jeffries, 60 Ala. 380 (1877) (immovable belonging to the wife in a non-domiciliary state was sold and movables received in payment were treated as a *new acquisition* with consequence that the marital property interests were determined by the marital domicile at the time of the sale—note the similarity between this factual situation and that of the instant cases). Also, the rule of "partial immutability" established by Mr. Justice Story in Saul v. His Creditors, 5 Mart. (n.s.) 569 (La. 1827), would probably support the application of the traditional domicile rule to the instant case. Story's rule was that any property acquired during coverture, absent an agreement to the contrary, was subject to the law of the marital domicile at the time of acquisition. For a brief discussion of the origin and effect of this rule see A. EHRENZWEIG, CONFLICT OF LAWS § 245, at 648-53 (1962).

time of acquisition.[4] It has been said that Louisiana is the only state in which statutory law has played a significant part in the process of choice of law where property has been acquired in a non-domiciliary state by husband and wife. Exactly what effect that statutory law has had with regard to movable (or intangible) property, however, has been an unsettled issue to the present day.[5] Until quite recently, the great majority of courts have applied the rule of lex loci delicti (the law of the place of injury) in resolving the conflict of laws problems in tort actions.[6] Widespread dissatisfaction with this inflexible rule led to the development of the theory that choice of law problems in torts should be resolved by applying the law of the state having the most significant interest in the particular legal dispute.[7] The case of *Babcock v. Jackson*[8] represents the embodiment of this significant interest theory in tort law, and is the case most often cited to provide

4. The classic argument invoked in support of the situs rule is that it affords greater protection to purchasers and attaching creditors. However, the situs of a tangible chattel tends to be the marital domicile. Therefore, where a chattel has been taken from its situs at the time of acquisition and removed to the marital domicile, the attaching creditor is likely to experience obvious difficulty under the situs rule. With regard to intangible property, such property has only a fictional situs, and it is not possible to apply realistically a situs rule based on physical location of such property. *See* MARSH, *supra* note 3, at 100.

5. *See* Neuner, *Marital Property and the Conflict of Laws*, 5 LA. L. REV. 167, 170 (1943). The only cases have involved choses in action in tort arising in Louisiana in favor of non-domiciliaries. In Matney v. Blue Ribbon, Inc., 202 La. Ann. 505, 12 So. 2d 253 (1942), and Williams v. Pope Mfg. Co., 52 La. Ann. 1417, 27 So. 851 (1900), the courts held that art. 2400 did not apply to such a chose in action and that the law of marital domicile at the time of acquisition governed property rights in the chose. However, a federal court in Louisiana reached a different conclusion. Meyerson v. Alter, 11 F. 688, 689 (C.C.E.D. La. 1882) held that art. 2400 did apply to choses in action and that the object of the legislature was "to subject non-residents who acquire rights within this state to the same rules as those which govern the resident citizens." One writer in the area has said in reference to art. 2400 that it "provides that the community property system shall apply to . . . all Louisiana property (with no distinction between movables and immovables) acquired by non-residents." *See* Morrow, *Matrimonial Property Law in Louisiana*, 34 TUL. L. REV. 3, 12 (1959).

6. *See* Otey v. Midland Valley R.Co., 108 Kan. 755, 197 P. 203 (1921); Poplar v. Bourjois, Inc., 298 N.Y. 62, 80 N.E.2d 334 (1948); H. COODRICH, CONFLICT OF LAWS 260 (3d ed. 1949).

7. *See* Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951); Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215 (1963) (both articles suggest the application of the "significant interest" approach). The desire to be rid of the rule of lex loci delicti was fostered by its roots in the discredited vested-rights theory of conflict of laws. For an excellent discussion of the vested-rights theory and its shortcomings see Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945). The unhorsing of lex loci delicti was also given impetns by a "significant relationship" approach urged by the *Restatement* authors. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379 (1) (Tent. Draft No. 8, 1963); *id.* (Tent. Draft No. 9, 1964).

8. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) (the law to be applied in resolving each substantive issue in a tort action is the law of the jurisdiction having the most significant interest in the issue of law presented.)

the rationale for choice of law decisions in that area today.[9] A similar development has also taken place in the law of contracts in recent years. The leading case of *Auten v. Auten*[10] sets forth a significant interest approach to the solution of choice of law problems in the field of contracts in the form of "the center of gravity" rule. These advances[11] in choice of law resolution in tort and contract have touched the realm of family and marital relationships, particularly in the areas of intrafamily tort immunity and family support.[12] The decision in the instant case, however, represents the first major attempt to apply the significant interest doctrine to a conflicts problem arising out of a marital property dispute.

9. Prior to the complete rejection of the rule of lex loci delicti in *Babcock*, New York had made a tentative move away from the rule in Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). In *Kilberg*, the court used a rather transparent procedural-protective argument based on strong policy arguments and incidental contacts with the place of the accident to allow a New York resident to recover greater damages for wrongful death than would have been the case had the law of the place of the tort been applied. Advancing from *Kilberg*, *Babcock* presented a methodology which later courts could apply in solving conflicts problems. To determine which state had the greatest concern with the specific issue raised in litigation a court should: (1) isolate the issue; (2) group the contacts and relationships of the parties with the states involved; and finally (3) evaluate those contacts and relationships in the light of the policies of the states which underlie their rules of law. The *Babcock* methodology has been greeted with high hopes throughout the legal profession. *See, e.g.*, Cheatham, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1229 (1963); 77 HARV. L. REV. 355 (1963); 17 VAND. L. REV. 283 (1963); 49 VA. L. REV. 1362 (1963). The *Babcock* method of conflict resolution has been applied in numerous cases. *See, e.g.*, Dym v. Gordin, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 263 (1965) (questionable result). *See also* Macey v. Rozbicki, 18 N.Y.2d 289, 292, 221 N.E.2d 380, 381, 274 N.Y.S.2d 591, 593 (1966) (Keating, J., concurring); Long v. Pan American World Airways, Inc., 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965).

10. 308 N.Y. 155, 124 N.E.2d 99 (1954); *accord*, W. H. Barber Co. v. Hughes, 223 Ind. 570, 63 N.E.2d 417 (1945); Kievit v. Loyal Protective Life Ins. Co., 34 N.J. 475, 170 A.2d 22 (1961).

11. Not all authorities are agreed that the "center of gravity," "grouping of contacts," or "significant interest" test, as it is interchangeably called, represents an advance. It has been termed a test based on mere catchwords inadequate to describe a principle of law. *See* Judge Van Voorhis' dissent in *Babcock* and Judge Desmond's dissent in Dym v. Gordin, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 263 (1965). Prof. Cheatham, however, has defended the characterizing phrases as being "at least as adequate to define a principle of law as the terms 'due process of law' . . . 'reasonableness'. . . . Cheatham, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1229, 1230-31 (1963).

12. *See* McSwain v. McSwain, 420 Pa. 86, 215 A.2d 677 (1966), where law of marital domicile was applied rather than lex loci delicti in order to prevent wife from recovering from husband for wrongful death of daughter. Citing *Babcock*, the court held that "[w]hat should be sought is an analysis of the extent to which one state rather than another has demonstrated by reason of its policies and their connection and relevance to the matter in dispute, a *priority of interest* in the application of its rule of law." *Id.* at 94, 215 A.2d at 682 (emphasis added); *accord*, Thompson v. Thompson, 193 A.2d 439 (N.H. 1963). In Downs v. American Mut. Liab. Ins. Co., 14 N.Y.2d 266, 251 N.Y.S.2d 19, 200 N.E.2d 204 (1964), Judge Fuld, who wrote the

Proceeding on the premise that Louisiana had no reasonable interest in regulating marital property rights of the decedent and his widow—who were domiciled in New York, had not been married in Louisiana, and had never resided there during coverture—the instant court concluded that it was "reasonable to assume" that article 2400 was enacted solely for the purpose of effectuating the legitimate governmental interest of Louisiana in regulating the marital property rights of persons domiciled in that state.[13] Conceding that the presence of intangible property in Louisiana gave that state power to adjudicate rights in the property according to its own laws,[14] the instant court reasoned that if it allowed such adjudication in this case, it would in reality be acquiescing to "an attempt of Louisiana to regulate the marital relationship of New York domiciliaries." Dismissing traditional choice of law rules used to determine the rights of husband and wife in marital property,[15] the court decided that

opinion in *Babcock*, held that an assignment of wages illegal under Massachusetts law would be upheld where made by a worker in Massachusetts whose marital domicile was New York and where the wages were assigned for the purpose of supporting his wife and child in New York. He said that New York had the most significant relationship and contacts with the dispute and thus a paramount interest in settling it under New York law.

13. As indications of the context in which art. 2400 was enacted, the court cited two cases decided prior to enactment of the statute holding that the real property of non-residents located in Louisiana was not subject to the community property laws of that state, but rather to the laws of the state where the owners were domiciled at the time the property was acquired. Wolfe v. Gilmer, 7 La. Ann. 583 (1852); Huff v. Borland, 6 La. Ann. 436 (1851). MARSH, *supra* note 3, at 198, suggests that art. 2400 might have been passed in reaction to the result of these cases. As support for its premise that Louisiana has no interest in regulating marital-property rights of non-domiciliaries, the instant court cited Hyman, Lichtenstein & Co. v. Schlenker & Hirsch, 44 La. Ann. 108, 10 So. 623 (1892). The instant court conceded that from the unequivocal wording of the article, it would appear that the Louisiana courts would apply their own law to determine the widow's rights in the disputed intangible property; however the court felt that two Louisiana decisions rendered subsequent to the enactment of art. 2400 lent weight to the conclusion that the article was not meant to apply to the property of non-domiciliaries. In Williams v. Pope Mfg. Co., 52 La. Ann. 1417, 27 So. 851 (1900), the Supreme Court of Louisiana held that a married woman's cause of action for a tort occurring in Louisiana was an intangible property right which had its legal situs at the matrimonial domicile of the woman and could not be said to have been property acquired in Louisiana so that Louisiana law would necessarily apply. In Matuey v. Blue Ribbon, Inc., 202 La. 505, 12 So. 2d 253 (1942), the Louisiana Supreme Court held that art. 2400 was not inapplicable in such a situation but that it would not be applied where the domiciliary law of the non-residents was not inimical to the policy of Louisiana. The instant court reasoned that certainly the law and policy of New York afforded a widow adequate protection and thus could not be inimical to the policy of Louisiana. For a different interpretation of the *Matney* case see MARSH, *supra* note 3, at 201.

14. *See* Stumberg, *Marital Property and Conflict of Laws*, 11 TEXAS L. REV. 53, 62 (1932) for a general discussion of this power.

15. The instant court cites the traditional choice of law rule in this type of dispute as "one which looks to the *law of the marital domicile* to determine the rights of the

the choice of law problem in this case "should be resolved by an examination of the contacts which Louisiana and New York have with this controversy for the purpose of determining which of those jurisdictions has the paramount interest in the application of its law."[16] Though cognizant of the fact that this case did involve several "contacts" with Louisiana,[17] the court found that New York had a greater interest in applying its marital property laws to govern persons married and domiciled within its borders, and that New York had "not only the dominant interest in the application of its law and policy, but the *only* interest."[18]

The immediate effect of the instant decision is to extend the significant interest doctrine, as a choice of law rule, into the area of marital property disputes. In so doing, the instant court has expressly rejected traditional conflicts rules previously applied in this field.[19] Though this extension is limited by the facts of this case to disputes involving movable or intangible property, it would seem

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husband and wife in property acquired during coverture," (Emphasis added). Citing with approval two previous New York cases which had refused to apply that rule, the court stated that the rule was rejected because it failed "to take cognizance of the policies of jurisdictions other than those which have what is regarded as the sole controlling contact and the interests which those other jurisdictions have in the application of their laws," 20 N.Y.2d at 133, 228 N.E.2d at 805, 281 N.Y.S.2d at 819. *See* Wyatt v. Fulrath. 16 N.Y.2d 169, 211 N.E.2d 637, 264 N.Y.S.2d 233 (1955), and Hutchison v. Ross, 262 N.Y. 381, 187 N.E. 65 (1933), cited by the instant court as authority for this point. In both of these cases, a New York court applied the law of a jurisdiction *other* than that of the marital domicile, and as it turned out, applied the law of the jurisdiction which happened to be the situs of disputed intangible property (New York law). The appellant-executrix in the instant case urged that these cases represented the rule that New York would now apply the law of the *situs* of intangible property. The instant court answered this contention by stating that the major rationale in those two cases had not been grounded on any situs doctrine, but rather that "[i]n both these cases we were *giving effect to New York's policy and governmental interest.*" 20 N.Y.2d at 137, 228 N.E.2d at 808, 281 N.Y.S.2d at 822. (Emphasis added).

16. 20 N.Y.2d at 133, 228 N.E.2d at 805, 281 N.Y.S.2d at 819. The instant court used as principle authority Dym v. Gordon, 16 N.Y.2d 120, 262 N.Y.S.2d 463, 209 N.E.2d 792 (1965) and applied those principles which guided it in Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.2d 743 (1963). *See* note 9 *supra.*

17. The appellant-executrix urged that the significant contacts which should give Louisiana the paramount interest in the case were: (1) deceedent was born in Louisiana; (2) although domiciled in New York, the majority of his wealth had been gained in Louisiana; and (3) the situs of his intangible property, *i.e.*, the documentary evidence of that property, was located in Louisiana.

18. 20 N.Y.2d at 134, 228 N.E.2d at 806, 281 N.Y.S.2d at 820 [Emphasis added]. In support of this conclusion the instant court relied on McSwain v. McSwain, 240 Pa. 86, 215 A.2d 677 (1966). *See* note 12 *supra.*

19. *See* notes 3 & 4 *supra,* and accompanying text. It is evident that the *Crichton* court could have decided the dispute before it by simply giving effect to LA. CIV. CODE ANN. art 2400, or by relying on the rule that the law of the marital domicile at the time of acquisition applied, which would have given the *same result* as that reached in the instant case, or by resorting to the rarely used situs rule.

that, logically, the significant interest rule could be applied by a court with the same result to immovable (real) property, although in such a case, the state in which the real property had its situs could set forth a forceful "sovereignty" argument in favor of applying its own law.[20] However, the policy argument that the state of the marital domicile has the most significant interest in applying its law to govern property rights arising out of the marriage relationship sanctioned by that state, is persuasive and it is possible that it would prevail.[21] Marital property rights are inextricably tied to the marriage relationship and that relationship has its existence in the state of marital domicile. It would seem logical, therefore, to look to the law of the state where the relationship exists for the determination of the property incidents of that relationship.[22] Applying the methodology of *Babcock*, as it was applied by the instant court, it is likely that most courts will find that the state of marital domicile would have the most significant interest in the application of its law.[23] It is submitted that the instant court has intelligently applied the rule of *Babcock* and, in so doing, has extended that already pervasive rule to yet

20. Doubtless, Louisiana could assert that it has, as a sovereign state, a very close connection with regnlating title to the real property within its borders and as a consequence of that connection, it has the paramount interest in applying its own law to all such property regardless of the law of the marital domicile. *See* MARSH, *supra* note 3, at 199. It has been stated that the choice of law rule with regard to real property is that the law of the situs of that property governs. There is ample ground for questioning this rule, however. *See* note 22 *infra*.

21. *See* United States v. Yazell, 382 U.S. 341 (1966), where in a case involving a conflict between federal law and state marital property law, the Supreme Court held that the law of family-property rights is peculiarly loeal in nature and the domiciliary state has a great interest in regulating its families and the property rights arising from the family relationship. From a different perspective, the rule that the situs of realty should give the state of that situs the paramount interest in applying its law to govern rights to the land is weakened by its rather archaic justification. Such notions have a largely historical basis in the "feudal identification of land ownership with political powers and the consequent insistence that the land law be wholly autarkic." MARSH, *supra* note 3, at 101. Numerous cases have held that the law of the situs of real property does not determine the law to be applied in determining marital rights in that property. *See, e.g.*, Wolfe v. Gilmer, 7 La. Ann. 583 (1852); Huff v. Borland, 6 La. Ann. 436 (1851) (cited by the instant court in support of its deeision regarding the relative strength of the case for applying Louisiana policy compared with that for applying its own).

22. *See* Stumberg, *Marital Property and the Conflict of Laws*, 11 TEXAS L. REV. 53 (1932): "Marital property and the marital relationship are so closely bound together that unless some particular reason founded on loeal policy dictates otherwise they should be subject to the same law." *Id.* at 65-66.

23. *See* notes 3 & 9 *supra*. Indeed, it appears that, in marital property litigation, the law of the marital domicile will be applied with more frequency under the traditional "law of the marital domicile rule." It should also be noted that the "time of acquisition," which was an essential element of the traditional rule loses its significance under the paramount interest rule—the state of marital domicile probably has the dominant interest in applying its law regardless of when the property was acquired.

another problem area of conflict of laws. By applying the significant interest doctrine, the *Crichton* decision has set a new standard of objectivity which will hopefully be followed in the area of marital property litigation.

Constitutional Law—Search and Seizure—Fourth Amendment Restrictions Apply to Electronic Eavesdropping When Conversations Are Private—Physical Trespass Test Discarded

Defendant Katz was indicted for violating a statute prohibiting the interstate transmission of bets or wagers by wire communication.[1] At the trial, the government introduced recordings of defendant's telephone conversations, obtained by FBI agents who had attached an electronic device to the outside of the public telephone booth from which defendant placed his calls.[2] The defendant was convicted in the district court, and the Ninth Circuit Court of Appeals upheld the use of the electronic eavesdropping equipment on the ground that there had been no physical intrusion into the telephone booth.[3] On certiorari to the United States Supreme Court, *held*, reversed. Although the eavesdropping equipment did not penetrate the wall of the telephone booth, the government's unauthorized eavesdropping violated the defendant's privacy upon which he had justifiably relied while using the telephone booth and thus constituted an illegal search and seizure under the fourth amendment. *Katz v. United States*, 389 U.S. 347 (1967).

1. 18 U.S.C. § 1084, which provides in pertinent part: "(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both."

2. The defendant had been seen placing calls from a bank of three public phone booths during certain hours and on an almost daily basis. From February 19, 1965 to February 25, 1965, at predetermined hours, the FBI placed microphones on the tops of two of the phone booths normally used by defendant. (The third phone was placed out of order). The microphones were attached to the outside of the telephone booths with tape, and there were no physical penetrations inside of the booths. The microphones were activated only when the defendant was approaching and actually in the booth. Wires led from the microphones to a wire recorder on top of one of the booths. Katz v. United States, 369 F.2d 130, 131 (9th Cir. 1966).

3. *Id.* at 133, 134.

Electronic eavesdropping was first considered by the Supreme Court in *Olmstead v. New York*,[4] a 1928 wiretapping case in which the Court held that electronic eavesdropping was not per se violative of the fourth amendment.[5] The Court said that verbal utterances were not tangible objects which could be unconstitutionally seized and that the fourth amendment was not violated unless there had been an official search and seizure of defendant's person, or a seizure of his papers or his tangible material effects, or an actual physical invasion of his house for the purpose of making a seizure.[6] The Court concluded that the eavesdropping did not violate the fourth amendment because no physical intrusion had taken place.[7] In response to the *Olmstead* case, Congress enacted section 605 of the 1934 Federal Communications Act,[8] which prohibited the interception or divulgence of communications of others. The Supreme Court, however, restricted the scope of section 605 and held that it prohibited wiretapping only.[9] The Court also continued to apply the rationale of the *Olmstead* case so that it was clearly established that the fourth amendment prohibited eavesdropping only when it was accomplished by a physical trespass.[10] Nevertheless, in 1961 the Supreme Court began to intimate that the adequacy of the trespass test was being reconsidered. In *Silverman v. United States*,[11] the Court stated that the fourth amendment should not turn upon the technicality of a trespass as a matter of local law, but that the application of the amendment should be based on the reality of an unauthorized physical intrusion into a constitutionally protected area.[12] The Court also suggested that it

4. 277 U.S. 438 (1928), *noted in* 38 YALE L.J. 77 (1928).

5. The Court also said that the electronic eavesdropping did not violate the defendant's fifth amendment right against self-incrimination since there was no evidence of compulsion. *Id.* at 462.

6. *Id.* at 464-66. Justices Holmes, Braudeis, Stone and Butler dissented. Mr. Justice Holmes contended that the evidence should have been excluded on the grounds that the wiretapping had violated state law. *Id.* at 469-71. Mr. Justice Brandeis (Stone, J., concurring) felt that the fourth amendment, liberally construed, conferred the "right to be let alone," and that "[t]o protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." *Id.* at 478.

7. *Id.* at 466.

8. 47 U.S.C.A. § 605 (1962), which provides in pertinent part: "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ."

9. Irvine v. California, 347 U.S. 128, 131 (1954); Goldman v. United States, 316 U.S. 129, 133 (1942).

10. On Lee v. United States, 343 U.S. 747 (1952); Goldman v. United States, 316 U.S. 129 (1942); United States v. Farina, 218 F.2d 62, 63 (2d Cir. 1954).

11. 365 U.S. 505 (1961).

12. *Id.* at 512. However, the Court never outlined the requisites of a constitutionally protected area. *See* King, *Electronic Surveillance and Constitutional Rights; Some Recent Developments and Observations*, 33 GEO. WASH. L. REV. 240, 255 (1964);

would have reconsidered the trespass test if that test had not prohibited the eavesdropping,[13] but since the electronic eavesdropping which occurred was prohibited under the trespass test, the Court declined to reconsider its adequacy.[14] In *Wong Sun v. United States*,[15] the Supreme Court extended fourth amendment protections to verbal statements.[16] Since the trespass test originally had been necessitated because of the Court's refusal to include verbal statements within the scope of fourth amendment protections,[17] the *Wong Sun* holding eliminated the main reason for the continued use of the trespass test.[18] Finally, in *Berger v. New York*,[19] the Court held unconstitutional a New York statute which regulated eavesdropping and wiretapping.[20] The Court clearly determined that electronic eavesdropping was a search within the meaning of the fourth amendment[21] and held that the statute was unconstitutional because it lacked provisions for adequate judicial supervision and permitted general searches by electronic devices.[22] Justice Douglas, in a concurring

Note, *Electronic Surveillance and the Right of Privacy*, 27 MONT. L. REV. 173, 183 (1966). The Court has said that an accused's house, business office, or store are constitutionally protected areas. Lanza v. New York, 370 U.S. 139, 143 (1962). *See also* Jones v. United States, 362 U.S. 257, 261 (1960). But without clearly distinguishing these above areas, the Court said that a jail cell was not a constitutionally protected area. Lanza v. New York, 370 U.S. 139, 143 (1962). *See also* Smayda v. United States, 352 F.2d 251, 256-57 (9th Cir.), *cert. denied*, 382 U.S. 981 (1966).

13. 365 U.S. 508-09. *See The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 184 (1961). In fact, since the inception of the trespass test in *Olmstead*, there always had been some members of the Court who had advocated its abandonment. Mr. Justice Brandeis felt that eavesdropping should be treated as an invasion of privacy and subject to the prohibitions of the fourth amendment. Olmstead v. New York, 277 U.S. 438, 471, 478 (1928) (dissenting opinion). Justices Frankfurter and Stone subsequently agreed with Mr. Justice Brandeis, Goldman v. United States, 316 U.S. 129, 136 (1942) (dissenting opinion), as did Mr. Justice Douglas, Berger v. New York, 388 U.S. 41, 64 (1967) (concurring opinion); On Lee v. United States, 343 U.S. 747, 765 (1952) (dissenting opinion).

14. 365 U.S. at 509.

15. 371 U.S. 471 (1963).

16. *Id.* at 485. The statement was made after petitioner was confronted with evidence unlawfully obtained, and was thus "no less the 'fruit' of official illegality than the more common tangible fruits of unwarranted intrusion." *Id.* at 485-86. *See also* Hoffa v. United States, 385 U.S. 293, 301 (1966).

17. Olmstead v. New York, 277 U.S. 438, 463, 465 (1928).

18. *See* Note, *Electronic Surveillance and the Right of Privacy*, 27 MONT. L. REV. 173, 183 (1966). However, the Court did continue to refer to the trespass test as if it were good law. *E.g.*, Hoffa v. United States, 385 U.S. 293, 301 (1966); Lopez v. United States, 373 U.S. 427, 438-39 (1963). But, after the *Silverman* case, the Court did not use the trespass test to uphold the electronic eavesdropping.

19. 388 U.S. 41 (1967).

20. N.Y. CODE CRIM. PROC. § 813-a.

21. 388 U.S. at 51.

22. *Id.* at 59-60.

opinion, indicated that the *Berger* case overruled sub silentio *Olmstead v. United States*[23] and its offspring.[24]

In the instant case, the Supreme Court first considered the circumstances under which electronic eavesdropping would be within the purview of the fourth amendment. The Court noted that the fourth amendment protects persons, not places, and that its protection extends to the recording of oral statements; therefore, the Court felt its prohibitions should not turn on the absence or presence of a physical intrusion. The Court concluded that the "trespass" doctrine of *Olmstead* could no longer be regarded as controlling. Instead the Court applied a privacy standard and said that a person may be protected by the fourth amendment from unreasonable searches and seizures in any area he seeks to preserve as private, even an area accessible to the public.[25] Consequently, since the fourth amendment extends to the recording of oral statements and since the Court felt that defendant had justifiably relied upon the telephone booth for privacy, the Court concluded that the electronic eavesdropping had violated defendant's right of privacy and constituted a search and seizure within the meaning of the fourth amendment.[26] Having made this determination, the Court next considered whether the eavesdropping was a "reasonable" search and seizure. In this regard, the Court emphasized that, with narrow exceptions,[27] searches conducted without prior approval by a judicial officer are per se unreasonable under the fourth amendment. Noting that the surveillance here had been so narrowly circumscribed that a judicial officer could have approved it,[28] the Court concluded that the search and seizure was

23. 277 U.S. 438 (1928).

24. Berger v. New York, 388 U.S. 41, 64 (1967) (Douglas, J., concurring). *But see* Note, *Fourth Amendment Limitations on Eavesdropping and Wire-tapping*, 16 CLEV.-MAR. L. REV. 467, 475 (1967). *See also* Note, *Electronic Surveillance and the Right of Privacy*, 27 MONT. L. REV. 173, 183-84 (1966).

25. 389 U.S. at 351-52. The Court also said that what a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth amendment protection. *Id.*

26. "No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment." *Id.* (footnotes omitted).

27. The Court listed several cases as examples of instances in which prior judicial approval was not required. Warden v. Hayden, 387 U.S. 294 (1967) (search of suspect's house minutes after an armed robbery had occurred and suspect had entered the house); Cooper v. California, 386 U.S. 58 (1967) (search of car which had been impounded as evidence); Brinegar v. United States, 338 U.S. 160 (1949) (search of a car on the open road for contraband where suspect's actions established probable cause for belief that a crime was being committed); Carroll v. United States, 267 U.S. 132, 153 (1925) (search of a ship, motor boat, wagon or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle could be quickly moved out of the locality or jurisdiction in which the warrant must be sought).

28. "[I]t is clear that this surveillance was so narrowly circumscribed that a duly

per se unreasonable because it was conducted without such approval.[29]

The Court's action in discarding the trespass test has substantial merit for three reasons. First, the trespass test had turned on whether there was a physical intrusion into a constitutionally protected area, but there was considerable confusion as to what constituted a constitutionally protected area.[30] Second, the application of the trespass test oftentimes resulted in logically irreconciliable decisions. For example, in *Goldman v. United States*[31] the government agents placed a detectaphone against the wall of a room adjoining the office of defendant. The eavesdropping was held not violative of the fourth amendment.[32] On the other hand, in *Clinton v. Virginia*[33] the police inserted a very small device into the wall of an adjoining apartment, and the Court held the eavesdropping did violate the fourth amend-

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authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place." 389 U.S. at 354.

29. Justice Harlan, in his concurring opinion, felt that the application of the fourth amendment was dependent upon the fulfillment of two requirements: "first, that a person have exhibited an actual (subjective) expectancy of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" 389 U.S. at 360 (concurring opinion). Applying this test to the instant case, Harlan concluded that the defendant's telephone conversations were protected by the fourth amendment. Justices White, Douglas and Brennan also concurred, but disagreed as to when electronic eavesdropping was excepted from the fourth amendment requirements. Mr. Justice White said that the Court should not require the warrant procedure nor the magistrate's judgment if the President or Attorney General "has considered the requirements of national security and authorized electronic surveillance as reasonable." *Id.* at 364. On the other hand, Mr. Justice Douglas, with whom Mr. Justice Brennan concurred, felt that there should be no distinction between types of crimes and that national security should not be excepted from fourth amendment requirements. In a dissenting opinion, Mr. Justice Black said that the language of the fourth amendment shows that the amendment was to be limited to the protection of tangible things. He said that the *Olmstead* and *Goldman* cases had not been eroded by subsequent decisions and that prior to the instant case they were still good law. He conceded that the Bill of Rights should be liberally interpreted, but he refused to "give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage." *Id.* at 373. Therefore, he concluded that the fourth amendment did not apply to electronic eavesdropping.

30. Cases and materials cited note 12 *supra*. Note, *Electronic Surveillance and the right of Privacy*, 27 MONT. L. REV. 173, 183 (1966). The Supreme Court had said that the accused's house, business office, or even a store were constitutionally protected areas. Lanza v. New York, 370 U.S. 139, 143 (1962). *See also* Jones v. United States, 362 U.S. 257, 261 (1960). However, without clearly distinguishing the preceding cases, the Court said that a jail cell was not a constitutionally protected area. Lanza v. New York, 370 U.S. 139, 143 (1962). *See also* Smayda v. United States, 352 F.2d 251, 256-57 (9th Cir.), *cert. denied*, 382 U.S. 981 (1966).

31. 316 U.S. 129 (1942).

32. *Id.* at 135.

33. 377 U.S. 158 (1964) (per curiam).

ment.[34] Although the practical effects of the eavesdropping in both cases were identical, the legal conclusions were totally different. Finally, the Court was justified in discarding the trespass test because of the inadequate protection it had provided. Since modern technology has provided the police with devices which can detect and record conversations occurring within the most private confines without necessitating a physical intrusion, the trespass test permitted eavesdropping without any meaningful limitations.[35] In place of the trespass test, the Court has inserted a privacy test: verbal utterances which a person seeks to preserve as private will be protected by the fourth amendment from unreasonable electronic eavesdropping.[36] It would appear that this new standard is considerably more pervasive than the trespass test and that it will bring within the purview of the fourth amendment *all* verbal statements intended to be private. This means that for evidentiary purposes electronic eavesdropping cannot be used unless "a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail,"[37] has authorized a very limited surveillance. These restrictions eliminate, at least for evidentiary purposes, eavesdropping on a broad scope, or for a long duration, or before probable cause has been established. On the other hand, the restrictions imposed on eavesdropping for evidentiary purposes may not affect its use when the government does not use the eavesdropping itself as evidence. For example, the police may be able to use eavesdropping as a method of discovering other incriminating evidence which may then be seized by lawful means. Since neither the accused nor the trial judge will know that the police have been eavesdropping in violation of the fourth amendment, the prosecution will have no difficulty using the evidence.[38] Furthermore, the fruit-of-the-poisonous-tree doctrine, which excludes evidence obtained directly or indirectly as a result of an illegal search and seizure,[39] is practically ineffective when the trial judge and the accused are not aware that an illegal search and seizure has taken place. Therefore, the courts will

34. *Id. See also* Note, *The Constitutionality of Electronic Eavesdropping,* 18 S.C.L. REV. 835, 836 (1966).

35. *See* Olmstead v. New York, 277 U.S. 438, 471 (dissenting opinion); King, *Electronic Surveillance and Constitutional Rights: Some Recent Developments and Observations,* 33 GEO. WASH. L. REV. 240, 262 (1964); Note, *Electronic Surveillance and the Right of Privacy,* 27 MONT. L. REV. 173, 185 (1966); Note, *The Constitutionality of Electronic Eavesdropping,* 18 S.C.L. REV. 835, 841 (1966).

36. 389 U.S. at 351-52. *See also id.* at 360 (concurring opinion).

37. *Id.* at 354.

38. In many instances, the prosecution also may not be aware that the evidence was obtained as the fruits of illegal eavesdropping.

39. Wong Sun v. United States, 371 U.S. 471, 484-85 (1963).

find that they are unable to prohibit effectively some of the constitutional abuses attending illegal eavesdropping unless the police attempt to use the eavesdropping itself as evidence. This practical inability of the courts to restrict eavesdropping means that the legislatures may have to intervene with civil and criminal sanctions as well as other means of more effectively controlling the use of eavesdropping.

Constitutional Law–Section 5(a)(1)(D) Prohibiting Members of Communist-Action Organizations from Employment in Defense Facilities Held Unconstitutional Infringement Upon Freedom of Association

The defendant, a member of the Communist party and employee of a shipyard, was charged with violation of section 5(a)(1)(D)[1] of the Subversive Activities Control Act of 1950, which prohibits a member of a Communist-action organization[2] from working in a "defense facility."[3] The indictment charged the defendant with unlawfully and willfully continuing his employment with knowledge of the final registration order against the Communist Party and with notice of the shipyard's designation as a defense facility. In granting defendant's motion to dismiss the indictment, the district court held that section 5(a)(1)(D) required allegations of "active membership" in the Communist Party and "specific intent" to further its unlawful goals.[4] On direct appeal to the United States Supreme Court, *held*, affirmed. Section 5(a)(1)(D) of the Subversive Activities Control Act of 1950 unconstitutionally infringes upon the first amendment in establishing guilt by association without requiring proof that the individual is in a "sensitive position" within the defense facility and that he is an active member in agreement with the unlawful aims of the Communist Party. *United States v. Robel*, 389 U.S. 258 (1967).

1. 50 U.S.C. § 784(a)(1)(D) (1964).

2. Section 3(3)(a) of the Act, 50 U.S.C. § 782(3)(a) (1964), defines "Communist-action organization" as: "any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement . . . and (ii) operates primarily to advance the objectives of such world Communist movement. . . ."

3. Under § 5(b) of the Act, 50 U.S.C. § 784(5)(b) (1964), when the Secretary of Defense determines that the security of the United States so requires, he may designate a facility as a "defense facility," thus making section 5(a)(1)(D) applicable.

4. The decision of the District Court for the Western District of Washington is unreported.

Freedom of association was first delineated in *N.A.A.C.P. v. Alabama ex rel. Patterson*,[5] in which the Supreme Court, treating freedom of association as derivative from and ancillary to first amendment rights, elevated it to an independent status.[6] The Court considered that the interest of the state in compulsory disclosure of the Association's membership list was insufficient to justify possible adverse effects upon the rights of members of the Association. The Court, as in subsequent freedom of association cases,[7] applied a balancing test, weighing the interest that the government seeks to protect and the means by which it is protected against the degree of infringement upon the right of association under the first amendment.[8] Thus in *Communist Party v. Subversive Activities Control Board*,[9] the Court, finding the interest of the government in national defense sufficient to allow significant infringement upon freedom of association, upheld an order of the Board requiring the Communist Party to register as a Communist-action organization and to disclose its officers and mem-

5. 357 U.S. 449 (1958). The Supreme Court, reversing judgment of contempt against the N.A.A.C.P. for failure to produce its membership list in accordance with an order of the Alabama state court, found that such disclosure might affect the ability of the N.A.A.C.P. and its members to pursue their beliefs and might induce some members to withdraw from the Association due to the consequences of exposure.

6. For a discussion of the development of freedom of association, see generally Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1964); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

7. *See, e.g.*, Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963) (investigative committee ordered local N.A.A.C.P. president to disclose Association's membership in order to determine whether certain alleged Communists were members of the Association); N.A.A.C.P. v. Button, 371 U.S. 415 (1963) (Virginia statute prohibited the N.A.A.C.P. from urging Negroes to seek redress through the Association's legal staff for violation of civil rights); Shelton v. Tucker, 364 U.S. 479 (1960) (Arkansas statute required teachers, at risk of loss of employment, to list all organizations in which they were members or which they had contributed in the last five years). *But see* Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 137 (1961) (Black, J., dissenting); Scales v. United States, 367 U.S. 203, 259 (1961) (Black, J., dissenting). For general discussion and criticism of balancing test and Justice Black's theory of absolute first amendment rights, *see* Douglas, *The Right of Association*, 63 COLUM. L. REV. 1361 (1963); Emerson, *supra* note 6; Franz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Griswold, *Absolute is in the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 UTAH L. REV. 167 (1963); Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom*, 49 CALIF. L. REV. 4 (1961).

8. In a series of cases involving freedom of speech and press, the Court adopted the "clear and present danger" test, developed by Justice Holmes in Schenck v. United States, 249 U.S. 47 (1919). This test, which has not been applied in freedom of association cases, allowed significant infringement upon freedom of speech or the press when the circumstances are such that the words, if not repressed, "will bring about the substantive evils that Congress has a right to prevent." 249 U.S. at 52. *See* Antieu, *Dennis v. United States—Precedent, Principle or Perversion?*, 5 VAND. L. REV. 141 (1952); Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COLUM. L. REV. 313 (1952).

9. 367 U.S. 1 (1961).

bership. However, in *Scales v. United States*,[10] the Court recognized that Congress' derivative power under national security was limited and that membership in an organization which may have both legal and illegal aims may not be prohibited without proof that the individual adheres to and promotes the illegal as well as the legal aims.[11] Thus, the Court in *Scales* held that the Smith Act,[12] which imposes criminal penalties upon members of an organization advocating violent overthrow of the government, requires active membership with knowledge of the illegal aims of the organization and the specific intent of the member to overthrow the government. The Court has also refused to sustain an infringement upon constitutionally protected liberties where the purpose of Congress can be achieved by more narrowly drawn legislation. In *Aptheker v. Secretary of State*,[13] the Court declared unconstitutional, under the fifth amendment, section 6 of the Subversive Activities Control Act,[14] which denied the right to travel abroad to members of a Communist-action organization which was under a final registration order. The majority condemned the statute on the ground that it applied indiscriminately to all members regardless of an individual's knowledge or belief that he was associated with a Communist-action organization, or that its aims may be illegal, and regardless of whether the area in which an individual wishes to travel is "sensitive" security-wise.[15]

In the instant case, the majority held that section 5(a)(1)(D) was unconstitutional due to overbreadth. The statute was found to impose guilt by association in that it "sweeps indiscriminately across all types of associations with Communist-action groups, without regard to the quality and degree of membership."[16] The Court determined that section 5(a)(1)(D), in effect, forced the individual to either terminate his association with the designated organization or give up his job. Citing *Aptheker*,[17] the Court held that the specific constitutional infringement was due to the failure of Congress in

10. 367 U.S. 203 (1961) *noted in* 15 VAND. L. REV. 279 (1961).
11. 367 U.S. at 229-30.
12. 18 U.S.C. § 2385 (1964).
13. 378 U.S. 500 (1964).
14. 50 U.S.C. § 785 (1964).
15. 378 U.S. at 510-12.
16. 389 U.S. at 262 (1967). The Court rejected the district court's decision that the statute could be saved from constitutional infirmity by reading into the section the requirement of active membership and specific intent. Although this was done under the Smith Act in Scales v. United States, 367 U.S. 203 (1961), the Court found that the clarity and preciseness of section 5(a)(1)(D) prevented such an interpretation in this case.
17. The government had argued that Aptheker v. Secretary of State, 378 U.S. 500 (1964) was not controlling, because the right to travel under the fifth amendment was a more basic freedom than the right to work in a defense facility. The Court rejected this argument by holding that under § 5(a)(1)(D), the basis of loss of employment

section 5(a)(1)(D) to distinguish between active and passive membership in a Communist-action organization. The Court found that the statute did not require the individual to be aware of or to agree with the organization's aims and, further, that the statute did not consider whether the individual was in a "sensitive" position within the defense facility. "Sensitive position" was defined as a position in which the individual "could bring about any discernible adverse effects on the Nation's security."[18] While recognizing the legitimacy of Congress' interest in national defense and security,[19] the Court determined that Congress must adopt more narrowly drawn legislation so as to avoid a conflict with first amendment freedoms.[20] Mr. Justice White, dissenting, contended that the right of association, as a judicial construct, was not an absolute right and was subject to regulation by the State in certain instances. In the area of national security, for example, the dissent would prefer the judgment of Congress, based on a thorough investigation, to that of the Court, particularly since the extent of infringement upon protected rights was here limited to exclusion from employment in only certain designated defense facilities. This specific and minimal loss of employment or associational rights, the dissent contended, was outweighed by the threat to the national security.[21]

The instant decision is consistent with the tests applied by the Supreme Court in *Scales* and *Aptheker*. By imposing the requirements of active membership, knowledge of and agreement with the unlawful aims of the organization, and sensitivity of position, the Court has attempted to insure that a member of a Communist-action organization is not penalized for association which may be based upon purely philosophical agreement with Communism and therefore limited only to furtherance of the legal aims of the Communist organization. The result is that Congressional legislation must distinguish between activities which may, but do not necessarily, pose a threat to national security, and those activities in which the

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was the exercise by the individual of his constitutional right of associatiou under the first amendment.

18. 389 U.S. at 266 n.17, at 25 (1967).

19. The government had contended that the statute was justified under Congress' war power. In dismissing this contention, the majority said that implicit in the term "national defense" is the concept of protecting the democratic ideals found in the Constitution, the "most cherished" of which are expressed in the first amendment.

20. The majority of the instant court noted that it did not balance the first amendment rights against the governmental interests involved. *See* note 19 *supra*. The Court's analysis was confined to whether or not the means adopted by Congress was constitutional.

21. Mr. Justice Brennan in a concurring opinion held that the statute was not unconstitutional for overbreadth, but that it constituted an unauthorized delegation of power to the Secretary of Defense to designate certain facilities as "defense facilities."

individual's commitment and strategic position pose a clear and immediate threat. In order to preserve the individual's personal freedom of expression and association, it is essential that this distinction be maintained. Nevertheless, while the result achieved by the majority decision may be correct, the reasoning employed by the Court is open to question. The Court seems to balance the respective interests only to the extent that it normally does so in most cases involving close constitutional issues. However, contrary to previous cases involving freedom of association,[22] the Court expressly declined to apply the traditional "balancing test" employed under the first amendment.[23] Rather than weigh the interests of the government against the degree of infringement upon freedom of association, the Court found that "the Constitution requires that the conflict between congressional power and individual rights be *accommodated* by legislation drawn more narrowly to avoid the conflict."[24] By utilizing this method, the Court failed to examine properly the basis upon which the instant legislation was promulgated. The national security interest of Congress evidenced by this legislation, based generally upon self-preservation and specifically upon the desire to protect against espionage and sabotage in defense facilities, are given insufficient consideration in the majority opinion. Although the end of national security in a broad sense may not justify the resulting indiscriminate application under this statute, one can be highly critical of a decision which fails to delineate the exact nature and purpose of the particular governmental end evidenced here. Having propounded a set of vague tests, the Court failed to afford any specific indication as to what type of corrective legislation it might uphold.[25] Unfortunately, the thrust of this decision is essentially negative, leaving definitional guidelines to future litigation under new legislation by Congress.

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22. *See* note 7 *supra.*

23. "It has been suggested that this case should be decided by "balancing" the governmental interests . . . against the First Amendment rights asserted by the appellee. This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other." 389 U.S. at 268 n.20 (1967).

24. *Id.* (Emphasis added).

25. The Court in the instant decision expressly declined to consider either the constitutionality of an industrial security screening program or the constitutionality of other alternatives which might possibly be available to Congress. 389 U.S. at 267 (1967). In a subsequent case, the Supreme Court, faced with a security screening program set up by the executive branch, held that the executive branch had exceeded its authority under the Congressional legislation. For an indication of the first amendment implications involved in such a program, see Schnieder v. Smith, 389 U.S. 810 (1968) (Fortas, J., concurring).

Criminal Law—Evidence—Unauthorized Juror View Violates Sixth Amendment Right to Confrontation

Defendants DeLucia and Montella were convicted of attempted burglary and possession of burglar's tools. The defendants filed a motion for a new trial, alleging that certain jurors admitted having viewed the premises where the defendants allegedly committed the crime. The defendants contended that the jurors' view and re-enactment[1] at the scene of the alleged crime violated their right to due process of law under the fourteenth amendment.[2] The conviction was upheld by the New York Supreme Court Appellate Division and on re-argument[3] to the court of appeals, *held,* reversed. Where jurors, prior to return of a verdict, have an unauthorized view of premises where a crime has allegedly been committed by the defendant, they will be permitted to impeach their verdict to insure that the defendant's sixth amendment guarantee[4] of right to confrontation is safeguarded. *People v. DeLucia*, 20 N.Y.2d 275, 229 N.E.2d 211, 282 N.Y.S.2d 526 (1967).

The general rule that a juror may not impeach his own verdict has been firmly entrenched in American[5] and English[6] jurisdictions for many years. The doctrine first gained prominence following Lord Mansfield's decision in *Vaise v. Delaval.*[7] Since that time the vast majority of American courts[8] have consistently accepted and applied the rule. The doctrine originally was justified by Lord Mansfield on

1. Since this was the basis of the defendant's appeal to the Court of Appeals for the Second Circuit, United States *ex rel.* DeLucia v. McMann, 373 F.2d 759 (2d Cir. 1967), it is assumed to be the defendant's contention in the present decision.

2. U.S. CONST. amend. XIV.

3. The case was first argued before the court of appeals in People v. DeLucia, 15 N.Y.2d 294, 205 N.E.2d 324, 258 N.Y.S.2d 377 (1965), in which the conviction of the defendants was upheld. The Supreme Court denied certiorari in DeLucia v. New York, 382 U.S. 821 (1965). The defendants petitioned for a writ of habeas corpus in the United States District Court for the Northern District of New York, and while the appeal for dismissal of the writ was pending the Court of Appeals for the Second Circuit in United States *ex rel.* DeLucia v. McMann, 373 F.2d 759 (2d Cir. 1967), dismissed the writ without prejudice and vacated the order of the district court in order to allow the New York courts to reconsider the case in light of the Supreme Court decision in Parker v. Gladden, 385 U.S. 363 (1966).

4. U.S. CONST. amend. VI states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

5. State v. Gabriel, 342 Mo. 519, 116 S.W.2d 75 (1938); State v. Cacavas, 55 Idaho 538, 44 P.2d 1110 (1935); Smith v. State, 59 Ark. 132, 26 S.W. 712 (1894); *see* 8 J. WIGMORE, EVIDENCE § 2354 (McNaughton rev. ed. 1961). *But see* C. MCCORMICK, EVIDENCE § 68 (1954): "Other courts would abandon the rule of disqualification, and would permit jurors to testify to misconduct and irregularities which are ground for new trial."

6. *See* 8 J. WIGMORE, EVIDENCE § 2354 (McNaughton rev. ed. 1961).

7. 99 Eng. Rep. 944 (K.B. 1785).

8. *See* note 5 *supra.*

the grounds that a juror should not be permitted to allege his own turpitude,[9] thereby indicating a policy against self-stultification. Various other justifications have since been offered: (1) That a privilege exists against disclosure of deliberations;[10] (2) that the doctrine prevents jury tampering;[11] (3) that it avoids protracted litigation;[12] (4) that it protects free discussion among jurors;[13] and (5) that the parol evidence rule excludes such evidence.[14] In an effort to avoid injustice[15] which might result from inflexible application of the rule, many courts have applied restrictions delimiting its use.[16] These modifications have not ordinarily been justified on constitutional grounds, but have been imposed on grounds of seeking to avoid patent injustice through denial of a fair trial.[17] Thus jurors have been permitted to impeach verdicts arrived at by lot or chance,[18] verdicts based on communication, during retirement, of a juror's personal knowledge,[19] and verdicts where jurors gave false answers to questions asked during voir dire examination.[20] Some courts apply the so-called "Iowa"[21] rule and allow jurors' affidavits to avoid a verdict by proving any matter which does not "inhere"[22] in the verdict

9. Vaise v. Delaval, 99 Eng. Rep. 944 (K.B. 1785).

10. Clark v. United States, 289 U.S. 1 (1933); *see* 8 J. WIGMORE, EVIDENCE § 2346 (McNaughton rev. ed. 1961).

11. People v. Van Camp, 356 Mich. 593, 97 N.W.2d 726 (1959); People v. Pizzino, 313 Mich. 97, 20 N.W.2d 824 (1945).

12. State v. Gardner, 230 Ore. 569, 371 P.2d 558 (1962); Hudson v. State, 17 Tenn. 408 (1836).

13. McDonald v. Pless, 238 U.S. 264 (1915); Sandoval v. State, 151 Tex. Crim. 430, 209 S.W.2d 188 (1948).

14. Murdock v. Sumner, 39 Mass. 156 (1839); *see* 8 J. WIGMORE, EVIDENCE § 2348 (McNaughton rev. ed. 1961).

15. Mattox v. United States, 146 U.S. 140 (1892); Smith v. Cheetham, 3 Cai. R. 56 (N.Y. Sup. Ct. 1805); *see* State v. Gardner, 230 Ore. 569, 371 P.2d 558 (1962), which indicates that departures from the rule are only to be permitted where "it is 'manifest that enforcement of the rule would violate the plainest principles of justice.'" *Id.* at 574, 371 P.2d at 560.

16. *See* cases cited notes 18-24 *infra*; State v. Gardner, 230 Ore. 569, 371 P.2d 558 (1962).

17. McDonald v. Pless, 238 U.S. 264 (1915); State v. Gardner, 230 Ore. 569, 371 P.2d 558 (1962).

18. People v. Zelver, 135 Cal. App. 2d 226, 287 P.2d 183 (1955).

19. State v. Kociolek, 20 N.J. 92, 118 A.2d 812 (1955); State v. Joseph, 230 Ore. 585, 371 P.2d 689 (1962).

20. The reason for this exception is grounded in the belief that since the affidavit establishes that the juror was never qualified to serve, then in effect there is no verdict to impeach. *See* People v. Lessard, 25 Cal. Rptr. 78, 375 P.2d 46 (1962); State v. Serpas, 188 La. 1074, 179 So. 1 (1938).

21. Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195 (1866).

22. Marks v. State Rd. Dept., 69 So.2d 771 (Fla. 1954). Under this rule the effect of extraneous or overt circumstances in influencing a juror's vote is excluded, but where the juror's testimony concerns the mere existence or occurrence of events, it is permitted. State v. Kociolek, 20 N.J. 92, 118 A.2d 812 (1955).

itself, consequently excluding the mental process of the jury members during deliberations. Other courts distinguish between events occurring outside[23] the jury room and those occurring within.[24] In the recent case of *Parker v. Gladden*,[25] the Supreme Court relied on constitutional grounds in reversing a conviction where the conduct of third persons had prejudicially influenced the jurors. A court bailiff, assigned to a sequestered jury, had made statements to the jury which were prejudicial to the defendant. Although the jurors' statements had been admitted into evidence, the Supreme Court of Oregon failed to find denial of a fair trial. In reversing, the Supreme Court determined that the defendant's sixth amendment right to confrontation had clearly been violated.

Insofar as an unauthorized view is concerned, the majority of courts,[26] including those of New York,[27] apply the rule that the view, while always improper, does not alone[28] require the granting of a new trial unless it is shown that rights of a defendant are substantially prejudiced[29] thereby.

In the instant case the majority relied on *Parker v. Gladden*[30] in support of their determination that the jurors, by their re-enactment

23. *See* Hempton v. State, 111 Wis. 127, 86 N.W. 596 (1901); Pierce v. Brennan, 83 Minn. 422, 86 N.W. 417 (1901).

24. The New York courts followed the early rule of Vaise v. Delaval, 99 Eng. Rep. 944 (K.B. 1785), and refused to allow jurors' affidavits to impeach their own verdict, Dalrymple v. Williams, 63 N.Y. 361 (1875); either within or without the courtroom, People v. Sprague, 217 N.Y. 373, 111 N.E. 1077 (1916). The New York decisions also have modified the broad scope of the rule by permitting jurors' affidavits to establish a mistake in the reading or recording of the verdict, Dalrymple v. Williams, 63 N.Y. 361 (1875), and by distinguishing between juror misconduct and the conduct of third persons in dealing with the jury. Schrader v. Joseph H. Gertner, Jr., Inc., 282 App. Div. 1064, 126 N.Y.S.2d 521 (2d Dept. 1953). Jurors' affidavits are also permitted to establish false answers during voir dire. McHugh v. Jones, 258 App. Div. 111, 16 N.Y.S.2d 332 (2d Dept. 1939); People v. Leonti, 262 N.Y. 256, 186 N.E. 693 (1933). Since the jurors' testimony is excluded, hearsay affidavits of third persons concerning what jurors may have stated are likewise inadmissible. People v. Sprague, 217 N.Y. 373, 111 N.E. 1077 (1916).

25. 385 U.S. 363 (1966). *See also* Sheppard v. Maxwell, 384 U.S. 333 (1966), wherein massive and adverse publicity prevented a defendant from receiving a fair trial.

26. Ng Sing v. United States, 8 F.2d 919 (9th Cir. 1925); Phillips v. State, 157 Neb. 419, 59 N.W.2d 598 (1953).

27. *See* cases cited note 29 *infra*.

28. *See* N.Y. CODE CRIM. PROC. § 465(2) (McKinney 1958), which provides: "The Court in which a trial has been had upon an issue of fact has power to grant a new trial, when a verdict has been rendered against the defendant by which his substantial rights have been prejudiced . . . [w]hen the jury has received any evidence out of court, other than that resulting from a view . . . ."

29. In Phillips v. State, 157 Neb. 419, 424, 59 N.W.2d 598, 601 (1953), it was held that an unauthorized view "will not vitiate the verdict where it is not shown to have affected the result of the verdict." People v. Kraus, 147 Misc. 906, 265 N.Y.S. 294 (Ct. Gen. Sess. 1933); People v. Thorn, 156 N.Y. 286, 50 N.E. 947 (1898).

30. 385 U.S. 363 (1966).

at the scene of the alleged crime, became "unsworn witnesses"[31] against the defendant, thereby denying his right of confrontation as guaranteed by the sixth amendment. The court recognized that it was faced with the conflict of weighing the policy reasons behind forbidding jurors to impeach their verdict with the possible injustice to the defendant which would result in applying the general rule. The majority reasoned that since the alleged prejudicial conduct of the jurors occurred outside the jury room, the policy reasons for holding jurors' statements inadmissible are less compelling, since the purpose of the doctrine is to prevent instability of verdicts resulting from post-trial harassment of jurors concerning matters during deliberations. Consequently the court found that statements concerning outside influence on a jury which deprive a defendant of the constitutional safeguard of the right to confront witnesses against him should be admissible in evidence. However, the majority specifically noted that in cases involving statements made during jury room deliberations the policy justifying the general rule ordinarily outweighs possible injustice to a defendant, since the entire jury system itself is threatened.[32]

The present case appears particularly significant when viewed in terms of prior authority. The court, based on common law authority, had earlier held the jurors' statements inadmissible in its first decision.[33] However, in light of *Parker v. Gladden,* the majority concluded that a contrary result was required. This indicates that constitutional requirements may demand a higher standard than did the prior exceptions to the general rule. Since past decisions have not specifically relied on the Constitution in developing restrictions to the general rule, the determination by the present court that the sixth amendment compelled the result indicates a new approach to an old problem. Additionally, the case is contrary to past authority insofar as the effect of an unauthorized view is concerned, since the instant court found the view alone to adversely affect the defendant's constitutional rights without requiring an inquiry into its prejudicial effect upon jury deliberations. Since the present decision was based upon a newly enunciated constitutional right,[34] it is likely that future litigation will be forthcoming to test the validity of the standards created

31. People v. DeLucia, 20 N.Y.2d 275, 279, 229 N.E.2d 211, 214, 282 N.Y.S.2d 526, 530 (1967).

32. *Id.* Judge Van Voorhis, in his dissenting opinion, concluded that Parker v. Gladden, 385 U.S. 363 (1966), was distinguishable in that it involved statements by a third party to the jury, consequently it did not compel a reversal. He also felt that the rule forbidding a juror's impeachment of his own verdict was supported by sound public policy and outweighed any prejudice to the defendant.

33. People v. DeLucia, 15 N.Y.2d 294, 206 N.E.2d 324, 258 N.Y.S.2d 377 (1965).

34. *See* United States *ex rel.* DeLucia v. McMann, 373 F.2d 759 (2d Cir. 1967).

by prior authority. The court's reliance upon the sixth amendment right to confrontation in reaching its decision might be subject to serious criticism, since it is difficult to conceive how a defendant might reasonably be afforded an opportunity to "confront" an unauthorized view of the scene of an alleged crime. Even if this determination is not accepted by other courts it is possible that the same result could be reached through the due process clause of the fourteenth amendment,[35] since once it is determined that the prejudicial effect of the outside influence outweighs the policy reasons justifying the general rule, then it is easily arguable that a defendant has been denied "fundamental fairness."

Domestic Relations–Intentional False Representation of Pregnancy Grounds for Annulment

Defendant, having engaged in sexual intercourse with plaintiff at frequent intervals for a year, told him, with no reasonable cause to believe it true,[1] that she was pregnant, and threatened him with expulsion from college and punitive civil and criminal action if he did not marry her. Plaintiff married defendant and upon finding that these representations were fabrications, plaintiff sought an annulment on the ground that the marriage was obtained by fraud.[2] The trial court denied relief and on appeal to the Court of Appeals of Kentucky, *held,* reversed. An intentional false representation of pregnancy upon which the husband was induced to marry constitutes fraud sufficient to grant an annulment. *Parks v. Parks,* 418 S.W.2d 726 (Ky. 1967).

It is generally recognized that a marriage induced by fraud is voidable and subject to annulment.[3] Such fraud as will justify annulment must be perpetrated at or before the marriage, must be intended to induce consent,[4] and it must be shown that, absent the

35. U.S. CONST. amend. XIV.

1. The dissenting judge interpreted the facts to read that defendant had an actual belief that she was pregnant, confirmed by a doctor. 418 S.W.2d 726, 728 (Ky. 1967).

2. KY. REV. STAT. § 402.030. "Courts having general equity jurisdiction may declare void any marriage obtained by . . . fraud . . . ."

3. *See* J. MADDEN, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS 13-22 (1931); 3 W. NELSON, DIVORCE AND ANNULMENT §§ 31.29-41 (2d ed. 1945).

4. Allen v. Allen, 126 W. Va. 415, 28 S.E.2d 829 (1944). There is authority to the effect that where there has been no consummation of the marriage, fraud sufficient to set aside an ordinary contract is sufficient to grant an annulment. Nocenti v. Ruberti, 17 N.J. Misc. 21, 3 A.2d 128 (Ch. 1933). It is probably better to state that where the marriage has not been consummated the requirements of fraud are less strict. Craun v. Craun, 300 F.2d 737 (1962) (Maryland law).

fraud, the defrauded party would not have consented to the marriage.[5] Because of the social importance attached to the institution of marriage all courts require something more than that measure of fraud required to render a simple contract voidable.[6] This idea is usually expressed by the courts' requirement that the fraud go to the "essentials"[7] of the marriage relationship. However, there is wide disagreement among the courts as to what factors constitute the essentials of a marriage. Generally, misrepresentation as to matters incidental to the marriage relationship, such as age, rank, family, fortune, health, character, morality, habits, reputation and premarital falsehoods as to love and affection are not sufficient grounds for annulment.[8] However, in aggravated cases of misrepresentation or concealment of the above factors courts have held that the essentials of the conjugal relationship are affected.[9] Concealed intent not to perform marital duties[10] or not to engage in normal relations[11] is generally considered to be so significantly involved with the marital relationship that annulment will be granted. When the husband has not had premarital intercourse with his wife, concealment of her pregnancy by another is grounds for annulment,[12] whereas the courts are split when there has been premarital intercourse between the parties.[13] Further, when the wife misrepresented to her husband that she was pregnant by him, when in fact she was not pregnant at all, the majority of courts have denied annulment. These courts denying relief have usually reasoned that since the parties were in *pari delicto,* her action in inducing him to marry her could be regarded

5. Damaskinos v. Damaskinos, 325 Mass. 217, 89 N.E.2d 766 (1949); Shonfeld v. Shonfeld, 260 N.Y. 477, 184 N.E. 60 (1933).

6. Mayer v. Mayer, 207 Cal. 685, 279 P. 783 (1929).

7. Craun v. Craun, 300 F.2d 737 (1962) (Maryland law); Handley v. Handley, 179 Cal. App. 2d 742, 3 Cal. Rptr. 910 (1960) ("very essence"); Allen v. Allen, 126 W. Va. 415, 28 S.E.2d 829 (1944) ("very fundamentals"); Masters v. Masters, 13 Wis. 2d 332, 108 N.W.2d 674 (1961) ("essential to").

8. Marshall v. Marshall, 212 Cal. 736, 300 P. 816 (1931) (false representation of wealth); Bielby v. Bielby, 333 Ill. 478, 165 N.E. 231 (1929) (simulation of affection to gain property interest); Fontin v. Fontin, 106 N.H. 208, 208 A.2d 447 (1965) (coucealment of previous marriage terminated by divorce); Avery v. Avery, 236 N.Y.S.2d 379 (Sup. Ct. 1962) (premarital falsehood as to love and affection and to defendant's wealth).

9. Craun v. Craun, 300 F.2d 737 (1962) (concealment of illicit living conditions); Vachata v. Vachata, 58 Ill. App. 2d 78, 207 N.E.2d 129 (1965) (concealment of pending indictnent for forgery). Where oue has venereal or other disease which is dangerous to either spouse or offspring there exists an affirmative duty to reveal such condition. Smith v. Smith, 171 Mass. 404, 50 N.E. 933 (1898) (syphilis).

10. Bernstein v. Bernstein, 25 Conn. Supp. 239, 201 A.2d 660 (Super. Ct. 1964).

11. Santos v. Santos, 80 R.I. 5, 90 A.2d 771 (1952) (wife wanted to engage only in unnatural intercourse).

12. Hardesty v. Hardesty, 193 Cal. 330, 223 P. 951 (1924).

13. Westfall v. Westfall, 100 Ore. 224, 197 P. 271 (1921) (refusing); Winner v. Winner, 171 Wis. 413, 177 N.W. 680 (1920) (granting annulment).

as merely inducing him to perform his social obligation.[14] In *DiLorenzo v. DiLorenzo*,[15] an early New York case allowing annulment in a situation analogous to the instant case, the wife had represented to her husband that a young baby was his, when actually she had borrowed the child from a friend; he thereupon married her. The court, making no reference to the obvious fact that plaintiff must have engaged in premarital intercourse with defendant, held that the fraud was as to a fact, except for the truth of which the necessary consent of the plaintiff would not have been given, and that it therefore afforded a sufficient ground for annulment. The court emphasized the inducement of plaintiff to marry defendant, without requiring that the fraud go to the essentials of the marriage. The New York rule became perceptively less liberal with *Shonfeld v. Shonfeld*,[16] in which the court reiterated the *DiLorenzo* test but emphasized the objective criteria of the "ordinarily prudent man." In a recent interpretation of the *DiLorenzo-Shonfeld* rule a New York court, in *Kober v. Kober*,[17] again rejected the "essentials of the marriage relation" test and emphasized the lack of "consent" on the part of plaintiff. The court in both *DiLorenzo* and *Kober* used an objective test, approaching marriage as a civil contract in which inquiry is directed toward defendant's inducement and plaintiff's reliance rather than toward the "essentials of the marriage relationship." Two courts have allowed annulment in the factual situation presented by the instant case.[18] In the most recent of the two, *Masters v. Masters*, the Wisconsin Supreme Court quoted favorably from the *DiLorenzo* case, rejecting the "essentials of the marriage" test and the *pari delicto* defense. The court emphasized the necessity to determine that the marriage would not have been entered had such false representations not been made.[19]

In the instant case, the court refused to recognize as a legal defense the alleged social obligation of a single man to marry a single woman with whom he has had sexual intercourse. The court reasoned that since this social obligation nowhere provides grounds for affirmative

14. Mobley v. Mobley, 245 Ala. 90, 16 So. 2d 5 (1943); Brandt v. Brandt, 123 Fla. 680, 167 So. 524 (1936).

15. 174 N.Y. 467, 67 N.E. 63 (1903).

16. 260 N.Y. 477, 184 N.E. 60 (1933) (annulment allowed where defendant misrepresented that she had $6,000 to lend plaintiff to set up a business).

17. 16 N.Y.2d 191, 211 N.E.2d 817, 264 N.Y.S.2d 364 (1965) (annulment allowed where husband concealed his background as a Nazi officer and his intense anti-semitism).

18. Garfinkel v. Garfinkel, 9 App. Div. 2d 98, 191 N.Y.S.2d 574 (1959); Masters v. Masters, 13 Wis. 2d 332, 108 N.W.2d 674 (1961).

19. *Id.* The court adds that there may be situations where policy reasons should preclude the annulment of a fraudulently-induced marriage, such as false representations as to financial worth.

relief it should not furnish justification for fraud. The court also rejected the *pari delicto* argument, reasoning that the punishment inflicted by denial of an annulment is disproportionate to the offense of premarital intercourse. Further, it felt that a denial of annulment would, in effect, punish plaintiff for the laudable act of marrying defendant, an action which he undertook to rectify the wrong which would have resulted had her representation been true. The court rejected defendant's deterrence argument by stating that if the current civil and criminal remedies and social pressures are not sufficient to discourage premarital sex, denial of annulment will hardly be more effective. The court concluded that when this small possibility of deterrence is weighed against the reward to defendant for perpetrating the fraud and the punishment of plaintiff for attempting to remedy his wrong, the equities are clearly in favor of granting an annulment. The dissenting opinion favored the adoption of the majority position and stated that to grant the annulment "would open up a new field to people inclined to throw off the relation and responsibility of a sacred contract upon which the basis of our society rests."[20]

With this decision Kentucky joins New York and Wisconsin in rejecting the "essential of the marriage" test, as well as the *pari delicto* and social obligation arguments as applied to actions for annulment on the grounds of fraud in the inducement to marry. The approach taken by the Kentucky Court of Appeals, in contrast to the majority position, regards the marriage contract as containing the attributes more generally found in a civil contract. Usually, a contract of marriage is considered different from a simple civil contract in that the state, because of its vital interest in marriage as an important social institution, is a third party to the contract.[21] The state's concern with maintaining marital relationships is the principal reason for requiring that fraud go to the "essentials" of the marriage before an annulment will be granted. However, this same touchstone can be employed to support the argument that the integrity of marriage as an institution is better strengthened by allowing annulment of those marriages which are fraudulently induced. If assistance is to be sought from existing cases in developing realistic grounds for annulment consonant with our current values as to individual rights, the New York experience[22] appears to be the most promising. In *DiLorenzo, Shofeld,* and *Kober* the New York courts stated that, in actions for annulment on the ground of fraud in the inducement, the

20. 418 S.W.2d 726, 729 (Ky. 1967).

21. J. MADDEN, *supra* note 3, at 3-4.

22. The probable reason for the greater liberality of the New York courts in annulment proceedings is the very strict divorce laws which existed until 1967. *See* Note, *Annulment for Fraud in New York,* 24 ALBANY L. REV. 125, 134-35 (1960).

determining factor is that the fact intentionally misrepresented or concealed by defendant was relied upon by plaintiff and that it induced plaintiff's consent. The instant case appears to accept that criterion. However, considering the very personal nature of the marriage contract, the appropriate criterion should be purely subjective: that defendant's fraudulent activity induced this particular plaintiff to enter the marriage. It is submitted that society gains little by perpetuating a marriage in which one party was deceived into consenting; and that individual personal rights are eroded by tying the defendant to a relationship, the severance of which the laws seek to discourage through stringent divorce statutes.

Income Tax—Corporations—Attorneys' and Accountants' Fees Incurred in Sale of Assets Pursuant to a Section 337 Liquidation Are Not Deductible

Pursuant to a plan of complete liquidation under section 337 of the Internal Revenue Code,[1] taxpayer corporation sold all of its assets and incurred brokers' commissions and accountants' and attorneys' fees,[2] for the sale, which it claimed as a deduction from ordinary income on its final federal income tax return. The District Director disallowed the deductions on the ground that they represented capital expenditures, and as such were not deductible from ordinary income. After paying the deficiency, the corporation successfully sued for a refund in district court, contending that the deductions were ordinary and necessary business expenses.[3] On appeal to the Court of Appeals for the Seventh Circuit, *held,* reversed. Corporate expenditures directly related to a sale of its capital assets in the course of a complete liquidation under section 337 of the Internal Revenue Code do

1. INT. REV. CODE of 1954, § 337. "Gain Or Loss On Sales Or Exchanges In Connection With Certain Liquidations. (a) General Rule.—If—(1) a corporation adopts a plan of complete liquidation . . . and (2) within the 12-month period beginning on the date of the adoption of such plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims, then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period."

2. The taxpayer, Alphaco, Inc., sold all of its assets at a gain in excess of $1,000,000 during fiscal year 1960-61. On its income tax return for the same period it took a deduction for ordinary and necessary business expenses of $54,103.47, representing expenses (brokers' commissions and accountants' and attorneys' fees) incurred in effectuating the sale of capital assets.

3. INT. REV. CODE of 1954, § 162. "Trade Or Business Expenses. (a) In General.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ."

not constitute business expenses deductible from ordinary income reported in the corporation's final return. *Alphaco, Inc. v. Nelson*, 385 F.2d 244 (7th Cir. 1967).

Section 337 of the Internal Revenue Code was the product of Congressional reaction to two Supreme Court decisions dealing with corporate liquidation. In *Commissioner v. Court Holding Co.*,[4] the Court held that where a corporation with two stockholders had declared its only asset, an apartment house, as a liquidated dividend and the stockholders then sold the asset to a purchaser who had previously made an agreement to buy from the corporation, the transaction was merely a tax avoidance scheme. Both the corporation and the shareholder were held taxable on the gain, thus resulting in a double tax. In the second decision, *United States v. Cumberland Public Service Co.*,[5] the Court reached the opposite result where a similar liquidation was not accompanied by prior corporate sale negotiations. Following these two decisions, Congress enacted section 337, intending to eliminate the distinction made by the Court in reaching a contrary result in two substantively similar factual settings which differed only in form. This intent was accomplished by eliminating the tax at the corporate level and imposing a single tax at the shareholder level. Tax liability was thus no longer dependent on the mere formality of distinguishing parties to the sales negotiations.[6] Expenses incurred in producing such a sale are deductible only if within the ambit of section 162 of the Code. Two lines of authority have evolved as to the deductibility of legal and accounting fees incident to a section 337 liquidation. In *United States v. Mountain States Mixed Feed Co.*,[7] the Tenth Circuit Court of Appeals allowed a deduction of all attorney's fees incurred during a section 337 liquidation, although the Commissioner had initially allowed the deduction only to the extent of fees allocable to liquidation and dissolution, and had disallowed legal fees incident to the sale of capital assets. The court based its decision on previous cases,[8] reasoning that "liquidations occur[red] with sufficient frequency in

4. 324 U.S. 331 (1945).

5. 338 U.S. 451 (1950).

6. In analyzing the two decisions, Congress stated that "in order to eliminate questions resulting only from formalities, your committee has provided that if a corporation in process of liquidation sells assets there will be no tax at the corporate level, but any gain realized will be taxed to the distributee-shareholder, as ordinary income or capital gain depending on the character of the asset sold." H.R. REP. No. 1337, 83d Cong., 2d Sess. 38-39 (1954). *See also* S. REP. No. 1622, 83d Cong., 2d Sess. 258-59 (1954).

7. 365 F.2d 244 (10th Cir. 1966).

8. In Pacific Coast Biscuit Co. v. Commissioner, 32 B.T.A. 39, 43 (1935), the court stated "[W]e are of the opinion that costs of dissolution and liquidation are both ordinary and necessary expenses within the meaning of the statute." *Accord*, Pridemark, Inc. v. Commissioner, 345 F.2d 35 (4th Cir. 1961); Gravois Planing Mill Co. v.

business that a liquidation [was] an 'ordinary' event within the meaning of *Welch v. Helvering*[9] and consequently their costs [were] 'ordinary' expenses within the meaning of Section 162 of the 1954 Internal Revenue Code."[10] Although expenses of liquidation do not concern the creation or continuance of a capital asset,[11] the court reasoned further that it is probable that the attorneys could account for the time they devoted to the corporate dissolution as distinguished from the sale of the assets; however, there is no reason why this sale of assets is not as much a part of the liquidation as the dissolution of the corporation.[12] A contrary position was advanced in *Otto F. Rupprecht*,[13] where the Tax Court disallowed deductions for broker's commissions and attorney's fees incurred solely in the sale of assets,[14] on the ground that "the expenses involved were not costs of dissolving the corporation, but arose in connection with the sale of its principal asset,"[15] and thus were non-deductible capital costs.[16]

In the instant case the court relied on the "principle of tax law" that under the scheme of the income tax statute, "related disbursements and receipts should be given consistent tax treatment."[17] In its analysis, the court noted that since under section 337 "capital gain is given no recognition and has no tax incidence to the corporation, the costs of producing that gain should likewise be ignored."[18] Thus, the court reasoned, the section did not indicate a purpose to transmute the selling costs from their normal character as capital

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Commissioner, 299 F.2d 199 (8th Cir. 1962) (partial liquidation); Commissioner v. Wayne Coal Mining Co., 109 F.2d 112 (3d Cir. 1934); United States v. Areade Co., 203 F.2d 230 (6th Cir. 1933).

9. 290 U.S. 111 (1933). The Court held that what is "ordinary" is "none the less a variable affected by time and place and circumstance." *Id.* at 113-14.

10. United States v. Mountain States Mixed Feed Co., 363 F.2d 244, 245 (1966).

11. 4A J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 25.35 (1967).

12. United States v. Mountain States Mixed Feed Co., 365 F.2d 244, 245 (1966).

13. 20 CCH Tax Ct. Mem. 618 (1961).

14. Thus, in this case, as in the instant case, there was a liquidation, but no allocation problem as there was in *Mountain*.

15. 20 CCH Tax Ct. Mem. 620 (1961).

16. *See* Winner v. Commissioner, 371 F.2d 684 (1st Cir. 1967), holding that a liquidating corporation disposing of its inventory in non-taxable bulk sale could not compute cost of goods sold for income tax purposes, assuming that ending inventory for year was zero, thus reducing the corporation's gross income by an amount equal to the final inventory at date of sale and Towanda Textiles, Inc. v. United States, 180 F. Supp. 373 (Ct. Cl. 1960), holding that where a corporation adopted a plan of complete liquidation and shortly thereafter the corporation's principal manufacturing plant was destroyed by fire and insurance proceeds resulted in a gain, the corporation was exempt from the tax on the gain from the involuntary conversion, but attorney and adjuster fees incurred in collection of insurance proceeds could be used only to reduce gain, not as a deduction by the corporation from other income.

17. 385 F.2d at 245, *quoting* Spangler v. Commissioner, 323 F.2d 913 (9th Cir. 1963).

18. *Id.*

expenses into ordinary expenses, and therefore, to permit the taxpayer to deduct legal fees from ordinary income would be to confer an additional tax benefit on the taxpayer—exactly what Congress had sought to avoid in enacting section 337. The court therefore concluded that to allow a business expense deduction for costs incident to the sale of capital assets would not only violate a basic principle of income tax law, but would also be inconsistent with the purpose for which section 337 was enacted.[19]

The instant case illustrates the clear division of authority as to the treatment of selling expenses incident to a section 337 liquidation. In holding these expenses non-deductible as ordinary and necessary expenses, the instant court purports to distinguish *Mountain States Mixed Feed Co.*, relied upon by the taxpayer, by reasoning that the *Mountain* court did not "examine the critical considerations."[20] This distinction is indefensible, since in its analysis, the court fails to give due weight to the entire opinion of the *Mountain* case, particularly the fact that the Commissioner there had allocated the lawyers' fees between those incident to the liquidation in general and those properly allocated to the sale of capital assets. The Tenth Circuit then unequivocally rejected this allocation—certainly a "critical consideration."[21] However, the instant court's holding advocates such allocation and is, therefore, contrary to *Mountain.* Further, although the Commissioner's position here is that expenses related to the sale of a capital asset are "capital expenditures" and as such require an adjustment to basis under section 1016 of the Code,[22] the Code takes no position directly on this point.[23] The corporation's contention that its selling expenses were necessary and ordinary expenses was accepted in *Mountain;* but the instant court rejects this position, hinging its opinion largely on the policy implications of section 337. The court views this policy as requiring equal tax consequences regardless of whether the corporation sells the asset or the asset is distributed in liquidation and sold by the shareholders.[24] An examination of three alternative methods of dealing with expense deductions under a 337 liquidation best illustrates this policy.[25] First, the effect of al-

19. *Id.*

20. *Id.* at 247.

21. United States v. Mountain States Mixed Feed Co., 365 F.2d 244, 245 (1966).

22. INT. REV. CODE of 1954, § 1016. "Adjustments To Basis. (a) General Rule.—Proper adjustment in respect of the property shall in all cases be made—(1) for expenditures, receipts, losses, or other items, properly chargeable to capital account . . . ."

23. INT. REV. CODE of 1954, § 162.

24. *See* note 6 *supra.*

25. Postulate the following factual situation: A soley owned corporation has as its only asset an apartment house. Its fair market value is $100,000 and its basis is $50,000. The basis of the stock owned by the shareholder is $10,000. The corpo-

owing the corporation a deduction as an ordinary and necessary expense would be to lower the net profit of the corporation, thus reducing its tax and increasing the earnings and profits distributable to the shareholder.[26] Second, by disallowing the deduction, as in the instant case, the corporation merely reduces the gain realized; but since the gain realized is not recognized under section 337, the earnings and profits are not affected.[27] Third, if the assets are distributed to the shareholder in liquidation and the shareholder sells the asset incurring the same legal expenses, he will adjust the basis of the asset upward, thus realizing less.[28] Since the allowance of a deduction to the corporation in the first alternative above would increase the earnings and profits, the imbalance sought to be avoided by the drafters of section 337 is again created. Viewed in this light the instant court's holding seems to coincide with the policy of section 337. However, whether this policy is administratively feasible for lawyers and accountants is questionable. As accurate time records are the heart of effective office management,[29] it is submitted that to require lawyers to allocate their time during a liquidation between "liquidation" and "sale of assets" matters (*i.e.* "planning expenses"

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ration has in its cash account $50,000 and has net earnings of $50,000 for the year to date. Expenses incident to the sale of the asset would be $5,000.

26. The following step transactions in relation to the factual situation given in note 25 *supra* would follow: (1) the cash account would be reduced by $5,000 (the amount of the sales expense) leaving $45,000; (2) the tax on the net profits (now $45,000 due to the deduction of the sales expenses) would be $22,500 (using 50% rate for simplicity) leaving $27,500 for Earnings and Profits; (3) the $50,000 gain realized on the sale of the apartment building will not be recognized to the corporation under § 337; (4) the corporation distributes in liquidation (a) $45,000 (cash account), (b) $100,000 (from the asset), (c) $27,500 (Earnings and Profits) for a total of $172,500, (5) the shareholder pays tax on $162,500 (total distribution less basis of the shareholder's stock) or $40,625 leaving $131,875.

27. The following step transactions in relation to the factual situation postulated in note 25 *supra* would follow: (1) the cash aecount would be reduced by $5,000 (the amount of the sales expense) leaving $45,000; (2) the tax on the net profits would be $25,000 (using 50% rate) leaving $25,000 for the Earnings and Profits; (3) the basic of the asset would be adjusted to $55,000 (sales expenses) leaving $45,000 realized but not recognized; (4) the corporation distributes in liquidation (a) $45,000 (cash account), (b) $100,000 (from the asset), (c) $25,000 (Earnings and Profits) for a total of $170,000; (5) the shareholder pays tax on $160,000 (total distribution less basis of shareholder's stock) or $40,000 leaving $130,000.

28. When the shareholder sells the asset distributed in liquidation the following step transactions take place: (1) the corporation distributes to the shareholder in liquidation (a) asset (fair market value of $100,000), (b) $50,000 (cash account), (c) $25,000 (earnings and profits after the net profits have been taxed; (2) the shareholder incurs the same expenses as the corporation; (3) the shareholder realizes a gain of $160,000 (total distribution of $175,000 less basis of stock and sale expenses in selling the asset); (4) the shareholder pays tax on $160,000 (amount realized) or $40,000 leaving $130,000.

29. D. McCarthy, Law Office Management (1946).

v. "expenses of putting the plan into effect")[30] would often be impractical, if not impossible. Even though this administrative difficulty might outweigh the policy argument of section 337, it would seem that the court's holding is better founded on that policy than upon such a theoretical statement as "related disbursements and receipts should be given consistent tax treatment."[31]

Interest—Usury—Charging Debtor with Statutory Maximum Loan Fees Prohibited Unless Reasonably Related to Services Rendered and Expenses Incurred by Lender

Over a fourteen-month period, the debtor executed a series of five promissory notes in favor of petitioner loan company, one of which, the subject of the instant litigation, was an unsecured "claim note," executed on March 10, 1967.[1] The face value of the claim note was 612 dollars payable in eighteen monthly installments of 34 dollars. Petitioner designated 55.08 dollars of the face amount as interest and deducted it in advance as allowed by statute.[2] Petitioner charged the debtor 24.48 dollars as a loan and investigation fee[3] and made the grant

30. 65 MICH. L. REV. 1508, 1510 (1967).
31. 385 F.2d at 245.

1. The claim note, on its face, bears the following computation:

Date 3/10/67 Statement.	$612.00
Amount of note	
Interest	55.08
Loan Fee	24.48
Ins.: L 18.36 A & H 45.90	64.26
Ins.: Prop 18.36	18.36
Unpaid bal. former loan	450.00

The claim note was executed before the immediately preceeding loan had been repaid and constituted a loan of the amount necessary to pay the balance due on the prior loan.

2. Industrial Loan and Thrift Act, TENN. CODE ANN. § 45-2007 (1964). In pertinent part, this section of the Act provides loan companies with the power "[t]o lend money on the personal undertaking of a borrower or other persons, with or without security including certificates of indebtedness or investment purchased by the borrower simultaneously with said loan transaction, or otherwise, and to deduct interest in advance on the face amount of the loan for the full term thereof." In the instant case, $2.78 of the $34.00 monthly installment was a return of this pre-deducted interest and $31.22 was a return of principal.

3. TENN. CODE ANN. § 45-2007(i) (1964). In pertinent part, allows loan companies "[t]o charge for services rendered and expenses incurred in connection with investigating the moral and financial standing of the applicant, security for the loan, investigation of titles and other expenses incurred in connection with the closing of any

of the loan conditional on the debtor's payment of 82.62 dollars to cover the premium charges on health, accident, life, and property insurance.[4] On June 1, 1967, the debtor filed a Wage Earner's Petition in a Chapter XIII Wage Earner Plan Proceeding.[5] The Referee in Bankruptcy approved the debtor's plan and on his own motion found the petitioner's claim note usurious on its face in that the amount of interest deducted in advance was in excess of the ten percent maximum allowed under the state constitution,[6] the loan and investigation fee was excessive and unrelated to services rendered or expenses actually incurred, and the debtor, without his assent, was charged with insurance costs from which petitioner received substantial profits.[7] On appeal to the Federal District Court for the Western District of Tennessee, *held*, affirmed. A claim note is usurious where the charge for pre-deduction of interest exceeds the statutory limit, the loan and investigation fee is not reasonably related to services

loan an amount not to exceed four dollars ($4.00) per each one hundred dollars ($100.00) of the principal amount loaned and or proportionate amount for any greater or lesser amount loaned, provided no charge shall be collected unless a loan shall have been made." In arriving at the instant charge, petitioner applied the statutory formula to the face amount of the claim note ($612.00).

4. TENN. CODE ANN. § 45-2007(k) (1964), allows lenders "to require at the expense of the borrower, insurance against the hazards to which the collateral used to secure the loan is subject, and upon failure of the borrower to supply such insurance, to procure the same and to accept, but not require, as collateral, insurance against the hazards of death or disability of a borrower; provided, however, that such insurance shall be obtained . . . at rates approved by the department of insurance and banking of the state of Teunessee, and provided that the amount of the loan and the type of coverage bears a reasonable relation to the existing hazard or risk of loss."

5. Following the filing of the Wage Earner's Plan on June 1, 1967, the referee ordered the petitioner to produce information concerning possible usurious features of the claim note. The last order came on July 19, 1967, when the referee filed a Memorandum Opinion setting forth the law of usury applicable to the loan company. On July 21, the Wage Earner's Plan was approved. The loan company accepted the Plan on July 24, but refused to comply with the referee's earlier orders to produce information on the claim note. The loan company then petitioned the instant court to set aside the Memorandum Opinion on the ground that the referee had approved the debtor's plan and thus had no further power to inquire into the nature of the claim note. The court ruled that the referee had power to make further inquiry into the question of usury even though an order had been entered approving the plan. The referee then scheduled hearings at which the opinion on instant appeal was rendered. The petitioner sought the permission of the referee to withdraw its claim with prejudice, which the referee denied. The petitioner then amended its claim to "zero," and moved that the hearings not be conducted. That motion was also denied.

6. TENN. CONST. art. 11, § 7.

7. The petitioner denied that the claim note was usurious and also contended: (1) that under U.S.C. § 1056(b) the referee had no power to inquire into the issue of usury after confirming the Plan, in the absence of objections to the claim by the debtor, trustee, or another creditor; (2) that the reduction of the claim to "zero" rendered further proceedings moot; and (3) that the referee prejudged the issues, was antagonistic toward the loan company and its attorney, and that his opinion should be considered advisory only.

rendered or expenses incurred by the lender, and the requirement that the debtor pay insurance charges as a condition precedent for the granting of the unsecured loan is prohibited by statute. *In re Bogan*, No. BK 67-1811 (W.D. Tenn. 1968).

Usury, broadly defined as the intentional exaction of more compensation than is allowed by law in return for the loan of money,[8] is a subject entirely regulated by statute. While usurious charges on small loans are forbidden in most states,[9] the statutes regulating the general conduct of the loan industries are nonetheless so heavily biased in favor of the lender that the prohibitions on usury are often rendered impotent.[10] The reason for this statutory bias has been due partly to a strong lobby and partly to the realization that in our society money lending takes place in a competitive market situation. A predominant theory concerning the dynamics of the loan market asserts that usury statutes cannot realistically limit the interest rate, because economic laws of supply and demand may dictate a rate higher than the statutory maximum. If such a statutory limitation were strictly applied, then whenever the market price of money exceeded the point at which the maximum allowable interest would yield a profit, the moneylender would simply be forced to terminate his lending operations. This, of course, produces the unsatisfactory result of denying the needy borrower a source of funds.[11] This theory has led legislatures to adopt certain measures which ameliorate the restrictive effects of the statutory maximum interest rate and allow the lender to emerge with a profit in almost any market situation, thus protecting the sources of credit so necessary in an expanding, consumer-oriented economy. Among these measures has been the raising of the statutory maximum interest to a level which may exceed the rate which the market dictates.[12] Another measure has been to allow the lender to impose various service charges and investigation fees, and to utilize profit maximizing methods of computing interest.[13]

8. 91 C.J.S. *Usury* § 13, at 583 (1955). *See* Jenkins v. Dugger, 96 F.2d 727, 729 (6th Cir. 1938), a typical usury case in which it was held that "[a] contract is usurious when there is any contingency by which the lender may get more than the lawful rate of interest . . . . From the Mosaic laws to the present . . . the weight of every law on the subject has fallen on the possibility of the receipt by the lender of more than the law allowed . . . ."

9. A fairly recent survey shows that 13 states have a maximum interest rate of 6% per annum; 27 have rates ranging from 7-11% and 9 states allow 12% or more. *See* Meth, *A Contemporary Crisis: The Problem of Usury in the United States*, 44 A.B.A.J. 637, 638 (1958).

10. Testimony by Prof. David Caplivitz, *New York Attorney General's Hearings on Truth-In-Lending*, 22 PERSONAL FIN. LAW Q. REPORT 11 (1967).

11. *See* Shanks, *Practical Problems in the Application of Archaic Usury Statutes*, 53 VA. L. REV. 327 (1967); Meth, *supra* note 9.

12. *See* note 9 *supra*.

13. An excellent example of how these varied methods of interest computation

Still another measure has been to impose relatively slight penalties for usurious transactions.[14] In recent years, however, there has been a growing concern among legislatures and courts with abuses resulting from this creditor bias, sparked by the fact that over the past decade the increase in consumer debt has been matched by a concomitant rise in the rate of personal bankruptcies.[15] Several states have recently enacted "truth-in-lending" legislation designed to inform the public of the actual costs of credit,[16] and to curb some of the more flagrant usurious practices of loan companies, such as unlimited renewals of loans.[17] As the instant case illustrates, courts have also become more

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operate is found in a comparison of the "add-on" and "discount" (used in the instant case) methods of calculation. Suppose a company offers a $100 loan at an advertised rate of 6% interest per annum. Under the "add-on" method the debtor would be charged $6.00 interest, pre-computed, which would be added to the principal thus requiring repayment of $106.00 at $8.83 per month. The debtor receives the use of $100. Under the "discount" method, however, the $6.00 interest would be discounted from the principal and the debtor would pay back $100 at $8.33 per month, receiving the use of only $94.00. It would seem that the "add-on" method is preferable to the debtor because he gets the use of more money at the same amount of interest. However, it should be noted that under the "add-on" method the *true* annual interest would approach 12% rather than the advertised 6% rate. Under the discount rate it would be even higher. This is so because under both methods the debtor does not have the use of the principal for the entire year. By the end of the sixth month, he will have repaid half of the principal, whereas under 6% true annual interest he would have had the use of the principal for the entire period. *See* Note, *Truth in Lending*, 18 VAND. L. REV. 856, 858 (1965).

14. As to statutory penalties for usury, thirteen states provide for forfeiture of interest in excess of the statutory maximum, eighteen provide for forfeiture of all interest, eight provide for a forfeiture of a multiple of interest or of excess interest, one declares forfeiture of 8% of principal and all interest, and five declare forfeiture of interest and principal. In seventeen states usury is also considered a crime or misdemeanor. *See* Meth, *supra* note 9, at 638.

15. Costello, *Chairman of N.Y. Mayor's Council on Consumer Affairs Presents Views on "Truth-In-Lending,"* 22 PERSONAL FIN. LAW Q. REPORT 13 (1967). The current bankruptcy rate is more than twice that of the depression years and almost 90 percent of these are personal bankruptcies. Note, *Truth in Lending*, 18 VAND. L. REV. 856, 857 (1965).

16. Disclosure to the debtor of all costs incident to a loan transaction is now required in at least 6 states by statutes enacted since 1966. *See, e.g.*, ILL. REV. STAT. ch. 74, § 4(g) (1967) amendment; MASS. GEN. LAWS § ch. 140A 1-5 (1966). 45 TENN. CODE ANN. § 2106 (1968) amendment), enacted just after the decision in the instant case was rendered is typical in providing that the lender must provide the debtor with a "written statement showing in clear and distinct terms: (a) the date of the loan; (b) the schedule of payments on the loan; (c) the amount of interest charged; (d) the amount charged for making and servicing of the loan; (e) an itemization of disbursements made on behalf of the borrower, including all insurance premiums paid."

17. Many lenders are reported to engage freely in practice of renewals or "flipping." Under this practice, the debtor who has repaid a portion of a loan is allowed to make another loan, which includes the balance still due on the old loan, on which all allowable charges (precomputed interest, investigation fees, etc.) have already been made. Then the full amount of allowable charges is again imposed on the new principal amount. 45 TENN. CODE ANN. § 2010(k) (1968 amendment) was amended to prohibit flipping just after the decision in the instant case was rendered.

active in protecting the debtor from usurious loan charges.[18]

Holding that the referee had the power to determine whether the claim note was usurious,[19] the instant court moved to a consideration of whether the amount deducted for advance interest in the claim note was excessive.[20] The court found that since the deduction of the 55.08 dollars in advance interest left the debtor with the use of only 556.92 dollars, the precomputed interest thus amounted to approximately twelve percent per annum, due to the declining balance. Though recognizing that precomputed interest is statutorily permissible,[21] the instant court reasoned that the amount of interest which could be charged by this method was limited to the ten percent per annum maximum allowed by the state constitution.[22] Thus, the court cluded, the claim note was usurious on its face.[23] Turning to a con-

18. *See, e.g.*, Nash v. State, 271 Ala. 173, 123 So. 2d 24 (1960); Cochran v. State, 270 Ala. 440, 119 So. 2d 339 (1960). In both cases the courts held that small loan laws against usury could not be evaded by charging and retaining exorbitant insurance premiums. In Sosebee v. Boswell, 242 Ark. 396, 414 S.W.2d 380 (1967), a case involving charges for services rendered and expenses incurred by the lender in making a loan, it was held that such charges were usurious where they constituted the lenders' "overhead" business expenses.

19. In holding that the referee had the power to pursue the usury issue even after he had approved the Wage Earner's Plan, the instant court found that a bankruptcy court could reject in whole or in part claims previously allowed. The court cited Pepper v. Litton, 308 U.S. 295, 304 (1939), and American A.&B. Coal Corp. v. Leonardo Arrivabene, S.A., 280 F.2d 119 (2d Cir. 1960), in support of this proposition. Further, the court found that the petitioner's reduction of the claim to zero did not render the proceeding moot nor had the referee been guilty of antagonistic conduct toward petitioner or its counsel.

20. For a definition of usury the instant court cited Jenkins v. Dugger, 96 F.2d 727, 729 (7th Cir. 1938), which stated: "Usury imports the existence of four elements: (1) A loan or forbearance, either express or implied; (2) an understanding between the parties that the principal shall be repayable absolutely; (3) the exaction of a greater profit than allowed by law; and (4) an intention to violate the law. The last may be implied if the first three are present."

21. *See* note 2 *supra*.

22. TENN. CONST. art. 11, § 7, provides as follows: "The Legislature shall fix the rate of interest, and the rate so established shall be equal and uniform throughout the State; but the Legislature may provide for a conventional rate of interest not to exceed ten per centum per annum." The court cited Pugh v. Hermitage Loan Co., 167 Tenn. 389, 70 S.W.2d 22 (1934), as authority for the proposition that this section of the constitution should control the loans in the instant case.

23. Though recognizing that the loan company had realized a "shocking profit" by the process of renewal (a loan to repay the balance still due on the previous loan) since interest from the prior loan was incorporated into the principal amount of the new loan, the court refused to hold this usurious where effectuated by agreement, citing Parham v. Pulliam, Executor, 45 Tenn. 497 (1868), and Crowley v. Kolsky, 57 S. W. 386 (Tenn. Ch. 1900). Stating that it would leave the problem to be solved by the legislature the instant court outlined in detail how the renewal process (often called "flipping;" *see* note 17 *supra* and accompanying text) could result in such a profit. In the instant case the debtor was charged $48.60 interest, deducted in advance and payable in 15 monthly installments, on the $540.00 prior loan. When the claim note was executed, the debtor was refunded $9.54 of the $48.60. The difference, $39.06,

sideration of the loan and investigation fee, the instant court found that the maximum statutory fee formula (4 dollars per 100 dollars of the principal amount loaned)[24] had been applied to the full face amount of the claim note, yielding an investigation fee of 24.48 dollars. Noting that this fee comprised part of the full face value of the claim note, the court concluded that the petitioner had charged the debtor a fee which was, in part, on the fee itself. The court concluded that while the legislature intended that the loan fee could be borrowed in order to complete the transaction, the fee itself could not be included in the principal amount to which the statutory formula was applied. Therefore, to the extent that petitioner applied the statutory formula to a principal amount including the borrowed fee, the petitioner realized excessive and usurious compensation. The court reasoned further that the loan and investigation fee bore no reasonable relation to the expenses and services of the petitioner in connection with the claim note. The maximum loan fee was charged for each of the five loans made to the debtor, and the loans were all made within such a short period of time that the need for intensive investigation of the latter loans should have lessened. From these circumstances the court concluded that a prima facie case of usury could be made against the petitioner due to its arbitrary application of the maximum loan fee to each loan regardless of the fact that the actual expense of investigating the debtor was much less than the maximum allowable by statute.[25] As to the insurance charges assessed against the debtor by the petitioner, the court found that one of petitioner's officials was also an agent for the insurance companies involved, and was allowed 50 per cent of the premium charge (less any refunds of premiums) as a commission. Recognizing the obvious profit realized by the petitioner in these transactions, and noting that,

was included in the $450.00 designated as the unpaid balance of the former loan. By including the $39.06 remaining interest on the previous loan in the principal amount of the present loan, petitioner actually obligated the debtor to pay $39.06 interest for the use of the $90.00 which had been repaid on the previous loau. An additional $55.08 interest was charged on the present loan. Thus, if the obligation on the claim note had been met as scheduled, petitioner would have received a return on the $90.00 at a rate in excess of 50% per annum.

24. *See* note 3 *supra.*

25. The instant court reasoned that the maximum fee could not be charged unless it bore a reasonable relation to the services rendered or expenses incurred, citing: Family Loan Co. v. Hickerson, 168 Tenn. 36 (1934); Personal Fin. Co. v. Hammack, 163 Tenn. 641 (1932); Koen v. State, 162 Tenn. 573 (1931). Each of these cases construed the Small Loan Act, 45 TENN. CODE ANN. § 2101-23. The holding of the *Hammack* case is typical. There the court held that moneylenders are not empowered to contract arbitrarily for the service fees and charges to the maximum limit fixed by the Small Loan Act; but that the fees aud charges must bear a reasonable relation to the expeuse and services of the lender in the transaction. The Small Loan Act applies only to loans of $300 or less.

contrary to statute, the petitioner required the debtor to obtain the insurance as a condition to receiving the loan,[26] the court decided that the petitioner had illegally acquired additional usurious profit on the loan.[27]

Usury regulation is generally more amenable to legislative than judicial reform. The decision in the instant case is commendable, however, as an example of an activist court entering into an area in which the law has been much abused. Of particular importance is the fact that the court, in determining the legality of the loan and investigation fee, was willing to look beyond the lender's compliance with statutory form and examine the substantive facts of the situation to determine whether the fee charged was reasonably related to the actual expenses incurred by the lender in servicing the loan. In so doing, the court effectively dealt with this onerous aspect of the "flipping" scheme, in which the maximum investigation fee allowable under statute is charged for each renewal even though there is no reasonable basis for the fee.[28] Though applying the statutory standard to decide whether the advance interest deduction was usurious, the instant court presented significant dicta, voicing concern over the abuses to which borrowers are subjected when such deductions are incorporated into the practice of "flipping."[29] Thoroughly analyzing the inequity of flipping in the area of pre-deducted interest, the court

26. *See* note 4 *supra*. Construing the statute, the court held that the portion of the Act allowing a loan company to require hazard insurance to protect collateral was inapplicable because the instant loan was unsecured.

27. Though not deciding the case on this point, the court noted with approval a case which disallowed profit from insurance required by a loan company official where the official was also an agent of the insurance company due to the fraudulent overtones of such a transaction. *See* Hagler v. American Road Ins. Co., (unreported case recently decided by the Tennessee Court of Appeals). The instant court also found that the debtor was given insufficient information about the insurance by the petitioner, and concluded that the debtor could not be bound by any authorization form he had signed because he was illiterate and unaware of its meaning.

28. The practice which the instant court struck down is prevalent: "To keep operations prima facie legal, the loan companies have developed ways and means of charging usurious rates without such practices appearing on the face of their records. Since the statutes under which lenders operate provide a maximum service charge that may be exacted from the borrower for investigating the latter's moral and financial standing, one such device is to charge the maximum service charge allowed by law although it may bear no reasonable relation to expenses actually incurred." Note, *Usury: Small Loan Companies in Tennessee*, 26 TENN. L. REV. 279, 284 (1959). This imposition of the maximum service charges is one of the more obvious ways a loan company can gain an unfair and excessive profit on its loans through utilization of the "flipping" process. *See* note 17 *supra*. While Tennessee courts have stated that a maximum statutory fee cannot be charged without its having a reasonable relation to services rendered or expenses incurred, the instant case is the first to attack the problem as it arises under the practice of "flipping." *See* note 25 *supra* and accompanying text.

29. *See* notes 17 & 23 *supra*.

urged legislative action to stop the practice.[30] The court also recognized, by way of dicta, the harm resulting to the borrower through the general failure of the loan industry to disclose adequately the real cost of loan transactions.[31] It is submitted that the instant court has followed an exemplary course, one which is certainly in line with the recent trend toward providing the borrower with greater protection against usurious practice. The importance of judicial vigilance becomes readily apparent when it is realized that even the most stringent disclosure statutes can have at best only limited success in protecting the debtor. In many instances, the victim of usurious charges is "unsophisticated, uneducated, and foolish. He is often the person who is least able to benefit from detailed disclosure provisions."[32] Furthermore, because the loan industry operates in a competitive market, supported by capital investors, the urge to maximize profit will be strong, and will no doubt lead resourceful lenders to continue to impose maximum legal rates and charges regardless of their reasonableness. Flipping will continue in states where it is not prohibited by statute, and, in states where it is prohibited, it is reasonable to assume that other methods will be devised to allow the lender to increase his profits—always at the expense of the debtor.[33] While recognizing that the legislature should lead the way in combating usury, the instant court demonstrates how the power of equity can and should be employed in protecting the debtor from the abuses of unscrupulous members of the small loan industry.

30. Though perhaps by coincidence, flipping was prohibited by the Tennessee Legislature on March 14, 1968—just a few weeks after this decision was rendered. *See* note 17 *supra.*

31. *See* note 16 *supra.*

32. Jordan & Warren, *Disclosure of Finance Charges: A Rationale,* 64 MICH. L. REV. 1285, 1321 (1966). Though the new Tennessee statutory revisions represent a great advance in debtor protection it should be noted that the disclosure section does not provide a statutory standard to force lenders to disclose accurately the true costs of credit to the debtor. The amendment provides simply for disclosure of "the amount of interest charged." Clearly the lender will still be able to compute interest by any one of several methods, none of which accurately reflects the true cost of credit either on an actual dollar basis or on a simple annual interest charge basis. Consequently, deception of the borrower will still be a problem. *See* note 13 *supra.* A disclosure statute designed to provide the maximum possible protection to the debtor should "enable the cousumer first, to judge whether an extension of credit is worth the price he must pay for it, and second, to shop effectively for credit." Buerger, *Disclosure of Finance Charges in Credit Transactions,* 21 PERSONAL FIN. LAW Q. REPORT 45 (1967). The Tennessee disclosure provision does not adequately fulfill the descriptive-shopping function which ideally it should, and as a result does not offer adequate protection even to those debtors who would be capable of intelligently utilizing such detailed disclosure.

33. *See* note 11 *supra* and accompanying text.

Labor Law—Authorization Cards—Doubt of Union Majority Based on Cards Found to Meet Good Faith Requirements in Spite of Employer Unfair Labor Practices

Food Store Employees Union, Local 347 obtained signed authorization cards and sought recognition as the exclusive bargaining representative of a majority of the employees of the defendant, S. S. Logan Packing Co.[1] The employer responded to the union's demand for recognition by filing charges of coercive practices[2] with the National Labor Relations Board. The union countercharged that the employer had violated sections 8(a)(1)[3] and 8(a)(5)[4] of the National Labor Relations Act. The Board concluded that since defendant had no "good faith doubt" of the union's majority status, it had violated section 8(a)(5), and issued an order requiring the defendant to bargain with the union.[5] On appeal to the Courts of Appeals for the Fourth Circuit, *held*, enforcement denied in part. In the absence of outageous unfair labor practices, a representation election is required if an employer, having a good faith doubt, refuses to accept authorization cards as determinative of a union's majority status. *NLRB v. S. S. Logan Packing Company*, 386 F.2d 562 (4th Cir. 1967).

Before 1947 there were two methods by which employees could select their exclusive bargaining representatives. The most common was the secret ballot election provided for in section 9(c)[6] of the NLRA, which enabled any interested party to petition for an election conducted by the Board under careful regulation designed to prevent coercion by either participating employees or management. In addition, section 9(c) also gave the Board power to "utilize any other

1. Four years earlier the same union had lost a consent election.

2. The alleged coercive practices consisted of threats made to obtain signatures on authorization cards in violation of section 8(b)(1) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1) (1964).

3. 29 U.S.C. § 158(a)(1) (1964), provides that it shall be an unfair labor practice for an employer to coerce or interfere with employees exercising their right to organize and bargain collectively.

4. 29 U.S.C. § 158(a)(5) (1964), provides that it shall be an unfair labor practice for an employer to refuse to participate in collective bargaining with the representative of his employees.

5. S. S. Logan Packing Co., 152 N.L.R.B. 421 (1965).

6. 29 U.S.C. § 159(c) (1964), stating that when a petition is filed by an employee or group of employees, or an individual or labor organization acting in their behalf, alleging that a substantial number of employees wish to be represented for purposes of collective bargaining, and it is determined that a representation question in fact exists, the Board should direct an election by secret ballot. This section also provides for an election request by an employer who has been confronted with a bargaining request from an individual or union.

suitable method to ascertain such representative."[7] One such method was the authorization card procedure. In *Franks Bros. Co. v. NLRB*,[8] the Supreme Court held that where an employer refused to recognize a union claiming to hold authorization cards which entitled it to represent a majority of employees, the NLRB could properly issue a compulsory bargaining order if (1) the union attained a majority representative status and, (2) the refusal to bargain was improper.[9] However, in 1947, the Taft-Hartley Act[10] revised section 9(c) by eliminating the "suitable method" alternative, thus giving rise to a strong implication that election was the only proper procedure for selection of the bargaining representative.[11] In many instances, however, the courts ignored this supposed presumption in favor of election[12] and relied instead upon the construction of section 9(a) of the Act which provides that "[r]epresentatives, designated or selected" by the majority of employees may be recognized as the proper bargaining representative.[13] Thus, despite the Taft-Hartley revision, courts under certain circumstances have allowed the union to circumvent the section 9(c) election procedure by use of authorization cards. However, even if the union was a proper representative under section 9(a), in order for the compulsory bargaining remedy to be employed under the *Franks Bros.* rationale, it was necessary first to make an improper refusal to bargain; the refusal was improper uuless the employer had a good faith doubt that the union lacked status as a majority representative. In *Joy Silk Mills, Inc. v. NLRB*[14] the Supreme Court scrutinized the employer's motivation at the time of his initial refusal to bargain, and determined that bad faith could be established by showing the improbability of a "good faith doubt" as to the validity of a card majority, or by showing employer conduct tending to dissipate the union's strength subsequent to such refusal.[15] Thus, where the employer committed an unfair labor practice after refusing to recognize a card majority, a presumption arose that the

7. National Labor Relations Act (Wagner Act), 49 Stat. 453 (1935).

8. 321 U.S. 702 (1944). The Court found the bargaining order permissible under § 10(c) of the Act which allows the Board to fashion appropriate remedies.

9. Note, *Union Authorization Cards,* 75 YALE L.J. 805, 809-10 (1966).

10. Labor Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 141 (1964).

11. The majority and minority reports seem to indicate that the revision served to grant the employer an absolute right to an election. Note, *supra* note 9, at 820, interpreting S. REP. No. 105, 80th Cong., 1st Sess., pt. 1, at 25, pt. 2, at 11 (1947).

12. United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62, 72 n.8 (1956), is a prime example of the denial of a strict interpretation of Taft-Hartley ignoring the negative implications of the 9(c) revision.

13. 29 U.S.C. § 159(a) (1964). It has been suggested that both the designated and selected categories refer to elections—"designated" to the single union, "selected" to the multi-union election.

14. 185 F.2d 732 (D.C. Cir. 1950), *cert. denied,* 341 U.S. 914 (1951).

15. Note, *supra* note 9, at 811-12.

prior refusal to recognize was in bad faith.[16] This presumption practically precluded the employer who committed an unfair labor practice from proving good faith doubt under the *Joy Silk* test. On the other hand, if the union, with knowledge of employer unfair labor practices resorted to an election rather than an order to bargain, the result of the election would be final regardless of any pre-election unfair labor practice by the employer.[17] In *Bernel Foam Products Co.*,[18] the NLRB gave further impetus to authorization cards as an effective tool by which a union might gain recognition. The Board held that where the employer engaged in unfair labor practices during the election procedure, the election was not determinative if the union lost, and the union which had obtained authorization cards could request an order to bargain. However, despite this decision, the Board has not been overly permissive in extending the use of the compulsory bargaining remedy. In fact, the present trend seems to indicate a greater reliance on the election procedure.[19] Although in a 1961 case[20] the Board seemed to reject specifically the employer's absolute right to an election, by holding that a refusal to bargain can only be justified by a doubt "which has some objective warrant,"[21] there has been a distinct withdrawal from this position, and in several instances the Board has refused to infer bad faith from a denial of recognition based upon a failure to accept authorization cards as proof of a valid majority.[22]

In the instant case the court found that in order to insure a free and unfettered choice of the bargaining unit there must be an election by secret ballot conducted under "laboratory conditions." The court recognized that, although the Act provides for such an election as the exclusive means of choice, there is a decisional rule which circumvents the election procedure, allowing authorization cards to replace the secret ballot. In attacking this decisional rule the court stated that there is no more unreliable method than authorization cards for

16. *See* Colson Corp., 148 N.L.R.B. 827, 829 (1964), *enforced*, 347 F.2d 128 (8th Cir.), *cert. denied*, 382 U.S. 904 (1965).

17. Aiello Dairy Farms, 110 N.L.R.B. 1365 (1954). The theory behind this decision was that the card procedure and election procedure were inconsistent. *See also* Note, 33 U. CHI. L. REV. 387, 401-2 (1966).

18. 146 N.L.R.B. 1277 (1964). The Board reaffirmed the use of the bad faith presumption used in *Joy Silk*. This decision also had the effect of preventing an employer from relying on a re-run election.

19. Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 MICH. L. REV. 851, 852 (1967).

20. Snow & Sons, 134 N.L.R.B. 709 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962). This case has been strictly confined to its facts.

21. Lesnick, *supra* note 19, at 852.

22. H & W Const., 161 N.L.R.B. 77 (1966); Aaron Bros. Co., 158 N.L.R.B. 1077 (1966); Strydel, Inc., 156 N.L.R.B. 1185 (1966).

determining the wishes of the employer.[23] Consequently, the court reasoned that an employer could not help but doubt the reliability of card checks, especially when reinforced by knowledge that the union had engaged in unfair labor practices.[24] An employer investigation will usually tend to confirm rather than negate a good faith doubt.[25] The court concluded that there is no legal basis for precluding an employer who commits an unfair labor practice subsequent to a bargaining request from asserting his good faith doubt. However, the court expressly reserved the right to enforce an 8(a)(5) order in extraordinary cases of employer misconduct.

As opposed to elections, the authorization card check has several obvious shortcomings, not the least of which is the absence of secrecy to the employee in making his ultimate choice.[26] In the instant case, the employer had adequate grounds for a good faith doubt based upon both the union's past failure to gain representation and the employer's own investigation, which in all probability would have rebutted even the bad faith presumption raised by the *Joy Silk* test. This ground alone may justify the instant court's result. The court however launched a diatribe against the reliability of authorization cards and in the process effectively limited the section 8(a)(5) bargaining order to situations of "outrageous" employer abuse.[27] Thus, a union which fails to prove such outrageousness must win an election to become the exclusive bargaining representative. In view of the fact that this union had lost a previous consent election, the result of an election in this case will most probably be the final rejection of the union as the bargaining representative. If the instant decision is followed, one alternative open to the union—the use of authorization

23. The court stated: "Overwhelming majorities may indicate a probable outcome of an election; but it is no more than an indication, and close card majorities prove nothing. . . . Cards are collected over a period of time, however, and there is no assurance that an early signer is still of the same mind on the crucial date when the union delivers its bargaining demand." 386 F.2d at 565-66.

24. Here the employer not only had evidence of interference by card solicitors but also the union defeat in the prior election.

25. Regarding employer investigation conducted to determine the validity of his doubt, the court stated that minimally coercive practices will have no effect on the § 8(a)(5) issue.

26. As a result, the employee may be exposed to numerous forms of coercion. Thus, the loss of anonymity may lead the employee to sign a card in order to protect himself from harassment. *E.g.*, Peterson Bros., 144 N.L.R.B. 679 (1963). He may simply acquiesce due to the internal pressure which emanates from a feeling of unfaithfulness to fellow employees. This type of practice may lead to haphazard card signing. Another shortcoming is that the privilege of free speech guaranteed to the employer by section 8(c) of the Act may be denied him due to the fact that he may be unaware of the organization drive until the very moment that he is presented with the demand for recognition.

27. NLRB v. S. S. Logan Packing Co., 386 F.2d 562, 568 (4th Cir. 1967). The bargaining order is referred to as an extraordinary remedy.

cards, on the one hand, or an election, on the other—may be severely weakened by unduly restricting the usefulness of authorization cards. Further, the "outrageous and pervasive" test laid down by the instant court as the means of obtaining a compulsory bargaining order might encourage the employer to commit unfair labor practices which approach the brink of outrageous abuse but which could be interpreted as permissible employer conduct. An employer also might easily disguise his improper motive by claiming good faith doubt and alleging various types of union coercive practices. It is doubtful that the Taft-Hartley Act was intended to eliminate authorization cards[28] to create a rigid technical process that would provide a loophole for management abuse, thus stifling unionization. It is submitted that, in the presence of employer unfair labor practices, card majorities must be given some measure of viability in order to prevent the employer from using a restrictive interpretation of the Act to sterilize unionization efforts.

Procedure—Federal Rules of Civil Procedure and Federal Interplcader—Claims Under Rule 13(g) May Be Asserted in an Action in Interpleader Only to Attack the Cross-Claim Defendant's Claim Against the Common Fund

A bus owned by Queen City Coach Company collided with an automobile in North Carolina, killing the automobile driver and his passengers and injuring several bus passengers. The automobile insurer, Allstate Insurance Company, instituted an interpleader action under the Federal Interpleader Act[1] to obtain an equitable and conclusive distribution of the proceeds payable under the policy.[2] Named as defendants in interpleader were Queen City Coach Company, a North Carolina corporation; the bus driver, a North Carolina resident; each of the injured bus passengers, who were from various states;[3] and the administrator of the estates of the two passengers

28. Sobeloff, J., concurring, in NLRB v. Sehon Stevenson & Co., 386 F.2d 551, 555 (4th Cir. 1967).

1. 28 U.S.C. § 1335 (1964).

2. The deceased insured was a resident of South Carolina. His estate was not named as a defendant in the interpleader action.

3. The passengers named as defendants in interpleader were from the following states: three from Virginia; one each from Delaware, New Jersey, and Texas; and the remainder from North Carolina. Brief for Appellants at 22, Allstate Ins. Co. v. McNeill, 382 F.2d 84 (4th Cir. 1967).

in the insured's automobile, residents of South Carolina. In addition to the defendants' claims against the fund, the administrator cross-claimed under Federal Rule of Civil Procedure (FRCP) 13(g)[4] against Queen City and the bus driver, residents of the forum state, for the death of his intestates.[5] Queen City and the bus driver filed motions for the dismissal of the interpleader action and the cross-claims, which motions were denied by the district court.[6] On appeal to the United States Court of Appeals for the Fourth Circuit, *held*, allowance of the cross-claims reversed. Cross-claims under FRCP 13(g) may be asserted in an action in interpleader only to attack the cross-claim defendant's claims against the common fund. *Allstate Insurance Co. v. McNeill*, 382 F.2d 84 (1967).[7]

Cross-claims between claimants in interpleader actions were not adjudicated in the federal courts until the liberalization of the interpleader requirements in the Federal Interpleader Act of 1936[8] and the establishment of the Federal Rules of Civil Procedure in 1938.[9] Although thirty years have passed since the cross-claim remedy was made available in FRCP 13(g), the development of its use in inter-

4. "Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."

5. The cross-claim was for a total of $351,500: $200,000 for the wrongful death of the first passenger; $150,000 for the wrongful death of the second passenger; and $1,500 for the conscious pain and suffering of the second passenger whose death from the collision was not immediate. Brief for Appellants at 31, Allstate Ins. Co. v. McNeill, 382 F.2d 84 (4th Cir. 1967).

6. From the order of Algernon L. Butler, Chief Judge of the United States District Court for the Eastern District of North Carolina, on June 15, 1966: "[T]he Court concluding . . . as a matter of law that the service of cross-complaint . . . is proper; and the Court further concluding as a matter of law that the subject matter of the said cross-claim derives from the same transaction or occurrence as the transaction or occurrence involved in the interpleader action and that this court has jurisdiction over said cause of action as asserted in the cross-complaint ancillary to the jurisdiction of this court in the principal interpleader action; and this Court concluding as a matter of law that said cross-action should not be dismissed or stricken . . . ." Brief for Appellants at 18, Allstate Ins. Co. v. McNeill, 382 F.2d 84 (4th Cir. 1967).

7. The attorneys for the administrator have petitioned the United States Supreme Court for writ of certiorari on grounds that the general usage of rule 13(g) cross-claims in interpleader actions is in need of clarification; that the fourth circuit majority misapplied the holding in State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967); and that the Rule 13(g) cross-claim in this instance should have been granted in the interests of the efficient administration of justice. Petitioner's Brief for Certiorari.

8. 28 U.S.C. § 41(26) (1940 ed.), now 28 U.S.C. § 1335 (1964).

9. 28 U.S.C. §§ 723(b), 723(c), now 28 U.S.C. § 2072 (1964). Professor Chaffee states that adjudication of additional controversies in interpleader actions occurred prior to this time only in a few state cases. Chaffee, *Broadening the Second Stage of Interpleader*, 56 HARV. L. REV. 541 (1943).

pleader actions has been slow due to the infrequent assertion of cross-claims between interpleader claimants.[10] Generally, with respect to subject matter jurisdiction, cross-claims may be asserted between claimants in interpleader if the rule 13(g) requirement[11] that the cross-claim arise out of the same transaction or occurrence as the interpleader action is satisfied. Subject matter jurisdiction of the cross-claim is said to be ancillary to that of the interpleader action.[12] With respect to personal jurisdiction, there need be no diversity of citizenship between the parties to the cross-claim if the court has personal jurisdiction over the claimants either under rule 22(1) or under the Federal Interpleader Act.[13] But personal jurisdiction over

10. Professor Chaffee states that the possibility of additional controversies between claimants in interpleader was not even considered by the drafters of the Federal Interpleader Act of 1936. Chaffee, *Broadening the Second Stage of Federal Interpleader*, 56 HARV. L. REV. 929, 944-45 (1943).

11. *See* note 4, *supra*.

12. Kerrigan's Estate v. Joseph E. Seagram & Sons, 199 F.2d 694 (3d Cir. 1952); 3 J. MOORE, FEDERAL PRACTICE ¶ 22.15, at 3131 (2d ed. 1966).

13. The differing jurisdictional requirements are set forth in detail in 3 J. MOORE, FEDERAL PRACTICE ¶¶ 22.04(2), 22.09(1) & 22.09(2), at 3015, 3054 & 3059 (2d ed. 1966). The following table is taken from Robinson, *The Use of Federal Interpleader in Casualty Insurance Cases*, 32 INS. COUNSEL J. 446, 452 (1965):

CONCISE COMPARISON OF INTERPLEADER REMEDY UNDER FEDERAL INTERPLEADER ACT AND RULE 22(1) F.R.C.P.

	Federal Interpleader Act	Rule 22(1)
Jurisdiction	(a) Amount in controversy must exceed $500.00 (b) Must be diversity between at least one claimant and the others.	(a) Amount in controversy must exceed $10,000.00. (b) Must be diversity of citizenship between plaintiff-stakeholder and the claimants.
Deposit	Policy limits or bond therefor.	No deposit required.
Venue	District court where one or more of the claimants reside.	District court of the state where all of the claimants reside or where the plaintiff-stakeholder resides.
Process	May be served on claimants anywhere in the United States by the marshals of the respective districts involved.	Must be served under Rule 4(f) F.R.C.P., on claimants residing in the state in which the district court sits.
Admission of Liability	Denial of liability limited.	Admission of liability not required.
Injunction	District court may restrain and enjoin proceedings involving fund in state and federal courts.	District court may enjoin state court proceedings if court considers injunction necessary in aid of its jurisdiction or to protect and effectuate its judgment.

the parties to the cross-claim has been deemed to be limited, for courts have recognized possible hardship to cross-claim defendants and have established a number of limitations on the availability of the cross-claim in interpleader actions. For convenience of analysis and classification of these limitations, the cases may be divided into two categories,[14] as follows: (1) those interpleader actions in which the cross-claim defendant is not a resident of the forum state; and (2) those interpleader actions in which the cross-claim defendant is a resident of the forum state. When the cross-claim defendant is a non-resident, courts have been extremely reluctant to allow the cross-claim to be asserted. The basis reason given for disallowance of such cross-claims is that the court has jurisdiction over the person of the non-resident cross-claim defendant only for purposes of adjudicating claims against and to the extent of the fund.[15] While some cases have discussed the hardship on non-resident claimants which could result if the cross-claims against them were allowed, only a few courts have based their decisions squarely on hardship rather than on the lack of personal jurisdiction over the cross-claim defendant for any controversy beyond that concerning the fund.[16] In cases where the

14. These categories are adopted from Chaffee, *Broadening the Second Stage of Federal Interpleader*, 56 HARV. L. REV. 929 (1943).

15. Hagan v. Central Ave. Dairy, Inc., 180 F.2d 502 (9th Cir. 1950); Metropolitan Life Ins. Co. v. Enright, 231 F. Supp. 275 (S.D. Cal. 1964); Stitzel-Weller Distillery, Inc. v. Norman, 39 F. Supp. 182 (W.D. Ky. 1941); Atlas Assurance Co. v. Needle, Unreported: Civil Action No. 1240 (D. Md. 1941) (discussed in Chaffee, *id.* at 960-62).

16. *Compare* Coastal Airlines, Inc. v. Dockery, 180 F.2d 874 (8th Cir. 1950) (cross-claim allowed as it would not work a hardship on cross-claim defendant); Hallin v. C. A. Pearson, Inc., 34 F.R.D. 499 (N.D. Cal. 1963) (cross-claim disallowed as it would work a hardship on cross-claim defendant); Bank of Neosho v. Colcord, 8 F.R.D. 621 (W.D. Mo. 1949) (cross-claim in rule 22(1) interpleader action against nonresident upheld, on ground that appearance for purposes of interpleader action gives a court general jurisdiction over subject matter and parties to cross-claim, provided cross-claim and interpleader action arise out of same transaction), *with* Stitzel-Weller Distillery, Inc. v. Norman, 39 F. Supp. 182 (W.D. Ky. 1941) (cross-claim against non-resident in statutory interpleader action disallowed for lack of personal jurisdiction over non-resident cross-claim defendant).

The Supreme Court recently commented on broadening interpleader actions to include additional controversies in State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967). The case involved a collision between a Greyhound bus and a pickup truck in California, resulting in injuries to bus passengers and to the driver and passenger of the pickup truck. The insurer of the pickup truck brought an action under the Federal Interpleader Act in the District Court of Oregon, joining as defendants all actual and potential claimants, including Greyhound, its driver, the bus passengers, the pickup-truck driver and his passenger. Greyhound then sought the protection of the interpleader statute by broadening the injunction in the Oregon interpleader action to require the prosecution of all claims against it arising out of the collision to be made in the interpleader action in Oregon. The Supreme Court held, *inter alia*, that Greyhound was not entitled to the benefits of the interpleader statute, remarking in dicta that interpleader "cannot be used to solve all the vexing problems of multiparty

cross-claim defendant is a resident of the forum state none of these jurisdictional problems are present, and the courts have shown more willingness to allow the assertion of cross-claims, generally dismissing them only if they have not arisen out of the same transaction as the interpleader action, as required by rule 13(g).[17] In such cases, the strictness with which the judge delimits the boundaries of the original transaction can be crucial.[18]

In the instant case the Fourth Circuit reversed the district court's order allowing the assertion of the cross-claim by the administrator against Queen City and the bus driver, claimants who were residents of the forum state. As authority for this reversal the court quoted a statement in *State Farm Fire & Casualty Co. v. Tashire,*[19] which said that interpleader is not an all-purpose bill of peace, to be used to solve all the difficult problems of multiparty litigation arising out of a mass tort. Interpreting this to mean that an interpleader suit "may not be used as the arena for resolution of claims of the defendants *inter se,* except insofar as they have adversity in their demands upon the fund,"[20] the court concluded that a cross-claim under rule 13(g) could be used by the administrator to attack the claims of the resident cross-claim defendants against the common fund, but for no other purpose. In a dissenting opinion,[21] Chief Judge Haynsworth noted the important differences between *Tashire* and the instant case and

litigation arising out of a mass tort." *Id.* at 535. This dicta was used by the majority in the instant case as authority for the disallowance of the administrator's cross-claim.

17. Kerrigan's Estate v. Joseph E. Seagram & Sons, 199 F.2d 694 (3d Cir. 1952); Degree of Honor Protective Ass'n v. Charles T. Bisch & Son, 194 F. Supp. 614 (D. Mass. 1961); Lawyers Trust Co. v. W. G. Maguire & Co., 2 F.R.D. 310 (D. Del. 1942); Stitzel-Weller Distillery, Inc. v. Norman, 39 F. Supp. 182 (W.D. Ky. 1941) (cross-claim by non-resident against resident dismissed but considered on its merits). *But see* Consolidated Underwriters of S.C. Ins. Co. v. Bradshaw, 136 F. Supp. 395 (W.D. Ark. 1955) (cross-claim by non-resident against resident in Rule 22(1) interpleader action disallowed on ground that jurisdiction limited to distribution of fund). This last case is strongly criticized as "clearly improper" in 3 J. MOORE, FEDERAL PRACTICE ¶ 22.15, at 3132 (2d ed. 1966).

18. See Professor Chaffee's remarks on Lawyers Trust Co. v. W. G. Maguire & Co., 2 F.R.D. 310 (D. Del. 1942), in Chaffee, *Broadening the Second Stage of Federal Interpleader,* 56 HARV. L. REV. 929, 931-33 (1943), wherein he suggests that the court was perhaps too strict in its view of the transaction.

19. 386 U.S. 523 (1967). The dicta cited in the opinion was as follows: "We recoguize, of course, that our view of interpleader means that it caunot be used to solve all the vexing problems of multiparty litigation arising out of a mass tort. But interpleader was never intended to perform such a function, to be au all-purpose bill of peace.' . . . None of the legislative and academic sponsors of a modern federal interpleader device viewed their accomplishment as a 'bill of peace,' capable of sweeping dozens of lawsuits out of the various state and federal courts in which they were brought and into a single interpleader proceeding." 386 U.S. at 535-36. Cited in the instant case at 382 F.2d at 87.

20. 382 F.2d at 87.

21. *Id.* at 88-89.

concluded that the former did not provide authority for dismissing the administrator's cross-claim. In *Tashire*, which involved a bus-pickup truck collision in California, it was the bus company, as cross-claim plaintiff, which sought to compel all adverse tort plaintiffs—including injured bus passengers, the truck driver, and his passenger—to proceed against it only in the Oregon interpleader action brought by the insurer of the pickup truck.[22] In the instant case, the cross-claim plaintiff was the administartor of the deceased automobile passengers, who sought to cross-claim against the bus company and its driver, both residents of the forum state. The Chief Judge therefore argued that the dismissal was improper, since the administrator's cross-claim sought no broad, unfair objective, as did that of the bus company in *Tashire*, and since deciding which claimant had a superior claim to the insurance fund in the interpleader action necessarily involved litigating the same issues of negligence raised by the cross-claim.

In disallowing the cross-claim, the majority failed to analyze the case, preferring to apply dicta from a Supreme Court case which was not in point.[23] The resolution of whether cross-claims are assertible in interpleader actions should not be an automatic dismissal of every cross-claim. Rather, a discerning analysis of the particular case should be made, with a balancing of the advantages and hardships resulting from allowance of the cross-claim.[24] The majority failed to recognize that the question of whether cross-claims are assertible in interpleader actions involves a balancing of competing policies. On the one hand, a policy of consolidation of litigation to prevent unnecessary multiplicity encourages courts to allow all cross-claims which arise out of the same transaction as the interpleader suit. On the other hand, a policy of ensuring fairness to all parties to the action encourages courts to disallow cross-claims against non-resident, and occasionally resident, cross-claim defendants. Since this balancing process is involved, the allowance of cross-claims in interpleader is necessarily a matter for judicial discretion.[25] In order properly to balance the competing

22. *See* note 19 *supra.*

23. *Id.*

24. "[T]he judge who is hearing the interpleader should balance the convenience of a single trial against whatever hardship this will really cause the outside claimant, and then cautiously admit the independent controversy in a few cases where the speedy administration of justice will be clearly promoted without serious injury to the objecting nonresident." Chaffee, *Broadening the Second Stage of Federal Interpleader,* 56 HARV. L. REV. 929, 938 (1943).

25. "[I]n the second stage of an interpleader . . . joinder should be even easier . . . than in an independent aetion at law because of the equity tradition of doing nothing by halves. The Chancellor has long sought to accomplish complete justice between the parties before him. . . . It would be only a short step to use a somewhat similar

policies two requirements should be satisfied before leave to file a cross-claim in interpleader is granted: the rule 13(g) requirement that the cross-claim arise out of the same transaction or occurrence as the interpleader suit; and the requirement that the cross-claim defendant not be unfairly subjected to the claim of a co-party merely because he has come into court to assert his claim against the deposited fund. The rule 13(g) requirement should be administered liberally in order to prevent unnecessary multiplicity of litigation. In the instant case, the cross-claim clearly satisfies this requirement, as the dissent indicates. The occurrence out of which both the interpleader action and the cross-claim arise was the collision between the Queen City bus and the insured's automobile, and the issues of negligence are common to both the interpleader action and the cross-claim. The second requirement, fairness to the cross-claim defendant, becomes especially important when the cross-claim defendant is a non-resident of the forum state.[26] While many of the cases to date have disallowed such cross-claims on grounds of lack of personal jurisdiction over the non-resident cross-claim defendant, a better approach would be to hold that the court would have personal jurisdiction over him if it had personal jurisdiction for purposes of the interpleader action.[27] In such an instance, the ground for dismissal is not lack of personal jurisdiction; rather, it is the fact, as determined by the court, that allowance of the cross-claim would work a hardship on the cross-claim defendant,[28] such as deterring him from coming into court to assert his claim against the deposited fund.[29] The possibility of such hardship is rare when the cross-claim defendant is a resident of the forum state.[30] In such cases, the cross-claim should normally be allowed, provided it arises out of the same transaction or occurrence as the interpleader action, and no other substantial

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flexibility in the second stage of interpleader. This does not mean that the court hearing the interpleader is forced to admit every additional controversy between the claimants in the second stage. The judge can use his discretion as in ordinary cases when joinder is sought. He can exclude inconvenient outside controversies. It is really a question of multifariousness." Chaffee, *Broadening the Second Stage of Interpleader*, 56 HARV. L. REV. 541, 548 (1943).

26. *See* 3 J. MOORE, FEDERAL PRACTICE ¶ 22.15, at 3132 (2d ed. 1966).

27. "[C]ourts have sometimes been too quick to rely upon an assumed jurisdictional defect as a ground for outright dismissal of the cross-claim. *Id.* at 3132.

28. *Id.* In a recent case involving an asserted cross-claim in a statutory interpleader action, the court stated: "[A]llowance of an in personam cross-claim by one claimant against another should rest, not upon the point of appearance, but upon a cautious application of Rule 13(g) in the light of the unique service of process feature of the Federal Interpleader Act." Hallin v. C. A. Pearson, Inc., 34 F.R.D. 499, 503 (N.D. Cal. 1963).

29. Hagan v. Central Ave. Dairy, Inc., 180 F.2d 502 (9th Cir. 1950).

30. 3 MOORE, *supra* note 26.

reason exists for disallowance.[31] It is this requirement of fairness to the cross-claim defendant which is the basis for differentiating between the instant case, in which such disallowance of the cross-claim was improper, and *Tashire*, in which such disallowance was proper, since allowance of the cross-claim in *Tashire* would have given the bus company an unfair advantage over other parties adverse to it, as the Supreme Court recognized.[32]

Torts—An Unemancipated Minor May Maintain Action for Personal Injuries Caused by a Parent's Negligent Driving

Plaintiff brought an action on behalf of his six year-old daughter against her mother for personal injuries sustained as a result of the mother's negligent driving. The defendant moved to dismiss on grounds of parental immunity. Depositions made part of the motion for summary judgment revealed that the mother had picked up her daughter from a babysitter and that the two were proceeding home when the accident occurred. The record also revealed the existence of liability insurance. In a case of first impression, the trial court denied the motion and allowed the action. On appeal to the Supreme Court of Alaska, *held*, affirmed. An unemancipated minor may maintain an action against a parent for personal injuries caused by the parent's negligent driving. *Hebel v. Hebel*, 435 P.2d 8 (Alaska 1967).

31. An objection by a cross-claim defendant that allowance of the cross-claim would deprive him of a jury trial should seldom be sustained. Under modern procedure, a jury trial is readily available, at the court's discretion, even in interpleader actions where there is normally no right to a jury trial. *See* Chaffee, *supra* note 9, at 552-53, 555-57. In proper cases, such as those like the instant case involving multiple torts, a jury would probably be used by the court to try the issues of negligence, thus affording the cross-claim defendant his desired jury trial. Of course, a trial judge may disallow a cross-claim on the ground that a jury trial would unnecessarily complicate the interpleader action, which is a valid exercise of judicial discretion. Also it should be noted that the denial of a cross-claim between co-claimants in an interpleader action provides an ideal framework for the application of the doctrine of collateral estoppel, should a later suit be brought on the cause of action asserted in the disallowed cross-claim. If the resolution of the interpleader action necessitates the determination of the relative negligence of the parties to the disallowed cross-claim, then the unsuccessful cross-claimant could be deemed collaterally estopped from bringing suit on this cross-claim in a subsequent action. *See* RESTATEMENT OF JUDGEMENTS § 68 (1942); Chaffee, *supra* note 9, at 533. Of course, if the judgment in the interpleader suit was for the unsuccessful cross-claim plaintiff, then he could later bring suit for damages, the issue of negligence having already been determined in his favor, and the cross-claim defendant would be collaterally estopped from denying his liability.

32. 386 U.S. at 533-34.

The weight of judicial authority denies an unemancipated minor civil redress for personal injury caused by a parent.[1] Although early common law cases permitted property and contract actions between parent and child, the early English reports contain no personal injury cases; however, most commentators agree there was no rule preventing such an action.[2] The doctrine of parental immunity in the United States was introduced by a Mississippi court in *Hewlett v. George*,[3] where, without citing prior authority, the court dismissed an unemancipated child's false imprisonment action against her mother on the grounds of "sound public policy" and "the peace of society." Citing *Hewlett*, a Tennessee court in *McKelvey v. McKelvey*,[4] dismissed a minor's action against her father and stepmother for cruel and inhuman treatment. Similarly, in *Roller v. Roller*, a Washington court held that a minor had no civil remedy against her father for rape.[5] These cases form the basis for the American doctrine of parental immunity, and although the rule has been criticized by writers,[6] only two jurisdictions have rejected it.[7] The principal reasons offered

1. Decisions upholding parental immunity on the specific issue of negligent driving include: Downs v. Poulin, 216 A.2d 29 (Me. 1966); Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960); Badigian v. Badigian, 9 N.Y.2d 472, 174 N.E.2d 718, 215 N.Y.S.2d 35 (1961); Redding v. Redding, 235 N.C. 638, 70 S.E.2d 676 (1952); Teramano v. Teramano, 6 Ohio St. 2d 117, 216 N.E.2d 375 (1966); Tucker v. Tucker, 395 P. 2d 67 (Okla. 1964); Chaffin v. Chaffin, 239 Ore. 374, 397 P.2d 771 (1964); Castellucci v. Castellucci, 96 R.I. 34, 188 A.2d 467 (1963); Maxey v. Sauls, 242 S.C. 247, 130 S.E.2d 570 (1963); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927).

2. W. PROSSER, TORTS § 116, at 886 (3d ed. 1964); McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1059-62 (1930). Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823, 832 (1956), indicates that some courts have reasoned that the absence of cases supports the proposition that no such action was allowed, whereas others reason the absence shows there was no bar. In Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905) the court stated that there was a bar at common law; however, the Washington court later repudiated this statement as "clearly erroneous." Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1959).

3. 68 Miss. 703, 9 So. 885 (1891).

4. 111 Tenn. 388, 77 S.W. 665 (1903) (abuse of parental power does not give child civil action), Sanford, *supra* note 2, at 833 states that "[t]he basis of the rule is not that the parent is under no duty with respect to his child, but rather that the child has no right to bring a civil action against his parent for redress of such injuries."

5. 37 Wash. 242, 79 P. 788 (1905).

6. McCurdy, *supra* note 2; Comment, *Tort Actions Between Members of the Family—Husband & Wife—Parent & Child*, 20 MO. L. REV. 152 (1961). See also the extensive list of commentators and decisions cited in Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960) (Jacobs, J., dissenting, at 254-55, 151 A.2d at 151-52). These sources suggest that family harmony is no more threatened by tort actions than by property and contract actions, which are allowed. Furthermore, when the parental conduct which injured the child is unrelated to parental discipline, it is difficult to justify denying recovery for personal injury on the basis of protecting family harmony.

7. Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963) abrogated the rule except "(1) [w]here the alleged negligent act involves an exercise of parental authority over the child; and (2) where

in support of the rule barring a child's action against his parent for personal injury have been the fear that to allow such an action would disturb the peace and harmony of the family and impair parental discipline and control. Although the plaintiff in *Roller* argued the absurdity of disallowing redress for rape in the interest of domestic tranquillity and parental respect, the court determined that "there is no practical line of demarkation [*sic*] which can be drawn."[8] Various other reasons supporting the rule have included prevention of depleting family funds, avoidance of fraud and collusion, deference to the legislature regarding any change, and the adequacy of criminal remedy.[9] However, numerous exceptions have been developed to avoid the harsh results ensuing from a strict application of the rule.[10] Thus some courts have drawn a line of demarcation and allowed an action for personal injury caused by intentional[11] or "grossly negligent" conduct,[12] primarily on the theory that the parent has abandoned the parental relation and family harmony has already been destroyed.[13] A few courts have refused to apply the rule when the parent was not acting in his capacity as a parent, but rather in his business or occupational capacity,[14] or where the relation was one of carrier-pas-

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the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care." *Id.* at 413, 122 N.W.2d at 198.

8. Roller v. Roller, 37 Wash. 242, 244, 79 P. 788, 789 (1905).

9. McCurdy, *supra* note 2, at 1072-77.

10. It has been established that an emancipated minor may sue and be sued by a parent; although not entirely consistent with some explanations for the rule of parental immunity, the reasoning seems to be that possibility of disruption of family harmony is lessened in the case of an emancipated child. Wood v. Wood, 135 Conn. 280, 63 A.2d 586 (1948); Bulloch v. Bulloch, 45 Ga. App. 1, 163 S.E. 708 (1932); Lancaster v. Lancaster, 213 Miss. 536, 57 So. 2d 302 (1952); Wurth v. Wurth, 322 S.W.2d 745 (Mo. 1959); Glover v. Glover, 44 Tenn. App. 712, 319 S.W.2d 238 (1958). Partial emancipation, however, is not enough. Perkins v. Robertson, 140 Cal. App. 2d 536, 295 P.2d 972 (1956); Brumfield v. Brumfield, 194 Va. 577, 74 S.E.2d 170 (1953).

11. Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951) (illegitimate daughter was eyewitness to father's murder of her mother and father's subsequent suicide; issue of whether eyewitness had tort action determined separately); Brown v. Selby, 206 Tenn. 71, 332 S.W.2d 166 (1960) (in killing his divorced wife the father destroyed peace of family; right of recovery for wrongful death of mother passed to the children).

12. Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); Cowgill v. Boock, 189 Ore. 282, 218 F.2d 445 (1950) (reckless driving while intoxicated was beyond scope of parental authority and violative of father's duty to son).

13. Thus, these courts, while adopting the rule of parental immunity developed in *Hewlett, McKelvey,* and *Roller,* would decide these cases involving intentional and malicious conduct differently.

14. Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952) (daughter injured by fire from gasoline pump); Borst v. Borst, 41 Wash. 2d 642, 658, 251 P.2d 149, 157 (1952) ("For all practical purposes the relationship between the two at the time of the accident was not parent and child, but driver and pedestrian. The cost of operating the business, if recovery is permitted here, will be no greater than it would have been had a neighbor boy been the victim.").

senger[15] or master-servant.[16] Basic to these exceptions is the fact that the parent-child relationship is merely incidental. The extreme to which some courts have gone in refusing specifically to reject the rule, yet still allowing recovery, is indicated by cases holding that immunity does not extend to an adoptive father,[17] nor to a stepfather who voluntarily stands in loco parentis.[18] Authorities have also held that the parental immunity rule does not bar an action by an unemancipated minor against the estate of a deceased parent.[19] Finally, the existence of liability insurance has persuaded other courts to allow child-parent recovery on the ground that there is little possibility of disruption of family harmony, and that since the insurer will bear the financial burden, the parent-child interests unite in favor of recovery.[20]

Rejecting application of the doctrine of parental immunity in the instant case, the court reasoned that to deny an action for fear of diminishing the family funds at the expense of other members of the

15. Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939) (minor daughter injured by negligence of driver-employee while travelling on bus line operated by her father).

16. Dunlap v. Dunlap, 84 N.H. 352 150 A. 905 (1930) (while working at a regular wage for father, son was injured through negligence of father; father carried employer's liability on son). This jurisdiction rejected the parental immunity rule in 1966. *Supra* note 7.

17. Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939) (action by administrator of adopted son's estate against adoptive father accused of administering strychnine poison to son; although the action could easily have been allowed on the basis of malicious wrong, the court went out of its way to hold specifically "that an adopted child may sue an adoptive father for torts committed upon it [*sic*] which cause him suffering and pain. *Id.* at 421, 129 S.W.2d at 248).

18. Burdick v. Nawrocki, 21 Conn. Supp. 272, 154 A.2d 242 (Super. Ct. 1959). Although the court conceded the defendant's argument that the public policy of maintaining family harmony could not discriminate between stepfather and blood father, it held that because the stepfather voluntarily assumed his responsibility and was under no legal obligation of care and control of the child, parental immunity did not extend to him.

19. Davis v. Smith, 253 F.2d 286 (3d Cir. 1958); Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957) (with death comes severance of family relationship).

20. Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939) (compulsory public liability required by state statute to protect passengers on common carrier); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932) ("business capacity" exception rejected, but action allowed because parent protected by insurance in his vocational capacity as school bus driver and his interest and injured daughter's both favored recovery). *See also* Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930). In this case, the father transferred final financial liability by carrying employer's liability insurance. "Such immunity as the parent may have from suit by the minor child for personal tort, arises from the disability to sue, and not from lack of violated duty. This disability is not absolute. It is imposed for the protection of the family control and harmony, and exists only where a suit, or the prospect of a suit, might disturb the family relations. Stated from the viewpoint of the parent, it is a privilege, but only a qualified one. . . . It does not apply to an emancipated child, or to a case where the liability in fact has been transferred to a third party." *Id.* at 372, 150 A. at 915. *Contra,* Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938); Belleson v. Skilbeck, 185 Minn. 537, 242 N.W. 1 (1932).

family was an insufficient justification for the doctrine, since this argument ignored the injury to the child's assets of health and strength. The court reasoned that the fact that most parents have liability insurance undermined the arguments regarding disruption of family harmony and parental discipline, and that if a family does not have insurance, the possibility of a suit on behalf of the child is remote. Although the court recognized the danger of fraud and collusion, it relied upon a dissenting opinion by Judge Fuld[21] of the New York Court of Appeals, and noted that the fraud-collusion-perjury possibility exists in all liability insurance cases. That this possibility is more prominent in parent-child relations merely demands greater caution on the part of court and jury in assessing the facts, rather than the total denial of redress to the injured child. The court did not define the scope of its rejection of the parental immunity rule, but limited its decision to the given situation involving negligent driving.

While society has an interest in providing a right to compensation to persons injured by another's negligent or intentional acts, it also has an interest in preserving the basic family unit from fear of liability for personal injury resulting from the intimacy of daily living.[22] Where these policies conflict, the scales are clearly weighed in favor of allowing redress for injuries resulting from intentional acts; however, in cases involving negligence, the scales are more evenly balanced. The instant court implies that the injured child should be allowed redress where "it is reasonably clear that the domestic peace has already been disturbed beyond repair or where by reason of the circumstances it is not imperiled, and where the reasonableness of family discipline is not involved."[23] This approach would allow an action in cases where liability insurance coverage exists, therefore enabling the use of fraud and collusion as affirmative defenses. The major argument against maintaining parental immunity thus becomes the danger of fraud and collusion. The instant court wisely refused to deny summarily an action to an entire class merely because of the possibility of fraud or collusion. Clearly, there are many instances in which no fraud is involved, and those injured should have a day in court. If deemed necessary, legislatures could ensure this

21. Badigian v. Badigian, 9 N.Y.2d 472, 174 N.E.2d 718, 215 N.Y.S.2d 35 (1961).

22. Sanford, *supra* note 2, at 840: "[B]y reason of the shortcomings of all humans, the home is of necessity a somewhat dangerous place for its inhabitants. Children will leave their roller skates on the front porch, and fathers will forget to fix the broken stairs. Moreover, the lack of knowledge or of means may also create unsafe conditions in the home. The nature of family life, therefore, compels the members of the family group to accept the risks inherent in such circumstances."

23. 1 F. HARPER & F. JAMES, TORTS § 8.11 at 650 (1956), *cited in*, Hebel v. Hebel, 435 P.2d 8, 13 (Alas. 1967).

right, although of course the gain to the public would no doubt be minimal, since insurers would immediately amend policies to deny intrafamily indemnity, or raise premium costs commensurate with the added risk. Even with such a reaction from the insurance industry, however, injury could be redressed far more effectively than is possible under a strict parental immunity rule. Such an abrogation of the rule, legislative or judicial, is not only necessary if the courts are to perform their function evenhandedly, but also required by common sense, in that the hazards of modern living, traffic, and travel[24] expose the child to greater risks than were present when the parental immunity doctrine and its rationale were developed.

Trade Regulation—Dealer Coerced to Terminate Franchise May Recover Future Profits Under Automobile Dealer's Day in Court Act

Plaintiff automobile dealer brought an action against defendant manufacturer under The Automobile Dealer's Day in Court Act,[1] asserting that defendant had in bad faith and by coercion and intimidation forced plaintiff to terminate his dealership. As evidence of bad faith, plaintiff alleged that defendant had refused to accept an order for vehicles unless unwanted models were also ordered,[2] and that on numerous occasions defendant had refused to authorize certain warranty work for plaintiff, causing his customers to obtain service from other dealers. Plaintiff alleged further that he had not been fully reimbursed for other warranty work which he had performed under oral agreements with defendant's agents.[3] The jury returned

24. Sanford, *supra* note 2, at 845-46.

1. 15 U.S.C. §§ 1221-25 (1964).

2. After pressure by manufacturer, dealer signed a "projection," in which he estimated a need for three American automobiles. Relying on the projection, manufacturer produced the models. Defendant refused to accept an order for models that plaintiff wanted until he also ordered one of the automobiles anticipated in the projection.

3. Manufacturer asserted that under its warranty agreement with plaintiff, it warranted cars to the dealer only; the dealer made warranties to purchasers and had the obligation to do any warranty work on the cars. Only then could the dealer seek reimbursement from the manufacturer. Dealer also asserted bad faith in manufacturer's refusal to approve an assignment of dealer's franchise to a Chrysler dealer. Although manufacturer's denial of bad faith alleged that its national policy was to avoid dual dealerships in sales areas of similar potential, it subsequently did make an offer for such a dealership arrangement in this same area. The court held that this refusal was not pertinent to the decision of the case since it occurred after dealer had decided to terminate.

a verdict for plaintiff,[4] and manufacturer appealed, alleging that it had acted in good faith and contending that the Act did not apply where the dealer, rather than the manufacturer, terminated the franchise. On appeal to United States Court of Appeals for the Tenth Circuit, *held,* affirmed. Refusal by an automobile manufacturer to accept orders from a dealer unless unwanted models are also accepted, and refusal to authorize and to reimburse dealer for appropriate warranty work constitute a "lack of good faith" which, when forcing the dealer to terminate his franchise, allows the dealer recovery under the Automobile Dealer's Day in Court Act. *American Motors Sales Corp. v. Semke,* 384 F.2d 192 (10th Cir. 1967).

The franchise relationship between automobile dealer and manufacturer caused extensive litigation under the common law of contracts, the usual result being to deny the dealer a remedy on the franchise agreement alone.[5] Not only were the dealer's rights under the agreement difficult to enforce, but his bargaining position was weak relative to that of the large automobile manufacturer.[6] In order to balance the relationship so heavily weighted in favor of the manufacturer, Congress in 1956, enacted The Automobile Dealer's Day in Court Act, which "create[d] a cause of action where none previously existed in that, irrespective of contractual provisions, it grant[ed] a right of review in the federal courts . . . ."[7] The dealer was given two grounds for recovery: (1) lack of good faith by the manufacturer in performing under the provisions of the franchise; and (2) lack of good faith by the manufacturer in terminating, cancelling or failing to renew the franchise.[8] The source of most litigation has been the scope

4. Judgment was rendered in the amount of $18,000 for loss of future profits as a result of the termination of the franchise. On appeal, manufacturer argued that under general contract law, the awarding of future profits was error.

5. Successful defenses of the manufacturer included: (1) the franchise lacked mutuality of obligation and was therefore not a legal contract; (2) the franchise provided for dealer's performance to the satisfaction of manufacturer, and therefore, only the manufacturer could determine whether dealer had performed; (3) no damages are recoverable, since loss of future profits was not contemplated by the parties at the time the franchise agreement was signed; (4) the franchise was unenforceable because of indefiniteness, uncertainty, and lack of consideration; (5) the manufacturer had the right to terminate the contract at will, even if it was valid. S. REP. No. 1879, 84th Cong., 2d Sess. 79 (1956).

6. In 1954, 3 manufacturers accounted for 96% of the automobiles produced in the United States, while there were 40,000 dealers. U. S. CODE CONG. & AD. NEWS 4597 (1956).

7. U.S. CODE CONG. & AD. NEWS 4596 (1956).

8. The Automobile Dealer's Day in Court Act provides in pertinent part: "An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States . . . and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer . . . to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, cancelling, or not re-

of the good faith requirement. Although the Act and its legislative history[9] impose upon each party the duty to act in good faith, neither clearly indicates the scope of that duty. One view holds that only that part of the dealer-manufacturer relationship governed by the written franchise itself is within the scope of duty—not their entire relationship.[10] This position would seem to imply that the manufacturer may insert in the contract any provision he desires, and acts in bad faith only if he attempts to exercise powers that he does not clearly have. A contrary view of the scope of the good faith duty is that it actually modifies even express terms of the contract so that the manufacturer cannot use its contractual powers to force the dealer's economic demise.[11] This latter view would make manufacturer's lack of good faith actionable when "it relates to" compliance with provisions of the franchise, or termination, cancellation, or nonrenewal of the franchise.[12] In addition to determining the scope of the good faith requirement, there is the related question of what constitutes a lack of good faith. From the Act's definition of good faith, it is clear that a "lack of good faith" must be determined within the context of coercion, intimidation or threats thereof.[13] The Act, therefore, does not protect the dealer from the manufacturer's unfair, inequitable, or arbitrary behavior which is noncoercive.[14] Thus far, no case interpreting the good faith requirement and resulting in a verdict against the manufacturer has been upheld on appeal.[15] Case

newing the franchise with said dealer: *Provided,* That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith." 15 U.S.C. § 1222 (1964).

9. U.S. CODE CONG. & AD. NEWS 4596 (1956).

10. Note, *Statutory Regulation of Manufacturer-Dealer Relationships in the Automobile Industry,* 70 HARV. L. REV. 1239, 1246-47 (1957). Support for this position can be found in General Motors Corp. v. MAC Co., 247 F. Supp. 723 (D.C. Colo. 1965). *See* Note, *The Automobile Dealer Franchise Act of 1956—An Evaluation,* 48 CORNELL L.Q. 711, 726 (1963).

11. Southern Rambler Sales, Inc. v. American Motors Corp., 375 F.2d 932 (5th Cir.), *cert. denied,* 389 U.S. 832 (1967).

12. "Manufacturer coercion or intimidation or threats thereof is actionable by the dealer where it relates to performing or complying with any of the terms or provisions of the franchise, or where it relates to the termination, cancellation, or nonrenewal of the dealer's franchise. Thus, where a dealer's resistance to manufacturer pressure is related to cancellation or non-renewal of his franchise a cause of action would arise." U.S. CODE CONG. & AD. NEWS 4603 (1956).

13. Good faith is defined as "the duty of each party . . . to act in a fair and ethical manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party. . . ." 15 U.S.C. § 1221(e) (1964).

14. Annot., 7 A.L.R.3d 1173, 1182 (1966); Note, *The Automobile Dealers Act,* 9 STAN. L. REV. 760, 769 (1957). For example, cancellation of a franchise without cause must be proved to be part of a pattern of coercive behavior before an action is possible.

15. Two cases rendering verdicts for the dealer were reversed on appeal. Globe

law thus emphasizes the negative, illustrating what does not constitute a lack of good faith, rather than establishing standards for determining whether the good faith requirement has been met. Where the manufacturer terminates or refuses to renew the franchise because of the dealer's failure to perform his obligations under the contract, the courts have found the termination to be in good faith.[16] Similarly, absent coercion or intimidation, it is not a lack of good faith for a manufacturer to take action which, though not authorized by the agreement, is not expressly prohibited by its terms, such as establishing a competing dealership or discriminating in the allocation of fast-selling models.[17] Nor is it a lack of good faith for a manufacturer to refuse to perform an act which it is not obligated by the franchise to perform, such as approving assignment of a franchise when the manufacturer honestly doubts the ability and financial resources of the applicant.[18] The legislative history of the Act must be consulted for an affirmative example of the circumstances from which the existence of coercion or intimidation may be inferred: "[M]anufacturer pressure . . . upon a dealer to accept automobiles . . . which the dealer does not need, want, or feel the market is able to absorb, may in appropriate instances constitute coercion or intimidation."[19] Facts similar to this example were present in *Kotula v. Ford Motor Co.*,[20] where the dealer alleged that he was unable to obtain needed models unless he also accepted an unwanted model. The court held this was not an "appropriate instance" for finding the manufacturer's termination coercive, since the termination was caused by the dealer's

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Motors, Inc. v. Studebaker-Packard Corp., 328 F.2d 645 (3rd Cir. 1964); Garvin v. American Motors Sales Corp., 318 F.2d 518 (3rd Cir. 1963).

16. Such breaches of contract by the dealer that have been held to permit good faith manufacturer termination include: (1) Failure to meet reasonable sales quotas as provided in the francise. Leach v. Ford Motor Co., 189 F. Supp. 349 (N.D. Cal. 1960); Sam Goldfarb Plymouth, Inc. v. Chrysler Corp., 214 F. Supp. 600 (E.D. Mich. 1962). (2) Failure to maintain adequate facilities as required by the contract, Milos v. Ford Motor Co., 317 F.2d 712 (3rd Cir.), *cert. denied*, 375 U.S. 896 (1963); Woodard v. General Motors Corp., 298 F.2d 121 (5th Cir.), *cert. denied*, 369 U.S. 887 (1962). (3) Failure to provide the manufacturer with adequate representation, Staten Island Motors, Inc. v. American Motors Sales Corp., 169 F. Supp. 378 (D.N.J. 1959). (4) Failure to maintain sufficient working capital and employees or to submit required financial statements specified in the franchise, Globe Motors, Inc. v. Studebaker-Packard Corp., 328 F.2d 645 (3rd Cir. 1964); Walker v. Ford Motor Co., 241 F. Supp. 526 (E.D. Tenn. 1965); Augusta Rambler Sales, Inc. v. American Motors Sales Corp., 213 F. Supp. 832 (N.D. Ga. 1963).

17. Southern Rambler Sales, Inc. v. American Motors Corp., 375 F.2d 932 (5th Cir.), *cert. denied*, 389 U.S. 832 (1967); Garvin v. American Motors Sales Corp., 318 F.2d 518 (3rd Cir. 1963).

18. Pierce Ford Sales Co., Inc. v. Ford Motor Co., 299 F.2d 425 (2nd Cir.), *cert. denied*, 371 U.S. 829 (1962).

19. U.S. Code Cong. & Ad. News 4603 (1956).

20. 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965).

failure to comply with the franchise provisions, rather than by its forced acceptance of the unwanted model. After a dealer has proved that the questioned conduct evidenced a lack of good faith under the Act, he must further establish a relationship between the manufacturer's bad faith and the performance or termination of the franchise agreement. With one exception the cases concerning the lack of good faith in termination, cancellation, or nonrenewal specify the manufacturer as the one who ended the dealership. In that case, *Pinney & Topliff v. Chrysler Corporation*,[21] the court assumed, without deciding, that a dealer forced to terminate on his own behalf as the result of coercion by the manufacturer would have a cause of action. However, since the court found that the dealer terminated voluntarily and without coercion, the question whether a terminating dealer could recover under the Act was left unresolved.

In deciding, as a case of first impression, whether the Automobile Dealer's Day in Court Act is applicable where the dealer terminates as a result of the manufacturer's coercion, the court in the instant case resorted to the legislative history[22] of the Act. Where the coercion or intimidation compelled the dealer to terminate, the court held that "it relates to" the termination as required by the statute, interpreted in light of its legislative history. The *Kotula*[23] case was distinguished on the ground that there the dealer had not adequately fulfilled his franchise obligations, while the issue in the instant case was whether the manufacturer had coerced the dealer into terminating, not whether the manufacturer was justified in terminating.[24] Considering whether the manufacturer had acted in bad faith, the instant court held that the facts established were sufficient for the jury to find that pressure was applied, causing the plaintiff to take unwanted cars, amounting to coercive or intimidative acts within the statute as explained by its legislative history.[25]

The Automobile Dealer's Day in Court Act is designed to equalize the bargaining positions of the dealers and the manufacturers. The Tenth Circuit's holding would seem to misconstrue this objective. The Act gives the dealer causes of action for the manufacturer's

21. 176 F. Supp. 801 (S.D. Cal. 1959).

22. *See* note 12 *supra* for the wording of the pertinent section of the legislative history.

23. 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965).

24. Relying on the reasoning of the district court in Garvin v. American Motors Sales Corp., 202 F. Supp. 667 (W.D. Pa. 1962), *rev'd on other grounds*, 318 F.2d 518 (3rd Cir. 1963), the court upheld the lower court's allowance of damages for loss of future profits.

25. *See* text accompanying note 19 *supra*.

failure to act in good faith: (1) in performing or complying with the franchise provisions; or (2) in terminating, cancelling, or not renewing the franchise. Where a dealer is coerced in the performance of the contract, he has a right to damages under the first cause of action. The instant case holds, however, that a dealer need not prevent a manufacturer's coercion in performance, but may instead delay, terminate on his own, and recover under the second cause of action pertaining to termination. Such a decision creates the possibility of injustice to the manufacturer. After even an isolated act with the appearance of coercion, a dealer may, without actual necessity, terminate the franchise and sue the manufacturer for damages before a jury, which is likely to be more receptive to the small dealer than the large automobile manufacturer.[26] The uncertain boundaries of "lack of good faith" give the jury considerable freedom in judging the acts of the manufacturer. Although the Act gives the manufacturer the defense of the dealer's lack of good faith,[27] it could be a difficult task to prove that the dealer coerced or intimidated the manufacturer. The dealer's first cause of action under the Act gives him the power to prevent manufacturer's pressure from becoming so great as to *cause him to terminate.*[28] However, by allowing the dealer to ignore the first cause of action, terminate, and sue under the second, the court appears to have diverged from the literal wording of the statute which awards damages under the second cause of action for "failure of the . . . manufacturer . . . to act in good faith . . . in terminating . . . the franchise. . . ."[29] The only justification given for this departure is one sentence of a two-sentence paragraph in the legislative history[30] to the effect that coercion or intimidation is actionable if "it relates to" termination. However, the second sentence goes on to illustrate the first, indicating that if the manufacturer applies coercion, the dealer resists, and the manufacturer consequently brings the franchise to an end, then the dealer has a cause of action.[31] This interpretation is based upon the belief that Congress, in creating a

26. Dealers' attorneys who have tried cases under the Act admit that juries tend to be sympathetic toward the dealer. This fact enables settlement of many cases with manufacturer without a trial. *See* S. MACAULAY, LAW AND THE BALANCE OF POWER; THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS 97, 206 (1966). The instant decision gives dealer the *right* to terminate and the *power* to threaten a jury trial in his attempts to reach an out-of-court settlement with the manufacturer.

27. *See* note 8 *supra.*

28. The dealer could get an injunction for the interval between filing of the suit and final adjudication if it appeared that otherwise the manufacturer's coercive or intimidative acts would force the dealer to terminate during the interim.

29. 15 U.S.C. § 1222 (1964).

30. 384 F.2d at 197.

31. *See* note 12 *supra* for the wording of both sentences from the legislative history.

cause of action for termination, would not duplicate the cause of action for lack of good faith in performing, which is contained in the same brief section of the Act. Thus, while giving the first indication of what constitutes a lack of good faith under the Act, the court had little justification upon which to base its departure from the literal wording of the statute and to give the dealer the right to terminate and sue for loss of future profits.