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Antitrust—Robinson-Patman—Adoption of Physical Comparison Test To Determine "Like Grade or Quality"

The Borden Company produced and sold evaporated milk under its nationally advertised name and under private brand names owned by certain customers. The private brand milk was physically and chemically identical with the milk distributed under the Borden name, but at both the wholesale and retail levels, it was sold at prices consistently below those obtained for milk bearing the Borden name. Competing private packers filed a complaint with the Federal Trade Commission charging Borden with price discrimination in violation of section 2(a) of the Robinson-Patman Act.[1] The Commission found that since all the milk sold by Borden was "of like brand and quality," section 2(a) was applicable, and held that the price differential was discriminatory and adversely affected commerce.[2] The Court of Appeals for the Fifth Circuit set aside the Commission's cease and desist order on the ground that the Commission failed to consider the commercial and economic importance of consumer preference, which, when considered, classified the products as *not* of the same grade and quality under the act.[3] On

1. Clayton Act § 2(a), 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1964). The pertinent portion provides: "[I]t shall be unlawful . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or to tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance in the cost of manufacture, sale or delivery resulting from the different methods or quantities in which such commodities are to such purchasers sold or delivered. . . ."

2. The hearing examiner found that Borden had discriminated in price but dismissed the complaint on grounds that no injury to competition was present or likely, and that the respondent had successfully shown cost justification. The FTC, in a 2-1 decision with two members not participating, reversed the examiner on both points, and issued a cease and desist order. The proof of injury to competition consisted of showing specific instances where competitors had lost accounts, or, in at least one instance, had gone out of business as resnlt of respondent's activities. Borden's cost computations, in which it attempted to justify the price differentials, were likewise rejected. The Commission affirmed the examiner's determination that the products were of "like grade and quality." The Borden Co., TRADE REG. REP. (1961-1963 Transfer Binder) ¶ 16191 (FTC) (Nov. 28, 1962).

3. Borden Co. v. FTC, 339 F.2d 133 (1964). The approach which incorporates

certiorari to the United States Supreme Court, *held*, reversed. In determining whether commodities are of like grade and quality under section 2(a) of the Robinson-Patman Act, a chemical and physical comparison test is to be used, without regard to differences in consumer preference for the products. *Federal Trade Commission v. The Borden Co.*, 383 U.S. 637 (1966).

Section 2(a) of the Robinson-Patman Act forbids discrimination by a seller in prices charged for "commodities of like grade and quality" when such discrimination presents a real or potential injury to competition in interstate commerce.[4] Before issuing a charge, the Commission must first determine if the goods whose prices are being compared are of "like grade and quality," since section 2(a) is applicable only if this condition is satisfied. The legislative history surrounding the "like grade and quality" provision does not clearly indicate what was to be considered in interpreting that phrase,[5] but it is clear that differences in brand alone were not to be considered a basis of differentiation. Federal Trade Commission decisions have left little doubt that the Commission has always favored a physical comparison test of like grade and quality.[6] The test is seemingly

consumer preference is known as the market test approach. In subscribing to this approach, the Court of Appeals rejected the physical comparison interpretation of the Commission. The Appellate Court's reasoning was largely adopted by the Supreme Court's dissenting opinion.

4. The Act provides two affirmative defenses, either of which justifies or excuses the price differential. If the differential only reflects differences in costs of manufacture, sale or delivery (the cost justification defense), or if the differential is due to the good faith meeting of an equally low price of a competitor (the good faith meeting of competition defense), it is not prohibited. See sections 2(a) and 2(b) of the Act. 49 Stat. 1526 (1936), 15 U.S.C. §§ 13(a), 13(b) (1958).

In the instant case Borden asserted the cost justification defense. It submitted data showing price differential on private and premium brands of $1.09 per case, and corresponding cost computations showing savings on the private brands in excess of $1.09. The Commission rejected Borden's broad averaging approach, in view of individual discriminations shown of up to $1.70 per case in some areas. The Supreme Court apparently adopted this view as no mention of the defense was made in the opinion.

5. See notes 13 & 14 *infra*.

6. In Goodyear Tire & Rubber Co., 22 F.T.C. 232 (1936), *rev'd on other grounds*, 101 F.2d 620 (6th Cir. 1939), the respondent was shown to be selling tires under the Allstate brand to Sears, Roebuck & Co. at prices, after all quantity adjustments, averaging eleven to twenty-two per cent below the tires sold to its own Goodyear dealers under the All Weather brand. Both parties stipulated that the tires were of "like grade and quality." Again, in United States Rubber Co., 28 F.T.C. 1489 (1939), the respondent was selling tires under private labels to favored customers at prices below those charged its own dealers. Here again, the Commission's initial determination that the commodities were of "like grade and quality" was not contested; instead the respondent defended unsuccessfully on cost justification. In Whitaker Cable Corp., 51 F.T.C. 58 (1955), an order was issued to respondent to stop price discrimination in favor of private brand customers, after a determination of "like grade and quality" had been made without objection. These cases are relied upon in *Borden* for the proposition that brand, and presumably other commercial distinctions, are not to be considered in determining "like grade and quality." The cases discussed

simple: if the goods are chemically and physically alike, they are within the provision.[7] Nowhere in the cases considering section 2(a) is there support for the proposition that brand preference, or any other commercial factor, can be a basis for a finding of unlike grade and quality. Yet, in none of these cases was the issue of commercial distinctions actually raised and litigated; the question went by default because the respondents relied upon the affirmative defenses available to them rather than challenging the Commission's initial determination of like grade and quality.

The alternative to the physical comparison test has been variously termed the economic, commercial, or market test approach.[8] Pro-

above are representative of the three other cases cited by the Court: Page Dairy Co., 50 F.T.C. 395 (1953); United States Rubber Co., 46 F.T.C. 998 (1950) (to avoid confusion notice there are two United States Rubber Cases); Hansen Inoculator Co., Inc., 26 F.T.C. 303 (1938). For a discussion of how these cases would have been decided under the market test approach, see Comment, *Like Grade and Quality: Emergence of the Commercial Standard.* 26 OHIO ST. L.J. 294, 320-21 (1965).

There are several more recent cases where "like grade and quality" was assumed irrespective of the brand. The Commission, in the instant case, cited Hartley & Parker, Inc. v. Florida Beverage Corp., 307 F.2d 916 (5th Cir. 1962), where respondent was ordered to cease selling nationally advertised liquors at one price, and identical liquor under different brands at lower prices. In American Metal Products Co., 60 F.T.C. 1667 (1962), bathtubs carrying the customers' own brands were found to be of the same grade and quality as tubs bearing respondent's brand (later vacated for mootness).

7. The physical comparison test is not without its pitfalls, however. See Bruce's Juices, Inc. v. American Can Co., 87 F. Supp. 985 (S.D. Fla. 1949), *aff'd,* 187 F.2d 919 (5th Cir.), *modified on rehearing,* 190 F.2d 73 (5th Cir. 1951); Atlanta Trading Corp., 53 F.T.C. 565 (1956); General Foods Corp., 52 F.T.C. 798 (1956); E. Edelmann & Co., 51 F.T.C. 978 (1954); Sylvania Elec. Prods., Inc., 51 F.T.C. 282 (1954). These cases are discussed in Rowe, *Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act,* 66 YALE L.J. 1 (1956). In these cases, the Commission was confronted with products of the same brand with minor physical variations.

8. Even though no resourceful respondent had ever directly challenged the physical comparison test prior to the instant case, it has not gone unchallenged among legal writers. After a majority of the Attorney General's Committee To Study the Antitrust Laws endorsed the physical comparison test in 1955, a number of articles appeared which took issue. See Cassady & Grether, *The Proper Interpretation of "Like Grade and Quality" Within the Meaning of Section 2(a) of the Robinson-Patman Act,* 30 SO. CAL. L. REV. 241 (1957); Rowe, *supra* note 7; Comment, 26 OHIO ST. L.J. 294 (1965). See also Jordan, *Robinson-Patman Aspects of Dual Distribution By Brand of Consumer Goods,* 50 CORNELL L.Q. 394, 404 (1965).

The majority of the Attorney General's Commission recommended "that the economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory 'like grade and quality' test. . . . [T]he Commission majority feels that the abandonment of a physical test of grade and quality in favor of a marketing comparison of intrinsically identical goods might not only enmesh the administrators of the statute in complex economic investigations of every price discrimination charge, but also could encourage easy evasion of the statute through artificial variations in the packaging, advertising, or design of goods which the seller wishes to distribute at different prices. . . ." ATT'Y GEN. NAT'L COMM. ANTITRUST REP., 158 (1955). The minority dissented in favor of the market test approach.

ponents of this view contend that in any appraisal of like grade and quality, consumer preference must be recognized as a differentiating factor. The commercial significance of any product is the price it will command in the marketplace, and products with widely varying consumer appeal are not, in any realistic sense, of "like grade and quality."[9] The market test approach does not differentiate on the basis of brand as such, but rather on the relative consumer acceptance of a given product. Thus, two established brands commanding substantially the same high price would not be differentiated under the market test approach.[10] Until the instant case, no respondent had urged the market test approach before the Commission, and thus no court had considered the validity of the physical test as the sole criterion of "like grade and quality."[11]

The Supreme Court's decision in the instant case is based upon three considerations: (1) the interpretation placed upon "like grade and quality" in earlier FTC cases; (2) the legislative history of the act; and (3) the practical results which the Court felt would result from using a market test approach. The majority devoted the greater part of its opinion to congressional history to determine legislative intent.[12] The Court attached particular significance to the express rejection of an amendment during the 1936 hearings which would have limited the application of the section to commodities of like "grade, quality *and brand.*"[13] (Emphasis added.) Equally significant to the Court was an exchange between Representatives Patman and Taylor, in which Representative Taylor was assured that under the bill like grade and quality would be considered "irrespective of the brand."[14] The Court concluded that these events demonstrated a congressional intent that brand (and by implication, any other commercial factor) should not be considered in determining "like grade and quality." Finally, the majority felt that the market test approach

9. It is contended, for example, that if consumers will pay $8.00 for brand A shirts, while brand B can command only $5.50, then it is ignoring commercial realities to base a finding of "like grade and quality" solely upon physical identity.

10. It is almost universally conceded that a rule permitting brand alone to differentiate grade and quality would be a highly artificial approach which would limit the effect of the Act. The market test approach is better appreciated after having seen consumer habits surveys which reveal the importance of brand image to the average consumer. See Cassady and Grether, *supra* note 8, at 259-62.

11. See Rowe, *supra* note 7, at 18.

12. The Court first cited six cases decided under section 2(a) dating back to 1936, but did not explain their significance. See note 6, *supra.*

13. "There was strong objection to the amendment and it was not adopted by the Committee. The rejection of the amendment assumes particular significance since it was pointed out in the hearings that the legality of price differentials between proprietary and private brands was then pending before the Federal Trade Commission in *The Goodyear Tire and Rubber Co. . . .*" FTC v. Borden Co., 383 U.S. at 641-42.

14. 80 CONG. REC. 8115 (1936).

would enable sellers to circumvent the act by careful branding and pricing policies which would generate differing degrees of apparent "consumer preference."[15] It declined to meet Borden's argument that the Commission's view of like grade and quality for purposes of section 2(a) cannot be squared with its rulings in cases under section 2(b) where a seller presents a "good faith meeting of competition" defense.[16] The Court saw no need to resolve this apparent conflict since the 2(b) cases were not before the Court.

Justices Stewart and Harlan dissented on the grounds that there is nothing in the act, its history, or prior FTC decisions which requires reliance upon a physical test to the exclusion of other "commercially significant distinctions." The minority found the "sparse" legislative history in no way inconsistent with a grade and quality test which included market acceptance.[17] The prior FTC precedents cited by the majority were found equally unpersuasive, since the question of consumer preference as a relevant factor in comparison of grade and quality was never raised in the cases. The minority indicated that the instant decision would reduce rather than promote competition,[18]

15. "The seller, to escape the Act, would have only to succeed in selling some unspecified amount of each product to some unspecified portion of his consumer customers . . . . The seller's pricing and branding policy, by being successful, would apparently validate itself by creating a difference in 'grade' and thus taking itself beyond the purview of the Act." *Supra* note 13, at 644-45.

16. Section 2(b) provides in part: ". . . nothing herein shall prevent a seller . . . [from] showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . . ." When manufacturers of premium products have reduced their prices to the level of non-premium products, and have defended at FTC action under the 2(b) "good faith meeting of competition" exception, the Commission has consistently held that the premium seller was not meeting competition but undercutting it, because the premium product would command a higher price. In these cases the Commission has, in effect, recognized that a premium label makes a product different; otherwise, the premium product could have been lawfully reduced to the same price as the non-premium product. See Standard Oil Co., 49 F.T.C. 923 (1953) (*"public acceptance* rather than the *chemical analysis* of the product is the important competitive factor"). (Emphasis added.) See also Anheuser-Busch, Inc. 54 F.T.C. 277 (1957); Callaway Mills Co., TRADE REG. REP. (1963-1965 Transfer Binder) ¶ 16,800 (1964); Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351 (1948). The dissenting justices viewed the inconsistency more seriously than did the majority and thought it proper for the Court to resolve the conflict.

17. To the minority, the rejection of the "brand" amendment meant no more than that mere differences in brand were insufficient to differentiate, and with that they were not in disagreement. They found no authority which spoke with clarity on the precise issue in the instant case, *i.e.*, can physically identical products be differentiated under § 2(a) by substantial market factors.

18. In analyzing the competitive effects of Borden's system, Mr. Justice Stewart noted that Borden's own large private brand customers represented a significant countervailing power to Borden itself and thus insured greater competition. Furthermore, the minority failed to see how competition on either the primary (competition between competing sellers) or secondary (competition between competing buyers) level was harmed by Borden's pricing policies. F.T.C. v. Borden Co., *supra* note 13, at 647-50.

and would encourage price uniformity conflicting with the broad antitrust policies of the government.[19]

Because neither the statute nor its legislative history is conclusive on the point, most discussion of the proper approach concerns the anticipated results which would flow from the application of each approach. Proponents of the physical comparison test express the fear that recognition of brands or other commercial factors in differentiating products under 2(a) will "emasculate" the act by providing an easy means of circumvention.[20] Arguments advanced for a market preference test emphasize that the "laboratory analysis" approach used in the instant case is a rigid standard unattuned to market realities, which will impede broad antitrust objectives by reducing rather than promoting competition.[21] If a well-known premium product and an unknown brand of the same physically identical product are brought within 2(a) under the physical comparison test, the seller may be forced into one of three general choices: (1) equalize prices at the private brand price level; (2) equalize prices at the premium brand level; or (3) forego private brand sales entirely. Alternative (1) is unlikely to be acceptable economically. Alternative (2) will normally result in the occurrence of (3), because of private brand price competition. Thus, the end result of a strict application of the physical comparison test may well be the exclusion of the premium brand producers from the private brand market.[22] The potential impact of

19. The Supreme Court in Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953), said that the Act should be interpreted and applied consistently with "the broader antitrust policies that have been laid down by Congress" and so to avoid "a price uniformity and rigidity in open confliet with the purposes of other anti-trust legislation."

20. For a rebuttal to the "emasculation" argument, see Cassady & Grether, *supra* note 8, at 272; Comment, 26 OHIO ST. L.J. 294, at 316.

21. The Robinson-Patman Act has the same ultimate end as the other antitrust law from which it stems: promotion of a climate of healthy marketplace competition. Yet the Robinson-Patman Act seems too concerned with, to put it simply, competition found undesirable for reasons as much social as economic—thus the danger that the Act may be applied in a manner counter to overall antitrust policy. See note 19 *supra*. See also Comment, 26 OHIO ST. L.J. 294 (1965).

For interesting examples of some of the anti-chain store bombast which accompanied the passage of the Act, see Rowe, *supra* note 7, at 3.

22. At first impression, such a result seems to follow from the instant decision, where Borden is prohibited from unjustifiably discriminating in price between its premium and nonpremium brands. By Borden's own computations, the price differentials averaged $1.09 per case. It is unlikely that Borden can raise wholesale prices even one dollar per case and still remain competitive with private brand packers who aren't bampered by distributing a premium brand in addition to their private brands. On the other hand, Borden will be reluctant to reduce its prices on the Borden brand, which constitutes the bulk of its volume. However, Borden is required to equalize prices only to the extent of the differential which is not justified by cost savings. Differentials due to bona fide cost savings are not proscribed. Judging from the respondent's cost analysis table set out in the Commission's record, *supra* note 2, at 21,024, and the Commission's discussion of disallowable cost items at page 21,025, Borden apparently successfully justified a cost savings of approximately one dollar

the decision upon marketing in general appears almost unlimited because of the extent to which dual multi-brand distribution is prevalent in the economy. The practice of selling a heavily advertised premium product at a premium price while at the same time supplying large private brand customers at lower prices has become so embedded in American marketing that a sudden, strict application of the decision would be seriously disruptive. However, the fact that the Commission has waited so long to move against what is unquestionably a widespread business practice suggests that the Commission may not be prepared to go as far as logical extension of the physical comparison test might carry it. As in many landmark decisions, the instant case is seemingly very broad in its implications and must await further clarification. The Commission probably will not adopt an expansive construction of *Borden* in dealing with the problem. Earlier periods of Commission practice suggest that "like grade and quality" standards have not been without some flexibility, and it is submitted that a stricter application of existing standards as to what constitutes "like grade and quality," along with a more liberal construction of cost justification defenses, may dilute the impact of the decision on marketing generally.[23] Any meaningful evaluation of the net effect of the application of the physical comparison test must await further developments.[24]

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per case on the nonpremium brand. Thus the Commission would have permitted, and presumably will permit in the future, Borden to continue this cost justified difference. Therefore, the position of premium producers in the private brand market isn't as bleak as it appears at first impression. The point to remember is that the Act only requires equalization of prices to the extent that the difference is not justified by cost. See note 23 *infra*, for discussion of another critical matter, *i.e.*, what costs can be included in the cost justification computation.

23. In summary, three provisions of the Act suggest themselves as possible escapes, or at least as mitigating the impact of the instant decision. They are discussed in Cassady & Grether, *supra* note 8, at 273.

(1) Cost justification. This subject was explored in the preceding footnote. The cost factors which may be included in raising the defense have been largely settled by case law. See *supra* note 2, at ¶ 21,025. But a remaining question is whether the Commission will permit the inclusion of advertising expense as a cost factor for the premium brand. If advertising and promotion are to be included, the impact of the instant decision would be diluted substantially. Borden did not include promotion of the Borden name in its cost computations, perhaps because it thought it had successfully justified the difference without it.

(2) Good faith meeting of competition. If Borden could have shown that the private brand prices were no more than a good faith meeting of already established prices for comparable goods, that defense would have been sufficient.

(3) No injury to competition. An initial determination of injury to commerce is necessary before the Act is operative. However, the Commission's readiness to impute potential injury to commerce, and its rejection of commercial distinctions for purposes of Section 2(a) make this defense unpromising.

24. See the analysis of the Commission's application of the "like grade and quality" provision over the years in Rowe, *supra* note 7, at 9-12.

Antitrust—Tying Arrangement Held Unfair Method of Competition Under Section 5 of Federal Trade Commission Act

Atlantic Refining Company agreed to promote to its dealers the tires, batteries, and accessories (TBA) of the Goodyear Tire and Rubber Company;[1] in exchange, Goodyear agreed to pay Atlantic a commission on the Atlantic dealers' sales of TBA.[2] The Federal Trade Commission's hearing examiner found that Atlantic had used coercive tactics in promoting the Goodyear TBA products to its dealers and ordered it to cease-and-desist.[3] The Federal Trade Commission affirmed this order but found, that even absent Atlantic's coercive tactics, the agreement, standing alone, was a "classic example" of illegal use of economic power in one market (gasoline distribtuion) to destroy competition in another market (TBA distribution).[4] As such, the agreement was an unfair method of competition in violation of section 5 of the Federal Trade Commission Act.[5] The Commission ordered Atlantic and Goodyear to cease further participation in the agreement.[6] The Seventh Circuit affirmed.[7] On certiorari from the Supreme Court of the United States, *held*, affirmed. The Federal Trade Commission could reasonably find that the agreement was in effect a tying arrangement and was an unfair method of competition prohibited by section 5 of the Federal Trade Commission Act. *Atlantic Refining Co. v. FTC*, 381 U.S. 357 (1965).

Section 5 of the Federal Trade Commission Act provides that "unfair

1. The agreement is termed a sales-commission plan.

2. 7.5% on sales by Atlantic wholesalers; 10% on sales by Atlantic retailers. Atlantic had a similar agreement with the Firestone Tire & Rubber Company. Though Firestone was not joined as respondent, the Commission's final order prohibited Atlantic from implementing similar agreements with Goodyear or "with any other rubber company . . . or with any other supplier" of TBA. Goodyear Tire & Rubber Co., 58 F.T.C. 309, 369 (1961).

3. The hearing examiner found that Atlantic coerced its dealers by demands that the dealers discontinue purchasing tires, batteries and accessories from manufacturers other than Goodyear under threat of lease cancellation or non-renewal. *Id.* at 321-23. Goodycar had similar agreements with numerous oil companies. For a list, see *id.* at 323 n.1. The Commission's final order also prohibited Goodyear from implementing these agreements, though the other cil companies were not joined as respondents. *Id* at 323, 370.

4. "[W]e regard these overt acts of coercion as mere symptoms of a more fundamental restraint of trade inherent in the sales commission itself." *Id.* at 348.

5. *Id.* at 325.

6. *Id.* at 369-70.

7. Goodyear Tire & Rubber Co. v. FTC, 331 F.2d 394 (7th Cir. 1964); 63 MICH. L. REV. 713 (1965). In a similar case, the Circuit Court of Appeals for the District of Columbia reversed the Commission. Texaco, Inc. v. FTC, 336 F.2d 754 (DC Cir. 1964), *vacated and remanded per curiam*, 381 U.S. 739 (1965).

methods of competition in commerce . . . are . . . unlawful"[8] and empowers the Federal Trade Commission to prevent unfair methods of competition.[9] The statute's language is purposely broad. Congress apparently intended to reach not only trade practices condemned by prior antitrust legislation but also anticompetitive methods which businessmen might use to avoid the force of those prior laws.[10] Initially the courts assumed ultimate power to define the words "unfair methods of competition."[11] In the first section 5 case to come before it, the United States Supreme Court held that section 5 prohibited "restrictive," as well as "unfair," practices.[12] "Restrictive" was defined as having a "dangerous tendency unduly to hinder competition or create monopoly."[13] It thus followed that section 5 would reach actions violating both the Sherman and Clayton Acts.[14] In dictum, the Supreme Court has acknowledged that section 5 could condemn tying arrangements[15] which are unlawful under either of those acts.[16] Until the instant case, however, the only successful attacks on tying arrangements have been those under section 1 of the Sherman Act[17] and section 3 of the Clayton Act.[18] The Supreme Court has also indicated in dicta that "unfair methods of competition" may

8. 66 Stat. 632 (1952), 15 U.S.C. § 45(a)(1) (1964).

9. Section 5(a)(6) provides: "The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair . . . acts or practices in commerce." 66 Stat. 632 (1962), 15 U.S.C. § 45(a)(6) (1964).

10. "The committee gave careful consideration to the question whether it would attempt to define the many . . . unfair practices which prevail in commerce . . . [or] whether it would . . . [make] a general declaration. . . . It concluded that the latter course would be the better, for the reason . . . that . . . after writing 20 of them into law it would be quite possible to invent others." S. REP. No. 597, 63d Cong., 2d Sess. 13 (1914).

11. FTC v. Gratz, 253 U.S. 421, 427 (1920). See Handler, *Recent Antitrust Developments*, 71 YALE L.J. 75, 94 n.113 (1961).

12. FTC v. Gratz, *supra* note 11, at 427; Handler, *supra* note 11, at 94.

13. FTC v. Gratz, *supra* note 11, at 427. "Unfair" was held to mean "opposed to good morals because characterized by deception, bad faith, fraud, or oppression." *Ibid.*

14. FTC v. Cement Institute, 333 U.S. 683, 689-93 (1948) (Sherman Act); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 463-64 (1941) (Clayton Act).

15. The term "Tying arrangement" describes the situation where a seller or lessor makes the purchase or lease of one product (the tied product) a prerequisite to the purchase or lease of another product (the tying product).

16. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 609 (1953): "In either case, the [tying] arrangement transgresses § 5 of the Federal Trade Commission Act, since minimally that section registers violations of the Clayton and Sherman Acts."

17. 50 Stat. 693 (1937), as amended, 15 U.S.C. § 1 (1964), International Business Mach. Corp. v. United States, 298 U.S. 131 (1936).

18. 38 Stat. 731 (1914), 15 U.S.C. § 14 (1964), United Shoe Mach. Corp. v. United States, 258 U.S. 451 (1922).

include "incipient" violations of the Sherman Act.[19] Likewise, section 5 might reach conduct resembling a Sherman Act violation even though all the elements of such a violation are not present.[20] Since the instant decision relies on Sherman Act precedents, it can only be understood in light of the Sherman Act treatment of tying arrangements.[21]

In the earliest cases applying the Sherman Act to trade practices generally, the rule evolved that only those restraints which were "unreasonable" were prohibited.[22] Thus the courts had to balance the extent of the restraint against justifications for the particular trade practice to determine whether the trade practice imposed an unreasonable restraint on competition.[23] The early application of the Sherman Act to tying arrangements followed the same approach.[24] Later tying arrangement cases, however, introduced a new rule: a tying arrangement is an unreasonable restraint of trade per se whenever the defendant seller has a "monopolistic position" in the market for the tying product and the arrangement involves a substantial amount of interstate commerce in the tied product.[25] With limited exceptions[26] this per se approach dispensed with the need to weigh the extent of the restraint or the business justifications for it. Nevertheless, courts still had to analyze the tying product market in order to determine whether the seller held a monopolistic position in that market.[27] *Northern Pacific Ry. v. United States*[28] substantially

19. See Howery, *Utilization by the FTC of Section 5 of the Federal Trade Commission Act as an Antitrust Law*, 5 ANTITRUST BULL. 161, 170-73 (1960).

20. FTC v. Motion Picture Advertising Service Co., 344 U.S. 392, 394 (1953); FTC v. Cement Institute, *supra* note 14, at 721 n.4; Fashion Originators' Guild of America, Inc. v. FTC, *supra* note 14, at 463.

21. In the instant case, the Federal Trade Commission relied on cases which were decided on the basis of Sherman Act rules; a discussion of the Clayton Act rules on tying arrangements is considered outside the scope of this paper. Times-Picayune Publishing Co. v. United States, *supra* note 17, restated the Clayton rule. The Clayton and Sherman rules are now approximately the same. Turner, *The Validity of the Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50, 59 (1958).

22. Standard Oil Co. v. United States, 221 U.S. 1, 60, 66 (1911).

23. HENDERSON, FEDERAL TRADE COMMISSION, 14-15 (1924).

24. Henry v. A. B. Dick Co., 224 U.S. 1 (1912).

25. International Salt Co. v. United States, 332 U.S. 392 (1947) appears to be the origin of this rule.

26. *International Salt* indicated that an exception might exist where, in order to protect the integrity of its machinery, a seller ties to the sale of his machinery a product to be used with the machinery. However, this exception did not apply where a product of suitable quality was readily available elsewhere. 332 U.S. at 398. Another case indicates that an exception may be made where the tie-in is used by a new business with a highly uncertain future. United States v. Jerrold Electronics Corp. 187 F. Supp. 545, 555-57 (E.D. Pa.), *aff'd per curiam*, 365 U.S. 567 (1960).

27. To gain an appreciation of how intricate such an analysis could be, see the opinion in Times-Picayune Publishing Co. v. United States, *supra* note 16, at 610-21.

28. 356 U.S. 1 (1958); Turner, *supra* note 21, at 50.

relaxed this burden. The Supreme Court there abandoned the requirement that the seller have a "dominant" or "monopolistic" position in the market for the tying product; henceforth the seller need merely have "sufficient economic power to impose an appreciable restraint on free competition in the market for the tied product."[29] The Court held that "sufficient economic power" could be inferred, in the absence of some other explanation, from the existence of a large number of tying arrangements.[30] No substantial modifications of the Sherman Act approach to tying arrangements have followed *Northern Pacific*.[31]

In *Osborn v. Sinclair Refining Co.*,[32] the Sherman Act was applied to a situation similar to that in the instant case. Relying on *Northern Pacific Ry.*, a Sinclair retail dealer attacked Sinclair's promotion of Goodyear TBA as a tying arrangement in violation of the Sherman Act. The Court of Appeals for the Fourth Circuit found that Sinclair had used coercive tactics to promote the Goodyear TBA, and held that the agreement to promote, coupled with Sinclair's coercive conduct, amounted to an agreement to tie TBA to the retail sale of gasoline and was an unreasonable restraint of trade per se.[33]

In the instant case, the Court recognized that there was no express requirement that Atlantic dealers take the Goodyear TBA.[34] The Court also observed that Atlantic was not contending for a right to use coercive tactics in promoting the Goodyear TBA.[35] Hence there could be no tying arrangement either expressed in the agreement as in *Northern Pacific Ry.*, or implied from a course of coercive conduct as in *Osborn*. On the other hand, the Court noted that Atlantic possessed great power over its dealers.[36] Due to this power,[37] Atlantic's

29. Northern Pac. Ry. v. United States, *supra* note 28, at 6.

30. *Id.* at 8.

31. At least one writer felt that the Court had already extended the per se rule too far. Oppenheim, *Developments in the Courts and the Federal Trade Commission*, 15 ABA ANTITRUST SEC. REP. 39-41 (1959).

32. 286 F.2d 832 (4th Cir. 1960).

33. *Id.* at 836.

34. 381 U.S. 369 (1965). Mr. Justice Clark wrote the opinion in this five-to-three decision. Mr. Justice Stewart, joined by Mr. Justice Harlan, dissented on the ground that the anticompetitive effects could be cured simply by prohibiting Atlantic's use of coercive taetics in the promotion of TBA. Mr. Justice Goldberg, in a separate dissenting opinion did not necessarily disagree in principle with the majority but felt that the Court should remand the case to the Commission for clarification of the Commision's opinion and order.

35. *Id.* at 367.

36. *Id.* at 368. The Court cited four sources of power: (1) short-term lease contracts, (2) short-term equipment loan contracts, (3) control of the supply of gasoline and oil, and (4) control of advertising. One might take issue with the realities of this power. See *Distribution Practices in the Petroleum Industry, Hearing Before Subcommittee Number 5 of the House Select Committee on Small Business*, 85th Cong., 1st Sess. 205-11 (1957) [hereinafter cited as *1957 Hearings*].

37. It should be said that the Court is ambiguous on this point. At one point the

agreement to promote Goodyear TBA was equivalent to an agreement requiring the purchase of TBA by its retailers as a condition precedent to retention of their dealership, *i.e.*, a tying arrangement.[38] The inability to fit this situation into the traditional tying arrangement mold did not disturb the Court, for section 5 was held broad enough to reach conduct bearing "the characteristics" of antitrust violations.[39] Having found conduct which resembled a tying arrangement, the Court went on to apply the Sherman Act test for determining whether the tying arrangement was illegal per se. Defining the tying product as the distribution of gasoline and the tied product as the distribution of TBA, the Court found that Atlantic's dominant position over its dealers gave it sufficient economic power in the distribution of gasoline to impose an appreciable restraint on free competition in the distribution of TBA.[40] Moreover, the dollar volume of Goodyear sales indicated that the arrangement affected a substantial portion of interstate commerce.[41] Since these two elements of a Sherman Act violation were established, further analysis of the competitive effects of the arrangement was unnecessary.[42] Likewise it was unnecessary to weigh business justifications.

> Nor can we say that the Commission erred in refusing to consider evidence of economic justification. . . . The anticompetitive effects of this program are clear on the record and render unnecessary extensive economic analysis of market percentages or business justifications . . . .[43]

The agreement, an effective tying arrangement, was unreasonable per se within the meaning of the Sherman Act and thus was an unfair method of competition in violation of section 5 of the Federal Trade Commission Act.[44]

Court says, "The long existence of the plan, coupled with coercive acts . . . warranted . . . ." the decision to prohibit the agreement altogether. *Id.* at 372. At another point the Court says, "it is the oil companies' *power* and overt acts . . . that outlaw the commission plan . . . ." *Id.* at 373. (Emphasis added.)

38. 381 U.S. 370.

39. *Id.* at 369-70. In so saying, the Court relied on dicta of earlier opinions. See note 19 *supra* and accompanying text.

40. *Id.* at 368.

41. *Id.* at 370.

42. *Id.* at 370-71. Again the Court was ambiguous. At one point the Court said, "just as the effect of this plan is similar to that of a tie-in, so it is unnecessary to embark upon a full-scale analysis of competitive effect. We think it enough that the Commission found that a not insubstantial amount of commerce is affected." *Id.* at 371. At another point the Court noted with approval that, having rejected a "mechanieal application" of the tying arrangement rules, the Commission had made an analysis of anticompetitive effeets. *Id.* at 370. A reader could conclude that in a similar case in the future the Commission would not have to make an analysis of anticompetitive effects. He could also conclude the opposite.

43. *Ibid.*

44. Although the Court does not use the words "per se" in its opinion, the Court seemed to take the per se approach. *But see* note 42 *supra* and accompanying text.

The decision may be limited to the particular factual situation presented. The Court relied heavily upon the power held by the oil-product manufacturer over his retail dealers by virtue of short-term leases,[45] and this situation is virtually unique to the oil industry.[46] In fact, the Court indicated that even in the oil industry generally, the manufacturer's power over his retailers may be insufficient to render a similar sales-commission plan unlawful.[47] Thus limited, the decision is probably correct, since the arrangement between Atlantic and Goodyear did suppress competition in TBA. By dealing directly with Goodyear or some other TBA supplier, the Atlantic dealers would obtain the benefit of competition in TBA. Direct dealing with the TBA distributors would not prevent the Atlantic dealers from obtaining the other advantages of the sales-commission plan.[48]

The decision might have broader implications, however, which subject it to possible criticism. Mr. Justice Stewart's dissent suggests one criticism. It is possible to construe the Court's decision as a condemnation of a manufacturer's promotion of a complementary line of products wherever the manufacturer has substantial power over his retailers. If this reading is correct, the Court was ignoring considerable authority which allows a manufacturer to force his retailers to carry his full line of products.[49] One might argue for a distinction based upon the difference in the manufacturer's proprietary interests in the two situations; in one situation the manufacturer produces the complementary product himself, while in the other he merely promotes the products of another manufacturer. However, if in the latter situation the promoting manufacturer receives a commission, this distinction becomes tenuous. Thus the instant case leaves uncertain the continued validity of a long line of cases authorizing a significant business practice.[50]

The decision is also subject to criticism on the ground that the Court should have considered possible business purposes for the arrangement rather than adopting the per se approach. The justification for applying a rule of per se illegality to tying arrangements was

45. Note that the opinion is not altogether clear on this point. See note 37 *supra*. Compare Simpson v. Union Oil Co., 377 U.S. 13 (1964).

46. The degree to which these problems are unique can be seen by a reading of *1957 Hearings*.

47. "This order does not necessarily prohibit Goodyear from making contracts with companies not possessed of economic power over their dealers." 381 U.S. at 376-77.

48. The alleged advantages to the retail dealer are the manufacturer's assistance by advertising, training, maintaining an adequate current inventory, and offering credit services. Those to the consumer are more efficient services. *1957 Hearings* 213.

49. United States v. J. I. Case Co., 101 F. Supp. 856 (D. Minn. 1951).

50. Indeed, the full-line forcing issue may soon be relitigated on the tying arrangement theory. See Hammond Ford, Inc. v. Ford Motor Co., Trade Reg. Rep. 71689 (S.D.N.Y. Feb. 18, 1966).

found in the long line of cases analyzing typical tie-in situations and finding that they serve no purpose "but the suppression of competition."[51] The Court considered that repeated analysis of the competitive effects and business purposes of such an arrangement was a waste of time. The per se rule eliminates the need for such analysis.[52] Though this approach seems valid when the Court is considering a typical tying arrangement, such an arrangement was not under consideration in the instant case. But the majority assimilated the agreement to a tying arrangement because Atlantic's power over its retailers seemed to render its promotion of TBA equivalent to a requirement that the dealers take the TBA as a condition for continuing the lease.[53] In a situation which does not fit squarely within the traditional tying arrangement mold, the Court's justification for using the rule of per se illegality may not be valid since there may well be proper business purposes for the arrangement.[54] For example, in the instant case it might be argued that Atlantic does have a purpose in the sales-commission arrangement beyond the mere suppression of competition. Since Atlantic invests capital in its retail stations and sells its products through these stations, certainly it may properly attempt to maximize the return on this investment. Likewise, efforts to protect the reputation of its oil products by insuring the quality of the TBA products sold simultaneously seem legitimate. In unique situations, such as presented here, a court should analyze actual competitive effects, weigh the relevant business purposes, and determine whether the restraint on competition is, in fact, unreasonable.[55] A court should not avoid this analysis by drawing a simple conceptual analogy to a situation covered by a per se rule of illegality.

51. Northern Pac. Ry. v. United States, *supra* note 28, at 6; Standard Oil Co. v. United States, 337 U.S. 293, 305-06 (1949).

52. Turner, *supra* note 21, at 59.

53. Note, again that the opinion is not altogether clear. See note 37 *supra.*

54. Indeed, there is some doubt that this justification is valid in a typical tying arrangement case. Baldwin & McFarland, *Some Observations on "Per Se" and Tying Arrangements,* 6 ANTITRUST BULL. 433 (1961); Bowman, *Tying Arrangements and the Leverage Problem,* 67 YALE L.J. 19 (1957); Turner, *supra* note 21, at 50.

55. It is interesting to note here some legislative history. In 1957, H.R. 428 was introduced in Congress, H.R. 428, 85th Cong., 1st Sess. (1957). This bill sought to prohibit the sales-commission plan or any similar plan under which the oil-products manufacturer would receive payment for a sale of TBA to his retail dealers. Of that bill John Gynne, then chairman of the Federal Trade Commission, said: "it seems to me the propriety of such actions can best be determined in the context in which they take place. By this I mean it is possible that the actions . . . could have no harmful effect and indeed might be beneficial to all concerned . . . ." *1957 Hearings* 181.

Bankruptcy—Tax—Rights of a Trustee in Bankruptcy Against an Unrecorded Tax Lien

The Internal Revenue Service sought to enforce an unrecorded tax lien against a trustee in bankruptcy. The tax had been assessed and demand for payment made. Refusal to pay gave rise to a federal tax lien under section 6321 of the Internal Revenue Code of 1954,[1] but prior to the recording of the lien the taxpayer filed a petition in bankruptcy. The trustee in bankruptcy contended that section 70c of the Bankruptcy Act vested him with the rights of a "judgment creditor"[2] and, therefore, the lien was unenforceable under section 6323 of the Internal Revenue Code which invalidates unrecorded tax liens against "judgment creditors."[3] The government contended that section 6323 "judgment creditors" did not include trustees in bankruptcy. A decision by the referee in bankruptcy in favor of the trustee was affirmed by both the district court and the Sixth Circuit Court of Appeals.[4] On certiorari to the United States Supreme Court, *held*, affirmed. A federal tax lien unrecorded at the time of bankruptcy is invalid as against the trustee in bankruptcy. *United States v. Speers*, 382 U.S. 266 (1965).

The traditional aim of American bankruptcy acts[5] has been "to marshal the bankrupt's assets; and to distribute them among his creditors equitably."[6] To promote this aim, statutes have attempted to protect the trustee's distributions against subsequent attack by secret lien holders by vesting him with title in the bankrupt's property

1. INT. REV. CODE OF 1954, § 6321 provides: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

2. Section 70c of the Bankruptcy Act provides in part: "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exits."

3. Section 6323 of the INT. REV. CODE provides in part: "[T]he lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the secretary or his delegates . . . ."

4. United States v. Speers, 335 F.2d 311 (6th Cir. 1964).

5. The Bankruptcy Act of 1898 made bankruptcy legislation a permanent part of American jurisprudence, and it is upon the act that the present Act of 1938, known as the Chandler Act, is largely based. 1 COLLIER, BANKRUPTCY ¶ 0.001, at 3 (14th ed. 1940) [hereinafter cited as COLLIER].

6. H.R. REP. No. 1293, 81st Cong., 1st Sess. 4 (1949). Seligson, *Preferences Under the Bankruptcy Act*, 15 VAND. L. REV. 115 (1961).

superior to unrecorded liens.[7] The first of these statutes[8] was interpreted, in 1906, to vest trustees with superior title *only* where creditors existed who were similarly protected against the unrecorded lienors by state law.[9] Otherwise the trustee could not intercede to prevent perfection of secret liens and prevent this threat to creditors having taken, or hoping to take, under the trustee's distributions. Dissatisfied with this limitation, Congress amended the Bankruptcy Act in 1910, to grant trustees in bankruptcy the status of a creditor holding a lien by legal or equitable proceedings with regard to property coming into the custody of the bankruptcy court, and the status of a judgment creditor holding an unsatisfied execution as to all other property.[10] This provision with no material change in wording became the present section 70c by the Bankruptcy Act of 1938.[11]

Contrasted with the congressional disfavor toward unrecorded liens has been congressional favor granted federal revenue claims. Federal revenue obligations have been protected by liens upon the property of the delinquent taxpayer[12] and granted first priority over competing claims in liquidation proceedings.[13] Congress limited

7. MacLachlan, *The Title and Rights of the Trustee in Bankruptcy*, 14 RUTGERS L. REV. 653, 667 (1960).

8. See § 70a(5) of the Bankruptcy Act of 1898 as discussed in 4 COLLIER ¶ 70.48, at 1400.

9. York Mfg. Co. v. Cassell, 201 U.S. 344 (1906). Except where creditors were specifically protected by state law against unrecorded liens whieh existed as to the bankrupt, the trustee obtained no better title to the property than would have existed in the bankrupt party. "Since under the laws of many states, unrecorded mortgages, pledges, conditional sales and the like as well as many other types of secret transactions dangerous to creditors, are not invalid except as to creditors who have levied upon or have fastened a lien on the property in dispute, the York case sharply limited the usefulness of the provisions of § 70a(5) . . . ." 4 COLLIER ¶ 70.48, at 1401.

10. Bankruptcy Act, ch. 541, § 47a(2), 30 Stat. 544 (1898), as amended, 36 Stat. 838 (1910), 11 U.S.C. § 75 (1964), states in part: "[T]rustees, as to all property in the custody . . . of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by equitable or legal proceeding thereon; and also as to all property not in custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied." Note that the trustee is given a less advantageous status with regard to property without the custody of the bankruptcy court, *i.e.*, that of a "judgment creditor," than he is given with regard to property within the custody of the court, *i.e.*, that of a creditor holding a lien by legal or equitable proceedings. Morris, *Avoiding Federal Tax Liens in Bankruptcy*, 39 TEXAS L. REV. 616, 618 (1961); 4 COLLIER ¶ 70.47, at 1393 n.18; *Id.* ¶ 70.49, at 1413 n.3a.

11. For an explanation of the shift of this provision from § 47(a)2 to § 70c, see *id.* ¶ 70.47, at 1391.

12. Int. Rev. Code of 1939, ch. 2, § 3670, 53 Stat. 448 (1939); Loiseaux, *Federal Tax Liens in Bankruptcy*, 15 VAND. L. REV. 137 (1961).

13. "The government has had, since 1789, a statutory priority which provides, in essence, that in any case of insolvency the debts due the United States shall be satisfied first [1 Stat. 42, § 21 (1789), codified in Rev. Stat. § 3466 (1875), 31 U.S.C. § 191]. This statute has always been construed liberally in favor of the government, and in 1929, the Supreme Court embarked upon greater expansion of

this protection in 1913 by enacting section 3672 of the Internal Revenue Code (the predecessor of the present section 6323), which invalidated unrecorded tax liens against "judgment creditors."[14]

Prior to 1950, section 70c of the Bankruptcy Act had been interpreted as granting trustees the status of "judgment creditor" for purposes of various statutes benefiting such creditors.[15] Only one case, however, *United States v. Sands*,[16] purported to pass on a trustee's rights under section 3672[17] of the Code. The court there stated that section 70c made the trustee a "judgment creditor" within the protection of section 3672. In 1950, however, section 70c was amended to give trustees the position of a creditor holding a judicial lien on all the bankrupt's property.[18] Thus, the previous distinction between property held within and without the bankruptcy court was eliminated and any express reference to "judgment creditors" was deleted. The legislative history of the 1950 amendment to section 70c clearly indicates that the amendment was in no way intended to restrict the benefits or rights previously extended to trustees under that section.[19] Nevertheless, many courts subsequently

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the priority by announcing the inchoate lien doctrine. By reading the priority statute in pari materia with the lien provision of the Internal Revenue Code, the Court has concluded that only a prior lien which is choate should prevail over the federal tax lien. . . . [W]hen the trustee is deprived of his status as a judgment creditor under section 6323 of the Code, his chances against the federal tax lien are meagre indeed." Note, 35 IND. L.J. 351, 356-57 (1960). MACLACHLAN, BANKRUPTCY § 18 (1956); 1 COOGAN, HOGAN & VAGTS, SECURED TRANSACTIONS UNDER U.C.C. ¶ 12.03, at 1256 (1963) (for a discussion of the inchoate lien doctrine).

14. Int. Rev. Code of 1939, ch. 2, § 3672, 53 Stat. 449 (1939). Section 3672 became § 6323 in the INT. REV. CODE OF 1954. See note 3 *supra* for text of the statute.

15. See *In re* Fidelity Tube Corp., 278 F.2d 776, 782-85 (3d Cir.) (Kalodner and Hastie, J.J. dissenting), *cert. denied sub. nom.* Borough at East Newark v. United States, 364 U.S. 828 (1960).

16. 174 F.2d 384 (2d Cir. 1949). The court expressly rejected the contention of the government based on the "dictum of *In re Taylorcraft Aviation Corp.* . . . that 'an unrecorded tax lien of the collector was good against a trustee because a trustee was not a judgment creditor.'" *Id.* at 385. However, the court held for the government on other grounds.

17. Note that § 3672 was re-enacted without change as § 6323 in the 1954 Code. Though it is necessary to refer to the sections separately, they may be treated as synonymous for all purposes.

18. See note 2 *supra* for the text of the statute.

19. Congress felt that this amendment was a necessary corollary to an amendment of § 60a of the same act which caused the four-month statute of limitations on the voidability of preferential transfers to begin as of the time those transfers "became so far perfected that no subsequent lien . . . obtainable by legal or equitable proceedings . . . could become superior to the rights of the transferee." See 3 COLLIER ¶ 60.38, at 946, for an explanation of the change in § 60a. The relationship of this amendment to the amendment to 70c was stated by the report of the Judiciary Committee of the House of Representatives, H.R. REP. No. 1293, 81st Cong., 1st Sess. 4 (1949): "In view of the amendment made to section 60a as well as intrinsically, it is deemed wise to place the trustee in bankruptcy in the position of a lien creditor with

held that the 1950 deletion of the term "judgment creditor" from section 70c excluded trustees from the protection extended such creditors under section 6323 of the Code.[20] Alternatively it was argued that section 6323 itself excluded trustees from its coverage of "judgment creditors." This argument was initiated by the 1953 Supreme Court case of *United States v. Gilbert Associates*,[21] a case arising out of a state insolvency proceeding. The state court had classified the local tax claim as "in the nature of a judgment," and had found that the unrecorded federal tax lien was therefore invalid as against the municipal tax assessment under section 3672 of the Code.[22] To avoid making the rights of section 3672 "judgment creditors" subject to the diverse state definitions of "judgment creditors," the Supreme Court reversed, holding that the term "judgment creditor" for purposes of section 3672 was meant to be applied "in the usual, conventional sense of a judgment of the court of record."[23] Subsequent decisions in the Second, Third, and Ninth Circuits held that the Supreme Court's definition of a section 3672 "judgment creditor" was binding and excluded trustees in bankruptcy from its protection.[24] To resolve the conflict between these decisions and the immediate decision of the Sixth Circuit, the Supreme Court granted certiorari in the instant case.[25]

The Supreme Court examined the legislative histories of sections 70c and 6323 and found, in both instances, a congressional intent

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respect to all of the bankrupty's property, and section 2 of the bill so amends section 70c."

"That Congress intended to give the trustee the status of a 'judgment creditor' [in the 1950 amendment to § 70c] is perfectly plain." Seligson, *Creditors' Rights*, 32 N.Y.U.L. REV. 708, 710 (1957). 4 COLLIER ¶ 70.47, at 1399; H.R. REP. No. 1293, 81st Cong., 1st Sess. 4 (1949); Morris, *supra* note 10, at 618; Loiseaux, *supra* note 12, at 139.

Section 70c was again amended in 1952 with the aim being clarity of expression rather than a change in substance. "What should be said is that . . . the trustee has the rights of a lien creditor upon property in which the bankrupt has an interest or as to which the bankrupt may be the ostensible owner." H.R. REP. No. 2320, 82d Cong., 2d Sess. 16 (1952). No change in content was made with regard to the trustee's rights under § 6323. For further explanation, see 4 COLLIER ¶ 70.47, at 1396.

20. "The cases [following this reasoning] are collected . . . in an annotation, 2 L. Ed. 2d 1823, 1867 (1958)." MacLachlan, *supra* note 7, at 667 n.66; *In re* Fidelity Tube Corp., *supra* note 15.

21. 345 U.S. 361 (1953).

22. Petition of Gilbert Associates, Inc., 97 N.H. 411, 414, 90 A.2d 499, 502 (1952).

23. 345 U.S. at 364.

24. Simonson v. Granquist, 287 F.2d 489 (9th Cir. 1961) (Hamley, J., expressing contrary views), *rev'd on other grounds*, 369 U.S. 38 (1961); *In re* Fidelity Tube Corp., *supra* note 15; Brust v. Sturr, 237 F.2d 135 (2d Cir. 1956); United States v. England, 226 F.2d 205 (9th Cir. 1955); *In re* Taylorcraft Aviation Corp., 168 F.2d 808 (6th Cir. 1948) (dictum).

25. 382 U.S. 266, 269 (1965).

to invalidate unrecorded federal tax liens against the trustee in bankruptcy. The 1950 amendment to section 70c of the Bankruptcy Act which vested the trustee in bankruptcy with the rights of an individual holding a judicial lien on the bankrupt's property was deemed to have been intended to encompass the lesser rights of a "judgment creditor."[26] Furthermore, the House report accompanying the amendment indicated that its intent was not to reduce the rights of a trustee, but rather to extend to him further "protection . . . and to some extent expand . . . [his] rights."[27]

The Court noted that in enacting section 6323 of the Internal Revenue Code to succeed section 3672, an unsuccessful attempt had been made to exclude statutory judgment creditors from protection against unrecorded tax liens. However, it was finally deemed advisable to allow judicial interpretation to continue to govern "existing law" and section 6323 was enacted without the proposed exclusionary clause.[28] Since at this time the *Gilbert* interpretation of section 3672 had not been held applicable to trustees in bankruptcy, the Court considered it likely that the reference to "existing law" was to the rule of *United States v. Sands*, permitting protection of trustees under this section.[29] Further it found that subsequent ineffective attempts to amend sections 70c and 6323 so as to expressly include trustees within the protection of section 6323 were efforts to "remove . . . an erroneous gloss placed upon . . . [section 6323 of the Code] by the courts" following the *Gilbert* case.[30] The Court felt that the legislative histories of the acts were wholly inconsistent with any attempt to apply the *Gilbert* holding to the instant case, and further distinguished *Gilbert* by pointing out that the need for uniformity which compelled that narrow decision was absent in a case determining the rights of a trustee in bankruptcy since such rights are already governed by uniform federal law.[31]

In following the policy of equitable distribution of the bankrupt's

26. *Id.* at 273 n.11.
27. *Ibid;* H.R. REP. No. 1293, 81st Cong., 1st Sess. (1949).
28. 382 U.S. at 273; S. REP. No. 1622, 83rd Cong., 2d Sess. (1954).
29. 382 U.S. at 274.
30. *Ibid.*
31. *Id.* at 271. The Court summarily dismissed the government's final contention that §§ 70c and 6323 could not immunize a trustee against an unrecorded tax lien beeause such result would preclude the possibility which appears to be contemplated by § 67, sub. b, that a federal tax lien not perfected until after bankruptcy may nevertheless be "valid against the trustee." The Court said, "The purpose of Section 67, sub. b, insofar as tax claims are concerned, is to protect them from section 60, 11 U.S.C. Section 96 (1964 ed.), which permits the trustee to avoid transfers made within four months of bankruptcy . . . . It does not nullify or purport to nullify the consequences which flow from the Government's failure to file its perfected lien prior to the date when the trustee's rights as statutory judgment creditor attach—namely, on filing of the petition in bankruptcy." *Id.* at 278.

estate in preference to the policy of security for federal tax revenues, the Court was in accord with both congressional intent and the demands of equity and practicality. The effect of giving unrecorded tax liens first priority, at the expense of other creditors, or of permitting such lienors subsequently to attack the trustee's distributions would be to hold the other creditors liable, in part, for the bankrupt's federal tax debts.[32] This seems particularly harsh where the creditors are dependent on the bankrupt's obligations for their livelihood as in the case of unpaid wage earners and where, as here, the government liens are secret and afford no opportunity for taking precautions against them. The policy of section 6323 was to provide relief from the inequities of secret liens.[33] To exclude trustees from protection under section 6323 would defeat this policy and work a great injustice since the debt payments precluded by the secret tax lien would be discharged forever. On the other hand, to include trustees within the protection of that section would not defeat the policy of securing federal revenues since it would be an easy matter for the federal government to record its liens[34] and since even unrecorded federal tax liens are not discharged in bankruptcy.[35] It has been further suggested that the increased costs of obtaining credit resulting from the ever present threat of government lien priorities has limited business prosperity to the extent of costing the government tax revenues in the long run.[36] This damage would be aggravated by restricting the relief granted under section 6323 in the manner suggested by the *Gilbert* doctrine.

By reducing the status of unrecorded federal tax liens to fourth priority in the class of unsecured creditors,[37] the instant case substantially reduces the assets available to satisfy delinquent federal

32. For a discussion of the dissatisfaction with federal tax debt priorities, see MacLachlan, *Improving the Law of Federal Liens and Priorities*, 1 B.C. IND. & COMM. L. REV. 73 (1959); Kennedy, *The Relative Priority of the Federal Government, The Pernicious Career of the Inchoate and General Lien*, 63 YALE L.J. 905 (1954), Note, 35 IND. L.J. 351, 358 n.58 (1960).

33. Kennedy, *supra* note 32, at n.99.

34. "This responsibility of recording liens does not impose a heavy burden on taxing bodies. The precise amount of the tax due need not be determined within the six-month period for the filing of claims. An unliquidated claim may be filed within the statutory period, and an amended claim may, in property situation, be filed after the expiration of that period." Seligson, *supra* note 19, at 717.

35. Bankruptcy Act, ch. 575, § 17(a)(1), 52 Stat. 851 (1938), as amended, 74 Stat. 409 (1960), 11 U.S.C. § 35 (1964).

36. MacLachlan, *supra* note 32, at 75.

37. Section 64a of the Bankruptcy Act, 52 Stat. 874 (1938), as amended, 11 U.S.C. § 104a (1964) set up the following priorities subsequent to payment of secured claims: (1) expenses of the administration and preservation of the estate, (2) wage claims; (3) expenses of successful opposition to the arraignment of discharge and of adducing evidence resulting in conviction of a bankruptcy offense; (4) federal, state, and local tax claims.

tax bills of bankrupt parties against whom no lien had been recorded.[38] The effect of this holding will no doubt be the government's recordation of tax liens as a matter of course, particularly in light of the increased number of bankruptcies in recent years.[39] The instant case does not represent the Court's disenchantment with the general priority granted federal tax liens. It does indicate a willingness to effect the intended limitation on that priority embodied in section 6323 of the Code, and may indicate an increased willingness to find a party within the protection of that section when a separate statute, such as 70c, purports to grant him the status or rights of a judgment creditor.

Constitutional Law—Applicability of the Fourteenth Amendment to a Charitable Trust in Which a State Agency Was the Original Trustee

In 1911, Senator Augustus O. Bacon executed a will which devised a tract of land to the city of Macon, Georgia, for use as a segregated park.[1] Until it became evident that the fourteenth amendment[2] prohibited segregation of public parks, the city operated the facility on a segregated basis. Thereafter Negroes were permitted to use the park. Individual members of the park's Board of Managers[3] brought this action to remove the city as trustee and to have the court appoint private trustees to whom title to the park would be transferred. Several Negro citizens of Macon intervened alleging that this was

38. "[O]nly 13% of the straight bankruptcy cases are 'asset' cases in which there is something for creditors. . . . Of the total proceeds realized . . . [approximately $50,077,000 per year] about 30% goes for administrative and other expenses and 70% to creditors, which is sufficient to pay about 18% of the total claims. . . . Secured creditors come first to the extent of their security and realize an average recovery of two-thirds of their claims. Next . . . priority creditors realize an average of one-third recovery." Countryman, *Bankruptcy Boom*, 77 HARV. L. REV. 1452, 1453-54 (1964); Note, 35 IND. L.J. 351 n.6 (1960).

39. In the ten year period, 1953-1962, total bankruptcy filings have quadrupled, increasing from 40,087 in 1953 to 123,878 in 1962. Countryman, *supra* note 38, at 1452; Morris, *supra* note 10, 616 n.1. At the same time federal tax lien suits were increasing from 1,000 in 1950 to 3,875 in 1962. COOGAN, HOGAN, & VAGTS, *op. cit. supra* note 13, ¶ 12.01(2), at 1253.

1. Senator Bacon stated in his will that, while he had only the kindest feelings for the Negro race, he was of the opinion that "'in their social relations the two races (white and negro) should be forever separate.'" Evans v. Newton, 382 U.S. 296, 297 (1966).

2. U.S. CONST. amend. XIV, § 1.

3. The will provided that the park should be under the control of a Board of Managers consisting of seven persons, all of whom were white. 382 U.S. at 297.

a step toward re-segregating the park and asking that the court refuse to appoint private trustees.[4] The city, admitting that it could not carry out the terms of the trust by enforcing racial segregation in the park, resigned, and the court appointed new trustees. On appeal by the Negro intervenors, the Supreme Court of Georgia affirmed,[5] stating that the appointment of private trustees was necessary to prevent failure of the trust. On certiorari[6] to the United States Supreme Court, *held,* reversed. Where the tradition of municipal control of a park is firmly established, appointment of private trustees accompanied by no change in municipal maintenance does not authorize segregation in the park under the fourteenth amendment. *Evans v. Newton,* 382 U.S. 296 (1966).

The courts have long recognized that the fourteenth amendment's prohibition against racial discrimination does not apply to discriminatory acts by private individuals, but only to those instances involving significant state action.[7] Exactly how much state action is necessary to bring the fourteenth amendment into play is not clear. Where the state directly discriminates against a given race, the fourteenth amendment's applicability is clear. A discriminatory statute or city ordinance is obviously prohibited state action.[8] Similarly, the fourteenth amendment prohibition has regularly been applied to a state agency acting as trustee for a private charitable trust. For example, in *Pennsylvania v. Board of Trusts,*[9] the court held that refusal by city trustees to admit Negro students to a college was discrimination by the state, even though the city was acting under a private will[10] requiring that the college be segregated. This prompted state courts to substitute private trustees and uphold their exclusion of Negroes on the grounds that there was no longer any state action involved.[11] The Supreme

4. The heirs of Senator Bacon also intervened and asked for a declaration that the trust property would revert to the Bacon estate in the event that new trustees were not appointed. Since the state courts appointed new trustees, they found it unnecessary to consider the claim of the heirs. On remand to the state courts, the Georgia Supreme Court held that the trust had failed and the property should revert to the heirs. 148 S.E.2d 329 (Ga. 1966).

5. Evans v. Newton, 220 Ga. 280, 138 S.E.2d 573 (1964).

6. 380 U.S. 971 (1965).

7. Civil Rights Cases, 109 U.S. 3 (1883).

8. Lombard v. Louisiana, 373 U.S. 267 (1963).

9. 353 U.S. 230 (1957).

10. This was the will of Stephen Girard which established a trust for white male orphans. For a complete discussion of the case, see Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard,* 66 YALE L.J. 979 (1957).

11. *In re* Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844 (1958). It is interesting to note that in two earlier decisions in which the trust created by the will of Stephen Girard was being attacked, the Supreme Court commented that if the city were legally incapable of acting as trustee, a new trustee should be appointed rather than have the trust fail. In these cases, however, there was no consideration of the applicability of the fourteenth amendment. Girard v. Philadelphia, 74 U.S. (7 Wall.)

Court denied certiorari[12] and has refused to decide whether judicial substitution of private trustees under such circumstances constitutes state action.[13]

The more difficult problems arise where state discrimination is indirect. In *Shelley v. Kraemer*,[14] the Court held that judicial enforcement of a racially restrictive covenant in a private contract constituted state action. *Barrows v. Jackson*[15] extended this holding to include judicial award of damages for the breach of such a covenant. At least one federal court has indicated that this same principle might apply to a court order requiring a private trustee to abide by discriminatory terms of a private trust.[16]

In the instant case, the majority, through Mr. Justice Douglas, observed that for many years the park had been an integral part of the city's recreational facilities. The city granted the park a tax exemption and provided maintenance and police protection during that time.[17] The majority assumed that the city continued to maintain the park after resigning as trustee.[18] On the basis of this assumption,

1, 12 (1868); Vidal v. Girard's Ex'rs, 43 U.S. (2 How.) 126, 188 (1844).

12. 357 U.S. 570 (1958).

13. Several state courts have summarily rejected the idea that the *Shelley* principle applies to trusts. See note 14 *infra* and accompanying text. Gordon v. Gordon, 332 Mass. 197, 124 N.E.2d 228, *cert. denied*, 349 U.S. 947 (1955); United States Nat'l Bank v. Snodgrass, 202 Ore. 530, 275 P.2d 860 (1954).

14. 334 U.S. 1 (1948).

15. 346 U.S. 249 (1953).

16. Guillory v. Administrators, Tulane Educ. Fund, 212 F. Supp. 674 (E.D. La. 1962). Negroes brought suit asking that they be allowed to enroll in Tulane University of Louisiana, a private university established under the will of Paul Tulane. The will restricted the gift to white males. After a lengthy discussion the court concluded that there was not sufficient state involvement to require compliance with the fourteenth amendment, even though 7% of the University's funds could be traced to state sources, certain state officers were members of the Board of Trusts, and a tax exemption had been granted for all property of the University. Then, in commenting on whether the heirs of Paul Tulane could require the trustees to abide by the discriminatory terms of the will, the court stated, "Indubitably the Tulane Board is free to act as it wishes since neither this nor any other court may exercise its power to enforce racial restrictions in private covenants." *Id.* at 687.

17. Justices Harlan and Stewart believe that even this is supposition, since Senator Bacon's will left other property in trust precisely in order to maintain the park. They ask: "Why should it be assumed that these resources were not used in the past for that purpose, still less that the new trustees, now faced with a challenge as to their right to effectuate the terms of Senator Bacon's trust, will not keep Baconsfield privately maintained in all respects?" 382 U.S. at 318 (dissent).

18. Mr. Justice White joins the dissenters in questioning the propriety of this assumption. "On the contrary, the city's interest would seem to lead it to cut all ties with the operation of the park. . . . I refer to possible inferences from the city's self-interest solely to emphasize that the record affords absolutely no basis for inferring continued involvement of the city in the management and control of the park. What the majority has done is to raise a presumption of one fact by showing the absence of proof of the converse. To postulate in this manner that the city's involvement has not been dissipated is simply a disguised form of conjecture and, I submit, is an insufficient basis for decision of this case." *Id.* at 304, 305.

they held that the mere change of trustees, without any change in the public operation and maintenance of the park, would not effectively transfer the park from the public to the private sector. Therefore, state action was still present, and the private trustees were subject to the requirements of the fourteenth amendment. The majority viewed the park as similar to a police department, a fire department, or a street, since the service rendered even by a private park is "municipal in nature."[19] Apparently applying *Marsh v. Alabama*,[20] the majority stated that "state courts that aid private parties to perform a public function on a segregated basis implicate the State in conduct proscribed by the fourteenth amendment."[21]

In his concurring opinion, Mr. Justice White charged that the majority's opinion was based on "a disguised form of conjecture."[22] Nevertheless, he reached the same result by finding state action in the passage of a statute[23] by the Georgia legislature. The statute authorized restriction of a charitable trust to a particular race. He argued that the trust, in the instant case, could not have been legally executed under Georgia law prior to the enactment of this statute.[24] However, since the statute enabled the discriminatory terms to be included in the charitable trust, it departed from strict neutrality in matters of private discrimination and therefore constituted unconstitutional state action.[25]

In a dissenting opinion, Mr. Justice Harlan, joined by Mr. Justice Stewart, echoed the charge that the majority decision was apparently based on mere conjecture. The dissenters[26] would have dismissed the

19. *Id.* at 301.

20. 326 U.S. 501 (1946). In this case the Court held that, even though a private company owned the streets in a company town, it could not deny people on those streets the rights guaranteed by the first amendment since the streets had a public character.

21. 382 U.S. at 302.

22. See note 18 *supra*.

23. GA. CODE ANN. § 69-504 (1957).

24. The dissent disagrees with this conclusion and rejects the thesis for three reasons: "First, it is by no means clear that Georgia common law would not have permitted user restrictions on such a park in trust, so that the statute was but declaratory of existing law *pro tanto*. . . . There is, however, absolutely no indication whatever in the record that Senator Bacon would have acted otherwise but for the statute, a gap in reasoning that cannot be obscured by general discussion of state 'involvement' or 'infection.' Third, it could hardly be argued that the statute in question was unconstitutional when passed, in light of the then-prevailing constitutional doctrine; that being so, it is difficult to perceive how it can now be taken to have tainted Senator Bacon's will at the time he made his irrevocable choice." 382 U.S. at 316-17 n.1.

25. *Id.* at 306.

26. Mr. Justice Harlan was joined in his dissent by Mr. Justice Stewart. Mr. Justice Black dissented in a separate opinion stating that the only question before the Court was whether the city had a right to resign as trustee. Concluding that it is obvious the city had such a right, he warns that nothing in his opinion should be taken to mean that the private trustees may segregate the park. *Id.* at 314.

writ of certiorari as improvidently granted because the constitutional question, if presented at all, was not sufficiently clear to be adjudicated. Speaking on the merits, which they considered only because the majority reached them, Justices Harlan and Stewart found nothing that conld constitute state action of the kind necessary to bring the fourteenth amendment into play. They argued that the majority opinion, while ostensibly grounded upon unwarranted assumptions, was actually based on the "public function" of the park. They pointed out that the *Marsh* case, the origin of the "public function theory," is shaky precedent since the theory in that case received the support of only five members of the Court and has not been the basis for any other decision. A logical application of the "public function" test, it was argued, would require that all private facilities whose primary purpose is to serve the public conform to the fourteenth amendment. Such an application would have far-reaching consequences.[27]

The majority opinion in this case is neither impressive nor convincing. Indeed, it appears to be little more than a rationalization of a result which the Court was determined to reach. The exceptionally broad language creates doubt as to the Court's actual holding.[28] Moreover, by basing their opinion on the assumption of continuing municipal involvement in the maintenance of the park, the majority has restricted the holding to a set of facts which is not likely to recur. Indeed, it now appears that the city did not maintain the park after resigning as trustee. This very restricted holding makes the case of questionable value as precedent for future decisions.

In spite of its doubtful value as precedent, the decision is significant in that it evidences a willingness on the part of a majority of the Court to apply the equal protection requirement of fourteenth amendment to discriminatory charitable trusts where the original trustee was a state agency. This is a step which the Court was not willing to take in 1958 when it denied certiorari in the *Girard College* case.[29] Perhaps in the near future the Court will be called upon to decide a case in which it will have to state the basis for the fourteenth amendment's application without assuming

27. Mr. Justice Harlan suggests that this reasoning would not only outlaw racial discrimination in private schools, but would also jeopardize the existence of denominationally restricted educational facilities. A host of other functions, such as libraries, orphanges, detective agencies, and even garbage collection companies, which parallel fields of government activity, might also be affected. *Id.* at 322. The first amendment may offer some protection to denominational schools and thus things may not be quite as bad as Mr. Justice Harlan indicates. Clark, *supra* note 10, at 1012.

28. 382 U.S. at 321-22 (dissent).

29. *Supra* note 11. The fact that the Court refused to grant certiorari in the *Girard College* case surprised many scholars. See, *e.g.*, Clark, *supra* note 10.

additional facts. Then it will be able to delineate explicitly its reasons for applying the fourteenth amendment to certain charitable trusts.

The alternatives ignored by the Court may be of more significance than the approach actually adopted. No member of the Court suggested that the many Court functions essential to creating and maintaining a charitable trust might constitute state action.[30] The Court might well have applied the *Shelley* principle and found state action in the judicial substitution of private trustees in the instant case.[31] The tax exemption, which would seem to be a likely place to find state action, received only passing mention. Indeed, the Court seems to have gone far out of its way to avoid the question of what activities relating to trusts constitute state action. This indicates, no doubt, that the Court appreciates the many problems which would arise out of a holding that judicial activity in charitable trusts constitutes state action.[32]

Justices Harlan and Stewart apparently feel that the fourteenth amendment should not be applied to private trustees of a charitable trust under any theory. Their concern over the "public function" test seems to be justified in view of the ramifications which this theory might have in all areas of the law. All the other members of the Court,[33] however, seem to think that private trustees of charitable trusts should be subject to the fourteenth amendment requirements

30. "The power to dispose of property at death is a privilege granted by law and supervised through probate and administration by courts and judicially appointed fiduciaries. While these incidents of ministerial control have been thought too slight to constitute state action, the state's role in a charitable trust is all this and much more. The trust becomes operative only after a court has found, either specifically or by inference, that it is charitable. Nor has government remained neutral. To encourage a continuous flow of funds into philanthropic enterprises, it bestows privileges, of which tax immunity is only one. The state creates and defines charitable trusts, grants them perpetual existence, modernizes them through *cy pres*, appoints and regulates the trustees, approves accounts, construes ambiguous language in the trust charter and sometimes goes so far as to impose a less stringent standard of tort liability on such trusts than on their private counterparts. These are practical benefits, granted or withheld by the action of government." Clark, *supra* note 10, at 1003-04. (Footnotes omitted.)

31. *Supra* note 13.

32. The concurring judge in the *Girard Will* case felt realization of this possibility "would shock the people of Pennsylvania and the people of the United States more than a terrible earthquake or a large atomic bomb." 386 Pa. 548, 613, 127 A.2d 287, 318 (1956).

33. Mr. Justice White seems to be as anxious as the majority to reach the results in this case without upsetting the law of trusts. Although his argument is more in line with what has traditionally been considered state action, it is not without its own shortcomings. The fact that the statute was enacted before there was any policy against segregation might have some merit as a refutation of this argument. The most significant shortcoming of using this argument to justify application of the fourteenth amendment to charitable trusts generally is that in most cases there will probably be no such discriminatory statute to serve as state action.

in instances where the trustee was originally a state agency. If this is a desirable result, the Court should reach it with as little disruption of the existing law as possible. The best solution would appear to be the application of the *Shelley* doctrine to judicial substitution of private for public trustees solely to enable segregated operation of the trust properties. This approach would allow the Court to prohibit segregation in cases like *Girard*, or the instant case, but would not affect the law applicable to private trusts which never had a public trustee.

Constitutional Law–Clandestine Surveillance of Public Toilet–Not an Unreasonable Search

Appellants were convicted in the federal district court of violating the Assimilative Crimes Act,[1] which declares, *inter alia*, that acts committed on federal property not made crimes by Congress can be punished as federal crimes under the laws of the state in which the property is located. The offense of oral copulation, a criminal act under California law,[2] was committed in Yosemite National Park in a men's toilet and washroom at Camp Curry, a resort maintained and operated by a government concessionaire.[3] The prosecution's evidence consisted of a park ranger's testimony, and photographs taken without a search warrant through holes drilled in the ceiling above the toilet stalls.[4] Appellants objected to the admission of evidence, claiming that all of the evidence against them was obtained in violation of the

1. "Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment." 18 U.S.C. § 13 (1964). 18 U.S.C. § 7 (1964) defines special maritime aud territorial jurisdiction of the United States aud provides: "The term 'special maritime and territorial jurisdiction of the United States,' as used in this title includes: (3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof. . . ."

2. CAL. PEN. CODE § 288(a).

3. Smayda v. United States, 352 F.2d 251, 252 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966).

4. Park rangers had received information that the restroom was being used as a "hangout" by homosexuals. After conferring with the resort manager it was decided that a hole about 6 inches square and covered with a screen so as to make it look like an air vent would be cut in the ceiling. Thereafter, on two successive Saturday nights, during late evening hours when it was assumed that families would not be using the facility, rangers conducted a surveillance. It was a result of this second surveillance that the arrests here in question were made.

fourth amendment to the United States Constitution,[5] and that a conviction would be contrary to California Supreme Court decisions on similar facts.[6] The objection was overruled. On appeal to the Court of Appeals for the Ninth Circuit, *held*, affirmed. A police officer's observation and photographing of occupants in an enclosed public toilet stall is not an unreasonable search within the fourth amendment where police had reasonable cause to believe that the stalls were being used in commission of crime. *Smayda v. United States*, 352 F.2d 251 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966).

The fourth amendment, which has now been incorporated into the due process clause of the fourteenth amendment,[7] prohibits unreasonable searches and seizure of persons, or their houses, papers, or effects[8] by agents of either the federal[9] or state governments.[10] It was primarily intended to protect the right of privacy, *i.e.*, the right of undisturbed enjoyment of one's property unless entry by officials is under proper authority.[11] It also secures the right of self-protection: the right to resist unauthorized entry by the state perpetrated to obtain information against the individual which might be used to effect a further deprivation of life, liberty, or property.[12] The Supreme Court

5. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." U.S. CONST. amend. IV.

6. Appellants relied primarily upon two California cases, Bielicke v. Superior Court, 57 Cal. 2d 602, 21 Cal. Rptr. 552, 371 P.2d 288 (1962) (pay toilet with lock) and Britt v. Superior Court, 58 Cal. 2d 469, 24 Cal. Rptr. 849, 374 P.2d 817 (1962) (door could be locked). In each case it was held that the surveillance was an unreasonable search, forbidden by both the CAL. CONST. art I, § 19 and U.S. CONST. amend. IV., and that the evidence thus obtained was inadmissible.

7. Wolf v. Colorado, 338 U.S. 25 (1949). "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." *Id.* at 27-28. *But see* SCHUBERT, CONSTITUTIONAL POLITICS 618 (1960).

8. See note 5 *supra*. An interesting discussion of the history of the evils designed to be prevented by the fourth amendment can be found in Stanford v. Texas, 379 U.S. 476, 481-85 (1965). See also SOURCES OF OUR LIBERTIES 418 (Perry & Cooper ed. 1959).

9. See, *e.g.*, Silverman v. United States, 365 U.S. 505 (1961); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Carroll v. United States, 267 U.S. 132 (1925); Boyd v. United States, 116 U.S. 616 (1886).

10. See, *e.g.*, Stoner v. California, 376 U.S. 483 (1964); Mapp v. Ohio, 367 U.S. 643 (1961); Monroe v. Pape, 365 U.S. 167 (1961); Rochin v. California, 342 U.S. 165 (1952).

11. Wolf v. Colorado, *supra* note 7, at 27-29; Johnson v. United States, 333 U.S. 10, 14, 17 (1948). See ROTTSCHAEFER, CONSTITUTIONAL LAW 741 (1939); Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 667 (1961).

12. Frank v. Maryland, 359 U.S. 360, 365 (1959).

has recognized that this latter protection is also secured by the self-incrimination clause of the fifth amendment.[13] Thus, evidence of criminal action generally may not be seized without a judicially issued search warrant. One exception to the search warrant requirement is that of a search incident to a lawful arrest.[14] A second exception, based upon the idea that the object to be searched could easily be moved out of the reach of authorities before a warrant could be obtained, is a search of vehicles where there is probable cause for believing that the vehicles contain contraband or forfeited goods.[15] In any event, unless the facts and circumstances within the officer's knowledge are sufficient to warrant a reasonable man to believe that an offense has been or is being committed, the search will be without probable cause and hence unlawful.[16] In *Weeks v. United States*,[17] the Supreme Court declared that evidence seized by federal police in violation of the fourth amendment was not admissible in the federal courts. The "exclusionary rule" adopted in that case was not immediately made applicable to the states; only after the Supreme Court's decision in *Mapp v. Ohio*[18] in 1961 was it established that the fourteenth amendment prohibited the admission of evidence obtained by an unreasonable search or seizure in prosecutions in state courts.[19] Prior to *Mapp*, however, California[20] and several other states[21] had adopted a rule which precluded the use of illegally obtained evidence in state courts. In the federal courts, in order to raise the claim that evidence has been seized in violation of the fourth amendment, a party must establish that there was a physical invasion[22] of his

13. "[T]he 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment." Boyd v. United States, *supra* note 9, at 633.

14. Agnello v. United States, 269 U.S. 20 (1925).

15. Carroll v. United States, *supra* note 9.

16. Ker v. California, 374 U.S. 23, 34-35 (1963).

17. 232 U.S. 383 (1914).

18. 367 U.S. 643 (1961). See Traynor, *"Mapp v. Ohio" At Large in the Fifty States*, 1962 DUKE L.J. 319; Wilson, *Perspectives of "Mapp v. Ohio,"* 11 KAN. L. REV. 423 (1963).

19. Wolf v. Colorado, *supra* note 7.

20. See People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955). The state court refused to admit evidence obtained by officers who, without a search warrant, entered the premises of a bookmaker and installed microphones and took papers.

21. See Elkins v. United States, 364 U.S. 206, 224 (1960) (appendix). This case represented an intermediate step between Weeks, *supra* note 17, and Mapp, *supra* note 18, in that it abolished the "silver platter doctrine," the practice of using evidence in federal courts that had been illegally obtained by state police.

22. See Lee v. United States, 343 U.S. 747 (1952) (microphone hidden on under-

constitutionally protected interest in the place or thing searched or the property seized.[23] But this interest is not limited to the literal language of the fourth amendment, and the concept of the protected interest has expanded significantly.[24] Searches of a generalized nature, with or without a warrant, which are conducted solely for the purpose of acquiring evidence of guilt are characterized as "exploratory," and are deemed unreasonable by both state and federal courts.[25]

In the principal case, the basic issue confronting the court was whether one's right of privacy as protected by the fourth amendment extended to activities in a public toilet stall so as to preclude admission of evidence secured by a clandestine surveillance. In answering the question in the negative, the court relied upon two alternative grounds: (1) if the ranger's conduct was a "search," appellants impliedly consented to it and (2) there was no "unreasonable search" within the meaning of the amendment.[26] The court cursorily dismissed appellants' contention that their conviction was contrary to California law with the response that the Assimilative Crimes Act[27] created a federal offense which referred to California statutes only for definition and penalty, and did not incorporate the entire criminal or constitutional law of that state.[28] Discussing the first alternative, the court

cover agent); Goldman v. United States, 316 U.S. 129 (1942) (hearing device in adjoining room). *Cf.* Lanza v. New York, 370 U.S. 139 (1962) (electronic device to overhear conference in jail).

23. See Gibson v. United States, 149 F.2d 381 (D.C. Cir.), *cert. denied,* O'Kelley v. United States, 326 U.S. 724 (1945).

24. See, *e.g.,* Stoner v. California, *supra* note 10 (hotel room); Rios v. United States, 364 U.S. 253 (1960) (taxi); Jones v. United States, 362 U.S. 257 (1960) (apartment); Davis v. United States, 328 U.S. 582 (1946) (private automobile and office); Amos v. United States, 255 U.S. 313 (1921) (locked store); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (private portion of business office).

25. See Stanford v. Texas, *supra* note 8; United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, *supra* note 9; Marron v. United States, 275 U.S. 192 (1927); Gouled v. United States, 255 U.S. 298 (1921); Britt v. Superior Court, *supra* note 6. The generalized search had long been held in disapprobation in England as can be seen in this speech of Chatan: "The poorest man may, in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his forces dare not cross the threshold of the ruined tenement." 2 COOLEY, CONSTITUTIONAL LIMITATIONS 611 n.1 (8th ed. 1927).

26. 352 F.2d at 253. The court's first alternative, implied consent or waiver, is, at best, a tenuous basis for the decision. While one may consent to what would otherwise constitute an illegal search, to state that one constructively consents to such searches or impliedly waives fourth amendment rights by engaging in criminal conduct in a public facility is a concept of consent that is unsupported by federal case law. See Note, 113 U. PA. L. REV. 260 (1964).

27. See note 1 *supra* for the text of this act.

28. It cannot be disputed that the Assimilative Crimes Act does not incorporate the entire body of state law to which it looks for the definition of the crime and the penalty. McCoy v. Pescor, 145 F.2d 260 (8th Cir. 1944); United States v. Andem, 158 Fed. 996, 1000 (D.N.J. 1908).

concluded that when people resort to a public toilet for criminal purposes, they run the risk that they may be observed by police officers; they are not protected from such observation simply because they choose the most nearly "private" part of such a facility—the toilet stall.[29] Quoting at length the language of the California District Court of Appeal in *People v. Young*,[30] the court stated that to hold the public toilets to be "off limits" from clandestine surveillance by police would encourage their use by those engaged in criminal activities. Moreover, the court stated that since members of the public could have viewed appellants' conduct merely by peering over or under the partition of the stall or by pushing open the door, appellants had waived any right of privacy they may have had.[31] The court's second alternative ground for the decision, the reasonableness of the search,[32] was premised upon the literal language of the fourth amendment—"The right of the people to be secure in their *persons, houses, papers and effects* . . . ." Clearly, there had been no search of persons or papers and effects. The court reasoned that even if the stalls were private places analogous to houses, the appellants used them subject to their present condition which included the holes in the ceiling.[33] In sustaining the search as one based upon cause, the court referred to complaints by camp guests and writings on the walls of similar facilities which indicated that the particular toilet was a "hangout" for homosexuals.[34] In addition, there was no invasion of appellants'

29. The court discussed at length the dimensions of the stalls and the opportunity that persons who entered the restroom would have to witness the offense by looking over or under the door. Obviously the stall was a semi-public area within a public area so far as the majority was concerned.

30. 214 Cal. App. 2d 131, 29 Cal. Rptr. 492 (Dist. Ct. App. 1963). Officers viewed the restroom from a vantage point in a gardener's toolshed. The toilet in the restroom had neither doors nor sides, and was exposed to any person who entered the restroom. The court declared the testimony of the officers to be admissible.

31. The same position was adopted by another California court in People v. Norton, 209 Cal. App. 2d 173, 25 Cal. Rptr. 676 (Dist. Ct. App. 1962). Officers observed occupants of an enclosed toilet stall which had no door through a marble partition separating one part of the restroom from another. The court concluded that under such circumstances, an occupant of one of the toilet stalls waived any right of privacy he may have had.

32. Judge Pope was unwilling to agree that the appellants waived any right of privacy they had, and concurred in a separate opinion wholly on the basis of the second alternative stated by Judge Duniway. Judge Pope adopted the position that at no time was there an actual intrusion into a constitutionally protected area.

33. 352 F.2d at 256. The court stated that no rights of the appellants had been violated when the holes were cut since it had been done under proper authorization; nor had any rights been invaded when the ranger and photographer went into the attic.

34. Hearsay, if properly corroborated, may be enough to establish probable cause. See Jones v. United States, 362 U.S. 257 (1960); Draper v. United States, 358 U.S. 307 (1959); see also Student Symposium: *The Fourth Amendment*, 25 OHIO ST. L.J. 501, 518 (1964).

right of privacy since they were only entitled to assume that the facility would afford a modicum of privacy, and that privacy was limited.[35] Judge Browning dissented, stating that the fourth amendment protects such privacy as a reasonable person would suppose to exist in given circumstances. Judge Browning conceded that the stall afforded only a modicum of privacy, but felt it was that modicum of privacy which the officers had invaded.[36] According to him, probable cause was sufficient to authorize a warrant, but it could not justify search without one.

The conduct of the park ranger in the instant case constituted a search according to both federal[37] and state[38] authorities, and the ultimate question is the reasonableness of the search. What constitutes a reasonable search depends upon the particular facts in each case,[39] and as suggested above, a search will be deemed reasonable under federal law if it involves no physical trespass to a protected interest.[40] The court found no such trespass in this instance. Essentially the decision constituted a rejection by the federal court of the standard established by California state courts prohibiting police surveillance of areas not easily accessible to the public even where no trespass was involved.[41] For the federal court to have adopted the state standard would have narrowed the scope of permissible searches under the fourth amendment. The requirement of physical trespass to a protected interest is an anachronism in the law of search and seizure, probably having its roots in the history of man's concern for private property. To decide cases on this criterion is to lose sight of the fact that modern technology has provided instrumentalities permitting extensive searches without a prohibited invasion under present standards. Moreover, personal privacy may require a standard of reasonableness different from that utilized to protect property. Personal privacy should be accorded full protection against any police invasion as long as the private interest does not run counter to the public one. Concededly, this introduces the difficult task of balancing the individ-

35. "We would not uphold a clandestine surveillance of such an area without cause. We are made as uncomfortable as the next man by the thought that our own legitimate activities in such a place may be spied upon by the police. We also think, however, that the nature of the criminal activities that can and do occur in it, the ready availability therein of a receptacle for disposing of incriminating evidence, and the right of the public to expect that the police will put a stop to its use all join to place a reasonable limitation on the right of privacy involved." 352 F.2d at 257.

36. *Id.* at 260 (dissenting opinion).

37. See McDonald v. United States, 166 F.2d 957, 958 (D.C. Cir.), *rev'd on other grounds*, 335 U.S. 451 (1948).

38. See, *e.g.*, People v. Marvin, 358 Ill. 426, 193 N.E. 202 (1934).

39. United States v. Rabinowitz, 339 U.S. 56, 63 (1950).

40. See cases cited at note 22 *supra*.

41. Bielicki v. Superior Court, *supra* note 6.

ual's interest in personal privacy against the public interest in community welfare; but this is more desirable than arbitrarily requiring a physical trespass in order to declare a search unreasonable. The reasonableness of a search should bear some relation to the offense against which it is directed. Morals offenses between consenting adults typically do not involve secular interests of the community.[42] Therefore, official conduct which is unreasonable in such instances may well be reasonable when directed against more serious criminal conduct. Moreover, consideration should be given to the probable cause inspiring the search. This factor is particularly relevant when, as in the instant case, a search is conducted without a warrant. But the most important consideration involved in determining what constitutes a reasonable search should be the activities of the searching authorities. Photographing the conduct of occupants of public toilets in order to "spy" on them is patently offensive to the concept of privacy. Yet, the police might photograph the same individuals in a variety of other situations in which no question of reasonableness would arise. To limit unreasonable searches to those cases where there has been a physical invasion of a protected interest is to oversimplify a complex problem, and the federal courts should reevaluate the present standard of reasonableness to harmonize it with the realities of our society.

Criminal Law—Joint Trials—Admission of Confession Implicating Both Defendants Held Erroneous

Defendants were arrested on suspicion of armed robbery. Defendant Martinez admitted that he and defendant Aranda had committed the crime; Aranda never made any admissions. Both men were convicted in a joint trial at which Martinez's confession was introduced in evidence. On appeal to the Supreme Court of California, *held*, reversed as to both defendants.[1] In a joint criminal trial the admission of a confession implicating both defendants is

42. See PAULSEN & KADISH, CRIMINAL LAW AND ITS PROCESSES 3-17 (1962) Henkin, *Morals and the Constitution: The Sin of Obsenity*, 63 COLUM. L. REV. 391 (1963).

1. The court found no indication in the record that Martinez had been advised of his rights to counsel and to remain silent. Relying on Escobedo v. Illinois, 378 U.S. 478 (1964) and People v. Dorado, 62 Cal. App. 2d 338, 398 P.2d 361 (1965), both decided after the defendants' trial, the court found Martinez's confession inadmissible and reversed his conviction. The court then turned to a consideration of the possible prejudicial effect of the confession upon Aranda.

erroneous because the confession may be prejudicial to the nondeclarant despite a jury instruction that it is to be considered only against the declarant. *People v. Aranda*, 47 Cal. Rptr. 353, 407 P.2d 265 (1965).

Apparently all states provide for joint trials of defendants jointly charged, with discretion in the trial court to order a separate trial when justice so requires.[2] The well-established majority rule permits joint trials even though the prosecution intends to submit to the jury a confession by one defendant implicating a co-defendant.[3] Although the statement is inadmissible as to the nondeclarant, it may be put into evidence so long as there is a jury instruction that the confession is to be considered only against the declarant.[4] Implicating statements are to be disregarded in determining the guilt or innocence of the nondeclaring party, even though the confession is believed. This procedure has been upheld by the Supreme Court of the United States.[5] Despite its wide use, however, the procedure has been severely criticized by those who feel that the jury cannot compartmentalize their mental processes in the way the instruction presumes.[6] A number of states, recognizing the difficulties involved,

2. See 8 MOORE, FEDERAL PRACTICE § 8.02 (2d ed. 1965). The common law rule leaves the question of joint or separate trial to the discretion of the trial court. 23 C.J.S. *Criminal Law* § 933 (1955). Many states have enacted status codifying the common law view. For representative statutes, see CAL. PEN. CODE § 1098; N.Y. CODE CRIM. PROC. § 391. In justification of joint trials it has been pointed out that they conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in the punishing of the guilty. People v. Aranda, 47 Cal. Rptr. 353, 360, 407 P.2d 265, 272 n.9 (1965).

3. Cases restating and upholding the majority rule: Delli Paoli v. United States, 352 U.S. 232 (1957); Stein v. New York, 346 U.S. 156 (1953); Cwach v. United States, 212 F.2d 520, 526-27 (8th Cir. 1954); Nash v. United States, 54 F.2d 1006 (2d Cir. 1932); People v. Ketchel, 59 Cal. 2d 503, 532, 381 P.2d 394, 410 (1963); People v. Fisher, 249 N.Y. 419, 164 N.E. 336 (1928).

4. Iu justifying its approval of the majority rule in the federal courts, the Supreme Court said: "It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear . . . the jury system makes little sense." Delli Paoli v. United States, *supra* note 3, at 242.

5. Delli Paoli v. United States, *supra* note 3 (upheld federal procedure which follows majority practice); Stein v. New York, *supra* note 3 (upheld constitutionality of majority precedure in New York).

6. See Nash v. United States, *supra* note 3, at 1007, for Judge Hand's apology for the rule: "[T]he rule probably furthers, rather than impedes, the search for truth, and this perhaps excuses the device which satisfies form while it violates substance; that is, the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's [*sic*] else." Mr. Justice Frankfurter, dissenting in Delli Paoli v. United States, *supra* note 3, at 247, found even less to recommend the rule, charaeterizing the cautionary instruction to the jury as "intrinsically ineffective" because "the effect of such a non-admissible declaration cannot be wiped from the brains of the jurors." He felt that the decided unfair advantage given the prosecutor under the rule could be avoided only by separate trials of those inculpated by the

have enforced rules requiring trial severance in such cases unless those portions of the confession inculpating the co-defendant are effectively deleted.[7]

The court in the instant case found that the Martinez confession was inadmissible under *Escobedo*[8] and reversed as to him. Turning to Aranda, Chief Justice Traynor noted earlier decisions[9] holding that the prejudicial effect of an involuntary confession implicating both defendants is not necessarily cured by an instruction that it is to be considered only against the declarant. The court felt that, in view of the evidence as a whole, a result more favorable to Aranda would probably have been reached had the confession been excluded; therefore Aranda's conviction was also reversed. Rather than stopping here, however, the court went on to adopt a set of rules to be followed by California courts in considering future joint trials.[10] Under these rules, when the prosecution proposes to introduce a confession implicating a co-defendant, the court must grant a severance of trials unless it receives assurance prior to trial that the portions implicating the nondeclarant can and will be effectively deleted. If the deletion is not made, the trial court will exclude the entire confession in a joint trial.[11]

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confession. See also People v. Buckminster, 274 Ill. 435, 444, 113 N.E. 713, 716 (1916); 10 VAND. L. REV. 859, 861-62 (1957).

7. People v. Barbaro, 395 Ill. 264, 69 N.E.2d 692 (1946); People v. Bolton, 339 Ill. 225, 171 N.E. 152 (1930). These two cases state the minority view, held in Illinois, that trial severance must be granted when an inculpating admission by a co-defendant is to be introduced in evidence. State v. Rasen, 151 Ohio St. 339, 86 N.E.2d 24 (1949) (Ohio procedure requiring deletion or severance); See also People v. Buckminster, *supra* note 6, at 716; State v. Castelli, 92 Conn. Supp. 58, 101 Atl. 476 (1917).

8. Escobedo v. Illinois, *supra* note 1, held that the right to effective counsel or to remain silent arises as soon as attention centers on a particular suspect and the investigation enters an accusatory stage.

9. Greenwell v. United States, 336 F.2d 962, 968 (D.C. Cir. 1964); People v. Gonzales, 136 Cal. App. 2d 666, 69 Pac. 487 (1902); People v. Donovan, 13 N.Y.2d 148, 243 N.Y.S.2d 841, 193 N.E.2d 628 (1963); People v. Waterman, 9 N.Y.2d 561, 216 N.Y.S.2d 70, 175 N.E.2d 445 (1961). These cases, like the instant case, found prejudice to the non-declarant where the confession admitted under the majority procedure was subsequently held involuntary and inadmissible.

10. People v. Aranda, 47 Cal. Rptr. at 363, 407 P.2d at 272-73. The rules were adopted pursuant to the CAL. PEN. CODE § 1098, which vests discretion in the courts to grant trial severance when justice so requires.

11. People v. Smith, 46 Cal. Rptr. 382, 409 P.2d 222 (Sup. Ct. 1966), decided since *Aranda*, makes clear that these rules are subject to the "harmless error" provision of the California Constitution, which means that failure to comply with them may not necessarily be grounds for reversal. The pertinent parts of the provision are: "No judgment shall be set aside, or new trial granted . . . for any error as to any matter of procedure, unless the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." CAL. CONST. art. VI, § 4½. In *Smith*, the court affirmed a conviction even though the appellant had been inculpated by an inadmissible confession in a joint trial. The court reasoned that the independent evidence against the appellant was so overwhelming that the inadmissible confession was not prejudicial to him.

In the instant case the court dealt with two similar but distinct problems. On the facts, it held that a non-declarant co-defendant was prejudiced by the introduction of an *inadmissible* confession inculpating him, even though the usual cautionary instruction had been given to the jury. The court went beyond the facts, however, and adopted a set of rules dealing with all implicating confessions in joint trials whether or not admissible as to the declarant. This was an express adoption in California of the minority view which requires courts to grant severance if the implicating portions of the confession are not effectively deleted. The rules, the court declared, "are to be regarded, not as constitutionally compelled, but as judicially declared rules of practice . . . ."[12] Yet the opinion expressed "grave constitutional doubts" about "whether or not it [the old procedure] is constitutionally permissible."[13] It implied that the United States Supreme Court is likely to reverse its previous position upholding the majority procedure. The court apparently felt that two recent decisions have undercut the authority of earlier precedent[14] and have set the stage for a decision holding the majority procedure unconstitutional. *Jackson v. Denno*[15] held that it violated due process to rely on a jury's presumed ability to disregard an involuntary confession. The *Jackson* rationale should seemingly apply with equal force to a jury's presumed ability to disregard, as to the nondeclarant, a co-defendant's confession. *Pointer v. Texas*[16] incorporated the sixth amendment right of confrontation into the fourteenth amendment, thus making it applicable to the states. This casts some doubt on a procedure in which one may, in effect, be accused without opportunity for cross-examination of one's accuser. These developments, the court feels, will probably compel another Supreme Court test of the majority procedure, with a holding

12. *Id.* at 272.
13. *Ibid.*
14. Delli Paoli v. United States, *supra* note 3; Stein v. United States, *supra* note 3.
15. 378 U.S. 368 (1963). The case held that the New York practice of submitting the question of voluntariness of confession to the jury along with the other issues in the case was unconstitutional. It was reasoned that notwithstanding the instruction, the jury would be affected in their determination of guilt or innocence by a confession which they believed even though they found it involuntary. See *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143, 213 (1964) ("Because of these close parallels between Jackson and Delli Paoli, Jackson may foreshadow a holding that the Delli Paoli procedure violates due process.")
16. 380 U.S. 400 (1965). The grounds for finding the majority procedure unconstitutional would probably be fourteenth amendment due process and the sixth amendment right to confront and cross-examine one's accuser. Yet the sixth amendment did not prevent the Court from approving the majority procedure as used in the federal courts, Delli Paoli, *supra* note 4, so it is not immediately apparent why the application of the sixth amendment to the states should imperil the procedure in state courts. Nevertheless, the California court views *Pointer* as casting further doubt on any rule which purports to cure an encroachment on the right to confrontation by an instruction to disregard inadmissible evidence.

of unconstitutionality likely. Considering the California court's reputation for being years ahead of the United States Supreme Court in this area of constitutionally permissible criminal procedure,[17] its views on the outcome are not to be taken lightly.

A holding of unconstitutionality would further limit the traditional view that use of the jury system presupposes that the jury is capable and willing to follow the clear instruction of the court in applying law to fact.[18] Even if such an assumption is generally valid and justified, however, there would seem to be little reason to subject the jury to the stress of a difficult and demanding instruction if workable alternatives are available. It seems highly doubtful that the average juror can really be expected to disregard a confession which he believes to be true and which inculpates an alleged accomplice. To do so would require a degree of mental discipline quite beyond that of the average man. The newly adopted California procedure offers a simple expedient which will insure fairer administration of justice without consequent undue burdens upon the state. Joint trials, it is submitted, will continue to be the rule rather than the exception under this procedure. In many cases, the prosecution will be able to get a confession which does not implicate others; and deletion of the inculpating portions will be possible in most other cases.[19] Thus trial severance will probably not be required in a greatly increased number of cases so as to burden the time and funds of the state.

17. See Time, Jan. 24, 1966, p. 48; Manwaring, *California and the Fourth Amendment*, 16 STAN. L. REV. 318, 323 (1963).

18. See Delli Paoli v. United States, *supra* note 3, at 242. The reasoning in Jackson v. Denno, *supra* note 15, rejected the assumption that the jury can and will do as instructed in all cases. The court indicated a willingness to inquire into not only whether the instruction was clearly understood, but also whether it is reasonably probable that the jury can and will follow the instruction.

19. Deletion presents special problems, however. "Effective deletion" will require the striking of all plural pronouns and other constructions from which the jury could infer that others were involved. Otherwise, the jury will make the obvious inference that the other person was the co-defendant sitting before them beside the confessor. Furthermore, the heavy deletion required may reduce the confession to an absurdity. Obviously, substituting "X" for the name of the co-defendant is not an effective deletion.

Also, the nature of the crime confessed to, such as the theft of a Grand piano, could raise an inference that others were involved. But whether severance would be granted in such instances is doubtful.

Evidence—No Cross-Examination of Defendant's Character Witnesses as to His Prior Arrests and Conviction if Their Contact With Him Had Terminated Before Such Arrests and Convictions

Defendant was convicted in the federal district court of assault and assault with intent to kill. She had been arrested three times previously on similar charges and convicted on one occasion.[1] Defendant presented two character witnesses, neither of whom was familiar with her reputation for peacefulness and good order in the community in which the prior arrests and conviction had occurred. Both character witnesses revealed, on cross-examination, that their contact with the defendant had terminated before the date of the first arrest.[2] On cross-examination, the trial judge, over defense counsel's objection, permitted the prosecution to ask both witnesses if they had heard of the accused's prior arrests and conviction. On appeal to the Court of Appeals for the District of Columbia, *held*, reversed. Permitting cross-examination of a character witness as to defendant's prior arrests and conviction constitutes abuse of judicial discretion when the witness is unfamiliar with the defendant's reputation either in the community where the prior arrests and conviction occurred or at the time of their occurrence. *Awkard v. United States*, 352 F.2d 641 (D.C. Cir. 1965).

The rule that the prosecution may not initiate an attack upon the defendant's character is firmly established.[3] However, once the de-

1. The defendant was arrested in 1963 and 1964 for assault with a deadly weapon. The defendant's husband filed the complaints in the aftermath of domestic quarrels. The conviction for disorderly conduct, also stemming from a domestic quarrel, occurred in 1962. Awkard v. United States, 352 F.2d 641, 642 n.2, 645 (D.C. Cir. 1965).

2. The defendant's first character witness was a minister in a town fifteen miles from the district, who testified that he knew the defendant when "she was just a kid." He stated he knew nothing about defendant's reputation in Washington. Both the arrests and the conviction occurred after the defendant had left the minister's community. The second witness, a supervisor at defendant's former place of employment, testified that she knew nothing of defendant's reputation in the community for peacefulness and good order, but testified that she had "never had any complaints about defendant's behavior . . . or her work." On cross-examination she testified that she knew nothing about the defendant after 1961, a date prior to the arrests and conviction. *Id.* at 644-45.

3. Michelson v. United States, 335 U.S. 469, 475 (1948); Mackreth v. United States, 103 F.2d 495, 496 (5th Cir. 1939); Leverette v. State, 104 Ca. App. 743, 744-45, 122 S.E.2d 745, 746 (1961); People v. Hetenyi, 304 N.Y. 80, 88, 106 N.E.2d 20, 24 (Ct. App. 1952); State v. Garceau, 122 Vt. 303, 306, 170 A.2d 623 (1961). See also 2 VAND. L. REV. 479 (1949). According to Wigmore, this rule is "firmly and universally established in policy and tradition." He attributes the rule to "the inborn sporting instinct of Anglo-Normandom—the instinct of giving

fendant has placed his character in issue,[4] by calling witnesses to testify as to his reputation[5] in the community at the time of the alleged crime,[6] the prosecution may then cross-examine such character witnesses concerning the defendant's prior arrests[7] or call rebuttal witnesses for the purpose of introducing evidence of bad character.[8] The rule allowing the prosecution to cross-examine a defendant's character witness is based upon the principle that the witness's testimony is always answerable to the demands of credibility.[9] Since reputation testimony must be based solely on hearsay evidence,[10] the inquiry on cross-examination is necessarily restricted to those prior events of which the witness has heard, but has no personal knowledge.[11] According to the majority rule embraced by

the game fair play even at the expense of the efficiency of procedure." 1 WIGMORE, EVIDENCE § 57, at 546 (3d ed. 1940) [hereinafter cited as WIGMORE].

4. McCormick states that the expression "placing his character in issue" is misleading, since character is merely circumstantial evidence bearing on the probability of guilt, and as such it is almost never an operative fact determinative of guilt or innocence. MCCORMICK, EVIDENCE § 158, at 334 (1954) [hereinafter cited as MCCORMICK].

5. According to McCormick, reputation evidence is the only method of proving character. Certain jurisdictions, however, as well as the Model Code of Evidence and the Uniform Rules of Evidence, permit testimony by those who have obtained knowledge of the defendant's character from observation of his conduct. *Id.* at 334 n.9. See MODEL CODE OF EVIDENCE rule 306 (2)(a) (1942); UNIFORM RULES OF EVIDENCE 46, 47.

6. The majority rule limits reputation evidence to the time of the alleged crime or a reasonable time before it. MCCORMICK § 158, at 335. See also Strickland v. State, 37 Ariz. 368, 379, 294 Pac. 617, 621 (1930); People v. Willy, 301 Ill. 307, 320, 133 N.E. 859, 865 (1922); State v. Riggs, 32 Wash. 2d 281, 284, 201 P.2d 219, 221 (1949). The term "community," although usually synonymous with place of residence, is extended by the better view to include a place of business. United States v. White, 225 F. Supp. 514, 522 (D.D.C. 1963); People v. Workman, 136 Cal. App. 2d 898, 902, 289 P.2d 514, 516 (1956); State v. Axilrod, 248 Minn. 204, 210, 79 N.W.2d 677, 682 (1956), *cert. denied,* 353 U.S. 938 (1957); MCCORMICK § 158, at 335; 5 WIGMORE § 1616.

7. See generally MCCORMICK § 158. The special rules pertaining to the cross examination of a character witness must not be confused with those applicable in impeaching the veracity of the defendant-witness who takes the stand to testify. In the latter case the initiative is transposed and the defendant is precluded from bolstering his reputation until the prosecution has attacked it. *Id.* at 334 n.7.

8. See generally 1 WIGMORE § 58.

9. 3 WIGMORE § 988, at 618. According to Wigmore, a witness's knowledge of prior arrests will either entirely discredit testimony that the witness has never heard any ill spoken of the defendant, or it will prove a deficiency in the witness's testimony that the community concensus is favorable to the accused. *Ibid.* Cross-examination is used only for purposes of testing the credibility of the witness's testimony, and does not go to the substantive question of guilt or innocence. 3 WHARTON, CRIMINAL EVIDENCE § 865, at 249 (12th ed. 1955).

10. Michelson v. United States, 335 U.S. 469, 477. Wigmore states that character testimony is hearsay since it is an expression of community opinion uttered out of court and is thus not subject to cross-examination. 5 WIGMORE § 1609.

11. The form of questioning on cross-examination has become stereotyped. Quite uniformly the courts limit the questions to "Have you heard"? and hold it reversible error to permit the inquiry "Do you know"? Stewart v. United States, 104 F.2d 234,

the Supreme Court in *Michelson v. United States*,[12] the scope of cross-examination includes prior arrests and convictions reflecting traits of the defendant's character which are likewise an ingredient of the immediate offense.[13] The "Illinois Rule" narrows the permissible area of inquiry to acts of misconduct similar to the crime in issue.[14] Other courts have held that particular instances of misconduct are inadmissible since the questioning should pertain only to the "general character" of the defendant.[15] Similarly, Mr. Justice Rutledge in his dissenting opinion in *Michelson* favored the exclusion of all inquiry to

235 (D.C. Cir. 1939) ("the witness on cross-examination should be asked only—"Have you heard"?—not—"Do you know"?); People v. Marsh, 28 Cal. Rptr. 300, 309, 58 Cal.2d 732, 745-46, 376 P.2d 300, 308-09 (1962); Baker v. State, 154 Tex. Crim. 627, 629, 230 S.W.2d 219, 220 (1950). See Kasper v. United States, 225 F.2d 275, 279 (9th Cir. 1955) (suggestion that "Did you know or have you heard"? is objectionable). *But see* State v. Shull, 131 Ore. 224, 227, 282 Pac. 237, 240 (1929) (no prejudicial error in "Do you know of his having beaten up on a girl a year or two ago . . ."?). Cases are collected in 3 WHARTON, CRIMINAL EVIDENCE § 865, at 256-57 n.20 (12th ed. 1955) and 3 WIGMORE § 988 n.1. McCormick contends that it should be proper to direct the questioning to the witness's knowledge when indictments, convictions, crimes committed in public and imprisonment are involved, since they are common knowledge in the community. MCCORMICK § 158, at 335-36.

12. *Supra* note 3. In *Michelson*, the defendant appealed a conviction of bribing a federal revenue agent. The defendant alleged that the trial court committed error in allowing the prosecution on cross-examination to ask his character witnesses whether they had heard of the defeudant's arrest twenty-seven years prior to the date of the trial. The Supreme Court found no prejudicial error.

13. People v. Marsh, *supra* note 11; Adams v. District of Columbia, 134 A.2d 645, 648 (Munic. Ct. App. 1957). Compare Travis v. United States, 247 F.2d 130, 132-33 (10th Cir. 1957), *rev'd on other grounds*, 364 U.S. 631 (1961). Cases are collected in Annot., 71 A.L.R. 1504 (1931) and Annot., 47 A.L.R.2d 1258 (1956); 2 VAND. L. REV. 479 (1949).

14. Aside from dictum in People v. Hannon, 381 Ill. 206, 44 N.E.2d 923 (1942), the "Illinois Rule" is apparently misnamed. The court in *Hannon* stated "Where the matters about which the inquiries are made have no connection with or relation to the offense charged it is reversible error to ask such questions. . . . The witnesses were not asked as to rumors and reports . . . but were interrogated as to their knowledge of such assumed facts and of specific acts which were not of a *generic nature*." (Emphasis added.) *Id.* at 211-12, 44 N.E.2d at 925. Compare the Illinois court's position in People v. Page, 365 Ill. 524, 6 N.E.2d 845 (1937). See generally Comment, 40 J. CRIM. L. & C. 58, 60 (1949). One commentator attributes the substance of the "Illinois Rule" to Judge Frank's opinion in United States v. Michelson, 165 F.2d 732, 735 (2d Cir. 1948); Note, 70 YALE L.J. 763, 780 (1961).

15. North Carolina is the leading jurisdiction adopting the "general character" rule. State v. Robinson, 226 N.C. 95, 96, 36 S.E.2d 655 (1946) ("State . . . could not . . . offer evidence as to particular acts of misconduct of the defendant."); State v. Shepherd, 220 N.C. 377, 17 S.E.2d 469 (1941) (character witness may be questioned as to the general reputation of the defendant concerning particular vices or virtues). *Accord*, Commonwealth v. Butts, 204 Pa. 302, 310, 204 A.2d 481, 486 (1964) (". . . character may be discredited only by evidence of general reputation, and not by particular acts of misconduct"); People v. Page, *supra* note 14 (general reputation for particular matter or misconduct); Viliborghi v. State, 45 Ariz. 275, 286-87, 43 P.2d 210, 215 (1935) (" . . . the questions must not be in such form as to imply specific acts of misconduct . . . .").

specific incidents in the defendant's past life.[16] There is unanimous agreement that any inquiry concerning prior arrests or convictions is "pregnant with possibilities of destructive prejudice."[17] In an attempt to combat this possible prejudice, the courts have toyed with procedural technique[18] and have mentioned sanctions for instances of bad faith by the prosecutor.[19] Ultimately, however, most courts have placed the burden on the discretion of the trial judge.[20]

The court in the instant case, guided by the decision in *Michelson*, emphasized the active role of the trial judge in weighing the probative value of the cross-examination against the possible prejudice to the defendant.[21] Drawing an analogy to *Jackson v. Denno*,[22] and noting

16. Mr. Justice Rutledge cautioned about trying a defendant for all prior misconduct, criminal or otherwise, and contended that the prosecution and the defendant should be on the same "plane" as far as the use of character evidence is concerned. Michelson v. United States, 335 U.S. at 496. See generally Comment, 40 J. CRIM. L.&C. 58-59 (1949) for a discussion of the Justice's "fair play" rule.

17. MCCORMICK § 158, at 336. See Michelson v. United States, 335 U.S. at 479-80, 494; People v. Hannon, *supra* note 14, at 209, 210, 44 N.E.2d at 925; People v. Page, *supra* note 14, at 528, 6 N.E.2d at 847.

18. McCormick suggests that the trial judge, prior to cross-examination, should be required to receive reasonable assurance from the prosecutor that the prior crimes, misconduct, or convictions did in fact occur. The procedure should take the form of a bench conference in the absence of the jury. In the instant case the defense counsel questioned the admissibility of the cross-examination, at a bench conference but the trial judge permitted the questioning. 352 F.2d at 644. In People v. Dorrikas, 354 Mich. 303, 92 N.W.2d 305 (1958), the court held, with three judges dissenting, that the trial judge committed reversible error in failing to ascertain, out of the presence of the jury, the actuality of the prior acts as well as their time and place of occurrence. The court also held that the trial judge erred in not properly instructing the jury as to the limitations of the cross-examination. The court reversed even though the defendant had not objected at the trial level.

19. Cases are collected in Annot., 71 A.L.R. 1504, 1541-43 (1931) and Annot., 47 A.L.R.2d 1258, 1314-22 (1956). According to McCormick, "actual reversals on this ground [the prosecution's bad faith] are exceedingly rare." (no cases cited). MCCORMICK § 158, at 336 n.19. Perhaps the most common instance of bad faith on the part of the prosecutor is the propounding of questions concerning prior arrests that lack a factual basis. See People v. Thomas, 23 Cal. Rptr. 161, 58 Cal.2d 121, 373 P.2d 97 (1962).

20. Mr. Justice Frankfurter, concurring in *Michelson*, *supra* note 3, best expresses this position: "To leave District Courts of the United States the discretion given to them by this decision presupposes a high standard of professional competency, good sense, fairness and courage on the part of the federal district judges. If the United States District Courts are not manned by judges of such qualities, appellate review, no matter how stringent, can do very little to make up for the lack of them." 335 U.S. at 487-88. *But cf.* Mr. Justice Rutledge's statement in his dissenting opinion in *Michelson*: "Nor is it enough, in my judgment, to trust to the sound discretion of trial judges to protect the defendant against excesses of prosecution." *Id.* at 494.

21. The court cited Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965) for the proposition that although the defendant "has opened the door" to the cross-examination, it is the trial judge who is to decide what passes through.

22. 378 U.S. 368, 388 (1964), 18 VAND. L. REV. 237 (1964). The case held that the submission of the question of the voluntariness of a confession to the jury, without the trial judge first having made an independent determination of voluntariness, does not afford a defendant a reliable determination of voluntariness and is violative of

the psychological fact that juror's minds are not compartmentalized, the court stated that "cautionary instructions, copiously provided by the trial judge" fail to afford the accused adequate protection once prejudicial testimony has been introduced.[23] That the questions asked on cross-examination were highly prejudicial was made apparent by the nature of the testimony presented on direct examination. The testimony of the first witness pertained to defendant's reputation at an earlier time and in a different community. The testimony of the second witness revealed that she did not know the defendant's reputation for peacefulness and good order in the community where the prior arrests and conviction occurred. In fact, the prosecution could have had the testimony of both witnesses stricken as irrelevant.[24] In addition, the cross-examination of the second witness was incapable of impeaching her direct testimony, since the arrests occurred after her association with the defendant had terminated.[25] The court acknowledged the criticism of the rule allowing a defendant's prior arrests to be revealed during the cross-examination of his character witnesses; it refused, however, to reverse the procedure "at this time."[26] Instead, the court urged that trial judges limit the practice to situations where cross-examination is necessary to establish witness credibility and where prejudice to the defendant does not outweigh the probative value of the testimony.

The rule permitting the defendant in a criminal prosecution to present character witnesses is justified as a relevant means of resolving probabilities of guilt.[27] Testimony that the defendant's reputation is favorable may create in the minds of the jurors a reasonable doubt as to the defendant's guilt. Likewise, such testimony may even lead the jury to infer that the defendant did not commit the offense charged.[28] The prosecution is allowed to cross-examine the

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the due process clause of the fourteenth amendment. The instant court's reference was to the Supreme Court's rhetorical question whether the jury, after receiving instructions to disregard an involuntary confession, unconsciously resorts to the confession when there are doubts about the sufficiency of the evidence. See generally 3 WIGMORE § 988, at 619-24.

23. 352 F.2d at 645-46.

24. *Id.* at 644-45.

25. *Ibid.*

26. *Id.* at 646.

27. Michelson v. United States, 335 U.S. at 476.

28. In discussing the basis of the rule allowing the criminal defendant to present character witnesses, Mr. Justice Rutledge stated: "[T]he rule is justified by the ancient law which pronounces that a good name is rather to be chosen than great riches. True, men of good repute may not deserve it. Or they may slip and fall in particular situations. But by common experience this is more often the exception than the rule. Moreover, most often in close cases, where the proof leaves one in doubt, the evidence of general regard by one's fellows may be the weight which turns the scales of justice. It may indeed be sufficient to create a clear conviction of innocence or to how that

character witnesses concerning the defendant's prior arrests and convictions for purposes of testing the credibility of their testimony. This right to cross-examine and introduce rebuttal witnesses appears sound, since the testimony of the defendant's character witnesses may be used by the jury for substantive purposes to decide the issue of guilt or innocence, rather than for the impeachment purposes of testing credibility. Objection to the current practice of including prior arrests and convictions in the cross-examination is based on the possible prejudice to the defendant and the apparent inadequacy of the trial judge's instructions in eliminating this prejudice. The court in the instant case, while recognizing both the prejudicial effects of the current practice and the widespread criticism that the practice has engendered, has attempted to minimize the prejudicial effects by establishing certain judicial guidelines for the trial judge. These guidelines, which have the effect of limiting the trial judge's discretion, have delineated concrete examples of abuse of judicial discretion. Henceforth, reference to prior arrests on cross-examination will be precluded when the witness's testimony relates to the defendant's reputation in a different community or at an earlier time, or when the testimony reveals that the witness has known nothing about the defendant since before the prior arrest. Additional developments might well be expected if the decision receives favorable acceptance. The court noted with approval the use of the bench conference,[29] and subsequent case law may vindicate earlier decisions that required this procedure.[30] In addition, the courts may put some substance into the good faith requirements that have often been mentioned, but rarely applied.[31] For example, the trial court could have discontinued the cross-examination of the second witness once her lack of knowledge was established, on the ground that further inquiry would constitute bad faith. Although the court has effectively limited the instances in which the prosecution may cross-examine a defendant's character witness as to prior arrests and convictions,[32] the success

reasonable doubt which our law requires to be overcome in all criminal cases before the verdict of guilty can be returned." *Id.* at 490-91.

29. The court noted that the bench conference would permit the trial judge to weigh considerations of prejudice and probative value. 352 F.2d at 646 n.14.

30. People v. Dorrikas, *supra* note 18.

31. See note 19 *supra.*

32. By emphasizing the need for reforming the present system the court in the instant case has distinguished itself from the reluctant position taken by the Supreme Court in Michelson v. United States, 335 U.S. 469 (1948). The Court in *Michelson* stated: "We concur in the general opinion of courts, textwriters and the profession that much of this law is archaic, paradoxical and full of compromises by which an irrational advantage to one side is offset by a poorly reasoned counter-privilege to the other. But somehow it has proved a workable even if clumsy system when modcrated by discretionary controls in the hands of a wise and strong trial court. To

of the court's guidelines may be diminished by the prosecution's reliance on rebuttal witnesses. Thus, the prosecution may be able to propound certain questions to its own witnesses which, if directed to the defendant's witnesses on cross-examination, would be precluded under the holding in the instant case.[33] Moreover, although there is little authority on this matter, it appears that the testimony of rebuttal witnesses, unlike the information elicited on cross-examination, may be used by the jury as substantive evidence and not merely for purposes of impeachment.[34]

Labor Law—Successful Parties May Intervene in Appellate Court Proceedings

In the first of two cases consolidated for decision, certain employees charged a union local with violations of the National Labor Relations Act.[1] The National Labor Relations Board dismissed the complaint and the employees sought review of the Board's decision in the Court of Appeals of the Seventh Circuit. The successful charged party,[2] the

pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice." *Id.* at 486. The court in the instant case, at 646 n.13, noted that the force of this argument is diminished by the Supreme Court's approach in Jackson v. Denno, 378 U.S. 368 (1964).

33. For example, the prosecution could have circumscribed the holding in the instant case by introducing rebuttal witnesses familiar with the defendant's reputation in the community at the time of the prior arrests and conviction. From a practical standpoint, however, it would appear far easier for the prosecution to cross-examine the defendant's character witnesses than to locate rebuttal witnesses.

34. "The rules of admissibility of character evidence . . . may be summarized in a few clear-cut propositions. . . . If the defendant does not go upon the witness stand, but offers evidence of his good character, the door swings open, and the state can thereupon offer evidence of his bad character, which must be considered as substantive evidence upon the question of guilt or innocence." State v. Nance, 195 N.C. 47, 141 S.E. 468, 470 (1928). Wigmore, in citing this decision, states that the "character rule [is] well summarized." 1 WIGMORE § 58, at 458 n.1. Compare: "The accused thus runs the risk in opening the issue, for if the prosecution has convincing evidence of the defendant's bad character for the germane trait, the jury may, and often will, consider it a substantive, evidentiary fact, making the affirmative inference from it that he committed the crime charged. It is important, however, to see that technically the evidence of *bad* character is admissible for the sole and *negative* purpose of rebutting the defendant's evidence of *good* character, and not as an affirmative evidentiary fact against him." Udall, *Character Proof in the Law of Evidence—A Summary*, 18 U. CINC. L. REV. 283, 301 (1949).

1. 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-188 (1964) (hereinafter cited NLRA). The union had fined certain members for exceeding incentive pay ceilings set by the union.

2. "Charged party" is used throughout this comment to refer to the party against whom the Board's formal complaint is issued, *i.e.*, the respondent in the proceedings before the Board.

union, moved to intervene[3] in the proceedings, but the motion was denied. In the second case, a union local charged Fafnir Bearing Company with violations of the National Labor Relations Act.[4] The Board sustained the complaint and the company sought review in the Court of Appeals of the Second Circuit. The successful charging party,[5] the union, moved to intervene, but its motion was denied.[6] On certiorari to the United States Supreme Court, *held,* reversed. Either a successful charged party or a successful charging party may intervene as a matter of right in the appellate court proceedings to review or enforce a NLRB decision. *Local 283, UAW v. Scofield,* 382 U.S. 205 (1965).

The NLRA is silent as to the rights of a *successful* party to review a decision of the NLRB in appellate proceedings.[7] However, the rules of the various appellate courts pertaining to review of administrative proceedings do allow "interested" persons to intervene in the court's discretion.[8] Exactly what an "interested" person is has not been determined.[9] As a matter of practice, however, the courts have usually allowed a successful charged party to intervene,[10] but, unfortunately, they have not articulated the bases for their decisions. Since reversal

3. A "successful party" is the party in favor of whom the Board decides. Appellate proceedings on a NLRB decision are between the Board and the unsuccessful party. The successful party may, at the court's discretion, enter proceedings already begun. See note 6 *infra.*

4. The union charged that the company had refused to bargain collectively.

5. "Charging party" is used throughout this comment to refer to the private party who has made charges of unfair labor practices to the Board. Upon becoming aware of the alleged violations, the General Counsel of the Board may issue the Board's formal complaint against the alleged violator.

6. Fafnir Bearing Co. v. NLRB, 339 F.2d 801 (2d Cir. 1964).

7. Section 10(f) of the NLRA gives *unsuccessful* parties the right to seek review as a "person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought. . . ." 49 Stat. 455 (1935), as amended, 29 U.S.C. § 160(f) (1964).

8. First Circuit Rule 16(6); Second Circuit Rule 13(f); Third Circuit Rule 18(6); Fourth Circuit Rule 27(6); Sixth Circuit Rule 13(6); Seventh Circuit Rule 14(f); Eighth Circuit Rule 27(f); Ninth Circuit Rule 34(6); Tenth Circuit Rule 34(6); D.C. Circuit Rule 38(f). 3 CCH LAB. L. REP. ¶ 6040 lists all the above. The First Circuit Rule 16(6) states: "A person desiring to intervene in a case where the applicable statute does not provide for intervention shall file with the court and serve upon all parties a motion to intervene. The motion shall contain a concise statement of the nature of the moving party's interest and the grounds upon which intervention is sought."

9. Fafnir Bearing Co. v. NLRB, *supra* note 6, at 803.

10. Local 1441, Retail Clerks Int'l Ass'n, v. NLRB, 326 F.2d 663 (D.C. Cir. 1963), *cert. denied,* 377 U.S. 981 (1964); Amalgamated Clothing Workers v. NLRB, 324 F.2d 228 (2d Cir. 1963); Minnesota Milk Co. v. NLRB, 314 F.2d 761 (8th Cir. 1963). *Contra,* Amalgamated Meat Cutters v. NLRB, 267 F.2d 169 (1st Cir.), *cert denied,* 361 U.S. 863 (1959) (private party should not ordinarily be allowed to intervene on the side of the Board); Haleston Drug Stores Inc. v. NLRB, 190 F.2d 1022 (9th Cir. 1950) (no authority to allow intervention by a successful party). The cases allowing intervention do not discuss the question.

of the Board normally remands the case for reconsideration, and since the new decision is usually against the previously successful party, a prior successful charged party might subsequently face a cease and desist order without the opportunity to argue in favor of the Board's original dismissal. Being aware of this, the appellate courts have apparently felt that a successful charged party's "interest" in preventing a cease and desist order is sufficient to permit intervention under the court rules.

The appellate courts have been less consistent in dealing with intervention attempts of successful charging parties, but in the greater number of cases intervention has been denied.[11] Denial has been predicated upon the idea that since the NLRA created no private remedy for unfair labor practices,[12] the successful charging party has no "legal" interest.[13] Traditionally the Board's orders vindicate the interest of the public as a whole, not that of the individual complaining party. In order that this public interest might be better served, the Board, a public agency, has been viewed as having the exclusive power to prosecute unfair labor practices.[14] The formal complaint is that of the Board, not the charging private party; if a labor law violation is found and an appropriate order issued, the Board alone may initiate proceedings to enforce that order.[15] In prior cases, the courts have taken the view that intervention by the charging party would be incompatible with this exclusive power of the Board.[16]

Mr. Chief Justice Warren, speaking for a unanimous Court, based

11. NLRB v. Florida Citrus Canners Co-op., 288 F.2d 630 (5th Cir. 1961), *rev'd on other grounds*, 369 U.S. 404 (1962); NLRB v. Local 648, Retail Clerks Int'l. Ass'n, 243 F.2d 777 (9th Cir. 1956); Aluminum Ore Co. v. NLRB, 131 F.2d 485 (7th Cir. 1942). *Contra*, Kearney & Trecker Corp. v. NLRB, 210 F.2d 852 (7th Cir.), *cert. denied*, 348 U.S. 824 (1954); West Texas Util. Co. v. NLRB, 184 F.2d 233 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 939 (1951). Note the conflict in the Seventh Circuit. The decisions of that court give no explanation.

12. Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261 (1940), Comment, 25 CORNELL L.Q. 591 (1940). The Court cited the following from the congressional history: "No private right of action is contemplated. Essentially the unfair labor practices listed are matters of public concern, by their nature and consequences, present or potential; the proceeding is in the name of the Board, upon the Board's formal complaint." H.R. REP. No. 972, 74th Cong., 1st Sess. 21 (1935).

13. Fafnir Bearing Co. v. NLRB, *supra* note 6, at 803 where the court said that no matter how deeply concerned a successful *charging* party might be with the outcome of the review, such a party had no "legal interest."

14. H.R. REP. No. 972, 74th Cong. 1st Sess. 21 (1935). This concept of a dichotomy between private and public rights or interests is attacked vigorously in Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 HARV. L. REV. 720, 725-26 (1946).

15. Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261, 265 (1940).

16. See cases denying intervention, note 10 *supra*. The charging party has been viewed as just another member of the public which the Board represents.

the instant decision on three considerations: judicial expediency, fairness to the parties, and the fact that the NLRA does not expressly deny a successful party a place in the review proceedings. The Court found that when a reviewing court set aside a NLRB decision, the matter was remanded to the Board for further consideration, and the Board's second decision was usually contrary to the first. The new unsuccessful party might then seek review, but this required additional expenditure of judicial time and energy on issues resolved in the first review. By allowing successful parties to intervene in the first review, however, the entire controversy would be centralized at that point and the case could be disposed of promptly by a single decision.[17] The Court also recognized the possibility of unfairness for the intervenor in any second review since the reviewing court could defer to the decision in the initial review "as a matter of *stare decisis* or of comity."[18] In order to insure effective review, the Court felt that the successful party should be allowed to present its argument before the views of the reviewing court became crystallized. Finally, since the NLRA did not expressly treat the issue, the Court concluded that Congress could not have intended, on the one hand, to deprive parties of a right to intervene on appeal simply because they had been successful before the Board, and, on the other, to grant that same right to others merely because they had been unsuccessful. The Court carefully distinguished a case denying a successful charging party the right to initiate contempt proceedings to enforce a Board order,[19] on the grounds that it was not inconsistent to deny private parties the right to initiate proceedings to enforce a Board order and at the same time allow such parties to join proceedings already begun.[20]

The older view of the NLRB's role in labor disputes has been that of the Board as the guardian of the *public's* interest in freedom from unfair labor practices.[21] Although the Board followed a policy of fostering the development of unions,[22] the unions as private individual parties were merely incidental beneficiaries. Complaining unions and employees acted only as communication ducts through which the Board became informed of industrial activities conflicting with its pro-labor policy. Since the enactment of the Taft-Hartley Act[23] in 1947, the Board

17. Local 283, UAW v. Scofield, 382 U.S. 205, 212-13 (1965).

18. *Id.* at 213.

19. Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261 (1940). The Court denied the successful charging parties efforts on the grounds that the Board had exclusive power to deal with unfair labor practices. *Id.* at 265.

20. 382 U.S. at 221. The Court stated that the NLRA did not create a dichotomy between private and public interests but instead blended the two.

21. Report of the Advisory Panel on Labor-Management Relations Law to the Senate Labor Committee, S. Doc. No. 81, 86th Cong., 2d Sess. 5 (1960).

22. *Ibid.*

23. 61. Stat. 136 (1947) (codified in scattered sections of title 29 of U.S.C.)

has had to deal with the complaints of companies, as well as those of unions and employees. This new role is analogous to that of an umpire.[24] The public interest of which it is the custodian is now thought to be the attainment of good order in the field of industrial relations generally. Although the NLRB is still the public's representative in labor disputes, its orders are not now primarily aimed at fostering unions, but at good order attained by the vindication of essentially private interest.[25] It is the individual or private interest that is primarily being served, with the public being relegated to the position of an incidental beneficiary. That the Board is no longer the exclusive agency for dealing with labor disputes is amply demonstrated by the increasing significance of such remedies as suits under section 301 of the Labor Management Relations Act,[26] and private arbitration, especially in view of the Board policy of deferring to the arbitrator's decision.[27] For example, in *Smith v. Evening News Ass'n*,[28] the Court held that a section 301 suit could be maintained by an individual employee for a contract violation, even though the particular violation also constituted an unfair labor practice; and in *Carey v. Westinghouse Electric*,[29] the Court held that arbitration was allowed as an alternative to Board proceedings. These are "private remedies," and their end is the vindication of the interests of individuals. The recognition of the substantial interest of private parties[30] gives the Board proceedings a tripartite appearance. This is compatible with the decisions in *Smith* and *Carey* where such recognition is basic. Thus, the instant decision seems clearly correct; the existence of

24. S. Doc., *supra* note 21. The report stated, "The Board is no longer charged solely with promoting the spread of labor unions and collective bargaining. It is largely an umpire engaged in enforcing established rules first against one party then against the other." *Ibid.* "Party" refers to complaining unions and complaining companies respectively.

25. *Ibid.*

26. Taft-Hartley Act, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1964). The statute gives a right to bring private suit in the United States District Courts for violation of a contract between an employer and a labor organization representing his employees.

27. Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 274-75 (1964), Comment, 36 ST. JOHN'S L. REV. 356 (1964)) (union is entitled to arbitration of its grievance even though the dispute may involve matters within the jurisdiction of the NLRB). In International Harvester Co., 138 N.L.R.B. 923 (1962), the NLRB stated that it would as a matter of policy defer to an arbitration decision unless its results were repugnant to the Labor Act. The Board has even declined to issue a complaint on the grounds that arbitration provided an adequent solution, McDonnell Aircraft Corp., 109 N.L.R.B. 930, 935 (1954); Crown Zellerbach Corp., 95 N.L.R.B. 753 (1951). This policy is dictated by the Taft-Hartley Act, 61 Stat. 137 (1947), 29 U.S.C. § 151 (1964) which states that voluntary settlements by the parties according to their own arrangements are to be encouraged.

28. 371 U.S. 195, 197 (1962).

29. 375 U.S. 261.

30. Local 283, UAW v. Scofield, 382 U.S. at 219.

private interests should not be denied because a party either chose or was forced to bring its complaint to the Board.[31] Since private interests have been recognized as having a legitimate place in Board proceedings, it might even be desirable to amend the NLRA to allow proceedings before the Board to be initiated by private complainants.[32] This would prevent a party with no cause of action under section 301 from being left without a remedy because of the Board's refusal to issue the necessary complaint. In the alternative, unfair labor practices could, by statute, be made actions in the nature of a tort.

Taxation—Partnership Entity Not Automatically Disregarded in a Section 1235 Transfer, Even Though Transferors and Partners Are "Related Persons"

In December, 1954, taxpayers entered into a contract with an inventor whereby taxpayers agreed to assume all costs for the development of a bath oil formula[1] in exchange for a two-thirds interest in its commercial exploitation.[2] The parties "reduced the formula to practice" no earlier than January 6, 1955, and obtained a patent the following month. On May 31, less than five months after reducing the formula to practice, taxpayers and the inventor transferred their interests in the patent to a newly created partnership, consisting of the inventor and the taxpayers' wives. In return, the transferors received certain annual payments, measured by the net sales of the bath oil.[3] Relying upon section 1235 of the Internal

31. In the absence of a contract provision covering a particular unfair labor practice, the aggrieved party would have no suit under section 301, and likewise no contract violation to have arbitrated. Such a party could have recourse only to the Board.

32. It is arguable that the availability of arbitration and suits under section 301 makes such a step unnecessary, possibly even undesirable. Perhaps the Board might best be regarded as a forum for cases involving a stronger degree of public interest.

1. These costs were to include the following: $1,000 for attorney fees in connection with the patent application; $1,000 for other legal fees; $500 to be paid a chemist for producing samples of the product; $5,000 to $6,000 for the cost of producing a 50-gross commercial batch; and $2,000 to $3,000 for laboratory testings of the product. Max A. Burde, 43 T.C. 252, 254 (1965).

2. Thus, as a result of the contract, each party received a one-third interest in the bath oil formula.

3. Taxpayers received a flat $2,500, plus 6% of the net sales commencing January 1, 1956. During the year in question, 1958, this amounted to $19,484.33 for each of the taxpayers.

Revnue Code of 1954,[4] taxpayers reported these payments as capital gains. The Tax Court disregarded the partnership entity and held the payments taxable as ordinary income since section 1235 does not apply to transfers between "related persons."[5] The Court of Appeals for the Second Circuit rejected the theory that the partnership entity should be disregarded in all section 1235 cases, but *held,* affirmed. In determining whether transferors and a partnership are related persons, the partnership entity is not automatically to be disregarded, but rather the tests to be applied are those set out in section 707(b)(2) providing that in certain situations the gains derived from a transfer involving a partnership shall be treated as ordinary income.[6] *Burde v. Commissioner,* 352 F.2d 995 (2d Cir. 1965).

Section 1235(d) denies section 1235 coverage to transfers between "related persons," and specifically refers to section 267(b) for definition of this term. Section 267(b) defines related persons in terms of members of a family, corporations, fiduciaries and grantors of trusts, and certain educational and charitable organizations, but makes no reference to partnerships. Therefore, a court could conclude that this omission indicates a congressional intent not to include partnerships within the concept of related persons.[7] A possible means of avoiding this result is to apply the same percentage tests to partnerships that section 267(b) applies to corporations; that is, where an

4. INT. REV. CODE OF 1954, § 1245: "(a) GENERAL.—A transfer (other than by gift, inheritance, or devise) of property consisting of all substantial rights to a patent, or an undivided interest therein which includes a part of all such rights, by any holder shall be considered the sale or exchange of a capital asset held for more than 6 months, regardless of whether or not payments in consideration of such transfer are (1) payable periodically over a period generally coterminous with the transferee's use of the patent, or (2) contingent on the productivity, use, or disposition of the property transferred."

5. INT. REV. CODE OF 1954, § 1235(d): "(d) RELATED PERSONS.—Subsection (a) shall not apply to any transfer, directly or indirectly, between persons specified within any one of the paragraphs of section 267(b); except that, in applying section 267(b) and (c) for purposes of this section—(1) the phrase '25 percent or more' shall be substituted for the phrase 'more than 50 percent' each place it appears in section 267(b), and (2) paragraph (4) of section 267(c) shall be treated as providing that the family of an individual shall include only his spouse, ancestors, and lineal descendants."

6. INT. REV. CODE OF 1954, § 707(b)(2): "(2) GAINS TREATED AS ORDINARY INCOME.—In the case of a sale or exchange, directly or indirectly, of property, which, in the hands of the transferee, is property other than a capital asset as defined in section 1221—(A) between a partnership and a partner owning, directly or indirectly, more than 80 percent of the capital interest, or profits interest, in such partnership, or (B) between two partnerships in which the same persons own, directly or indirectly, more than 80 percent of the capital interest or profits interests, any gain recognized shall be considered as gain from the sale or exchange of property other than a capital asset."

7. This theory was urged by taxpayers; the court, however, found it probable that Congress had never considered the question. 352 F.2d at 999.

individual or a group of individuals owns fifty per cent or more of the assets of a partnership, any transfer between the two would be considered a transfer between related persons not qualifying for section 1235 treatment.[8] This approach gains additional weight from the fact that similar treatment is accorded both corporations and partnerships in situations where a business entity theory of partnerships is used.[9] Another possibility is to disregard the partnership entity in all section 1235 situations, and to treat the partners in their individual capacities.[10] In support of this position, congressional reports indicate that where appropriate, the partnership entity can be disregarded.[11] As a final alternative, section 707(b)(2) tests could be applied in determining when a partnership was a related person—an approach adopted by the court of appeals.

Agreeing that to permit capital gains treatment would frustrate section 1235(d),[12] the majority and concurring opinions differed mainly over the amount of control the transferors must hold in the partnership before section 1235 is inapplicable. The majority was concerned with the resulting injustice if the partnership entity were disregarded[13] in all section 1235 situations, regardless of the amount of control. The court investigated the only two alternatives it thought to be realistically available,[14] and decided to apply the eighty per cent control test of section 707(b)(2) rather than disregard the

8. The majority made no mention of this possibility. The concurring opinion did mention it, but only in a passing manner as a possible ideal solution. *Id.* at 1005.

9. *Compare* § 721 (concerning the nonrecognition of gain or loss on ownership contributions to a partnership), *with* § 351 (concerning a transfer to a corporation controlled by the transferor). *Compare* § 723 (concerning the basis of property contributed to a partnership), *with* § 362 (concerning the basis of property acquired by a corporation). Section 1361 expressly provides that, in certain situations, partnerships may be taxed as corporations.

10. This was the theory proposed by the Commissioner and followed in the Tax Court. 352 F.2d at 998.

11. "No inference is intended, however, that a partnership is to be considered as a separate entity for the purpose of applying other provisions of the internal revenue laws [than § 707] if the concept of the partnership as a collection of individuals is more appropriate for such purposes." H.R. REP. No. 2543, 83d Cong., 2d Sess. 59 (1954).

12. Roth the majority and the concurring opinion concluded that to permit capital gains treatment in the instant case would be to permit it where the asset remained within "essentially the same economic group," a result definitely not intended by Congress. 352 F.2d at 1000, 1003.

13. "If this were the rule [that in all § 1235 cases it is necessary to 'pierce the partnership veil'], then the transfer of a wholly owned patent to a partnership in which the transferor (or a related person) owned but a small interest would fail to qualify for capital gains rates to the extent of the transferor's partnership interest, in spite of the fact that the patent was no longer controlled within essentially the same economic group. This result was rejected in Weller v. Brownell, 240 F. Supp. 201, 208-10 (M.D. Pa. 1965) . . . ." *Id.* at 999.

14. The third alternative, that of treating the partnership as a corporation under § 267(b), was never really considered as an available alternative. See note 8 *supra.*

partnership entity in all section 1235 situations. The concurring opinion, on the other hand, concluded that it would be more in line with congressional intent of the partnership entity were automatically disregarded in all section 1235 cases. In support, it pointed out that the fifty per cent control tests ordinarily applied to corporations by section 267(b) had been reduced to twenty-five per cent where coverage under section 1235 was sought.[15]

Finding no reference to partnerships in section 267(b), the majority turned to section 707(b)(2) because similar congressional policies concerning transfers within the same economic group supported both this section and section 1235. In order to apply section 707(b)(2), the majority found it necessary to consider the agreement between the transferors as constituting a partnership,[16] even though it conceded that many of the normal incidents of a partnership were not present.[17] Since no single transferor had an eighty per cent ownership interest, as required for application of section 707(b)(2),[18] the majority was forced to consider the transferors as a whole.[19] This approach indicates that while there would be no "related persons" under section 707(b)(2) if there were only one transferor owning as much as seventy-nine per cent control, there would be such "related persons" if four transferors each owned twenty per cent. This arbitrary distinction appears incongruous with section 1235's purpose of taxing all transfers within essentially the same economic group. Even though capital gains treatment was not available under section 1235, it might have been obtained had the section 1222(3) requirements, normally incident to capital gains, been met.[20] Little difficulty would be encountered in meeting two of these requirements since there had been a "sale or exchange"[21] of

15. See note 5 *supra* for the text of this section.

16. INT. REV. CODE OF 1954, § 707(b)(2)(B). See note 6 *supra* for this section.

17. "Although some of the factors often found relevant to the existence of a joint venture, such as joint bank accounts, filing of partnership returns, an agreement to share losses, are not present in this case, single factor is controlling." 352 F.2d at 1002.

18. Although § 707(b)(2) made reference to transfers between individuals and partnerships, and between partnerships, it made no reference to transfers between individuals who as a group owned most of the transferee partnership assets, no single individual and related person, however, owning more than 80%.

19. To justify this position, the majority again directed attention to the fact that there had been no substantial change in the economic ownership of the patent as a result of the transfer. 352 F.2d at 1000.

20. INT. REV. CODE OF 1954, § 1222(3); "(3) LONG-TERM CAPITAL GAIN.—The term 'long-term capital gain' means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing gross income."

21. Although the question once arose as to whether or not a transfer of a patent in return for periodic payments based upon its use met the "sale or exchange" require-

a "capital asset."[22] The third requirement necessary for capital gains treatment, however, could not be met. The period between the time the patent was reduced to practice and the transfer in question had been less than five months, and section 1222(3) requires that the capital asset be held by the transferors for a minimum of six months. Consequently, capital gains treatment under section 1222(3) was unavailable. Another possible approach to the problem of determining whether there had been a transfer between related persons should have been considered. The majority noted[23] in passing that during the year in question, the payments received by the transferors were made by a corporation since the partnership had been incorporated in an earlier year. The court might have utilized a more satisfactory method for denying capital gains treatment by looking to the ultimate incorporation of the partnership as the net result of the transaction. Section 1235(d)[24] provides that the general rule of section 1235 shall not apply to any transfer which is directly or indirectly between persons specified within any one of the paragraphs of section 267(b). This section defines as a transfer between related persons a transfer between a corporation and the owner of more than fifty per cent of the stock of that corporation. It might be concluded, therefore, that a transfer to a partnership which is later incorporated is an *indirect* transfer between "related persons." Consequently, such a transfer would come within the exceptions to the general rule of section 1235, and would thus be denied capital gains treatment. In any event, since the policy underlying section 1235(d) requires similar treatment of transfers within essentially the same economic group, there appears to be no reason for affording

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ment, the question now appears to be settled in the affirmative. Some courts found it difficult to conceive of the receipt of periodic payments based upon the use of a patent as meeting this requirement. Instead, often it was thought more closely akin to a license. As of late, however, at least with respect to patent interests, the Treasury has taken the position that such a transfer does meet this requirement. Kurtz, *Distinctions Between License and Capital Transaction on Transfer of Patent,* N.Y.U. 23d INST. ON FED. TAX 135, 139 (1965).

22. As long as the inventor is not a "professional," courts have usually considered his patent right a capital asset. This requirement, generally speaking, has not been difficult to show. Mann, *Capital Asset Status of Patents and Inventions Under General IRC Sections 1221-1223,* 42 TAXES 317 (1964). Likewise, the taxpayers would also be thought to have possessed an interest in a capital asset since they had not employed the inventor and had taken part in the development of the bath oil formula prior to its reduction to practice. Treas. Reg. § 1.1235-2(d) (1954).

23. "On January 2, 1956, Emory and the wives resuscitated a dormant corporation (Sardeau, Inc.), transferred to it the assets and liabilities of Sardo by Sardeau, and extinguished the partnership. The corporation took over the royalty payments to Emory and the husbands. . . . For purposes of this case we can ignore the incorporation of the partnership and treat the royalities as if received directly from the partnership." 352 F.2d at 997.

24. See note 5 *supra* for the text of this section.

special treatment to transfers involving partnerships. It would seem that the same tests applied to corporations under section 267(b) might most appropriately determine which transfers involving partnerships may qualify for section 1235 treatment.

Taxation–Section 1231 v. Section 165(c)(3)–Uninsured Casualty Loss to Personal Residence Must Be Offset Against Section 1231 Gains

In 1960, the taxpayer sustained an uninsured 5000 dollar casualty loss when an ice storm damaged trees, shrubbery and other improvements to her personal residence. In the same year, she realized a gain of approximately 19,000 dollars from the sale of an orange grove held for the production of income. In her return, the taxpayer deducted the loss from her adjusted gross income pursuant to section 165[1] and treated the sale of the orange grove as a section 1231[2] long-term capital gain. The District Director disallowed the deduction, claiming that the uninsured casualty loss was an involuntary conversion under section 1231[3] which had to be netted against

1. INT. REV. CODE OF 1954, § 165(a): "There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise." INT. REV. CODE OF 1954, § 165(c)(3): "In the case of an individual, the deduction under subsection (a) shall be limited to—(3) losses of property not connected with a trade or business, if such loss arise from fire, storm, shipwreck, or other casualty, or from theft. A loss described in this paragraph shall be allowed only to the extent that the amount of loss to such individual arising from each casualty, or from each theft, exceeds $100."

2. INT. REV. CODE OF 1954, § 1231(a): "If during the taxable year, the recognized gains on sales or exchange of property used in trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof) of property used in trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. . . . In the case of any property used in trade or business and of any capital asset held for more than 6 months and held for the production of income, this subsection shall not apply to any loss, in respect of which the taxpayer is not compensated for by insurance in any amount arising from fire, storm, shipwreck, or other casualty, or from theft."

3. INT. REV. CODE OF 1954, § 1231(a)(2): "[L]osses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion." While the code section says an involuntary conversion occurs when there is conversion "into other property or money," the regulation says there need not be a conversion "into other property or money."

the gain received from the orange grove. The district court found for the plaintiff and ordered a refund.[4] On appeal to the Sixth Circuit Court of Appeals, *held,* reversed. Even though there is no conversion into other property or money, an uninsured casualty loss of a capital asset held for more than six months must be offset against section 1231 gains. *Morrison v. United States,* 355 F.2d 218 (6th Cir. 1966).

In its inception, section 1231 of the Internal Revenue Code of 1954[5] provided capital gain treatment to taxpayers whose business property had been requisitioned in furtherance of the war effort.[6] If insurance proceeds were realized from certain business conversions, they also received the favorable capital gains treatment.[7] Congress did not just countenance "war time profits and losses" in the statute, but also included within the scope of these involuntary conversions[8] losses or gains realized from the fire, theft, or destruction of capital assets held for over six months.[9] Since many taxpayers sold their business property to the government because of an impending threat of condemnation and seizure, Congress found it necessary to add gains or losses from the sales or exchanges of business property to section 1231.[10] Thus, the scope of section 1231 was broadened con-

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Treas. Reg. § 1.1231-1(e) (1965): "For purposes of section 1231, the terms 'compulsory or involuntary conversion' and 'involuntary conversion' of property means the conversion of property into money or other property as a result of complete or partial destruction, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof. Losses upon the complete or partial destruction, theft, seizure, requisition, or condemnation of property are treated as losses upon an involuntary conversion whether or not there is a conversion of the property into other property or money. . . . For example, if a capital asset held for more than 6 months, with an adjusted basis of $400, but not held for the production of income, is stolen, and the loss is not compensated for by insurance or otherwise section 1231 applies to the $400 loss."

4. Morrisson v. United States, 230 F. Supp. 989 (E.D. Tenn. 1964).

5. "Section 1231 of the Internal Revenue Code of 1954 corresponds to Section 117(j) of the 1939 Code. Although somewhat rearranged, the Section has not been substantially changed from prior law. . . ." MERTENS, FEDERAL INCOME TAXATION (Code Commentaries) § 1231:1 (1965).

6. BITTKER, FEDERAL INCOME ESTATE AND GIFT TAXATION 553 (3d ed. 1964). Maurer v. United States, 284 F.2d 122, 123-24 (10th Cir. 1960): "The avowed purpose [of § 1231] was to allow taxpayers, whose property had been seized in furtherance of the war effort a capital gain rather than increase in ordinary income. This is so because not infrequently the taxpayer received much more for his seized property than his depreciated cost, and it seemed unjust to tax him at wartimes exceptionally high income tax rates."

7. BITTKER, *op. cit. supra* note 6, at 553. Insurance proceeds received after the sinking of American vessels received favorable capital gain treatment provided by § 1231.

8. See note 3 *supra.*

9. BITTKER, *op. cit. supra* note 6, at 553. Sale and exchanges of capital assets held for more than six months are also brought within § 1231.

10. *Id.* at 554.

siderably from its original purpose.[11] All these section 1231 transactions are added together, and if an overall gain results, it is taxed as a capital gain. An overall loss, however, is treated as an ordinary loss.[12] Section 165(c)(3) of the Internal Revenue Code of 1954 confers an ordinary deduction from adjusted gross income[13] to losses involving an individual's nonbusiness property if such "losses arise from fire, storm, shipwreck, or other casualty or from theft."[14] Congress allowed the deduction only if the loss was not "compensated for by insurance or otherwise."[15] Treasury Regulation section 1231-1(e),[16] created the conflict between section 165(c)(3) and section 1231.[17] This regulation states that "losses upon the complete or partial destruction . . . of property are treated as losses upon an involuntary conversion whether or not there is a conversion *into other property or money*. . . ."[18] The statute on its face, however, defines an involuntary conversion to be a conversion into other property or money, thus permitting a not unreasonable inference that it means only a loss which has been, to some extent compensated for by insurance or otherwise.[19] Since the regulation has existed as long as section 1231, the Commissioner has argued[20] that it has

11. *Id.* at 554. In order to come within § 1231, the property must be held for more than six months. INT. REV. CODE OF 1954, § 1231.

12. INT. REV. CODE OF 1954, § 1231. 3B MERTENS, FEDERAL TAXATION § 22.125, at 520 (Zimet & Weiss rev. 1958): "After all the gains and all the losses from section 1231 transactions are ascertained, the gains and losses are aggregated respectively, and one total is offset against the other, leaving a net gain or a net loss. A net gain, or an excess of gains over losses, is treated as a capital gain; a net loss, or an excess of losses over gains, is treated as an ordinary loss. In the former case, all the gains and losses are treated as capital gains and losses; in the latter case, they are all treated as ordinary gains and losses. If there are no gains, but only losses, they are all treated as ordinary losses."

13. INT. REV. CODE OF 1954, § 165(c)(3).

14. See note 1 *supra* for text of this Code section.

15. MERTENS, *op. cit. supra* note 5, § 165:2, at 178 (1965): "Included in the deductions allowed in computing taxable income are losses actually sustained by the taxpayer during the taxable year and not made good by insurance or some other form of compensation. . . . § 165(c):2: The amount of the deduction for a casualty loss is the lesser of the following: (a) the difference between the fair market value of the property immediately before and after the casualty. (b) The adjusted basis of the property for determining loss." Helvering v. Owens, 305 U.S. 468 (1939).

16. See note 3 *supra* for text of this regulation.

17. Fed. Tax Reg. (Regulations under I.R.C. 1939) § 39.117(g)(1)(a)(2), U. S. CODE CONG. & ADM. NEWS, 854-55 (1956).

18. Treas. Reg. § 1231-1(e) (1965). (Emphasis added.)

19. INT. REV. CODE OF 1954, § 1231.

20. Maurer v. United States, *supra* note 6 (Commissioner's argument rejected); Killebrew v. United States, 234 F. Supp. 481 (E.D. Tenn. 1964) (Commissioner's argument rejected); Hall v. United States, 64-2 USTC Decision 9770 (E.D. Tenn. 1964) (Commissioner's argument rejected); Oppenheimer v. United States, 220 F. Supp. 194 (W.D. Mo. 1963) (Commissioner's argument rejected); E. Taylor Chewning, 44 T.C. 678 (1965) (Commissioner's argument sustained). Since Killebrew and Hall, *supra*, are now pending appeal in the Sixth Circuit, it is most likely that

become law by virtue of the "re-enactment doctrine."[21] The Commissioner's position is supported by a consideration of the 1958 amendment to section 1231[22] which clearly excludes from the coverage of section 1231 any uninsured casualty loss incurred by the taxpayer where such loss involved property used in the *trade or business* or involved a capital asset held for more than six months and held for the *production of income.* The 1958 amendment does not exclude from the coverage of section 1231 a loss from a capital asset held for more than six months and *not* held for the production of income, *i.e.,* a loss to the taxpayer's personal residence. The Commissioner argued that in passing the amendment Congress admitted that uncompensated losses not involving conversion into other "property or money" were within the scope of section 1231.[23] In the leading case of *Maurer v.*

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they will be reversed and brought in line with the Sixth Circuit determination in the instant case.

21. Treas. Reg. § 1.1231-1(e) has been in existence ever since the enactment of § 1231 (formerly 117(j) of INT. REV. CODE OF 1939). Fed. Tax Reg., U. S. CODE CONG. & ADM. NEWS (Regulations under I.R.C. 1939) 854-55 (1956). The Commissioner takes the position that because this Code section has subsequently been rcenacted several times since its inception in 1939, it now has the force and effect of law. Helvering v. Windmill, 305 U.S. 79, 83 (1938) explains the effect of the re-enactment doctrine: "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes are deemed to have received congressional approval and have the effect of law." See Boehm v. Commissioner, 326 U.S. 287, 291-92 (1945). Of course, the re-enactment doctrine has no effect where the law is plain and needs no interpretation. Oberwinder v. Commissioner, 147 F.2d 255, 258 (8th Cir. 1945): "An administrative construction of an unambiguous statute is not controlling on the courts. . . . 'Where the law is plain the subsequent re-enactment of a statute does not constitute adoption of its administrative construction.'" 1 MERTENS, FEDERAL INCOME TAXATION § 3.23, at 48-49 (Zimet, Stanley & Kilcullen rev. 1962): "The doctrine has no application where the law itself is plain and needs no administrative construction. . . ." Since the Code section 1231 appears to be clear and unambiguous, in that it requires a conversion into "other property or money," it is hard to see how the Commissioner can contend that the Regulation [§ 1.1231-1(e)], which says there need not be conversion into other property or money, has become law by the re-enactment doctrine alone.

22. Technical Amendments Act of 1958, 72 Stat. 1606, 1642 (1959), 26 U.S.C. 1231 (1964): "In the case of any property used in the trade or business and of any capital asset held for more than 6 months and held for the production of income, this subsection shall not apply to any loss, in respect to which the taxpayer is not compensated for by insurance in any amount, arising from fire, storm, shipwreck, or other casualty, or from theft."

23. This view is supported by the legislative history of the Technical Amendments Act of 1958, S. REP. No. 1983, 85th Cong., 2d Sess., U.S. CODE CONG. & ADM. NEWS 4791, 4992: "Under section 1231, uninsured casualty losses on depreciable property or real estate used in the trade or business or on capital assets must be aggregated with various other types of section 1231 gains and losses." The viewpoint of the Commissioner that uninsured losses on a capital asset held for six months and *not* held for the production of income (as a loss on a personal residence) are still within scope of Section 1231 is also supported by this committee report: "On the other hand, the amendment does not apply to a loss arising from the destruction or theft of the taxpayer's uninsured personal automobile." *Id.* at 4992. The amendment

United States,[24] the Tenth Circuit held that an uninsured casualty loss to a personal residence, which had not been converted into other property or money, was exclusively covered by section 165(c)(3) and should not go into the section 1231 "hotchpot."[25] The basis of the decision was that section 1231 only applied to involuntary conversions involving a conversion into other "property or money."[26] After the decision in *Maurer*, the Commissioner issued his non-acquiescence[27] but did not seek review by the Supreme Court.[28]

In the instant case, the court accepted the government's contention that a loss from an uninsured capital asset held for more than six months (taxpayer's trees and shrubbery) must be brought within section 1231.[29] Noting that the regulation interpreting section 1231 had been in existence since the 1939 Code and the code section had been re-enacted without any disaffirmance of the regulation, the court

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was designed to exclude from operation of section 1231 certain uninsured losses arising from a business nature. Congress wanted to give those taxpayers who had to carry their own insurance the benefit of ordinary loss deduction when they sustained a loss. *Ibid.* From a reading of this amendment's legislative history, it appears that Congress thought *uninsured losses* were within the scope of § 1231.

24. 284 F.2d 122 (10th Cir. 1960).

25. This term is borrowed from BITTKER, *op. cit. supra* note 6, at 552 (3d ed. 1964). It simply means a combining of all the section 1231 transactions for purpose of determining overall gains and losses.

26. Maurer v. United States, *supra* note 6, at 124: "Section 1231 is aimed at involuntary conversion where 'other property or money' is received in return, i.e., compensated losses, leaving Section 165 applicable to uncompensated losses. . . . If, however, the casualty is uncompensated, it seems to follow that he should be allowed an ordinary deduction. This is made clear when it is seen that Section 1231 is contextually similar to the sections dealing with capital gains and losses. Thus a compensated loss is a taxable event closely akin to a 'sale or exchange' albeit an involuntary one. Where, however, the taxpayer receives nothing in return, the factual situation is entirely different and there is no rational basis for capital loss treatment. If he can prove that the loss qualifies as a 'casualty,' it is only logical to conclude that Congress intended that there be an ordinary deduction under Section 165. . . ."

27. Rev. Rul. 61-54, 1961-1 CUM. BULL. 398-99.

28. In another case rejecting the Commissioner's argument, Killebrew v. United States, *supra* note 20, *appeal pending* to 6th Cir., the court specifically discussed both the 1958 amendment to § 1231 and the congressional committee's explanation of the amendment. Relying on the overall purpose and the clear language of the statute, the court found that an involuntary conversion only resulted when there was a conversion into other "property or money." The court said: "If this congressional committee language were the only matter to be considered, the government's case would be plausible. However, as indicated in the *Maurer* case, there is considerably more legislative history behind the two statutes involved than is indicated in the brief comments on this section appearing in the long committee report cited. Furthermore to accept the construction of the language actually enacted by the government might well raise serious questions as to congressional power to make the distinction urged. Certainly when the most reasonable ruling of the language Congress actually chose to enact into law avoids a constitutional question, it would be folly for courts to look outside the statute for evidence in indicating a different intent that might pose such a question." *Id.* at 483-84.

29. 355 F.2d at 221.

found that the regulation had acquired the force of law.[30] In addition, the court adopted the Commissioner's interpretation of the 1958 amendment to section 1231 and its legislative history.[31] Although recognizing the apparent split of authority[32] and admitting the closeness of the question, the court held that the casualty loss to the taxpayer's residence was to be brought within section 1231 even though there was no conversion into other "property or money."[33]

The congressional intent in the original enactment of section 1231 indicates that an involuntary conversion results when either property or money is returned, *i.e.*, proceeds from insurance or otherwise.[34] Although the regulation[35] does state that there need not be a conversion into other property or money, this does not mean the regulation controls. In order for a regulation to be effective, it must be consistent with the statute.[36] If the unambiguous law is later re-enacted with a contrary regulation still in existence, the regulation does not gain the force and effect of law.[37] Prior to the 1958 amendment to section 1231,[38] the language of the statute clearly required a conversion into other "property or money."[39] When the 1958 amendment to section 1231 is considered,[40] however, the court's argument that the regulation has gained the approval of congress seems quite convincing. The amendment and its legislative history[41] clearly indicate that Congress thought certain uninsured losses, that is, losses where there is no conversion into other "property or money," were already within the purview of the section. In fact, the example given by the Senate Finance Committee[42] in discussing the effect of the 1958 amendment shows that Congress did not intend to exclude from section 1231 uninsured losses of capital assets held

30. See note 17 *supra*.
31. See notes 22 and 23 *supra* and accompanying text.
32. See note 20 *supra* for cases accepting and rejecting the Commissioner's argument.
33. 355 F.2d at 221.
34. 14 VAND. L. REV. 1538, 1539 (1961).
35. Treas. Reg. § 1231-1(e) (1965).
36. Manhattan Gen. Equip. Co. v. Commissioner, 297 U.S. 129, 134 (1936): "A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. . . . And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable."
37. See Oberwinder v. Commissioner, *supra* note 21.
38. See note 22 *supra* for text of amendment.
39. INT. REV. CODE OF 1954, § 1231(a): "If, during the taxable year, the recognized gains on sales and exchanges of property . . . plus the recognized gains from the compulsory or *involuntary conversions of property* used in trade or business and capital assets held for more than six months *into other property or money*. . . . (Emphasis added.)"
40. See note 22 *supra* for text of amendment.
41. See note 23 *supra*.
42. *Ibid.*

for more than six months. In *Maurer v. United States*,[43] the court noted that section 1231 was contextually similar to the other sections dealing with capital gains and losses.[44] Reasoning that a compensated loss was like a "sale or exchange," although an involuntary one, that court determined section 1231 applied only if property or money was received in exchange. When there was an uncompensated loss, the court reasoned that section 165 logically applied.[45] Since a 1954 loss was involved in *Maurer*, however, the court did not discuss the effect of the 1958 amendment.[46] The *Maurer* decision may be inapplicable for post 1958 transactions since the 1958 amendment and its legislative history appear to support the instant court's view. It seems apparent that the confusion in the area stems from the fact that the statute is ambiguous. The 1958 amendment and the language requiring a conversion into other "property or money" are in apparent conflict. In passing the 1958 amendment, Congress had a reason for excluding from the operation of section 1231 uninsured property used in the *trade or business* and capital assets held for the *production of income* for more than six months. The insured businessman could deduct as a business expense the insurance premiums he paid to insure his business property, but the businessman who was unable to obtain insurance could not deduct the reserve he carried in lieu of insurance. In order to equalize this situation, Congress decided to give the business casualty losses of the latter the favorable ordinary loss treatment. There was, however, no equally compelling reason to exclude from the operation of section 1231 uninsured nonbusiness casualty losses.[47] This congressional history indicates Congress thought certain uninsured losses were within the scope of section 1231, for otherwise there would have been no need to enact the 1958 amendment, excluding the business uninsured losses. The ambiguity presently inherent in section 1231 could most easily be eliminated by amending the section to provide expressly that a conversion need not be into other "property or money."

43. 284 F.2d 122 (10th Cir. 1960).
44. *Id.* at 124. See note 26 *supra*.
45. *Ibid.*
46. See note 22 *supra* for text of amendment.
47. Technical Amendments Act, S. REP. No. 1983, 85th Cong., 2d Sess., U.S. CODE CONG. & ADM. NEWS 4791, 4992. 23 J. TAXATION 213 (Oct. 1965).

Torts—Issuance of Tickets at Plane's Boarding Ramp Not Sufficient Delivery To Qualify for Liability Limitation Under Warsaw Convention

Plaintiffs, as administrators, brought a wrongful death action in the federal district court to recover damages resulting from an airplane crash on an international flight. Decedents were military personnel flying to Vietnam aboard defendant's aircraft, which had been chartered by the United States Air Force. They were given their plane tickets at the foot of the boarding ramp, each ticket containing notice that the carrier's liability was limited in accordance with the Warsaw Convention.[1] The aircraft disappeared en route. The district court determined that the 8300 dollars liability limit per person, established by the Convention, was applicable.[2] Plaintiffs appealed, maintaining that there had not been adequate delivery of the tickets for the Convention limitation to be invoked.[3] On appeal to the United States Court of Appeals for the Ninth Circuit, *held*, reversed. Where a ticket is not delivered in sufficient time to afford the passenger an opportunity to take self-protective measures, there is not adequate delivery as required by the Warsaw Convention. *Warren v. Flying Tiger Air Lines, Inc.*, 352 F.2d 494 (9th Cir. 1965).

In 1934, the United States signed the Warsaw Convention, which limits liability of air carriers to approximately 8300 dollars per passenger for injury or death on international flights except where willful negligence can be proved.[4] In exchange for this limitation of liability the Convention granted the passenger (1) a rebuttable presumption of the carrier's negligence[5] and (2) a choice of four possible forums

1. Convention for the Unification of Certain Rules Relating to International Transportation by Air [Hereinafter cited as the Warsaw Convention], adherence advised by United States Senate on June 15, 1934; adherence declared on June 27, 1934; proclaimed October 29, 1934, 49 Stat. 3000, 3013, 3015, 3019, 3020, 3021, 3025, T.S. No. 876.

2. Warren v. Flying Tiger Line, Inc., 234 F. Supp. 223 (N.D. Calif. 1965).

3. Warsaw Convention, art. 3(2), 49 Stat. 3015, provides: "Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

4. Warsaw Convention, art. 22(1), 49 Stat. 3019, states: "In the carriage of passengers the liability of the carrier toward each passenger is limited to the sum of 125,000 francs."

5. Warsaw Convention, arts. 17, 20, & 21 provide: art. 17, "The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." Article 20, "The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him and them to take such measures." Article 21 provides the carrier the defense of contributory negligence.

in which to bring his action.[6] The burden was thus shifted to the carrier to disprove its negligence. Consequently the passenger no longer had to show the applicability of res ipsa loquitur in those states where such a doctrine was available; in jurisdictions where, prior to the Convention, res ipsa loquitur was not applicable to aviation accidents the passenger was given the presumption of negligence.[7] At the same time, the choice of forum provision usually made a remedy available at minimum expense. Also, the 8300 dollars liability limit benefited passengers in many jurisdictions where national limits on liability would have been substantially lower.[8] By this balancing of interests of passengers, air carriers, and other nations, it was hoped that a degree of uniformity could be achieved in international air law, that the risk of loss could be more equitably apportioned, and that excessive judgments which would thwart the growth of the then infant air transport industry could be avoided.[9]

In the United States, largely because of the high standard of living, the limitation of liability to 8300 dollars has spawned a movement either to raise substantially the limit or to withdraw from

6. Warsaw Convention, art. 28(1), 49 Stat. 3020. "An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court having jurisdiction where the carrier has his domicile or has its principal place of business, or has an establishment by which the contract has been made, or before the court having jurisdiction at the place of destination."

7. In 1934, the doctrine of res ipsa loquitur was not widely available. Since that time it has become accepted in practically all common law jurisdictions. However, there has been a lack of uniformity in the amount of evidence required to make the doctrine applicable and in the determination of the effect of the doctrine. In aviation cases it has been said that reliance on res ipsa loquitur is an extremely uncertain route to recovery where the case is to go to a jury. (One study revealed that where there was reliance upon res ipsa, 22 out of 24 verdicts were returned for defendants.) see McLarty, *Res Ispa Loquitur in Aviation Passenger Litigation,* 37 VA. L. REV. 55 (1957); Sand, *Limitation of Liability and Passenger's Accident Compensation Under the Warsaw Convention,* 11 AM. J. COMP. L. 21, 33 n.16 (1962).

8. This reason has been advanced as a rationale for continued adherence to the Convention. However, it has also been stated that there might be many exceptions to national limitations, or that foreign courts applying the law of a forum might refuse to accept these national limits as part of the applicable law. See Lissitzyn, *The Warsaw Convention Today,* 56TH ANN. PROC. AM. SOC. OF INT. LAW, 115, 118 (1962).

9. Several other rationales for the limitation of liability have been suggested. These are collected and discussed in DRION, LIMITATION OF LIABILITY IN INTERNATIONAL AIR LAW 12-43 (1954). They include the following: (a) analogy to maritime law with its global limitation of the shipowner's liability; (b) protection of a financially weak industry; (c) catastrophical risks should not be borne by aviation alone; (d) necessity of carriers or operators being able to insure against these risks; (e) possibility for the potential claimants to take insurance themselves; (f) limitation of liability as a counterpart to the aggravated system of liability imposed upon the carrier and operator (*quid pro quo*); (g) avoidance of litigation by facilitation of quick settlements; (h) unification of the law with respect to the amount of damages to be paid. DRION, *op. cit. supra* at 12-13.

the Convention.[10] It is argued that this limit is unfair to the passenger since the airline industry is now well-developed and can avoid irreparable injury from large judgments through proper insurance. Indeed, as a result of pressure from this country, the Warsaw signatories met at the Hague in 1955 where an amendment was proposed which would have doubled the liability limit.[11] However, the Hague Protocol also proposed that the standard of proof of wilful negligence be raised, making it more difficult to avoid the limitation of liability.[12] The United States, still displeased with these limits and conditions, has now served notice of its intent to withdraw from the Convention, effective May 15, 1966.[13] However, some writers maintain that the advantages granted in the presumption of negligence and choice of forum provisions outweigh the disadvantage of the low liability limit, especially since the passenger can readily avoid the harsh impact of this limit by obtaining flight insurance at any airport.[14]

It is in the context of dissatisfaction with the low liability limit that American courts have defined "delivery" for purposes of the Convention. The Convention provides that in order for the carrier to avail itself of the liability limit, it must not "accept a passenger without a passenger ticket having been delivered."[15] The ticket must contain a statement that the transportation is subject to the rules

10. Lissitzyn, *supra* note 8, at 115; Calkins, *Hiking the Limits of Liability at the* HAGUE, 56TH ANN. PROC. AM. SOC. INT. LAW 120-21 (1962).

11. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air [hereinafter cited as the Hague Protocol], concluded at the Hague on Sept. 28, 1955, International Civil Aviation Organization, Doc. 7632, 2 AV. L. REP. 27,101, 27,104. The United States has not ratified the Protocol, and is not expected to. For comments on the Protocol and its history, see Calkins, *supra* note 10; Forrest, *Carriage by Air: The Hague Protocol,* 10 INT'L & COMP. L.Q. 726 (1961).

12. At present the Warsaw Convention, art. 25(1), reads as follows: "The carrier shall not be entitled to . . . limit his liability, if the damage is caused by his wilful misconduct (literally: his intentional misconduct or such fault on his part as . . . is considered to be equivalent to intentional misconduct)." The Hague Protocol would change this to read: "The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result . . . ." Thus, the Protocol would impose a more definite and higher standard of proof on the plaintiff in order to avoid the limited liability.

13. N.Y. Times, Nov. 16, 1965, p. 94. For a recent article discussing and approving this action see Kreindler, *Denunciation of the Warsaw Convention,* 31 J. AIR L. & COM. 291 (1965).

14. Sand, *supra* note 7. *Cf.* DRION, *op. cit. supra* note 9, at 42, where he states that the only sound rationales for the limitation of liability in case of injury or death of a passenger are (1) "the better position of the passenger in insuring risk of his death or injury in excess of the average passenger accident risk, and (2) reduction of litigation by offering an easy basis for settlement."

15. Warsaw Convention, art. 3(2), 49 Stat. 3015.

relating to liability established by the Convention.[16] *Ross v. Pan American World Airways*,[17] one of the two cases dealing with delivery, held that the ticket was delivered when given either to a person with implied authority to act for the passenger, or to one whose acts are ratified by the passenger's boarding the plane after seeing the ticket.[18] Thus the court employed an agency principle to resolve the issue of delivery. In *Mertens v. Flying Tiger Lines, Inc.*,[19] the court adopted a functional approach by requiring as a prerequisite for valid delivery that the passenger have an opportunity to take self-protective measures once he has seen his ticket advising him of the limited liability.[20] The court reasoned that by use of the word "accepted" in the Convention, the signors intended to set such limits on "delivery" as would afford the passenger an opportunity to secure self protection after he had read the ticket. Otherwise, delivery would be meaningless.

In the instant case the court followed the *Mertens* decision. The function of the delivery requirement is to apprise passengers of the carrier's limited liability so that they may take self-protective measures. The court found that the tickets were delivered too late for this function to be fulfilled and thus the carrier had accepted a passenger to whom a ticket had not been effectively delivered.[21] By the terms of the Convention, then, the carrier was not entitled to limited liability.[22]

A lack of any clear manifestation of intent by the framers[23] has permitted the court, in this case, to place its own construction on the word "delivery"—a construction which clearly reflects the national animosity toward the low limitation upon liability. Similar construc-

16. Warsaw Convention, art. 3(1)(e), 49 Stat. 3015, states: "For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following: . . . (e) A statement that the transportation is subject to the rules relating to liability established by this convention."

17. 299 N.Y. 88, 85 N.E.2d 880 (1949).

18. 63 HARV. L. REV. 692 (1949).

19. 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

20. *Id.* at 857.

21. A tinge of sympathy may be felt for the defendant air carrier at this point. In the litigation of the *Mertens* case, the defendants had learned that delivery in the air was probably not sufficient, and had carefully instructed their employees to let no one aboard the aircraft without first giving them a boarding ticket.

22. Warsaw Convention, art. 3(2), 49 Stat. 3015.

23. The problem of whether delivery is to contain some element of notice is inherent in the language of art. 3 of the Convention. Art. 3 (2) provides: "The absence, irregularity, or loss of the passenger ticket shall not affect the existenee or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability." Warsaw Convention, art. 3(2).

tions by courts of all the Convention signatories would lead to confusion in an area where uniformity was an express goal.[24] Furthermore, it seems that a case by case interpretation of the Convention's terms to fit American notions of fairness is clearly an undesirable approach.[25] To the American plaintiff the Convention has lost many of the advantages which recommended it in 1934. Both the choice of forum provisions and the presumption of the carrier's negligence have become less important with the development of the law. It is now likely that most plaintiffs would be entitled to an American forum under the "minimal contacts" tests of *International Shoe*.[26] Also, the fact that res ipsa loquitur has now been accepted in all common law jurisdictions lessens the value of the Convention to American plaintiffs. The Convention's limit on liability may also be criticized on the basic ground that such uniformity in the amount of damages is not desirable because of diverse standards of living among the nations. For example, compensatory damages for the loss of life of the average American school teacher would be very different from compensatory damages for the loss of life of the average Indian school teacher. This difference arises solely from the standard of living and social values of the two countries. However, it still appears that uniformity in the standard of care and ticketing procedures is a desirable goal in international travel, and that the only real objection to the Convention is the low liability limit.[27] Since this problem could be alleviated in a large number of cases by enactment of implementing legislation requiring compulsory flight insurance for American air carriers on international flights, it is hoped that the United States might reconsider its withdrawal from the Convention.[28]

24. Though uniformity may be desired in procedures of claimants and in the determination of liability of the carrier, it has been submitted that uniformity in the amount of damages may not be desirable because of the diverse economic and social characteristics of the different nations. DRION, *op. cit. supra* note 9, at 42.

25. Such an approach does nothing to ameliorate other equally "hard cases" where all the technical requirements of the Convention have been met. Surely, the average passenger does not read the fine print on his ticket and then either purchase insurance or refuse to fly.

26. International Shoe Co. v. Washington, 326 U.S. 310 (1943); Berner v. United Airlines, Inc., 3 App. Div. 2d 9, 157 N.Y.S.2d 884 (1st Dep't 1956), *aff'd*, 2 N.Y.2d 1003, 147 N.E.2d 732, 170 N.Y.S.2d 340 (1957); Goodman v. Pan American World Airways, 1 Misc. 2d 959, 148 N.Y.S.2d 353 (Sup. Ct.), *aff'd*, 2 App. Div. 2d 707, 153 N.Y.S.2d 600 (2d Dep't), *appeal denied*, 2 App. Div. 2d 781, 154 N.Y.S.2d 839 (2d Dep't 1956).

27. It should be noted that although the limit might be raised to a level consonant with the standard of living in the United States, this would not mean that all recoveries would automatically be the upper limit. Rather it would remain the function of the court to determine actual damages and deserved compensation in each case. The airlines, however, argue that any set limit tends to become the standard recovery and thus oppose the substantial raising of the limit. Kreindler, *supra* note 13, at 292.

28. For expansion and delineation of this idea see Sand, *supra* note 7.