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RECENT CASE COMMENTS

Attorneys—Violation of Canon 27 by Encouraging or Permitting Favorable Publicity

Canon 27¹ of the Canons of Professional Ethics condemns advertising, both direct and indirect, by lawyers. The Canon expresses the policy that the legal profession should disavow the commercial and sometimes sensational methods of attracting patronage employed by businesses and trades.² A lawyer is an officer of the court, and the use of commercial advertising is incompatible with his position of dignity and public trust.³ In addition to the necessity of preserving the dignity of the law as a profession, the usual reasons given for prohibiting advertising by lawyers are: (1) that advertisements, like other forms of solicitation, unless strictly confined, are likely to stir up litigation; (2) that incompetent attorneys might publish attractive advertisements and thereby deceive unknowing members of the public; and (3) that lawyers would be tempted to hold out unfounded promises of success in order to secure clients.⁴

Canon 27 condemns advertising, not publicity. Some publicity is necessary and helpful to individual lawyers and to the legal profession as a whole. Laymen must somehow be informed of the presence of the lawyer in the community and of his skill and integrity; otherwise neither the lawyer nor the layman can benefit from the former's specialized training and studies. The lay public demands and deserves information concerning what lawyers do and how they do it. If such information is not forthcoming, the profession stands in danger of being labeled a closed society of necromancers engaged in the practice of a black and occult art. Publicity—heaping measures of it—is essential to the lawyer who is a candidate for an elective political office. A

1. The first paragraph of Canon 27 states: "It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper." A.B.A. CANONS OF PROFESSIONAL ETHICS, No. 27 (1908, amended 1951).

2. *In re Rothman*, 12 N.J. 528, 549-50, 97 A.2d 621, 632-33 (1953).

3. *Ibid.*

4. Hewitt, *Advertising by Lawyers*, 15 A.B.A.J. 116 (1929) (letter to the editor).

lawyer receives publicity through participation in social and fraternal organizations,⁵ and through public service and successful representation of clients. Such publicity is proper and will probably result in the lawyer's gaining new clients.⁶ But it is improper for the lawyer to augment this normal publicity by broadcasting his successes through news media and popular publications.⁷ The legal profession is thus faced with a difficult and troublesome question: When does publicity, some of which is necessary and helpful, become "advertising," any of which is undesirable and subjects the offending lawyer to the liability of censure by his peers? It is to this matter that Canon 27 is directed.

Two recent decisions, both applying Canon 27, serve to point up the difficulties involved in this question. In *State ex rel. The Florida Bar v. Nichols*,⁸ a newspaper article was published concerning the respondent, a Florida lawyer. The article covered generally the respondent's life and career as a specialist in personal injury cases. Most of the facts in the article were gathered by a newswriter in an interview with the respondent. The Supreme Court of Florida *held*: the article was not "self-laudation" within the meaning of Canon 27 and did not constitute indirect advertising.

In the second decision, *In the Matter of Connelly*,⁹ *Life* magazine published an article about respondents' New York law firm. The article gave brief descriptions of the partners, their specialties, their incomes, and cases upon which they were working. The article described the organization of the firm's corporate practice and some of the interests that had been or were being handled by it. The information for the article came from interviews with the partners and associates of the firm. The Appellate Division of the Supreme Court of New York *held*: the article was "self-laudation" within the meaning of Canon 27 and constituted indirect advertising by the firm.

The Florida decision¹⁰ must be regarded as either a failure to recognize the full proscriptive force of Canon 27 or a refusal to make an unqualified, undiluted application of the Canon to the article under consideration. The article did mention the success of the respondent's firm and the skill and dispatch with which it handled personal injury cases. The court, however, viewing the article in its entirety, concluded that it did not offend Canon 27. The decision appears to be based upon the following points: (1) the article was primarily a news

5. Note, 7 VAND. L. REV. 677, 679 (1954).

6. DRINKER, LEGAL ETHICS 218 (1953).

7. *Ibid.*

8. 151 So. 2d 257 (Fla. 1963).

9. 18 App. Div. 2d 466, 240 N.Y.S.2d 126 (1963).

10. *State ex rel. The Florida Bar v. Nichols*, *supra* note 8.

item and was published only once; (2) the article had a biographical tenor; and (3) the story was solicited by the newspaper, not volunteered by the lawyer.¹¹ The court also stated as a reason for not censoring the article that it contained subjects upon which respondent had lectured to bar associations and professional groups.¹² A strong dissent¹³ stated that the respondent had a duty to edit the final story and to remove any statements that might be construed as advertising. The dissent emphasized that the article contained remarks indicating the size and success of respondent's firm, that such statements were self-laudatory, and that the mere furnishing of such statements to the press with the knowledge that they were to be published, whether or not the statements were solicited, constituted a violation of Canon 27.

The New York court, in the *Connelly* case,¹⁴ based its holding that the *Life* magazine article violated Canon 27 on the following points: (1) the article discussed cases in which the firm was involved and the manner of their conduct; (2) the article cited the fees the firm would receive from handling certain cases; (3) the article gave laudatory descriptions of the firm's partners and mentioned their incomes and the "blue-chip" status of the firm; and (4) the tone of the article as a whole publicized the magnitude of the interests handled by the firm and the special legal skills of the members of the firm.

Existing materials and opinions on the problem of indirect advertising by means of newspaper and magazine articles appear to support the New York court. One of the leading statements on this question is Opinion No. 806 of the Committee on Professional Ethics of the Association of the Bar of the City of New York.¹⁵ The committee states that a lawyer should not encourage laudatory statements concerning his professional attainments, nor should he collaborate in their preparation. A lawyer may, however, furnish to the press

11. Canon 27 condemns self-laudation. It does not qualify this condemnation by stating that such self-laudation is rendered innocuous when it is bound up in newsworthy or biographical material.

12. This is fallacious reasoning; there are many subjects that can properly be discussed within professional circles that would be highly improper if presented to a lay audience. See Opinion No. 158 of the American Bar Association Committee on Ethics and Grievances approving the practice of lawyers' names appearing in law journals in conjunction with legal matters of current interest. The opinion concludes: "This is not the case of lawyers seeking to have their names extolled in laudatory accounts of their achievements at the Bar, to advertise their attainments and 'sell their goods'—a practice which offends *Canon 27* and justly merits the condemnation of the profession." OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES OF A.B.A., No. 158 (1936) [hereinafter cited as A.B.A. OPINIONS].

13. 151 So. 2d 257, 262 (Fla. 1963).

14. 18 App. Div. 2d 466, 240 N.Y.S.2d 126 (1963).

15. OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, No. 806 (1955).

personal and professional data of a non-privileged nature concerning his career. He should see to it that the article is in good taste and maintains a dignified tone. This opinion is of little help. It is to be presumed that self-laudatory statements constituting indirect advertising will be wanting in dignity and tastefulness, but the standards of dignity and tastefulness are too vague and indefinite to serve as proper guide-lines for the entire American bar. Such standards vary from region to region, from state to state, and even among members of the same city bar association. Another view of the matter is put forth in Opinion No. 423 of the Committee on Professional Ethics of the New York County Lawyer's Association.¹⁶ This opinion states that it would be improper for a lawyer actively engaged in practice to retain public relations counsel to secure press publicity for himself, even though no mention is made of his legal or professional activities. A more recent opinion explaining Canon 27 states in part: "When a lawyer himself writes a book, article or script, the material should not contain statements which praise or emphasize the lawyer's ability or skills, or statements which describe the lawyer in laudatory terms or as having prominent clients or special success in any branch of the law."¹⁷ The opinion goes on to say that what a lawyer cannot properly do himself, he should not allow or encourage others to do for him.

Two opinions by the Committee on Professional Ethics and Grievances of the American Bar Association indicate the chariness with which that body regards newspaper comments about lawyers. The question bringing forth Opinion No. 42¹⁸ concerned the propriety of certain articles and pictures about lawyers specializing in divorce actions. These articles usually contained laudatory statements about the lawyers involved. The Committee replied that conduct which brings a lawyer and his qualifications as a specialist into the limelight is a form of indirect advertising and is condemned by Canon 27. Opinion No. 140,¹⁹ in reply to a question concerning the propriety of a news story and photograph of an attorney representing an unwed mother, stated that it is not professionally proper for a lawyer to furnish or acquiesce in newspaper accounts of causes in which he is or has been engaged. A laudatory newspaper or magazine article concerning a lawyer's professional life is, of course, not offensive to the Canon if the lawyer took no part in the preparation of the article.

Newspaper comments by lawyers are further circumscribed by

16. OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION, No. 423 (1953).

17. OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, No. 859 (1963).

18. A.B.A. OPINIONS, No. 42 (1931).

19. A.B.A. OPINIONS, No. 140 (1935).

Canon 20,²⁰ limiting comment upon pending or anticipated litigation, and Canon 37,²¹ prohibiting the disclosure of confidences arising from the lawyer-client relationship. Another restraint upon the publicity allowable to lawyers, though one extraneous to any canon or opinion, is the attitude of the clients with whom the lawyer usually deals. If the lawyer's usual clients are conservative business firms or persons such as those involved in trust and estate work, they will expect him to eschew any self-laudatory or flamboyant publicity, especially where their interests are concerned. If, on the other hand, the lawyer's clientele is made up of persons who desire their lawyer to manifest the qualities of dash, flair, and showmanship, then he will not feel so constrained to refrain from self-laudatory publicity as will his more conservatively oriented colleague.

English lawyers have attempted to meet the problem of indirect advertising by applying one rule to solicitors and another to barristers. The rule applicable to solicitors is that if the press interview is inspired by the solicitor, it is objectionable per se. On the other hand, if the solicitor is engaged in newsworthy litigation, there is felt to be no harm in having his name mentioned in connection with such litigation or, with the client's consent, in his giving information about the litigation. Care must be taken, however, to see that the article does not constitute an advertisement for the solicitor.²² The rule applicable to barristers can be, and is, stricter, probably because barristers do not look directly to the public for their clients but are retained by solicitors and hence do not really suffer from the increased restraints on the general publicity available to them. A barrister may not cause or permit to be published any particulars concerning his life, practice, or earnings at the bar. He may not discuss any case or other legal matter in which he is or has been engaged except in legal periodicals. If he becomes a candidate for Parliament or for a local office, he may not, in his capacity as a candidate, answer questions put to him by prospective constituents concerning legal matters. A non-practicing barrister may write about cases in which he was engaged, using a refined discretion as to the propriety of the disclosures and being careful not to betray confidences.²³

Canon 27 as interpreted and applied in the *Connelly*²⁴ case and supplemented by the above mentioned opinions markedly restricts the material a lawyer can properly furnish in aiding the preparation of a

20. A.B.A. CANONS OF PROFESSIONAL ETHICS, No. 20 (1908).

21. A.B.A. CANONS OF PROFESSIONAL ETHICS, No. 37 (1928, amended 1937).

22. LUND, A GUIDE TO THE PROFESSIONAL CONDUCT AND ETIQUETTE OF SOLICITORS 17 (1960).

23. 3 HALSBURY'S LAWS OF ENGLAND, *Barristers* § 3 (3d ed. 1953).

24. 18 App. Div. 2d 466, 240 N.Y.S.2d 126 (1963).

newspaper or magazine article about his professional career. How severe are the restrictions? What can a lawyer safely say? The Canon expressly prohibits two things: furnishing information concerning the manner in which a case is conducted and furnishing information relating to the magnitude of the interest involved in a case. The two remaining prohibitions, the one against the furnishing of information discussing the importance of the lawyer's position and the one against "other like self-laudation," are not sufficiently specific to give adequate guidance to interested lawyers. The Canon itself should not provide this specificity; it should remain a broad principle against public self-laudation. Some specific guide-lines, however, must be laid down. Perhaps the best way to formulate these guide-lines would be to encourage state and local bar associations to address specific questions concerning permissible press publicity to the Committee on Ethics and Grievances and thereby elicit advisory opinions defining the scope of the Canon. All possible situations cannot, of course, be covered by advisory opinions, but there are a number of questions the answers to which would do much toward clarifying Canon 27: Of how much importance is the type of publication in which the article appears? May a lawyer furnish the same information for publication in a popular article that he may furnish for publication in an approved law list? Is local custom to be taken into consideration? What if the comments about the lawyer are only one part of an article about several lawyers or firms? Should the Canon make an exception for lawyers who are candidates for the offices of district attorney or attorney-general and whose legal abilities thus affect their qualifications for office? These questions are not exhaustive, but they are illustrative of the large penumbral areas of doubt that must be illuminated before lawyers can adequately advise themselves as to what Canon 27 prohibits in the way of unprofessional conduct.

Constitutional Law—Dismissal of Criminal Charges Because of Deprivation of Right to Effective Counsel by Eavesdropping

Defendant, upon discovering that sheriff's officers had been eavesdropping on his conversations with his attorney,¹ moved to dismiss the

1. Unable to post bail, defendant, on trial on twelve counts of burglary and larceny, was provided a conference room in which to consult with his attorney. The eavesdropping was by means of a tape recorder which had a microphone concealed in the room. "In this case we must assume that information gained by the sheriff was transmitted to

charges against him. The trial court denied the motion,² and defendant was tried and convicted. On appeal to the Supreme Court of Washington, *held*, judgment set aside and charges dismissed. Dismissal of criminal charges is the only effective remedy for eavesdropping by police officers upon private consultations between accused and his attorney, which is prohibited by the tenth amendment to the Washington Constitution and by the sixth amendment to the United States Constitution, as made applicable to the states by the fourteenth amendment. *State v. Cory*, 382 P.2d 1019 (Wash. 1963).

Those guarantees of the Bill of Rights which are "fundamental safeguards of liberty"³ are protected against state invasion by the due process clause of the fourteenth amendment.⁴ The Supreme Court of the United States has held that among these fundamental safeguards is the right of the accused to the aid of counsel in a criminal prosecution.⁵ Although that Court broke away from its own precedent in 1942,⁶ it reaffirmed this constitutionally protected right as applied against the states just three months before the instant case was decided.⁷ Moreover, the right to assistance of counsel has been repeatedly held by both state and federal courts to mean effective assistance,⁸ which includes the right of the accused to consult in

the prosecutor, since the opportunity and the motive were there and the defendant has no way of knowing what was communicated to the prosecutor. It is known that, at the least, he listened to two tapes." *State v. Cory*, 382 P.2d 1019, 1022 n.3 (Wash. 1963).

2. But the trial court did indicate that, on defendant's motion, it would exclude any evidence derived through the eavesdropping. *Id.* at 1020.

3. "Explicitly reeognized to be of this 'fundamental nature' and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedom of speech, press, religion, assembly, association, and petition for redress of grievances. For the same reason, though not always in precisely the same terminology, the Court has made obligatory on the States the Fifth Amendment's command that private property shall not be taken for public use without just compensation, the Fourth Amendment's prohibition of unreasonable searches and seizures, and the Eighth's ban on cruel and unusual punishment." *Gideon v. Wainwright*, 372 U.S. 335, 341-42 (1963).

4. *Powell v. Alabama*, 287 U.S. 45 (1932).

5. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

6. *Betts v. Brady*, 316 U.S. 455 (1942). There it was held that the sixth amendment right to assistance of counsel was not one of the fundamental safeguards which are protected from state infringement by the fourteenth amendment.

7. "We accept *Betts v. Brady's* assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of those fundamental rights." *Gideon v. Wainwright*, *supra* note 3, at 342.

8. Effective assistance of counsel is guaranteed in both federal and state courts by the fifth, sixth, and fourteenth amendments and by many state constitutions and statutes. See, e.g., *Gideon v. Wainwright*, *supra* note 3; *Glasser v. United States*, 315 U.S. 60 (1942); *Powell v. United States*, *supra* note 4; *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951); *Neufield v. United States*, 118 F.2d 375 (D.C. Cir. 1941); *Thomas v. District of Columbia*, 90 F.2d 424 (D.C. Cir. 1937); *People v. Cahon*, 44 Cal. 2d

private with his counsel before and during trial.⁹ These decisions have provided the bases for holdings that the acts of informers¹⁰ and actions of police officers, such as wiretapping¹¹ and illegal searches and seizures,¹² were infringements on defendant's right to counsel, and that the amount of prejudice arising from an infringement is immaterial.¹³ There is also an established line of authority for the proposition that once an accused has retained counsel, even though he is not constitutionally entitled to it, and once his case has proceeded to the immediate pretrial and trial stages, he cannot have effective representation¹⁴ if he is not allowed to confer in private with his attorney.¹⁵ Procedurally, habeas corpus,¹⁶ mandamus,¹⁷ order for new trial,¹⁸ postponement or continuance of the trial,¹⁹ mandatory injunction,²⁰ and dismissal of the charges²¹ have been the remedies available to a defendant whose right to assistance of counsel has been abridged by police authorities. The remedies most frequently granted have been orders for new trial,²² and habeas corpus,²³ both of which afford the state another chance to convict the accused. It appears that only

434, 282 P.2d 905 (1955); *Decker v. State*, 113 Ohio St. 512, 150 N.E. 74 (1925); *State ex rel. Tucker v. Davis*, 9 Okla. Crim. 94, 130 Pac. 962 (1913); *James v. State*, 27 Wyo. 378, 196 Pac. 1045 (1921). For an excellent review of the development of this guarantee see *Powell v. Alabama*, *supra* note 4, at 58-73. For more recent discussion of this precise issue see 21 *FORDHAM L. REV.* 175 (1952); 7 *WYO. L.J.* 44 (1952).

9. *People v. Mattson*, 51 Cal. 2d 777, 336 P.2d 937 (1959); *People v. Sarazzawski*, 27 Cal. 2d 7, 161 P.2d 934 (1945); *People v. Boyden*, 116 Cal. App. 2d 278, 253 P.2d 773 (1953).

10. *Caldwell v. United States*, 205 F.2d 879 (D.C. Cir. 1953); *Fusco v. Moses*, 304 N.Y. 424, 107 N.E.2d 581 (1952).

11. *Benanti v. United States*, 355 U.S. 96 (1957); *Coplon v. United States*, *supra* note 8.

12. *Mapp v. Ohio*, 367 U.S. 643 (1961); *McNabb v. United States*, 318 U.S. 332 (1943); *People v. Cahan*, *supra* note 8.

13. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States*, *supra* note 8, at 76.

14. See note 8 *supra*.

15. See note 9 *supra*.

16. *McBee v. Bomar*, 296 F.2d 235 (6th Cir. 1961).

17. *State ex rel. Burgess v. Riseley*, 13 Abb. N. Cas. 186, 1 N.Y. Crim. 492 (1883).

18. *State ex rel. Tucker v. Davis*, *supra* note 8; *Turner v. State*, 91 Tex. Crim. 627, 241 S.W. 162 (1922).

19. *Mays v. Commonwealth*, 25 Ky. L. Rep. 646, 76 S.W. 162 (1903).

20. *Thomas v. Mills*, 117 Ohio St. 114, 157 N.E. 488 (1927).

21. *Fusco v. Moses*, *supra* note 10. In *Spano v. New York*, 360 U.S. 315 (1959), the conviction was reversed and the case dismissed when police illegally coerced a confession from the defendant who was not allowed to consult with counsel. The coerced confession, not the denial of counsel, however, was the main basis of the decision, although Mr. Justice Douglas felt that the denial of representation was the more important ground for the decision. "They in effect deny him effective representation by counsel." *Id.* at 325 (concurring opinion).

22. *E.g.*, *Thomas v. District of Columbia*, *supra* note 8.

23. *E.g.*, *Yung v. Coleman*, 5 F. Supp. 702 (D. Idaho 1934).

one appellate court has reversed a conviction without remand for a new trial.²⁴ The vast majority of the courts, however, upon finding that a defendant has been deprived of his right to the assistance of counsel under either the federal or a state constitution, send the case back for retrial.

In the present case the court held that the granting of a new trial was an inadequate remedy for the deprivation of the right to counsel.²⁵ Although the opinion is short the decision seems to have been based on a desire both to prevent prejudice to defendant's right to counsel and to discipline the state authorities. The court thought that if the prosecution received information which helped it in the preparation of the first trial, it would be helped to the same extent in a second proceeding.²⁶ Thus the defendant's right would be as seriously prejudiced in the second trial as in the first. Further, the granting of a new trial would not be a very effective deterrent to obtaining evidence illegally, since the authorities would have this evidence readily available to them. The court approvingly quoted Judge Traynor, who said, in a case involving an illegal search and seizure, "it is morally incongruous for the state to flout constitutional rights and at the same time demand that its citizens observe the law."²⁷

The instant decision demonstrates a praiseworthy attempt on the part of the Washington court to give a more effective sanction to the constitutionally protected right to effective counsel. Nevertheless, a number of problems are raised by the brevity of the opinion—problems which will require that considerable effort be spent by the judiciary in coming to the best decision in future cases. It was noted that the decision had two bases: prevention of prejudice and discipline of the authorities. Is either of these alone enough to require the result reached in this case, or are both necessary? Pressing deeper, just

24. *Fusco v. Moses*, *supra* note 10. There an informer, fearful that his status as such would be revealed if he did not accompany his fellow employees to their attorney's office, attended the privileged conference. The court held that the employees were deprived of their right of effective representation, with the result that the administrative determination against them was annulled, and that therefore they should be reinstated in their jobs.

"The right accorded to the petitioners to be represented by counsel at hearings upon charges filed against them . . . involved more than the mere privilege of being accompanied by an attorney at the hearings. It included the right to *private* consultation with the attorney of their choice free from the presence of an informer . . ." 304 N.Y. at 433, 107 N.E.2d at 585. (Emphasis added.)

25. "It is our conclusion that the defendant is correct when he says that the shocking and unpardonable conduct of the sheriff's officers, in eavesdropping upon the private consultations between the defendant and his attorney, and thus depriving him of the right to effective counsel, vitiates the whole proceeding. The judgment and sentence must be set aside and the charges dismissed." 382 P.2d at 1023.

26. This was under the assumption that the sheriff conveys the information to the prosecuting attorney. See note 1 *supra*.

27. *People v. Cahan*, *supra* note 8, at 445, 282 P.2d at 911.

what is the test for deciding whether there was prejudice to the defendant? Is it whether he *had* a fair trial, or that he *might not get* a fair (second) trial? Or should it be that he *must never be able to get* a fair trial in order to secure a dismissal? The instant case seems to say that when a defendant has been prevented from getting a fair trial in the first instance, probably he will never get a fair trial, and thus it is senseless to keep trying him.²⁸ Perhaps a firm statement that this is the direction in which the courts are or should be heading would be profitable in future cases.

Another basic question that must be answered is, what is the test for determining when, and by what method, the activities of the authorities should be controlled? Should policemen be punished? It is questionable whether a dismissal of the case is an effective sanction. Would it not be better to hold the possibility of a jail term for contempt of the legal process over the heads of would-be offenders? In other words, would not a better solution than the subjection of society to a proved (but, unfortunately, by illegal means) criminal be to discipline individual offenders, who were trying to protect society by attempting to get the criminal off the streets?²⁹ The instant case, while imposing on the state the former sanction, indicates that the latter method of deterrence is that which is desired. Thus the court is inflicting on the public a punishment that rightfully should be given to private offenders. The question really boils down to one of what to do with a defendant whose rights have been infringed, taken in conjunction with that of what to do with those who have deprived him of these rights. What about the other remedies mentioned above? Why would it not be just as good to allow this defendant to be sent back for retrial while *at the same time* punishing wrongdoing policemen individually? Or must the defendant's constitutional rights be protected no matter what the cost to society? It seems that if the courts are to dismiss charges in these cases,³⁰ they should also see that the offending officers of the law are properly disciplined.

28. Compare this result with that obtained in cases involving an illegal search and seizure, in which a retrial is not precluded per se; the evidence thus acquired and other evidence obtained therefrom is simply excluded. Whether or not there will be a retrial in these cases depends upon the importance to the government's case of the excluded evidence. See *Mapp v. Ohio*, *supra* note 12.

29. On the other hand, could such discipline be effectively administered? Those charged with enforcing it—the police—are those to whom it applies.

30. Including, naturally, cases of illegal searches and seizures, police brutality, illegal detention, third degree, and wiretapping, as well as eavesdropping.

Criminal Law—Credit Card Invoice as a “Security” under National Stolen Property Act

Defendant, fraudulently using an oil company credit card, forged the cardowner's name on an invoice which had been imprinted by using the card. In the course of collection, this invoice was shipped across state lines to the main office of the oil company. Defendant was prosecuted in a federal district court for transporting a security across state lines with fraudulent intent.¹ Defendant pleaded not guilty, and the case was tried under an agreed statement of facts. The sole issue for the court's determination was whether the invoice was an “evidence of indebtedness” and therefore a “security”² within the meaning of the National Stolen Property Act.³ *Held*, that an invoice recording a credit card transaction is a security within the meaning of the National Stolen Property Act. *United States v. Mingo*, 217 F. Supp. 729 (M.D. Fla. 1963).

A number of cases turning on the issue of whether a credit invoice is a security have arisen within the past few years and have created a difficult problem of construing the word “security” within the context of the National Stolen Property Act. Earlier cases under this act dealt with such instruments as checks,⁴ letters of credit,⁵ or traveler's checks,⁶ which are specifically listed in the definition of a security.⁷ One of the first cases to hold that a credit card invoice is a security was *Williams v. United States*.⁸ Here, as in other cases adopting this rule,⁹ the court relied on the plain words of the act that any “evidence of indebtedness” is a “security” and ruled that since a credit invoice records the transaction from which a debt arises, it is an evidence of

1. The act under which defendant was prosecuted reads as follows: “Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamp, knowing the same to have been falsely made, forged, altered, or counterfeited . . . shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.” 18 U.S.C. § 2314 (1958), as amended, 18 U.S.C. § 2314 (Supp. IV, 1963).

2. “‘Securities’ includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness . . . or, in general, any instrument commonly known as a ‘security’” 18 U.S.C. § 2311 (1958), as amended, 18 U.S.C. § 2311 (Supp. IV, 1963).

3. 18 U.S.C. §§ 2311-17 (1958), as amended, 18 U.S.C. §§ 2311-18 (Supp. IV, 1963).

4. See, *e.g.*, *Caldwell v. United States*, 160 F.2d 371 (8th Cir. 1947).

5. See, *e.g.*, *Pines v. United States*, 123 F.2d 825 (8th Cir. 1941).

6. *Ibid.*

7. See note 2 *supra*.

8. 192 F. Supp. 97 (S.D. Cal. 1961).

9. See, *e.g.*, *United States v. Rhea*, 199 F. Supp. 301 (W.D. Ark. 1961). There the prosecution was based on defendant's transporting the credit card, which was held to be an instrument used for making fraudulent securities. A holding that the invoices made were securities was essential to a conviction.

indebtedness. The courts which have dealt with this issue are, however, sharply divided, and the majority rule seems to be that an invoice from a credit card transaction is not a security within the meaning and purpose of the act, even though it is an evidence of indebtedness within a broad interpretation of that phrase. In *United States v. Jones*¹⁰ the court reasoned that a credit card sales slip is essentially unlike any of the other instruments¹¹ which have been held to be securities in prosecutions under the act.¹² The court continued that the act's purpose of discouraging the interstate circulation of fraudulent instruments does not apply to cases in which the instrument crossing state lines is not the sort of paper which, by itself, can be used to injure an innocent party.¹³ Other courts have balked at using the word "security" in a sense which varies so greatly from its popular meaning.¹⁴ The fact that the act itself defines the word will probably defeat an argument that the defendant was denied due process of law by reason of the uncertainty of the statute. However, the use of the phrase "or in general any instrument *commonly* known as a 'security'"¹⁵ suggests that Congress in using "any . . . evidence of indebtedness" may not in fact have meant *any* evidence of indebtedness. That is, the list of instruments stated in the definition of "security" may have been intended as an elaboration of the popular meaning of that term rather than an extension of that meaning. Although it has been suggested that a distinction could be made on the basis of the type of contract under which a credit card is held and the resulting negotiability or assignability of the invoice itself,¹⁶ the cases

10. 182 F. Supp. 146 (W.D. Mo. 1960).

11. See notes 4-6 *supra*.

12. "No authority is cited by the parties, and independent research has failed to disclose any document held to be a 'security' within the ambit of 2311, *supra*, which has not in some general or specific manner called for the payment, delivery or promise to pay or deliver money or property to the holder thereof, and as to which some innocent person would be tempted to act thereon in its falsely made or forged character." 182 F. Supp. at 150.

13. The *Jones* case was cited with approval in *Barack v. United States*, 317 F.2d 619 (9th Cir. 1963). Although the *Barack* court does not absolutely preclude the possibility of some credit invoices being securities, it lays on the prosecution the burden of proving that there exist exceptional circumstances or contractual obligations which would differentiate the instrument in question from normal credit invoices. In reversing the defendant's conviction, the court said: "Neither the face of the instrument nor any evidence extrinsic thereto, whether or not within the knowledge of Barack, establishes that these charge vouchers were intended as commercial instruments which, as pieces of paper, have value to the holder, giving assurance to him that the papers' very existence indicates that the debts there evidenced continue to exist." 317 F.2d at 623.

14. See, *e.g.*, *United States v. Young*, 210 F. Supp. 640 (W.D. Mo. 1962). The court there was especially unwilling to apply an unusual definition in light of the rule that penal statutes are to be strictly construed.

15. See note 2 *supra*. (Emphasis added.)

16. See *Lewis v. United States*, 301 F.2d 787 (10th Cir. 1962). In upholding a conviction, the court held that it is possible for a credit invoice to be a security in

have not been decided on that basis and no court faced with the problem of deciding the nature of a particular invoice has made this distinction. The authority on this issue, therefore, remains hopelessly divided.¹⁷

The court in the instant case follows the reasoning of the earlier cases which held that a credit card invoice is a security. After stating in a dictum that the card itself is not a security,¹⁸ the court held that the invoice is more than a mere record of the transaction and constitutes an acknowledgment of the debt by the holder of the card. The court placed great emphasis on the fact that a credit card invoice is the only record of a credit card transaction and hence is the sole evidence of indebtedness. The only issue dealt with in this case was whether the invoice was a security, the court assuming that the requirements of transportation by the defendant¹⁹ and fraudulent intent²⁰ were established.

certain circumstances. Since the defendant had failed to object to the prosecution's pleading that the credit invoice was a security, the court did not need to go beyond this holding in order to affirm the conviction. Although the court did not say what circumstances were required in order to make a credit invoice a security, they may have been thinking of a case in which the invoice itself is assignable and can be the basis of an action.

17. The extent of this split of authority was shown dramatically in the United States District Court for the Southern District of California, where, within two weeks, two different judges handed down conflicting decisions on this issue. Judge Yankwich held that credit invoices are not securities for purposes of the act. *United States v. Fordyce*, 192 F. Supp. 93 (S.D. Cal. 1961). Judge Westover reached the opposite conclusion in *United States v. Williams*, *supra* note 8.

18. "The court has no hesitance to agree with cases holding that a credit card in and of itself is not an evidence of indebtedness . . ." 217 F. Supp. at 731.

19. A difficult problem raised by the holding that credit invoices are securities is the issue of whether a defendant has sufficient knowledge of the workings of the credit agency to justify a decision that he transported the invoice in commerce when the invoice was actually sent by the creditor to the agency's central office. The act has been interpreted to include cases in which the defendant caused the instrument to be transported in commerce rather than transporting it himself. In *United States v. Sheridan*, 329 U.S. 379 (1946), defendant was held to have transported the check for purposes of the act when he cashed it knowing that it would be transported to the drawee bank in another state and when it was in fact transported to that bank. In the case of credit card invoices, however, the defendant may have been ignorant of the fact that the invoice would be transported in commerce. Few courts have faced this issue squarely. In *United States v. Jones*, *supra* note 10, defendant was an employee of the company issuing the card and could be assumed to have actual knowledge of the collection process, but in the majority of cases such an assumption may be unwarranted. This problem seldom arises in traditional prosecutions under the National Stolen Property Act, because in most cases the defendant himself transports the security, and in the case of checks the location of the drawee bank appears on the face of the check.

20. The problem of whether fraudulent intent was involved in the interstate transportation of a security arose in earlier cases dealing with fraudulent checks. In these cases, interstate transportation took place when the check was sent to the drawee for collection. In *Kann v. United States*, 323 U.S. 88 (1944), defendants argued that, since they had already received the cash when the transportation took place, the

The reasoning of the court in the instant case does not eliminate the basic objections raised in *United States v. Jones*.²¹ Since a credit invoice as a practical matter reaches only the collection office and the owner of the card and thus is incapable of being used to defraud an innocent purchaser, the purpose of the act is not served by punishing for the invoice's transportation in commerce. Furthermore, since the invoice is unmarketable, it is difficult to regard it as a security even under the broad terms of the act. In light of the growing number of businesses that use credit cards, some federal regulation of credit card theft may well be necessary, but this is a consideration which is properly left for Congress. The process of expanding the meaning of the word "security" to include a credit card invoice not only exposes the courts to charges of usurping legislative functions but also creates immediate problems which could easily be avoided in an act designed to cope with the matter of credit card theft. These problems arise from the fact that, in jurisdictions following the rule of the instant case, the gravamen of the action is the transportation of the invoice—rather than the credit card itself—across state lines. The conceptual difficulties involved in holding that the accused transported the invoice across state lines and that he did so with fraudulent intent²² are among the problems that would be obviated by basing the action on the transportation of the credit card.²³ Holding the invoice to be a security also raises problems of administering the law. Although a court adopting this rule is able to reach all truly interstate crimes of this nature,²⁴ it is also faced with cases in which the invoice but not the

transportation had not contributed to the success of the scheme and was, therefore, made without fraudulent intent. Although the argument was successful in that case, *United States v. Sheridan*, *supra* note 19, limited *Kann* to its specific facts and gave a broader meaning to the words "fraudulent intent." The thrust of the reasoning in *Sheridan* tends to support the decision in the instant case, since the court holds that the act does not apply solely to the transporting of securities which are still capable of defrauding innocent persons. The *Sheridan* case, however, can be distinguished from the instant case since it deals with the problem of fraudulent intent and not with the issue of whether the instrument is a security at all. Also the check in that case was a type of instrument which could be used to perpetrate a fraud, even though the particular check transported was no longer capable of imposing on an innocent party.

21. See note 10 *supra*.

22. See notes 18 & 19 *supra*.

23. Although the transportation of a stolen credit card across state lines has repeatedly been held not to violate this part of the act, a strong argument can be made that a credit card is a letter of credit and, therefore, a security within the meaning of the act. For an argument that a credit card should be regarded as a letter of credit, see Note, 35 NOTRE DAME LAW. 225 (1960). The insuperable barrier to a prosecution under the present law is not the requirement that the item be a security but the requirement that it be "falsely made, forged, altered, or counterfeited." See note 1 *supra*. Since the credit card need not be altered to permit fraudulent use, its transportation could not be prosecuted even if it were held to be a security.

24. It would be a rare case in which the credit card crossed state lines while the invoice did not, but even in such a case a court holding a credit invoice to be a security

card crosses a state line.²⁵ Thus federal agents, courts, and attorneys become embroiled in the prosecution of petty thefts in which neither the defendant nor the credit card leave the jurisdiction and which are, therefore, easily within the competence of local authorities. If a need is felt for federal regulation of credit card thefts, that regulation should take the form of an act of Congress. An act intended to deal with this issue could eliminate the problems of finding transportation and fraudulent intent and could put the offense on its proper basis by punishing only the transportation of the credit card.²⁶

Criminal Law—Rights of Alleged Parole Violator at Revocation Hearing

Appellant-parolees,¹ arrested on parole violator warrants, were afforded a hearing² before a member of the United States Parole Board.³ Appellants were not advised that they had a right to have counsel or to present the testimony of voluntary witnesses. After their parole had been revoked, appellants filed suit for declaratory judgment in a fed-

could convict the defendant under the part of the act dealing with the transportation of tools used in counterfeiting securities: "Whoever, with unlawful or fraudulent intent, transports in interstate commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof . . . shall be fined not more than \$10,000 or imprisoned not more than ten years, or both." 18 U.S.C. § 2314 (1958), as amended, 18 U.S.C. § 2314 (Supp. IV, 1963). Congress cannot be accused of using unduly restrictive definitions in this act, and a court which holds that a credit card slip is a "security" should have no difficulty finding that a credit card is a "thing."

25. In the instant case, for example, it does not appear that either the defendant or the credit card left the jurisdiction after the fraudulent purchase was made.

26. In the typical case of a prosecution for transporting the card itself, the defendant would personally have transported the card across state lines, and the court would be relieved of making the often unwarranted assumption that defendant was familiar with the interstate collection process of the creditor. Also, defendant's retention of a stolen credit card would raise a strong and justified presumption of his intent to use it fraudulently.

1. These cases arise from eight separate parole revocation proceedings. Because the basic questions are common to all the appeals, they are consolidated for consideration en banc.

2. 18 U.S.C. § 4207 (1958) provides the procedure for the revocation of parole upon the retaking of the parolee: "A prisoner retaken upon a warrant issued by the Board of Parole, shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board. The Board may then, or at any time in its discretion, revoke the order of parole and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced."

3. Hereinafter referred to as the Board.

eral district court seeking release from confinement on the ground that the revocation procedure used by the Board was void and illegal. Summary judgment was granted in favor of the Board. Appellants claimed that except for a jury, parolees must be given the full due process safeguards of a criminal prosecution before the Board can revoke parole.⁴ On appeal to the United States Court of Appeals for the District Circuit, *held*, affirmed in part and reversed in part. A parolee charged with violation of his parole is entitled to an informal preliminary interview at a point as near as reasonably possible to the place where the alleged violation occurred, but due process does not require the Parole Board to conduct adversary hearings in the nature of a non-jury trial and does not require appointment of counsel for indigent parolees, confrontation and cross-examination of informants, discovery of the Board's files and confidential reports, or compulsory process to obtain witnesses. *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir. 1963).

Parole was defined at the 1956 National Conference on Parole as "a method of selectively releasing an offender from an institution prior to the completion of his maximum sentence—a method whereby society can be protected and the offender can be provided with continuing treatment in the community."⁵ The legislative purpose of the Federal Parole System is rehabilitation—to restore good-risk offenders to society.⁶ Section 4207 of title 18 of the United States Code in pertinent part provides: "A prisoner retaken upon a warrant issued by the Board of Parole, shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board." The procedural rights to which an alleged parole violator is entitled at his revocation hearing have been held to be a matter

4. "In essence appellants claim they are entitled to a revocation hearing before the Board which includes

- (a) appointed counsel for indigents,
- (b) specification of charges,
- (c) confrontation and cross-examination of the Board's informants,
- (d) right to examine confidential reports of the Board,
- (e) compulsory process to obtain witnesses, and
- (f) a hearing held in the district where the alleged parole violation occurred."

Hyser v. Reed, 318 F.2d 225, 233 (D.C. Cir. 1963).

5. *Reed, Due Process in Parole Violation Hearings*, 27 Fed. Prob., June 1963, p. 38. See DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE 44 (1959) wherein parole is defined "a treatment program in which an offender, after serving part of a term in a correctional institution, is conditionally released under supervision and treatment by a parole worker."

6. *Neal v. Hunter*, 172 F.2d 660, 662 (10th Cir. 1949). See *Zerbst v. Kidwell*, 304 U.S. 359, 363 (1938); *United States v. Murray*, 275 U.S. 347, 357 (1928). Compare *Woods v. Steiner*, 207 F. Supp. 945 (D. Md. 1962), wherein the purpose of parole was stated to be "to permit a deserving prisoner to leave prison before the expiration of his term and to serve out its balance while living in the community. Parole is an extension of the prison walls, an institution intended to achieve maximum prisoner rehabilitation at a minimal cost to the state." *Id.* at 951.

of statutory construction and not of constitutional right.⁷ The basic

7. *Martin v. United States Bd. of Parole*, 199 F. Supp. 542 (D.D.C. 1961). "It must be borne in mind in this connection that there is no constitutional right to a hearing before the Parole Board on the question of revocation of parole. The only reason such a right exists is because it is prescribed by statute." *Id.* at 543. See *Wright v. Settle*, 293 F.2d 317 (8th Cir. 1961); *Francis v. Lyman*, 216 F.2d 583 (1st Cir. 1954); *United States ex rel. Harris v. Ragen*, 177 F.2d 303 (7th Cir. 1949); *Fleming v. Tate*, 156 F.2d 848 (D.C. Cir. 1946); *Woods v. Steiner*, *supra* note 6; *Gibson v. Markley*, 205 F. Supp. 742 (S.D. Ind. 1962); *Hock v. Hagan*, 190 F. Supp. 749 (M.D. Pa. 1960); *State v. Meyer*, 228 Minn. 286, 37 N.W.2d 3 (1949); *Zink v. Lear*, 28 N.J. Super. 515, 101 A.2d 72 (App. Div. 1953); *White v. Parole Bd.*, 17 N.J. Super. 580, 86 A.2d 422 (App. Div. 1952); Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 818, 824 (1961) [hereinafter cited as Kadish, *The Advocate and the Expert*]; Urbaniak, *Due Process Should Not Be a Requirement at a Parole Revocation Hearing*, 27 Fed. Prob. June 1963, p. 46; 11 AM. U.L. REV. 95, 96 (1962). Compare *Escoe v. Zerbst*, 295 U.S. 490 (1935); *Burns v. United States*, 287 U.S. 216 (1932); *McCain v. Shepherd*, 33 Ala. App. 431, 34 So. 2d 225 (1948). In *Escoe v. Zerbst*, *supra*, the landmark case in this area, Justice Cardozo said by way of dictum in reference to probation: "In thus holding we do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose." *Id.* at 492-93. See generally Annot., 29 A.L.R.2d 1074 (1953). See also Note, *Procedural Safeguards in Federal Parole Revocation Hearings*, 57 Nw. U.L. Rev. 737, 747 (1963). However recent decisions indicate that due process is applicable to parole revocation proceedings. See, e.g., *Hannah v. Larche*, 363 U.S. 420 (1960), wherein the Supreme Court discusses the concept of due process and its application to government agencies as follows: "'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account." *Id.* at 442. Compare *Greene v. McElroy*, 360 U.S. 474 (1959) ("Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny." *Id.* at 496-97.) *with Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886 (1961) ("The Fifth Amendment does not require a trial-type hearing in every conceivable case of

reason for this is that parole is a matter of grace,⁸ not of right,⁹ and the withholding, granting, or revoking of parole rests in the sound discretion of the Board of Parole.¹⁰ The courts, in interpreting the

government impairment of private interest The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation" [D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions' As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. Where it has been possible to characterize that private interest (perhaps in oversimplification) as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required." *Id.* at 894-95).

8. For criticism of the concept of grace, see Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 HARV. L. REV. 904, 919 (1962); Note, 38 N.Y.U.L. REV. 702, 704-08 (1963).

9. *Hiatt v. Compagna*, 178 F.2d 42, 45 (5th Cir. 1949), *aff'd without opinion by equally divided court*, 340 U.S. 880 (1950); *United States ex rel. McCreary v. Kenton*, 190 F. Supp. 689, 691 (D. Com. 1960); *accord*, *Vera v. United States*, 288 F.2d 25 (8th Cir. 1961); *United States ex rel. Holderfield v. Ragan*, 170 F.2d 189 (7th Cir. 1948), *cert. denied*, 336 U.S. 906 (1949); *Fleming v. Tate*, 156 F.2d 848 (D.C. Cir. 1946); *United States ex rel. Bongiorio v. Ragan*, 146 F.2d 349 (7th Cir. 1945); *Woods v. Steiner*, *supra* note 6; *United States ex rel. McNelis v. Pennsylvania Bd. of Parole*, 141 F. Supp. 23 (W.D. Pa. 1956); *Ex parte Harris*, 80 Cal. App. 2d 173, 181 P.2d 433 (1947); *Dear v. Mayo*, 153 Fla. 164, 14 So. 2d 267, *cert. denied*, 320 U.S. 766 (1943); *Adkins v. Commonwealth*, 232 Ky. 312, 23 S.W.2d 277 (1929); *People ex rel. Castle v. Spivey*, 10 Ill. 2d 586, 141 N.E.2d 321 (1957); *People v. Thompson*, 381 Ill. 71, 44 N.E.2d 876 (1942); *Belch v. Raymond*, 196 Md. 649, 75 A.2d 96 (1950); *State ex rel. Koalska v. Swenson*, 243 Minn. 46, 66 N.W.2d 337 (1954); *Zink v. Lear*, *supra* note 7; *White v. Parole Bd.*, *supra* note 7; *Owens v. Swope*, 60 N.M. 71, 287 P.2d 605 (1955), *cert. denied*, 350 U.S. 954 (1956); *Ex parte Hines*, 289 P.2d 972 (Okl. Cr. 1955); *Commonwealth ex rel. Senkovich v. Banmiller*, 184 Pa. Super. 592, 135 A.2d 788 (1957); *Commonwealth ex rel. Davidson v. Maroney*, 177 Pa. Super. 82, 110 A.2d 822 (1955); *Beardon v. State*, 223 S.C. 211, 74 S.E.2d 912 (1953). Other courts consider parole to be a privilege, *People v. Ray*, 181 Cal. App. 2d 64, 5 Cal. Rptr. 113 (1960), *cert. denied*, 368 U.S. 971 (1962); *Ex parte McManus*, 123 Cal. App. 2d 395, 266 P.2d 929 (1954); *People ex rel. Kurzynski v. Hunt*, 250 App. Div. 378, 294 N.Y. Supp. 276, *cert. denied*, 303 U.S. 654 (1937); *Rondoni v. Langlois*, 89 R.I. 373, 153 A.2d 163 (1959); *State ex rel. Alldis v. Board of Prison Terms & Paroles*, 56 Wash. 2d 412, 353 P.2d 412 (1960); or a favor, *State ex rel. Kincaid v. State Parole Bd.*, 53 N.J. Super. 526, 147 A.2d 817 (App. Div. 1959); *Mahoney v. Parole Bd.*, 10 N.J. 269, 90 A.2d 8, *appeal dismissed*, 344 U.S. 871 (1952). *Cf.* MODEL PENAL CODE § 305.6 (Proposed Official Draft, 1962): "Every prisoner sentenced to an indefinite term of imprisonment shall be eligible for release on parole upon completion of his minimum term less reductions granted in accordance with Section 305.1, or, if there is no minimum, at any time. Within sixty days before the expiration of such minimum less reductions, or, if there is no minimum, within ninety days of his commitment, the prisoner shall have a hearing before the Board of Parole or a member or members designated by the Board, or, when appropriate, before the Young Adult Division of the Board. The hearing shall be conducted in an informal manner, but a verbatim record of the proceedings shall be made and preserved." (Emphasis added.)

10. *United States ex rel. McCreary v. Kenton*, *supra* note 9, at 691. For additional factors regarding the nature of parole relied upon by the courts in concluding that there is no constitutional right to a notice or hearing before revocation of parole, see

above statute, have held: that there is no right to a court trial;¹¹ that the hearing must be more than a mere formality;¹² that it must be provided within a reasonable time;¹³ that it need not measure up to the requirements of the Administrative Procedure Act;¹⁴ that the rules of evidence are not applicable;¹⁵ and that upon review, a court will not reverse the Board's decision unless an abuse of discretion is

Kadish, *The Advocate and the Expert*, 818; Urbaniak, *supra* note 7, at 49; Note, 38 N.Y.U.L. Rev. 702, 708-20 (1963).

11. "A revocation hearing is not a trial, nor indeed is it primarily concerned with the commission of an offense. As a matter of fact, a prisoner having been granted his conditional freedom on parole, the sole question before the Board, the determination of which may be delegated to a single member or even an examiner, is whether the parolee, in the judgment of the Board, is still a good parole risk. That determination presupposes an informal type of conference far removed from the technical ritual of a trial." *Hock v. Hagan*, *supra* note 7; *accord*, *Wright v. Settle*, *supra* note 7; *Hiatt v. Compagna*, *supra* note 9; *Christianson v. Zerbst*, 89 F.2d 40 (10th Cir. 1937); *Gibson v. Markley*, 205 F. Supp. 743 (S.D. Ind. 1962); *United States ex rel. McCreary v. Kenton*, *supra* note 9; *Washington v. Hagan*, 183 F. Supp. 414 (M.D. Pa.), *aff'd*, 287 F.2d 332 (3d Cir. 1960), *cert. denied*, 366 U.S. 970 (1961); *Lopez v. Madigan*, 174 F. Supp. 919 (D.D.C. 1959). Compare *Woods v. Steiner*, *supra* note 6; *Martin v. Warden*, 182 F. Supp. 391 (D. Md. 1960); *State v. Boggs*, 49 Del. 277, 114 A.2d 663 (Super. Ct. 1955); *Warden v. Palumbo*, 214 Md. 407, 135 A.2d 439 (1957); *Hendrickson v. Pennsylvania Bd. of Parole*, 409 Pa. 204, 185 A.2d 581 (1962).

12. *Washington v. Hagan*, *supra* note 11; *Gibson v. Markley*, *supra* note 11; *United States ex rel. McCreary v. Kenton*, *supra* note 9.

13. "Section 4207 in granting a hearing to alleged parole violators, contemplates, without explicitly so providing, that the hearing shall be held within a reasonable time after the prisoner is 'retaken upon a warrant issued by the Board of Parole.' . . . It should also be noted that a long delay in time makes it less likely that sources of evidence the prisoner may ask the parole board to consider will be available, and that if as a result thereof the prisoner is prevented from having the fair hearing contemplated by the statute, he would be entitled to release." *Holliday v. Settle*, 218 F. Supp. 738, 741 (W.D. Mo. 1963); *accord*, *United States ex rel. Buono v. Kenton*, 287 F.2d 534 (2d Cir.), *cert. denied*, 368 U.S. 846 (1961); *Adams v. Hudspeth*, 121 F.2d 270 (10th Cir. 1941); *United States ex rel. Rowe v. Nicholson*, 78 F.2d 468 (4th Cir.), *cert. denied*, 296 U.S. 573 (1935); *Gibson v. Markley*, *supra* note 11; *Application of Gillette*, 175 F. Supp. 255 (E.D.N.Y. 1959); *Mac Aboy v. Klecka*, 22 F. Supp. 960 (D. Md. 1938). See also *Phipps v. Pescor*, 68 F. Supp. 242 (W.D. Mo. 1946).

14. 60 Stat. 237 (1946), 5 U.S.C. §§ 1004-06 (1958). "The requirements as to procedure in the Administrative Procedure Act have no application to the Parole Board." *Hiatt v. Compagna*, *supra* note 9; *accord*, *Washington v. Hagan*, *supra* note 11; *Bozell v. United States*, 199 F.2d 449 (4th Cir. 1952); *Gibson v. Markley*, *supra* note 11; *United States ex rel. DeLucia v. O'Donovan*, 82 F. Supp. 435 (N.D. Ill. 1948), *aff'd*, 178 F.2d (7th Cir. 1949). Compare *Hendrickson v. Pennsylvania Bd. of Parole*, 409 Pa. 204, 185 A.2d 581 (1962).

15. "It is urged that the board acted upon hearsay evidence and that the order of revocation is not supported by evidence. Strict observance of technical rules of law and procedure accorded parties in a judicial proceeding is not required in such a hearing before an administrative body. It may be informal and the consideration of hearsay evidence does not invalidate the final action taken." *Christianson v. Zerbst*, 89 F.2d 40, 43 (10th Cir. 1937); *accord*, *Lopez v. Madigan*, 174 F. Supp. 919 (N.D. Cal. 1959); *Fleming v. Tate*, 156 F.2d 848 (D.C. Cir. 1946). *Cf.* Comment. 57 Nw. U.L. Rev. 737, 756-58 (1963).

shown.¹⁶ Until 1959¹⁷ an alleged parole violator in the federal system was at his revocation hearing¹⁸ permitted neither to be represented by counsel nor to have voluntary witnesses appear in his behalf. Attorneys or other interested persons could, however, present additional argument or affidavits in support of the alleged parole violator at the Board's offices in Washington. Two recent decisions of the Court of Appeals for the District of Columbia have broadened the procedural requirements of the parole revocation hearing. *Glenn v. Reed*¹⁹ held that a hearing and revocation of parole was invalid because the alleged parole violator "neither had nor was offered counsel."²⁰ Prior to 1961 the circuits were split on this question²¹ but in that year the Board amended its rules to permit an alleged parole violator to be represented by retained counsel.²² *Reed v. Butter-*

16. "The Parole Board may not act capriciously in revoking a parole or conditional release, but a revocation is within the discretion of the Board. If the Board revokes upon evidence or information showing a violation of parole or conditional release, it is not an abuse of its discretion, and the courts will not interfere in a habeas corpus proceeding." *Freedman v. Looney*, 210 F.2d 56, 57 (10th Cir. 1954). See *Moore v. Reid*, 142 F. Supp. 481, 483 (D.C. Cir. 1956), for a discussion of the appellate courts' scope of review.

17. *Robbins v. Reed*, 269 F.2d 242 (D.C. Cir. 1959), held that appellant's complaint, which indicated that there was no counsel, no advice to appellant of his right to counsel, and no waiver of the right to appear with counsel and to present testimony, "if sustained by evidence, would undermine the validity of the parole revocation." *Id.* at 244.

18. *Reed*, *supra* note 5, at 38.

19. 289 F.2d 462 (D.C. Cir. 1961).

20. *Id.* at 463.

21. *Accord*, *Barnes v. Reed*, 301 F.2d 516 (D.C. Cir. 1961); *Reed v. Butterworth*, 297 F.2d 776 (D.C. Cir. 1961); *Hurley v. Reed*, 288 F.2d 844 (D.C. Cir. 1961); *Robbins v. Reed*, 269 F.2d 242 (D.C. Cir. 1959); *Moore v. Reid*, *supra* note 16; *Martin v. United States Bd. of Parole*, 199 F. Supp. 542 (D.C. Cir. 1961); *Cannon v. Stucker*, No. 19, 822, E.D. Mich., June 16, 1960. Compare *Fleming v. Tate*, *supra* note 9, and *Woods v. Steiner*, *supra* note 6, and *State v. Boggs*, *supra* note 11, and *Warden v. Palumbo*, *supra* note 11, with *Jerabek v. State*, 69 N.J. Super. 264, 174 A.2d 248 (App. Div. 1961). *Contra*, *Washington v. Hagan*, *supra* note 11; *Hiatt v. Compagna*, *supra* note 9; *Gibson v. Markley*, *supra* note 11; *Hoover v. Stevens*, No. 20, 349, E.D. Mich., September 15, 1960; *Poole v. Stevens*, 190 F. Supp. 938 (E.D. Mich. 1960); *Hock v. Hagan*, *supra* note 7; *United States ex rel. McCreary v. Kenton*, *supra* note 9; *Lopez v. Madigan*, *supra* note 11.

22. The Board now provides by rule that: "All federal prisoners who have been returned to custody as parole or mandatory release violators under a Board warrant shall be advised that they may be represented by counsel at the revocation hearing provided that they arrange for such counsel in accordance with Board procedure. All prisoners in custody as violators previously given revocation "hearings" without being afforded the opportunity for representation by counsel shall be given an opportunity for a hearing with counsel." Set out in *Singleman v. Stevens*, 308 F.2d 513 n.1 (6th Cir. 1962). See *Kadish, The Advocate and the Expert*, 822 for an account of the reversal of the Board's policy. See generally *Kadish, The Advocate and the Expert*, 803, 825; *Rubin, Due Process Is Required in Parole Revocation Proceedings*, 27 Fed. Prob. June 1963, p. 42; Note, *Freedom and Rehabilitation in Parole Revocation Hearings*, 72 YALE L.J. 368, 372 (1963); 11 AM. U.L. REV. 95 (1962); 65 HARV. L. REV. 1230 (1962); 108 U. PA. L. REV. 423 (1960).

worth²³ held that a hearing and revocation of parole were invalid because the alleged parole violator was prevented from presenting the testimony of voluntary witnesses.²⁴ On the other hand, it has been held that an alleged parole violator is entitled neither to confront and cross-examine his accusers²⁵ nor to have counsel assigned to him at his parole revocation hearing.²⁶

The majority in the instant case stated that the Board was established "to administer the parole system as a part of the program to rehabilitate federal prisoners and restore them to useful membership in society."²⁷ The procedural safeguards urged by the appellants,²⁸ were held not to be commanded by either the parole statute, the Administrative Procedure Act, or the Constitution. The court held the parole statute inapplicable, analogizing the court procedures thereunder to probation revocation, the most comparable legal pro-

23. 297 F.2d 776 (D.C. Cir. 1961).

24. "There is no reason why the Parole Board should decline to hear either counsel or voluntary witnesses if they appear of their own motion." *Martin v. United States Bd. of Parole*, 199 F. Supp. 542, 543 (D.D.C. 1961); *contra*, *Gibson v. Markley*, *supra* note 11; *Poole v. Stevens*, 190 F. Supp. 938 (E.D. Mich. 1960); *United States ex rel. McCreary v. Kenton*, *supra* note 9.

25. "Revoking of parole, like the granting of it in the first instance, is not, under the statutes, intended to be determined by means of the full-dress adversary proceedings of a trial [see note 13 *supra*] with right to counsel, right to summon witnesses, right of confrontation, etc. The words 'opportunity to appear' do not call for a hearing of this sort. It is not lack of administrative due process that the prisoner is not entitled to have witnesses summoned and heard or that he may not appear with counsel. If changes are to be made to permit them, Congress and not the courts should make the appropriate changes." *United States ex rel. McCreary v. Kenton*, *supra* note 9, at 691; *accord*, *Gibson v. Markley*, *supra* note 11. "It would seem that the right to confront accusers and cross-examine them is similarly not applicable to such hearings." *Id.* at 743. See Note, *Procedural Safeguards in Federal Parole Revocation Hearings*, 57 Nw. U.L. Rev. 737, 754-56 (1963) which suggests that confrontation and cross-examination are procedural safeguards guaranteed by the fifth amendment. Compare *Petition of Vaughn*, 371 Mich. 386, 124 N.W.2d 251 (1963), construing a statute which gave the alleged parole violator, under certain circumstances, the right to meet the witnesses who are produced against him.

26. "Consequently the plaintiff is not entitled to have counsel assigned to him at a new hearing before the Parole Board if he chooses to take advantage of an opportunity that is being extended to him for a new hearing. I may add that as a practical matter it is not feasible to assign counsel in these matters. Most Federal penitentiaries, except perhaps Atlanta and Alcatraz are located away from large centers of population. Very few lawyers would be available for assignment, and if it were necessary to assign counsel for those hearings the burden on the local bar, which is invariably small, would be intolerable." *Martin v. United States Bd. of Parole*, 199 F. Supp. 542, 543 (D.D.C. 1961); *accord*, *Moore v. Reid*, *supra* note 16 (dictum). Compare *Coppedge v. United States*, 369 U.S. 438 (1962); *Fleming v. Tate*, *supra* note 9 (dictum). *Cf.* Comment, *Procedural Safeguards in Federal Parole Revocation Hearings*, 57 Nw. U.L. Rev. 737, 758-60 (1963); Note, *Freedom and Rehabilitation in Parole Revocation Hearings*, 72 YALE L.J. 368, 374 (1962).

27. *Hyser v. Reed*, 318 F.2d 225, 233 (D.C. Cir. 1963).

28. See note 4 *supra*.

ceeding, in which procedural safeguards do not apply,²⁹ and to a state judge's use of out-of-court information to assist him in the exercise of his discretion.³⁰ The Administrative Procedure Act was held inapplicable because "the Board does not adjudicate, nor is it required to hold hearings, in the sense that those words are employed in the Administrative Procedure Act."³¹ The sixth amendment was held inapplicable because the "Sixth Amendment by its terms governs only 'criminal prosecutions.'"³² The court said that, assuming that the various requirements of the sixth amendment are included in the due process restrictions of the fifth amendment, as argued by the appellants,³³ due process does not require appointment of counsel for indigent parolees,³⁴ confrontation and cross-examination of the Board's informants,³⁵ access to the Board's files,³⁶ or right to compulsory process.³⁷ One exception was made: The court held that the preliminary

29. See *Escoe v. Zerbst*, *supra* note 7; *Burns v. United States*, 287 U.S. 216 (1932). "Congress, which is the source of both of these penological devices has given no indication that the revocation of parole should be more difficult or procedurally different than the revocation of probation." 318 F.2d at 236.

30. See *Williams v. New York*, 337 U.S. 241 (1949), wherein the Supreme Court upheld a death sentence imposed by a state court on the basis of "information supplied by witnesses with whom the accused had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal." *Id.* at 243.

31. 318 F.2d at 237.

32. *Ibid.* See *Counselman v. Hitchcock*, 142 U.S. 547 (1892). Compare *Levine v. United States*, 362 U.S. 610 (1960); *Strickland v. United States*, 114 F.2d 556 (4th Cir. 1940).

33. 318 F.2d at 237.

34. The court pointed out that "Congress has not authorized the Parole Board to appoint counsel for indigent parolees appearing before it and that Congress has not empowered the federal courts to make such appointments." *Id.* at 238. The court distinguished the *Coppedge* case, *supra* note 26, by saying that there "the Supreme Court did not place an indigent's right to counsel and a free transcript in judicial proceedings on any command of the Constitution, but more narrowly on its interpretation of a statute, 28 U.S.C. § 1915." 318 F.2d at 238. The court also mentioned the fact that "no case has yet held that an interested party in an administrative or regulatory proceeding is entitled to be furnished with counsel if he cannot afford one of his own choice." *Ibid.*

35. The court reasoned that the "parole revocation process is neither a 'criminal prosecution' nor an adversary proceeding in the usual sense of that term. The primary issue before the Board is: Has the parolee violated a condition of his parole? Even if this determination is adverse to the parolee the Board has discretion to continue his parole notwithstanding a violation." *Ibid.* The court distinguished *Greene v. McElroy*, *supra* note 7, on the ground that "there are obvious factual distinctions between attempted governmental action which destroyed the means of livelihood of an engineer employed by a private contractor and governmental relations with a convicted prisoner released subject to certain conditions before completing a sentence imposed after full due process criminal trial." 318 F.2d at 239.

36. On this point the court briefly remarked: "In light of our view of the purpose of parole and of the revocation process, we hold that appellants are not entitled to discovery of the Board's files." *Ibid.*

37. The court pointed out that "Congress has not invested the Parole Board with subpoena power and that this important power is not an inherent attribute of agency authority," *ibid.*; that "the Parole Board is not bound by the rules of evidence in con-

interview,³⁸ "in order to meet standards of fairness inherent in the congressional scheme of parole, be conducted at or reasonably near the place where the alleged parole violation occurred, or the place of the violation chiefly relied upon, and as promptly as is convenient after the arrest while the information is likely to be fresh and the sources are available."³⁹

The three dissenting opinions are important and should be considered. Dissenting in part, on constitutional grounds, Chief Justice Bazelon and Justice Edgerton, applying the principles enunciated in *Greene v. McElroy*⁴⁰ and relying upon the discussion of due process in *Hannah v. Larche*,⁴¹ argued that the denial of the traditional safeguards of confrontation, cross-examination, and inspection raised serious constitutional questions, that Congress had not explicitly authorized the Parole Board to conduct parole revocation proceedings without these traditional safeguards, and that therefore "the Parole Board has no authority to conduct parole revocation proceedings without these traditional safeguards."⁴² They also argued that the parole statute should be construed to provide for appointment of counsel for indigent parolees.⁴³ Justice Fahy, dissenting in part, on statutory grounds, argued that section 4205 of title 18 of the United States

sidering information relating to parole violation," *id.* at 240; and that to hold otherwise would be to "imply that revocation hearings are comparable to criminal prosecutions rather than to administrative processes within the framework of prisoner rehabilitation and penal administration." *Ibid.*

38. The preliminary interview is "a first step toward a tentative evaluation of what the parolee wishes to offer by way of explanation of his conduct." *Id.* at 243.

39. *Id.* at 243-44. But if the parolee does elect to present evidence contesting the alleged parole violation at this preliminary interview, "the Board may in its discretion dispense with a hearing at the prison." *Id.* at 244. The Board will, however, still consider affidavits and letters in support of the parolee's contentions submitted after the preliminary interview.

40. 360 U.S. 474 (1959). See note 7 *supra*.

41. 363 U.S. 420 (1960). See note 7 *supra*. Justices Bazelon and Edgerton here concluded: "A parole revocation seems to us more like a 'binding [determination] which directly affect[s] the legal rights of individuals' than 'a general fact finding investigation.' It seems to follow that the traditional safeguards are required." 318 F.2d at 252.

42. *Ibid.* They distinguished the procedures used by a sentencing judge and in revoking probation on the ground that there neither specific facts nor a specific violation need be found. *Id.* at 252-53. As to the question of whether or not a parole revocation proceeding is an adversary proceeding they said: "[W]hatever general philosophy underlies parole revocation, when the Board tells a parolee that he has done a specific act for which his parole may be revoked, and he denies it, there are 'adverse, conflicting objectives,' not 'genuine identity of interest,' at least in regard to the specific issue in dispute." *Id.* at 253.

43. "Poverty bears no more relationship to the question of parole violation than to the question of guilt. Therefore congressional discrimination against parolees who cannot afford counsel would raise serious problems of due process of law. To avoid such problems we should construe the statute to provide for the appointment of counsel for such parolees." *Id.* at 255.

Code⁴⁴ required that a semi-formal⁴⁵ hearing be held to determine whether a violation of parole had occurred before a warrant could be issued or the parolee retaken.⁴⁶ Justice Wright, also dissenting in part, argued that while a hearing should be held before the warrant is issued, this hearing should be "non-adversary and relatively informal."⁴⁷

The court reached the proper result in the instant case. As was pointed out in *Hannah v. Larche*,⁴⁸ due process is not an inflexible concept. Although present in parole revocation proceedings, its requirements are less stringent there than in a criminal prosecution, in which the adjudication directly affects the rights of heretofore totally free men. Indeed, it would appear that, in the case of the parole revocation proceeding, the requirements of due process are, in fact, less rigorous than those of the parole statute. To adopt the minority's views, while not affecting or limiting the discretion of the Board as feared by some authorities,⁴⁹ would impose a heavy burden upon the Board. Justice Washington adequately summed up the significance of the instant case in his concurring opinion: "[The opinion] represents an important step forward, yet does not impose requirements so onerous as to endanger the fulfillment of the salutary objectives for which Congress has created the Board of Parole."⁵⁰ It is submitted, however, that the Board should consider the feasibility of adopting Justice Wright's suggestions that a probation officer be ap-

44. 18 U.S.C. § 4205 (1958) provides in part: "A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced."

45. "At the hearing he should have the opportunity to be heard in person and to present witnesses, to bring counsel to assist him, and to have access to, and, on request, confrontation, of the sources of information as to the alleged violation, with right of cross-examination." 318 F.2d at 259. Justice Fahy concluded: "While due process is required, this does not as a rule for parole violation call for a procedure broken down into the right to have counsel appointed, or to have compulsory process. If, however, these appear in a particular case to be essential to the reaching of a fair and reasonable result by the Board the Board may not validly act without them." *Id.* at 200.

46. *Id.* at 258.

47. *Id.* at 261-62. Justice Wright also suggested three other changes. First, if the parolee denies the charges and is not represented by counsel, a probation officer should be appointed pursuant to sections 3655 of title 18 of the United States Code, which authorizes The Attorney General to assign probation officers "duties with respect to persons on parole," to assist the parolee in his defense. Second, if witnesses for the parolee prefer not to appear at the hearing, a probation officer should interview them and file summaries of the interviews in evidence. Third, the right of confrontation should be extended to the parolee. The reason for the latter change is that "this right is basic to fairness in any type of hearing where personal liberty is involved." *Ibid.*

48. 363 U.S. 420 (1960). See note 7 *supra*.

49. Reed, *supra* note 5, at 40-41.

50. 318 F.2d at 247.

pointed (1) to assist an indigent parolee in his defense, and (2) to interview those witnesses of the parolee who refuse to appear at the hearing and file in evidence summaries of those interviews. The appointment of a probation officer to assist the indigent parolee in his defense would assure that the parolee appreciates the nature and significance of the hearing. The appointment of a probation officer to interview reluctant witnesses would assure that all testimony favorable to the parolee's position is presented before the Board for consideration. The adoption of these procedures therefore, while not imposing onerous obligations on the Board, would provide the same type of protection as guaranteed by the due process clause.

Labor Law—Federal Procedure—Right to Jury Trial under Section 17 of the Fair Labor Standards Act

The Secretary of Labor of the United States brought an action in a federal district court in Georgia under section 17 of the Fair Labor Standards Act,¹ against Alapaha Yellow Pine Products, Inc. In addition to seeking an injunction to restrain violations of the shipping, minimum wage, overtime, and bookkeeping provisions of the act,² plaintiff asked the court to exercise the jurisdiction recently conferred upon it by Congress³ to restrain defendant from withholding payment to his employees of the difference between statutory minimum wages or overtime compensation and the lower wages which the defendant had paid in violation of the act. The seeking of this latter injunctive relief prompted defendant to demand a jury trial on all issues of fact as made by the pleadings.⁴ Defendant contended that for the court to exercise this newly granted jurisdiction without submitting issues of fact to a jury constituted a denial of the right to jury trial guaranteed by the seventh amendment to the United States Constitution.⁵ *Held*, motion to strike demand for jury granted. No right to a jury trial exists in a suit by the Secretary of Labor under section 17 of the Fair Labor Standards Act to restrain withholding of pay due employees under the act; the suit asserts a statutory claim rather than a common law claim. *Wirtz v. Alapaha Yellow Pine Products, Inc.*,

1. 52 Stat. 1060 (1938), 29 U.S.C. § 201 (1958).

2. 52 Stat. 1068 (1938), 29 U.S.C. § 215 (1958).

3. 52 Stat. 1069 (1938), as amended, 29 U.S.C. § 217 (Snpp. IV 1961).

4. *Wirtz v. Alapaha Yellow Pine Prods., Inc.*, 217 F. Supp. 465, 466 (M.D. Ga. 1963).

5. *Ibid.*

217 F. Supp. 465 (M.D. Ga. 1963).

The right to a jury trial in civil actions in federal courts is guaranteed by the seventh amendment to the United States Constitution "in suits at common law, where the value in controversy shall exceed twenty dollars. . . ."⁶ In deciding what proceedings are to be deemed suits at common law the courts have been guided almost entirely by historical considerations.⁷ The basis of this approach is that the purpose of the seventh amendment was to preserve the right to trial by jury as it existed under the English common law when the amendment was adopted. Therefore its protection is afforded only in suits similar to those triable by jury in 1791. Since at that time it was settled that there was no right to a jury in equity and admiralty the amendment does not apply to such actions. Neither does it apply to certain statutory actions and other proceedings unknown to the common law.⁸ Thus, to determine whether in a particular case there exists a constitutional right to jury, a federal court must determine whether the proceeding is in the nature of a suit in which at early common law litigants had the right to a jury trial. Because of the historical denial of a jury in equity, litigants in suits brought by the Secretary of Labor to restrain violations of the Fair Labor Standards Act have consistently been denied a jury on the grounds that the injunctive relief sought was equitable.⁹

In 1938, the Federal Rules of Civil Procedure abolished the procedural differences between equitable suits and legal actions.¹⁰ Thus in the same suit a federal court has both legal and equitable jurisdiction. However, a litigant before the court still has a right to a jury trial on legal issues, even though such issues are combined with equitable issues. Two recent cases decided by the Supreme Court, *Beacon Theatres, Inc. v. Westover*¹¹ and *Dairy Queen, Inc. v. Wood*,¹² have made it explicitly clear that a litigant does not lose his right to a jury trial by combining a claim based upon a legal issue with a plea for equitable relief.¹³

6. U.S. CONST. amend. VII.

7. ROTTSCHAEFER, AMERICAN CONSTITUTIONAL LAW 866 (1939).

8. *Id.* at 866-67.

9. *Mitchell v. Independent Stave Co.*, 159 F. Supp. 829 (W.D. Mo. 1957); *Tobin v. Abelson*, 103 F. Supp. 404 (E.D. Tenn. 1951); *Walling v. Richmond Screw Anchor Co.*, 52 F. Supp. 670 (E.D.N.Y. 1943); *Fleming v. Peavy-Wilson Lumber Co.*, 38 F. Supp. 1001 (W.D. La. 1941).

10. "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." FED. R. CIV. P. 38(a); *Conn v. Kohlemann*, 2 F.R.D. 514 (E.D. Pa. 1942); see 5 MOORE, FEDERAL PRACTICE § 38.07(1), at 39 (2d ed. 1951).

11. 359 U.S. 500 (1959).

12. 369 U.S. 469 (1962).

13. *Id.* at 470. "It would make no difference if the equitable cause clearly outweighed the legal cause so that the basic issue of the case taken as a whole is

The recovery of back wages and overtime has had an interesting history. In the original 1938 Act there was no mention as to whether reimbursement of this compensation to employees was permissible in suits by the Secretary to restrain violations of the act. United States courts of appeal differed on the availability of such relief.¹⁴ The Supreme Court did not pass on the issue directly but did say in *McComb v. Jacksonville Paper Co.*¹⁵ that a district court had the power to enforce its injunctive decree for compliance with the act by requiring a civil contempt to be purged by the employer's paying to his employees the back wages and overtime due them.¹⁶ In 1949, Congress amended section 17 of the act to provide that the employees could recover back wages and overtime only by suing their employer themselves or by requesting the Secretary to sue in a separate suit under section 16(b).¹⁷ In such a suit the names of the complaining employees had to be revealed to the employer. Then in 1961, after the Department of Labor brought to the attention of Congress that few such suits were being instigated by the employees because of feared reprisals,¹⁸ Congress again amended the act. That amendment granted district courts jurisdiction to restrain withholding of back wages and overtime when such relief was prayed for in a suit by the Secretary to restrain violations of the Act.¹⁹ The Secretary can now seek such relief for the employees without obtaining their consent to the suit.

When employees have sued for their back pay such suits have been deemed to be at law for breach of the employment contract. *Olearchick v. American Steel Foundries*²⁰ was the first case dealing with the right to a jury in a wage-overtime suit brought by employees. There the court granted a jury trial, holding that the claim is "nothing more than a money judgment which is sought against each of the defendants based upon the provisions of the Fair Labor Standards Act. [This is] an action in assumpsit, on contract, at law."²¹ A later Fifth Circuit case, *Lewis v. Time Publishing Co.*,²² held that denial

equitable. As long as any legal cause is involved the jury rights it creates control. This is the teaching of *Beacon Theatres*, as we construe it." *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486, 491 (5th Cir. 1961).

14. *McComb v. Frank Scerbio & Sons, Inc.*, 177 F.2d 137 (2d Cir. 1949) (district courts have power to order reimbursement to employees); *Walling v. Crane*, 158 F.2d 80 (5th Cir. 1946) (district courts have no power to order reimbursement to employees).

15. 336 U.S. 187 (1949).

16. *Id.* at 193-94.

17. 63 Stat. 919 (1949).

18. S. REP. No. 145, 87th Cong., 1st Sess. 141-42 (1961).

19. 52 Stat. 1069 (1938), 29 U.S.C. § 217 (Supp. IV 1961).

20. 73 F. Supp. 273 (W.D. Pa. 1947).

21. *Id.* at 280.

22. 185 F.2d 457 (5th Cir. 1950).

of a jury in such a suit was reversible error. The first case ruling on the jury issue after the 1961 amendment was *Goldberg v. A. G. Wimpy Co.*,²³ where the court denied an employer a jury trial, resting its decision upon the grounds that "the Seventh Amendment has no application . . . where recovery of money damages is sought as an incident to injunctive relief."²⁴

The court in the instant case answered the defendant's argument that its constitutional right to a jury had been violated by relying on *NLRB v. Jones & Laughlin Steel Corp.*,²⁵ which held that the seventh amendment "has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. . . . It does not apply where the proceeding is not in the nature of a suit at common law."²⁶ The court distinguished cases such as *Beacon Theatres*²⁷ and *Dairy Queen*²⁸ by pointing out that in those cases the plaintiffs had an existent right to a jury upon a legal issue.

In the case at bar neither the Secretary nor the employees have any common law cause of action. They do have a statutory cause of action for unpaid statutory amounts, but the statute enables and empowers the district courts sitting as courts of equity to order the payment of back wages in relief of violation of §§ 6 and 7 of the Act, as a sort of legislative sanction.²⁹

The decision in the instant case is based on the ground that the Secretary's claim on behalf of the employees was one unknown to the common law since it was created by statute. However, not all statutorily authorized actions are without the scope of the seventh amendment.³⁰ The test is whether a statutory action can be analogized to a common law cause of action for which there was a right to jury trial at the time of the adoption of the amendment. If so, then that right cannot be dispensed with.³¹ The court's reliance on *Jones & Laughlin*³²

23. 46 CCH Lab. Cas. ¶ 31344 (S.D. Fla. 1962).

24. *Ibid.*

25. 301 U.S. 1 (1937).

26. *Id.* at 48.

27. 359 U.S. 500 (1959).

28. 369 U.S. 469 (1962).

29. 217 F. Supp. at 470-71.

30. 5 MOORE, *op. cit. supra* note 20, § 38.11(7). As was said in *United States v. Jepson*, 90 F. Supp. 983 (D.N.J. 1950), "It is my thought that when a federal statute embraces a common-law form of action, that action does not lose its identity merely because it finds itself enmeshed in a statute. The right of trial by jury in an action for debt still prevails whatever modern name may be applied to the action." *Id.* at 986. The court was speaking there of an action to recover treble damages in an anti-trust suit.

31. 5 MOORE, *op. cit. supra* note 20, § 38.11(7); 4 VAND. L. REV. 170, 172 (1950). For a detailed historical review of the requirement that a suit be of the nature of a suit at common law, see *People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 231 P.2d 832 (1951).

32. 301 U.S. 1 (1937).

is misplaced. In the light of *Beacon Theatres*³³ and *Dairy Queen*³⁴ it can no longer be said that the seventh amendment "has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law."³⁵ At the present time it is clear that the merger in one suit of legal and equitable issues does not eradicate the right to a jury trial on the legal issue. However, the Supreme Court's holding in *Jones & Laughlin* that the amendment "does not apply where the proceeding is not in the nature of a suit at common law"³⁶ is still a correct expression of the law. It should be noticed that in *Jones & Laughlin* the statute authorized an administrative board to order reinstatement of employees who were discharged because of their union activity and to direct payment of wages for time lost by the discharge.³⁷ No such similar action or relief was known at common law. However, such an action as that involved in the instant case can be analogized to the common law action of assumpsit, which was an action for the recovery of damages for the nonperformance of a contract, express or implied.³⁸ In such an action there existed a right to jury trial.³⁹ Because this analogy can be made, the court in the instant case has wrongfully precluded defendant from a jury trial.⁴⁰ A decision handed down subsequent to the instant case came to this conclusion in a similar suit.⁴¹ Furthermore, a finding that the act was violated is

33. 359 U.S. 500 (1959).

34. 369 U.S. 469 (1952).

35. 301 U.S. at 48.

36. *Ibid.*

37. 301 U.S. at 47.

38. "The action of assumpsit . . . is so called from the word 'assumpsit' (he undertook, or he promised), which, when the pleadings were in Latin, was inserted in the declaration as descriptive of the defendant's undertaking. It is a proper remedy for the breach of any simple or unsealed contract, whether the contract is verbal or written, express or implied, and whether it is for the payment of money, or for the performance of some other act, as to render services or deliver goods, or for the forbearance to do some act. In no case will the action lie unless there has been an actual contract or promise, or unless the law will imply one; for a promise either given in fact or implied by law is essential." SHIPMAN, COMMON LAW PLEADING § 58, at 148 (3d ed. 1923); see MORGAN & DWYER, THE STUDY OF LAW 107 (1948); see also 4 WORDS & PHRASES 601 (1940) and cases cited therein.

39. MORGAN & DWYER, *op. cit. supra* note 38, at 109; MOORE, *op. cit. supra* note 10, § 38.27, at 208.

40. It might be possible to analogize this claim for back wages and overtime to other common law forms of action such as debt or debt on a statute. See SHIPMAN, *op. cit. supra* note 38, §§ 152-53; MORGAN & DWYER, *op. cit. supra* note 38, at 94. However, the most analogous common law form is that of assumpsit. As was pointed out in footnote 38, for the action to lie it is essential that the promise sued upon be given in fact or implied by law. In the instant case the employer-defendant did not promise to pay his employees the minimum wage but since the statute required such payment the law will imply a promise. Thus the Secretary is suing the employer to recover back wages and overtime for the employer's breach of his implied promise to pay the legal minimum wage.

41. *Wirtz v. Thompson Packers, Inc.*, 224 F. Supp. 960 (E.D. La. 1963).

necessary to give the Secretary standing to sue for unpaid minimum wages and overtime compensation for the employees, therefore, the entire case should be tried by a jury to prevent collateral estoppel from applying to the legal issue, as it would if the judge first decided, as it necessarily would have to, whether the act had been violated.

Although much has been said here regarding the principles of constitutional law which should guarantee the right to jury trial in these wage-overtime suits, it is submitted that here is one case where the mechanical application of the Constitution may thwart the main purpose of some much needed legislation. The 1961 amendment allowed the Secretary to join with his suits for injunctive relief to restrain violations of the act these requests for back pay. The need for such action was revealed by a report which stated that in 1960 an estimated thirty million dollars in unpaid minimum wages and overtime compensation was due nearly two hundred thousand employees. Of this amount sixteen million dollars had not been paid and in the absence of an employee request the Secretary had no authority to require payment.⁴² The paramount reason that more of this money was not paid was that employers could bring pressure upon employees who insisted on their statutory rights.⁴³ The amendment remedies this by allowing the Secretary to institute the suit without employee sanction; but if in every such case a time-consuming jury trial is required it will be impossible to maintain the present number of such suits. It appears that on the authority of *James & Laughlin*⁴⁴ an administrative proceeding could be created to settle the issues of whether the Act has been violated and if so, to determine how much money is due to the wronged employees. In that event no jury would be available to the parties. However, since this claim for back pay is deemed to be based on a legal issue it is doubtful whether in the light of *Beacon Theatres*⁴⁵ and *Dairy Queen*⁴⁶ that *Jones & Laughlin* is still good law on this point. Thus it appears that a jury trial is dictated in the Secretary's suits for back pay under section 17 of the Fair Labor Standards Act; whether this result is desirable depends on one's assessment of the value of the jury system.

42. S. REP. NO. 145, 87th Cong., 1st Sess. 141-2 (1961).

43. 107 CONG. REC. 4505 (1961) (remarks of Representative Roosevelt).

44. 301 U.S. 1 (1937).

45. 359 U.S. 500 (1959).

46. 369 U.S. 469 (1962).

Labor Law—Representation Elections—Provision on Ballot Allowing Vote for “No Representation”

Two contending unions sought certification as the bargaining representative for a craft or class of airline employees. The official ballot provided spaces for the employee to indicate whether he wished to be represented by one of the two contending unions or by any other organization or individual. Plaintiff, an association of airline employees who did not wish to be represented by a union, filed with the National Mediation Board a petition to intervene in the representation dispute, asking that a space be provided on the ballot for an employee to state that he desired no representation.¹ The Board dismissed plaintiff's petition to intervene and refused its request to change the form of the ballot on the grounds that plaintiff was not a properly constituted party in interest in the pending dispute. Claiming a right under the Railway Labor Act² plaintiff brought suit to enjoin the Board from holding an election using these ballots. *Held*, judgment for plaintiff. Section 2 of the Railway Labor Act requires that the ballots in a representation election include a space where eligible voters may express a preference for no collective bargaining representation. *Association for the Benefit of Non-Contract Employees v. National Mediation Board*, 218 F. Supp. 114 (D.D.C. 1963), *aff'd per curiam sub nom. United Airlines v. National Mediation Bd.*, 49 CCH LAB. L. REP. ¶ 18,809 (D.C. Cir. Mar. 12, 1964).³

Congress has provided that to settle representation disputes among railroad and airline employees “the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives . . . [and that] in the conduct of any election for the purposes herein indicated the Board shall . . . establish the rules to govern the election”⁴ However, the statute does provide that “the majority of any craft or class of employees shall have the right to determine who shall be the repre-

1. Under the Board's present rules, the Board would consider a write-in ballot for “no representation” as void.

2. Railway Labor Act, 48 Stat. 1185 (1934), as amended, 45 U.S.C. §§ 151-58 (1958).

3. In another action based on the same disputed election ballot, *United Airlines, Inc. v. National Mediation Bd.*, Civil No. 402-63 (D.D.C. 1963), which was consolidated for appeal with the instant case, the district court denied the carrier's motion for a preliminary injunction, and the court of appeals denied its motion for an injunction pending appeal. Neither court indicated the grounds for the denial, but one of the important issues argued in the case was the question of the carrier's standing to enjoin an election among its employees, an issue not raised in the instant case.

4. 48 Stat. 1188 (1934), 45 U.S.C. § 152, Ninth (1958).

sentative of the craft or class”⁵ Employees have the “right to organize and bargain collectively through representatives of their own choosing,”⁶ but they also have “the duty . . . to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes [with their employers].”⁷ The statute makes no express provision for judicial review of the Board’s decision. The Supreme Court in *Switchmen’s Union v. National Mediation Board*,⁸ indicated that the decisions of the Board are not reviewable. The statute has thus been characterized as “inexplicitly precluding review.”⁹ A ballot without a provision for “no representation” has been used by the Board continuously since its inception in 1934.¹⁰ The Board has maintained that a ballot which gives the employee the right to choose between contending unions but which does not allow him to express a preference for no representation will best effectuate the intent of Congress in framing section 2 of the Railway Labor Act. Since the statute imposes a duty on the carriers and the employees to negotiate their disputes through their respective representatives, the Board’s position has been that Congress must have intended that the employees secure some form of representation; the ballot was drafted so that it could readily insure the realization of this intent.¹¹ On the other hand, it can be observed that one of the stated purposes¹² of the act and portions of its legislative history¹³ indicate that Congress intended the

5. 48 Stat. 1187 (1934), 45 U.S.C. § 152, Fourth (1958).

6. *Ibid.*

7. 48 Stat. 1187 (1934), 45 U.S.C. § 152, First (1958).

8. 320 U.S. 297 (1943).

9. 4 DAVIS, ADMINISTRATIVE LAW TREATISE § 28.09 (1958).

10. U.S. NATIONAL MEDIATION Bd., ADMINISTRATION OF THE RAILWAY LABOR ACT 1934—1937, at 19 (1958). The ballot has been employed in over 3400 representation disputes since 1934. *Ibid.*

11. *Ibid.*

12. “The Purposes of the Act are . . . (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization” 48 Stat. 1186 (1934), 45 U.S.C. § 151(a)2 (1958).

13. The House Committee on Interstate and Foreign Commerce, in reporting on the bill, stated: “It [the Railway Labor Act] provides that employees shall be free to join any labor union of their choice and likewise be free to refrain from joining any union if that be their desire and forbids interference by the carriers’ officers with the exercise of said rights.” H.R. REP. No. 1944, 73d Cong., 2d Sess. 2 (1934).

During the hearings on this and related bills, Commissioner Joseph P. Eastman, Federal Coordinator of Transportation and one of the principal draftsmen of the bill, testified as follows:

“Mr. Huddleston: ‘Well, as I get your idea it is the purpose of this bill not to coerce organizations and not necessarily to imply an organization.’

“Commissioner Eastman: ‘No; it does not require collective bargaining on the part of the employees. If the employees do not wish to organize, prefer to deal individually with the management with regard to these matters, why, that course is left open to them, or it should be.’” *Hearings on H.R. 7650 and 9689 Before the House Committee on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 57 (1934).

employees to be free not to associate and to have a right to vote for no representation. In 1937 the Supreme Court in *Virginian Ry. v. System Federation No. 40, Ry. Employees Department*¹⁴ interpreted the statutory majority requirement of the Railway Labor Act to mean that certification of a union did not require a majority of eligible voters; a majority of those voting in the election would be sufficient.¹⁵ Although more than a majority of eligible voters participated in the *Virginian* election, the court did not base its decision on this distinction.¹⁶ Rather, it was based on the theory that those who did not vote would be presumed to have assented to the decision of the majority who did.¹⁷ Regarding this problem, the National Mediation Board has had for many years the policy of refusing certification where less than a majority of eligible voters participated.¹⁸ The Attorney General advised the President that the NMB had the power to certify in such a situation but that it could within its discretion limit its exercise of power to cases in which participation was sufficiently substantial and representative to warrant the presumption that those who did not vote assented to the will of the majority voting.¹⁹ The courts have upheld this position.²⁰ The ballot form was first challenged in the courts in 1950, but the Fourth Circuit failed to reach the merits of the case, holding that exclusive jurisdiction of this issue was vested in the Mediation Board and that the courts lacked power to review its action.²¹ Subsequent to the decision in the instant case, several suits were instituted challenging this same ballot form. In two of these cases the courts have asserted jurisdiction and at-

Senator Robert F. Wagner testified before the Senate hearings:

"Senator Wagner: 'I didn't understand these provisions compelled an employee to join any particular union. I thought the purpose of it was just the opposite, to see that the men have absolute liberty to join or not to join any union or to remain unorganized.'" *Hearings on S. 3266 Before the Senate Committee on Interstate Commerce*, 73d Cong., 2d Sess. 76 (1934).

14. 300 U.S. 515 (1937).

15. *Id.* at 560.

16. *But see* *System Fed'n No. 40, Ry. Employees Dep't v. Virginian Ry.*, 11 F. Supp. 621, 628 (E.D. Va. 1935) (the district court opinion in *Virginian*). There the court held that in the election of one craft or class, in which a majority had refrained from voting, no representative would be certified. This part of the lower court's holding was not appealed and was, therefore, not before the Supreme Court. 300 U.S. at 559.

17. 300 U.S. at 560.

18. See, e.g., *Radio Officers' Union v. National Mediation Bd.*, 181 F.2d 801 (D.C. Cir. 1950), where the Board had "indicated its intention to dismiss [the union's] . . . application for certification in accordance with a Board policy of many years standing to decline to certify a representative where less than a majority of the eligible voters participated by casting valid ballots." *Id.* at 801.

19. 40 Ops. ATT'Y GEN. 541 (1947).

20. *Radio Officers' Union v. National Mediation Bd.*, *supra* note 17; *System Fed'n No. 40, Ry. Employees Dep't v. Virginian Ry.*, *supra* note 15, at 628.

21. *Rose v. Brotherhood of Ry. Clerks*, 181 F.2d 944 (4th Cir.), *cert. denied*, 340 U.S. 851 (1950).

tempted to reach the merits.²² In two others the courts have declined to reach the merits, ruling that the Board's decision regarding the form of the ballot is not reviewable.²³ Under a similar statute²⁴ the National Labor Relations Board early in its history established the policy that ballots must contain a place to indicate that the voter wishes no representation.²⁵ The NLRB reasoned that those not voting would be presumed to acquiesce in the choice of the majority of those who did vote, that a blank ballot would be considered a failure to vote, and that there was no advantage in adopting the rather ambiguous method of expression involved in casting a blank ballot or refraining from voting, when the employee's choice could be clearly indicated by providing a space for it on the ballot.²⁶ As to the related problem of what percentage of the union need vote to create a valid election, the Court of Appeals for the Fourth Circuit has upheld the principle that in an NLRB election where "no representation" was on the ballot, a majority of those voting would be sufficient even though less than a majority of eligible voters participated.²⁷

The court in the instant case distinguished *Switchmen's Union v. National Mediation Board*²⁸ and its progeny,²⁹ noting that courts have

22. In *Lynch v. National Mediation Bd.*, 48 CCH LAB. L. REP. ¶ 18,467 (D.D.C. 1963), the district court denied the carrier employee's preliminary suit for an injunction to restrain the Board from certifying a union which had been elected on the basis that there was no showing of irreparable injury or that plaintiff would ultimately succeed if the certification were enjoined and a new election were ordered. However, citing the instant case, the court denied the Board's motion for dismissal or summary judgment since the court could not agree with the Board's interpretation that the employees did not have the right to vote for "no representation." The suit was voluntarily dismissed. *Transportation Corp. of America, d/b/a/ Trans Caribbean Airways, Inc. v. National Mediation Bd.*, Civil Action 1947-63 (D.D.C. 1963), which was based on the same disputed election as that in the *Lynch* case, *supra*, presented the issue of standing. The court denied the Board's motion to dismiss, and the carrier now has under advisement the question of moving for summary judgment.

23. In *Droggos v. National Mediation Bd.*, Civil No. C-63-579 (N.D. Ohio 1963), the court held that it did not have jurisdiction since the ballot form was within the discretion of the Board. In *Lake Central Airlines v. National Mediation Bd.*, 63-C-275 (S.D. Ind. 1963), based on the same disputed election as that in the *Droggos* case, *supra*, the court denied the carrier's motion for a preliminary injunction on the grounds that (1) the court had no jurisdiction, (2) the carrier had no standing, and (3) the action was prematurely brought.

24. National Labor Relations Act § 9(a), 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1958).

25. *Interlake Iron Corp.*, 4 N.L.R.B. 55 (1937).

26. *Id.* at 61-62.

27. *NLRB v. Standard Lime & Stone Co.*, 149 F.2d 435 (4th Cir.), *cert. denied*, 326 U.S. 723 (1945).

28. *Supra* note 8.

29. *General Comm. of Adjustment of the Bhd. of Locomotive Eng'rs v. Missouri-K. T.R.R.*, 320 U.S. 323 (1943); *Flight Eng'rs' Ass'n v. Eastern Air Lines, Inc.*, 311 F.2d 745 (2d Cir.), *cert. denied*, 373 U.S. 924 (1963); *WES Chapter, Flight Eng'rs' Ass'n v. National Mediation Bd.*, 314 F.2d 234 (D.C. Cir. 1962); *Air Line Stewards and Stewardesses Ass'n v. National Mediation Bd.*, 294 F.2d 910 (D.C. Cir. 1961), *cert.*

taken jurisdiction to review actions of the Board where "serious issues of constitutionality or of statutory construction were presented"³⁰ and that the nature of the question presented was such as to urgently require judicial review in light of section 10 of the Administrative Procedure Act,³¹ enacted subsequent to the *Switchmen's* case. Where judicial review is not precluded by statute or where the agency's discretion is not exclusive,³² that act enables a court to "decide all relevant questions of law, [and] interpret . . . statutory provisions" where necessary to the decisions.³³ Turning to the merits of the case, the court found that the Board's construction of the Railway Labor Act as forbidding a vote for no representation was not correct; the statute gives employees "the right to organize and bargain collectively"³⁴ but does not require them to do so.³⁵ This freedom to bargain collectively or to refrain from doing so is emphasized by the provision that, subject only to the union shop provision,³⁶ no carrier "shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization."³⁷ The court recognized that the statute envisions that in most cases employees will bargain collectively to settle their disputes, but it ruled that employees should have the opportunity to indicate that no employer-employee disputes exist and that therefore they neither need nor want a union to represent them. The court indicated further that legislative history strongly supported its conclusion and that the Board's interpretation of the statute was contrary to one of the stated purposes of the 1934 Railway Labor Act. The court noted that such an interpretation was inconsistent with the rationale of the *Virginian* case, which justified a certification on the basis of majority participation because "those who do not participate 'are presumed to assent to the expressed will of the majority of those voting.' . . ."³⁸ However, the court continued, the Board's interpretation is based on the theory that those who do not participate are, on the contrary, indicating their preference for having no representation. The court emphasized the importance of freedom of expression of the desires of

denied, 369 U.S. 810 (1962); *UNA Chapter, Flight Eng'rs' Ass'n v. National Mediation Bd.*, 294 F.2d 905 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 956 (1962); *Decker v. Linea Aeropostal Venezolana*, 258 F.2d 153 (D.C. Cir. 1958).

30. 218 F. Supp. at 124.

31. 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1958).

32. 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1958) (first two lines).

33. 60 Stat. 243 (1946), 5 U.S.C. § 1009(e) (1958).

34. 48 Stat. 1187 (1934), 45 U.S.C. § 152, Fourth (1958).

35. See statute cited note 12 *supra*; legislative history cited note 13 *supra*.

36. 64 Stat. 1238 (1951), 45 U.S.C. § 152, Eleventh (1958).

37. 48 Stat. 1188 (1934), 45 U.S.C. § 152, Fifth (1958).

38. 300 U.S. at 560, quoting from *County of Cass v. Johnston*, 95 U.S. 360, 369 (1877).

the majority in positive terms, so that "the votes recorded for a particular representative [would] express a free choice rather than a choice in default of the possibility of expressing disapproval of both or all proposed representatives."³⁹ The court concluded that the statute required that there be on the ballot a space in which employees could vote for no representation and that an injunction should issue barring the Board from proceeding with the election unless the ballots were changed to conform with the court's opinion.

The statutes and legislative history in the instant case seem to indicate that employees have a right not to be represented. The question, therefore, is not whether the right exists, but to what extent and in what manner this right will be protected. The right has been given minimum protection by the NMB's refusal to certify unless at least half of the employees vote. "No representation" is not placed on the ballot, but no union is certified if less than fifty-one per cent of the eligible employees vote. This rule requires fifty per cent of the *eligible* voters to defeat certification by not voting; it seems rather anomalous to force those supporting any position into the position of advocating not voting. This policy is the least favorable to the "no representation" faction of all the alternatives.⁴⁰ Furthermore, it does not give an accurate report of the employees' wishes, since it places in the same group those who refuse to vote because they did not want union representation and those who did not vote simply because they were apathetic or unable to do so. This method places a great burden on the leaders of the "no representation" faction to inform its supporters of the proper action to follow to defeat certification. However, if fifty out of a craft or class of one hundred refuse to vote, no union will be certified. Implicit in the court's ruling in the instant case is the assertion that this is inadequate protection of the employees' right, and, in an effort to hurdle the jurisdictional problem and avoid the problem of non-reviewability of matters of administrative discretion, the court concludes that the statute *requires* that "no representation" be on the ballot.⁴¹ While the statute does require that the "majority" shall determine who shall be the representative, and this may be extended to "*if* there shall be a representative," it nowhere requires that this determination be made in any specific manner. In fact, the statute expressly entrusts this determination to the discretion of the Board and expresses no limitation on the Board's discretion. By its decision, the district court has in effect substituted its discretion for that of the Board.⁴² In addition to the

39. *Interlake Iron Corp.*, 4 N.L.R.B. 55, 61 (1937).

40. See material discussed note 41 *infra*.

41. 218 F. Supp. at 130.

42. The court did not set out the rules for handling a run-off election; these rules

rule which has been used by the NMB, various rules have been used or suggested by the NLRB, each of which would give "no representation" a greater or lesser chance of winning the election.⁴³ Both boards

would presumably be formulated by the Board. Even under the least favorable run-off procedure, plaintiff will be in a better position than it was formerly since its adherents will not inadvertently vote for a union, assuming that there is a choice only between the two unions.

43. All of the rules of the NLRB have permitted a space for "no representation." They may be listed as follows:

(a) If no choice receives a majority of votes cast on the first ballot, a run-off election is held between the union with the most votes and "no representation." See, *e.g.*, Coos Bay Lumber Co., 16 N.L.R.B. 476 (1939). Under this rule "no representation" need not receive any votes on the first ballot to be placed on the run-off. The rule is based on the idea that this is not a political election, where someone *must* be elected; the statute does not require a union to be certified, and no one should be forced into voting for a union (which would be the effect of having two unions on the run-off ballot). This method gives great weight to the effect of inter-union rivalry by assuming that, in the event that the less successful union has no chance of winning fifty-one per cent in the run-off, those who had supported that union would prefer to have no representation than to be represented by the opposing union. While this may be true, the use of this rule overlooks the basic concept that both union A and union B represent a policy of collective bargaining, which Congress intended to favor. Not only does this rule not favor collective bargaining, but it places a decided disadvantage on it.

(b) If no choice receives a majority of votes cast on the first ballot and the total votes for the two unions comprise a substantial majority, a run-off is held between the two contending unions. Otherwise, the run-off is held between "no representation" and the union with the most votes. See, *e.g.*, R.K. LeBlonde Machine Tool Co., 22 N.L.R.B. 465 (1940). This rule would permit "no representation" on the run-off ballot if neither union received a majority and if the total union vote was less than a "substantial majority." It would eliminate the apparent gross inequity of invalidating one choice (one of the unions), which received forty-eight per cent and validating another choice ("no representation"), which received three per cent.

(c) If no choice receives a majority of the votes cast on the first ballot, a run-off is held between the two top choices. See, *e.g.*, Golten Marine Co. v. Douds, 137 F. Supp. 531 (S.D.N.Y. 1956); 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(3) (1958). This rule, which is presently being used by the NLRB, would permit "no representation" on the run-off ballot if it received a minimum of twenty-six per cent of the votes, and neither union received a majority. It assumes that "no representation" is the equivalent of representation by the individual and that, since it is opposed by representation by union A and representation by union B, all three are choices of like kind and should be afforded like treatment. This assumption—that there is no difference in kind between "no representation," union A, and union B—gives the election the appearance of being the most democratic since it does not ostensibly favor any party. In reality, it favors "no representation" by forcing those who desire unionization to split their votes between the two union choices, each of which must compete individually with the "no representation" faction. This means that although seventy-five per cent of the voters may want some form of union representation, the run-off ballot might list only the top union and "no representation."

(d) If no choice receives a majority of votes cast on the first ballot and if each union receives at least twenty per cent of the vote, a run-off is held between the two contending unions. Otherwise the run-off is held between the union with the most votes and "no representation." See, *e.g.*, B.F. Goodrich Co., 73 N.L.R.B. 1250 (1947); 11 Fed. Reg. 613 (1946). This rule would permit "no representation" on the run-off ballot if it received a minimum of thirty-one per cent of the votes and neither union received a majority. It would eliminate the apparent gross inequity of invalidating one

have been given the power to regulate elections, and both seem to have used this power at various times to aid or hinder unionization or "no representation," depending on the orientation of the boards as to the realities of union elections and, in general, as to the desirability of having union representation. The election procedure of the NMB, as well as those procedures used by the NLRB, seems to be a valid exercise of discretion which ought not be overruled by the courts unless it conflicts with express provisions in the statute. The court in the instant case uses the rationale of the *Virginian* decision in an attempt to show that the majority requirement in the statute has, in fact, been violated. This rationale, however, is not applicable, for the conflict here presented is intrinsically different from the one before the *Virginian* court. In that case there was no real contest as to whether there would or would not be union representation; the rationale is not applicable in a situation such as this, where there is, in addition to the contest between contending unions, an implicit contest to decide whether there shall be union representation. The *Virginian* decision concerned an election in which a relatively small percentage of the employees did not vote; it could be fairly assumed that, because of their small number and because one of the contending unions was sponsored by the employer, these uncast votes represented voters who were unable to vote or were uninterested in the outcome and could in fact be presumed to assent to the will of the majority. On the other hand, if a case arose in which the percentage of non-voters was greater

choice ("no representation"), which received forty-nine per cent of the votes and validating another choice (one of the unions), which received three per cent of the votes.

(e) If no choice receives a majority of votes cast on the first ballot, a run-off is held between the two contending unions; "no representation" is never permitted on the run-off ballot. See, e.g., *R.K. LeBlonde Machine Tool Co.*, 22 N.L.R.B. 465, 469 (1940) (concurring opinion, (dictum)). This rule would require fifty-one per cent of the votes cast on the first ballot to defeat certification. The rule seems to place the problem in its proper perspective. It permits those wishing no representation to express themselves in positive terms, while recognizing that "no representation" is the antithesis of unionization. The first ballot determines if the majority of the craft or class wants unionization or "no representation"; if the latter, the problem is solved, if the former, a run-off is held to decide which union will be the representative. This rule assumes that those who voted for the number two union in the first election would rather be represented by the number one union than have no representation at all (which would be possible if the run-off were held between the number one union and "no representation"). In fact, considering the intense inter-union rivalry engendered by election disputes, this assumption is probably not true. The rule seems to disfavor "no representation," for, even if it received forty-nine per cent of the votes cast and the unions received forty-eight per cent and three per cent respectively, "no representation" would be invalidated in the run-off. However, considering the fact that "no representation" constitutes a choice which is essentially opposed to unionization, it seems just that it should be pitted against the combined forces of those choices which represent unionization. From this standpoint, the rule neither favors nor disfavors "no representation."

and in which there was no company-sponsored union, a more reasonable assumption would be that there was a contestant ("no representation") being evidenced by non-voting. Since it is not reasonable to assume that these uncast votes represented voters unable to vote or uninterested in the outcome, the presumption that those not voting assent to the will of the majority should not be applied. However, language in the *Virginian* decision seems to indicate that if forty-nine per cent of the eligible voters do not vote, they are presumed to assent to the will of the majority.⁴⁴ Such a distinction is unrealistic. The *Virginian* case concerned an election in which no real contestant was evidenced by non-voting, and its rationale should be limited to such cases. It is submitted that the most equitable procedure permits "no representation" on the ballot, and if none receives a majority of votes cast, a run-off election will be held between the contending unions.⁴⁵ The NMB's procedure, while it appears less equitable, is not invalid; it merely reflects the Board's interpretation of the realities of union elections and its emphasis on the desirability of having union representation. It is submitted that the agency set up by Congress to deal with these specific problems is peculiarly able to deal with them and should be permitted to exercise its broad discretion to determine what these realities of union elections demand and precisely to what degree the various parties should be favored. Certainly the Board's position would be more acceptable if it would provide adequate publicity of its policy to the affected employees; however, it seems unwilling to do this.⁴⁶ This deficiency should not be fatal although it does seem reasonable to require that the Board formalize its policy by promulgating a rule in the *Federal Register* stating that certification will be refused if less than a majority of eligible employees vote. Although the ballot used by the NMB is ambiguous in its method and is extreme in its discouragement of "no representation," it still provides a means by which a majority of employees may express their desire for no representation, and this is all that is required by the statute. It seems to follow that the ballot was within the allowable area of discretion provided by the statute.

44. 300 U.S. at 560.

45. See note 43(e) *supra*.

46. See 218 F. Supp. at 125.

Labor Law—Unfair Labor Practice—Availability of Injunction Prior to Exhaustion of Administrative Remedies

Plaintiff employers' association brought suit to enjoin the Regional Director of the NLRB and others from proceeding against it and its members¹ in a trial de novo of a consolidated unfair labor practice case² pending before the Board.³ Five months after the original hearings had begun, the trial examiner had himself disqualified, principally because of the objectionable conduct of union counsel. The NLRB, here pressing the rights of the union, designated a new trial examiner to begin the hearings de novo.⁴ Plaintiff contended that the expense of duplicating the lengthy hearings would cause it irreparable injury.⁵ Defendants moved to dismiss the complaint on the ground that the injunctive relief sought was not within the subject-matter jurisdiction of the district court because the plaintiff had failed

1. The plaintiffs also asked for an order directing the Board's Chief Trial Examiner to reinstate the original trial examiner. *Chicago Auto. Trade Ass'n v. Madden*, 215 F. Supp. 828, 829 (N.D. Ill. 1963).

2. The Regional Director of the NLRB issued separate complaints against five employers after investigation of unfair labor practice charges filed by two unions recently certified as bargaining agents for employees of these five employers. After further investigation "the Regional Director issued a complaint against the association. The complaint alleged that the association was committing unfair labor practices by assisting and inducing some of its members (namely, the five employers against whom complaints had already issued) to refuse to bargain with the charging unions." *Ibid.* These cases were then consolidated.

3. "By delegation, through the Taft-Hartley Act, the National Labor Relations Board has been granted complete authority over representation and complaint matters, insofar as they are 'in' or 'affect' interstate commerce, without any qualification except that the legislative purposes be effectuated." FORKOSCH, *LABOR LAW* 649-50 (1953). (Footnotes omitted.) See *Volney Felt Mills, Inc. v. Le Bus*, 196 F.2d 497 (5th Cir. 1952); *American Optical Co. v. Andert*, 108 F. Supp. 252 (W.D. Mo. 1952).

4. "On July 30, 1962, hearing on the consolidated cases opened before Trial Examiner Reyman in Chicago On December 12, 1962, when the consolidated proceeding had accumulated about 1,800 pages of transcript and 100 exhibits, Trial Examiner Reyman adjourned the hearing *sine die*." *Chicago Auto. Trade Ass'n v. Madden*, *supra* note 1, at 829. Reyman had himself disqualified for "reasons concerning his personal health." *Id.* at 830. However Judge Campbell determined that "any sickness due to tension Trial Examiner Reyman may now have was caused by what he felt to be the contemptuous and obstreperous conduct of attorney Gore." *Id.* at 831. Since the Board was advocating the alleged rights of the union Mr. Gore was representing, Judge Campbell observed that "the board's action here . . . was occasioned not so much by its solicitude for the trial examiner's health as by its fear of his unfavorable decision were he permitted to resume the case." *Ibid.* Subsequent to this action Reyman has been assigned to and conducted other Board hearings; according to the evidence Reyman was available at the time of trial. *Ibid.*

5. Plaintiff argues that unless this court intervenes he will have to spend time and money in defending against the same charges. *Ibid.* Plaintiff lacks an administrative remedy because "review of Board action in certain labor practice cases applies only to its final orders." *Id.* at 832.

to exhaust its administrative remedies.⁶ *Held*, injunction granted. Where irreparable injury will result if plaintiff is required to exhaust its administrative remedies a federal district court can exercise equitable jurisdiction in an unfair labor practice action under section 10 of the National Labor Relations Act. *Automobile Trade Association v. Madden*, 215 F. Supp. 828 (N.D. Ill. 1963).

Section 10(f) of the National Labor Relations Act⁷ makes specific provision for review of section 10 unfair labor practice charges by the courts of appeals. There is no corresponding provision for review in a section 9⁸ certification and representation action,⁹ except with reference to section 9(d) where the certification proceeding is preliminary to the unfair labor practice action.¹⁰ The nonstatutory review of certification orders is usually¹¹ sought through the general equity

6. This argument is properly classified as one of "exhaustion" rather than "primary jurisdiction." While both doctrines must be considered in this area, exhaustion applies "where a claim is cognizable in the first instance by an administrative agency alone." *United States v. Western Pac. R.R.*, 352 U.S. 59, 63 (1956). Since the federal courts and the NLRB cannot in theory have concurrent jurisdiction over a controversy involving unfair labor practices, the doctrine of primary jurisdiction is inapplicable. See 3 DAVIS, ADMINISTRATIVE LAW 1-115 (1959).

7. 61 Stat. 147, 148 (1947), 29 U.S.C. §§ 160(c), (f) (1958).

8. 61 Stat. 143 (1947), 29 U.S.C. § 159 (1958).

9. "The conclusion is unavoidable that Congress, as the result of a deliberate choice of conflicting policies, has excluded representation certifications of the Board from the review by federal appellate courts authorized by the Wagner Act except in the circumstances specified in § 9(d)." *AFL v. NLRB*, 308 U.S. 401, 411 (1940). "A majority of the court believes that Congress has dealt in section 9(d) with reviews of certification and 'decertification,' and has provided therein the only relief it means to grant on that subject." *Fitzgerald v. Douds*, 167 F.2d 714, 716 (2d Cir. 1948). Support for this view may be found in the legislative history of the original National Labor Relations Act. See S. REP. NO. 573, 74th Cong., 1st Sess. 14 (1935); H. R. REP. NO. 1147, 74th Cong., 1st Sess. 23 (1935); 79 CONG. REC. 7658 (1935). See also *Local 1545, United Bhd. of Carpenters v. Vincent*, 286 F.2d 127 (2d Cir. 1960); *Elm City Broadcasting Corp. v. NLRB*, 123 F. Supp. 838 (D. Conn. 1954); *White v. Herzog*, 80 F. Supp. 407 (D.D.C. 1948).

10. "[The Act] does, however, provide an indirect review in section 9(d) which directs that when an order under section 10(c) prohibiting an unfair labor practice has been based in part on a certification following an investigation pursuant to section 9(c) and is to be enforced or reviewed under section 10(c) or 10(f) the record of the certification and investigation shall be included in the transcript." *Fitzgerald v. Douds*, *supra* note 9, at 716. See also *AFL v. NLRB*, *supra* note 9.

11. Some attempts have been made to gain jurisdiction under provisions of the Federal Administrative Procedure Act. The pertinent section reads in part as follows: "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—(a) Any person suffering legal wrong . . . shall be entitled to judicial review thereof." 60 Stat. 243 (1946), 5 U.S.C. § 1009(a) (1958). While this question has not been decided by the Supreme Court, the rule has been generally followed that the Administrative Procedure Act does not confer jurisdiction on the district courts to review representation proceedings of the Board. See, e.g., *Connecticut Light & Power Co. v. Leedom*, 174 F. Supp. 171 (D.D.C. 1959); *Elm City Broadcasting Corp. v. NLRB*, *supra* note 9; *White v. Douds*, 80 F. Supp. 402 (S.D.N.Y. 1948); *White v. Herzog*, *supra* note 9.

jurisdiction¹² of the district court. Although attempts to get review have generally been unsuccessful,¹³ exceptions have been recognized. These exceptions¹⁴ may be categorized as: (1) where the Board's action has resulted in the denial of a constitutional right;¹⁵ (2) where the Board's action clearly violates a "specific . . . and mandatory"¹⁶ provision of the act;¹⁷ and (3) where the action of the Board exceeds

12. The general jurisdiction of the district courts is relied upon to justify judicial review where no provision for review is contained in the specific statutory scheme. "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." 28 U.S.C. § 1337 (1959). See *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297 (1943) (arising under 28 U.S.C. § 41); *Madden v. Brotherhood of Transit Employees*, 147 F.2d 439 (4th Cir. 1945) (arising under general equity power); *Reilly v. Millis*, 144 F.2d 259 (D.C. Cir. 1944), *cert. denied*, 325 U.S. 879 (1945) (injunctive relief sought under general equity powers). *But see* *Millis v. Inland Empire Dist. Council*, 325 U.S. 697 (1945), *reversing* 144 F.2d 539 (D.C. Cir. 1944) (injunctive relief sought, but denied, under general equity powers).

13. *Inland Empire Dist. Council v. Millis*, *supra* note 12; *Switchmen's Union v. National Mediation Bd.*, *supra* note 12; *AFL v. NLRB*, *supra* note 9; *Reilly v. Millis*, *supra* note 12; *Reeves v. Phillips*, 206 F. Supp. 847 (N.D. Ga. 1962); *Sheridan Silver Co. v. Alpert*, 197 F. Supp. 228 (D. Mass. 1959).

14. *Robinson v. McLeod*, 213 F. Supp. 111 (S.D.N.Y. 1963); *Consolidated Edison Co. v. McLeod*, 202 F. Supp. 351 (S.D.N.Y. 1962), *aff'd*, 302 F.2d 354 (2d Cir. 1962). In each case the court recognized and categorized the exceptions that allowed jurisdiction by the district court. In neither case was one of these exceptions present.

15. This exception originated in *Fitzgerald v. Douds*, *supra* note 9, and *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1948). The court held that "if this assertion of a constitutional right is not transparently frivolous, it gave the district court jurisdiction; and having once acquired jurisdiction, the court might, and should, dispose of all other questions which arose, even though they would not be independently justiciable." *Fay v. Douds*, *supra* at 723. However a proper constitutional question was not presented in either case. Although this exception has been recognized in a number of cases, jurisdiction by the district court has been granted very rarely. *Eastern Greyhound Lines v. Fusco*, 323 F.2d 477 (6th Cir. 1963); *Local 25, Teamsters Union v. Greene*, 196 F. Supp. 772 (D. Mass. 1961); *Mechanics Educ. Soc'y v. Schaufli*, 103 F. Supp. 130 (E.D. Pa. 1952); *Volney Felt Mills v. LeBus*, *supra* note 3; *White v. Douds*, *supra* note 11; *White v. Herzog*, *supra* note 9. The court found the required constitutional violation in *Elm City Broadcasting Corp. v. NLRB*, *supra* note 9, but failed to grant jurisdiction saying "the plaintiff . . . [argues] that if a constitutional issue is raised, ipso facto, the jurisdiction of the district court immediately takes hold. But this is not so. There must also be the necessity for equitable relief." *Id.* at 840. See *Worthington Pump & Mach. Corp. v. Douds*, 97 F. Supp. 656 (S.D.N.Y. 1951) (district court assumed jurisdiction on the basis of constitutional question but refused to give relief because of failure to show irreparable injury).

16. *Leedom v. Kyne*, 358 U.S. 184, 188 (1958).

17. The Supreme Court intimated in two early decisions, *AFL v. NLRB*, *supra* note 9, and *Switchmen's Union v. National Mediation Bd.*, *supra* note 12, that resort might be had to the equity jurisdiction of the district courts where action by the Board was in violation of a statutory or constitutional right. Following the *AFL* decision, equitable jurisdiction in representation matters was asserted by a number of lower courts but relief was rarely granted. *De Pratter v. Farmer*, 232 F.2d 74 (D.C. Cir. 1956) (district court is without jurisdiction to review a representation proceeding because there was no showing of unlawful activity on the part of the board); *Klein v. Herrick*, 41 F. Supp. 417 (S.D.N.Y. 1941) (district court asserted jurisdiction but

its jurisdiction in the field of foreign affairs.¹⁸ The nonstatutory review of unfair labor practice actions, on the other hand, depends on whether statutory review by the court of appeals may be circumvented.¹⁹ If the court adheres to the doctrine of exhaustion of administrative

did not give injunction because Board did not violate section 9(c) of the NLRA). Eighteen years later a case presented squarely the situation found not to have been presented in *AFL v. NLRB*. This situation resulted where the unlawful action of the Board inflicted an injury on the plaintiff. Mr. Justice Whittaker said in *Leedom v. Kyne*, *supra* note 16, that "this was an attempted exercise at power that had been specifically withheld. It deprived the professional employees of a right assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given." *Id.* at 189. For examinations of the significance of *Leedom v. Kyne*, see 27 GEO. WASH. L. REV. 600 (1959); 42 MINN. L. REV. 938 (1958); 11 STAN. L. REV. 760 (1959); 33 TUL. L. REV. 705 (1959); 1959 U. ILL. L.F. 682; 5 UTAH L. REV. 561 (1957); 12 VAND. L. REV. 1404 (1959). See also 8 BUFFALO L. REV. 72 (1959); 76 HARV. L. REV. 401, 403 (1962). As many courts have pointed out, "since *Leedom v. Kyne*, the Court of Appeals . . . has resisted every effort to apply that decision to orders in § 9(c) proceedings, alleged to violate statutory or constitutional commands . . ." *Local 1545, United Bhd. of Carpenters v. Vincent*, *supra* note 9, at 132. For comments on this case see 29 GEO. WASH. L. REV. 948 (1961). The courts have consistently found no violation of "clear and mandatory" statutory language. *Boyles Galvanizing Co. v. Waers*, 291 F.2d 791 (10th Cir. 1961) (district court cannot take jurisdiction because calling of election was not beyond the statutory power and authority of the union); *McLeod v. Local 746, United Bhd. of Indus. Workers*, 288 F.2d 198 (2d Cir. 1961) (unreasonable action by the Board short of violation of an act is inadequate to establish jurisdiction by the district court); *International Ass'n of Tool Craftsmen v. Leedom*, 276 F.2d 514 (D.C. Cir.), *cert. denied*, 364 U.S. 815 (1960) (no showing that the Board violated a "clear and mandatory" statutory prohibition by according controlling consideration to bargaining history); *Leedom v. Local 494, Norwich Printing Specialties Union*, 275 F.2d 628 (D.C. Cir.), *cert. denied*, 362 U.S. 969 (1960) (Board did not violate § 9(b)(2), thus the district court was without jurisdiction and erred in enjoining the election); *National Biscuit Div. v. Leedom*, 265 F.2d 101 (D.C. Cir.), *cert. denied*, 359 U.S. 1011 (1959) (court does not find action by the Board that exceeds its authority); *Lawrence Typographical Union v. McCulloch*, 222 F. Supp. 154 (D.D.C. 1963) (Board did not violate § 9(c) and so district court does not have jurisdiction); *Connecticut Light & Power Co. v. Leedom*, 174 F. Supp. 171 (D.D.C. 1959) (not a question of an unlawful action on the part of the Board of the type which would confer jurisdiction on the district court). *But see* *Local 46, Miami Newspaper Printing Pressman's Union v. McCulloch*, 322 F.2d 993 (D.C. Cir. 1963) (failure of the Board to certify the results of an election was a violation of § 9(c)(1)); *Boire v. Greyhound Corp.*, 309 F.2d 397 (5th Cir.), *cert. granted*, 372 U.S. 964 (1962) (Board violates § 9 of the NLRA by including in the representation election employees of an independent contractor).

18. In the only case since *Leedom v. Kyne* where the Supreme Court felt the facts sustained district court jurisdiction, Mr. Justice Clark said, "While here the Board has violated no specific prohibition in the Act, the overriding consideration is that the Board's assertion of power to determine the representation of foreign seamen aboard vessels under foreign flags has aroused vigorous protests from foreign governments and created international problems for our Government." *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 16 (1963).

19. Only in rare cases has nonstatutory review of unfair labor practice actions been allowed. One recent case where this was allowed is *Deering Milliken, Inc. v. Johnston*, 295 F.2d 856 (4th Cir. 1961). There the injunction was predicated upon findings that a second remand order in an unfair labor practice case was in violation of the Board's duty to dispose of the case with reasonable dispatch and was arbitrary and oppressive.

remedies,²⁰ nonstatutory review is precluded.²¹ However, where the exhaustion of the administrative remedy is not required²² because of the likelihood of irreparable injury,²³ lack of an adequate administrative remedy,²⁴ presence of a constitutional question,²⁵ or lack of jurisdiction of the action by the agency,²⁶ the district court is permitted to exercise its equitable jurisdiction.

In the instant case the court recognized that generally plaintiffs in an unfair labor practice action must exhaust their administrative remedies prior to invoking the jurisdiction of the district court.²⁷ However, the court acknowledged that there were exceptions²⁸ to the exhaustion rule and stated three criteria²⁹ that must be met to prevent

20. There has been some confusion as to the application to specific cases of the doctrine of exhaustion of administrative remedies. Justice Magruder says "this doctrine had its origin in a discretionary rule adopted by courts of equity to the effect that a petitioner will be denied equitable relief when he has failed to pursue an available administrative remedy by which he might obtain the same relief." *Smith v. United States*, 199 F.2d 377, 381 (1st Cir. 1952). For a thorough analysis of this doctrine, see *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50 (1938); 3 DAVIS, *op. cit. supra* note 6, at 50-51; Berger, *Exhaustion of Administrative Remedies*, 48 YALE L.J. 981 (1939); Jaffe, *The Exhaustion of Administrative Remedies*, 12 BUFFALO L. REV. 327 (1963); 2 RACE REL. L. REP. 561 (1957).

21. *Franklin v. Jonco Aircraft Corp.*, 346 U.S. 868 (1953) ("appellee having failed to exhaust its administrative remedy, the judgment is reversed"); *Vapor Blast Mfg. Co. v. Madden*, 280 F.2d 205 (7th Cir. 1960) (dismissed for lack of jurisdiction on the ground that review provision of the NLRA provided for adequate review of the issue in § 10(b), (e), (f)); *Biazevich v. Becker*, 161 F. Supp. 261 (S.D. Cal. 1958) (district court refused to require Board officers and agents to produce before a Board trial examiner certain documents pursuant to the terms of subpoenas issued by the trial examiner during an unfair labor practice hearing).

22. See Note, *Primary Jurisdiction and Exhaustion of Administrative Remedies*, 16 WYO. L.J. 290 (1962).

23. The normal expenses of continued litigation before the administrative agency have been held legally insufficient to constitute irreparable injury. *Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535, 540 (1950); *Petroleum Exploration, Inc. v. Public Serv. Comm'n*, 304 U.S. 209, 220 (1938); *Myers v. Bethlehem Shipbuilding Corp.*, *supra* note 20. *But cf.* *Public Util. Comm'n v. United Fuel Gas Co.*, 317 U.S. 456 (1943).

24. Where the administrative remedy, though available, is unreasonably delayed, the doctrine of exhaustion is relaxed. *Montana Nat'l Bank v. Yellowstone County*, 276 U.S. 499 (1928); *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587 (1926). See also *Frozen Food Express v. United States*, 351 U.S. 40 (1956); *Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407 (1942); *Waite v. Macy*, 246 U.S. 606 (1918).

25. "If . . . an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy plainly should be pursued. But where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right." *Public Util. Comm'n v. United States*, 355 U.S. 534, 539-40 (1958). See also *Lichter v. United States*, 334 U.S. 742 (1948); *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752 (1947).

26. *Allen v. Grand Cent. Aircraft Co.*, *supra* note 23; *Aircraft & Diesel Equip. Corp. v. Hirsch*, *supra* note 25; *Macauley v. Waterman S.S. Corp.*, 327 U.S. 540 (1946); *Skinner & Eddy Corp. v. United States*, 249 U.S. 557 (1919).

27. *Chicago Auto. Trade Ass'n v. Madden*, *supra* note 1, at 830.

28. *Ibid.*

29. *Id.* at 831.

its application: (1) The actions of the Board must be in excess of its authority. (2) The result of the Board's conduct must be irreparable injury to the plaintiff. (3) The plaintiff must otherwise lack an adequate administrative or judicial remedy.

Failure of the courts to recognize different³⁰ requirements for judicial review under sections 9 and 10 of the NLRA has resulted in an anomaly. Cases are cited interchangeably regardless of the section that governs the particular case. In the instant case, an unfair labor practice action, the court cites a certification case as precedent for its holding.³¹ There are distinctions between the requirements for review under each section which makes this intermingling of precedent unjustifiable. In order to obtain review of a certification action, plaintiff must show a violation of a "clear and mandatory" statutory direction.³² In an unfair labor practice case he must show "actions of the Board in excess of its authority."³³ Although some type of injury to the plaintiff is required under either section, a technical injury³⁴ will suffice in a certification action, while plaintiff in an unfair labor case must be subjected to real and substantial injury.³⁵ The inadequacy of the administrative remedy is not particularly important in the certification cases but is a strict requirement in the unfair labor practice cases.³⁶ These differences have resulted from the failure of Congress to provide for statutory review of certification like that in the court of appeals for unfair labor practice cases. The absence of statutory review over the certification action is based on a policy of securing a final result in a certification election as rapidly as possible.³⁷ That the same policy consideration does not apply in

30. There are also definite similarities in the requirements for judicial review of a certification order and of an unfair labor practice ruling by a district court. Both (theories) allow review where a valid constitutional question is involved. Irreparable injury to the plaintiff must be alleged when proceeding under either section. These similarities exist, first, because equitable jurisdiction must be asserted under both sections for review by the district court and, second, because the case law in this field evolved from a hybrid case, *AFL v. NLRB*, *supra* note 9, that involved an unfair labor practice ruling based on failure to bargain because of an allegedly unjust certification order.

31. In the instant case the court cites *Leedom v. Kyne*, *supra* note 16, a case which was brought under § 9 of the NLRA.

32. See note 16 *supra*.

33. *Chicago Auto. Trade Ass'n v. Madden*, *supra* note 1, at 831.

34. See note 16 *supra*.

35. *Chicago Auto. Trade Ass'n v. Madden*, *supra* note 1, at 831-32.

36. *Id.* at 832.

37. In reference to the procedure for review of certification actions under section 9, a House Committee declared: "The weakness of this procedure is that under the provision for review of election orders employers have a means of holding up the election for months by an application to the circuit court of appeals At the present time 10 cases for review of the Board's election orders are pending in the circuit courts of appeals. Only three have been argued and none have been decided." H.R. REP. No. 1147, 74th Cong., 1st Sess. 5-6 (1935).

unfair labor cases is indicated by the congressional provision for appellate review of these decisions. In recognition of this congressional policy the courts have imposed much stricter requirements on nonstatutory review of certification actions. Recognition of these basic differences in nonstatutory review under sections 9 and 10 of the NLRA will insure the facilitation of the different congressional policies in certification and unfair labor practice cases.

Taxation—Federal Estate Tax— Survivor's Annuity as Insurance Under Section 2039(a)

Thomas C. McCobb, a retired employee of Standard Oil Company of New Jersey, was, prior to his demise, an annuitant under a company-funded annuity plan. His widow received benefit payments under a death benefit plan, the cost of which was unfunded and was borne entirely by the company. The death benefit plan provided for monthly payments to surviving dependents for one year in the same amount that would have been received by McCobb under the annuity plan, less Social Security payments made. The annuitant had no right to designate beneficiaries other than those specified in the plan, except the negative right, subject to the approval of the company, to exclude them on written request. Standard Oil could have cancelled the death benefit plan at its option, but, since it did not, the rights of McCobb's widow became fixed at McCobb's death; the widow was then entitled to receive over thirty thousand dollars under the plan. The estate paid an estate tax deficiency based on the Commissioner's inclusion of these payments in the gross estate. Upon denial of a refund, suit was brought in federal district court, where it was held that the death benefit payments were not includible in the decedent's gross estate. On appeal, *held*, reversed. An unfunded plan, involving no actuarial distribution of the risk of premature death, whereby the employer agreed to pay a sum certain to a named beneficiary upon the death of a retired employee, does not shift the risk and distribute the risk of death, and thus is not insurance within section 2039(a) of the Internal Revenue Code of 1954; therefore the benefits payable under the plan are taxable to the decedent's gross estate as an "annuity or other payment."¹ *All v. McCobb*, 321 F.2d 633 (2d Cir. 1963).

1. "The gross estate shall include the value of an annuity or other payment receivable by any beneficiary by reason of surviving the decedent under any form of contract or agreement entered into after March 3, 1931 (other than as insurance under policies

Section 2039(a) of the Internal Revenue Code of 1954 requires that survivors' payments under an "annuity or other payment" be included in the decedent's gross estate if they were payable under a "contract or agreement" or if the decedent "possessed the right" to receive payments; however, life insurance is specifically excluded from taxation under this section. *Bahen's Estate v. United States*² upheld Treasury Regulation 20.2039-1(b),³ which includes an informal arrangement or understanding within the phrase "contract or agreement" and encompasses within that phrase more than a formal contract between the employer and the employee. *Bahen* also commented on the requirement that the decedent must have "possessed the right" to receive payments. Insurance policies are included within the gross estate by section 2042(2) when the decedent possesses any of the incidents of ownership at his death, but this requirement refers to an actual property interest rather than the existence of a possibility that some time in the future the decedent might possess an enforceable claim to the payments (as was the case in *Bahen*).⁴ Although the survivor's rights under such a plan or plans would not be fixed until the decedent's death, a sufficient possibility of possessing the property right would exist if the payments had customarily been made.⁵ A life annuity plan established by the decedent's employer has the function of protecting against the risk of extreme longevity, while insurance has the opposite function of protecting against the risk of premature

on the life of the decedent), if, under such contract or agreement, an annuity or other payment was payable to the decedent, or the decedent possessed the right to receive such annuity or payment, either alone or in conjunction with another for life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death." INT. REV. CODE OF 1954, § 2039(a).

2. 305 F.2d 827 (Ct. Cl. 1962), 16 VAND. L. REV. 989 (1963).

3. "The term 'contract or agreement' includes any arrangement, understanding or plan, or any combination of arrangements, understandings or plans arising by reason of the decedent's employment." Treas. Reg. § 20.2039-1(b)(ii) (1963).

4. Estate of Edward H. Wadewitz v. Commissioner, 39 T.C. No. 97 (1963). The decedent's right to receive future payments was forfeitable only at his own election, and by choosing to refrain from causing any of the voiding contingencies to happen he preserved his rights. *But see* 67 YALE L.J. 467, 475 (1958), where it is suggested that equating possibility with right overreaches the statutory language. "Possessed the right" is given detailed analysis in 16 VAND. L. REV. 989, 992 (1963).

5. "If, however, it can be established that the employer has consistently paid an annuity under such circumstances, the annuity will be considered as having been paid under a 'contract or agreement'." Treas. Reg. § 20.2039-1(b)(2), Example (4)(a) (1963). In the legislative history of section 2039 periodic payments for a specified period of time are included within the annuity, and the situation where the survivor of an annuitant continued to receive payments made by the decedent's employer is given as an example of receiving an annuity or other payment. S. REP. NO. 1622, 83d Cong., 2d Sess. 123, 469-72 (1954). *But see* *Worthen v. United States*, 192 F. Supp. 727 (D. Mass. 1961) (yearly bonus reasonably expected, because of past practice, but held, no right to receive until actually voted by the corporation).

death.⁶ A common type of annuity pays the annuitant a fixed sum for life and after his death the amount of the annuitant's payment remaining with the company is paid to a named beneficiary. The primary concern of this arrangement is to insure the annuitant against the risk of extreme longevity. In addition it provides assurance that the annuitant or his estate will receive the face amount of the policy. Therefore, when the decedent's employer establishes a life annuity plan and establishes and maintains a plan to pay periodic benefits to a beneficiary, the value of the beneficiary's annuity is includible in the decedent's gross estate.⁷ The payments are excluded from the gross estate if they qualify as insurance under section 2039(a), but the Treasury Regulations fail to set out the attributes of insurance.⁸ Whether or not payments to a decedent's survivor under an "unqualified plan"⁹ fall within the parenthetical exclusion of insurance in section 2039(a)¹⁰ depends on the definition given by the courts to the term "insurance." In *Helvering v. Le Gierse*, the Supreme Court held that a contract must shift and distribute the risk of premature death if it is to qualify as insurance;¹¹ the Court found the risk element was not present because the insured had purchased both an annuity and a life insurance policy from a commercial insurer for a single premium that exceeded the possible proceeds from the insurance policy.¹² When the reserve value of a life insurance policy becomes greater than the proceeds payable at death, a risk element is no longer present, but when there is no funding, a policy has no reserve value.¹³ Although the nature of the payment is usually

6. "The risk assumed in an annuity contract is to pay to the annuitant an annuity so long as he lives, while the risk assumed in a life insurance contract is to pay upon insured's death." *Rosenbloom v. New York Life Ins. Co.*, 65 F. Supp. 692, 695 (W.D. Mo. 1946), *remanded on other grounds*, 163 F.2d 1 (8th Cir. 1947). See also *Knight v. Finnegan*, 74 F. Supp. 900 (E.D. Mo. 1947); *Corporation Comm'n v. Equitable Life Assur. Soc'y*, 73 Ariz. 171, 239 P.2d 360 (1951); *Cruthers v. Neeld*, 14 N.J. 497, 103 A.2d 153 (1954).

7. "All rights and benefits accruing to an employee and to others by reason of the employment . . . are considered together in determining whether or not section 2039(a) . . . applies. The scope of section 2039(a) . . . cannot be limited by indirection." *Treas. Reg. § 20.2039-1(b)(2)*, Example (6) (1963).

8. *Treas. Reg. § 20.2042-1(a)* (1963) merely states that insurance refers to all life insurance.

9. Not qualified under INT. REV. CODE OF 1954, § 401. When an annuity or other payment is receivable under certain qualified plans, section 2039(c) excludes the payment from the decedent's gross estate. *Treas. Reg. § 20.2039-2(a)* (1963).

10. See note 1 *supra*.

11. The individual aspect of insurance is characterized by risk shifting, while risk distribution is the method of spreading the cost of a potential loss throughout a group. See 59 *YALE L.J.* 780 (1950).

12. 312 U.S. 531, 539 (1941). See also *Essenfeld v. Commissioner*, 311 F.2d 208, 209 (2d Cir. 1962).

13. For a general discussion of problems in this area see *LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES* 215 n.42 (1962).

ascertained by a comparison of the reserve value of the policy with the value of the death benefits payable at the decedent's death, an inability to prove an exact amount as reserve value does not preclude a payment's being treated as insurance, so long as there is a shifting and distribution of the risk of premature death.¹⁴ When the Commissioner in *Haynes v. United States*¹⁵ argued that a health insurance plan established by a self-insuring employer should not be treated as insurance for income tax purposes because there was no payment of fixed periodic premiums and no creation of a fund to assure payments of the disability benefits, the Supreme Court held that these were not necessary elements of insurance. When these cases are considered together, it is clear that shifting the risk of premature death to another and distributing that risk, whereby the cost of a loss is diffused throughout a group, is the essence of insurance for this purpose; funding, premium paying, and actuarial planning are common attributes of insurance but they are not essential.

The court in the instant case considered the annuity plan and the death benefit plan as a single integrated plan under section 2039,¹⁶ accepting Treasury Regulation 20.2039-1(b)(ii)¹⁷ as descriptive of the relationship. Therefore the payments made to the widow could be excluded from the gross estate under section 2039(a) only if they were denominated insurance. Rejecting the lower court's finding that the payments received by Mrs. McCobb were functionally insurance since they were designed to provide partial protection against the loss of her husband's retirement allowance through his untimely death,¹⁸ the court pointed out that providing partial protection was a characteristic of a great many survivorship annuities, which are not insurance for purposes of federal estate taxation. The court noted both a lack of funding and premium payments and stated that there was no risk shifting or risk distribution in the death benefit

14. *Commissioner v. Treganowan*, 183 F.2d 288, 291 (2d Cir.), *cert. denied*, 340 U.S. 853 (1950).

15. 353 U.S. 81 (1957). A recent letter ruling of the Attorney General of Delaware emphasized that the *Haynes* interpretation of the term "accident and health insurance" is not conclusive of the question of the meaning of that term as used in the Delaware income tax statute; he also stated that the interpretation in *Haynes* was too broad. He ruled that the term insurance will be given its "commonly understood" meaning, "a binding insurance contract, with payment of premiums determined by actuarial computations, and coverage based upon such premiums," although noninsured plans are specifically recognized as being included within the term "accident and health insurance" under section 105(e) of the Internal Revenue Code of 1954. 19 J. TAXATION 379 (1963).

16. See note 6 *supra*.

17. See note 1 *supra*.

18. *McCobb v. All*, 206 F. Supp. 901, 903 (D. Conn. 1962), *rev'd*, 321 F.2d 633 (2d Cir. 1963).

plan. The court went on to say that the company did not accept the risk of decedent's premature death by gambling with the decedent that he would live a long life and pay for the plan before his death. Furthermore, the court continued, the company did not distribute this risk over a large group of persons based on actuarial data. "The company did nothing more than promise to pay a sum certain to a named beneficiary upon the death of a retired employee."¹⁹

The Treasury Regulations combine employer-financed annuity and death benefit plans covering an employee into a single plan, even though they were the subject of separate agreements or contracts, and the regulations state that a future possibility of an enforceable claim is sufficient under section 2039 for an employee to "possess the right" to receive payments. These regulations have been sustained by the court as a reasonable expression of Congressional intent²⁰ to include a joint and survivor annuity in the decedent's gross estate to the extent that its cost was contributed by the decedent or by the employer under a nonqualified plan. Congress gave favored treatment to qualified plans,²¹ so that annuities or other payments attributable to employer's contributions will be excluded from the decedent's gross estate if they are made under a qualified plan.²² As noted above the definition of "insurance" under section 2039(a), has been left to the courts. *Haynes* did not require premiums, funding, or actuarial data, and said that "health insurance" should be given the broad general meaning that "life insurance" had been given in *Le Gierse*.²³ Therefore, the court in the instant case is not correct in requiring either funding or the use of actuarial data to compute a reserve value before it will recognize a valid insurance policy because these are not the essential criteria for insurance.²⁴ Risk shifting and risk distribution are the essential features.²⁵ There is little question that this was done in the

19. 321 F.2d at 637 (2d Cir. 1963).

20. S. REP. NO. 1622, 83d Cong., 2d Sess. 470 (1954). See text accompanying note 2 *supra*.

21. INT. REV. CODE OF 1954, § 2039(c).

22. INT. REV. CODE OF 1954, § 401.

23. The two decisions may be validly synthesized as to what are the elements of insurance, although the term insurance is being taken from both the income tax and the estate tax sections of the code, and although it is common for a term's definition to vary with the code section in which it is used.

24. See notes 6 & 15 *supra*.

25. Risk was effectively shifted from McCobb to Standard Oil, which distributed the risk over the large number of executives, who were covered by the plan. Contingent on decedent's death, Standard Oil was able to employ funds equal to possible death benefit payments toward the production of income. Standard Oil gambled as to whether it would lose the utility of these funds at an early date or have the decedent's continued employment toward the production of income in excess of the eventual expense of making the death benefit payments. Standard Oil had the same agreement with all executives covered by the death benefit plan, and the company assumed that

instant case. The court omitted from its quotation from *Le Gierse* the crucial requirement that the risk being shifted and distributed be the risk of premature death.²⁶ The court mentioned the risk of premature death in its discussion of *Treganowan*, but it failed to distinguish that risk from the risk of extreme longevity. The risk which is shifted determines whether there is an insurance policy or an annuity.²⁷ Contrary to the court's opinion, the company did in fact gamble with the decedent; in the combined plans it assumed the risk that decedent might lead a long life. This is the seller's risk in an annuity,²⁸ the proceeds of which are not excluded from the decedent's estate by section 2039(a). The court adds a touch of irony by concluding that "the company did nothing more than promise to pay a sum certain to a named beneficiary upon the death of a retired employee." This neatly fits a widely accepted definition of insurance.²⁹ Although the death benefit plan has the character of insurance, the primary emphasis when it is combined with the annuity plan is protection against the risk of extreme longevity rather than protection against the risk of premature death. The distinction between the type of risk in an annuity and an insurance policy is implicit in the treasury regulation used by the court³⁰ and the legislative history of section 2039(a).³¹ This court reached the proper result for reasons which will not bear scrutiny. Mere bookkeeping entries will cure the lack of funding, and reserve value can be computed by using commonly available

only a few of these would die in one year. Therefore, the profits made for Standard Oil by these executives would absorb the amount of death benefits paid each year, and the company thereby distributed the risk that it had assumed.

26. "That life insurance is desirable from an economic and social standpoint as a device to shift and distribute risk of loss from premature death is unquestionable." 312 U.S. at 539.

27. "An annuity is usually defined as being an obligation to pay a stated sum . . . to a stated recipient, such payments to terminate upon the death of the designated beneficiary." 1 APPLEMAN, INSURANCE § 81, at 71 (1941). An insurance policy holder exchanges the possibility of great loss through premature death for a smaller, fixed loss, which he can absorb without financial disaster. 1 APPLEMAN, INSURANCE § 2, at 9 (1941). "[A]nnuity and insurance are opposites From the company's viewpoint, insurance looks to longevity, annuity to transiency." 312 U.S. at 541.

28. The court assessed the risk assumed by the issuer of an annuity, and stated that "even if a substantial number live beyond their predicted demise, the company issuing the annuity . . . is obligated to make the annuity payments on the basis of the mortality prediction reflected in the contract." SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65, 70 (1959).

29. "[O]ne party, for a compensation called the 'premium,' assumes particular risks of the other party and promises to pay to him or his nominee a certain or ascertainable sum of money on a specified contingency . . ." 44 C.J.S. *Insurance* § I, at 471 (1945). A life insurance policy is a contract to pay a stated sum to the named beneficiary on the death of the insured. 1 APPLEMAN, INSURANCE § 1, at 2 n.1 (1941).

30. See note 7 *supra*.

31. See note 5 *supra*.

life expectancy and annuity tables. This sham might satisfy the court, but likely the court's intention was to implement a policy decision requiring a commercial insurance policy instead of self-insurance;³² if decedent himself had purchased an insurance policy, the premiums would normally be paid in after-tax dollars, and failure to tax the decedent on imputed income equal to premiums necessary to purchase a death benefit plan means that the entire amount escapes taxation when the death benefit payments are held to be insurance.³³ The cost of life insurance purchased on the life of an employee by an employer under a qualified plan is still taxable in part to the employee, when there is no intervening trust. The amount taxable is the net term cost at risk, which is the amount of money needed to buy insurance equal to the difference between the face value of the policy and its cash surrender value. The proceeds are not taxable to the employee's estate at his death. If the payments in the instant case are not taxed to the estate they will be given preferred treatment over qualified plans and defeat Congressional intent.

Taxation—Federal Income Taxation—Prosecution of Shareholder under Section 7201 for Charging Personal Expenditures to Corporation's Expense Account

The defendant, president and sole stockholder of a corporation, was convicted of criminal tax evasion because he had failed to include in his income tax returns for the years 1954-1956 personal expenditures¹ which admittedly had been improperly charged to various expense accounts of the corporation. Internal Revenue agents twice had examined the corporate books and had informed the defendant after each examination that such expenditures were includible in his gross income. The defendant's continued failure to report such expenditures as income led to his indictment in 1961 on three counts of criminal tax

32. Certainly the term "policies" used in the statute suggests such an approach.

33. Rev. Rul. 57-191, 1957-1 CUM. BULL. 162.

1. These expenditures totaled \$212,328.97 for the three years. An additional \$602,692.11 had been charged to defendant's personal expense account, but it appears that the defendant had repaid this amount to the corporation so that its treatment was not challenged. See Brief for Appellant, p. 5, *United States v. Durant*, 324 F.2d 859 (7th Cir. 1963). It was stipulated by the parties that the defendant derived economic benefit from these expenditures. The nature of this "economic" benefit was suggested by the court when it discussed the "defendant's benefactions to various ladies" as a "nurture of cordial relations with them." 324 F.2d at 864.

evasion. The defendant denied any criminal liability on the grounds that the expenditures involved were loans and thus not income and further claimed that, even if the expenditures were income, there was no evidence that he had willfully attempted to evade taxes. A federal district court found him guilty on each count of willful failure to report income in violation of section 7201 of the Internal Revenue Code of 1954.² On appeal to the Court of Appeals for the Seventh Circuit, *held*, affirmed. Failure by a corporate officer and sole stockholder to report as income personal expenditures charged to corporate expense accounts after repeated warnings that such expenditures should be included in income constitutes a willful attempt to evade the payment of income tax. *United States v. Durant*, 324 F.2d 859 (7th Cir. 1963).³

The courts generally have found that the transfer, either directly or indirectly, of corporate funds in such a manner that the benefit of the funds goes to a corporate stockholder constitutes income to the recipient. When the benefits have been in the form of money, as they were here, and not intended as compensation,⁴ the courts have usually found the amounts received to be income, relying on one of two theories.⁵ Perhaps the most frequently applied theory has been that such money constitutes a "disguised dividend" to the stockholder.⁶ Such payments are dividends often only because the court so characterizes them. (This often is a fiction, for, in some instances, the corporation may not have intended such benefits as dividends).⁷ The

2. 208 F. Supp. 890 (N.D. Ill. 1962). The defendant was fined a total of \$15,000 and sentenced to the custody of the attorney general for a period of 60 days on each count. The wording of the statute is as follows: "§ 7201. Attempt to Evade or Defeat Tax. Any person who *willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof* shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution." INT. REV. CODE OF 1954, § 7201. (Emphasis supplied.)

In a recent case a court held that § 7201 defines two possible crimes—an attempt to evade or defeat (1) any tax, or (2) the payment thereof. *Cohen v. United States*, 297 F.2d 760 (9th Cir. 1962).

3. *Petition for cert. filed*, 36 U.S.L. WEEK 3305 (U.S. Feb. 28, 1964) (No. 875).

4. Note that the Internal Revenue Service would probably not be anxious to claim that the taxpayer has received compensation from the corporation, as this amount would then be deductible by the corporation as a business expense.

5. But the court need not adopt any theory as to the nature of the income. See note 25 *infra*.

6. Section 61(a)(7) of the Code provides for the inclusion of dividends in gross income. It has been held that, where expenses incurred by the president and sole stockholder of a corporation were not shown to be corporate expenses, these expenses were constructive dividends to the taxpayer. *Louis Marks*, 22 CCH Tax Ct. Mem. 1600 (1963). *Cf. Oyster Shell Prod. Corp. v. Commissioner*, 313 F.2d 449 (2d Cir. 1963); *A. John Cohen*, 22 CCH Tax Ct. Mem. 1189 (1963); *Isaac Engel Realty Co.*, 22 CCH Tax Ct. Mem. 1372 (1963).

7. *Regensburg v. Commissioner*, 144 F.2d 41 (2d Cir.), *cert. denied*, 323 U.S. 783

application of this theory is limited by the Code's requirement that before a dividend can be found there must be accumulated or current earnings and profits.⁸ The Code thus would permit the finding, for tax purposes, of a dividend if it met the aforementioned requirement even though the dividend would be illegal under state law. Even if there are no current or accumulated earnings and profits to support constructive dividend treatment, the court may find that the stockholder has embezzled the funds, which, under the 1961 decision in *James v. United States*,⁹ constitute income to the embezzler. While the above theories are instruments for a finding that the taxpayer did receive income, they must be supported by facts permitting their application, though such application will usually be contested. A favorite argument for supporting the taxpayer's contention that the funds received were not income is that the money was extended to him as a loan by the corporation.¹⁰ Especially indicative of a loan is the situation in which the stockholder gives the corporation some evidence of the indebtedness.¹¹ A necessary prerequisite for finding that a withdrawal

(1944). In this case, the court, although supporting a Tax Court finding that the taxpayer had received a dividend, noted that it would also have been plausible to find that the transaction actually involved a loan to the stockholder by the corporation. "To constitute a distribution taxable as a dividend, the benefit received by the shareholder need not be considered as a dividend either by the corporation or its shareholders, declared by the board of directors, nor other formalities of a dividend declaration need be observed, if on all the evidence there is a distribution of available earnings or profits under a claim of right or without any expectation of repayment." *Clark v. Commissioner*, 266 F.2d 698, 711 (9th Cir. 1959).

8. Section 316 of the Code defines dividend for income tax purposes.

9. 366 U.S. 213 (1961), 15 VAND. L. REV. 660 (1962). The Supreme Court held that embezzled funds must be included in the taxpayer's gross income in the year in which they are misappropriated, thus overruling *Commissioner v. Wilcox*, 327 U.S. 404 (1946), which had held that embezzled funds were not income.

If the *James* case were not controlling here (while it would control the question of whether the embezzled funds were income it probably would not permit a finding of willfulness since the actions in question occurred while *Wilcox* was in effect), the defendant could avoid a conviction for tax evasion if he could prove that he had embezzled the funds. *Chan Shing Ho v. United States*, 186 F.2d 574 (9th Cir. 1951); *Currier v. United States*, 166 F.2d 346 (1st Cir. 1948) (constructive dividend found). Along this same theoretical line, if defendant were to claim to be an embezzler it could be claimed that the corporation condoned the action since he is the sole stockholder. Thus the funds would not have been embezzled. Indeed it has been held that a stockholder cannot embezzle funds from his wholly owned corporation. *Davis v. United States*, 226 F.2d 331 (6th Cir. 1955). But this holding seems incorrect if one applies the theory that a corporation is a separate legal entity, distinct and apart from its stockholders.

10. Robert Binda, 22 CCH Tax Ct. Mem. 1195 (1963); Carl L. White, 17 T.C. 1562 (1952). Essential to a finding of a loan is that at the time of the payment the parties intended that the money be repaid. If it could be shown, as in the instant case, that the advance was made with no intention of repayment, it is doubtful if the payment would be treated as a loan even if entered on the corporate books under an account such as "Accounts Receivable-Officers."

11. *Soden v. Bookwalter*, 63-1 U.S. Tax Cas. ¶ 9329 (W.D. Mo. 1963). There the court noted as circumstances indicative of a loan the execution of notes, the presence

is a loan is the presence at the time of withdrawal of an intention of the parties to repay.¹²

This case is one of the few in which a court has held a stockholder of a wholly owned corporation liable for criminal fraud under section 7201 for failure to report as income personal expenditures charged to corporate expense accounts.¹³ Before discussing the element of fraud under the Internal Revenue Code, two distinctions should be made. The first is that between civil and criminal fraud under the Code. Suits under section 6653(b), which imposes a penalty for civil fraud of fifty per cent of the underpayment assessed, are quite frequent.¹⁴ An intentional failure to disclose income from various sources, or an attempt to hide the sources of income, will satisfy a finding of civil fraud.¹⁵ On the other hand, the case at bar involves criminal fraud under section 7201, so that cases involving civil fraud have limited relevance. Second, the two related sections dealing with criminal fraud tend to be confused. Section 7203 makes it a misdemeanor to willfully fail to file a return, supply information on the return, or pay tax, while section 7201, under which the instant case was brought, makes it a felony to *willfully attempt* to evade or defeat tax.¹⁶ Both sections are similar to the extent that they require the

of a business purpose, and the fact that very little surplus was on hand out of which a dividend could have been paid. Several articles have discussed whether a withdrawal is a loan or a constructive dividend and what elements are determinative of the issue. Werner, *Stockholder Withdrawals—Loans or Dividends?*, 10 TAX L. REV. 569 (1955); Note, 36 N.C.L. REV. 540 (1958); Note, *Disguised Dividends: A Comprehensive Survey*, 3 U.C.L.A.L. REV. 207 (1956).

12. Clark v. Commissioner, 266 F.2d 698, 710-11 (9th Cir. 1959) (citing other cases).

13. A case with facts similar to those of the instant case is Max P. Lash, 15 CCH Tax Ct. Mem. 453 (1956), *aff'd per curiam*, 245 F.2d 20 (1st Cir. 1957). The taxpayer had charged his personal expenses to improper corporate expense accounts. He was held to have violated § 293(b) of the 1939 Code (§ 6653(b) of the 1954 Code) covering civil fraud. Lash had previously been convicted of criminal tax evasion for engaging in practices similar to those of defendant Durant. Lash v. United States, 221 F.2d 237 (1st Cir.), *cert. denied*, 350 U.S. 826 (1955). The Lash case seems to be good authority for the instant decision, but the failure of the court to cite it may be evidence that each case of willfulness must be decided on its facts alone. See also United States v. Brill, 270 F.2d 525 (3d Cir. 1959), where an accountant was convicted of felonious tax evasion in filling out a corporate officer's tax forms.

14. E.g., Max P. Lash, *supra* note 13. A case with facts strongly indicative of an intent to evade taxes is Hub Cloak & Suit Co., 15 CCH Tax Ct. Mem. 1033 (1956). The taxpayer was a dominating stockholder and accountant who kept the corporate books and was certainly aware of correct accounting procedure. Nevertheless, he reported as corporate expenses his own personal expenditures. He was found guilty of civil fraud under what is now § 6653(b) of the Internal Revenue Code of 1954. On this type of fraud see Whiteaker, *Federal Income Taxes and the Civil Fraud Penalty*, 7 VAND. L. REV. 366 (1954).

15. Sam D. Hecht, 16 T.C. 981 (1951).

16. A leading case is Spies v. United States, 317 U.S. 492 (1943), which makes this distinction clear.

conduct to be willful. However, section 7201 appears to have a more stringent requirement of willfulness than section 7203—the former requiring some affirmative overt act,¹⁷ the latter requiring only an intentional failure or omission.¹⁸ What constitutes willful conduct is a subjective matter,¹⁹ and the taxpayer's actual intent is controlling.²⁰ It is a question of fact which will usually be determined by inferences drawn from the particular circumstances.²¹ Neither does negligence, gross negligence, mistake, or lax conduct constitute the requisite willfulness under section 7201,²² nor does a mere understatement of income.²³ It has been stated, however, that a repetitive pattern of certain objectionable conduct can be considered in determining whether the taxpayer's behavior was willful.²⁴

The court in the instant case quickly disposed of defendant's contention that the withdrawals were loans rather than income, finding no evidence to sustain the contention. This ruling was supported by the corporation's carrying the expenditures on its books as expenses rather than as accounts receivable, by the lack of any evidence of indebtedness given the corporation by the defendant, and by the general nature of the payments (no interest was charged and no date for repayment designated). The court advanced no theory as to why the expenditures were income to the defendant but, having disposed of his loan theory, assumed them to be income. The court also found that there was sufficient evidence to support the trial judge's finding that the defendant willfully attempted to evade taxes during the three year period. A significant contributing factor to the determination of willfulness

17. *Spies v. United States*, *supra* note 16, at 499. A good example of an affirmative act found sufficient for conviction of § 7201 fraud is illustrated by a taxpayer's use of two sets of books for purposes of concealing certain sources of income in order to evade taxes. *United States v. Glascott*, 216 F.2d 487 (7th Cir. 1954).

18. One court made the distinction between willfulness under § 7201 and § 7203 as follows. In a misdemeanor action under § 7203 willfulness means bad purpose, but the requirement for a felony conviction under § 7201 is much higher—there must be bad faith, an evil intent, to sustain a conviction. *Abdul v. United States*, 254 F.2d 292 (9th Cir. 1958).

19. *United States v. Glascott*, 216 F.2d 487 (7th Cir. 1954).

20. *Blackwell v. United States*, 244 F.2d 423 (8th Cir. 1957).

21. *Paschen v. United States*, 70 F.2d 491 (7th Cir. 1934). See also *Haskell v. United States*, 241 F.2d 790 (10th Cir.), *cert. denied*, 354 U.S. 921 (1957).

22. *United States v. Litnan*, 246 F.2d 206 (3d Cir. 1957); *United States v. Glascott*, *supra* note 19, at 490.

23. *Holland v. United States*, 348 U.S. 121, 139 (1954); *United States v. Lindstrom*, 222 F.2d 761 (3d Cir. 1955).

24. *Blackwell v. United States*, 244 F.2d 423 (8th Cir. 1957), citing *Holland v. United States*, 348 U.S. 121 (1954), and other cases. See also *Blauner v. United States*, 293 F.2d 723, 734-35 (8th Cir. 1961) (warnings apparently were given by defendant's own accountants rather than by government agents); *Wolfe v. United States*, 261 F.2d 158, 160 (6th Cir. 1958); *Abraham Galant*, 26 T.C. 354, 365 (1956). Warnings to the taxpayer by legal counsel would fall within the protection of the attorney-client privilege.

was the examination of the corporate books by federal agents at two different times; on each occasion deficiencies were assessed for expenditures similar to those now involved and those deficiencies were paid by defendant. Although the court agreed with defendant's contention that mere laxity would not constitute willfulness, it pointed out that circumstances—especially the repeated warnings—indicated that the defendant's conduct exceeded laxity. The court further ruled that after the warnings he was aware that these expenditures were taxable income and that he knew the corporation was paying these expenses. In addition, on many of his expenditure vouchers the defendant failed to disclose information sufficient to enable the clerks to determine the proper account, namely the L. A. Durant personal account, to which the items should be charged. Finally, the court held that all these factors, complemented by the defendant's continued improper conduct over a number of years, were sufficient to support a finding that defendant's behavior was willful.

A notable omission from the court's opinion was any discussion of a theory upon which the expenditures could be called income. While the court felt it unnecessary for such a theory to be espoused,²⁵ it is interesting to consider possible reasons why the previously mentioned theories were not used. It may be that the corporate earnings history would not permit a finding of dividends out of earnings and profits. On the other hand, the court may have avoided the embezzlement theory since although the *James* case would allow a finding that embezzled funds were income, the transactions involved here occurred while *Wilcox* was in effect, thereby negating any charge of willfulness.²⁶ The court appears to have treated the case as one of first impression since it cited no cases in point.²⁷ The instant decision may well indicate a general tightening down by the courts and the Internal Revenue Service on tax-evading sole stockholders.²⁸ One incidental benefit of this tightening will be an enforced observance of the concept of the separate corporate entity. If one is to enjoy the advantages of

25. "Appellant makes much of the fact that the government has not fixed a label of some kind on the funds that he took from his corporation. It is not necessary to describe them as additional salary, illicit bonuses, or commissions, or anything more than wrongful diversions, since, as above mentioned, substance controls over form, and taxation is concerned with the actual command over the property taxed." *Davis v. United States*, 226 F.2d 331, 335 (6th Cir. 1955).

Of course, from the corporate standpoint it may be very important what label is put on these expenditures. If dividends, then they would not be deductible for tax purposes, but if compensation then they would be a properly deductible corporate expense.

26. See note 9 *supra*.

27. See note 13 *supra*.

28. On this point see Murphy, *Recent Developments in the Fraud Field*, N.Y.U. 17TH INST. ON FED. TAX 483 (1959).

limited liability, and possibly lower corporate tax rates, he should be expected to live up to his obligations as well. The defendant clearly was using the corporation as his alter ego. The Government's success may encourage prosecuting attorneys to intensify their efforts to prosecute tax evaders. However, the future applicability of this case will be limited. It would not apply, for example, to persons who honestly had taken out corporate funds as a loan and later found themselves unable to repay the money. It is also important to note that the conviction was based in large part upon the prior warnings given the defendant. Absent these warnings, his conduct, which here was denoted willfulness, probably would have been held to be merely negligence.²⁹ While it may be contended that unduly harsh punishment is being inflicted upon the defendant,³⁰ this does not alter the fact that the decision represents a correct application of the statute. While the court neither distinguished between willfulness under section 7201 and 7203 nor expressly mentioned any affirmative act of this defendant, as suggested by the *Spies* case as being illustrative of willfulness,³¹ the evidence seems sufficient to support a finding of willfulness under section 7201.

Trademarks—Risk of a Trademark Becoming Generic Solely by Non-discriminatory Use by a Majority of the Public

Defendant, a manufacturer of vacuum bottles, threatened to use the word "thermos" on its products. Plaintiff sued to prevent infringement of its registered trademark, "Thermos." Defendant counterclaimed, asking that the trademark be cancelled since the word "thermos" had

29. While one might construe the court's language as stating that repeated negligent conduct becomes willful by the very fact of repetition, this would be a distortion. The court has stated that the negligent conduct became willful *only after the repeated warnings* to the defendant. But see the district court opinion stating that: "There is a point of repetition at which action originally careless or negligent becomes deliberate and wilful." 208 F. Supp. at 895. This is probably just a careless use of phraseology as the judge had just previously referred to the agents' warnings as signaling the end of negligence and the beginning of willfulness.

30. It seems safe to assume that the defendant's troubles are just beginning. He faces a possible fifty per cent penalty upon the tax assessed under § 6653(b) of the Code. The criminal conviction, however, will not be res judicata or collateral estoppel of the finding of fraud in the civil suit. *Estate of W. Favre Slater*, 21 CCH Tax Ct. Mem. 1355 (1962). The same would be true if the defendant were acquitted in this criminal prosecution. *Helvering v. Mitchell*, 303 U.S. 391 (1938). The criminal action was probably brought first because of the six year statute of limitations. INT. REV. CODE OF 1954, § 3748.

31. See notes 16 and 17 *supra* and accompanying text.

become generic.¹ Defendant introduced into evidence opinion polls which showed that only about twelve per cent of the general public recognized the word "thermos" as indicating either the source or the manufacturer of a specific brand of vacuum bottle, while seventy-five per cent used the word as the common description of a vacuum bottle.² Further evidence showed that in 1922 plaintiff had been warned that "thermos" was becoming generic³ and had taken steps to insure that its trademark was correctly used in the trade; however, it made little attempt to prevent the general public from using "thermos" in a generic manner until 1953.⁴ Furthermore, when companies or individuals refused to stop making improper use of the trademark, the Thermos Company did not bring suit to enforce its rights.⁵ Finally, in 1962 the defendant's actions forced plaintiff to choose between abandoning the trademark or protecting it by bringing the present action. The district court held that the word "thermos" had become descriptive of the product to a large part of the public due to plaintiff's lack of diligence in requiring proper use of the trademark.⁶ Therefore, said the court, the defendant would not be enjoined from using the word "thermos" with a small "t" in conjunction with the possessive form of one of defendant's own trademarks.⁷ However, since a minority of the public still recognized the use of the word as a trademark and the defendant conceded that the trademark was recognized within the industry, the court refused to cancel it. Plaintiff appealed, alleging that "Thermos" had sufficient secondary meaning to be entitled to complete protection from infringement. In the Second Circuit Court of Appeals, *held*, affirmed. An action for infringement will not lie where the trademark is considered a generic term by a substantial majority of the public, regardless of the efforts of the manufacturer to save his trade-

1. A trademark will be cancelled "at any time if the registered mark becomes the common descriptive name of an article . . ." Lanham Trade-Mark Act § 14(c), 76 Stat. 771 (1962), 15 U.S.C. § 1064(c) (Supp. IV, 1963).

2. The district court accepted the defendant's survey as accurately reflecting public opinion. *American Thermos Prod. Co. v. Aladdin Indus., Inc.*, 207 F. Supp. 9, 21 (D. Conn. 1962). The proper taking of public opinion polls has been discussed in several recent notes. See generally *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351 (1960); Annot., 76 A.L.R.2d 619 (1961).

3. *American Thermos Bottle Co. v. W.T. Grant Co.*, 279 Fed. 151 (D. Mass.), *aff'd*, 282 Fed. 426 (1st Cir. 1922).

4. 207 F. Supp. at 17, 18.

5. "Action has been contemplated; however . . . there is a very real danger that some 'liberal' might decide, particularly, if he himself has been in the habit of using 'Thermos' as a generic term, to declare it that. Damage of an adverse decision would be irreparable as you know." 207 F. Supp. at 18-19 n.6. See also *id.* at 17-18 n.4.

6. *Id.* at 27, 28.

7. Examples are "Aladdin's thermos" and "Aladdin's Huckelberry Hound thermos." In addition the defendant could not use "thermos" as the first word in any sentence and could not use the words "original" or "genuine" in connection with "thermos." *Id.* at 27.

mark. *King-Seeley Thermos Co. v. Aladdin Industries, Inc.*, 321 F.2d 577 (2d Cir. 1963).⁸

Determining whether a trademark has lost its ability to indicate source and has become a generic term for a product has been a difficult problem for the courts. The majority of the cases arise upon the expiration of patents on trademark products.⁹ During the life of the patent a company will often use its trademark as the sole name for the product. In both the *Aspirin*¹⁰ and *Cellophane*¹¹ cases the manufacturers had used those terms exclusively; the closest generic terms were "acetyl salicylic acid"¹² and "transparent glycerinated cellulose hydrate regenerated from viscose,"¹³ respectively. Thus, when the patents expired and other companies began to manufacture these products, it was necessary that they use the trademark names, those being the only names the public knew for the product. "To say otherwise would be to hold that . . . [the producer] could take the benefit and advantage of the patent . . . and yet when the end was reached disregard the public dedication [of the trademark] and practically perpetuate indefinitely an exclusive right."¹⁴ The test applied to see if the trademark passes to the public domain is basically one of fact: What does the public understand the term to mean?¹⁵ If the primary connotation is source, the mark is entitled to protection from infringement; if the primary connotation is only a general product itself, the term is generic and may be used by all manufacturers.¹⁶ There is some conflict regarding the following factors: How large a percentage of the

8. King-Seeley Co. succeeded to all interests of American Thermos Bottle Co. after the conclusion of the first trial.

9. *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938); *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169 (1896); *DuPont Cellophane Co. v. Waxed Prods. Co.*, 85 F.2d 75 (2d Cir. 1936); *Bayer Co. v. United Drug Co.*, 272 Fed. 505 (S.D.N.Y. 1921).

10. *Bayer Co. v. United Drug Co.*, *supra* note 9.

11. *DuPont Cellophane Co. v. Waxed Prods. Co.*, *supra* note 9.

12. 272 Fed. at 510.

13. 85 F.2d at 77.

14. *Singer Mfg. Co. v. June Mfg. Co.*, *supra* note 9, at 185-86.

15. "The single question . . . in all these cases, is merely one of fact: What do the buyers understand by the word for whose use the parties are contending? If they understand by it only the kind of goods sold, then . . . it makes no difference whatever what efforts the plaintiff has made to get them to understand more." *Bayer Co. v. United Drug Co.*, *supra* note 9, at 509. "[T]his case does not properly turn on abandonment, nor does it even turn on the question whether the word cellophane was at one time more than a descriptive term. The real problem is what it meant to the buying public during the period covered by the present suit." *DuPont Cellophane Co. v. Waxed Prods. Co.*, *supra* note 9, at 77.

16. VANDENBURGH, TRADEMARK LAW AND PROCEDURE § 9.20, at 196. (1959). Callmann recognizes this rule, but criticizes it for being harsh in that it will cause a trademark owner, who is making a bona fide effort to save his mark to lose it because of public opinion which is beyond his control. 3 CALLMANN, UNFAIR COMPETITION AND TRADE-MARKS 1149-56 (2d ed. 1950).

public must consider the term generic before it in fact becomes generic¹⁷ How much weight is to be given the fact that there are other available generic terms for the given product¹⁸ Finally, what effect is to be given to the efforts of a manufacturer to save his trademark¹⁹ In *Selchow v. Baker*²⁰ and *Marks v. Polaroid Corp.*,²¹ the courts indicated that a trademark would not be declared generic until the public as a whole no longer recognized it as a trademark. The *Marks* court stated that "where the possibility of some deception remains real and the need of a competitor to satisfactorily describe the product is satisfied by several common nouns or adjectives suitable for that purpose, the Courts will protect the interest of the owner in his trademark."²² The Lanham Act states that a registered mark will be deemed abandoned "when any course of conduct of the registrant, including acts of omission as well as commission, causes the mark to lose its significance as an indication of origin."²³ In the Senate hearings this section was thought to mean that "a company that has a good trade-mark and is making every effort to maintain its right, should not lose the right because the public wants to use that name."²⁴ Recent cases, however, seem to repudiate the earlier *Selchow* case,²⁵ disregard the congressional intent, and hold that an all-too-adoring public is a peril to which all trademark advertising is subject—"its very success

17. Some cases require that the public as a whole no longer recognize the trademark. *E.g.*, *Marks v. Polaroid Corp.*, 129 F. Supp. 243 (D. Mass. 1955), *aff'd*, 237 F.2d 428 (1st Cir. 1956); *Selchow v. Baker*, 93 N.Y. 59 (1883). Other cases require only that a substantial majority of the public consider the trademark generic. *E.g.*, *Feathercombs, Inc. v. Solo Prods. Corp.*, 306 F.2d 251, 256 (2d Cir.), *cert. denied*, 371 U.S. 910 (1962); *DuPont Cellophane Co. v. Waxed Prods. Co.*, *supra* note 9; *Bayer Co. v. United Drug Co.*, *supra* note 9.

18. *Marks v. Polaroid Corp.*, *supra* note 17, at 270. The availability of other generic terms is not controlling. *DuPont Cellophane Co. v. Waxed Prods. Co.*, *supra* note 9; *Bayer Co. v. United Drug Co.*, *supra* note 9. See generally VANDENBURGH, *op. cit. supra* note 16, at 195. (Supp. 1963, at 60-61).

19. "This opinion [a Belgian case, as yet unreported, holding "Thermos" a valid trademark in that country] is perhaps the most striking illustration of the rule of law prevalent in other parts of the world, that an established trade-mark is lost only because of acts of commission or omission on the part of its owner, and not because of the habits of the public." 3 CALLMANN, *op. cit. supra* note 16 (Supp. 1963, at 42). See also *Selchow v. Baker*, *supra* note 17, at 69. *Contra*, *DuPont Cellophane Co. v. Waxed Prods. Co.*, *supra* note 9; *Bayer Co. v. United Drug Co.*, *supra* note 9.

20. 93 N.Y. 59 (1883).

21. 129 F. Supp. 243 (D. Mass. 1955).

22. *Id.* at 270.

23. Lanham Trade-Mark Act § 45(b), 60 Stat. 444 (1946), 15 U.S.C. § 1127(b) (1958).

24. *Hearings on H.R. 82 Before a Subcommittee of the Senate Committee on Patents*, 78th Cong., 2d Sess. 103 (1944).

25. *American Chicle Co. v. Topps Chewing Gum, Inc.*, 208 F.2d 560 (2d Cir. 1953); *DuPont Cellophane Co. v. Waxed Prods. Co.*, *supra* note 9; *Bayer Co. v. United Drug Co.*, *supra* note 9.

may prove its failure."²⁶ The majority of American courts seem to disregard all factors except the understanding of the particular term in question by a substantial majority of the public.²⁷ Thus, once the general public thinks of a trademark as a class description only, the trademark may be used by competitors as long as they do not deceive the public as to source—regardless of either the efforts of the owner to save his mark or alternative names available for the competitor's use.²⁸

In the instant case the court extends the *Aspirin* and *Cellophane* doctrines to cover trademarks of non-patented goods.²⁹ The court rejects the idea that the efforts of the trademark owner should be given weight, stating that it is "not convinced that the trademark's loss of distinctiveness was the result of some failure on the plaintiff's part. . . . [T]he fact is the word 'thermos' had entered the public domain beyond recall."³⁰ It further rejects the idea that the trademark should be protected if there is another generic term available to describe the product. In this case "vacuum bottle" had been used for many years as a generic term, "but," states the court, "the test is not what is available as an alternative to the public, but what the public's understanding is of the word it uses."³¹ Finally, the court rejects the theory that the mark becomes generic only when the public as a whole so uses it. Instead its test is whether to a substantial majority of the public the term connotes merely a general product and not the source of a particular brand of that product: "there is not enough dual use to support King-Seeley's claim to monopoly of the word as a trademark."³² The court, however, acknowledging that a minority of the public knew the word "thermos" as a trademark and that it was

26. *American Chicle Co. v. Topps Chewing Gum, Inc.*, *supra* note 25, at 562.

27. *Supra* note 9.

28. "The test of whether or not a mark has become generic involves a determination of what does it mean to purchasers of the goods or services. Where the former mark has become generic to one segment of the public, the fact that it still serves as an indication of origin to another small segment will not save it. . . . The fact that there are other words *available* to purchasers to identify the goods or services or that the owner of the alleged mark has taken steps to endeavor to prevent the mark from becoming generic will not prevent a mark from being generic if it serves to identify the goods or services rather than the origin thereof." *VANDENBURGH*, *op. cit.* *supra* note 16, at 196. Even if a company does not have a valid registered trademark, a competitor cannot duplicate the owner's names, displays, or marks so as to deceive a customer as to the actual manufacturer. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169 (1896); *Feathercombs, Inc. v. Solo Prods. Corp.*, 306 F.2d 251 (2d Cir. 1962); *Blisscraft of Hollywood v. United Plastics Co.*, 294 F.2d 694 (2d Cir. 1961); *American Chicle Co. v. Topps Chewing Gum, Inc.*, 208 F.2d 560 (2d Cir. 1953).

29. Vacuum bottles were imported into this country from Germany prior to 1900 and had never been patented in this country.

30. 321 F.2d at 579.

31. *Id.* at 580.

32. *Id.* at 581.

universally recognized as such in the trade, refused to cancel the trademark registration. But since a substantial majority of the public did not recognize the trademark, it held that the defendant would not infringe the trademark by using the word "thermos" with a small "t" in conjunction with one of defendant's own trademarks so as to prevent any confusion as to source of the product.³³

The equities in trademark cases are difficult to determine.³⁴ The public is entitled to be able to buy a brand product with the assurance that one, and only one, company has made it. On the other hand, if the public uses a brand name to mean only a class of products it is deceived if given a particular brand alone. Whereas protection of a trademark means that other companies are deprived of an equal opportunity to compete for the sale of the goods, it is nevertheless arguable that a company that has spent time and money to popularize a trademark should be protected from another company's exploiting the former's trademark and good will. It would seem that a new company should be able to use freely any generic term to describe its product. The court in the instant case felt that the rights of the trademark holder should be governed solely by what the trademark connotes to the public. The decision is based primarily on maximum protection for the consumer;³⁵ the defendant was not seriously damaged by not being able to use "thermos" on his vacuum bottles (his sales had been increasing much faster than those of the plaintiff³⁶). The decision, by allowing the defendant to use "thermos," insures that the general public (which uses "thermos" generically) will have a chance to buy any brand vacuum bottle offered by the retailer. As a leading text writer has pointed out, this doctrine is a harsh one as applied to trademark owners.³⁷ However, by requiring the defendant to use the possessive of one of its trademarks with "thermos" and by enjoining any use of the words "original" and "genuine" in advertising, the court insures that the minority that still think of "Thermos" as a brand name will not be deceived into buying the defendant's product when they in

33. The remedy is substantially the same as the one applied in the *Aspirin* case, *supra* note 9, where the trade still recognized the word aspirin as a trademark. The *Cellophane* case, *supra* note 9, required the defendant to state that it was filling an order with its own product if a customer ordered only cellophane without any other name. The district court required Aladdin to follow the same procedure. 207 F. Supp. at 27.

34. 321 F.2d at 581.

35. *Ibid.*

36. In 1945 plaintiff's sales were \$5,300,000; they increased to \$13,280,000 in 1960. Defendant's sales in 1945 were \$500,000; this increased to \$6,800,000 in 1960. Thus, defendant's sales increased by a factor of more than twelve while plaintiff's increased by a factor of less than three. Reply Brief for the Plaintiff-Appellant, p. 16, *King-Seeley Thermos Co. v. Aladdin Indus., Inc.*, 321 F.2d 577 (2d Cir. 1963).

37. 3 CALLMANN, *op. cit. supra* note 16, at 1149-56.

fact want the plaintiffs. Still, the plaintiff has the benefit of the word "Thermos" in its stylized forms, may advertise it as the "original" or "genuine" Thermos, and is given a great deal of free advertising by the public's continued use of the name as a household word.

The instant case will have a substantial effect on owners of trademarks that have become closely identified with a single product. It clearly indicates that if a substantial majority of the public considers the trademark as the name for the class rather than a brand name other companies may use the trademark. The court's reasoning indicates that trademarks such as Kleenex, Scotch brand tape, Vaseline, B.V.D., Band-Aid, and Q-Tips may be in danger of falling into the public domain.³⁸ The economic value of trademarks is substantial, and large sums of money are expended to popularize them.³⁹ The instant case points up the danger of excessive careless advertising, in view of the court's exaltance of the public's understanding of a word and its corresponding disregard of other factors. A trademark owner must exercise extreme caution in order to prevent an enthusiastic public from appropriating his trademark for its own use.⁴⁰ It is in this area of preventive law that this case will have its greatest import. In order to retain a trademark, the owner should maintain a clipping service, both in trade and general circulation publications, to discover all improper uses of his mark. He must then attempt to stop these misuses either by a letter explaining that the word is a trademark⁴¹ or, if necessary, by suit for unfair competition to prevent infringement or dilution of the mark.⁴² In all advertising the owner will have to educate the public

38. The plaintiff cited a number of cases which had upheld dual functioning trademarks; however, the court indicated that it was a question of fact whether or not a given mark still had sufficient use as a trademark to justify its continued protection. Brief for Plaintiff-Appellant, pp. 9-11, *King-Seeley Thermos Co. v. Aladdin Indus., Inc.*, *supra* note 37. In the *Q-Tips* case the court distinguished that trademark from words like aspirin and cellophane on grounds that customers had not yet come to regard Q-Tips as a generic term. *Q-Tips, Inc. v. Johnson & Johnson*, 108 F. Supp. 845 (D.N.J. 1952); 3 CALLMANN, *op. cit. supra* note 16 (Supp. 1963, at 43). Thus it would seem to be only a matter of time before some of these other trademarks pass into the public domain.

39. 3 CALLMANN, *op. cit. supra* note 16, at 1149-51.

40. For general comments dealing with protection of trademarks see *ibid.*; ROBERT, *THE NEW TRADE-MARK MANUAL* 31-38 (1947); THE UNITED STATES TRADEMARK ASSOCIATION, *TRADEMARK MANAGEMENT* (1960) [hereinafter cited as *TRADEMARK MANAGEMENT*]; VANDENBURGH, *op. cit. supra* note 16, at 169-87.

41. Most violations by writers and publishers are unintentional, and a letter explaining the proper use of a trademark will correct the problem for future uses by that party. *TRADEMARK MANAGEMENT* 67-88. It is interesting to note that King-Seeley began to send letters of protest only immediately prior to the beginning of litigation in this case. In 1957 they sent only 178; in 1958 they sent 270; in 1959 they sent 1109; in 1960 they sent 950; and in 1961 they sent 1171. 207 F. Supp. at 19 n.7.

42. A trademark owner has a right to recover damages under the Lanham Act for infringements by members of the trade; as to members of the general public or newspaper publishers the owner can only get an injunction against future improper uses as

that his mark is a brand name and not a generic description for the product itself.⁴³ The use of a simple and popular descriptive term accompanying the trademark in advertising will be the best insurance.⁴⁴ The possibility of this alternative alleviates much of the hardship which might result from the principles embodied in this decision. Also, using one trademark on several different products will aid the public to recognize the mark as a brand name and not as a generic term for a single product.⁴⁵ All these preventive measures should be taken as early as possible, because once the public begins to use a mark in a generic sense, it becomes increasingly difficult to recapture the mark.⁴⁶

Trade Regulation—Unfair Competition—Use of Antidilution Statute as Independent Ground for Relief

“Polaroid,” a word coined by plaintiff, is its internationally known trademark and trade name for a variety of optical, photographic, and electrical devices. Defendant, a general contractor specializing in the designing and installation of refrigeration and heating systems in a three-state area, knowing of plaintiff’s earlier use of “Polaroid,” had used “Polaraid” as its trademark and trade name since its incorporation in 1953. Plaintiff had notified defendant that such use of a name similar to its own constituted trademark infringement and unfair

long as the infringement is not intentional. Lanham Act § 32, 60 Stat. 437-38 (1946), 15 U.S.C. § 1114 (1958).

43. TRADEMARK MANAGEMENT 43-56.

44. *E.g.*, “Corfam” is a remarkable new material for shoe uppers. It is the world’s first poromeric, the result of over a decade of intensive research to create a breathable, man-made product for shoe uppers “Corfam is Du Pont’s registered trademark for its poromeric shoe upper material.” N.Y. Times, Feb. 16, 1964, § 1, p. 57, col. 7. Since the *Cellophane* case, *supra* note 9, and the instant case Du Pont has been very careful to use its trademarks with a generic term. Du Pont publishes a pamphlet containing instructions on the use of each of its trademarks. A sample page from the pamphlet on Dacron is reproduced in TRADEMARK MANAGEMENT 56.

45. Thermos products were diversified in 1954 to include various items of camping goods. 207 F. Supp. at 19. Apparently this action by the plaintiff came too late also. As a general rule the use of a trademark on several products is an excellent way to impress the public that the mark is a brand name and not a generic term. VANDENBURG, *op. cit. supra* note 16, at 175.

46. TRADEMARK MANAGEMENT 68-69. *But see* Singer Mfg. Co. v. Redlich, 109 F. Supp. 623 (S.D. Cal. 1952), which held that Singer was a valid trademark in spite of its having been declared a generic term in 1896 in Singer Mfg. Co. v. June Mfg. Co., 163 U.S. 169 (1896). A current example of a preventive measure designed to recover a trademark is the use of the word brand in Scotch “brand” cellophane tape.

competition, but defendant persisted in using it. Plaintiff instituted an action in federal court in Illinois for infringement of its federally recognized trademark, unfair competition in using a trademark and trade name confusingly similar to its own, and violation of the Illinois Antidilution Statute.¹ The trial court rendered judgment for defendant² and denied plaintiff's motion for a new trial.³ On appeal in the Court of Appeals for the Seventh Circuit, *held*, reversed. Defendant's use on noncompeting products of a trade name similar to plaintiff's distinctive and well-known mark is a sufficient ground for injunctive relief as either unfair competition or a violation of the Illinois Antidilution Statute, or both. *Polaroid Corp. v. Polaroid, Inc.*, 319 F.2d 830 (7th Cir. 1963).

The term "unfair competition" was used in the United States originally to supplement the law of technical trademarks by protecting trade names that had acquired secondary meaning.⁴ It has since come to be applied in actions involving noncompeting products.⁵ Use on non-competing goods of a trade name with a secondary meaning is prohibited under several theories based on some possibility of consumer confusion. The theory of confusion of source is that there exists a likelihood that a product will be purchased in the belief that it is manufactured or sold by the plaintiff because of his use of the same or a similar trade name.⁶ According to the theory of confusion

1. "Every person, association, or union of workmen adopting and using a mark, trade name, label or form of advertisement may proceed by suit, and all courts having jurisdiction thereof shall grant injunctions, to enjoin subsequent use by another of the same or any similar mark, trade name, label or form of advertisement if there exists a likelihood of injury to business reputation or of dilution of the distinctive quality of the mark, trade name, label, or form of advertisement of the prior user, notwithstanding the absence of competition between the parties or of confusion as to the source of goods or services . . ." ILL. ANN. STAT. ch. 140, § 22 (Smith-Hurd Supp. 1963).

2. *Polaroid Corp. v. Polaroid, Inc.*, 206 F. Supp. 290 (N.D. Ill. 1962).

3. *Polaroid Corp. v. Polaroid, Inc.*, 211 F. Supp. 255 (N.D. Ill. 1962).

4. Callmann, *Unfair Competition Without Competition? The Importance of the Property Concept in the Law of Trade-Marks*, 95 U. PA. L. REV. 443, 444 (1947). Secondary meaning "contemplates that a word or phrase originally, and in that sense primarily, incapable of exclusive appropriation with reference to an article on the market, because geographically or otherwise descriptive, might nevertheless have been used so long and so exclusively by one producer with reference to his article that, in that trade and to that branch of the purchasing public, the word or phrase had come to mean that the article was his product; in other words, had come to be, to them, his trade-mark. So it was said that the word had come to have a secondary meaning, although this phrase, 'secondary meaning,' seems not happily chosen, because, in the limited field, this new meaning is primary rather than secondary; that is to say, it is, in that field, the natural meaning." *G. & C. Merriam Co. v. Saalfield*, 198 Fed. 369, 373 (6th Cir. 1912), *modified and aff'd*, 238 Fed. 1 (6th Cir.), *cert. denied*, 243 U.S. 651 (1917).

5. Callmann, *supra* note 4, at 445.

6. *E.g.*, *Aunt Jemima Mills Co. v. Rigney & Co.*, 247 Fed. 407 (2d Cir. 1917), *cert. denied*, 245 U.S. 672 (1918) (sources of "Aunt Jemima" pancake syrup and self-rising flour likely to be confused); *Florence Mfg. Co. v. J. C. Dowd & Co.*, 178 Fed. 73

of sponsorship, the public may be led to believe that the defendant is in some way connected with or endorsed by the plaintiff.⁷ In general, the likelihood-of-confusion concept is a test for determining whether the buying public will be harmed by another's use of a mark in a manner that will connote a relationship with its originator.⁸

An alternative and more recently developed theory of trademark protection is that a trademark or trade name is the exclusive property of its owner,⁹ and its uniqueness is therefore to be protected whether or not there is also a danger of harm to the public because of a possibility of confusion.¹⁰ This doctrine, popularly known as the dilution theory, was introduced in this country by Schechter,¹¹ who derived it from a German case which found an infringement of the famous "Odol" trademark for mouthwash by its use on hardware.¹² The essence of trademark dilution is that the use of a similar mark on noncompeting products results in a gradual whittling away of a mark's distinctive quality, or commercial magnetism, and ultimately in a decline of its advertising appeal as a business symbol.¹³ Only distinctive and well-known marks are generally associated with this degree of protection because generic or relatively unknown symbols

(2d Cir. 1910) ("Sta-Kleen" tooth brushes marked and wrapped like "Keepclean" toilet brushes); *Pan Am. World Airways, Inc. v. Clipper Van Lines, Inc.*, 98 F. Supp. 524 (E.D.N.Y. 1951) ("Clipper" motor carrier likely to be confused with airplane engaged in motor haulage incidental to its usual business); *Great Atl. & Pac. Tea Co. v. A. & P. Cleaners & Dyers, Inc.*, 10 F. Supp. 450 (W.D. Pa. 1934) (use of "A & P" mark to advertise cleaning and dyeing business enjoined at suit of grocery chain). *But cf.* the following findings of a sufficient possibility of confusion of source as to constitute unfair competition: *L. E. Waterman Co. v. Gordon*, 72 F.2d 272 (2d Cir. 1934) ("Waterman" razor blades and fountain pens); *Yale Elec. Corp. v. Robertson*, 26 F.2d 972 (2d Cir. 1928) ("Yale" flashlights and locks); *Bulova Watch Co., v. Stolzberg*, 69 F. Supp. 543 (D. Mass. 1947) ("Bulova" shoes and watches); *Armour & Co. v. Master Tire & Rubber Co.*, 34 F.2d 201 (S.D. Ohio 1925) ("Armour" tires and meat products).

7. *E.g.*, *Triangle Publications, Inc. v. Rohrlisch*, 167 F.2d 969 (2d Cir. 1948) ("Seventeen" dresses so closely related to "Seventeen" magazine that public might assume seller of dresses was sponsored by magazine); *Academy of Motion Picture Arts & Sciences v. Benson*, 15 Cal. 2d 685, 104 P.2d 650 (1940) (adoption of name "The Hollywood Motion Picture Academy" for dramatic and coaching school led persons to believe it was connected with plaintiff, generally known as the "Motion Picture Academy").

8. "The fundamental question in cases of trade-mark or unfair competition . . . is whether the public is being misled and deceived, so that a defendant is in effect taking the advantage of the good will and business reputation that a complainant has built up . . ." *Anheuser-Busch, Inc. v. Budweiser Malt Prods. Corp.*, 287 Fed. 243, 246 (S.D.N.Y. 1921). See 3 CALLMANN, *UNFAIR COMPETITION AND TRADEMARKS* 1644-45 (2d ed. 1950).

9. See 3 CALLMANN, *op. cit. supra* note 8, at 1642-45.

10. *Deering, Trade-Marks on Noncompetitive Products*, 36 ORE. L. REV. 1, 3 (1956).

11. *Schechter, The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927).

12. *Id.* at 831-32.

13. 3 CALLMANN, *op. cit. supra* note 8, at 1643-44.

are, in a sense, already diluted. Confusion or deception constitute no part of a charge of dilution, since a mark's distinctiveness can be lessened by its use on even dissimilar products; the borrowing of a trademark for use on similar commodities, or those likely to be connected with a plaintiff's mark, is prohibited under the more established theories of confusion of source or confusion of sponsorship. When courts have considered the dilution theory they have refused to accept it as a primary basis for relief, but have used it as a make-weight rationale in cases not involving competition, while grounding their decisions on findings of a possibility of confusion.¹⁴ Four states have adopted antidilution legislation,¹⁵ but even the decisions which have interpreted these statutes have been reluctant to enforce an allegation of dilution standing alone.¹⁶

The court in the principal case, relying primarily upon the Illinois case of *Lady Esther, Ltd. v. Lady Esther Corset Shoppe, Inc.*,¹⁷ held

14. In *Tiffany & Co. v. Tiffany Prods., Inc.*, 147 Misc. 679, 264 N.Y. Supp. 459 (Sup. Ct.), *aff'd*, 237 App. Div. 801, 260 N.Y. Supp. 821 (1932), *aff'd*, 262 N.Y. 482, 188 N.E. 30 (1933), generally recognized as the landmark case on dilution, the court based its decision in part on confusion resulting from defendant's use of a sketch of a gem and the "Tiffany" name in its advertisements for motion pictures. Although the dilution theory was applied, elements of a possibility of confusion influenced such well known "dilution" cases as *Stork Restaurant, Inc. v. Sahati*, 166 F.2d 348 (9th Cir. 1948); *Vogue Co. v. Thompson-Hudson Co.*, 300 Fed. 509 (6th Cir. 1924), *rehearing denied*, 12 F.2d 991 (1926), *cert. denied*, 273 U.S. 701 (1926); *Alfred Dunhill of London, Inc. v. Dunhill Shirt Shop, Inc.*, 3 F. Supp. 487 (S.D.N.Y. 1929).

15. GA. CODE ANN. § 106-115 (1956); ILL. ANN. STAT. ch. 140, § 22 (Smith-Hurd Supp. 1963); MASS. LAWS ANN. ch. 110, § 7A (1954); N.Y. GEN. BUS. LAW § 368-d. (Supp. 1963). The Georgia and Illinois acts are identical.

16. Only the Massachusetts and New York statutes had been construed prior to the instant case. The New York statute was considered in *Jean Patou, Inc. v. Jacqueline Cochran, Inc.*, 201 F. Supp. 861 (S.D.N.Y. 1962), *aff'd*, 312 F.2d 125 (2d Cir. 1963), but the court refused to grant relief, and expressed the view that the dilution doctrine "has been given little weight in the Second Circuit." 201 F. Supp. at 866. The court added: "It may also be argued that the Lanham Act rejects the dilution doctrine as a basis for relief in trade-mark cases in that the trade-mark owner must prove the likelihood of confusion in order to recover. 15 U.S.C. § 1114(1), 15 U.S.C.A. § 1114(1)." 201 F. Supp. at 867. In reference to the Massachusetts act, the court in *Mann v. Parkway Motor Sales, Inc.*, 324 Mass. 151, 85 N.E.2d 210 (1949), stated: "The word 'Parkway' having acquired no secondary meaning as designating the plaintiff's place of business, his rights are not enlarged by G.L.(Ter.Ed.) c. 110, § 7A . . ." 324 Mass. at 157, 85 N.E.2d at 214. RESTATEMENT (SECOND) TORTS, Explanatory Note, § 731, at 109 (Tent. Draft No. 8, 1963) reflects the general view that although the courts recognize the concept of dilution, "they apply it sparingly."

17. 317 Ill. App. 451, 46 N.E.2d 165 (1943). This case granted relief to a manufacturer of cosmetics in an action to prohibit use of the "Lady Esther" name by a retailer of ladies' wearing apparel. Although there was no competition between the parties, the court based its holdings upon a finding of a possibility of confusion, and strengthened its opinion by noting the presence of trademark dilution: "[W]e think it clear that the public might be deceived into thinking there was some connection between the defendant and the plaintiff companies. And the good-will of plaintiff, which it had built up at great expense over a period of years, would be whittled away." 317 Ill. App. at 459, 46 N.E.2d at 169.

that although there was no product competition between the parties, defendant's use of the trademark "Polaraid" constituted unfair competition. The instant opinion emphasized that lack of proof of instances of actual confusion would be no bar to the cause of action of unfair competition, since only a showing of a likelihood of confusion, as distinguished from actual confusion, is required.¹⁸ The court also dismissed defendant's contention that the combination of the word "polar" signifying cold, and "aid" signifying service, constituted a legitimate business purpose for selecting "Polaraid" as its business name, pointing out that defendant's lack of intent to trade on plaintiff's name was immaterial.¹⁹ In holding that plaintiff was entitled to independent relief under the Illinois Antidilution Statute, the majority opinion noted that "Polaroid" is a distinctive coined word that was originated by plaintiff and had become a strong mark with a widespread reputation, largely as a result of an extensive investment in promotional efforts.²⁰ This observation enabled the court to distinguish a case which had refused to apply the Massachusetts Antidilution Statute in an action involving a weaker and more generic word.²¹ Nevertheless, the court concluded that confusion as to the identity of the parties is "inescapable . . . due to the close resemblance of defendant's trade name to that of plaintiff."²² A discussion of the first cause of action, that of trademark infringement, was therefore not deemed necessary. In his dissenting opinion, Judge Schnackenberg insisted that the dissimilarity of the parties' products and the small clientele of the defendant could not afford the basis for a conclusion that a possibility of confusion either of source or of spon-

18. "It is well established in Illinois and by the decisions of this circuit that injunctive relief is properly granted in cases involving the use of deceptively similar names even though there is no proof of *actual* confusion. It is sufficient to show the *likelihood* that confusion will result and that the public might be misled." 319 F.2d 830, 835, quoting from *Metropolitan Life Ins. Co. v. Metropolitan Ins. Co.*, 277 F.2d 896, 900 (7th Cir. 1960).

19. 319 F.2d at 835-36.

20. Sales of Polaroid products throughout the United States and in seventy foreign countries exceeded 450 million dollars, and approximately thirty million dollars had been spent in advertising them. Defendant's sales, however, never exceeded five hundred thousand dollars per year, and its annual advertising expenses were less than one thousand dollars. 319 F.2d at 832.

21. *Esquire, Inc. v. Esquire Slipper Mfg. Co.*, 243 F.2d 540 (1st Cir. 1957). That court noted that the word "Esquire" "is not a coined word but one firmly established in the English vocabulary that has by no means become obsolete. . . . In short, the plaintiff picked an already diluted name as the mark for its 'magazine for men.' . . . [T]he scope of the protection to which it is entitled is not as broad as that which might be accorded to a strong, coined name, as 'Kodak,' for instance." 243 F.2d at 543. The decision added that application of the Massachusetts statute was a matter of judicial discretion and that its enactment did not expand the application of the dilution theory to cases not involving infringement or unfair competition. 243 F.2d at 544.

22. 319 F.2d at 837.

sorship could result from defendant's continued use of the name "Polaraid." He emphasized this point by stressing that defendant's advertisements were placed in skating rink magazines and trade journals, and that its promotional literature bore likenesses of a smiling solar face and a polar bear in conjunction with its trade name as a means of signifying its connection with refrigeration and heating systems.²³ Criticizing the majority's application of the antidilution statute, he noted that the United States Court of Appeals for the First Circuit had denied relief under the similarly-worded Massachusetts Antidilution Statute on the ground that consideration of the statute is "'primarily a matter for the District Court with which we would interfere were we convinced that the trial court's conclusion resulted from an error of law, or an abuse of discretion.'"²⁴

Several distinguished commentators have doubted whether the dilution doctrine has been broadened by the four existing antidilution statutes.²⁵ Although the instant court specifically held that it could grant injunctive relief solely on the basis of the Illinois Antidilution Statute,²⁶ it is perhaps significant that the court's decision was supported by its finding that defendant's conduct constituted unfair competition because of a possibility of the public's confusing its mark with plaintiff's. Nevertheless, the facts of the case provided a classic opportunity for the application of an antidilution statute because of the conflict between a very strong and distinctive coined word and a similar word used as the trade name of a noncompetitive business; also the products were completely unrelated—photographic and optical goods on the one hand and heating and refrigeration installations on the other. However, it is possible that the statute would not receive so warm a reception in a case involving a relatively unknown or nondistinctive trade name. It remains to be seen whether this decision will foster greater reliance upon the state antidilution statutes, and whether it will help to provide the necessary impetus for incorporation of the dilution theory into federal legislation.²⁷

23. *Id.* at 838-39.

24. *Id.* at 841, quoting from *Esquire, Inc. v. Esquire Slipper Mfg. Co., Inc.*, *supra* note 21.

25. See VANDENBURGH, *TRADEMARK LAW AND PROCEDURE* 111-12 (1959); Derenberg, *The Problem of Trademark Dilution and the Antidilution Statutes*, 44 CALIF. L. REV. 439, 451-52 (1956); Pattishall, *The U.S.A. Courts and the Prevention of Unfair Competition*, 53 TRADEMARK REP. 599, 620-22 (1963).

26. 319 F.2d at 837.

27. An antidilution provision appears in the Lindsay Bill, which has been introduced into Congress several times, most recently as H.R. 4651, 88th Cong., 1st Sess. (1963). Section 2(a)(3) of this bill defines as an unfair commercial activity any act or practice which is likely "to dilute the distinctive quality of a trademark or trade name of another."

Trusts—Cy Pres—Acceptance by Rejection

An action was brought by an executor for construction of a holographic will by which the testator had willed his estate to an endowment fund for an orphanage maintained by a fraternal organization. At the time of testator's death, the fraternal organization had closed the designated orphanage but maintained orphans at similar homes in other states. The chancery court held that the charitable gift failed, since at the death of the testator the particular orphanage¹ and endowment fund² no longer existed.³ On appeal to the Tennessee Court of Appeals, *held*, reversed. Although the doctrine of cy pres does not exist in Tennessee, charitable trusts are highly favored by courts of equity and should be sustained when the manifestly clear intent of the donor can be carried out. *Hardin v. Independent Order of Odd Fellows*, 370 S.W.2d 844 (Tenn. App. E.S. 1963).

The cy pres⁴ doctrine⁵ has been often misunderstood in the United States. This is a result of the fact that the doctrine was developed by the English Lord Chancellor, who served not only as a judicial officer but also in administrative and legislative capacities.⁶ Under the doctrine of judicial cy pres, which is based on the power stemming from the inherent jurisdiction of a court of equity, the chancellor would, when a specifically designated charitable purpose failed, apply a gift in trust for another charitable purpose if he could ascertain that the

1. The chancellor also decreed that the bequest lapsed because no orphanage existed at the date of execution of the will. The court of appeals reversed this ruling on two grounds: (1) the evidence showed that such an orphanage was maintained in 1899, and the presumption is that a fact once shown to exist continues until the contrary is shown; and (2) a presumption arises that a testator is informed as to the object of his bounty and has information as to its existence at the date of execution of the will.

2. The appellate court held that an endowment fund need not have been in existence at the time the will was written or became operative since the testator might have intended the creation of such a fund.

3. A subsidiary of the fraternal organization, Tennessee Odd Fellows Home, Inc., a party defendant, was organized under a separate charter to operate and take title to the orphanage; it has received gifts for and administered the support of the orphans since its incorporation. The court of appeals held the disposition would not be struck down as a result of the testator's failure to use its corporate name. A legacy or devise will not be defeated by a mistake in the name or description of a legatee when there is no reasonable doubt as to the person intended.

4. "Cy pres" or "cy pres comme possible" is Norman French which translates to mean "as near as possible."

5. Although the contemporary doctrine of cy pres has developed from the common law, the Supreme Court has traced the notion of cy pres as far back as the Roman Empire, in the Digest of Justinian. *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890).

6. The Lord Chancellor served as the chief judge of chancery, a member of the monarch's cabinet, and perpetual president of the two houses of the legislature. 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 397 (1922).

settlor had a *general* charitable intent.⁷ Under his prerogative power,⁸ on the other hand, the chancellor would, acting as a representative of the crown, the *parens patriae*, divert a charitable gift to another charitable purpose when the gift would fail for some other reason.⁹ The latter power was exercised when a general charitable gift was made without a trust or when a charitable purpose was illegal,¹⁰ whereas the former was exercised when a charitable gift was made in trust.¹¹ Prerogative *cy pres* was never a part of American law, since no court or agency of government has the power of a monarch.¹² The doctrine of judicial *cy pres*, however, is recognized in the majority of American jurisdictions.¹³ Applying that doctrine, if a gift in trust for a particular

7. The courts reasoned that the testator would have desired that the property be redirected to another charitable purpose had he realized that it would be impossible to carry out the particular purpose which he had designated. 4 SCOTT, TRUSTS § 399 (2d ed. 1956). A more likely motive, however, for the development of the doctrine of judicial *cy pres* was that the early chancellors were churchmen, and the law developed under ecclesiastical influences. Since most ancient gifts for charity were in aid of religion, the chancellors did not want them to fail. 2A BOCERT, TRUSTS AND TRUSTEES § 431 (1935).

8. The prerogative power was exercised by the sign manual of the crown, that is, by direction of the monarch under his signature, on the suggestion of the attorney general. Originally the chancellor simply ordered the disposition of the property as directed by the crown, but, in time, the power was delegated to the king's council and finally to the chancellor as keeper of the king's conscience. BOCERT, *op. cit. supra* note 7, § 432; FISCH, THE *CY PRES* DOCTRINE IN THE UNITED STATES 56-61 (1950).

9. The reason for the exercise of such power by the crown was that charity was an expiation of sin and would be rewarded in the "hereafter." If for some reason the gift failed, the benefit of having made the gift should not be lost to the testator. Thus, applying the gift to another charitable purpose was equally beneficial and effective in entitling the testator to the same reward. *Attorney General v. Lady Downing*, Wilm. 1, 97 Eng. Rep. 1 (Ch. 1767). See 4 SCOTT, TRUSTS § 399.1 (2d ed. 1956). With this reasoning and the fact that the crown had no legal duty to abide by the intent of the testator, it is understandable why dispositions were at times far different from the gift originally intended. In one case, the testator left a gift to establish a *Jesuba*, an assembly for reading the Jewish law and instructing people in the Jewish religion. Since no gifts could be given to promote any other than the state religion at that time, the king exercised his prerogative power and directed the fund to be applied to the support of a preacher in a foundling hospital to instruct the children in the tenets of Christianity. *Da Costa v. De Pas*, Amb. 228, 27 Eng. Rep. 150 (Ch. 1754).

10. Consideration of charitable gifts for an illegal purpose has only academic interest now since most such gifts were illegal because they were given to a religion other than the state religion. FISCH, *op. cit. supra* note 8, at 57-58 & n.53.

11. *Moggridge v. Thackwell*, 7 Ves. 36, 32 Eng. Rep. 15 (Ch. 1803), *aff'd*, 113 Ves. 416, 33 Eng. Rep. 350 (Ch. 1807). See also BOCERT, *op. cit. supra* note 7, § 432; FISCH, *op. cit. supra* note 8, 56-61; Comment, *A Reevaluation of Cy Pres*, 49 YALE L.J. 303, 305-07 (1939).

12. See BOCERT, *op. cit. supra* note 7, § 434. For an opinion of Justice Holmes which might lead one to a contrary conclusion see *Minct v. Baker*, 147 Mass. 348, 17 N.E. 839 (1888).

13. In only a few states have the courts said that the doctrine is not a part of the law of the state: *Arizona: In re Hayward's Estate*, 65 Ariz. 228, 178 P.2d 547 (1947); *Mississippi: National Bank of Greece v. Savarika*, 167 Miss. 571, 148 So. 649 (1933);

charitable purpose cannot be carried out because of impracticality, impossibility, or illegality, but the settlor has manifested a general charitable intent, the courts will direct the application of the trust property to another charitable purpose, as close as possible to that designated by the settlor.¹⁴ A small minority of jurisdictions,¹⁵ however, do not accept the doctrine, reasoning either that (1) any doctrine of cy pres is based on the prerogative power of the crown and thus is not within equity jurisdiction, or that (2) judicial cy pres, like the prerogative power, is unrestricted and can be applied arbitrarily, disregarding the intent of the testator, and is therefore an unsound doctrine.¹⁶ Nevertheless, some of these same courts will, by a process of construction, reach a result similar to that reached when cy pres is applied.¹⁷ Thus, where a donee of a charitable gift ceases to exist prior to the vesting of the gift, the majority view is that the cy pres doctrine applies to save the gift,¹⁸ while the minority say that the general intent of the settlor is determinative and that the trust will not fail if that intent can be carried out.¹⁹

Agreeing with appellee's contention that the cy pres doctrine does not apply in Tennessee, the court in the instant case stated that a court of equity does not have the peculiar powers exercised by the chancellor in England as a representative of the crown. The cy pres doctrine, however, according to the court, refers only to the prerogative power, and not to the rules of liberal judicial construction of charitable trusts which have always been a part of the inherent jurisdiction of the court of chancery.²⁰ One such rule of construction, says the court, is that a charitable trust, valid except for an impracticable method of

North Carolina: Woodcock v. Wachovia Bank & Trust Co., 214 N.C. 224, 199 S.E.2d 20 (1938); *South Carolina:* Furman Univ. v. McLeod, 238 S.C. 475, 120 S.E.2d 865 (1961); City of Columbia v. Monteith, 139 S.C. 262, 137 S.E. 727 (1927); *Tennessee:* Bell v. Shannon, 367 S.W.2d 761 (Tenn. 1963); Henshaw v. Flenniken, 183 Tenn. 232, 191 S.W.2d 541 (1946).

14. For other definitions, see 14 C.J.S. *Charities* § 52 (1939); RESTATEMENT (SECOND), TRUSTS § 399 (1959); 4 SCOTT, TRUSTS § 399, at 2825 (2d ed. 1956).

15. See note 13, *supra*.

16. BOGERT, *op. cit. supra* note 7, § 433, at 331; FISCHE, *op. cit. supra* note 8, at 61.

17. Furman Univ. v. McLeod, *supra* note 13; Mars v. Cibert, 93 S.C. 445, 77 S.E. 131 (1913); Henshaw v. Flenniken, *supra* note 13. *Contra*, National Bank of Greece v. Savarika, *supra* note 13; Woodcock v. Wachovia Bank & Trust Co., *supra* note 13.

18. See, e.g., *In re William's Estate*, 59 So. 2d 13 (Fla. 1952); Kentucky Children's Home v. Woods, 289 Ky. 20, 157 S.W.2d 473 (1941); Miller v. Merchantile-Safe Deposit & Trust Co., 224 Md. 380, 168 A.2d 184 (1961); Fidelity Union Trust Co. v. Ackerman, 18 N.J. Super. 314, 87 A.2d 47 (Ch. 1952); New York City Mission Soc'y v. Board of Pensions of Presbyterian Church in the U.S.A., 261 App. Div. 823, 24 N.Y.S.2d 395, *appeal denied*, 261 App. Div. 932, 26 N.Y.S.2d 502 (1941); *In re Stouffer's Trust*, 188 Ore. 218, 215 P.2d 374 (1950).

19. Mars v. Cibert, *supra* note 17. See generally note 17 *supra*.

20. Hardin v. Independent Order of Odd Fellows, 370 S.W.2d 844, 849 (Tenn. App. E.S. 1963).

execution indicated by the testator, will be sustained by the court.²¹ The primary purpose of the present testator was, in the court's opinion, to aid the orphaned children of the members of the fraternity, and not the specific orphan's home; therefore the geographic designation by the settlor did not negative a general charitable intent. The gift would, therefore, be sustained.²²

In reaching this result, the court, while denying the existence of the *cy pres* doctrine, found (1) that the testator manifested a general charitable intent,²³ (2) that the specific charitable purpose was impossible,²⁴ and (3) that the trust was otherwise valid.²⁵ These are the same three factors which are required for the application of judicial *cy pres* as that doctrine has been developed in the United States.²⁶ Thus the court actually applied *cy pres* while denying its existence in Tennessee. This anomalous situation results from the court's failure to differentiate between the two aspects of the doctrine, treating the term "*cy pres*" as if it applied to only the prerogative power.²⁷ It may be thought that the name is unimportant so long as it is established that the courts will in essence apply *cy pres*. However, denominating the doctrine as one of "liberal rules of judicial construction"²⁸ could cause some courts to decide that in order to sustain the validity of a charitable trust whose designated purpose has failed the donor must have had an actual intent that the gift be redirected to another charitable purpose. The doctrine of *cy pres*, on the other hand, requires only that the donor have had a general charitable intent. Furthermore, when a doctrine has been recognized by a certain name for several hundred years it is difficult to justify changing that name. To create a

21. *Id.* at 850.

22. *Ibid.*

23. *Ibid.*

24. *Id.* at 847.

25. *Id.* at 850.

26. All states, including Tennessee, have adopted the English common law and English statutes passed before the fourth year of James I (1607). This presumably includes the doctrine of judicial *cy pres* as it developed at common law. See, *e.g.*, TENN. CONST. art. 11, § 1 (1956).

27. "The tendency to assume that a word which appears in two or more legal rules, and in connection with more than one purpose, has and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against." COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 159 (1942).

28. *Id.* at 849-50. In distinguishing between *cy pres* and "liberal rules of judicial construction" the court cites a section in an encyclopedia explaining the application of *cy pres*. 10 AM. JUR. *Charities* § 125 (1937). When the words "liberal rules of judicial construction" appear in that section, however, they refer to the doctrine of judicial *cy pres* as distinguished from prerogative *cy pres*, rather than an altogether separate doctrine. Thus the court has actually stated that it is applying *cy pres*, although it attempts to distinguish its "liberal rules" from *cy pres*. "A rose by any other name"

new label for an established doctrine can lead only to confusion and unnecessary complexity, whereas the law should be functional and clear, never introducing complexity unless absolutely necessary to implement more important policy considerations.