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# Recent Cases

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# RECENT CASES

## Administration of Justice–Federal Rules of Civil Procedure–District Court Has No Power To Penalize Counsel for Delay Which Violates Standing Orders of Court

In the course of a personal injury action, a United States district judge imposed a fine of one hundred dollars upon the defendant's attorney for negligently failing to file a pretrial memorandum. Pursuant to powers believed given it by the Federal Rules of Civil Procedure,[1] the court had adopted two standing orders on pretrial conferences. The first provided for mandatory filing of pretrial memoranda, defendant's counsel to file within thirty days after receiving plaintiff's memorandum; the second order provided for "fines, costs and counsel fees" for failure to prepare for or appear at the pretrial conference. Defendant's counsel, through negligence, failed to file his memorandum until the day before the conference and was ten months late in so doing. The plaintiff's counsel then filed a written motion to strike the untimely memorandum. The court, finding the motion too drastic under the circumstances,[2] issued an order which (1) struck names of certain witnesses appearing on the memorandum, (2) imposed a one hundred dollar fine on the defendant's attorney, and (3) permitted the plaintiff to submit an order imposing costs and counsel fees caused by defendant's delay.[3] After the trial, which resulted in verdict for the plaintiff with indemnity against a third party, the defendant's attorney appealed, attacking that portion of the order which provided for the imposition of a fine as carrying "the criminal hallmark." On appeal to the United States Court of Appeals for the Third Circuit, *held*, reversed, two judges dissenting. The Federal Rules give the district courts no power to discipline or penalize counsel in civil litigation for violation of standing orders of the court. *Gamble v. Pope & Talbot, Inc.*, 307 F.2d 729 (3d Cir.) (en banc), *cert. denied*, 371 U.S. 888 (1962).

The lawyer owes a duty of punctuality not only to his client, but

1. "In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference . . . ." FED. R. CIV. P. 16. "Each district court . . . may from time to time make and amend rules governing its practice not inconsistent with these rules." FED. R. CIV. P. 83.

2. Noting that this was the first time a fine had been imposed and that the opposing counsel had not reminded his adversary of the delay, the district court said that in subsequent cases the fine would be more substantial. Gamble v. Pope & Talbot, Inc., 307 F.2d 729, 731 (3d Cir.) (en banc), *cert. denied*, 371 U.S. 888 (1962).

3. 307 F.2d at 730.

also to the court.[4] The judge may "hold counsel to a proper appreciation [of this duty] . . . so as to enforce due diligence in the dispatch of business before the court."[5] The inherent power of all courts to manage their affairs in such a way as to achieve the expeditious disposition of cases is unquestioned,[6] but the sanctions a court may employ in dealing with a tardy or dilatory lawyer present a difficult problem. There are two general methods that might be used: sanctions directed at the litigant, and sanctions against the real party at fault—the lawyer.

Ordinarily, the federal courts have penalized the litigant for his counsel's misconduct in failing to appear or being tardy,[7] while the more personal measure, contempt, has been employed against the attorney himself, if he is found to have intentionally obstructed justice.[8] In visiting the sanction upon the litigant, the courts have used measures as extreme as dismissal or default judgment,[9] in addition to preclusion orders such as striking witnesses or defenses.[10] To dismiss the suit when the attorney is at fault is of questionable fairness to the litigant, who is unaware of the proper steps to be taken in a proceeding.[11] Furthermore, a dilatory lawyer would usually prefer to pay a reasonable fine for his negligence[12] rather than submit his client to a loss of his action and incur the possibility of defending an

4. Canons of Professional Ethics, Canon 21.

5. Canons of Judicial Ethics, Canon 18.

6. See Link v. Wabash R.R., 370 U.S. 626, 630-31 & n.4 (1961).

7. The Federal Rules provide for involuntary dismissal for "failure of plaintiff to prosecute or to comply with these rules or any order of court," FED. R. CIV. P. 41(b), and for default judgment against a defendant who "has failed to plead or otherwise defend," FED. R. CIV. P. 55. See *e.g.*, Levine v. Colgate-Palmolive Co., 283 F.2d 532 (2d Cir. 1960), *cert. denied*, 365 U.S. 821 (1961); Weiss Noodle Co. v. Aprile, 272 F.2d 923 (6th Cir. 1959) (Rule 33). These are severe sanctions which are used with restraint and are critically examined by appellate courts, who are sensitive to abuse of discretion. Waterman, *An Appellate Judge's Approach When Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance With Pretrial Orders*, 29 F.R.D. 420, 424 (1962).

8. There is no such thing as negligent contempt; there must be a finding of wilfulness. United States *ex rel.* Porter v. Kroger Grocery & Baking Co., 163 F.2d 168 (7th Cir. 1947).

9. Note 7 *supra*.

10. See, *e.g.*, the drastic preclusion orders in Padovani v. Bruchhausen, 293 F.2d 546 (2d Cir. 1961) (order vacated); Syracuse Broadcasting Corp. v. Newhouse, 271 F.2d 910 (2d Cir. 1959) (order modified); Matheny v. Porter, 158 F.2d 478 (10th Cir. 1946) (reversing on other grounds but quoting from an unreported district court decision).

11. "It would seem hardly likely . . . that the lay plaintiff could know or comprehend the doom about to be visited upon him, not his counsel, in time to avert it if, indeed, that were in any way possible." Padovani v. Bruchhausen, *supra* note 10, at 548. For a judicial discussion of the respective rights and duties of the client and his attorney in legal proceedings, see Bonnifield v. Thorp, 71 Fed. 924 (D. Alaska 1896).

12. McIlvaine, *A District Judge's Views as to the Means of Insuring Compliance by Counsel With the Pretrial Procedures*, 29 F.R.D. 408, 411 (1962). Judge McIlvaine's court used money penalties to control pretrial procedure.

action for negligence brought against him by his client.[13]

The federal contempt statute,[14] arising from the desire of Congress to curb the contempt power of the federal courts,[15] specifically enumerates the conduct for which a court may impose a criminal fine.[16] In the instant case, the court of appeals, relying upon the purpose of the contempt statute, accepted the appellant attorney's contention that "the district court has not been given authority and possesses no inherent power to fine an attorney who has not been held in contempt nor given a hearing."[17] While recognizing that the lower court did not regard its punitive action as an exercise of the contempt power, but rather as a disciplinary measure, this court found nothing in the Federal Rules which would authorize such a sanction. The court reasoned that any imposition of costs other than a contempt penalty must come within the statute[18] providing for compensatory costs payable to the opposing party and could not, as in this case, be made payable to the court. The dissenting judges expressed the opinion that a small fine intended only as a sanction for the attorney's misconduct did not constitute a contempt penalty but was only an exercise of the inherent power of the court.[19] Since all courts have the power to control members of their bars by suspension and disbarment,[20] as well as by contempt proceedings, Judge Goodrich in his dissent urged that the court could also impose a lesser sanction. The majority's view that to uphold the action of the district judge in this case would imply that a trial court could impose a fine of any amount for whatever conduct the judge deemed subject to discipline is answered by the action in the instant case itself: the attorney has the

13. See Wade, *The Attorney's Liability for Negligence,* 12 VAND. L. REV. 755, 766-67 (1959).

14. 18 U.S.C. § 401 (1958).

15. See the excellent article by Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers,* 37 HARV. L. REV. 1010 (1924).

16. "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; (2) Misbehavior of any of its officers in their official transactions; (3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command." 18 U.S.C. § 401 (1958).

17. 307 F.2d at 731.

18. "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs." 28 U.S.C. § 1927 (1958). Some courts have interpreted "vexatiously" to mean wilfulness.

19. 307 F.2d at 735 (Biggs, J., dissenting), 737 (Coodrich, J., dissenting).

20. *Ex parte* Wall, 107 U.S. 265 (1882); *Ex parte* Robinson, 86 U.S. (19 Wall.) 505 (1873); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871); In the Matter of Schlesinger, 404 Pa. 584, 172 A.2d 835 (1961); *In re* Rappoport, 256 App. Div. 823, 9 N.Y.S.2d 51 (1939); Ingersoll v. Coal Creek Coal Co., 117 Tenn. 263, 98 S.W. 178 (1906).

right to appellate review of unauthorized or excessive action.[21]

The court's approach to this problem is unnecessarily narrow in scope. Confining its inquiry to the Federal Rules, the contempt statute, and the compensatory costs statute, the instant case limits a district court's available sanctions against the lawyer, the real party at fault, and requires all sanctions to be directed at the innocent client. Rule 41(b) of the Federal Rules of Civil Procedure provides for involuntary dismissal of a plaintiff's action if he fails "to prosecute or to comply with these rules or *any order of court.*"[22] In a statement which accompanied the recent amendments to the Federal Rules,[23] Justices Black and Douglas urged a major change in Rule 41(b). Citing *Link v. Wabash R.R.*,[24] where the Court affirmed a dismissal of a plaintiff's action because of his lawyer's failure to appear at a pretrial conference, the two Justices were of the opinion that "a fair system of justice should not have penalized him because his lawyer, through neglect or any other reason, failed to appear when ordered."[25] Their submitted alteration in Rule 41(b) would require actual notice communicated to the plaintiff of the failure of his attorney. While this concept of actual notice to the plaintiff at first blush seems a reasonable one, it neglects problems of administration, *e.g.*, reaching an unavailable plaintiff, or waiting for the plaintiff to retain another lawyer. These troublesome aspects of actual notice would eventually lead to further complications in the prompt disposition of civil cases. However, the purpose underlying the Justices' suggestion, *i.e.*, to prevent injustice to the innocent litigant, is obviously a sound one. Unfortunately, the Supreme Court declined certiorari in the instant case, leaving the district courts with a difficult problem: how to control the court calendar and a careless lawyer without materially prejudicing the unsuspecting litigant.

## Banks & Banking—Clauses in Contract of Deposit Which Relieve Bank of Liability for Paying Over Stop Order and Which Require Depositor To Give Prompt Notification of Error in Statement Are Valid

The plaintiff-depositor and the defendant-bank entered into a deposit contract under which the depositor was required to make

21. See Waterman, *supra* note 7.

22. FED. R. CIV. P. 41(b). (Emphasis added.)

23. Black and Douglas, JJ., Statemeut on the Rules of Civil Procedure and the Proposed Amendments, 83 Sup. Ct., advance sheet no. 7, 31, 33 (special yellow section) (1963).

24. 370 U.S. 626 (1962).

25. Black and Douglas, JJ., *supra* note 23, at 33.

any request to stop payment of a check in writing and the bank was to be exempted from liability for paying a check contrary to such written request through accident or oversight.[1] A second provision further exempted the bank from liability for any difference of account of which the depositor failed to notify the bank within a ten-day period from the date the bank mailed his bank statement and cancelled checks to him.[2] Subsequently the plaintiff telephoned instructions to a vice-president of the drawee bank to stop payment of a $1000 check he had drawn. He was advised to make his request in writing, which he did by letter the same day.[3] Three days later, after receipt of drawer's letter, the check was received by the drawee bank and charged to his account. The bank informed the depositor of the check's payment.[4] Upon request for and receipt of the inclusive month's cancelled checks and bank statement, the drawer failed to submit within the ten-day period written notice of any difference in account.[5] In an action by the drawer against the drawee bank seeking judgment in the amount of the check, the jury found for the plaintiff. However, the trial judge granted defendant's motion for judgment notwithstanding the verdict, on the basis that the contractual provision requiring notice within a ten-day period of any difference of account was valid, "that the bank did not waive compliance thereof, and that it was prejudiced by plaintiff's failure to do

1. The first exculpatory provision of the deposit contract was as follows: "Any request for stop payment must be made in writing on a form prescribed by this bank, and this bank will not be liable in any way for refusing payment of the item nor for paying the item through accident or oversight." Brief for Appellant, p. 6, Brief for Respondent, p. 5, Haman v. First Nat'l Bank, 115 N.W.2d 883 (S.D. 1962).

2. The second exculpatory provision of the deposit contract was as follows: "This bank will not be liable for any amount paid on any forged or altered item including forged indorsements, nor for any missing cancelled check, nor for any difference of account, unless written notice thereof is delivered to this bank within 10 days after date of mailing or delivering the depositor's statement; and if the depositor fails to give such notice, or if any statement or cancelled checks are lost in transit, the bank's records of the account shall be accepted as correct." Brief for Appellant, p. 6, Brief for Respondent, p. 4, Haman v. First Nat'l Bank, 115 N.W.2d 883 (S.D. 1962).

3. The defendant-bank denied that prior to presentation and honor of the check on November 17, 1956, it had received any notice in writing or otherwise of a desire of plaintiff to "stop payment." However, the jury found that notice had been given to the defendant-bank by the depositor, through a letter placed in the mail on November 14, 1956.

4. "This is to advise you that your check No. 333 dated November 14, 1956, payable to the Calhoun Realty Company in the amount of $1,000 was paid November 17th. The fact that the check was paid three days ago makes it impossible for us to return it to you." Text of the letter of November 20th, 1956, addressed by the assistant vice-president of the bank to the depositor. Brief for Respondent, p. 23, Haman v. First Nat'l Bank, 115 N.W.2d 883 (S.D. 1962).

5. On December 18, 1956, the depositor wrote the bank requesting his November 1956 bank statement and additional information as to several December 1956 deposits regarding a tenant's account. In a letter dated December 20, 1956, they were sent to him. However, the depositor admittedly failed to examine them until the latter part of January 1957.

so."[6] Upon appeal, *held*, affirmed. Terms of a contract of deposit which purport to absolve the bank of any liability for the payment through "accident, or oversight" of depositor's stop-payment request and which require the depositor to report any difference of account within ten days after receipt of his bank statement and cancelled checks are within the contracting capacity of the parties and valid. *Haman v. First National Bank*, 115 N.W.2d 883 (S.D. 1962).

The relationship between a bank and its depositor is that of debtor and creditor.[7] As a debtor, the drawee bank's obligation to the depositor is to honor his checks when properly presented if his bank balance justifies their payment.[8] Since a check is simply an order or an authorization for the bank to pay, the drawer has the right to revoke such authority and countermand his check.[9] At common law, the bank that pays the check against which a stop-payment order is in effect does so at its own peril.[10] This result has been adopted by both the Negotiable Instruments Law[11] and the Uniform Commercial Code.[12] In order to avoid loss incurred through the inadvertence of their employees, banks have attempted to restrict their common-law liability by a release clause in the stop-payment form which is executed by the depositor at the time of his request. The release clause in the stop-payment form has been attacked as an agreement

6. 115 N.W.2d at 885.

7. Barbour v. First Citizens Nat'l Bank, 77 S.D. 106, 86 N.W.2d 526 (1957).

8. *E.g.*, Baird v. Reinertson, 235 N.W. 159 (N.D. 1934); Flaherty v. Bank of Kimbal, 75 S.D. 468, 68 N.W.2d 105 (1955).

9. "The drawing and issuance of a check operates to create in the drawee a duty and power of discharging, *pro tanto*, the drawee's debt to the drawer by paying the sum called for to the holder. . . . The duty and power thus created by the voluntary act of the drawer necessarily is capable of destruction by the act of the party who brought these relations into existence, provided such act of destruction precedes any act of the drawee in reliance upon the power created which would constitute a change of position by such drawee." BRITTON, BILLS AND NOTES § 181, at 520 (1961).

10. "The bank is the drawer's agent. Its primary duty is to hold or to pay his money as he directs. Primarily it owes no duty to the holder, except under and by virtue of directions from the drawer. Until, by reason of these directions, it has assumed voluntarily, or by action of law has involuntarily come under, secondary and superseding obligations to the holder, the latest orders from the drawer govern its right to act on his behalf." 1 MORSE, BANKS AND BANKING § 398 (6th ed. 1928). See American Defense Soc'y v. Sherman Nat'l Bank, 225 N.Y. 506, 122 N.E. 695 (1919); Pease & Dwyer Co. v. State Nat'l Bank, 114 Tenn. 693, 88 S.W. 172 (1905); Hewitt v. First Nat'l Bank, 113 Tex. 100, 252 S.W. 161 (Comm'n App. 1923). *But see* Union Nat'l Bank v. Oceana County Bank, 80 Ill. 212 (1875).

11. According to § 189 of the Negotiable Instruments Law, a check is not an assignment of the funds of the drawer until it is certified. Consequently, under this provision payment may be stopped by the drawer of a check at any time before certification, or payment. BIGELOW, BILLS, NOTES AND CHECKS §§ 208, 209 (3d ed. 1928).

12. "As under the original sections [N.I.L. §§ 127, 189], a check or other draft does not of itself operate as an assignment in law or equity." UNIFORM COMMERCIAL CODE § 3-409, comment 1 (1962).

without consideration[13] and as contrary to public policy.[14] In response, it has been extracted from the stop-payment order and included within the initial contract of deposit. This satisfies the lack of consideration argument,[15] but objections as to public policy still remain. The ambiguity of the phrase "public policy" has caused the courts little consternation; they have found it violated by the inequality of bargaining power,[16] the snare of precatory words in the printed contract or notice,[17] the inconspicuous placement of the exculpatory clause,[18] or simply the economic and social detriments which would result from the enforcement of the clause.[19] And yet the guardians of contractual freedom have attacked this ambiguity as a means for masking unjustified infringement upon the contract rights of the parties.[20] Although statutes defining the phrase "public policy" in its general application to the laws of the jurisdiction,[21] as well as past judicial decisions, have been the subject of extensive construction and interpretation, a clear line of demarcation between sound and unsound public policy has not emerged, and the facts and circumstances of the particular case often dictate the result.[22]

13. Hiroshima v. Bank of Italy, 78 Cal. App. 362, 248 Pac. 947 (Dist. Ct. App. 1926); Calamita v. Tradesmens Nat'l Bank, 135 Conn. 326, 64 A.2d 46 (1949); Reinhardt v. Passaic-Clifton Nat'l Bank & Trust Co., 16 N.J. Super. 430, 84 A.2d 741 (App. Div. 1951); Speroff v. First-Cent. Trust Co., 149 Ohio St. 415, 79 N.E.2d 119 (1948); Thomas v. First Nat'l Bank, 316 Pa. 181, 101 A.2d 910 (1954).

14. See Hiroshima v. Bank of Italy, 78 Cal. App. 362, 248 Pac. 947 (Dist. Ct. App. 1926); Carnegie Trust Co. v. First Nat'l Bank, 213 N.Y. 301, 107 N.E. 693 (1916); Levine v. Bank of United States, 132 Misc. 130, 229 N.Y. Supp. 108 (N.Y. Munic. Ct. 1928); Speroff v. First-Cent. Trust Co., 149 Ohio St. 415, 79 N.E.2d 119 (1948); Winchester Milling Co. v. Bank of Winchester, 120 Tenn. 225, 111 S.W. 248 (1908); Comment, 39 YALE L.J. 542 (1930); 15 CALIF. L. REV. 46 (1926); 15 CALIF. L. REV. 235 (1927); 40 HARV. L. REV. 110 (1926).

15. Reinhardt v. Passaic-Clifton Nat'l Bank & Trust Co., 16 N.J. Super. 430, 84 A.2d 741 (App. Div. 1951) (dictum).

16. *Id.* at 436, 84 A.2d at 744.

17. Calamita v. Tradesmens Nat'l Bank, 135 Conn. 326, 327, 64 A.2d 46, 47 (1949) ("the undersigned hereby requests"); Hiroshima v. Bank of Italy, 78 Cal. App. 362, 248 Pac. 947, 949 (Dist. Ct. App. 1926) ("the undersigned makes the foregoing request as an act of courtesy only").

18. Los Angeles Inv. Co. v. Home Sav. Bank, 180 Cal. 601, 182 Pac. 293 (1919).

19. Hiroshima v. Bank of Italy, 78 Cal. App. 362, 248 Pac. 947 (Dist. Ct. App. 1926).

20. See Martinez v. National City Bank, 80 F. Supp. 545 (D.P.R. 1948); Hodnick v. Fidelity Trust Co., 183 N.E. 488 (Ind. Ct. App. 1932); Tremont Trust Co. v. Burack, 235 Mass. 398, 126 N.E. 782 (1920); Gaita v. Windsor Bank, 231 N.Y. 152, 167 N.E. 203 (1929).

21. In South Dakota the relevant provision is: "Contracts Against Public Policy. All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud or willful injury to the person or property of another or from violation of law whether willful or negligent, are against the policy of the law." S.D. CODE § 10.0702 (1939).

22. "Whether or not a contract is against public policy is a question of law for the court to determine from all of the circumstances in a particular case." Hodnick v. Fidelity Trust Co., 183 N.E. 488, 491 (Ind. Ct. App. 1932).

In addition, the negligent bank has attempted to defend against liability by showing that the depositor has a duty to examine his returned statement and checks and give notice of any discovered defalcation, and that upon failure to perform this duty, the negligence of the bank is offset. Founded in common law as a defense against a forged, or altered instrument,[23] the duty required the notice to be given within a reasonable time.[24] The purposes of this notice were to allow a bank to proceed immediately against the wrongdoer, and to permit a more expeditious verification of accounts for the bank's protection from unjust claims.[25] In an effort to strengthen the defense, banks have stipulated within the contract of deposit that without notice within an established period of time of infirmities in the depositor's stated account the bank would be released from its common-law liability. When a court has determined the stipulated time to be reasonable, it will enforce the provision as to forgeries and alterations that were unreported by the depositor within the period.[26] In a jurisdiction under the Negotiable Instruments Law the inclusion in the contract of deposit of both attempts to restrict common-law liability is reassuring to a bank desiring any degree of protection from liability.[27] However, the introduction of the Uniform Commercial Code in an increasing number of jurisdictions suggests a short-lived reassurance; under the Code, the restrictive clauses fail to exempt the bank from loss if they attempt to disclaim liability for "failure to exercise ordinary care."[28] A qualification of this provision allows the bank to reasonably establish, by contract, the standard of care from which the bank's responsibility to its depositor shall be determined.[29]

In the instant case, the court recognized a bank's common-law

23. Leather Mfrs.' Bank v. Morgan, 117 U.S. 96 (1886); First Nat'l Bank v. Allen, 14 So. 335 (Ala. 1893); Scanlon-Gipson Lumber Co. v. Germania Bank, 90 Minn. 478, 97 N.W. 380 (1903); Myers v. Southwestern Nat'l Bank, 193 Pa. 1, 44 Atl. 280 (1899).

24. Leather Mfrs.' Bank v. Morgan, 117 U.S. 96 (1886); Scanlon-Gipson Lumber Co. v. Germania Bank, 90 Minn. 478, 97 N.W. 380 (1903).

25. " 'Perhaps as the jury found defendant was at fault but the point is if the notice had been given it might have been able to have shown the contrary. At any rate, it appears to be a reasonable construction of the contract to conclude that notice should be given in such cases so that a bank with multiple transactions is forewarned in sufficient time so that it may ascertain the facts and protect itself against unjust claims.' " 115 N.W.2d at 885 (S.D. 1962) (quoting the opinion of the trial judge).

26. See Brunswick Corp. v. Northwestern Nat'l Bank & Trust Co., 214 Minn. 370, 8 N.W.2d 333 (1943); Semingson v. Stockyards Nat'l Bank, 162 Minn. 424, 203 N.W. 412 (1925).

27. Spanogle, *The Bank-Depositor Relationship—A Comparison of the Present Tennessee Law and the Uniform Commercial Code*, 16 VAND. L. RV. 79, 100 n.139 (1962).

28. UNIFORM COMMERCIAL CODE § 4-103(1).

29. Leary, *Article 4: Bank Deposits and Collections Under the Uniform Commercial Code*, 15 U. PITT. L. REV. 565, 581 (1954).

liability but also recognized the defense against its negligent depositor arising from the contractual duty of the depositor to examine, within ten days after mailing, the statement of account and cancelled checks, and to report to the bank not only any alterations or forgeries but also "any discrepancy" in the amounts.[30] In addition the court recognized the right of the bank to accept or refuse a deposit and to agree upon the terms and conditions under which the deposit will be accepted, so long as they are not in conflict with a controlling statute (including the Negotiable Instruments Law) or other rule of law.[31] The court found no such conflict under the given circumstances either in the contractual stipulation that "notice be given . . . within ten days," or in the provision excusing the bank's negligence.[32] As to plaintiff's claim that by virtue of his stop-payment order the defendant had actual notice of the error and consequently additional notice was unnecessary the court was unsympathetic since the contractual provision required specific action of the plaintiff which he had not performed.[33] The court, recognizing the right of the bank to contract in the deposit agreement so as to restrict its liability for paying a stop-payment item through " 'accident or oversight,' " dismissed plaintiff's contention that his contributory negligence was immaterial in light of the defendant's negligence.[34] It noted that those authorities who felt otherwise substantiated their feelings on the grounds of lack of consideration and public policy. Distinguishing this case from those in which the release clause was imbedded in an agreement executed subsequent to the deposit contract, the court found no problem as to consideration.[35] However the court made no specific response to the problem of public policy. Rather, it addressed itself to the joint grounds of consideration and public policy in concluding that "the weight of authority supports the view that such a stipulation in a stop order constitutes a valid and enforceable contract."[36]

This case correctly holds that the problem of lack of consideration is cured by the inclusion in the contract of deposit of the exculpatory provision as to accidental or inadvertent payment,[37] but its suggestion that such relocation cures the public policy obstacle is erroneous. Regardless of when the depositor signs the contract, the point is that the bank has exceeded the reasonable bounds allowed a quasi-public institution in its dealings with the public. Although

30. 115 N.W.2d at 885 (1962).
31. *Ibid.*
32. *Id.* at 885-86.
33. *Ibid.*
34. *Ibid.*
35. *Ibid.*
36. *Ibid.*
37. See text accompanying note 35 *supra.*

limitations of liability for negligence are not foreign to the field of public service institutions, total abrogation of liability is.[38] To allow banks to contract as private organizations and transact as public service organizations is inconsistent. Such inconsistency pricks at the very image the banks labor to project to the public.

As to the second exculpatory provision, the court in the instant case gave little consideration to the distinction between the various defalcations which create a "difference in account" and contractually require notice by the depositor. Yet a pertinent distinction exists. In the areas of forgery and alteration, an appreciation of the nature of the defect and a recognition of the bank's liability regardless of whether a reasonable examination would have disclosed the defect make it reasonable that the depositor be charged with a responsibility to assist the bank in minimizing its exposure. By fulfilling this duty the depositor helps the bank to minimize any injury resulting from its negligence. By contractually extending the depositor's duty to encompass "any difference of account" and interpreting the phrase as inclusive of errors other than forgery and alteration, the justification is purportedly to minimize the effect of false claims that become more easily established with the passage of time.[39] And yet, to extend the scope of the duty of depositor in this respect should require that the bank justify the request for such protection by manifest evidence of its sincerity. The bank's failure in the instant case automatically to issue monthly statements to its depositors is hardly in keeping with its contention that a sense of currency as to the depositor's accounts is professionally necessary; the depositor was issued his statement not by virtue of any bank-administered program but through his own initiative.[40] Since the contract of deposit gave the bank the option of sending the depositor's statement when it chose,[41] an awareness of circumstances that could possibly have litigious repercussions (*e.g.*, the payment of the check over a stop-payment order) would require more than a passive role to absolve the bank from liability. In fact the bank, by reserving the right to send the depositor's statement at its option instead of automatically mailing it within a reasonable period, should be charged with the duty to exercise the option upon reasonable notice of any negligent act as to depositor's account. In summary, a bank desirous of a greater degree of protection from its own negligence through exculpatory clauses will be warned by the instant case to place such clauses in the contract of deposit. The obstacle of lack of consideration will

38. WATKINS, SHIPPERS AND CARRIERS § 2-26 (5th ed. 1962).
39. See note 25 *supra*.
40. See note 5 *supra*.
41. Brief for Respondent, p. 18, Haman v. First Nat'l Bank, 115 N.W.2d 883 (S.D. 1962).

thereby be removed. However, the case is not very persuasive authority for the proposition that such placement eliminates the public policy argument.[42] A bank would be better advised to avoid false confidence in this holding and to ensure that it exercises every reasonable means to maintain a position consistent with that degree of care which justifies the contractually created duty of the depositor. In the situation presented in the instant case, the bank should have pursued one of two reasonable courses of action: (1) deletion of the optional mailing clause and automatic mailing of depositor's statements; or (2) exercise of the mailing option upon reasonable notice of any transaction in which the bank has acted negligently toward the depositor's account.

## Carriers—Routes—Action for Reparation Available Under Motor Carrier Act for Unreasonable Routing

Defendant motor carrier transported shipments for plaintiff shipper between intrastate points, using an interstate route and charging the applicable interstate rate instead of using an available intrastate route with an accompanying lower rate.[1] Upon submission to the Interstate Commerce Commission,[2] the routing practice was found unreasonable, whereupon plaintiff instituted suit in a federal district court for reparation of the difference between the rates.[3] The lower court's dismissal[4] was affirmed[5] by the Court of Appeals for the Second Circuit, on the authority of *T.I.M.E., Inc. v. United States*.[6] On certiorari in the United States Supreme Court, *held*, reversed, three judges dissenting. Survival of a judicial remedy of reparation for unreasonable routing practices is not inconsistent with the regulatory scheme of the Motor Carrier Act of 1935 and such a remedy is available through the act's saving clause.[7] *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962).

42. See UNIFORM COMMERCIAL CODE §§ 4-103(1), -406(1).

1. Between 1953 and 1955 plaintiff made numerous shipments of rubber pads between Buffalo and New York City. The rate charged was the published rate properly filed with the Interstate Commerce Commission. The intrastate route and rate used were also properly filed with the New York Commerce Commission.

2. 302 I.C.C. 173 (1957).

3. The amount of excess charges was approximately $10,000.

4. 187 F. Supp. 722 (S.D.N.Y. 1960).

5. 293 F.2d 205 (2d Cir. 1961) (one judge dissenting).

6. 359 U.S. 464 (1959).

7. Section 216(j) of the Motor Carrier Act preserves any "remedy . . . not inconsistent" with it. Motor Carrier Act, § 216(j), 49 Stat. 558 (1935), 49 U.S.C. § 316(j) (1958). If any common law right of action would not be inconsistent with the act's scheme of regulation of the motor carrier industry, then it is available through the clause.

At common law, reparation was awarded an injured shipper for a carrier's breach of the duty to select the cheaper of two equally convenient alternative routes.[8] The purpose of the Motor Carrier Act of 1935[9] was to protect carriers from self-destruction by unrestrained competition within the industry. The act (part II of the Interstate Commerce Act),[10] as do the railroad and navigation acts (parts I and III respectively of the Interstate Commerce Act),[11] declares that unreasonable practices are unlawful, but it differs from parts I and III by failing to provide any express procedure for reparation for practices found to be unreasonable.[12] Section 13 of part I authorizes suit in the federal district courts for reparation for unreasonable practices, but the issue of reasonableness is retained within the exclusive jurisdiction of the Interstate Commerce Commission in order to preserve uniformity.[13] The *T.I.M.E.* case involved the unreasonableness of rates under the Motor Carrier Act; the court held that a shipper has no statutory right and no surviving common law right to recover unreasonable charges, since to retain such a common law right would disrupt the statutory scheme of regulation.[14] An analogous statute, the Federal Power Act,[15] is also without provision for reparation of unreasonable rates. Originally, in actions for reparation under that act, the issue of reasonableness was determined by the commission, with the courts using the commission's determination as a basis for awarding relief.[16] This procedure, which

8. See, *e.g.*, Galveston H. & S.A. Ry. v. Lykes Bros., 294 Fed. 968 (S.D. Tex. 1923); Parker v. Great W. Ry., 7 Man. & G. 252, 135 Eng. Rep. 107 (C.P. 1844). In Northern Pac. Ry. v. Solum, 247 U.S. 477 (1918), the Court said, "In the absence of shipping instructions it is ordinarily the duty of the carrier to ship by the cheaper route." *Id.* at 482. See DOBIE, BAILMENTS AND CARRIERS 460 (1914).

9. Motor Carrier Act §§ 201-27, 49 Stat. 543-67 (1935), as amended, 49 U.S.C. §§ 301-27 (1958). See George, *Federal Motor Carrier Act* of 1935, 21 CORNELL L.Q. 249 (1936).

10. Note 9 *supra*.

11. Interstate Commerce Act, part I, 24 Stat. 379-87 (1887), as amended, 49 U.S.C. §§ 1-300 (1958); part III, 54 Stat. 929 (1940), as amended, 49 U.S.C. §§ 901-23 (1958). Part I provides for a retroactive rate adjustment through a suit for reparation provided by §§ 8, 9, 13, 16, 49 U.S.C. §§ 8, 9, 13, 16 (1958). See Southern Pac. Ry. v. Darnell-Taenzer Lumber Co., 245 U.S. 531 (1918); *cf.* 12 STAN. L. REV. 674 (1959).

12. T.I.M.E., Inc. v. United States, *supra* note 6; see 13 VAND. L. REV. 412 (1959).

13. The Court in Texas & Pac. R.R. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907), held that the determination of reasonableness is within the exclusive province of an administrative body, since only that body can issue orders regarding the practice and provide for a uniform construction of the statute. See 3 DAVIS, ADMINISTRATIVE LAW § 19.01 (1958); Jaffe, *Primary Jurisdiction Reconsidered; The Anti-Trust Laws*, 102 U. PA. L. REV. 577 (1954); Note, 30 GEO. L.J. 545 (1942); 62 COLUM. L. REV. 520 (1962); *cf.* T.I.M.E., Inc. v. United States, *supra* note 6.

14. See 13 VAND. L. REV. 412 (1959).

15. Federal Power Act, 49 Stat. 838 (1935), as amended, 16 U.S.C. §§ 791-828 (1958). Like the Motor Carrier Act, the Federal Power Act also declares unreasonable practices unlawful but makes no provision for reparation.

16. The method used is analogous to that used under the Motor Carrier Act prior

was similar to one used here under the Motor Carrier Act,[17] was rejected by the Supreme Court in 1951.[18] Congress, although presented with numerous opportunities,[19] failed to amend the Motor Carrier Act to provide an explicit procedure for reparation awards. This failure has been advanced to support both positions, *i.e.*, (1) it is indicative of a congressional intent not to provide a procedure similar to parts I and III,[20] or (2) Congress felt that there was no need to act since an equitable arrangement had evolved.[21] The latter argument is based on *Bell Potato Chip Co. v. Aberdeen Truck Lines, Inc.*,[22] where the commission, using the saving clause, which retains common law remedies if consistent with the regulatory scheme, determined that if it could not award reparation, it could determine the reasonableness of a practice, which determination could then be used as a basis of court action.

The majority opinion distinguished the instant case from the *T.I.M.E.* decision on the ground that *T.I.M.E.* concerned rates while the instant case involved routes.[23] Since rates are surrounded with numerous statutory safeguards, such as filing rate schedules with the commission,[24] permitting the commission to determine that a published rate is unreasonable would disrupt the statutory scheme of regulation; on the other hand, according to the majority of the Court, the matter of routes is dealt with primarily on an *ad hoc* basis, without prior regulation of the carrier's selection of a route. The majority noted that a motor shipper cannot choose the route to be used, while the rail shipper has a choice of route; therefore, if no method of re-

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to *T.I.M.E.* The issue of reasonableness is submitted to the commission for a determination. Once the commission determines the practice to be unreasonable, an action is instituted in court for reparation.

17. See, *e.g.*, United States v. Garner, 134 F. Supp. 16 (E.D.N.C. 1955); New York & New Brunswick Auto Express Co. v. United States, 126 F. Supp. 215 (Ct. Cl. 1954).

18. Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951). The Court said the Federal Power Act, like the Motor Carrier Act, declares unreasonable rates unlawful but does not create a cause of action for recovery of unreasonable past charges. If the commission could declare the rate unreasonable for the purpose of a reparation suit, then it would be doing indirectly what it was not empowered to do directly.

19. The commission favors an amendment to create uniformity with the other sections of the Interstate Commerce Act. *Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 2324, 2295*, 80th Cong., 1st Sess. 41 (1947). See also S. REP. No. 433, 76th Cong., 1st Sess. 18 (1940).

20. See T.I.M.E., Inc. v. United States, *supra* note 6; *cf.* Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., *supra* note 18.

21. See 62 COLUM. L. REV. 520, 523 n.25 (1962).

22. 43 M.C.C. 337 (1944). See Monheim, *An Analysis of the Question of Reparations Involving Motor Carriers*, 27 ICC PRAC. J. 257 (1959); *cf.* W.A. Barrows Porcelain Enamel Co. v. Cushman Motor Delivery Co., 11 M.C.C. 365 (1939).

23. 371 U.S. at 86-87.

24. *Id.* at 87.

covery existed the motor shipper would be completely at the mercy of the carrier.[25] The dissent asserted that the case was squarely within the purview of *T.I.M.E.*[26] An attempt was made to point out certain devices protecting against unreasonable routes, and it was shown that only a handful of cases had been based on unreasonable practices over the past twenty-four years.[27]

It would be an inequitable application of the statute to subject a shipper to the whim of a carrier by denying reparation for an unreasonable routing practice when there are no prospective safeguards. The correctness of the instant decision hinges on its distinguishability from *T.I.M.E.*, which the Court accomplished adequately. The dissent correctly asserted that there are safeguards on selection of routes, but these safeguards are applied subsequently and not prospectively, as in the rate situation. If this decision is a spur to litigation, as the dissent suggested, then increased litigation should be accepted if the alternative is for an injured shipper to be left remediless. There is no question but that the commission should have exclusive jurisdiction to determine the reasonableness of the practice, as they possess a certain expertise, and uniform application is desirable; but it is foolish to say that this is sufficient. The practice may be determined to be unreasonable, but the shipper would still have an unreimbursed pecuniary loss. The Court wisely perceived this dilemma and corrected it by extending the foregoing process one step further: once the issue of unreasonableness has been determined, judicial relief in the form of reparation is available. Since the commission cannot prospectively regulate routes, as it can rates, this result is not inconsistent with the scheme of the Motor Carrier Act; therefore, the majority's construction of the saving clause seems correct.

## Constitutional Law—Full Faith and Credit—Collateral Attack on Errors of Court of Prior Forum

A Florida decree granted the plaintiff an absolute divorce from her husband, awarded the plaintiff permanent alimony during her lifetime, and provided that in the event her husband predeceased her the alimony would continue as a charge upon his estate. After the divorce the husband remarried and moved to West Virginia but continued to pay the alimony until his death. The plaintiff brought the present action in West Virginia to enforce against his estate a claim for unpaid alimony accrued after the death. The defendants in the

25. *Id.* at 88.
26. *Id.* at 89. Justices Harlan, Stewart, and White dissented.
27. *Id.* at 92.

case were the executor of the estate and the wife and son of the second marriage. The trial court found for the defendants. On appeal to the Supreme Court of Appeals of West Virginia, *held*, affirmed. The courts of one state need not grant full faith and credit to a provision in another state's divorce decree which granted alimony for a period beyond the husband's life without statutory authority or an agreement between the parties; such a provision is beyond the Florida court's jurisdiction, and the decree is therefore void and of no force and effect in Florida. *Aldrich v. Aldrich*, 127 S.E.2d 385 (W. Va. 1962), *cert. granted*, 372 U.S. 963 (1963).

Under the full faith and credit clause,[1] a final judgment of *F-1* must be given the same effect in *F-2*, including res judicata effect, that it enjoys in *F-1*, if *F-1* had jurisdiction over the person of the defendant and the subject matter of the action.[2] So *F-2* must inquire into the law of *F-1* to determine the standing of the judgment under the law of *F-1*. If the doctrine of res judicata prevents the impeaching of the judgment in *F-1*, then it is unimpeachable in *F-2*.[3] A mistake of law on the part of the *F-1* court is not a defense against the judgment in *F-2*.[4] The full faith and credit clause precludes any inquiry into the logic or consistency of the decision of *F-1* or the validity of the legal principles upon which the judgment is based. If the court in *F-2* decides that there is error in *F-1*, and it is only error and not a lack of jurisdiction, then *F-2* must give full faith and credit. When *F-1* had personal jurisdiction of the parties and afforded an opportunity to litigate any jurisdictional issue, it is unlikely that the res judicata effect will be ignored unless there are extremely strong grounds of "no jurisdiction over the subject matter."[5] The res judicata principle is usually stated as follows:

1. U.S. CONST. art. IV, § 1.

2. "It is settled by repeated decisions of this Court that the full faith and credit clause of the Constitution requires that a judgment of a State which had jurisdiction of the parties and the subject matter in suit, shall be given in the Courts of every other State the same credit, validity and effect which it has in the State where it was rendered, and be equally conclusive upon the merits. . . ." Roche v. McDonald, 275 U.S. 449, 451 (1928). See discussion and authorities cited in Cheatham, *Res Judicata and the Full Faith and Credit Clause: Magnolia Petroleum Co. v. Hunt*, 44 COLUM. L. REV. 330 (1944); Sumner, *Full Faith and Credit for Judicial Proceedings*, 2 U.C.L.A. L. REV. 441 (1955); 107 U. PA. L. REV. 261 (1958).

3. For cases where the issue was either litigated or the parties had the opportunity to do so: Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940); Davis v. Davis, 305 U.S. 32 (1938); American Sur. Co. v. Baldwin, 287 U.S. 156 (1932).

4. Milliken v. Myer, 311 U.S. 457 (1940); Roche v. McDonald, *supra* note 2; Fauntleroy v. Lum, 210 U.S. 230 (1905); 16 MONT. L. REV. 54 (1955); 1 OKLA. L. REV. 287 (1949).

5. Coe v. Coe, 334 U.S. 378 (1948); Sherrer v. Sherrer, 334 U.S. 343 (1948); Chicot County Drainage Dist. v. Baxter State Bank, *supra* note 3. The Supreme Court will examine and weigh the conflicting policies of the law of *F-1* in an effort to protect the judgment of *F-2*. Barber v. Barber, 323 U.S. 77 (1944); Adams v. Saenger, 303

> When the conrt has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction.[6]

The West Virginia court conceded that Florida had jurisdiction of the parties and the subject matter of the suit. After reviewing the Florida decisions and statutes relevant to making alimony a charge on a defendant's estate, it found that the Florida court "did not have jurisdiction" to make such an award.[7] Though speaking of "jurisdiction," the court, acting in essentially an appellate capacity, determined that the Florida divorce court misconstrued Florida law.

After stating that West Virginia is to give the Florida judgment the same force and effect that it has in Florida and that Florida law will control the conditions and extent of impeachment of the judgment,[8] the court did not deal with the questions that these principles present. It failed to examine Florida law as to the impeachability or standing of the judgment there, but rather inquired whether the Florida cases and statutes support the decree rendered. This inquiry ignores entirely the considerations of res judicata and full faith and credit, which the court admits to be the controlling factors in the case. Generally, when a divorce decree cannot be attacked in the rendering state for lack of jurisdiction by parties actually before the court or strangers,[9] it cannot be attacked by them anywhere.[10] Likewise, a third party in privity usually cannot attack the judgment collaterally if parties to the action cannot do so.[11] The right of a stranger to assail the decree is governed by the law of the forum rendering the decree, and there is a division[12] among the states as to whether or not the interest of the stranger which is affected must have accrued prior to the time when the decree was rendered.[13] Two Supreme Court cases

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U.S. 59 (1938).

6. Duke v. Durfee, 308 F.2d 209 (8th Cir. 1962), *cert. granted,* 83 Sup. Ct. 509 (1963). For critical comment see 63 COLUM. L. REV. 353 (1963); 49 VA. L. REV. 180 (1963). The case is also commented on in 37 TUL. L. REV. 335 (1963).

7. Aldrich v. Aldrich, 127 S.E.2d 385, 393 (W. Va. 1962).

8. *Id.* at 389.

9. As the term is used here, *stranger* means a third party who though neither party nor privy has some interest which is affected by the divorce decree (*e.g.,* a subsequent spouse).

10. See note 5 *supra.*

11. Johnson v. Muelberger, 340 U.S. 581 (1951), held that the law of the divorce forum should describe the limits of privity.

12. *Compare* Old Colony Trust Co. v. Porter, 324 Mass. 581, 88 N.E.2d 135 (1949), *with* de Marigny v. de Marigny, 43 So. 2d 442 (Fla. 1949).

13. See generally Comment, *Stranger Attack on Sister-State Decrees of Divorce,* 24 U. CHI. L. REV. 376 (1957).

construing the law of Florida concluded that the stranger could attack a decree that was presumed to be binding on the parties only when he had a pre-existing interest at the time of the suit which would be affected by the decree.[14] This would appear to block any collateral attack in Florida by the wife and son of the second marriage (defendants here), since they certainly had no interest existent at the time the plaintiff got her judgment. The conclusion seems inescapable that if West Virginia intended to respect the validity of the decree in the rendering state it was bound to deny the collateral attack.

However, the principle of res judicata is, in certain instances, outweighed by the policy against permitting a court to act beyond its jurisdiction. Among the factors to be considered in permitting collateral attack on a judgment for lack of jurisdiction are clear lack of jurisdiction over the subject matter, determination that jurisdiction depended upon a question of law rather than of fact, that the court was one of limited rather than of general jurisdiction, that the question was not actually litigated, and that the policy against the court acting beyond its jurisdiction was strong.[15] To override the requirement of res judicata there must be a strong countervailing policy.[16] The usual application of these exceptional elements occurs when there is a collateral attack in *F-1* against its own judgment. There seems to be no direct authority concerning their use in the situation before this court, an attack in *F-2* on an *F-1* judgment.[17] The opinion of the West Virginia court gives no exceptional factors which would justify the denial of full faith and credit to the Florida decree. Since the decree is not impeachable in Florida, it should not be impeachable in West Virginia.[18]

14. Cook v. Cook, 342 U.S. 126 (1951); Johnson v. Muelberger, *supra* note 11; Sumner, *Full Faith and Credit for Divorce Decrees—Present Doctrine and Possible Changes*, 9 VAND. L. REV. 1 (1955).

15. RESTATEMENT (SECOND), CONFLICTS §§ 111a, 112, comments (Tent. Draft No. 1, 1953); RESTATEMENT, JUDGMENTS § 10 (1942).

16. See note 6 *supra*.

17. See Boskey & Braucher, *Jurisdiction and Collateral Attack: October Term 1939*, 40 COLUM. L. REV. 1006 (1940). This article discusses the application in a series of Supreme Court cases of res judicata principles to questions of jurisdiction.

18. The instant case is commented on in 14 SYRACUSE L. REV. 497 (1963) and 65 W. VA. L. REV. 89 (1962).

## Restraint of Trade—Labor Law—Where Defendants Stipulated They Were Independent Contractors and Joined Union To Fix Prices, Having No Other Legitimate Union Interest, Membership May Be Terminated Under Sherman Act

The United States brought a civil action under section 1 of the Sherman Act[1] to enjoin a union, its business agent, and four self-employed grease peddlers[2] from unlawfully conspiring and combining in an unreasonable restraint of trade and commerce in yellow grease. The defendants stipulated that their conduct was unlawful, but contended that a "labor dispute" was present, and therefore the district court was barred by section 4 of the Norris-La Guardia Act[3] and sections 6 and 20 of the Clayton Act[4] from ordering the union to terminate the union membership of the grease peddlers. The district court found that there was no competition between the peddlers and union members, that the only object of the peddlers' membership was to increase their profit by price fixing, and issued an order to terminate the union membership of the self-employed peddlers.[5] On

1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

2. It was stipulated that these grease peddlers were independent contractors. Their earnings as middlemen consisted of the difference between the price at which they bought the commodity and the price at which they sold to the processors, less the cost of operating and maintaining their trucks. Los Angeles Meat Drivers Union, Local 626 v. United States, 371 U.S. 94, 110 (1962). The processors obtained their grease in two ways: (1) The union members, employees of the processors, picked up and hauled the grease from the restaurants; (2) other processors purchased grease directly from the grease peddlers who procured their grease from sources other than restaurants. *Id.* at 96-97.

3. "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts: . . . . (b) Becoming or remaining a member of any labor organization or of any employer organization. . . ." 47 Stat. 70 (1932), as amended, 29 U.S.C. § 104(b) (1958).

4. Section 6: "Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help . . . nor shall such organizations, or the members thereof, be held or construed to be illegal combinations, or conspiracies in restraint of trade, under the antitrust laws." 38 Stat. 731 (1914), 15 U.S.C. § 17 (1958). Section 20: "No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment. . . ." 38 Stat. 738 (1914), as amended, 29 U.S.C. § 52 (1958).

5. United States v. Los Angeles Meat Drivers Union, Local 626, 196 F. Supp. 12 (S.D. Cal. 1961).

appeal[6] to the Supreme Court of the United States, *held*, affirmed. Where a defendant's stipulations show there is no competition and that the only object in union membership is to fix prices, an order terminating the membership for violation of the antitrust laws is proper. *Los Angeles Meat Drivers Union, Local 626 v. United States*, 371 U.S. 94 (1962).

In 1914 Congress ostensibly removed labor organization activity from the sanctions of the Sherman Act by enacting section 6 of the Clayton Act which took unions out of the "illegal combination" class,[7] and section 20 which forbade injunctions against boycotts, picketing and strikes connected with "labor disputes."[8] However, the Supreme Court restricted the apparent labor union advantages under the Clayton Act by a series of cases[9] which caused Congress to broaden the definition of a "labor dispute" in the Norris-La Guardia Act of 1932.[10] Nevertheless, the Court has required that aspects of the employer-employee relationship be significantly related to the controversy if a case is to be treated as arising out of or concerning a "labor dispute."[11] Subsequently, the Court in *United States v. Hutcheson*[12] declared that the Sherman, Clayton, and Norris-La Guardia Acts must be jointly construed[13] and that "so long as a union acts in its self-interest and does not combine with non-labor groups the licit and illicit under

6. This was a direct appeal under the provisions of the Expediting Act, 32 Stat. 823 (1903), as amended, 15 U.S.C. § 29 (1958).

7. 38 Stat. 731 (1914), 15 U.S.C. § 17 (1958), quoted in part, note 4 *supra*.

8. 38 Stat. 738 (1914), as amended, 29 U.S.C. § 52 (1958), quoted in part, note 4 *supra*.

9. See, *e.g.*, United Leather Workers v. Herkert & Meisel Trunk Co., 265 U.S. 457 (1924); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921). For comments, see GREGORY, LABOR AND THE LAW 223 (2d rev. ed. 1958); Boudin, *The Sherman Act and Labor Disputes*, 39 COLUM. L. REV. 1283 (1939), 40 COLUM L. REV. 14 (1940).

10. 47 Stat. 70 (1932), as amended, 29 U.S.C. § 101 (1958).

11. Section 13 of Norris-La Guardia defines "labor dispute," 47 Stat. 73 (1932), 29 U.S.C. § 113 (1958). However, the Court has set some limits on section 13: "We recognize that by the terms of the [Norris-La Guardia] statute there may be a 'labor dispute' where the disputants do not stand in the proximate relation of employer and employee. But the statutory classification, however broad, of parties and circumstances to which a 'labor dispute' may relate does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing. . . . The controversy here is altogether between fish sellers and fish buyers . . . . [and] does not place in controversy the wages or hours, or other terms and conditions of employment. . . ." Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 146 (1942). See also United States v. Sportswear Mfrs. Ass'n, 336 U.S. 460 (1949) (manufacturer and contractor sought to allocate work and fix prices).

12. 312 U.S. 219 (1941) (jurisdictional dispute). See Gregory, *The New Sherman-Clayton-Norris-La Guardia Act*, 8. U. CHI. L. REV. 503 (1941); Nathanson & Wirtz, *The Hutcheson Case: Another View*, 36 ILL. L. REV. 41 (1941); Steffen, *Labor Activities in Restraint of Trade: The Hutcheson Case*, 36 ILL. L. REV. 1 (1941). *Cf.* United States v. Bruns, 272 U.S. 549 (1926).

13. "Such legislation must not be read in a spirit of mutilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out the

§ 20 [of the Clayton Act] are not to be distinguished."[14] *Allen Bradley Co. v. International Brotherhood of Electrical Workers, Local 3*[15] reaffirmed the *Hutcheson* rationale, holding that the same labor activities may or may not be in violation of the Sherman Act depending upon whether the union acts alone or in combination with business groups, and enjoined a combination of union and employers which was formed to fix prices. In the absence of a "labor dispute" it is well settled that an offending association of businessmen can be ordered dissolved to remedy most effectively the unlawful condition.[16]

The majority of the Supreme Court in the instant case approved the finding of the district court that this was not a case "involving or growing out of a labor dispute," but rather was one involving an illegal combination between businessmen and a union to restrain commerce.[17] As no "labor dispute" was involved, the prohibitive sections of the Norris-La Guardia and Clayton Acts did not apply, and under its equity power the district court could order dissolution.[18] The Court was careful to point out that a labor organization might often have a legitimate interest in soliciting self-employed entrepreneurs as members,[19] but determined that was not the case here.[20] Mr.

importance of giving 'hospitable scope' to Congressional purpose even when meticulous words are lacking." 312 U.S. at 235.

14. *Id.* at 232.

15. 325 U.S. 797 (1945) (combination using union's boycott power to monopolize electrical equipment). Sherman Act sanctions applied in Local 175, Int'l Bhd. of Elec. Workers v. United States, 219 F.2d 431 (6th Cir. 1955) (combination with employers to suppress competition of electrical equipment); Streiffer v. Seafarers Sea Chest Corp., 162 F. Supp. 602 (E.D. La. 1958) (union corporation formed to monopolize sale of slop chests); United States v. Milk Drivers, Local 471, 153 F. Supp. 803 (D.C. Minn. 1957) (combination with store owners to fix retail price). Union-business conspiracy was not found in Hunt v. Crumboch, 325 U.S. 821 (1945) (union refused to supply workers where only unionized employers could obtain contracts); Adams Dairy Co. v. St. Louis Dairy Co., 260 F.2d 46 (8th Cir. 1958) (union-dairy group contract had purpose of forcing competing dairy to adopt unsound business practices); United States v. Employing Plasterers Ass'n, 138 F. Supp. 546 (N.D. Ill. 1956) (union imposed own standards on work quality).

16. International Boxing Club, Inc. v. United States, 358 U.S. 242 (1959); Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948); Hartford-Empire Co. v. United States, 323 U.S. 386 (1945); United States v. Crescent Amusement Co., 323 U.S. 173 (1944).

17. 371 U.S. at 98.

18. 371 U.S. at 98, citing Hartford Empire Co. v. United States, 323 U.S. 386, 428 (1945).

19. 371 U.S. at 103, citing Int'l Bhd. of Teamsters, Local 24 v. Oliver, 358 U.S. 283 (1959) (union's picketing of peddlers sustained under first amendment); Bakery Drivers, Local 802 v. Wohl, 315 U.S. 769 (1942) (conflict between union and peddlers); Milk Wagon Drivers' Union, Local 753 v. Lake Valley Farm Prods. Inc., 311 U.S. 91 (1940) (peddlers flourished causing union members to lose jobs). In the instant case the district court found that the Supreme Court had never directly passed on the issue of whether an independent contractor could validly join a labor union; however, the district court found an implication in the above cases that such contractors conld join if they *competed* with union members, and the *purpose* for organization was to eliminate unfair competition with union members. 196 W. Supp. at 15.

Justice Goldberg, concurring in the result, thought the district court too narrowly circumscribed the permissible area of legitimate union activity,[21] but approved the result because the record showed no other legitimate union interest presently being served by the membership of these peddlers. In his dissenting opinion Mr. Justice Douglas rejected the stipulations of the peddlers' status (independent contractors who do not compete) and applied the "economic reality" test of *NLRB v. Hearst Publications*.[22] He pointed out that certain marginal groups, though entrepreneural in form, were more nearly comparable in economic status to employees and that they lacked the bargaining power necessary to obtain decent hours, wages, and working conditions. He reasoned that all who hauled grease were in the "same boat," and concluded with a finding that with respect to the remedies available the situation should be characterized as a "labor dispute."[23]

The defendants' broad stipulations make this case difficult to examine for they amount to conclusions foreclosing a significant inquiry by the court.[24] However, the economic milieu of the peddlers

See also United States v. Fish Smokers Trade Counsel, Inc., 183 F. Supp. 227 (S.D.N.Y. 1960).

20. "Here as in *Columbia River Co.*, the grease peddlers were sellers of commodities, who became 'members' of the union only for the purpose of bringing union power to bear in the successful enforcement of the illegal combination in restraint of the traffic in yellow grease." 371 U.S. at 102.

21. "To believe that labor union interests may not properly extend beyond mere direct job and wage competition is to ignore not only economic and social realities so obvious as not to need mention, but also the graphic lesson of American labor union history." *Id.* at 105.

22. "Unless the common-law tests are to be imported and made exclusively controlling, without regard to the statute's purposes, it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation. Interruption of commerce through strikes and unrest may stem as well from labor disputes between some who, for other purposes, are technically 'independent contractors' and their employers as from disputes between persons who, for those purposes, are 'employees' and their employers." 322 U.S. 111, 127 (1944). *But see* H.R. REP. No. 245, 80th Cong., 1st Sess. 18 (1947) which condemned the *Hearst* case approach. As a result the labor acts now exclude "independent contractors." 49 Stat. 450, as amended, 29 U.S.C. § 152(3) (1958). See Leidy, *Salesman as Independent Contractors*, 28 MICH. L. REV. 365 (1930); Steffen, *Independent Contractor and the Good Life*, 2 U. CHI. L. REV. 501 (1935); Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 188 (1939); Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*, 41 COLUM. L. REV. 1015 (1941). Since the 1947 amendments the Board has consistently used the "right-of-control" test. 23 NLRB, ANNUAL REPORT 40 (1958).

23. The Norris-La Guardia Act "is broad and includes 'any controversy concerning terms or conditions of employment or concerning the association and representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or condition of employment.' 29 U.S.C. § 113 (d)." 371 U.S. at 112.

24. But the Court has repeatedly held that stipulations as to questions of law are not binding. Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942); Estate of Sanford v. Commissioner, 308 U.S. 39 (1939); Swift & Co. v. Hocking Valley R.R., 243 U.S. 281 (1917); California v. San Pablo & T.R.R., 149 U.S. 308 (1893); Los

would seem to allow only a finding that they were independent contractors,[25] and perhaps for this reason the Court was not disposed to inquire further into their status. In the instant case the majority did not expressly approve of the district court's "competition-object" test,[26] but did make findings consistent with such a test.[27] Both the concurring and dissenting opinions take issue with the district court's use of "actual or potential wage or job competition," as the measure of competition to be used, but there is no disagreement as to the unlawful purpose of the peddler-union combination. While it does not appear that it would necessarily have produced a different result,[28] it seems proper to reject the "economic reality" test of competition proposed by Mr. Justice Douglas since it has been disapproved by Congress.[29] Such an exception to the sanctions of the Sherman Act would allow a number of small businessmen to combine into a guild-like agency having substantial economic power to operate as a monopoly. Mr. Justice Goldberg said that the majority, by implication, overruled the strict view of the district court and stated that job or

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Angeles Shipbuilding & Drydock Corp. v. United States, 289 F.2d 222 (9th Cir. 1961); Hanson v. Ford Motor Co., 278 F.2d 586 (8th Cir. 1960). *Cf.* United States v. Reading Co., 289 F.2d 7 (3d Cir. 1961) (attempt to limit issues by stipulation of due care upheld). For list of state cases see Annot., 92 A.L.R. 663 (1934). At least one Supreme Court case has, by dictum, indicated that it will disregard a stipulation of the parties as to the facts, accepted and applied by the court below, if the stipulation obviously forecloses real questions of law. United States v. John J. Felin & Co., 334 U.S. 624, 640 (1948).

25. It appears that the peddlers were not subject to the processors' right of control in the physical performance of the services. From the abbreviated fact statement it further appears that:

(1) there was no agreement governing the right of control;
(2) the grease peddlers were in a distinct business (35-40 in Los Angeles area);
(3) the service of hauling could be performed by either a processor's employee, or by a peddler without supervision;
(4) the skill required was low;
(5) the peddlers supplied their own tools and trucks, and performed the work where and when they chose;
(6) the peddlers had been in business for some years prior;
(7) the peddlers were paid by the haul-load and not by the hour, etc.;
(8) the processors to whom the peddlers sold did not usually perform the hauling for themselves;
(9) and that the parties did not believe they were creating the relation of employer-employee. See RESTATEMENT (SECOND), AGENCY § 220 (1958).

26. See note 19 *supra.*

27. Object: The peddlers joined "for the purpose of increasing the margin between the prices they paid for grease and the prices at which they sold it to processors." 371 U.S. at 97.

Competition: "There was no showing of any actual or potential wage or job competition, or of any other economic interrelationship, between the grease peddlers and the other members of the union." *Id.* at 98.

28. *Cf.* United States v. Silk, 331 U.S. 704 (1947).

29 See note 22 *supra.* But the congressional disapproval was given with reference to a situation which did not involve the important countervailing policy of preserving free business competition.

wage competition is not the sole measure of union activity, but there may be other legitimate union purposes; he concurred because there were no legitimate union interests present.[30] However, such a wide road into the union may be ignoring, or at least neglecting, the policy of the Sherman Act when it is recalled that an independent contractor is saved from that act once "validly" within the union.[31] Just how much and what kind of competition the Court will require is unclear, but the tone of the opinions points to a very low standard, both as to quality and quantum.

## Domestic Relations—Annulment—Female Impotence Is Made Curable by the Surgical Creation of a Functional Organ

Defendant, a twenty-one-year-old woman married to plaintiff, had normal female external sex characteristics but suffered from vaginal astresia, which meant that she had no more than an incipient vagina in the form of a cul-de-sac.[1] This condition admittedly rendered sexual intercourse impossible between defendant and plaintiff, but defendant testified that she was willing to undergo an operation to construct a vagina, which operation was purportedly successful in eighty-nine per cent of the cases. Plaintiff alleged that the condition existed at the time of marriage but was unknown to him at that time[2] and that because of this defect the marriage had never been consummated, though regular and frequent attempts had been made. Plaintiff also claimed that even if defendant was willing to undergo the operation, the type of copulation possible after a successful operation would not constitute *copula vera*. On the ground of his spouse's impotence, plaintiff sought a decree of nullity, and from a denial of

30. 371 U.S. at 105.

31. See note 3 *supra*.

1. "In November, 1951, when the wife was a girl of 17, she was taken by her mother to Addenbrooke's Hospital in Cambridge because she had never menstruated. There she was examined by a consultant obstetrician and gynaecologist, who found that though all her external sex characteristics were perfectly normal she had no, or virtually no, vagina and no uterus. She was advised that she would never menstruate, that she would never be able to bear children, but that if and when she wanted to marry, it would be possible, with an operation, to construct an artificial vagina." S. Y. v. S. Y., [1962] 3 Weekly L.R. 526, 527 (C.A.)

2. There was evidence that the husband had previous sexual experience (he had fathered a child by another woman), that he knew defendant could not have children, and that he had attempted penetration with defendant prior to marriage. *Id.* at 527. Plaintiff claimed (and the court did not seem to question his assertion) that he attributed the failure to have successful intercourse "to the conditions in which the intercourse was attempted." *Ibid.*

same he appealed. *Held*, affirmed. The existence of an operation by which a vestigial vagina may be enlarged to admit full pentration by the husband renders the condition of impotence merely temporary and curable; enjoyment of sexual intercourse is not a required element of *copula vera*, *S. Y. v. S. Y.*, [1962] 3 Weekly L.R. 526 (C.A.).

Incurable impotency is a ground for a decree of nullity of marriage in England.[3] The classic English case on possibility of cure by medical treatment is *D. v. A.*,[4] decided in 1845, in which the court stated that, since there was no reasonable possibility of medical cure of an incipient vagina, this condition constituted incurable impotency.[5] Following advances in medical technology making surgical repair of this defect possible, English courts have denied a decree of nullity if the temporarily impotent spouse is willing to undergo a treatment[6] which is reasonably certain of success.[7] However, where an operation does not create an ability to engage in *copula vera*, a decree of nullity will be granted.[8]

In the United States, impotency is not a ground for annulment unless so provided by statute;[9] but at the present time, impotency is a statutory ground for annulment in twenty-five states[10] and for divorce in forty-three states.[11] Impotency is defined as a lack of ability to copulate, not inability to procreate.[12] To be a ground for annulment

3. M. v. M., [1956] 3 Weekly L.R. 975 (P. Ct.); D. v. A., 1 Rob. Ecc. 279, 163 Eng. Rep. 1039 (Consistory Ct. 1845); 3 NELSON, DIVORCE AND ANNULMENT § 31.26 (2d ed. 1945); Nullity and Impotence, 180 L.T. 392 (1935).

4. 1 Rob. Ecc. 279, 163 Eng. Rep. 1039 (Consistory Ct. 1845).

5. *Id.* at 297-300, 163 Eng. Rep. at 1045-46.

6. G. v. G., [1960] 3 Weekly L.R. 648 (P. Ct.); M. v. M., [1956] 3 Weekly L.R. 975 (P. Ct.).

7. S. v. S., [1962] All E.R. 816 (C.A.); S. v. S., [1955] 2 Weekly L.R. 246 (P. Ct.).

8. B. v. B., [1954] 3 Weekly L.R. 237 (P. Ct.).

9. Southern Pac. Co. v. Industrial Comm'r, 54 Ariz. 1, 91 P.2d 700 (1939); S. v. S., 42 Del. (3 Terry) 192, 29 A.2d 325 (Super. Ct. 1942); D. v. D., 41 Del. (2 Terry) 263, 20 A.2d 139 (Super. Ct. 1941); Linneman v. Linneman, 1 Ill. App. 2d 48, 116 N.E.2d 182 (1953); MADDEN, PERSONS AND DOMESTIC RELATIONS § 16 (1931); 3 NELSON, DIVORCE AND ANNULMENT § 31.26 (2d ed. 1945).

10. ARK. STAT. ANN. § 55-102 (1947); CAL. CIV. CODE § 82 (Deering 1961); COLO. REV. STAT. ANN. § 46-3-2 (1953); CONN. GEN. STAT. § 46-28 (1958); DEL. CODE ANN. tit. 13, § 1551(1) (1953); D.C. CODE ANN. § 16-403 (1961); GA. CODE ANN. § 53-102 (3) (1935); HAWAII REV. LAWS § 324-1(e) (1955); IDAHO CODE ANN. § 32-501 (1948); IOWA CODE ANN. § 598.19 (1946); ME. REV. STAT. ANN. c. 166, §§ 51, 55 n.III (1954); MICH. STAT. ANN. § 22.115 (1957); MONT. REV. CODE ANN. § 2A: 34-1 (1952); NEB. REV. STAT. § 42-334 (1943); N. J. STAT. ANN. § 2A:34-1 (1952); N.Y. DOM. REL. LAW § 7; N.C. GEN. STAT. § 51-3 (1950); N.D. CENT. CODE § 14-04-01 (1960); S.D. CODE § 14.0601 (1939); TEX. CIV. STAT. ANN. art. 4628 (Vernon's 1960); VT. STAT. ANN. tit. 15, § 512 (1958); VA. CODE ANN. § 20-45 (1950); W. VA. CODE ANN. § 4701 (1961); WIS. STAT. § 247.02 (1957); WYO. STAT. § 20-46 (1957).

11. See Vernon, *Annulment of Marriages in New Mexico: Part II—Proposed Statute*, 2 NAT. RES. J. 270, 271-72 & nn.4-7 (1962).

12. Stepanek v. Stepanek, 14 Cal. Rptr. 793 (Dist. Ct. App. 1961); S. v. S., 42 Del. (3 Terry) 192, 29 A.2d 325 (Super. Ct. 1942); S. v. S., 211 Ga. 365, 86 S.E.2d

or divorce, the defect must exist[13] and be unknown to the moving spouse[14] at the time of marriage; and it must be incurable.[15] While impotency resulting from advancing years has been held not to be a sufficient ground,[16] the condition need not be solely organic, but may be a combination of organic and psychological phenomena which prevent copulation.[17] The plaintiff has the burden of proving impotency and incurability,[18] and the usual method is by expert medical testimony.[19] Little authority exists as to what condition, before or after surgical repair, constitutes an ability to participate in the vaguely defined act of *copula vera.* At least one case has stated that the wife's ability to enjoy copulation is irrelevant if she has the ability to participate,[20] but legal authority is extremely sparse as to whether

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103 (1955); Griffith v. Griffith, 162 Ill. 368, 44 N.E. 820 (1896); Kinkaid v. Kinkaid, 256 Ill. 548, 100 N.E. 217 (1912); Bunger v. Bunger, 85 Kan. 564, 117 Pac. 1017 (1911); J. G. v. H. G., 33 Md. 401 (1870); S. v. S., 192 Mass. 194, 77 N.E. 1025 (1906); Payne v. Payne, 46 Minn. 467, 49 N.W. 230 (1891); Kempf v. Kempf, 34 Mo. 211 (1863); Smith v. Smith, 206 Mo. App. 646, 229 S.W. 398 (1921); Turney v. Avery, 92 N.J. Eq. 473, 113 Atl. 710 (1921); Kirshbaum v. Kirshbaum, 92 N.J. Eq. 7, 111 Atl. 697 (1920); Tompkins v. Tompkins, 92 N.J. Eq. 113, 111 Atl. 599 (1920); Godfrey v. Shatwell, 38 N.J. Super 501, 119 A.2d 479 (1955); Donati v. Church, 13 N.J. Super 454, 80 A.2d 633 (1951); Kronman v. Kronman, 247 App. Div. 186, 286 N.Y. Supp. 627 (1936); Steinberger v. Steinberger, 33 N.Y.S.2d 596 (Sup. Ct. 1940); Vanden Berg v. Vanden Berg, 197 N.Y. Supp. 641 (Sup. Ct. 1923); Schroter v. Schroter, 56 Misc. 69, 106 N.Y. Supp. 22 (Sup. Ct. 1907); Carmichael v. Carmichael, 106 Ore. 198, 211 Pac. 916 (1923); Wilson v. Wilson, 126 Pa. Super 423, 191 Atl. 666 (1937).

13. Cott v. Cott. 98 So. 2d 379 (Fla. Dist. Ct. App. 1957); D. v. D., 41 Del. (2 Terry) 263, 20 A.2d 139 (Super. Ct. 1941); Griffith v. Griffith, 162 Ill. 368, 44 N.E. 820 (1896); Payne v. Payne, 46 Minn. 467, 49 N.W. 230 (1891).

14. *E.g.*, D. v. D., 41 Del. (2 Terry) 263, 20 A.2d 139 (Super. Ct. 1941). See MADDEN, *op. cit. supra* note 9, at § 36; 1 NELSON, *op. cit. supra* note 9, at § 8.03; 3 NELSON, *op. cit. supra* note 9, at § 31.26.

15. Stepanek v. Stepanek, 14 Cal. Rptr. 793 (Dist. Ct. App. 1961); Rickards v. Rickards, 166 A.2d 425 (Del. Super. Ct. 1959); D. v. D., 41 Del. (2 Terry) 263, 20 A.2d 139 (Super. Ct. 1941); Griffith v. Griffith, 162 Ill. 368, 44 N.E. 820 (1896); Grosvenor v. Grosvenor, 194 Ill. App. 652 (1915); Payne v. Payne, 46 Minn. 467, 49 N.W. 230 (1891); Kempf v. Kempf, 34 Mo. 211 (1863); Smith v. Smith, 206 Mo. App. 646, 229 S.W. 398 (1921); Heller v. Heller, 116 N.J. Eq. 543, 174 Atl. 573 (1934); Fehr v. Fehr, 92 N.J. Eq. 316, 112 Atl. 486 (1920); Godfrey v. Shatwell, 38 N.J. Super. 501, 119 A.2d 479 (1955); Heibink v. Heibink, 56 N.Y.S.2d 394 (Sup. Ct. 1945); Vanden Berg v. Vanden Berg, 197 N.Y. Supp. 641 (Sup. Ct. 1923); A. C. v. B. C., 10 Weekly Notes Cas. 569 (Pa. C.P. 1881); Reed v. Reed, 26 Tenn. App. 690, 177 S.W.2d 26 (M.S. 1943).

16. Hatch v. Hatch, 58 Misc. 54, 110 N.Y. Supp. 18 (Sup. Ct. 1908).

17. Rickards v. Rickards, 166 A.2d 425 (Del. Super. Ct. 1960); Helen v. Thomas, 150 A.2d 833 (Del. Super. Ct. 1959); Griffith v. Griffith, 162 Ill. 368, 44 N.E. 820 (1896); Grosvenor v. Grosvenor, 194 Ill. App. 652 (1915); Heibink v. Heibink, 56 N.Y.S.2d 394 (Sup. Ct. 1945); Vanden Berg v. Vanden Berg, 197 N.Y. Supp. 641 (Sup. Ct. 1923).

18. Kinkaid v. Kinkaid, 256 Ill. 548, 100 N.E. 217 (1912); Reed v. Reed, 26 Tenn. App. 690, 177 S.W. 26 (M.S. 1943).

19. S. v. S., 211 Ga. 365, 86 S.E.2d 103 (1955).

20. *Ibid.* The Georgia court held that a woman who was paralyzed from the waist down was able to participate in *copula vera* since she had a natural genital organ, for,

sexual enjoyment is a required element of *copula vera.*[21]

Three basic treatments have emerged for both congenital absence of the vagina and vaginal astresia: the Frank treatment;[22] the Wharton operation;[23] and the McIndoe operation.[24] The latter, which is the one described by the medical experts in the instant case, is medically successful in eighty-one per cent of the cases and results in few complaints by patients of impediments to intercourse.[25] Since congenital absence of the vagina is only rarely accompanied by absence of the ovaries, the patient always has complete and normal secondary female characteristics including the clitoris.[26] Thus, after a successful operation the patient is usually able to enjoy copulation[27]—though, if the uterus is also absent, there can, of course, be no possibility of procreation.

In the instant case, the court ruled that the evidence established that the defendant had an incipient vagina,[28] and that this condition was not a ground for a decree of nullity since the vestigial vagina could be enlarged to normal size by surgical creation of an artificial vaginal vault. Accepting the reasoning of the case of *D. v. A.*[29] as good and controlling law, the court held that recent changes in medical techniques rendered defendant's condition curable.[30] Therefore, the decree of nullity was denied, though both defendant's condition and the legal principles involved were almost identical to those in *D. v. A.* in which, in 1845, a decree of nullity was granted. By ruling that the defendant's defect was a vestigial vagina rather than the complete absence of a vagina, the court obviated the necessity of

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said the court, inability to reach orgasm resulting from lack of sensory perception does not negate the possibility of copulation. On this basis, her husband was denied an annulment.

21. It has sometimes been held, however, that continued acts of even partial or imperfect connection over an unreasonably long period of time will constitute ratification and thus deprive the complaining spouse of his cause of action. Donati v. Church, 13 N.J. Super. 454, 80 A.2d 633 (1951); Cofer v. Cofer, 287 S.W.2d 212 (Tex. Civ. App. 1956).

22. The Frank treatment is nonsurgical and consists of continuous dilation over a period of months. TE LINDE, OPERATIVE GYNECOLOGY 717-19 (3d ed. 1962).

23. The Wharton operation involves the cutting of a canal and the placing therein of a mold until the incision heals. *Id.* at 719-20.

24. The McIndoe operation consists of an incision, followed by the placement of a skin graft taken from the inner thigh to line the constructed vaginal vault, and finally the insertion of a mold until the incision heals. *Id.* at 720-26. See generally LAWYERS' MEDICAL CYCLOPEDIA § 36.8 (Frankel et al. ed. 1960).

25. Thompson, Wharton, & Te Linde, *Congenital Absence of the Vagina, An Analysis of Thirty-two Cases Corrected by the McIndoe Operation,* 74 AMERICAN JOURNAL OF OBSTETRICS AND GYNECOLOGY 397, 403 (1957).

26. TE LINDE, *op. cit. supra* note 22, at 716-17.

27. *Ibid.;* Thompson, Wharton, & Te Linde, *supra* note 25, at 404-05.

28. [1962] 3 Weekly L.R. at 538.

29. 1 Rob. Ecc. 279, 163 Eng. Rep. 1039 (Consistory Ct. 1845).

30. [1962] 3 Weekly L.R. at 539.

answering plaintiff's argument that complete absence of a vagina is incurable impotency whether or not an artificial vagina can be surgically constructed. However, in an interesting dictum, the court stated that there was no legal difference between these two conditions since medical authority indicated that, under either condition, it was possible to construct a vaginal vault surgically which would admit full penetration by the male.[31] Declaring that the degree of sexual satisfaction to be obtained by either party is irrelevant, the court held that an artificial vagina, located in precisely the same position as a natural one, would create an ability to participate in *copula vera*;[32] therefore, defendant was not incurably impotent.

The court's holding on this somewhat unusual fact situation graphically illustrates both the English view and the majority American view that there need only exist a medical treatment reasonably likely to create an ability to copulate—though not to create a perfectly natural organ—to render female impotency curable. However, the assertion by the court that the degree of sexual satisfaction to be obtained by the parties engaging in coitus involving a surgically constructed organ is not a determining factor regarding what is and what is not curable, is for the most part untested in both England and the United States. This probably results from the fact that nearly all women so afflicted possess, like the defendant here, natural and complete secondary sexual characteristics and thus experience no obstacle to enjoyment following a successful operation.[33] However, in that small percentage of cases in which surgical repair cannot produce tactile perception in the vaginal vault, courts might well consider the possible psychological effects on both partners to the marriage. It is conceivable that a lack of enjoyment by a purportedly cured wife, which would seem readily discernible by the husband, might make the relation so one-sided as to be distinctly unappealing to him. One of the purposes of allowing annulment and divorce for incurable impotency is to lessen the possibility that the capable spouse will commit adultery in order to obtain sexual satisfaction. If the physical condition of the wife which has existed since before the marriage is such that only adulterous sexual intercourse is possible for the husband, the purpose of discouragement of adultery would seem best served by granting an annulment.

31. *Id.* at 539-41.
32. *Id.* at 540-41.
33. See notes 26 & 27 *supra.*

# Equity—Power of a State To Provide Medical Treatment for a Child Despite the Parents' Objection Based on Religious Belief

Parents of a "blue baby" suffering from a serious heart defect refused permission for blood transfusions which physicians believed essential for the child's survival.[1] The parents were Jehovah's Witnesses and based their refusal on religious grounds.[2] At the request of a hospital administrator, a special guardian was appointed by court order for the purpose of granting permission for the transfusions.[3] While appeal of the order was pending in the appellate division, the question was certified to the Supreme Court of New Jersey on its own motion.[4] *Held,* order affirmed. The religious freedom of a parent is not violated by equity's removal of an infant from parental custody for the purpose of administering medical treatment which is contrary to the parents' religious beliefs. *State v. Perricone,* 37 N.J. 463, 181 A.2d 751, *cert. denied,* 371 U.S. 890 (1962).

Sharply conflicting interests clash head-on whenever a court of equity is presented with a petition to remove a child from the custody of his parent. Despite difficulties inherent in such judicial action, equity has consistently taken jurisdiction to protect the intangible personal rights and welfare of the child. In the view taken by the early common law courts, a father had the right to the custody of his minor child to the exclusion of all others, including the mother.[5] English chancellors, however, began early to temper this apparently

1. Physicians concluded that the blood transfusions were not a cure, but were a stop-gap method of keeping the child alive and preventing mental damage. They had treated the child without resorting to transfusions for as long as they thought possible before invoking the aid of the court to carry out the transfusions.

2. The parents, who were represented by counsel at the hearing before the Juvenile and Domestic Relations Court, did not introduce any medical testimony. The father asserted that he was a minister of the Jehovah's Witnesses sect and set out that group's objection to blood transfusions, quoting from the Witnesses' Bible, New World Translation of the Holy Scriptures (1961), and specifically from *Leviticus* 17:11-12.

3. The court based its authority to take jurisdiction on a New Jersey statute, the pertinent part of which reads: "When the parents of any minor child . . . are grossly immoral or unfit to be intrusted with the care and education of such child, or shall neglect to provide the child with proper protection, maintenance and education . . . it shall be lawful for any person interested in the welfare of such child to institute an action in the Superior Court or the Juvenile and Domestic Relations Court . . . for the purpose of having the child brought before the court, and for the further relief provided by this chapter." N.J. STAT. ANN. § 9:2-9 (1960).

4. Despite receiving the transfusions, the child did not survive, and the question before the court was for all practical purposes moot when the Supreme Court of New Jersey handed down its decision. However, both sides urged the court to decide the case because of its importance to the public in settling the issue in order that parents, physicians and hospitals would have proper legal guidance. 37 N.J. at 469, 181 A.2d at 755.

5. *Ex parte* Hopkins, 3 P. Wms. 152, 24 Eng. Rep. 1009 (Ch. 1732).

absolute right[6] through application of the doctrine of *parens patriae*,[7] whereby the state, in the exercise of its sovereign powers, acts to protect those persons, including infants, who are unable to protect themselves.[8] Under this doctrine, the chancellor would take jurisdiction and decide the controversy even if no question of property rights was involved.[9] In direct conflict were the right of a parent to rear his child as he saw fit[10] and the interest of the state in protecting and nurturing its future citizens.[11] As time passed, the personal right of the parent to control the child became conditional;[12] the welfare of the child became the dominant factor.[13] Thus, the doctrine of *parens patriae* has become an important equitable doctrine of increasing vitality. However, the use of the doctrine to justify a court of equity in taking custody of a child to ensure that the child receives proper medical attention is a relatively recent innovation.[14] Whenever such

6. Early equity courts did not recognize the natural right of a father to the custody of his child as an absolute right and did not hesitate to interfere when the father was grossly unfit to retain eustody. Wellesley v. Duke of Beaufort, 2 Russ. 1, 38 Eng. Rep. 236 (Ch. 1827), *aff'd sub nom.* Wellesley v. Wellesley, 2 Bligh N.S. 124, 4 Eng. Rep. 1078 (Ch. 1828), has an excellent discussion of the jurisdiction of a chancery court over infants. See also Eyre v. Countess of Shaftsbury, 2 P. Wms. 103, 24 Eng. Rep. 659 (Ch. 1722).

7. The doctrine has been exercised by eourts of equity in England for more than two centuries. Although there are other theories, its origin seems to rest on the fiction of the right of the king to serve as general protector of all infants in the realm. *Ex parte* Badger, 286 Mo. 139, 226 S.W. 936, 939 (1920).

8. Hclton v. Crawley, 241 Iowa 296, 41 N.W.2d 60 (1950); Johnson v. State, 18 N.J. 422, 114 A.2d 1 (1955); McIntosh v. Dill, 86 Okla. 1, 205 Pac. 917 (1922).

9. "Regardless of any question of property rights, the chancellors have always exercised jurisdiction over the care and control of minor children by delegation of the power of the state to exercise such control." McCLINTOCK, EQUITY § 162 (2d ed. 1948).

10. The great value placed by carly chancellors upon the father's right to custody is forcefully demonstrated by the extremely low standards of conduct necessary before removing a child from the father's custody. See, *e.g.*, Wellesley v. Wellesley, 1 Dow & Clark 152, 6 Eng. Rep. 481 (H.L. 1828) (father carrying on illicit relationship); Shelley v. Westbrooke, Jac. 266, 37 Eng. Rep. 850 (Ch. 1821) (father an atheist and guilty of adultery); Lyons v. Blenkin, Jac. 245, 37 Eng. Rep. 842 (Ch. 1821) (abandonment); Creuze v. Hunter, 2 Cox 243, 30 Eng. Rep. 113 (Ch. 1790) (father an outlaw).

11. "[T]he welfare of the child should be looked to as a future member of society upon whom in the fullness of time will fall its share of the burdens and responsibilities of citizenship." *Ex parte* Badger, 286 Mo. 139, 226 S.W. 936, 939 (1920).

12. "The natural right of a father [parent] to the custody of his child is not an absolute property right, but rather a trust reposed in the father [parent] by the state as parens patriae." Gardner v. Hall, 132 N.J. Eq. 64, 26 A.2d 799, 809 (1942). (Footnotes omitted.)

13. The tendency of modern courts is to give additional weight to the rights of children when opposed to a parent's right to custody. This approach is based on the theory that a child has a right to a fair start in life and that the child's welfare is the paramount consideration. There is, however, a strong presumption that a child's welfare is best served when he is left in the custody of his parents. 1 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS § 744 (6th cd. 1921).

14. At least a partial explanation of the late application of the doctrine to medical treatment and surgery is that perhaps medical seience had to develop a substantial

action is proposed, the court must answer difficult arguments growing out of the collision of conflicting interests. There are few decisions in the United States concerning the jurisdiction of courts to withdraw a child from parental custody for medical purposes,[15] an area now largely controlled by statute.[16] The statutes are of two general types, one of which imposes criminal sanctions against parents who fail to provide care, support and maintenance for their children. The theory of such an enactment is that the threat of criminal sanctions will deter parents from neglecting their children.[17] The second and more important type of legislation provides for the setting up of juvenile court machinery designed to provide special treatment for cases involving juveniles.[18] Juvenile court acts vary widely but have two key provisions in common: (1) their wording makes it clear that they are aimed directly at "unfit parents"; and (2) they give the courts express authority to remove a child from the custody of such a parent.[19] If a parent is "unfit" under the statute, the court can step in and appoint for the child a guardian who will permit medical treatment. The juvenile acts themselves fall into two categories. The New York type of statute[20] expressly declares a child to be "neglected" if his parent fails to provide medical care. The other category includes those statutes which describe parental neglect in general terms but do not expressly require a parent to provide

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degree of reliability before a court with equitable powers could feel justified in overriding parents. This attitude is indicated by the reluctance of the courts to act when the surgery or treatment involves a high degree of risk to the child's health or life. See 13 WYO. L.J. 88, 89 (1958).

15. Perhaps the first American case on the subject is Heinemann's Appeal, 96 Pa. 112, 42 Am. Rep. 532 (1880), where the court based its decision on a state statute.

16. All decisions noted in this survey in which a child was withdrawn from parental custody for medical treatment are based on statutes. It has been suggested that under the common law a court of equity would not deprive otherwise competent parents of control of a child in order that the infant be allowed to receive medical attention. 28 ROCKY MT. L. REV. 235, 236 (1956).

17. "Parental failure to provide medical treatment for children has been the subject of criminal action against the parent, at common law or pursuant to statute, for nonsupport or neglect, or, where death results, for manslaughter." 12 WASH. & LEE L. REV. 239 (1955).

18. Examples of representative state statutes include: ILL. REV. STAT. c. 23, §§ 2001-36 (1955); MO. ANN. STAT. §§ 211.011-.431 (1959); N.Y.C. SOC. WELFARE ACT §§ 371-89; N.D. REV. CODE §§ 27-1601 to -41 (1943); OHIO REV. CODE §§ 2151.01-.99 (Anderson 1953); TEX. REV. CIV. STAT. art. 2330-38 (1948); WASH. REV. CODE §§ 13.04.010-.180 (1956); WYO. COMP. STAT. ANN. §§ 14-29 to -58 (1945).

19. See note 18 *supra.*

20. " 'Neglected child' means a male less than sixteen years of age or a female less than eighteen years of age (a) whose parent or other person legally responsible for his care does not adequately supply the child with food, clothing, shelter, education, or medical or surgical care . . . ." N.Y.C. SOC. WELFARE ACT § 371(4). Other examples of statutory language expressly referring to failure to provide medical care are: MO. ANN. STAT. § 211.031 (1959); N.D. REV. CODE § 27-1608 (1943); OHIO REV. CODE § 2151.03 (Anderson 1953).

medical care for his child.[21] These enactments create a problem of interpretation. The courts must decide whether the failure to provide medical care, under the circumstances of the case, constitutes neglect rendering the parent unfit under the statute to retain custody of the child. Factors which appear to govern the decisions include (1) the relative danger of the treatment or surgery,[22] (2) the necessity of the medical attention to save life,[23] and (3) the advisability of having the child undergo the treatment in the interests of his psychological well-being.[24] When necessary medical care has been denied by a parent because of poverty, ignorance, abandonment or meanness, the courts have had little trouble justifying the appointment of a guardian under the statutes. But when medical aid is denied because of a religious or philosophical belief of the parent, a question arises under the Constitution's "freedom of religion" guaranty.

The Supreme Court has upheld as constitutional other types of laws which restrict the exercise of religious freedom. These decisions are based on Thomas Jefferson's idea that while profession and propagation of religious principles should not be restrained, governmental interference is allowed "when principles break out into overt acts against peace and good order."[25] For example, in a case distinguishable from, but closely akin to the medical care cases, the Supreme Court held in *Prince v. Massachusetts*[26] that a parent cannot make a martyr of a child because of the parent's religious belief.[27] Decisions by the Supreme Court indicate that freedom of religion under the first amendment consists of two distinct concepts: (1) the freedom of each individual to hold his own religious beliefs and (2) the freedom to practice those beliefs.[28] The freedom to believe is conceded to be

21. "Persons of either sex under 16 years of age, whose parents or guardians neglect or wilfully fail to provide for them, or allow them to have vicious associates or visit vicious places, or fail to exercise proper parental discipline and control over them, are classed as neglected children." WYO. COMP. STAT. ANN. § 14-40(2) (1945). Other examples of generally worded statutes not expressly requiring parents to provide proper medical care are: ILL. REV. STAT. c. 23, § 2001 (1955); TEX. REV. CIV. STAT. art. 2330 (1948); WASH. REV. CODE § 13.04.010 (1956).

22. Morrison v. State, 252 S.W.2d 97 (Mo. App. 1952) (blood transfusions almost devoid of risk to life); *In re* Hudson, 13 Wash. 2d 673, 126 P.2d 765 (1942) (risk of amputation considered); Oakey v. Jackson, [1914] 1 K.B. 216 (adenoids operation involves only minor risk).

23. See 13 WYO. L.J. 88, 91 (1958) and citations noted.

24. *In re* Seiferth, 127 N.Y.S.2d 63 (Child Ct. 1954), *rev'd,* 284 App. Div. 221, 137 N.Y.S.2d 35 (1955).

25. This principle was enunciated by Jefferson in an early Virginia law. 12 Hening's Stat. 84. In a leading case decided in 1878, the Supreme Court relied on the principle to chart the course of religious liberty in the United States. Reynolds v. United States, 98 U.S. 145, 163 (1878).

26. 321 U.S. 158 (1944).

27. The Supreme Court affirmed the conviction of a member of the Jehovah's Witnesses sect for violation of a state statute in allowing her nine-year-old ward to distribute religious tracts.

28. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1939). This case delineates

absolute, while the freedom to practice a particular belief through worship or other outward manifestation is said to be a qualified right, subject to regulation for the protection of society.[29] Thus, forms of worship "not injurious to the equal rights of others"[30] are allowed, while any action disturbing the peace, good order, or public welfare may be curtailed.[31] The power of the state to interfere with the performance of "religious" acts is strikingly illustrated by the human sacrifice analogy in *Reynolds v. United States*.[32] There still remains the unqualified right to believe, but the right to act must yield where interests of society as a whole dictate a contrary course and are "held paramount to certain personal freedoms."[33]

The proposition laid down by the Supreme Court in *Prince v. Massachusetts* that "neither rights of religion nor rights of parenthood are beyond limitation"[34] is the heart of the instant decision. The New Jersey court declined to dismiss on the ground that the question was moot,[35] and instead found that the trial court properly removed the infant from the custody of his parents. To reach this decision, the court relied squarely on the doctrine of *parens patriae* as codified in the broadly worded New Jersey statute.[36] The court distinguished the right to believe from the right to act[37] in finding that religious freedom guaranteed by the first amendment had not been violated. It concluded that the right to act is a qualified right, subject to state controls in the interest of society as a whole.[38] In a clear, well-reasoned opinion, the New Jersey court did not appear to change the law, but reasserted an ancient principle of equity jurisdiction in protecting personal rights of an infant.[39]

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the dimensions of freedom to act in pursuance of religious beliefs. In holding that the right to act is not absolute, *Cantwell* cites Reynolds v. United States, *supra* note 25, and Davis v. Beason, 133 U.S. 333 (1890).

29. Reynolds v. United States, *supra* note 25, at 166; Davis v. Beason, *supra* note 28.

30. Davis v. Beason, *supra* note 28, at 342.

31. "Whilst legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as religion." *Id.* at 345.

32. "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interefere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice"? Reynolds v. United States, 98 U.S. 145, 166 (1878).

33. This language is used by the court in the principal case. 37 N.J. at 474, 181 A.2d at 757.

34. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

35. Note 4 *supra*.

36. Note 3 *supra*.

37. Davis v. Beason, note 28 *supra*.

38. Note 33 *supra*.

39. "This much is certain: . . . [*parents patriae*] exists and has been exercised by

Although the United States Supreme Court declined to grant certiorari and finally decide the religious freedom question within the context of removing an infant from parental custody for the purpose of administering medical treatment, there seems to be little real doubt as to its decision in such a case. It appears highly unlikely that the Court would further restrict the limited control a state may exercise over religious "acts."[40] Still, a decision would have settled the issue and conceivably made it less difficult in the future for an ailing child to obtain the medical care to which he is entitled despite the religious objections of parents.[41]

## Evidence—Witnesses—Clinical Psychologist May Give Expert Testimony on Existence of Mental Disease

Insanity was the sole defense relied upon by defendant in a criminal proceeding which resulted in conviction for housebreaking and assault.[1] Clinical psychologists who had subjected defendant to psychological tests gave opinion testimony that defendant was suffering from a mental disease at the time of the alleged crimes.[2] The trial court

courts of equity for more than two centuries in England and in the different states of this republic for shorter periods of time, but for like reasons and purposes." *Ex parte* Badger, 286 Mo. 139, 226 S.W. 936, 939 (1920).

40. See note 29 *supra* and accompanying text.

41. The Supreme Court denied certiorari without comment. The reason for the denial is purely conjectural, but it is highly probable that the denial came in absence of a justiciable controversy.

1. The trial in the District of Columbia, which in 1954 changed from the "right-wrong plus irresistible impulse" definition of insanity to what has become known as the "Durham" or "product" test of criminal responsibility. "The rule we now hold must be applied . . . . is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954). In abandoning a definition of insanity, the court hoped to make better use of the testimony of experts who had come to "understand there was a 'legal insanity' different from any clinical mental illness." Carter v. United States, 252 F.2d 608, 617 (D.C. Cir. 1957). "Thus . . . a jurisdiction adopted a rule which leaves the psychiatrist free to speak in a psychiatric frame of reference rather than to conform to unrealistic legal artificialities." MACDONALD, PSYCHIATRY AND THE CRIMINAL 29 (1958) [hereinafter cited as MACDONALD].

2. Defendant had been confined to two hospitals for over a year after indictment before being declared mentally competent to stand trial. It was while he was confined to these institutions that the three psychologists (who testified) administered the psychological tests which served as the basis for their opinions. All three were members of the staffs of these institutions and apparently had doctor of philosophy degrees. The tests given defendant included the intelligence tests which are a standard part of psychological test batteries. MACDONALD 163. Three different series of tests were administered with different results being obtained on the I.Q. section in each series. Defendant's I.Q. first appeared to be 63, then 74, and finally 90. (For a discussion of the accuracy of these tests see MACDONALD 163-65.) Relying upon the results of these test batteries, all three psychologists were of the opinion that defendant had been suffering from a mental disease, schizophrenia, at the time of the alleged crime. Two were of the opinion that the alleged crimes and the disease were related.

instructed the jury to disregard this testimony on the grounds that a clinical psychologist cannot qualify as an expert on mental condition and is therefore not competent to express an opinion as to the existence of a mental disease. On appeal, the United States Court of Appeals for the District of Columbia, sitting en banc, *held,* reversed and remanded. A clinical psychologist may qualify as an expert on mental condition and having qualified may give opinion testimony as to the existence of mental disease.[3] *Jenkins v. United States,* 307 F.2d 637 (D.C. Cir. 1962).

Under the American opinion rule, the ordinary lay witness may relate to the trier of fact only what he has observed; he is not permitted to draw inferences from his observations, *i.e.,* to give opinion testimony.[4] The expert witness, however, is called for the express purpose of drawing inferences, either from his personal observations or from assumed facts.[5] The question of whether a witness qualifies as

3. This was an alternative holding. The first assignment of error considered by the court was the exclusion by the trial court of a diagnosis which a psychiatrist had revised upon learning the result of the most recent I.Q. test and without first personally re-examining the defendant. This testimony was excluded by the trial court on the grounds that the expert must base his opinion on his personal observations or resort to the hypothetical question. See note 5 *infra* and accompanying text. The court of appeals held that a qualified expert could express a direct opinion which was based in part on personal observation and in part on the reports of others which were not offered in evidence but which the expert customarily relies upon in the practice of his profession.

This decision appears to be contrary to the weight of authority. See MCCORMICK, EVIDENCE § 15, at 32 (1954) [hereinafter cited as MCCORMICK]; 3 WIGMORE, EVIDENCE § 688(4) (3d ed. 1940) [hereinafter cited as WIGMORE]. A case directly in point with this aspect of the present decision is People v. Black, 367 Ill. 209, 10 N.E.2d 801 (1937). A medical doctor's diagnosis that the accused was sane was rejected because it was based in part on tests administered by psychologists, reports of social workers, and an examination by another physician. The court stated that the witness had, in effect, weighed the evidence and thereby invaded the province of the jury.

4. MCCORMICK § 11. Wigmore emphasizes the fact that the American opinion rule is the child of error. English courts permit the lay witness to draw inferences from his observations. American courts misinterpreted the phrase "mere opinion" to mean "inference." In England it was used to designate "the guess of a person who had no personal knowledge . . . ." 7 WIGMORE § 1917, at 10.

A major exception to the American opinion rule is the rule that the lay witness is permitted to express an opinion as to mental condition. 7 WIGMORE § 1938. " 'The rule in this jurisdiction is that a layman may express an opinion as to mental competency, provided he first states the facts upon which he bases his opinion.' " Blunt v. United States, 244 F.2d 355, 366 (D.C. Cir. 1957), quoting United States v. Lyles, Criminal No. 119-54, D.D.C., Jan. 19, 1957.

5. "An observer is qualified to testify because he has firsthand knowledge which the jury does not have . . . . The expert has something different to contribute. This is a power to draw inferences from the facts which a jury would not be competent to draw." MCCORMICK § 13, at 28. When the expert does not have personal observations upon which to base his opinion, he is asked to draw inferences from assumed facts through the use of hypothetical questions. *Id.* § 14, at 30.

The use currently being made of expert witnesses has been severely criticized because the practice of having the expert called by a party has had the result of the expert's becoming an advocate. See 3 WIGMORE § 563; McCormick, *Science, Experts and the*

an expert in a particular field has been interpreted by state and federal courts to be a matter entirely for the trial court's discretion, and the determination is reviewable only if that discretion is abused.[6] For this reason, in addition to the fact that psychology is a relatively new science,[7] appellate courts have only rarely considered the issue of whether a clinical psychologist[8] may qualify as an expert on mental condition.[9] When they have considered the issue, they have been confronted with the argument that mental disorders are medical

*Courts*, 29 TEXAS L. REV. 611 (1951). Expert witnesses were originally called by the court and were considered "helpers of the court." "After they began to be regarded as witnesses of the parties under the adversary system, they gradually took on, in most instances, the role of expert advocates. In this role they have given shocking exhibitions of partisanship in criminal cases, will contests, and personal injury litigation." MORGAN, BASIC PROBLEMS OF EVIDENCE 222 (1963).

The return to the ancient practice of having the expert called by the court has been universally recommended. See MODEL CODE OF EVIDENCE rule 403 (1942); UNIFORM RULE OF EVIDENCE 59; MCCORMICK § 17, at 35; MORGAN, BASIC PROBLEMS OF EVIDENCE 224 (1963); 2 WIGMORE § 563.

6. MCCORMICK § 13, at 29. As at least one commentator has pointed out, the qualification of expert witnesses involves questions of law and fact. What qualifications are required of a witness in order to be recognized as an expert in a particular field is a question of law. Whether a particular witness possesses those qualifications is a question of fact. Only the latter lies within the domain of the trial court's discretion. Cusack, *Qualify Your Psychologist*, 27 INS. COUNSEL J. 339, 340 (1960). Because the courts have refused to make this distinction very few rules have been developed relating to the qualifications required of expert witnesses. MCCORMICK § 13, at 29.

7. A German court in 1911 was apparently the first to avail itself of a psychologist as an expert witness. McCary, *The Psychologist in Court*, 33 CHI.-KENT L. REV. 230 (1955). In 1920 there were only 3.7 psychologists in the United States per million inhabitants; by 1950 the ratio had increased to 48.4 per million. CLARK, AMERICA'S PSYCHOLOGISTS 13 (1957).

8. "*Clinical psychology* is a form of applied psychology which endeavors to define the capacities and characteristics of an individual by the use of various methods of measurement, analysis, and observation, and which, on the basis of an integration of these findings with data secured from a physical examination and social history, gives recommendations for the readjustment of the individual. A *clinical psychologist* is a university-trained specialist in the field of clinical psychology, having a Ph. D. degree in psychology from an accredited institution. He is qualified to examine and apply psychotherapeutic measures to persons manifesting personality disorders.

"Psychiatry is a branch of medicine which deals with the recognition and treatment of mental disorders. A *psychiatrist* is a medical doctor who specializes in the diagnosis and treatment of individuals manifesting marked abnormalities of behavior. A psychiatrist has an M. D. degree and special training in psychiatry. Although there is no clear-cut distinction between the fields of abnormal psychology and psychiatry, there are several differences between a clinical psychologist and a psychiatrist. First, being medically trained, a psychiatrist is qualified to administer medication, whereas a clinical psychologist is not. The psychologist must depend on a physician for a physical examination of his patient. . . . Second, in actual practice psychiatrists deal principally with the more severe types of personality disorders requiring institutionalization, whereas clinical psychologists tend to concern themselves with less severe forms of personality maladjustment. Clinical psychologists also are trained in the administration and interpretation of psychological testing instruments—intelligence and achievement tests, personality inventories, projection tests, interest inventories, aptitude tests, etc." THORPE, THE PSYCHOLOGY OF MENTAL HEALTH 22-23 (1950).

9. See Louisell, *The Psychologist in Today's Legal World*, 30 MINN. L. REV. 235 (1955).

diseases which can be properly diagnosed only by medical doctors.[10] One of the few rules which the courts have been able to develop relating to the training and experience required of an expert witness is that a medical doctor, regardless of his area of specialization, generally qualifies as an expert on mental condition.[11] Some of the reported decisions in which this rule has been mentioned contain language which suggests that only a medical doctor may qualify as an expert in this field.[12] There appears, however, to be only one case, a 1935 decision, in which an appellate court has held a psychologist incompetent on this ground at common law.[13] The majority of the higher courts have indicated that a psychologist is not prohibited from qualifying as an expert on mental condition.[14] The first judicial statement to this effect and the one which has become the leading authority for this proposition despite the fact that it is dictum is *People v. Hawthorne*, decided by a divided Michigan Supreme Court in 1940.[15] The *Hawthorne* majority rejected the argument that only a medical doctor may qualify, on the grounds that some clinical psychologists were as well qualified to detect insanity as medical doctors who had little or no experience in the diagnosis of mental disorders but

10. See cases cited note 14 *infra*.

11. 3 WIGMORE § 560. Some jurisdictions, including the District of Columbia, recognize as experts on mental condition only those medical doctors who specialize in the diagnosis and treatment of mental disorders. *E.g.*, Lewis v. American Security & Trust Co., 289 Fed. 916 (D.C. Cir. 1923); Old Colony Trust Co. v. DiCola, 233 Mass. 119, 123 N.E. 454 (1919); *In re* Lindou's Will, 241 App. Div. 819, 270 N.Y. Supp. 771 (1934).

12. "Mental 'disease' means mental illness. Mental illnesses are of many parts and have many characteristics. They, like physical illnesses, are the subject matter of medical science. . . . The law wants from the medical experts medical diagnostic testimony as to a mental illness, if any, and expert medical opinion as to the relationship, if any, between the disease and the act of which the prisoner is accused." Carter v. United States, 252 F.2d 608, 617-18 (D.C. Cir. 1957). *But see* Odom v. State, 174 Ala. 4, 56 So. 913 (1911). "As a general rule, only medical men—that is, persons licensed by law to practice the profession of medicine—can testify as experts on the question of insanity; and the propriety of this general limitation is too patent to permit of discussion. . . . An exception may perhaps be recognized where the witness has made a protracted and systematic study of mental science and diseases under approved conditions . . . ." *Id.* at 7, 56 So. at 914.

13. Dobbs v. State, 191 Ark. 236, 85 S.W.2d 694 (1935). California courts have construed that state's sexual psychopathy statute as requiring an expert in that particular area of mental disorder to be a medical doctor specializing in the treatment of mental disorders. On this ground they have denied psychologists expert status. People v. Jones, 42 Cal. 2d 219, 266 P.2d 38 (1954).

14. Hidden v. Mutual Life Ins. Co., 217 F.2d 818 (4th Cir. 1954); People v. McNichol, 100 Cal. App. 2d 554, 224 P.2d 21 (Dist. Ct. App. 1950); People v. Hawthorne, 293 Mich. 15, 291 N.W. 205 (1940) (dictum); *In re* Masters, 216 Minn. 553, 13 N.W.2d 487 (1944); State v. Padilla, 66 N.M. 289, 347 P.2d 312 (1959); Doherty v. Dean, 337 S.W.2d 153 (Tex. Civ. App. 1960); Watson v. State, 161 Tex. Crim. 5, 273 S.W.2d 879, *rev'd on other grounds on rehearing*, 161 Tex. Crim. 9, 273 S.W.2d 882 (1954). *Contra*, Dobbs v. State, 191 Ark. 236, 85 S.W.2d 694 (1935); People v. Jones, 42 Cal. 2d 219, 266 P.2d 38 (1954).

15. 293 Mich. 15, 291 N.W. 205 (1940).

were nevertheless recognized as experts.[16] *Hawthorne* and the decisions following it, while making it clear that not everyone claiming the title of clinical psychologist may qualify as an expert, have—with one exception—declined to establish what qualifications are required.[17] The single exception is *State v. Padilla*[18] in which the New Mexico Supreme Court established the following minimum requirements: (1) doctor of philosophy degree, (2) five years postgraduate training in clinical psychology, (3) one year as psychology intern in a mental hospital approved by the American Psychological Association.

In the present appeal, the court was again urged to deny the psychologist expert status because of his lack of medical training.[19] In addition to raising the argument that mental disorders are medical diseases, the attack on the psychologist's competency called into question the reliability of psychological tests which serve as the primary basis for his opinion.[20] It was emphasized that medical doctors who specialize in the treatment of mental disorders do not place such great reliance on these tests but consider them in conjunction with other data.[21] In rejecting the proposition that medical training is a *sine qua non* for qualification as an expert, the majority did not—indeed, could not—rely on the *Hawthorne* rationale, since the District of Columbia recognizes as experts on mental condition only those medical doctors who specialize in the treatment of mental disorders.[22] The contention that only medical doctors should be permitted to qualify because mental disease is a medical problem was disposed of by the majority by citing cases in which non-medical witnesses were permitted to give opinion testimony on medical matters.[23] The proper criterion, stated the majority, is whether the witness' training and experience enables him to form an opinion

16. *Id.* at 23, 291 N.W. at 208.
17. See cases cited note 14 *supra.*
18. 66 N.M. 289, 298, 347 P.2d 312, 318 (1959).
19. See dissenting opinion of Chief Judge Miller and Circuit Judge Bastian, 307 F.2d at 651; Brief for the American Psychiatric Association as Amicus Curiae, pp. 12-17.
20. See Brief for the American Psychiatric Association as Amicus Curiae, pp. 23-26. MacDonald makes the following observations on the reliability of psychological tests:
"Psychological tests administered by a qualified and experienced psychologist make a valuable contribution to the total psychiatric examination of a criminal suspect. . . .
. . . .
"It is important to be aware of the limitations as well as the merits of psychological tests. It would be unreasonable to demand of the psychologist a decision as to criminal responsibility. In some cases he may be able to answer this question but not invariably, as there is no psychological test designed to determine the criminal responsibility of a suspect. A battery of psychological tests may, however, a [sic] provide much useful information in the evaluation of intelligence, personality and clinieal diagnosis." MACDONALD 162-63.
21. Brief for American Psychiatric Association as Amieus Curiae, pp. 17-19.
22. See note 11 *supra.*
23. 307 F.2d at 643.

which will be useful to the jury.[24] Although the majority apparently did not consider it necessary to rebut expressly the argument that psychological tests in themselves are not sufficiently reliable to enable a witness to form a useful opinion, it did note that they are customarily relied upon by medical experts in making their diagnoses.[25] The majority also tacitly recognized that medical experts are better qualified to form an opinion than psychologists, but indicated that this should not be determinative of the psychologist's competency since there is no requirement that only the best qualified witnesses be accepted as experts by the courts.[26] The question of what training and experience will be required of psychologists was expressly deferred to the trial court.[27] Nevertheless, the majority opinion contains at least one standard which cannot be ignored by the trial judge. Clinical psychologists, certified by the American Board of Examiners in Professional Psychology, whose required post-doctoral experience includes "substantial experience in a hospital or clinical setting in association with psychiatrists or neurologists . . . should ordinarily qualify as expert witnesses."[28]

In disposing of the contention that mental disorders lie exclusively within the realm of medical science, it would appear that the majority could have relied upon another line of authority in addition to the cases cited. Mental abnormalities seem to have always been treated by the courts as being in a category apart from strictly physical illnesses since one of the major exceptions to the American opinion rule is that a layman may express an opinion on mental condition based on his personal observations.[29] A troublesome aspect of the present decision is that the testimony of all three psychologists appears to fall squarely within this exception. Apparently each of them interviewed defendant and was present when some of the tests were administered. Nevertheless, the decision is significant judicial recognition of the properly trained psychologist's ability to detect mental disorders through psychological testing techniques. It also calls attention to the fact that there are an increasing number of specialists whose training and experience enable them to aid triers of fact in drawing inferences which the lay juror or even the experienced jurist is not capable of drawing. The courts will not make proper use of these potential experts, however, as long as the practice of having

24. *Id.* at 643, 644.
25. *Id.* at 642, 645. See note 3 *supra.*
26. 307 F.2d at 643.
27. *Id.* at 645.
28. *Ibid.* The requirements for certification include: (1) Ph. D. degree, (2) five years professional experience, four of which must be postdoctoral, (3) passage of written and oral examinations. Kelley, Sanford & Clark, *The Meaning of the ABEPP Diploma,* 16 AMERICAN PSYCHOLOGIST 132, 133 (1961).
29. See note 4 *supra.*

experts called by the parties rather than the court continues. The abuses which result when the expert becomes an advocate[30] undoubtedly have caused trial judges, as in the present case, to be overly reluctant to allow witnesses to give expert opinion testimony. As specialized branches of knowledge become more highly developed, the need for reform becomes more acute.[31]

## Insurance—Automobile Liability Policy—Obligation To Defend Not Controlled by Allegations in Third Party's Complaint Against Insured

Plaintiff insured brought suit to recover attorney fees and expenses incurred in defending a suit[1] which he contended that the defendant insurer was obligated by contract to defend.[2] Defendant refused to defend because the complaint in the suit by the injured party against the insured alleged that the injured party was an employee of insured and hence fell within the employee exclusion clause of the policy.[3] Plaintiff's attorney furnished defendant with information that the injured party was not his employee but an independent contractor, and defendant made no further investigation. The trial court sustained a general demurrer and dismissed the petition. On appeal, *held,* reversed. An automobile liability insurer whose policy obligates it to defend all suits against the insured alleging damages within policy coverage, even if the suit is groundless, is required to defend a suit

30. See note 5 *supra.*
31. *Ibid.*

1. The injured party originally brought suit against insured in a United States district court in North Carolina. The action was later dismissed by the claimant, who then brought suit in a Virginia court, again naming insured as defendant. Insurer was notified of all such suits, but refused to defend, on the ground that claimant was an employee of the insured and hence within the employee exclusion clause of the policy. The Virginia court entered a decree finding that claimant as a matter of fact was not an employee of defendant (insured) and that she was operating the vehicle with the permission, consent, and authority of insured.

2. The policy provided that: "With respect to such insurance as is afforded by this policy for bodily injury liability and for property damage liability, the company shall (a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent, but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient." Under exclusions the policy provided that: "This policy does not apply: (d) . . . to bodily injury to or sickness, disease or death of any employee of the insured arising out of and in the course of (1) domestic employment by the insured . . . ." Loftin v. United States Fire Ins. Co., 127 S.E.2d 53, 54-55 (Ga. Ct. App. 1962). For a discussion of employee exclusion clauses see Plummer, *Automobile Policy Exclusions,* 13 VAND. L. REV. 945, 952 (1960).

3. The defendant informed insured that upon investigation it had found that the injured parties "were in the course of their employment for you and/or the Union Circulation Company at the time." 127 S.E.2d at 55.

against its insured where the alleged facts, which place the claim within an exception, are false and the true facts, which are known or ascertainable by the insurer, would require insurer to defend. *Loftin v. United States Fire Insurance Co.*, 127 S.E.2d 53 (Ga. Ct. App. 1962).

Standard automobile liability policies provide that the insurer shall defend the insured in all those cases in which the company would be obligated to pay a resulting judgment under the policy.[4] It is generally held that the scope of this duty to defend is to be determined by the allegations of the complaint.[5] Thus if the complaint alleges facts which, if established, could require the company to pay the judgment, the insurer is bound to defend.[6] Likewise most courts have held that the allegations of the complaint control where they do not indicate coverage.[7] In a small number of jurisdictions, however, the obligation

4. APPLEMAN, AUTOMOBILE LIABILITY INSURANCE 83-84 (1938).

5. APPLEMAN, AUTOMOBILE LIABILITY INSURANCE 94-101 (1938); 7A APPLEMAN, INSURANCE LAW AND PRACTICE § 4683, at 436 (1962).

6. 7A APPLEMAN, INSURANCE LAW AND PRACTICE § 4682, at 428 (1962).

7. Such a rule has been indicated by statements of the courts in the following cases, *inter alia*, although there are sufficient variations in facts to leave room for doubt in some instances.

*Alabama*: American Mut. Liab. Ins. Co. v. Agricola Furnace Co., 236 Ala. 535, 183 So. 677 (1938).

*Alaska*: Theodore v. Zurich Gen. Acc. & Liab. Ins. Co., 364 P.2d 51 (Alaska 1961).

*Arkansas*: Equity Mut. Ins. Co. v. Southern Ice Co., 232 Ark. 41, 334 S.W.2d 688 (1960) (insurer breached duty to defend where allegations against insured were not mere legal conclusions but factual allegations); Home Indem. Co. v. Snowden, 223 Ark. 64, 264 S.W.2d 642 (1954).

*California*: Columbia So. Chem. Corp. v. Manufacturers & Wholesalers Indem. Exch., 190 Cal. App. 2d 194, 11 Cal. Rptr. 762 (1961) (allegations control, but rule must be applied with extreme care to include all potentialities of pleadings in coverage); Cametal Corp. v. National Auto. & Cas. Ins. Co., 189 Cal. App. 2d 831, 11 Cal. Rptr. 280 (Super. Ct. 1961), *modified sub. nom.* Continental Cas. Co. v. Zurich Ins. Co., 17 Cal. Rptr. 12, 366 P.2d 455 (1961) (complaint must be read in four corners and facts arrayed in complete pattern without regard to nicieties of pleading); Firco, Inc. v. Fireman's Fund. Ins. Co., 173 Cal. App. 2d 524, 343 P.2d 311 (Dist. Ct. App. 1959) (where allegations may or may not be covered by policy, insurer is obligated to undertake defense and to continue until it appears that claim is not within coverage); Ritchie v. Anchor Cas. Co., 135 Cal. App. 2d 245, 286 P.2d 1000 (Dist. Ct. App. 1955).

*Connecticut*: Allstate Ins. Co. v. Lumbermen's Mut. Cas. Co., 204 F. Supp. 83 (D. Conn. 1962) (insurer's duty to defend a groundless suit tested by allegations of complaint); Smedly Co. v. Employer's Mut. Liab. Ins. Co., 143 Conn. 510, 123 A.2d 755 (1956).

*District of Columbia*: Boyle v. National Cas. Co., 84 A.2d 614 (Mun. Ct. App. D.C. 1951) (allegations control regardless of facts ascertained before suit or developed in process of litigation or by ultimate outcome).

*Florida*: Zipperer v. State Farm Mut. Auto. Ins. Co., 254 F.2d 853 (5th Cir. 1958) (allegations determine insurer's duty to defend); Bennett v. Fidelity & Cas. Co., 132 So. 2d 788 (Fla. 1961).

*Illinois*: Sears Roebuck & Co. v. Liberty Mut. Ins. Co., 199 F. Supp. 769 (E.D. Ill. 1961) (duty to defend does not depend on whether ultimate liability must necessarily be covered by policy, but on whether it might be so covered under any of

the allegations of the pleadings); Rom v. Gephart, 30 Ill. App. 2d 199, 173 N.E.2d 828 (1961) (where complaint states different causes of action, one of which is within coverage, insurer is bound to defend one within coverage); Canadian Radium & Uranium Corp. v. Indemnity Ins. Co., 342 Ill. App. 456, 97 N.E.2d 132 (1951).

*Indiana*: Mitzner v. Fidelity & Cas. Co., 94 Ind. App. 362, 154 N.E. 881 (1927).

*Kansas*: Midland Constr. Co. v. United States Cas. Co., 214 F.2d 665 (10th Cir. 1954) (where complaint fails to allege facts which, if established, create liability within the policy, no duty rests upon insurer to defend); Leonard v. Maryland Cas. Co., 158 Kan. 263, 146 P.2d 378 (1944) (duty to defend measured by allegations of petition).

*Louisiana*: Butler v. Maryland Cas. Co., 147 F. Supp. 391 (E.D. La. 1956) (obligation to defend determined by allegations of petition; mere fact that petition charges that defendant is assured of insurer, does not obligate insurer to defend if defendant is not in fact insured); Kansas v. Sun Indem. Co., 37 So. 2d 621 (La. App. 1948) (allegations of complaint determine insurer's obligation to defend).

*Massachusetts*: Klefbeck v. Dous, 302 Mass. 383, 19 N.E.2d 308 (1939) (duty to defend determined by allegations of complaint); Fessenden School, Inc. v. American Mut. Liab. Ins. Co., 289 Mass. 124, 193 N.E. 558 (1935).

*Minnesota*: Employer's Liab. Assur. Corp. v. Youghiogheny & Ohio Coal Co., 214 F.2d 418 (8th Cir. 1954) (duty to defend depends upon claim made in complaint); Bobich v. Oja, 258 Minn. 287, 104 N.W.2d 19 (1960) (insurer not bound to defend suit on claim outside coverage of policy).

*Mississippi*: Southern Farm Bureau Cas. Ins. Co. v. Logan, 238 Miss. 580, 119 So. 2d 268 (1960) (duty to defend determined by allegations of complaint).

*Nebraska*: Pickens v. Maryland Cas. Co., 141 Neb. 105, 2 N.W.2d 593 (1942) (insurer not obligated to defend action arising out of accident not covered by public liability policy).

*New Hampshire*: Hersey v. Maryland Cas. Co., 102 N.H. 541, 162 A.2d 160 (1960) (insurer's obligation to defend suit limited to suit upon claim for which it has assumed liability under terms of the policy; if there is no coverage, there is no duty to defend).

*New Jersey*: Finley v. Factory Mut. Liab. Ins. Co., 38 N.J. Super. 390, 119 A.2d 29 (1955) (liability insurer's duty to defend arises when complaint states a claim constituting insured risk); Danek v. Hommer, 28 N.J. Super. 68, 100 A.2d 198, *aff'd per curiam*, 30 N.J. Super. 585, 105 A.2d 677 (1954) (complaint should be laid alongside policy and determination made whether, if allegations are sustained, insurer will be required to pay).

*New York*: Scheer & Sons Co. v. Travelers Indem. Co., 35 Misc. 2d 262, 229 N.Y.S.2d 248 (Sup. Ct. 1962) (insurer's duty to defend is broader than his obligation to pay, but does not extend to parties who are not insured at all); Brooklyn & Queens Allied Oil Burner Serv. Co. v. Security Mut. Ins. Co., 24 Misc. 2d 765, 208 N.Y.S.2d 259 (Sup. Ct. 1960) (insurer obliged to defend if there is potentially a case under the complaint within coverage of policy; fact that insurer is possessed of information which may show claim against insured falls outside coverage of policy of no consequence); Mireider v. New Hampshire Fire Ins. Co., 24 Misc. 2d 765, 204 N.Y.S.2d 504 (N.Y. City Ct. 1960).

*North Carolina*: Stout v. Grain Dealers Mut. Ins. Co., 307 F.2d 521 (4th Cir. 1962) (duty determined by allegations of complaint, but rule does not apply where intentional injuries by insured expressly excluded from coverage; intentional injury case is a typical problem, but court intimates that it would follow the general rule).

*Ohio*: Travelers Ins. Co. v. Motorists Mut. Ins. Co., 178 N.E.2d 613 (Ohio App. 1961) (allegations of complaint determine insurer's duty to defend even though insurer may not ultimately be liable); Lessak v. Metropolitan Cas. Ins. Co., 168 Ohio St. 153, 151 N.E.2d 730, *aff'd*, 106 Ohio App. 179, 153 N.E.2d 787 (1957) (obligation to defend arises when petition pleading action within coverage filed against insured).

*Oregon*: Tidewater Associated Oil Co. v. Northwest Cas. Co., 264 F.2d 879 (9th Cir. 1959) (insurer required to defend, if by any reasonable intendment of complaint, and regardless of ultimate merit, liability of a kind covered by policy could be inferred).

*Pennsylvania*: Gulf Ins. Co. v. Mack Warehouse Corp., 212 F. Supp. 39 (E.D. Pa. 1962) (obligation of insurer to defend action determined by allegations of complaint); Wilson v. Maryland Cas. Co., 377 Pa. 588, 105 A.2d 304 (1954) (insurer's duty to

of an insurance company to defend its insured is to be determined by the actual facts brought to the attention of the company, rather than by false allegations in a complaint.[8] A few courts have adopted an

defend must be determined solely by allegations of complaint).

*Rhode Island*: Thomas v. American Universal Ins. Co., 80 R.I. 129, 93 A.2d 309 (1952) (insurer's duty to defend determined by allegations of complaint, regardless of facts made known before action tried or during litigation).

*South Carolina*: Heyward v. American Cas. Co., 129 F. Supp. 4 (E.D.S.C. 1955) (duty of insurer to defend suit against insured depends upon allegations of complaint in that suit); Employers Mut. Liab. Ins. Co. v. Hendrix, 199 F.2d 53 (4th Cir. 1952) (where actions against insured contain various claims, some within and some without indemnity agreement, insurer must take charge of entire suit).

*South Dakota*: Black Hills Kennel Club, Inc. v. Firemans Fund Indem. Co., 77 S.D. 503, 94 N.W.2d 90 (1959) (insurer not obligated to defend aetion based on claim outside coverage of policy).

*Tennessee*: Kern v. Transit Cas. Co., 207 F. Supp. 437 (E.D. Tenn. 1962) (insurer's duty to defend determined from allegations of complaint and not from outcome of suit); First Nat'l Bank v. South Carolina Ins. Co., 207 Tenn. 520, 341 S.W.2d 569 (1960); South Knoxville Brick Co. v. Empire State Surety Co., 126 Tenn. 402, 150 S.W. 92 (1912). See Covington, *Insurance—1961 Tennessee Survey*, 14 VAND. L. REV. 1303, 1309 (1961).

*Texas*: Liberty Ins. Co. v. Rawls, 358 S.W.2d 920 (Tex. Civ. App. 1962) (insurance company has obligation to defend even though additional allegations are made which, if proved and made basis for judgment against insured, would take case out of provisions of coverage of policy); Travelers Ins. Co. v. Newsom, 352 S.W.2d 888 (Tex. Civ. App. 1962) (insurer not obligated to investigate truthfulness of third party's allegations against insured of matters excluded from coverage or to take insured's statements as true, and insurer had to decide at its peril whether complaint alleged injuries within coverage); General Ins. Corp. v. Harris, 327 S.W.2d 651 (Tex. Civ. App. 1959) (insurer's duty to defend determined by nature of claim alleged in petition in action against insured).

*Utah*: United Pac. Ins. Co. v. Northwestern Nat. Ins. Co., 185 F.2d 443 (10th Cir. 1950) (insurer bound to defend only suits alleging a cause of action and not bound to defend any action not falling within coverage of policy).

*Vermont*: American Fid. Co. v. Deerfield Valley Grain Co., 43 F. Supp. 841 (D. Vt. 1942) (insurer's duty to defend should be determined from allegations of petition in such action); Commercial Ins. Co. v. Papandrea, 121 Vt. 326, 159 A.2d 333 (1960) (duty to defend measured by allegations upon which claim is stated).

*Virginia*: London Guar. & Acc. Co. v. White & Bros., Inc., 188 Va. 195, 49 S.E.2d 254 (1948) (duty determined by allegations of injured party; if allegations left doubt, refusal of insurer to defend was at his own risk).

*Washington*: Murray v. Mossman, 56 Wash. 2d 909, 355 P.2d 985 (1960) (insured's right of recovery against insurance company sounds in tort and is founded on bad faith); Lawrence v. Northwest Cas. Co., 50 Wash. 2d 282, 311 P.2d 670 (1957) (insurer's liability determined by allegations of complaint filed against insured).

*Wisconsin*: Wisconsin Transp. Co. v. Great Lakes Cas. Co., 241 Wis. 523, 6 N.W.2d 708 (1942) (insurer under duty to investigate claim and defend action against insured even though claim or action might ultimately be determined to be groundless).

8. *New Mexico*: Albuquerque Gravel Prods. Co. v. American Employers Ins. Co., 282 F.2d 218 (10th Cir. 1960) (duty of liability insurer to defend action against insured determined from allegations of complaint, unless insurer knows that true, but unpleaded, basis for claims brings them within coverage of policy).

*Oklahoma*: American Motorists Ins. Co. v. Southwestern Greyhound Lines, Inc., 283 F.2d 648 (10th Cir. 1960) (obligation to defend determined by actual facts brought to attention of insurer rather than pertinent but untrue allegations contained in complaint); United States Fid. & Guar. Co. v. Briscoe, 205 Okla. 618, 239 P.2d 754 (1952) (liability insurer not obligated to defend groundless suit against insured when insurer would not be liable under its policy for any recovery in such suit).

extension of this qualification requiring the insurer to consider not only those facts which it knows, but also those which could be learned through reasonable investigation.[9]

In the instant case the court found that the policy language was ambiguous[10] and misleading to the insured.[11] The court acknowledged the general rule but stated that it was inadquate here as a construction of the contract of insurance. Since the insurer undertook to defend even groundless suits, a fortiori it should defend suits within the contract coverage in spite of false allegations.[12] To make the scope of the duty realistic, the court held that the insurer is bound to conduct a reasonable investigation of the accident in order to determine its own liability. The court held that the burden was on the insurer to show that the injury came within an exception to the policy coverage and that this burden was not sustained by a showing that the allegations of the complaint did not indicate coverage.[13] In answer to defendant's contention that either the true facts or the allegations must uniformly control the insurer's liability, the court stated that in the former situation the insurer is obligated to defend "even groundless" suits and that in the latter situation the insurer is obligated to defend with respect to such insurance as is afforded by

9. *Georgia*: American Fid. & Cas. Co. v. Pennsylvania Threshermen & Farmer's Mut. Cas. Ins. Co., 280 F.2d 453 (5th Cir. 1960); Loftin v. United States Fire Ins. Co., 127 SE.2d 53 (Ga. Ct. App. 1962) (insurer required to defend suits against its insured in which alleged facts, which placed claim within exception to coverage, were false and true facts, which placed claim within coverage of policy, were known or ascertainable by insurer).

*Missouri*: State *ex rel.* Inter-State Oil Co. v. Bland, 354 Mo. 622, 190 S.W.2d 227 (1945) (insurance company cannot ignore actual facts which it knows or could know from a reasonable investigation, in determining its liability under a liability policy to defend action against insured); Marshall's U.S. Auto Supply, Inc. v. Maryland Cas. Co., 354 Mo. 455, 189 S.W.2d 529 (1945) (insurance company cannot ignore actual facts known or ascertainable from a reasonable investigation, in determining its liability under policy, though such facts are not alleged in petition).

*Vermont*: McGettrick v. Fidelity & Cas. Co., 264 F.2d 883 (2d Cir. 1959) (insurer liable for breach of contract to defend where there was evidence that he did not make reasonable investigation).

10. "The dubiousness of asserting the non-ambiguity of the contract provision in issue is well illustrated by the lack of agreement among the decisions throughout the country on this problem. . . . An interpretation of the words, 'such insurance as is afforded by this policy' to mean other than 'insurance afforded according to the true facts' would be unreasonable. . . . If the insurer intended otherwise, it could have made its intent clear and unmistakable by undertaking to defend 'unless the complaint alleges facts which show the claim to be excluded from coverage,' or by using other unambiguous language . . . ." 127 S.E.2d at 57-58.

11. "In considering the policy as a whole, laymen might well conclude that the company would defend any suit arising from an accidental injury in truth covered by the policy despite the manner in which the injured party presented his claim, as well as a suit falsely showing coverage." *Id.* at 58-59.

12. *Id.* at 56-57.

13. "With respect to an exception to the duty to defend, this burden is not carried merely by proving that the allegations of the complaint alleges [sic] facts excluding the claim from the policy." *Id.* at 58.

the policy "any suit alleging personal injury."[14] The determination of the insurer's duty to defend, therefore, rests upon objective facts. The court concluded that when the insured has given notice and the information required, the assertions of a stranger to the contract should not determine the insurer's duty to defend.[15]

The purpose of the defense clause in an automobile liability policy is twofold. On the one hand the insurer is able to protect against collusion and incompetence by its power to control and conduct the defense of any suits which are brought against the insured on the policy. In addition, the insured will not be tempted to compromise or default on a claim in order to avoid the expense of litigation. On the other hand, the defense clause benefits the insured whenever he is sued on the policy. Therefore the determination of the obligation to defend is of the utmost importance. If the insurer determines his duty to defend strictly from the allegations of the complaint, the insured will be at the mercy of the injured claimant's pleadings. Yet if one determines the duty of the insurer to defend from the true facts, which may not be ascertainable until after a verdict is reached, the insurer may then be liable for breach of contract to defend even though it has acted reasonably and in good faith. The rule announced in the instant case would seem to be the most equitable to both parties concerned, since the insurer has the greater facilities for the investigation of any claims; moreover it was the insurer who drafted the contract in the first place. The dissent's objection that the insurer should be able to rely absolutely either on allegations or true facts would seem to be inequitable on its face. As was pointed out by the majority, the layman might well interpret the policy to mean that the insurer would defend all suits arising out of the use of the insured vehicle, notwithstanding the manner in which the action was pleaded. Furthermore, if one were to lay down the rule that the allegations of the complaint control in all situations, then what effect will the right to amend have, since many states follow the federal rules of procedure, where the allegations can be amended at any time up to and including the time when a judgment is rendered? In addition, where the terms of a contract are ambiguous, they are always construed against the writer, for it is he who allowed the ambiguity to creep in.

## Trade Regulation—Advertising—Permissible Scope of FTC Cease and Desist Order Against Manufacturer for Deceptive Advertising Practices

The Federal Trade Commission, recognizing that television is a

14. *Id.* at 59.
15. *Ibid.*

relatively new and tremendously important outlet for high-pressure advertising, has recently been waging a strenuous campaign to keep the advertisements within reasonable bounds.[1] In the first case of the campaign to emerge for full scale court review, Colgate-Palmolive Company, through its advertising agency, Ted Bates & Company, released television commercials extolling the superior wetting qualities of its "Rapid Shave" shaving cream. The highlight of the commercials was a demonstration in which coarse sandpaper was apparently shaved with the aid of "Rapid Shave." Actually, the "sandpaper" was merely sand sprinkled on plexiglass, and in fact "Rapid Shave" would not shave actual sandpaper. The FTC issued a cease and desist order prohibiting the company and the agency from, among other things, using in connection with any product demonstrations which are not accurate or genuine.[2] On appeal, *held*, order set aside and remanded. Where respondents' violation was a single misleading demonstration of a single product, an order directed against all future demonstrations of all products is too broad.[3] *Colgate-Palmolive Co. v. Federal Trade Commission*, 310 F.2d 89 (1st Cir. 1962). On remand, the Commission clarified the order and the principles of law on which it was based, and removed some obvious ambiguities, but made no substantial changes in its effect on Colgate-Palmolive.[4]

The touchstone of liability under the Federal Trade Commission Act for false advertising is consumer deception.[5] This primarily involves a duty not to misinform rather than an affirmative duty to disclose.[6] The accepted policy with respect to the scope of FTC cease and desist orders is for the courts to defer to the Commission's expertise and specialized knowledge by giving it broad discretion in framing its orders.[7] An order may, however, come under judicial scrutiny when (1) it is vague, as typified by the order framed in the broad language of the applicable statute,[8] or (2) "the remedy selected

1. See Legislation & Administration, 37 NOTRE DAME LAW. 524 (1962); Note, 36 ST. JOHNS L. REV. 274 (1962).

2. Colgate-Palmolive Co., 3 TRADE REG. REP. ¶ 15643 (1961).

3. The order also seemingly required that the demonstrations be literally accurate even where such would not be necessary to convey actual truth and no public interest would be served thereby; this was the primary reason for setting it aside. In addition a sanction against the advertising agency as broad as that against the principal was held to be open to objection.

4. Colgate-Palmolive Co., 3 TRADE REG. REP. ¶ 16318 (Feb. 18, 1963) (opinion only; proposed order released as FTC Docket No. 7736).

5. The statutory basis is Federal Trade Commission Act § 5(a)(1), as amended, 66 Stat. 632 (1952), 15 U.S.C. § 45(a)(1) (1958), banning "unfair methods of competition" and "unfair or deceptive acts or practices." Injury or likelihood of injury may be either to the consumer or to a competitor, but danger of consumer deception is still necessary to produce injury to either. See FTC v. Algoma Lumber Co., 291 U.S. 67, 78 (1934); Colgate-Palmolive Co., *supra* note 4, at 21156.

6. See Alberty v. FTC, 182 F.2d 36 (D.C. Cir.), *cert. denied*, 340 U.S. 818 (1950).

7. *E.g.*, Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946).

8. See, *e.g.*, FTC v. Morton Salt Co., 334 U.S. 37 (1948); NLRB v. Express Pub-

has no reasonable relation to the unlawful practices found to exist,"[9] in that it is too broad as to practices, products, or parties affected. A criticism of the first type of order is that Congress, in passing a law and creating an agency to administer it, speaks in generalities and leaves the agency to fill in the details; by falling back on the statutory generalities the agency abdicates its function to the court that may in the future be called on to enforce the order.[10] The most recent Supreme Court decision on the subject[11] gives an indication of the chances of success on the second ground of attack. The Court refused to set a broad order aside but indicated that its holding would have been different had the same order been issued under present law, which provides that cease and desist orders automatically become final[12] and thereby expose the respondent to liability for heavy civil penalties.[13] This idea of fashioning the order in light of its practical effect found immediate approval in the lower courts[14] and, apparently, in the eyes of at least one of the FTC Commissioners.[15] Precedent

lishing Co., 312 U.S. 426 (1941) (order not to violate the NLRA held too broad); Swanee Paper Corp. v. FTC, 291 F.2d 833 (2d Cir. 1961), *cert. denied*, 368 U.S. 987 (1962). *But cf.* FTC v. Ruberoid Co., 343 U.S. 470 (1952).

9. Jacob Siegel Co. v. FTC, 327 U.S. 608, 613 (1946); see, *e.g.*, FTC v. Mandel Bros., 359 U.S. 385 (1959); FTC v. National Lead Co., 352 U.S. 419 (1959).

10. See FTC v. Morton Salt Co., *supra* note 8, at 54; FTC v. Ruberoid Co., *supra* note 8, at 480 (Jackson, J., dissenting); 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 8.19, at 607 (1958); Connor, *The Defense of Abandonment in Proceedings Before the Federal Trade Commission*, 49 GEO. L.J. 722, 729-32 (1961); Elman, *The FTC and Procedural Reform*, 14 AD. L. REV. 105 (1961); Note, 29 U. CHI. L. REV. 706 (1962); *cf.* C.E. Niehoff & Co. v. FTC, 241 F.2d 37 (7th Cir. 1957), *rev'd per curiam sub nom.* Moog Indus., Inc. v. FTC, 355 U.S. 411 (1958).

11. FTC v. Henry Broch & Co., 368 U.S. 360 (1962).

12. Clayton Act § 11(g), as amended, 73 Stat. 244 (1959), 15 U.S.C. § 21(g) (Supp. III, 1961). This subsection is substantially identical with Federal Trade Commission Act § 5(g), as amended, 52 Stat. 113 (1938), 15 U.S.C. § 45(g) (1958). The *Broch* case was brought under the Clayton Act, the instant case under the Federal Trade Commission Act.

13. Clayton Act § 11(*l*), as amended, 73 Stat. 245 (1959), 15 U.S.C. § 21(*l*) (Supp. III, 1961). This subsection is substantially the same as Federal Trade Commission Act § 5(*l*), as amended, 52 Stat. 114 (1938), as amended, 64 Stat. 21 (1950), 15 U.S.C. § 45 (*l*) (1958).

14. See Giant Food, Inc. v. FTC, 307 F.2d 184 (D.C. Cir.), *cert. denied*, 83 Sup. Ct. 723 (1963); American News Co. v. FTC, 300 F.2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962); Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962). *But cf.* Vanity Fair Paper Mills, Inc. v. FTC, 311 F.2d 480 (2d Cir. 1962), where the court points out that if the order is too broad to perfectly apprise the respondent as to what is prohibited, this defect is not of compelling importance because respondent must, under FTC Rules of Practice, Procedures and Organization § 5.6, 16 C.F.R. § 3.26 (1960), propose his method of compliance, which may either be accepted or rejected by the Commission. Interestingly, a rationale similar to the *Broch* dictum was proposed some years ago, R. J. Reynolds Tobacco Co. v. FTC, 192 F.2d 535 (7th Cir. 1951), apparently never gained much of a foothold, and was finally overruled, Mandel Bros., Inc. v. FTC, 254 F.2d 18 (7th Cir. 1958), *rev'd in part on other grounds*, 359 U.S. 358 (1959).

15. See Vanity Fair Paper Mills, Inc., 3 TRADE REG. REP. ¶ 15796, 20611 (Elman, C., dissenting), *aff'd*, 311 F.2d 480 (2d Cir. 1962). Commissioner Elman's dissent

affords little concrete assistance in determining the permissible scope of an order directed at deceptive advertising because the FTC has heretofore been content to issue much narrower orders against deceptive advertising than in other areas of enforcement.[16] In the few deceptive advertising cases where the scope of the order has been seriously attacked,[17] the courts have permitted the orders to proscribe the particular deceptive practice as applied to any product. These cases are not, however, determinative of the Commission's authority, since there was no definite holding that the degree of specificity as to prohibited practices was the outer limit of permissible breadth, and there were circumstances justifying an order applicable to all products.[18] These circumstances may not be present in a case involving a single product of a highly diversified company like Colgate-Palmolive. Common-sense application of the above mentioned "reasonable relation" generality may still provide the most concrete assistance.

Indications of a recent shift in policy are apparent. One response by the Commission to criticisms of its case by case method of enforcing the Federal Trade Commission Act is announcement of an intention to promulgate industry-wide Trade Regulation Rules declaring certain practices unlawful.[19] Rules applicable to advertising are forthcoming.[20]

The objectionable part of the order against Colgate-Palmolive

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briefly and persuasively outlines the relevant considerations in arriving at a proper order. The court of appeals approved the dissent as a statement of what the Commission *should* do but refused to hold that it stated what they *must* do.

16. Connor, *supra* note 10, at 730 n.33; see, *e.g.*, Standard Brands, Inc., 56 F.T.C. 1488 (1960) (consent order); Brooklyn Fashion Center, Inc., 56 F.T.C. 535 (1959); Azome Utah Mining Co., 54 F.T.C. 269 (1957); J. David Paisley Co., 54 F.T.C. 87 (1957) (consent order); *cf.* Bankers Sec. Corp. v. FTC, 297 F.2d 403 (3d Cir. 1961); Niresk Indus., Inc., v. FTC, 278 F.2d 337 (7th Cir.), *cert. denied,* 364 U.S. 883 (1960); Consumer Sales Corp. v. FTC, 198 F.2d 404 (2d Cir. 1952), *cert. denied,* 344 U.S. 912 (1953).

17. Bankers Sec. Corp. v. FTC, *supra* note 16; Niresk Indus., Inc. v. FTC, *supra* note 16; Consumer Sales Corp., v. FTC, *supra* note 16. *But cf.* Korber Hats, Inc. v. FTC, 311 F.2d 358 (1st Cir. 1962).

18. In the *Niresk* and *Consumer Sales* cases the respondent companies dealt in a specialized line of products; in *Bankers Sec.* the respondent was a department store which admitted that the specific deceptive practice was applicable to most of its merchandise and had been so used on occasion. But in the *Korber Hats* case, decided after the instant case by the same panel of judges, the court questioned, in light of the *Broch* dictum, the propriety of an order prohibiting substantially all misrepresentations about a specific product.

19. Address by Commissioner Anderson, Charlotte-Piedmont Better Business Bureau, Nov. 16, 1962, reported in 5 TRADE REG. REP. ¶ 50164 (1962); see Elman, *supra* note 10; 5 TRADE REG. REP. ¶ 50153 (1962); Address by FTC Chairman Dixon, Section on Antitrust Law of the New York State Bar Association, Jan. 24, 1963, reported in 5 TRADE REG. REP. ¶ 50169 (1963).

20. Address by Commissioner MacIntyre, National Congress of Petroleum Retailers, Inc., Aug. 22, 1962, reported in 5 TRADE REG. REP. ¶ 50155 (1962).

proscribed representing the merits of "any product" by means of "demonstrations" that are not "genuine or accurate."[21] The first ground for setting aside the order was a conclusion that it is common and legally unobjectionable advertising practice to use demonstrations that, although not genuine, are nevertheless not misleading and thus would be permissible.[22] The court declined to undertake to modify the order but sent it back to the Commission with "suggestions."[23] It was suggested, but expressly not decided, that had it been proper to hold all non-genuine demonstrations illegal, the order might have been appropriate. The necessary inference from this is that the defect might be cured merely by limiting the order to misleading demonstrations, but the court seemingly negatived this inference by expressing dissatisfaction with the idea of a broad prohibition against demonstrations when the offense is narrow—"a single misrepresentation about a single product."[24] Discussion of the issue was closed with a citation to *Colgate-Palmolive Co.*[25] (a different case) as one example of a properly drawn order for this situation. The facts in that case were sufficiently similar to those of the instant case for the order to be paraphrased and applied here; were this done, it would prohibit Colgate-Palmolive from misrepresenting, presumably by any method, the wetting properties of any shaving cream manufactured by it.

On remand the Commission emphasized that it had found two unfair practices: (1) misrepresentation of the qualities of "Rapid Shave" and (2) representation that the visual demonstration proved that which it did not.[26] The part of the order applicable to the latter finding was reframed to remove any possible doubt as to its interpretation, but even in its new form it does not appear to conform to the mandate of the court of appeals.[27] The proposed new order prohibits visual demonstrations that do not, because of the use of a substitute, actually prove what they appear to prove about any product. The application to any product was justified by mention-

21. 310 F.2d at 93.

22. *E.g.*, iced tea does not look like iced tea when reproduced on the television screen; therefore it is permissible to use colored water that looks, on the television screen, like iced tea should look.

23. 310 F.2d at 93.

24. *Ibid.* Nowhere in the opinion is there any discussion of the second paragraph of the order which prohibited *any* misrepresentation of the qualities of shaving cream. This provision was left intact on remand.

25. TRADE REG. REP. 1960-61 Transfer Binder ¶ 29445 (1961) (a different proceeding against Colgate in connection with their toothpaste).

26. 3 TRADE REG. REP. at 21157.

27. The Commission frankly acknowledges that it is merely removing the technical defects to clarify the issues for possible further judicial review. *Id.* at 21154. The basic disagreement here is as to what constitutes a violation of the Federal Trade Commission Act; this comment is addressed to the problem of what to do about it when the violation is found.

ing the obvious ineffectuality of putting a stop to "spurious television demonstrations in advertising shaving cream, but to allow them to continue the practice in advertising toothpaste or soap."[28] The need for a broad scope was further buttressed by pointing out that in three prior proceedings Colgate has been required to cease making thirty-one misleading representations about eight products.[29]

An evaluation of the propriety of the breadth of an order should be made in cognizance of the theory underlying administrative cease and desist proceedings. First, though, a distinction must be drawn between the question of whether the order is within the authority of the Commission, *i.e.*, able to withstand attack on appeal, and whether the order, although technically unassailable, actually accomplishes its desired purpose.[30] This discussion will deal with the latter consideration. The purpose of an order, as well as its effect, is twofold: (1) to declare what is unlawfnl, and (2) to operate as an injunction against the particular violator.[31] Since, as previously noted, the Commission intends to rely on industry-wide rules to set forth its interpretation of the law, the impetus to seek broad orders on this first ground should now be gone. Considerable breadth may still be desirable, though, in accomplishing the second objective. It must be remembered that a cease and desist order is not, strictly speaking, a penalty; it is an injunction to refrain from violating the law in certain specified ways, these ways being determined with reference to past conduct, presumably because past conduct is an indication of what future conduct would be in absence of legal restraint.[32] The problem further sub-

28. *Id.* at 21158.

29. Colgate-Palmolive Co., *supra* note 25; Stipulation 8380, 49 F.T.C. 1601 (1952); Stipulation 2867, 31 F.T.C. 1630 (1940).

30. FTC v. Ruberoid Co., *supra* note 8, illustrates the distinction; it is at least arguable that the order there was not well suited to deal with the situation, but it was held that the defects were not such as to require it to be set aside. Justice Jackson's dissent therein would seem to hold the Commission to a higher standard of competency in drafting appropriate orders. *Id.* at 480. The dissent of Commissioner Elman (the writer of both opinions in the instant case) in Vanity Fair Paper Mills, Inc., *supra* note 15, is also illustrative of the distinction. There he proposed a tripartite process to formulate a proper decision: (1) consideration of the *breadth of the order, i.e.*, would the public interest be best served by extending the order's proscriptions to practices like and related to those found to have existed; (2) explicit statements in *justification* of the broad order, this being necessary both to show the requisite "reasonable relation" and simply because the parties and the public have a right to be fully informed; (3) *formulation* of the order with precision and clarity. The original decision was apparently deficient on at least the second and third grounds; the most recent makes it clear that the disagreement between the FTC and the court is on the more fundamental problem of determination of the public interest.

31. For analytical purposes it has been suggested that these be designated the legislative and judicial functions, respectively. Comment, 29 U. CHI. L. REV. 706, 713 (1962).

32. One writer has expressed it in this manner: "The perfect cease and desist order . . . would prohibit precisely those illegal acts which the respondent will in fact commit." *Id.* at 719.

divides into the issues of the breadth of the order in reference to (1) the type of prohibited practice and (2) the products to be covered. These issues are necessarily interrelated when the likelihood of future misconduct is considered, since there are indications that the tendency to engage in questionable advertising practices grows stronger as the competition becomes keener.[33] The gravamen of Colgate's wrong was the representation, by a visual demonstration on television, that its product had qualities that it did not have (or, in the view of the FTC, that the demonstration was proof of a quality when in fact it did not constitute such proof). The company had made similarly misleading demonstrations regarding a like product in the past,[34] and such conduct warrants an inference of future repetition. Therefore, the practice to be prohibited should be such demonstrative television misrepresentations.[35] Consideration of the same facts dictates that the range of products included within the prohibition should extend beyond shaving cream, but not beyond some generic class embodying those products whose marketing situation allows a fair inference that similar practices might be applied to them. Colgate's product line may roughly be divided into four classes: toilet articles, household products (principally soaps and detergents), proprietary drugs, and ethical drugs.[36] All but the last would seem to be marketed under substantially similar conditions, *e.g.*, they are highly advertised, low cost, high-use consumer items. Therefore the order should include the first three classes, although it is arguable that it should be limited to toilet articles since the present violation and the proven past violation concerned products in this class. At any rate, substantial identity (or lack of it) of marketing conditions should be a fit subject for introduction of the type of evidence that the FTC is well equipped to evaluate. These considerations, with the exception of the one concerning marketing conditions, are embodied in the present FTC order. Even aside from the disagreement as to the type of demonstration to be prohibited, this has produced an order somewhat broader than the court indicated would be proper, but the opinion sets forth factual bases which should adequately support its breadth on further

33. Interview with advertising agency official, in Nashville, Tenn., Feb. 1963. The circumstances surrounding the present case are an illustration. See Legislation & Administration, 37 NOTRE DAME LAW. 524, 531 (1962), for an account of the FTC proceedings against Colgate-Palmolive and against two other shaving cream manufacturers for similar practices. The author wryly observes: "Perhaps the Commission should have allowed Rapid Shave, Rise, and Soft Stroke to continue their demonstrations against each other; even more interesting tests and claims may have resulted as the competition thickened."

34. Colgate-Palmolive Co., *supra* note 25.

35. Legally it is not necessary to limit the order to television misrepresentation, Vanity Fair Paper Mills, Inc. v. FTC, *supra* note 14, but because of the peculiar suitability of the practice to the medium it would be wise to so restrict the order.

36. STANDARD LISTED STOCK REPORTS 566 (Standard & Poor 1962).

court review, except possibly as it would apply to products that are not highly advertised high-use consumer items.

## Securities—Investment Advisers Act of 1940—Act Requires Showing of Common Law Fraud for Violation of Sections 206(1) and (2)

An investment advisory service[1] presented a financial analysis of specific securities and recommendations to subscribers[2] for the purposes of protecting their investment capital, allowing a realization of steady and attractive income, and allowing the accumulation of capital gains.[3] Without disclosing the transactions to its customers, the advisory service by way of prior purchase or short sale availed itself of the profit margin created through the market reaction to its published advice.[4] The Securities Exchange Commission, alleging a

1. " 'Investment Adviser' means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities . . . or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include (A) a bank, or any holding company affiliate, as defined in the Banking Act of 1933, which is not an investment company; (B) any lawyer, accountant, engineer, or teacher whose performance of such services is solely incidental to the practice of his profession; (C) any broken or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor; (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation; (E) any person whose advice, analyses, or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest which shall have been desiguated by the Secretary of the Treasury, pursuant to section 3(a) (12) of the Securities Exchange Act of 1934, as exempted securities for the purposes of that Act; or (F) such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order." Investment Advisers Act of 1940, § 202(a)(11), 54 Stat. 848, 15 U.S.C. § 806-2(a)(11) (1958).

2. "There are about . . . 5,000 subscribers to the 'Capital Gains Report'; the . . . publication is frequently distributed to a large group of about 100,000 nonsubscribers by use of general mailing lists." SEC v. Capital Gains Research Bnreau, 306 F.2d 606, 6I2 (1962) (Clark, J., dissenting).

3. The Capital Gains Report Circular reads as follows: "An Investment Service devoted exclusively to (1) The protection of investment capital, (2) The realization of a steady and attractive income therefrom, (3) The accumulation of CAPITAL GAINS thru the timely purchase of corporate equities that are proved to be undervalued." *Ibid.*

4. The specific transactions questioned are as follows:

(a) On March 15, 1960, Capital Gains purchased 500 shares of Contineutal Insurance Company stock at $47 ¾ and $47 ⅞ per share. Three days later it cireulated a report recommending the purchase of the stock. On March 29th Capital Gains sold the stock at $50 ⅛.

(b) Between May 13th and May 20th 1960 Capital Gains purchased 5,300 shares of United Fruit Company stock, at a total cost of $117,114.00. On May 27th, a report was circulated recommending purchase of the stock. Between June 6th and Jnne 10th, Capital Gains sold the 5,300 shares at a profit of $10,725.00.

violation of the Investment Advisers Act of 1940, sections 206(1) and (2),[5] sought a temporary restraining order, preliminary injunction, and final injunction against the advisory service to prevent it from employing, in the terminology of the act, "any device, scheme, or artifice to defraud any client or prospective client"[6] and from engaging "in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client."[7] The district court concluded that "fraud" and "deceit" are used in their technical sense in the act. Consequently, in the absence of defendant's clearly established intent actually to "defraud any client, or prospective client" the court vacated the temporary restraining order and denied the motion for a preliminary injunction.[8] On appeal to the United States Court of Appeals for the Second Circuit, *held*, affirmed. Proof of an undisclosed personal profit accruing to an investment adviser from the predictable market effect of his honest advice does not amount to common law fraud and thus is not so clearly a violation of the Investment Advisers Act of 1940, sections 206(1) and (2), as to warrant a preliminary injunction in advance of a trial on the merits. *SEC v. Capital Gains Research Bureau*, 306 F.2d 606 (2d Cir. 1962), *cert. granted*, 371 U.S. 967 (1963).

Pursuant to section 30 of the Public Utility Holding Company Act of 1935,[9] the Securities and Exchange Commission made an overall study and report on investment trusts, investment companies, and investment advisers.[10] This report and the recommendations of the Commission[11] were forwarded to the Congress in seeking legislative

(c) On July 5th and July 14th, Capital Gains bought 2,000 shares of Creole Petroleum. The Company recommended the stock on July 15th by an optimistic report on Creole. Between July 20th and 22d, Capital Gains sold its shares at a profit.

(d) On August 6th, 1960, Capital Gains purchased 600 shares of Hart, Schaffner & Marx stock at $23. On August 12th, it issued a report recommending purchase of this security. Within 10 days, the company sold all of its shares at a profit.

(e) Between October 4th and October 13th, 1960, Capital Gains sold short 500 shares of the Chock Full O'Nuts corporation at a net price of $34,200. On October 14th, it circulated a comparative report of the Chock Full O'Nuts Corporation position in its industry suggesting its overvalue. On October 24th, Capital Gains covered its short sale at a profit.

(f) On October 28th and October 31st, 1960, Capital Gains purchased 2,000 shares of Union Pacific stock at approximately $25 per share. On November 1st, a circulated report recommended the stock. On November 7th, Capital Gains sold the 2,000 shares at $27. *Id.* at 612-13.

5. 54 Stat. 852, as amended, 15 U.S.C. § 806-6(1), (2) (Supp. III, 1961).

6. Investment Advisers Act of 1940, § 206(1), 54 Stat. 852, as amended, 15 U.S.C. § 80b-6(1) (Supp. III, 1961).

7. Investment Advisers Act of 1940, § 206(2), 54 Stat. 852, as amended, 15 U.S.C. § 80b-6(2) (Supp. III, 1961).

8. SEC v. Capital Gains Besearch Bureau, 191 F. Supp. 897 (S.D.N.Y. 1961).

9. 49 Stat. 837, 15 U.S.C. § 79z-4 (1958).

10. H.R. Doo. No. 477, 76th Cong., 2d Sess. 1 (1939).

11. Statement of Robert E. Healy, Commissioner, Securities and Exchange Commission, *Hearings Before the Subcommittee on Securities & Exchange of the Senate*

enactment to ensure regulatory safeguards in the subject area, heretofore unaffected by any of the four earlier regulatory acts.[12] In response, a committee draft sought a licensing requirement as to all investment advisers,[13] a general clause preventing fraudulent and deceitful practices within the industry,[14] and an endowment of the Commission with investigative powers to ensure compliance.[15] Due to unanimously adverse reaction,[16] the provision for investigative powers was deleted from the bill.[17] The limited scope of subsequent judicial interpretation of the Investment Advisers Act as so passed has been attributed to the legislative pruning of these investigative powers,[18] as well as a strict regard for what was once stated to be the purpose of the act, *i.e.*, a means for providing an industry census.[19]

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*Committee on Banking & Currency*, 76th Cong., 3d Sess. pt.1, at 32 (1940).

12. Securities Act of 1933, 48 Stat. 74, as amended, 15 U.S.C. §§ 77a-aa (1958); Trust Indenture Act of 1939, 53 Stat. 1149, as amended, 15 U.S.C. §§ 77aaa-bbbb (1958), as amended, 15 U.S.C. § 77ddd (Supp. III, 1961); Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. §§ 78a to hh-1 (1958); Public Utility Holding Company Act of 1935, 49 Stat. 803, as amended, 15 U.S.C. §§ 79 to 79z-6 (1958).

13. S. 3580, 76th Cong., 3d Sess. § 204 (1940).

14. S. 3580, 76th Cong., 3d Sess. § 206(1), (2) (1940).

15. "Any investment adviser, or any person who presently contemplates becoming an investment adviser, may register under this section by filing with the Commission an application for registration. Such application shall contain such of the following information and documents, in such form and detail, as the Commission may by rules and regulations prescribe as necessary, or appropriate in the public interest, or for the protection of investors: . . . (3) Such further information and copies of such further documents relating to such investment adviser, his or its affiliated persons and employees, as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors." S. 3580, 76th Cong., 3d Sess. § 204(c) (1940).

16. See Statement of Charles M. O'Hearn, Vice President and Director of Clarke, Sinsabaugh & Co., Investment Counsel, *Hearings Before the Subcommittee on Securities & Exchange of the Senate Committee on Banking & Currency*, 76th Cong., 3d Sess. pt. 2, at 713, 716 (1940); Statement of Alexander Standish, President, Standish, Racey & McKay, Inc., *id.* at 718, 720; Statement of Dwight C. Rose, Partner of Brundage, Story & Rose, and President, Investment Counsel Association of America, *id.* at 723; Statement of Rudolph P. Berle, General Counsel, Investment Counsel Association of America, *id.* at 742, 750; Statement of James N. White, of Scudder, Stevens & Clark, Investment Counsel, *id.* at 755, 758.

17. See Investment Advisers Act of 1940, § 203(c), 54 Stat. 850, 15 U.S.C. § 80b-3(c) (1958), as amended, 15 U.S.C. § 80b-3(c) (Supp. III, 1961).

18. "The most serious defect in the original statute was the absence of any provision comparable to § 17(a) of the 1934 act, which gives the Commission authority to inspect the books and records of registered brokers and dealers, to prescribe what books and records shall be kept, and to require the filing of reports. Certainly the minuscule number of proceedings against registered advisers before 1960 as compared with those against registered brokers and dealers demonstrates either (1) that the former industry is inherently a good deal more saintly than the latter or (2) that a statute of this sort without inspection power is a statute without teeth. And the Commission may be pardoned for having preferred the latter conclusion until the former had been proved." 2 Loss, SECURITIES REGULATION 1408 (2d ed. 1961).

19. "[O]ur fundamental approach to this problem is in the first instance, before we could intelligently make an appraisal of the economic function or of the abuses which

Regardless, the result requires an appreciation of and reliance on the judicial definition of corollary terminology found in other of the regulatory acts.[20] Although the terms "fraud" and "deceit" as they appear through the other regulatory acts have been regarded by some authority as based strictly on common law fraud,[21] the majority of courts have regarded the terms as used in these acts as not to be limited to the narrow confines of common law fraud, but to be liberally interpreted as terms inclusive of all conduct tending to deceive, or to mislead the purchasing public though not designed to perpetrate fraud, or to injure others.[22] In applying this non-common law approach, courts confronted with prosecutions under the other regulatory acts have indicated a duty to provide full and fair disclosure of those facts whose omission would mislead[23] both as to the stock to be sold[24] and the impartial nature of a broker.[25] Yet, a recognition of uncertainty as to the nature of interest requiring a disclosure[26] as to these other acts resulted in an amendment to the

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might exist in that type of organization, to see if we would not get something which approximated a compulsory census." Statement of David Schenker, Chief Counsel, SEC Investment Trust Study, *Hearing Before the Subcommittee of Securities & Exchange of the Senate Committee on Banking & Currency*, 76th Cong., 3d Sess. pt. 1, at 47, 48 (1939).

20. *Cf.* 3 Loss, SECURITIES REGULATION 1515 (2d ed. 1961): "These clauses [sections 206(1)-(2) of the Investment Advisers Act] are modeled on Clauses (1) and (3) of § 17(a) of the Securities Act. Consequently, everything which has been said . . . applies with equal force to investment advisers, *mutatis mutandis*."

21. SEC Rule X-10B-5, 17 C.F.R. § 240.10b-5 (1949), as to the employment of any device, scheme, or artifice to defraud, has been held to be based on common law fraud. Tobacco & Allied Stocks, Inc. v. Transamerica Corp., 143 F. Supp. 323, 327 (D. Del. 1956).

22. See Los Angeles Trust Deed & Mortgage Exch. v. SEC, 264 F.2d 199 (9th Cir. 1959); Seipel v. SEC, 229 F.2d 758 (D.C. Cir. 1955) (per curiam; see 3 Loss, SECURITIES REGULATION 1515-16 & n.120 (2d ed. 1961) for content of parties' briefs); Hughes v. SEC, 174 F.2d 969, 974 (D.C. Cir. 1949); Charles Hughes & Co. v. SEC, 139 F.2d 434, 435-36 (2d Cir. 1943), *cert. denied*, 321 U.S. 786 (1944); SEC v. Torr, 15 F. Supp. 315 (S.D.N.Y. 1936), *rev'd on other grounds*, 87 F.2d 446 (2d Cir. 1937); 3 Loss, SECURITIES REGULATION 1435 (2d ed. 1961); Shulman, *Civil Liability and the Securities Act*, 43 YALE L.J. 227 (1933).

23. "The statute did not require [a securities dealer] to state every fact about stock offered that a prospective purchaser might like to know or that might, if known, tend to influence his decision . . . ." But it did require statements not to be misleading. Otis & Co. v. SEC, 106 F.2d 579, 582 (6th Cir. 1939).

24. Securities Act of 1933, §§ 4(1), 5(a)(1), as amended, 68 Stat. 684 (1954), 15 U.S.C. §§ 77d(1), (a)(1) (1958); SEC v. Ralston Purina Co., 346 U.S. 119 (1953).

25. "When a prospective buyer comes to a broker for advice he supposes that what he gets is an opinion unweighted by personal interest." United States v. Brown, 79 F.2d 321, 325 (2d Cir. 1935).

26. "*Section 9. Creation of rulemaking power over antifraud provisions* . . . .

Because of the general language of the statutory antifraud provision and the absence of any express rulemaking power in connection with them, the SEC has always had doubt as to the scope of the fraudulent and deceptive activities that are prohibited . . . ." Staff memorandum on S. 1182, The Investment Advisers Act of 1940, in explanation of new subsection (4) for § 206, *Hearings before the Subcommittee on*

Investment Advisers Act in 1960;[27] this amendment was passed subsequent to the alleged violation in the instant case. The amendment incorporated an express prohibition of any practice which is "manipulative"[28] and directed the Securities Exchange Commission to draft rules and regulations defining and prescribing "means reasonably designed to prevent such practices, and courses of business as are fraudulent, deceptive, or manipulative."[29] Subsequently, the Commission has issued regulations dealing with registration of stock dealings by investment advisers and their staffs[30] and with types of advertising deemed to be fraudulent, or deceptive.[31]

The court characterized the Investment Advisers Act of 1940 as less comprehensive than either the Securities Act of 1933, or the Securities Exchange Act of 1934.[32] Rather than dealing with the purchase and sale of securities and broker-dealer-customer relationships, it was viewed as but a modest beginning toward regulation of investment advisers, designed "to be a 'compulsory census' of the industry."[33] Recognizing the relationship of trust and confidence existing between an adviser and a purchaser, the court would condemn "scalping" for a third party seller,[34] or advice not rendered in good faith.[35] However, the court failed to so regard personal profit accruing from the predictable market effect of a broker's honest advice.[36] The adherence to the requisite of common law fraud or deceit manifest in the distinction was further expressed by recognition of "the recent warnings of the Supreme Court against excessive judicial expansion of provisions of the securities laws to accomplish objectives believed to be salutary."[37] In post-enactment reflections by both the Securities Exchange Commission[38] and legislative bodies,[39]

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*Securities of the Senate Committee on Banking & Currency*, 86th Cong., 1st Sess. 512, 516 (1959).

27. 74 Stat. 887 (1960), 15 U.S.C. § 80b-6 (Supp. III, 1961).

28. 74 Stat. 887 (1960), 15 U.S.C. § 80b-6(4) (Supp. III, 1961).

29. *Ibid.*

30. 26 Fed. Reg. 10000 (1961), proposing an addition of a para. (12) to 17 C.F.R. § 275. 204-2(a) (Supp. 1961).

31. 17 C.F.R. § 275.206(4)-(1) (Supp. 1962).

32. 306 F.2d at 609.

33. *Id.* at 610.

34. *Id.* at 608.

35. *Id.* at 609.

36. *Ibid.*

37. *Id.* at 609 [citing Blau v. Lehman, 368 U.S. 403 (1962)].

38. Staff memorandum on S. 1182, The Investment Advisers Act of 1940, in explanation of new subsection (4) for § 206, *Hearings Before the Subcommittee on Securities of the Senate Committee on Banking & Currency*, 86th Cong., 1st Sess. 512, 516 (1959).

39. Senate Subcommittee on Legislative Oversight, short section p. 53 of report—from hearings held on September 17th, 1958, transcript, pp. 3753-67; H.R. REP. No. 2179, 86th Cong., 2d Sess. § 9 (1959); S. REP. No. 1760, 86th Cong., 2d Sess. (1960).

the court found substantiation for the stricter view.[40] In addition, the court regarded the 1960 amendment to the act authorizing the prohibition of "manipulative" practices as recognition of the prior inadequacy of the act as a vehicle through which the Commission could prosecute such infractions.[41] The provision of the amendment which constitutes an authorization of the Commission to issue rules and regulations as to specific infractions was regarded as further recognition of the prior inability of the Commissioner, under the act, to prosecute infractions regarded as less than common law fraud or deceit.[42]

The court's recognition of the pre-amendment impotence of the act,[43] as well as the clarity of prohibited practices[44] introduced by the amendment,[45] would scarcely seem to justify a characterization of sections 206(1) and (2) as based upon common law fraud. The Investment Advisers Act of 1940 is but one of a series of regulatory acts of the securities market. In aggregate their philosophy of "let the seller also beware"[46] requires a full disclosure of relevant data through a variety of devices. Except for necessary changes in points of detail, the fact that the prohibited practices of non-common law "fraud" and "deceit" are the same among the acts is exemplary of this common purpose. Although the sterilization of investigative powers[47] distinguishes the 1940 act as to its impotency in aggressive prosecution,[48] the offensive practices remained the same under the act; merely the means of prosecution changed. Consequently, any characterization of the 1940 act as a mere tool for "compulsory census" is reflective of history only, not of purpose. The further contention that the purpose of the act should be confined by the 1960 amendment's introduction of clarity as to prescribed offenses, i.e., "manipulative" practices[49] or an authorization for decree as to specific acts found offensive,[50] is without justification.[51] That offensive practices should be more clearly presented to potential offenders well serves the purpose of the act. Yet, these new vehicles of clarification are not in themselves a panacea to the interpretive problems surrounding the

40. "The history of the 1960 amendment confirms the narrow scope of the initial enactment, in an area highly relevant here." 306 F.2d at 610.
41. *Id.* at 611.
42. *Ibid.*
43. *Id.* at 610.
44. *Id.* at 611.
45. 74 Stat. 887, (1960), 15 U.S.C. § 80b-6(4) (Supp. III, 1961).
46. H.R. Rep. No. 85, 73d Cong., 1st Sess. 2 (1933).
47. See note 17 *supra.*
48. See note 18 *supra.*
49. See text accompanying note 41 *supra.*
50. See text accompanying note 42 *supra.*
51. 306 F.2d at 611 (dissenting opinion).

act. The blank endorsement which Congress has given the Securities and Exchange Commission, allowing the issuance of regulations concerning offensive practices, is subject to the principles of administrative law ensuring an adherence to the scope of the 1940 act.[52] An attempt to ignore the pre-existing purpose of the act and to define its limits by reference to the legislative proceedings some fifteen to twenty years subsequent to the enactment of the language would be unwarranted statutory construction. Rather, it is the origins of the act from which the propriety of prosecuting non-common law fraud must be ascertained. Its dictates suggest that the failure of an investment adviser to inform a subscriber of its own pecuniary interest which directly contravenes its compensated advice may be prosecuted under the Investment Advisers Act of 1940.

## Taxation—Federal Estate Tax—Employer's Payments Into Annuity in Which Decedent's Lifetime Interest Is Subject to a Condition Precedent Are Includible in Gross Estate

Decedent's employer voluntarily and unilaterally established an unfunded deferred compensation plan by which decedent would receive a stated maximum sum in sixty equal monthly installments if he should become totally and permanently disabled.[1] The plan further provided that if decedent received no payments prior to death, the entire amount would be paid in monthly installments to his widow; and if decedent received only part of the payments before death, then the remaining installments would be paid to his widow. Decedent died having received no payments under the plan so that the full amount was paid to the widow.[2] The Commissioner assessed

52. Greene v. Dietz, 247 F.2d 689 (2d Cir. 1957).

1. Decedent was assistant to the president of the Chesapeake and Ohio Railway Company. The company passed a resolution promising to pay certain high ranking officials deferred compensation and death benefits out of the general funds of the corporation.

2. Decedent died two years after the establishment of the plan. It apparently was not contended that this was a life insurance contract which are expressly exempted from estate tax under § 2039(a) of the Internal Revenue Code of 1954. However, it might be argued that this plan was primarily a device to shift the risk of premature death to the employer. Section 20.2039-1(d) of the Treasury Regulations of 1958 provides that when the reserve value of the policy equals the value of the death benefits, then there is no longer an insurance risk, and it is not insurance under § 2039. If the company had set up a reserve and had made annual contributions based on the value of decedent's services, it is unlikely that the reserve would have equalled $100,000, the value of the death benefits, within two years. However, it is doubtful whether an unfunded plan would ever be classified insurance under the test of the regulations. LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES 214 (2d

a deficiency when the value of the payments was not included in the estate tax return, and decedent's estate, having paid the deficiency, filed this petition for a refund. *Held*, for the defendant. Payments made by decedent's employer to his widow pursuant to a deferred compensation plan by which decedent would have received payments if he had become totally and permanently disabled are includible in the gross estate under section 2039 of the Internal Revenue Code of 1954. *Bahen's Estate v. United States*, 305 F.2d 827 (Ct. Cl. 1962).

Prior to 1954 there was considerable doubt as to the includibility in the gross estate of the value of the survivor's interest in joint and survivor type annuities, especially where such an annuity was purchased by decedent's employer.[3] The primary purpose for the passage of section 2039 was to include the value of the survivor's interest in such annuities whether purchased by the decedent or his employer.[4] It is provided in section 2039 that 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 . . ." shall be includible in the gross estate if under the contract the annuity "was payable to the decedent, or the decedent possessed the right to receive such annuity or payment . . . for his 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."[5] Congress, for constitutional or other reasons, considered it necessary to require some sort of lifetime interest in the decedent under the contract or agreement in order to constitute a taxable transfer.[6] The main problem presented in the instant case is whether decedent's right to receive payments only if he should become totally disabled, a future conditional right, is such a lifetime interest as that contemplated by Congress. The position of the treasury regulations, which is adopted by the instant case, is that the term "possessed the right" means that decedent must

ed. 1962); see Note, *Estate Taxation of Employee Death Benefits*, 66 YALE L.J. 1217, 1233 (1957).

3. See, *e.g.*, Commissioner v. Twogood's Estate, 194 F.2d 627 (2d Cir. 1952); Higgs' Estate v. Commissioner, 184 F.2d 427 (3d Cir. 1950).

4. H.R. REP. No. 1337, 83d Cong., 2d Sess. 90 (1954); S. REP. No. 1622, 83d Cong., 2d Sess. 123 (1954).

5. INT. REV. CODE OF 1954, § 2039(a). Section 2039(b) provides in part: "For purposes of this section, any contribution by the decedent's employer or former employer to the purchase price of such contract or agreement . . . shall be considered to be contributed by the decedent if made by reason of his employment."

6. The estate tax is a tax upon the right to transfer property at death. New York Trust Co. v. Eisner, 256 U.S. 345 (1921). It might be argued that there is no transfer by decedent where he has no lifetime interest. However, it would probably be constitutional either on the theory that the decedent makes a constructive transfer by performing services or that the provision is necessary to prevent avoidance of the tax. Helvering v. City Bank Farmers Trust Co., 296 U.S. 85 (1935).

only have possessed "an enforceable right to receive payments at some time in the future" and that such future right may be "conditional or unconditional."[7] Therefore, it is necessary to consider whether this is a fair interpretation of "possessed the right." Although this is a case of first impression under section 2039, there has been some discussion of this problem by text writers, and they have voiced considerable doubt as to the correctness of the interpretation given by the treasury regulations.[8] Congress employed language in section 2039 very similar to that used in section 2036,[9] which taxes transfers where decedent retained a life interest. It was expressly stated in the committee reports that the rules applicable under section 2036 should be applied in construing section 2039.[10] The courts in construing section 2036 have held that the decedent has a "right to income" only where he has retained a property right. Contract rights subject to conditions precedent have been held insufficient to satisfy section 2036.[11] Contingent contract rights have also generally been considered mere expectancies under other estate tax sections.[12] Contingent estates in

7. Treas. Reg. § 20.2039-1(b)(1) (1958).

8. Kramer, *Employee Benefits and Federal Estate and Gift Taxes,* 1959 DUKE L.J. 341, 359; Note, *Contract Rights Subject to Conditions Precedent,* 67 YALE L.J. 467, 475 (1958); Note, *Estate Taxation of Employee Death Benefits,* 66 YALE L.J. 1217, 1223 (1957). This doubt as to the Treasury's interpretation is aptly summed up as follows: "The regulation implies that decedent had the requisite 'right to receive' if, at the moment before death, a possibility existed that he would, at some future time in life, possess an enforceable claim to payments. Thus, if decedent at death possessed an expectancy, as in *Goodman,* a possibility of future vesting would justify inclusion of the contract rights in the gross estate under section 2039. But this interpretation—equating possibility with right—overreaches the statutory language." 67 YALE L.J. at 475.

9. INT. REV. CODE OF 1954, § 2036. It is provided in § 2036 (a) that the gross estate shall include the value of property transferred by the decedent in which "he has retained for his 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: (1) the possession or enjoyment of, or the right to the income from, the property . . . ."

10. H.R. REP. No. 1337, 83d Cong., 2d Sess. A316 (1954); S. REP. No. 1622, 83d Cong., 2d Sess. 472 (1954).

11. *E.g.,* Commissioner v. Twogood's Estate, 194 F.2d 627 (2d Cir. 1952); William S. Miller, 14 T.C. 657 (1950). In the *Twogood* case decedent had the right to receive an annuity from his employer which was contingent upon his meeting certain requirements for retirement. In the opinion of the court, "[N]o life interest was retained by the decedent in whatever his wife received. . . . All that decedent had prior to his reaching his retirement date was a right to receive an annuity which was contingent upon his meeting the requirements for retirement." 194 F.2d at 629.

12. The leading case on the property-expectaney problem is Dimock v. Corwin, 19 F. Supp. 56 (E.D.N.Y. 1937), *aff'd on other grounds,* 99 F.2d 799 (2d Cir. 1938), *aff'd,* 306 U.S. 363 (1939), which held contract rights forfeitable at the whim of one's employer were not property. The rule of the *Dimock* case has been extended to include contingencies generally. See Libbey v. United States, 147 F. Supp. 383 (N.D. Cal. 1956); Molter v. United States, 146 F. Supp. 497 (E.D.N.Y. 1956); Hanner v. Glenn, 111 F. Supp. 52 (W.D. Ky. 1953), *aff'd per curiam,* 212 F.2d 483 (6th Cir. 1954); Albert L. Salt, 17 T.C. 92 (1951); William S. Miller, 14 T.C. 657 (1950); M. Hadden Howell, 15 T.C. 224 (1950); Eugene F. Saxon, 12 T.C. 569 (1949); Emil

property, on the other hand, have been treated as property rights under section 2036.[13]

The court in the instant case relied primarily on the regulations in finding that decedent "possessed the right" to payments within the meaning of section 2039.[14] However, after discussing at length the position of the regulations, the court proceeded to attempt to justify its holding independently of the regulations. The court reasoned from the wording of the statute that for "possessed the right" to have any meaning in addition to "was payable," it must be construed to apply to payments coming due in the future. Therefore, the court argued, section 2039 must apply to contingent payments because all future payments are contingent on decedent living until a specified future time. Consequently, the court concluded, since section 2039 obviously applies to one type of contingency and makes no distinction between types of contingencies, it must apply to all contingent rights to payments.[15] Finally, the court relied on decisions holding that "right to income" under section 2036 applies to situations where the transferor retains a secondary life estate contingent on surviving the first life tenant.[16]

The decision in the instant case apparently stands for the proposition that interests which were considered expectancies and not property under prior sections of the estate tax law are taxable under section 2039. There is little support for this proposition outside the regulations.[17] If Congress had not considered it necessary for decedent to possess a lifetime property interest in order to make a constitutional transfer of property, it is doubtful that any interest in the decedent would have been required. The same economic benefit passes to the survivor at decedent's death whether he possessed a lifetime interest or not, so policywise there appears to be no reason to discriminate between the two situations. The courts construing similarly worded

L. Stake, 11 T.C. 817 (1948). See also, for a discussion of the property-expectancy problem under the estate tax, Kramer, *Employee Benefits and Federal Estate and Gift Taxes*, 1959 DUKE L.J. 341, 348; Note, *Contract Rights Subject to Conditions Precedent*, 67 YALE L.J. 467 (1958).

13. Commissioner v. Arent's Estate, 297 F.2d 894 (2d Cir. 1962), *cert. denied*, 369 U.S. 848 (1962); Marks v. Higgins, 213 F.2d 884 (2d Cir. 1954); Commissioner v. Estate of Nathan, 159 F.2d 546 (7th Cir. 1947), *cert. denied*, 334 U.S. 843 (1948).

14. 305 F.2d at 831.

15. *Ibid.* The court not only is assuming that "possessed the right" applied to future payments, but also that all payments coming due in the future are conditioned on survivorship. This reasoning does not appear to be very convincing.

16. *Id.* at 832.

17. The court stated: "Unless they violate the statute they seek to implement, such Treasury Regulations must be accepted in the areas they occupy." *Id.* at 829. The court cites the regulations much as if they were binding authority, without seriously questioning whether they represent a correct interpretation. In a case of first impression under an ambiguous statute like § 2039, such an approach would seem to result in resolving any ambiguity in favor of the Treasury.

sections of the estate tax law have held unanimously that decedent must have possessed a lifetime property interest in order to make a taxable transfer and that a contract right subject to a condition precedent is not such an interest. The decisions under section 2036 which hold that contingent life estates are property would seem to lend little support to the proposition that contingent contract rights are property.[18] The interpretation given by the regulations and the court appears desirable from a policy standpoint, since many, if not most, employee benefits are subject to various contingencies which, if permitted to exempt the benefits from the estate tax, would largely limit section 2039 as a comprehensive tax upon employee death benefits.[19] However, even if it be assumed that section 2039 was intended to tax private annuities paid by reason of employment,[20] it does not appear that it can be properly construed to tax any annuity where decedent's lifetime interest is a bare contract right subject to a condition precedent.[21]

18. Most jurisdictions recognize a contingent remainder as a valuable present interest in property which is freely alienable inter vivos. Even though they are contingent, such interests are nevertheless considered property. According to Professor Simes, "[I]t can be said that modern law recognizes the contingent future interest as an existing thing, not as something which will be acquired in the future, and that the policy of the law is generally to permit people to alienate property interests which they have. . . ." SIMES, FUTURE INTERESTS § 32, at 103 (1951). The courts have not expressly made any distinction but are uniform in holding contingent remainders property and contingent contract rights expectancies for purposes of estate taxation. See notes 11 and 12 *supra*.

19. See Kramer, *Employee Benefits and Federal Estate and Gift Taxes*, 1959 DUKE L.J. 341, 358. This expectancy loophole invites the avoidance of the tax by the insertion of contingencies by employers for the sole purpose of escaping the tax. It is unfortunate that this loophole was incorporated into § 2039, but since it was, it will be difficult for the courts to ignore. Whether the decedent had a lifetime interest or not would seem to be largely irrelevant since a valuable interest created by reason of his employment passes in his estate, and in the interest of fairness, such interest should be taxed equally in either case.

20. It might be argued from the language of § 2039(b) that private annuities paid directly out of the funds of the employer are not to be taxed to the employee's estate. Section 2039(b) states that § 2039(a) is applicable "to only such part of the value of the annuity or other payment receivable under such contract or agreement as is proportionate to that part of the purchase price therefor contributed by the decedent. . . . Any contribution by the decedent's employer or former employer to the purchase price of such contract or agreement . . . shall be considered to be contributed by the decedent if made by reason of his employment." In a private annuity such as the one in the instant case, it is difficult to find a "purchase" of an annuity by the employer or a "contribution" in the ordinary sense of these words. See Kramer, *Employee Benefits and Federal Estate and Gift Taxes*, 1959 DUKE L.J. 341, 368.

21. The recent decision in Estate of Edward H. Wadenitz, 39 T.C. No. 97 (March 20, 1963), purported to follow the principal case, but was placed upon a much more narrow ground. The court held that a future conditional right to an annuity was a sufficient lifetime interest in the decedent to satisfy the requirements of § 2039 where the conditions were entirely within the control of the decedent.

## Taxation—Federal Estate Tax—Retained Administrative Powers Over Trust Held Not a Power To Alter or Amend Within Section 2038

Coexecutors brought an action for refund of federal estate taxes paid under protest. The deceased settlor, one of the co-trustees, created an inter vivos trust for his wife as life tenant and his daughters as remaindermen. He retained the following powers: (1) the power to direct the investment policy; (2) the power to invade the corpus for "happiness" of beneficiaries and for education of remaindermen; (3) the power to pay income to life tenant, and upon his death, to the remaindermen.[1] Upon settlor's death, a return was filed excluding the assets of the trust property. The Commissioner asserted a deficiency based upon the retained powers of administration. The coexecutors paid the deficiency and filed a claim for refund which was denied by the Commissioner. The district court rendered a judgment for the coexecutors. On appeal, *held*, affirmed. The powers retained by the settlor were limited by an ascertainable and judicially enforceable external standard and did not give the settlor power to alter or amend the trust within the meaning of section 811(d)(2) of the 1939 Code (now section 2038(a)(2)).[2] *United States v. Powell*, 307 F.2d 821 (10th Cir. 1962).

The Internal Revenue Service has met with few setbacks over the years in its construction of the critical language of section 2038: "[the] power . . . to alter, amend, or revoke."[3] The Supreme Court has held that the terms "alter and amend" are not synonymous with "revoke,"[4] thereby allowing the application of section 2038 to irrevocable trusts. In determining whether reserved powers affected

1. The last power brought up the question of the duty to administer the trust so as to preserve a fair balance between beneficiaries.

2. Int. Rev. Code of 1939, ch. 3, § 811(d)(2), 53 Stat. 121, is the applicable section since the settlor executed the trust instrument in 1932.

3. INT. REV. CODE OF 1954, § 2038(a)(2). The prototype of what is now § 2038 was enacted in 1924. It was changed from time to time and took on its present form in 1936. It provides that the gross estate shall include all property transferred by the decedent "where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any other person, to alter, amend, or revoke. . . ."

4. Porter v. Commissioner, 288 U.S. 436 (1933). The Court held that § 2038 was intended by Congress to reach property in which the decedent had no interest of the type that would be subject to § 2033, and that the terms "alter" and "amend" in § 2038 were not synonyms for "revoke." The Court further said: "We need not consider whether every change, however slight or trivial, would be within the meaning of the clause. Here the donor retained until his death power enough to enable him to make a complete revision of all that he had done in respect of the creation of the trusts even to the extent of taking the property from the trustees and beneficiaries named and transferring it absolutely or in trust for the benefit of others. So far as concerns the tax here involved, there is no difference in principle between a transfer subject to such changes and one that is revocable." *Id.* at 443.

the beneficial enjoyment of the property, some courts have stated that if the death of the settlor changes or firms up the relationships between the parties, there has been an alteration sufficient to invoke section 2038.[5] The "termination of contingencies" upon which the right of enjoyment is based, on enabling such right to vest in a particular beneficiary, has been used as a criterion by the Supreme Court.[6] The regulations do not require that the identity of a particular beneficiary be subject to change, but call for the application of section 2038 when a trust instrument reserves a power affecting the "time or manner of enjoyment of property or its income . . . ."[7] One of the most important cases in this area is *State Street Trust Co. v. United States*.[8] Until this decision the Commissioner had generally been unsuccessful in trying to assert that the retention of investment powers brought the corpus into the gross estate.[9] Before the *State Street* decision, the test apparently was whether the reserved power effected any substantial change in the beneficial enjoyment of the property in question. In deciding *State Street* the First Circuit relied upon a case[10] that set forth a test which seems applicable to the instant situation—that of a "determinable external standard" and an instrument "subject to court control."[11] The combination of an external standard and court control was held to be enough to put the trust beyond the discretionary control of the settlor. This decision implied that a power in the trustee to do an act only if he satisfies an external standard is a contingent power—contingent upon that standard's being met. Until the standard is met, the power is simply an expectancy and should not cause the inclusion of the trust in the settlor-trustee's estate.[12] The retention of investment powers alone is generally not enough to warrant inclusion of the corpus in the gross estate.[13] When this power is combined with the power to invade

5. Porter v. Commissioner, *supra* note 4. See also United States v. Wells, 283 U.S. 102 (1931).

6. It seems obvious that "one who has the power to terminate contingencies upon which the right of enjoyment is staked, so as to make certain that a beneficiary will have it who may never come into it if the power is not exereised, has power which affects not only the time of the enjoyment but also the person or persons who may enjoy the donation." Commissioner v. Estate of Holmes, 326 U.S. 480, 487 (1946).

7. "[Section] 2038 is applicable to any power affecting the time or manner of enjoyment of property or its income, even though the identity of the beneficiary is not affected." Treas. Reg. § 20.2038-1(a)(3) (1961).

8. 263 F.2d 635 (1st Cir. 1959).

9. Estate of Arnold Resch, 20 T.C. 171 (1953); Estate of John W. Neal, 8 T.C. 237 (1947); Estate of George W. Hall, 6 T.C. 933 (1946); Estate of Henry S. Downe, 2 T.C. 967 (1943).

10. Jennings v. Smith, 161 F.2d 74 (2d Cir. 1947).

11. *Ibid.*

12. LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES ch. 8, § 22 (1956).

13. See Fifth Ave. Bank v. Nunan, 59 F. Supp. 753 (E.D.N.Y. 1945); Estate of George W. Hall, 6 T.C. 933 (1946); Estate of Henry S. Downe, 2 T.C. 967 (1943).

the corpus for the "comfort, support, and/or happiness"[14] of the beneficiaries, the courts have usually held the trust includable on the grounds of an insufficient external standard.[15] The power to control the remainderman's interest is one that frequently is categorized as a power to alter or amend. If a court feels that any power substantially affects the interests of the life tenants and the remaindermen, it will usually hold such a power to be one to alter or amend.[16]

In holding in the instant case that the settlor-trustee's powers to control the investment policy and invade the corpus did not give him the power to alter or amend the trust within the provisions of section 2038, the Tenth Circuit relied heavily on the fact that the discretionary powers conferred upon the trustee were subject to review by the equity courts of Kansas.[17] Although counsel for the United States argued that the investment powers gave the trustee unbridled power to choose between the life tenant (the wife) and the remaindermen (the daughters)[18] the court maintained that the fact that there were *two* beneficiaries imposed a duty upon the trustee to deal in an impartial manner.[19] The court felt that this duty to deal in a fair manner provided an ascertainable, external, and judicially established standard, capable of being enforced by a court of equity.[20] The court went on to say that they had no doubt that the courts of Kansas would intervene if the trustee in the exercise of his investment powers displayed partiality as between the life tenant and the remainder beneficiaries. The court distinguished *State Street*[21] on its facts, in that the First Circuit had held

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See also Dominick's Estate v. Commissioner, 152 F.2d 843 (2d Cir. 1946).

14. The Supreme Court feels that "only where the conditions on which the extent of the invasion of the corpus depends are fixed by reference to some readily ascertainable and reliably predictable facts . . . will . . . elements of speculation be weeded out." Merchant's Nat'l Bank v. Commissioner, 320 U.S. 256 (1943).

15. The general rule seems to be that the trust will be includable if the grantor is a trustee and a readily determinable external standard is not available. See Chase Nat'l Bank v. Commissioner, 225 F.2d 621 (8th Cir. 1955); Mollenberg's Estate v. Commissioner, 173 F.2d 698 (2d Cir. 1949); Blunt v. Kelley, 131 F.2d 632 (3d Cir. 1942). See also Merchant's Nat'l Bank v. Commissioner, *supra* note 14.

16. "Our conclusion is that the grantor of these trusts retained to himself as trustee a sufficient power to alter or amend to affect very substantially the interests of the life tenants and the remaindermen, even though he could not, unless he lost all the money of the trusts by unfortunate investments, completely eliminate the remaindermen. He could certainly affect them by many of the things he kept power in himself to do." Commissioner v. Hager's Estate, 173 F.2d 613, 616 (3d Cir. 1949).

17. "It is well settled, under the law of Kansas, that a court of equity has power to review the exercise of discretionary powers conferred upon trustees and to correct any abuse in the exercise of such discretion." United States v. Powell, 307 F.2d 821, 824 (10th Cir. 1962).

18. *Ibid.*

19. *Id.* at 825.

20. *Ibid.*

21. See note 8 *supra.*

that the powers of the trustee in that case were so broad and all inclusive as not to be within any limitation the Massachusetts courts could impose. The court went on to hold that the term "happiness," as used in the trust instrument,[22] was not a vague or undefinable term but constituted a judicially enforceable external standard. Bothered by case law that held "happiness" to be an insufficient standard,[23] the court turned to *Webster's New International Dictionary*[24] for a definition and equated "happiness" to "welfare" and "comfort," well settled external standards.[25] Counsel's argument that the powers retained, if not sufficiently broad individually, were sufficiently extensive cumulatively was turned aside by an axiom borrowed from Judge Magruder's dissenting opinion in *State Street*: "the whole cannot be greater than the sum of its parts. . . ."[26]

In comparing the decision in the instant case with *State Street*, the essential difference seems to be the attitude of the courts with respect to the effectiveness of the control exercised by the respective state courts. While the Tenth Circuit felt that the Kansas courts were fully capable of reviewing the powers retained by the trustee, the First Circuit correctly concluded that no court of equity could exercise jurisdiction upon so broad a base.[27] As a practical matter, the probability of a beneficiary seeking the aid of a court of equity in such a close family matter as the one at hand is extremely remote. Further, even the respective beneficiaries would probably not be aware of the shifting of the benefits, much less a court of equity. While the instant case asks an important question, namely, are the management provisions of so broad a scope that they cut across the dispositive provisions of the trust instrument, enabling the grantor to affect the enjoyment of the trust property by shifting beneficial interests, it is submitted that the *State Street* test is more realistic.[28] In that case the First Circuit lumped all of the administrative powers of the trustee together and found them to be offensively broad. While no individual power was held to be sufficiently broad to warrant the tag of section 2038, the court indicated that the combination of powers enabled the trustees to shift the economic benefits between the life tenant and remaindermen. The Tenth Circuit's confidence in the Kansas courts in the instant case could have been strengthened by a more precise delineation of the limits of equity's power to review a trustee's acts. The fact that the court had to juggle

22. 307 F.2d at 826.
23. See notes 14, 15 *supra*.
24. WEBSTER, NEW INTERNATIONAL DICTIONARY 1136 (2d ed. 1934).
25. 307 F.2d at 828.
26. 263 F.2d at 642.
27. See note 8 *supra*.
28. *Ibid.*

various definitions[29] of the word "happiness" to arrive at a definable external standard suggests that the "beneficial enjoyment" test does not solve the problems posed by the facts of this case. It is submitted that the "sum of the administrative powers" test offers a touchstone for judicial review and provides a higher degree of certainty for the estate planner.

## Taxation—Federal Income Taxation—Legal Expenses Incurred by Husband To Protect His Property Against Claim of Wife Arising from Marital Dispute Are Not Deductible

After *Baer v. Commissioner*,[1] lower federal courts were frequently confronted with the question of whether any portion of a husband's attorney's fees emanating from a divorce in which the wife claimed a portion of her spouse's income-producing property was deductible as an expense incurred for the "management, conservation, or maintenance of property held for the production of income." Two recent cases confronted the Supreme Court with this question. In the first case, respondent, president and principal owner of three General Motors dealerships, litigated his wife's California community property claims arising from divorce.[2] The California Supreme Court granted respondent a divorce and denied his wife's alimony and community property claims in the entirety.[3] Thereafter, the Commissioner of Internal Revenue denied respondent's legal expense deduction on the ground that it was a personal expense. In a refund suit, the Court of Claims held that eighty per cent of the legal fees were attributable to respondent's defense against his wife's community property claims, and thus were deductible under section 23(a)(2) of the 1939 Code, the predecessor to section 212(2) of the 1954 Code.[4]

29. See note 24 *supra*.

1. 196 F.2d 646 (8th Cir. 1952).

2. The husband's primary source of income was the salary and dividends he received from the three automobile dealerships. United States v. Gilmore, 372 U.S. 39, 41 (1963). The wife's claims had two aspects: first, that earnings retained by the corporations were the product of her husband's services (these were considered community property under California law); second, that she was the innocent party in the divorce proceeding and therefore was entitled to more than a one-half interest in the community property under California statute. *Id.* at 41-42.

If the wife had proven her charges of marital infidelity, the respondent might have lost the General Motors franchises because General Motors had the right to terminate them if any interest in the dealership was transferred without its consent. See Gilmore v. United States, 290 F.2d 942, 946 (Ct. Cl. 1961).

3. Gilmore v. Gilmore, 45 Cal. 2d 142, 287 P.2d 769 (1955).

4. Gilmore v. United States, 290 F.2d 942, 948 (Ct. Cl. 1961).

On certiorari in the United States Supreme Court, *held,* reversed and remanded. Legal expenses incurred by a husband in a divorce proceeding are personal and not deductible under section 23(a)(2) of the 1939 Code, regardless of the potential consequences of the wife's claims on the husband's income-producing assets. *United States v. Gilmore,* 372 U.S. 39 (1963).

In the second case, respondent, the president of a family owned publishing company, was sued for divorce by his wife. At the time of this proceeding, the respondent and his wife each owned a twenty-eight per cent interest in the corporation and jointly owned the real estate on which the company was situated. After extended negotiations between the parties' attorneys, a property settlement was reached.[5] Thereafter, the South Carolina divorce court granted the wife a divorce, approved the property settlement, and ordered respondent to pay the attorneys' fees for both parties. The Commissioner disallowed respondent's deduction for these attorneys' fees. In a refund suit, the district court held that the attorneys' fees were deductible expenses within section 212(2) of the 1954 Code.[6] The court of appeals affirmed.[7] On certiorari in the United States Supreme Court, *held,* reversed. Legal expenses incurred by a husband in resolving his wife's property interests in a marital dispute are personal and not deductible under section 212(2) of the 1954 Code, even though the expenditures were utilized to arrange a stock transfer and business lease and to assure the husband control of the business through the use of a trust arrangement. *United States v. Patrick,* 372 U.S. 53 (1963).

Prior to the 1942 amendment of the 1939 Code, attorney's fees were not deductible unless they were an ordinary and necessary business expense.[8] To alleviate inequities resulting to the non-business taxpayer, Congress amended the 1939 Code, thereby creating a new category of deductions, non-trade or non-business expenses.[9]

5. As a result of the settlement, the respondent obtained his wife's 28% interest for $112,000, a new long-term lease on the real property on which the company was situated was executed, and this realty was transferred to a trust. United States v. Patrick, 372 U.S. 53, 54-55 (1963).

6. Patrick v. United States, 186 F. Supp. 48 (W.D.S.C. 1960).

7. Patrick v. United States, 288 F.2d 292 (4th Cir. 1961).

8. See, *e.g.,* Frank G. Robbins, 8 B.T.A. 523 (1927); David G. Joyce, 3 B.T.A. 393 (1926). If the expenses were personal, they were not deductible. Int. Rev. Code of 1939 § 24(a)(1), as amended, ch. 619, § 127, 56 Stat. 826 (1942).

9. As a result of Higgins v. Commissioner, 312 U.S. 212 (1941), expenses incurred by an individual in investment activities were personal and not deductible even though a professional stock broker was entitled to a business expense deduction for identical expenditures. In hearings before the House Ways and Means Committee, the *Higgins* decision was criticized and the following amendment to § 23 (deductions from gross income) of the 1939 Code was recommended. "§ 23(3) *Nonbusiness expenses.* —All the ordinary and necessary expenses paid or incurred during the taxable year,

A non-business expense, to be deductible, must be: (1) ordinary and necessary, (2) paid or incurred during the taxable year, (3) for the production or collection of income, or for management, conservation, or maintenance of property held for the production of gross income,[10] and (4) must fall outside the statutory nondeductibility sanctions, such as section 24(a)(1) of the 1939 Code (section 262 of the 1954 Code).[11] In determining whether legal expenditures emanating from a divorce are deductible, two factual situations must be considered. First, if no alimony or property settlement is involved in the divorce, the legal expenses of neither party are deductible.[12] Second, where the divorce also involves alimony, the wife's legal fees attributable to

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other than those paid or incurred in carrying on any trade or business, to the extent that such expenses were paid or incurred with respect to the production or collection of, or to the management, protection, or conservation of property producing income required to be included in gross income under this chapter." *Hearings on the Revenue Revision of 1941 Before the House Committee on Ways and Means*, 77th Cong., 1st Sess. 165 (1941).

Section 23(a)(2) of the 1939 Code provides: "(2) Non-Trade or Non-Business Expenses—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income."

Section 212 of the 1954 Code retains these basic provisions. It provides: "In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—

(1) for the production or collection of income;
(2) for the management, conservation, or maintenance of property held for the production of income; or
(3) in connection with the determination, collection, or refund of any tax."

10. "This amendment allows a deduction for the ordinary and necessary expenses of an individual paid or incurred during the taxable year for the production and collection of income, or for the management, conservation, or maintenance of property held by the taxpayer for the production of income, whether or not such expenses are paid or incurred in carrying on a trade or business. . . .

"Expenses, to be deductible under section 23 (a)(2), must be ordinary and necessary, which rule presupposes that they must be reasonable in amount and must bear a reasonable and proximate relation to the production or collection of income, or to the management, conservation, or maintenance of property held for that purpose.

"A deduction under this section is subject, except for the requirement of being incurred with a trade or business, to all the restrictions and limitations that apply in the case of the deduction under section 23(a)(1)(A) of an expense paid or incurred in carrying on any trade or business." H.R. REP. No. 2333, 77th Cong., 2d Sess. 74-75 (1941); S. REP. No. 1631, 77th Cong., 2d Sess. 87-88 (1941). See generally 4 MERTENS, FEDERAL INCOME TAXATION §§ 25 A.01-.09a (rev. 1960).

From the legislative history and subsequent case law it is evident that the business expense and non-business expense deduction provisions are comparable and *pari materia*. See Trust Under the Will of Bingham v. Commissioner, 325 U.S. 365, 373-74 (1945).

11. See Dohan, *Deductibility of Non-Business Legal and Other Professional Expenses; Expenses for Creation or Protection of Income or Property, Divorce, etc.*, N.Y.U. 17TH INST. ON FED. TAX 579, 581 (1959). Personal or family expenses are not deductible under the 1939 Code. Note 9 *supra*. See INT. REV. CODE OF 1954, § 262.

12. Treas. Reg. § 1.262-1(7) (1960).

the collection of alimony are deductible;[13] whether the husband's legal fees are deductible depends on the interpretation of the statutory language "for management, conservation, or maintenance of property" of section 23(a)(2) of the 1939 Code.[14] Nowhere are these terms defined in the Code, legislative history,[15] or the Treasury Regulations, although the Regulations provide that attorney's fees emanating from a divorce are "generally" not deductible.[16] Since the deduction is not expressly prohibited in all situations, it is necessary to resort to case law to determine when the fees are deductible.

Examination of case law reveals that a split exists among the federal courts concerning whether the husband's legal expenditures are deductible. The courts denying deductibility follow *Lykes v. United States*[17] (a federal gift tax case) where the Court said that deducti-

13. "[T]he part of an attorney's fee and the part of the other costs paid in connection with a divorce, legal separation, written separation agreement, or a decree for support, which are properly attributable to the production or collection of amounts includible in gross income under section 71 are deductible by the wife under section 212." *Ibid.* Fees expended by the wife to secure an increase in alimony are also deductible as an ordiuary and necessary expense incurred for the production of income. Elsie B. Gale, 13 T.C. 661 (1949), *aff'd*, 191 F.2d 79 (2d Cir. 1951); Barbara B. Le Mond, 13 T.C. 670 (1949). In spite of this regulation, some courts require that legal expenses be capitalized. Shipp v. Commissioner, 217 F.2d 401 (9th Cir. 1954); Robert L. Wilson, 37 T.C. No. 28 (1961).

14. See 4 MERTENS, FEDERAL INCOME TAXATION § 25 A.09a (rev. 1960). See also Brodsky & McKibbin, *Deduction of Non-Trade or Non-Business Expenses*, 2 TAX. L. REV. 39 (1946); Brookes, *Litigation Expenses and the Income Tax*, 12 TAX L. REV. 241 (1957); Brown, *Tax Effects to Client of Legal Fees Paid*, 35 TAXES 808 (1957); Dohan, *Deductibility of Non-Business Legal and Other Professional Expenses; Expenses for Creation or Protection of Income or Property, Divorce, etc.*, N.Y.U. 17TH INST. ON FED. TAX 579 (1959); McDonald, *Deduction of Attorney's Fees for Federal Income Tax Purposes*, 103 U. PA. L. REV. 168 (1954); *Nahstol, Non-Trade and Non-Business Expense Deductions*, 46 MICH. L. REV. 1015 (1948).

15. See 4 MERTENS, FEDERAL INCOME TAXATION § 25 A.09a (rev. 1960); *Supreme Court Says Property Settlement Legal Fees Are Not Deductible; Conflict Resolved*, 18 J. TAXATION 214 (1963).

In defining the scope of "management," the Court in Trnst Under the Will of Bingham v. Commissioner, 325 U.S. 365 (1945), said that the cost of distributing the trust corpus was "quite as much expenses of a function of 'management' of the trust property as were expenses incurred in producing the trust income." *Id.* at 375. "Since there is no requirement that business expenses be for the production of income, there is no reason for that requirement in the case of like expenses of managing a trust, so long as they are in connection with the management of property which is held for the production of income." *Id.* at 374. Since most courts appear to consider management and conservation interchangeably, the broad definition of management set forth in *Bingham Trust* would seem to apply in interpreting the meaning and scope of "conservation." See 4 MERTENS, FEDERAL INCOME TAXATION § 25 A.09a (rev. 1960).

16. "Generally, attorney's fees and other costs paid in connection with a divorce, separation, or decree for support are not deductible by either the husband or the wife." Treas. Reg. § 1.262-1(7) (1960).

17. 343 U.S. 118 (1952). See, *e.g.*, Harris v. United States, 275 F.2d 238 (9th Cir. 1960); Lewis v. Commissioner, 253 F.2d 821, 826-27 (2d Cir. 1958); Tressler v. Commissioner, 228 F.2d 356, 361 (9th Cir. 1955) (the *Baer* rule was accepted but inapplicable because the dispute concerned the question of liability, not the means of payment); Smith's Estate v. Commissioner, 208 F.2d 349, 354 (3d Cir. 1953); Howard

bility "turns wholly upon the nature of the activities to which they [the attorney's fees] relate."[18] Under this view, the character of the expense (business or personal) depends on whether it originated from the pursuit of income-producing activity. A contrary line of authority allowing the deduction follows *Baer v. Commissioner.*[19] In *Baer* the taxpayer, president of a department store, deducted legal expenses incurred resisting his wife's divorce claim. The wife claimed one-sixth of the taxpayer's estate, a substantial portion of which consisted of stock in the department store. The court distinguished *Lykes*[20] and allowed the taxpayer's deduction because the "expenditure had a proximate and direct relation to the conservation and maintenance of specific property, the ownership or control of which enabled the petitioner to receive income."[21] The *Baer* approach

v. Commissioner, 202 F.2d 28, 30 (9th Cir. 1953); O'Loughlin v. United States, 192 F. Supp. 520 (D.N.J. 1961); Bonnyman v. United States, 156 F. Supp. 625 (E.D. Tenn. 1957), *aff'd,* 261 F.2d 835 (1958); Henry M. Rockwell, 37 T.C. No. 31 (1961) (attorney's fees arising out of defense of a suit for breach of promise to marry are personal expenses).

18. 343 U.S. at 123. "Legal expenses do not become deductible merely because they are paid for services which relieve a taxpayer of liability. That argument would carry us too far. It would mean that the expense of defending almost any claim would be deductible by a taxpayer on the ground that such defense was made to help him keep clear of liens whatever income-producing property he might have. For example, it suggests that the expense of defending an action based upon personal injuries caused by a taxpayer's negligence while driving an automobile for pleasure should be deductible. Section 28 (a)(2) never has been so interpreted by us. It has been applied to expenses on the basis of their immediate purposes rather than upon the basis of the remote contributions they might make to the conservation of a taxpayer's income-producing assets by reducing his general liabilities." *Id.* at 125.

"An expense (not otherwise deductible) paid or incurred by an individual in determining or contesting a liability asserted against him does not become deductible by reason of the fact that property held by him for the production of income may be required to be used or sold for the purpose of satisfying such liability." Treas. Reg. § 1.212-1(m) (1960).

19. 196 F.2d 646 (8th Cir. 1952). See, *e.g.,* Owens v. Commissioner, 273 F.2d 251 (5th Cir. 1959); Bowers v. Commissioner, 243 F.2d 904 (6th Cir. 1957); Aller v. United States, 51 Am. Fed. Tax. R. 1341 (S.D. Cal. 1956); McMurty v. United States, 132 F. Supp. 114, 116 (Ct. Cl. 1955) (*Baer* rule accepted and the relevant factors necessary to invoke rule stated).

20. In distinguishing *Lykes* the court said: "The services in that case were relative to property which the taxpayer had given away, and, as pointed out by the court, thereby reduced, rather than conserved, the property held by him for income-producing purposes. The activities of the attorneys in the instant case, on the other hand, were directed to the conservation and maintenance of property held by their client for income producing purposes. The facts in the Lykes case are so unlike those in the case at bar as to rob it of any persuasive force. Lykes made gifts to members of his family—clearly a family transaction which had nothing to do with the conservation or maintenance of specific property held by him for income producing purposes." Baer v. Commissioner, *supra* note 19, at 652-53.

21. *Id.* at 651. Speaking of *Baer* and related cases the court in Dallman v. United States, 191 F. Supp. 478 (N.D. Cal. 1961), said: "The exception carved out by the authorities is explicit: a deduction may be taken only when the controversy goes not to the question of liability but to the manner in which it might be met." *Id.* at 479.

Another case, Deem v. United States, 209 F. Supp. 369 (D. Colo. 1962), in dis-

determines the expense characterization from its consequences upon the taxpayer's income-producing activities, rather than its origin. Some courts follow neither view but require the taxpayer to capitalize legal expenditures.[22]

The Supreme Court in *Gilmore* said that the legislative history and prior case law indicate that the family expense restriction (section 24(a)(1), now section 262) is a limitation on the scope of the non-business expense deduction (section 23(a)(2) now section 212 (2)); thus only business expenses, expenses that relate to a profit-seeking purpose, are within section 23(a)(2). In synthesizing several previous decisions,[23] the Court said:

> The principle we derive from these cases is that the characterization, as "business" or "personal," of the litigation costs of resisting a claim depends on whether or not the claim *arises in connection with* the taxpayer's profit-seeking activities. It does not depend on the *consequences* that might result to a taxpayer's income-producing property from a failure to defeat the claim . . . .[24]

The basic test in determining whether the expense is business or personal is the origin and character of the claim with respect to which the expense was incurred.[25] The rationale of *Baer* is unsatisfactory for it results in uncertainty and inequities, since it depends on the relative impact of a claim on the taxpayer's income-producing resources. Because the wife's claims emanated from the marital relationship, not from income-producing activity, the respondent's expenditures in resisting these claims are personal and therefore not deductible under section 23(a)(2).[26] The Court in *Patrick* said that the principles applicable in *Gilmore* are equally applicable here. There is no "significant distinction in the fact that the legal fees . . . were paid for arranging a transfer of stock interests, leasing property and creating a trust rather than for conducting litigation."[27] These matters were incidental to the wife's claims which arose from the marital dispute. Since the claims arose from the respondent's personal and family life, the legal expenditures incurred in resolving these

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cussing *Baer* and related cases said: "The conclusion to be drawn from these authorities is that closeness or remoteness of relationship between the service rendered and conservation and maintenance of income is the recognized touchstone here." *Id.* at 372.

22. See, *e.g.*, Harris v. United States, *supra* note 17, at 240; Shipp v. Commissioner, *supra* note 13; Robert L. Wilson, *supra* note 13.

23. Lykes v. United States, *supra* note 17; Deputy v. duPont, 308 U.S. 488 (1940); Kornhauser v. United States, 276 U.S. 145 (1928).

24. United States v. Gilmore, 372 U.S. 39, 48 (1963).

25. *Ibid.*

26. Mr. Justice Black and Mr. Justice Douglas, dissenting, thought that the Court's interpretation of § 23(a)(2) of the 1939 Code was unjustifiably narrow. *Id.* at 52.

27. United States v. Patrick, 372 U.S. 53, 57 (1963).

claims are personal and not deductible.

The basic premise of deductibility is that the expenditure must be incurred in the pursuit of taxable income-producing activity; otherwise the expense is considered personal and not deductible unless there is an express provision for deductibility, such as in the case of medical expenses. The Court in deciding *Gilmore* and *Patrick* recognized and applied this principle; furthermore the prior split between *Lykes* and *Baer* appears to have been resolved in favor of the *Lykes* rationale. Prior to the instant cases, the courts appeared to be looking for a way to sustain the deduction. Thus, the *Baer* approach was adopted even though it resulted in more favorable treatment of taxpayers having income-producing property than of taxpayers possessing cash. The present decision is desirable because the *Gilmore* rule, that origin and character are determinative, is administratively convenient, dispenses with the need for exhaustive examination of the character of the taxpayer's assets considered in the light of possible consequences of marital litigation necessary under *Baer*, and terminates taxpayer discrimination. Hereafter, in order for a husband to deduct marital litigation expenses, the origin and character test of *Gilmore* must be satisfied. It is difficult to conceive of a situation where deduction of attorney's fees emanating from a divorce will be sustained. Since the Court did not answer the government's contention that the expenditures should be capitalized, it may be possible for a taxpayer to capitalize these expenditures,[28] although it seems unlikely that this will be sustained.[29] A question which remains to be answered is whether *Gilmore* is restricted to the divorce situation or is applicable to the interpretation of section 212 generally. Furthermore, section 1.262-1(7) of the Treasury Regulations (allowing the wife's deduction for attorney's fees) may also be withdrawn in the future because the origin of the wife's legal expenditure is personal even though its purpose was to obtain income.

## Torts—Statutory Exemptions of Emergency Vehicles From Traffic Laws Do Not Relieve Driver From Standard of Care Imposed by Common Law

Answering an alarm, two fire engines, giving the statutorily required warning, collided at an intersection, resulting in one death and

28. See note 22 *supra* and accompanying text.

29. "The phrase 'conservation, or maintenance of property,' severed from its context, may sound as though it were intended to cover a defense of title. But the cases indicate that the maintenance and conservation of capital assets to which the statute refers relates primarily to the protection of the physical property and not to the right or title of the taxpayer with respect to it." Herman F. Ruoff, 30 T.C. 204, 208 (1958).

various personal injuries to plaintiffs, the occupants of two automobiles which had yielded to the emergency vehicles by pulling to the curb. Although the California Vehicle Code expressly exempts authorized emergency vehicles from its provisions, the statute also states that this exemption does not relieve the driver from the duty to drive with due regard for the safety of others.[1] In a negligence suit against the city the trial judge instructed the jury that liability for common law negligence is not within the exemption afforded by this section[2] and the jury rendered its verdict for the plaintiffs. On appeal to the Supreme Court of California, *held,* affirmed. Statutory exemptions of emergency vehicles from traffic laws do not relieve the driver from the duty to exercise the care of a reasonably prudent man under similar circumstances. *Torres v. City of Los Angeles,* 22 Cal. Rptr. 866, 372 P.2d 906 (1962).

Many courts have had to solve a statutory construction problem of whether an express statutory exemption of emergency vehicles from specific traffic laws also impliedly exempts the driver from exercising the common law standard of reasonable care under the circumstances.[3] In an attempt to alleviate this problem, many states have enacted specific provisions limiting the scope of the exemption and imposing on the drivers of emergency vehicles a duty to drive "with due regard"

1. At the time of the accident, June 1, 1958, Cal. Vehicle Code § 454 (1935), as amended, stated:

"The driver of an authorized emergency vehicle shall be exempt from those provisions of this code herein set forth under the following conditions:

"(a) Said exemptions shall apply whenever any said vehicle is being driven in response to an emergency call or while engaged in rescue operations or when used in the immediate pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm.

"(b) Said exemptions shall apply only when the driver of said vehicle sounds a siren as may be reasonably necessary and the vehicle displays a lighted red lamp visible from the front as a warning to others. Under the circumstances hereinabove stated, any said driver shall not be required to observe those regulations contained in . . . [various sections] of this code, but said exemptions shall not relieve the driver of any said vehicle from the duty to drive with due regard for the safety of all persons using the highway nor shall the provisions of this section protect any such driver from the consequences of an arbitrary exercise of the privileges declared in this section." This was reenacted, remaining the same, in substance, as CAL. VEHICLE CODE §§ 21055, 21056.

Compare UNIFORM VEHICLE CODE Act V, art. II, § 25.1 (d): "The foregoing provisions [exemptions from traffic laws under emergencies] shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others."

2. 372 P.2d 906, at 909 n.2. "The instruction which was given is as follows: 'if you find that the accident in question was a direct and proximate result of an act of one or more firemen and that such act was outside the exemption contained in Section 454 of the Vehicle Code, then you must determine this issue: Was this act that proximately caused the accident a negligent act under the instructions and definitions that I have given you?' "

3. See generally, Annots., 19 A.L.R. 459 (1922); 23 A.L.R. 418 (1923).

for others.[4] Courts must interpret these provisions and apply them in negligence suits involving accidents of emergency vehicles. Standing in the minority before the instant case, the California court had adhered to its formulated rule of interpreting the statutory requirement of "due regard" to mean that the driver need do no more than give others an opportunity to yield.[5] Thus, where there was an emergency call and where the statutory warning was given, liability was found only where there was "an arbitrary exercise of the privileges declared in this section [of the code]."[6] Decisions in twelve states with similar statutory provisions have rejected this antiquated California rule and have held drivers of emergency vehicles to the standard of care of a reasonably prudent man under the same or similar circumstances.[7] No recent decision has adopted the former California rule. These decisions are based both on the intent of the legislature evidenced in the statute and on public policy.[8]

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4. See, *e.g.*, UNIFORM VEHICLE CODE Act V, art. II, § 25.1(d); CAL. VEHICLE CODE § 21056; TENN. CODE ANN. § 59-822 (1961).

5. "It is evident that the right of way of fire apparatus over other vehicles is dependent upon 'due regard to the safety of the public' only in so far as such 'due regard' effects the person required to yield the right of way. Notice to the person required to yield the right of way is essential, and a reasonable opportunity to stop or to otherwise yield the right of way [is] necessary in order to charge a person with the obligation fixed by law to give precedence to the fire apparatus." Balthasar v. Pacific Elec. Ry., 187 Cal. 302, 311, 202 Pac. 37, 41 (1921).

"This [the *Balthasar* case's interpretation] is the only reasonable interpretation that the statute will bear. If the driver of an emergency vehicle is at all times required to drive with due regard for the safety of the public as all other drivers are required to do, then all the provisions of these statutes relating to emergency vehicles become meaningless and no privileges are granted to them. But if his 'due regard' for the safety of others means that he should, by suitable warning, give others a reasonable opportunity to yield the right of way, the statutes become workable for the purpose intended." Lucas v. City of Los Angeles, 10 Cal. 2d 476, 483, 75 P.2d 599, 603 (1938).

6. Cal. Vehicle Code § 454 (1935), as amended (now CAL. VEHICLE CODE § 21056).

7. City of Miami v. Thegpin, 152 Fla. 96, 11 So. 2d 300 (1943); Archer v. Johnson, 90 Ga. App. 418, 83 S.E.2d 314 (1954); Russell v. Nadeat, 139 Me. 286, 29 A.2d 916 (1943); City of Baltimore v. Fire Ins. Salvage Corps, 219 Md. 75, 148 A.2d 444 (1959); City of Kalamazoo v. Priest, 331 Mich. 43, 49 N.W.2d 279 (1951); Johnson v. Brown, 75 Nev. 437, 345 P.2d 754 (1959); Desmond v. Basch & Greenfield, 94 N.J.L. 52, 108 Atl. 362 (Sup. Ct. 1919); Farrell v. Fire Ins. Salvage Corps., 179 N.Y. Supp. 477 (App. Div. 1919); McDermott v. Irwin, 73 N.E.2d 86 (Ohio 1948); Horsham Fire Co. v. Fort Washington Fire Co., 383 Pa. 404, 119 A.2d 71 (1956); Roadmann v. Bellone, 379 Pa. 483, 108 A.2d 754 (1954); Grimmer-Dismukes Co. v. Payton, 22 S.W.2d 544 (Tex. App. 1929); Montalto v. Fond Du Lac County, 276 Wis. 552, 76 N.W.2d 279 (1956). See also Ruth v. Rhodes, 66 Ariz. 129, 185 P.2d 304 (1947); Henderson v. Watson, 262 S.W.2d 811 (Ky. 1953); Calvert Fire Ins. Co. v. Hall Funeral Home, 68 So. 2d 626 (La. App. 1953).

8. "In holding that operators of authorized emergency vehicles are liable for ordinary negligence under the statutes mentioned, we do not, of course, mean to state that their conduct in the operation of such vehicles is measured by exactly the same yardstick as the actions of the operators of conventional vehicles. The urgency of their missions demands that they respond to calls with celerity and as expeditiously as is reasonably possible. . . . However, they are bound to exercise reasonable precautions against the

After describing the facts of the accident, the court in the instant case discussed the meaning of the relevant provisions of the California Vehicle Code. To understand the legislative intent expressed in the statute, the court examined legislative history and prior California cases and explained the chronological interrelation and reaction between the state legislature and the courts. The court concluded that the statute "does not in any manner purport to exempt the employer [*i.e.*, the municipality or the private fire company] from the liability due to negligence attributable to the driver's failure to maintain that standard of care imposed by the common law."[9] In reaching this conclusion, the court repudiated the doctrines and implications of the earlier California cases.[10] To buttress its position, the court, quoting from the decisions of other states as persuasive authority, emphasized that negligence and reasonable care are relative to both the situation and the circumstances and that emergency vehicle drivers must exercise reasonable precautions against danger.[11] "The question to be asked is what would a reasonable, prudent emergency driver do under all of the circumstances, including that of the emergency."[12] This is the new California test of negligence for emergency vehicles, a test currently used in most states.

The negligence test used in this case is the product of good reason and is a logical interpretation of the statute. That the legislature intended to impose on emergency vehicle drivers performing their emergency function a degree of care which requires more than merely giving the requisite warning seems clear on the face of the statute.[13]

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extraordinary dangers of the situation that the proper performance of their duties compels them to create. When dealing with the operation of emergency vehicles, it is particularly appropriate to recognize that negligence and reasonable care are *relative* terms and their application depends upon the *situation* of the parties and the degree of care and vigilance which *circumstances* reasonably impose. Negligence and reasonable care derive their only significance from a factual background, and that background must contain evidence of circumstances which justify a legitimate inference that in the exercise of reasonable care and prudence injury could have been avoided. . . . We are dealing here with a situation that involves the operators of two emergency vehicles, each having all of the privileges granted to such operators and each having the same obligation to exercise such care and control as an ordinarily careful and prudent person would exercise under like circumstances." City of Baltimore v. Fire Ins. Salvage Corps, 219 Md. 75, 82, 148 A.2d 444, 448 (1959). This is also quoted in the instant decision, 372 P.2d at 914-15.

9. 372 P.2d at 913.

10. *Id.* at 913 (where the court overruled the doctrine in the *Balthasar* and *Lucas* cases cited note 4 *supra*).

11. See, *e.g.*, notes 6 & 7 *supra*.

12. 372 P.2d at 916.

13. The *Southern California Law Review* reached the same conclusion. "It is submitted that the effect of this last-quoted limitation [currently, CAL. VEHICLE CODE § 21056] upon the exemptions is that, while the driver of an emergency vehicle is not bound by the traffic rules, under the conditions in (a) and (b) above [see note 1 *supra*], he must act as a reasonably prudent man under the particular circumstances. If such is the case, the effect of the exemptions is merely to say that the violation

Although the statute under certain conditions relieves the driver from the statutory requirements and any negligence per se arising from violations of them, it does not relieve the driver of general common law negligence which is not based on the violation of a statute. Public policy also supports this interpretation. To perform a useful function, emergency vehicles must arrive at their destination.[14] Recklessness and utter disregard of others who are on the same streets are detrimental both to the objective of the vehicle and to the safety of the public. By the standards of modern civilization with its high regard for human life, neither the apprehension of a traffic violator nor extinguishing a garage fire is worth the risk of severe accidental injury or death of a bystander. A precise analysis should consider such factors as the congestion of the streets where the vehicle is traveling, the lives and value of the property endangered by the emergency, the possible additional harm caused by the vehicle's arrival at a later moment.[15] These and other factors should be weighed rather than saying that as long as the fire engine sounded its siren and flashed its red light, there could be no liability for negligence. The importance of the functions of policemen and firemen to the public's general welfare is a relevant circumstance in measuring their duty to exercise due care.[16] But the test of negligence and of this duty should remain constant—under the circumstances of the emergency what would a reasonably prudent man do?

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per se, the traffic law, by the driver of an authorized emergency vehicle, has no effect on an issue of negligence; that the question is whether or not, under the circumstances, he acted as a reasonable man." *The Work of the 1937 California Legislature*, 11 So. CAL. L. REV. 1, 187 (1937).

14. This practical point was well expressed in Horsham Fire Co. v. Fort Washington Fire Co., 383 Pa. 404, 119 A.2d 71, 75 (1956): "The object of a fire truck's journey is not merely to make a show of rushing to a fire, but actually to get there. If the driver is to ignore all elements of safety driving at breakneck speed through obviously imperilling hazards, he may not only kill others en route, but he may frustrate the whole object of his mission and not get there at all!"

15. See generally Terry, *Negligence*, 29 HARV. L. REV. 40 (1915). The reasonableness of the risk is measured by five factors, all of which are balanced to indicate whether there was negligence. As applied to the instant case, 1) the magnitude of the risk was the probability that other people (*e.g.*, plaintiffs) on the street would be injured; 2) the principal object was the lives and well being of the people on the street; 3) the collateral object was the extinguishment of the fire, the alleviation of the emergency; 4) the utility of the risk was the probability that the fire engine could save the burning property from destruction, and this could not be done unless the fire engine arrived at the fire; 5) the necessity of the risk was the probability that the property would be saved and the fire extinguished.

16. See generally 2 STEVENSON, NEGLIGENCE IN THE ATLANTIC STATES § 681 (1954).