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Recent Cases

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RECENT CASES

Civil Rights–Civil Rights Act of 1871–"Under Color of Law" Defined

Plaintiff brought a civil suit for damages in the United States district court under section 1979[1] of the Civil Rights Act of 1871, against thirteen Chicago policemen. The complaint alleged that the defendants, while acting "under color of" Illinois law, committed an unlawful search and seizure in violation of the federal constitution.[2] The defendants moved to dismiss the complaint claiming that since their acts were in clear violation of Illinois law, they could not have been committed "under color of law" within the meaning of the Civil Rights Act. This motion was granted and affirmed.[3] On certiorari to the Supreme Court of the United States, *held* reversed. An official acts "under color of law" within the meaning of section 1979 when the power conferred on him by the state enables him to commit a wrong, even though the state power is misused. *Monroe v. Pape*, 365 U.S. 167 (1961).

The fourteenth amendment, whether invoked directly or as implemented by Congress, is limited to protecting the individual against "state action."[4] To be entitled to relief under the Civil Rights Act, a plaintiff must also show that he was deprived of a federal right by one who was acting "under color of law." The same facts may be significant in determining each of these separate elements. "Under color of law" appears in the criminal, civil, and jurisdictional sections of the act,[5] and has the same meaning in all three.[6] Although "under color of law" has been defined

1. "Every person who, under color of any statute, ordinance, regulation, custom or usage, or any State or Territory subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958). Hereinafter referred to as section 1979.

2. The complaint alleged that the defendants, without a warrant, broke into the plaintiff's house in the early morning hours, aroused him from bed, and forced him to stand naked in the living room of the apartment while the residence was ransacked. Then plaintiff was taken to a police station and held for ten hours while being questioned about a murder, but no charges were ever made against him. 365 U.S. at 169.

3. Monroe v. Pape, 272 F.2d 365 (7th Cir. 1959).

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

5. The criminal provisions are 28 U.S.C. § 241-42 (1958). The civil section is REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958). The jurisdictional section is 28 U.S.C. § 1343 (1958).

6. *Substantive Civil Rights Under Federal Legislation*, 3 RACE REL. L. REP. 133, 154 (1958).

to include under pretense of law, section 1979 does not protect one from an invasion of rights by an individual acting as a private citizen.[7] Owners of a private amusement park who ejected Negroes were held not acting "under color of law."[8] However, Kansas City's park commissioners, acting pursuant to local law, were held to be acting "under color of law" in excluding Negroes from a city swimming pool.[9] In applying section 1979, one problem is determining whether the words "under color of law" include only those acts of state officials which are done in strict obedience to state law, or whether these words reach the case where state, as well as federal law, is violated. Prior to this decision the leading case on the meaning of "under color of law" was *United States v. Classic*.[10] The defendants in that case were state election officials who had deprived Louisiana citizens of federally secured voting rights, and in so doing had violated both state and federal law.[11] In affirming their conviction the Supreme Court stated: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[12] The Supreme Court has applied this language in later cases, holding that local policemen who had beaten prisoners in violation of state law were acting "under color of" state law.[13] The members of the Court, however, have not been in complete agreement on the meaning of "under color of law."[14] Justice Frankfurter has expressed the opinion that he could not "grasp the principle on which the State can . . . be said to deny the plaintiff equal protection of the laws when the foundation of his claim is that the Board had disobeyed

7. See Watkins v. Oaklawn Jockey Club, 86 F. Supp. 1006 (W.D. Ark. 1949).

8. Valle v. Stengel, 75 F. Supp. 543 (D.N.J. 1948).

9. Williams v. Kansas City, 104 F. Supp. 848 (W.D. Mo. 1952).

10. 313 U.S. 299 (1941).

11. *Id.* at 325.

12. *Id.* at 326. The Court in *Classic* supported its holding by reference to three of its earlier decisions, one of which involved the Civil Rights Act. In Hague v. CIO, 307 U.S. 496 (1939), the plaintiffs sued under section 1979, alleging numerous violations of New Jersey law. The Supreme Court upheld jurisdiction, accepting the district court's findings that many of the acts of "personal restraint and interference by force and violence were accomplished without authority of law." In Home Tel. & Tel. v. Los Angeles, 227 U.S. 278 (1913), the defendants contended that the fourteenth amendment "deals only with the acts of state officers done within the strict scope of the public powers possessed by them and does not include an abuse of power by an officer." The Supreme Court, however, rejected this argument: "It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even though the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer."

13. Williams v. United States, 341 U.S. 97 (1951); Screws v. United States, 325 U.S. 91, 97 (1945).

14. Chaffee, *Safeguarding Fundamental Human Rights: The Tasks of the States and Nation*, 27 GEO. WASH. L. REV. 519 (1959).

the authentic command of the state."[15] Likewise, lower federal courts have disagreed on the content of the phrase. It has been held that a sheriff, his deputy, and a state's attorney were not acting "under color of law" when they unlawfully arrested the plaintiff and charged his excessive bail in violation of state law.[16] However, a prison official has been held to be acting "under color of law" in the unlawfully beating of a prisoner.[17]

Apparently the definition of "under color of law" in the previous Supreme Court cases had been announced without full discussion of the legislative history. The Court decided to re-examine the scope of the term fully in the principal case. From its history the majority found that one purpose of the act was to provide a federal remedy where the state remedy, though available in theory, was not adequate in practice.

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claim of citizens to the enjoyment of rights, privileges, and immunity guaranteed by the Fourteenth Amendment might be denied by state agencies.[18]

This construction of the act enabled the federal courts to reach the case where the official had violated state, as well as federal, law. This conclusion was supported by references to statements made in the debates by both proponents and opponents of the bill.[19] Although the Court relied principally on congressional intent, it also relied on the interpretation it had given in prior cases. The Court said: "We conclude that the meaning given 'under color of' law in the *Classic* case and in the *Screws* and *Williams* cases was the correct one; and we adhere to it."[20] Justices Harlan and Stuart, in a concurring opinion, regarded the question of congressional intent as a difficult one, but felt that unless the definition given in the *Classic* case were clearly wrong, it should be followed.[21] Frankfurter dissented on two grounds. First, heretofore "under color of law" had been construed to mean "action taken either in strict pursuance of some specific command of state law or within the scope of executive discretion."[22] He also held that "all the evidence converges to the conclusion that Congress by § 1979 created a civil liability enforceable in the federal courts only in instances of injury for which redress was barred in the state courts because some 'statute, ordinance, regulation, custom or usage' sanctioned the grievance complained of."[23] Thus, the entire Court agreed that Congress could

15. Snowden v. Hughes, 321 U.S. 1, 17 (1943).
16. Stift v. Lynch, 267 F.2d 237 (7th Cir. 1959).
17. United States v. Jones, 207 F.2d 785 (5th Cir. 1953).
18. 365 U.S. at 180.
19. See CONG. GLOBE, 42d Cong., 1st Sess. 428 (1871).
20. 365 U.S. at 187.
21. *Id.* at 193.
22. *Id.* at 213.
23. *Id.* at 237.

provide a remedy for a situation such as the instant one, but it divided three ways on whether Congress did intend to legislate for this situation.

Prior to this case, a leading legal scholar made the statement that if one knows what "under color of law" means, he knows "more than justices of the Supreme Court,"[24] notwithstanding the clear definition in the *Classic* case. If any confusion existed previously as to the meaning of "under color of law," it should now be removed insofar as applied to violations of local law. The decision in the instant case must be analyzed in terms of the proper allocation of powers as between the federal and state governments. Assuming that a wrong was done in this case, should a state or a federal court supply the remedy? Some, viewing the states as the real protectors of civil rights, contend that the states should redress such wrongs, while others want the federal government to have a free hand in protecting civil rights.[25] Whichever is the better position this decision is consistent with a trend toward greater federal protection of civil rights, which began about 1937 according to one authority.[26] Defining "under color of law" as an act done under pretense of law or by the misuse of power conferred by state law, rather than limiting these words to acts done in strict pursuance of state law, gives the federal government more power to protect civil rights from invasion by local officials. Since the phrase has the same meaning throughout the act, it is possible that the Justice Department may rely on this case in enforcing the criminal sections of the act. The effectiveness of greater protection of civil rights through a broad construction of "under color of law" has been a subject of disagreement among legal scholars. One view is that a broad construction of these words is an effective deterrent in the police brutality cases.[27] Others think that little can be done under existing law adequately to protect civil rights. It is submitted that the passage of a new, comprehensive civil rights act would do more to protect individual citizens in 1962 than the re-interpretation of a statute "left-over from the days of General Grant."[28]

24. Chaffee, *supra* note 14, at 524.
25. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS 106-15 (1947).
26. REPPEY, CIVIL RIGHTS IN THE UNITED STATES 125 (1951).
27. Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1357 (1951).
28. Chaffee, *supra* note 14, at 529.

Conflict of Laws—Characterization—Amount of Damages in Wrongful Death Action Held to be Procedural and thus Controlled by Law of the Forum

Plaintiff's husband was killed in the crash of defendant's airliner in Massachusetts. The deceased bought his ticket and departed from New York where both he and plaintiff were domiciled. An action was brought in New York under the wrongful death statute of Massachusetts which provided that a common carrier could be liable in damages in the sum of not less than $2,000 nor more than $15,000.[1] New York, in its wrongful death statute, followed a strongly worded provision of its constitution by prohibiting any limitation on the amount of recovery.[2] Plaintiff contended that the court should only apply that portion of the foreign statute which did not offend this "public policy." In the court of appeals, *held*,[3] in a wrongful death action the amount of damages is a matter of remedial or procedural law to be governed by the law of the forum, and a foreign limitation on recovery will not be applied. *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526 (1961).

Generally, when there is a conflict of laws in tort, the law of the state of injury applies to substantive matters while that of the forum governs the procedure.[4] Whether a matter is characterized as substantive or procedural is determined by the court of the forum by reference to its own conflict of laws rules.[5] With few exceptions, American courts have held that the

1. MASS. ANN. LAWS c. 129, § 2 (1955).

2. "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation." N. Y. CONST. art. I, § 16; N. Y. DECED. EST. LAW § 130.

3. The statements of the court on this point are clearly dicta since the appeal concerned only the appellate court's dismissal of plaintiff's second cause of action which sounded in contract. It should be noted that neither party actually sought a ruling on the separate tort cause of action. On this point Justice Fuld said: "[W]hether the monetary limitation specified in the Massachusetts wrongful death statute may be disregarded . . . should await an appeal where the issue is presented and the parties have had an opportunity of briefing and arguing it." Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 530 (1961) (Fuld, J., concurring). In agreeing that this was dictum Justice Frossel said: "Although the *first* cause of action is not before us, and it has not been argued or passed upon by the courts below, the majority of this court is now reaching out to consider that cause of action, without application of any kind with respect thereto on the part of anyone. . . . This procedure is not only unprecedented but extends beyond our province." *Id.* at 532 (concurring opinion).

4. GOODRICH, CONFLICT OF LAWS § 80 (3d ed. 1949); LEFLAR, CONFLICT OF LAWS §§ 60, 118 (1959); 11 AM. JUR. *Conflict of Laws* §§ 182, 186, 188 (1937); RESTATEMENT, CONFLICT OF LAWS §§ 378-84, 585 (1934); Leflar, *Choice of Laws Torts: Current Trends*, 6 VAND. L. REV. 447 (1953). For an article questioning this view see Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951).

5. "The court of the forum, subject to the limitations of the federal constitution, determines in accordance with its own Conflict of Laws principles whether the question

amount of damages in tort generally, and in wrongful death specifically, is substantive.[6] A minority,[7] on the basis of public policy, have used local law, characterized as remedial or procedural[8] to reduce the amount recoverable under a foreign statute. Despite the use, in some cases, of all-inclusive language, none of the minority courts have *increased* the liability of the defendant so that it exceeded that created by the foreign soverign.[9] New York was of the majority view as evidenced by numerous lower state court decisions.[10] The minority view had some local support in the old case of *Wooden v. Western N.Y. & Pa. Ry.*[11] to the extent that it characterized the amount of damages as remedial matter. The status of that case on this point is certainly questionable since Justice Cardozo's vigorous attack on it

involved is one of substance or procedure." GOODRICH, CONFLICT OF LAWS § 81 (3d ed. 1949); LEFLAR, CONFLICT OF LAWS §§ 58, 59 (1959); RESTATEMENT, CONFLICT OF LAWS § 584 (1934). For a discussion of the factors involved in the decision see Cook, *Substance and Procedure in the Conflict of Laws*, 42 YALE L.J. 333, 343 (1933). See also Cheatham, *Internal Law Distinctions in the Conflict of Laws*, 21 CORNELL L.Q. 570 (1936); McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws*, 78 U. PA. L. REV. 933, 937 (1930). For constitutional limitations see John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936); Home Ins. Co. v. Dick, 281 U.S. 397 (1930); GOODRICH, CONFLICT OF LAWS § 81 (1949); LEFLAR, CONFLICT OF LAWS § 59 (1959); RESTATEMENT, CONFLICT OF LAWS, Introductory note c. 12 (1934).

6. Annot., 15 A.L.R.2d 762, 65 (1951); GOODRICH, CONFLICT OF LAWS § 91 (3d ed. 1949); LEFLAR, CONFLICT OF LAWS § 65 (1959); RESTATEMENT, CONFLICT OF LAWS §§ 391, 412, 417 (1934).

7. GOODRICH, CONFLICT OF LAWS §§ 91, at 259, 97, at 273 (3d ed. 1949); LEFLAR, CONFLICT OF LAWS § 65 (1959); RESTATEMENT, CONFLICT OF LAWS §§ 417, 606 (1934). See also Annot., 15 A.L.R.2d 762, 767 (1951).

8. See Annot., 15 A.L.R.2d 762, 767, 775-77 (1951).

9. *Id.*, especially Wooden v. Western N.Y. & Pa. Ry., 126 N.Y. 10, 26 N.E. 1050 (1891), applying a $5,000 "procedural" limitation to a claim, under a Pennsylvania wrongful death statute, which was brought in the New York forum. Pennsylvania had no limitation at that time. This may be significant, with reference to due process issues, where the state has no substantial connection with the matter to which it seeks to apply its law. If the law of the forum allows the plaintiff less, rather than more, than the foreign law as in *Wooden*, no clear question of due process arises since plaintiff sues in New York out of choice and might sue elsewhere if he did not wish to be subject to its limits. If, on the other hand, more is allowed than under the foreign statute, a definite question arises as to denial of due process to defendant; he, unlike the plaintiff, has no choice as to where he is sued. "Beeause a law of the forum is applied to plaintiffs who volumtarily submit themselves to it is no argument for imposing the law of the forum on those who do not." Lauritzen v. Larsen, 345 U.S. 571, 591-92 (1953). The Supreme Court has implied that any question of due process disappears if there are substantial connections between the forum state and the matters in question so as to make the application of its law reasonable. "We have held it a denial of due process of law when a state of the Union attempts to draw into control of its law otherwise foreign controversies on slight connections, because it is a forum state." *Id.* at 590-91 (refering to Home Ins. Co. v. Dick, *supra* note 5, where the state had used an exaggerated characterization in order to utilize the law of the forum). See generally LEFLAR, CONFLICT OF LAWS § 59 (1959).

10. Annot., 15 A.L.R.2d 762, 765 (1951). *Cf.* Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918).

11. 126 N.Y. 10, 26 N.E. 1050 (1891).

in *Loucks v. Standard Oil Co.*[12] In three federal court cases in which New York law was applied, it was held that the limitation in the foreign wrongful death statute would apply in New York.[13]

The majority in the instant case reasoned (1) that it was arbitrary to allow limitation on the value of the life of one of its traveling citizens merely because the airplane in which he was a passenger happened to crash in a particular state;[14] (2) that New York had a number of significant contacts with the matter in dipsute;[15] (3) that there was no contrasting significant interest of Massachusetts as a basis for subjecting New York domiciliaries to such "unfair and anachronistic treatment" when this could be avoided "without doing violence to the accepted pattern of conflict of law rules";[16] (4) that it was open to New York, as the forum state, to characterize the amount of damages recoverable as a matter of remedial or procedural law, and then to invoke its public policy to prohibit any limitation;[17] and (5) that the facts called for such a ruling. Although these statements were clearly dicta[18] they indicate a reversal of the former *trend*[19] in New York state courts and apparently call for a complete reversal of the position taken by the federal courts applying New York law.[20]

The "center of gravity" of all "significant contacts" in the instant case clearly fell in New York.[21] Massachusetts had no "significant contacts" as

12. 224 N.Y. 99, 120 N.E. 198 (1918). For a discussion of the effect of *Loucks* on the *Wooden* opinion in the instant case, see 172 N.E.2d at 533 (Frossel, J., concurring).

13. Maynard v. Eastern Airlines, Inc., 178 F.2d 139 (2d Cir. 1949); Pearson v. Northeast Airlines, Inc., 180 F. Supp. 97 (S.D.N.Y. 1960); Snow v. Northeast Airlines, Inc., 176 F. Supp. 385 (S.D.N.Y. 1959). It is interesting to note that both the *Pearson* and *Snow* cases involved the same crash as in the instant case. They result in the situation referred to by Justice Frankfurter in Sutton v. Leib, 342 U.S. 402, 413 (1952), where the federal courts make a decision construing local law and are, in effect, later overruled by the highest court of the state. All three relied on Faron v. Eastern Airlines, Inc., 193 Misc. 395, 84 N.Y.S.2d 568 (Sup. Ct. 1948). For a discussion of the problem see Carnahan, *What Is Happening in the Conflict of Laws: Three Supreme Court Cases*, 6 VAND. L. REV. 607, 628-37 (1953).

14. 172 N.E.2d at 527.

15. *Id.* at 527-28. *Cf.* concurring opinion of Justice Fuld: "If this were a matter of first impression, it might be effectively argued that, where 'two or more communities are touched or affected by a factual sequence', the 'guide to the governing law' should be the jurisdiction having 'the most significant contact or contacts' . . . and, since the contract of safe carriage was undertaken in New York . . . this State's wrongful death statute and not that of Massachusetts should apply." *Id.* at 531.

16. *Id.* at 527-28.

17. *Id.* at 529.

18. See note 3 *supra.*

19. See note 10 *supra.*

20. See note 13 *supra.*

21. Deceased was a New York domiciliary; the contract for safe carriage was made in New York, where he purchased his ticket; the airplane took off in New York; the defendant was doing business in New York; the plaintiff and other survivors of the deceased were domiciliaries of New York and might become dependents of the state under an adverse ruling; and the action was brought in the New York forum.

a basis for the arbitrary limitation *in this case*.[22] In view of these facts, it was very reasonable for the court to apply the substantive law of New York as to the amount of damages,[23] but this did not justify their characterization of the matter as procedural. If New York applied the same characterization when all significant contacts were in Massachusetts it would be so unreasonable as to be violative of the due process clause of the Constitution.[24] It is unfortunate that the court chose this course rather than to provide the same flexibility in the choice of tort law that it had already provided for contracts in *Auten v. Auten*,[25] or that which the Supreme Court had provided for admiralty torts in *Lauritzen v. Larsen*.[26]

Criminal Law—Insanity—Third Circuit Adopts A New Test for Criminal Responsibility

The defendant was tried and convicted of violation of the Dyer Act.[1] His defense was insanity, predicated on medical reports indicating the defendant had a basic sociopathic personality with emotional instability, and certain schizophrenic reactions. The district court's charge to the jury on this issue was in terms of the *M'Naghten* and "irresistible impulse" tests of insanity. On appeal, *held*, reversed. A charge based on the *M'Naghten* test was prejudicial error, and a new test of criminal responsi-

22. In the instant case the only Massachusetts contact was that by fortuity the plane crashed on her soil.

23. See notes 9 and 21 *supra*.

24. See note 9 *supra*.

25. 308 N.Y. 155, 124 N.E.2d 99 (1954). Here the court of appeals adopted "the 'center of gravity' or 'grouping of contacts' theory of the conflict of laws. Under this theory, the courts, instead of regarding as conclusive the parties' intention or the place of making or performance, lay emphasis rather upon the law of the place 'which has the most significant contacts with the matter in dispute' . . . thus allowing the forum to apply the policy of the jurisdiction 'most intimately concerned with the outcome of [the] particular litigation'." *Id.* at 101-02.

26. 345 U.S. 571 (1953). "Maritime law, like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved. The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority." *Id.* at 582. For a good article on this problem, see Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959).

1. "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U.S.C. § 2312 (1958). After the defendant had agreed to buy a car, the salesman permitted him to drive it for a brief period. The defendant drove the car from Ohio to West Virginia, and then to Pittsburgh where he abandoned it.

bility is to be used. *United States v. Currens,* 290 F.2d 751 (3d Cir. 1961).

Today, insanity tests for judging criminal responsibility provoke as much controversy as any other problem in criminal law.[2] The first formulation of such an insanity test was the "right-wrong" criterion promulgated in *M'Naghten's Case.*[3] The federal courts[4] first adopted the *M'Naghten* rule,[5] and then supplemented it with the "irresistible impulse" test[6] after this modification had been approved by the Supreme Court.[7] An amalgamation of these two tests remained the basis for judging criminal responsibility in all of the federal courts until 1954, when the District of Columbia Court of Appeals, drawing on an old New Hampshire decision,[8] put forth a new test for insanity in *Durham v. United States.*[9] This decision evoked much praise,[10] and criticism,[11] from writers in both the legal and medical professions, but, when put in issue, was expressly repudiated by three federal

2. "Indeed, it is probably no exaggeration to say that this subject is receiving more attention today than any other subject in the criminal law." Commonwealth v. Chester, 337 Mass. 702, 150 N.E.2d 914, 919 (1958).

3. "[T]o establish a defence on the ground of insanity, it must be proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." M'Naghten's Case, 10 Cl. & Fin. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843). In the instant case, Judge Biggs offers evidence that this test can be traced to the sixteenth century. 290 F.2d at 764.

4. Brevity precludes any discussion of the insanity tests employed by the states. As of 1955, thirty-one states adhered only to the *M'Naghten* test; fourteen states had supplemented *M'Naghten* with the "irresistible impulse" test; and one state (New Hampshire) had a test similar to the *Durham* rule. MODEL PENAL CODE § 4.01, app. A (Tent. Draft No. 4, 1955).

5. United States v. Young, 25 Fed. 710 (E.D.N.C. 1885).

6. "The mere ability to distinguish right from wrong is no longer the correct test . . . where the defense of insanity is interposed. The accepted rule . . . is that the accused must be capable, not only of distinguishing between right and wrong, but that he was not impelled to do the act by an irresistible impulse, which means before it will justify a verdict of acquittal that his reasoning powers were so far dethroned by his diseased mental condition as to deprive him of the will power to resist the insane impulse to perpetrate the deed, though knowing it to be wrong." Smith v. United States, 36 F.2d 548, 549 (D.C. Cir. 1929).

7. Davis v. United States, 160 U.S. 469 (1895).

8. State v. Pike, 49 N.H. 399 (1869).

9. 214 F.2d 862 (D.C. Cir. 1954). "The rule . . . . is simply that an accused is not criminally responsible if the unlawful act was the product of mental disease or mental defect." *Id.* at 874-75.

10. BIGGS, THE GUILTY MIND (1955); ROCHE, THE CRIMINAL MIND (1958); Douglas, *The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists,* 41 IOWA L. REV. 485 (1956); Sobeloff, *Insanity and the Criminal Law: From M'Naghten to Durham, and Beyond,* 41 A.B.A.J. 793 (1955); Zilboorg, *A Step Toward Enlightened Justice,* 22 U. CHI. L. REV. 331 (1955).

11. Cavanagh, *A Psychiatrist Looks at the Durham Decision,* 5 CATHOLIC U.L. REV. 25 (1955); Hall, *Responsibility and Law: In Defense of the M'Naghten Rules,* 42 A.B.A.J. 917 (1956); Wechsler, *The Criteria of Criminal Responsibility,* 22 U. CHI. L. REV. 367 (1955).

circuits.[12] Though rejected by the courts, the *Durham* decision was not the only expression of dissatisfaction with the prevailing insanity tests. Even before *Durham*, writers had stressed the need to overcome the apparent fetish for *M'Naghten*, and develop a more comprehensive test which would incorporate the advances in psychological knowledge and methods.[13] In the Third Circuit, Judge Biggs, who wrote the opinion in the instant case, had, in a vigorous dissent, questioned the adequacy of the *M'Naghten* and "irresistible impulse" tests.[14] The English Royal Commission on Capital Punishment was critical of *M'Naghten*, and advocated a new test.[15] Quite naturally, after the *Durham* decision there was a renewed interest and investigation into the area of criminal responsibility.[16] Attempts were made to devise new tests, rejecting that which was defective, vague, and ambiguous in the *M'Naghten*, "irresistible impulse," and *Durham* tests.[17] These new proposals met with some approval,[18] but were not adopted in a judicial decision until the instant case.

As indicated above, Judge Biggs, of the Third Circuit, has long been critical of the *M'Naghten* and "irresistible impulse" tests,[19] but in judicially supplanting them there were certain obstacles to overcome. One extremely difficult point was the failure of the Supreme Court ever to have approved any but the *M'Naghten* and "irresistible impulse" tests for the federal courts.[20] To circumvent this problem, the court assumed that the Supreme Court, in the earlier cases, only approved the *M'Naghten* and "irresistible

12. Voss v. United States, 259 F.2d 699 (8th Cir. 1958); Sauer v. United States, 241 F.2d 640 (9th Cir. 1957); Howard v. United States, 232 F.2d 274 (5th Cir. 1956).

13. *E.g.*, WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW (1933); ZILBOORG, THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT (1954).

14. United States *ex rel.* Smith v. Baldi, 192 F.2d 540 (3d Cir. 1951). For a further discussion of this case and the dissenting opinion, see BIGGS, *op. cit. supra* note 10, at 127-35.

15. ROYAL COMMISSION ON CAPITAL PUNISHMENT (1953).

16. See, *e.g.*, Symposium, *Insanity and the Criminal Law—A Critique of Durham v. United States*, 22 U. CHI. L. REV. 317 (1955).

17. MODEL PENAL CODE § 4.01 (Tent. Draft No. 4, 1955). This test is set forth at note 27 *infra*. A committee appointed by the Maryland legislature, and headed by Dr. Guttmacher, also proposed a new test. See United States v. Hopkins, 169 F. Supp. 187, 190 (D. Md. 1958).

18. Illinois has recently adopted by statute the American Law Institute test. ILL. ANN. STAT. c. 38, § 6-2 (Smith-Hurd Crim. Code 1961). "The tests proposed by the American Law Institute and the Maryland committee have much to recommend them." United States v. Hopkins, *supra* note 17, at 190.

19. United States *ex rel.* Smith v. Baldi, 192 F.2d 540 (3d Cir. 1951) (dissenting opinion); BIGGS, *op. cit. supra* note 10.

20. In the *Davis* case, *supra* note 7, the Supreme Court had approved a charge based on *M'Naghten* and "irresistible impulse." This decision was reaffirmed in Matheson v. United States, 227 U.S. 540 (1913). It should be reiterated that this discussion is limited to the federal court system. The Supreme Court has, more recently, not disturbed a state's application of only the *M'Naghten* test. Leland v. Oregon, 343 U.S. 790 (1952).

impulse" tests, without making them "paramount and exclusive."[21] The strongest basis, however, upon which the court supported its deviation from the earlier cases was the lapse of time since the last Supreme Court decision manifesting such approval.[22] During this forty-eight year period, psychology has made great strides forward, and its new concepts present the phenomenon of insanity in a completely different perspective and afford new sources of knowledge for judging criminal responsibility. In light of this progress in medical science, it seemed reasonable to conclude that the Supreme Court would not today impose *M'Naghten* as the rule for the federal courts.[23] Having decided that it was necessary and permissible to formulate a test more closely alligned with present psychological techniques, there remained the larger obstacle of verbalizing a test which would utilize these techniques and still be meaningful to a jury of laymen. Because it limits itself to only the cognitive capacity, the *M'Naghten* test was not comprehensive enough to meet the court's requirements.[24] But the court impliedly accepted *M'Naghten's* basic assumption of responsibility and moral agency, and for this reason, rejected the *Durham* rule. In addition, the *Durham* test seemed weakened by an inherent vagueness in its terms and by an overemphasis on the causal relationship between "disease" and "product" which to some extent precluded a consideration of the ordinary requirements of *mens rea*.[25] The concept of responsibility had to be retained because the jury must, in effect, make a social judgment, not a medical analysis. With these requirements and objectives before it, the court formulated this test for judging criminal responsibility: "The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated."[26] In a footnote, the court acknowledged the insanity tests proposed by the American Law Institute and the Royal

21. 290 F.2d at 769. But in Leland v. Oregon, *supra* note 20, the Supreme Court said the *Davis* decision, approving *M'Naghten* and "irresistible impulse," "establishes no constitutional doctrine, but only the rule to be followed in federal courts." 343 U.S. at 797.

22. The last time the Supreme Court approved *M'Naghten* and "irresistible impulse" for the federal courts was in 1913 in Matheson v. United States, *supra* note 20.

23. "[T]he Supreme Court in view of the present state of medical knowledge, would not approve the M'Naghten Rules and would not impose them as the test to be applied today by a jury to determine the criminal responsibility of a mentally ill defendant in a trial in a federal court." 290 F.2d at 770. Parenthetically, among the present members of the Supreme Court, Justice Douglas, *supra* note 10, Justice Frankfurter, 290 F.2d at 765-66, and apparently Justice Black, United States *ex rel.* Smith v. Baldi, 344 U.S. 561 (1953) (dissenting opinion), have objected to the *M'Naghten* test as being inadequate.

24. 290 F.2d at 765-67.

25. *Id.* at 773. For further discussion of why the *Durham* rule fails in this regard, see Judge Burger's concurring opinion in Blocker v. United States, 288 F.2d 853 (D.C. Cir. 1961); Wechsler, *supra* note 11.

26. 290 F.2d at 774.

Commission on Capital Punishment, upon which it had drawn.[27] The principal objective of the court was to have a test which will put before the jury the total personality of the accused, and, at the same time, mold the test in such a way that it will be consistent with the purposes of the criminal law in its capacity as a social agency.

There is, in the test promulgated by this court, a realization and acceptance of the fact that insanity is a relative state, projecting itself in varied forms in different situations. This view of insanity comes from a recognition of the advances made in psychology, and a desire that the criminal law make full use of medical science, an idea advocated long ago by Justice Holmes.[28] Here the court has succeeded in putting forth a test which, on the technical level, avoids *M'Naghten's* categorical rejection of all but the cognitive capacity, and simultaneously avoids the vagueness of *Durham.* The test succeeds, where *Durham* fails, in giving the jury a standard by which it can properly determine whether the defendant was capable of possessing the necessary *mens rea.* Thus this test does not ignore its social responsibility. In essence, the court's formula is much closer to the *M'Naghten* and "irresistible impulse" tests, devoid of their absolutism,[29] than it is to the *Durham* rule. But, regardless of its merit, a new ruling like this poses certain questions. For example, can a circuit

27. *Id.* at 774 n.32. The American Law Institute test is: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01 (Tent. Draft No. 4, 1955). The test proposed by the Royal Commission on Capital Punishment is as follows: "The jury must be satisfied that, at the time of committing the act, the accused, as a result of disease of the mind (or mental deficiency) (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it." ROYAL COMMISSION ON CAPITAL PUNISHMENT (1953). As can be seen, the court's test is identical to the ALI test with the exception that the court has eliminated the phrase "to appreciate the criminality of his conduct." This phrase, the court feels, is somewhat superfluous, and overemphasizes, especially to the mind of the jury, the cognitive element, which is the very weakness of *M'Naghten* that the court is trying to avoid. Removing parts (a) and (b) of the Royal Commission proposal makes that test similar to the one in the instant case.

28. "An ideal system of law should draw its postulates and its legislative justification from science. As it is now, we rely upon tradition, or vague sentiment, or the fact that we never thought of any other way of doing things, as our only warrant for rules which we enforce with as much confidence as if they embodied revealed wisdom." HOLMES, *Learning and Science,* in COLLECTED LEGAL PAPERS 139 (1920).

29. "In addressing itself to impairment of the cognitive capacity, M'Naghten demands that impairment be complete: the actor must *not* know. So, too, the irresistible impulse criterion pre-supposes a complete impairment of capacity for self-control. The extremity of these conceptions is, we think, the point that poses largest difficulty to psychiatrists when called upon to aid in their administration. . . . Nothing makes the inquiry into responsibility more unreal for the psychiatrist than limitation of the issue to some ultimate extreme of total incapacity, when clinical experience reveals only a graded scale with marks along the way." MODEL PENAL CODE § 4.01, comment at 158 (Tent. Draft No. 4, 1955).

court properly lay down a different ruling without prior action by the Supreme Court?[30] Will the administration of this new test impose some of the problems incurred in the application of the *Durham* rule?[31] Does it not make for a difficult situation when one test is used in the District of Columbia, another in the Third Circuit, and still another in the remaining federal courts? Finally, since the *Currens* decision is not expressly a prospective ruling, will there be difficulties with appeals of past verdicts rendered under the old test? In time, of course, all of these questions must, and will, be answered. For the present, the *Currens* case is another breach of the tradition-clothed *M'Naghten* rule; it is a step forward in the effort to judge the defense of insanity in relation to all the new and tenable discoveries of medical science. And it might be suggested, with some degree of confidence, that if the *Currens* case reaches the Supreme Court, this new test for criminal responsibility would be affirmed.[32]

Criminal Law–Smith Act–Membership Clause Requiring Active Membership in Communist Party and Specific Intent To Use Violence Held Not To Violate the First or Fifth Amendments

The defendant, an active member of the Communist Party, was convicted by the United States District Court for the Middle District of North Carolina in 1958[1] for having violated the membership clause of the Smith

30. In the majority opinion of the case, Judge Biggs says the Supreme Court "desires to treat the circuits as it does the states, as laboratories for the development of substantive law." 290 F.2d at 769. *But see* Howard v. United States, *supra* note 12: "In the face of such recognition by the Supreme Court of a test [*M'Naghten* and "irresistible impulse"] of criminal responsibility, we do not feel at liberty to consider and decide whether . . . some other test should be adopted. This Circuit follows the law as stated by the Supreme Court and leaves any need for modification thereof to that Court . . . ." 232 F.2d at 275.

31. See Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L.J. 905 (1961).

32. See note 23 *supra*.

1. The defendant was first tried and convicted in 1955, and the judgment affirmed in Scales v. United States, 227 F.2d 581 (4th Cir. 1955). After certiorari had been granted and argument presented the United States confessed error because of the Court's intervening decision in Jencks v. United States, 353 U.S. 657 (1957). The judgment was reversed, 355 U.S. 1 (1957) (per curiam), and a new trial took place in 1958. Remarking as to the length of time which this case had been in the courts, Mr. Justice Clark once said, "It looks as if Scales' case, like *Jarndyce v. Jarndyce* [DICKENS, BLEAK HOUSE (1853)], will go on forever, only for the petitioner to reach his remedy, as did Richard Carstone there, through disposition by the Lord." Scales v. United States, 360 U.S. 924, 926 (1959) (order for reargument). Scales, however, was not subjected to such a fate.

Act,[2] which makes membership in any organization advocating the violent overthrow of the Government while knowing of the organization's purposes a crime. The United States Court of Appeals for the Fourth Circuit upheld the conviction.[3] On certiorari to the Supreme Court, *held*, affirmed. The membership clause of the Smith Act, interpreted as requiring "active" membership and specific intent to accomplish the aims of the organization by violence, does not abridge the freedom of speech and association guaranteed by the first amendment, nor does it impute guilt by association so as to violate the due process clause of the fifth amendment. *Scales v. United States*, 367 U.S. 203, *petition for rehearing denied*, 366 U.S. 978 (1961).

The Smith Act was held to be constitutional as early as 1943 when it was considered by the Court of Appeals for the Eighth Circuit.[4] In referring to the membership clause of the act, the court rejected the argument that the clause imposed guilt by association, finding, instead, that the guilt thus imposed was "entirely individual and personal."[5] The Supreme Court first construed the Smith Act in the controversial case of *Dennis v. United States*.[6] Although the Court did not specifically pass on the membership clause,[7] it decided that the structure and purpose of the act required proof of the defendant's intent to overthrow the Government by force and violence as an essential element of the crime of advocating violent overthrow. The Court in the *Dennis* case also held that the "clear and present danger" test is satisfied when the gravity of the evil, discounted by the improbability of the evil occurring, justifies the particular invasion of free speech—assuming that the invasion is necessary to avoid the danger.[8] It is

2. 18 U.S.C. § 2385 (1958). The so-called "membership clause" reads as follows: "Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government [*i.e.*, the Government of the United States or the government of any state, territory, district or possession thereof, or any political subdivision therein] by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—Shall be fined not more than $20,000 or imprisoned not more than twenty years or both . . . ." The other clauses of the act punish those who advocate, abet, advise or teach violent overthrow and those who publish or distribute such printed matter.

3. Scales v. United States, 260 F.2d 21 (4th Cir. 1958).

4. Dunne v. United States, 138 F.2d 137 (8th Cir.), *cert. denied*, 320 U.S. 790 (1943).

5. *Id.* at 143. The court also held the "clear and present danger" doctrine inapplicable in a situation where the legislative body has determined by statute that these utterances involve sufficient danger of substantive evil that they may be punished. *Id.* at 145. *Accord*, Gitlow v. New York, 268 U.S. 652 (1925). *Contra*, Dennis v. United States, 341 U.S. 494 (1951).

6. Note 5 *supra*.

7. The defendants in the *Dennis* case were charged with conspiring to violate those clauses of the Smith Act making criminal the advocation of violent overthrow and the organization of any group which advocates such overthrow.

8. *Id.* at 510. The Court found that the defendants' intentions to overthrow the Government "as speedily as circumstances would permit" afforded the requisite danger.

on this aspect of the case that the critical eye of a number of legal writers have looked with disfavor.[9] During the interim between the *Dennis* and *Scales* cases, the Supreme Court was not called upon to rule on the membership clause of the act.[10] There were, however, rulings in the lower federal courts on the membership clause. In *Frankfeld v. United States*,[11] which involved a conspiracy to violate several clauses of the Smith Act, one being the membership clause, the court of appeals upheld the conviction. It found the clause to be valid in that the element of guilty knowledge made the defendant a party to the criminal actions of the group.[12] The membership clause likewise survived a district court's scrutiny on a motion to dismiss the indictment, the court noting that the statute's "careful language precludes the possibility that the innocent may be ensnared."[13] A number of state statutes either similar to or mirroring the Smith Act also were upheld[14] prior to the Court's ruling that Congress had "occupied the field" when it passed the Smith Act.[15]

Before arriving at the constitutional issues, the Court in the *Scales* case first construed the membership clause to have two implied requirements other than the express requirement of knowledge of the organization's purposes: (1) active, as opposed to nominal, membership and (2) specific

For a careful analysis of the history of the "clear and present danger" test from the time of its origin in Schenck v. United States, 249 U.S. 47 (1919) see *id.* at 503-11. The Court in the *Scales* case, however, did not consider the application of the "clear and present danger" doctrine since the petition for certiorari did not raise this issue. 367 U.S. at 230 n.21. For a discussion of the relationship between the membership clause and that doctrine as it was interpreted in the *Dennis* case see Scales v. United States, 260 F.2d 21, 25-26 (4th Cir. 1958), *aff'd*, 367 U.S. 203 (1961); United States v. Blumberg, 136 F. Supp. 269, 270-71 (E.D. Pa. 1955).

9. *E.g.*, Antieau, *Dennis v. United States—Precedent, Principle or Perversion?*, 5 VAND. L. REV. 141 (1952). The author of this article rejects the Court's interpretation of the clear and present danger criterion: "However, the heart, the core, the particular contribution of the criterion lies in its rightful insistence that the danger be *both* clear and present, not doubtful, not remote nor possible nor probable. . . . Surely today, and tomorrow too, the ideas cherished in our American heritage will survive attack from the nonsense uttered by these poor peddlers of pap and promise. . . . The test of constitutional freedoms can not be the hollow fears of scared, suspicious men without faith in democratic processes." *Id.* at 144-45.

10. Yates v. United States, 354 U.S. 298 (1957), involving the same offenses as the *Dennis* case, was reversed by the Supreme Court for improper instructions to the jury and insufficient evidence.

11. 198 F.2d 679 (4th Cir. 1952), *cert. denied*, 344 U.S. 922 (1953).

12. The circuit courts in the *Scales* case and its companion case also found the statute valid. Scales v. United States, 260 F.2d 21 (4th Cir. 1958), *aff'd*, 367 U.S. 203 (1961); United States v. Lightfoot, 228 F.2d 861 (7th Cir. 1956), *rev'd on other grounds*, 355 U.S. 2 (1957); Scales v. United States, 227 F.2d 581 (4th Cir. 1955), *rev'd on other grounds*, 355 U.S. 1 (1957).

13. United States v. Blumberg, 136 F. Supp. 269, 272 (E.D. Pa. 1955).

14. *E.g.*, Whitney v. California, 274 U.S. 357 (1927); People v. Lloyd, 304 Ill. 23, 136 N.E. 505 (1922); Nelson v. Wyman, 99 N.H. 33, 105 A.2d 756 (1954); Commonwealth v. Widovich, 295 Pa. 311, 145 Atl. 295 (1929). See generally Annots., 1 A.L.R. 336 (1919), 20 A.L.R. 1535, 1543 (1922), 73 A.L.R. 1494, 1498 (1931).

15. Pennsylvania v. Nelson, 350 U.S. 497 (1956).

intent to accomplish the aims of the organization by violence. As to specific intent, the Court based its conclusion on the theory that the reasoning of the *Dennis* case, which implied specific intent into the "advocacy" and "organizing" clauses, would likewise apply to the membership clause.[16] The element of active membership was arrived at on the basis that (1) the penalty imposed by the statute was too heavy for Congress to have intended to punish mere passive members and (2) Congress would impose an objective standard of membership as fixed by the law itself, rather than allow it to vary with the standards of membership as subjectively viewed by the organization.[17] This would assure an even-handed application of the statute. Having so construed the clause, the Court then turned to the defendant's argument that the membership clause did not satisfy the concept of personal guilt required by the due process clause of the fifth amendment, but instead, imposed guilt by association. However, the Court rejected this contention, reasoning that the quantum of guilt inherent in membership in an organization doing illegal acts, when accompanied by guilty knowledge, was no smaller than the amount of guilt required in the familiar concepts of conspiracy and complicity.[18] The Court found a sufficient and significant form of aid and encouragement to the illegal acts in the required elements of active membership, guilty knowledge, and specific intent so as to permit the imposition of criminal sanctions.[19] In rejecting the defendant's contention that the membership clause infringes upon free political expression and association as protected by the first amendment, the Court again relied on its construction of the statute.

16. See Dennis v. United States, 341 U.S. 494, 499-500 (1951).

17. *Cf.* Rowoldt v. Perfetto, 355 U.S. 115 (1957); Galvan v. Press, 347 U.S. 522 (1954) (deportation cases requiring active membership). It was also helpful to find the requirement of active membership in order to avoid conflict with the Internal Security Act of 1950 § 4(f), 64 Stat. 992, 50 U.S.C. § 783(f) (1958) which states: "Neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of subsection (a) or subsection (c) of this section or of *any other criminal statute.*" (Emphasis added.) See 367 U.S. at 207-08.

18. The MODEL PENAL CODE § 2.06(3) (Tent. Draft No. 4, 1955) includes in the crime of complicity the following:

"(3) A person is an accomplice of another person in the commission of an offence if:

(a) with the purpose of promoting or facilitating the commission of the offence, he

(i) commanded, requested, encouraged, or provoked such other person to commit it; or

(ii) aided, agreed to aid or attempted to aid such other person in planning or committing it; or

(iii) having a legal duty to prevent the commission of the offence, failed to make proper effort so to do . . . ."

19. "[W]e can perceive no reason why one who actively and knowingly works in the ranks of that organization, intending to contribute to the success of those specifically illegal activities, should be any more immune from prosecution than he to whom the organization has assigned the task of carrying out the substantive criminal act." 367 U.S. at 226-27.

The *Dennis* case held that advocacy of violent overthrow of government, as punished in the Smith Act, is not constitutionally protected speech; nor is a combination to promote such advocacy a protected association. Therefore, the Court could see no reason why "membership when it constitutes a purposeful form of complicity in a group engaging in this same forbidden advocacy, should receive any greater degree of protection from the guarantees of that Amendment."[20]

It is apparent that what the Court has done is to define the statute in such a way as to avoid more difficult problems of constitutionality.[21] It would seem that conviction for the mere act of becoming a member in such an organization might not satisfy the due process standards of criminal imputability.[22] Also, without the requirement of specific intent to accomplish the organization's illegal aims by force, association with a group having both legal and illegal aims would be made criminal even though the member adhered only to the legal aims. This might be so substantial an abridgement of freedom of association as to be unconstitutional.[23] The main problem presented by the case seems to be whether the *Scales* case has further expanded those limitations placed on free speech and association by the *Dennis* case, or has merely applied the *Dennis* doctrine to a situation which comes within the limitations that case has already imposed. The *Dennis* case held that there is no constitutional right to conspire to organize an association whose purpose is to advocate this violent overthrow of the Government, nor is there a right to conspire to advocate violent overthrow. It seems also that the *Dennis* case has been interpreted as requiring an overt act to constitute the conspiracy—for example, conspiracy presently to advocate violent overthrow, as opposed to conspiracy to advocate in the future.[24] Even if that be so, active, knowing, and intentional

20. *Id.* at 229.

21. *Cf.* 360 U.S. 924 (1959) (order for reargument), where the Court requested arguments in this case on the constitutionality of the statute both with and without each of the elements of active membership and specific intent.

22. "It may indeed be argued that such assent [to the organization's purposes and activities by merely joining it] and [moral] encouragement do fall short of the concrete, practical impetus given to a criminal enterprise which is lent for instance by a commitment on the part of a conspirator to act in furtherance of that enterprise." 367 U.S. at 227-28. For arguments as to the unconstitutionality of the clause if interpreted not to require active membership see Comment, *Communism and the First Amendment: The Membership Clause of the Smith Act*, 52 Nw. U.L. REV. 527 (1957).

23. "If there were a . . . blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired . . . ." 367 U.S. at 229. But thanks to the requirement of specific intent, "the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute . . . . such a person may be foolish, deluded, or perhaps merely optimistic, but he is not by this statute made a criminal." *Id.* at 229-30.

24. See Yates v. United States, 354 U.S. 298, 324 (1957), *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 948 & n.187 (1959). *Contra*, Dennis v. United States, 341 U.S. at 561 (Jackson, J., concurring); *id.* at 579 (Black,

membership in the illegal organization is no more remote, or perhaps even less remote, from the undesirable result of attempted revolution than is such a conspiracy;[25] for the defendant, in becoming a member of the group, has become what is in effect a party to a conspiracy,[26] not just to advocate, but actually to overthrow the Government.[27] As a practical matter, it appears that the Court has construed the membership clause so that it adds little to the remainder of the Smith Act. In most instances, in order to establish that a defendant had been an active member, had knowledge of the guilty purposes, and had intended to accomplish the organization's aims by force, the proof would necessarily include showing the defendant advocated, abetted, advised, or taught violent overthrow; thus he could be punished under that clause of the act. Finally, if one accepts the holding of the *Dennis* case and its application of the clear and present danger test, there can be but little question as to the constitutionality of the membership clause as it was interpreted.[28]

J., dissenting); *cf.* Noto v. United States, 367 U.S. 290, 298-99 (1961). In a case decided at the same time as the *Scales* case, the Supreme Court reversed a conviction on the membership clause stating, "[I]t is *present* advocacy, and not an intent to advocate in the future or a conspiracy to advocate in the future once a groundwork has been laid, which is an element of the crime under the membership clause. To permit an inference of present advocacy from evidence showing at best only a purpose or conspiracy to advocate in the future would be to allow the jury to blur the lines of distinction between the various offences punishable under the Smith Act." *Ibid.* At best, this statement would seem to leave the problem somewhat muddled.

25. "The law [the Smith Act] denounces a conspiracy to form, or affiliate with, an organization whose purpose it is to advocate the overthrow of government by force or violence. This conspiracy is one step ahead of the actual formation of or affiliation with the organization, two steps ahead of actual advocacy, and three steps ahead of attempted revolt." *Reference—Freedom of Association,* 4 RACE REL. L. REP. 207, 214 (1959).

26. "Membership in an organization renders aid and encouragement to the organization; and when membership is accepted or retained with knowledge that the organization is engaged in an unlawful purpose, the one accepting or retaining membership with such knowledge makes himself a party to the unlawful enterprise in which it is engaged." Frankfeld v. United States, 198 F.2d 679, 684 (4th Cir. 1952), *cert. denied,* 344 U.S. 922 (1953). The *Scales* case states that "there is no great difference between a charge of being a member in a group which engages in criminal conduct and being a member of a large conspiracy . . . ." 367 U.S. at 226 n.18.

27. "The membership clause of the statute is, of course, nothing more nor less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence." Scales v. United States, 227 F.2d 581, 587 (4th Cir. 1955), *rev'd on other grounds,* 355 U.S. 1 (1957).

28. The dissents of Mr. Justice Black and Mr. Justice Douglas, however, are primarily restatements of their arguments against the *Dennis* case. See 367 U.S. at 259, 262 (dissenting opinions).

Criminal Procedure—Evidence—States May Not Constitutionally Use Evidence Obtained by Illegal Search and Seizure in Criminal Cases

Defendant, indicted for knowingly possessing obscene matter in violation of Ohio law,[1] objected to the introduction into evidence of certain lewd books and pictures unlawfully seized by Cleveland police officers who, without a search warrant, broke into defendant's home. The trial court overruled the objection and rendered judgment against the defendant. The Supreme Court of Ohio affirmed this ruling and upheld the constitutionality of the Ohio statute.[2] On appeal to the United States Supreme Court, *held,* reversed. The fourth amendment's embodiment of the right of privacy is enforceable against the states through the due process clause of the fourteenth amendment and, therefore, evidence obtained as a result of the violation of that constitutional right is inadmissible in a state court. *Mapp v. Ohio,* 367 U.S. 643 (1961).

Since the decision in *Weeks v. United States,*[3] federal courts have consistently denied the admission of evidence procured by federal officers in violation of the fourth amendment's guarantee of freedom from illegal search and seizure.[4] The adoption of this exclusionary rule represented a departure from traditional common law[5] by the process of "judicial implication"[6] rather than by an explicit mandate of the fourth amendment.[7] State courts, faced with the dilemma of admitting or excluding illegally obtained evidence, seem to be in irreconcilable conflict,[8] having advanced a "contrariety of views"[9] in justification of their positions.[10] The Supreme

1. OHIO REV. CODE § 2905.34 (Baldwin 1960), which provides in part that "no person shall knowingly . . . have in his possession or under his control an obscene, lewd, or lascivious book [or] . . . picture . . . ."

2. 170 Ohio St. 427, 166 N.E.2d 387 (1960).

3. 232 U.S. 383 (1914).

4. See, *e.g.,* Olmstead v. United States, 277 U.S. 438 (1928), Byars v. United States, 273 U.S. 28 (1927), and Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), in each of which the *Weeks* case was cited and its rule applied.

5. At common law the established rule was that "the admissibility of evidence is not affected by the illegality of the method through which it is obtained." 8 WIGMORE, EVIDENCE § 2183 (3d ed. 1940). Similar statements are made in MCCORMICK, EVIDENCE § 137 (1954) and 20 AM. JUR. *Evidence* § 393 (1939).

6. Wolf v. Colorado, 338 U.S. 25, 28 (1949).

7. *Ibid.*

8. Elkins v. United States, 364 U.S. 206, 225 (1960). The Supreme Court, in an appendix to its opinion, lists twenty-six states as allowing the admission of evidence illegally seized by state officers and twenty-four holding such evidence to be excludable.

9. Wolf v. Colorado, 338 U.S. 25, 29 (1939).

10. *Compare* Shields v. State, 104 Ala. 35, 16 So. 85, 88 (1894) where, under the assumption that no compulsion to incriminate was involved, it was held that "however unfair or illegal may be the methods by which evidence may be obtained . . . if relevant, it is admissible . . . ." *with* State v. Kroening, 274 Wis. 266, 79 N.W.2d 810 (1956), where the court viewed such admission of evidence as a violation of

Court, in *Wolf v. Colorado*,[11] rejected the contention that the due process clause required state adherence to the *Weeks* rule, relying to a great extent upon the availability of other means[12] by which to prevent illegal police action. An intermediate step from the *Wolf* holding to an exclusionary rule applicable to state courts was taken in *Elkins v. United States*,[13] where it was held that evidence illegally seized during a search by *state* officers was inadmissible in a federal court. The *Mapp* decision's resolution of the issue—how to protect citizens effectively from illegal police action—was not then unanticipated.

The Supreme Court's decision in the instant case that the exclusionary rule is an essential part of both the fourth and the fourteenth amendments seems to be the culmination of what was termed in *Elkins* a "halting but seemingly inexorable"[14] movement. The *Wolf* decision, while demanding that the states apply the substance of the fourth amendment, refused to require as a constitutional matter that they use the procedural means of excluding illegally obtained evidence. The majority opinion overrules *Wolf*,[15] reasoning that a denial of the procedural correlative—exclusion of evidence so procured—vitiates any intent to effectuate the *Wolf* sanction.[16] However, the Court's primary and most persuasive basis for decision, beyond any mere logical extension of *Wolf*, is that by no other means than an exclusionary rule can state and local law enforcement officers be prevented from acting illegally.[17] Mr. Justice Black grounded his concurring opinion on the conclusion that the admission of evidence unlawfully obtained is violative of the fourth and fifth amendments considered jointly.[18] Three

defendant's rights under the state constitution, thereby violating the fourteenth amendment.

11. Note 9 *supra*.

12. The Court said, referring to the rejection of the *Weeks* rule, that it cannot be regarded "as a departure from basic standards to remand such persons . . . to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford." 338 U.S. at 31.

13. 364 U.S. 206 (1960). The Court relied heavily in *Elkins* on the practical necessity of a non-ambivalent approach aimed at preventing violations of the fourth amendment by police officers. This aspect of the problem was discussed by the majority in the instant case, but not to such a degree. Another consideration in *Elkins* was "the imperative of judicial integrity," 364 U.S. at 222, advancing the idea that admitting illegally procured evidence depicted the federal government as a violator of its own laws.

14. 364 U.S. at 219.

15. 367 U.S. at 654-55.

16. *Id.* at 656. In the language of the Court, "To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment."

17. *Id.* at 657-60. *Contra*, Wolf v. United States, 338 U.S. 25, 31 (1949), where the Court enumerated such means. The achievement of this end was felt by the Court in *Mapp* to outweigh any other, including possible lost convictions, and led it to deny the validity of the famous statement of Cardozo: "The criminal is to go free because the constable has blundered." People v. Defore, 242 N.Y. 13, 150 N.E. 585, 587 (1926).

18. 367 U.S. at 661-62. The dissent criticizes Mr. Justice Black's position by citing Cohen v. Hurley, 366 U.S. 117 (1961), where the Supreme Court held that the fifth

members of the Court dissented, in part on the ground that the majority could have avoided the precise issue decided by a determination of the less far-reaching question of the constitutionality of the Ohio statute,[19] and in part from a conviction that such a procedural rule can not be imposed upon the sovereign judicial systems of the states.[20]

In excluding illegally obtained evidence from both state and federal courts, the *Mapp* decision has settled a problem particularly troublesome, collectively speaking, to the states.[21] In so resolving this issue, however, the case may have engendered new questions equally burdensome. The law enforcement problems of state and local agencies differ substantially from those of their federal counterparts. Many crimes are discovered by state and local officers as a result of chance encounters or pleas for emergency assistance, and the opportunities and temptations to seize upon evidence without observing normal procedures are correspondingly frequent.[22] In contrast, the detection of crime by federal officers generally results from deliberate investigations which allow time for proper forms to be followed.[23] The experience of California's law enforcement officers with an exclusionary rule[24] illustrates that, contrary to the result in federal prosecutions,[25] the ability of state and local police to obtain convictions may be markedly circumscribed. Indeed, a study of the record of one municipal court[26] seems to indicate that the exclusionary rule is more likely to preclude the admission of evidence in cases involving serious offenses[27] where conviction is more important to the public safety than in

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amendment privilege against compelled self-incrimination is not applicable to the states.

19. 367 U.S. at 672-76.

20. *Id.* at 680.

21. See note 8 *supra.*

22. ADLOW, POLICEMEN AND PEOPLE 2 (1947).

23. MILLSPAUGH, CRIME CONTROL BY THE NATIONAL GOVERNMENT 25 (1937); Comment, 50 J. CRIM. L., C. & P.S. 144, 158 (1959), where it is stated that "One must remember, however, that there is a clear distinction to be drawn between an investigative ageney such as the FBI which can appropriate long hours and great man power to the preparation of an action, and a local police force which cannot."

24. "The chief of the State Bureau of Narcotics Enforcement reported . . . that the decision [People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955), in which the California Supreme Court held that unlawfully obtained evidence was inadmissible in California courts] had cut arrests of dope addicts and peddlers by state agents by nearly two-thirds." Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan,* 43 CALIF. L. REV. 565, 589-90 (1955).

25. The federal courts have operated under the *Weeks* rule for almost fifty years and "it has not been suggested either that the Federal Bureau of Investigation has thereby been reudered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted." Elkins v. United States, 364 U.S. 206, 218 (1960).

26. Branch 27 of the Chicago Municipal Court. This study is shown in tabular form in Comment, 47 NW. U.L. REV. 493, 498 (1952).

27. *Ibid.* The study indicates that motions to suppress evidence have been granted in a greater percentage of the cases involving narcotics violations and carrying concealed weapons than in cases involving lesser crimes.

cases involving lesser crimes. It is here, at the trial level, where the true impact of the rule upon law enforcement is felt;[28] but the decision is not without effect upon police departments. Even the federal courts, bound by the *Weeks* rule for over forty years, have been unable to establish reasonably clear definitions of the rules of search and seizure by which to guide federal police agencies and have been compelled to resolve search and seizure issues on an *ad hoc* basis.[29] The addition of uncertainty concerning the law in this field to the requirement that state and local police make rapid decisions in emergency situations may handicap state and local authorities in the fulfillment of their law enforcement function, particularly in view of the increased incidence[30] of crime.

Evidence—Hearsay—Old Newspaper Article Admitted as Evidence of Facts Contained on Grounds of Necessity and Trustworthiness

In an action against its fire and lightning insurers for damages resulting from the collapse of a courthouse tower,[1] the plaintiff, Dallas County, asserted that the collapse was caused by lightning. The defendants, however, claimed that the tower was structurally defective and introduced a contemporary account in a 58-year-old newspaper article[2] in support of their argument that charred timbers found in the debris were not due to lightning, but to a fire which occurred in 1901. The trial court, over a hearsay objection,[3] admitted the newspaper in evidence, and the jury returned a verdict for the defendants. On appeal, *held*, affirmed. The

28. Comment, 50 J. CRIM. L., C. & P.S. 144, 159 (1960); DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 534-35 (Chafee ed. 1951). In 24 GA. B.J. 129, 131 (1961) is presented a corollary to the difficulties ahead for trial courts—in states admitting illegally obtained evidence prior to the *Mapp* decision there is generally no procedural device similar to FED. R. CRIM. P. 41(3), which allows a motion for the suppression of evidence, and consequently, until the legislatures of these states act on the problem, criminal trials will necessarily be interrupted to prove the legality of evidence. "This leads to confusion for the jury and to criminal trials burdensome in length."

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

30. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1961, at 140 (82d ed. 1961).

1. The action was originally brought in the Circuit Court of Dallas County, Alabama, but was removed to the United States District Court for the Southern District of Alabama on diversity of citizenship.

2. The article was an unsigned description of a fire which destroyed the then unfinished tower of the courthouse.

3. Dallas County also contended that Alabama law was controlling in this matter under the rule of Erie R.R. v. Tompkins, 304 U.S. 64 (1938). A study of this facet of the case is beyond the scope of this report, but see 14 VAND. L. REV. 1017 (1961) for a discussion of the application of the *Erie* doctrine to rules of evidence.

newspaper was admissible because of its necessity as a source of information and because of its trustworthiness. *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961).

The rule excluding hearsay evidence is a distinctive anomaly of the Anglo-American system of jurisprudence,[4] but one should not assume that hearsay has been forbidden since the inception of the common law. The truth of the matter is that English courts functioned for several hundred years before they firmly adopted this restriction near the middle of the eighteenth century.[5] It is not surprising to find that exceptions to this harsh rule developed to allow extra-judicial declarations in some situations. Some of the exceptions were established from the time of the adoption of the rule.[6] Later exceptions were derived from the exigencies of particular situations.[7] The number of hearsay exceptions has increased so that the Uniform Rules of Evidence[8] list 31, while most authorities have grouped approximately the same subject matter into 14 to 18 categories.[9] Most of the hearsay exceptions have been a part of the law of evidence long enough to be well settled rules upon which the courts may comfortably rely, but this is not to say that the rules governing admissibility of extra-judicial declarations have matured to the point where they exhibit the epitome of common law efficiency and logic.[10] Scholarly attempts to elucidate the complex situation created by the many exceptions have been directed toward announcing a general rule as a test for admission of hearsay. Thayer, in his great treatise, suggested a more liberal test for admission of evidence based on its relevancy.[11] The courts, however, turned

4. "Under no other system of law than the Anglo-American has a general rule been laid down by the courts that relevant hearsay evidence is to be entirely disregarded in the trial of lawsuits." Wickes, *Ancient Documents and Hearsay*, 8 TEXAS L. REV. 451, 475 (1930).

5. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 108-09 (1956).

6. *Id.* at 107-08.

7. 5 WIGMORE, EVIDENCE § 1420 (3d ed. 1940).

8. UNIFORM RULE OF EVIDENCE 63.

9. Professor Morgan has named reported testimony, admissions, confessions, declarations against interest, dying declarations, business entries, commercial lists, official written statements, *res gestae* declarations, declarations concerning pedigree, reputation, declarations as to private land boundries, ancient writings, attestation of documents, and learned treatises as the generally recognized exceptions. MORGAN, BASIC PROBLEMS OF EVIDENCE 254-368 (1961); *cf.* 5 WIGMORE, *op. cit. supra* note 7, § 1426.

10. "Finally, and this is fundamentally serious, few if any lawyers or scholars can succinctly collate the hearsay exceptions in common use, let alone intelligibly state the measure of their aggregate effect upon our law of proof." Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 774 (1961).

11. "A true analysis would probably restate the law so as to make what we call the hearsay rule the exception, and make our main rule this, namely, that whatsoever is relevant is admissible. To any such main rule there would, of course, be exceptions; but as in the case of the other exceptions, so in the hearsay prohibition, this classification would lead to a restricted application of them, while the main rule would have freer course." THAYER, A PRELIMINARY TREATISE ON EVIDENCE 522 (1898). Thayer

a deaf ear to this advice, and followed the precedents by holding that hearsay was inadmissible if it failed to come within one of the rather narrow categories recognized as exceptions.[12] Wigmore followed Thayer in attempting to advance the cause of reform by purporting to find that the reasons for the exceptions could be coordinated under the two heads of necessity and "circumstantial probability of trustworthiness."[13] Only rarely have the courts heeded the advice of the scholars,[14] and they have continued to exclude hearsay where it did not fit one of the recognized exceptions.[15]

The appellant in the instant case brought the problem of the strict exceptions to the hearsay rule squarely before the court by contending that the newspaper was not admissible "under any recognized exception to the hearsay doctrine."[16] In an excellent study of the controversy surrounding the hearsay rule, the court stressed the confusion caused by the numerous hearsay exceptions.[17] The court, however, refused to follow the route of least resistence by acknowledging one of the hearsay exceptions as a basis for its decision. Only the *G. & C. Merriam Co. v. Syndicate Publishing Co.*[18] case decided in 1913 offered assistance by showing an alternative method.

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thought that there must be truly important grounds for the rejection of relevant evidence. "The two leading principles should be brought into conspicuous relief, (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it." *Id.* at 530.

12. A typical statement of this attitude was announced by Lord Blackburn in the case of Sturla v. Freccia, [1880] 5 App. Cas. 623, 647 when he said, "I base my judgment upon this, that no case has gone so far as to say that such a document could be received; and clearly, unless it is to be brought within some one of the exceptions, it would fall within the general rule that hearsay evidence is not admissible."

13. 5 WIGMORE, *op. cit. supra* note 7, § 1420. Compare this section with 3 WIGMORE, EVIDENCE § 1420 (2d ed. 1923). This comparison will indicate that the more accurate language of "circumstantial probability of trustworthiness" has been substituted for "circumstantial guarantee of trustworthiness." Professor Morgan's slightly different approach is that the test of admissibility should be "(a) whether the hearsay is such that the trier can put a reasonably accurate value upon it as evidence of the matter it is offered to prove, and (b) whether direct testimony of the declarant is unavailable or, if available, is likely to be less reliable." MORGAN, *op. cit. supra* note 9, at 254.

14. For an early adoption of a liberal test, see G. & C. Merriam Co. v. Syndicate Publishing Co., 207 Fed. 515 (1913). The most progressive of state courts seems to be the Supreme Court of New Hampshire. See O'Haire v. Breton, 102 N.H. 448, 159 A.2d 805 (1960) (report made in 1955 by now deceased engineer admitted).

15. "Statements of parties outside of court are ordinarily inadmissible, unless they come within some of the exceptions to the hearsay rule, either where they are made as part of res gestae, or where they are declarations against interest as classified in our statute . . . or some of the other recognized and established exceptions to the hearsay rule." Welch v. Thomas, 102 Mont. 591, 601, 61 P.2d 404, 407 (1936); see, *e.g.*, Kalamazoo Yellow Cab Co. v. Sweet, 363 Mich. 384, 109 N.W.2d 821, 822 (1961).

16. 286 F.2d at 391.

17. "However, the law governing hearsay is somewhat less than pellucid." *Id.* at 392 & n.3.

18. 207 Fed. 515 (1913).

As did Judge Learned Hand in the *Merriam* case, this court cut through the "smoke" to the real problem of whether an adversary should be deprived of the benefits of cross-examination when the evidence offered "may otherwise be lost"[19] and the nature of the assertion is such that the trier of fact could give it a "reasonably accurate value."[20] First, the Wigmore requirement of "necessity" was applied to the facts by showing that even if witnesses to the 1901 fire could be found, their testimony based on memory would not be as accurate as the "contemporary newspaper article."[21] The second requirement of "trustworthiness" was met by pointing out that the results of either a deliberate desire to falsify or mere inaccuracy would have been corrected because of the public nature of the declaration.[22] In stating its decision the court made clear its disapproval of the stereotyped exceptions to the hearsay rule, when it said:

> We do not characterize this newspaper as a "business record," nor as an "ancient document," nor as any other readily identifiable and happily tagged species of hearsay exception. It is admissible because it is necessary and trustworthy, relevant and material, and its admission is within the trial judge's exercise of discretion in holding the hearing within reasonable bounds.[23]

The Fifth Circuit Court of Appeals might have upheld the district court on the basis of the "ancient documents" exception,[24] but, instead, it chose to base its holding on a broader rule. The decision in the instant case looks beyond the misleading exceptions to the ideal goal of using "the exercise of common sense in deciding the admissibility of hearsay evidence."[25] Legal thinkers have long believed that the trier of fact should have all valuable and relevant evidence presented to it as a basis for its decision.[26] Although the opinion in the *Dallas County* case goes a long way toward the scholar's utopia, it is not to be assumed that there is a great movement away from the standard methods for determining when hearsay is admissible.[27] This

19. 286 F.2d at 396.

20. MORGAN, *op. cit. supra* note 9, at 254. Note that Professor Morgan's liberal language is used here, but this seems to be the practical effect of the "circumstantial guarantee of trustworthiness" test.

21. 286 F.2d at 396.

22. *Id.* at 397.

23. *Id.* at 397-98.

24. See Trustees of German Township v. Farmers & Citizens Sav. Bank Co., 113 N.E.2d 409 (Ohio C.P.), *aff'd*, 115 N.E.2d 690 (Ohio Ct. App. 1953) (80-year-old newspaper held admissible). But see State v. Otis Elevator Co., 10 N.J. 504, 92 A.2d 385 (1952) (lower court upheld in rejecting 40-year-old newspaper).

25. 286 F.2d at 397.

26. Morgan, *Practical Difficulties Impeding Reform in the Law of Evidence*, 14 VAND. L. REV. 725 (1961).

27. "Just what time will determine the result to be is hard to tell, for any consideration of hearsay is bonnd up with a slowly unfolding historical growth that has thus far resisted most efforts to stimulate a faster growing process." Ladd, *The Hearsay We Admit*, 5 OKLA. L. REV. 271, 288 (1952). General resistance to change is also indicated by the fact that no jurisdiction has adopted the Model Code of Evidence, and the hear-

decision and similar efforts by the Supreme Court of New Hampshire,[28] however, show the way; one can only hope that other courts will choose to follow their example.

Restraint of Trade—Anti-Trust Law—Complete Divestiture of Stock Ordered as Remedy For Violation of Section 7 of Clayton Act

In a 1957 decision the Supreme Court found that the defendant corporation had violated section 7 of the Clayton Act[1] by its twenty-three per cent holding of General Motors stock which tended to lessen competition and create a monopoly in the automotive fabrics and finishes markets.[2] On remand "for a determination . . . of the equitable relief necessary and appropriate . . . to eliminate the effects of the acquisition offensive to the statute,"[3] the district court decreed that while all voting rights incident to Du Pont's ownership of General Motors stock must be divested by a "pass through"[4] to the shareholders of Du Pont, legal title to the stock with all other incidents of ownership could be retained by the defendant corporation.[5] On appeal by the United States to the Supreme Court, *held*, reversed. Complete divestiture by Du Pont of its General Motors stock is the only effective remedy for this violation of section 7 of the Clayton

say provisions of the Uniform Rules of Evidence have had only limited acceptance. Maguire, *supra* note 9, at 741 n.1.

28. See note 14 *supra*.

1. 38 Stat. 731-32 (1914), as amended, 15 U.S.C. § 18 (1958):

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

2. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957). *But see* United States v. E. I. du Pont de Nemours & Co., 126 F. Supp. 235 (N.D. Ill. 1954), holding that Du Pont, Delaware Realty, Christiana Securities Co., and General Motors had violated neither § 7 of the Clayton Act nor §§ 1 and 2 of the Sherman Act. Delaware and Christiana are holding companies controlled by the Du Pont family. Although neither was a party to the action, both consented to be bound by the lower court judgment.

3. 353 U.S. at 607-08.

4. This is the procedure through which the holders of the Du Pont stock, rather than the corporation itself, would exercise the voting rights of General Motors stock held by Du Pont. The voting rights given to each stockholder would be proportional to his holding of outstanding shares of Du Pont stock.

5. United States v. E. I. du Pont de Nemours & Co., 177 F. Supp. 1 (N.D. Ill. 1959).

Act. *United States v. E. I. du Pont de Nemours and Co.*, 366 U.S. 316 (1961).

The Clayton Act is directed toward the same inherent evils of unlawful combinations as the Sherman Anti-Trust Act and was enacted to supplement and bolster the Sherman Act.[6] Neither statute expressly provides for the use of divestiture as a remedial solution.[7] Rather discretion is vested in the trial judge to frame a decree granting the necessary relief.[8] Divestiture, however, has historically been a remedy utilized by the courts for Sherman Act violations effected through intercorporate stock acquisitions and combinations.[9] Although the litigation involving violations of section 7 of the Clayton Act has been limited relative to that of the Sherman Act, in the majority of section 7 cases the courts have ordered divestment.[10] There is authority for the proposition that divestiture is mandatory for Clayton Act violations,[11] but the majority of courts called upon for a determination of an appropriate remedy in civil proceedings under both the Clayton and Sherman acts have been guided by the premise that relief is to be remedial not punitive,[12] and that divestiture is not to be used indiscriminately or as a matter of course.[13] Apparently this continued use

6. Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 355 (1922). The function of the Sherman Act is to eliminate proven monopolies while that of the Clayton Act is "to reach the agreements embraced within its sphere in their incipiency" and to extinguish tendencies toward monopoly. 258 U.S. at 356.

7. United States v. United Shoe Mach. Co., 110 F. Supp. 295 (D. Mass. 1953); United States v. National Lead Co., 332 U.S. 319 (1947); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); KAYSEN & TURNER, ANTITRUST POLICY 111 (1959); 2 WHITNEY, ANTITRUST POLICIES 385-92 (1958). *But see* Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587 (1934).

8. The Court, in remanding the instant case after a determination of liability, said: "The . . . courts, in the framing of equitable decrees, are clothed 'with large discretion to . . . fit the exigencies of the particular case'." 353 U.S. at 607-08; *accord*, International Salt Co. v. United States, 332 U.S. 392 (1947); United States v. Crescent Amusement Co., 323 U.S. 173 (1944). In KAYSEN & TURNER, *op. cit. supra* note 7, at 111, the authors term the trial judge's range as "the tremendous area of discretion in making remedies."

9. See, *e.g.*, International Boxing Club v. United States, 358 U.S. 242 (1959); Hartford-Empire Co. v. United States, 323 U.S. 386 (1945); Standard Oil Co. v. United States, 221 U.S. 1 (1911); Northern Sec. Co. v. United States, 193 U.S. 197 (1904); HALE & HALE, MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT 371 (1958).

10. See, *e.g.*, Maryland & Va. Milk Producers' Ass'n v. United States, 362 U.S. 458 (1960); Aluminum Co. of America v. FTC, 284 Fed. 401 (1922). *But see* American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387 (S.D.N.Y. 1957); United States v. New England Fish Exch., 258 Fed. 732 (D. Mass. 1919). There have been several consent decrees accepted by the FTC which have not required complete divestiture. *E.g.*, Vendo Co., 54 F.T.C. 253 (1957); International Paper Co., 53 F.T.C. 1192 (1957). *Cf.* 2 WHITNEY, ANTITRUST POLICIES 391 (1958).

11. Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587 (1934).

12. United States v. National Lead Co., 332 U.S. 319, 338 (1947); Hartford-Empire Co. v. United States, 323 U.S. 386, 409 (1945); Standard Oil Co. v. United States, 221 U.S. 1 (1911); Comment, 58 MICH. L. REV. 1024, 1039 (1960).

13. Timken Roller Bearing Co. v. United States, 341 U.S. 593, 603 (1951). Courts

of divestiture is grounded on a belief in its unquestioned effectiveness in suppressing the antitrust violation by creating an opportunity for the restoration of competition in the encroached line of commerce. The courts have evolved three criteria in determining the proper relief for antitrust violations of this nature: (1) the duty to give complete and efficacious effect to the prohibitions of the statute; (2) the achievement of an effective result with a minimum of injury to the public interest; (3) a proper regard for the vast interests of private property vested in owners of stocks or securities who are in no way responsible for the violation.[14]

In the instant case, Mr. Justice Brennan, writing for the majority,[15] based his decision on the finding that no relief short of complete divestiture would be adequate to assure proper redress of the violation of section 7.[16] The Court concluded that a pass through of voting rights to the shareholders[17] of Du Pont would result in a continued community of interest between the two corporate entities arising from the 40 million shares of General Motors stock remaining under the dominion of Du Pont stockholders.[18] The majority reasoned that such an arrangement would make it implicitly beneficial to the interest of defendant's shareholders to vote the stock in such a manner as to induce General Motors to favor Du Pont.[19] Justice Brennan refused to be governed by possible economic injury of significant magnitude in individual cases to the shareholders of Du Pont and General Motors, holding that economic considerations, no matter how onerous, could be an auxiliary factor only in the selection of a remedy proven effective.[20]

Mr. Justice Frankfurter, in a vigorous dissent, reasoned that a pass through of voting rights, coupled with the other restrictive provisions of the lower court decree would achieve an effective redress of the violation of section 7.[21] To the dissenters the original violation of the Clayton Act

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dealing with unlawful stock acquisitions order the relief "necessary and appropriate" to eliminate any reasonable possibility of continued monopolization. 177 F. Supp. at 50.

14. 366 U.S. at 327-28; United States v. American Tobacco Co., 221 U.S. 106, 185 (1911); Wise, *Three D's of Antitrust Enforcement,* 1958 INSTITUTE ON ANTITRUST LAWS 105 (1958).

15. Chief Justice Warren and Justices Black, Brennan and Douglas. Mr. Justice Clark and Mr. Justice Harlan took no part in the consideration of the case. Mr. Justice Frankfurter, joined by Justices Stewart and Whittaker, dissented.

16. 366 U.S. at 334.

17. None of Du Pont's 220,000 shareholders or General Motors' 700,000 shareholders were found guilty of an antitrust violation. 177 F. Supp. at 10.

18. 366 U.S. at 331-32.

19. *Ibid.*

20. *Id.* at 328.

21. *Id.* at 379. A summary of the district court's pertinent remedial provisions follows. Du Pont, Christiana, and Delaware were enjoined from acquiring further General Motors stock except as to stock or rights that might be distributed to them purely as stockholders of General Motors. Du Pont, Christiana, and Delaware were prohibited from having common officers, directors, or employees with General Motors.

resulted from Du Pont's voting power of General Motors stock and the consequent mutuality of directors between the two corporate entities.[22] It followed that once the voting rights had been divorced and the two corporations enjoined from maintaining interlocking directorates,[23] the intent of the lawmakers in framing section 7 had been met.[24] The divestiture of voting rights appeared to be sufficient relief because this arrangement brought the defendants within the so-called failing corporation exception to section 7 whereby those corporations holding stock merely for investment purposes are excluded from the purview of the statute.[25] Stating his view that the province of the trial judge had been invaded,[26] Justice Frankfurter concluded that the effect on the securities market coupled with the tax consequences of total divestiture to the shareholders of Du Pont were adequate grounds for the rejection of divestiture by the trial judge in his formulation of a remedial decree.[27]

There appear to be two distinct schools of thought as to the propriety of the use of divestiture as a remedy for stock acquisitions and combinations violative of the antitrust laws. The majority in the instant case adhered to the conviction that divestiture is the preferred mode of relief,[28] to be rejected only for compelling and extraordinary reasons.[29] Although expressly rejecting the government's theory that divestiture is the mandatory remedy prescribed by Congress for section 7 violations,[30] the Court, in shifting the burden of persuasion, requiring the defendant to show that a proposed remedy short of divestiture would be completely effective,[31]

The defendant corporations were restrained from entering into any joint business venture with General Motors or knowingly holding stock in any business enterprise in which General Motors held stock. General Motors and Du Pont were required to deal with each other at "arm's length" during the continuation of the stockholding period. Separate provisions preserved the right of either party to appeal for a modification of the decree in the event of a change in circumstances and reasonable means of inspection by the Department of Justice were inserted in the decree to insure compliance with the judgment by Du Pont, Christiana, Delaware, and General Motors.

22. 366 U.S. at 338-40.

23. *Id.* at 359-60.

24. *Ibid.*

25. Clayton Act § 7, 38 Stat. 731-32 (1914), as amended, 15 U.S.C. § 18 (1958): "This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about the substantial lessening of competition."

26. 366 U.S. at 356-79.

27. *Id.* at 361.

28. *Id.* at 328-31. The majority said divestiture "should always be in the forefront of a court's mind when a violation of § 7 has been found." *Id.* at 331; Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 IND. L.J. 1 (1951).

29. *Id.* at 328-31.

30. *Id.* at 328 n.9.

31. *Id.* at 331-32. Compare with Judge Wyzanski's statement in *United Shoe* that "the Court agrees that it would be undesirable, at least until milder remedies have been tried, to direct United to abolish leasing forthwith." 110 F. Supp. at 348.

has come to the position of a presumption in favor of divestment. This view runs counter to the rising sentiment expressed by Judge Wyzanski in *United States v. United Shoe Machinery Co.*[32] that extreme caution ought to be the guide in ordering the drastic remedy of divestment.[33] Wide discretion is to be vested in the trial judge to formulate an equitable decree.[34] These "cautious" courts have not granted divestiture absent a finding that the stocks or assets in question have been acquired by means violative of the antitrust laws[35] or a clear showing by the complaining party of the necessity of divestiture to insure effective competition.[36] Although the conservative approach of the dissent is more sympathetic to the wrongdoer, it would seem that in view of the distinct possibility of serious market disruptions and adverse tax and trade affects on third parties that relief for antitrust violations of this nature should remain flexible, with broad discretion left to the trial courts in the framing of an equitable remedy on the basis of the record and the independent findings of the trial judge.[37]

Clearly there is foundation for an original finding in the instant case for the necessity of divestment due to the continued community of interest between the two corporations, but it would appear that the trial judge also had a firm basis for ordering only partial divestiture. It is very likely

32. "In the antitrust field the courts have been accorded . . . an authority they have in no other branch of enacted law. . . . They would not have been given, or allowed to keep, such authority in the antitrust field . . . if the courts were in the habit of preceding with surgical ruthlessness that might commend itself to those seeking absolute assurance that there will be workable competition, and to those aiming at immediate realization of the social, political, and economic advantages of dispersal of power." 110 F. Supp. at 348. See also KRONSTEIN, MILLER & SCHWARTZ, MODERN ANTITRUST LAW 180 (1958).

33. See note 32 *supra*. KAYSEN & TURNER, ANTITRUST POLICY 111 (1959); Brown, *Injunctions and Divestiture*, in AN ANTITRUST HANDBOOK 545 (ABA Section of Antitrust Law ed. 1958).

34. See note 8 *supra*.

35. See, *e.g.*, United States v. Crescent Amusement Co., 323 U.S. 173 (1944); United States v. Southern Pac. Co., 259 U.S. 214 (1922); United States v. Reading Co., 253 U.S. 26 (1920); Northern Sec. Co. v. United States, 193 U.S. 197 (1904); ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 355 (1955).

36. 110 F. Supp. at 346-51; Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); KRONSTEIN, MILLER & SCHWARTZ, MODERN ANTITRUST LAW 180 (1958); ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 354 (1955). The Committee proposes four standards to be complied with by the Department of Justice before requesting the use of divestiture as a remedy: (1) it should not be invoked as a penalty; (2) it should not be used where less drastic remedies are effected; (3) it is important to consider possible detrimental affects to the industry involved; (4) once divestiture has been ordered, a plan to effectuate the decree must take into consideration the affect on the public and the violator as well as interested parties such as investors, customers, and employees. *Id.* at 355-56.

37. "There are two basic principles which govern the application of this form of relief in antitrust cases. . . . The application of these two principles is dependent upon the circumstances in each individual case." Wise, *Three D's of Antitrust Enforcement*, 1958 INSTITUTE ON ANTITRUST LAWS 105, 107 (1958).

that the widespread distribution of voting rights of the General Motors stock to the 220,000 Du Pont shareholders coupled with the other restrictive provisions of the decree[38] will completely eliminate any effects forbidden by the statute.[39] Following the logic of the government adopted by the Supreme Court in its mandate[40] the same avenues for coercion will remain open, as the majority of the stock will go to Du Pont stockholders in the form of dividends over a ten year period, leaving these Du Pont investors in a position to apply pressure to the management of General Motors to favor Du Pont.

The majority in the instant case was cognizant of the possibility of serious economic repercussions to the shareholders of General Motors and Du Pont,[41] but evidently felt that no overwhelming or irreparable damage would result.[42] Although a definitive judgment of the tax and market consequences of the decree would be difficult at present, there are substantial indications that no great loss to General Motors or Du Pont investors will occur. Congress is now considering a bill, passed by the House and reported favorably out of committee in the Senate, to mitigate the harsh tax burden for Du Pont stockholders;[43] in the current state of the securities market prospects are excellent that, given effective programming of selling efforts, institutional investors will absorb spaced offerings of the General Motors stock over the ten year divestment period without permanently depressing the price of the stock.[44] The majority opinion is consistent with the proposition that unless divestiture were ordered in this case its use as a remedy for section 7 violations would be materially curtailed. The logic of this position is that if divestiture is not ordered in a section 7 violation involving two of the country's largest corporatons, it is very doubtful that the trial courts would subsequently order divestment for violations on a smaller scale. It is submitted, however, that the decision might have been more meaningful had the majority made explicit the view that part of its finding was colored by the size of the corporations involved.

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38. See note 21 *supra.*
39. 366 U.S. at 359-60.
40. *Id.* at 334-35.
41. *Id.* at 326-28.
42. *Id.* at 327 n.7.
43. H.R. 8847, 87th Cong., 1st Sess. (1961). See also S. REP. No. 1100, 87th Cong., 1st Sess. (1961).
44. See Brief for Appellant, pp. 53-80, United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316 (1961). In United States v. Aluminum Co. of America, 91 F. Supp. 333, 418-19 (S.D.N.Y. 1950) the court required divestiture of 35% of the outstanding common stock of Aluminium, Ltd., over a ten year period; as of 1959 90% of the required stock had been divested. Generally, during this period the stock's market price performance was better than that of most industrials.

Taxation—Income Tax—Deduction Allowed Husband For Entire Alimony Payment to Wife Unless A Portion Thereof Is Specifically Designated For Child Support

In a divorce decree,[1] it was provided that the wife, *W*, would have custody of the three minor children and that the husband, *H*, would make certain periodic payments to *W* for the support of *W* and the children. Should any one of the children marry, become emancipated, or die, these payments were to be reduced one-sixth. For the taxable years 1951 and 1952, *H* deducted from his gross income all of the payments made under the decree. The Commissioner determined a deficiency, claiming that the language of the agreement impliedly designated one-half[2] of the payments for the support of the children and that this part of the payments, therefore, was not deductible by *H*.[3] The Tax Court approved the Commissioner's disallowance,[4] but the court of appeals reversed.[5] On certiorari to the Supreme Court of the United States, *held*, affirmed. *H*[6] may deduct from his gross income, payments made to *W* under a divorce decree, except portions thereof which are *specifically designated* as payable for the support of a minor child. *Commissioner v. Lester*, 366 U.S. 299 (1961).

Prior to 1942, there was no provision in the Code for a deduction of any alimony payments by *H*. Furthermore, it had been settled in the

1. A written agreement was made in anticipation of divorce and subsequently approved by the divorce court. Commissioner v. Lester, 366 U.S. 299, 300 (1961).

2. That is, one-sixth for each of the three children.

3. The Commissioner makes this contention under § 22(k) of the 1939 Code, which provides:

> "[P]eriodic payments . . . received [by the wife] subsequent to [a decree of divorce] . . . in discharge of . . . a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree . . . shall be includible in the gross income of such wife. . . . This subsection shall not apply to that part of any such periodic payment *which the terms of the decree . . . fix*, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband." Int. Rev. Code of 1939, § 22(k), added by ch. 619, 56 Stat. 816 (1942) (now INT. REV. CODE OF 1954, § 71). (Emphasis added.)

and under § 23(u), which provides:

> "[There shall be allowed as a deduction] . . . in the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year." Int. Rev. Code of 1939, § 23(u), added by ch. 619, 56 Stat. 816 (1942) (now INT. REV. CODE OF 1954, § 215).

4. Jerry Lester, 32 T.C. 1156 (1959).

5. Lester v. Commissioner, 279 F.2d 354 (2d Cir. 1960).

6. As used in the Code and in this article, the terms "husband" and "wife" should be read as "former husband" and "former wife," and if the alimony payments are being made to the husband by the wife, then the terms "husband" and "wife" should be reversed. Int. Rev. Code of 1939, § 3797(a)(17), added by ch. 619, 56 Stat. 816 (1942) (now INT. REV. CODE OF 1954, § 7701(a)(17)).

leading case of *Gould v. Gould*[7] that these payments were not taxable to *W*.[8] In 1942, Congress shifted the tax burden of alimony to *W*,[9] but the new provision did not apply to any amount which was "fixed" by the decree as payable for the support of minor children.[10] Under the new law, combined payments to *W* for alimony *and* child support, with no part of the total amount designated as either, have been held entirely taxable to *W*.[11] Litigous difficulties have arisen, however, where the decree does not distinctly designate alimony and child support but does provide that the total payments will be altered upon the happening of some future event.[12] In these situations the Tax Court and the various circuit courts have rendered conflicting decisions.[13] Using the results reached as a basis of division, the approach of the Tax Court and the First, Seventh, and Ninth Circuits has been characterized as the *liberal view*, while that of the Second and Sixth Circuits has been called the *strict view*.[14] If the decree provides for an alteration of the payment upon the happening of some contingent event, then the *liberal view* courts have construed this to be an indirect designation of a part as child support.[15] On the other side of the

7. 245 U.S. 151 (1917).

8. The Court reasoned that the payments were not deductible by *H* because they were a personal expense and were not taxable to *W* since they were a portion of the husband's estate to which *W* was equitably entitled. 245 U.S. at 153. That the Court was also "influenced by the fact that *H* had no deduction and taxing the payments to *W* would result in double taxation," see Note, 45 VA. L. REV. 1362, 1363 (1959). See Lagomarcino, *Federal Tax Consequences of Alimony and Separate Maintenance Payments*, 3 BUFFALO L. REV. 179 (1954).

9. The most frequently given reason is that increased surtax rates could work a hardship on *H*. STANLEY & KILLCULLEN, THE FEDERAL INCOME TAX 26-27 (4th ed. 1961); Lagomarcino, *supra* note 8, at 180; SURREY & WARREN, FEDERAL INCOME TAXATION 1044 (5th ed. 1960). For other reasons see Note, *supra* note 8, at 1363.

10. Note 3 *supra*.

11. Dora H. Moiteret, 7 T.C. 640 (1946); Henrietta Seltzer, 22 T.C. 203 (1954); Treas. Reg. 111, § 29.22(k)-1(d) (1953) (now Treas. Reg. 1.71-1(e)); Annot., 4 A.L.R.2d 252, 271 (1949).

12. 13 S.C.L.Q. 288, 289 (1961); STANLEY & KILLCULLEN, *supra* note 9, at 28.

13. See Eisenger v. Commissioner, 250 F.2d 303 (9th Cir. 1957), *cert. denied*, 356 U.S. 913 (1958); Dorothy H. Hirshon, 27 T.C. 558 (1956), *rev'd*, 250 F.2d 497 (2d Cir. 1957); Weil v. Commissioner, 240 F.2d 584 (2d Cir.), *cert denied*, 353 U.S. 958 (1957); SURREY & WARREN, *supra* note 9, at 1101-02.

14. Note, 45 VA. L. REV. 1362, 1365 (1959).

15. Within this category, however, there is a variation in the tests expressed by the courts. In Jerry Lester, 32 T.C. 1156, 1159 (1959), *rev'd*, 279 F.2d 354 (2d Cir. 1960), *aff'd*, 366 U.S. 299 (1961), it is said: "The Tax Court . . . has felt that payments, made by the husband to the mother of his children, which are obviously intended to include both alimony for the wife and support for the minor child or children should not be regarded entirely as alimony . . . if the terms of the agreement or decree contain a *reasonable indication* of how the total payment is to be divided." (Emphasis added.) The Tax Court has found portions fixed for child support where the decree provides for reduction in payments at the marriage, emancipation, or death of the children, Jerry Lester, *supra;* change in custody of the children, Truman W. Morsman, 27 T.C. 520 (1956), *acq.*, 1957-1 CUM. BULL. 4; and remarriage of the wife, Eisenger v. Commissioner, 250 F.2d 303, (9th Cir. 1957), *cert. denied*, 356 U.S.

controversy, the *strict view* courts seem to hold that unless there is a direct and exclusive designation of part of the amount for child support, the whole payment will be taxed to *W* as alimony.[16]

To resolve this conflict, the Supreme Court granted certiorari in the instant case.[17] The Court first considers the legislative history of section 22(k). From a detailed examination of the congressional debates and hearings on the section, the Court finds that the child support clause was meant to effect a tax shift only where an amount was "specified" as child support in the decree.[18] Taking a broader view, the Court points out that in divorce agreements like the one in this case, *W* has unrestricted use of the whole payment and that "the power to dispose of income is equivalent of ownership of it."[19] Therefore taxing the whole amount to *W*, unless a portion is specified for child support, is consistent with the "underlying philosophy of the Code."[20] The Court then considers the Commissioner's contention that the decree in this case does "fix" one-half of the payments for child support. To answer this contention, the Court points to the uncertainty of the tax consequences where designations for child support may be implied from the provisions of a divorce decree,[21] and the Court finds that it was the intent of Congress to eliminate these uncertainties through strict wording in the statute.[22] Therefore, the Court concludes, allocations for child support will not be determined by inference but only where the parties clearly and specifically designate them.[23]

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913 (1958). The First and Seventh Circuits have followed the Tax Court. Metcalf v. Commissioner, 271 F.2d 288 (1st Cir. 1959); Mandel v. Commissioner, 185 F.2d 50 (7th Cir. 1950). The Ninth Circuit expresses the rule in terms of "sufficient certainty and specificity . . . without reference to contingeneies which may never come into being," but reaches the same result. Eisenger v. Commissioner, *supra.* See generally Note, 45 VA. L. REV. 1362 (1959); 13 S.C.L.Q. 288 (1961).

16. In Weil v. Commissioner, 240 F.2d 584 (2d Cir.), *cert. denied,* 353 U.S. 958 (1957), the court said: "We hold that sums are 'payable for the support of minor children' when they are to be used for that purpose only. Accordingly . . . their use must be restricted to that purpose, and the wife must have no independent beneficial interest therein." *Id.* at 588. See also Deitsch v. Commissioner, 249 F.2d 534 (6th Cir. 1957); Note, 45 VA. L. REV. 1362 (1959).

17. 366 U.S. 299, 301 (1961).

18. The term "specified" was used in explaining the part of the proposed amendment on child support to the Senate Committee on Finance. *Hearings on H.R. 7378 Before the Senate Committee on Finance,* 77th Cong., 2d Sess. 48 (1942). When the section was originally proposed in 1941, it stated that child support payments must be "specifically designated" as such if they are to be included in *H's* gross income. H.R. 5417, 77th Cong., 1st Sess. § 117 (1942). In the final version the term "specifically designated" was changed to "fix," but this was explained as a "little more streamlined langnage" rather than a change in legislative intent. *Hearings on H.R. 7378 Before the Senate Committee on Finance, supra.*

19. 366 U.S. at 303-04.

20. *Ibid.*

21. See notes 7-16 *supra* and aecompanying text.

22. S. REP. No. 673, 77th Cong., 1st Sess., pt.1, at 32 (1942).

23. In a concurring opinion, Mr. Justice Douglas wrote, "In an early income tax case, Mr. Justice Holmes said 'Men must turn square corners when they deal with

This decision has settled a controversy which existed for nearly twenty years. It is a decision of special importance today because section 22(k) was incorporated essentially unchanged into the 1954 Code.[24] In deciding who will pay the income tax on the money used for support of the children, the parties to a divorce or separation agreement have several collateral considerations.[25] Among these are loss of the right to file a joint return and its income-splitting advantages,[26] the difference in their respective tax brackets,[27] the qualification of either to deduct for dependents,[28] the deduction of medical expenses if these are required in substantial amounts for the children,[29] and the effect on tax rates if the wife qualifies for head of household status.[30] With these considerations in mind the parties may negotiate the tax consequences of child support payments to their *mutual* advantage. Whatever the results of these negotiations may be, two things are now clear. If they intend for *H* to bear the tax on money paid for support of the children, they must clearly specify what portion of the total payment to *W* is to be used for child support, and if they agree that *W* should pay this tax, they may still provide for altering the payments upon the happening of a future event, without fear that a designation for child support will be implied from these provisions.

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the Government.' The revenue laws have become so complicated and intricate that I think the Government in moving against the citizen should also turn square corners . . . . The present agreement makes no specific designation of the portion that is intended for the support of the children. It is not enough to say that the sum can be computed. Congress drew a clear line when it used the word fix. Resort to litigation, rather than to Congress, for a change in the law is too often the temptation of government which has a longer purse and more endurance than any taxpayer." 366 U.S. at 306-07.

24. INT. REV. CODE OF 1954, § 71(b) relating to payments to support minor children is worded identically like the child support clause of § 22(k). The major change in § 71 of the 1954 Code is that it includes payments made to *W* pursuant to a written separation agreement, even though there is no legal divorce or separation. Lagomarcino, *Federal Tax Consequences of Alimony and Separate Maintenance Payments*, 3 BUFFALO L. REV. 179, 185 (1954).

25. See generally N.Y.U. 18TH INST. ON FED. TAX 901, 911-17 (1960).

26. INT. REV. CODE OF 1954, §§ 2, 6013.

27. For example, *W* might receive all of the payments as alimony and still pay no tax if her income is low enough, while *H* may deduct the total payment. Also, if there is a wide difference in their tax rates, *H* might be induced to pay more because it could all be deducted by him.

28. INT. REV. CODE OF 1954, §§ 151(e), 152(a).

29. This in turn depends on whether the child is a dependent. INT. REV. CODE OF 1954, § 213.

30. INT. REV. CODE OF 1954, §§ 1(b)(1), (2).

Taxation—Income Tax—Lodging Expenses Allowed As Medical Expense Deduction

Taxpayer claimed as a medical deduction, in his federal income tax return, lodging expenses incurred while spending several winter months in Florida.[1] Taxpayer had been advised to go there by his doctor because of previous heart attacks. The Commissioner disallowed the deduction on the basis that the expenses were not necessary to taxpayer's medical care and that, even if they were necessary, they were not allowable under section 213(e) of the 1954 Internal Revenue Code.[2] Only "transportation expenses," according to the Commissioner, were included in the definition of "medical care"; meals and lodging were not within that concept. On appeal to the Third Circuit Court of Appeals from a decision of the Tax Court allowing the deduction, *held,* affirmed.[3] Deductions for medical expenses under section 213 of the 1954 Internal Revenue Code include lodging expenses if they are primarily for and essential to medical care. *Commissioner v. Bilder,* 289 F.2d 291 (3d Cir. 1961).

Under section 23(x) of the 1939 Code,[4] the predecessor of section 213 of the 1954 Code, the lower federal courts allowed both transportation and lodging expenses as medical deductions in "proper cases."[5] The Commissioner acquiesced in these decisions[6] and allowed the deductions when they were incurred primarily for medical care.[7] The determination of an allowable deduction was difficult, however, since transportation and lodging expenses claimed as medical deductions bore the characteristics of normal living expenses expressly made non-deductible by section 24(a)1 of the

1. Taxpayer also included as a medical deduction transportation expenses for the trip; this, however, was a factual question of medical necessity and not a question of law. If they were medically necessary, then they were deductible under INT. REV. CODE OF 1954, § 213(e)(1)(B). Taxpayer claimed similar deductions for his family who had accompanied him.

2. "*Definitions.*—For purposes of this section—(1) The term "medical care" means amounts paid—(A) for the diagnosis, cure, mitigation, or prevention of disease . . . (B) for transportation primarily for and essential to medical care referred to in subparagraph (A)."

3. In affirming the decision of the Tax Court that taxpayer's expenses were deductible, the circuit court reversed the Tax Court's decision that similar expenses incurred by taxpayer's family were not medically necessary to taxpayer and allowed them as a medical deduction.

4. Int. Rev. Code of 1939, § 23(x).

5. Deductions were allowed in: Embry's Estate v. Gray, 143 F. Supp. 603 (W.D. Ky. 1956) (deductions allowed for the expenses of taxpayer's wife); L. Keever Stringham, 12 T.C. 580 (1949), reviewed by the Tax Court, *acq.,* 1950-2 CUM. BULL. 4, *aff'd,* 183 F.2d 579 (6th Cir. 1950). Deductions were disallowed in: Samuel Ochs, 17 T.C. 130 (1950); Samuel Dobkin, 15 T.C. 886 (1950); Edward A. Havey, 12 T.C. 409 (1949); Martin W. Keller, 8 CCH Tax Ct. Mem. 685 (1949).

6. I.T. 3786, 1946-1 CUM. BULL. 75; Rev. Rul. 55-261, 1955-1 CUM. BULL. 307, 308.

7. Treas. Reg. 111, § 29.23(x)-1 (1944).

1939 Code. In *Edward A. Havey*,[8] the Tax Court enumerated several factors which, although not conclusive, were to be considered in making this determination: the motive of the taxpayer in incurring the travel expense, the advice of taxpayer's doctor upon which he acted, the relationship between the illness and the treatment, and the proximity in time of the treatment to the illness.[9] To avoid allowing taxpayers to write off vacation expenses as a medical deduction, the courts strictly applied these standards in determining medical necessity.[10] In writing section 213 of the 1954 Code, Congress included a proviso expressly allowing transportation expenses as a medical deduction when they were necessary to taxpayer's medical care but made no mention whatever of lodging expenses.[11] The purported reasons for this change from the 1939 Code are found in the committee reports on the section.[12] At the same time, Congress reemphasized, in section 262, that: "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses."[13] The question of whether lodging expenses could constitute a medical deduction under these changed provisions of the 1954 Code had never been decided by an appellate court prior to the instant case.

On appeal to the circuit court, the Commissioner contended that even though the lodging expenses were necessary to taxpayer's medical care, they should not be deductible.[14] He reasoned that the express proviso in the 1954 Code allowing transportation expenses reflected the intent of Congress to exclude lodging expenses, an intent confirmed by a reading

8. 12 T.C. 409 (1949).

9. Previous cases had employed these factors in reaching a decision. In the *Dobkin* and *Keller* cases, *supra* note 5, the deductions were disallowed because the taxpayer could not prove a direct relation between the illness and treatment.

10. John L. Seymour, 14 T.C. 1111 (1950), the court said that not all expenses incurred upon a doctor's advice are allowable as a medical deduction. See, *e.g.*, the cases in note 5 *supra* where the deductions were disallowed.

11. INT. REV. CODE OF 1954, § 213(e)(1)(B). See note 2 *supra*.

12. In both the Senate and House reports on the 1954 Code, the following appears: "The deduction permitted for 'transportation primarily for and essential to medical care' clarifies existing law in that *it specifically excludes deduction of any meals and lodging while away from home receiving medical treatment.* For example, if a doctor prescribes that a patient must go to Florida in order to alleviate specific chronic ailments and to escape unfavorable climatic conditions which have proven injurious to the health of the taxpayer and the travel is prescribed for reasons other than the general improvement of a patient's health, the cost of the patient's transportation to Florida would be deductible but not his living expenses while there." H.R. REP. No. 1337, 83d Cong., 2d Sess. 30, A60 (1954); S. REP. No. 1622, 83d Cong., 2d Sess. 35, 219-20 (1954). (Emphasis added.)

13. Section 262 of the 1954 code replaced INT. REV. CODE OF 1939, § 24(a)(1), which had provided that: "In computing net income no deduction shall in any case be allowed in respect of—(1) personal, living, or family expenses, except extraordinary medical expenses deductible under Section 23(x) . . . ."

14. It should be noted that on appeal the Commissioner changed his argument. In the Tax Court he contended that the expenses were not medically necessary.

of the committee reports.[15] The taxpayer denied such a Congressional intention and maintained that since seetion 213(e)(1)(A) of the 1954 Code[16] defined medical care in the same terms as did the 1939 Code, and since the cases construing the latter permitted lodging expenses as a medical deduction, the 1954 Code also permitted such deduetions. The Court deeided that on its face the 1954 Code does not exclude lodging expenses and that the legislative history was too ambiguous to be controlling.[17] On the basis that the policy underlying both of the codes—the promotion of public health—was the same, and that the 1954 Code was similar to the 1939 provisions which had been construed to allow lodging expenses as a deduction in proper eases, the court decided that these expenses remain deductible under the 1954 Code. The determination of the medical neeessity of the expenses in this case was not before the court since the Commissioner had not challenged the finding of the Tax Court in this regard.[18]

In the recent case of *Carasso v. Commissioner*,[19] decided after the instant case, the Second Circuit held that although lodging expenses might be necessary to taxpayer's medical care they were not deductible under the 1954 Code. The *Carasso* court found the legislative history of section 213(e) more illuminating than did the Third Circuit and from it concluded that there was a legislative intent not to allow lodging expenses as a medical deduction.[20] It seems a reasonable prediction that certiorari will be granted in one of these cases by the Supreme Court to remedy this split in the circuits. It is submitted that the *Carasso* case and not the instant case will be followed. The committee reports are not so ambiguous that they can be disregarded, and they can not be read without it being apparent that the adoption of the new definition of medical care was intended to

15. See note 12 *supra.*

16. See note 2 *supra.*

17. See note 12 *supra.* The court found the reports were ambiguous in stating that the new proviso "clarifies existing law" and in stating that only transportation expenses for health, and not the ordinary living expenses incurred during such a trip were deductible. The judicial interpretations of the 1939 Code were clear and ordinary living expenses had never been deductible. Ambiguous reports "cannot be availed of under the teaching that the use of legislative history is to solve, but not to create, an ambiguity." United States v. Shreveport Grain & El. Co., 286 U.S. 77, 83, (1932).

18. The court was confronted with the factual determination of taxpayer's family's expenses. The court took judicial notice that when a person has had four previous heart attacks he should not live alone especially when he is a hyperkinetic person. In reversing the Tax Court's decision and allowing the expenses of the family it appears that the court took into consideration the factors considered in *Edward A. Havey, supra* note 8.

19. 292 F.2d 367 (2d Cir. 1961).

20. The court referred to Justice Hastie's dissenting opinion in the instant case as the proper result. His opinion was based on the same committee reports and on section 262 of the 1954 Code.

permit deduction of the cost of transportation necessary for health but not meals and lodging during the trip. Section 262 seems controlling. It imposes upon the taxpayer the burden of showing a code section which expressly provides for the deduction of what would otherwise be a normal living expense. Nowhere in section 213 is there such an express provision for the deduction of meals or lodging.

Taxation–Income Tax–Transfer of Appreciated Stock To Wife in Divorce Settlement Held Not To Produce Income to Husband

Stock with an appreciated value was transferred by taxpayer to his wife in exchange for a release of her marital rights pursuant to a property settlement agreement.[1] The Commissioner determined that the amount of appreciation should be taxed as a capital gain on the theory that this appreciation was realized by the taxpayer because of the transfer. Taxpayer, after paying the deficiency under protest, claimed a refund on the grounds that no taxable gain was realized from the transfer. In the United States Court of Claims, *held,* for the taxpayer. The fair market value of the property transferred by a taxpayer to his wife in exchange for a release of her marital rights is not determinative of the amount of gain or loss realized by the taxpayer on the transaction. *Davis v. United States,* 287 F.2d 168 (Ct. Cl. 1961), *cert. granted,* 368 U.S. 813 (1961).

Generally in a transfer of property, the amount of taxable gain is the excess of the "amount realized" over the adjusted basis[2] of the property transferred.[3] The Code defines the "amount realized" as the sum of money received plus the fair market value of any property received.[4] There is no difficulty in determining the value of the property transferred in exchange for the release of a wife's marital rights. The problem is whether the release received from the wife should be similarly valued. The Third Circuit, in *Commissioner v. Mesta,*[5] held that where the fair market

1. "Mrs. Davis agreed to accept 'the division of property herein provided [in the agreement] in full settlement and satisfaction of any and all claims and rights against the husband whatsoever (including but not by way of limitation, dower and all rights under the laws of testacy and intestacy), which she ever had, now has, or might ever have against the husband by reason of their relationship as husband and wife or otherwise.'" Brief for Petitioner on Petition for a Writ of Certiorari to the United States Court of Claims, p. 26, Davis v. United States, 287 F.2d 168 (Ct. Cl. 1961), *cert. granted,* 368 U.S. 813 (1961).

2. INT. REV. CODE OF 1954, § 1011.

3. INT. REV. CODE OF 1954, § 1001(a).

4. INT. REV. CODE OF 1954, § 1001(b).

5. 123 F.2d 986 (3d Cir.), *cert. denied,* 316 U.S. 695 (1941). For a discussion of this case see 9 U. CHI. L. REV. 525 (1942).

value of the wife's release could not be otherwise ascertained, the fair market value of the property transferred should be used in determining the value of the release. The court concluded that when a person exchanges property having a fixed value for property having an unliquidated value, he is presumed to be getting his money's worth.[6] The Sixth Circuit, while adopting this test for transactions of a purely commercial nature,[7] rejected its application where a release of a wife's marital rights was involved.[8] *Commissioner v. Marshman*[9] held that the parties in a marriage settlement were not in the position of a willing buyer and a willing seller[10] and could not be presumed to be getting their money's worth from the transaction.

The instant case follows the *Marshman* decision in concluding that the value to a husband of a wife's release could not be determined by the value of the property he had transferred to her. Although the Court of Claims has used this criterion in valuing other property transfers,[11] it has refused to do so where the property is exchanged for the release of a wife's marital rights.[12] The court here goes so far as to say that no value[13] could be placed on the release.[14] Had this transaction been at arms length and strictly commercial, the result probably would have been different.[15] The *Mesta* rule could not be applied, the court reasons, because the Code requires taxable gain to be determined by the use of fair market value of

6. 123 F.2d at 988. This same conclusion was reached by the Second Circuit in Commissioner v. Halliwell, 131 F.2d 642 (2d Cir.), *cert. denied*, 319 U.S. 741 (1942).

7. In United States v. General Shoe Corp., 282 F.2d 9 (6th Cir. 1960), the court used this view in determining the amount of taxable gain realized by a corporation when it transferred stock with an appreciated value to a trust fund set up to provide pensions for its employees.

8. Commissioner v. Marshman, 279 F.2d 27 (6th Cir.), *cert. denied*, 364 U.S. 918 (1960).

9. *Ibid.*

10. "[F]air market value is the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell." *Id.* at 32. See *In re* Williams v. Commissioner, 256 F.2d 217 (9th Cir. 1958); Fitts v. Commissioner, 237 F.2d 729 (8th Cir. 1956); Helvering v. Walbridge, 70 F.2d 683 (2d Cir.), *cert. denied*, 293 U.S. 594 (1934); Metropolitan St. Ry. v. Walsh, 197 Mo. 392, 94 S.W. 860 (1906). See generally 4 CCH 1961 STAND. FED. TAX REP. ¶ 4430.07.

11. United States v. General Shoe Corp., *supra* note 7.

12. "Again we agree with the . . . Marshman case that a transaction between a husband and a wife made under the emotiou, tension and practical necessities involved in a divorce proceeding does not comply with this rule." 287 F.2d at 174.

13. "The Commissioner has for many years asserted that 'only in rare and extraordinary cases will property be considered to have no fair market value.' While the courts have occasionally criticized this bold assertion, they have also strained on occasion to avoid holding that what the taxpayer received had no fair market value." Hacker, *Bringing Capital Gains Into Focus*, 12 W. RES. L. REV. 244, 248 (1961).

14. The reason for the property having no valuation was that the valuation was "dependent upon so many uncertain factors that neither the taxpayer nor a revenue officer could do more than guess at it." 287 F.2d at 174.

15. See note 7 *supra*.

the property received,[16] and fair market value could not be determined in this case by the "willing buyer-willing seller" test because of the emotions and tensions necessarily involved in a divorce proceeding. No attempt is made by the court to distinguish the *Mesta* and *Marshman* cases; it simply adopts the rule it deems more likely to bring about a just result.

While the courts have held that property transfers pursuant to antenuptial agreements are subject to the federal gift tax,[17] they have refused to so decide with regard to post-nuptial property settlements.[18] Conceivably, it could be argued that such post-nuptial property settlements are not subject to income tax just as the courts refuse to hold them subject to gift tax. However, the better argument seems to be that since such transfers are not subject to gift tax, they should be taxed as a realization of income by the husband. In reaching its decision, the Court of Claims was faced with conflicting decisions of the circuits. By adopting the rule of the *Marshman* case and rejecting that of the *Mesta* case, this court failed to provide any guidance on the important problem of the tax basis of the property transferred. Several questions must be taken into consideration in seeking a solution to this problem. If the release is not to be valued, at what basis will the wife hold the property transferred to her?[19] If the wife's basis is the fair market value of the property at the date of transfer,[20] who is taxed on the realization of the appreciated value of the property? On the other hand, if the wife's basis is to be that at which the husband held the property, does not this seem to indicate that this transfer was a gift and thus in conflict with the courts' holdings?[21] By giving the answer to each question that seems justified, it appears clear that the rule of the *Mesta* case is the better rule to be applied in these situations. Since the Supreme Court has granted certiorari[22] in this case, the conflict of decisions should be resolved within a short time.

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16. INT. REV. CODE OF 1954, § 1001(b).

17. Commissioner v. Wemyss, 324 U.S. 303 (1945); Merrill v. Fahs, 324 U.S. 308 (1945).

18. Harris v. Commissioner, 340 U.S. 106 (1950).

19. For a discussion of the basis of property acquired in a divorce settlement see 5 CCH 1961 STAND. FED. TAX REP. ¶ 4516.55.

20. Commissioner v. Mesta, *supra* note 6; Eustice, *Cancellation of Indebtedness and the Federal Income Tax: A Problem of Creeping Confusion*, 14 TAX L. REV. 225, 235 (1959). *Cf.* Farid-Es-Sultaneh v. Commissioner, 160 F.2d 812 (2d Cir. 1947).

21. This type of property transfer was held not to be a gift for gift tax purposes in Harris v. Commissioner, *supra* note 18.

22. Certiorari was granted on the instant case in the early part of October 1961. 368 U.S. 813 (1961).

Wills—Contest—Right of Heirs-at-law To Contest Not Affected by Prior Unprobated Disinheriting Wills

Testatrix executed a series of seven consecutive wills whereby no part of her estate was left to the heirs-at-law. The last of these wills, executed in 1955, bequeathed the bulk of testatrix's estate of over three quarters of a million dollars to a designated residuary legatee. The next preceding will, executed in 1953, made certain specific bequests and provisions for charitable trust beneficiaries. Upon proponent's petition for probate of the 1955 will, the heirs-at-law objected on the grounds of fraud, undue influence and mental incompetence. Proponent challenged the right of the heirs to contest contending that even if the 1955 will were successfully overthrown the heirs-at-law would be barred from any interest in the estate by virtue of the prior disinheriting wills. Proper execution of these wills was conceded but none had been probated. Both the probate court and the circuit court found the heirs to be proper contestants. On appeal to the Supreme Court of Michigan, *held*, affirmed.[1] Heirs-at-law are proper parties to contest a will notwithstanding the possible effect of prior, duly executed, but unprobated wills whereby the heirs are disinherited. *In re Power's Estate*, 106 N.W.2d 833 (Mich. 1961).

Clearly a decedent's estate should not be subjected to frivolous or unnecessary litigation by parties having no interest in its disposition. Accordingly the determination of requisite interest is preliminary to the issue of the validity of a will.[2] Following this policy, statutory provisions which generally allow "persons aggrieved" or "interested" to contest a will have been consistently interpreted by the courts as limiting the right to contest to parties whose interest would, in a pecuniary sense, be adversely affected by establishment of the will.[3] Under this construction a beneficiary under a will whose interest has been diminished by a subsequent will is a proper contestant;[4] and, as a general rule, an heir-at-law or next of kin who stands to take a larger share of the estate should intestacy occur, is con-

1. The court, however, found that under Michigan statutes the county prosecuting attorney and not a guardian ad litem appointed by the circuit court is the proper party to contest a will in behalf of undetermined charitable trust beneficiaries and accordingly reversed a contrary decision of the circuit court on this issue.

2. *E.g.*, Winters v. American Trust Co., 158 Tenn. 479, 14 S.W.2d 740 (1929).

3. *E.g.*, Cassem v. Prindle, 258 Ill. 11, 101 N.E. 241 (1913). This construction has been adopted even where the statute provides for contest by "any person." See generally ATKINSON, WILLS § 99 (2d ed. 1953); RITCHIE, ALFORD & EFFLAND, DECEDENTS' ESTATES AND TRUSTS 228-29 (2d ed. 1961).

4. *E.g.*, Crowley v. Farley, 129 Minn. 460, 152 N.W. 872 (1915); Kennedy v. Walcutt, 118 Ohio St. 442, 161 N.E. 336 (1928) (beneficiary may contest although prior will upon which he relies has not been probated).

sidered as having a sufficient interest to contest.[5] The courts, however, have not agreed upon the precise nature of the interest which an heir-at-law must possess to be a proper contestant. A number of jurisdictions have adhered to the view that a showing of heirship merely establishes a prima facie right to contest which may be successfully challenged by the existence of a previous, *valid*,[6] but unprobated will which disinherits the heirs-at-law.[7] Under these circumstances the heir is said to have merely a possibility of an interest or an "apparent interest" rather than the "substantial interest" required of a proper contestant.[8] Underlying these legal conclusions the primary motivation of the courts is apparently a desire to avoid a multiplicity of suits[9] coupled with a belief that in a practical sense the heir's possibility of ultimate success has been greatly diminished by the number of wills which must be challenged.[10] On the other hand, perhaps a majority of courts[11] have been unwilling to consider a prior unprobated will as a *valid* will to the prejudice of the heirs-at-law and have declared that until a will has been probated it is merely a "scrap of paper," indeterminative of substantive rights.[12] These jurisdictions have reasoned that a previous will, introduced to defeat the right of the heirs-at-law, may never be offered for probate or if so, may also be the subject of contest.[13] Thus under the so called "scrap of paper doctrine," "an heir-at-law may contest without any other showing of interest than heirship."[14]

After recognizing this conflict of authority, the Michigan court in the instant case embraced the scrap of paper doctrine as the "preferable" view. The court made reference to a Michigan statute which provided in essence

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5. 3 PAGE, WILLS § 26.52, at 118-19 (Bowe-Parker ed. 1961); ATKINSON, *op. cit. supra* note 3, at 519.

6. See note 18 *infra* and accompanying text.

7. Wilcoxen v. Wilcoxen, 165 Ill. 454, 46 N.E. 369 (1896); *In re* Livingston's Estate, 179 Iowa 183, 153 N.W. 200 (1915); Succession of Feitel, 187 La. 596, 175 So. 72 (1937); Cowan v. Walker, 117 Tenn. 135, 96 S.W. 967 (1906).

8. Cowan v. Walker, *supra* note 7, 96 S.W. at 970-71.

9. "[T]o maintain that the wills which have not been probated cannot be considered in determining whether the Plaintiff has a right of action to annul the last will would . . . be contrary to that policy of the law, which is opposed to a multiplicity of suits . . . ." Succession of Feitel, 187 La. 596, 175 So. 72, 81 (1937). *But see* 12 TUL. L. REV. 475 (1937), suggesting that multiplicity of suits would not in fact be avoided by the *Feitel* decision.

10. This consideration is well illustrated in Succession of Feitel, *supra* note 9, 175 So. at 81, and the dissenting opinion of Judge Black in the instant case. 106 N.W.2d at 841 (1961).

11. Lonas v. Betts, 160 F.2d 281 (D.C. Cir. 1947); Stephens v. Brady, 209 Ga. 428, 73 S.E.2d 182 (1952); Hilfikev v. Fennig, 224 Ind. 594, 69 N.E.2d 743 (1947); Marr v. Barnes, 126 Kan. 84, 267 Pac. 9 (1928); Murphy's Ex'r v. Murphy, 23 Ky. L. Rep. 1460, 65 S.W. 165 (1901).

12. Marr v. Barnes, 126 Kan. 84, 267 Pac. 9, 10 (1928).

13. *E.g.*, Murphy's Ex'r v. Murphy, 23 Ky. L. Rep. 1460, 65 S.W. 165, 166 (1901).

14. Marr v. Barnes, 126 Kan. 84, 267 Pac. 9, 11 (1928) (quoting BORLAND, WILLS AND ADMINISTRATION 210).

that an unprobated will may not pass title to property[15] and reasoned that by implication a prior will which has not been probated cannot serve to disinherit. Relying upon language utilized in *In re Dutton's Estate*,[16] the court concluded that the authority in Michigan is disposed to the view that while an unprobated will may be of some evidentiary value it is not determinative of substantive rights.[17]

It is important to note that an eminent authority has implied that there is some basis, procedural at least, for distinguishing the two apparently conflicting views discussed above. According to Atkinson an heir or next of kin is a proper contestant even if excluded by a previous will,[18] but where the prior unprobated will is *"admitted to be valid,"* the heirs have been denied the right to contest.[19] Some of the cases, however, are vague as to whether validity of the prior will was in fact conceded,[20] and other opinions indicate clearly that a concession of validity has not always been determinative of the issue.[21] Apparently the courts in reviewing the decisions of other jurisdictions on this point have either been unaware of this distinction or have not considered it controlling. It is difficult to see why the heirs would make such a concession or how this factor could be controlling where treatment of an unprobated will as a valid will would conflict with the court's interpretation of the necessity for probate under the probate statutes.[22] Assuming therefore that there is a basic conflict in this

15. MICH. STAT. ANN. § 27.3178 (90) (1943).

16. 347 Mich. 185, 79 N.W.2d 608 (1956). It is interesting to note that the *Dutton* opinion was written by the dissenting judge in the instant case. There Judge Black stated: "An instrument submitted as a final testament enjoys no legal, distinguished from evidentiary, worth unless and until it is authenticated by judgment. The reason given . . . is that it cannot be told whether the instrument . . . is void or not until it has 'passed the ordeal of probate'."

17. In a dissenting opinion, Judge Black would allow introduction of prior unprobated wills in evidence and place the burden upon the disinherited heirs of showing, "prima facie at least," that each of the previous wills would not have been entitled to probate had testatrix died shortly after its execution.

18. ATKINSON, *op. cit. supra* note 3, at 519 (citing, *e.g.*, Lonas v. Betts, *supra* note 11; Stephens v. Brady, *supra* note 11; Marr v. Barnes, *supra* note 11). In the instant case it is apparent that due execution but not validity was conceded.

19. *Ibid.* (citing Wilcoxen v. Wilcoxen, 165 Ill. 454, 46 N.E. 369 (1896); Cowan v. Walker, 117 Tenn. 135, 96 S.W. 967 (1906)). (Emphasis added.) See also 3 PAGE, WILLS § 26.52, at 121 & § 26.9, at 22 (Bowe-Parker ed. 1961).

20. *E.g.*, Cowan v. Walker, 117 Tenn. 135, 96 S.W. 967 (1906). *But see* note 19 *supra* and accompanying text.

21. In Stephens v. Brady, 209 Ga. 428, 73 S.E.2d 182, 183-84 (1952) (holding the heirs to be proper contestants) the court stated: "One ground of the propounder's motion for a directed verdict was that . . . 'the evidence shows and statement of counsel in his place admitted that a prior will . . . was duly and properly executed *and that it was a valid will*' . . . ." (Emphasis added.) *But see* note 18 *supra* and accompanying text. In Succession of Feitel, 187 La. 596, 175 So. 72, 79 (1937) (holding the heirs not to be proper contestants) there was no concession of validity of the prior unprobated wills.

22. Clearly where there is no concession of validity of the prior wills the heir's right to contest should not be denied. It is suggested that where such concession is made

area of the law, the view that a prior unprobated will may be introduced in evidence and its validity determined to defeat the right of the heirs-at-law to contest is supported by a strong argument. On the surface this rationale would avoid excessive litigation by determining the validity of a previous will together with the heir's standing to contest the last will in a single proceeding. Furthermore, the heir-at-law's right to contest would be cut off under circumstances where in all probability more than one will would have to be contested thus avoiding a multiplicity of suits[23] instigated by parties whose possibility of eventual success seems unlikely. It has been urged that this policy would also discourage a certain class of heirs whose true motive in seeking to contest is the exaction of a tributory settlement.[24] However convincing this argument may be, it is difficult to see how the mere fact that a testator has executed more than one disinheriting will can operate to divest the right of the heirs-at-law to contest the last will.[25] Initially the heirs-at-law are granted a legal interest in a decedent's estate by virtue of the intestate laws. Thus if the heirs are disinherited by a single will which is found to be invalid it is the general policy of the law that the estate should devolve upon the heirs-at-law or next of kin. Yet, under the view discussed above it would seem that this policy could be at least partially defeated by the due execution of two or more apparently valid disinheriting wills since the heir would have no opportunity to contest their validity. Perhaps more troublesome to avoid is the proposition that heirs or next of kin who are *eligible* and entitled to take under the intestate laws do in fact have a pecuniary interest which will be adversely affected by the establishment of any will whereby they are disinherited.[26] The mere assumption that an heir-at-law's possibility

by way of demurrer the heirs shonld not be barred. Judging from the language of the Kansas court in Marr v. Barnes it would seem that an unprobated will could not be considered a valid will even if validity had been conceded. See 267 Pac. at 10. And see Lonas v. Betts, 160 F.2d 281, 282 (D.C. Cir. 1947) (prior unprobated will is not in issue).

23. *But see* 49 COLUM. L. REV. 275, 277 (1949).

24. This factor apparently bore a great deal of weight with the dissenting judge in the instant case. See 106 N.W.2d at 839.

25. This reasoning was employed by the Georgia court in Stephens v. Brady, *supra* note 11, at 184: "The interest of the husband in the estate of his deceased wife, *as an heir*, was not severed by the mere existence of a prior will, but would continue to exist until that former will was probated. If the former will had been offered for probate unquestionably the husband would have been entitled to file a caveat. The execution of a second will by testatrix could not affect the right of the husband to contest the probate of the first will. The mere existence of a prior unprobated will could have no effect on the interest of the husband, as an heir, to caveat the second will." (Emphasis added.)

26. Several courts have found support for the contrary view in cases involving a release or settlement executed by the heir. The Tennessee court, in Cowan v. Walker, 117 Tenn. 135, 148, 96 S.W. 967 (1906), denied a twice disinherited heir's right to contest on the basis that the heir had merely an "apparent interest." The court's authority for this proposition was Wynne Ex'r v. Spiers, 26 Tenn. 394 (1846). In the

of ultimate success as a contestant is remote, it is submitted, has no real bearing upon the issue of the *right* to contest.[27] Therefore it is believed that the holding in the instant case is based upon a fair implication of the Michigan statute[28] and that the court, despite the existence of a rather extreme fact situation,[29] arrived at a desirable conclusion.

Wynne case the court held that a husband was without interest and therefore estopped to resist probate of his former wife's will when the husband and wife had previously executed a deed of compromise pending a divorce suit whereby the wife was conveyed a separate estate absolutely with right to dispose of the same by will or otherwise. The court stated: "It is well settled that . . . a kinsman . . . *who could take nothing under the statutes of distribution if there were no will,* shall not disturb it . . . ." 7 Tenn. at 407. (Emphasis added.) It is clear in *Wynne* that the husband had divested himself of any interest in the wife's estate and could have taken nothing even had the wife died intestate. Similarly, the dissenting opinion in the instant case relied primarily upon *In re* Zinke's Estate, 235 Mich. 201, 209 N.W. 83 (1926). The *Zinke* case held that testator's grandson had no standing to contest as heir of his predeceased father where the father had accepted a full settlement of his share and interest in the estate from the testator during the latter's lifetime. Here the court concluded that since the agreement was a valid contract or release of the father's interest in the estate, the grandson *was not entitled to take under the statutes of descent and distribution* and therefore could gain nothing in a successful contest. It is erroneous to suppose that the principle of *Cowan* and *Zinke* has any application to situations where the heirs are, as in the instant case, in fact eligible to take under the laws of descent and distribution should intestacy be ultimately established.

27. The issue involves the determination of a substantive right which should not be denied on the basis of the inconvenience or unlikelihood of obtaining a remedy.

28. See note 15 *supra.* Under a similar statute which provided that a testament must be probated before it can have effect, the Lonisiana court concluded that this did not mean that an unprobated will is not admissible in evidence to determine the right of the heirs to contest. Succession of Feitel, 187 La. 596, 175 So. 72, 80 (1937). For a criticism of this construction see 12 TUL. L. REV. 475 (1937).

29. The dissenting judge in the instant case was apparently impressed by the number of wills and the fact that the heirs-at-law were distant relatives of testatrix who had been "marshalled into court by an heir hunting corporation." Although one may have little sympathy for the heirs under these circumstances, it is suggested that these facts have little bearing upon the true issue, *i.e.,* whether the right of the heirs-at-law to contest may be defeated by a prior, unprobated, disinheriting will.