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RECENT CASES

Civil Rights—Civil Rights Act of 1957 Gives Federal Court Mandatory Jurisdiction To Entertain Suit by the United States To Enjoin State Criminal Prosecution

John Hardy, a Negro resident of Tennessee, came to Walthall County, Mississippi, and set up a voter registration school to encourage and teach Negroes to register and vote. Hardy accompanied several Negroes to the county registrar's office to submit registration applications, was ordered to leave, and was allegedly assaulted by the registrar. Soon thereafter, Hardy was arrested on a charge of breach of the peace. Just prior to his trial, the United States brought an action in a federal district court under section 1971 of the Civil Rights Act of 1957[1] to enjoin the prosecution of Hardy, on the theory that his criminal prosecution would deter and discourage qualified Negro citizens of Walthall County, Mississippi, from attempting to register to vote. There was no contention by the United States that the statute under which Hardy was to be prosecuted was invalid, nor that Hardy would not receive a fair trial. The district court refused to grant the temporary restraining order, relying on its equitable discretion.[2] On appeal to the Fifth Circuit Court of Appeals, *held*, reversed. When the United States asserts a valid claim for relief under section 1971 of the 1957 Civil Rights Act, a district court must exercise mandatory equitable jurisdiction, and the traditional federal doctrine of noninterference with pending state criminal prosecutions affords no basis for discretionary refusal of these cases. *United States v. Wood*, 295 F.2d 772 (5th Cir. 1961), *cert. denied*, 369 U.S. 850 (1962).

The United States Constitution places no restriction on the power of

1. 71 Stat. 637, 42 U.S.C. § 1971 (1958), providing in part:
"(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose . . . .
"(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for permanent or temporary injunction, restraining order, or other order.
"(d) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law."
2. 6 RACE REL. L. REP. 1069 (1961).

federal courts to enjoin actions in state courts. However, the authority of the federal courts in this regard was sharply limited by the Act of March 2, 1793, which provided that "no writ of injunction [shall] be granted to stay proceedings in any court of a state. . . ."[3] The purpose of the statute was to prevent needless friction and conflict between the federal and state courts.[4] This blanket prohibition was subsequently incorporated into section 265 of the Judicial Code of 1911.[5] In time the federal courts began to devise exceptions to the limitations imposed by the statute until finally it presented only a slight obstacle to federal equity power in this area.[6] However, in 1941, the Supreme Court in *Toucey v. New York Life Insurance Co.*[7] reversed the prior trend of decisions, and affirmed a strict interpretation of section 265. The *Toucey* decision was codified in 1948 when section 2283 of the Revised Judicial Code[8] was passed, which provides that a federal court may enjoin state court proceedings only where specifically authorized by an act of Congress[9] or when necessary to aid its jurisdiction[10] or to protect or effectuate its judgments.[11] The instant case seemingly presents the question of whether the 1957 Civil Rights Act expressly authorizes, within the purview of the first exception to the anti-injunction statute, federal courts to enjoin state criminal prosecutions growing out of an

3. Act of March 2, 1793, ch. 22, § 5, 1 Stat. 335.

4. Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4, 9 (1939); Hale v. Bimco Trading, Inc., 306 U.S. 375, 378 (1939); Essanay Film Mfg. Co. v. Kane, 258 U.S. 358, 360 (1922); Wells Fargo & Co. v. Taylor, 254 U.S. 175, 183 (1920).

5. Act of March 3, 1911, ch. 231, § 265, 36 Stat. 1162.

6. *E.g.*, suits to enjoin the institution or prosecution in a state court action to enforce a local statute which is void under the Constitution, *Ex parte* Young, 209 U.S. 123 (1908); suits to enjoin voidable state judgments, Wells Fargo & Co. v. Taylor, *supra* note 4; suits to enjoin state proceedings affecting rights of the United States, United States v. Inaba, 291 Fed. 416 (E.D. Wash. 1923). See Note, *Federal Power To Enjoin State Court Proceedings*, 74 HARV. L. REV. 726, 727-32 (1961).

7. 314 U.S. 118 (1941).

8. 28 U.S.C. § 2283 (1958).

9. Examples of "expressly authorized" congressional grants of injunctive power in this connection are found in the Bankruptcy Act, §§ 2, 11, 30 Stat. 546 (1898), 11 U.S.C. §§ 11(15), 29 (1958); the Interpleader Act, 28 U.S.C. § 2361 (1958); the Habeas Corpus Act, 28 U.S.C. § 2251 (1958); and the Frazier-Lemke Farm Mortgage Act, § 6(s)(2), 49 Stat. 944 (1935), 11 U.S.C. § 203(s)(2) (1958).

10. The reviser's note to this section states that this exception was added to conform with the "All Writs Statute," 28 U.S.C. § 1651 (1958), and is applicable to restrain actions in state courts after proper removal to a federal court. This exception also allows a federal court to protect its control over a res by restraining state proceedings which interfere. See Green v. Green, 259 F.2d 229 (7th Cir. 1958).

11. In Toucey v. New York Life Ins. Co., *supra* note 7, the Supreme Court held that federal courts had no power to restrain the relitigation of cases which had already been fully adjudicated. The reviser's note to 28 U.S.C. § 2283 (1958) states that the federal courts had this power at the time of the 1911 revision of the Judicial Code. The effect of this third exception, therefore, is to restore the law as it stood prior to the *Toucey* decision. See Jackson v. Carter Oil Co., 179 F.2d 524 (10th Cir.), *cert. denied*, 340 U.S. 812 (1950); Jacksonville Blow Pipe Co. v. RFC, 244 F.2d 394 (5th Cir. 1957).

alleged violation of the Civil Rights Act.[12] Prior to the 1948 anti-injunction statute, certain statutes were construed to allow the enjoining of state court proceedings which had already commenced, but the Civil Rights Act of 1871[13] was not one of these.[14] Yet in 1957, the Supreme Court in *Leiter Minerals, Inc. v. United States*[15] held that the anti-injunction statute is inapplicable when the United States is the party seeking to enjoin the state court proceeding. To reach this result, the Court relied on the English rule of construction that a statute depriving persons of rights and remedies should not be applied to deprive the sovereign of those rights and remedies unless the statute expressly so provides.[16] The Court recognized that the anti-injunction statute is based on the policy of avoiding friction between federal and state courts, but ruled that this policy is less compelling when the federal government rather than a private litigant seeks to stay actions in state courts. It therefore concluded that the general language of the section did not justify its application in this situation in which "frustration of superior federal interests" would result.[17]

Even if the limitations imposed by the anti-injunction statute are satisfied, any plaintiff seeking to have a state court proceeding enjoined must initially qualify for the equitable relief of the federal court.[18] The Supreme

12. In Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950), *and* Tribune Review Publishing Co. v. Thomas, 153 F. Supp. 486 (W.D. Pa. 1957), it was held the civil rights legislation contained in 42 U.S.C. §§ 1981-85 (1958) was express authorization by Congress. Both of these cases were concerned with section 1983 which provides: "Every person who . . . subjects . . . any citizen . . . to the deprivation of any rights . . . 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." However, the Seventh Circuit in Smith v. Village of Lansing, 241 F.2d 856 (7th Cir. 1957), held that there was nothing in the Civil Rights Act to suspend or modify the anti-injunction statute.

13. 17 Stat. 13 (1871), as amended, 42 U.S.C. § 1983 (1958).

14. See Aultman & Taylor Co. v. Brumfield, 102 Fed. 7 (C.C.N.D. Ohio 1900).

15. 352 U.S. 220 (1957).

16. See 31 HALSBURY, LAWS OF ENGLAND 430-31 (3d ed. 1960). For a short discussion of this rule and for a case applying this rule in this country, see Dollar Savings Bank v. United States, 86 U.S. (19 Wall.) 227, 238-39 (1874).

17. 352 U.S. at 226.

18. The courts are not often specific in outlining the prerequisites to equitable relief in this connection. See ILWC v. Ackerman, 82 F. Supp. 65, 111 (D. Hawaii 1949), *rev'd*, 187 F.2d 860, 865 (9th Cir. 1951) (clean hands doctrine); Beal v. Missouri Pac. R.R., 312 U.S. 45, 50 (1941) (inadequacy of legal remedy). Sometimes these requirements are grouped together by the courts under "exceptional circumstances." See Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 95 (1935); Cline v. Frink Dairy Co., 274 U.S. 445, 451 (1927). An injunction may be granted because of the burden imposed on a plaintiff in defending successive prosecutions. See Cline v. Frink Dairy Co., *supra;* Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559 (1917). A federal court may issue an injunction due to the presence of constitutional issues. See Ackerman v. ILWC, 187 F.2d 860, 864 (9th Cir. 1951) (interference with the right to picket); Sellers v. Johnson, 163 F.2d 877 (8th Cir. 1947), *cert. denied*, 322 U.S. 851 (1947) (interference with freedom of speech and assembly).

Court in *Douglas v. City of Jeannette*[19] adopted the doctrine that federal courts in exercising their discretionary equity powers should adhere to the congressional policy of generally leaving to the state courts the trial of criminal cases, and should refuse to enjoin state criminal proceedings except in cases in which the prosecution in the state court creates a clear and imminent danger of irreparable injury to the party seeking the injunction.[20] This doctrine was held to apply when injunctions were sought under the Civil Rights Act of 1871 to stay state criminal prosecutions.[21] The irreparable injury requisite to the restraint of a state court proceeding by a federal court has been satisfied by a showing that the plaintiff's property rights will be destroyed,[22] that there is a multiplicity of threatened criminal prosecutions under allegedly unconstitutional statutes,[23] and that the condition precedent to testing the validity of a tax statute would impose a heavy and inequitable burden on the plaintiff.[24] Even though a plaintiff may qualify under this doctrine for equitable relief, he is then confronted with still another rule: that only threatened prosecutions will be enjoined, and that an injunction will not lie against pending prosecutions.[25]

The legislative history of the 1957 Civil Rights Act gives no hint as to whether Congress meant to allow federal courts to enjoin state court proceedings. The proponents of the bill in the legislative committee declared that the bill only substituted "civil proceedings for criminal proceedings in the already established field."[26] However, the opponents of the bill argued that the state courts would be circumvented and deprived of jurisdiction if federal courts tried offenders for violating injunctions by acts which also violated state criminal statutes.[27] The right of the United States to seek equitable relief, under section 1971 of the Civil Rights Act of 1957, to protect private constitutional rights against discriminatory actions of state voting registrars was upheld by the Supreme Court in *United States v. Raines*.[28] However, the instant case is the first in which a federal court has been asked to enjoin a state criminal prosecution under the 1957 Civil Rights Act.

The Fifth Circuit Court of Appeals in the case at hand took the position

19. 319 U.S. 157 (1943).
20. *Id.* at 163.
21. Stefanelli v. Minard, 342 U.S. 117, 122 (1951). *But see* Bailey v. Patterson, 199 F. Supp. 595, 609 (S.D. Miss. 1961) (Rives, J., dissenting).
22. Dobbins v. Los Angeles, 195 U.S. 223, 241 (1904); Davis & Farnum Mfg. Co. v. Los Angeles, 189 U.S. 207, 218 (1903).
23. Cline v. Frink Dairy Co., *supra* note 18.
24. Denton v. City of Carrollton, 235 F.2d 481, 485 (5th Cir. 1956).
25. Stefanelli v. Minard, *supra* note 21, at 122-23; *Ex parte* Young, *supra* note 6, at 162; Texas & Pac. Ry. v. Kuteman, 54 Fed. 547, 551 (5th Cir. 1892). But see Davis & Farnum Mfg. Co. v. Los Angeles, *supra* note 22, at 218.
26. House Report No. 291, 85th Cong., 1st Sess. (1957), 1957-2 U.S. CODE CONG. & ADMIN. NEWS 1966.
27. See 103 CONG. REC. 11342-43 (1957).
28. 362 U.S. 17, 27 (1959).

that that statute was intended by Congress to make federal injunctions available to restrain violations of civil rights, because "civil proceedings . . . may be brought into play immediately to prevent the completion or continuation of a violation of the Act, while criminal proceedings are cumbersome and are invoked only after the violation is completed."[29] The requirement of irreparable injury was found to be satisfied on the basis of the government's claim that the state's prosecution of Hardy would intimidate other Negroes and thus interfere with their right to register and vote.[30] The *Leiter Minerals* case was relied on to prove that the anti-injunction statute does not apply to this situation, the United States being the party seeking the injunction.[31] Further, it was held that since section 1971(d) of the Civil Rights Act is a mandatory jurisdictional statute, the district court erred in denying a restraining order on the basis of its equitable discretion.[32] *Morrison v. Davis*[33] was relied on by the court as holding the doctrine of comity inapplicable where civil rights questions are involved.[34]

The decision in the instant case seems open to question in several respects. In view of the traditional "hands off" policy maintained by the federal courts when asked to interfere with state criminal prosecutions,[35] it is certainly arguable that if Congress had intended for the 1957 Civil Rights Act to make federal injunctions available in such cases, an express provision

29. 295 F.2d at 782. In arriving at this conclusion the court relied heavily on statements made by southern opponents of the bill that it would enable the Attorney General to wrest jurisdiction from state courts and place it in the federal courts.

30. *Id.* at 780-81. It was noted that in the *Douglas* case, the Supreme Court did not regard threatened arrest and prosecution in violation of constitutional guaranties sufficient to meet the requirement of irreparable injury, but the court of appeals held this ruling to be immaterial on three grounds. First, section 1971 specifically creates an equitable cause of action for preventive relief from intimidation in the exercise of the right to vote, and such intimidation, it was held, constitutes irreparable injury. Second, section 1971(d) removes the defense of adequate state remedy by expressly directing district courts to exercise jurisdiction without requiring that the aggrieved party first exhaust other available legal remedies. Third, other cases in the Fifth Circuit have held the doctrine of comity inapplicable where civil rights questions were involved.

31. *Id.* at 778. Although recognizing that the *Leiter Minerals* case was concerned with enjoining state civil proceedings in order to protect federal property interests, the court ruled that the type of state proceedings and the nature of the interests asserted are immaterial as far as the application of the anti-injunction statute is concerned.

32. *Id.* at 783. The court said that the normal equitable doctrine of comity was of little importance when the United States after due consideration seeks to restrain a state court proceeding in order to prevent irreparable injury to national interests.

33. 252 F.2d 102 (5th Cir.), *cert. denied*, 356 U.S. 968 (1958). The *Morrison* case involved an action by Negro citizens against city officials and a public transportation company for a declaratory judgment as to the constitutionality of Lousiana statutes requiring segregation on public transportation facilities. The Fifth Circuit Court affirmed a judgment of the district court declaring the statutes unconstitutional and enjoining the transportation company from enforcing the statute.

34. 295 F.2d at 784.

35. Stefanelli v. Minard, *supra* note 21, at 120; Watson v. Buck, 313 U.S. 387, 400 (1941); Beal v. Missouri Pac. R.R., *supra* note 18, at 50; Spielman Motor Co. v. Dodge, *supra* note 18, at 95; Fenner v. Boykin, 271 U.S. 240, 243 (1926).

to that effect would have been inserted. The finding that the requirement of irreparable injury was satisfied also appears doubtful. In the *Douglas* case, the Supreme Court did not regard threatened deprivation of the plaintiff's constitutional guaranties sufficient to meet this requirement. Therefore, it seems unlikely that an allegation by the government that Hardy's prosecution would deprive a group of unknown persons of their rights would satisfy the requirement of irreparable injury. Furthermore, the reliance on *Leiter Minerals* for its finding that the anti-injunction statute has no application here leaves room for doubt. Aside from certain factual differences which may distinguish these two cases,[36] it is significant that in *Leiter Minerals* the federal court was the only court which had jurisdiction of the case and the only court in which the basic issue of the litigation could be finally determined.[37] In the case at hand, however, the Mississippi state court was the only court having jurisdiction over the subject matter of the action, which was the trial of Hardy on a charge of breach of the peace under a state statute not alleged by the federal government to be invalid. Moreover, the instant court did not mention the fact that it enjoined a pending prosecution, whereas the injunctive power has generally been limited to threatened prosecutions. It is suggested that the court's action in this respect is also questionable. Finally, the holding that section 1971(d) is a mandatory jurisdictional statute and that the district court had no equitable discretion would appear to be ill-founded. Certainly section 1971(d) does not expressly authorize federal court intervention as does the Interpleader Act or the Bankruptcy Act. The reliance on the *Morrison* case in support of the proposition that the doctrine of comity and the principles of *Douglas* no longer have application in civil rights cases appears dubious. The *Morrison* case held only that an unconstitutional state statute providing for criminal penalties could under certain circumstances be enjoined.[38] It is submitted that *Morrison* should have no application in the principal case situation, since there was no contention that the statute under which Hardy was to be tried was unconstitutional. Moreover, the doctrine of the *Douglas* case was reaffirmed by the Supreme Court in 1961, in *Wilson v. Schnettler*.[39]

36. In *Leiter Minerals*, the federal government was seeking to protect federal property interests, whereas here, the government was seeking to protect intangible rights of a constitutional nature. Also, in *Leiter Minerals*, the injunction was sought to stay a state civil proceeding, while this injunction was to lie against a state criminal prosecution.

37. 352 U.S. at 226.

38. The court said those circumstances were situations where the ordinary result of testing constitutional rights under the statute would be the arrest and prosecution of the complainants.

39. 365 U.S. 381, 385 (1961). The case involved an attempt by one charged with illegal possession of narcotics to have a federal court enjoin the introduction of the narcotics seized from him without a warrant as evidence in his pending trial in a state court. The Supreme Court held that there was an adequate remedy available in the state action and it was proper for the district court to dismiss the complaint since the *Douglas* requirement of irreparable injury had not been satisfied.

If the view is adopted that federal courts may enjoin state criminal prosecutions when violations of civil rights are threatened, frequent disruption of state court proceedings may result. Before the courts determine that Congress intended to confer an authority fraught with such serious consequences, it would appear desirable that Congress express its intent more explicitly than has been done in the Civil Rights Act.

Conflict of Laws–Federal Tort Claims Aet–Applicable Substantive Law Held To Be Whole Law of State Where Negligence Occurred

Plaintiffs, personal representatives of passengers killed in a commercial airplane crash in Missouri, sued the United States under the Federal Tort Claims Act, which provides that liability is governed by the law of the place "where the act or omission occurred."[1] The alleged negligence was based on the failure of the Civil Aviation Agency to enforce certain provisions of the Civil Aeronautics Act in Oklahoma. The United States moved to dismiss the complaint on the grounds that the act referred to the whole law of the place of the negligence, Oklahoma, which would refer to the Wrongful Death Act of Missouri,[2] under which plaintiffs had received the maximum amount recoverable in a prior suit against the airline. The airline, as third party defendant, contended that the law of the place of the injury, Missouri, should be applied. Plaintiffs argued that the statute referred only to the *internal* law of Oklahoma, excluding choice-of-law rules, and that the Oklahoma Wrongful Death Act[3] should therefore be applied. The district court dismissed the complaint[4] and the United States Court of Appeals for the Tenth Circuit affirmed.[5] On certiorari in the Supreme Court, *held*, affirmed. In an aetion under the Federal Tort Claims Act for injuries suffered in one state as a result of negligence in a different state, the applicable substantive law is the whole law of the state where the negligence occurred. *Richards v. United States*, 369 U.S. 1 (1961).

The orthodox choice-of-law in tort cases is the internal law of the

1. 28 U.S.C. § 1346 (b) (1958).
2. MO. REV. STAT. § 537.090 (1949). After the origination of these actions the maximum damages were raised from $15,000 to $25,000. MO. REV. STAT. § 537.090 (Supp. 1955).
3. OKLA. STAT. tit. 12, §§ 1053, 1054 (1951).
4. The opinion of the district court is not reported.
5. 285 F.2d 521 (10th Cir. 1960).

place of the injury.[6] Some jurisdictions have departed from this rule, preferring a less rigid reference to the state with "the more significant contacts."[7] A few courts have applied the law of the place where defendant's act was done regardless of where the harm occurred.[8] When considering what rule should be applied under the Federal Tort Claims Act, the federal circuit courts have been divided on both the question of which state's law was applicable and on what the term "law" encompassed. One court insisted that no change was intended from the orthodox "place of the injury" rule.[9] Another applied the law of the place of the negligence, but restricted "law" to mean internal law only, excluding the choice-of-law rules.[10] A third circuit held that "law" includes the choice-of-law rules of the place of the negligence.[11]

The Court in the instant case was presented with arguments based on all three views. In deciding which state's law was to be applied, the Court found the legislative history unpersuasive and assumed that the legislative purpose was expressed by the ordinary meaning of the words chosen by Congress. In deciding what the term "law" included, the Court was not "bound" by a direct expression of Congress so it took notice of the prevailing state choice-of-law rule and held that the whole law of the place of the negligence must be used so that final reference would be to the "place of the injury" in most cases. Also, the Court reasoned, if the choice-of-law rule of the place of the negligence referred instead to the state with "the more significant contacts," then that more flexible rule could be applied.

The desire of the Court to formulate a just and flexible rule is admirable. However, the methods used are questionable. The Court's interpretation of the statutory language, while not unreasonable, is not in accordance with

6. See Alabama Great So. R.R. v. Carroll, 97 Ala. 126, 11 So. 803 (1892); RESTATEMENT, CONFLICTS OF LAWS §§ 377, 378 (1934); GOODRICH, CONFLICT OF LAWS § 93 (3d ed. 1949).

7. See, *e.g.*, Gordon v. Parker, 83 F. Supp. 40, 42 (D. Mass. 1949); Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953); Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957); Leflar, *Choice of Law: Torts: Current Trends*, 6 VAND. L. REV. 447, 458 (1953).

8. Burkett v. Globe Indem. Co., 182 Miss. 423, 181 So. 316 (1938). See also Levy v. Daniels U-Drive Auto Renting Co., 108 Conn. 333, 143 Atl. 163 (1928); Caldwell v. Gore, 175 La. 501, 143 So. 387 (1932); See generally Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4, 165 (1944); Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958).

9. Hess v. United States, 259 F.2d 285 (9th Cir. 1958) (alternative holding); Landon v. United States, 197 F.2d 128 (2d Cir. 1952).

10. United States v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955), 9 VAND. L. REV. 83 (1955). See also Richards v. United States, 285 F.2d 521 (10th Cir. 1960) (Murrah J., dissenting); Voytas v. United States, 256 F.2d 786 (7th Cir. 1958).

11. Hess v. United States, 259 F.2d 285 (9th Cir. 1958); United States v. Marshall, 230 F.2d 183 (9th Cir. 1956); United States v. Union Trust Co., 221 F.2d 62, 80 (D.C. Cir. 1955) (W. Miller, J., dissenting in part).

the tort choice-of-law rule prevailing now and at the time of the passage of the act. Nor was this interpretation necessary to implement the primary purpose of the act, *i.e.*, removing the sovereign immunity of the United States in recognized causes of action. Furthermore, the place of the negligence may be difficult to determine, especially in cases of continuing negligence. There was no strong policy requiring a choice of the place of the negligence in this particular case since the alleged liability involved failure to enforce a federal law and not an Oklahoma law. Had the Court decided in favor of the local law of the place of the injury, the orthodox rule would have been preserved. More importantly, the difficult problems of determining where the negligence took place and of deciphering the choice-of-law rules of that place would have been avoided. If the Court thought this latter problem of *renvoi* to be outweighed by the possibility of reference to the "more substantial contacts" rule, the *whole* law of the place of the *injury* could have been selected. The Court may have thought that a selection of the law of the place of injury was beyond "the framework of the words chosen by Congress,"[12] and would therefore be termed judicial legislation, but such criticism would not be warranted in light of the prevailing choice-of-law rule and of the absence of a strong public policy or Congressional intent to the contrary.

12. 369 U.S. 1, 10 (1961).

Constitutional Law—Discrimination—Conviction for Disturbing the Peace in Lunch Counter Sit-in Held To Violate Due Process for Lack of Evidence

Petitioners[1] were tried and convicted in a Louisiana district court on complaints charging them with disturbing the peace[2] by remaining[3] at a lunch counter reserved for white customers after being told that they would only be served at separate facilities provided for Negroes.[4] In one case the manager called the police after some delay, while in the other cases the police came without being summoned by either the owner or his agent. The police ordered petitioners to leave, and then arrested them when they refused. The Louisiana Supreme Court dismissed petitioners' appeal.[5] On appeal to the Supreme Court of the United States, *held,* reversed. A conviction for disturbing the peace is a violation of the due process clause of the fourteenth amendment when there is no evidence which would support a finding that the accused's acts caused or could foreseeably lead to a disturbance of the peace as required by The Louisiana statute. *Garner v. Louisiana,* 368 U.S. 157 (1961).

Upon refusing to leave a restaurant,[6] sit-in demonstrators are usually arrested and prosecuted under a civil or criminal trespass statute.[7] Even

1. This appeal is a consolidation of three cases: (a) No. 26 *Garner v. Louisiana* (petitioners arrested at a drug store lunch counter); (b) No. 27 *Briscoe v. Louisiana* (petitioners arrested at a bus terminal lunch counter); (c) No. 28 *Houston v. Louisiana* (petitioners arrested at a department store lunch counter).

2. LA. REV. STAT. § 14:103 (1950): "Disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public: (7) Commission of any other act in such a manner as to unreasonably disturb or alarm the public." It should be noted that another statute has subsequently been enacted and reads: "No person shall without authority of laws go into or upon or remain in or upon any structure . . . which belongs to another . . . after having been forbidden to do so . . . by any owner, lessee, or custodian of the property or by any other authorized person . . . ." LA. REV. STAT. § 14:63.3 (Supp. 1961). The Supreme Court did not express any opinion as to whether or not petitioners' conduct would have been unlawful under this statute.

3. The arresting officer testified that the petitioners were not boisterous or rowdy but were only sitting at the counter, and his testimony is amply supported by other testimony.

4. The bus terminal did not provide separate facilities.

5. The opinion of the Louisiana Supreme Court is not reported but appears at 368 U.S. 161 (1961). "Writs refused. This court is without jurisdiction to review facts in criminal cases. See Art. 7, Sec. 10, La. Constitution of 1921. The rulings of the district judge on matters of law are not erroneous. See *Town of Ponchatoula v. Bates,* 173 La. 824, 138 So. 851."

6. It should be noted that there is no such common law duty of nondiscrimination imposed on restaurant owners as there is on inn keepers. Alpaugh v. Wolverton, 184 Va. 943, 36 S.E.2d 906 (1946).

7. They may also be prosecuted under an owner's control of the premises statute, disturbance of the peace statute, or under a statute providing that it is a conspiracy to interfere with trade or commerce. The demonstrators may be protected under a

though the order to leave and the subsequent prosecution are based on a discriminatory practice, they do not violate rights protected by the United States Constitution[8] unless they occur as a result of state action or unless the demonstrators have a constitutional right to be served after they have been invited into the premises. The argument that there is a constitutional right to be served has been rejected by the courts[9] although there is dictum in *Marsh v. Alabama*[10] supporting such a position. Since in the absence of such a constitutional right it has been held that "merely private conduct, however discriminatory or wrongful," is not prohibited by the Constitution,[11] the demonstrators point to the customs of the state encouraging and condoning discrimination, the licensing of the restaurant by the state, and the enforcement of the owners' segregation policies by state law enforcement officers as comprising state action in violation of the equal protection clause of the fourteenth amendment. These arguments have not been rejected as readily as the right-to-be-served contention, but neither have they been accepted. Although the *Civil Rights Cases*[12] indicated that customs supported by state authority may constitute state action, the courts have held otherwise in sit-in cases.[13] After refusing to accept this contention, the court in *Williams v. Howard Johnson's Restaurant*[14] also held that a state licensing act did not provide the necessary connecting link between the state and the private discriminatory action, since the discrimination was purely voluntary in nature. It stated that in order for the licensing act to provide the necessary link, the discrimination must be "performed in obedience to some positive provision" of the statute.[15] Finally, the demonstrators have not been successful in their attempt to equate the enforcement of the private discriminatory practices of the restaurants by state law enforcement officials[16] with court enforcement

public accommodations statute which is not present here. For a discussion of these statutes see 5 RACE REL. L. REP. 935 (1960).

8. If the restaurant is one used in interstate commerce, the discrimination is unconstitutional under the commerce clause. Boynton v. Virginia, 364 U.S. 454 (1960). Even though the petitioners in the *Briscoe* case were in a bus terminal restaurant, they did not seek to hold their convictions invalid under the commerce clause.

9. Slack v. Atlantic White Tower Sys., Inc., 181 F. Supp. 124, *aff'd*, 284 F.2d 746 (4th Cir. 1960), 46 VA. L. REV. 123 (1960) (commented on with approval); Williams v. Howard Johnson's Restaurant, 268 F.2d 845 (4th Cir. 1959). The court in the *Williams* case also held that sections 1 and 2 of the Civil Rights Act of 1875 do not confer upon a person the constitutional right to be served.

10. 326 U.S. 501, 506 (1946).

11. Shelley v. Kraemer, 334 U.S. 1, 13 (1947).

12. 109 U.S. 3 (1883).

13. Slack v. Atlantic White Tower Sys., Inc., *supra* note 9; Williams v. Howard Johnson's Restaurant, *supra* note 9; State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958). *But see* Baldwin v. Morgan, 287 F.2d 750 (5th Cir. 1961).

14. See note 9 *supra*.

15. 268 F.2d at 847.

16. State v. Goldfinch, 241 La. 958, 132 So. 2d 860 (1961); State v. Clyburn, *supra* note 13. The *Goldfinch* case upheld another Louisiana statute, a criminal mischief

of discriminatory covenants, which has been held to be unconstitutional state action.[17]

The majority of the Supreme Court in the instant case did not find it necessary to decide the broad constitutional question presented: Whether it is a violation of the equal protection clause for a private restaurant owner to refuse service to customers because of their race. Instead, the Court decided that under *Thompson v. City of Louisville*,[18] the convictions could not be sustained since there was no evidence at all to support a finding that the petitioners had disturbed the peace either by boisterous, rowdy conduct or by conduct which could foreseeably cause a disturbance. From an applicable state decision,[19] the pertinent statute,[20] and a statute passed after petitioners' convictions,[21] the Court concluded that the statute did not expressly prohibit the petitioners' peaceful and orderly conduct.[22] However, it was recognized that the legislature could validly prohibit peaceful conduct which would lead to an "imminent public commotion."[23] After reviewing the evidence regarding petitioners' conduct and refusing to uphold respondent's contention that the Louisiana courts had taken judicial notice of the racial conditions in Louisiana[24] which might create a threat of violence, the Supreme Court concluded that petitioners' conduct would not foreseeably cause a public disturbance.

Justices Harlan and Douglas, concurring in the result, thought that the convictions should have been reversed for other reasons. Justice Harlan argued for reversal of the convictions in two of the cases[25] on the ground that under the Court's decision in *Cantwell v. Connecticut*,[26] the petitioners' conduct was a form of expression, similar to speech, and protected by the fourteenth amendment. This right of expression could only be taken away by a statute "narrowly drawn to define and punish [the] specific conduct as constituting a clear and present danger to a substantial interest of the

statute, which was used to prosecute sit-in demonstrators.

17. See note 11 *supra*.

18. 362 U.S. 199 (1960).

19. State v. Sanford, 203 La. 961, 14 So. 2d 778 (1943).

20. See note 2 *supra*.

21. *Ibid*.

22. See note 3 *supra*.

23. Cantwell v. Connecticut, 310 U.S. 296 (1940). In this case a Jehovah's Witness was convicted in a state court when he played a record to two men with their permission attacking their religion. The Supreme Court held that the petitioner's conduct was a liberty protected by the first amendment that could not be taken away by a general breach of the peace statute.

24. LA. REV. STAT. § 15:422 (1950) provides that Louisiana courts may take judicial notice of "social and racial conditions prevailing in this state." Respoudent's contention was rejected by the Court because it was not shown in the record that the trial court took judicial notice, and the Court said that to extend the doctrine so that a judge would not have to notify the parties that he was taking judicial notice would be a denial of due process. 368 U.S. at 173. *But see* notes 36-37 *infra*.

25. Garner v. Louisiana, *supra* note 1; Houston v. Louisiana, *supra* note 1.

26. 310 U.S. 296 (1940). See note 23 *supra*.

State . . . ."[27] Although he decided that in the other case[28] no freedom of expression existed because the petitioners remained over the manager's objection,[29] he voted for reversal of this case on the ground that the statute as applied was unconstitutionally vague and uncertain.[30] In the other two cases this would have been an alternative ground for reversal. Justice Douglas would have reversed the convictions by deciding the broad constitutional question presented. He found that "the proprietors in the instant cases were segregating blacks from whites pursuant to Louisiana's custom"[31] and that these customs comprised state action prohibited by the fourteenth amendment.[32] Alternatively, Justice Douglas reasoned that the restaurants were "affected with a public interest"[33] and the state "should not have under our Constitution the power to license it [the restaurant] for the use of only one race."[34]

The Court reached the proper result in the instant case but should have decided it on other grounds. The majority opinion recognized that the Louisiana statute[35] might be applicable to peaceful conduct if such conduct could foreseeably result in a public disturbance. The Court should have upheld respondent's contention that the Louisiana district court took judicial notice of the racial conditions in Louisiana[36] to determine this foreseeability.[37] The trial judge did not have to notify the parties that he was taking judicial notice[38] since the racial conditions were a matter of common knowledge.[39] If the trial judge did take judicial notice of these

27. 310 U.S. at 311.

28. Briscoe v. Louisiana, *supra* note 1.

29. After being asked to leave the restaurant, a sit-in demonstrator would become a trespasser and lose his constitutional right. Gober v. City of Birmingham, 133 So. 2d 697 (Ala. Ct. App. 1961).

30. Justice Harlan states that implicit in the *Cantwell* decision is the legal concept that an accused can not be constitutionally convicted of a crime under a criminal statute which defines the crime in vague and uncertain terms since there is "inadequate warning to a defendant that his conduct has been condemned by the State." 368 U.S. at 205.

31. 368 U.S. at 181.

32. Citing the Civil Rights Cases, 109 U.S. 3 (1883), *and* Baldwin v. Morgan, 287 F.2d 750 (5th Cir. 1961), Justice Douglas concluded that customs may comprise state action. *But see* note 13 *supra*.

33. Munn v. Illinois, 94 U.S. 113 (1876).

34. 368 U.S. at 185.

35. See note 2 *supra*.

36. See note 24 *supra*.

37. Mr. Justice Harlan did not join in the majority opinion because he believed that judicial notice had been taken by the Louisiana courts of the racial conditions in Louisiana at the time of the sit-in. In substantiating this position, he cited several authorities on evidence. Furthermore, he stated that the Louisiana Supreme Court in its short opinion declining jurisdiction stated in effect that the statute applied to peaceful conduct in certain circumstances and that the petitioners' conduct was of that type.

38. MCCORMICK, EVIDENCE 708 (1954); MORGAN, BASIC PROBLEMS OF EVIDENCE 9-10 (1954).

39. 368 U.S. at 194 (concurring opinion of Harlan, J.). The Supreme Court has taken judicial notice of matters of common knowledge without notifying the parties.

conditions, he might have concluded that the demonstrators' presence at the white counters could have foreseeably resulted in a public disturbance. Of the alternative grounds for reversal suggested by Justices Harlan and Douglas, Harlan's position would be in keeping with the Court's policy of not formulating a rule of law that would be broader than the decision requires.[40] Justice Douglas's contention that private discrimination is unconstitutional when the customs of a state dictate segregation would result in the farthest reaching decision possible, as this rule would extend to many areas of society where segregation has heretofore been legally practiced. Almost inevitably the Supreme Court will decide another sit-in case in which the decision will have to be based on some grounds other than the one employed in the instant case. When it is next confronted with the question of the constitutionality of "private discrimination" as a result of the conviction of a sit-in demonstrator under a statute which is narrowly drawn, specifically stating the type of conduct forbidden, will the Court uphold the conviction? Justice Harlan's first inquiry would be as to the absence or presence of the other[41] *Cantwell* requirement: Was the statute enacted to prevent a grave and immediate danger to interests which the state may lawfully protect?[42] If Justice Harlan found that the statute was constitutional under the *Cantwell* decision, in order to sustain the conviction he would still have to decide that there was no discriminatory state action present which would constitute a violation of the equal protection clause of the fourteenth amendment. Even though "the trend in recent years has been towards extension of the state action concept,"[43] there is no indication, other than Justice Douglas's opinion in the instant case, that the Court will accept any of the sit-in demonstrators' contentions as to the practices which constitute state action.

Hoyt v. Florida, 368 U.S. 57 (1961). Appellate courts have taken judicial notice of matters of common knowledge to support a lower court's decision. Comment, 42 MICH. L. REV. 509, 512-13 (1943).

40. 368 U.S. at 163.

41. The statute would satisfy the first of the two *Cantwell* requisites, that the statute is "narrowly drawn to define and punish specific conduct. . . ." See note 27 *supra* and accompanying text.

42. This would be the second requisite of the *Cantwell* deeision. See note 41 *supra.* If this determination had already been made by the trial court, then unless the finding was clearly erroneous the Court wonld not decide otherwise since it will not review the sufficiency of the evidence. 368 U.S. at 163.

43. Note, *Racial Discrimination by Restaurant Serving Interstate Travelers,* 46 VA. L. REV. 123, 127 (1960).

Federal Courts—Erie Doctrine—Opinion Evidence Held Admissible Under Federal Rule 43(a) in Diversity Case

Plaintiff brought an action for libel in a New York federal court on the basis of diversity. To prove that the libelous reference was to him, and that this was understood by his friends, plaintiff, over objection, introduced depositions in which the deponents had been asked to state to whom they understood the publication to refer and why they so thought. These depositions were inadmissible under New York law.[1] The trial court allowed the evidence under rule 43(a) of the Federal Rules of Civil Procedure which provides for the admission of all evidence admissible under (1) a United States statute, (2) a statute of the state in which the federal district court is sitting, or (3) a federal equity rule.[2] On appeal to the Court of Appeals for the Second Circuit, *held*, affirmed. Opinion evidence inadmissible under state law may be admitted under rule 43(a) in federal courts hearing diversity cases if the evidence could have been admitted in a pre-1938 federal court hearing a case in equity. *Hope v. Hearst Consolidated Publications, Inc.*, 294 F.2d 681 (2d Cir. 1961).

Since *Erie R.R. v. Tompkins*[3] federal courts hearing diversity cases apply their own "procedural" rules but follow the "substantive" law of the states in which they are located.[4] Grave difficulties have been encountered in determining what is meant by the terms "substantive" and "procedural." In the leading case of *Guaranty Trust Co. v. York*[5] the Supreme Court in effect held that for purposes of *Erie* a rule of law would be considered substantive if the application of the federal rule would produce a different determination of the case from that which would be reached under a conflicting state rule. Lower courts which have considered the application of

1. The court made its determination of the New York law from two New York cases: Gibson v. Williams, 4 Wend. 320 (Sup. Ct. N.Y. 1830); *and* People v. Parr, 42 Hun 313 (Sup. Ct. N.Y. 1886).

2. "All evidence shall be admitted which is admissible under the Statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. *In any case the statute or rule which favors the reception of the evidence governs . . . .*" FED. R. CIV. P. 43(a). (Empbasis added.)

3. 304 U.S. 64 (1938). The policy reason underlying *Erie* is that state and federal courts apply the same law. This keeps the out-of-state litigant who can choose between the state or federal district court as a forum for bis suit from having an advantage over the resident who must take what his state has to offer.

4. Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940). It is important to remember that when it is said that a rule is "substantive" or "procedural," these terms are being used as classifications to suit *Erie* policy when considering the effect of the application of the rule on the outcome of the case. Therefore, a rule which may be procedural in a conflict of laws sense can be classified substantive to satisfy *Erie* policy.

5. 326 U.S. 99 (1945).

the *Erie* doctrine to rule 43(a) in light of *Guaranty Trust* have consistently upheld the tri-partite test of 43(a) on the grounds that admitting or excluding the evidence was not outcome-determinative.[6] Thus opinion evidence,[7] hearsay,[8] and reported testimony[9] have been admitted in district courts despite exclusionary state rules. Then in *Byrd v. Blue Ridge Rural Electric Co-op,*[10] the Court refused to apply the outcome-determinative test because it could discover no state policy underlying the state rule, and there was a significant federal interest in applying its own rule. Relying on the *Byrd* test, the Fifth Circuit Court of Appeals in *Monarch Insurance Co. v. Spach,*[11] stated through dictum that even if the proffered evidence would have been outcome-determinative, the federal interest in having uniform evidentiary rules would sustain the application of the federal rule in the absence of any considered state interest behind the state exclusionary rule. At least one other case has given a similar indication.[12]

In the instant case, the majority treated the *Erie* question summarily by citing the *Spach* decision and holding that *Spach's* application of the *Byrd* test to *Erie* problems raised by rule 43(a) resolved these problems in favor of applying the more liberal federal rule. The implication is that the opinion has given the weight of a decision to the *Spach* dictum. The dissent was based on the grounds that admitting the evidence would be outcome-determinative, hence *Erie* required use of the state rule. It did not appear to give effect to the interest-weighing test of *Byrd* on which the majority relied. Having decided that the federal rule could be applied, the court was faced with the argument that there was no proof of application in equity of any rule which would allow the admission of opinion evidence in a libel action.[13]

6. Erie R.R. v. Lade, 209 F.2d 948 (6th Cir. 1954); New York Life Ins. Co. v. Schlatter, 203 F.2d 184 (5th Cir. 1953); Peoples Gas Co. v. Fitzgerald, 188 F.2d 198 (6th Cir. 1951); Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467 (3d Cir. 1950); Franzen v. E.I. du Pont de Nemours & Co., 51 F. Supp. 578 (D.N.J. 1943).

7. Peoples Gas Co. v. Fitzgerald, *supra* note 6.

8. Dallas County v. Commercial Union Corp., 286 F.2d 388 (5th Cir. 1961).

9. Hertz v. Graham, 23 F.R.D. 17 (S.D.N.Y. 1958).

10. 356 U.S. 525 (1958). For law review treatments of the impact of the *Byrd* decision see, 72 HARV. L. REV. 147 (1958); 43 MINN. L. REV. 580 (1959); 28 U. CINC. L. REV. 390 (1959).

11. 281 F.2d 401 (5th Cir. 1960). The most detailed analysis of the *Erie* problem raised by rule 43(a) is found in the *Spach* opinion. For recent case treatment, see, 15 RUTGERS L. REV. 536 (1960); 39 TEXAS L. REV. 680 (1961); 14 VAND. L. REV. 1017 (1961).

12. Hambrice v. F. W. Woolworth Co., 290 F.2d 557 (5th Cir. 1961).

13. The problem of determining whether there was a federal equity rule which the court could apply to admit the evidence commanded most of the court's attention. The defendants argued that the plaintiffs had shown no equity cases admitting such evidence and could not do so because libel actions could not be brought in equity. In solving the problem, the court relied on decisions in other circuits supporting a broad and liberal application of the federal equity clause of rule 43(a) and held that proof of application in equity would not be required where the rule of evidence was of a general nature and had been applied in courts of law. The court then concluded that a pre-1938 federal chancellor could have admitted the opinion evidence in a suit in

Noting that other courts consistently supported a liberal interpretation of 43(a), the court held that it would not require proof of application or even of applicability in equity where the rule was general in nature and had been followed in admiralty and at law.

The court has applied the *Byrd* test in a situation where rule 43(a) could not have been used under the outcome-determinative test of *Guaranty Trust*. Since district courts in diversity cases are not allowed to anticipate state court decisions upon reconsidering old state rules,[14] those rules are ordinarily binding on the federal courts. Although the *Byrd* decision creates an exception to the necessity of following the state rule, if there is any apparent state interest behind its rule, *Erie* demands that the state rule be followed in spite of a substantial federal interest to the contrary. The use of the federal rule in the instant case is probably justified because the state exclusionary rule, established in 1807 and reiterated only sporadically since then, probably represented no significant state policy. Although this decision is inconsistent with the *Erie* policy discouraging forum-shopping, *Erie*, so far as it is an indication of policy, may be limited by other policy considerations.[15] In the absence of any apparent state interest behind a contrary state rule, federal courts should be free to admit evidence under the most liberal of the three tests of 43(a) in order to promote the policy of having modern uniform rules of evidence in all federal district courts.

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equity on the basis of the existence of a general federal rule of evidence calling for admission.

14. Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940).

15. Certain language used by the Supreme Court in the *Erie* decision hinted that *Erie* might be a constitutional doctrine rather than a mere statement of policy. The heart of the Court's position is as follows: "The federal courts [in the *Swift v. Tyson* period] assumed, in the broad field of 'general law,' the power to declare rules of decision which Congress was confessedly without power to enact as statutes." 304 U.S. 64, at 72.

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or part of the law of torts. And no clause in the Constitution purports to confer such a power on the federal courts." *Id.* at 78. "We merely declare that in applying the doctrine [of *Swift v. Tyson*] this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States." *Id.* at 80.

If one construes this language to constitutionally preclude federal courts in diversity cases from applying any rule of evidence which is outcome-determinative notwithstanding the absence of any state policy behind a contrary state rule, no interest weighing test could be used. Since the *Byrd* decision attached such a test to the *Erie-Guaranty Trust* doctrine, the Court seems to have dispelled any notions that the constitutional overtones of *Erie* extend this far.

Federal Courts—Federal Question Jurisdiction—Lack of Jurisdiction to Enforce Award of Airline System Board of Adjustment in Labor Dispute

Plaintiff brought a non-diversity suit in a federal district court to enforce the award of an airline system board of adjustment. The court dismissed the suit for lack of federal jurisdiction because (1) the complaint did not, on its face, present a question arising under the Constitution or laws of the United States and (2) though the amendment,[1] extending most of the provisions of the Railway Labor Act to the airline industry, did dictate the contract provision which created the board, it did not grant jurisdiction to federal courts to enforce its awards in non-diversity suits. On appeal plaintiff maintained that the policy indicated in the Supreme Court's decision in *Textile Workers Union v. Lincoln Mills*[2] implied that such a dispute as this arises under federal law. *Held*, dismissal affirmed. A suit to enforce the award of an airline system board of adjustment does not involve a question arising under the laws of the United States merely by virtue of a federal statute requiring the parties to provide for such a board in their collective bargaining agreement. *International Ass'n of Machinists v. Central Airlines, Inc.*, 295 F.2d 209 (5th Cir. 1961), *cert. granted*, 369 U.S. 802 (1962).

The Constitution limits the scope of the judicial power of the federal courts to two jurisdictional situations when the dispute is between one or more citizens.[3] The first is where there is a federal question—the complaint, without benefit of answer, poses a question of federal law which must necessarily be resolved to decide the case.[4] The second is where there is diversity of citizenship between the adverse parties. From early times the limits of federal question jurisdiction, in non-diversity suits, have been in almost constant litigation,[5] especially in recent years in the field of labor relations

1. 49 Stat. 1189 (1936), 45 U.S.C. §§ 181-88 (1958).

2. 353 U.S. 448 (1957).

3. "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . to controversies . . . between citizens of different states . . . ." U.S. CONST. art. III, § 2. Note that the statute below extends the jurisdiction of the district courts, in this limited area (acts regulating commerce) to the limits permitted by the Constitution. "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce . . . ." 28 U.S.C. § 1337 (1958). And since this discussion concerns only this area no further reference will be made to the distinction between statutory and constitutional limits on jurisdiction.

4. Pan Am. Petroleum Corp. v. Superior Court, 366 U.S. 656, 663 (1961); Gulley v. First Nat'l Bank, 299 U.S. 109, 112-13 (1936); Metcalf v. Watertown, 128 U.S. 586, 589 (1888); see generally HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 763-769 (1953) and the authorities cited therein.

5. Osborn v. Bank of the United States, 22 U.S. 738, 819-828 (1824), was one of the first cases to discuss what constituted "arising under" the Constitution or laws of the United States.

affecting interstate commerce.[6] Two basic congressional enactments, together with their amendments, cover this field. The Railway Labor Act, as amended to include the airline industry,[7] is complemented by the National Labor Relations Act and its amendments,[8] which for practical purposes occupy the remainder of the field.[9] Section 153 of the Railway Labor Act[10] provided for the creation of a National Railroad Adjustment Board and subsection (p)[11] provided for a federal right to enforcement of its awards in federal courts. The amendment, which extends the Railway Labor Act to include the airline industry, specifically excludes section 153[12] and in section 184 the amendment provides for compulsory creation of airline system boards of adjustment without any jurisdictional subsection comparable to subsection 153(p) of the original act.[13] In litigation between unions and railroads or airlines, involving neither the validity or interpretation of the Railway Labor Act, another federal statute, or the Constitution, the federal courts have consistently denied jurisdiction in non-diversity suits with the exception of suits involving railroads, pursuant to section 153.[14] On the other hand, the Supreme Court in *Lincoln Mills*[15] held that section

6. See Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); Association of Westinghouse Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955).

7. 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-88 (1958).

8. 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1958).

9. Section 2 of the National Labor Relations Act carves out some exceptions by way of definition, *e.g.*, the state, local, and federal governments and their employees are not covered by the act. 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1958).

10. 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-88 (1958).

11. "If a carrier does not comply with an order of a division of the Adjustment Board . . . the petitioner . . . may file in the District Court . . . a petition setting forth briefly the causes for which he claims relief, and the order . . . of the Adjustment Board . . . . The district courts are empowered . . . to make such order and enter such judgment . . . as may be appropriate to enforce or set aside the order . . . ." 44 Stat. 577 (1926), as amended, 45 U.S.C. § 153 (p) (1958).

12. 49 Stat. 1189 (1936), 45 U.S.C. §§ 181-88 (1958).

13. 49 Stat. 1189 (1936), 45 U.S.C. § 184 (1958).

14. See Metcalf v. National Airlines, Inc., 271 F.2d 817 (5th Cir. 1959); Duplisea v. Maine Central R.R., 260 F.2d 495 (1st Cir. 1958); Hettenbaugh v. Airline Pilots Ass'n Int'l, 189 F.2d 319 (5th Cir. 1951); Hayes v. Union Pac. R.R., 184 F.2d 337 (9th Cir. 1950), *cert. denied*, 340 U.S. 942 (1951); Starke v. New York, C. & St. L.R.R., 180 F.2d 569 (7th Cir. 1950); Morrissette v. Chicago, B. & Q.R.R., 193 F. Supp. 600 (N.D. Ill. 1961); Bohannon v. Reading Co., 168 F. Supp. 662 (E.D. Pa. 1958); Stranford v. Pennsylvania R.R., 155 F. Supp. 680 (D.N.J. 1957); Air Line Dispatchers Ass'n AFL v. California E. Airways, 127 F. Supp. 521 (N.D. Cal. 1954); Strawser v. Reading Co., 80 F. Supp. 455 (E.D. Pa. 1948). *Accord*, Hostetler v. Brotherhood of R.R. Trainmen, 287 F.2d 457 (4th Cir. 1961); Cunningham v. Erie R.R., 266 F.2d 411 (2d Cir. 1959); Pellicer v. Brotherhood of Ry. Steamship Clerks, 217 F.2d 205 (5th Cir. 1954), *cert. denied*, 349 U.S. 912 (1955); Dillard v. Chesapeake & O. Ry., 199 F.2d 948 (4th Cir. 1952); Cepero v. Pan Am. Airways, Inc., 195 F.2d 453 (1st Cir. 1952), *cert. denied*, 350 U.S. 925 (1955); Rolfes v. Dwellingham, 198 F.2d 591 (8th Cir. 1952); Air Line Dispatchers Ass'n v. National Mediation Bd., 189 F.2d 685 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 849 (1951); Hooser v. Baltimore & O.R.R., 177 F. Supp. 186 (S.D. Ind. 1959); Southern Pac. R.R. v. Switchmen's Union, 138 F. Supp. 919 (N.D. Cal. 1956).

15. Textile Workers Union v. Lincoln Mills, note 2 *supra*.

301(a) of the Labor Management Relations Act,[16] which is somewhat broader but comparable to subsection 153(p) of the Railway Labor Act,[17] was a congressional mandate for federal courts to fashion a body of federal common law to govern collective bargaining agreements within the scope of the act.[18] Thus, any litigation involving the agreements covered by the act thereafter presented the federal question necessary for jurisdiction in non-diversity suits. Subsequent to *Lincoln Mills*[19] the 5th Circuit, in *Metcalf v. National Airlines*,[20] held that since Congress had excluded section 153 when it extended the Railway Labor Act to include the airline industry, a suit to enforce an award of an airline system board of adjustment does not, in and of itself, present a federal question.

In the instant case[21] the court was asked to re-examine its decision in the *Metcalf*[22] case in light of *Lincoln Mills*,[23] the alleged similarity of congressional purpose manifested in the two statutes, and the impracticality of leaving enforcement of awards of federally established tribunals to the well known hostility of state law. Judge Wisdom, for the majority, said that the *Lincoln Mills*[24] decision was not applicable because an implication of a similar congressional mandate for the airline industry was foreclosed. He reasoned this because statutory language similar to that which was the basis for the *Lincoln Mills*[25] decision was expressly excluded by Congress when it extended the Railway Labor Act[26] to the airline industry. He pointed out that while state laws were generally hostile to executory agreements to arbitrate, even at common law, an award after arbitration was enforceable.[27] He recognized the irony of denying the airline industry

16. "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." Labor Management Relations Act (Taft-Hartley), 61 Stat. 156 (1947), 29 U.S.C. § 185 (a). This act amended the National Labor Relations Act (NLRA), 49 Stat. 449 (1935). Another section of Taft-Hartley should be noted: "The provisions of this title shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time." 61 Stat. 156 (1947), 29 U.S.C. § 182.

17. 44 Stat. 577 (1926), as amended, 45 U.S.C. § 153 (p) (1958).

18. Textile Worker's Union v. Lincoln Mills, *supra* note 2, at 456-57.

19. Textile Workers Union v. Lincoln Mills, *supra* note 2.

20. 271 F.2d 817, 819 (1959).

21. 295 F.2d at 211-12.

22. Metcalf v. National Airlines, *supra* note 20.

23. Textile Workers Union v. Lincoln Mills, *supra* note 2. The plaintiff in the instant case maintained that *Lincoln Mills* was controlling and implied that such a dispute arose under federal law because the statute dictating the provision for adjustment proceedings necessarily required federal enforcement of the awards to be effective. it should be noted that this was not argued in Metcalf v. National Airlines, Inc., *supra* note 20.

24. *Ibid.*

25. *Ibid.*

26. 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-88 (1958).

27. 295 F.2d at 214-15.

access to the federal courts to enforce awards of adjustment boards, as pointed out in the dissent, but answered by saying: (1) that federal district court jurisdiction is created only when Congress provides for it; (2) that Congress did not accomplish this by a statute compelling the parties to enter into a contract from which the rights, sought to be enforced, arose; and (3) that "if the legislative pattern creates an anomaly, it is not for the courts to override the statutory dictates."[28]

This decision leaves a dichotomy in the law governing labor relations affecting interstate commerce.[29] This can only be remedied by action of the Supreme Court, whieh has granted certiorari,[30] or by Congress if the Supreme Court affirms the 5th Circuit. It clearly poses a situation wherein the Supreme Court is faeed with a "hard case" concerning the proper role of the judiciary in the legislative process. Granting the need for uniform treatment of labor relations throughout an industry affecting interstate commerce, should the Supreme Court: (1) fill the statutory deficiency in the absence of language necessary to the implication of such a congressional mandate, (2) alter the traditional requisites for federal question jurisdiction,[31] or (3) affirm the 5th Circuit, thus referring the matter to Congress with the hope that it will act to remedy the deficiencies?[32] The writer favors the third choice because of the far-reaching and unsettling ramifieations manifest in either of the other choices. This "hard case" does not justify Supreme Court disturbance of the great body of federal jurisdictional law merely to place upon the federal courts a problem that Congress created and should be left to remedy.

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28. 295 F.2d at 220.

29. Under *Lincoln Mills*, *supra* note 2, a trend towards uniform law in labor relations subject to the NLRA can be predicted because the Supreme Court can resolve the splits between the circuits. At the same time a good deal of litigation concerning labor relations in the railroad and airline industries is left to the state law and courts, where uniformity is not the expected result.

30. 369 U.S. 802 (1926).

31. For a statement of these requisites, see Pan Am. Petroleum Corp. v. Superior Court, 366 U.S. 656, 663 (1961).

32. The third choice is recommended by an article discussing the *Lincoln Mills* decision, *supra* note 2, and its ramifications. Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

Interstate Commerce–Taxation–State Privilege Tax on Itinerant Photographers Held Not To Violate Commerce Clause

Plaintiff, a Tennessee corporation, sought a declaratory judgment determining its liability under an Alabama statute[1] which levied a license tax on transient photographers. In conducting its business in Alabama, plaintiff used advance salesmen to solicit orders and arrange for sittings to be held later in a local hotel room rented for such purpose. At the appointed time cameramen were sent into the town to take the pictures. The exposed film was mailed to the home office in Chattanooga, Tennessee, for processing. Proofs were returned at a designated time to be shown, usually in the same hotel room, to the customers. Finally, the customer's order was mailed to him from the Tennessee plant. Payment for the pictures was made either to the proof salesman or cash on delivery. On these facts, the Circuit Court of Montgomery County found that the tax was a burden upon interstate commerce and was thus invalid. On appeal to the Supreme Court of Alabama, *held*, reversed. Where itinerant photographers, involved in an integrated process of solicitation, photography, and sale across state lines, set up periodically in local hotels to take photographs, their activity is sufficiently local in nature to be separable from the stream of interstate commerce and thus be subject to the state privilege tax. *Haden v. Olan Mills, Inc.*, 135 So. 2d 388 (Ala. 1961).

It is a settled rule that foreign corporations conducting multi-state business are subject to taxes on the privilege of doing a local business within state borders.[2] Moreover, agents of these foreign corporations are subject to state privilege taxes where their activity is local in nature.[3] Equally well established is the rule that the privilege of engaging in interstate commerce is under the exclusive control of Congress and is therefore immune to state taxation.[4] Serious problems have arisen in determining what factors will motivate the characterization of an activity as a "local incident"[5]

1. ALA. CODE ANN. tit. 51, § 569 (1958), which reads in part: "Every photograph gallery, or person engaged in photography, when the business is conducted at a fixed location. . . . [The amount is graduated in cities and towns with regard to population.] *For each transient or traveling photographer, five dollars per week.*" (Emphasis added.)

2. HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE 102-03 & n.43 (1953).

3. Caskey Baking Co. v. Virginia, 313 U.S. 117 (1941).

4. "No state can compel a party, individual or corporation to pay for the privilege of engaging in interstate commerce." Atlantic & Pac. Tel. Co. v. Philadelphia, 190 U.S. 160, 162 (1903).

5. Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948) (maintaining a gas line across the state of Mississippi); Caskey Baking Co. v. Virginia, *supra* note 3 (peddling food); Wagner v. City of Covington, 251 U.S. 95 (1919) (peddling soft drinks); General Ry. Signal Co. v. Virginia, 246 U.S. 500 (1918) (installation of railway signal equipment sold under a contract requiring installation); Browning v. Waycross, 233 U.S. 16 (1914) (installation of lightning rods); Martin Ship Serv. Co. v. City of

or as "purely interstate commerce."[6] Presumably the primary consideration has been the balancing of the state's revenue and regulatory needs against the national economy's need for the free flow of commerce.[7] The Supreme Court has held[8] upon numerous occasions that *mere* solicitation of orders by agents of foreign corporations within the taxing state, even though continuous and systematic,[9] and notwithstanding the fact that domestic taxpayers were subject to the same tax,[10] is inseparable from interstate commerce and not subject to a state privilege tax. Without such a ruling the Court reasons that state privilege taxes would tend to erect trade barriers between the states[11] and discourage the acquisition of new business outlets,[12] results contrary to the spirit of the commerce clause. In the other extreme, courts following the so-called "Peddler" cases[13] have characterized the activity as purely local in nature where foreign corporations have sought to obtain the advantages of local outlets, and therefore have held them subject to the state's privilege tax.[14] The basis of these decisions was the belief that to allow a foreign corporation such advantages under the shield of interstate commerce would place them in a more advantageous trade position and may constitute a discrimination against the local concern.[15] A large number of the privilege tax cases involving photographers have been

Los Angeles, 34 Cal. 2d 793, 215 P.2d 24 (1950) (repairing and provisioning of ships used exelusively in interstate or foreign commeree).

6. Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947) (stevedoring); Fisher's Blend Station, Inc. v. State Tax Comm'n, 297 U.S. 650 (1936) (physical activities of radio broadcasting); Caldwell v. North Carolina, 187 U.S. 622 (1903) (assembling pictures and frames that have been shipped separately into state). For the entire list of solicitation or "drummer" cases see State v. Mobley, 234 N.C. 55, 66 S.E.2d 12 (1951).

7. HARTMAN, *op. cit. supra* note 2, at 103.

8. State v. Mobley, *supra* note 6.

9. Norton Co. v. Department of Revenue, 340 U.S. 534 (1951); Cheney Bros. Co. v. Massachusetts, 246 U.S. 147 (1918); *cf.* Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952); HELLERSTEIN, STATE AND LOCAL TAXATION 183 (1952).

10. Nippert v. City of Richmond, 327 U.S. 416, 431 (1946); Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 497 (1887).

11. "For, though 'interstate business must pay its way,' a State consistently with the commerce clause cannot put a barrier around its borders to bar out trade from other States and thus bring to naught the great constitutional purpose of the fathers in giving to Congress the power 'To regulate Commeree with foreign Nations, and among the several States . . . .'" Nippert v. City of Richmond, *supra* note 10, at 425.

12. Robbins v. Shelby County Taxing Dist., *supra* note 10, at 494-95; HARTMAN, *op. cit. supra* note 2, at 112.

13. Caskey Baking Co. v. Virginia, *supra* note 3; Wagner v. City of Covington, *supra* note 5; Emert v. Missouri, 156 U.S. 296 (1895); Machine Co. v. Gage, 100 U.S. 676 (1879). "If he carries goods with him for immediate delivery, he is in the category of a 'peddler' and as such he is engaged in a local business and becomes subject to state or municipal privilege taxes." HARTMAN, *op. cit. supra* note 2, at 109.

14. Norton Co. v. Department of Revenue, *supra* note 9; HARTMAN, *op. cit. supra* note 2, at 110.

15. See HARTMAN, *op. cit. supra* note 2, at 110, 112.

litigated by Olan Mills.[16] Most of them have held that the activity of the photographer was not separable from interstate commerce and have struck down the taxing statutes on this and other grounds.[17] These decisions, relying on the leading authorities,[18] implied that photography was not an activity distinct from solicitation because most of those authorities were solicitation or "drummer" cases.[19]

In the instant case the court reaffirmed its earlier position in *Graves v. State*,[20] by holding that the acts of the cameraman were separable from the interstate chain of events and hence taxable by the state. The opinion, relying heavily on *Graves v. State*, acknowledged that its holding was in the face of much state authority.[21] It also brushed aside plaintiff's reliance on the United States Supreme Court's denial of certiorari in *Olan Mills, Inc. v. City of Tallahassee*,[22] a case holding that a Florida city ordinance[23] taxing

16. Annot., 7 A.L.R.2d 416 (1949). In more recent years Olan Mills has completely dominated the field of itinerant photographer litigation.

17. License taxes are a direct burden on interstate commerce. See, *e.g.*, Olan Mills, Inc. v. City of Tallahassee, 100 So. 2d 164 (Fla. 1958); Warren Kay Vantine Studio, Inc. v. Portsmouth, 95 N.H. 171, 59 A.2d 475 (1948); State v. Mobley, *supra* note 6; Bossert v. City of Okmulgee, 97 Okla. Crim. 140, 260 P.2d 429 (1953); Olan Mills v. Town of Kingstree, 236 S.C. 535, 115 S.E.2d 52 (1960); Commonwealth v. Olan Mills, Inc., 196 Va. 898, 86 S.E.2d 27 (1955). License fees discriminate against interstate business in favor of local concerns and are void. See, *e.g.*, Olan Mills, Inc. v. Panama City, 78 So. 2d 561 (Fla. 1955); Graves v. City of Gainesville, 78 Ga. App. 186, 51 S.E.2d 58 (1948); Olan Mills, Inc. v. City of Cape Girardeau, 364 Mo. 1089, 272 S.W.2d 244 (1954); Olan Mills, Inc. v. Board of Comm'rs, 40 N.J. Super. 168, 122 A.2d 383 (N.J. Super. 1956). Discriminatory license taxes are an invalid exercise of the police power. See, *e.g.*, Olan Mills, Inc. v. Niagara Falls, 206 Misc. 1105, 136 N.Y.S.2d 668 (Sup. Ct. 1955); State v. Mobley, *supra* note 6; Olan Mills, Inc. v. City of Sharon, 371 Pa. 609, 92 A.2d 222 (1952); Ralph v. City of Wenatchee, 34 Wash. 2d 638, 209 P.2d 270, (1949). States may not erect trade barriers and stifle competition from out of state. See, *e.g.*, Olan Mills, Inc. v. Niagara Falls, *supra*; Bossert v. City of Okmulgee, *supra;* Olan Mills, Inc. v. City of Sharon, *supra;* City of Racine v. Wehye, 241 Wis. 133, 5 N.W.2d 747 (1942). *But see* Lucas v. City of Charlotte, 86 F.2d 394 (4th Cir. 1936); Graves v. State, 258 Ala. 359, 62 So. 2d 446 (1952); Craig v. Mills, 203 Miss. 692, 33 So. 2d 801 (1948) (cases generally holding taxed incident as separable from interestate commerce).

18. Memphis Steam Laundry Cleaner, Inc. v. Stone, *supra* note 9; Nippert v. City of Richmond, *supra* note 10; Real Silk Hosiery Mills v. City of Portland, 268 U.S. 325 (1925); Brennan v. City of Titusville, 153 U.S. 289 (1894); Robbins v. Shelby County Taxing Dist., *supra* note 12.

19. As primary authority the leading solicitation cases, note 18 *supra*, were relied upon. The courts apparently reasoned either that there was no difference between solicitation and photography in the itinerant photographer cases or that the taking of pictures was an integral part of the overall program of solicitation.

20. 258 Ala. 359, 62 So. 2d 446 (1952). The same set of facts were litigated here with the court finding that the acts of the photographer were sufficiently local in nature to be separable from interstate commerce and, therefore, subject to the license tax.

21. See cases cited note 17 *supra*.

22. 100 So. 2d 164 (Fla. 1958), *cert. denied*, 359 U.S. 924 (1959).

23. Pertinent sections of the Tallahassee ordinance are as follows: "Photographers or cameraman, whether resident, non-resident, transient or itinerant . . . . 25.00. In addition to the license hereinabove provided for there is hereby levied and imposed upon every person engaged in the occupation of a salesman or solicitor for any photogra-

the privilege of photography and the privilege of solicitation with an equal burden on local and interstate concerns was "an attempt to place a direct tax upon the privilege of engaging in interstate commerce."[24] The court reasoned that such denial of certiorari did not necessarily extend the "drummer" doctrine to Olan Mills' traveling operation.[25] The *Tallahassee* case was further distinguished on the wording of the Tallahassee ordinance[26] which included solicitors as well as photographers. The court reasoned further that in reality there was little difference between the traveling operation of Olan Mills and their branch studio operation, since the photographers and proof salesmen maintained a temporary office or studio on several occasions during the year, thus giving their activity the nature of a separate and distinct local incident.[27]

Viewing the instant case in the light of the principles governing characterization of taxable local incidents,[28] a factor favoring the invalidation of Alabama's license tax was the argument that Olan Mills' traveling operation was based entirely on interstate solicitation and that the activity of the photographer was an integral and inseparable part of this solicitation thus making it non-taxable interstate commerce.[29] On the other hand, however, a closer look at Olan Mills' operation might reveal that the activity of the photographer in setting himself up and taking pictures in a local hotel was nothing more than the temporary operation of a local studio.[30] In addition, the granting of tax immunity to Olan Mills would give the out-of-state firm a significant competitive advantage over the local merchant who must pay a similar tax.[31] It is submitted, therefore, that if this case were to come before the Supreme Court of the United States,[32] the Court should find the

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pher, cameraman . . . whether such salesman or solicitor be resident, non-resident, transient or itinerant and who solicits orders from the general public . . . an occupational license fee of fifteen dollars per annum . . . ." 100 So. 2d at 165.

24. 100 So. 2d at 167.

25. 135 So. 2d at 390. The court explained that writs of certiorari in the Supreme Court are matters of grace and often result in a denial without any consideration on the merits so that the constitutional issue may have no bearing on the denial.

26. See note 23 *supra*.

27. 135 So. 2d at 390. In the words of the court: "In the so-called traveling operation there is no permanent location in this state, but on several occasions during the year the employees of Olan Mills, Inc., maintain a temporary office or studio, of a kind, in a hotel within the bounds of the city where the business is done."

28. See notes 2-6 *supra* and accompanying text.

29. See solicitation cases, note 6 *supra*. Many Olan Mills cases have been decided on this exact point. See cases cited note 17 *supra*.

30. This was the finding of the court in the instant case. 135 So. 2d at 390.

31. HARTMAN, *op. cit. supra* note 2, at 112.

32. It should be noted here that in the instant case the issue was restricted to whether or not the acts of the photographer were interstate commerce and, hence, not taxable. The question of discrimination against the out-of-state firm was not answered. The omitted part of the Alabama statute, *supra* note 1, placed a yearly tax upon local photographers ranging from twenty-five dollars per year for the largest cities down to three dollars in the case of the smallest unincorporated towns. It would seem that the burden of a five dollar per week tax on the out-of-state photographer is

act of the photographer to be a taxable local activity.[33]

Legal Ethics—Duty of Attorney To Disclose Adverse Information to Court

Plaintiff sued a police officer for false imprisonment and for assault and battery stemming from the plaintiff's arrest in Trafalgar Square. After the arrest defendant was reduced in rank from chief inspector to station sergeant by a disciplinary board because he had attempted to deceive a court in another case.[1] To preserve the credibility of his client, the leading counsel for defendant sought to conceal the demotion by instructing him to wear civilian clothes rather than his uniform while in court.[2] Furthermore, during the trial defendant's counsel addressed him as "inister," a form of address appropriate to his former rank. Following a verdict for the defendant, the plaintiff discovered the concealed demotion and moved before the Court of Appeals for a new trial, *held*, granted. Plaintiff was entitled to a new trial on the grounds of deception of the court and materiality of new evidence. *Meek v. Fleming*, [1961] 2 Q.B. 366 (C.A.). Subsequently, the Masters of the Bench of The Honourable Society of the Inner Temple suspended defendant's leading counsel for three years because he had knowingly pursued a course of conduct which was likely to deceive the court and which had done so. On appeal, the Committee of Judges

discriminatory in nature and was passed for the obvious intent of stifling all out-of-state competition. Possibly a different result would have been reached if this point had been raised. *Cf.* Memphis Steam Laundry Cleaner, Inc. v. Stone, *supra* note 9.

33. A recent development in Olan Mills' dispute with the Alabama liceuse tax may be found in *Olan Mills, Inc. v. Opelika*, 207 F. Supp. 332 (M.D. Ala. 1962), where Olan Mills sought a declaratory judgment in federal district court on the validity of license taxes in 75 municipalities in Alabama. The court dismissed the suit saying that the state court had already construed the tax ordinances and defined their nature on two separate occasions, and according to the rule of *United Gas Pipeline Co. v. Ideal Cement Co.*, 369 U.S. 134 (1962), federal courts were hound by the decisions of state courts as to the interpretations of state taxing statutes. The court also refused to hear the case because in all probability every one of the seventy-five ordinances questioned had different provisions.

1. Defendant was charged with being party to an arrangement whereby a police constable purported to have arrested a bookmaker, when the defendant actually made the arrest.

2. During the proceedings the plaintiff's counsel as well as the judge frequently addressed the defendant as "inspector" or "chief inspector" and nothing was done to correct their misapprehension. On cross examination the defendant, when asked the question, "you are a chief inspector and have been in the force, you told us, since 1938"? said, "Yes, that is true"; yet defcudant's counsel made no attempt to correct this misstatement.

affirmed the suspension, but reduced the period to one year in part because of the lawyer's candor in the disciplinary proceedings.[3] *The Appeal of Mr. Victor Albert Charles Durand, Q.C., from the Order of the Masters of the Bench dated the 22d of November, 1961.*

The scope of an advocate's duty of candor in an adversary proceeding is determined primarily by the reconciliation of his two major loyalties, to his client and to the system of law administration of which he is the most important part. As to the first of these loyalties the attorney is a fiduciary of the highest nature owing a duty of unwavering loyalty to his client.[4] This duty requires him to give, in the language of the Canons of Professional Ethics, "his entire devotion to the interest of his client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability to the end that nothing be taken or withheld from him, save by rules of law legally applied."[5] Nevertheless, however strong the loyalty to his client, it does not justify any form of trickery,[6] deceit,[7] or misrepresentation[8] because the attorney has a comparable loyalty to the system of law administration which requires him to be fair and candid in all his dealings before the court.[9] This conflict of loyalties is inherent in the adversary system. Each lawyer presents his side,[10] leaving his adversary to present the elements favorable to the other side. Similarly, a lawyer in an adversary proceeding need not disclose the favorable or the unfavorable aspects of his client's case prior to the trial. It is easy, therefore, for an advocate to slip over from this one-sided presentation of the favorable to the covering up of the unfavorable. Moreover, even for the lawyer with the best of will there is great difficulty in determin-

3. The disbarment proceedings both before the Benches and before the Judges were *in camera*, as Mr. W. W. Boulton, Secretary of the General Council of the Bar, has kindly informed the REVIEW.

4. ABA CANONS OF PROFESSIONAL ETHICS, Canon 37 (1908).

5. ABA CANONS OF PROFESSIONAL ETHICS, Canon 22 (1908).

6. See, *e.g.*, *In re* Smith, 365 Ill. 11, 5 N.E.2d 227 (1936) (attorney censured for advising his client, charged with burglary, to smut his face and exchange clothes with his brother in an effort to confuse the district attorney); Werminont v. State, 101 Ark. 210, 142 S.W. 194 (1911) (attorney disbarred for fraudulently obtaining jurisdiction by trickery).

7. See, *e.g.*, *In re* Heimsoth, 225 N.Y. 409, 175 N.E. 112 (1931) (attorney censured for so artfully framing his questions to a client as to secure answers which, though literally true, concealed from the court the pendency of a relevant lawsuit).

8. See, *e.g.*, Gordon v. Clinkscales, 215 Ga. 843, 114 S.E.2d 15 (1960) (attorney disbarred for representing himself to be an attorney of another name); *In re* Pray, 64 Nev. 412, 183 P.2d 627 (1947) (attorney disbarred for misrepresenting that complainant in a divorce action had been a bona fide resident of the state for six weeks).

9. "The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness." ABA CANONS OF PROFESSIONAL ETHICS, Canon 22 (1908).

10. It is a basic assumption of the adversary system in the United States that justice will be better served by a system of judicial administration in which each advocate presents only so much of the truth as may be favorable to his cause. See generally CURTIS, IT'S YOUR LAW (1954).

ing what is fairly called for by the adversary system, and the Canons of Professional Ethics are too vague to be a helpful guide.[11]

Under our judicial systems it is inevitable that American judges vary in the standards of candor they require. Some may treat severely the covering up of the unfavorable. In *Kingland v. Dorsey*,[12] for example, the Supreme Court of the United States upheld the disbarment of a patent attorney for his part in the concealment of the ghost-written nature of an important item of evidence. Others may deplore the suppression as harmful to the administration of justice, yet find it not deserving greater condemnation. Such was the attitude of Circuit Judge Miller toward a lawyer who had been guilty of tampering with a witness for the other side.[13] Still other judges may disregard it as a consequence of the excessive zeal of a young attorney.[14]

Procedural changes are now aiding in a notable movement toward fuller disclosure. Pre-trial discovery proceedings[15] make it possible for the alert trial lawyer to inform himself of the elements of his opponent's case ahead of time. The accompanying changes in attitude are indicated by two contrasting items in a recent casebook:[16] one an excerpt from an English case of the late 1700s in which the Lord Chancellor contemptuously dismissed an effort to ascertain the nature of the opponent's case as a "fishing bill";[17] the other a United States Supreme Court decision of the 1940s which vaunted the open trial now possible.[18] So far have the changes in attitude come that the failure to employ discovery possibilities has been held to be lack of prudence on the part of an attorney which may justify denial of a motion for a new trial.[19] The result of these procedural changes

11. Several leading members of the American bar have voiced their disagreement with interpretations of the Canons by the Committee on Professional Ethics of the American Bar Association. See, *e.g.*, Tunstall, *Ethics in Citation: A Plea For Reinterpretation of a Canon*, 35 A.B.A.J. 5-7 (1949); Curtis, *Ethics of Advocacy*, 4 STAN. L. REV. 3, 10-11 (1951).

12. 338 U.S. 318 (1949). The majority opinion indicated that a disclosure of the authorship would have resulted in a rejection of the granting of the patent. See also Roark v. State Bar, 5 Cal. App. 2d 665, 55 P.2d 839 (1936).

13. *In re* Thomas, 36 Fed. 242 (1888). See also *In re* Smith, 365 Ill. 11, 5 N.E.2d 227 (1936); *In re* Heimsoth, 225 N.Y. 409, 175 N.E. 112 (1931).

14. *In re* Dreiband, 273 App. Div. 113, 77 N.Y.S.2d 585 (Sup. Ct. 1948). But see the lower court opinion as to the quality of the attorney's overzealousness. The judge not only censured counsel's reprehensible conduct, but strongly implied that disciplinary action should be taken. People v. Steele, 65 N.Y.S.2d 214 (Gen. Sess. 1946).

15. See FED. R. CIV. P. 26-37.

16. COUNTRYMAN, THE LAWYER IN MODERN SOCIETY (1962).

17. Ivy v. Kekewick, (1795) 2 Ves. Jun. 679, 30 Eng. Rep. 839 (Ch. 1795).

18. Hickman v. Taylor, 329 U.S. 495 (1947).

19. Kotsonaros v. Minnesota, 79 Ariz. 368, 290 P.2d 478 (1955). Chief Justice La Prade concluded: "Plaintiff's failure in this case to make use of any of the procedures provided by our rules to determine exactly what the adverse party would testify to, constitutes failure to exercise ordinary prudence. When a party is basing his entire case on something as uncertain as the testimony of an adverse party, prudence

has been a change in the tone of the administration of both civil and criminal law. It was this change in tone that a discerning lawyer characterized as the greatest change in English law in the nineteenth century, and this change was attributed principally to the judges.[20] Thus, these procedural changes may affect strongly, even though slowly, the standards which the courts demand of the bar. The instant case illustrates two principal methods through which judges, who seek to aid the bar, impose these standards. One is to grant relief in the case itself to the litigant who has lost because of trickery, as through the granting of a new trial.[21] The second is by disciplinary measures directed toward the offending lawyer, such as suspension from professional practice.[22]

Whatever progress may come through procedural changes and the courts themselves, the greater responsibility for developing the standards may well rest on the individual lawyer. Perhaps this professional responsibility has best been stated by a Chief Justice of the United States: "[T]he profession of law if it serves its high purpose, if it vindicates its existence, requires from those who have assumed its obligations a double allegiance, a duty toward one's client and a duty toward the court which, reconciled as they can be, and are in fact reconciled in practice, make for justice."[23] To attain such a reconciliation, however, something more than a mere adherence to the letter of the Canons may be needed. For some lawyers the ultimate answer may be a personal standard of fairness, an "obedience to the unenforceable,"[24] which is given primary importance in the leading treatise on professional ethics.[25]

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demands that he use some of the discovery devices provided by the rules of pleading to ascertain in advance what the testimony will be, or to use the pretrial information to impeach the testimony at the trial if it is of a surprising and contrary nature."

20. ODGERS, W. BLAKE ODGERS IN A CENTURY OF LAW REFORM 41-42 (1901).

21. See, *e.g.*, People v. Steele, *supra* note 14. The principal case is the first one in which the Court of Appeal has granted a new trial on the grounds of deception of the court. In an earlier case a new trial was denied upon facts strikingly similar to the principal case, on the ground that the misconduct of counsel was irrelevant as to any issue other than the credibility of the witness. Tombling v. Universal Bulb Co., [1951] 2 T.L.R. 289.

22. See, *e.g.*, *In re* Hoover, 46 Ariz. 24, 46 P.2d 647 (1935) (60 day suspension for knowingly allowing the court to be misled by a client's trickery); Vickers v. State Bar, 32 Cal.2d 247, 196 P.2d 10 (1948) (three year suspension for a misrepresentation through concealment).

23. TAFT, ETHICS OF THE LAW (Hubbard Lectures 1914).

24. See brief excerpt from CHEATHAM, CASES ON THE LEGAL PROFESSION 124 (2d ed. 1955); Moulton, *Law and Manners*, 134 Atlantic Monthly 1 (July 1924).

25. DRINKER, LEGAL ETHICS (1953).