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RECENT CASES

BANKRUPTCY—ALLOWANCE OF FEDERAL TAX CLAIM AS A JUDGMENT

After the Government's claim for assessed taxes had been allowed without contest by the bankruptcy court, suit was brought against the estate of the deceased ex-bankrupt for the amount remaining unpaid on the claim.[1] The statutory time limitation on enforcement of the assessed tax had expired.[2] The Government contended that the limitation applied only to an original action on the assessment, while the instant suit was to enforce a prior judgment of the bankruptcy court on which there is no statute of limitations against the Government. The district court gave judgment for the United States. On appeal, *held,* reversed. The allowance of a claim in bankruptcy is not a personal judgment against the bankrupt for any balance not realized from the bankrupt's estate. *Walley v. United States,* 259 F.2d 579 (9th Cir. 1958).

A properly assessed[3] federal tax may be collected within six years by levy or court proceeding.[4] Where the latter method is employed and a judgment is obtained against the delinquent taxpayer, there is no statute of limitations on the Government's enforcement of such a judgment.[5] If a bankruptcy proceeding intervenes before collection,

1. "The taxes were regularly and timely assessed and the Bankruptcy Court allowed the claim in the amount of $5,759.04 without contest having been made. A dividend of $243.29 was paid to the government on the claim. Nothing further was realized from the estate." 259 F.2d at 580.

2. The parties stipulated that the applicable statute, if any, was Internal Revenue Code of 1939, ch. 28, § 3312(d), 53 Stat. 400 (now INT. REV. CODE OF 1954, § 6502), which read: "Where the assessment of any tax imposed by this title has been made within the statutory period of limitation . . . such tax may be collected . . . by a proceeding in court, but only if begun—(1) Within six years after the assessment of the tax . . . ." The 1939 Code will remain applicable until all taxes imposed by that Code have been collected or compromised.

3. Assessment is the formal administrative act imposing a tax liability upon a taxpayer, and, with certain exceptions, the amount of a tax imposed by the Internal Revenue Code must be assessed within three years after the taxpayer's return is filed. INT. REV. CODE OF 1954, § 6501.

4. See note 2 *supra.*

5. "The right to initiate a suit to enforce collection of a tax necessarily implies the right to have its fruits, namely, judgments which are enforceable by execution. No doubt Congress might have provided for a period of limitation beyond which judgments obtained by the Government for taxes should be unenforceable, but, in the absence of any statute providing such a limitation . . . no court has power to restrict the right of the Government to enforce a judgment to which it is lawfully entitled." United States v. Havner, 101 F.2d 161, 165 (8th Cir. 1939). *Accord,* Investment & Securities Co. v. United States, 140 F.2d 894 (9th Cir. 1944), *cf.* United States v. Whited & Wheless, Ltd., 246 U.S. 552 (1918).

the district director should file a claim with the bankruptcy court.[6] The six-year limitation on collection is suspended during any period in which the assets of the taxpayer are in the control or custody of a court and for six months thereafter.[7] A tax claim is provable in bankruptcy[8] and, if proved, is a demand against a fund in possession of the court for distribution,[9] not an action in personam.[10] The bankruptcy court has jurisdiction to determine all disputes regarding the amount and validity of taxes claimed,[11] and the court's allowance of a claim is a judicial act[12] which is in effect a judgment.[13] But courts of bankruptcy are of limited jurisdiction,[14] and their judgments are conclusive only as to the estate which has been brought within their custody.[15] A discharge[16] releases the bankrupt from all his debts, with some important exceptions. One of the major exceptions is a tax claim,[17] which remains enforceable as if there had been no bankruptcy.[18]

The United States conceded that the six-year limitation,[19] if applicable, had expired.[20] In support of its contention that the allowance

6. Treas. Reg. § 301.6871(a)-2(b) (1958).

7. INT. REV. CODE OF 1954, § 6503(b). Under the 1939 Code the suspension applied only to estate and gift taxes. INT. REV. CODE OF 1939, ch. 1, § 274(b), 53 Stat. 86, and ch. 4, § 1015(b), 53 Stat. 153. The taxes in the instant case were insurance contribution, unemployment, and witholding taxes. 259 F.2d at 580.

8. Ingels v. Boteler, 100 F.2d 915 (9th Cir. 1938), *aff'd*, 308 U.S. 57 (1939); 2 REMINGTON, BANKRUPTCY § 797 (5th ed. rev. 1956) (taxes provable by implication from §§ 1 (11), 17, 57(j) of The Bankruptcy Act).

9. *In re* Schaffner, 267 Fed. 977 (2d Cir. 1920).

10. Meyer v. Fleming, 327 U.S. 161 (1946).

11. *In re* Florence Commercial Co., 19 F.2d 468 (9th Cir.), *cert. denied*, 275 U.S. 542 (1927); Cohen v. United States, 115 F.2d 505 (1st Cir. 1940).

12. *In re* Two Rivers Woodenware Co., 199 Fed. 877 (7th Cir. 1912).

13. *In re* John Osborn's Sons & Co., 177 Fed. 184 (2d Cir. 1910).

14. "Courts of bankruptcy, being of statutory origin, possess only such jurisdiction and powers as are expressly, or by necessary implication, conferred upon them by the Bankruptcy Act." Chicago Bank of Commerce v. Carter, 61 F.2d 986, 988 (8th Cir. 1932). *Accord,* Finn v. Carolina Portland Cement Co., 232 Fed. 815 (5th Cir. 1916).

15. "With regard to the estate of the bankrupt debtor, which has been . . . brought within the . . . jurisdiction of the court, its orders, decrees, and *judgments as to the right and title to the property* . . . are binding upon all persons, and in every court." Abendroth v. Van Dolsen, 131 U.S. 66, 71 (1889). (Emphasis added.) *Accord, In re* McChesney, 58 F.2d 340 (S.D. Cal. 1931) (allowed claim is judgment to extent of bankrupt's estate, but not against bankrupt); Massee & Felton Lumber Co. v. Benenson, 23 F.2d 107 (S.D. N.Y. 1927) (claim is a petition to share in fund, and allowance thereof does not determine bankrupt's personal liability); Goldstein v. Pearson, 121 A.2d 260 (D.C. Mun. App. 1956) (not a personal judgment).

16. The Bankruptcy Act § 1(15), 30 Stat. 544 (1898), as amended, 11 U.S.C. § 1(15) (1952).

17. The Bankruptcy Act § 17(a)(1), 30 Stat. 550 (1898), as amended, 11 U.S.C. § 35(a)(1) (1952).

18. Consolidated Plan v. Bonitatibus, 130 Conn. 199, 33 A.2d 140 (1943); Katzenstein v. Reid, Murdock & Co., 41 Tex. Civ. App. 106, 91 S.W. 360 (1906).

19. See note 2 *supra.*

20. "The tax assessments having been made in 1948, and this action not having been commenced until well more than six years thereafter, this suit

of a claim by the bankruptcy court constitutes a judgment which may be enforced at any time, the Government relied principally on five decisions.[21] The trial court accepted these decisions as authoritative and said that they overruled, by implication,[22] the prior cases of *In re McChesney*[23] and *Massee & Felton Lumber Co. v. Benenson*.[24] The latter cases had held that the allowance of a claim in bankruptcy was a judgment only to the extent of the assets in the custody of the court and did not determine the bankrupt's personal liability for any unpaid balance. The court of appeals distinguished the cases on which the Government relied as being concerned merely with the res judicata effect of the allowance or disallowance of a claim by a bankruptcy court.[25] In reaffirming the rationale of the *McChesney* and *Benenson* decisions the court pointed out that the jurisdiction granted to the court by the Bankruptcy Act is expressly limited to the allowance or disallowance of claims against bankrupt *estates*.[26] The court discussed but did not decide whether the allowance of a claim without contest would be res judicata if the Government sought to enforce its claim for the unpaid balance by a subsequent suit within the statutory period of limitation.[27]

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is clearly barred unless the allowance of the claim . . . amounted to a judgment . . . as to which there is no statute of limitations affecting the United States." United States v. Walley, 160 F.Supp. 67, 69 (S.D. Cal. 1958).

21. United States v. Ettelson, 159 F.2d 193 (7th Cir. 1947); Investment & Securities Co. v. United States, 140 F.2d 894 (9th Cir. 1944); United States v. Coast Wineries, 131 F.2d 643 (9th Cir. 1942); Lewith v. Irving Trust Co., 67 F.2d 855 (2d Cir. 1933); United States v. American Surety Co., 56 F.2d 734 (2d Cir. 1932).

22. United States v. Walley, 160 F.Supp. 67, 71 (S.D. Cal. 1958).

23. 58 F.2d 340 (S.D. Cal. 1931). See note 15 *supra*.

24. 23 F.2d 107 (S.D. N.Y. 1927). See note 15 *supra*.

25. "Lewith v. Irving Trust Co. . . . . was merely concerned with the *res judicata* effect of a prior claim as between the *Trustee* and a creditor with respect to the estate in bankruptcy. . . . United States v. Coast Wineries . . . and United States v. American Surety Co. of New York . . . . deal with the *res judicata* effect of bankruptcy proceedings pursuant to a proof of claim. . . . These cases do not involve the question of whether the bankruptcy proceeding resulted in a personal judgment against the bankrupt. They deal with the question of whether creditors who were parties in the bankruptcy proceeding are estopped to deny certain findings of fact and conclusions of law in those proceedings." 259 F.2d at 581. The court did not distinguish the *Ettelson* and *Investment & Securities Co.* cases, both cited note 21 *supra*, since they were cited to support the proposition that once the United States had obtained a judgment there is no statute of limitations on the enforcement of such a judgment. The court of appeals agreed with this contention.

26. "The jurisdictional grant of the Bankruptcy Court is contained in Section 2, sub. a(2) of the Bankruptcy Act. . . . It is given the power to 'Allow claims, (and) disallow claims . . . against bankrupt *estates*' (Emphasis added). We think the wording of the statute is clear and confines the operation of the allowance of a claim to the bankrupt estate in existence at the time of the institution of the bankruptcy proceedings." 259 F.2d at 581.

27. "Had the government . . . sued the bankrupt within the permissible period of limitations, the bankrupt perhaps would have been estopped to deny the effect of the allowance of the claim in the bankruptcy proceeding. However, this could not be predicated on the ground that the prior proceeding was a judgment against him *in personam*." 259 F.2d at 582. 5 REMINGTON, BANK-

The objects of the bankruptcy laws are to secure a just distribution of the bankrupt's property among his creditors and to effect the release of the bankrupt from the obligation to pay his debts.[28] The express privileges granted to the Government by the Bankruptcy Act[29] are not so much designed to aid in the collection of taxes as they are to restrain interference with the collection process. Thus the court in the instant case correctly declined to bestow an additional advantage on the Government which Congress had not seen fit to provide.

CONFLICT OF LAWS—JURISDICTION—RESIDENCE AS A JURISDICTIONAL BASIS FOR DIVORCE

Plaintiff-husband sued for divorce in Arkansas under a statute which declared in effect that residence, rather than domicile, was a sufficient jurisdictional requirement for divorce.[1] Upon a finding by the lower court that plaintiff was not domiciled in Arkansas, defendant sought to have the suit dismissed, urging that the statute was void in that the legislature had no power to substitute residence, in the sense of physical presence only, for domicile as the basis for jurisdiction. The lower court dismissed the suit. On appeal, *held,* reversed. A statute conferring jurisdiction to render a divorce on the basis of residence alone is not unconstitutional under the due process clause of the fourteenth amendment.[2] *Wheat v. Wheat,* 318 S.W.2d 793 (Ark. 1958).

RUPTCY § 2313 (5th ed. 1953) suggests that the allowance of a claim would be binding on the bankrupt in subsequent litigation with the creditor, since the bankrupt is under a duty, by § 7 (a) of the Bankruptcy Act, to object to claims, when presented to him, if not proper. *Cf.* Maryland Casualty Co. v. United States, 91 Ct. Cl. 203, 32 F.Supp. 746 (1940), holding that the referee's disallowance of a claim of the U.S. for taxes is res judicata in an action brought by the bankrupt's surety to recover from the United States the amount of excess taxes for which the surety had been required to respond in a suit against it by the United States on a deficiency tax bond.

28. Wilson v. City Bank, 84 U.S. 473 (1872).

29. Under the Bankruptcy Act the Government's claim for taxes is exempt from discharge. See note 17 *supra.* Further, the act in § 64 gives the Government's tax claim a priority. The Bankruptcy Act § 64(a)(4), 30 Stat. 563 (1898), as amended, 11 U.S.C. § 104(a)(4) (1952).

1. "The word 'residence' as used in Section 34-1208 is defined to mean actual presence and upon proof of such the party alleging and offering such proof shall be considered domiciled in the State and this is declared to be the legislative intent and public policy of the State of Arkansas." ARK. STAT. § 34-1208.1 (1957). The court in the instant case construed this as substituting residence, in the sense of physical presence, for domicile as the jurisdictional basis for divorce. Wheat v. Wheat, 318 S.W.2d 793 (Ark. 1958).

2. U.S. CONST. amend. XIV, § 1.

It is generally recognized that domicile of at least one of the parties is a prerequisite to jurisdiction for granting a divorce.[3] Such a decree is entitled to full faith and credit although the defendant spouse was not present.[4] A divorce granted in a jurisdiction where neither party was domiciled is not entitled to recognition in other states,[5] although if the defendant was present he may be precluded from attacking the decree on the grounds of res judicata.[6] The Supreme Court has never decided whether a divorce granted where neither party was domiciled may be valid at the place where rendered and yet not entitled to full faith and credit. Scattered statements in *Williams v. North Carolina (II)*[7] indicate a view that without domicile no state has jurisdiction to grant a divorce that is valid anywhere.[8] In *Alton v. Alton*,[9] the

3. "A state cannot exercise through its courts jurisdiction to dissolve a marriage when neither spouse is domiciled within the state." RESTATEMENT, CONFLICT OF LAWS § 111 (1934). See also GOODRICH, CONFLICT OF LAWS § 127 (3d ed. 1949). Goodrich states "only a court at the domicile has jurisdiction to grant a divorce." (cases cited) *Id.* at 397. The marriage relationship is said to be a matter of public concern in which the state has a vital interest; the state having that interest being the state of domicile. Williams v. North Carolina (I), 317 U.S. 287, 298 (1942); Alton v. Alton, 207 F.2d 667, 673 (3d Cir. 1953). GOODRICH, *op. cit. supra* at 396. As divorce has been thought to be the responsibility of the domicile, divorce litigation has been called an action in rem, but that they are more than mere in personam actions. Williams v. North Carolina (I), *supra* at 297.

4. Williams v. North Carolina (I), 317 U.S. 287 (1942).

5. Williams v. North Carolina (II), 325 U.S. 226 (1945). For commentary and analysis of the *Williams* case, see Powell, *And Repent at Leisure, an Inquiry into the Unhappy Lot of Those Whom Nevada Hath Joined Together and North Carolina Hath Put Asunder,* 58 HARV. L. REV. 930 (1945). For a complete discussion of the problem raised by the cases see Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study,* 65 HARV. L. REV. 193 (1951); Sumner, *Full Faith and Credit for Divorce Decrees —Present Doctrine and Possible Changes,* 9 VAND. L. REV. 1 (1955).

6. Sherrer v. Sherrer, 334 U.S. 343 (1948); Coe v. Coe, 334 U.S. 378 (1948). Following these cases, the Supreme Court held that if a person cannot collaterally attack the decree by the law of the rendering state, he cannot do so elsewhere. Johnson v. Muelberger, 340 U.S. 581 (1951).

7. 325 U.S. 226 (1945).

8. "A judgment in one state is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits—had jurisdiction, that is to render the judgment. . . . Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil. Bell v. Bell, 181 U.S. 175; Andrews v. Andrews, 188 U.S. 14. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it." 325 U.S. 226, 229 (1945). Mr. Justice Murphy, concurring, makes a distinction between the internal and external power of Nevada, saying that "Nevada has unquestioned authority, consistent with procedural due process, to grant divorces on whatever basis it sees fit to all who meet its statutory requirements. It is entitled, moreover, to give to its divorce decrees absolute and binding finality within the confines of its borders.

"But if Nevada's divorce decrees are to be accorded full faith and credit in the courts of her sister states it is essential that Nevada have proper jurisdiction over the divorce proceedings." *Id.* at 239.

Justices Rutledge and Black, in separate dissents, contended that the divorces were valid in Nevada, and that thus the majority denied full faith and credit without determining that the decrees were invalid in the rendering state. Mr. Justice Rutledge argued that the judgment was valid in Nevada

leading case on this point, the Third Circuit, in an opinion by Judge Goodrich, held that a divorce rendered by a state wherein neither party is domiciled is an invalid attempt to affect an interest without jurisdiction and contrary to the due process clause of the fourteenth amendment.[10]

In rejecting the reasoning and holding of the *Alton* case,[11] the Arkansas court held that due process does not require domicile as the sole basis for the exercise of jurisdiction to grant a divorce.[12] It was stated that even if the statute defining residence as actual presence deprives the divorce of extraterritorial validity when there is no finding of domicile, the legislature had the power to say that this disadvantage was outweighed by the benefits of the statute.[13] A strong dissent, relying chiefly on *Alton,* argued that as domicile is the juris-

against any attack. *Id.* at 244. Mr. Justice Black thought that the Court recognized that the decrees were valid under Nevada law, but declared them invalid under the due process clause, *id.* at 271, deciding the matter as though it were purely a federal question. *Id.* at 268. For a discussion of these views see Powell, *supra* note 5.

9. 207 F.2d 667 (3d Cir. 1953).

10. *Id.* at 676. "An attempt by another jurisdiction to affect the relation of a foreign domiciliary is unconstitutional even though both parties are in court and neither one raises the question." *Id.* at 677. See also Jennings v. Jennings, 251 Ala. 73, 36 So. 2d 236 (1948) (statute permitting non-resident couples to confer jurisdiction by consent and thus obtain an Alabama divorce held invalid on the theory that domicile is a prerequisite to jurisdiction). *Contra,* Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958) (held within the power of the legislature to establish bases of jurisdiction for divorce other than domicile). The Seventh Circuit has held that there could be a divorce decree valid at home but invalid elsewhere. Sutton v. Leib, 188 F.2d 766 (7th Cir. 1951). In discussing this case, Judge Goodrich, in *Alton,* stated that it was an application of the full faith and credit clause, not involved in *Alton.* "But if the opinion . . . was directed at the validity of a divorce decree in the rendering state before subsequent proceedings call for the application of the full faith and credit clause, we are, with due deference, compelled to disagree." Alton v. Alton, 207 F.2d 667, 675 (3d Cir. 1953). The court generalized in saying that due process at home and full faith and credit were correlative. *Id.* at 676. The dissenting opinion found nothing in the rule requiring domicile for jurisdiction that entitled it to constitutional sanction. *Id.* at 681. Judge Hastie's dissent stated further that the Supreme Court had not held that due process and full faith and credit were of the same dimensions in this area. *Id.* at 684. In reasoning that the due process clause did not prevent adjudication of divorce in any state having personal jurisdiction over both spouses, the dissent stated that if such were the rule, a choice of law problem would necessarily arise. *Id.* at 684. For further discussion of the choice of law problem see Sumner, *supra* note 5, at 19. Certiorari was granted by the Supreme Court in the *Alton* case, but it was dismissed as moot since one of the parties had obtained a second divorce in another state. The Virgin Islands statute was later declared invalid, but not on the basis of the due process clause. The Court decided on the grounds that the legislature, in enacting the statute, had exceeded the power granted it by Congress. Granville-Smith v. Granville-Smith, 349 U.S. 1 (1955).

11. 318 S.W. 20 at 796.

12. *Id.* at 797.

13. The court states that even without the statute, the acceptance of an Arkansas divorce decree by a foreign court will depend on whether that court finds that Arkansas domicile did exist. 318 S.W.2d at 796. The concurring opinion states that any divorce granted under the statute will "probably be worth only the paper it is printed on" in sister states. *Id.* at 798.

dictional test for recognition of a foreign divorce decree, the same test should determine the validity of the decree in the rendering state, and the rationale of the *Alton* case should be followed.[14]

The concept of domicile as a jurisdictional basis is an elusive and nebulous one which necessitates delving into a party's mental inclinations.[15] The problem of which state is the domicile has given the courts much trouble.[16] Alternative bases have been suggested, each with shortcomings of its own.[17] The chief concern in this area is that the state having the paramount interest in the marriage relationship should not lose control over the domestic relations of its citizens, as it would should a divorce be granted by another state with more lax divorce laws. Although the state of domicile has an interest, perhaps the dominant one, it is difficult to see how its concern is so pervasive as to exclude the interest of other states having vital connections with the parties and the marriage relationship, even though of lesser degree than those of the domicile. Perhaps the solution would be to allow states having any vital connection with a party and his status to render a decree, with the Supreme Court setting forth a definite choice of law rule which must be followed.[18] The due process clause could then be used to correct states which passed beyond proper choice of law rules.[19] The Supreme Court may change its mind on the theory of the *Williams* cases and announce any of several rules which have been suggested.[20] There is no requirement of domicile found in the Constitution, and Congress has not decreed one. Obviously, the decision of a state court cannot be controlling on this issue. The question must ultimately be decided by the Supreme

14. 318 S.W.2d at 798. The dissent argued against a "judicial double standard under which the court of one state fondly embraces a jurisdictional practice within its own realm which it condemns as downright reprehensible when indulged in by the courts of a sister state." *Id.* at 805.

15. See Alton v. Alton, 207 F.2d 667, 682 (1953) (dissent); Sumner, *Full Faith and Credit For Divorce Decrees—Present Doctrine and Possible Changes,* 9 VAND. L. REV. 1, 13 (1955).

16. See Knapp, *Solutions of the Double Domicil Problem,* 15 CONN. B.J. 251 (1941), cited in Sumner, *supra* note 15, at 14.

17. Sumner, *supra* note 15, at 14-19. (a) Place of marriage: often the only contract with the state is the ceremony, which interest may not be substantial enough to confer jurisdiction. (b) Matrimonial domicile: today, upon separation one or both parties often leave and establish separate homes in other states, severing all ties with this state. The remaining interest, if any, might be insufficient under due process to confer jurisdiction for divorce. (c) Residence: here there may still be relitigation of the jurisdiction fact, *i.e.*, residence for the required time, in a later suit, just as with domicile. A rule requiring residence only would slight the interests of the state of domicile and of matrimonial domicile.

18. For a discussion of this theory and the choice of law problem involved, see Sumner, *supra* note 15, at 19-25.

19. The due process clause has been so used before, *e.g.*, Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934); Alton v. Alton, 207 F.2d 667, 677 (1953) and cases cited therein.

20. See note 16 *supra.*

Court, holding either that domicile is necessary for jurisdiction, or that some lesser requirement is necessary, with or without an established choice of law rule.

CORPORATIONS—SECURITIES ACTS—DISTINCTION BETWEEN "CLASS" AND "SERIES" UNDER SECTION 16(b) OF SECURITIES EXCHANGE ACT

Plaintiff brought a statutory action under section 16(b) of the Securities Exchange Act[1] to recover profits made by defendant shareholder through its trading of corporate stock. Section 16(b) provides for recovery on behalf of the corporation of so-called "short swing" profits[2] made by any director, officer, or owner of ten per cent or more of any *class* of its securities.[3] The articles of the corporation authorized the issuance of 150,000 shares of cumulative preferred stock. Pursuant thereto, 75,000 shares with a 4¼ per cent dividend rate were initially issued. Subsequently, 25,000 shares were issued providing for a dividend rate of 3¾ per cent. At the time of the transaction in question defendent owned more than ten per cent of the 3¾ per cent stock, but, including its holdings of the 4¼ per cent shares, it possessed less than ten per cent of all outstanding cumulative preferred. Plaintiff contended that for the purposes of 16(b) the 4¼ per cent and the 3¾ per cent preferred constituted separate *classes*. Defendant asserted that these two stock issues were different

1. This statutory action is specifically provided for in the Securities Exchange Act:
"(b) For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer. . . ." Securities Exchange Act of 1934 § 16(b), 48 Stat. 896, 15 U.S.C. § 78p(b) (1952). This section has been a powerful legislative force in preventing inside profits by directors, officers, and large shareholders.

2. For purposes of § 16(b), a short swing profit is any profit realized by a purchase and sale of any stock of a corporation within a six month period. 15 U.S.C. § 78p(b) (1952). See LOSS, SECURITIES REGULATION 564 (1951).

3. "To prevent the unfair use of 'inside information' for the purpose of speculation Congress included a provision in the Securities Exchange Act of 1934, that every person who as director, officer or beneficial owner of more than ten per cent of any class of 'equity security' . . . must file a statement and report each month the changes of ownership as to such securities which have occurred during the month. Any profit realized from any purchase or sale of any equity security within a period of less than six months is made recoverable by the issuer without the need of proving unfair use of official information." BALLANTINE, CORPORATIONS 216 (rev. ed. 1946).

series within the same class, and therefore it did not own the necessary percentage of any one class required to bring the transaction within the purview of 16(b). *Held,* for the defendant. Where the only substantial difference between two issues of corporate stock is the dividend rate, and they have identical voting rights, they are to be treated as one *class* for purposes of section 16 of the Securities Exchange Act. *Ellerin v. Massachusetts Mutual Life Ins. Co.,* 167 F. Supp. 71 (S.D.N.Y. 1958).

Prior to the passage of the Securities Exchange Act, directors, officers, and principal shareholders often used inside information obtained by virtue of their positions to speculate in the securities of their own corporations.[4] Such information was not usually available to the smaller shareholders.[5] One of the primary purposes of the act was to protect the "outside" shareholders against profits made by insiders through the use of such advance information.[6] The instant case is one of first impression, the distinction between "class" and "series" not previously having been made for the purposes of 16(b).[7] However, it has been recognized that such a problem was likely to arise,[8] especially in the case of preferred shares because of the common practice of issuing various series within the same class.[9] When such series are issued there can arise the perplexing question as to whether subsequent series are not in reality separate classes.[10] It has been suggested that local incorporation laws be consulted to distinguish

4. For a discussion of this problem see Smolowe v. Delendo Corp., 136 F.2d 231 (2d Cir. 1943); Tracy & MacChesney, *The Securities Exchange Act of 1934,* 32 MICH. L. REV. 1025 (1934). See also 32 MICH. L. REV. 678 (1934); *Hearings on S. 84 Before Committee on Banking and Currency,* 72d Cong., 2d Sess. (1934).

5. *Hearings on S. 56 and S. 97, Before Committee on Banking and Currency,* 73d Cong., 1st & 2d Sess. (1934).

6. *Hearings on H. R. 7852 and H. R. 8720, Before Committee on Interstate and Foreign Commerce,* 73d Cong., 2d Sess. (1934). See also Smolowe v. Delendo Corp., 136 F.2d 231 (2d Cir. 1943); LOSS, SECURITIES REGULATION 564 (1951).

7. "This question of the distinction between 'class' and 'series' is a matter of novel impression under the 'insider's profit' provision of the Securities Exchange Act." 167 F. Supp. at 73.

8. Seligman, *Problems Under The Securities Exchange Act,* 21 VA. L. REV. 1, 7 (1934).

9. "In order to determine whether a person owns more than 10% of any class of an equity security, questions will frequently arise as to what constitutes a class. Especially in the case of preferred stock it has been the practice frequently to issue what are termed series of preferred stock varying in certain respects. Is each series a separate class for the purpose of the Act? If not, is the test solely whether a particular category of stock is termed a separate class or a separate series? While it is arguable that this view is a formal one, nevertheless it would seem that it was the correct one and that reference can properly be made to the local laws of incorporation for the purpose of determining what is a separate class and what is merely a separate series." Seligman, *Problems Under the Securities Exchange Act,* 21 VA. L. REV. 1, 7 (1934).

10. *Ibid.*

class and series.[11] In fact, many states do statutorily authorize the issuance of a class of stock consisting of several series.[12]

The court here noted that local laws made it permissible to create a class of stock and then issue various series.[13] However, the theory that local law was controlling in differentiating class and series was rejected;[14] rather, the similarities and differences between the two issues were analyzed for this purpose.[15] It was noted that both had the same par value; that there was no preference as to dividends; that both had the same limited voting rights; and that neither had preemptive rights. These similarities indicated that the stock involved constituted only one class. On the other hand differences in dividend rates, redemption prices, and dates of issuance gave some support to plaintiff's contention that the 4¼ per cent and the 3¾ per cent stock constituted different classes.[16] The court concluded that the controlling

11. *Ibid.*

12. Under this type of statute the restrictions of the various classes are fixed in the charter or articles of incorporation. However, the directors are authorized to vary such items as the dividend rate and the liquidation price with the issue of each successive share. See BALLANTINE & LATTIN, CASES AND MATERIALS IN THE LAW OF CORPORATIONS 379-84 (1939); Dodd, *Statutory Developments in Business Corporation Law, 1886-1936*, 50 HARV. L. REV. 27 (1936); Berle, *Corporate Devises for Diluting Stock Participations*, 31 COLUM. L. REV. 1239, 1263 (1931). These kind of shares are sometimes referred to as "blank shares." Ballantine states: "In general the preferences and restrictions of any class of preferred shares will be fixed in the charter or articles of incorporation. The financing of an enterprise goes on year after year, as business expands or the needs of capital arise. New issues of securities will be made from time to time and it may be necessary to meet changing market conditions as to the dividend rate and other terms of the preferred share contract. In order to avoid the expense and delay of amendments of the charter, some modern corporation laws permit the directors to be authorized in the charter to vary the dividend rate, the liquidation price and some other financial terms of new series of preferred shares to adjust these terms to market needs. A number of recent statutes authorize classes of preferred shares to be subdivided by the directors into series, if this is provided for in the charter. A series of shares is a sub-class or subdivisions of a class. There seems no reason why the board of directors should not be given much the same freedom in fixing the financial terms of unissued preferred shares that it has in respect to the terms of notes, debentures, and bonds. In general each series of a class should have the same priorities that are given to other series and the directors should not be given power to undermine the rights of shares already outstanding." BALLANTINE, CORPORATIONS 471 (rev. ed. 1946).

13. The company in the instant case was an Ohio corporation. The applicable law is OHIO REV. CODE ANN. § 1701.06 (Baldwin 1957): "(A) The express terms of shares may include statements specifying: (12) The right of directors, subject to such limitations as may be stated, to adopt amendments to the articles in respect of any unissued or treasury shares of any class and thereby to fix or change: the division of such shares into series and the designation and authorized number of shares of each series; the dividend rate; the dates of payment of dividends and the dates from which they are cumulative; liquidation price, redemption rights and price; sinking fund requirements; conversion right; and restrictions on the issuance of shares of any class or series."

14. 167 F. Supp. at 79.

15. *Id.* at 76-78.

16. *Ibid.*

factor was that both issues had the same voting rights, and thus were series comprising a single class.[17]

By broadly defining class to include separate series having substantial differences, the decision rendered tends to defeat the legislative intent of the Securities Exchange Act. Such an interpretation allows the defendant to escape the sanctions of 16(b) although he is a principal shareholder within the meaning of that section. The court based its ruling primarily on the fact that this stock had very limited voting rights. However, it is questionable as to whether this should be the determining factor. Certainly, full voting rights are not a prerequisite for a large shareholder to have access to inside information.

The problem of defining class for the purposes of section 16 is a difficult one. If local law is looked to, non-conformity and confusion will result. A solution to the problem may be supplementary federal legislation. Congress could decide that successive stock issues would be considered as separate classes, unless substantially identical. But what is the meaning of the phrase "substantially identical"? This should be determined by the courts in light of the purpose of section 16(b) and the equities of each particular case.[18]

CORPORATIONS—STOCK DIVIDENDS—INCONSISTENCY BETWEEN TRADITIONAL AND MODERN CONCEPTS OF STOCK DIVIDENDS

In a deed of trust the settlor included a special provision which required the trustee to transfer to the settlor or his executor all stock dividends which might be received on the principal stock.[1] One of

17. "The most important single factor in determining whether a series of stock is 'class' for the purpose of a statute regulating transactions by insiders who may be making unfair use of inside information, is voting rights." 167 F. Supp. at 78.

18. For other problems concerning § 16(b) see 25 So. CAL. L. REV. 475 (1952); Comment, 27 TEXAS L. REV. 840 (1949). See also Ferraiolo v. F. R. Newman, 259 F.2d 342 (6th Cir. 1958); Stella v. Graham-Paige Motors Corp., 259 F.2d 476 (2d Cir. 1958). In the *Ferraiolo* case defendant converted preferred stock into common stock and the court held that this was not a purchase within the meaning of § 16. The *Newman* case concerned the definition of the § 16(b) term "profit." The court in finding for defendant concluded that the profit shown on defendant's income tax return was not necessarily profit within the meaning of the Securities Exchange Act.

1. The deed of trust, executed in 1918, contained a special provision regarding the treatment of stock dividends as follows: "Anything hereinabove contained to the contrary notwithstanding, said Trustee shall transfer to the said Donor, or if he is dead, to his executor or administrator, free of all trusts

the stocks held in trust was subjected to a three-for-one conversion.[2] Concurrently, the company transferred earned surplus to the capital account[3] in compliance with a statute forbidding the impairment of capital.[4] In an action for construction of the deed of trust with reference to these stock distributions, the beneficiaries argued first, that the transaction in reality constituted a stock split-up,[5] and second, that even if the distribution in part constituted a stock dividend, the number of shares allocable to the settlor's legatee[6] under the special trust provision should be no more than the total number of shares whose aggregate *fair market value* equalled the amount of earned surplus capitalized.[7] The trial court ruled that the amount of new stock whose aggregate *par value* was equivalent to the amount of earned surplus transferred to capital constituted a stock dividend within the meaning of the trust instrument.[8] On appeal, *held,* affirmed. A stock dividend consists of a distribution to shareholders of additional stock accompanied by the transfer of accumulated sur-

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hereby created, any and all stock dividends which it may from time to time receive on any stocks held by it hereunder." The use of such a provision in the trust instrument precludes the problem of determining whether the stock dividend should be allocated to income or to principal. For discussions of that problem see 32 N.Y.U.L. REV. 878 (1957); 6 VAND. L. REV. 416 (1952).

2. The deed of trust created two identical trusts with principals originally consisting of 300 shares of General Electric common stock. By April of 1954 the trustee held 1200 shares of General Electric no-par value common stock in each trust. On April 20, 1954 an annual shareholders' meeting was held at which a resolution was adopted to change the 35,000,000 shares of common stock without par value, which the Company was authorized to issue, into 105,000,000 shares of common stock with a par value of $5 each.

3. On February 26, 1954 the Board of Directors adopted a resolution providing that the capital of the Company be increased from $180,287,046 to $432,688,910.40 by the transfer of $252,401,864.40 from earned surplus to the capital account; and that such transfer should be made upon the adoption by the shareholders of the resolution authorizing the stock conversion.

4. N.Y. STOCK CORP. LAW § 58.

5. The beneficiaries contended that the nature of the stock distribution should be determined by the substance and intent of the action taken by the distributing corporation judged in accordance with the rules of disclosure and accounting promulgated in the New York Stock Exchange, Company Manual §§ A 13, A 14 (1955); and the American Institute of Accountants, Accounting Research Bull. No. 42 (1953).

6. The settlor died in 1926, leaving a will in which the respondent, the American Museum of Natural History, was named as sole residuary legatee.

7. Both the American Institute of Accountants and the New York Stock Exchange require that shares distributed as stock dividends be capitalized at their fair value. American Institute of Accountants, Accounting Research Bull. No. 43, at 51 (1953); New York Stock Exchange, Company Manual § A 13, at 235 (1955).

8. The trial court held that 7/12ths (the ratio of new capital to total capital) of the new stock was attributable to the capitalization of earned surplus and constituted a stock dividend. *In re* Fosdick's Trust, 147 N.Y.S.2d 509, 512, 518 (1955). Each trust received 3600 shares of the new stock, of which 7/12ths or 2100 shares constituted a stock dividend distributable to the American Museum of Natural History. *Id.* at 518. This resulted in a reduction of the beneficiaries income from the trusts from $11,520 to $4,800 a year. Brief for Appellants, p. 9, *In re* Fosdick's Trust, 4 N.Y.2d 646, 152 N.E.2d 228, 176 N.Y.S.2d 966 (1958).

plus to the corporation's capital account, and in determining the number of newly distributed shares attributable to the new capital, no reference is had to market value. *In re Fosdick's Trust,* 4 N.Y.2d 646, 152 N.E.2d 228, 176 N.Y.S.2d 966 (1958).[9]

A stock dividend consists of two elements: (1) the transfer of a certain amount of accumulated surplus to the corporate capital account, and (2) the distribution of additional shares of stock by the corporation to its shareholders.[10] A stock split-up consists simply of

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9. For other decisions holding that 7/12ths of this same General Electric stock distribution constituted a stock dividend, see *In re* Bryan's Trust, 6 Misc.2d 468, 162 N.Y.S.2d 481 (Sup. Ct. 1957); Estate of Boissevain, N.Y.L.J. Feb. 6, 1956, p. 8 (Surr. Ct.); *In re* Lissberger's Estate, 145 N.Y.S.2d 308 (Surr. Ct. 1955); *In re* Muller's Estate, 145 N.Y.S.2d 283 (Surr. Ct. 1955); Matter of Sonneborn, N.Y.L.J. Jan. 27, 1958, p. 6 (Surr. Ct.).

10. Bass v. Commissioner of Internal Revenue, 129 F.2d 300 (1st Cir. 1942); Lich v. United States Rubber Co., 39 F. Supp. 675 (D.N.J. 1941), *aff'd per curiam,* 123 F.2d 145 (3d Cir. 1941); United States v. Siegel, 52 F.2d 63 (8th Cir. 1931), *cert. denied,* 284 U.S. 679 (1931); Williams v. Western Union Telegraph Co., 93 N.Y. 162 (1883); Matter of Sanford, 4 Misc. 2d 487, 161 N.Y.S.2d 507, (Surr. Ct. 1957); *In re* Davis' Estate, 128 N.Y.S.2d 152 (Surr. Ct. 1953); *In re* Strong's Will, 198 Misc. 7, 96 N.Y.S.2d 75 (Surr. Ct. 1950), *aff'd,* 277 App. Div. 1157, 101 N.Y.S.2d 1021 (1950); *In re* Lissberger's Estate, 189 Misc. 277, 71 N.Y.S.2d 585 (Surr. Ct. 1947), *aff'd,* 273 App. Div. 881, 78 N.Y.S.2d 199 (1948), *leave to appeal denied,* 298 N.Y. 934 (1948); *In re* Norton's Will, 129 Misc. 875, 224 N.Y.S. 77 (Surr. Ct. 1927). See also Eisner v. Macomber, 252 U.S. 198 (1920); Gibbons v. Mahon, 136 U.S. 549 (1890); Matter of Osborne, 209 N.Y. 450, 103 N.E. 723 (1913); Robertson v. Brulator, 188 N.Y. 301, 80 N.E. 938 (1907); *In re* Horrmann's Estate, 3 App. Div. 2d 5, 157 N.Y.S.2d 704 (1956); *In re* Thoms' Trust, 3 Misc.2d 784, 152 N.Y.S.2d 939 (Sup. Ct. 1956).

The capitalization of accumulated surplus without the distribution of additional stock will not constitute a stock dividend. People *ex rel.* Adams Electric Light Co. v. Graves, 272 N.Y. 77, 4 N.E.2d 941 (1936). The transferred surplus may be either earned surplus or capital surplus. See *In re* Bryan's Trust, 6 Misc. 2d 468, 162 N.Y.S.2d 481 (Sup. Ct. 1957); *In re* Lawrie's Estate, 119 N.Y.S.2d 906 (Surr. Ct. 1953); *cf. In re* Bingham's Trust, 11 Misc. 2d 367, 161 N.Y.S.2d 217 (Sup. Ct. 1957), *mod.,* 4 App. Div. 937, 167 N.Y.S.2d 999 (1957). Some courts have held that, in the absence of proof of the actual intent of the directors, surplus must be capitalized simultaneously with the issuance of the new stock if the distribution is to be held a stock dividend. See *In re* Lindsay's Will, 11 Misc. 2d 374, 109 N.Y.S.2d 600 (Surr. Ct. 1952); *In re* Strong's Will, 198 Misc. 7, 96 N.Y.S.2d 75 (Surr. Ct. 1950), *aff'd,* 277 App. Div. 1157, 101 N.Y.S.2d 1021 (1950). Other courts have recognized a stock dividend although the capitalization of surplus occurred prior to the stock distribution. See *In re* Bryan's Trust, 6 Misc. 2d 468, 162 N.Y.S.2d 481 (Sup. Ct. 1957) (several months intervened between the two transactions).

A dividend paid in the stock of other corporations is not a stock dividend, but is the same as a cash dividend. City Bank Farmers Trust Co. v. Ernst, 263 N.Y. 342, 189 N.E. 241 (1934). A dividend paid by a parent corporation in stock of subsidiary is not a stock dividend. *Id.* at 346, 189 N.E. at 242. A stock dividend declared by a subsidiary is not a stock dividend of the parent corporation. *Id.* at 347, 189 N.E. at 243. A dividend declared to be payable, at the shareholder's election, either in cash or stock is not a stock dividend. Kellogg v. Kellogg, 166 Misc. 791, 4 N.Y.S.2d 219 (Sup. Ct. 1938), *aff'd sub nom.,* Kellogg v. Neale, 254 App. Div. 812, 5 N.Y.S.2d 560 (1938). A dividend in cash with the right to purchase new stock is not a stock dividend. *Id.* at 221.

A stock dividend is not a true dividend. It is not a distribution of corporate earnings and does not change the proportionate interest of the shareholders in the corporate enterprise, but merely gives the shareholders additional evidence representing that interest. See Eisner v. Macomber, 252 U.S. 189

an increase in the number of shares of a given class without any transfer of surplus to the capital account.[11] The capitalization of surplus is a legal requirement[12] designed to insure that the new shares are supported by an adequate increase in the legal capital[13] and to prevent the issuance of new shares without consideration.[14] When a dividend of par value stock is declared most statutes require the transfer of an amount equal to the par value of the shares issued;[15] when the dividend consists of no-par value stock the statutes may leave the determination almost entirely to the directors,[16] or they may require capitalization on the basis of the estimated fair value per dividend share or the average original consideration received per share previously outstanding.[17] The amount capitalized per dividend share must be equal to at least the minimum requirements set by the laws of the state of incorporation,[18] but the directors are not precluded from directing the transfer of a greater amount computed on a different basis, *e.g.*, the fair market value per share as of the date of the dividend declaration, or the average amount of

(1920); Gibbons v. Mahon, 136 U.S. 549 (1890); Merrit-Chapman & Scott Corp. v. New York Trust Co., 184 F.2d 954 (2d Cir. 1950); Powell v. Maryland Trust Co., 125 F.2d 260 (4th Cir. 1942); Williams v. Western Union Telegraph Co., 93 N.Y. 162 (1883). "In essence the thing that has been done is to distribute a symbol purporting to represent an amount of accumulated profits which is already invested in the business and which is to remain there as capital." BALLANTINE, CORPORATIONS 483 (rev. ed. 1946).

11. The feature that distinguishes a stock dividend from a stock split-up is the permanent retention of earnings and profits in the business through the capitalization of accumulated surplus. *In re* Davis' Estate, 128 N.Y.S.2d 152 (Surr. Ct. 1953); *In re* Lawrie's Estate 119 N.Y.S.2d 906 (Surr. Ct. 1953); *In re* Lissberger's Estate 189 Misc. 277, 71 N.Y.S.2d 585 (Surr. Ct. 1947), *aff'd*, 273 App. Div. 881, 78 N.Y.S.2d 199 (1948), *leave to appeal denied*, 298 N.Y. 934 (1948); see also BALLANTINE, CORPORATIONS 483 (rev. ed. 1946).

12. The rule that dividend shares must be accompanied by a capitalization of surplus is a legal requirement governed by statute in most states. Even in the absence of any express statutory requirements, it is generally recognized that a stock dividend, being a new issue of shares, increases the legal capital by an amount equal to the par or stated value of the shares issued. BALLANTINE, CORPORATIONS 485 (rev. ed. 1946).

13. "The purpose of requiring surplus to be transferred and capitalized upon the issue of share dividends is to give some assurance that there is adequate net worth or value behind the shares . . . ." *Id.* at 484. "Similar principles to those giving rise to liability for stock which has been sold for a consideration less than the stated or par value, prevail in the analogous dividend situation." KEHL, CORPORATE DIVIDENDS 174 (1941).

14. "Limitations on 'dividends' in shares are in reality simply restrictions on the issue of new shares without consideration except capitalization of surplus . . . ." BALLANTINE, CORPORATIONS 481 (rev. ed. 1946).

15. KEHL, CORPORATE DIVIDENDS 176 (1941).

16. DEL. CODE ANN. tit. 8, § 173 (1953); ILL. ANN. STAT. c. 32, § 157.17 (Smith-Hurd 1954); KAN. GEN. STAT. ANN. § 17-3506 (1949); OHIO REV. CODE ANN. § 1701-33 (Baldwin 1958); PA. STAT. ANN. tit. 15, § 2852-702.1 (1958).

17. CAL. CORP. CODE ANN. § 1506 (Deering 1947) (estimated fair value); MICH. STAT. ANN. § 21.22 (1937) (average original consideration); MINN. STAT. ANN. § 301.22 (1947) (estimated fair value).

18. The legal requirements for capitalization of surplus are minimum requirements, which may not necessarily be proper accounting requirements under individual circumstances.

capital paid in per share.[19] The number of dividend shares represented by a known transfer of surplus to capital is the quotient of the total amount transferred divided by the amount transferred per share as prescribed by the directors.[20] The courts, however, in making this determination, have consistently used the par or stated value per share, and no reference is had to market value.[21]

The disclosure and accounting policies of the New York Stock Exchange[22] and the American Institute of Accountants,[23] relied upon by the beneficiaries in the instant case, would apply a more restricted meaning to the term "stock dividend." These policies are premised upon the supposition that many shareholders look upon stock dividends as the equivalent of distributions of corporate earnings equal in amount to the fair value of the shares received.[24] The policies are designed to achieve a two-fold purpose; (1) to insure proper disclosure of the true nature of all stock distributions, and (2) to insure that stock dividends more nearly comport with the popular conception entertained by the recipient shareholders as to the relation of stock dividends to current earnings, and their effect on the shareholder's

19. The various bases for determining the amount per dividend share to be transferred from surplus to capital may be summarized as follows:

A. Minimum legal requirements: For par value shares, the par value; for no-par value shares, the stated value.

B. Other bases: For shares with or without par value:

(1) The average amount per share of all paid-in capital applicable to the stock—the total amount received for the outstanding shares, represented by credits to all paid-in capital accounts applicable to the shares, divided by the number of shares outstanding.

(2) The average original paid-in capital per share—the total amount received for the outstanding shares divided by the number of shares outstanding.

(3) The average amount per share credited to the capital stock account—the total amount credited to the capital stock account for the outstanding shares, divided by the number of shares outstanding.

(4) The fair market value per share as of the date of the dividend declaration. HOLMES, MAYNARD, EDWARDS & MEIER, INTERMEDIATE ACCOUNTING 620 (3d ed. 1958); JOHNSON, INTERMEDIATE ACCOUNTING 423 (rev. ed. 1958).

20. $$\text{number of shares constituting the stock dividend} = \frac{\text{total accumulated surplus transferred to capital account}}{\text{amount transferred per share as prescribed by the directors}}$$

21. See *In re* Horrmann's Estate, 3 App. Div. 2d 5, 157 N.Y.S.2d 704 (1956); Matter of Sanford, 4 Misc. 2d 487, 161 N.Y.S.2d 507 (Surr. Ct. 1957); *In re* Strong's Will, 198 Misc. 7, 96 N.Y.S.2d 75 (Surr. Ct. 1950), *aff'd,* 277 App. Div. 1157, 101 N.Y.S.2d 1021 (1950).

22. New York Stock Exchange, Company Manual §§ A 13, A 14 (1955).

23. American Institute of Accountants, Accounting Research Bull. No. 43 (1953).

24. *Id.* at 51. The capitalization of earnings through stock dividends has been characterized as a condensation of two transactions; (1) a pro-rata distribution in cash and (2) a pro-rata reinvestment of cash by the recipient shareholders. PATON, ACCOUNTANTS' HANDBOOK 1016 (3d ed. 1943). The policies of the American Institute of Accountants and the New York Stock Exchange seem to be in line with this analysis.

equity in the company.[25] The first purpose is accomplished through the distinction drawn between a stock dividend and a stock split-up[26] —a stock dividend is a distribution which increases the number of shares previously outstanding by less than twenty-five per cent[27]; a stock split-up is a distribution which increases the number of shares previously outstanding by twenty-five per cent or more.[28] The second purpose is accomplished through the requirement that dividend shares be capitalized on the basis of fair value, rather than par or stated value.[29] The net effect of these policies is to limit the term

25. American Institute of Accountants, Accounting Research Bull. No. 43, at 51 (1953); New York Stock Exchange, Company Manual § A 13, at 235 (1955).

26. This distinction is drawn to treat stock distributions according to their true nature and effect, irrespective of the designation assigned them by the distributing corporation.

"The Term *stock dividend* . . . refers to an issuance . . . of . . . common shares . . . under conditions indicating that such action is prompted mainly by a desire to give the recipient shareholders some ostensibly separate evidence of a part of their respective interests in accumulated corporate earnings without distribution of cash or other property.

. . . .

"The term *stock split-up* . . . refers to an issuance . . . of . . . common shares . . . under conditions indicating that such action is prompted mainly by a desire to increase the number of outstanding shares for the purpose of effecting a reduction in their unit market price and, thereby, of obtaining wider distribution and improved marketability of the shares." American Institute of Accountants, Accounting Research Bull. No. 43, at 49 (1953).

27. The term stock dividend is confined to those distributions which are so small in comparison with the number of shares previously outstanding that they have no apparent effect on the share market price. The point at which the relative size of the distribution becomes large enough to materially influence the market value of the stock has been set at 25% of the number of shares previously outstanding. *Id.* at 51, 52. The New York Stock Exchange has incorporated this 25% dividing line into its stock dividend listing policy:

> "That stock dividend policy does not apply to a split-up or distribution which increases, by 100% or more, the number of shares outstanding immediately prior to the split-up or distribution. It does apply, however, to a split-up or distribution which increases the number of shares theretofore outstanding by less than 25%, regardless of whether such increase is effected through the technique of a stock dividend or that of a split-up, and regardless of whether it is represented as a stock dividend or a split-up.
>
> "As to split-ups or distributions of 25% or more, but less than 100%, the Exchange will require capitalization at fair value only when, in the opinion of the Exchange, such distributions assume the character of stock dividends through repetition under circumstances not inconsistent with the true intent and purpose of stock split-ups." New York Stock Exchange, Company Manual § A 14 (1955).

28. The purpose of a stock split-up is to reduce the unit market price of the stock, thus obtaining wider distribution and improved marketability of the shares. This purpose normally cannot be accomplished by a stock distribution representing less than 25% of the previously outstanding shares. American Institute of Accountants, Accounting Research Bull. No. 43, at 52 (1953).

29. "The Exchange, in authorizing the listing of additional shares to be distributed pursuant to a stock dividend . . . will require that . . . there be transferred from earned surplus to the permanent capitalization of the company . . . an amount equal to the fair value of such shares. While it is impracticable to define 'fair value' exactly, it should closely approximate the current share market price adjusted to reflect issuance of the additional shares."

"stock dividend" to include only those distributions which represent an increase of less than twenty-five per cent of the number of shares previously outstanding, and which are composed of shares capitalized at their fair value.

The court in the instant case refused to adopt this restricted concept of a stock dividend.[30] In affirming the lower court's decision that the number of shares whose par value was represented by the new capital constituted a stock dividend,[31] the court adhered to the broader traditional definition—that all distributions of stock which capitalize surplus constitute stock dividends.[32] The primary problem presented in this case was the construction of a deed of trust executed in 1918.[33] Refusing to deviate from the basic principle governing its inquiry, that the settlor's intent as manifested in the trust instrument must be effectuated,[34] the court addressed itself essentially to the task of ascertaining the meaning of "stock dividend" as existent at the time of its selection by the settlor.[35] The policies of the New York Stock Exchange and the American Institute of Accountants being promulgated subsequent to the execution of the trust agreement,[36] the court did not find it necessary to consider the merits of the definitions contained therein. The intent of the settlor could not be thwarted by an ex post facto change in the law governing stock dividends.[37] The court did note, however, that the definitions urged by the beneficiaries might more nearly reflect the modern views of

New York Stock Exchange, Company Manual § A 13, at 235 (1955). Using the market value of the stock is in line with the doctrine of reinvestment. See note 24 *supra*. Capitalization on the basis of fair value has been attacked on two grounds: "(1) it is argued that if a stock dividend is not income to the recipient, the issuing corporation should not base accounting procedures upon the reaction of the recipient who may think otherwise; and (2) since fair market price reflects both paid-in and accumulated capital, a transfer between the two based upon fair market price fails to maintain the desired distinction between the two capital elements." HOLMES, MAYNARD, EDWARDS & MEIER, INTERMEDIATE ACCOUNTING 622 (3d ed. 1958); see also PATON, ACCOUNTANTS' HANDBOOK 1017 (3d ed. 1943).

30. 4 N.Y.2d 645, 655, 152 N.E.2d 228, 233, 176 N.Y.S.2d 966, 973.

31. *Id.* at 653, 152 N.E. at 232, 176 N.Y.S.2d at 971.

32. *Ibid.* See note 10 *supra*.

33. *Id.* at 650, 152 N.E.2d at 230, 176 N.Y.S.2d at 968. See note 2 *supra*.

34. *Id.* at 655, 152 N.E.2d at 233, 176 N.Y.S.2d at 973.

35. The definition of "stock dividend," applied by the court in this case was established in New York as early as 1883. Williams v. Western Union Telegraph Co., 93 N.Y. 162 (1883). Further, several stock dividends were paid by General Electric and received by the settlor, Wood Fosdick, under the special trust provision during his lifetime. Brief for Respondent, pp. 22, 23, instant case.

36. American Institute of Accountants, Accounting Research Bull. No. 43 (1953); New York Stock Exchange, Company Manual §§ A 13, A 14 (1955).

37. "The terms of the trust are determined by the intention of the settlor at the time of the creation of the trust . . . ." 2 SCOTT, TRUSTS § 164.1, at 1159 (2d ed. 1956). Clearly, Fosdick must have intended to use the term "stock dividend" in its traditional legal concept. See note 35 *supra*.

economists and accountants, but concluded that a change in the legal definition is a function for the legislature alone.[38]

The argument advanced by the beneficiaries in this case represents the first significant attempt to obtain a judicial alteration of the traditional definition of the term "stock dividend" in order to bring that definition into conformity with the definitions used today by the New York Stock Exchange and the American Institute of Accountants. It is unfortunate, however, that the argument should have been made in a case in which the court's determination depended so clearly on the manifested intent of the settlor rather than on the operation of general rules determining the nature of stock dividends. Clearly, the purpose of the corporate action in this case was not to pay a dividend, but to increase the number of outstanding shares so that more investors would be attracted by the reduced market price,[39] and to establish a relatively low par value in order to minimize federal transfer taxes.[40] The action coincided exactly with the transactions recommended by the New York Stock Exchange in its policies to promote improved marketability of listed securities.[41] This case illustrates the potential litigation that may develop in this area because the concept of stock dividends currently being applied by the courts is inconsistent with the concepts prevailing in modern financial and accounting circles. This inconsistency should be remedied by a change in the conventional legal definition to conform with present-

38. 4 N.Y.2d 645, 655, 152 N.E.2d 228, 233, 176 N.Y.S.2d 966, 973.

39. For the effect of relatively large stock distributions on market price see note 28 *supra*.

40. At the time of the General Electric transaction the federal transfer tax was based on the unit of $100 of par value. No-par shares were taxed at the same rate as shares of $100 par value. INT. REV. CODE OF 1954, § 4321. A change from no-par value to $5 par value per share reduced the transfer tax on 100 shares whose selling price was $20 or more from $6 to thirty cents. Under the present tax laws the transfer tax is based on "actual value," and no distinction is made between par value shares and no-par value shares. Thus, a tax benefit can no longer be gained by a change from no-par stock to low par stock. INT. REV. CODE OF 1954, § 4321, as amended, 72 Stat. 1295 (1958).

41. "The Exchange is . . . interested in any steps that can be taken to improve the quality of the market for a listed security . . . therefore, it is suggested that the management of any company having a stable record of earnings, and a consistently high dollar-market-price for its stock, consider the advantages which may be derived from a stock split-up through the broadening of public ownership of the company's stock and possible improvement of the market." New York Stock Exchange, Company Manual § A 14 at 255-56 (1955).

"When a split-up is in contemplation, thought should be given also to the possible desirability of a change of par value.

"Shares having a high par value, and shares having no par value, are at a substantial disadvantage, from the standpoint of the Federal transfer tax on securities transactions, as compared with shares having a low par value. A stock split-up offers a logical and convenient opportunity to eliminate that disadvantage . . . ." *Id.* at 257-58.

day corporate accounting and financing practices[42]—the nature of a stock distribution should be determined by the substance and intent of the corporate action judged in light of the practices and understanding of the financial community. The court in the principal case properly refused to remedy the inconsistency through judicial decision. The change should be made by the legislature, which after investigation and consideration can, without being hampered by precedent, lay down objective tests to guide lawyers, trustees and courts in the allocation of stock distributions.

CRIMINAL PROCEDURE—EVIDENCE—STATUTORY LIMITATION OF JENCKS DECISION

The defendant was indicted for willful evasion of his federal income tax.[1] An accountant who had helped defendant prepare his return gave sworn testimony to tax agents prior to trial. Defendant requested that this information be made available for possible impeachment purposes. Under section 3500, a recent provision of Title 18 of the United States Code, governing production of statements of this nature in the hands of the Government,[2] witness' signed testimony,[3] a supplemental affidavit,[4] and a copy of the accountant's grand jury testimony[5] were made available to the defendant. The Government, however, refused to surrender a memorandum which an agent had prepared summarizing an interview with the witness.[6] Defendant

42. At one time the book value of shares bore a reasonable relation to the market value, and the earnings of a corporation were almost wholly distributed to the shareholders, either in the form of cash dividends or in liquidation. Present-day corporate financing practice "ploughs back" a large portion of the earnings into the business and such earnings never will be distributed to the shareholders. See dissenting opinion, instant case.

1. The applicable statute was INT. REV. CODE OF 1939, ch. 289, § 145(b), 52 Stat. 513 making willful tax evasion a felony. This is now included in §§ 7201-03 of the INT. REV. CODE OF 1954.

2. 18 U.S.C. § 3500 (Supp. V, 1958). Hereafter in the text referred to as § 3500. For further amplification of this statute see notes 7 and 15 *infra*.

3. This consisted of testimony transcribed and then signed by the witness.

4. The affidavit was employed to make changes in the transcribed testimony and was likewise signed by the witness.

5. This is definitely not an item which § 3500 requires to be handed over to the defendant. In fact one of the reasons for enacting § 3500 was to repudiate the holding in United States v. Rosenberg, 245 F.2d 870 (3d Cir. 1957) which directed the production of grand jury testimony under authority of the *Jencks* decision. "The committee rejects, therefore, any interpretation of the Jencks decision which would provide for the production of entire investigative files, grand jury testimony, or similar materials." U.S. CODE CONG. & AD. NEWS, 85th Cong., 1st Sess. 1862 (1957).

6. The memorandum was prepared shortly after the interview relating to the affidavit and indicated that the witness had responded to further question-

argued that even though this memorandum did not come within the specifications of section 3500,[7] it must be made available under the authority of *Jencks v. United States*.[8] The district court did not accept this argument and defendant was convicted. On appeal, *held*, affirmed. Whether production of an informal memorandum, such as here involved, would have been required under authority of the *Jencks* decision need not be decided since section 3500, which clearly excludes this matter, is now the exclusive procedural guide in federal criminal proceedings. *United States v. Palermo*, 258 F.2d 397 (2d Cir. 1958).

Prior to the *Jencks* decision a body of federal law had built up with regard to documentary evidence in the hands of the Government which must be made available to a defendant in a criminal prosecution.[9] There was a decided lack of harmony among the circuits as to the foundation upon which the right to such evidence was based as well as to the application of that right.[10] In June of 1957 the Supreme Court entered the field for the first time in *Jencks*. The defendant there was convicted of filing a false noncommunist affidavit. Two government witnesses had been fellow communists with Jencks but had regularly given reports to the FBI. It was held that the Government must produce these reports directly to the defendant without a prior inspection by the judge and that this must be done even though there was no prior showing of testimonial inconsistency.[11] The re-

ing. The memorandum was made part of the record on appeal as "Court's Exhibit 2." 258 F.2d at 398 and n. 1.

7. The pertinent provision of the statute defines the word "statement" as follows: "(1) A written statement made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." 18 U.S.C. § 3500(e) (Supp. V, 1958).

8. 353 U.S. 657 (1957).

9. The Second Circuit has probably discussed this problem more frequently and more articulately than the other circuits. Its procedure permits the judge to inspect the testimony *in camera* and to hand over to defendant any material capable of use for impeachment purposes. Cases in which this matter has been discussed are: United States v. Angelet, 255 F.2d 383 (2d Cir. 1958); United States v. Lebron, 222 F.2d 531 (2d Cir. 1955); United States v. Grayson, 166 F.2d 863 (2d Cir. 1948); United States v. Beekman, 155 F.2d 580 (2d Cir. 1946); United States v. Ebeling, 146 F.2d 254 (2d Cir. 1944); United States v. Cohen, 145 F.2d 82 (2d Cir. 1944); United States v. Krulewitch, 145 F.2d 76 (2d Cir. 1944); United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944).

10. It has been suggested that three major areas of difference existed among the circuits: "(1) the basis for ordering disclosure, (2) the procedural requirements necessary to acquire an order for disclosure and (3) the extent of the disclosure." Comment, 106 U. PA. L. REV. 110 (1957).

11. The lower court had held that the evidence need not be produced since there had been no preliminary showing of an inconsistency between the testimony of the witness and the statements in the hands of the Government. The Supreme Court reversed and directed dismissal of the action. "Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occa-

action to this decision came immediately and was uniformly unfavorable.[12] Within three months numerous lower federal courts had interpreted this decision in a variety of ways.[13] The Congress, already alarmed, was further spurred to prompt activity by these diverse interpretations. This culminated in the passage of section 3500 in early September, 1957. Congress desired to control the exposure of government sources of information, particularly in areas where security matters were concerned. Thus section 3500 provides that information which the Government considers privileged will first be submitted to the judge to inspect *in camera.* If a portion of the information which the Government claims to be privileged is not relevant to witness' testimony, then the judge may excise that portion and direct the Government to hand over only the relevant portion.[14] On the other hand if the judge finds that all of the information is relevant then he will direct its transmission to the defendant regardless of its sensitive nature. Such procedure forces the Government to decide whether to expose the information or to retain it and thereby lose the testimony of the witness, facing a possible mistrial if the defendant has been prejudiced.[15] Congress was also concerned that *Jencks* not be used as a basis for so called "fishing expeditions" into government files in the hope of turning up impeachment information.[16] This has been met by a provision, involved in the instant case, limiting the action to statements recorded "substantially verbatim" or statements which have been signed or adopted by the witness.[17]

Here, as in several other similar cases, an attempt was made to induce the court to go beyond section 3500 on the ground that *Jencks*

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sion for determining a conflict cannot arise until after the witness has testified and unless he admits conflict, as in *Gordon,* the accused is helpless to know or discover conflict without inspecting the reports." 353 U.S. at 667-68.

12. The general feeling was that the Court had in effect opened the government files to inquisitive defendants and their attorneys. For an interesting discussion of the public reaction see, Eagleton, *A State Prosecutor Looks at the Jencks Case,* 4 ST. LOUIS U.L.J. 405 and n.2 (1957).

13. For a full discussion of divergent case history which led up to the enactment of § 3500 see, U.S. CODE CONG. & AD. NEWS, 85th Cong., 1st Sess. 1864-69 (1957).

14. "The committee is also of the opinion that the decision as to relevance must be made by the trial judge and not by the defendant or his attorney." U.S. CODE CONG. & AD. NEWS, 85th Cong., 1st Sess. 1863 (1957).

15. "(d) If the United States elects not to comply . . . the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared." 18 U.S.C. § 3500 (Supp. V, 1958). This penalty is less severe than that rendered in the *Jencks* case where failure to produce the evidence resulted in dismissal of the action. 353 U.S. at 672.

16. This statement was first used in Gordon v. United States, 344 U.S. 414 (1953) and quoted again in the *Jencks* case. It was the committee's opinion that the *Jencks* decision when carefully studied does not entitle a defendant "to rove at will through Government files." U.S. CODE CONG. & AD. NEWS, 85th Cong., 1st Sess. 1864 (1957).

17. See note 7 *supra.*

was founded upon due process considerations and must therefore supersede inconsistent provisions of the statute.[18] The courts have not as yet accepted this interpretation. Recent decisions have pointed out that *Jencks* was based upon the power of the Supreme Court to regulate procedural aspects of the lower federal courts and not upon constitutional grounds.[19] The phrase in the *Jencks* case which has caused the courts considerable difficulty is, "justice requires no less."[20] This would tend to indicate an inherent right to such evidence rather than mere procedural policy. However, in the remainder of *Jencks*, the Court did not speak in such terms, and no cases were cited which would indicate that the decision turned on constitutional grounds. Another item which has given the courts pause is the declaration by the congressional committee that section 3500 was not intended to curtail or abrogate the due process aspects of the *Jencks* decision.[21] In the instant case the court does not reach the direct question of whether there is a conflict between section 3500 and *Jencks* since the court concludes that if any such conflict existed it must be resolved in favor of the legislation.[22]

The present holding seems consistent with congressional intent,[23] and should the Supreme Court grant certiorari, affirmance is likely. The excluded material clearly did not come within the scope of the statute and the appeal was not squarely based upon constitutional grounds.[24] It cannot definitely be said that an opposite result would

18. United States v. Spangelet, 258 F.2d 338 (2d Cir. 1958) (§ 3500 not unconstitutional in not applying *Jencks* decision to grand jury minutes); United States v. Grunewald, 162 F. Supp. 621 (S.D.N.Y. 1958) (involving inter-office memorandum). See also United States v. De Lucia, 27 U.S.L. Week 2319 (7th Cir. Dec. 31, 1958) (quoting with approval the *Spangelet* decision).

19. "The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure. . . ." 18 U.S.C. § 3771 (1952).

20. 353 U.S. at 669.

21. "The proposed legislation is not designed to nullify, or to curb, or to limit the decision of the Supreme Court insofar as due process is concerned." U.S. CODE CONG. & AD. NEWS, 85th Cong., 1st Sess. 1862 (1957).

22. "We hold that the legislation is the exclusive standard in this field and controls the procedure to be followed in such cases." 258 F.2d at 400.

23. "It is the specific intent of the bill to provide for the production only of written statements previously made by a Government witness in the possession of the United States which are signed by him or otherwise adopted or approved by him, and transcriptions or recordings of oral statements made by the witness to a Federal law officer, relating to the matter as to which the witness has testified." U.S. CODE CONG. & AD. NEWS, 85th Cong., 1st Sess. 1862 (1957).

Since the chief aspect of § 3500 is to permit the impeachment of witnesses, statements within the statute must be witness' own statements not what someone else at a later time thought was said.

24. A specific provision of the Constitution was not designated as having been abrogated by a denial of the evidence. It was merely claimed that § 3500 could not be used to deny the testimony since defendant was "entitled to have it produced" under the *Jencks* decision. 258 F.2d at 399.

have been reached under *Jencks* alone since in that case the evidence in question appears to have either been written by the witness or recorded contemporaneously by the FBI.[25] Thus that case does not of itself stand for the proposition that subsequent memoranda, as here involved, must be made available to the defense. The interesting case is yet to arise where excluded evidence definitely of impeachment value is refused because not signed, acknowledged, or recorded verbatim in accord with section 3500.[26] At that time, with the constitutional issue properly raised, the courts will have to face directly the question of whether the sixth amendment[27] or the due process clause of the fifth amendment[28] guarantees the production of such information in criminal cases.

25. "Petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I. . . ." 353 U.S. at 668. The reports "written" by the witness would clearly come within § 3500. Furthermore, oral reports "as recorded by the F.B.I." would seem to indicate a contemporaneous recording. It is unlikely that a regular report from a counter-espionage agent would be left to faulty memory and subsequent recordation.

26. The constitutionality of § 3500 might also be challenged on the ground that a prior inspection of the testimony by the judge *in camera* rather than handing over the evidence directly to the defendant is a violation of the due process clause of the fifth amendment. The *Jencks* decision indicated that "justice requires no less." 353 U.S. at 669. However there appear sound reasons why such a challenge will not be successful. The statute provides for the preservation of any excised testimony so that it may be challenged directly upon appeal. 18 U.S.C. § 3500(c) (Supp. V, 1958). This would seem to satisfy due process objections. A further reason for upholding the statute is the fact that this type of inspection has become accepted procedure where grand jury testimony is involved. See United States v. Johnson, 319 U.S. 503 (1943); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. H.J.K. Theatre Corp., 236 F.2d 502 (2d Cir. 1956); United States v. Alper, 156 F.2d 222 (2d Cir. 1946). However grand jury testimony is considered in some respects confidential information which would distinguish it from ordinary testimony in the hands of the Government. "This secrecy is indispensable if the Grand Jury is to be assured that witnesses called to testify before it are testifying fully and freely, without fear that their testimony will expose them to unwanted publicity, obloquy or intimidation. This secrecy is indispensable if innocent persons, not indicted by the Grand Jury, are to be protected." United States v. Consoldiated Laundries Corp., 159 F. Supp. 860, 866 (S.D.N.Y. 1958). However it has been suggested that the need for such protection of grand jury testimony is removed once the witness takes the stand upon trial. 8 WIGMORE, EVIDENCE § 2362 (3d ed. 1940). The opposing view holds that the need continues until it is shown that the grand jury testimony can be of use in testing the evidence presented on trial. 159 F. Supp. at 866. Some courts have gone to extended length to deny a defendant the use of grand jury minutes. There appears to have been no constitutional violation in *Socony-Vacuum* where such minutes were employed to refresh the memory of government witnesses, but upon inspection by the judge these same minutes were denied the defendant for impeachment purposes. 310 U.S. 150 (1940).

27. U.S. CONST. amend. VI. "The court's discretionary power to compel production of a document in the custody of a government agency must be exercised in the light of the Sixth Amendment that: 'In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . .'" United States v. Schneiderman, 106 F. Supp. 731, 735 (S.D. Cal. 1952).

28. U.S. CONST. amend. V. As already indicated the committee that drafted § 3500 felt that due process considerations might well be involved in the *Jencks* case. See note 21 *supra*.

EVIDENCE—SEARCHES AND SEIZURES—INADMISSIBILITY IN FEDERAL COURT OF EVIDENCE OBTAINED THROUGH AN UNREASONABLE SEARCH BY STATE OFFICERS

The defendant was convicted of housebreaking and larceny on evidence obtained in the following manner: A Maryland motel keeper became suspicious of the defendant and another man to whom he had rented a cabin[1] and notified the state police. The police proceeded to the cabin, knocked, confronted the occupant with a shotgun, and entered. Upon entering, they recognized the occupant as a person having a criminal record and who was then sought by his bondsman for delinquency in paying a bond premium. The man was immediately arrested, the grounds for the arrest not being clear, and a search was conducted of the cabin and the adjoining room occupied by the defendant. A quantity of money was found in and under the defendant's bed. It was not until hours later that the police learned of the crime of which the defendant was accused. The federal district court refused defendant's motion to exclude the money from evidence. On appeal, *held,* reversed. Evidence obtained by state officers through a search which violates the due process clause of the fourteenth amendment is inadmissible in a federal court even though the search is conducted without the involvement of federal authorities. *Hanna v. United States,* 260 F.2d 723 (D.C. Cir. 1958).

At common law, the illegality of the means by which evidence was obtained provided no ground of objection to its admission.[2] In a majority of states the common law doctrine still prevails, but in *Weeks v. United States,*[3] decided in 1914, the Supreme Court of the United States took a different stand. There the Court held that evidence gained through violation of the fourth amendment, a constitutional safeguard against unreasonable search and seizure, was inadmissible in a federal court provided a timely pretrial motion to suppress such evidence was made.[4] The reasoning behind the federal exclusionary rule thus adopted was that it provided the only effective way to prevent violations of the fourth amendment by federal authorities.[5] The

1. At an early morning hour one of the men had rented a cabin with an adjoining room, ostensibly for his invalid wife. The motel keeper became suspicious when he failed to see a woman and instead saw the man who rented the cabin and another man (the defendant) enter the cabin carrying what appeared to be a money bag. Upon looking through a window he observed the two men counting a quantity of money.

2. MCCORMICK, EVIDENCE § 137 (1954).

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

4. MCCORMICK, EVIDENCE § 139 (1954). At the present time, the Federal Rules of Criminal Procedure broaden the provision of the requirement of a pretrial motion. FED. R. CRIM. P. 41(e).

5. 232 U.S. at 393. For an extensive criticism of the exclusionary rule, see 8 WIGMORE, EVIDENCE § 2184 (3d ed. 1940).

Weeks case pointed out that the exclusionary rule was not binding upon the states, however, because the fourth amendment was not applicable to them. This part of the *Weeks* case was later modified by *Wolf v. Colorado*[6] where the Court held that the fourth amendment was applicable to the states through the due process clause of the fourteenth amendment; but due process did not necessarily require the exclusion of evidence illegally obtained by *state* officers. The Court indicated in the *Wolf* case that as long as a state provided some remedy[7] against an illegal search and seizure, due process would not be denied by the admission of evidence illegally obtained. Since *Wolf*, however, the Supreme Court has not had occasion to determine the admissibility in federal courts of evidence obtained through unreasonable search and seizures by state officers.[8]

Rather than following the reasoning of other federal circuit courts in similar cases,[9] the decision here was drawn from impressions voiced by individual members of the Supreme Court indicating that any evidence procured by officers in violation of a constitutional right should be excluded.[10] The court thus anticipates what the Supreme Court holding would be, and indicates that that Court would probably find the extension of the exclusionary rule necessary to the maintainence of judicial integrity.[11] The court failed to recognize implications previously found by other federal courts in *Lustig v. United*

6. 338 U.S. 25 (1949).

7. Provisions against illegal search and seizure are found in almost every state. CORNELIUS, SEARCH AND SEIZURE § 2 n.14 (2d ed. 1930). However, the exclusionary rule has been adopted in only about two-fifths of the states. MCCORMICK, EVIDENCE § 139 (1954).

8. See Benanti v. United States, 355 U.S. 96, 102 n.10 (1957). Before the *Wolf* decision evidence unlawfully obtained by state officers was freely admitted. *E.g.*, Byars v. United States, 273 U.S. 28 (1927); Shelton v. United States, 169 F.2d 665 (D.C. Cir. 1948), *cert. denied*, 335 U.S. 834 (1948). Even since the *Wolf* decision, however, some federal courts have continued to hold that the United States Constitution does not prohibit unreasonable searches and seizures by state officers and thus have continued to follow the *Weeks* doctrine. See, *e.g.*, Gallegos v. United States, 237 F.2d 694 (10th Cir. 1956); United States v. Moses, 234 F.2d 124 (7th Cir. 1956); Serio v. United States, 203 F.2d 576 (5th Cir. 1953), *cert. denied*, 346 U.S. 887 (1953).

9. See Gaitan v. United States, 252 F.2d 256 (10th Cir. 1958); Jones v. United States, 217 F.2d 381 (8th Cir. 1954); Fredericks v. United States, 208 F.2d 712 (5th Cir. 1953), *cert. denied*, 347 U.S. 1019 (1954); Parker v. United States, 183 F.2d 268 (9th Cir. 1950); Losieau v. United States, 177 F.2d 919 (8th Cir. 1949).

10. See Rea v. United States, 350 U.S. 214, 218 (1956) (Harlan, J., dissenting); Irvine v. California, 347 U.S. 128, 138 (1954) (Clark, J., concurring); Wolf v. Colorado, 338 U.S. 25, 40 (1949) (Douglas, J., dissenting). *But see* Lustig v. United States, 338 U.S. 74, 80 (1949) (Burton, J., dissenting). See also the decisions merely indicating that the question remained open. Benanti v. United States, 355 U.S. 96, 102 n.10 (1957) (Warren, C. J.); Lustig v. United States, 338 U.S. 74, 79 (1949) (Frankfurter, J.).

11. 260 F.2d at 728. The concern with the integrity of the judicial process appears to be a departure from the ordinary concept that the exclusionary rule was created solely for the judicial enforcement of the fourth amendment in the federal sphere.

States[12] to the effect that evidence illegally obtained by state officers without federal participation might be admissible. Instead, the court cites the *Lustig* case as merely indicating that the admissibility of such evidence remained an open question.[13] In extending the exclusionary rule the court takes the position that since the fourth amendment is applicable to the states through the due process clause, constitutional rights would be no less infringed when illegally obtained evidence is presented in a federal court by a state officer than when it is introduced by a federal officer. In so concluding the court recognizes that in addition to preserving judicial integrity state officers may be effectively persuaded to conform to constitutional methods and procedures in obtaining evidence.[14]

In effect, the decision weighs the preservation of judicial integrity and the enforcement of constitutional rights against the strict enforcement of federal criminal law and the encroachment upon the sphere of state law enforcement agencies. Since the exclusionary rule already prevents the strict enforcement of federal criminal law,[15] the further subjection of such enforcement by the extension reached here does not appear alarming. However, the encroachment upon the activities of state law enforcement agencies presents a different question.[16] The decision tends to regulate state authorities in the enforcement of federal law, but does not, however, impose any restrictions on the state's enforcement of its own criminal laws, as the state remains free to decide the admissibility of illegally obtained evidence in its own courts. Since only the enforcement of federal law is involved, such regulation does not present an appreciable interference with state agencies.[17] Should this decision be adopted by the United States

12. 338 U.S. 74 (1949). The *Lustig* case established the "silver platter" doctrine which implied that evidence obtained by state officers through an unreasonable search could be turned over to federal authorities on a "silver platter" as long as federal authorities had not participated in any way in the search or instigation of the search. See also Gambino v. United States, 275 U.S. 310 (1927), where the admissibility of evidence illegally obtained by state officers was made dependant upon the intent of the officers at the time of the search.

13. Lustig v. United States, 338 U.S. 74, 79 (1949).

14. 260 F.2d at 728.

15. "That the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that it deters invasions of right by police." Irvine v. California, 347 U.S. 128, 136 (1954).

16. A similar problem was encountered in Rea v. United States, 350 U.S. 214 (1956), where the Supreme Court enjoined a state court from admitting evidence gained through an unreasonable search by federal officers. The interference imposed on the state by the instant decision would appear to be less than that imposed by the *Rea* case.

17. The decision, at any rate, remedies the anomalous result previously reached whereby evidence illegally obtained by state officers was admissible in federal courts under the "silver platter" doctrine even though both the state in which the evidence was obtained and the federal court employed the exclusionary rule. For a discussion of this odd situation, see Parsons,

Supreme Court there would remain yet another field into which the exclusionary rule might be extended: that of exclusion of evidence gained through unreasonable searches and seizures by private citizens.[18] Whether the preservation of judicial integrity would serve as a basis for an extension of the rule in that situation is doubtful.

EVIDENCE—WITNESSES—ABILITY OF ONE SPOUSE TO TESTIFY AGAINST THE OTHER IN FEDERAL CRIMINAL PROCEEDINGS

Petitioner was convicted in a federal district court for transporting a girl from Arkansas to Oklahoma for immoral purposes.[1] At the trial petitioner's wife was permitted to testify for the prosecution. In affirming, the court of appeals[2] held there was no error in the admission of the wife's testimony against petitioner. On certiorari to the Supreme Court of the United States, *held,* reversed. Absent the consent of both husband and wife, the public interest in preserving domestic peace requires the exclusion of the testimony of one spouse against the other in federal criminal proceedings.[3] *Hawkins v. United States,* 358 U.S. 74 (1958).

At common law one could not testify for or against his spouse[4] except in cases involving corporal violence committed by one upon the other.[5] The danger of falsification due to pecuniary interest and marital bias,[6] and the public interest in preserving domestic peace[7]

State-Federal Crossfire In Search and Seizure and Self-Incrimination, 42 CORNELL L.Q. 346, 362 (1957).

18. At the present time evidence obtained illegally by private citizens is readily admissible. See, *e.g.,* McGuire v. United States, 273 U.S. 95 (1927); Burdeau v. McDowell, 256 U.S. 465 (1921). *Cf.* Lustig v. United States, 338 U.S. 74 (1949); Feldman v. United States, 322 U.S. 487 (1944).

1. The Mann Act, 18 U.S.C. § 2421 (1952).

2. 249 F.2d 735 (10th Cir. 1957).

3. The Court also decided that the error in admitting the evidence was prejudicial to petitioner.

4. 1 COKE, COMMENTARY UPON LITTLETON, ch. 1, § 1, (6b) (h) (19th ed. 1853).

5. 8 WIGMORE, EVIDENCE § 2239 (3d ed. 1940). In the federal courts the exception has been broadened to include torts and moral wrongs inflicted. See, *e.g.,* Shores v. United States, 174 F.2d 838 (8th Cir. 1949); Hayes v. United States, 168 F.2d 996 (10th Cir. 1948); Kerr v. United States, 11 F.2d 227 (9th Cir.), *cert. denied,* 271 U.S. 689 (1926); Denning v. United States, 247 Fed. 463 (5th Cir. 1918). In the *Shores* case it was said that a wife may be compelled to testify under the exception. This position was taken in a holding subsequent to the principal case. Wyatt v. United States, 263 F.2d 304 (5th Cir. 1959).

6. 2 WIGMORE, EVIDENCE § 601 (3d ed. 1940).

7. 8 *Id.* § 2227.

were the principal reasons given in support of the exclusion. Since none of the dangers involved in the former reason were applicable if one spouse testified *against* the other, it has been insisted that the exclusion of adverse testimony was based on a privilege of each not to testify against the other and not to be testified against by the other.[8] The early cases, however, spoke in terms of an absolute disqualification when referring to either type testimony,[9] and this was the view taken by the Supreme Court when it adopted the common law rule.[10] In the states the rule has been subject to extensive changes,[11] but state rules of competency did not affect federal criminal proceedings[12] where the competency of witnesses was determined by the common law as it existed in the states in 1789[13] or at the time of entry of a subsequently admitted state.[14] But in 1933 the Court in *Funk v. United States*,[15] refusing to adhere to law antiquated by changed conditions and modern thought,[16] abolished that part of the rule excluding testimony given *for* a spouse. Soon thereafter a tenth circuit decision went further, holding a spouse competent to testify *against* the other where confidential communications were not involved.[17] Although one circuit has approved,[18] others have refused to follow the lead.[19]

In the present case the Court, examining the exclusionary rule in the light of "reason and experience,"[20] rejected the position taken by the tenth circuit. Distinguishing the *Funk* case, the Court concluded that the basic reason supporting the rule, the preservation of family

8. *Id.* §§ 2227-29.

9. Shenton v. Tyler, [1939] Ch. 620, reviews the authorities and concludes that testimony offered against a spouse was excluded on the grounds of incompetency, not on that of privilege.

10. Stein v. Bowman, 38 U.S. (13 Pet.) 209 (1839). Later cases have spoken of this aspect of the rule as a double privilege See, *e.g.*, United States v. Mitchell, 137 F.2d 1006, 1008 (2d Cir.), *aff'd on rehearing*, 138 F.2d 831 (2d Cir. 1943), *cert. denied*, 321 U.S. 794 (1944); Cohen v. United States, 214 Fed. 23, 29 (9th Cir.), *cert. denied*, 235 U.S. 696 (1914).

11. The statutes are collected in 2 WIGMORE, EVIDENCE § 488 (3d ed. 1940).

12. In 1862 Congress enacted that "the laws of the State in which the court shall be held shall be the rules of decision as to competency of witnesses in the courts of the United States, in trials at common law, in equity, and in admiralty." 12 Stat. 588 (1862). In Logan v. United States, 144 U.S. 263 (1892), "trials at common law" was construed as not including criminal actions.

13. United States v. Reid, 53 U.S. (12 How.) 361 (1851).

14. Logan v. United States, 144 U.S. 263 (1892).

15. 290 U.S. 371 (1933).

16. Common law rules of evidence are now applied in the light of "reason and experience." FED. R. CRIM. P. 26.

17. Yoder v. United States, 80 F.2d 665 (10th Cir. 1935). That a separate and distinct privilege protecting confidential communications between spouses existed at common law, see 8 WIGMORE, EVIDENCE § 2333 (3d ed. 1940). *But see* Shenton v. Tyler, note 9 *supra*.

18. United States v. Lutwak, 195 F.2d 748, 761 (7th Cir.), *cert. granted*, 344 U.S. 809 (1952), *aff'd*, 344 U.S. 604 (1953).

19. United States v. Walker, 176 F.2d 564 (2d Cir.), *cert. denied*, 338 U.S. 891 (1949); Brunner v. United States, 168 F.2d 281 (6th Cir. 1948); Paul v. United States, 79 F.2d 561 (3d Cir. 1935).

20. See note 16 *supra*.

harmony, had not been undermined by time or changing legal practices. The Government argued that while this reason might be valid in respect to compelled testimony, it fails where the spouse volunteers, because of the strong likelihood in such case that no domestic interest is left to be preserved. The Court refused to recognize this distinction and held that the rule creates a privilege in both husband and wife. The reasoning was that it should not be the policy of the law to force or encourage testimony which would disrupt marital harmony. This, of course, rests upon the assumption that adverse testimony given by a spouse in criminal proceedings would disrupt marital harmony.

The value which the Court places upon the protection of domestic tranquillity at the sacrifice of individual justice has been severely criticized.[21] It has been noted that since modern developments have wrought significant changes in the old family relationships, this is a sacrifice made to a concept which no longer merits it.[22] Yet the basic assumption of the Court is that under present conditions the modern family justifies the continuation of the rule. While it is quite apparent how unrealistic this assumption may be in a particular case,[23] it is equally apparent that all the data necessary for an intelligent determination of the rule's effect under modern conditions should be collected and studied. This task could be performed by a body such as that proposed at the Circuit Judicial Conferences.[24] In the absence of legislation based upon the findings and recommendations of such a body, the opinion of the Court, reversing a previously liberal trend toward the admission of a spouse's testimony, is unlikely to be changed in the near future.

HABEAS CORPUS—FEDERAL COURT REMAND OF PETITIONER TO STATE COURT FOR NEW TRIAL

Petitioner was convicted and imprisoned for armed robbery. On appeal and on denial of his state petition for a post-conviction hearing certiorari was denied by the Supreme Court of the United States.[1] He

21. See 7 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 480-86 (Bowring ed. 1843).

22. Hutchins and Slesinger, *Some Observations on the Law of Evidence—Family Relations*, 13 MINN. L. REV. 675 (1929).

23. See United States v. Walker, note 19 *supra*, (dissenting opinion).

24. See ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 43 (1957).

1. Petitioner was first denied certiorari on his appeal in Westbrook v. Ragen, 337 U.S. 960 (1949) and again on denial of his petition for a post-conviction hearing in Westbrook v. People, 349 U.S. 957 (1955).

then sought release on a writ of habeas corpus in the state courts, and certiorari was again denied.[2] Discharge on a writ of habeas corpus in the federal district court was then sought, petitioner alleging a denial of due process in that he was unable to obtain a transcript of the record[3] for use in perfecting his appeal. The district court discharged petitioner from custody. On appeal to the court of appeals, *held,* reversed with special instructions. On a petition for habeas corpus by a state prisoner, a federal court may remand petitioner to the state court, instructing the latter to grant a new trial, with the provision that the failure to comply within six months will result in petitioner's final discharge. *United States v. Randolph,* 259 F.2d 215 (7th Cir. 1958).

The writ of habeas corpus is recognized by the Federal Constitution,[4] having been brought to this country as a part of the common law,[5] but the power of the federal courts to issue the writ is statutory.[6] From the original grant of power to issue the writ[7] and its limitation to the writ ad testificandum in cases of state prisoners,[8] this power has been broadened until today the federal courts can issue the writ in all cases of restraint of liberty in violation of the Constitution, laws, and treaties of the United States.[9] Under the present code the court is "to dispose of the party as law and justice require,"[10] but this provision does not deny the federal courts the use of discretion as to time and mode of issuance of the writ,[11] with proper regard to state sovereignty.[12] The original notion was that the writ was available only for discharge or remanding to custody or bail.[13] It is not avail-

2. *Cert. denied,* Westbrook v. Randolph, 352 U.S. 973 (1957).

3. Petitioner was unable to obtain a transcript of the record due to the illness of the court reporter.

4. U.S. Const. art. I, § 9; "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless in Cases of Rebellion or Invasion the public Safety may require it." This is the only mention of the writ of habeas corpus in the constitution.

5. *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 95 (1868). See also 25 AM. JUR. *Habeas Corpus* § 3 (1947).

6. Whitney v. Dick, 202 U.S. 132, 134 (1906); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93 (1807).

7. The federal courts were first given the power to issue the writ in the Judiciary Act of 1789. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

8. *In re* Burrus, 136 U.S. 586, 590 (1890); *Ex parte* Dorr, 44 U.S. (3 How.) 104, 105 (1845).

9. Act of Feb. 5, 1867, 14 Stat. 385, U.S. Rev. St. § 753; Carfer v. Caldwell, 200 U.S. 293, 296 (1906); Whitten v. Tomlinson, 160 U.S. 231, 239 (1895); Cross v. Burke, 146 U.S. 82, 86 (1892). Legislation concerning habeas corpus is now embodied in 28 U.S.C. §§ 2241-55 (1952).

10. 1948 Revised Judicial Code. 28 U.S.C. § 2243 (1952).

11. Whitten v. Tomlinson, 160 U.S. 231, 240 (1895); New York v. Eno, 155 U.S. 89, 94 (1894); *Ex parte* Royall, 117 U.S. 241, 251 (1886). See also 25 AM. JUR. *Habeas Corpus* § 132 (1947).

12. See discussion of this point in Johnson v. Wilson, 131 F.2d 1 (5th Cir. 1942).

13. See 25 AM. JUR. *Habeas Corpus* § 152 (1947); 39 C.J.S. *Habeas Corpus* § 102 (1950).

able as a substitute for an appeal or writ of error[14] and it follows that it should not be used to grant a new trial, but little authority can be found for this proposition.[15] Provisional orders of discharge, however, have been issued wherein the trial court is advised that if the errors rendering the discharge necessary are not corrected within a fixed or reasonable time the petitioner will be discharged,[16] any corrective action being left to the discretion of the trial court. Only one case has been found, *United States v. McCorkle*,[17] where a new trial without provisos was granted a state prisoner, apparently purporting to leave the state court no alternative.

The court in the instant case did not cite *McCorkle* but, in directing the district court to instruct the state court to grant petitioner a new trial, relied on a line of cases culminating in *Chessman v. Teets*[18] and *Mahler v. Eby*.[19] In none of the decisions cited was the petitioner remanded to the state court with instructions that it grant a new trial. *Chessman* went further in this direction than any of the other cases relied on, but there the order was simply to "allow California a reasonable time in which to take further proceedings. . . ."[20] *Mahler* involved a federal administrative action, not a state proceeding, and even there the order was for a provisional discharge.[21] Only three of the remaining cases in this line of authority concerned state prisoners[22] and in none of them did the court grant a new trial. These

14. McNally v. Hill, 293 U.S. 131, 138 (1934); Kaizo v. Henry, 211 U.S. 146, 148 (1908); Riggins v. United States, 199 U.S. 547, 548 (1905).

15. "Also, the habeas corpus court cannot grant a new trial, which is the just remedy for errors. . . ." Sanford v. Robbins, 115 F.2d 435, 438 (5th Cir. 1940), *cert. denied*, 312 U.S. 697 (1941) (involving a court-martial conviction). Apparently the principle that habeas corpus cannot be used to grant a new trial is so well settled that there is scant authority for it.

16. Chessman v. Teets, 354 U.S. 156 (1957); Dowd v. United States, 340 U.S. 206 (1951); Mahler v. Eby, 264 U.S. 32, 46 (1924).

17. 248 F.2d 1, 9 (3d Cir. 1957), *cert. denied*, 355 U.S. 873 (1957). Here petitioner was convicted of first degree murder during an armed robbery and sought release because one of the jurors had been a recent victim of an armed robbery. Since the error went only to the sentence, which might have been life imprisonment instead of death, the court granted a new trial. This trial was to be limited to the sentence, if possible under state procedure; otherwise petitioner was granted a new trial generally. The court cited no authority in granting the new trial.

18. "The task of affording petitioner a further review of his conviction upon a properly settled record is necessarily one for the state courts." 354 U.S. 156, 165 (1957).

19. 264 U.S. 32 (1924).

20. 354 U.S. 156, 166 (1957).

21. Here the district court was ordered not to order the discharge of petitioners until the Secretary of Labor had been allowed sufficient time to make corrections in his findings or to institute new proceedings against them.

22. Dowd v. United States, 340 U.S. 206 (1951); Medley, Petitioner, 134 U.S. 160 (1890); Coleman v. Tennessee, 97 U.S. 509 (1878). *Dowd* involved a murder conviction in a state court wherein petitioner's appeal papers were suppressed, a release was ordered provisional on the correction of the defects rendering discharge necessary. *Medley* concerned a prisoner who was convicted under an ex post facto law changing the punishment for murder; the

cases are factually a heterogenous lot,[23] involving a variety of orders under peculiar circumstances. They are illustrative of the manner in which the relief granted in federal habeas corpus proceedings has been broadened but they do not contain authority for granting a new trial.

At first glance the difference between the holding here and in the *Chessman* case seems to be only a matter of words. In *Chessman* the warden was ordered to discharge petitioner after a reasonable time if the errors had not been corrected.[24] Here the state court was ordered to grant petitioner a new trial failing which he should be discharged.[25] In *Chessman* the order was properly to the restraining party but in the instant case the order was to the state court.[26] Apparently *Medley, Petitioner*[27] gave birth to the authority relied on for granting a provisional discharge. No doubt the use of the order arose from the feeling that even though constitutional guarantees of a fair trial must not vitiated in any degree, neither should an obviously guilty party whose constitutional rights have been violated be returned to society without allowing the state or trial court an opportunity to correct its errors.[28] Thinking it necessary to accomplish both these results, the courts have turned to the provisional discharge. Though the difference between the order in *Chessman* and in the present case might appear to be one of words and though the effect might well be the same, that is, discharge if the errors are not corrected, there are significant differences. The order in *Randolph* directing the state court to grant a new trial, as opposed to an order to the warden to discharge after a reasonable time if the errors are not corrected, lends itself to the omission of the proviso which would, in effect, amount to the use of the writ of habeas corpus as a writ of error.

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warden was ordered to notify state authorities of the date and hour of discharge ten days previous. In *Coleman*, petitioner was convicted of murder and sentenced by a military court but the sentence was not carried out. Later Tennessee convicted him for murder and the habeas corpus court ordered him discharged and turned over to the military authorities.

23. See note 22 *supra*. Other cases included Tod v. Waldman, 266 U.S. 113 (1924) (an action by the immigration authorities); *In re* Bonner, 151 U.S. 242 (1894) (after federal court conviction and erroneous sentencing to a state penitentary, petitioner was turned over to the federal court in order that they might correct the sentence in so far as the place of confinement was concerned); United States v. McBrantney, 104 U.S. 621 (1881) (a conviction under federal law and by a federal court without authority wherein the prisoner was placed in the custody of the state having jurisdiction); Bryant v. United States, 214 Fed. 51 (8th Cir. 1914) (petitioner was remanded to the federal court of conviction for proper sentencing).

24. 354 U.S. 156, 166 (1957).

25. 259 F.2d 215, 219 (7th Cir. 1958).

26. *Ibid.*

27. 134 U.S. 160 (1890). See note 22 *supra*.

28. Sanford v. Robbins, 115 F.2d 435, 438 (5th Cir. 1940), *cert denied*, 312 U.S. 697 (1941).

MUNICIPAL CORPORATIONS—TORT LIABILITY—DUTY TO PROVIDE POLICE PROTECTION TO INFORMERS

In response to an FBI flyer, Arnold L. Schuster supplied the New York City Police Department with information leading to the arrest of the wanted criminal, Willie "The Actor" Sutton. After Schuster's part in the capture was widely publicized he received several communications, allegedly from Sutton's cohorts, threatening his life, and consequently requested police protection. Although provided, such protection was withdrawn after a short time, against the demands of Schuster. Nineteen days after Schuster had supplied the requested information he was shot and killed by an unknown assailant.[1] In an action for wrongful death by Schuster's administrator against the city for negligence of the police in failing to provide necessary protection, the complaint was dismissed for legal insufficiency. On appeal,[2] *held,* reversed. A municipality is under a duty to exercise reasonable care for the protection of persons who have collaborated with it in the arrest or prosecution of criminals if it reasonably appears that they are in danger as a result of this collaboration. *Schuster v. City of New York,* 5 N.Y.2d 75, 180 N.Y.S.2d 265 (1958).

The instant case could not have arisen in any state which had not waived its sovereign immunity[3] and extended such waiver to municipalities[4] acting in their governmental capacities. Where this immunity has been waived, there still remains the problem of determining the extent of substantive responsibility of the municipality.[5] In attempting to solve this problem, New York courts have had little trouble in finding municipalities liable for the misfeasance or malfeasance of their public servants[6] but have not entirely settled the question of liability for failure to act or to provide certain benefits.[7] In some

1. For details of the murder, see New York Times, Mar. 9, 1953, p. 1, Col. 8.
2. The Appellate Division had affirmed the trial court, Schuster v. City of New York, 286 App. Div. 389, 143 N.Y.S.2d 778 (1955).
3. Court of Claims Act, N. Y. Laws c. 860 § 8 (1939). For a survey of the status of state tort liability, see Leflar & Kantrowitz, *Tort Liability of the States,* 29 N.Y.U.L. REV. 1363 (1954).
4. Bernardine v. New York, 294 N.Y. 361, 62 N.E.2d 604 (1945). See also Lloyd, *Municipal Tort Liability In New York,* 23 N.Y.U.L. REV. 278 (1948). See generally, 18 MCQUILLAN, MUNICIPAL CORPORATIONS, § 53 (3d ed. 1950).
5. Gardner, *An Inquiry Into Principles of Municipal Responsibility In General Assumpsit and Tort,* 8 VAND. L. REV. 753, 772 (1955).
6. See, *e.g.,* Lubelfeld v. City of New York, 4 N.Y.2d 455, 151 N.E.2d 861, 176 N.Y.S.2d 302 (1958); O'Grady v. City of Fulton, 4 N.Y.2d 717, 148 N.E.2d 317, 171 N.Y.S.2d 108 (1958); Flamer v. City of Yonkers, 309 N.Y. 114, 127 N.E.2d 838 (1955); Wilkes v. City of New York, 308 N.Y. 726, 124 N.E.2d 338 (1954); Dunham v. Village of Canisteo, 303 N.Y. 498, 104 N.E.2d 872 (1952); Adamo v. P.G. Motor Freight, Inc., 4 App. Div. 2d 758, 164 N.Y.S.2d 874 (1957); Benway v. City of Watertown, 1 App. Div. 2d 465, 151 N.Y.S.2d 485 (1956).
7. Gardner, *An Inquiry Into Principles of Municipal Responsibility In General Assumpsit and Tort,* 8 VAND. L. REV. 753, 773 (1955).

cases,[8] liability for non-action has been negatived by finding that there was no duty on the part of the municipality extending to the individual seeking recovery. Such a finding is based upon the premise that the duty of a municipality to act extends to the public as a whole, and to extend it to each individual would place an impossible burden upon the municipal government. Thus, municipalities have been relieved of liability for failure of their fire departments to provide necessary water pressure[9] or adequately maintain equipment,[10] and for failure of their police departments to provide adequate protection.[11] Under this reasoning, it became necessary to find an express duty extending to Schuster.

The court found a duty on the part of the city stemming from two sources: (1) A duty of police protection arising in return from a citizen's duty to inform; (2) A duty to "go forward" or continue an undertaking once started if failure to do so would leave the plaintiff in a worse or aggravated position. In support of the first proposition the court cited a decision of the United States Supreme Court, *In re Quarles*,[12] as envisaging a duty on the part of a citizen to inform and also as contemplating that the government owed the informer a duty of protection. This reciprocal duty finds further foundation in the policy implied in section 1848 of the New York Penal Law[13] which, although inapplicable here, was cited as indicating the Legislature's desire that the government be liable for "care and solicitude for the private citizen who cooperates with public authorities in the arrest and prosecution of criminals."[14] As for the second proposition, the

8. Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704 (1945); Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928). See also RESTATEMENT, TORTS § 288 (1934).

9. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928). See also PROSSER, TORTS § 85 (2d ed. 1955); Annot., 163 A.L.R. 348 (1946).

10. Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704 (1945). See also 18 MCQUILLAN, MUNICIPAL CORPORATIONS § 53.53 (3d ed. 1950).

11. Murrain v. Wilson Line, 296 N.Y. 845, 72 N.E.2d 29 (1947). For a general outline of the duties of the New York police, see NEW YORK CITY CHARTER § 435 (1938).

12. 158 U.S. 532 (1894) (government owes a duty of protection to a private citizen who exercises or has exercised his right to report law violations). See also, *Ex re* Yarbrough, 110 U.S. 651 (1884). *Cf.* Worthington v. Scribner, 109 Mass. 487, 12 Am. Rep. 736 (1872).

13. N.Y. PEN. LAW § 1848. The law provides in part:
"A person, who after having been lawfully commanded to aid an officer in arresting any person, . . . wilfully neglects or refuses to aid such officer is guilty of a misdemeanor. Where such a command is obeyed and the person obeying it is killed . . . and such death . . . arises out of and in the course of aiding an officer in arresting or endeavoring to arrest a person, . . . the personal representatives of the person so killed shall have a cause of action to recover the amount of such damage . . . against the municipal corporation by which such officer is employed at the time such command is obeyed."

14. 180 N.Y.S.2d at 274.

court relied upon an earlier New York opinion[15] of Judge Cardozo imposing a duty to "go forward," once having started, if failure to do so would be an active element in causing injury. The court indicated that failure to provide Schuster with protection was more than a mere withholding of a benefit, for by seeking information the police had "started forward" and had induced Schuster to put himself in an irretrievable and dangerous position. Thereafter, an obligation arose to use due care to protect the responding informer once he reasonably appeared to be endangered. Non-performance of this obligation constituted a breach of duty.

Although finding a special duty extending to informers, the case requires only that the police use reasonable care in determining the necessity of special protection for such persons. The police are not insurers of the informer's life and are liable only if they fail to exercise sound judgment in withholding protection.[16] Since there are few murders or assaults on witnesses and informers resulting from their collaboration with the authorities,[17] it is unlikely that special protection would "reasonably appear necessary" in many cases, and therefore the cost of special protection would not impose an unreasonable burden. The decision reached satisfies an innate sense of justice and, in effect, will probably do more to encourage cooperation between citizens and law enforcement authorities in the capture of criminals than offers of high rewards. Although applicable only in New York, the decision will probably be of greater importance if the current trend of increasing municipal tort liabilities[18] continues.

TAXATION—ESTATE TREASURY REGULATIONS ON GOVERNMENT SAVINGS BONDS AS AFFECTING FEDERAL ESTATE TAX

Decedent's executors sought to recover estate taxes paid on Series E government bonds which had been issued to decedent as co-owner,

15. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928). The rule as expressed by Chief Judge Cardozo states that "[I]f conduct has gone forward to such a state that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward."

16. Some factors used in determining the necessity of protection would probably be (1) Whether actual threats have been made, (2) The nature of crimes previously committed by the apprehended criminal, (3) Type of individuals and cohorts the criminal has been associated with, and (4) Whether the criminal is known or suspected of being connected with an underworld syndicate or gang.

17. This "well known" fact is pointed out in the dissenting opinion of Conway, Ch. J., 180 N.Y.S. 2d at 278.

18. A trend in increasing tort liabilities of municipalities is noted in PROSSER, TORTS § 109 (2d ed. 1955).

contending that an inter vivos gift of the bonds by decedent had removed them from his gross estate.[1] The Commissioner included these bonds in decedent's estate relying on the applicable Treasury regulations[2] which preclude an effective inter vivos transfer of bonds without a reissuance in the name of the donees. Decedent had executed the inter vivos transfer without such a reissuance. The United States District Court gave judgment for the Commissioner. On appeal, *held,* reversed. The Treasury regulations applicable to government savings bonds pertain only to relations between the government and the holder of record and do not create property rights; it is state property law that determines whether such bonds are within an estate for purposes of the federal estate tax. *Silverman v. McGinnes,* 259 F.2d 731 (3rd Cir. 1958).

The Treasury regulations issued pursuant to the amended Second Liberty Bond Act,[3] have been the source of judicial conflict concerning property rights in Government Savings Bonds. It is generally agreed that the act authorizing the issuance of the bonds and the regulations pursuant thereto are part of the contract[4] between the Government and the bondholder, and are to be read into the contract with the force and effect of federal law.[5] From this generally-accepted interpretation, there have emerged two conflicting views regarding the property rights in the bonds. The majority of the courts have interpreted the regulations as creating property rights[6] which are governed by federal law, to take precedence over state

1. Int. Rev. Code of 1939, ch. 3, § 811(e), 53 Stat. 122 (now INT. REV. CODE OF 1954, § 2040).

2. 31 C.F.R. §§ 315.2, 315.11, 315.13 (1949).

3. 49 Stat. 21 (1935), 31 U.S.C. § 757C (1952). "This section confers very broad powers on the Secretary of the Treasury, authorizing him to issue Savings bonds in such manner and subject to such terms and conditions as he may prescribe." Jones, *United States Savings Bonds, Series E, F, and G,* 11 MD. L. REV. 262, 263 (1950).

4. *Ex parte* Little, 259 Ala. 532, 67 So. 2d 818 (1947); Fidelity Union Trust Co. v. Tezyk, 140 N.J.Eq. 474, 55 A.2d 26 (1947); *In re* Christie's Estate, 130 N.Y.S.2d 650 (Surr. Ct. 1954).

5. In reference to the terms of a national service life insurance policy issued by the United States Government, the court stated: "The terms of this insurance contract, and the rights and liabilities of the parties are fixed by the National Service Life Insurance Act of 1940, 38 U.S.C.A. Sec. 801 et. seq., and the authorized administrative regulations promulgated in conformity with the Act, have the force and effect of federal law. . . ." Jones v. United States, 189 F.2d 601, 602 (8th Cir. 1951). For cases in accord with this reasoning in reference to government savings bonds, see United States v. Sacks, 257 U.S. 37 (1921); United States v. Janowitz, 257 U.S. 42 (1921); Maryland Casualty Co. v. United States, 251 U.S. 342 (1920); United States v. Birdsall, 233 U.S. 223 (1914).

6. For cases holding that the rights of the parties depend entirely on the terms of the bonds and the regulations governing them, see Chambless v. Black, 250 Ala. 604, 35 So. 2d 348 (1948); Lee v. Anderson, 70 Ariz. 208, 218 P.2d 732 (1950); Knight v. Wingate, 205 Ga. 133, 52 S.E.2d 604 (1949); *In re* Hendricksen's Estate, 156 Neb. 463, 56 N.W.2d 711 (1953).

property law.[7] This interpretation would affect all individuals dealing with government bonds, and would render a gift without a reissuance void.[8] On the other hand, a minority holds that the regulations do not determine property rights as between persons claiming ownership to the bonds, but affect only the registered holder. This assures the government that the holder is the sole party who would be able to claim the proceeds of the bond,[9] and avoids any possibility of involving the government in interpleader suits in discharging its obligation.[10] Under this view, the rights of individuals involved in transactions with government savings bonds would not be determined by the regulations, but by the applicable local law.[11] Under the majority's interpretation, the attempted gift of the bonds without a reissuance would be unsuccessful, whereby the bonds would remain in decedent's estate for tax purposes; however, under the minority view the attempted gift would be valid, and the bonds would not be included in decedent's estate.

The court here followed the minority view,[12] holding that the regulations affect only the holder of record. In upholding the inter vivos transfer[13] state property law was employed, whereby the donee under the transaction becomes the equitable owner, and the transferor a trustee of the proceeds.[14] The rationale used for relieving decedent's estate from an estate tax on these bonds was that "the Estate Tax attaches to the economic benefit to be derived from the property rather than the technical ramifications of title."[15] No attempt was made to reconcile the two conflicting views.

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7. The rationale of the courts taking this view is that the regulations constitute a part of the supreme law of the land; therefore, state legislation may not properly interfere with them. Warren v. United States, 68 Ct. Cl. 634 (1929), *cert. denied*, 281 U.S. 739 (1930); *In re* Stanley's Estate, 102 Colo. 422, 80 P.2d 332 (1938); Franklin Washington Trust Co. v. Beltram, 133 N.J.Eq. 11, 29 A.2d 854 (Ch. 1943); *In re* Deyo's Estate, 42 N.Y.S.2d 379 (Surr. Ct. 1943).

8. "While there is a division of authority as to whether a gift inter vivos of United States War Savings Bonds Series E is effective by physical delivery, the weight of authority seems to be that such a gift by delivery only with appropriate words indicating an intention to give, but without registration, etc., in the name of the donee, is not effective, since it is in violation of the regulations and provisions under which the bonds were issued." Brown v. Vinson, 188 Tenn. 120, 216 S.W.2d 748, 751 (1949). See Annot., 40 A.L.R.2d 788, 793 (1955).

9. These decisions justify the application of state laws of transfer by a narrow interpretation of the Treasury regulations. See Annot., 37 A.L.R.2d 1221, 1233 (1954).

10. *Ibid.*

11. In a state where a contract of survivorship is not presumed, the court held that the regulations could not create a contract of survivorship. Brown v. Vinson, 188 Tenn. 120, 216 S.W.2d 748 (1949).

12. See note 9 *supra.*

13. See note 11 *supra.*

14. 259 F.2d at 733.

15. *Ibid.* The reported case derived this principle from the words of the Internal Revenue Code of 1939: "The value of the gross estate shall include

The holding that the regulations were designed solely for convenient payment by the United States Government is clearly consistent with the language of the act[16] which defines the scope of the regulations.[17] It is apparent that the act [as interpreted by the majority view] does not authorize the Secretary of the Treasury to fix title to or ownership of bonds by the regulations. The latter interpretation is not only in derogation of the statute which gave breath to the regulations, but necessarily involves an interference with state law, in that property rights in government bonds would not be governed by applicable local property law, but by the regulations.

TORTS—CONSPIRACY—ECONOMIC COERCION THROUGH FORCE OF NUMBERS AS AN ACTIONABLE WRONG

Plaintiff alleged that defendants, five race track corporations, refused to book plaintiff's greyhounds as a result of maliciously conspiring together and with other persons to prevent plaintiff from racing his dogs on defendants' tracks. The sole motive was said to be the precipitation of plaintiff's financial ruin. It was further alleged that defendants through their force of numbers and economic stature intimidated other dog track owners in the state and made them unwilling partners in the conspiracy. Substantial damages in the loss of sales and purses were claimed. The trial court dismissed the complaint for failure to state a cause of action. On appeal, *held,* reversed. Although the general rule is that there can be no independent tort for conspiracy, in some circumstances mere force of numbers acting in unison may make an actionable wrong. *Snipes v. West Flagler Kennel Club, Inc.,* 105 So. 2d 164 (Fla. 1958).

There has been disagreement as to whether conspiracy is or ought to be a separate tort.[1] It is often stated that it is not the conspiracy itself but the damage resulting therefrom which is the basis of the

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the value of all property . . . to the extent of the interest therein held . . . ." Int. Rev. Code of 1939, ch. 3, § 811(e), 53 Stat. 122 (now INT. REV. CODE OF 1954, § 2040).

16. See note 1 *supra.*

17. "Such bonds and certificates may be sold at such price or prices, and redeemed before maturity upon such terms as the Secretary of the Treasury may prescribe." 49 Stat. 21 (1935), 31 U.S.C. § 757C(b)(1) (1952).

1. PROSSER, TORTS § 46 (2d ed. 1955). See Burdick, *Conspiracy as a Crime, and as a Tort,* 7 COLUM. L. REV. 229 (1907); Burdick, *The Tort of Conspiracy,* 8 COLUM. L. REV. 117 (1908); Charlesworth, *Conspiracy as a Ground of Liability in Tort,* 36 L.Q. REV. 38 (1920); Hughes, *The Tort of Conspiracy,* 15 MODERN L. REV. 209 (1952).

cause of action.[2] Conspiracy is usually defined as a combination of persons to accomplish an unlawful purpose or a lawful purpose unlawfully.[3] But many courts have also stated that an act of a combination of persons may have such coercive effect as to give rise to liability even though an individual would not be liable for the act.[4] Probably the most familiar application of this principle is in the labor boycott situation,[5] but it has been applied elsewhere.[6] The problem seems to lie in determining the factual elements necessary for the invocation of the principle that mere force of numbers may make a wrong.[7]

2. Nalle v. Oyster, 230 U.S. 165 (1913); Hazelwerdt v. Industrial Indem. Exchange, 321 P.2d 831 (Cal. App. 1958); Seno v. Franke, 16 Ill. App. 2d 39, 147 N.E.2d 469 (1957); Miller v. Ortman, 235 Ind. 641, 136 N.E.2d 17 (1956); Sewell v. Detroit Elec. Contractors Ass'n, 345 Mich. 93, 75 N.W.2d 845 (1956); Brackett v. Griswold, 112 N.Y. 454, 20 N.E. 376 (1889); Tennessee Publishing Co. v. Fitzhugh, 165 Tenn. 1, 52 S.W.2d 157 (1932); Worrie v. Boze, 198 Va. 533, 95 S.E.2d 192 (1956), *aff'd on rehearing*, 96 S.E. 799 (1957).

3. Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1920); Peskins v. Squires, 319 P.2d 405 (Cal. App. 1957); Field v. Oberwortmann, 14 Ill. App. 2d 218, 144 N.E.2d 637 (1957); Mississippi Power & Light Co. v. Town of Coldwater, 106 So. 2d 375 (Miss. 1958); Dale v. Thomas H. Temple Co., 186 Tenn. 69, 208 S.W.2d 344 (1948); Lewis Pac. Dairymen's Ass'n v. Turner, 50 Wash. 2d 762, 314 P.2d 625 (1957).

4. *E.g.*, Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 41 S.E. 553 (1902); Klingel's Pharmacy v. Sharp & Dohme, 104 Md. 218, 64 Atl. 1029 (1906); A. T. Stearns Lumber Co. v. Howlett, 260 Mass. 45, 157 N.E. 82 (1927); Ertz v. Produce Exch. Co., 79 Minn. 140, 81 N.W. 737 (1900); Place v. Minster, 65 N.Y. 89 (1875); Collins v. Cronin, 117 Pa. 35, 11 Atl. 869 (1887); Hawarden v. Youghiogheny & Lehigh Coal Co., 111 Wis. 545, 87 N.W. 472 (1901).

The English cases seem confused. Holding that an action will lie: Pratt v. British Medical Ass'n, [1919] 1 K.B. 244; Quinn v. Leathem, [1901] A.C. 495; Temperton v. Russell, [1893] 1 Q.B. 715. Apparently contra: Sorrell v. Smith [1925] A.C. 700; Allen v. Flood [1898] A.C. 1; Mogul S.S. Co. v. McGregor, Gow & Co., [1892] A.C. 25. For a discussion of these cases, see Charlesworth, *Conspiracy as a Ground of Liability in Tort*, 36 L.Q. REV. 38 (1920).

5. Fleming v. Dane, 304 Mass. 46, 50, 22 N.E.2d 609, 611 (1939). See *e.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1920).

6. *E.g.*, Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 41 S.E. 553 (1902) (refusal to deal because selling below fixed prices); A.T. Stearns Lumber Co. v. Howlett, 260 Mass. 45, 157 N.E. 82 (1927) (union members refused to work with non-union goods); State v. Huegin, 110 Wis. 189, 85 N.W. 1046 (1901) (newspapers refused ads from those who advertised in a certain paper); Hawarden v. Youghiogheny & Lehigh Coal Co., 111 Wis. 545, 87 N.W. 472 (1901) (wholesalers refused to sell to dealers unless members of association); Pratt v. British Medical Ass'n, [1919] I K.B. 244 (association would boycott or expel doctors who dealt with plaintiff).

Many of the conspiracy cases may be aligned under other general titles of law, particularly boycotts and interference with prospective economic advantage. See PROSSER, TORTS § 106 (2d ed. 1955), where the *Mogul Steamship* and *Temperton v. Russell* cases, cited in note 4 *supra*, are discussed under interference with prospective economic advantage. In the instant case, the court notes that the conduct was a species of financial boycott, and an analogy is drawn to labor combination cases. 105 So. 2d at 167.

7. Courts differ in their emphasis of factors relevant to invoking the principle. For instance, Pratt v. British Medical Ass'n, [1919] 1 K.B. 244, seems to focus on the coercion element. In Temperton v. Russell, [1893] 1 Q.B. 715 emphasis was placed on the intention of defendants to injure plaintiff. A stronger expression of emphasis on the intent element may be found in Bliss v. Southern Pac. Co., 212 Ore. 634, 321 P.2d 324 (1958), where it was held that for an action to lie the primary purpose of a conspiracy must be to cause injury to another. In the *Mogul Steamship* case the conspiring defendants

The Florida court in the present case agrees that the ordinary rule is that "civil conspiracy is not an independent tort, and the sufficiency of a complaint in such cases is to be determined by the otherwise tortious character of the acts alleged."[8] But the court then adopts the reasoning of a line of Massachusetts cases[9] in recognizing what it terms an exception to the ordinary rule when the fact of combination results in a peculiar power to coerce the plaintiff. The plaintiff alleged that the conspiring defendants maliciously refused to contract and intimidated other track owners so that they would not contract with him.[10] The majority opinion[11] held that although an individual is under no obligation to contract, plaintiff's allegations were sufficient to place his case within the "mere force of numbers" exception to the general rule.

The opinion in this case is a late demonstration of the fact that the law of civil conspiracy is uncertain. The exception relied on by this court and by a good many others[12] seems not to be an exception but a principle inconsistent with the one which states that no independent action for conspiracy will lie. But if the rule is that an action for conspiracy will lie even though no other tortious act is alleged, the question of the elements necessary for invoking the rule remains unanswered because the court fails to set them out.[13] It may be that the general failure of the courts to set up specific rules is not unintentional.[14] But a lack of general, consistent principles is a lack of meaningful law. The failure to establish them has resulted in extended confusion.[15] Clear statements as to whether conspiracy is to be recognized as an independent tort, and its composite elements if so recog-

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intended to injure plaintiffs by forcing them out of the China trade, but defendants prevailed, the court holding that business competition was a just excuse. For a criticism of any use of a motive test, as well as of the action in general, see Hughes, *The Tort of Conspiracy*, 15 MODERN L. REV. 209 (1952). For an assertion that motive is properly a determing factor in some tort actions, see Ames, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor*, 18 HARV. L. REV. 411 (1905).

8. 105 So. 2d at 164.

9. Fleming v. Dane, 304 Mass. 46, 22 N.E.2d 609 (1939); Deslauries v. Shea, 300 Mass. 30, 13 N.E.2d 932 (1938); Willett v. Herrick, 242 Mass. 471 136 N.E. 366 (1922); Burnham v. Dowd, 217 Mass. 351, 104 N.E. 841 (1914).

10. 105 So. 2d at 165.

11. The decision was 4-1. Roberts, J., dissented, primarily on the ground that the allegations of the complaint were too vague.

12. See notes 4 through 7 *supra*.

13. The court refers to the allegations of a combination, intent to injure, improper motive, peculiar power through force of numbers and economic stature, coercion, and resultant damage; but it is not clearly stated whether all of these elements must be alleged in order to state a cause of action.

14. See 39 HARV. L. REV. 517 (1926), indicating that there are no established principles and that many cases involving economic coercion are properly decided on the particular facts according to the court's idea of social and economic policy.

15. Dating at least from the time of the cases of Mogul S.S. Co. v. McGregor, Gow & Co., [1892] A.C. 25, and Temperton v. Russell, [1893] 1 Q.B. 715.

nized, would do much to eliminate the existing uncertainty and would not be so restricting as to result in injustice in particular cases.[16]

16. If the action is recognized and its elements are determined, a great deal of maneuvering room would remain since to some extent the courts must determine the degree of proof required to establish such elements as improper motive, peculiar power, and economic coercion.